IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Richardson v. Hartwick,*
2023 BCSC 2151

Date: 20231206
Docket: M207817
Registry: Vancouver

Between:

Shannon Margaret Richardson

Plaintiff

And

Donna Dianne Hartwick

Defendant

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Plaintiff:	G.E. Rafter H. Kang, Articled Student
Counsel for the Defendant:	S.M. Smyth M. Foster
Place and Date of Trial/Hearing:	Vancouver, B.C. October 10-13, 16-18, 2023
Place and Date of Judgment:	Vancouver, B.C. December 6, 2023

Table of Contents

INTRODUCTION

[1] This action arises out of a motor vehicle accident that occurred in West Vancouver, British Columbia, on October 3, 2018 (the "Accident"). The defendant rear-ended Shannon Richardson's vehicle while she was stopped at a stop sign, pushing Ms. Richardson's vehicle into the vehicle in front of her.

[2] While liability is not admitted by the defendant, it is not contested either. The defendant did not give evidence, and I find that Ms. Richardson's version of events establish that the defendant is liable in negligence. The only issues argued before me at trial are the extent of the injuries the Accident caused Ms. Richardson, and her damages arising from those injuries.

[3] Ms. Richardson was 56 years old at the time of the Accident and 61 at the time of the trial. She is the founder and owner of Premiere Talent Management ("Premiere"), which she had grown to approximately eight talent agents by the time of the Accident, including herself. The financial records show that Premiere was a highly successful and profitable agency, and the evidence at trial was that it was a well-respected and sought-after agent for talent in the region.

[4] While their full diagnoses differ somewhat, all of the medical experts testified at trial that Ms. Richardson suffered soft-tissue injuries to her upper back, shoulders, and neck, and headaches, causing a chronic pain condition, as a result of the Accident.

[5] Ms. Richardson testified that, as a result of her injuries, she has not only had to give up many of her social and recreational activities, but also significantly scale back her work for her clients. The defendant challenges these assertions.

CREDIBILITY

[6] The defendant attacks Ms. Richardson's credibility and reliability. The defendant argues that Ms. Richardson failed to fully report her pre-existing soreness, low mood, and headaches to the various independent medical examiners, making

their reports, diagnoses, and opinions (including the medical report tendered by the defendant) unreliable.

[7] The defendant also says that Ms. Richardson was impeached in cross-examination, and that she overstated her pre-injury sources of income in a pre-trial affidavit. For these reasons, the defendant argues that I should find Ms. Richardson neither credible nor reliable, and that she has not proven her injuries or losses.

[8] The test for assessing credibility was recently summarized in *Rab v. Prescott*, 2020 BCSC 1255 at para. 69 as follows:

> … The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] SCCA No. 392. They include the firmness of the witness's memory, the ability of the witness to resist the influence of interest in modifying her recollection, whether the witness's evidence harmonizes with independent evidence that has been accepted, whether the witness changes her evidence during direct examination and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in her recollections, the witness's demeanor, and whether the witness's evidence seems generally unreasonable, impossible, or unlikely.

[9] I also consider the observations made in *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 8–10 to be pertinent. After reviewing the oft-cited factors to be considered when assessing credibility set out in *Bradshaw* at para. 186, the Court in *Hardychuk* said as follows:

> [10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[10] I found Ms. Richardson to be generally candid but unreliable in her recollection of her massage therapy and chiropractic records from 2017 to 2018.

She agreed to having mild neck pain and various work-and exercise-related soreness for which she regularly attended massage therapy. She did not endorse the descriptions of her complaints in those records, saying she was unable to remember specifics, other than that she had some pain and stiffness which the massage and chiropractic treatments helped with, and that she used these services to maintain her active lifestyle.

[11] Although Ms. Richardson did not endorse the truth of all of the subjective complaints recorded by these practitioners on the basis that she was no longer able to remember each specific day, she generally did not contest their accuracy, and she admitted those records as business records with respect to the facts reported and recorded.

[12] Although the defendant may have found Ms. Richardson's pre-trial evidence incomplete in some aspects, her evidence at trial did not suffer from this infirmity. Nor do I consider that she was meaningfully impeached on her discovery evidence, given the limited nature of the questions posed in discovery.

[13] Overall, I found Ms. Richardson to be a credible witness, notwithstanding the limitations on her specific recollection of pre-Accident regular massages and chiropractic services. Where Ms. Richardson's memory failed in this regard, the records themselves were admitted to address this very issue.

[14] Having reviewed those records, and having heard the expert opinion evidence of both her family physician and independent medical examiners retained by each side, I find that Ms. Richardson's evidence that she did not have a pre-Accident chronic pain condition was independently verified by these experts.

[15] I consider Justice Baker's comments in *Craven v. Brar*, 2022 BCSC 291 apposite here:

> [23] Notwithstanding the thorough review of Ms. Craven's past medical records under cross examination, I am satisfied that Ms. Craven was of reasonably good health for a woman of her age at the time the accident. She was 51 years old. It is not surprising that over her life time she visited the doctor with various health complaints from time to time. I find that it is an

> unrealistic standard for plaintiffs to have to meet, to suggest that they cannot suffer the normal aches and pains of life, or visit their doctor with periodic injuries over their lifetime, without being found to be not credible when they report they are in generally good health.
>
> [24] In assessing the credibility of Ms. Craven's statement that she was in good health at the time of the accident, what is more important, in my view, is how Ms. Craven was able to participate in activities in her life. Notwithstanding her periodic visits to the doctor, Ms. Craven was very active at the time of the accident. She engaged in competitive dance of various types. She skied. She played the piano. She held down full time work. She had taken on physical work as a cleaner when she was in her 40s. In addition to her work, she successfully established herself as a marketable actor in film and TV. At the time of the accident, her life was not negatively affected in any material way by her previous accidents or health complaints. I agree that Ms. Craven was in good health at the time of the accident.

