IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dhillon v. Mansell,*
2024 BCSC 1080

Date: 20240620
Docket: M1812600
Registry: Vancouver

Between:

Amritpal Kaur Dhillon

Plaintiff

And

Neil Tochor and Ana-Elisa Mansell

Defendants

- and -

Docket: M1812601
Registry: Vancouver

Between:

Amritpal Kaur Dhillon

Plaintiff

And

Ravdeep Munday and Ravinder Munday

Defendants

Before: The Honourable Justice Stephens

Reasons for Judgment

Counsel for the Plaintiff:	M. Randhawa
Counsel for the Defendants:	N. Wignall
Place and Dates of Trial:	Vancouver, B.C. January 8-12 and January 23-24, 2024

Place and Date of Judgment: Vancouver, B.C.
June 20, 2024

Table of Contents

OVERVIEW

[1] The plaintiff, Amritpal Kaur Dhillon, was rear-ended in her car in two separate motor vehicle accidents, one on January 6, 2017 ("MVA #1"), and again on July 12, 2018 ("MVA #2"). Those two accidents gave rise to these two actions, which have been tried at the same time.

[2] Liability is admitted; the issue is what global assessment of damages should be awarded to the plaintiff due to the two accidents.

[3] At the time of MVA #1, the plaintiff was 38 years old and worked full-time as a manager in a jewellery store. Despite MVA #1, and MVA #2, she maintained her position at the jewellery store, with some work modifications, up to the trial.

[4] The plaintiff complains of headaches, pain, nausea, difficulty sleeping, low mood, and anxiety, as a result of the accidents, which interferes with her work and causes her to take time off. She contends that she suffered a mild traumatic brain injury ("MTBI"), and although she has worked through the pain she experienced and associated physical limitations, she is permanently partially disabled as a result of these two accidents. The plaintiff's claim for damages is approximately $730,000.

[5] The defendants contend that the plaintiff has worked full-time since the accidents, and has exaggerated her symptoms. To contest her claim, the defendants (among other things) rely on medical records which they contend are at odds with the plaintiff's subjective reports of her post-accident symptoms and evidence at trial. They also contend that portions of her claim for loss of earning capacity are unsubstantiated. The defendants contend that a potential damages award for the plaintiff is $126,553.

[6] I find that the two accidents did cause the plaintiff to have a MTBI, and that she experiences headaches and other neck and back pain, as well as low mood and anxiety, caused by these accidents. She sustained the MTBI and other physical injuries in MVA #1, and MVA #2 aggravated them. However, the plaintiff must be put in the position she would have been but for the accidents, no more no less. In

implementing that principle, I have considered the real and substantial possibility that the plaintiff's pain may improve in the future, although I assess this as a small possibility and apply a negative contingency of 10%.

[7] For the reasons that follow, the plaintiff is awarded damages as assessed at $520,217.60.

BACKGROUND

The Plaintiff's Pre-Accident Circumstances

[8] Before MVA #1, the plaintiff was an active mother of one child. She enjoyed swimming, hiking, and yoga. She had an active social life.

[9] The plaintiff moved from India to Canada in 1997. At the time, she had completed grade 12, and had completed one-and-a-half years in a Bachelor of Arts program in political science and history at a college in India. After moving to Canada, she took ESL classes and some other vocational courses.

[10] In 2000, she obtained full time employment at jewellery store in Victoria, British Columbia, where she worked until 2004 as a customer service representative.

[11] In 2004, she moved to Vancouver, British Columbia, and again obtained employment at a jewellery store as a sales representative. Her son was born in 2005.

[12] She subsequently returned to full-time work at a jewellery store in Surrey, British Columbia, working as a manager, where she worked until 2014.

[13] In 2014, she obtained employment in another jewellery store (Artic Canadian Diamonds) in Langley, British Columbia. At this store, she started as a sales representative, then became the assistant manager shortly after. This is where she worked at the time of MVA #1.

