IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Padgham v. Ram,*
2024 BCSC 72

Date: 20240116
Docket: M184778
Registry: Vancouver

Between:

Cheyenne Ashley Padgham

Plaintiff

And

Jagat Ram, South Coast BC Transportation Authority dba Translink and Coast Mountain Bus Company Ltd.

Defendants

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for the Plaintiff:	M.L. Elliott S. Morishita
Counsel for the Defendants:	J.A. Thomson B. Easton
Place and Dates of Trial:	Vancouver December 4–8, 11–14, 2023
Place and Date of Judgment:	Vancouver January 16, 2024

Table of Contents

I. INTRODUCTION

[1] On October 10, 2016, the plaintiff, then 21 and now 28 years old, drove her Nissan Maxima into the intersection at 150th Street and 105 Avenue in Surrey, exercising her right of way through a green light. Entering the intersection from the opposite direction was the Translink bus driven by the defendant, Jagat Ram. Mr Ram attempted a left turn, hitting the plaintiff's car nearly head on. The plaintiff's car was spun sideways, its hood and bumper rumpled: a complete write-off. Both airbags activated.

[2] The defendants admit liability. They also admit causation: that the bus collision caused or contributed to the plaintiff's injuries and current conditions.

[3] The plaintiff experienced a double whiplash motion. She broke her C4 vertebra, which healed successfully after a few months. Pain in her jaw, hips, and knee soon resolved. Seven years after the collision, however, she still suffers from neck and upper back pain. More profoundly, she suffers from near-daily low grade headaches. She also suffers from throbbing migraine-type headaches, sometimes accompanied by light sensitivity and nausea, several times a month.

[4] At the time of the collision, she carried two jobs: as a restaurant server and a bank teller. She was able to return to her banking job within a month of the collision, with modest accommodations: an anti-fatigue mat, a stool, and occasional sitting. She soon returned to hours similar to those she worked before the collision. She was also soon promoted to the role of a mortgage specialist. Past lost earnings from October 2016 to March 2019 were minimal: the plaintiff only claims $2,831.

[5] In March 2019, she started her career as a tattoo artist, in which she has built a reputation for fine-line and floral designs. By July 2020, she left her bank job to focus solely on tattooing. That job, in which she hunches over and focuses on stretching and inking her clients' skin under bright lights, triggers and exacerbates her conditions. She believes that her headaches have worsened over the past two years: coincident with her focus on tattooing. She says that she can only work four to five hours a day, three to four days a week: on average 15 to 20 hours a week.

[6] The central issue in this case is the plaintiff's refusal to take medications or receive medical treatments to address her conditions. The defendants argue that were she to follow the recommended treatments of Botox injections, trigger point injections, beta blockers, kinesiology, and any number of likely helpful medications, she could return to near- full employment and functionality.

II. CREDIBILITY AND RELIABILITY

[7] Credibility weighs heavily in a personal injury claim based on soft-tissue injuries and headaches, as here. *Jenkins v. Irving*, 2020 BCSC 391, aff'd 2022 BCCA 64, leave to appeal to SCC ref'd, 40203 (9 February 2023) surveys the relevant authorities:

> [100] The injuries in this case are soft tissue injuries. There is no objective indication of those injuries; they cannot be detected on an MRI, X-ray, or other device. Thus the six expert medical reports and two vocational and rehabilitation reports adduced by the plaintiff all rely almost entirely upon the plaintiff's self-report of her pain symptoms. In cases such as the present, credibility findings are important.
>
> [101] The court must be "exceedingly careful" when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery. As McEachern CJ stated in *Price* v. *Kostryba* (1982), 70 BCLR 397 (SC), citing his earlier decision in *Butler v. Blaylock Estate*, [1981] BCJ No. 31 (SC):
>
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - *which could be just his own evidence if the surrounding circumstances are consistent* - that his complaints of pain are true reflections of a continuing injury. [italics added]
>
> [102] *Price* must be read with more recent authority that recognizes that even minor motor vehicle accidents can cause long-term and debilitating soft-tissue injuries. For example, in the recent case of *Sekhon v. Gill*, 2019 BCSC 811 at para. 39, N. Smith J tempered *Price*:
>
> > Medical knowledge has obviously advanced in the almost four decades since *Price* was decided. In this case, there is expert evidence of an identified medical/psychological condition — chronic pain syndrome — that explains the persistence of the plaintiff's symptoms.
>
> [103] In *Kallstrom v. Yip*, 2016 BCSC 829, Kent J stated:
>
> > [329] Much scepticism, some might say cynicism, can accompany claims that significant injury has been sustained as a result of a minor

> MVA, and particularly so where there is little objective evidence of physical injury and where complaints of pain persist far beyond what most observers might consider to be "normal". It must be remembered, however, that not everybody has the mental or physical constitution of a rugby prop forward.

[104] Kent J also notes (at para. 335) that the *Butler* decision cited in *Price* was later overturned: *Butler v. Blaylock Estate*, [1983] BCJ No. 1490 (CA), where the Court stated:

> [12] With the greatest respect, I am of the opinion that there is no evidence upon which one could reasonably conclude that the appellant did not continue to suffer pain as of the date of the trial. After careful consideration of the expert testimony and the evidence of that appellant and his wife, I have reached the conclusion that the only finding open to the learned trial judge was that as of the date of trial the appellant continued to suffer moderate pain and in the words of Dr. Lehmann, his symptoms 'will gradually subside with further time. Having been present for approximately two and a half years, it is doubtful that they will disappear completely'.
>
> [13] … It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages. There is no suggestion in this case that the pain suffered by the plaintiff did not result from the accident. I would add that a plaintiff is entitled to be compensated for pain, even though the pain results in part from the plaintiff's emotional or psychological makeup and does not result directly from objective symptoms.

[105] In *Karim v. Li*, 2015 BCSC 498, Abrioux J (as he then was) usefully gathered the guiding authorities for assessing credibility:

> [88] As Madam Justice Dillon noted in *Bradshaw v. Stenner,* 2010 BCSC 1398 at para.186, 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 (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny* (1951), 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S. (R.D.)*, 1997 CanLII

> 324 (SCC), [1997] 3 S.C.R. 484 (S.C.C.) at para.128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[89] In addition, the following principles should be taken into account by the trier of fact:

> • no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
>
> • every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
>
> • where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
>
> • it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114; and
>
> • in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, aff'd 2011 BCCA 516.

[8] The plaintiff generally presented as credible. In the stand, she exhibited pain management movements consistent with her conditions. She conceded many points contrary to her interest: she was careful to confirm that certain post-accident injuries had resolved, as set out above. She also readily admitted that she did not keep ordinary business records, and regularly underreported her income to the Canada Revenue Agency (the "**CRA**").

[9] While soft tissue chronic pain cases are exceedingly difficult, as they rely primarily on the credibility of the plaintiff's pain reports, which are generally not detectable through objective medical testing, none of the medical evidence questions the legitimacy of the plaintiff's pain complaints. That evidence provides some (albeit not many) objective corroborative reassurances. For example, her physiatrist expert, Dr Caillier, noted in each of her 2019, 2021, and 2023 examinations of the plaintiff an involuntary shoulder spasm upon palpation, consistent with her pain complaints. Louise Craig, a registered physical therapist, confirmed that the plaintiff exhibited consistent and full physical effort during her 2021 and 2023 evaluations, and that her diminished performance results were consistent with her pain complaints. That evaluation incorporated protocols to safeguard consistency, reliability, and validity. These include effort tests, and mechanisms such as asking the subject a question while she is engaged in another activity, prompting spontaneous movements untainted by conscious manipulation.