[16] Furthermore, Ms. Richardson's evidence of her pre- and post-Accident social, recreational, and work life were supported by credible and compelling evidence.

[17] I find that I can generally rely upon Ms. Richardson's evidence in this case. I will specifically address those instances where I find her evidence falling short of the burden upon her to prove certain elements of her damages claims.

INJURIES AND CAUSATION

[18] Ms. Richardson alleges both physical and emotional injuries caused by the Accident. The physical injuries relate primarily to her left neck, shoulder, and upper back, as well as severe headaches. She says that the physical injuries have resulted in chronic pain and persistent low mood which have had a dramatic effect on her ability to function socially, recreationally, and professionally in her demanding job as a talent agent.

[19] By contrast, the defendant says that Ms. Richardson suffered all of the same symptoms before the Accident as indicated by her massage and other clinical records, both before and after the Accident. The defendant says that Ms. Richardson has therefore not proven that the Accident caused her injuries and losses. The defendant also argues that Ms. Richardson suffered from a pre-existing condition that caused her current injuries.

Causation Principles

[20] Causation need not be determined with scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 1996 CanLII 183. Ms. Richardson must establish on a balance of probabilities that the defendant's negligence caused her injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range: *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[21] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? This "but for" test recognizes that compensation for negligent conduct should only be made where there is a "substantial connection" between the injury and the defendant's conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23; *Farrant* at para. 11.

[22] Causation must be established on a balance of probabilities before damages are assessed. As Chief Justice McLachlin stated in *Blackwater v. Plint*, 2005 SCC 58:

> [78] . . . 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*.

[23] The plaintiff must be placed in the position that they would have been in if not for the defendant's negligence—no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for the average person (sometimes referred to as the "thin skull" rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which they would have experienced anyway (often referred to as the "crumbling skull" rule): *Athey* at paras. 32–35.

[24] While the burden is on the plaintiff to establish the causation of injury, the defendant has an evidentiary burden to establish that there is a real and substantial possibility of future injuries or losses arising from a pre-existing condition: *Shongu v. Jing*, 2016 BCSC 901 at paras. 99–100; *Rezaei v. Piedade*, 2012 BCSC 1782 at paras. 43–45.

Ms. Richardson's Pre-Accident Condition

[25] The evidence of Ms. Richardson, and of the witnesses who know her well, establishes that before the Accident, Ms. Richardson maintained an active recreational and social life that included vigorous walks and hikes multiple times a week, a regular exercise regime at the gym, and active recreational activities, such as golf and kayaking in the summer. She was able to do all the yard work and regular maintenance for her property on Galiano Island.

[26] The evidence also establishes that, before the Accident, Ms. Richardson saw her friends multiple times a week and was a key organizer of social activities to bring friends together.

[27] At work, she was described as a "dynamo" working long hours to promote her clients, her agents, and her agency. Ms. Richardson started Premiere in her thirties, and she has since dedicated her life to the success and growth of Premiere, forgoing a family of her own.

[28] In the two years before the Accident, she saw a Registered Massage Therapist ("RMT") approximately 16 times and a chiropractor eight times. I find that, for the most part, the treatment records of these allied health professionals tend to support Ms. Richardson's evidence that she attended such treatment sessions for ordinary muscle tension and wear and tear. Ms. Richardson also had a documented sensation of pain on her left shoulder blade, neck, and torso in December 2017 which was treated by an RMT on that date, approximately ten months before the Accident. However, subsequent treatment notes tend to indicate bilateral treatments for general soreness and some headaches.

[29] Dr. Colleen Lawlor, Ms. Richardson's family physician both before and after the Accident, considered that these records indicated ordinary levels of massage and other non-medical treatments for her relatively affluent patient group. In this regard, she considered Ms. Richardson to be a "baseline healthy" person before the Accident.

[30] The evidence also establishes that Ms. Richardson suffered from headaches before the Accident. While the experts differed in opinion as to whether these headaches were migraine headaches, they were severe enough that Ms. Richardson would have to take medication and lie down at times. I accept Dr. Lawlor's evidence that some of these headaches were distinct sinus headaches, which were corrected by surgery after the Accident, but that others were multi-factorial and included musculoskeletal causes such as muscle tightness.

[31] The evidence also establishes that in August 2018, only a month before the Accident, Ms. Richardson was prescribed Prozac by Dr. Lawlor while suffering from a bout of low mood, which continued into September 2018. I find it likely that this condition persisted until the Accident occurred a few weeks later. Although the defendant often suggested that Ms. Richardson suffered from clinical depression before the Accident, Dr. Lawlor did not endorse this diagnosis, and it is not established in the evidence.

[32] I accept Ms. Richardson's evidence to be that while she has suffered from bouts of low mood throughout her life, they had never interfered with her social, recreational, or work life. Ms. Richardson's evidence is supported by the evidence of her two lifelong friends and work colleagues, all of whom describe Ms. Richardson as very outgoing and energetic before the Accident, but that her presentation has changed dramatically since.

[33] The fact that her closest friends and work colleagues were not aware of any of Ms. Richardson's muscle soreness or struggles with low mood before the Accident tend to support her evidence that she was able to maintain her active social

and work life, despite experiencing bouts of depressed mood and regularly attending massage and chiropractic treatments.

[34] Overall, the evidence establishes that before the Accident, despite some bad headaches, occasional muscle soreness, and bouts of low mood, Ms. Richardson was fully capable of maintaining an active social and recreational life, while working more than full-time in a highly demanding job that required her to be “on” every day and at all hours of the day.

Injuries Sustained in the Accident

[35] Ms. Richardson submitted the opinion evidence of her family physician, Dr. Lawlor, and two independent medical examiners: a physiatrist, Dr. Zeeshan Waseem, and a neurologist, Dr. Donald Cameron. The defence submitted the expert opinion of Dr. Cory Toth, who is also a neurologist.

[36] The medical experts all agreed that Ms. Richardson suffered soft-tissue injuries to her left neck, shoulder, and back in the Accident that have now resulted in a chronic pain condition, which also includes more frequent and severe headaches. While Dr. Toth would add a potential rotator cuff injury and a concussion, and the experts provided different diagnoses for Ms. Richardson’s headaches, little turns on these differences. Based on the expert medical evidence, I find that Ms. Richardson suffered soft-tissue injuries to her neck, shoulder, and upper back in the Accident that have now evolved into a chronic pain condition in these areas, as well as more severe and debilitating headaches.

[37] The medical experts also largely agreed that Ms. Richardson’s prognosis for recovery is not promising, given the duration of her chronic pain. It is possible Ms. Richardson could see some improvement in symptom management if she tried some alternative medications suggested by the various independent medical examiners. However, all of the medical experts agreed that her chance of improvement is low, and that her chance of a full recovery is essentially non-existent.

[38] Ms. Richardson also described suffering from some driving anxiety, and the medical evidence indicates that her mood has been persistently low since the Accident, varying with her pain symptoms and her optimism for recovery. However, she does not claim, nor does the evidence support, a diagnosis of clinical depression or an anxiety disorder.

Causation and Pre-existing Condition

[39] All of the independent medical experts reviewed Ms. Richardson's treatment and medical records. They all concluded that Ms. Richardson's current chronic pain and debilitating headaches are both qualitatively and quantitively different from the occasional muscle pain and headaches that she had previously suffered from.

[40] Although Dr. Toth and Dr. Lawlor described the Accident as exacerbating "pre-existing conditions," they clarified, in evidence, that these "pre-existing conditions" are general soreness and occasional headaches. Indeed, there is no evidence before me of a degenerative condition or some other condition likely to evolve into a chronic pain condition or debilitating headaches, absent the Accident.

[41] If anything, the evidence of Dr. Cameron, Dr. Toth, and Dr. Waseem is that Ms. Richardson's low mood at the time of the Accident and vulnerability to muscle soreness in certain areas have likely contributed to the tenacity and chronicity of her post-Accident injuries. In so many words, they describe her case as a "thin-skull" scenario rather than that of a "crumbling skull."

[42] The defendant suggests that I might come to my own independent conclusion on the existence of a progressive and debilitating pre-existing condition, based on Ms. Richardson's pre-Accident treatment records, despite the expert evidence to the contrary (including the expert medical evidence tendered by the defendant herself). I am not inclined to do so.

[43] Instead, based on all of the evidence, I find that the Accident caused Ms. Richardson's present chronic neck, shoulder, and upper back pain, and more frequent and severe headaches. While her low mood at the time of the Accident has

likely contributed to the current chronicity of her pain, the defendant must take Ms. Richardson as she found her: *Dornan v. Silva*, 2021 BCCA 228 at para. 40.

[44] Ms. Richardson seeks damages under a number of headings: non-pecuniary damages, past and future loss of income earning capacity, cost of future care, and special damages. I will address each of these heads of damages in order.

NON-PECUNIARY DAMAGES

[45] 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 to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[46] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

> [46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> a) age of the plaintiff;
> b) nature of the injury;
> c) severity and duration of pain;
> d) disability;
> e) emotional suffering; and
> f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> g) impairment of family, marital and social relationships;
> h) impairment of physical and mental abilities;
> i) loss of lifestyle; and
> j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[47] The assessment of non-pecuniary damages is necessarily influenced by the plaintiff's personal experiences in dealing with their injuries and the consequences of those injuries: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[48] While Ms. Richardson did not attempt to quantify her pain, she did say that it impairs her ability to work and be physically and socially active. Although her pain is chronic, she experiences both good days and bad days. Her pain impairs her enjoyment of life and the social and recreational time with her friends. She is no longer able to enjoy many of the physical activities that she did before the Accident, including hiking, kayaking, and golf. She is no longer an organizer or eager participant in social activities, but instead has to be convinced to join her friends.

[49] I find that Ms. Richardson has established that the Accident has not only caused a significant change in her social and recreational life, but has also required her to pull back from a job that was central to her life. It is unlikely that she will see a significant improvement in this regard in the future.

[50] Ms. Richardson seeks $200,000 in non-pecuniary damages. She relies on four cases that she argues are comparable. The non-pecuniary damages awarded in these cases range between $170,000 to $225,000 (adjusted for inflation):

a) *Thiessen v. Kepfer*, 2023 BCSC 1593 ($200,000);

b) *Martin v. Steunenberg*, 2021 BCSC 1411 ($210,000);

c) *Noftle v. Bartosch*, 2018 BCSC 766 ($170,000); and

d) *Craven v. Brar*, 2022 BCSC 291 ($170,000).

[51] By contrast, the defendant suggests that the award should be in the range of $80,000 to $107,000 (adjusted for inflation), based on the following comparable cases:

a) *Andrews v. Mainster*, 2014 BCSC 541 ($85,000);

b) *Burtwell v. McCaffrey*, 2013 BCSC 886 ($80,000);

c) *Dueck v. Lee*, 2019 BCSC 1936 ($75,000); and

d) *Abraha v. Suri*, 2019 BCSC 1855 ($70,000).

[52] In a number of the defendant's cases, a pre-existing condition was established on the evidence, and significant reductions from the non-pecuniary award were made on that basis. In other cases, the plaintiff was seeking a much lower award for non-pecuniary damages, and the Court's award reflects that.

[53] Overall, I do not find the defendant's cases helpful in this regard. However, I also find that Ms. Richardson's cases included elements, such as significant psychiatric injuries, beyond those established in her own case.

[54] In my view, an award of $115,000 for non-pecuniary damages is appropriate based on the evidence in this case.

LOSS OF INCOME EARNING CAPACITY

[55] Ms. Richardson's claim for both past and future loss of earning capacity is rooted in the same evidence and arguments.

[56] In support of her claim, Ms. Richardson tendered spreadsheets generated from Premiere's accounting software showing the agent commissions that had been earned by other agents at Premiere since the Accident, for both the clients she used to directly represent, and for the clients she says she personally would have taken on since the Accident (the "Commission Spreadsheets"). These total over $330,000. She argues that these commissions represent the lost income that would have been paid to her (rather than to other Premiere agents), but for the Accident.

[57] She also tendered the July 13, 2023 report of Darren Benning, an economist, who analyzed the Commission Spreadsheets and Premiere's financial reports since 2015. Assuming that Ms. Richardson (instead of another agent) would have earned the commissions shown in the Commission Spreadsheets, Mr. Benning calculated

Ms. Richardson's post-tax loss of commissions since the Accident to the date of the trial as $153,855. This includes an 18% discount on the commission earnings that Mr. Benning estimated reflects the average costs Premiere incurs to earn income, based on Premiere's financial records. I am satisfied that this amount represents a conservative estimate of Ms. Richardson's losses overall.

[58] Based on the Commission Spreadsheets, Mr. Benning also estimated Ms. Richardson's future annual loss as $103,350 annually. After applying the appropriate discounts, Mr. Benning estimates Ms. Richardson's annual future loss of commission income amounts to approximately $85,000 of pre-tax income.

[59] Mr. Benning also provides actuarial and economic future loss multipliers for Ms. Richardson based on the average risk of disability and death for Ms. Richardson's sex and age. He did not include in these multipliers negative contingencies for unemployment (given that Ms. Richardson owns her company) or voluntary reductions in work, such as part-time work or early retirement. He says that he assumes the Court will make these findings and any required adjustments based on the evidence at trial. Assuming (as instructed) a retirement age of 75, Mr. Benning calculates Ms. Richardson's future loss of income earning capacity to be $978,010.

[60] Ms. Richardson says that I should accept Mr. Benning's calculations of her losses, both before and after the trial, subject to a 30% reduction to recognize the evidence at trial that she was already paying one or more of her agents 30% of the agency fee to assist her with her clients before the Accident. She says that I should also accept that these losses would have continued until the age of 75, based on her testimony that she had hoped to work her entire life.

[61] Conversely, the defendant says that Ms. Richardson has not proven any loss of earnings, including any loss of her commissions. To the contrary, the defendant says that, given Premiere's earnings did not take a significant hit after the Accident, I should not accept Ms. Richardson's evidence that she had given up her existing roster of clients, or stopped taking on new promising talent. The defendant says,

instead, that in the absence of proof that Premiere's total earnings (and thus Ms. Richardson's earnings) decreased after the Accident, Ms. Richardson has not proven a loss, whether a loss of commission income or otherwise.

[62] The defendant also says that Ms. Richardson would not have worked until she was 75 because she was already "maxed out" and stressed out at work, according to her various medical and allied health records. Although the defendant does not suggest a different age of retirement (and has not provided alternative future income present value tables based on a lesser participation rate), she notes that Premiere (and thus Ms. Richardson) continued to earn a very substantial income from the agency fees generated by Premiere even after the Accident.

[63] The defendant relies on the August 18, 2023 report of Frances Potgieter, a Chartered Professional Accountant retained to review Mr. Benning's calculations. Ms. Potgieter takes no issue with the present value tables provided by Mr. Benning but questions the adequacy of the Commission Spreadsheets as a foundation for Mr. Benning's conclusions regarding the loss of commission income.

[64] I note that the defendant accepted that tables 2 and 3 in Mr. Benning's report accurately summarized the financial records of Premiere and Ms. Richardson's income taxes from 2015 to mid-2023. Ms. Potgieter also provided a similar table at 7.3 in her own report based on these financial statements. Those reports were all disclosed to the defendant and subject to an agreement as to their authenticity.

[65] Ms. Potgieter was not concerned about these financial records, but she would have wanted to see more information with respect to the Commission Spreadsheets, including the amount of commission income Ms. Richardson was making before the Accident, as well as the amount of total commission income the other agents were making. Although she was later provided with spreadsheets containing additional information at her request, Ms. Potgieter did not have sufficient time to review them before the trial.

[66] I note that the defendant acknowledged during the trial that she was content with the redaction of client names from the Commission Spreadsheets to protect the privacy of Premiere's clients. Accordingly, both the defendant and the Court were provided only with: (i) a list of numbered clients that Ms. Richardson says were on her roster at the time of the Accident; and (ii) a list of numbered clients Ms. Richardson says she would have taken on herself after the Accident, but instead referred to other Premiere agents. No client names have been provided. Ms. Richardson acknowledges that this makes the analysis of the evidence more complex. The defendant now says that this means that Ms. Richardson has not proven her case.

[67] I turn then to the legal principles applicable to my consideration of the above evidence and arguments as they relate to Ms. Richardson's claim for both past and future loss of earnings.

Past Loss of Earning Capacity

Legal Principles

[68] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the plaintiff is entitled to recover damages for only her past net income loss. In exercising this discretion, I must keep in mind that the plaintiff must be put back in the position she would have been in had the accident not occurred: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 185–186.

[69] Compensation for past loss of earning capacity must be based on what the plaintiff would have, not could have, earned had the injury not occurred: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[70] The plaintiff need not establish earnings loss on a balance of probabilities, since what would have happened between the date of the accident and the date of the trial is essentially hypothetical, as are predictions regarding future losses. As the Court of Appeal stated in *Smith v. Knudsen*, 2004 BCCA 613:

> [29] . . . What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[71] A hypothetical possibility will be considered as long as it is a real and substantial possibility and not mere speculation: *Morlan v. Barrett*, 2012 BCCA 66 at para. 38, citing *Athey* at para. 27.

Findings

[72] The evidence establishes that, before the Accident, Ms. Richardson worked long hours, sometimes up to 14 to 16 hours a day, and she worked every day of the week. She had to be available at all hours of the day or week whenever her clients needed her. Her pre-Accident work required her to: vet a constant stream of potential clients seeking to be represented by Premiere; promote her clients (both through developing their offerings and through introducing them to key players in the industry); review posts known as "breakdown reports" multiple times per week from producers seeking talent; submit her clients for those and other opportunities; negotiate contracts for her talent; and attend industry events, such as award ceremonies, film festivals, and dinners, to promote her agency and her clients. Based on the unchallenged evidence, I am satisfied that this is an engrossing and energy-intensive job which Ms. Richardson excelled at before the Accident.

[73] As a result of the injuries caused by the Accident, I find Ms. Richardson is now working at about half of her previous capacity (which was considerable), largely in a supervisory role. She continues to review all of the talent that seeks to be represented by Premiere, and to vet and refer that talent to other Premiere agents where warranted. She supports her agents in their work, including negotiating contracts, and she still attends events to promote Premiere, but she does not personally promote individual clients.

[74] I also find that Ms. Richardson has established that, although she initially attempted to return to her full work load, she gave up her existing client roster over

the course of approximately a year after the Accident. She transferred the bulk of the work relating to her own clients to another Premiere agent, Melanie Hawthorne-Toogood. Before the Accident, Ms. Hawthorne-Toogood was already receiving 30% commission (or approximately half of the commission earnings) on Ms. Richardson's clients for assisting her with her roster of clients.

[75] I accept Ms. Richardson's evidence that her capacity is such that she is no longer able to directly represent her clients. I also find that, while Ms. Richardson continues to review hundreds of talent enquiries every month, she stopped taking on any new talent herself. I therefore accept Ms. Richardson's evidence that, in the last five years, she came across talent that looked particularly promising that she would have likely accepted into her own roster, were it not for her diminished capacity to take on clients. Instead, she referred those she considered particularly promising to Ms. Hawthorne-Toogood in most cases, but also to two other agents: Ally Copeland and Trudy Aronson.

[76] The defendant seeks an adverse inference for Ms. Richardson's failure to call Ms. Copeland and Ms. Aronson as part of her case. It is not clear what inference the defendant is asking me to make in this regard, but I would note that the defendant did call Ms. Copeland and attempted to call Ms. Aronson. Given that Ms. Copeland was called and gave evidence, there is no need for me to infer what her evidence might have been. Ms. Copeland confirmed that Ms. Richardson has traditionally kept the most promising talents for herself and sent other talented leads to Premiere's other agents. Ms. Copeland received such client referrals from Ms. Richardson both before and after the Accident, but she is generally not privy to Ms. Richardson's decision-making regarding these referrals. As a result, Ms. Copeland does not know which of the client leads she has received from Ms. Richardson since the Accident that Ms. Richardson would otherwise have kept for herself.

[77] Ms. Richardson also says that she does not discuss her injuries or her reasons for providing these leads to her agents, and so I have no reason to infer that Ms. Aronson would have said anything different.

[78] Overall, the evidence establishes that, in addition to the agency fees that Premiere receives for the work of all its agents, Ms. Richardson would have also earned commission income on her existing roster of clients had she been able to continue to represent them directly. I find that the best evidence of the commissions Ms. Richardson would have earned is the commissions that were paid to Ms. Hawthorne-Toogood for those same clients, as shown on the Commission Spreadsheets, with appropriate adjustments.

[79] I cannot agree with the defendant's assertion that Ms. Richardson did not suffer a loss if Premiere still continued to earn money through agency fees. The evidence establishes that Premiere charges a 15% agency fee to its clients when they book work. The commission paid to Premiere's agents out of that agency fee is generally about 60–65% of this fee. While Premiere continues to earn revenue of about 35–40% from the agency fees charged, the remaining amount is distributed in agent commissions, and Ms. Richardson's loss of commission income is a distinct loss above and beyond the revenue Premiere has received as part of the agency fee.

[80] Furthermore, the evidence does not support the defendant's position that Ms. Richardson could not have suffered a loss because Premiere has not lost revenue after the Accident. The evidence establishes that, since the October 2018 Accident, Premiere's total revenue (which includes Ms. Richardson's commissions) has been consistently below its pre-Accident revenue based on the fiscal year ending August 2018. Excluding the significantly lower revenue earned by Premiere in 2020 during the COVID-19 shut-down of the film industry in British Columbia, a comparison of Ms. Richardson's 2018 total income (including Premiere's net revenue and her salary) for subsequent years still indicates that Ms. Richardson experienced a significant loss of total available income post-Accident.

[81] Overall, I find that Ms. Richardson has proven a past income loss. In this regard, I prefer the more specific calculation of loss advanced by Ms. Richardson,

based on the loss of her commission income for specified clients, over one based more broadly on Premiere's total income over the years.

[82] However, I find that Ms. Richardson has not proven the full extent of her claimed losses in two respects.

[83] The first concerns the amount of commission income she would have earned but for the Accident. Ms. Richardson admitted that, before the Accident, Ms. Hawthorne-Toogood generally received a 30% commission on Ms. Richardson's roster of clients for the work Ms. Hawthorne-Toogood did to assist Ms. Richardson with those clients. Ms. Hawthorne-Toogood would also occasionally receive the full commission for certain bookings of Ms. Richardson's clients when Ms. Richardson was on vacation or away at an industry event. Full commissions on these talents were generally paid at 60–65% of the agency fee.

[84] In the Commission Spreadsheets relied upon by Mr. Benning, it is incorrectly assumed that the full commission would have been paid to Ms. Richardson before the Accident. Ms. Richardson agrees that Mr. Benning's figures need to be discounted by 30% to account for the amounts that would have been paid to Ms. Hawthorne-Toogood, or perhaps another agent, for assisting her with her roster of clients.

[85] In my view, 30% is not sufficient to address this pre-existing reduction from Ms. Richardson's commission earnings as shown on the Commission Spreadsheets. 30% of the agency fee is closer to 50% of the commissions earned on each booking (ranging generally from 60–65% of the agency fee). The pre-Accident 30% of the agency fee paid to Ms. Hawthorne-Toogood is thus closer to 50% of the commission revenue for each client, and not 30%. I must also consider that Ms. Hawthorne-Toogood would occasionally earn the full commission amount for these clients. I therefore find that the appropriate reduction to Mr. Benning's calculations on foregone commissions is 50%.

[86] The second aspect concerns Ms. Richardson's evidence that she would have certainly kept within her own roster, eight to nine talents that she vetted and passed on to other agents in the last five years. I find her evidence on this wanting in some respects.

[87] Unlike her existing roster of clients, which I have no reason to believe Ms. Richardson would have given up but for the Accident, the eight to nine additional talents she identified at trial are hypothetical, in that it is impossible to know, with any certainty, that she *would* have in fact kept these talents for herself, but for the Accident. In this regard, Ms. Richardson's desire to protect the identities and privacy of Premiere's clients resulted in a distinct lack of evidence as to who these specific talents were, and what about them made them special upon first review, or any other evidence to support her assertion that she would have kept them for herself but for the Accident. Although I do not question Ms. Richardson's honesty in this regard, the success of various clients over the last five years since the Accident could not help but colour a hindsight consideration of which clients would be most successful. As such, these losses are more in the nature of lost opportunities rather than the loss of her existing roster.

[88] Therefore, in my view, in addition to the 50% reduction in the value of the commissions claimed, some further reduction needs to be made for the claimed commissions lost on these prospective talents that were given up in the last five years.

[89] I have reviewed the Commission Spreadsheets by client number, and the commissions for the claimed foregone talent (as well as a few additional discrepancies I found in the Commission Spreadsheets) represent less than 20% of Ms. Richardson's claimed commission losses before Mr. Benning's deductions. I am satisfied that there was a real and substantial possibility that she would have lost commissions on these foregone clients, but such claimed losses require a further discount due to their more hypothetical nature. I would discount these claimed additional losses by another 50% for a total discount factor of 10% beyond

Mr. Benning's estimated post-tax and post-expense losses. I would then round the resulting figure up.

[90] I would therefore award Ms. Richardson $70,000 for net past loss of earnings.

Future Loss of Earning Capacity

[91] An assessment of loss of future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. Rather, the future or hypothetical possibility will be considered as long as it is a real and substantial possibility and not mere speculation: *Morlan* at para. 38, citing *Athey* at para. 27.

[92] The Court of Appeal in *Rab* has set out a three-step process to assess damages for future loss of earning capacity (at para. 47):

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

[93] Where the plaintiff has already suffered a loss of earnings caused by the accident, the answer to the first two questions is generally more apparent.

[94] Once the court determines the relative likelihood of the possible loss, the court must then also review the overall fairness and reasonableness of the award: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[95] Although I find that the Accident caused Ms. Richardson both a precipitous reduction in her own clients, and her decision not to take on any more clients, I do not accept that she would have continued at the same demanding pace into her seventies as she claims.

[96] Many factors affect participation in the work force. For Ms. Richardson, Premiere is her passion and her "baby," but she still earns a healthy income as the

owner of the agency. Indeed, Ms. Richardson earns a healthy six-figure income working part-time at this job, which might be considered full-time employment for others.

[97] Although Ms. Richardson had not showed any signs of slowing down at the age of 56, the evidence indicates that she was occasionally struggling with the workload and demands placed upon her. For example, she had already started accepting assistance with her client roster from Ms. Hawthorne-Toogood to some extent, such that Ms. Hawthorne-Toogood was taking 30% of the agency fee on all of Ms. Richardson's clients in recognition of this work. Similarly, Ms. Copeland had also assisted Ms. Richardson in the past, previously earning a portion of Ms. Richardson's commissions.

[98] Regardless of the Accident, I consider that there was a substantial possibility in the future that Ms. Richardson would have slowed down her intake of new clients and increased her delegation of client work, while still continuing to perform her current more supervisory and mentoring role.

[99] According to Mr. Benning's evidence, on average, self-employed persons with Ms. Richardson's education fully retire by around the age of 66 to 67, and I understand that average participation rates in the workforce drop precipitously around this age.

[100] While there are various possibilities where Ms. Richardson may have scaled back more gradually, and may have done so sooner or later in life, balancing the relative likelihood of all of those possibilities, I find that Ms. Richardson would have likely scaled back to her current level when she turned 66 in five years' time. Given the strength of Premiere's revenue, and its continued substantial income for Ms. Richardson even without her direct client work (as established in the evidence since the Accident), Ms. Richardson would have been in a financial position to step back from the demands of such client work at the age that most others would fully retire.

[101] Therefore, to determine Ms. Richardson's future income loss, I would apply the five-year present value multiplier to Mr. Benning's estimated annual losses, with the 50% reduction to account for Ms. Hawthorne-Toogood's pre-existing share of those commissions, plus the 10% discount discussed above in relation to new clients, rounded up.

[102] In total, I would award Ms. Richardson $180,000 for her future loss of earning capacity in relation to her lost ability to earn commission income.

FAILURE TO MITIGATE

[103] A plaintiff in a personal injury action has a duty to take reasonable steps to mitigate their loss. The burden is on the defendant to prove two elements: (i) that the plaintiff acted unreasonably; and (ii) that the plaintiff's loss would, in fact, have been eliminated or reduced had the plaintiff acted reasonably: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at paras. 32–36, 1985 CanLII 62; and *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. Whether the plaintiff acted reasonably is a factual question that involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[104] In her fairly *pro-forma* response to civil claim, the defendant pleads a failure to mitigate on Ms. Richardson's part. Specifically, she pleads that Ms. Richardson failed to follow medical advice with respect to treatments or exercise and failed to seek and secure available work. In closing submissions, the defendant argues that there is no evidence that Ms. Richardson tried to do more work but failed, and that Ms. Richardson was obliged to prove this.

[105] The defendant is correct that Ms. Richardson has the initial burden of proving that she lacks the capacity to work to the same extent that she did before the Accident, and her damages that flow from that. I have found that she has proven this to the extent set out above.

[106] Beyond that, however, there is no evidence that Ms. Richardson failed to follow prescribed treatments or medications. It was never put to Ms. Richardson that

she could have made up her lost commissions by taking on some other job. Instead, the evidence is clear that Ms. Richardson makes very good money in her current career—and likely far more than she would make in another one. While working at approximately half her previous capacity, her previous capacity was more than a full-time job, and I find that she is still working substantial hours. Her evidence was that she tried to continue working with her existing client roster and only gave them up over the course of a year after the Accident. As noted above, Ms. Richardson's prognosis does not call for any notable improvement to her condition.

[107] In any event, I am not satisfied that evidence related to this mitigation defence, upon which the defendant bears the burden, was properly put to Ms. Richardson during her testimony.

[108] For these reasons, I find that the defendant has not proven that Ms. Richardson failed to mitigate her loss.

SPECIAL DAMAGES

[109] Ms. Richardson has provided documentation related to her out-of-pocket expenses for her Accident-related treatments. These treatments include massage therapy, chiropractic treatments, physiotherapy, some strength training, and counselling.

[110] She also provided documentation for expenses related to yard work that she testified she had been doing on her own before the Accident but had to hire assistance with in the years since the Accident.

[111] Ms. Richardson was not challenged on any of this evidence, and the defendant took no issue with this claim for special damages.

[112] I therefore award special damages to date as claimed in the amount of $22,116.

COST OF FUTURE CARE

[113] A cost of future care award is meant to compensate for financial loss reasonably incurred by a plaintiff to sustain or promote their mental and physical health: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at para. 184, 1985 CanLII 179 (S.C.); *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30. The test for an award of future care is whether a reasonably-minded person of sufficient means would be ready to incur the expense: *Bystedt v. Hay*, 2001 BCSC 1735 at para. 162, aff'd 2004 BCCA 124; see also *Kallstrom v. Yip*, 2016 BCSC 829 at para. 429. The services and items must be reasonable in that they are medically required or justified, and that the plaintiff will likely incur them based on the evidence: *Milina* at paras. 210–212; and *Fontaine v. Van Kampen*, 2013 BCSC 1702 at paras. 155, 157. There must be some evidentiary link between the medical assessments and recommended treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

[114] The extent, if any, to which a cost of future care award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, positive contingencies offset negative ones, such that a contingency adjustment is not required. In other cases, however, the award is reduced or increased based on the plaintiff's prospect for future improvement or additional care. Each case is to be determined on its particular facts: *Gilbert* at para. 253.

[115] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. Rather, in assessing damages, the court does the best that it can based on the evidence before it.

[116] The plaintiff relies on the recommendations of the various medical experts that testified at trial with respect to her cost of future care claim.

[117] Dr. Lawlor recommended:

1. Continued physiotherapy and kinesiology on a weekly basis.

2. Engage in psychological counselling as needed.

3. Therapeutic Pilates weekly.

4. Continue gym training.

…

[118] Dr. Waseem recommended:

> … My recommendations for future treatments include (note I am unable to comment on the cost of any such future treatment): trial of Botox injections for myofascial pain of the cervical and thoracic spines along with image-guided C2/C3 medial branch blocks for left greater occipital neuralgia; intermittent access to pain relieving modalities including physiotherapy and massage therapy; ongoing self-directed exercises including yoga and Pilates; and ongoing use of current analgesics. …
>
> [Emphasis added.]

[119] Dr. Cameron stated:

> … She is a candidate for alternate prophylactic headache medications such as gabapentin, amitriptyline, nortriptyline, topiramate or valproic acid. These medications can be prescribed and monitored by her family physician; however, there should be a discussion with the Psychiatrist regarding the antidepressant medications, amitriptyline and nortriptyline as she is on duloxetine for depression. Shannon Richardson also is a candidate for botulinum toxin injection therapy for her post-traumatic musculoskeletal or cervicogenic headaches and post-traumatic common migraine headaches. If she agrees to pursue with this therapy, I would recommend that she be assessed by a neurologist or a physiatrist who is qualified in this therapy regarding appropriate dosing of the botulinum toxin. Most patients require between 100 and 200 units of botulinum toxin injected into the scalp muscles and cervical paraspinal muscles and upper fibres of trapezius on a monthly schedule (PREEMPT protocol). Botulinum toxin cost is approximately $400 per 100-unit vial. …

[120] Dr. Toth recommended performing exercises as much as Ms. Richardson is capable of performing; medication for neck and back pain; an MRI of the left shoulder; medication for migraines; and regular physiotherapy and massage therapy.

[121] Based on the above recommendations, Ms. Richardson seeks $271,618.20 up until the age of 82 for the following:

a) $1,600 for Botox injections – four times per year at $400.00 per vial (based on Dr. Cameron's report);

b) $1,680 for kinesiology/physiotherapy/chiropractic/massage – 12 times per year for each treatment modality at $140.00 each;

c) $4,420 for Pilates – 104 classes per year at $42.50 each; and

d) $6,000 for yard work assistance – 12 times per year at $500.00 each.

[122] Ms. Richardson suggests applying a 3% discount to the total amount to account for the present value of these amounts to the age of 82.

[123] The defendant says that none of the experts in this case has recommended further treatment for Ms. Richardson, “other than for maintenance purposes,” which is what Ms. Richardson was already doing before the Accident. She says, therefore, that the requirement in *Milina* that claims for cost of future care be medically justified is not met in this case.

[124] The defendant’s position in this regard does not accord with the evidence at trial. Rather, I find that there is ample medical evidence recommending that Ms. Richardson pursue the above therapies to treat the injuries caused by the Accident. All four of the medical experts that testified in this trial provided such recommendations. While these recommendations include massage therapy, which Ms. Richardson was also using before the Accident, that therapy is now medically endorsed in direct relation to the injuries caused by the Accident.

[125] However, I find that Ms. Richardson’s proposed award exceeds what the evidence can support. Ms. Richardson’s evidence suggests that she was not under any financial or time constraints in the past five years since the Accident, and her schedule of special costs suggests that she has made use of approximately two to three treatments per month on average, using a combination of massage therapy, chiropractic treatments, physiotherapy, strength training, and Pilates. Although no expert report was provided setting out the market costs of these therapies, I accept

that many of these costs can be inferred from her special costs schedule, with the exception of counselling

[126] Her yard work costs, the necessity of which I find were borne out on the evidence, averaged $2,500 per year in the last five years. However, I am not convinced that Ms. Richardson would have continued to climb onto her roof well into her sixties or seventies, even were it not for the Accident. Further, I have no evidence as to what was specifically done in the last five years, or what may be needed in the future in this regard.

[127] Overall, on the evidence before me, I make the following awards:

a) $5,000 for the cost of yard work and house maintenance labour;

b) $1,600 for the cost of a one-year trial of Botox; and

c) $3,000 annually for the combined costs of assistive therapies and exercise, including massage therapy, physiotherapy, chiropractic treatments, yoga, Pilates, and counselling services.

[128] Ms. Richardson did not provide the Court with present value tables for the costs of future care, but she did for loss of future earnings. The actuarial data would be the same as those provided by Mr. Benning for loss of earnings, but the discount factor under the *Law and Equity Act*, R.S.B.C. 1996 c. 253, is 2% instead of 1.5%. I am satisfied that a 3% discount factor, as suggested by Ms. Richardson, adequately captures the additional actuarial factors that must be considered when calculating the present value of future care costs, and I find it appropriate to use the present value tables in the Civil Jury Instructions provided for this very purpose rounded to the nearest $100. I would award Ms. Richardson her therapy costs to the age of 75 for a total present value of $35,800.

[129] In addition to the yard work and Botox costs, I would award Ms. Richardson a total of $42,400 for her costs of future care.

CONCLUSION AND COSTS

[130] In conclusion, Ms. Richardson is entitled to **$429,516** for damages as follows:

a)	Non-pecuniary Damages:	$115,000
b)	Past Loss of Earning Capacity:	$70,000
c)	Loss of Future Earning Capacity:	$180,000
d)	Cost of Future Care:	$42,400
e)	Special Damages	$22,116
	TOTAL	**$429,516**

[131] Ms. Richardson is also entitled to her costs, subject to any offers or other matters that may require an adjustment to her costs. If the parties wish to address costs, they may make arrangements with the Registry within 30 days of receipt of these Reasons to appear before me for this purpose.

"Marzari J."