[14] At Artic Canadian Diamonds, she worked six days a week, consisting of four opening shifts and two closing shifts per week.

[15] The plaintiff was responsible for handling the jewellery; setting them up for display at opening and returning them at closing; conducting daily and periodic jewellery inventory checks; placing orders and training the staff; and cleaning. The work required physical lifting of boxes, reaching, and close reading and other work with jewellery, including diamonds. It involved physical manual work with boxes and small pieces of jewelry, as well as detailed record keeping, requiring close concentration at times.

[16] She did not experience physical limitations before MVA #1.

[17] I find that before MVA #1, the plaintiff worked hard, and was a responsible and reliable worker as a jewellery store manager.

The Plaintiff's Pre-Existing Medical Conditions

[18] Other than some occasional headaches, the plaintiff did not experience any significant pre-existing medical conditions before MVA #1.

[19] She did not experience difficulty sleeping.

MVA #1

[20] In MVA #1, the plaintiff was rear-ended in her car while stopped at a red light in Surrey, British Columbia, when coming home from work. She was wearing a seatbelt.

[21] She described the impact to be very hard. She described being jolted and her head hitting the headrest. She testified that she lost consciousness and vomited twice at the scene, though this is disputed by the defendants. She was taken to the hospital.

[22] The plaintiff took about a month-and-a-half off work, and then gradually returned to work. By April 2017, she had returned to regular hours at Artic Canadian Diamonds.

MVA #2

[23] In MVA #2, the plaintiff was rear-ended in her car while stopped at a red light in Surrey. She described this as a hard impact. She did not experience any loss of consciousness.

[24] She went home after the accident, but later testified that she experienced severe headaches and later went to the hospital.

[25] The plaintiff testified that she missed about an average of 20 hours of work per month after this accident, which reduced the amount of pay she otherwise would have earned. From August 2018 to the date of trial, she testified that she missed about two shifts per month.

The Plaintiff's Post-Accident Circumstances

Physical

[26] Immediately after MVA #1, the plaintiff experienced headaches and pain in her neck and back. She had jaw pain after MVA #1, but it stopped after approximately six months, and did not reoccur after MVA #2. She had some abdominal pain, but it resolved shortly after.

[27] In her testimony, she described the pain on top of her head, and that her head felt very heavy, and she said it was a 10 out of 10 for pain. She testified that these headaches continued with frequency and intensity after MVA #1, and up to the time of MVA #2.

[28] The plaintiff's testimony described with precision the degree of pain she felt and various periods of time up to the trial, sometimes down to a 3 or 4 (out of 10), sometimes 5 or 6, and sometimes to 8, 9, or 10. The same is the case for her testimony about her neck pain, which she describes experiencing almost daily, in a range of 3 or 4 to 7 or 8 out of 10, for example, from January 2019 to January 2024. Her description of middle and upper back pain, and low back and tailbone pain, which she says she experienced daily, was similar in the precision of her testimony.

[29] In general, her testimony describes MVA #2 aggravating the symptoms she had experienced after MVA #1.

[30] The plaintiff also testified that she experienced, and continues to experience, difficulty sleeping after MVA #1 and MVA #2. She describes having difficulty falling asleep, and experiencing broken sleep and being unable to feel fresh the following morning. At times, she gets up and puts on a heating pad or patches.

[31] The plaintiff also described a loss of short-term memory recall, starting shortly after MVA #1. She says that she forgets things at work. Although she testified that she has experienced some improvement since MVA #2, she still experiences some short-term memory loss once or twice a week.

[32] She testified that she has experienced nausea, and still has it four or five times a month. She testified that the nausea accompanies severe headaches.

[33] She describes feeling dizziness constantly in the first week after MVA #1, which then dissipated to once or twice a week, and continued after MVA #2. Subsequently, she does still experience dizzy episodes, which accompany severe headaches, including in the last year before trial. She also described ringing in the ears (tinnitus) which dissipated after MVA #2, but she still experiences it approximately four or five times a year. She testified that this accompanies headaches, and that it can stay for ten days when it happens.