[10] Further, the plaintiff's testimony was not particularly undermined by any evidence adduced by the defendants directly or through cross-examination. No surveillance videos or medical records contradicted her testimony of her ongoing conditions and limitations. While Instagram videos and photographs presented an active and unhindered lifestyle, showing, for example, her brief kickboxing exercises and motorcycle riding, the Court accepts that social media does not always present a realistic depiction of one's lifestyle, and that positive and active social media posts are integral to the plaintiff's professional marketing. The defence did not seriously assert, as is sometimes the case, that her social media posts contradicted the plaintiff's pain complaints.

[11] That said, the plaintiff's lifestyle and history do undermine some of her pain complaints. While the demands of tattooing place greater strains on her neck and back than did her banking job, her ability to return to work in full capacity at the bank undermines her later pain complaints. Her 2019 daybook, while rough and incomplete, indicates that she was at times able to do tattoo work every day. While an active fitness and weight training regiment is an important part of post-accident

recovery and maintenance, her four personal training sessions a week, and the one to three hours a day she spends in workouts, provide an incentive to exaggerate her losses, and undermine the asserted profundity of her condition: she almost never misses a workout due to headaches, pain, or fatigue. Her love of fitness and other activities outside of work, as discussed below, also undermines her assertion that she would elect to work 40 hours a week if she could. Her imprecise evidence about how much she can lift, and the extent of her exercises and stretches, was perplexing given the amount of time she spends in the gym, and given the importance of her physical capacity to her claim.

[12] The plaintiff emphasises that, in contrast to some unhelpful trials (e.g. *Mocharski v. Ly*, 2022 BCSC 996 at paras 15–17), where only the plaintiff and their family members testified as to the plaintiff's conditions, witnesses from all aspects of the plaintiff's life—her mother, her partner, co-workers in the tattooing and banking world, tattoo recipients, and a former partner—provided consistent and compelling testimony of the effect of her ongoing conditions on her personal and professional life. Upon further reflection, however, those witnesses provided limited assistance in corroborating the plaintiff's pain conditions. All of the key lay witnesses are close to her: her present and a past partner, her personal trainer, her two co-workers, and a repeat client. The main lay witness was her own mother, who works as a claims adjuster for the Insurance Corporation of British Columbia. None of the witnesses regularly observe her at work over the full course of a day.

[13] Two aspects of the plaintiff's case further undermined her credibility: the first is financial; the second is medical.

[14] First, she does not keep proper business records, and she regularly under-reports her income, almost entirely received in cash at her own request, to the CRA. She receives some (roughly 10 percent) payments by e-transfer, but has not provided any such records, nor other records such as bank account statements that could better substantiate her claimed business losses and capacity for full-time work. Her business records consist of incomplete hand-written journals, with times, first names, and dollar amounts, removing from the defendants and the Court any way of

testing her assertions of lost past and prospective business. Her business records for 2023 consist *in toto* of two non-contemporaneous hand-written pages of dates, times, and client names (given names only). As an attempted shorthand of demand, she provides two binders purporting to consist of 1,100 email requests from May 2019 to December 2021 for her tattoo services. These requests are anonymised and omit the last two years of requests, not providing full assurances of infinite demand. It is especially perplexing that the plaintiff filed her claim in March 2018, but then chose not to generate or keep accurate business records that would help her acquit her onus of establishing her significant claim for lost income.

[15] Further, while it appears to be the industry norm for tattoo artists to receive the bulk of their remuneration in the form of cash, and to short-change the CRA, this economic dishonesty undermines the credibility of a party asking the court to order a significant damages award.

[16] As stated by Justice Verhoeven in *Firman v. Asadi*, 2019 BCSC 270, in concluding that the evidence did not allow him to determine a specific number of hours lost:

> [170] She acknowledges that she deliberately misrepresented her income in order to avoid paying taxes, by not declaring cash receipts. She acknowledged knowing that this is illegal. She testified that she had not paid taxes on cash receipts (gratuities) while working as a server, as well. She testified unconvincingly that she was ashamed of this. She said that not declaring cash receipts is common in these industries. Judging by her evidence as to her actual earnings compared with her declared income, the scale of her tax cheating is very large. It has also been persistent. Even after commencing this action August 18, 2014, she has continued to file false tax returns. She admits that she continues to receive most revenue in cash, and does not record or declare this income.[1]

[17] In *Kan v. McGill*, 2021 BCSC 843, Justice Walkem similarly found the plaintiff's failure to report earnings on a "side hustle" lash therapy business to undermine her credibility:

> [37] Amounts of undeclared income can be calculated into assessments of past or future loss of income (as I have done here with respect to past loss of income). However, I find that Ms. Kan's failure to report her lucrative Lash Therapy income has a bearing on her credibility. The failure to report this income shows Ms. Kan is willing to be malleable with her reporting of facts if

> it is in her financial interests to do so. Overall, I have accepted Ms. Kan's evidence about her injuries and the ongoing impact of the Accident where these assertions were corroborated by independent and objective evidence.

[18] The plaintiff's deliberate tax fraud combines with and compounds other difficulties with her credibility, and particularly undermines a claim such as the present where the plaintiff seeks a court order to compensate her for very significant amounts of purported lost income.

[19] Second, as discussed further below, the plaintiff has taken few active steps to seek to medically address the pain complaints about which she so profoundly complains at trial. She made only a few visits to her treating physicians; she claims that she also visited various walk-in clinics, but provides no details, records, or testimony about these visits, including reports of her conditions or the clinic doctors' recommendations. With the one exception of a single Botox treatment (where at least three are generally necessary to determine efficacy), a mere three months before trial, the plaintiff has not tried any of the bounty of medications and medical treatments recommended by medical experts, for no reason other than her stated preference not to take medications. While it is not unusual to avoid medications except where truly necessary, her refusal or failure to explore recommended and reasonable and promising medical solutions undermines her assertions that her headaches and pain have profoundly hindered her professional and personal life. In effect, she is asking the Court to provide a non-medical remedy for her conditions, to the tune of almost $6 million, while electing to not to seek any medical remedy herself. Apart from issues of credibility, how much should the Court help someone who refuses to try to help themselves? We will return to these problems in the discussions of mitigation, and prognosis and contingencies, below.

[20] In this, the Court shares the concerns of Justice Caldwell in *Franklin v. Coco,* 2022 BCSC 1929, where the plaintiff's failure to pursue promising treatments spoke to both mitigation and credibility:

> [91] Counsel for the plaintiff cites *Thomasson v. Moeller*, 2016 BCCA 14 at para. 39 [*Thomasson*] for the proposition that experts retained by counsel are not treating doctors and that mitigation does not require the plaintiff to follow

> their recommendations or even to discuss such recommendations with their treating doctors.
>
> [92] I am not convinced that *Thomasson* is as clear on that point as counsel suggests but, even if that is the general proposition regarding mitigation, I am of the view that the conflict between the plaintiff's evidence and actions are also properly considered in the context of credibility as indicated by Dillon J. in *Bradshaw*:
>
> > [186] … whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally [citation omitted] ….
>
> [93] I find it unreasonable, impossible, or at least unlikely that a person experiencing the types of headaches and migraines (and other physical symptoms) that the plaintiff describes would fail to in any way consult with her treating doctor about such symptoms and possible treatments or medication. I find it even more unreasonable or unlikely that, upon discovering that potential treatments are available, she would prefer continued suffering and pain over medical consultation and pursuit of relief – not for days, weeks or months, but for years.

[21] While it is clear that the collision has inflicted pain and disability on the plaintiff, and limited her ability to work, the above difficulties prompt the Court to question and discount the plaintiff's account of the extent and effect of these limitations, as set out in the damages section below. It also prompts the Court to treat the medical and capacity expert reports tendered on behalf of the plaintiff with caution, as those reports and assessments rely heavily, as they must, on the plaintiff's own self-reports of her pain, conditions, and limitations.

