IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cochran v. Bliskis,*
2023 BCSC 710

Date: 20230501
Docket: M203216
Registry: New Westminster

Between:

Nissa Cochran

Plaintiff

And

Matthew Bliskis

Defendant

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for Plaintiff:	D. Graves
Counsel for Defendant:	M. Trischuk
Place and Dates of Trial:	New Westminster, B.C. March 6,7,8,10, 2023
Place and Date of Judgment:	New Westminster, B.C. May 1, 2023

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I. INTRODUCTION AND ISSUES

[1] This is an assessment of damages arising from injuries suffered by the plaintiff in a motor vehicle accident (the "accident" or the "MVA") that occurred June 6, 2017, in Kelowna. The defendant admits liability.

[2] When the accident occurred, the plaintiff's name was Nissa L. Cochran. She was 29 years of age, and unmarried. She was working full-time as a Registered Massage Therapist ("RMT").

[3] At trial, more that four and one-half years post-accident, the plaintiff's major complaints of ongoing accident injury are of pain in her neck, upper back, right sided sacroiliac joint area, and headache.

[4] The plaintiff asserts that her accident injuries will affect her for life. She contends that due to her injuries she was unable to return to full-time work as an RMT, and that she will never be able to do so.

[5] The defendant contends that the plaintiff substantially recovered from her accident injuries within about six months of the accident.

II. BACKGROUND

A. The Plaintiff

[6] The plaintiff was born and raised in Grand Forks, BC, together with two brothers; one older, and one younger. Her parents divorced when she was in grade four. Her father left the home and remarried. She has four half siblings from that marriage.

[7] She was an active and healthy child who enjoyed participating in outdoor activities such as hiking, and summer camp activities such as kayaking, canoeing, and rock-climbing. She participated in various sports, including basketball, figure skating, slow pitch baseball, and others. The family lived in a home located on an acre of land. She and her siblings were expected to help with household chores, such as house cleaning, planting, harvesting, preserving food, and snow clearance,

especially after her parents divorced and her father left the home. She was an avid reader. She was an honour roll student at high school. She enjoyed high school. She graduated from Grand Forks Senior Secondary School in 2006.

[8] During high school she had various jobs, such as working in a greenhouse, and serving in a restaurant. Upon graduation she had no fixed career plans. She applied to various post-secondary educational institutions, and was accepted at all of them. However, instead of immediately going to post-secondary education, she took a trip to Hawaii with a friend, where she became interested in underwater diving. She obtained certification as a diving instructor with first-aid qualifications as well, in the summer of 2008.

[9] From 2008 to 2011 she worked as a diving instructor, as well as a host on live-aboard and charter vessels at various locations in the Caribbean. She returned to British Columbia in the fall of 2010. She spent the winter of 2010 to 2011, the winter season, working at the Big White Ski Resort near Kelowna. She worked in a restaurant, and snowboarded almost daily. On the last day of the ski season, she had a serious knee injury while boarding. She tore her right knee ACL and injured her medial meniscus.

[10] The plaintiff returned to Grand Forks for the summer of 2011, where she lived with her mother while working in order to save money. She had decided she wanted to become a registered massage therapist, like her maternal stepfather. She worked in a variety of jobs: working as a server in pubs and restaurants, working at a greenhouse, and working for an insulating company, without physical restrictions, and often working two jobs at once in order to save as much money as possible. She attended massage therapy school in Vernon, beginning in September 2012. At the time it was a three year program. She had knee surgery after the first year, in approximately May 2012. She then spent one and-a-half years out of school, recovering from the knee surgery, and saving money to return to school. She resumed part-time studies for the RMT program in January 2014, and then returned

for her final year of studies in September 2014. She qualified as an RMT in November 2015, and began working as an RMT in December 2015.

[11] Post surgery, and before returning to work full time, she worked at a restaurant, Minstrel Café, where she performed many roles, before being promoted to manager.

[12] Prior to the motor vehicle accident, besides the snowboarding accident resulting in the knee injury, the plaintiff had a number of other injuries. She had some minor “whiplash injuries” (as she described them) while snowboarding. She had a separated left shoulder (AC joint) that occurred at the end of dive school training, in May 2008. She broke her left clavicle (collarbone) twice; once as a child, and the second time, in an MVA that occurred in 2011.

[13] She explained that prior to the MVA she had problems with her left shoulder at times. It would bother her for a day or two, then she would get some massage, chiropractic or physiotherapy treatment, and the pain would go away. She states that the condition was not limiting in her role as an RMT.

[14] She testified that in the two years prior to the accident, she would occasionally have neck discomfort, headaches, or mid back pain. She related these conditions to falls or other incidents that happened at work, or snowboarding, or discomfort occasioned by weightlifting.

[15] The plaintiff was an exceptionally good student. As noted, she was an honour roll student at high school. She was among the top students in her dive instructor training program, and was one of the top students in RMT school.

[16] When the plaintiff began working as an RMT in December 2015, she was 27 years of age. She first worked at Valeo Health Clinic in Kelowna, BC. She was an independent self-employed contractor. She paid a flat rate rental to the clinic. Her goal was to bill for six hours of patient treatments per day, for five days a week, which would result in 30 hours of billing per week. In addition to direct patient services, she had other duties, such as preparing patient charts, communications

and correspondence (emails, etc.), and promoting her business as a massage therapist.

[17] By the summer of 2016, she had achieved about 75% of her billings goal.

[18] She left the Valeo Clinic in August 2016. She took a four to five week vacation to Australia, where she enjoyed travelling, hiking, surfing, and diving at the Great Barrier Reef. She attended a wedding in Brisbane. She returned to Canada in October 2016, to Grand Forks, where she lived with her mother for a time.

[19] The plaintiff then returned to the Okanagan Valley, where she began working at another clinic, Nalu Wellness, in Lake Country. She worked at Nalu until the accident happened on June 6, 2017. She brought in a locum to take over her practice while she recuperated from the accident injuries.

[20] The plaintiff attempted a graduated return to work program, guided by her GP's advice, approximately five weeks after the accident. She saw only a few patients before concluding that she was unable to return to work.

[21] When the accident occurred she was living with her older brother, Brandon, and paying part of the rent. She could not afford to continue paying rent, so she returned to Grand Forks to live with her mother, rent-free, in September 2017.

[22] The plaintiff had no billings for July and August 2017. She continued to pay rent to Nalu Wellness. In September 2017 the owner hired another RMT who took over the plaintiff's clientele.

[23] The plaintiff opened a new RMT clinic in Grand Forks in September 2017, operating out of her grandfather's commercial building. She was able to establish a thriving business quite quickly. By November 2017 she had built up a full patient caseload. She was able to work full-time (30 patients per week) over the course of a five day week, from November 2017 until May 2018.

[24] Unfortunately, on May 10, 2018, the town of Grand Forks was flooded, and the plaintiff had to close her business. She received business interruption insurance

proceeds covering her losses for several months, from May to October 2018. While off work, she took a trip to Italy with her mother in September 2018. In October 2018 she met her future husband, Kevin Hachey. In November 2018 she returned to Kelowna, where she began working as an RMT at a clinic called “The Clinic” at a reduced workload.

[25] The plaintiff claims that she was unable to work full time due to her pain and accident injuries. She limited her patients to four patients per day, rather than six. She also altered the nature of her practice, focusing more upon less demanding massage techniques.

[26] She spent three months at another clinic, “Mind Body Soul Integrative Clinic”, from December 2019 to February 2020. She married Kevin Hachey January 5, 2020. She returned to “The Clinic”, which was forced to close during April 2020 due to the Covid 19 pandemic. The Covid closure was for about two months, April and May 2020. Not all patients came back immediately. She continued to work at “The Clinic” in a reduced capacity, until she began a maternity leave in November 2021. Her first child, a daughter, was born in early December 2021. At around the same time, she and her husband decided to move from Kelowna to Kimberley, BC. They sold their Kelowna home and moved to Kimberley in April 2022.

[27] The plaintiff continues to be on maternity leave, looking after her daughter. At trial, she is pregnant with their second child, who is expected to be born April 21, 2023.

[28] Her husband is a licensed plumber and gas fitter, who works full-time. Currently, he is the sole financial support for the family. The plaintiff is a full-time mother. The plaintiff and her husband plan to have no more children after their second child is born. They plan for the plaintiff to return to work as an RMT, in Kimberley, when the children are three or four years of age.

B. The Accident and Treatment of Injuries Post-Accident

[29] The accident occurred on Tuesday, June 6, 2017 at approximately 2 p.m. The plaintiff had just finished a workout on Mount Knox, Kelowna, and was heading home to shower and get ready to go to work. She was driving her 2003 Nissan Xterra.

[30] She was proceeding southbound on Richter Street. She stopped for a pedestrian, when her vehicle was struck from behind by the defendant's vehicle. She had no warning of the impact.

[31] She has incomplete recollection of the events immediately after the accident. She recalls that her vehicle was pushed forward somewhat. The defendant's vehicle went under hers, damaging her vehicle's tow hitch and exhaust. She and the defendant pulled their vehicles over and exchanged information. No emergency vehicles attended. The plaintiff drove home, as planned. She cancelled the patients that were booked for the afternoon and went to Kelowna General Hospital, driving her own vehicle there. She recalls little in the way of immediate physical sensations, but recalls feeling that she had a “fuzzy brain”, and that there was “something wrong” with her. After waiting several hours, she saw a doctor, who, as far she can recall, ordered some tests, and discharged her with some medication. (Dr. Giantomaso notes that some x-rays were taken). She was picked up at the hospital by her then boyfriend. She returned home and slept. On arising the next day, she felt pain throughout her body, as well as dizziness and headache.

[32] After being discharged from the hospital, she saw her family physician, Dr. Paleta. He recommended physiotherapy treatment. The plaintiff obtained physiotherapy treatment, as well as chiropractic, massage therapy, acupuncture, and psychotherapy, all within the first one or two months after the accident. Dr. Paleta encouraged her to return to work on a graduated basis.

[33] She tried returning to work about five weeks post-accident, but found she was not capable of doing the work. She stopped working as an RMT until after her move to Grand Forks in September 2017.

[34] The repair cost for her vehicle were $1,923.45. The evidence of damage to her vehicle suggests the collision was minor to moderate in severity. However, as I stated in *McNabb v. Rogerson*, 2022 BCSC 1514, at para. 4, it is a well-known principle that the severity of the collision may have no relation to the severity and consequences of the injuries that can occur as a result: *Greenway-Brown v. MacKenzie,* 2019 BCCA 137, at para. 27, leave to SCC ref'd, 38696 (12 December 2019).

[35] The plaintiff described her injuries from the accident, in the weeks immediately post-accident, as follows:

1. Headaches – moderate to severe, and constant;
2. Dizziness, nausea, light sensitivity – severe;
3. Mental "fuzziness";
4. Neck pain;
5. Pain in her right T1 facet joint – moderate to severe, varying in intensity;
6. Numbness, pins and needles, in her left hand;
7. Sharp pains, and achiness, constant, in her left shoulder (AC joint);
8. General spinal pain – within a few days, became more localized to her mid back, and down to her low back. Achiness, and stabbing pains. Her mid back pain would get worse as the day went on. Moderately severe;
9. Pelvic pain – left SI joint, and hip pain, moderate to severe;
10. Abdominal pain;
11. Right knee pain – aggravation of previous injury;
12. Right side jaw pain – achiness. Eventually moving to the left side.
13. Trigeminal neuralgia (shooting nerve pain in her left cheek) – on two or three occasions;
14. Left foot numbness, lasting from 20 to 30 minutes; and
15. Mood changes – tearful, depressed, unsociable, easily frustrated, and withdrawn.

[36] The plaintiff had no billings in the months of July and August 2017. She recalls that during this time, other than the attempt to return to work, she did very little. She “laid in a dark room” much of the time. She went for treatment, went for brief walks, made meals for herself, and took Epsom salt baths.

[37] When she saw Dr. Paleta August 14, 2017, she complained of left AC joint (shoulder) pain, but only one headache per week and minimal back pain. On cross-examination, she stated that this must have been accurate since this is what she told the doctor at the time, but noted that she was off work at the time, and receiving treatment.

[38] She returned to work in September 2017 after her move to Grand Forks, where she opened her own clinic. She testified that by then there was some improvement in her condition. She had minor pain in the morning, and sometimes no headache at all in the morning. Her mid back pain was mild, but increased with activities. Mild exertion caused dizziness. Her SI joint pain was sometimes minimal in the morning, but could increase with activities. She was driving to Kelowna (two-and-a-half hours) for treatment, because there was limited healthcare available in Grand Forks.

[39] On October 16, 2017, after she had returned to work in Grand Forks, she reported that she was feeling really good, or feeling okay, when she saw her registered massage therapist, Vanessa Harris.

[40] By October and November 2017 her billings were approximately equivalent to her pre-accident billings.

[41] As previously noted, she was able to work full-time from November 2017 until early May 2018, when her business was interrupted due to the Grand Forks flood. She was able to see six patients per day, five days a week, for a total of 30 patients per week.

[42] However, she testified that this level of work came at a price. She worked, went to the gym, went home, and was unable to do anything else. She had moderate to severe pain to her:

1. mid back;
2. right T1 facet joint;
3. pelvic – left pelvic pain; and
4. headache.

[43] She testified that her pain would increase as the work week went on. She felt good on Monday morning, with almost no pain, but her pain worsened throughout the day, and through the week. She states that her doctor advised her to decrease her activities and work level.

[44] The May 2018 flood caused the plaintiff to permanently close her Grand Forks RMT clinic. Restoration of the building took four to five months.

[45] As noted, the plaintiff continued to work on a reduced, part-time basis until going on maternity leave in November 2021.

[46] The plaintiff has received massage therapy, chiropractic treatment, acupuncture, physiotherapy, kinesiology treatment and naturopathic treatment, from the date of the accident to the present, at various times.

[47] At trial, she is continuing to receive osteopathic treatment, for symptom management, every two weeks.

[48] At trial, she had no plans for further medical treatment. Lyanne Vaughan recommends continuation of massage therapy, chiropractic treatment and osteopathic treatment in future.

C. The Medical Opinion Evidence and Other Expert Opinion Evidence

1. Dr. Tony Giantomaso

[49] The only medical-legal opinion evidence is that of Dr. Tony Giantomaso, who provided an independent medical-legal report at the request of the plaintiff, and testified at the trial.

[50] Dr. Giantomaso saw the plaintiff on one occasion, March 8, 2019, approximately 21 months after the accident, and two years prior to the trial.

[51] Dr. Giantomaso noted the plaintiff's complaints as follows:

1. neck and upper back pain;
2. occipital headaches;
3. migraine headaches; and
4. pain in the right sacroiliac joint area.

[52] She described nausea, vertigo and dizziness following the accident, which had improved significantly. Her maximal area of discomfort was in her neck and upper back region. She complained of increased pain with prolonged work as a massage therapist, increasing during the course of a working day as she sees additional patients. Her occipital headaches were described as occasional, occurring especially when doing household chores such as vacuuming, dishes or cooking. She complained of migraine headaches including sensitivity to light and sound, nausea, blurred vision and vertigo-type symptoms brought on by driving.

[53] She described discomfort with sitting, standing and walking compared to her pre-accident condition. She described limitations with respect to sports and exercise activities. Previous higher-level physical activities such as snowboarding, canoeing and swimming were significantly reduced. She continued to work out in the gym, go to yoga, and snowshoe, when possible. She avoided housekeeping activities that

provoked neck pain. She had some mood issues and was seeing a psychologist. She noted that her work intensity had decreased by about 50%. Neck and upper back pain mostly on the right side occurred virtually every day. She indicated that, pre-accident, she was able to see six to eight patients on average, per day, and that despite therapy and exercise, she was limited to seeing four or five patients per day, due to her accident injuries.

[54] On examination, Dr. Giantomaso noted that the plaintiff was cooperative, and he observed no overt pain behaviours such as overreaction, or abnormal anatomical responses. There were no signs of exaggeration, or significant somatization. In Dr. Giantomaso's view, her examination was valid.

[55] He noted objective signs of injury, consisting of reproducible trigger points in the upper trapezius and other muscles in her neck and upper back. He noted spasm, and hypertonicity on palpation. The range of motion in her spine was "reasonable" but there was some pain, primarily in her cervical and thoracic spine areas. Palpation of her right sacroiliac joint was painful. There were no signs of nerve injury. He did not see a need for medical imaging such as MRI, CT imaging, or EMG studies.

[56] He diagnosed no pre-existing or unrelated injuries.

[57] His diagnosis of conditions causally related to the MVA of June 6, 2017 was as follows:

1. Post-traumatic cervical sprain-strain injury consistent with a WAD-II injury. Chronic.

2. Mild traumatic brain injury (concussive force through the body or head, reported alteration of consciousness, no loss of consciousness, no brain imaging, no reported GCS less than 15). No significant ongoing sequelae of brain injury.

3. Post-traumatic migraine headaches with occasional occipital headaches.

4. Post-traumatic right sacroiliac joint dysfunction.

[58] I note that although his report does not list injury to the thoracic spine in his list of diagnoses, his discussion of diagnoses refers to post-traumatic injuries to the plaintiff's cervical and thoracic spine. Therefore, he also diagnosed injury to the plaintiff's thoracic spine. This is consistent with the plaintiff's complaints of neck and upper back pain, and Dr. Giantomaso's findings on examination.

[59] Dr. Giantomaso explained that "WAD" was short for "Whiplash Associated Disorder", a classification system, having four levels. WAD-I consists of reports of pain, without objective findings. WAD-II consists of pain, with objective signs of soft tissue injury, but without neurological or bony injury findings. WAD-III involves neurological findings, and WAD-IV involves fractures.

[60] He also noted, outside of the scope of his expertise, some post-traumatic low mood.

[61] In relation to the diagnosis of mild traumatic brain injury, as Dr. Giantomaso noted, there were no significant ongoing sequelae, but she was experiencing significant post-traumatic headaches which include migrainous features and occipital headaches.

[62] Dr. Giantomaso made a number of recommendations for treatment:

1. A "strong recommendation" for an active rehabilitation program, including core strengthening and other forms of exercise. She would likely benefit from at least 16 to 24 supervised sessions and then could go on to work out at home or in the community in future;

2. With respect to her headaches, a referral to a neurologist for possible treatment with medications, including Botox;

3. Referral to an interventional pain management specialist for her headaches and cervical neck pain;

4. Topical pain relief medications, not requiring use of oral medications, which she indicated she wished to avoid;

5. Continued counselling for mood and anxiety; and

6. Occupational therapy assessment for her work site.

[63] As to prognosis, Dr. Giantomaso noted that his examination took place almost two years post trauma. Most improvement would be expected to have occurred within the first 6 to 12 months after the accident. He goes on to state, in his report:

> Thus, in my opinion, on a balance of probabilities she will likely continue to experience chronic pain to some degree long term in the future. By following my recommendations she may experience decreased pain and increased function in the future, however this should be considered part of a long-term pain management strategy and should not necessarily be considered curative.

[64] In Dr. Giantomaso's opinion, her self-reported impairments or limitations were "reasonable given her post-traumatic injuries". These consisted of her difficulties in working after seeing about four to five patients in a day, versus being able to see six to eight patients on average previously. She described significant headaches which at times made it hard for her to do any work whatsoever, and limitations in sitting, and standing, and in domestic and recreational activities.

2. Lyanne Vaughan, Occupational Therapist

[65] Lyanne Vaughan is a certified occupational therapist who performed a functional capacity evaluation of the plaintiff on August 15, 2022. Therefore, her assessment was conducted five years post accident and about seven months prior to the trial.

[66] Ms. Vaughan also testified at trial.

[67] When Ms. Vaughan saw the plaintiff, she was off work, on maternity leave. She had been on maternity leave since November 2021, prior to giving birth to her daughter December 2, 2021. At the time of the assessment, the plaintiff was living with her husband and nine-year-old daughter. She had recently moved to Kimberley,

BC (in April 2022), where she and her husband had bought a home on a half-acre lot with a large garden.

[68] The only medical opinion available to Ms. Vaughan was the report of Dr. Giantomaso. Ms. Vaughan also reviewed medical and treatment clinical records.

[69] The plaintiff described a longer list of current accident related injuries and symptoms to Ms. Vaughan than she did to Dr. Giantomaso. Her description of injuries given to Ms. Vaughan is more in keeping with the list of injuries she described in her evidence at trial. In addition to pain in her neck and upper back and right sacroiliac area, she reported: left arm paresthesia, resolved, but with a lingering sensation of weakness to her left hand; TMJ pain; infrequent episodes of trigeminal neuralgia (facial numbness); mild lumbar aches; left posterior hip pain; and reinjury to her pre-MVA left shoulder tear injury.

[70] The plaintiff reported to Ms. Vaughan, in summary:

1. daily stabbing pain in her upper mid back (thoracic spine) aggravated by activities such as housework and occupational work;

2. pain at the base of her neck daily with work, increasing during the day;

3. headaches – currently three per month, generally mild, but when she was working, several mild headaches per week;

4. post MVA left arm paresthesia, resolved, but with a lingering sensation of weakness to her left hand;

5. post MVA TMJ pain and flare-ups of trigeminal neuralgia. The trigeminal neuralgia had occurred only once in the last year;

6. mild aching in the lumbar back, a couple of times a week, primarily related to activities such as carrying weight and prolonged vacuuming;

7. left posterior hip capsule pain, recently improved with osteopathic treatment;

8. right SI joint pain – not currently being experienced. Was experiencing this pain while working;

9. reinjury of pre-MVA left AC joint injury. Aggravation of previous Grade 1 or 2 tear injury, aggravated with carrying her daughter on her left hand side;

10. concussion – 95% resolved;

11. some cognitive effects when fatigued;

12. she was no longer suffering from dizziness, nausea, or migraines with driving; and

13. tinnitus when she has headaches.

[71] The plaintiff reported to Ms. Vaughan that she does not use pain medications, as they do not make her feel well, they adversely affected her digestion, and she has some allergies. She used cannabis rarely, for pain relief. She primarily used self-management strategies for pain such as using a foam roller, applying heat, taking Epsom salt baths, stretching, and rest. She was exercising four to five times per week for approximately one hour. She incorporated kinesiology and Pilates exercises.

[72] The plaintiff reported that even with changes in her work technique as a massage therapist, she was only able to complete the equivalent of about four hours of massage therapy work per day, as compared to six hours equivalent prior to the MVA.

[73] Ms. Vaughan opined that the plaintiff's subjective report and presentation on her functional capacity evaluation was reliable. She noted no significant signs of dysfunction or soft tissue tension at the beginning of testing, however she demonstrated increased tension and mild decreases in cervical and thoracic ranges of motion post testing. Testing resulted in symptom aggravation. Based on the evaluation and observations in work simulation tasks, her complaints of symptom

aggravation and reduced tolerance for her work as a massage therapist were consistent with the functional capacity examination findings.

[74] Ms. Vaughan suggested that the plaintiff would continue to benefit from ongoing therapeutic treatments including massage therapy, chiropractic treatment and osteopathic treatment. She also recommended six sessions with a kinesiologist over the course of three to six months, and an occupational therapy workplace assessment.

[75] She suggested that she would benefit from assistance with seasonal housekeeping, and payment for costs of her portion of yard work, snow removal, home maintenance, and renovation work that her husband will have to do in her place, or that she will have to pay for.

3. Economists

[76] The plaintiff adduced evidence from an economist, Darren Benning. The defendant also adduced evidence from an economist, Mark Szekely, commenting on the report of Mr. Benning. I will refer to their evidence below.

III. THE PLAINTIFF'S INJURIES

[77] I previously summarized the plaintiff's evidence concerning her accident injuries.

[78] The defendant argues that the plaintiff's evidence should be viewed with caution, and that she is not a credible or reliable witness.

[79] I agree that a certain degree of caution is required in assessing the plaintiff's credibility and reliability. Although she was generally fair, there was a degree of advocacy and argumentativeness in her evidence during cross-examination. Also, I noted that her list of injuries increased, in comparing her complaints of injury set out in Dr. Giantomaso's report, based on his assessment on March 8, 2019, and as compared with the list of complaints set out in the report of Ms. Vaughan, based upon her assessment more than three years later, on August 15, 2022. Her list of

injuries at trial was more in keeping with her report to Ms. Vaughan. I conclude that the plaintiff has probably tended to attribute to the MVA every condition that she has had since the MVA occurred.

[80] The plaintiff had various aches and pains pre-accident. She had neck and mid-back discomfort at times, and headaches. She testified that these conditions were typically related to some activity or incident, such as a snowboarding fall, weightlifting training, or a work incident. She would get some treatment and her condition would improve.

[81] Dr. Giantomaso's report refers to post accident clinical records that mention TMJ pain, jaw pain, left AC joint pain, left hand tingling, and other complaints. However, after noting this history and these records, Dr. Giantomaso does not diagnose TMJ pain, or neurological issues (which he specifically does not find), or injury to her left shoulder caused by the accident. As noted, the only medical opinion evidence is that of Dr. Giantomaso.

[82] On the evidence, and a balance of probabilities, I am not satisfied that the plaintiff's complaints of TMJ pain, facial numbness and left foot numbness are accident related.

[83] Based on the plaintiff's evidence, and despite the fact that Dr. Giantomaso provided no opinion on this, I conclude that the MVA caused a temporary aggravation to her pre-accident left shoulder injury. Pre-accident, she had injured her left shoulder several times. She had broken her left clavicle (collar-bone) twice; once as a pre-teen, and then again in an MVA in 2011. She had a separated left AC joint injury in May 2008 at the conclusion of her dive training. She testified that pre-accident, her left shoulder would bother her for a day or two, and then would dissipate with massage, chiropractic, or physio therapies. She testified that her shoulder condition did not interfere with her work as an RMT, pre-accident. The plaintiff's evidence establishes a temporary worsening of her left shoulder condition.

[84] While as noted, some caution is warranted, I accept that the plaintiff's evidence about her accident injuries and their effects upon her are generally credible.

[85] I accept that the plaintiff was generally healthy and vigorous prior to the accident, with no significant limitation on her physical abilities. In addition to her own evidence about that, I accept the evidence of a former RMT colleague, John Solano, who knew the plaintiff quite well prior to the accident. He testified that she had no physical limitations, and that her energy level was very high. For a time they worked together at the same clinic (September 2015 to May 2016). Prior to the accident he and the plaintiff would "trade" massage therapies, by providing massage therapy to each other for "maintenance" purposes. After the accident, the plaintiff was not as excited about her work. She seemed tired all the time. She was not as sociable.

[86] The defendant argues that the plaintiff failed to disclose to Dr. Giantomaso that she had returned to work full time and was able to do so for about six months from November 2017 to May 2018. I do not accept this. Dr. Giantomaso's report notes, in his review of applicable documentation, that the plaintiff was working full-time as of December 13, 2017, and seeing six to eight patients per day, which was her premorbid volume, but was having difficulties after the fifth patient, with neck and shoulder pain. Therefore Dr. Giantomaso was aware of this history, and quite evidently it did not specifically affect his opinion. On cross-examination, Dr. Giantomaso did not concede that the plaintiff's ability to work full-time for a few months meant that she had fully recovered. As he pointed out, one would have to consider what the effect of working full-time was on her condition.

[87] The plaintiff's injuries had substantially improved by October and November 2017, a few months after the accident. She was able to work full time. However, as noted, her work significantly exacerbated the effects of her injuries. When she returned to work in November 2018, after the flood, she reduced her workload so that she was seeing patients for about 20 hours per week, rather than 30 hours. When she saw Dr. Giantomaso a few months later, on March 8, 2019, her major

area of complaint was to her neck and upper back region. She also had occasional occipital headaches, and infrequent migraine headaches. She had pain in her right buttock and sacroiliac regions.

[88] By the time of trial, the plaintiff had been away from work on maternity leave for almost one-and-a-half years. She suffers from pain with recreational activities and domestic duties, which she has to limit in order to avoid pain. Lifting and carrying her infant child causes pain.

[89] Her “fuzzy” feeling (cognitive issues) continued for approximately two years post-accident. She still feels occasional effects of concussion symptoms. She still has occasional pain in her hip and SI joint area. She no longer suffers from nerve pain in her face, but has some lingering TMJ pain.

[90] The plaintiff continues to have issues with mood, and sees a psychoanalyst. However she concedes that this is not primarily due to the motor vehicle accident. She referred to childhood traumas.

[91] In general, and in summary, the plaintiff's condition substantially improved within a few months of the motor vehicle accident, but then worsened with full-time work. Her condition improved when she cut back to part-time work. The effects of her injuries were moderate, although limiting, by the time she saw Dr. Giantomaso in March 2019. Her condition continued to improve following her maternity leave beginning in November 2021.

[92] Currently, the plaintiff experiences pain with childcare. She can do gardening for an hour or two, but then gets back pain. She has resumed snowboarding, but has reduced the amount and intensity of this activity. She has reduced her gym routine from high intensity training to rehabilitation workouts. She still walks regularly, but hikes have been less vigorous.

[93] The defendant argues that the plaintiff injured her back while placing sandbags in Grand Forks in May 2018 in an effort to protect the building in which her clinic was located from the flood. The defendant argues that this was a new

intervening injury, and that any complaints of the plaintiff post May 2018 are attributable to the sandbagging incident. This is not established on the evidence. There is no medical evidence to support this submission. The defendant relies upon statements made by the plaintiff several months later on October 25, 2018, when she saw a kinesiologist, Amanda Bradshaw, in Kelowna. The statements go no further than to establish that the sandbagging work caused a regression in her symptoms. In cross-examination, Dr. Giantomaso noted that "people injure themselves all the time" and it does not cause chronic pain. He stated that he would need much more information in order to provide an opinion as to whether the incident had any causative effects in relation to the plaintiff's injury complaints stemming from a motor vehicle accident. There is no such medical opinion in evidence.

[94] The defendant also argues that the plaintiff failed to mitigate her loss, by failing to fully adopt Dr. Giantomaso's recommendations as set out in his report.

[95] In *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, the Court of Appeal set out the test for failure to mitigate as follows:

> [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146.

[96] In *Haug v. Funk*, 2023 BCCA 110, the Court of Appeal ruled that in order to satisfy the second branch of the *Chiu* test, proof of a real and substantial possibility that the plaintiff's damages would have been reduced is not sufficient. The Court held that the defendant must establish a greater than even probability that the plaintiff's damages would have been reduced.

[97] Specifically, the defendant argues that the plaintiff failed to undertake an active rehabilitation and exercise program including core strengthening as

Dr. Giantomaso recommended. I do not accept the defendant's submission. I am satisfied that the plaintiff has continued to exercise to the limit of her ability, under appropriate professional guidance. In other words, the plaintiff has not failed to exercise in a manner consistent with Dr. Giantomaso's recommendation. Further, the defendant has not established, on the evidence, that had the plaintiff followed the specific recommendation of Dr. Giantomaso, her condition would have been improved.

[98] The defendant argues that the plaintiff should have used topical pain medications as recommended by Dr. Giantomaso, since she indicated she does not wish to take oral pain medications. Dr. Giantomaso stated that topical pain medications "may provide localized pain control". This is far from establishing that use of topical pain medications would have reduced the plaintiff's injuries. Dr. Giantomaso did not consider the plaintiff's reluctance to use oral medications unreasonable. He noted that there are side effects, and many young women who are planning to have children wish to avoid taking oral medications.

[99] On the evidence as a whole, the defendant has not established a defence of failure to mitigate.

IV. ASSESSMENT OF DAMAGES

A. Loss of Income or Income Earning Capacity

1. Legal Principles

[100] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal summarized the principles related to loss of future earning capacity, having regard to the court's recent decisions. The court stated:

> [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the

circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

[8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. …

…

[10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:

> [47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

First Step

[11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

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

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

> [13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. the plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> [14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.
>
> ***Second Step***
>
> [15] The reference to paras. 93–95 of *Dornan v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.
>
> ***Third Step***
>
> [16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

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

performed but was unable to perform because of the injury": *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

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

> [158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, at para. 153; *X. v. Y.*, 2011 BCSC 944, at para. 185.
>
> [159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.
>
> [160] In *Smith v. Knudsen*, 2004 BCCA 613, at para. 29, Rowles J.A. stated:
>
> > What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
>
> [161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140, at para. 32; *Falati v. Smith*, 2010 BCSC 465, at para. 41, aff'd 2011 BCCA 45.
>
> [162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.

2. Past Loss of Earnings or Earning Capacity

[103] The plaintiff argues that her past loss of earnings should be assessed at $139,450.

[104] The defendant argues that the plaintiff has failed to establish loss of earnings beyond six months after the accident. Thus, the plaintiff's losses are limited to the period of time from June 2017 to December 2017.

[105] On this basis, the defendant argues the plaintiff's losses are $40,371, gross, before consideration of the effect of income taxes. He argues that the net loss after deducting for income taxes is approximately $29,500.

[106] There are some periods of time for which the plaintiff makes no claim of past loss of her earnings.

[107] She makes no claim for the period from May through October 2018, since those losses were made up for by the proceeds of business interruption insurance.

[108] She makes no claim for the months from October 2017 to April 2018, when she was managing to work full time in her practice in Grand Forks.

[109] The plaintiff testified that Covid 19 caused a shut down of her business for one to two months in or about April 2020. Her billing records are reduced in September and October 2021. It would appear that she was reducing her hours while she was preparing to go on her maternity leave, commencing fully in November 2021.

[110] I accept that the plaintiff's accident injuries resulted in her being unable to work at all from the date of the accident, June 6, 2017, until September 2017, when she returned to work in Grand Forks, initially on a limited basis, while she built up her practice.

[111] I accept the plaintiff's submission that a reduction in gross billings results in a reduction of net income by approximately the same amount, since her overhead expenses remain approximately the same even if she works and bills fewer hours. So for example the plaintiff pays monthly rent to the clinic where she works. That does not change whether she works to 100% of her capacity, or a lower amount.

[112] I accept, as well, that when she resumed practice in Kelowna in the fall of 2018, her ability to work was reduced by approximately one third from what she had formerly been able to maintain, due to her accident injuries.

[113] The plaintiff testified that she tried numerous times to increase her workload beyond the four patient per day level. She was unsuccessful in achieving an increase in her workload. The evidence of the plaintiff's husband, Kevin Hachey, supports that when the plaintiff tried to increase her patient load to five patients per day, she was unable to do anything except work. As he put it, she had “nothing left at the end of the day". She would just fall asleep.

[114] In the opinion of Dr. Giantomaso, which I accept, her reduction in work capacity over this period of time was reasonable, given her injury limitations.

[115] The plaintiff's claims for past loss of earnings claims are as follows:

1. June 2017 – $6,520;

2. July and August 2017 – $8,500 for each month; total $17,000;

3. September, 2017 – $6,200;

4. October 2018 to October 2021 – $4,000 per month, for 35 months; total of $140,000, less $30,000 for negative contingencies such as the effects of Covid-19 on her business; time to re-establish her practice upon her move to Kelowna in November 2018; wind-down of her practice in September and October 2021, as she approached her maternity leave. Net claim – $110,000.

   Total – $139,450

[116] In part, the plaintiff's figures are based upon an assessment of her pre-accident gross billings for the five months preceding the accident from January to May 2017. The plaintiff contends that her billings for the months of March, April and May 2017 averaged approximately $8,500. She uses this figure as the basis of her claims of past loss for the months of June to September 2017.

[117] The plaintiff’s pre-accident billings for January to May 2017 averaged about $7,850. She billed $4,562 in June 2017, but had to pay a locum for half of the income she received after the accident. I assess her loss for the month of June 2017

at $5,569. Her loss for July and August is $15,700. In September, she billed $2,273.25. I assess her September 2017 loss at $5,577. The total loss for the months of June to September, 2017 is therefore $26,846.

[118] The plaintiff contends that her post accident billings while working full time in Grand Forks for January 2018 to May 2018 averaged $11,340. The plaintiff contends that her actual billings for the period November 2018 to November 2021, leaving aside April 2020 (Covid-19 shut-down) averaged $6,600 per month. Therefore she claims a loss of approximately $4,000 per month in gross billings, before consideration of the negative contingencies referred to above.

[119] I prefer to assess the loss in a somewhat different manner, but the result is similar the plaintiff's submissions.

[120] The plaintiff's billings for the period from November 2018 through to October 2021 total approximately $230,739. Had she been working full-time, her billings would have been higher by approximately 50% of that, or $115,370. This figure takes into account the effects of Covid 19, and a reduction in work as her maternity leave approached.

[121] Therefore, the past loss of income is $115,370 plus $26,846, which equals $142,216. I round that to $142,200. This amount is subject to deduction as required by s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

3. Loss of Future Earning Capacity

[122] I accept that there is a real and substantial possibility that the plaintiff's income earning capacity in future will be adversely affected by her accident injuries. Her earnings have already been reduced, in the past, due to her accident injuries. As noted, Dr. Giantomaso accepts that her work limitation is reasonable given her posttraumatic injuries. Thus, he did not disagree that, for example, in 2019 she should have worked part time.

[123] As one would expect in the circumstances, Dr. Giantomaso's prognosis was unspecific. As noted, he stated that "on a balance of probabilities she will likely continue to experience chronic pain to some degree long term in the future". The functional capacity evaluation of Ms. Vaughan, performed in August 2022, after the plaintiff had been on maternity leave for some months, noted continuation of her limitations and reduction in work capacity. Ms. Vaughan noted that the plaintiff "appears to have plateaued in her recovery".

[124] Therefore, there is a real and substantial possibility that the plaintiff's accident injuries will continue to limit her work capacity and billings as an RMT when she returns to work in that field in about three to four years when her children are in school. The plaintiff and her husband are very definite about their plans to have no more than two children. I accept that it is very likely the plaintiff will return to work as an RMT, as she testifies she plans to do.

[125] The plaintiff submits that but for the accident injuries, she would have billed $127,200 per year, and is now limited to billing $78,000, an estimated yearly loss of $40,000. ($49,200, based on these figures, actually). The plaintiff submits that a loss of $40,000 per year from 2027 (assuming that the plaintiff will return to work in about four years) equates to a loss of $576,240, based upon the multiplier report prepared by Mr. Benning.

[126] The defendant argues that the plaintiff has not established a real and substantial possibility of a future event that would cause a pecuniary loss. In the alternative, the defendant submits that there are various negative contingencies that should be applicable:

1. the plaintiff would have suffered an injury from moving sandbags in May 2018 (the flood event) in any event;

2. the plaintiff's work capacity and household capacity will increase should she properly mitigate her damages by using medication;

3. the plaintiff's earning capacity could increase should she change occupations to one in which she is capable of doing, in sedentary, light, or light to medium strength categories;

4. the plaintiff's work capacity and household capacity will increase should she receive further treatment such as counselling; and

5. the plaintiff's condition may wax and wane in future (as Dr. Giantomaso noted in his evidence) but will not worsen in future.

[127] I have rejected the defendant's arguments that the sandbagging incident played a causative role in the plaintiff's injuries, and the defendant's argument for a reduction based upon failure to mitigate.

[128] The defendant relies on the economist's report of Mark Szekely.

[129] The defendant adopts Mr. Szekely's figure of $749,521, for cumulative average earnings for BC female massage therapists, with average labour force participation rates, from age 35 to age 60. The defendant argues that this is the appropriate number to start with, considering the fact that the plaintiff is not planning to return to work for three or four years, until her children are in pre-school. Considering the contingencies, and asserted credibility issues with respect to the evidence of the plaintiff, the defendant submits that a fair and reasonable assessment of her future loss of earning capacity would be 10% of the expected overall lifetime earnings, or in other words, $74,952.

[130] I do not accept the defendant's submissions. I am satisfied that there is a strong possibility that the plaintiff will suffer a sustained loss of income as an RMT when she returns to work. The defendant's alternative submission is far too low.

[131] I think it quite unlikely that the plaintiff will choose not to return to the labour force in three or four years. She enjoys her work as an RMT, she has worked hard to develop her career, she has an established record of working steadily as an RMT, and although her husband earns a reasonably good income, she still needs to earn

an income. She is an industrious person. Finally, I accept the sincerity of her evidence that she plans to return to work.

[132] However, the plaintiff's assessment is significantly overstated. I do not accept that the plaintiff would have billed $127,200 per annum, or that such billings would continue until age 65, as submitted. This would result in an income far higher than the average full-time full year earnings for a British Columbia female massage therapist. Mr. Benning's report gives this amount at $53,647. Mr. Szekely's report is similar. He gives a figure of $54,485. These statistics suggest that a loss of income to the plaintiff based upon reduced capacity to work by about one-third would result in a loss of income of $18,000 per annum. However the plaintiff’s actual billings records suggest that this amount would be somewhat low, in her case.

[133] The plaintiff argues that I should rely on the testimony at trial of two other RMTs called by the plaintiff, Mr. Solano, and Ms. Harris. Mr. Solano testified that his gross billings were “around $125,000” for the years 2018 through 2020. Ms. Harris testified that her 2022 billings were approximately $105,000, working four days a week, and seeing six to eight patients per day.

[134] No documents were produced to support these figures. They are, of course, a sample size of two. The testimony of these two witnesses was vague and uncertain about this topic. I do not consider this evidence as a reliable indicator of what the plaintiff might have earned in future. The plaintiff’s actual part-time billings for 2019, if grossed up by one-third to represent full-time work, would be about $103,000, which is substantially lower than the amounts suggested by the two RMT witnesses. In my view the statistical information provided by the economists is reliable.

[135] The plaintiff's tax returns show the following amounts for gross and net business income:

Year	**Gross**	**Net**
2016	$62,573	$41,246
2017 (MVA)	$69,749	$43,942
2018 (Flood)	$68,487	$34,885

2019 (Part time all year)	$68,725	$41,087
2020 (Covid-19 affected)	$75,774	$48,048
2021	No evidence	No evidence

[136] Based upon the plaintiff's billings, the statistical evidence, and the evidence overall, a loss of $30,000 per annum to the plaintiff's earnings as an RMT is one reasonable starting point for the analysis, in my view.

[137] The economist reports of Mr. Benning and Mr. Szekely differ materially on one main point. That is, the applicable labour market participation rate that should be applied to the plaintiff. Mr. Benning used a higher labour market participation rate. Mr. Benning assumed that the plaintiff's participation rate would be higher than the average female in British Columbia of her age and education, by removing from the calculations a factor based upon those in her age cohort that were already outside of the labour force at her age of 35. Mr. Szekely states that this factor accounts for an increase in the participation rate by a factor of 19.98%. He disagrees with that adjustment. I agree with Mr. Szekely that this adjustment probably overstates the appropriate participation rate for the plaintiff. Mr. Szekely takes into account the fact that some census respondents who were out of the labour force at age 35 would re-enter the labour force at a later time, and relies on a study to that effect.

[138] Also, neither economist took into account (as they received no such instructions) the fact that the plaintiff was already out of the labour force at the time of trial, and would remain out of the labour force for several years to come. This is another reason to prefer Mr. Szekely's use of lower labour market participation rates.

[139] The figures set out in both reports must be adjusted to take into account of the fact that the plaintiff is currently out of the labour force and does not plan to return for approximately four years.

[140] Based on Mr. Benning's report, a loss of $30,000 per year in income to age 67 equates to a loss of $432,180. Mr. Szekely's calculation would result in a loss amount of $366,180. As noted, I would place more weight on Mr. Szekely's calculations in this respect.

[141] Mr. Benning's report gives lifetime earnings of $982,699, to age 67, based upon average female massage therapist incomes, after adjusting for labour market contingency factors and mortality. After deducting earnings for the next four years of $167,843, the net lifetime earnings, based on Mr. Benning's report, for the plaintiff would be $814,856. A loss of one-third of that amount is $271,618.

[142] The same analysis using Mr. Szekely's figures results in lifetime earnings, commencing in four years time, of $700,051. One third of this amount, is $233,350.

[143] Whether the plaintiff is assumed to retire at age 65 or 67 does not affect the results very much, since the earnings figures and the labour market contingency figures have already been taken into account. The participation rates drop steadily for workers over age 55, on either report.

[144] Assessing the loss globally, in my view a reasonable estimate of the plaintiff's loss of earning capacity in future based upon a loss of earning capacity as an RMT of about one third is approximately $330,000, before consideration of contingencies.

[145] This figure is derived by taking the midpoint between Mr. Szekely’s figures of $366,180 (loss of $30,000 per year to the plaintiff) and $233,350 (loss of one-third of average RMT earnings) which is $300,000. However, I put somewhat more weight on the loss of $30,000 per year figure of $366,180, in recognition of the fact that the plaintiff’s earnings would likely exceed the average, thus resulting in the figure of $330,000.

[146] However these figures assume that the plaintiff's loss of earning capacity as a massage therapist is permanent. Dr. Giantomaso’s report is not so definitive. There is a chance the plaintiff's condition will improve, at least to some extent. There is little chance her injuries will worsen. Dr. Giantomaso testified that her condition is not progressive, or degenerative. Therefore there is no reason to think that the plaintiff’s accident injuries will worsen and cause an increase in her level of lost work capacity. An improvement in her condition would reduce the loss, of course.

[147] A contingency factor that should be taken into account is the possibility that the plaintiff would retrain to another occupation, for which her condition would not be much of a limiting factor. The plaintiff was an exceptionally good student at all levels throughout her education. From this I infer that she could retrain to another occupation if she wishes to do so. In the past she has shown adaptability and success in various occupations. So for example in 2012 - 2013 she was promoted to manager of the café she worked at. In 2019, in addition to her RMT work, she worked as a teacher at the massage therapy school that she attended, in Vernon. Given her skills and aptitude, it is reasonable to conclude that she could transition into another occupation that is less physically demanding, where she could work full time.

[148] In my view a negative (i.e. downward) adjustment is necessary in the assessment, based upon the chances that the plaintiff's condition will improve, or that she could retrain to a position where she can earn more money. I note that, generally speaking, from the statistics provided, RMTs are not highly paid. Therefore it is not unlikely that the plaintiff could find other employment which is at least as remunerative as that of an RMT.

[149] On the other hand, retraining would likely require some time out of the workforce, and loss of income on that basis.

[150] In view of all the circumstances, a reduction of 25% is appropriate, against the global assessment of $330,000 that I referred to. This results in a net assessment of loss of earning capacity in future of $247,500. I assess the plaintiff's loss of future earning capacity in that amount.

B. Loss of Housekeeping Capacity

[151] In *McKee v. Hicks*, 2023 BCCA 109, the Court of Appeal endorsed the test for whether a discrete pecuniary award for loss of housekeeping capacity should be made, or whether the plaintiff's loss should be assessed as part of the plaintiff's loss in the award of non-pecuniary damages, set out in *Kim v. Lin,* 2018 BCCA 77. In *McKee*, the Court stated:

> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[152] In *Haug*, the Court of Appeal also endorsed the *Kim* test (at para. 98), and also made reference to the considerations set out in *Riley v. Ritsco*, 2018 BCCA 366:

> [98] There was no evidence that any incapacity on the part of Mr. Riley would result in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for. If it existed, such evidence could have supported a segregated award of pecuniary damages on the basis of *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652; (1995) 4 B.C.L.R. (3d) 178 (C.A.).

[153] In this case, the plaintiff does not seek a separate, pecuniary award for loss of housekeeping capacity.

[154] Accordingly, I have taken into account the plaintiff's loss in relation to housekeeping capacity, within the context of my assessment of her non-pecuniary damages award.

C. Non-Pecuniary Loss

1. Legal Principles

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

2. Assessment – Non-Pecuniary Loss

[156] The major injuries to the plaintiff caused by the MVA are those set out in Dr. Giantomaso's report, namely: moderate whiplash type injury to her neck and upper back; mild traumatic brain injury caused by concussive forces in the accident; headaches, including migraine and occipital headaches; and right sacroiliac joint

dysfunction. Based upon the plaintiff's evidence and the report of Ms. Vaughan, the plaintiff's right-sided sacroiliac pain has transitioned to the left side.

[157] Her injuries were very limiting for four or five months post-accident. By that time, there had been substantial improvement, but the plaintiff's injuries have continued to be significantly limiting, and have caused substantial ongoing pain and discomfort for several years.

[158] As Dr. Giantomaso noted, there are no significant ongoing sequelae of her brain injury, but her soft tissue injuries are chronic. The prognosis is generally negative. As noted, he stated that she is likely to continue to experience chronic pain to some degree long term in the future. His report is dated, but this prognosis has largely been borne out by subsequent events. The plaintiff continued to work, with pain, until her maternity leave commenced in November 2021.

[159] Currently, her major complaint is of neck and upper back pain, and headaches. Her condition limits her ability to participate fully in sporting events, other recreational pursuits, and domestic activities. She has pain in taking care of her infant daughter. Her child-care pain will continue with care of her second child.

[160] The accident injuries caused mood effects. At the time of the MVA, the plaintiff was in a relationship, which ended, likely due to the effects of the accident injuries on the plaintiff's mood.

[161] The plaintiff's mood issues have also caused some difficulty in her current relationship with Mr. Hachey. They met in October 2018, well after the accident, and began cohabiting about three months later. The plaintiff is not able to participate fully in the active lifestyle her husband seeks to have. This has caused some tension in the relationship, that the parties have managed to work past.

[162] I accept Mr. Hachey's evidence about the plaintiff's condition. Due to the plaintiff's limitations, he has to take on more of the domestic chores, such as cooking, dog walking, and so on. He does all the outside work, such as yardwork, gardening, weeding, and does heavier work such as snow removal. He testified that

she is “not a complainer". He testified that she is easily fatigued and needs to rest as much as possible. They are able to go for one hour walks together. Before the birth of their child they went snowboarding together, but the plaintiff's snowboarding was limited to less demanding runs, despite her high skill level.

[163] There is a substantial likelihood that the plaintiff's current level of complaints will continue indefinitely into the future. Should she return to work as an RMT, which I consider very likely, there is a real and substantial likelihood that her accident injuries will continue to limit her ability to work as an RMT, full time. The fact that the plaintiff will suffer pain at work and that her career is limited are relevant non-pecuniary loss factors.

[164] The accident injuries have had some effects on her ability to perform housework, including gardening. No separate award is sought for loss of housekeeping capacity. Her limitation in housekeeping is a factor to be taken into account in the assessment of non-pecuniary loss.

[165] The plaintiff argues that non-pecuniary loss should be assessed at $130,000. The plaintiff relies upon the following authorities, as guidance:

Name of Case	**Non-Pecuniary Award**
Rich v. Hamilton, 2022 BCSC 1134	$145,000
Huang v. First Choice Carpet Centers Corp., 2023 BCSC 132	$90,000
Melvin v. Li, 2023 BCSC 241	$135,000

[166] The defendant submits that the plaintiff's non-pecuniary loss damages should be assessed at $75,000. The defendant relies upon the following authorities as guidance:

Name of Case	**Non-Pecuniary Award**
McLean v. Redenbach, 2023 BCSC 8	$60,000
Klingler v. Lau, 2019 BCSC 1776	$95,000
Mills v. Graham, 2019 BCSC 641	$70,000

[167] In *Rich*, the plaintiff was 43 years of age when the accident occurred in 2018. She had no prior material health issues. Justice Veenstra held that the MVA caused injuries to the plaintiff's SI joint, and her hip and lumbar spine. At trial her primary complaints were in relation to her low back and thigh. Her injuries restricted her capacity to work, her housekeeping capacity, her ability to care for her children, and her social and recreational activities. The plaintiff was unable to work in the kinds of physical occupations she was doing pre-accident. However she had changed to a sedentary job in a senior management role, and her earnings were not reduced. No separate pecuniary award for loss of homemaking capacity was made. The court awarded non pecuniary damages of $145,000, which included a factor for loss of homemaking capacity. $205,000 was awarded for loss of earning capacity in future, because she was no longer capable of physically demanding work.

[168] In *Huang*, the plaintiff was 19 years of age when she was struck by the defendant's vehicle. The accident occurred in 2015. She was a university student. Justice Warren found that the MVA caused soft tissue injuries which resulted in pain in her left shoulder, left hip, waist, right buttock, neck, upper back, and lower back. Her injuries resolved within about two months, except for her neck and back injuries. Her neck and upper back injuries caused pain with activity. She had near constant and sometimes intense low back pain, made worse by activities. However her injuries had a relatively minor impact on her life, except that her injuries precluded her from working as a nurse in an acute care hospital, which had been a career aspiration. The prognosis was poor. Warren J. awarded $90,000 for non-pecuniary loss.

[169] In *Melvin,* the plaintiff was 32 years of age when the accident occurred in 2015, seven years pre-trial. At trial he continued to suffer from chronic upper back pain and right lower lumbar pain. When the accident occurred he was a restaurant meal delivery driver with Skip The Dishes. At trial he was in constant pain, and was unemployed. Due to chronic pain he was completely sedentary, had little motivation, and no social life. Justice Young found that his chronic pain was permanent, and would limit his ability to undertake physical activities and many forms of employment in future. His chronic pain severely affected his enjoyment of life. The court awarded $135,000 in non-pecuniary damages.

[170] In *McLean*, Chief Justice Hinkson awarded $60,000 for non-pecuniary damages to an RMT who was injured in 2016, some six years prior to the trial in 2022. She was 47 years of age at trial. The Chief Justice found that the plaintiff's neck pain and headaches limited her massage therapy work and other activities for four years after the accident, but that her pre-existing neck pain and headaches would have worsened regardless of the accident. She also experienced emotional suffering. The accident caused exacerbation and acceleration of her-pre-existing injuries, which would have forced her to leave her career as a massage therapist and seek less physically demanding work in any event. An award was made for past loss of earnings, but not for future loss of earning capacity. The Chief Justice awarded $4,500 for loss of housekeeping capacity, in relation to a four-year loss. *McLean* is not comparable to the present case, due to the finding that the accident only aggravated and exacerbated pre-existing injuries for four years.

[171] In particular*, Klingler* provides useful guidance. In that case, the plaintiff was 29 when she was injured in the accident, in 2013. She worked as a pediatric occupational therapist. Justice Adair found that the MVA had caused myofascial pain syndrome in her neck and upper back, and persistent post-traumatic headaches. The prognosis was poor. Her headaches were very disruptive to her life, and were emotionally and physically taxing. Due to her injuries she was no longer able to work at the same pace as before. Her social and recreational activities were negatively affected. Adair J. awarded $95,000 for non-pecuniary loss, as well as $7,500 for loss

of housekeeping capacity. These two amounts add to $102,500. The housekeeping capacity award may have been moderated by the court's award of $50,000 as future care costs for homemaking and seasonal cleaning. $102,500 is equivalent to about $117,000 in 2023 dollars, after taking inflation into account, based upon the Bank of Canada's online consumer price calculator. Adair J. also awarded $75,000 for past loss of earnings, and $300,000 for future loss of earnings capacity.

[172] In *Mills*, the plaintiff was 54 years of age when she was injured in the accident, that occurred in November 2014, just over four years before the trial in February, 2019. At the time of the accident she was working as an RMT. Justice B.D. MacKenzie held that at trial she continued to suffer from pain and discomfort in her neck, upper back, and shoulder. She continued to work as an RMT but her work and recreational activities would cause her condition to "flare up" from time to time in future. The court awarded $70,000 for non-pecuniary damages, $55,000 for past loss of earnings, $63,668 for future loss of earning capacity, and $20,000 for cost of future care, for the cost of future chiropractic and massage treatments. $70,000 in 2019 when *Mills* was decided equates to $80,400 in 2023. *Mills* is not comparable to the present case, because among other things the plaintiff was much older when she was injured, and her injuries were less consequential.

[173] Having regard to my findings, and the authorities relied upon by the parties, in my view a fair and reasonable assessment of the plaintiff's damages for her non-pecuniary loss is the sum of $115,000.

D. Costs of Future Care

1. Legal Principles

[174] A concise recent summary of the applicable principles is set out in *Pang v. Nowakowski*, 2021 BCCA 478 at paras. 56-58.

2. Assessment – Costs of Future Care

[175] The plaintiff claims future care costs of $62,622.

[176] Relying on the report of Ms. Vaughan, the plaintiff submits that an award of costs of future care should be made based on the following:

1. massage therapy every two weeks (26 per year) $70 each, total $1,820 per annum, in order to be able to maintain her ability to work part time as an RMT; and

2. chiropractic or osteopathic treatment every four weeks (13 times per year), $70 each, $910 per annum.

[177] The plaintiff therefore claims for future treatment costs of $2,730 per annum. The plaintiff submits that this treatment should be allowed for 30 years. Based upon the CIVJI future care multiplier of 22.3965, the plaintiff claims $61,142, in present value, for future care costs of massage therapy, and chiropractic or osteopathic treatments.

[178] The plaintiff also seeks $480 for an occupational workplace assessment and $1,000 for ergonomic office equipment.

[179] I do not accept that the plaintiff has established her claim for long term massage therapy, or chiropractic and osteopathic treatment. Dr. Giantomaso made no such recommendation. He emphasized active rehabilitation, meaning appropriate physical exercise. At trial, he testified that an exercise program has the best chance of improvement for soft tissue injuries. It is the “mainstay” or “foundation" of soft tissue pain management. He testified that the patient should be encouraged to be as active as possible.

[180] Ms. Vaughan's recommendation for very long term passive treatment is inconsistent with the views of Dr. Giantomaso, whose opinion I place greater weight on in this respect. Ms. Vaughan's recommendation seems to be largely based upon the fact that the plaintiff was attending massage therapy every two weeks during 2021, and has also taken osteopathic and chiropractic treatments as well. Ms. Vaughan thought these therapies should continue. I am not satisfied that the

medical evidence supports that recommendation. I note, in addition, that the plaintiff regularly had massage treatment before the accident.

[181] Dr. Giantomaso recommended an occupational therapy assessment of her worksite. I accept that such an assessment is likely to result in some ergonomic equipment recommendations. I therefore allow the claim of $1,480 in that respect.

[182] Therefore, costs of future care are assessed at $1,480.

E. Special Damages

[183] The plaintiff has adduced receipts for post-accident treatment that total $12,880.90. The receipts are for expenses such as massage therapy, chiropractic treatment, acupuncture, physiotherapy, kinesiology, and naturopathic treatment. She acknowledges that she had a pre-accident history of massage and chiropractic treatment, which likely would have continued even in the absence of the accident. She seeks special damages in the amount of $10,000.

[184] The defendant contends that no award should be made for expenses incurred following May 8, 2018.

[185] The defendant agrees to special damages in the amount of $4,676.75, for massage therapy, chiropractic, physiotherapy, acupuncture, kinesiology and naturopathic medicine treatments.

[186] The defendant contends that special damages should be limited to those incurred prior to May 8, 2018, the date of the flood and so-called sand bagging injury. I rejected the submission that the sandbagging incident resulted in an injury having any causative role.

[187] I accept the plaintiff's submissions that an award of $10,000 for special damages is appropriate, on the evidence.

V. CONCLUSION AND SUMMARY

[188] Subject to adjustment for income tax on the plaintiff's award for past income loss, the plaintiff's claims are allowed in the following amounts:

Head of Damage	**Award**
a. Past Loss of Earning Capacity	$142,200
b. Loss of Future Earning Capacity	$247,500
c. Non-Pecuniary Damages	$115,000
d. Costs of Future Care	$1,480
e. Special Damages	$10,000
TOTAL	**$516,180**

[189] I did not receive full submissions as to the effect of income taxes on the past loss of earnings claim and s. 98 of the *Insurance (Vehicle) Act*. I order that there will be an assessment by a master or registrar pursuant to R. 18-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] to determine the appropriate deduction, and to certify the result, if the parties are unable to agree on the deduction applicable.

[190] Subject to the effect of offers to settle and R. 9-1 of the *Rules*, the plaintiff is awarded costs of the action. The parties have liberty to apply in relation to costs, provided the application is filed within 30 days of the date of these reasons.

"Verhoeven J."