[34] She testified that she has light and sound sensitivity. She testified that she experiences sound sensitivity at work, since there is a machine that triggers it. She testified that she experiences noise sensitivity once or twice a week.

[35] The plaintiff also complains of a loss of an ability to focus and concentrate since MVA #1. She says that she has difficulty focussing on projects at work. Over the last year, she estimates that this has occurred quite regularly, about three or four times a week. When she has difficulty concentrating (including when at work), she testified that she feels the need to disengage, go to a different room, or take a break;

while this has improved over time, she estimates that it happens once or twice a week in the last year.

[36] She testified to having a low mood, and negative thoughts, starting three or four months after MVA #1. Since MVA #1, she estimates that this occurs quite often, two to three times a week, and she manages it with medication. She also describes feeling irritable, which is still present but not as bad as it was after the accident (two times a week on average).

[37] She describes feeling anxiety, at times coupled with heart palpitations. She also manages this with medication, prescribed by her family physician.

[38] After MVA #1, she also experienced blurred vision. She thought that this had improved, but she testified that she still experiences this infrequently, about every two or three months.

[39] The plaintiff regularly takes Tylenol and Advil for the pain, continuing to the time of trial. In 2017 and 2018, she took these every day; in 2019, three to four times a week; in 2020, two to three times a week; and from 2023 to present, three to four times a week.

[40] She applies Voltaren gel and CBD oil to her upper shoulders, shoulder blade, and neck to address pain.

[41] In 2021, the plaintiff tried trigger point injections (“TPI”) in her upper neck, base of head, and upper shoulders, which she said provided temporary headache relief, but the headaches came back after three or four days. She stopped doing TPI subsequently for this reason, and also because she was being treated for an unrelated condition.

[42] The plaintiff took a class on chronic pain in 2021.

[43] Since MVA #1, the plaintiff has regularly consulted with her family physician. She has also done physiotherapy from January 24, 2017 to February 2019, and again returned once to her physiotherapist and chiropractor in 2022, in part because

of her pain, but then stopped since she considered that they were telling her nothing new and it was expensive for her to attend. She also began seeing a kinesiologist in 2019, but stopped later that year because exercises made her feel unwell, and she thought that it was triggering more symptoms. After seeing a physiotherapist, she continued to do a daily home exercise program, and did daily stretching.

Social and Recreational

[44] After MVA #1, the plaintiff stopped swimming because she found her back and neck pain level was high, and she felt anxious. She also stopped hiking for fear it would increase her pain level. She has also not continued doing recreational yoga in a studio, though does do a type of yoga at home.

[45] Her socialization is now very limited: she does not like crowds, and she also finds that she is tired after work and needs to rest.

[46] In addition, post-MVA #1, the plaintiff's ability to perform household chores, including cleaning, cooking, and shopping, is limited.

EXPERT EVIDENCE

The Plaintiff's Expert Witnesses

Dr. Mark Adrian – Physical Medicine and Rehabilitation

[47] Dr. Mark Adrian was qualified to provide opinion evidence as a medical specialist in the area of physical medicine and rehabilitation and qualified to give expert opinion evidence to the Court with respect to the causation, management, treatment, diagnosis and prognosis of musculoligamentous, musculoskeletal injuries, chronic pain and the functional impact and limitations associated with musculoligamentous, musculoskeletal injuries, and chronic pain.

[48] Dr. Adrian opined that the plaintiff experiences the following diagnoses:

1. Chronic mechanical neck, upper mid-back, mid-back, and lower back pain; and

2. Cervicogenic (neck-related) headaches.

[49] Specifically, he opined that the plaintiff "experiences clinical features consistent with a diagnosis of chronic (persistent) mechanical neck, upper mid-back, mid-back, and lower back pain," which he states was likely a result of an injury to her spine in MVA #1 (and aggravated by MVA #2). He states that his physical examination of her is consistent with such a diagnosis. He further states that the mechanical spinal pain implies that:

> … the source of the pain stems from the tissues of the spinal column. The tissues that can be injured and become a source of chronic (ongoing) mechanical spinal pain are the intervertebral discs; the spinal joints; and the soft tissue structures. In general individuals experiencing mechanical spinal pain experiences symptoms with activities that physically (mechanically) stress these tissues as occur with activities that Involve awkward spinal positioning; stooping and bending; and lifting and carrying. ….