III. DAMAGES

A. Introduction

[22] The parties propose the following damages:

	Plaintiff	**Defendants**
Non-pecuniary damages	$150,000	$60,000 to $100,000
Past lost earnings	$2,831	$2,831
Past loss of earning capacity	$691,400	nil
Future loss of earning capacity	$3,105,000 to $4,644,000	$230,000
Cost of future care	$304,868	$5,000
Special damages	$50,639.06	$2,783.57
TOTAL	**$4,304,738 to $5,843,738**	**$300,614 to $340,614**

B. Medical experts

[23] The parties adduced the following expert medical witnesses:

Expertise	**Plaintiff expert and dates**	**Defendants' expert and dates**
Neurology	Dr Gordon Robinson (Neurologist) (June 10, 2019; August 13, 2021; May 8, 2023)	Dr Navraj Heran (Neurosurgeon) (May 17, 2021; September 22, 2021 (responsive); and October 11, 2023 (responsive))
Physiatry	Dr Lisa Caillier (August 12, 2019; July 16, 2021; June 1, 2023; October 11, 2023 (responsive))	
Psychiatry		Dr Kevin Solomons (June 17, 2021; September 24, 2021 (addendum))

[24] The plaintiff sought to diminish Dr Heran's opinion on two bases.

[25] First, they note that he is a neurosurgeon, specialising in surgical treatments of neurological conditions, in contrast to Dr Robinson, a neurologist specialising in the treatment of headaches through a variety of means. I am satisfied that Dr Heran's surgical subspecialty does not disqualify him from opining on the causes

and treatments of neurological conditions of headaches and pain, which he must understand, study, and diagnose as part of his medical specialty. His opinions are frequently accepted by this Court on these issues: see, for example, *Lo v. Hughes*, 2020 BCSC 840 and *Melahrinakis v. Melahrinakis*, 2021 BCSC 1837.

[26] Second, they argue that Dr Heran crosses the line into advocacy by using the phrase “failed to mitigate” with respect to the plaintiff’s failure to try recommended medications to resolve her symptoms. The legal profession does not hold a monopoly on the phrase “failure to mitigate” and in any case a medical expert who files a large number of medical opinions, like Dr Heran, understands and is entitled to use that phrase. Needless to say, the Court is not influenced in its conclusions by the use of that specific turn of phrase in the report.

C. Pre-existing conditions

[27] Before the collision, the plaintiff led a healthy active lifestyle, focused on work, art, exercise, and her family.

[28] The plaintiff suffered some mild to moderate headaches before the accident, triggered by alcohol consumption and the onset of menstruation. Over-the-counter medications provided effective treatment. Apart from those headaches, she had no pre-collision medical issues of any significance. She received no treatment and was on no medication. She had no limitations in her vocational, recreational, or social life.

[29] She was devoted to fitness. She worked out at a gym, often with her mother, three or four times per week with a focus on strength and weight training. Around 2015, the plaintiff began kickboxing, training two or three times per week. Most of her spare time outside of work and fitness was spent painting, drawing, and sketching.

D. Medical evidence and findings

[30] The plaintiff’s primary ongoing complaints are to her neck, upper back, and shoulders, as well as her daily dull and weekly profound headaches. The pain

sometimes causes her to wake at night, affecting her sleep. She also complains of ongoing driving anxiety, as well as lowered mood.

[31] The three testifying doctors are in general agreement of a description of her past and current conditions. Dr Heran summarised her conditions as follows, based upon a review of the medical records, and his own independent examination:

a) myofascial injuries involving the neck, upper torso, and low back;

b) cervicogenic headaches progressing to secondary migraines;

c) soft tissue injuries involving the jaw and right knee, both resolved;

d) transverse process fracture C4, left side, no resulting sequelae; and

e) features of anxiety and post-traumatic stress with residual features.

[32] That said, the medical experts were generally united in recognising that specific identification of the cause underlying chronic pain is complicated and often elusive. Nor is there is any clear diagnosis or consistently effective treatment for such pain and headaches. The overall theme of the medical experts on both sides is that due to the lack of objective testing, and the multiple potential causes for such conditions, patients often must attempt various treatments: a process of trying a treatment, monitoring it for efficacy and side effects, and then attempting other treatments if necessary.

[33] The doctors agree that any progress appears to have stalled or indeed worsened in the years since the plaintiff became a full-time tattoo artist. In his 2021 report, Dr Heran found that the plaintiff had “plateaued” with respect to her symptoms. He agreed that the plaintiff’s claims that her headaches and conditions had worsened over the preceding two years reflected her increased “work as a tattoo artist, being somewhat crouched forward with a head flexed position when doing the artistry.”

[34] The doctors primarily differ on the plaintiff’s long-term prognosis.

[35] Dr Caillier, a physiatrist, opines that the plaintiff's conditions are unlikely to fully resolve, even with ergonomic accommodations and adjustments, given their persistence over seven years. She believes, based on that the plaintiff's chronic conditions, as well as the progress of the other tattoo artists whom she treats, that the plaintiff will never be able to return to full-time hours, and will suffer ongoing pain and chronic headache complaints.

[36] The opinion of Dr Gordon Robinson, a neurologist specialising in headache treatments, generally matches that of Dr Caillier: given the persistence of the plaintiff's headache conditions, he believes that they will continue indefinitely, resulting in substantial limitations on her work as a tattoo artist and impacts on her general mood. Dr Robinson states that "[t]he treatment of chronic headache related to head and neck trauma is usually difficult," and that medications often do not assist in treating such a condition. On cross, he recognised that while medications are sometimes ineffective in the treatment of headaches, sometimes they are effective in addressing or minimising their effects: he acknowledged that there are "occasional patients that it seems to help quite a bit." He recognised that ibuprofen did appear to help the plaintiff somewhat.

[37] Dr Caillier notes that medications typically used for management of pain include tricyclic antidepressants, gabapentin, and Lyrica. She notes that taking over-the-counter medications such as Tylenol and Advil together during trial of particularly bad pain flare days may prove helpful to her. She also opines that the plaintiff may benefit from a trial of riboflavin, magnesium citrate, Coenzyme Q10, myofascial trigger point injections in her neck and shoulders, Efflexor, and Topamax. Overall, she believes that there "is still the opportunity to improve upon and better manage her pain with benefits from recommendations made." In her 2019 report, she specifically states that:

> In my opinion, benefit from recommendations made will likely result in the neck, upper back and shoulder girdle pain either becoming less intense on a daily basis or this pain becomes more intermittent in nature with lessening the intensity of pain, stiffness and muscle soreness as well as fatigue and reduced frequency of symptomatic flares when involved in sustained posture

> or heavier based activities. However, even with benefit from recommendations made she is unlikely to become completely pain-free.

[38] Dr Caillier also notes that the plaintiff "would likely benefit from working with a kinesiologist within an active rehabilitation program or at the very least a personal trainer". In that respect, she believes that "there is still an opportunity to further improve upon her overall physical conditioning which in turn will have a positive impact upon pain improvement and improved management as well as increase her endurance and tolerance for activities."

[39] That said, Dr Caillier believes that it is unlikely that any of these treatments will result in the plaintiff "becoming completely pain free", or returning her to her pre-collision level of function, or allowing her to work full-time as a tattoo artist.

[40] Dr Robinson notes that "it is possible that treatments used to treat frequent migraine may be helpful. As well as Botox, this could include daily medications such as atenolol, candesartan, nortriptyline, and topiramate." He recognises that migraine abortive medications may be helpful when headaches have migrainous features, as with this plaintiff. He notes that triptans could be useful for moderately severe headache pain. Similarly, some preventative treatments may be useful in suppressing her headaches. In his 2021 report, he notes that she has never tried any of these treatments.

[41] Both Dr Caillier and Dr Robinson identify CGRP monoclonal antibody treatments such as Emgality or Aimovig as effective treatments. Dr Robinson notes that they are safe, effective, and well tolerated, stating they "have been proven to be effective in episodic and chronic migraine."

[42] Like Dr Caillier, Dr Heran notes that Cambia (diclofenac) and Lyrica, prescribed and provided to the plaintiff but never taken, would likely be helpful for the management of her headaches. He also states that her symptoms may well be improved through prophylaxis (such as Topamax, beta-blockers, calcium channel blockers, or tricyclic antidepressants) or Botox.

[43] Dr Heran generally agrees with the diagnostic aspects of Dr Caillier's report, and her treatment recommendations. He differs, however, on the prognosis. He opines that if the plaintiff were to follow recommended treatments, including, potentially, Botox, her condition could improve sufficiently to allow a 40-hour work week. Dr Heran also suggests various ergonomic adjustments that could lessen the neck strain and consequent headaches imposed by a tattooist's posture: table and chair adjustments, magnifying glasses, and task breaks and adjustments. Ms Craig makes similar suggestions, in support of a claim for cost of future care.

[44] Dr Heran notes that the plaintiff has declined to try the medications prescribed and the free samples provided to her. When pressed on cross-examination, he said that she would likely be referred to as a "non-compliant patient" in her blanket refusal to take prescribed medication, or any medication, that provided a real prospect of improvement. The doctors testifying as part of the plaintiff's case echoed this theme, albeit softly. Dr Caillier recognised that patients who failed or refused to take medications caused "frustration". In reference to his recommendations in his 2019 expert report, Dr Robinson noted somewhat ruefully that the plaintiff "wasn't going to try anything anyway".

[45] Each of Drs Caillier, Robinson, and Heran recognised the significant potential value of Botox injections for the management of her chronic neck symptoms as well as her headaches. Dr Robinson called these injections the "treatment of choice for her in an attempt to reduce the frequency and severity of her posttraumatic headaches," and emphasised the utility, promise, and safety of the treatment in his oral testimony.

[46] Dr Robinson eventually treated the plaintiff with Botox injections in September 2023. That single treatment has not made any noticeable difference. That said, as noted, the treatment regime generally requires three sessions of injections. The plaintiff provided no compelling reason why she only started these treatments a few months before trial, and that she did not complete the required three rounds before trial.

[47] This leads to the central issue in this case: the plaintiff's decision not to take medications, or receive treatments, the subject of the next section of these reasons.

E. Failure to mitigate

1. Law

[48] In *Haug v. Funk*, 2023 BCCA 110, Chief Justice Bauman provides a recent and exhaustive overview of the legal principles governing an assertion that the plaintiff has failed to attempt to mitigate their loss through medical or other treatments:

> [56] The test for a plaintiff's failure to mitigate their losses is set out in *Chiu*. This Court stated at para. 57:
>
> > The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff ***has not pursued a course of medical treatment recommended to him by doctors***, the defendant must prove two things: ***(1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.***
> >
> > [Emphasis added.]
>
> [57] This test is drawn from the principles in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62. Justice Wilson, in discussing the onus of proof at para. 34, quoted with approval the Australian case *Plenty v. Argus*, [1975] W.A.R. 155:
>
> > In all the personal injury negligence cases so far reported, it appears to have been established ***on the balance of probabilities both that the plaintiff had acted unreasonably and that had the operation been carried out, the incapacity would have been removed or reduced to a certain degree. In such cases the onus is discharged on either view and with the result that damages are assessed 'as they would properly have been assessable if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it.***'
>
> …
>
> [61] In my view, the correct approach to mitigation is still based on the first principles set out in *Janiak*. This Court's decision in *Gregory* rightly interprets the wording in the second branch of the *Chiu* test as requiring the defendant to prove on a balance of probabilities that the plaintiff's injuries *would have* been reduced to some degree had they acted reasonably. Only once this is established does the Court go on to assess the reduction to the damages award based on *the extent* to which the injuries would have been avoided, which is the true hypothetical.

> [62] In *Gregory*, the trial judge had reduced the entire award by 10% on account of the plaintiff's refusal of cortisone injections. The plaintiff argued that as the medical witnesses did not specifically address the question of whether or not a cortisone injection would likely have had an effect on her recovery, the defendant had not discharged the burden of proving she failed to mitigate her damages. The experts had stated that the injections were a "reasonable first approach", they might have brought long term benefits, and there was no evidence they could be harmful. The trial judge found the plaintiff was unreasonable to refuse them, citing *Turner v. Coblenz*, 2008 BCSC 1801, which had also applied a 10% reduction for failure to receive injection therapy that had a 50% chance of success.
>
> [63] On appeal, Garson J.A. noted that the judge in *Turner* had articulated the second branch of the *Chiu* test differently, stating that the defendant must show "there is some likelihood that [the plaintiff] *would have received substantial benefit*" [emphasis added by this Court]: at para. 56. Garson J.A. declined to uphold this re-articulation of the test by the Court in *Turner*, holding that the trial judge had erred in the correct application of the *Chiu* test. As the judge had not found as a fact that the cortisone injections *would have* reduced the plaintiff's symptoms, and the experts "testified only that it was a reasonable treatment to try, and it might afford some relief", this did not meet the threshold for reducing an award: at paras. 57–58.
>
> [emphasis added]

[49] *Haug* confirms that the burden on the defendants is a high one:

> [69] *Janiak* imposes a not insignificant burden of proof on a defendant seeking to reduce a plaintiff's damages on the basis of a failure to mitigate. This is appropriate when one appreciates that a successful plea of mitigation completely denies the plaintiff that portion of their damages attributed to the failure. There is no apportionment of liability for this portion of the loss; mitigation and contributory negligence are distinct concepts leading to different assessments.

[50] *Haug* concludes with the mandated approach:

> [75] Applying that caution concerning the burden in proving the "causal link" to the mitigation issue leads to this: ***a defendant must establish on a balance of probabilities the causal link between an unreasonable failure to follow a prescribed treatment and a reduction (of some degree) in the plaintiff's damages. If they do, then the trier of fact goes on to assess the likelihood of the degree of a reduction.***
>
> [76] I note that the *Chiu* test is worded so as to absorb the hypothetical into the second branch of the test, by incorporating the words "***the extent, if any, to which the plaintiff's damages would have been reduced".*** If this is misinterpreted by trial judges as conflating the assessment of the reduction of damages with the assessment of the failure to mitigate on a balance of probabilities, it may lead to situations where reductions are applied when it is not probable that treatment would have actually reduced the plaintiff's

> damages. This must be avoided by keeping the stages of the analysis distinct.
>
> [emphasis added]

[51] Despite the high burden, the defendant need not prove the second part of the *Chiu* test with direct certainty: an impossible task particularly germane to a claim based on self-reported myofascial pain and headaches, as here. In the recent, post-*Haug* decision of *Flynn v. Raj*, 2023 BCSC 1895, Madam Justice Douglas states:

> [138] Justice Voith (then of this Court) considered the plaintiff's alleged failure to mitigate in *Liu v. Bipinchandra*, 2016 BCSC 283 [*Liu*]. His comments are instructive:
>
> > [102] The legal question of whether a plaintiff would have been assisted by a procedure or course of treatment is to be determined on a subjective basis. ***Nevertheless, a defendant need not lead direct evidence that the particular plaintiff at issue would have benefited from a specific treatment. The outcomes of many treatments, or therapies, or procedures are uncertain. A plaintiff who acts unreasonably in the face of the medical advice they are given cannot take refuge in that uncertainty.***
> >
> > [103] Instead, ***it is open to a defendant to establish the second aspect or branch of the mitigation test indirectly***. ***Thus, if most persons are assisted by a particular treatment the Court can, as a matter of inference, determine that it is probable that a particular plaintiff would have benefited from that treatment.***
>
> [139] In *Liu*, there was indirect evidence that two-thirds of persons with the same form of headache pain as the plaintiff benefit from Botox treatment. Accordingly, Voith J. found that this evidence established, as a matter of inference, that Ms. Liu would probably also benefit from such treatment: *Liu* at para. 104.
>
> [140] As noted by Justice Crerar in *Mocharski v. Ly*, 2022 BCSC 996 at para.100, citing *Kempton v. Struke Estate*, 2020 BCSC 2094 at para. 199 and *Qiao v. Buckley*, 2008 BCSC 1782 at para. 61, ***there need not be an overt statement in an expert report that a given course of treatment would definitely assist a plaintiff; a treating physician's prescription or recommendation in itself indicates that it would have a reasonable chance of success.***
>
> [emphasis added]

2. Discussion and decision

[52] For the reasons that follow, the Court is satisfied that the plaintiff has acted unreasonably in eschewing almost all recommended treatments, and not otherwise pursuing promising treatments for her conditions, and that, on a balance of

probabilities, had she reasonably pursued the bounty of treatments recommended for her pain and headaches, her pain conditions, and thus damages, would have been significantly reduced.

[53] With the exception of her incomplete and dilatory single Botox treatment, the plaintiff has limited her treatments to non-pharmaceutical treatments. These include vitamins, visits to her family doctor, physiotherapy, personal training, massage therapy, non-RMT massages (a “de-stress treatment” at a spa, in conjunction with a facial treatment), counselling, and home and gym-based exercise and stretching.

[54] The plaintiff’s preference not to take medications is not based upon any specific health risks, allergies, reactions, or preconditions, or a psychiatric aversion (as prevents some personal injury plaintiffs, for example, from receiving injections), or religious or other profound sources of aversion to medications. Rather, she and her family, with their focus on health, have generally felt it better to avoid medication unless necessary. As stated in the final argument: “[s]he testified that she prefers not to take medication if there is a more natural way to heal. This was something ingrained in her by her mother.” That may be well and good as a first approach for a minor or likely transitory ailment, but is not a reasonable approach in light of the plaintiff’s self-alleged serious and chronic conditions, for which there are many promising medical treatments offering significant relief and a return to near-complete functionality. The plaintiff’s mother explained that she taught her children to take medication only when needed. Given the plaintiff’s pain complaints, that time is now. Indeed, that time arose right after the accident, and became more acute when her new tattooing job exacerbated those conditions.

[55] The plaintiff expressed some concern about side effects. The difficulty in the present case, however, is that she has not even tried any pharmaceutical intervention, and so she does not know whether or to what extent any of the many recommended medications will cause side effects. There is no evidence that the plaintiff is particularly prone or sensitive to medication side effects. The plaintiff’s professed fear about hypothetical side effects undermines her assertions about non-hypothetical present pain conditions.

[56] In any case, she is inconsistent in her ongoing rejection of medical and pharmaceutical treatments. While the plaintiff is declining to take prescribed medicine for her headache and neck pain, she is filling out a prescription for a pharmaceutical to address a persistent skin condition: a pharmaceutical that also poses a risk of various side effects. She occasionally takes ibuprofen, which provides some temporary relief for her headaches: also with side effects. She has received the one Botox treatment. And, not to press the point, she has welcomed the repeated permanent injection of synthetic ink into much of the dermis layer of her skin.

[57] Certainly, as set out above, the medical reports contain many widely-accepted treatments for chronic neck and back pain, and headaches. With the exception of the single incomplete round of Botox injections, she has not attempted any of the pharmaceutical or medical treatments. The plaintiff comes close to attracting the *Haug* comment at para 45: “A failure to follow every recommendation from every doctor is not unreasonable, but a failure to follow *any* recommendation is” (emphasis in original). While the plaintiff casts the abundance of treatment options in a negative light (“a seemingly overwhelming list of suggested medications”), the reasonable response to the multitude of medical recommendations, in light of her profound and persistent pain complaints, is not to ignore their promise, but rather to proactively and exhaustively discuss these treatments with her doctors, and attempt them in earnest.

[58] In 2019, four doctors indicated the potential efficacy of Botox injections to the plaintiff. Her family doctor referred her to Dr Hussein specifically to assess her suitability for Botox injections. Dr Hussein discussed that treatment with her. He did not prescribe it at that time, not because it was unsuitable, but because he wanted the plaintiff to start with a trial of Lyrica, along with other supplements. As she never tried the condition precedent of Lyrica, nor followed up with Dr Hussein, the plaintiff neither explored nor was prescribed Botox.

[59] Complementing these discussions among her treating doctors, as set out above, the 2019 medical reports of Drs Robinson and Caillier both identify Botox injections as a promising and often efficacious treatment for her very conditions.

[60] Some authorities indicate that medico-legal reports are generally not to be cited with respect to failure to mitigate arguments: *MacKinnon v. Swanson*, 2022 BCSC 1821 at para 77, applying *Thomasson v. Moeller*, 2016 BCCA 14 at para 39, where the Court stated, as an addendum:

> [39] It is also, in my opinion, a leap in logic in these circumstances to ask the court to infer that Dr. Jones did not provide CBT [cognitive behavioural therapy] because she did not receive Dr. Corney's report. This proposition rests, in part, on the implication that it was Ms. Thomasson's obligation (or her counsel's) to ensure that Dr. Jones received Dr. Corney's report. In my opinion, such an implication should not be sustained. Dr. Corney was retained by plaintiff's counsel to provide a medical-legal report. He was not a treating physician whose recommendations Ms. Thomasson was obliged to follow, nor was she obliged to tell her treating psychologist, Dr. Jones, of Dr. Corney's recommendation for CBT.

[61] The *Thomason* passage on which this line of authority rests, replies to an adverse inference argument, based on the plaintiff's decision not to call Dr Jones as a witness. The passage does not address a failure to mitigate argument. The Court's later discussion of the failure to mitigate argument makes clear that the treating physician versus expert physician distinction is *obiter dicta* in two ways. First, the plaintiff had in fact attempted cognitive behavioural therapy (the trial judgment made an inconsequential error in stating that she had not). Second, the trial judge was satisfied that the plaintiff, unlike this plaintiff, had made every reasonable effort to recover from her injuries and return to work, not only in trying recommended treatments, but in seeking out treatments:

> [37] In my opinion, any adverse inference concerning Dr. Jones' failure to provide CBT to Ms. Thomasson, no matter how that inference is framed, ***is of little consequence in the context of the judge's findings as a whole***. As I will go on to discuss, the significance of CBT in Ms. Thomasson's care was, as the judge found, overwhelmed by the wealth of evidence that she undertook the treatments that were recommended by her care providers, which did not include Dr. Corney. The judge did not accept that Ms. Thomasson acted unreasonably in failing to take CBT. The force of that conclusion is only strengthened by the fact that Ms. Thomasson did indeed receive CBT from Dr. Tessier.

> …
>
> [46] ***Given Ms. Thomasson's concerted efforts in obtaining treatment, it seems highly unlikely that she would have knowingly refused a treatment that was recommended to her***. As the judge found, Ms. Thomasson "***at all times did her best to recover from the injuries so she could return to work".***
>
> [47] It is clear the judge did not accept that Ms. Thomasson acted unreasonably in failing to take CBT. While he was mistaken that she had not taken any CBT, this is a harmless error in the circumstances. He was persuaded that ***Ms. Thomasson was highly motivated to recover her health and, as the defendant's witness, Dr. Semrau, observed, had undertaken generally appropriate mental health treatment***.
>
> [emphasis added]

[62] In this, I echo the doubts of Caldwell J, in *Franklin v. Coco* at para 92, that *Thomasson* stands for the broad proposition that mitigation does not require the plaintiff to follow the recommendations of retained medical experts or even to discuss such recommendations with their treating doctors. To return to first principles of mitigation, it is a failure to mitigate where "the plaintiff could have avoided all or a portion of h[er] loss: *Haug* at para 56. Specifically, such losses could be avoided where it would have been reasonable to follow a "recommended treatment": *Haug* at para 56.

[63] In any case, the 2019 Robinson and Caillier reports would or should have been provided to the plaintiff upon her counsel receiving them, and the knowledge of her litigation counsel agents should be imparted to her as a matter of agency law. At a minimum, it is unreasonable—in the sense discussed in the mitigation jurisprudence—to ignore the medical recommendations of a medical expert retained to provide a medical opinion in support of the plaintiff's own case (perhaps in contrast to the medical opinion of an expert retained by the defendant), which indicates, by definition, confidence that the medical opinion is valid. Those 2019 reports, coupled with the plaintiff's discussions with her treating doctors, ought reasonably to have prompted exploration of these treatments with treating doctors. She has had four years to do so. A plaintiff seeking to convince the court that her injuries have overturned her life so profoundly is also expected to exercise reasonable due diligence through the timely exploration of treatments that hold such

a strong promise of substantially resolving her pain complaints and limits on personal and professional functionality.

[64] Turning to her one medical treatment, the fact that the plaintiff finally did obtain a single Botox treatment, a mere three months before trial, and four years after discussing Botox with Dr Hussein, and four years after her two medico-legal experts' recommendations, makes the situation worse rather than better. The plaintiff provides no compelling explanation for her laxity in seeking Botox treatments between 2019 and 2023. The only reasonable inference for her road to Damascus decision to try Botox is that the plaintiff is trying to trebly thread the needle: setting up a lucrative future costs of care claim for Botox treatments ($130,354), while seeking to avoid a failure to mitigate argument, while also not risking that the Botox injections may live up to their promise, wholly or partially curing her complaints, and thereby devaluing her tort claim. This last-minute exploration of a promising medical treatment, particularly in the form of a Botox or cortisone injection, appears to be a not uncommon pattern in personal injury cases (see, for example, *Tsonis v. Mizuguchi*, 2020 BCSC 643). Apart from engendering cynicism, it also undermines the legitimacy of the judicial process by artificially necessitating high-dollar and high-stakes adjudication based upon contingencies instead of certainties, as would be achieved through the plaintiff's prior good faith exploration of all reasonable treatment options.

[65] Applying the principles and jurisprudence summarised in *Haug* and *Flynn*, the plaintiff could have avoided all or a portion of her loss by pursuing some or all of the medical treatments recommended to her by doctors. Had the plaintiff tried any of the many pharmaceutical or other medical treatments recommended in the survey above, her condition, while not perfect, would be considerably better than it is presently, allowing her to work close to a 30- to 40-hour week, if she so chose, and enjoy close to full functioning, as per Dr Heran's opinion. I conclude this based on the medical evidence and credibility concerns set out above, especially given that the plaintiff's self-reports of pain play a heavy role in those medical assessments.

The heads of non-pecuniary damages, past loss of earning capacity, and special damages will accordingly be reduced by 70 percent.

F. Prognosis and contingencies

[66] For the same reasons discussed above under mitigation, the Court is also satisfied that if the plaintiff embarks in good faith on trials of the many treatments recommended by the medical experts and practitioners, coupled with ergonomic and other adaptations, she will likely be able to work close to a full 30- to 40-hour week, if desired, and enjoy close to full functioning.

[67] Dr Caillier's prognosis is guarded. She concludes that:

> It remains my opinion that there is still the opportunity to better manage her pain complaints provided she benefits from recommendations made but she is not going to become pain free. She will continue to have pain into the foreseeable future.

[68] Accordingly, in her opinion, the plaintiff's "ability to work 40 hours per week is likely poor."

[69] Dr Caillier's prognosis is necessarily vague. She has little to work with: it is difficult to provide a specific prognosis for this plaintiff, given her near-complete failure to pursue any of the many promising medical treatments for her conditions, coupled with the reliance of Dr Caillier and other medical professionals on the plaintiff's self-reports, undermined by the credibility concerns. Further, as set out above, Dr Caillier's pessimistic prognosis is based to a considerable extent on her experience treating other tattoo artists over several years: in essence, if the conditions of patients have not significantly improved over three years, they are unlikely to improve in future. We have no details of those comparator patients: their conditions, and what treatments they have attempted. In any case, by definition, those patients differ considerably from the present plaintiff, as those patients have actively pursued medical treatment with Dr Caillier over multiple years, in contrast to the largely passive or evasive attitude of the present plaintiff to medical assistance.

[70] Ultimately, the Court adopts the prognosis of Dr Heran:

> It is my interpretation, and hence my opinion, that Dr. Robinson clearly believes that her work capacity and functional abilities would be improved after optimization of her headache management. It is my opinion therefore, that I too disagree with the opinion that Dr. Caillier has outlined that she would be capable of only 20 to 25 hours of work in a week with optimization of her care. ***It is my opinion that she will likely be able to work a near full 40 hour work week if she were amenable to taking medications and using Botox, if warranted. Generally, in individuals who are able to function to work part-time, marked improvements are typically established through optimization of headache care through the medications as described. Being reluctant to take the medications, as has been described, fails to mitigate the potential benefits that could be established through such approaches***. Refraining from taking the medications prescribed to her, as well as the free given samples, has also been addressed by myself in my reporting….
>
> [emphasis added]

[71] Doing as best as one can, and based on the medical evidence surveyed above, the Court assigns a 70 percent contingency that the plaintiff will achieve a "marked improvement" allowing near-full vocational functionality, albeit with some residual pain and modest but manageable functional impairments.

G. Non-pecuniary damages

[72] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair. Fairness is measured against awards made in comparable cases. Comparable cases serve only as a rough guide, however, as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras 188–189.

[73] The oft-cited case of *Stapley v. Hejslet,* 2006 BCCA 34 at para 46, leave to appeal to SCC ref'd, 31373 (19 October 2006) sets out a non-exhaustive list of factors to be considered when assessing non-pecuniary damages:

- age of the plaintiff;
- nature of the injury;
- severity and duration of pain;

- disability;
- emotional suffering;
- loss or impairment of life;
- impairment of family, marital and social relationships;
- impairment of physical and mental abilities;
- loss of lifestyle; and
- the plaintiff's stoicism (which should not, generally, penalize the plaintiff).

[74] Subject to the credibility concerns, the factors all favour the plaintiff to some extent. The plaintiff is young. Before the accident, she was fit and hard-working, unencumbered by any limitations in her work, social, or recreational activities. She has exhibited determination and stoicism in maintaining fitness and embarking on her new career after the collision. Her chronic injuries continue to drag down her athletic, vocational, and personal activities.

[75] Before considering comparator cases, I will address a few specific assertions of lifestyle impairment that were pleaded and presented in the plaintiff’s opening submissions, but pursued with less vigour in closing submissions. These lifestyle diminishments will accordingly play a modest role in the assessment of non-pecuniary damages.

[76] In final argument, the plaintiff opted not to pursue a separate head of damages for loss of housekeeping capacity. While the plaintiff describes some limitations in her housekeeping ability, these limitations were not profound, and are presently readily addressed through adaptations such as breaking up laundry and other carrying tasks into smaller quantities. Dr Heran confirms that the plaintiff should be able to perform all household activities indefinitely into the future. The Court agrees.

[77] The plaintiff's driving anxiety has largely abated in the years since the accident. She is now fully able to drive, with only minor anxiety. Dr Solomons confirms that any remaining anxiety does not rise to the level of a diagnosable psychiatric disorder. Her complaints of driving anxiety are also somewhat undermined by her taking up motorcycling in 2020.

[78] With respect to her sleep disturbances, they are likely wholly treatable. Dr Caillier states that the plaintiff may benefit from a trial dose of melatonin (in pill, spray, or gummy form), or a tricyclic antidepressant. Dr Caillier acknowledged that melatonin has no known side effects, apart from doing its job too well: patients sometimes feel tired after waking up. If the underlying cause of that sleep loss—the pain and headaches—is resolved, as they likely will be, the sleep loss will also be resolved.

[79] The non-pecuniary damages awards in the comparator cases provided by each side do not differ significantly. Those proffered by the defendants range from $60,000 to $100,000; those proffered by the plaintiff range from $130,000 to $174,000.

[80] The defendants' cases:

a) *Kan* ($57,000; $62,822 adjusted for inflation): the plaintiff experienced intermittent soft tissue pain. Her injuries had largely resolved, and were likely to completely resolve within two years.

b) *Hinder v. Yellow Cab Company Ltd*., 2015 BCSC 2069 ($60,000; $74,811 adjusted for inflation): the plaintiff's injuries were limited to neck pain and headaches, which appeared to be less frequent and severe than in the present case.

c) *Libera v. Burgoyne*, 2021 BCSC 1028 ($90,000; $99,193 adjusted for inflation): the plaintiff's headaches, neck, and upper back pain had all resolved. Her remaining chronic low back and hip pain had minimal effect

on her work activities, requiring only that she take breaks throughout the workday to stand, stretch and walk.

d) *Duffy v. Dutt*, 2020 BCSC 995 ($55,000; $63,440, adjusted for inflation): the subject accident caused minor injuries to the plaintiff, resulting in some daily neck and back pain and headaches once or twice a month. The plaintiff's pain was aggravated by another accident that occurred after the subject accident.

[81] The plaintiff's cases:

a) *Chau v. Farshid,* 2023 BCSC 1004 ($140,000, plus $25,000 for loss of housekeeping capacity): the plaintiff's injuries prevented her from working extra hours, as she had previously, which caused her family financial strain. The plaintiff was a decade older than the present plaintiff, but as a fillip to higher damages, her injuries negatively impacted her relations with her partner and her children, in contrast to the present case.

b) *Clayton v. Barefoot*, 2018 BCSC 239 ($130,000; approximately $154,000, adjusted for inflation): the plaintiff was of a comparable age, with comparable injuries in terms of frequency. The plaintiff's injuries more significantly affected her lifestyle than in the present case, as she could not return to a previous labouring job, resume any sporting activities beyond limited walking, or do any travelling because she could not sit for longer periods.

c) *Gill v. Lai*, 2018 BCSC 101, rev'd on other grounds 2019 BCCA 103 ($140,000; approximately $166,000, adjusted for inflation): the plaintiff was slightly older, but suffered from more extensive injuries. The plaintiff decided to forego having another child as a result of her injuries, and they also "truncated her professional aspirations" (para 115).

d) *Mattson v. Spady*, 2019 BCSC 1144 ($150,000; approximately $174,000, adjusted for inflation): the plaintiff was slightly older, but even more active

> to the present plaintiff. After the subject accident, the plaintiff was unable to resume any of the sporting activities she enjoyed before, she was less able to care for her young children, and her injuries had a "devastating" impact on the life she knew (para 46).

[82] As concluded above, the credibility cautions set out above prompt the Court to discount the plaintiff's account of the effect of her pain complaints on her everyday life, and the medical recommendations indicate that they are unlikely to persist to the degree claimed in the long term. Non-pecuniary damages are assessed at $100,000. That amount is reduced by 70 percent, to reflect her failure to mitigate, and the contingency of future improvement in her condition with treatment and otherwise: $30,000.

H. Past loss of earnings

[83] The defendants concede that the plaintiff directly lost $2,831 in wages in her bank and restaurant jobs directly as a result of the accident. The Court confirms this award.

I. Past loss of earning capacity

1. Law

[84] In *Jajcaj v. Bevans*, 2021 BCSC 834, Justice Ball summarises the approach to assessing loss of both past and future earnings capacity:

> [190] The value of the loss of income, either past or future, is the difference between what the earnings would have been and what they are or will be, as a result of the tort: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at paras. 29–30. That assessment is based on either the earnings approach or the capital asset approach, and must be based on the evidence. The plaintiff must demonstrate that there is a real and substantial possibility, beyond mere speculation, that the loss has occurred or will occur in the future. It is a matter of assessment and not mathematical calculation: *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13–16; *Shongu v. Jing*, 2016 BCSC 901 at paras. 186–187. The overall fairness and reasonableness of the award must be considered: *Kuskis v. Hon Tin*, 2008 BCSC 862 at paras. 153–154.

[85] As stated recently, in *Lamarque v. Rouse*, 2023 BCCA 392:

> [29] An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have, not could have, performed, but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The standard of proof for past hypothetical events is: whether there is a "real and substantial possibility" that the events would occur: *Grewal v. Naumann*, 2017 BCCA 158, at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. If the claimant establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48.

2. Discussion and decision

[86] The plaintiff claims on an earnings approach. She calculates a gross total loss between May 2020 (delaying the period to account for the COVID-19 pandemic shutdown) to 2023, losing on average 20 hours a week, at $691,400. The lost earnings are based upon her hourly rates of $180 (2020), $200 (2021–22) and $250 (2023).

[87] The defendants cast doubt on the demand for the plaintiff's tattooing skills during this period, or, for that matter, in the future. They note her incomplete business records, coupled with her dishonest tax filings, and cash-based business.

[88] Testimony from the plaintiff, her coworkers, and her customers, coupled with email requests for tattoo commissions (at least between May 2019 and December 2021), to some degree indicate demand for the plaintiff's skills, and that the plaintiff could have worked a fuller work week of 30 to 40 hours. The idiosyncratic postural and focus demands of that vocation, coupled with her injury, permitted the plaintiff to work only a partial week. I generally agree with the characterisation presented by the plaintiff's counsel:

> It is often a cliché, but in this instance, it is true: Ms. Padgham is the rare person who is able to work doing what she loves. She has had a lifelong interest in art and is now able to have her art live permanently on a person. She finds her tattoo work interesting and meaningful. It is a job that, for Ms. Padgham, has the exceedingly uncommon characteristics of being something she enjoys, something she is good at, and something that pays well.

[89] These positive assessments must be tempered by the credibility concerns expressed above, and well as other limitations on both supply and demand. The

overall evidence, with respect to both tattoo artists collectively and the plaintiff individually, indicates that the plaintiff would likely not work a full 40 hours, even if demand existed.

[90] The testimony of the plaintiff's three associates in the tattooing industry, coupled with that of Dr Caillier, indicates that the postural demands of tattooing place significant physical stresses on all practitioners, including practitioners who have never suffered an accident, requiring regular proactive treatments. Tattooists, and this plaintiff, may be unable or disinclined to work full 40-hour weeks. One tattoo artist witness testified that the average tattoo artist works six to seven hours, four to five days a week.

[91] Further, as much as the plaintiff loves tattooing, she clearly and reasonably enjoys spending many hours in other activities such as working out with her personal trainer or in a fitness class, spending leisure time with her family and boyfriend, or travelling to tattoo conventions and elsewhere. Finally, in addition to the limited evidentiary utility of the two binders of email demands for her services, as noted above, her claims of infinite demand are undercut by the amount of marketing she engages in. They are also undermined by her somewhat down-market participation in pop-up tattoo booths at a local flea market, working full weekend days, applying generally simple stencil designs on strangers: the antithesis of her stated business practice of only accepting tattooing appointments with selective clients and designs that please her.

[92] The Court finds an average loss of 10 hours a week for past loss of earning capacity: $345,700.

[93] As set out above, the $345,700 must be reduced by 70 percent to account for the likelihood that the plaintiff could have functioned at near-normal capacity had she pursued reasonable recommended treatments for her conditions: $103,710.

J. Future loss of earning capacity

1. Law

[94] In *McHatten v. Insurance Corporation of British Columbia*, 2023 BCCA 271, Madam Justice Fenlon sets out the Court's task in assessing loss of future earning capacity:

> [19] As has oft been noted, assessing loss of future earning capacity is a particularly difficult exercise for a trial judge. The central task involves comparing the plaintiff's likely future working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133. That comparison must be grounded in the evidence before the judge, as limited as it may be.

[95] The Grauer JA trilogy of *Rab v. Prescott*, 2021 BCCA 345, *Lo v. Vos*, 2021 BCCA 421, and *Dornan v. Silva*, 2021 BCCA 228 issue the approach to loss of future earning capacity claims. *Rab* sets out a three-step approach:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. 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…***
>
> [emphasis added]

[96] In *Steinlauf v. Deol*, 2022 BCCA 96, the Court expands on *Rab*:

> [52] In *Rab v Prescott*, 2021 BCCA 345 at para 47, this Court referred to a three-step process for considering claims for loss of future earning capacity, "particularly where the evidence indicates no loss of income at the time of trial". The first step was an evidentiary one: "whether the evidence discloses a *potential* future event that could lead to a loss of capacity". In cases like this one, ***where the event giving rise to a future loss is manifest and continuing at the time of trial, that evidentiary step is a given.***
>
> [53] The second step, which in practical terms may prove to be the first, is whether, on that evidence, the plaintiff has established entitlement by demonstrating that there is a real and substantial possibility of an event giving rise to a future loss: see, for instance, *Perren v Lalari*, 2010 BCCA 140 at para

> 32. As this Court explained in *Rab* at para 29, establishing that threshold question, too, ***is less challenging in some cases than others***:
>
> > ***… In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous***. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. *Dornan* [*v Silva,* 2021 BCCA 228] was such a case.
>
> …
>
> [55] As for the quantification, this Court described the process in *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32:
>
> > …An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that ***the award is an assessment, not a mathematical calculation***. Nevertheless, ***the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened…***
>
> [emphasis added]

2. Discussion and decision

[97] The plaintiff argues that the most likely without-collision scenario is that she would have continued to work as a tattoo artist at 35 to 40 hours per week until, at least, age 67. Now, as a result of her collision-related injuries, she will be limited to working no more than 15 to 25 hours per week as a tattoo artist until the age of 67.

[98] The plaintiff provides an expert report of Darren Benning, an economist, who provided multipliers for the purposes of assessing the plaintiff's ongoing future loss. Based on those calculations, and applying a static hourly rate of $250, the plaintiff provides mathematical anchors of hours lost per week, to establish total future earning capacity losses ranging from $1.5 million (based on five hours lost per week) to $6.2 million (based on 20 hours lost per week).

[99] The plaintiff's claim resembles that discussed in *Steinlauf*: her present chronic injuries, continuing to trial, create a real and substantial possibility of reduced hours and reduced earnings, potentially for the rest of her life. As set out above, the

evidence provides some support for both the demand and supply sides of this contention, at least for the present. Further, even if tattoos become less fashionable, or the general demand for tattoos drops due to an economic downturn or otherwise, the plaintiff enjoys a sufficient reputation, based upon her considerable skill, likely to maintain sufficient client demand.

[100] At the same time, this must be considerably tempered by the analysis in the previous section, noting that the plaintiff may unable or disinclined to work a 40-hour week for reasons unconnected to the collision, coupled with the credibility concerns about her condition and limitations.

[101] The table of projected future losses, based on Mr Benning's multipliers, provides a useful framework for the inherently imprecise exercise of forecasting the effect of the collision-related conditions on the plaintiff's future earnings. Anchoring the future losses at an average of five hours loss per week due to her chronic conditions results in annual losses of $57,500 per year; over the course of her career to age 67 yields a total of $1,539,000.

[102] That said, the many promising treatment options largely unexplored by the plaintiff also create a real and substantial possibility that these future losses can be almost wholly avoided. Based on the medical evidence surveyed above, the Court quantifies this possibility at 70 percent. Applied to the total loss, that possibility yields a total damages award for loss of future earnings capacity at $461,700.

K. Cost of future care

[103] An award for the costs of future care compensates the plaintiff for the costs of the services, medications, and aids that are reasonably necessary to promote her health: *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (SC) at 78, aff'd (1987) 49 BCLR (2d) 99 (CA).

[104] The plaintiff seeks a future cost of care award based on the following treatment and supports:

a) Botox treatment;

b) Physiotherapy;

c) Massage therapy;

d) Kinesiology or personal training;

e) Medication;

f) Ergonomic equipment;

g) Housekeeping assistance; and

h) Home maintenance and repair assistance.

[105] In her closing submissions, the plaintiff withdrew a claim for $10,132 for annual gym and pool membership; although these activities were medically recommended, she concedes that she would maintain a gym membership, as before the collision, regardless of the collision: see *Sandhu v. Morris*, 2023 BCSC 35 at para 140.

[106] The total amount for care including contingency items is $330,079. The plaintiff proposes an award in the rough mid-point between the “with contingency” and “without contingency” totals set out in Mr Benning’s report, resulting in a claim for $304,868.

[107] The defendants provided no submissions and little evidence on future costs of care, except to question aspects of Ms Craig’s assessments and report.

[108] The plaintiff’s submissions usefully crossed-reference each future care item sought with recommendations by Ms Craig and medical experts.

[109] The Court is satisfied that each expense is reasonable to address the plaintiff’s conditions and limitations inflicted by the collision. These amounts will be reduced by 70 percent to reflect the strong likelihood that her conditions will significantly improve in future, either through following recommended treatments, or otherwise: $91,460.

L. Special damages

[110] The plaintiff seeks special damages of $52,273.97.

[111] The defendants do not object to the costs of the single Botox injection, the RMT treatments, and the physiotherapy sessions. The medical reports confirm the reasonableness of those treatments, and these amounts are awarded.

[112] The defendants object to the $35,870 claimed for the plaintiff's personal training sessions (three sessions a week in 2020, and four sessions a week since January 2021). They note that before the collision, the plaintiff was actively engaged in physical training and gym workouts, as evidenced by her kickboxing classes and attendance at a gym with her mother. At the same time, the medical experts stressed the importance of building and maintaining musculature, and stretching, to rehabilitation. The Court awards half — $17,935 — of the personal training session expenses.

[113] The defendants also object to the eight Sabai Thai spa "relaxation package" treatments between February 2021 and May 2023. The plaintiff acknowledges that half of each package consists of a facial, and proposes that only half of the total expenses be allowed: $652. The Court does not grant this expense, as its therapeutic value is not sufficiently established, and as the plaintiff would likely have incurred this expense in any case.

[114] These adjustments will also reduce the mileage awarded to $6,731.

[115] The Court awards $27,498 (gross) in special damages, from which must be deducted 70 percent for the failure to mitigate: $8,249.

[116] The parties agree that the amounts paid by ICBC to date that are not already accounted for in the plaintiff's table special damages must be deducted from the special damages total. It was not entirely clear on the evidence the total of these amounts. The Court will leave it to the parties to confirm this amount, and return to Court in the undesirable circumstance that direction is needed.

IV. CONCLUSION

[117] The plaintiff is awarded the following damages:

Non-pecuniary damages	$30,000
Past lost earnings	$2,831
Loss of past earning capacity	$103,710
Loss of future earning capacity	$461,700
Cost of future care	$91,460
Special damages	$8,249*
TOTAL	**$697,950**
* = less any part 7 benefits already received	

[118] The above losses of past and future earning capacity are gross amounts. I will leave it to counsel to calculate the net (after tax) amounts. If it is truly necessary, leave is granted to return to Court on that issue.

[119] The plaintiff has been successful, albeit not to the extent proposed. She is presumptively entitled to her costs at Scale B. If either side wishes to dislodge this presumption, that side will advise the other within 15 days of these reasons, and schedule with the Registry a date as soon as reasonably practicable to argue the matter. Each side will provide a written argument to the other side and to the Court at least seven days before the hearing date. Each side is encouraged to strive for a negotiated settlement to the costs issue prior to the costs hearing, and issue formal offers to settle costs.

[120] While the result may be disappointing for Messrs Elliott and Morishita, they are to be commended for their fine advocacy on behalf of their client, their helpful presentation of evidence and materials, and for their thorough and balanced final argument.

"Crerar J"

[1] In the end, Verhoeven J found that on a balance of probabilities the plaintiff had established a loss of earning capacity, both past and prospective. He assessed past loss at $45,000, and future loss at $250,000.