IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Valencia v. Duggan,*
2023 BCSC 476

Date: 20230328
Docket: M175024
Registry: Vancouver

Between:

Maria Eugenia Valencia

Plaintiff

And:

Phyllis Mary Duggan

Defendant

Before: The Honourable Mr. Justice D. M. Masuhara

Reasons for Judgment

Counsel for plaintiff:	B.A Hambrook D. Klein A. Maheem
Counsel for defendant:	J.S. Sheikhupura N.Chohan
Place and Date of Trial:	Vancouver, B.C. August 2-5, 8-12, 15-18, 2022 September 14-15, 21-23, 2022
Place and Date of Judgment:	Vancouver, B.C. March 28, 2023

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I. INTRODUCTION

[1] These reasons deal with injuries arising from a motor vehicle accident that occurred on July 28, 2015, at the intersection of 152nd Street and Fraser Highway in Surrey, B.C. The plaintiff, Ms. Valencia, was in the front passenger seat of a 2004 Mazda 6 driven by her daughter heading northbound on 152nd Street. She was wearing a three-point seat belt. She was 47 years old at the time and is now 54 years.

[2] The defendant, Ms. Duggan, driving a Ford Escape, drove through a red light into the path of the Mazda, causing the front of the Mazda to collide into the side of the Ford. The Mazda's airbags deployed and struck Ms. Valencia. She received assistance from passersby to exit the Mazda. She was taken via ambulance to the Emergency Department at Surrey Memorial Hospital.

[3] I will refer to the collision as the "Accident".

[4] The Mazda was declared a total loss. The estimate of repair to the Ford from the collision was at least $10,039.40.

[5] This action was commenced June 2017.

[6] The plaintiff seeks damages for the following:

(a) neck and back pain;

(b) left shoulder and arm pain;

(c) left wrist and hand pain, including carpal tunnel syndrome on the left hand being symptomatic as a result of the Accident;

(d) chronic pain;

(e) major depressive episodes;

(f) adjustment disorder with mixed depressive/anxiety disorder;

(g) somatic symptom disorder;

(h) persistent depressive disorder (chronic depression);

(i) chronic axial/para-axial myofascial disorder;

(j) sacroiliac joint dysfunction, SPR instability and misalignment, SPRD and malalignment syndromes;

(k) post-traumatic occipitofrontal and bitemporal, cervicogenic and tension type headache;

(l) upper body myofascial tension;

(m) chronic myofascial disorder involving the soft-tissues of her spinal axis/para-axis; and

(n) adjustment disorder and other psychological injuries.

[7] Liability has been admitted and the defendant accepts that the plaintiff has suffered physical injuries arising from the Accident. However, the extent and nature of the injuries are contested. The defence argues that the plaintiff had pre-existing conditions which should be taken into account; that the psychological condition which the plaintiff claims for is not related to the Accident; and that the plaintiff has not suffered past or future income loss. The defence also asserts that the plaintiff has failed to mitigate her injuries.

II. WITNESSES

[8] The witnesses in the plaintiff's case were:

(a) Maria Valencia, the plaintiff;

(b) Dr. Tarazi, an orthopedic surgeon, who prepared a medical-legal report;

(c) Dr. Levin, a psychiatrist, who prepared medical-legal reports;

(d) Dr. Armstrong, an expert in complex chronic pain, who prepared a medical-legal report;

(e) Mr. R. McNeil, an occupational therapist, who prepared a functional capacity evaluation and cost of future care expert report;

(f) Mr. Steigervald, an economist, who prepared an economic report;

(g) Dr. Rosemary Valencia, the plaintiff's daughter;

(h) Ms. Heidi Osario, the plaintiff's friend; and

(i) Whitney Caceres, the plaintiff's daughter.

[9] The witnesses in the defence case were:

(a) Dr. Mitchell Spivak, a psychiatrist, who prepared a medical-legal report;

(b) Dr. Najafi-Larijani, the plaintiff's one-time treating family physician, who is fluent in Spanish;

(c) Dr. Neil Wells, the plastic surgeon who treated the plaintiff for carpal tunnel syndrome;

(d) Dr. Stacey Chow, a family physician, who treated the plaintiff on one occasion;

(e) Diane Middagh, a nurse practitioner, who treated the plaintiff on one occasion;

(f) Dr. Reebye, a physiatrist, who treated the plaintiff;

(g) Dr. Saldana del Pielago, the plaintiff's family doctor at time of Accident who is fluent in Spanish; and

(h) Mr. Sergiy Pivnenko, a labour economist, who prepared a rebuttal report to Mr. Steigervald's report.

[10] The parties also tendered an Agreed Statement of Facts and a Document Agreement.

[11] The plaintiff testified through an interpreter. She spoke in Spanish. As experienced as the interpreter was, there were difficulties encountered in the process as the dialect or words used by Ms. Valencia were at times unfamiliar to the interpreter. My sense is that there was some loss of nuance in the interpreting process. I have taken this into account. Notwithstanding this, my view of her testimony was that it was weak in many areas.

III. BACKGROUND

[12] The plaintiff is presently 54 years old (47 years at the time of the Accident) and is single. She resides with her daughter, her daughter's spouse, and their young child in a townhouse in Surrey, B.C. The plaintiff's first language is Spanish. Her English is limited. She writes with her right hand and does everything else with her left hand.

[13] The plaintiff was born and lived in Buenoventura, Colombia prior to moving to Canada. Buenoventura is a coastal port city. She was in a relationship with Guillermo Caceres since she was 14 years old. He is the father of her three children, Rosemary, Whitney, and Jorge. They are 36, 29 and 27 years old, respectively.

[14] The plaintiff and Mr. Caceres married on November 3, 1999. However, in 2002, he left Colombia for the United States. She stated Guillermo's son from another relationship, Sammy, was involved with gangs, and Sammy and Guillermo became targets which necessitated them both leaving Colombia. Sammy, she said, fled to Panama. She did not see her husband for ten years, though he would send money back to her for the family. He eventually applied to come to Canada as a refugee and obtained residence status. This led to him subsequently to sponsor the plaintiff and their three children to immigrate to Canada.

[15] Guillermo sought a divorce from the plaintiff in this court in about 2015. In response, she applied for spousal support. In her spousal support application, the plaintiff deposed that from April 12, 1987 to 1998, she and her husband lived and

worked in Colombia but they “struggled financially and often relied on food donation from family and friends.” This is consistent with her evidence at trial.

[16] In Colombia, the plaintiff obtained a certificate in beauty and cosmetology in 1997. She obtained a further certificate in cleaning and cosmetology products in Colombia in August 2001. She obtained a certificate in body massages and preparation of products for facials, body aesthetics, and colon therapy in March 2010.

[17] The plaintiff described family life as difficult in the period of 2002 to 2013 because of the violence and lawlessness in Colombia generally and in her locality in particular. She and the family were forced to move to several times because of armed gang members pursuing Sammy and Guillermo. The family was often locked down in their residence because of the violence in the area. There were many vacant houses which were used by gangs to torture and murder men and women. She stated that she did not work during the times she had to move the family, but stated that when she would work, she did so out of her home and at a salon called Jenny Salon, where she did manicures, pedicures, and hairdressing between 2006 and 2010. For much of that time, she was a vendor selling clothing, beauty products, and other merchandise. She would travel to a nearby city, Cali, to obtain her products.

[18] As mentioned, Guillermo sponsored the plaintiff and their three children to immigrate to Canada. Their two youngest arrived in Canada in June 2013 and lived with Guillermo for a short period in Burnaby. Their eldest decided to remain in Colombia. The plaintiff arrived in October 2013.

[19] About two or three months prior to Ms. Valencia’s arrival, Guillermo ousted the two children from their residence. It appears that they did not get along with their father, who had a relationship with another woman. Eventually, the children were readmitted into the home and Guillermo was required to vacate, which he did. Ms. Valencia and the children lived there together.

[20] Shortly after arriving, the plaintiff applied for and began to receive social assistance benefits. She enrolled in an English language program which she says was at level zero. She also took a short course in child-minding and received a certificate of completion dated December 2, 2013. She moved from Burnaby to Surrey and enrolled in a Level 1 English class at Douglas College in April 2014. She progressed and completed Level 3 in March 2018. She started Level 4 in April 2018. It seems she attended from August 2018 to November 2018 but did not complete this level.

[21] There is evidence that the marriage between the plaintiff and Guillermo came to an end in September 2013. In an affidavit sworn in March 2019, the plaintiff states that this arose from a statement made to her by Guillermo that he no longer wanted to see her or to have anything to do with her. She also deposed that she learned at this time that Guillermo had a girlfriend in Costa Rica.

[22] In Canada, her son Jorge was involved in criminal activity. He was convicted twice for breaking and entering. The offences occurred in December 2014 and in June 2017. He received a custodial sentence in August 2015 and in August 2019, respectively. She acknowledged these events were upsetting to her but did not disclose them to her psychiatrist in 2018.

[23] The plaintiff attended at a Nurse Practitioner Community Clinic on December 19, 2013. She was seen by Nurse Practitioner Middagh. Ms. Valencia was noted as obese and in obvious pain. Her complaint was severe lower back pain with radiation to lower rib area and both legs down to ankles. She said it hurt to sit and lie down and was unable to sleep, eat, or function well. Ms. Valencia was unable to bend forward and on light palpation had significant tenderness in the entire lumbar sacral area.

[24] The clinical note of the plaintiff's complaint (through a translator) was that her first episode with back pain was several years previous with the sudden onset of acute back pain with no trauma. She was unable to leave her house in Columbia

and a doctor made a home visit and gave her an injection of pain medication. She had physiotherapy and recovered. She also had an X-ray that showed L4-5 fusion.

[25] On June 6, 2014, she attended Broadway Medical Clinic and saw Dr. Chow. The clinical note states that the plaintiff complained of cramps in her left arm and leg with "veins [in the] hand swollen and bigger". Dr. Chow found "mild weaker left grip (left handed) and left leg."

[26] On February 15, 2015, Guillermo Garces filed a Notice of Family Claim seeking a divorce. On June 16, 2015, the plaintiff filed her Response to Family Claim and her Counterclaim seeking spousal support.

[27] On May 18, 2015, in the clinical note of Dr. Saldana, the plaintiff reported that she had fallen down ten days earlier at home and had pain in her right knee and right ankle with swelling. Dr. Saldana's exam found right knee effusion and right ankle effusion.

[28] On July 28, 2015, the Accident occurred.

[29] In January 2016, Dr. Najafi-Larijani ordered X-rays of the plaintiff's spine, which revealed severe L4/5 degeneration. He referred the plaintiff to a spine clinic for corticosteroid injections.

[30] A CT scan conducted in August 2016 showed the plaintiff having severe L4/5 degeneration but not stenosis.

[31] The plaintiff reported to Dr. Najafi-Larijani that her headaches had become significantly better.

[32] In December 2016, the plaintiff was seen by Dr. Wells because of a "three-month history of pain from the shoulder down to the hand"; she denied any trauma. She told Dr. Wells she was "presently not working as a cleaner but does work as a cleaner." He found tendinitis/overuses syndrome and probably some degree of carpal tunnel syndrome.

[33] Dr. Najafi-Larijani wrote in the ICBC CL19 Medical Report dated August 15, 2017, that the plaintiff "was part time working in cleaning", but her carpal tunnel syndrome was now a limiting factor, along with her back pain. In giving his evidence to this court, Dr. Najafi-Larijani agreed that she would have told him this.

[34] In October 2017, Dr. Najafi-Larijani noted that plaintiff had been treated for carpal tunnel syndrome.

[35] In late 2017, the plaintiff underwent carpal tunnel release surgery.

[36] In November 2017, that plaintiff was referred to a pain clinic for assessment and treatment for pain of her bilateral upper back, shoulder, neck, forearm, low back and lower leg pain. Trigger point therapy was initiated for the plaintiff. It appears she continued with that therapy through 2018 and possibly afterwards.

[37] In 2017, the plaintiff locked herself in her bathroom with a bottle of Clorox and said she wanted to die. She did not do what she threatened and was calmed by her children.

[38] In December 2017, Dr. Najafi-Larijani noted the plaintiff's comment that she had experienced passive suicidal ideation for the past four weeks. He diagnosed her with severe depression and initiated medication and referral for psychiatric treatment, but noted the difficulty of finding a Spanish speaking psychiatrist.

[39] In March 2018, the plaintiff was seen by Dr. Vallabh, a psychiatrist with Fraser Health Authority on the referral of Dr. Najafi-Larijani. He noted that the plaintiff was "already on a complex regime of meds". She adamantly denied to him any current suicidal ideation. He stated that the plaintiff "comes across as having major depressive disorder along with possibly a mood disorder due to another medical condition (chronic pain)." He recommended the plaintiff being gradually switched off of amitriptyline because of side effects and placed onto Cymbalta, which is an antidepressant that has pain relieving and mood elevating properties. He also suggested a referral to a pain clinic and counselling.

[40] The plaintiff obtained a designation as a person with disabilities on December 11, 2018, and began to receive benefits in January 2019. She had been previously denied disability benefits but had applied for reconsideration.

[41] In 2020, the plaintiff applied for benefits under the Canada Emergency Response Benefit (CERB) program and began receiving the benefits March 2020. The plaintiff says she was working prior to this.

[42] She returned for a visit to Colombia in December 2018, right after the reconsideration application was successful.

[43] On March 18, 2019, the plaintiff filed a Notice of Application in the family action seeking the following orders:

> (a) An order for divorce;
>
> (b) An order that the Claimant, Guillermo Ivan Caceres Garces, pay the Respondent, Maria Eugenia Valencia, retroactive child support in the amount of $507.00 per month from October 2013 to January 2014; and
>
> (c) An order that the Claimant, Guillermo Ivan Caceres Garces, pay ongoing spousal support to the Respondent, Maria Eugenia Valencia, in the amount of $2,050.00 retroactively commencing from October 1, 2013, and on the first day of each and every month thereafter.

[44] On April 4, 2019, Justice Davies granted an order for divorce. The terms for spousal support state:

> (a) The Claimant shall pay the Respondent retroactive spousal support in the amount of $1,700.00 per month from January 2016 to today's date; and
>
> (b) The Claimant shall pay ongoing spousal to the Respondent in the amount of $1,700.00 per month commencing May 1, 2019.

[45] The family proceedings, the pleadings, and the resulting order came to light after a reopening by consent of the present trial. This arose from my query of plaintiff's counsel's submission that the plaintiff's spousal support was about to end (which had been what the plaintiff had said). I asked how it could be that given a long-term marriage and the spousal support advisory guidelines an order for spousal support would only be for three years. Counsel had no answer. Upon a review of the family proceeding order, which both parties agreed should be admitted, it became clear that spousal support was not just for three years but was indefinite. Ms. Valencia was recalled to speak to this. Her testimony was that it had always been her understanding that the order obtained was for three years and reflected only a claim for retroactive support.

[46] I did not find this persuasive. Her affidavit in support of the divorce and spousal support were certified as having been translated for Ms. Valencia. She also had the benefit of advice of Spanish-speaking counsel through the Legal Services Society in preparing her application. There was also a Spanish-speaking interpreter at the Judicial Case Conference. At the hearing for spousal support, Ms. Valencia appeared on her own but had an interpreter with her according to her evidence. She also signed the order that awarded her spousal support indefinitely.

[47] Since 2019, the plaintiff's family physician has been Dr. H. Shortt.

[48] The second report of Dr. Levin, dated April 4, 2022, states that the plaintiff contracted COVID-19 in October 2021, which the plaintiff described as "severe". She had to stay at home and was prescribed medication for her condition that she took for three months.

IV. EXPERT MEDICAL EVIDENCE

[49] The expert medical evidence relates to the different areas of injury claimed by the plaintiff. I summarize that evidence by category.

A. Psychiatric

[50] The plaintiff tendered two reports of Dr. Levin. He addressed the psychiatric condition of the plaintiff and made recommendations on future care. He interviewed the plaintiff on July 28, 2015, and April 4, 2022.

[51] He found that the plaintiff had initially suffered an adjustment disorder which transformed into chronic depression, which he defined as a persistent depressive disorder. He stated that given:

> Ms. Valencia's preoccupation with pain and reported inability (or failed attempts) to return to work, she seemed to also present with a somatic symptom disorder with predominant pain (*previously described in psychiatric literature as a chronic pain disorder*).

[52] In his first report, he stated that the plaintiff:

> requires more aggressive psychopharmacological and psychotherapeutic intervention. In that, her dose of Cipralex (antidepressant agent) needs to be optimized at least to 20 mg once a day. Given Ms. Valencia's ongoing experiences of insomnia and persistent anxiety symptomatology, she requires additional use of clonazepam 0.5 Ms. Garman hs. Should her negative ruminations and preoccupation with pain persist, she would benefit from augmentation by one of atypical neuroleptics, such as Abilify.
>
> Given Ms. Valencia's maladaptive coping strategies in dealing with her pain and depressive symptomatology, she would also require cognitive behavioural psychotherapy, 12 to 18 sessions with a focus on more adaptive coping strategies and a return to a more productive lifestyle (preferably the continuation of her courses of English as a second language).

[53] He stated he found features of somatic symptom disorder but was not sure on the DSM 5 criteria and could not make the diagnosis for court purposes. He agreed the causes of depressive disorder may be multi-factorial. He agreed that while he was aware of some issues with her husband, he was not aware of the threats of harm to the plaintiff, the falling out between her husband and her children, or a restraining order against the husband. Further, my sense was he had little awareness of the criminality and incarceration issues of her son and the effect of these issues on the plaintiff. He had also assumed the plaintiff's pre-existing back degeneration was asymptomatic.

[54] In terms of prognosis, he opined that full recovery from such a chronic psychiatric condition "often has a guarded prognosis for recovery." He further stated that "[a]lthough depression, in general, is a treatable psychiatric condition, Ms. Valencia's protracted clinical course, and persistent preoccupation with chronic pain, represent negative prognostic factors, regardless of any specific psychopharmacological regimen."

[55] Dr. Levin recommended that the plaintiff "requires a more intense psychotherapeutic approach, one focusing on improving her coping strategies and cognitive/behavioural restructuring. Therefore, she needs 12-14 sessions of cognitive behavioural psychotherapy and psycho-education."

[56] The defendant tendered the report of Dr. Spivak dated May 2, 2022. He assessed Ms. Valencia on April 27, 2022.

[57] Dr. Spivak commented that, based on his review of the plaintiff's history and medical treatment, she has developed depressive symptomatology as a result of not being able to pursue her vocations and not being able to do any form of work because of her pain. He stated that the symptoms she describes "would be compatible with a diagnosis of a major depressive disorder." He further noted that the plaintiff's preoccupation with her pain and its impact on her life was compatible with a somatic symptom disorder with predominant pain diagnosis.

[58] In terms of causation, Dr. Spivak stated that, "[t]o the extent that her pain could be attributed to the indexed collision, one can thus see commensurate contributions from the indexed collision to her psychological symptoms. She does describe other factors that could be [a] contribution to her symptomatology."

[59] In terms of recommendations and prognosis, Dr. Spivak noted that the plaintiff has trialled only one antidepressant, contrary to Dr. Vallabh's opinion that suggested trials of alternate medications should the antidepressants prove to be insufficient. He states that the plaintiff "would benefit greatly from seeing a psychotherapist to work on her pain management as well as her depressive

symptomatology." He also states that "trialling alternate medications and also psychotherapy would be appropriate interventions and in regard to psychotherapy, could be seen as a primary intervention, given the nature of her symptoms."

[60] Dr. Spivak states that his prognosis is guarded. He states that the plaintiff:

> presents as an individual who has been fairly depressed for several years, which is substantiated by both her mental status examination as well as the contemporaneous documentation. There is potential for further improvement, given that she has not received appropriately targeted treatment thus far and has otherwise had limited intervention in the face of ongoing pain and limitations. With more appropriate intervention, including trials of alterative medications (i.e. duloxetine and potentially adjunctive medications, as suggested by Dr. Vallabh) and with the addition of psychotherapy, there may potentially be room for further improvement. Until such interventions are trialled, it will be difficult to comment upon her prognosis with any certainty. However, to the degree to which she will continue to experience chronic pain, one would expect there to be commensurate challenges around her mental health if one sees her symptoms as being driven by her pain.

B. Chronic Pain

[61] Dr. Armstrong is a complex chronic pain expert. He assessed the plaintiff on April 20 and 22, 2022. In terms of her overall condition and level of recovery, he stated:

> Ms. Valencia presented a chronic condition with physical, mental, emotional, cognitive, spiritual, social, and behavioural dimensions. Based on my assessment of Ms. Valencia (paragraphs 48-53), it is my opinion that, in comparison to her condition as I have understood it to be before the MVA (paragraphs 39-44), my understanding of the MVA itself (paragraph 46) and her course after the MVA (paragraph 47), her functional recovery (paragraph 54) has been significantly incomplete, indicating she is likely in the 10-15% group of individuals (paragraph 55) who have sustained complex injuries with physical, mental, emotional, cognitive, spiritual, social, and/or behavioural complications and follow a course of delayed or incomplete recovery after an MVA owing to a variety of possible causes (paragraph 56). Her complex headache and chronic pain disorders have been perpetuated by sacroiliac joint dysfunction, malalignment syndrome and by her generally distressed state. At nearly seven years post-MVA, Ms. Valencia's condition has resulted from more than a "minor injury" and carries a poor prognosis.

[62] He noted that at the time he assessed her, the plaintiff was "not participating in any rehab activities". He also noted that the plaintiff "had a history of recurrent,

non-traumatic low back pain" and noted the complaint of two months of pain recorded by Nurse Practitioner Middagh on December 19, 2013.

[63] Dr. Armstrong opined that the Accident was the cause of her conditions, including her mental, emotional, cognitive, spiritual, and social distress. The dynamics and progression that led to the condition he found arose from the forces she encountered from the Accident. Dr. Armstrong describes the circumstances this way:

> In my opinion, the flexion, extension, and/or rotational forces and the torque applied around her lap belt were likely sufficient to overload and injure respectively the soft tissues of Ms. Valencia's spinal axis/para-axis and SPR [spinopelvic ring], causing (a) an acute axial and para-axial myofascial disorder and (b) the initiation of bilateral, posterior spinopelvic ligamentous and anterior sacroiliac joint capsular strain that led to sacroiliac joint dysfunction and, sequentially thereafter, to SPR instability and SPRD [spinopelvic ring distortion], initially with pain down the back of her right leg (as seen in the ORPC pain diagram, drawn by Ms. Valencia on August 10, 2015), likely a result of right-sided sciatic nerve entrapment by initial shortening of her right piriformis muscle. The myofascial disorder became chronic, owing to the malalignment syndrome that evolved from sacroiliac joint dysfunction and SPRD. In the absence of soft tissue healing and with her persistence in daily activities, including rehab where her care was not targeted to her primary problem, there had likely been persistent and worsening stretch of the anterior sacroiliac joint capsules and posterior spinopelvic ligaments responsible for form closure at the sacroiliac joints. Progressive sensorimotor inhibition and pain avoidance behavior resulted in deconditioning that increasingly weakened the musculature responsible for force closure at the joints. As a result of the MVA, it is my medical opinion that Ms. Valencia has been experiencing complex headache and chronic pain disorders, owing to a chronic myofascial disorder that has been maintained by SPRD and the malalignment syndrome, these conditions having been complications of sacroiliac joint dysfunction, itself the main cause of mechanical and spinal loading pain in her low back. It is my medical view that, absent the MVA, Ms. Valencia would not have developed the current conditions, including her mental, emotional, cognitive, spiritual and social distress, I found her to have.

[64] In terms of prognosis, Dr. Armstrong opined that, absent additional, appropriate, and successful rehabilitation and counseling, Ms. Valencia will continue to experience reduced physical capacity owing to complex headache and chronic pain disorders related to a chronic myofascial disorder, SPRD, malalignment syndrome and core weakness, which are rooted in her underlying chronic sacroiliac joint dysfunctions. Additionally, if she continues to have emotional and cognitive

distress, sleep poorly, abide by cognitive distortions and misbeliefs, and adopt pain avoidance behaviours, her pain experience and recovery will continue to be adversely affected. Dr. Armstrong stated that it is not possible to say for certain what her final capability will be before she undergoes the recommended counseling and rehab program.

[65] He stated her ultimate prognosis will depend on the outcome of her additional rehab and counseling and, for the time being, it is not possible to predict how much improvement, if any, she might obtain. The outlook for whether she can recover to her level of functions as it would be today, but for the MVA, is very guarded. He stated that, given the passage of time to date, further recovery is unlikely.

[66] Though he expresses a very guarded prognosis, he states that at the time he saw the plaintiff she had not previously been comprehensively diagnosed or treated, and he was therefore of the view that she "had possibly not yet reached maximum medical improvement and could have further rehab potential to return her closer to her pre-MVA conditions." His recommendations are as follows:

(a) An individualized program of rehabilitation to address her chronic myofascial disorder, her unrecognized and untreated sacroiliac joint dysfunction and malalignment problems, and her core weakness;

(b) Minimization of any future naturopathic, chiropractic, manual, massage or manipulative treatment, or other forms of passive treatment if such modalities are, in any way, to the exclusion of or interfering with focused, diagnostically driven, active therapy;

(c) Accessing a more senior physiotherapist experienced in treating sacroiliac joint dysfunction, SPRD and malalignment syndrome;

(d) A gym membership with supervised exercise program;

(e) Accessing a walking program using a pedometer after consulting Dr. Shortt;

(f) Counselling with a Spanish speaking clinical psychologist familiar with personal pain, stress and disability management for about fifteen one-hour sessions; and

(g) Limited volunteer work to assist in her de-isolating and re-establishing social connectivity.

[67] If the rehabilitation work does not yield positive results, then he indicated that the plaintiff could possibly be a candidate for ancillary remedies, all of which are invasive, including injections, lateral branch blocks, radiofrequency ablation, and prolotherapy.

C. Orthopedic Evidence

[68] Dr. Tarazi is an orthopedic surgeon. His independent medical examination report is dated May 1, 2019. He examined her on the same date. Just prior to his appearance at trial, he was provided by plaintiff's counsel with more recent documents regarding the plaintiff which he had reviewed. He maintained the opinions contained in his report.

[69] He opined that, in respect to the plaintiff's musculoskeletal complaints in the neck, back, and left shoulder, the pain is likely chronic and will continue on a permanent basis with the potential for some further modest improvement with further rehabilitation and the passage of time. He opined that the Accident caused multiple musculoskeletal injuries to the plaintiff.

[70] Dr. Tarazi opined that the Accident caused cervical and thoracolumbar myofascial soft tissue strains of moderate severity which led to the suffering pain in her neck and whole back. The neck pain has radiated down to her left shoulder and arm, and her lower back pain has radiated down to her lower extremities. He found that the plaintiff had pre-existing spondylosis, but that the spondylosis in her neck and back were asymptomatic prior to the Accident. He opined that the Accident aggravated her spondylosis to the point that it became painful prematurely and its future rate of progression has most likely been accelerated.

[71] He opined that the plaintiff had bilateral carpal tunnel syndromes prior to the Accident which were asymptomatic and that the Accident aggravated her conditions to the point where the left carpal tunnel syndrome became symptomatic. He stated that absent the Accident, her carpal tunnel syndrome would likely have continued to be asymptomatic until now and for many years to come. He also stated the Accident caused her left wrist strain.

[72] Dr. Tarazi declined to opine on the plaintiff's headaches and depression, as they were beyond the scope of his practise and expertise. He did state that it was common for patients to complain of headaches in combination with neck injuries, which are often referred to as cervicogenic headaches.

[73] With respect to right knee pain, Dr. Tarazi stated that the plaintiff's knee injury and associated pain pre-dated the Accident and was not aggravated by the Accident.

[74] In terms of income earning capacity, he opined that the plaintiff's goal of opening a beauty salon is not viable; she is no longer suited for that line of work because of her musculoskeletal injuries.

[75] Dr. Tarazi reported that, on a 10-point pain severity scale, the plaintiff indicated that, depending on her physical activity:

(a) Her neck pain can be up to 8;
(b) Her back pain can be up to 10;
(c) Her left shoulder pain can be up to 10; and
(d) She no longer has pain in her left hand.

[76] In terms of household activities, Dr. Tarazi stated:

> Ms. Valencia will continue to need her family members' help for the household cleaning. Repetitive/sustained bending to vacuum, mop floors or clean the bathrooms will be quite difficult. If her family members were not able to help her anymore, she would likely need to hire help on an ongoing basis.

[77] He recommended conservative therapy for her. He stated such therapy tends to resolve myofascial soft tissue strains to the neck and back over six to nine months. Some take longer and others may never fully recover. As mentioned, Dr. Tarazi opined that the plaintiff's condition is chronic. He noted that at the time the plaintiff appeared quite deconditioned.

[78] In terms of recreational pursuits, Dr. Tarazi recommends the plaintiff remain as active as she can within her pain limits. He recommends riding a stationary bike and swimming, as they are non-weightbearing and low-impact activities. He also recommends that she lift small weights, within her pain limits, to help her with overall muscle strength and endurance.

[79] For her back and neck, he recommended: continuing with conservative therapy; starting an exercise program directed by a physiotherapist or kinesiologist on a weekly basis over the next year; attendance at a gym on a regular basis to work on her cardiovascular system; lifting small weights, within her pain limits; trigger point injections on a biweekly injection for the next 12 to 18 months to control her pain so that she can exercise further; and using anti-inflammatory medications such as Celebrex or Naprosyn on a regular basis over the next one year to control her pain.

V. FUNCTIONAL CAPACITY ASSESSMENT EVIDENCE

[80] The plaintiff tendered the report of Mr. McNeil, dated May 4, 2022, regarding the cost of future care and functional limitations.

[81] The conclusions regarding the plaintiff's overall work capacity was that she would not be capable of working in occupations in the "heavy physical", "medium physical", and "light physical" demand categories.

[82] In regard to light work, the report states that:

> 87. She would be restricted in her capacity to perform the prolonged (frequent) standing requirements of light work and she would require accommodations to pace herself over the course of the work day.
>
> 88. She would be restricted in her capacity to perform occupations in the category that required static and dynamic vertical reaching (above shoulder

> level). She would be restricted in her capacity to perform occupations in the category that required static horizontal reaching (below shoulder level). She would require accommodations and would be restricted in her capacity to maintain a productive work pace, depending on the work.
>
> 89. There were restrictions in her tolerance to perform repetitive manual manipulation using her left hand and she would require accommodations to manage pain and altered sensation, and would be restricted in her capacity to maintain a productive work pace, depending on the work.
>
> 90. She would be restricted in her capacity to perform work in this category that required static or dynamic spinal positioning such as bending (trunk flexion), twisting, looking down, and looking up and she would require accommodations which would adversely affect her productivity.
>
> 91. She is able to achieve a crouched position and she was able to obtain a kneeling position.
>
> 92. Overall, she would not have the capacity to obtain a productive work pace even with accommodations and she would not have the capacity to compete for work in the open job market.

[83] The occupations that fall within the "light physical" category include hairstylist, hairdresser, cosmetologist, esthetician, manicurist/pedicurist, and nail technician.

[84] In terms of sedentary work, the report states:

> Ms. Valencia is capable of short periods of sedentary activity; however, she is not capable of sustained productive work in occupations that fall within the sedentary physical demands characteristics. She will struggle with work intensive sitting combined with prolonged static spinal positioning and reaching. Although she is able to sit, even with accommodations she would be unable to maintain work intensive postures.
>
> 85. Overall, she did not demonstrate the capacity to maintain sedentary work even with accommodations and would not be able to maintain a competitively employable work pace. Further, the need for accommodations would adversely affect her ability to compete for work in the open job market.

[85] In terms of her pain during the assessment, the plaintiff described her pain pre-testing and post-testing:

> 290. **Reports of Pain**: The following chart outlines changes in pain throughout the assessment according to the pain scale outlined in *Appendix G*.

Area of Pain	Pre-testing pain level	Post-testing pain level
Headache	3/10	4/10
Neck Pain	3/10	4.5/10

Area of Pain	Pre-testing pain level	Post-testing pain level
Upper Back Pain	3/10	4.5/10
Left Wrist Pain	2/10	3/10
Lower Back Pain	3.5/10	5.10

291. **Summary of Reports of Pain/Physical Restrictions**: In my opinion, Ms. Valencia's reports of pain and ongoing physical restrictions were generally consistent with her measured and observed abilities.

[86] The functional scale used by Mr. McNeil is set out below:

ACTIVITY LEVEL	PAIN LEVEL
5 = Unable Could not perform any task due to Pain Limited Strength Limited Mobility Limited Endurance	10/10 = Emergency Medical Attention
	8-9/10 = Near Hospitalization Not getting out of bed
	6-7/10 = Just resting Cannot do any more activity
4 = Severely Restricted Able but almost unable to perform a task due to Pain Limited Strength Limited Mobility Limited Endurance **Unable to work**	5/10 = Very Disabling Pain Causes great difficulty moving or applying any strength through the painful area. You are almost unable to complete a task.
3 = Moderately Restricted Able but restricted due to Pain Limited Strength Limited Mobility Limited Endurance Could be breaking frequently, resting, avoiding positions, avoiding tasks, avoiding the use of a body part	4/10 = Pain causing moderate restrictions or difficulty performing a task at home ad it is questionable you could work: it depends on the situation and on you.
2 = Slightly Restricted Able to perform usual tasks and work but there may be restrictions due to Pain Limited Strength Limited Mobility Limited Endurance You may have to stop a task for a moment to stretch or rest, but you can work and continue with any activity.	3/10 = Slightly Functionality Disabling Pain Pain is starting to affect your ability to perform an activity. There may be some decreased movement, decreased speed, and/or brief rest breaks or changes in position may be required to stretch.

ACTIVITY LEVEL	PAIN LEVEL
1 = Able No restrictions performing any task or work	0.25 to 2/10 Non-disabling pain. Pain may be present but not yet at a level that limits you during any activity. 0 = No pain

Note: *It should be noted that pain reports may vary from day-to-day, may vary depending on the activity and exact biomechanics of the activity, and/or may vary during testing depending on pre-testing pain levels.*

[87] I discuss cost of care later in these Reasons.

VI. ECONOMIC EVIDENCE

[88] The plaintiff tendered the report of Mr. Steigervald in support of her claim for past and future income loss. Mr. Steigervald also provided cost of future care multipliers that indicate the present value of each $1,000 of care costs incurred annually from the trial date onward. These multipliers are adjusted for discounting at 2.0% per annum, as required under the *Law and Equity Act,* R.S.B.C. 1996, c. 253.

[89] In terms of income loss, Mr. Steigervald produced two tables for the estimation of income.

[90] In Table 1, he provided a past and future income projection for a B.C. female, born outside Canada, whose highest education level is a high school diploma. In this case, the plaintiff's earnings (and pattern of earnings with age) are based on average earnings data for B.C. females with similar educational attainment to that of the plaintiff.

[91] In summary, Table 1 estimates $245,490 for the past period and $370,780 for the future period.

[92] In Table 2, he provided a projection of past and future income, assuming the plaintiff would earn income at the hourly minimum wage rate in B.C. which prevailed in the past period. For the future period, he relied on a wage rate of $15.65/hour, the minimum hourly wage rate in B.C. effective June 1, 2022. To estimate full-time

full-year income, he assumed 40 paid hours per week, and work/pay for 52 weeks per year.

[93] In summary, Table 2 estimates $151,345 for the past period and $240,434 for the future period.

[94] The defence tendered the responsive report of Mr. Sergiy Pivnenko. His conclusions are summarized as follows:

> 1. Based on the foregoing, Mr. Steigervald's Table 1 likely overestimates Ms. Valencia's absent accident earning potential.
> 2. The outcome of Table 2 provides a more realistic approximation of Ms. Valencia's earning capacity, which is consistent with her background. Possible understatement of earnings in Table 2 due to a constant wage rate assumption (see Mr. Steigervald's paragraph 26, page 6), is likely offset by the overstatement of earnings due to the application of above average participation rates and understated unemployment risks.

VII. FINDINGS

A. Credibility/Reliability

[95] The defence submits that there are credibility and reliability concerns with the plaintiff, which impact the key issues in this case.

[96] A helpful statement on this topic has been set out by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether

> a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; R. v. S.(R.D.), [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 (*Farnya* at para. 356).

[97] The difference between credibility and reliability is that credibility has to do with a person's veracity, while reliability has to do with a person's ability to accurately observe, recall and recount events in issues. A witness who is not credible on a point is not reliable.

[98] After considering the plaintiff's language barrier, the limitations of receiving testimony through an interpreter, and her health conditions, there were several aspects to her evidence, when taken collectively, which left me with concerns with the reliability of her evidence. Other aspects of her evidence were simply too thin. I found her evidence to be uneven overall and I have taken this into account in determining her claims.

[99] Aspects that have led to my reservations with the plaintiff's recollection of events include the following.

(a) Her testimony on the courses she took in Colombia and how she came to be eligible for some of those courses was vague and inconsistent. At one point, she said she was eligible for a course because her mother had worked at the organization that sponsored the course, which then qualified her to take the course; however, at another point, she stated that her mother did not work at the organization.

(b) While she provided some documentation — including certificates she received for courses taken in Colombia — she provided no documentation regarding her employment, her income, her finances, and her activities. I would have thought there would have at least been some photographs of her window advertisements of her in-home business, of her

providing service to customers, or a portfolio of her work as a stylist.

(c) She denied having health issues prior to the Accident. However, it is clear from the history she herself recalled to health professionals that she had prior back, arm, and hand problems and had injured her right knee.

(d) She testified that her husband had left Colombia for the United States in 1999; however, in her affidavit in the family proceedings, she deposed that he had left in 2003.

(e) She testified that her husband had immigrated to Canada in 2004, but in her affidavit in the family proceedings, she stated that he had “crossed into Canada” in 2008.

(f) In her affidavit, she deposed that her husband had left Colombia to seek a higher standard of living; at trial, she stated he had to leave because of the threats against his life.

(g) She stated that it was her husband who sponsored her and the children to immigrate to Canada and that he had a corresponding obligation to support them; yet, immediately upon her arrival to Canada, she applied for social assistance.

(h) She described her relationship with her husband as wonderful, yet she had been in a relationship with another man in Colombia prior to coming to Canada and she was aware prior to her arrival that her husband was involved with another woman.

(i) She spoke positively of her husband, yet revealed that just prior to coming to Canada, she had received word from another person that he had threatened physical violence against her. She said that when she arrived in Canada, she made a complaint through a social worker to the police and obtained

some form of restriction against her husband attending her and the children's residence.

(j) Her evidence regarding her understanding that a spousal support order was limited to three years was not persuasive, in light of the fact that she had a Spanish speaking lawyer assisting her, as well as the explicit language of the court order.

(k) She testified that she had separated from her husband in 2014, but in her affidavit, she deposes that the specific date of separation was September 30, 2013.

(l) She stated that she applied for and received CERB on the basis that she understood it was for disability payments was not persuasive. I note she was already receiving disability benefits under the Persons with Disabilities government program.

(m) Her explanation of why she did not disclose her son's criminality and involvement with the criminal justice system to her psychiatrist — specifically, because she only went to express how she herself was feeling — was unconvincing. It is understandable that it would be a matter of shame or embarrassment; however, this then raises the question of other matters not being disclosed.

(n) An essential element for a worker in her field would be a portfolio record of photographs of her work, showcasing her talents. None have been produced.

(o) Her denial of descriptions of her various complaints reflected in the clinical notes of care providers or treatments were not convincing and caused me doubt as to her recall.

(p) Her denial of not having worked as a cleaner after the Accident was questionable. I find her explanation of her work history in Canada to be vague overall, including her testimony of working

only one day as a cleaner in 2018. Though not determinative, the evidence of Dr. Wells is that, in 2017, he found her with tendinitis/overuse syndrome which he described as repetitive strain or overuse. This runs contrary to the plaintiff's evidence of limited activity and work post-Accident.

(q) She told Dr. Armstrong that her parents separated when she was eight years old. Dr. Vallabh's report states the plaintiff told him that she did not know her father, as he left her mother while she was pregnant.

[100] My reservations as to the plaintiff's reliability finds support in the comment of Dr. Armstrong in his report:

> Where there was any inconsistency between Ms. Valencia's account and the Documents, I have relied on the latter to minimize the impact of her memory attrition in forming my opinion. Even with the assistance of the interpreter, Ms. Valencia was a vague and, at times, a tangential historian. Making allowances for the MVA having occurred nearly seven years ago, I found her recall seemed poor.

[101] I have taken the forgoing into account, particularly in determining the nature and extent of her injuries, including the level of potential improvement from the Accident and in terms of quantification of damages.

VIII. NATURE AND EXTENT OF INJURIES FROM THE ACCIDENT

[102] The claims of the plaintiff have raised issues with respect to causation and pre-existing conditions. In terms of causation, a defendant is liable for any injuries caused or contributed to by his or her negligence. As stated in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17, there can be a "myriad of other background events which were necessary preconditions to the injury occurring. … As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions…"

[103] In terms of pre-existing conditions, the evidence leads me to find that the plaintiff's health included pre-existing conditions, namely back pain from degeneration of her lower spine and congenital sacralization. The medical notes of historical back pain and treatments, including injections and physiotherapy, over the years prior to arriving in Canada, and her severe back pain to the point of tears for two months in 2013 as recorded by Nurse Practitioner Middagh, support this finding. My finding is also supported by the plaintiff's evidence of using a pillow between her knees while in bed for years prior to the Accident, which Dr. Armstrong agreed could be because of back pain.

[104] I also find that the plaintiff was symptomatic of arm and wrist pain due to carpal tunnel syndrome prior to the Accident. I am not persuaded that the Accident caused her carpal tunnel syndrome. The medical evidence suggesting that the Accident caused her carpal tunnel syndrome, in my view, does not negate the weight I attribute to the evidence of her difficulties with her arm and hand prior to the Accident. In my view, the plaintiff likely had pre-existing symptomatic carpal tunnel syndrome which over time progressed to a level that required surgical intervention. My view is that the plaintiff more likely than not had engaged in cleaner type work which caused the progression. I note here the plaintiff reported to Dr. Wells that her pain did not arise from trauma to the area. Further, Dr. Wells on examination diagnosed tendinitis/overuse syndrome, which he described as caused by repetitive strain or overuse. Dr. Armstrong's view that an electrodiagnostic test would have been the diagnostic tool of choice if carpal tunnel syndrome was suspected by Dr. Chow does not negate the existence of carpal tunnel syndrome. It is the plaintiff's symptoms at the time that I take into consideration here.

[105] I find that the issues with her right knee pre-date the Accident and any pain she has experienced since the Accident was not aggravated by the Accident.

[106] I find that the Accident aggravated her symptomatic back pain.

[107] The pain in her upper back continues but has diminished. The pain in her mid-back has subsided, although her lower back pain continues to be of concern.

[108] I am also of the view that the plaintiff's congenital sacralization and pre-existing significant osteoarthritis has a real likelihood of affecting the plaintiff's physical capabilities with increased pain, regardless of the Accident.

[109] I also find that the plaintiff was and is vulnerable psychologically. The evidence of Dr. Armstrong and Dr. Levin refers to the plaintiff's background factors in this regard. These are both pre-accident and post-accident factors, such as her being raised by a single parent, the violent environment she lived in for years, the specific threats of violence targeted against her husband and his son, the threat of violence against her by her husband, adjusting to a new country, culture and language, her son's involvement in crime and his incarceration, the loss of a romantic relationship, and her divorce and lack of financial support, in addition to her pre-existing health conditions.

[110] I find that she now suffers from major depressive disorder and experiences some symptoms of somatic symptoms disorder with predominant pain, as reported by Dr. Levin. These conditions were caused or contributed to by the Accident. The evidence shows that her depression varies from little effect to severe.

[111] While there are other aspects in the plaintiff's life that are contributing stressors, as argued by the defendant, including those I have mentioned, and while the plaintiff did not reveal certain factors in her background to Dr. Levin, along with the candid comments of Dr. Levin that the nature of the examinations were short and limited in exploring the source of her condition and that further clinical explanation could reveal a source, the Accident does not have to be the sole contributor of the injuries at issue: *Athey v. Leonati*. In my view, the injuries she suffered are the stressors to her persisting depression.

[112] I find that her plantar fasciitis was caused by the Accident in the manner described by Dr. Armstrong. I note that this condition has been treated and is under control.

[113] In respect to weight gain, the plaintiff has claimed she was “thin” prior to the Accident; however, the clinical notation of Nurse Practitioner Middaugh was that she was obese. I have more confidence in the observations of Ms. Middaugh, and I find the notation reflects what was more likely the case at the time of the Accident. While I find some weight gain is likely a result of the Accident, the evidence of the amount of weight gained has not been established.

[114] Though the injuries suffered by the plaintiff have had a serious impact on her life, the evidence of Dr. Levin, Dr. Spivak, Dr. Tarazi, and Dr. Armstrong leads me to the view that the plaintiff has not, at this point, reached maximum medical recovery, and that, with the treatment and programs identified in the expert reports, improvement can occur in terms of capability and pain condition. I am cognizant that the opinions are guarded and refer to limited improvement. However, my view of the evidence and observations of the plaintiff over several days is that greater improvement than claimed by the plaintiff can be made with the help of therapy, treatments, medication, counselling, exercise and other items of care provided for in this decision. My view is that the plaintiff is more resilient mentally than claimed. At the same time, I recognize that the plaintiff has vulnerabilities to depression, a contingency which I discuss later.

[115] I note that Dr. Tarazi says that the plaintiff was quite deconditioned when he saw her. In my view, with proper instruction and supervision, there is a greater likelihood for conditioning to improve, which will likely reduce the level of pain she experiences with benefits to her mental health. Accordingly, the assessment of non-pecuniary damages will reflect this.

[116] Having determined the nature and extent of the plaintiff’s injuries from the Accident, I turn to quantification of damages.

IX. DAMAGES

[117] The general principle is that damages are intended to put the plaintiff in the position she would have been in, but for the defendants’ negligence, as far as money can. Damages should not put the plaintiff in a better position.

[118] The exercise involves determining the plaintiff's position before the negligent act and what it would have been absent the act, before determining the plaintiff's position after the negligent act. It is the difference in the two that is assessed in terms of damages. In determining the original position, the finder of fact should consider the reflection of any debilitating effects of a pre-existing condition, or a measurable risk that such a condition would have detrimentally affected the plaintiff in the future regardless of the defendant's negligence.

X. GENERAL DAMAGES

[119] The purpose of an award for non-pecuniary damages is to compensate the plaintiff for pain, suffering, and disability as experienced to the date of trial and as will be experienced into the future. The award is intended to permit the plaintiff to substitute other life amenities for those lost as a result of the defendants' negligence. The amount of an award for non-pecuniary damages is determined by a functional approach that does not depend exclusively on the gravity of the injury. Rather, it depends on the ability of the award "to ameliorate the condition of the victim considering his or her particular situation": *Lindal v. Lindal*, [1981] 2 S.C.R. 629.

[120] Awards made in other cases involving similar circumstances and injuries provide guidance. However, each case requires an assessment on its own specific circumstances — no two personal injury cases are identical: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.

[121] The plaintiff seeks an award under this head an amount in the range of $175,000 to $200,000.

[122] The cases offered in support of the plaintiff's position are: *St. Jules v. Cawley*, 2021 BCSC 1775; *Balint v. Lewandowski*, 2021 BCSC 1316; *Redmond v. Krider*, 2015 BCSC 178; and *Noftle v. Bartosch*, 2018 BCSC 766.

[123] The defence submits that an appropriate award under this head is an amount in the range of $60,000 to $85,000.

[124] The cases in support of the defence's position are: *Morgan v. Allen*, 2017 BCSC 1958; *Cheema v. Khan*, 2017 BCSC 974; *Khudabux v. McClary*, 2016 BCSC 1886, aff'd in 2018 BCCA 234; *Wiebe v. Wiebe*, 2018 BCSC 1062; *Wolford v. Shalakoff*, 2017 BCSC 2043; and *Ho v. Eccles*, 2021 BCSC 244.

[125] The defence also asserts that the plaintiff had pre-existing conditions that serve to reduce the award of damages. The two cases relied upon in this case to that effect are *Ho* and *Cheema*.

[126] Assessments under this head are guided by many factors. A non-exhaustive list is provided in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. These include: (i) age of the plaintiff; (ii) nature of the injury; (iii) severity and duration of pain; (iv) disability; (v) emotional suffering; (vi) loss or impairment of life; (vii) impairment of family, marital and social relationships; (viii) impairment of physical and mental abilities; (ix) loss of lifestyle; and (x) the plaintiff's stoicism (which should generally not detract from the award).

[127] In this case, the plaintiff has suffered since the Accident, which occurred over seven years ago. She is presently 54 years old.

[128] Prior to the Accident, the plaintiff had a normal, active life, and was involved in activities such as dancing, preparing food, and listening to music with friends. She is now limited to short and low intensity walks. The plaintiff formerly enjoyed spending time with her family and friends, but now she finds less joy in this and is embarrassed by her physical and psychological state.

[129] My view of the authorities handed up is that loss suffered by the plaintiff are more similar to those reflected in the plaintiff's cases. The impact of her psychological injuries operates more prominently in this case than those cited by the defence. I also note that most of the defence cases did not involve psychological injury caused by the collision.

[130] However, I take into consideration the pre-existing conditions which I have found and the real and substantial possibilities regardless of the Accident. The

evidence also leads me to find that the plaintiff is capable of more than has been argued and that, with the items for care provided for in this decision, her condition as a result of the Accident is likely to improve.

[131] In the result, I award $110,000 under this head.

XI. LOSS OF EARNING CAPACITY

[132] Damages sought under this head include both past loss and future loss. The assessment for each involves a consideration of hypothetical events. The applicable standard is whether there is a real and substantial possibility. It does not include speculation. The measure of damages is an assessment (as opposed to a mathematical exercise) of the likelihood of an event — the weighing of possibilities and probabilities of the hypotheticals.

[133] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, Justice Grauer described the approach as a three-step inquiry:

> 1. Whether the evidence discloses a potential future event that could lead to a loss of capacity;
> 2. Whether on the evidence there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and
> 3. If so, assess the value of that possible future loss which includes determining the relative likelihood of the possibly occurring.

[134] A loss may be quantified either on an earnings approach or on a capital asset approach.

[135] The defence submits that no award should be made for either past or future loss.

[136] The defence also submits that for any past loss damages, a deduction for CERB payments received and disability benefit payments is required to avoid double recovery. The plaintiff also seeks deduction of spousal support payments.

[137] On the issue of disability benefits, the plaintiff agrees that disability payments and social assistance payment should be deducted during the period she is awarded damages for past income loss.

[138] With respect to a future loss award, the plaintiff advises that if she receives a total damage award in excess of $100,000, she will not be eligible for disability benefits; thus, a deduction would not be required.

[139] With respect to benefits received under the CERB program, the plaintiff acknowledges that she did not qualify for the benefits and will have to return the payments received. The plaintiff submits that no deductions should be made for this. In my view, no deduction is necessary given the concession that the funds will be returned by the plaintiff. I will expect her counsel to facilitate this.

[140] In respect to the defence submission that spousal support should be deducted from the damage award, I am not convinced that such a deduction is appropriate. Though requested, neither defence nor plaintiff provided authorities on this topic.

[141] In the context of tort claims, collateral benefits are contributions or benefits, other than court-awarded damages, to a plaintiff's financial or physical well-being. Generally, where a plaintiff receives a collateral benefit assisting in the compensation for a loss, double recovery is not permitted, subject to certain exceptions. This engages broader policy considerations.

[142] Depending on the circumstances, collateral benefits are dealt with by allowing the double recovery, by deducting the value of the benefit from damage awards, or by reimbursement by the plaintiff to the third-party provider of the collateral benefit. Reimbursement may be effected by subrogation, the imposition of a trust or direction

for repayment, the creation of a statutory right of action by the third-party against the tortfeasor, or as a result of conditional benefits.

[143] In *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, the Supreme Court explained the collateral benefits exception as follows at para. 32:

> [32] In the tort context, the collateral benefits rule assists in fixing an award of damages. As a general rule, the compensation principle holds that an injured person should be compensated for the full amount of his or her loss but no more: *Ratych v. Bloomer*, 1990 CanLII 97 (SCC), [1990] 1 S.C.R. 940, at p. 948. Thus, some benefits received by an injured person as a result of the tort are deducted from a damages award in order to prevent overcompensation. However, the collateral benefits rule is an exception to this general principle. At common law, the collateral benefits rule acknowledges that it would be unfair to allow the tortfeasor to benefit from the insurance held by the plaintiff because he or she has paid premiums for the eventuality: *Parry v. Cleaver*, [1970] A.C. 1 (H.L.); *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1.

[144] An analogous argument can be made with respect to spousal support received by the plaintiff prior to the receipt of a damages award.

[145] Pursuant to s. 161 of the *Family Law Act*, S.B.C. 2011, c. 25, the objectives of spousal support are:

- to recognize economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- to relieve any economic hardship of the spouses arising the breakdown of the relationship between the spouses; and
- as far as practicable, to promote the self-sufficiency of each spouses within a reasonable period of time.

[146] Spousal support, while treated as income, is in effect a compensation payment for consequences arising from the breakdown of a marriage or marriage-

like relationship. In a sense, a spouse's contribution to the marriage or marriage-like relationship is consideration provided for the benefit (i.e., spousal support).

[147] The difference between damages for loss of income and spousal support was discussed by Justice Wilson in *Liapis v. Keshow*, 2021 BCSC 502 at paras. 248 to 249:

> [248] Damages for loss of income, whether by a court order or settlement, are focussed solely on the impact of the underlying event, often a tort or a breach of a contract, on the person's income. The purpose of a damages award is to put the plaintiff in the position they would have been in but for the negligence of the defendant (or breach of contract). The focus is solely on the plaintiff's loss — the economic circumstance of the defendant plays no role.
>
> [249] Spousal support has a very different purpose and is intended to relieve a party from the economic consequences of the breakup of a marriage. It involves an analysis of the economic circumstances and prospects of both parties, not only the recipient. As a result, the considerations are very different. A plaintiff who advances a claim for loss of income must prove the loss. By contrast, someone who is entitled to receive spousal support may not have lost any income at all.

[148] If a plaintiff is married or in a marriage like relationship of at least two years, there would be no deduction for the income of the plaintiff's spouse when considering the plaintiff's damages, although the spouse's wages would be available for their support. The effect of deducting the spousal support received by a plaintiff from an award for past wage loss, would effectively penalize a plaintiff for their separation, in addition to potentially shifting the burden of a plaintiff's decreased earning capacity resulting from an accident to the plaintiff's former spouse.

[149] I note that an award of damages for past loss of income may be considered in retroactive awards and variation of spousal support: *Miolla v. Miolla*, 2018 BCSC 2295 at paras. 33 to 36.

[150] Further, a payor former spouse may be able to argue that the plaintiff's receipt of a damage award for past income loss is a material change of circumstances requiring a variation in spousal support: see e.g., *Perry v. Fujimoto*, 2011 ONSC 3334 at para. 67.

[151] The plaintiff's entitlement to spousal support is not connected to the defendant's breach or tort. The receipt of spousal support, in my view, does not factor into the determination of damages for past loss of income.

[152] I also note an award of damages for past loss of income is "excluded property" under s. 85 of the *Family Law Act*, and thus not divisible as property between spouses.

[153] The plaintiff's income since arriving in Canada, as reflected in her income tax materials, is as follows:

Year	Income	Note
2013	$2,261	(Social Assistance)
2014	$6,693	(Social Assistance)
2015	$7,135	(Social Assistance)
2016	$7,195	(Social Assistance)
2017	$7,755	(Social Assistance)
2018	$9,035	(Social Assistance)
2019	$14,760	(Persons with Disabilities)
2020	$37,260	($20,000 CERB and $17,260 Persons with Disabilities)

[154] I now then turn to past loss and then future loss.

XII. PAST LOSS OF INCOME EARNING CAPACITY

[155] The plaintiff is claiming under this head from mid-2018 only. The claim here is for $115,057.80 in net past wage losses.

[156] The plaintiff argues that in the absence of the Accident, the plaintiff would have completed her English courses and obtained the certification necessary to obtain employment in the fields of esthetics and hairdressing by mid-2018. In support of this was her testimony that she did such work for many years in Colombia. She also produced certificates for courses in cosmetology, esthetics and pizza-making. She stated that there were additional certificates but they were not produced. She stated that she put up signs at her home to advertise her beauty and

cosmetology business around 1997. She stated she would straighten hair, dye hair, apply makeup and do nails. Further, in the absence of the Accident, the plaintiff would have been able to pursue other avenues to earn income such as housecleaning.

[157] The plaintiff's claim of $115,057.80 is based upon a 2016 Statistics Canada census chart for females born outside of Canada with a secondary school diploma or equivalent certificate. The chart shows the average employment income for an esthetician, electrologist, and related occupations as $31,173. For a light duty cleaner, the average employment income as $32,314.

[158] The plaintiff submits that since it was her intention to pursue work as an esthetician or hairdresser, she multiplied $31,173 by four years plus one month (i.e., June 30, 2018 to August 2, 2022), and then adjusted for taxes of 10% to arrive at $115,057.80.

[159] The defendant argues that the plaintiff has not established this loss. It is submitted that the plaintiff has failed to demonstrate a real and substantial possibility that, but for the Accident, she would have pursued a career in esthetics and hairdressing and/or other realistic options available to her. However, the defence notes that, should a loss, past or future, be found, then the loss should be assessed on the capital asset approach using one- or two-years income as a measure. In this regard, the defence submits that the only useable evidence to value loss is the plaintiff's work as a cleaner, and that the hourly wage should be the $10-$13/hour that the plaintiff says she received for that work.

[160] The evidence of the plaintiff's work history in Colombia and in Canada is thin. There are no documents evidencing her work or personal income. While we have some certificates she obtained in Colombia, in various areas, there is no evidence of photos or documents of the plaintiff's work or her being engaged in it. A hairdresser or beautician would normally have some type of portfolio of their work. One wishing to do such work in Canada would have brought such a portfolio. All that was presented at trial was a photo taken in Canada in 2020 or later of some cosmetics

and related items such as a blow dryer, brush, curling iron and files said to have been brought from Colombia for her work. I cannot distinguish the things in the photograph with what could be normally found on a woman's makeup table for personal use. Though the plaintiff described her work in Colombia in esthetics and hairdressing, her daughter stated that her mother retired from that line of work and took up being a vendor of merchandise such as clothing, magazines, and women's accessories.

[161] My sense of the evidence is that the plaintiff worked predominantly as a vendor for much of the years prior to coming to Canada; and this is the line of work she was engaged with in the years leading up to her immigrating to Canada. In Canada, prior to the Accident, there is little evidence of the plaintiff having made serious inquiries of qualified people in the business regarding the required steps to be a hairdresser or an esthetician. There is evidence that the plaintiff spoke to someone in a hair products store; however, the plaintiff had no knowledge of the identity of that person. There is no evidence that she has tried to provide hair dressing or esthetician services for pay on an ad hoc basis, such as out of her home, prior to the Accident. In terms of opening her own beauty salon, there is no objective or independent evidence of steps taken to follow through with this. The plaintiff, upon arrival in Canada, had the assistance of a social or settlement worker who provided her, among many things, with information and transportation to job interviews for different lines of work. The evidence does not indicate inquiries being made or interviews for jobs in a hair or beauty salon. There is only evidence that the plaintiff has worked as a house cleaner for payment. I am of the view that income for cleaning and housekeeping would be the appropriate proxy to assess damages.

[162] Another aspect of this claim is the plaintiff's reliance on Table 1 Projected Earning for British Columbia Females with a high school diploma or Equivalency Certificate (born outside Canada). I find the report overestimates the income loss of the plaintiff. I find the response comment in the defendant's economic expert's report to be persuasive in this regard:

> Full-time full year earnings values in Table 1 were derived from a reference group of immigrants of Ms. Valencia's age which predominantly includes those who have at least one of the following characteristics: English skills sufficient for competitive employment, immigration to Canada at a young age, Canadian educational and/or professional credentials, and experience in Canadian labour market. In economic literature these characteristics are proven to have a strong positive correlation with immigrants' employment incomes (for more information please refer to the Appendix). Facts of the matter suggest that Ms. Valencia does not possess any of these characteristics and that her potential full-time full year earnings are below average.
>
> Past labour force participation rates in Tables 1 and 2 are assumed at 100%. Future rates in Tables 1 and 2 (and in the "economic" multipliers in Table 4) are assumed to be above average. I note that Mr. Steigervald states no factual basis to support these assumptions.
>
> I understand that Ms. Valencia's involvement in labour force participation in her home country is unclear. Since arrival in Canada (2013) and before the accident date (July 28, 2015), she had not worked and received social assistance payments. In the absence of employment history that demonstrates Ms. Valencia's strong and persisting attachment to the labour force Mr. Steigervald's assumption of above average participation rates is not appropriate. Application of average participation rates would have substantially reduced the outcomes of Tables 1, 2 and 4.
>
> Given Ms. Valencia's extended absence from the labour force, lack of Canadian education and experience, and insufficient English language skills, the application of average unemployment rates in Tables 1, 2 and 4 would likely understate her risks of unemployment.

[163] In his conclusion, Mr. Pivnenko states:

> The outcome of Table 2 provides a more realistic approximation of Ms. Valencia's earning capacity, which is consistent with her background. Possible understatement of earnings in Table 2 due to a constant wage rate assumption (see Mr. Steigervald's paragraph 26, page 6), is likely offset by the overstatement of earnings due to the application of above average participation rates and understated unemployment risks.

[164] Another aspect in assessing this claim is determining contingencies; the real and substantial possibilities and their weightings. Though requested, neither the plaintiff nor defence addressed this aspect in a case specific way. I am left to do what I can with the evidence in gazing into a crystal ball. In this case, the impact of the global pandemic and its impact cannot be ignored. In this province, there was a province-wide health order restricting activities in a vast number of areas, including the activities sought by the plaintiff, for an extended period. English classes were

also suspended, thus impeding the plaintiff's ability to complete those courses. Work during much of the period of restriction was unavailable or severely restricted. Instructional and training courses would have been severely curtailed. An adjustment for this is required. I also adjust downward that the work would not be full-time during this period. I further adjust for the fact that the plaintiff contracted COVID-19 and was severely affected during the subject period. Finally, given her vulnerability and stressors outside of the Accident, there existed a real and substantial likelihood that depression such as she has now been diagnosed with which would have impacted her earning capacity.

[165] Taking all of the foregoing into account, I award for loss under this head $35,000.

XIII. FUTURE LOSS OF INCOME EARNING CAPACITY

[166] I turn now to future loss of earning capacity. The plaintiff seeks $305,607.

[167] This figure is premised on a plan to pursue a career in esthetics and hairdressing (or, alternatively, housecleaning). Ultimately, the plaintiff planned to operate her own business. It is submitted that given her work history in Colombia and ambitions in Canada, there is a substantial possibility that the plaintiff would have been successful in her future career had she not been injured in the Accident.

[168] The plaintiff submits that the average of the two scenarios in the income projections — namely, for a BC female with a high school diploma or equivalent certificate born outside of Canada of $370,780 and a BC resident working full time for a full year at minimum wage of $240,434 — is a realistic estimate of the plaintiff's future income loss. The average is the aforementioned amount.

[169] The plaintiff relies upon her own testimony as to the career she was intending to pursue in Canada. The evidence of Dr. Tarazi, Dr. Armstrong, and Mr. McNeil, in respect to her condition and her ability to perform work in the field of hairdressing, related work, and other work options, and recreational activities, are also relevant.

[170] As mentioned, the defendant argues that the evidence is uncertain as to whether the plaintiff would have successfully completed her English program; that there is no evidence that the level of English she had identified as her goal is required for her to engage in the field of esthetics; that her work history in Canada is vague and that it only relates to work as a cleaner; that her evidence as to the hourly wage she earned was inconsistent; and that there are credibility concerns with her testimony, such as the undeclared income she earned, receiving social assistance benefits while earning cash income, and fraudulently applying for and receiving CERB benefits. It is submitted that the plaintiff has not demonstrated that there is a real and substantial possibility that, but for the Accident, the plaintiff would have pursued a career in esthetics and hairdressing and/or other realistic options available to her. However, if a loss under this head is found, then the defendant argues that the loss of a capital asset approach should be used and that negative contingencies regarding the labour market should be taken into consideration. In the alternative, if a loss for past and future is found, then the defendant submits that the only evidence available to the court to use as a basis for determining loss of capacity is the plaintiff's work as a cleaner. The plaintiff testified that she received $10 to $13 per hour.

[171] I have reservations as to whether the plaintiff would have, but for the Accident, advanced to setting up her own beauty salon business. I also have reservations that she required English at the level she was seeking in order to enter into the esthetic or hairdressing business. There are contingencies based on the evidence that require reflection in this assessment. I find that there is a real and substantial possibility of the plaintiff entering into the field of esthetics and hair dressing; however, the weighting is on a much lower side, as the evidence of her work in the area in Colombia is thin as well as the absence of serious inquiries and actions in Canada. I also adjust for periods of work that would not be full time. My assessment is then $260,000. I next reflect the real and substantial possibility that the plaintiff's earning capacity could be negatively affected by the plaintiff's pre-existing spine condition and carpal tunnel syndrome at 15%. These conditions would have a more than insignificant impact on her activities as a cleaner and

hairdresser or aesthetician. I also reflect the real and substantial possibility of the plaintiff recovering sufficiently from her depression and physical injuries to participate in the work force at 15%. I further reflect a real and substantial possibility of the plaintiff being rendered unable to work because of the occurrence of depression at 10% regardless of whether the Accident having occurred given her vulnerabilities as discussed earlier.

[172] I am not persuaded that the capital asset approach to loss of capacity is appropriate in this case, given the plaintiff's condition from the Accident that I have found. My sense is that the nature of the injuries that have arisen from the Accident have income effects that are greater than the one- or two-years loss of income that typically results from the application of the capital asset approach.

[173] Taking into consideration the contingencies, recognizing that anyone identified is variable but that in total the effect appears fair, and adjusting the assumptions discussed above, an appropriate amount for the loss under this head is $156,000.

XIV. LOSS OF HOUSEKEEPING CAPACITY

[174] The plaintiff has pleaded compensation under this head, but did not provide a submission under this head except in reply to the closing argument of the defendant. The defendant submitted that the plaintiff had not established a loss under this head and argued that to the extent the plaintiff is limited in her ability to perform any housekeeping tasks, such limitation is more in the nature of loss of amenities and pain and suffering, and more appropriately compensated as part of the non-pecuniary damages.

[175] In response, the plaintiff argues that the she has discharged her burden regarding her need for necessary household services through the evidence of the functional capacity evaluation and cost of future care expert report, which sets out her need for household assistance based on objective test results.

[176] In my view, while I find that there is some loss of capacity, the report of Mr. McNeil indicates she has the capacity to perform lighter household chores. The circumstances here favour the loss as being part of the award for general damages.

XV. FUTURE COST OF CARE

[177] The plaintiff seeks $400,230.17 under this head.

[178] An award under this head is to provide for assistance, equipment, and facilities directly related to a plaintiff's injuries and that may reasonably be expected to be incurred. There must be medical justification but not medical necessity. Where an expense would have been incurred in any event, no award is to be made. Regard is to be taken as to whether an item will likely be acquired. Specific contingencies are to be reflected on a real and substantial possibility basis. General contingencies are to be reflected on a modest basis. The exercise here is an overall assessment and not a mathematical calculation. An award must be reasonable, moderate, and fair to the parties.

[179] The plaintiff relies upon the opinions of Dr. Tarazi, Dr. Levin, Dr. Armstrong, and Mr. McNeil. The amount sought is comprised of $32,478.98 of one-time costs, and $367,751.19 of annual/ongoing costs (including $818.90/year for medications) using a lifetime multiplier of $23,431 for every $1,000.

[180] Before moving on, there appears to be an error in the plaintiff's application of the lifetime multiplier. The plaintiff relies upon Table 5 from Mr. Steigervald's report that calculates the multipliers. The difficulty I have is that when I look at the table, the multiplier used by the plaintiff of $23,431 relates to the age 108. The life expectancy of the plaintiff in the report is estimated at 32.6 years. That would have the plaintiff reaching the age of 87 years. Table 5 shows that the applicable life multiplier is $21,580. In my view, this figure is the appropriate multiplier. If, I am incorrect, the parties are to advise me. The amount sought would then be $417,508 plus $32,479, which equals $449,987.

[181] Mr. McNeil's report makes cost of care recommendations as follows:

> **A. Pain Management:**
>
> a. Body Pillow: Full body pillow, such as the 5' Long Body Pillow that contours to the body's shape to relieve pressure areas causing less need for tossing and turning from Costco at a cost of $49.99 plus applicable taxes to be replaced every 2 years.
>
> b. TENS: Given the ongoing pain with physical restrictions, she would likely benefit from using a portable TENS unit for non-analgesic pain manage. A TENS unit can be purchased for varying costs ranging from $45.00 to $90.00 on Amazon.ca and would need replacing in 5 years.
>
> c. Heated Vest: While at work she would likely benefit from using a heated vest that will apply neck and back heat throughout the workday in order to assist her to manage pain. For example, the Dhapy vest from Amazon.ca for $73.99 and would need to be replaced every 3 years.
>
> **B. Homemaking Assistance:**
>
> Ms. Valencia should have the capacity to perform lighter household chores although she will need to pace herself to manage pain. While not working she should be encouraged to perform housework as a means of therapeutic exercise.
>
> However, in combination with working, I would recommend 2 hours of homemaking assistance weekly (52 weeks per year) in order to allow for deep cleaning and manage pain as well as allow her to participate in other activities outside of work. Typically services such as Molly Maid or We Care will charge on average $34.50 per hour for cleaning with a minimum one-hour call out, for a total yearly cost of $3,588.00 ($34.50/hr. x 4 hrs. x 52 wks.).
>
> Despite this recommendation for assistance, Ms. Valencia would still be required to remain active and perform lighter household chores throughout the week.
>
> **C. Seasonal Cleaning:**
>
> As a means to manage pain and limited activity tolerance while also assisting her to balance her activity tolerance, I would recommend assistance with heavier seasonal cleaning. I would recommend 16 hours per year (8 hours twice per year) for heavy seasonal cleaning chores. Services such as Molly Maid or We Care will charge on average $28.50 per hour for cleaning for a total yearly cost of $552.00 ($34.50/hr. x 16 hrs).
>
> **D. Rehabilitation/Health Related Costs:**
>
> Given the language barrier, any rehabilitation attempts and support will be difficult to implement. She will either need Spanish speaking therapists or she will need a translator with her particularly with counselling sessions and pain management session.

Translator: On average a Translator will charge $45.00/hr, although it is possible she could find a friend of service that may provide services cheaper. If she had 3 hours of service per week to attend sessions for a period of 1 year, anticipated cost would be $7,020.00.

Community Occupational Therapy: In my opinion, Ms. Valencia would benefit from sessions with an OT to address cognitive and behavioral pain management strategies. These sessions would take place at home or work and would review ways she may be able pace herself in order manage ongoing pain and reduce biomechanical strain.

I would recommend at least 24 sessions over a one year period. Sessions would typically be 60 minutes and would focus on cognitive/behavioral management strategies. On average an OT will charge $116.00/hour (ICBC scheduled rate). Travel time would be charged at $116.00/hour and there would typically be 1 hour travel. Total estimated cost (48 hours) would be $5,568.00 ($116.00 x 48 hrs.).

Exercise Equipment: Having some equipment that she can use at home would be beneficial.

a. Stability Ball: A stability ball such as the 85cm J-Fit will cost $69.95 at Walmart and will need to be replaced every 3 years.

b. Yoga Mat: I would suggest the Aeromat Yoga Mat Y14-2472 from Patterson Medical at a cost of $26.39 plus tax and will need to be replaced every 3 years.

c. Light weights: I would recommend the Tone Fitness Dumbbell Package from Walmart at a cost of $39.98 plus tax with no replacement cost.

d. Resistance Bands: I would recommend the Black Mountain Resistance Band Kit from Walmart at a cost of $62.66 plus tax and will need to be replaced every 3 years.

Kinesiologist: While Ms. Valencia should be encouraged to exercise independently, it would be beneficial to have an exercise routine reviewed and demonstration of home exercise equipment provided under the direction of a kinesiologist or physiotherapist.

On average Kinesiologists will charge $84.00/session (ICBC Scheduled Rate). Assuming that she attended 24 sessions, which would not be uncommon, the cost would be $2,016.00. I will defer to her physician or medical specialists to determine the ongoing need for the service.

Massage Therapy, Physiotherapy, and Chiropractic Care: It would be beneficial to provide ongoing passive modalities to help manage periods of exacerbated pain.

On average Massage Therapists will charge $110.00/session for general 60 minute treatment ($83.00 ICBC scheduled rate) and if Ms. Valencia accessed 12 sessions per year the total yearly cost would be $1,320.00. I will defer to the medical specialists for the number and frequency of sessions.

> On average a physiotherapist will charge $90.00/session (ICBC Scheduled Rate $81.00/session). It would not be uncommon to recommend 12 sessions per year resulting in a cost of $1,080.00. I will defer to her family physician or medical specialist to determine the ongoing need for service.
>
> Psychologist (Counselling): Given her reports, she would likely benefit from support and sessions with a psychologist.
>
> On average a psychologist will charge $225.00/session ($202.00 ICBC scheduled rate). I will defer to her specialist and/or the psychologist.

[182] The plaintiff's charts summarizing the one-time and annual costs are below:

One-time costs

Treatment	**Description**	**Cost**
Community Occupational Therapy	24 sessions	$5,568.00
Light Weights		$39.98
Kinesiology Treatments	24 treatments	$2,016.00
Physiotherapy Treatments	12 treatments	$1,080.00
Gym Pass - First year fee		$300.00
Prolotherapy		$5,000.00
Pain Management Program		$15,000.00
Psychologist Treatment	15 treatments	$3,375.00
Pedometer	24 sessions	$25.00
Sacral Belt		$75.00
Total		**$32,478.98**

Annual costs (frequency adjusted):

Treatment	**Cost**
Body pillow	$25.00
Tens	$13.50
Heated Vest	$24.66
Homemaking assistance	$3,588.00
Seasonal Cleaning	$552.00
Translator	$7,200.00
Stability ball	$23.32
Yoga Matt	$8.80
Resistance Bands	$20.89
Massage Therapy	$1,320.00
Gym Membership	$2,100.00
Medication	$818.90
Total	**$15,695.07**

[183] The defendant submits, with reference to Mr. McNeil's report, the following cost of future care items are not reasonably required as they are not supported by the medical advice or not causally related to the accident: body pillow; TENS; heated vest; weekly homemaking; seasonal cleaning; translator; community occupational therapy; stability ball; yoga mat; light weights; resistance bands; kinesiologist; massage therapy; physiotherapy; chiropractic care; and psychologist counseling.

[184] The defendant submits, with reference to page 8 of Dr. Levin's report, that the following recommended items by Dr. Levin are not expenditures which are likely to be incurred by the plaintiff:

- Cipralex, at least 20 mg per day;
- Clonazepam; and
- Cognitive behavioural psychotherapy, 12 to 18 treatments.

[185] The defendant refers to Dr. Levin's report dated May 30, 2019, in which it is recommended that Ms. Valencia undergo 12-18 sessions of cognitive behavioural psychotherapy with a focus on more adaptive coping strategies. He recommended that she optimize her dose of Cipralex to at least 20 mg once a day and trial clonazepam 0.5 mg for her ongoing experiences of insomnia and persistent anxiety symptomatology. The defendant notes that to date the plaintiff has not undertaken any of Dr. Levin's recommendations and submits that the plaintiff has not undertaken in any passive or active treatment since 2019. The defence urges that if a plaintiff has not used a particular item or service in the past, it is inappropriate to include its cost in a future care. The plaintiff's reply is that the plaintiff has not been able to afford a translator. I am not persuaded that a Spanish speaking psychiatrist could not have been accessed.

[186] In the alternative, with respect to mental health treatments, it is submitted that the plaintiff would have required these treatments in any event due to pre-existing anxiety noted by Dr. Chow and depression caused by marital and familial stress. That said, in view of the interrelationship between psychological factors and the

plaintiff's continuing pain-focused condition, the defendant accepts the treatment is reasonably required in part due to the Accident.

[187] The defendant further submits that Mr. McNeil's recommendations for a pain management program is not appropriate. The plaintiff advised the court that she is waiting to be seen by the Jim Pattison Chronic Pain Clinic, which is covered through MSP.

[188] The defendant submits, with reference to Dr. Armstrong's report, that the following recommended items are not reasonably required and further more they are not expenditures which are likely to be incurred by the Plaintiff:

- Analgesic medication to treat headaches;
- Treatment from a psychiatrist;
- Individualized rehabilitation program;
- Treatment from a senior physiotherapist, 18 initial treatments plus two treatments per month for up to one year at $75 to $100 per treatment;
- A sacral belt;
- A gym membership;
- A pedometer;
- Treatment from a psychologist;
- Multidisciplinary pain management program;
- Local anesthetic injections; and
- Prolotherapy, at a cost of $5,000.00.

[189] As a final alternative position, the defence submits that if an award is to be made, then $5,462.39 of one time costs; and $2,249.49 of annual treatment costs might be awarded. The total, they say, would be $58,170. The problem I have with the figure is that the multiplier of $23,431 is used. As mentioned earlier, that multiplier relates to the age of 108. Subject to correction the applicable multiplier in my view is $21,580. The resulting amount then is $54,006.

[190] As to medications, the defendant in closing submissions handed up PharmaCare (a provincial pharmacy benefits plan) charts that show benefits

coverage applicable to medications that have been referenced in this case: Gabapentin; Naproxen; Clonazepam, Cipralex, and Amitriptyline. The evidence of Dr. Armstrong also indicates that prolotherapy treatments are partially covered by the Medical Services Plan of B.C. I am also advised by plaintiff's counsel that if Ms. Valencia is no longer eligible for benefits under the person with disabilities program, she will no longer be eligible for PharmaCare coverage.

[191] As to the defence submission that the plaintiff advised that she was waiting to be seen by the Jim Pattison Chronic Pain Clinic, I have no note of this. However, there is an entry in a psychiatric consult report recommending a referral to a pain clinic. She was referred by Dr. Najafilarijani to a pain clinic in 2018. If further deductions or coverages are available for medications, treatments or pain clinic, the parties have leave to return to address adjustments to the award.

[192] In my view, the items sought by the plaintiff have been properly justified, except that I reflect a reduction related to the plaintiff likely not incurring the expenses (10%). I use a general factor here to reflect a combination of items such as psychological treatments, medications, gym membership, homemaking assistance, and occupational therapy in varying degrees. This is based on the evidence of the plaintiff having stopped using passive or active treatment modalities after 2019. There was little evidence as to the actions the plaintiff would take in respect to future care items. As well, I adjust for the real and substantial possibility that the plaintiff's condition may improve with her treatment and therapy and thus reducing the need for certain of the items at 15%. I also have reflected an adjustment for pre-existing conditions that would have necessitated the costs regardless of the Accident 15%.

[193] I further adjust the term for the need for a translator to five years, as in my view, the plaintiff by then should have a greater command of English.

[194] With the adjustment for the translator using the applicable multiplier and adjusting for the contingencies mentioned and recognizing that anyone is variable but that the total effect appears fair, I arrive at the figure of $192,387.

[195] To the extent that an adjustment for medications regarding deductions, the parties should return to address this issue.

XVI. SPECIAL DAMAGES

[196] An injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78.

[197] The plaintiff seeks $6,244.76 under this claim.

[198] This amount is comprised of charges for physiotherapy sessions at Pure Life Physiotherapy & Health Centre of $1,228 and Optimal Recovery Physiotherapy of $3,675, Shoppers Drug Mart for prescription medications of $131.93, and purchases of Tylenol and Advil of $1,209.83.

[199] The defence submits that a reasonable amount is $3,705. The defendant says that the plaintiff has been reimbursed for all but one Pure Life Physiotherapy receipt of $30. It also seems that the defence does not agree with the prescription medications or the non-prescription Tylenol and Advil purchased. There also seems to be a misunderstanding that the plaintiff has included a mattress purchase. This is not the case.

[200] Given my findings regarding the injuries of the plaintiff relating to the Accident, the items for which compensation is sought have been established as reasonable and justified. The amount submitted by the plaintiff reflects the reimbursement for Pure Life Physiotherapy and does not include an expenditure for a mattress. Accordingly, the amount sought by the plaintiff under this head is awarded, subject to any additional deductions which have been paid on behalf of the defendant.

XVII. FAILURE TO MITIGATE

[201] The defence submits that the plaintiff failed to take reasonable steps to mitigate.

[202] In *Rhodes v. Surrey (City)*, 2018 BCCA 281. At para. 56, the court stated:

> The test for failure to mitigate is set out in *Chiu v. Chiu*, 2002 BCCA 618:
>
> > [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] 1 S.C.R. 146.

[203] Put another way, if the plaintiff did not act reasonably, and had the plaintiff acted reasonably, there is a real and substantial possibility that the plaintiff would have reduced her damages. The degree of that probability that the loss would have been avoided is to be reflected in an award.

[204] In the present case, the defence argues that the plaintiff has failed to follow the medical advice and directives of medical experts and medical treatment providers, and that she had not undergone any modality of treatment since 2019.

[205] The plaintiff's response is that the she has been unable to afford the services of a translator to assist her in obtaining therapy, and, further, that the plaintiff has followed her physician's advice and undergone numerous treatments including surgery and painful therapeutic injections. She has also continued to take medications prescribed to her.

[206] In approaching this question, a plaintiff is not to be subjected to an overly critical standard of review.

[207] As per *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56, reasonableness is assessed on a subjective/objective test:

> [t]hat is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment."

[208] There are two aspects to the recommended course that the plaintiff did not pursue. They arise from the expert report of Dr. Levin requested by the plaintiff. The first is in relation to increased/optimization of Ciptralex and Clonazapam and the second is cognitive behavioural therapy.

[209] The plaintiff's decision to cease treatment modalities after 2019 and not to take up the recommendations of Dr. Levin contained in his report in 2019, a report sought and obtained by the plaintiff, is unfortunate. There is also evidence of a psychiatric consult report in 2018, referenced by Dr. Levin, which recommended a change in her medications. That recommendation was also not followed. The evidence of inability to find a Spanish speaking therapist was thin. While it is submitted that the plaintiff followed her physician's advice in the medications prescribed, surgery and other treatments, it is her mental health that features prominently in the condition she finds herself in. The failure to take up the recommendations was unreasonable. My view of the evidence indicates on balance that the effects of her injuries from the Accident would have been lessened had the recommended course been taken; which would then have allowed her to engage in more than an immaterial way in activities both personally and in work.

[210] In this regard, I reflect a 15% reduction in the total award.

XVIII. CONCLUSION

[211] From the foregoing, I have concluded that the plaintiff's injuries as discussed were caused by the Accident.

[212] My determination of damages are as follows, subject to any of the adjustments and deductions for which I have referred to (and others that would arise as a result of this decision):

	Item	**Amount**
(a)	General Damages:	$110,000
(b)	Loss of past earning capacity:	$35,000
(c)	Loss of future earning capacity:	$156,000
(d)	Cost of Future Care:	$192,387
(e)	Special Damages:	$3,705
		$497,092
(f)	LESS: Failure to Mitigate	($74,564)
	NET	$422,528

[213] The plaintiff is also awarded court ordered interest.

[214] If the parties wish to make submissions on costs, a requisition is to be made within 30 days of the issuance of these reasons. Otherwise, the plaintiff is awarded costs at Scale B.

"The Honourable Mr. Justice Masuhara"