[50] Dr. Adrian also opined that the plaintiff is unlikely to enjoy any further "meaningful improvement," and that her prognosis is poor and she is vulnerable to future injury:

> In Ms. Dhillon's situation, several years have elapsed since the accidents. The prognosis for further recovery of the injuries suffered to her spinal column into the future is poor. It is unlikely the injuries suffered to her spinal column will undergo progressive deterioration over time. Due to the injuries suffered in the accidents, her neck, upper midback, midback, and lower back are vulnerable to future injury.

[51] He further opined that the plaintiff will probably continue to experience difficulty performing activities that place physical forces onto the painful and injured structures involving her neck, upper mid-back, mid-back, and lower back, and that these limitations will likely continue into the future.

[52] Dr. Adrian opined that the plaintiff is "permanently partially disabled due to the Injuries suffered in the subject accidents."

Mr. Hassan Lakhani – Economic Evidence

[53] Mr. Hassan Lakani provided expert evidence with respect to multipliers for use in the calculation of loss of earning capacity and cost of future care.

Dr. Donald Cameron – Neurology

[54] Dr. Donald Cameron was qualified as an expert to provide opinion evidence as a medical specialist in the field of neurology and qualified to give expert opinion evidence to the Court with respect to the causation, management, treatment, diagnosis and prognosis of MTBI, post-traumatic brain injury syndrome, soft tissue and musculoskeletal injuries, and the functional impact and limitations associated with mild traumatic brain injury, post-traumatic brain injury syndrome, soft tissue, and musculoskeletal injuries.

[55] Dr. Cameron opined that the plaintiff "probably did suffer a brief altered state of consciousness or loss of consciousness at the time of" MVA #1. In his opinion, the plaintiff probably remained in a period of post-traumatic amnesia for several hours after MVA #1.

[56] In his opinion, the plaintiff "does fulfill the criteria to make a diagnosis of a mild traumatic brain injury (concussion) sustained at the time of" MVA #1. He further opined, among other things, that the plaintiff "probably did develop and continues to suffer with symptoms of post-traumatic brain injury syndrome following the accident."

[57] He opined that the plaintiff also "probably suffered soft tissue and musculoskeletal injuries at the time of the accident on January 6, 2017 [MVA #1] which were aggravated by" MVA #2.

[58] Dr. Cameron also opined that the plaintiff has been rendered partially disabled as a result of the accidents:

> Ms. Dhillon has been rendered partially disabled with respect to work capabilities, recreational activities, and her abilities with respect to housework chores due to the ongoing residual adverse effects of the mild traumatic brain injury (concussion) and the chronic pain that she has developed as a result of the soft tissue and musculoskeletal injuries that she sustained at the time of these two accidents.

[59] He further opined that she will probably also be "permanently partially disabled" as a result of the accidents:

> I have assessed Ms. Dhillon in September 2023, approximately 5 years since the second accident and 6-1/2 years since the first accident. Patients improve up to approximately two years following any type of physical injury including residual adverse effects of traumatic brain injury. It is my opinion that Ms. Dhillon will probably remain permanently partially disabled due to the residual adverse effects of the injuries that she sustained at the time of these two accidents.

Mr. Paul Pakulak – Functional Capacity

[60] Mr. Paul Pakulak was qualified as an occupational therapist and certified Work Capacity Evaluator, Functional Capacity Evaluator, and Cost of Care assessor qualified to provide expert opinion evidence to the Court regarding the plaintiff's abilities and limitations with respect to her overall capacity to complete functional activities, including her employment, and an assessment of her future cost of care needs.

[61] In his opinion, the plaintiff is "best suited for activities requiring up to light level strength," and that she "demonstrated functional limitations":

> …She demonstrated the strength sufficient for some load handling in the modified medium range but did not demonstrate the capacity to sustain that level of load handling. She demonstrated functional limitations specific to overhead work, prolonged and repetitive positioning of the neck and shoulders for work in front of the body, prolonged and repetitive bending, and prolonged standing. Given her response to testing (significant increases in pain levels during and following the testing and a reduction in work pace and capacity over the course of the assessment), it is anticipated that prolonged activity above a light level and/or without provisions for the above limitations will adversely impact her productivity.

[62] Mr. Pakulak further opined that the plaintiff's "overall ability to compete for work in an open job market is reduced due to her ongoing physical limitations."

[63] As to her current employment as store manager, he opined that the plaintiff "did not demonstrate the capacity to complete this work on a full-time basis at a competitive or sustainable level."

The Defendants' Expert Witnesses

Dr. Dhineskumar Sivananthan – Physiatry

[64] Dr. Sivananthan was qualified to provide opinion evidence as an expert in physiatry and physical medicine.

[65] Dr. Sivananthan characterized the plaintiff's presentation resulting from MVA #1 and MVA #2 as follows:

> 1. Cervical strain/sprain with chronic cervical myofascial impairment.
> 2. Thoracic strain/sprain with chronic thoracic myofascial impairment.
> 3. Lumbar strain/sprain with chronic lumbar myofascial impairment.
> 4. Post-traumatic headaches exacerbation of pre-existing headaches.

In his view, these injuries were the direct result of both MVA #1 and MVA #2.

[66] Dr. Sivananthan opined that the plaintiff sustained soft-tissue injuries and headaches following MVA #1 and these injuries were likely exacerbated following MVA #2.

[67] Dr. Sivananthan further opined that there were no musculoskeletal conditions identified that would limit the plaintiff's ability to complete her activities or instrumental activities of daily living. He similarly opined that there were no musculoskeletal conditions identified that would limit the plaintiff from completing the demands of her prior employment or any other career.

[68] Dr. Sivananthan's view is that the plaintiff's "overall prognosis at this point is best listed as guarded. The likelihood of complete resolution at this late date is unlikely."

[69] However, he opined that the plaintiff has the potential to improve her pain in the future:

> It is my opinion that Ms. Dhillon should focus on active core and back strengthening and stretching exercises rather than passive modalities and try neuropathic agents to manage her pain and headaches. She should also stretch regularly as the degree of taut bands in her neck and back are beyond what is expected at such late-stage post-injury. There may not be compete

> resolution in her chronic conditions, however one would expect further improvement. In addition, the degree of impairment reported is beyond what is expected. From a musculoskeletal perspective, there are no restrictions for Ms. Dhillon to return to her work and continue her work without any restrictions.

[70] Dr. Sivananthan provided treatment strategies "to minimize symptoms and maximize function within the parameters of her impairment state," including use of heat, active therapy, TPI, and physical conditioning. In his view, the plaintiff should undergo functional testing to determine ongoing barriers after completing an active program.

[71] Although Dr. Sivananthan did not keep notes of his conversation with defendants' counsel, and he testified that it was not his practice to do so at the time, I do not find that this detracts from his impartiality or the weight or reliability of the opinions in his report.

Dr. Alina Webber – Neurology

[72] Dr. Alina Webber was qualified to provide opinion evidence in the area of neurology.

[73] Dr. Webber opined that it is "at least possible" that the plaintiff experienced an MTBI in MVA #1. However, she opined that this is unlikely for MVA #2.

[74] Dr. Webber opined that it is "possible" that the plaintiff experiences post-concussion syndrome due to MVA #1, but that this is "unlikely."

[75] Dr. Webber opined that the plaintiff has probable whiplash or soft tissue injuries and probable headaches partly attributed to trauma or injury to the head and/or neck.

[76] In finding that a MTBI did not likely occur as a result of MVA #1, Dr. Webber relies on contemporaneous medical records which, in her view, do not substantiate the criteria for making such a diagnosis, most notably loss or altered state of consciousness post-accident.

[77] She opined that for MVA #1, a "concussion is at least possible but challenging to comment upon," since the version of events the plaintiff endorses differs from what was documented in initial medial records. She adds that "[h]er current history is not clearly supported by medical records."

[78] She states that "numerous healthcare providers documented there is no loss of consciousness on the day of the accident including the EHS, ER physician, and triage nurses." She states that a finding of concussion for MVA #1 would be based "primarily upon a subjective five minute history of confusion."

[79] However, in her view, "a concussion is very unlikely" for MVA #2.

[80] As to her prognosis, Dr. Webber opined that the plaintiff is currently able to work full-time, and she anticipated that this will likely continue. She opined that the plaintiff "is currently able to work full time, her disability is subjective and based upon pain alone, which with treatment could be optimized."

[81] Dr. Webber further opined that it is "likely [the plaintiff's] headaches attributed to trauma or injury to the head and/or neck"; and it is "much less likely that headaches attributed to mild traumatic injury of the head are contributing."

[82] In her view, the plaintiff meets the criteria for medication overuse headaches, stating:

> … [The plaintiff] endorses using Tylenol 3-4x/week, in addition to Advil. This is commonly associated with medication overuse headaches, and she meets the criteria for this as well. Headaches associated with regular use of analgesics can lead to chronic headaches that are often migraine-type in nature and challenging to distinguish from the primary headache type. I suspect it is possible this is also contributing to her headaches.

[83] Dr. Webber opined that the plaintiff's difficulty sleeping could possibly be due to sleep apnea, and recommends that it would be reasonable to screen for obstructive sleep apnea.

THE PARTIES' POSITIONS

The Plaintiff's Position

[84] The plaintiff submits that she continues to experience ongoing persistent physical pain symptoms, including neck pain associated with headaches, upper back pain, middle back pain, and low back pain. She further submits that she continues to experience ongoing psychological symptoms on a regular basis and has ongoing cognitive symptoms. She contends that her functional limitations are permanent and continue to affect her in all aspects of her life.

[85] The plaintiff seeks an award of $200,000 for non-pecuniary damages. She seeks an award of past loss of income from 2017 to the end of 2023 in the amount of $44,678.90; and future loss of earning capacity of $335,000 (based on a pre-accident age of retirement of 67 to 68 years of age, using an earnings approach). She further seeks an award of past loss of housekeeping capacity of $21,000, and cost of future care of $128,000. She also seeks special damages of $3,651.27. Her total claim is approximately $730,000.

The Defendants' Position

[86] The defendants take the position that the plaintiff's subjective complaints are inconsistent with her demonstrated record of work, which has essentially been full-time since some weeks off after MVA #1, and a shorter period off work following MVA #2. The defendants further contends that the plaintiff has demonstrated that she had the capacity to work a second job by briefly delivering Uber Eats with her son, and pursuing courses in early childhood education, although I find it unlikely, nor a real and substantial possibility, that she would be able to take on a second job given the symptoms she experienced due to her injuries. The defendants submit, in substance, that the plaintiff has overstated her pain and associated work and other limitations at trial.

[87] They submit that $80,000 would be a potential amount for non-pecuniary damages. The defendants did not advance a separate amount for loss of housekeeping capacity. Further, they contend that the plaintiff did not provide

verifiable wage loss documentation to establish the entirety of her claim for past loss of earning capacity. The defendants submit that the plaintiff has only clearly demonstrated lost wages of approximately $11,832 following MVA #1, and propose a total amount of $13,272 for past loss of earning capacity following MVA #2 up to the trial.

[88] The defendants further submit that the plaintiff has not demonstrated a real and substantial possibility leading to a loss of future income in the circumstances, and no award for loss of future earning capacity should therefore be made. Among other things, they argue that the plaintiff has demonstrated capacity for continuing full-time work following her two accidents despite her subjective complaints. The defendants submit that no amount of damages should therefore be awarded to the plaintiff for future loss of earning capacity. They also submit that $30,000 for the cost of future care would be sufficient for an active rehabilitation program and the more moderate medications for headaches without resorting to expensive Botox treatments. They agree to most ($3,281.54), but not all, of the special damages. The defendants advance a potential total award in the amount of $126,553.54.

[89] In their closing submissions, the defendants placed significant reliance on asserted inconsistencies between the plaintiff's testimony and certain of her medical records. However, I generally do not place great weight on any inconsistencies with these records, since medical records are not always reliable evidence of the existence, or non-existence, of injuries: *Edmondson v. Payer*, 2011 BCSC 118 at paras. 34–37, aff'd 2012 BCCA 114.

ISSUES

[90] The main issue to be resolved is the quantum of damages to which the plaintiff is entitled from the defendants as a result of MVA #1 and MVA #2. Liability is admitted; and the parties ask the Court to make a global assessment of the quantum of damages arising from both accidents.

[91] The issues in this case are:

(a) What amount of general non-pecuniary damages should be assessed?

(b) Has the plaintiff established entitlement to past loss of earning capacity, and, if so, what amount should be assessed under this head of damages?

(c) Has the plaintiff established entitlement to future loss of earning capacity, and if so, what amount should be assessed under this head of damages?

(d) What amount, if any, should be assessed for loss of housekeeping capacity?

(e) What amount, if any, should be assessed for cost of future care?

(f) What amount should be assessed for special damages?

(g) Should a contingency deduction be applied, and, if so, how much?

DISCUSSION

Credibility

[92] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), as follows:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on

> whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[93] Overall, I find that the plaintiff was an honest witness who tried to be accurate in her testimony. However, I have some concerns about the reliability of some of her evidence. She provided a degree of precision of her pain (on a scale of 1–10) going back over six years, including the frequency of experiencing certain symptoms per week, in a way which I find not to be plausibly accurate. The precision of her testimony with respect to her symptoms is contrasted with her evidence that she could not recall a meeting with her doctor less than one year prior in February 2023 (concerning her ability to work in the area of child education). I find that, in her effort to be helpful to the Court and give truthful evidence at trial, the plaintiff exaggerated the precision with which she could provide detail on certain matters concerning the degree of her pain and her symptoms, and this detracts from the reliability of her evidence.

[94] I find, however, that the plaintiff was substantially reliable in her testimony, particularly with respect to the limitations and symptoms she experiences at work. That said, my concerns about the reliability of her evidence are matters that I find go to the weight her testimony.

[95] The plaintiff's husband also testified. His evidence included his observations about the plaintiff which was generally consistent with the plaintiff's descriptions of her pre-accident lifestyle, as well as her post-accident symptoms and the associated limitation of her activities. Cross examination did not detract from the credibility and reliability of his evidence. I find the plaintiff's husband's evidence to be credible and reliable.

The Plaintiff's Post-Accident Circumstances

[96] The trial of this action commenced approximately seven years from the date of MVA #1, and approximately five-and-a-half years from the date of MVA #2.

[97] The plaintiff is currently 46 years old.

Findings Regarding the Plaintiff's Accident-Related Injuries

[98] I accept Dr. Adrian's evidence that as a result of the accidents, the plaintiff experiences chronic mechanical neck, upper mid-back, mid-back, and lower back pain; and cervicogenic (neck-related) headaches. Further, I accept his evidence that the plaintiff will more likely than not continue to experience difficulty performing activities that place physical forces onto the painful and injured structures of her body, and that the plaintiff is "permanently partially disabled due to the injuries suffered in the subject accidents [MVA #1 and MVA #2]" (a view which Dr. Cameron shares).

[99] Where there is disagreement between Dr. