

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Malhi v. Dhaliwal*,
2024 BCSC 535

Date: 20240417
Docket: M208935
Registry: Vancouver

Between:

Prabjot Kaur Malhi

Plaintiff

And

Shinderpal Kaur Dhaliwal

Defendant

Before: The Honourable Justice Thomas

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial:

Vancouver, B.C.
February 26-29,
March 1 and 4-8, 2024

Place and Date of Judgment:

Vancouver, B.C.
April 17, 2024

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[1] This action involves an assessment of the injuries and associated damages arising from a car accident that occurred on December 7, 2018. The main issue revolved around the prognosis and limitations arising from a thoracic outlet syndrome injury to Ms. Malhi's left shoulder / arm suffered in the accident.

December 7, 2018 Accident

[2] Ms. Malhi was driving to work when she was hit from behind by the defendant. She walked over to the defendant's car to ensure that the driver was okay, to obtain the defendant's information and provide her with her information.

[3] Ms. Malhi was in shock and developed pain. The ambulance was called and took her to the hospital. She received some medications and an ultrasound and was discharged with instructions to follow up with her doctor. She did not return to work.

[4] I agree with Dr. Filbey, a physiatrist who examined Ms. Malhi on behalf of the defendant and with Dr. Grover, Ms. Malhi's general practitioner, that in this case, the overall pattern of Ms. Malhi's symptoms are important, whereas the specific symptoms recorded at the scene of the accident, at the hospital and at the first doctor's visit are of little import.

[5] I find that Dr. Grover obtained and recorded an accurate summary of Ms. Malhi's symptoms at the time of the accident and in the period thereafter on the initial ICBC assessment form that he completed.

Credibility Concerns

[6] Justice Dillon summarized the factors to be considered when assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392 as follows:

[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), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether

the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[7] The defendant argued I should not accept Ms. Malhi's evidence with respect to the extent of her subjective injuries due to a number of credibility concerns:

- a) Ms. Malhi testified her ex-boyfriend returned at the end of April 2018, interacting with her ability to write a criminology exam at that time and his interference extended for two months; but testified under cross-examination that she saw Dr. Grover within days of him contacting her. She attended with Dr. Grover on June 29, 2018. However, Dr. Grover's notes indicate that her stress issues had impacted her sleep for the last two months, which makes the timeline consistent with Ms. Malhi's testimony.
- b) In direct examination she testified that she had been unable to write her final exams for the fall semester due to the motor vehicle accident; however, her exams were deferred for a period after the accident and she eventually wrote them. I note the marks she received for these classes were not in dispute.
- c) Ms. Malhi was mistaken about the number of courses she was taking in 2018 when she asked her employer to reduce her hours from seven hours per day to four hours per day. Ms. Malhi readily agreed that her transcript accurately stated the number of courses when it was presented to her in cross-examination.
- d) Ms. Malhi stated that prior to the accident she would attend the gym five or six days a week. Her gross attendance records indicate that she attended the gym on average 3.3 times per week for an eighteen-month period before the accident.

- e) Ms. Malhi testified that she attempts to lift more weight in the gym every so often, but the weights cause pain so she stops very quickly. In her discovery, she said that she didn't lift weights since the accident. When this evidence was put before her she said: "I didn't lift weights, I did try to lift them", but she could not. I do not see this as a significant discrepancy in her evidence.
- f) Ms. Malhi agreed that she mixed up the date of the trip that she took to India when shown records indicating that she was in Canada during the time she said she was in India.
- g) Ms. Malhi did not attend at Dr. Grover's office for long periods of time after her symptoms had plateaued. I find this to be appropriate and consistent with the fact that her symptoms had plateaued and there was little more that Dr. Grover could do besides renewing her physiotherapy forms. In my view, this supports the credibility of the plaintiff as opposed to raising a concern.

[8] I have enumerated these issues highlighted by the defence because I disagree that these issues raise substantial credibility concerns. In my view they establish, in general, that Ms. Malhi was attempting to provide accurate evidence about events that occurred many years ago. When she was mistaken, there was an appropriate explanation or she adopted the documentary evidence. Given the nature of many of the questions and the amount of time that has passed, in my view, Ms. Malhi's testimony was generally credible and reliable.

[9] I did have some concerns with the credibility of Ms. Malhi's evidence in the following areas:

- a) In her testimony and to Dr. Fung, she complained of significant sleep difficulties, yet at her October 20, 2022 discovery and to Dr. Squire, a psychiatrist she saw for treatment in June 2022, she indicated that she did not have problems with sleep. She did not provide persuasive explanations for these discrepancies. I do not accept that she was forthright with respect to how she currently sleeps.

- b) Ms. Malhi complained of minor tingling in her hand and numbness once every one to two months to Dr. Filbey in the fall of 2023 and then once every one to two weeks to Mr. Epp in the same time period. She agreed that her complaints would have plateaued at that time. In addition, she testified that she had not had any such complaints for at least the last three months. She could not recall when she last had them. Her parents have been away for the last three months with the result that she has had to do more cleaning in the family home. I find that the minor tingling in her hand and numbness occur once every one to three months.
- c) Ms. Malhi testified that she was exhausted at the end of her work day due to the increase in her symptoms over the course of the day from a two out of ten to a seven out of ten. She said she felt less productive at work in comparison to what she observed other paralegals doing and noticed a decline in her own productivity as the day progressed.

However, when asked how the “physical demands” of work were on her at the end of the day; Ms. Malhi stated:

- i. It was “okay”; and
- ii. She would have lunch with her colleagues or she would go home for lunch. Sometimes lunch would be 90 minutes to two hours. Sometimes she would rest at home over lunch and come back to work.

Ms. Malhi told Dr. Fung that there had been no concerns expressed to her by her employers and that she had made mistakes at work but attributed them to being a new paralegal rather than due to the accident.

Ms. Malhi used physiotherapy for pain relief and stretched at the gym. However, she only attended physiotherapy approximately 12 times in 2023. She did not miss any work, aside from perhaps leaving early on one or two days, while working as a paralegal for approximately two years. In addition, Ms. Malhi’s employer, whom she worked closely with, did not notice any

problems related to the accident that impacted her ability to work; outside of her occasionally rubbing her neck. Her employer did not provide her with any accommodations, aside from allowing her to come into work late in the mornings. However, she would work later when required and come in on weekends. Coming in late some mornings was a work preference as opposed to an injury-related issue. Her employer was a former senior personal injury lawyer.

I conclude that Ms. Malhi was not forthright about the degree to which her symptoms increased throughout her workdays. If she were to consistently experience a pain level at seven out of ten by the end of her workday, she would not have said she was “still pretty okay”, the quality of her work would have been worse, she would have missed more work and she would have required more accommodations from her employer.

- d) Ms. Malhi told Dr. Fung that she was an “A” student in high school. She clearly was not. Ms. Malhi blamed her bad grades prior to the accident on the fact that she was not able to register for courses that she wanted or that were appropriate to her interests; however she made little effort to ascertain what courses she signed up for, nor did she recall whether she attempted to enroll at first instance or at some later time.

In my view, Ms. Malhi was not a motivated student and her grades prior to the accident reflected her lack of academic motivation. She was interested in and had an aptitude for sports; Mr. Nordin’s testing revealed that she did not have a strong aptitude for academics.

Injuries

Soft Tissue Injuries

[10] Ms. Malhi had significant muscle spasms in her neck, upper back and shoulder area after the accident. Dr. Filbey diagnosed her as suffering from soft tissue injuries to the neck, upper back, shoulder and lower back. I agree with this

opinion. Ms. Malhi's soft tissue symptoms improved after the accident and had plateaued by 2021.

Psychiatric Issues

[11] Ms. Malhi was very anxious after the motor vehicle accident. Dr. Fung opined that she suffered from driving anxiety, general anxiety and depression and had an acute eating disorder in the spring of 2019; all of which were caused by the accident. Her opinion was not seriously challenged and I accept that this is the case. Ms. Malhi's current problems with anxiety and depression are not significant and would not impact her ability to work or participate in activities.

Headaches

[12] Ms. Malhi suffered from headaches after the motor vehicle accident. I accept that these headaches were consistent with and caused by a combination of her soft tissue injuries and psychiatric issues. Although she still suffers from headaches, they are nowhere near as common or debilitating after 2021 as they were prior.

Thoracic Outlet Syndrome

[13] Drs. Salvian and Filbey agreed that Ms. Malhi suffered from a traumatically induced nerve-type thoracic outlet syndrome ("TOS") caused by the accident that lasted until at least 2022. I accept this is the case. The doctors disagreed over the treatment and prognosis for the syndrome.

Sleep Difficulties

[14] Dr. Fung opined that Ms. Malhi suffers from impaired sleep due to the accident. I accept Ms. Malhi suffered from impaired sleep for some time after the accident; however, given the concerns noted about her testimony with respect to the extent of her current sleep problems, I find that her sleep was not impaired after 2021.

Prognosis

Thoracic Outlet Syndrome

[15] Ms. Malhi suffers from minor tingling and numbness in her left hand that is episodic and arises from repetitive use of her arm. She tries to avoid this activity as much as possible as her soft tissue pain occurs prior to the left arm symptoms. When she gets pain she tries to stop the activity as she would “rather be safe than sorry.” Thus it is unusual for her to persist in activity which would trigger her left arm symptoms. Her soft tissue pain in her neck and shoulder area typically arises prior to her left hand symptoms.

[16] Due to the minor nature of her left arm symptoms and their sporadic onset, it is difficult for her to estimate how frequently she suffers from them. I am satisfied Ms. Malhi suffers from left hand symptoms of numbness and tingling after repetitive arm activity. The complaints are documented by Dr. Grover and are consistent with the etiology of the condition. I am satisfied her symptoms rarely occur and when they do occur are minor. Given the history and results of the independent medical examinations, the frequency of these symptoms has decreased between the two examinations.

[17] During Dr. Filbey’s examination of 2023, he was unable to evoke clinical TOS symptoms during clinical examination. In his view, this indicates that Ms. Malhi’s reduction in movements that aggravated these symptoms had resolved the TOS such that she was free to increase her movement in a progressive manner without fear of further symptom aggravation or nerve injury. She may have some limitations but she can progressively increase her function without fear of further injury or ongoing symptom aggravation.

[18] Dr. Salvian disagrees with Dr. Filbey. In his opinion, traumatic TOS involving the nerve (which is the situation here) is a permanent condition. It is only by avoiding aggravating her symptoms that she has been able to manage her symptomology. Should she increase movement which aggravates her TOS, her symptoms would increase and she would risk permanent nerve damage and/or reduced function.

[19] Ms. Malhi underwent a functional capacity evaluation. There were some indications in this evaluation that she suffered from left hand pain, numbness and tingling. However, it is unclear whether these symptoms were provoked by activity that would trigger TOS symptomology. Given that Ms. Malhi limited her activities in this evaluation due to soft tissue pain, in my view, the results do not assist in distinguishing between Dr. Filbey's and Dr. Salvian's opinions.

[20] Ms. Malhi has performed more housework in the family home for the last three months without provoking left hand symptoms. However, she stops the activities when she gets pain and simply does what she can. It has also only been a limited period of time. Therefore the lack of symptoms in this period, in my view, does not assist in distinguishing between the two opinions.

[21] I prefer the opinion of Dr. Salvian over that of Dr. Filbey based on the following findings of fact:

- a) Ms. Malhi's TOS was the result of traumatic damage to her scalene and paraspinal muscles resulting in irritation and compression of the nerve with prolonged activity;
- b) These muscles had prolonged episodes of spasms, for years after the accident. Ms. Malhi continues to suffer from spasms in those muscles. Her neck, upper neck and shoulder soft tissue injury remains symptomatic; and
- c) Ms. Malhi's TOS is due to her soft tissue injuries in combination with an anatomic variant.

Based on these findings, in my view, it is unlikely that TOS would simply disappear. The underlying causes of Ms. Malhi's TOS are still present. Dr. Filbey provided no explanation as to how TOS would resolve despite ongoing soft tissue issues and an anatomic variant. Therefore, in my view, Dr. Salvian's prognosis makes more logical sense in these circumstances than Dr. Filbey's opinion.

[22] With respect to prognosis, I accept the following evidence from Dr. Salvian:

- a) Ms. Malhi's TOS symptoms are mild because she is not using her left arm very much in the way of repetitive movement, with her arm away from the chest or above the chest level, and avoids overhead or heavy lifting;
- b) If she engages in these activities her symptoms will increase and eventually become intolerable due to nerve damage; and
- c) She is at risk for increased symptoms should she suffer further injury to her paraspinal muscles through trauma, potentially sleeping in the wrong position or undertaking sudden heavy movements such as moving furniture at home.

Psychiatric Conditions

[23] Dr. Fung opined that there is a relationship between chronic pain and depressed mood. Ms. Malhi's chronic pain serves as an ongoing reminder of her accident and consequent limitations; as such her pain perpetuates ongoing vehicle-related fears, anxiety and low mood. Full recovery is unlikely. She will continue to have waxing and waning symptoms and is at elevated risk of developing a major depressive disorder with chronic pain. Her current psychiatric symptomology does not impact her ability to work full-time or drive a vehicle.

[24] Dr. Filbey opined that Ms. Malhi suffered from kinesiophobia, a fear of movement synonymous with anticipatory pain behaviour. He felt that this avoidance of activity needed to be treated in order to improve her soft tissue injuries. However, this ignores Dr. Salvian's opinion. Unlike a typically soft tissue case, there is a valid medical reason for Ms. Malhi to avoid physical activity on the basis that she would "rather be safe than sorry."

[25] I reject Dr. Filbey's opinion that Ms. Malhi's function could be improved by addressing her "fear of movement." However, I agree that Ms. Malhi could benefit from further counselling with respect to how to cope with her injuries and activities she can safely engage in given her TOS. I accept her evidence that the initial counselling she received was not focused on cognitive behavioural therapy and that she is now willing to receive this type of counselling. However, given my rejection of

Dr. Filbey's prognosis, such counselling would not have the impact postulated by Dr. Filbey on Ms. Malhi's level of function.

Soft Tissue injuries & Headaches

[26] It was conceded that Ms. Malhi suffers from soft tissue pain in her neck, upper back, shoulders and lower back. These symptoms are now permanent although there is the possibility of some improvement through Botox injections and pharmacotherapy, which addresses the pain stimulators. She receives transitory relief from specialized massage and physiotherapy that allows her to maintain her current level of function. Unfortunately due to TOS, Ms. Malhi is unable to fully activate her muscles which has made it difficult to treat her soft tissue injuries and in part explains their persistence.

[27] Ms. Malhi's headaches are caused by cervicogenic pain arising from her soft tissue injuries. She suffers from mild headaches several times a month, more severe headaches are less frequent and not so severe to impede her ability to work.

Pre-Accident Issues

[28] The defendant says Ms. Malhi suffered from pre-existing mental health issues that would have reoccurred and become symptomatic had the car accident not occurred.

[29] This is based on three facts:

- a) Ms. Malhi was prescribed a small amount of Ativan more than two years prior to the accident;
- b) Dr. Grover, her general practitioner, provided counselling to her in June 2018 for anxiety issues arising from a relationship and from school. The anxiety caused some sleep disruption for a two-month period; and
- c) Dr. Grover noted on September 10, 2018 that Ms. Malhi was "feeling down" and stressed". He recommended counselling and suggested that she withdraw from one university course.

[30] Dr. Fung, a psychiatrist, opined that Ms. Malhi had a pre-existing predisposition to anxiety and depression prior to the accident; but that her pre-accident issues were acute and caused by discrete issues such that her pre-accident anxiety issues were short-lived.

[31] Ms. Malhi's current psychiatric issues, which were caused by the accident, have been chronic and ongoing for over five years. Her symptoms were significant subsequent to the accident, but have since reduced in severity to their present level.

[32] The defendant has not established that Ms. Malhi had a real and substantial risk of suffering an anxiety disorder or depressive disorder in the future but for the accident. I am persuaded by Dr. Fung's evidence that the pre-existing issues were acute and short-lived. In my view, the evidence does not establish a real and substantial risk of future occurrences of such severity which would impact this assessment.

[33] The defendant does not accept that Ms. Malhi's eating disorder was caused by the accident but raised no substantive challenge to Dr. Fung's opinion on this issue. I reject the defendant's assertion that Ms. Malhi's eating disorder was not caused by the accident.

[34] Neither Ms. Malhi's pre-accident anxiety issues nor her post-accident eating disorder are comparable to the case of *Dornan v. Silva*, 2021 BCCA 228 [*Dornan*], relied upon by the defendant. In *Dornan*, a plaintiff's pre-existing susceptibility to concussions raised a real and substantial possibility of future concussions causing permanent sequela given the plaintiff's continued participation in sports that cause concussions. Here, Ms. Malhi's pre-accident anxiety issues—which were acute and short-lived—did not create a real and substantial risk that a future event would trigger psychiatric conditions, including an eating disorder.

Failure to Mitigate

[35] Our Court of Appeal set out the law on failure to mitigate in *Haug v. Funk*, 2023 BCCA 110 [*Haug*]. The onus is on the defendant to prove, on a balance of

probabilities, that the plaintiff could have avoided all or a portion of his or her loss. In cases where a plaintiff has failed to follow medical recommendations, the defendant must establish: (1) that the plaintiff acted unreasonably in eschewing the recommendations; and (2) the reduction in the plaintiff's damages if he or she had acted reasonably: *Haug* at para. 56, citing *Chiu v. Chiu*, 2002 BCCA 618.

[36] The defendant says that Ms. Malhi unreasonably refused to take anti-depressants and undergo counselling, and that had she done so, there would have been a reduction in her psychiatric and physical symptoms and a corresponding increase in her level of function.

[37] Ms. Malhi attended a course of recommended counselling, which was supposed to be cognitive behavioural therapy. Ms. Malhi felt that the counselling focused on talking about the accident, which she found upsetting. Instead of helping her, the counselling increased her anxiety and upset her.

[38] Ms. Malhi was unaware that the counselling she experienced may differ from cognitive behavioural therapy. She says that she would now be willing to attend counselling which focuses on cognitive behavioural therapy. The defendant says that Ms. Malhi should have raised the specific concerns she had about the counselling when she attended with her doctor, who would have explained the benefits of cognitive behavioural therapy and arranged for further counselling.

[39] Ms. Malhi followed medical advice with respect to attending a course of counselling. She did not find it helpful. When she became aware of a different type of counselling focusing on cognitive behavioural therapy through Dr. Fung's report, she indicated a willingness to participate. It was not unreasonable for Ms. Malhi to not know about the differences between various counselling methods and their relative efficacy, nor was it unreasonable for her to not report her experience in counselling to her doctor at the time. In my view, her current willingness to participate in cognitive behavioural therapy demonstrates her reasonable adherence to medical advice and is an appropriate course of conduct.

[40] Ms. Malhi was prescribed anti-depressants by Dr. Grover who advised her that he thought they might help her situation. However, Ms. Malhi was under the impression that this medication was only capable of treating her depression or anxiety. She did not feel her psychological symptoms were sufficient to require medication and she did not want to be stigmatized as a person with a mental health disorder. I accept that Ms. Malhi was unaware that the anti-depressant medication offered to her would have the potential to lessen her physical pain. I accept her evidence that she would be willing to take the medication now, in light of this new information. In my view, her initial decision not to take anti-depressants was a reasonable course of action, especially given her well founded concerns about taking medication due to her liver problems.

[41] Although cognitive behavioural therapy and pharmacology may provide some assistance, I do not expect that they will have a significant impact on Ms. Malhi's level of function. As noted previously, there is a valid medical reason for Ms. Malhi's limitation on her physical activities. Therefore, the impact of counselling or pharmacological pain reduction will be less than in a typical soft tissue scenario, and in my view, they would not have had a significant impact on her level of function had they been instituted earlier.

Functional Limitations

[42] Ms. Malhi began working as a paralegal on a part-time basis in January 2021 while going to school. In March 2022, she began working as a full-time paralegal, and she continued to do so up to the date of trial. Over this period of time, she may have missed one or two days of work. She did not have any formal accommodations, but I accept her work environment is informal and allows her freedom to change her positions and take breaks as necessary over the workday. I do not accept that there has been a significant change in these issues after moving from Mr. Armistead's previous office to the new office.

[43] As stated earlier, I do not accept that Ms. Malhi's pain level rose through each day beginning with a two out of ten and progressing to a six or seven out of ten by

the end of the day. This is inconsistent with her physiotherapy attendance and her ability to sustain continued full-time employment. I agree with the defendant that the physical demands on Ms. Malhi at the end of the workday left her feeling generally “okay”.

[44] Her employer stated he was impressed with Ms. Malhi’s abilities as a paralegal. He noted that her monthly billings were below what he expected given her abilities. However, it appears that she was still meeting appropriate hourly billing targets. He was unable to explain the cause of the discrepancy. Ms. Malhi did not have control over whether the hours she worked would be billed to the client. Her employer stated that on certain files he was very aggressive in writing time off due to the finances of his clients or due to the nature of the file. He did not state that he wrote Ms. Malhi’s time off due to poor work.

[45] Mr. Epp is an occupational therapist who performed a functional capacity and occupational therapy home assessment. Mr. Epp found that Ms. Malhi is not capable of working full-time in her present environment. I do not accept Mr. Epp’s functional capacity results reflect Ms. Malhi’s current ability to work. His results are inconsistent with Ms. Malhi’s established work pattern.

[46] However, the functional capacity evaluation does highlight the potential impact that a restrictive environment would have on Ms. Malhi’s ability to work full-time should she be placed in an environment where she does not have the flexibility to change positions and take breaks.

[47] I accept that Ms. Malhi’s ability to work full-time is dependent on:

- a) her access to physiotherapy and the gym for stretching exercises; and
- b) her ability to take breaks and change positions throughout the workday.

[48] I agree with Dr. Salvian that Ms. Malhi is limited from performing heavy housework.

[49] I accept the evidence of Dr. Salvian and Dr. Fung, respectively, that due to her accident sequela, Ms. Malhi is at risk for developing further TOS symptoms and of developing a major depressive disorder, which is likely to further impact her ability to work.

Past Loss of Income

[50] A claim for past income loss is a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the accident: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[51] In *Bolgar v. Fraser*, 2023 BCSC 468 [*Bolgar*], Justice Hughes recently summarized the proper approach to assessing the value of past income loss. Actual past events must be proven on a balance of probabilities. The assessment also includes accounting for hypothetical past events, which must be shown to be real and substantial possibilities—as opposed to mere speculation—which the court must then weigh according to their relative likelihood: *Bolgar* at para. 80.

[52] It is conceded that Ms. Malhi has a functional impairment resulting from the December 7, 2018 accident.

[53] Ms. Malhi was laid off shortly after December 7, 2018. However, I accept that this occurred for reasons not related to the accident given the evidence of Mr. Dahl, the store manager, who testified that he made the decision to terminate her employment prior to the accident.

[54] Ms. Malhi was not medically cleared to work part-time by her doctor until December 1, 2019, and she began applying for positions in January 2020.

[55] After December 2019, her injuries limited the jobs that she could do to sedentary work. In my view, her injuries restricted the number of jobs available to her and increased the amount of time it took for her to find employment.

[56] However, during this time, COVID-19 also made it difficult to find employment regardless of the accident. Ms. Malhi received Canadian Emergency Response

Benefits (“CERB”) to compensate her for non-accident-related causes for unemployment during this time period.

[57] Ms. Malhi found a job as a paralegal beginning at the end of January 2021.

[58] The parties were in general agreement that, if employed, Ms. Malhi would have earned an hourly wage similar to what she earned in her previous job, subject to inflationary increases. Based on her past history, I estimate that she would have earned income equivalent to approximately \$1,500 per month working at a part-time job. This is generally consistent with the estimates provided by both parties.

[59] In my view, the CERB benefits received by Ms. Malhi should be deducted from the past loss of earning capacity award on the basis that these benefits reflect the impact on employment caused by COVID-19 that are unrelated to the accident. Ms. Malhi’s CERB benefits total \$14,000.

[60] The defendant says that since it took Ms. Malhi a year to find a job after she was cleared to work part-time by her doctor, it would have taken her the same amount of time to find a new job had the collision not occurred. I reject this assertion. The types of jobs available to the plaintiff were restricted due to her injuries. In my view, a two-month period is a reasonable period of time for Ms. Malhi to have found a part-time job had the accident not occurred and account for any periods of unemployment not related to the accident.

[61] Therefore, but for the accident, Ms. Malhi would have been employed part-time during the period from February 2019 to January 2021. This means that Ms. Malhi missed ten months of work in 2019, 12 months of work in 2020 and one month of work in 2021 for a total of 23 months due to injuries suffered in the accident. This comes to a total loss of income of \$34,500. Adjusted for CERB, this results in a total of \$20,500.

[62] This would be subject to adjustment for any deductible benefits and for reduction of applicable income tax.

Future Loss of Earning Capacity

[63] In *Bolgar*, Justice Hughes also summarized the proper approach to assessing damages for loss of earning capacity, including the three-part test, following the recent trilogy of decisions on this issue from our Court of Appeal:

[106] The proper approach to assessing damages for loss of future earning capacity was clarified by the Court of Appeal in the trilogy of *Dornan; Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The approach to this assessment post-trilogy was aptly summarized in *Rattan* as follows:

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

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).

[107] The three-step process for considering claims for loss of future earning capacity is as follows:

- a) Does the evidence disclose a potential future event that could give rise to a loss of capacity;
- b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff; and

c) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

See *Rattan* at para. 148, citing *Rab* at para. 47.

1. Is there a potential future event that could give rise to a loss of capacity?

[64] It was agreed that Ms. Malhi suffers from a permanent functional impairment, which satisfies the first part of the *Rab* test.

2. Is there a real and substantial possibility that the loss of capacity will cause a pecuniary loss?

[65] I have determined that Ms. Malhi is currently working full-time with no pecuniary loss arising due to injuries suffered in the accident. However, this is contingent on her access to a gym, physiotherapy and workplace accommodations. I have also found that Ms. Malhi is at risk for developing further TOS symptoms and a major depressive disorder due to her accident sequela, and either event could impact her ability to work.

[66] There is a real and substantial possibility that Ms. Malhi's continuing need for workplace accommodations and her risk for developing further physical and psychological symptoms will limit the jobs she can accept in the future, causing a pecuniary loss. As a result, she satisfies the second part of the *Rab* test.

[67] Ms. Malhi says that a separate loss arises in that she wished to pursue a career as a lawyer, which she can no longer do as a result of the accident.

[68] Mr. Epp opined that in order to be competitive for law school admission, Ms. Malhi would need an average letter grade of B or higher, and to be very competitive, an average of A- or higher. Even prior to the accident, Ms. Malhi's grades did not meet this average. Further, Mr. Nordin opined that the aptitude testing he conducted revealed it was unlikely Ms. Malhi would have been able to gain entrance into law school. He stated that he did not believe her injuries from the accident would have negatively impacted her scores on the aptitude tests.

[69] I do not accept that there is a real and substantial possibility that she would have proceeded to law school but for the accident. Ms. Malhi had not shown an interest in or aptitude for academics prior to the accident. The evidence established that academic success is a pre-requisite for law school. I accept that Ms. Malhi always wanted to be a lawyer, but in these circumstances, specifically her personal circumstances subsequent to graduation and prior to the accident; and her academic achievements prior to the accident; satisfy me that there is no real and substantial possibility that she would have become a lawyer “but for” the accident.

3. What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[70] In my view, the appropriate method to use in assessing this loss is the capital asset approach. I reach this conclusion because while Ms. Malhi’s injuries may not currently impact her earning capacity, they have exposed her to future problems—namely, limiting the types of jobs she can apply for and creating a risk of developing further symptoms.

[71] There are a number of methods open to assess the loss under this approach. In *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), the Court of Appeal identified three acceptable methods for doing so:

43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff’s remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff’s entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff’s expected annual income.

[72] The defendant proposes the second method and that a sum of \$50,000, or approximately one year’s income would be appropriate.

[73] Ms. Malhi advocates for the third method and proposes that her workweek be reduced by 35% for the rest of her life. Accounting for contingencies, this method would result in an award of \$500,000.

[74] Although Ms. Malhi did suffer a past wage loss, I am satisfied that she is currently working full time without a loss of income. Given her age and circumstances, I find her situation to be comparable to that of Mr. McKee in *McKee v. Hicks*, 2023 BCCA 109 [McKee]. In my view, the proper procedure to use is set out by our Court of Appeal at paras. 87–92 of *McKee*.

[75] The present value of Ms. Malhi's career as a paralegal, working full-time with risk and choice contingencies is \$1,672,857.

[76] Ms. Malhi's ability to work full-time is dependent upon:

- a) Access to a gym and physiotherapy, which I assume will be available and ignore as a contingency in these calculations.
- b) The ability to receive accommodations from her employer. Ms. Malhi has always worked for one lawyer who allowed her to take breaks as needed throughout the day. She is in the process of transitioning to a new lawyer who may or may not be as accommodating. Mr. Nordin testified that people such as Ms. Malhi are at a disadvantage in being hired compared to people who do not require accommodations. I also infer that such people have a greater risk of losing their employment compared to people who do not require accommodations. However, given the tenor of Mr. Nordin's evidence and the relatively minor accommodations required by Ms. Malhi, I do not characterize this as a significant disadvantage.
- c) Ms. Malhi is at risk of further soft tissue issues which could aggravate her TOS, possibly significantly. This can be alleviated by providing her with assistance so that she does not have to do activities which could increase her risk of soft tissue injury, but the risk cannot be eliminated. I characterize this as a small but significant risk.

- d) Ms. Malhi is at risk of developing a major depressive disorder. By definition, this would impact her ability to work. However, given the paucity of evidence on this, I assess it as a smaller risk than the risk of aggravation of her TOS.

[77] I have used her proposed career path as a paralegal, as it is the most reasonable estimate of her future vocational profile and she seems relatively established on that path, despite the fact that she has only worked for one lawyer.

[78] The present value estimates include average contingencies for females from labour market risks and personal choices, such as elective part-time work. Ms. Malhi expressed a strong desire to have a family and children. In my view there is a greater than average chance that she will do so, and work part-time and/or have more absences from the work force than is reflected in the average contingencies as a result. Therefore, an additional contingency needs to be added to reduce her potential “but for” earnings to reflect a higher than average chance that she will take additional time off from work in comparison to the average.

[79] I have particularized and weighted these contingencies as far as the evidence will allow. Although Ms. Malhi did suffer a past wage loss, I am satisfied that she is currently working full-time without a loss of income. In *McKee* at para. 82 our Court of Appeal noted:

In my respectful view, the judge did not err by failing to assign specific probabilities and timelines to various possible future events. Such precision was unrealistic and not required in a case such as this involving a young plaintiff early on in his career who faced an uncertain risk of future complications but who had not experienced any loss of income due to the injury to the date of trial.

[80] The defendant’s proposed award of \$50,000 represents an inordinately low assessment of Ms. Malhi’s loss.

[81] In assessing the positive and negative contingencies, I assess a future vocational loss of \$200,000, which represents approximately a 12% loss based on the present value of her “but for” income based on average female paralegals. I note

that I have determined and considered in this award that Ms. Malhi's "but for" income would have been less than the income calculated using average contingencies.

Special Damages

[82] Despite significant pre-accident treatment, there is little evidence of expenses paid for directly by the plaintiff. I am satisfied that the plaintiff did expend some driving costs to her various appointments. I assess this at \$125 for special damages.

Housekeeping Services

[83] Housekeeping services are appropriately awarded in situations where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work: *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34 [*Kim*].

[84] This is to be distinguished from circumstances where a plaintiff is able to perform housekeeping tasks with some difficulty or decides they need not be done because performing the work causes discomfort. This type of loss is more properly compensated as part of non-pecuniary damages: *Kim* at para. 33.

[85] In this case, Dr. Salvian restricts Ms. Malhi from performing certain heavy household tasks not because of the discomfort that they cause, but because if Ms. Malhi repeatedly performs them she risks causing further nerve damage. In this situation, it is appropriate to award a separate pecuniary award for housekeeping services as opposed to compensation under non-pecuniary damages for the discomfort performing the work causes.

[86] Mr. Epp recommended two hours per week of housekeeping assistance and 34 hours per year of yard and garden maintenance and assistance. Ms. Malhi currently does not require this assistance, but if she were to live in a house with a yard and/or garden, the assistance may become necessary. The present value of these recommendations are \$135,907 for housekeeping assistance and \$46,249 for yard and garden maintenance. There is a high probability that some or all of the

housekeeping assistance will be required, there is a much smaller probability that all of the yard and garden maintenance will be required.

[87] In considering the circumstances, in my view, Ms. Malhi has established a loss of \$100,000 for loss of housekeeping and \$10,000 for loss of yard and garden maintenance.

[88] This amounts to a total award of \$110,000 under this head of damage.

Cost of Future Care

[89] The “test” for future care awards is essentially that there must be a medical justification for an item and the award must be reasonable in the circumstances: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.), aff’d (1987) 49 B.C.L.R. (2d) 99, 1985 CarswellBC 13 at paras. 210–211.

Gym / Personal Trainer / Kinesiologist

[90] Ms. Malhi was active in the gym prior to the accident and continues to be so after. There is no basis for a cost of care award for gym attendance. She is very knowledgeable about her body, stretches and exercises. I see no basis for further training for Ms. Malhi or for a personal trainer. She is both knowledgeable and motivated with respect to fitness.

Physiotherapy

[91] She attended ten physiotherapy sessions in 2023. In my view, this is a reasonable amount to use going forward to ensure she is able to continue to work. This amounts to approximately \$1,000 per year with a present lifetime value of \$33,943. In my view, this is an appropriate award.

Injections

[92] Ms. Malhi was recommended to undergo Botox injections and has recently made arrangements to pursue this recommendation but also expressed considerable reluctance about the injections. The cost, availability and duration can vary widely, making an appropriate cost award challenging. In my view, it is likely

that she will have to pursue this treatment privately. Given these considerations, I award \$7,500 inclusive of all costs for Botox injections.

Ergonomic Assessments and Items

[93] Ms. Malhi has always received ergonomic assessments and accommodations at her workplace. Given her modest needs for ergonomic accommodation, essentially sit-stand desks, office chairs, headsets, etc. I award \$2,000 to provide for the possibility that she will have to purchase some items to assist with her work.

[94] There are various recommendations for household items that Ms. Malhi may purchase in the future that may provide her with some assistance. Ms. Malhi will have to purchase many of these items (i.e., a pillow and vacuum) in any event. I am not satisfied that the extra expenses with these specialized items are medically justified.

[95] Ms. Malhi has learned to pace herself and listen to her body. I am not satisfied that additional occupational assessments are necessary. She is aware of what she can and can't do and has demonstrated an ability to adapt to different situations.

Childcare Expenses

[96] Mr. Epp noted that it is unlikely that childcare assistance will reduce the amount of lifting Ms. Malhi would be required to perform but recommended two hours a week for the first five years of the child's life to provide her with an opportunity to reduce symptoms by attending at the gym and physiotherapy.

[97] I am not satisfied that an award for potential childcare expenses is reasonable in the circumstances. Two hours a week of time to spend in a gym is consistent with her pre-accident fitness patterns and I am not convinced that she would have pursued this amount of time away from the children had the accident not occurred. In addition, I am not convinced that there would be an expense associated with this amount of time away from her children.

Medication

[98] Ms. Malhi is reluctant to take medication but has indicated a willingness to do so. I agree with the defendant that \$500 for prescription medication is an appropriate sum under this head of damage given the speculative nature of the drugs that may be recommended, the uncertainty of their cost and the limited impact that they would have on her overall level of function.

[99] Ms. Malhi is not as averse to taking non-prescription medication for the relief of her symptoms but does not take a significant amount. I agree with the defendant that \$85 is an appropriate amount for this aspect of the claim.

[100] This amounts to a total of \$585.00.

Counselling

[101] Dr. Fung recommends 27 counselling sessions focused on CBT for a total cost of \$3,650. I agree with the defendant that this is an appropriate expense.

Total Cost of Future Care

[102] This represents a total award of \$47,678, consisting of:

- a) \$33,943 for physiotherapy;
- b) \$7,500 for injections;
- c) \$2,000 for ergonomics;
- d) \$585 for medications; and
- e) \$3,650 for counselling.

Non-Pecuniary Damages

[103] Both parties relied upon the factors and methodologies set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34. I will not review counsel's submissions on the law. The principles are non-disputed and well-known.

[104] Ms. Malhi is 27 years old. I have set out the injuries caused by the accident, her functional limitations and my concerns about her reliability with respect to the extent of her injuries and limitations. I will not repeat them.

[105] Ms. Malhi's enjoyment of life has been significantly impaired due to her injuries. Dr. Grover had significant contact with Ms. Malhi before and after the accident. I found his evidence about the changes in Ms. Malhi to be compelling and consistent with the evidence of her family and friends. Ms. Malhi would be capable of doing more physical activities than she currently does, but she is restricted from doing them by a rationale fear of causing more injury. This makes the functional impact of her injuries greater than one would expect if her injuries were merely soft tissue-type injuries.

[106] Ms. Malhi's counsel referred me to three cases to provide a range of non-pecuniary damages. After reviewing the cases, I found the \$125,000 in *Smith v. Ries*, 2023 BCSC 1434 [*Smith*] and the \$110,000 in *Fatla v. McCarthy*, 2022 BCSC 577 to be helpful. Although the plaintiff in *Smith* had more significant psychological symptoms, Ms. Malhi has the added burden of an uncertain future and the possibility of worsening symptoms due to her TOS.

[107] The defendant's counsel referred me to a number of cases. These cases tended to represent plaintiffs who were not as significantly impacted by their injuries and did not have a prospect of worsening injuries as is the case here. For example, *Dutton-Jones v. Dha*, 2023 BCSC 854 is a case in which a plaintiff suffered soft tissue injuries in two motor vehicle accidents and was awarded \$85,000 in non-pecuniary damages. Defence counsel noted:

The accidents interfered with the plaintiff's fitness activities and made it difficult to study and sit through long lectures. There were no physical limitations that prevented her from continuing to work full time in a sedentary or light job. Her ongoing pain symptoms may impair her higher level recreational activities and overall quality of life.

[108] In my view, the \$125,000 proposed by Ms. Malhi's counsel represents a fair assessment of Ms. Malhi's non-pecuniary loss.

Summary of Award

[109] I award the following damages to Ms. Malhi:

- a) \$125,000 non-pecuniary loss;
- b) \$47,678 cost of future care;
- c) \$110,000 for loss of housekeeping services;
- d) \$125 special damages;
- e) \$200,000 loss of future earning capacity; and
- f) \$20,500 gross for loss of past earning capacity.

Costs

[110] The parties may apply to appear before me within 60 days if they are unable to resolve the issue of costs and/or deductibility of benefits.

“Thomas J.”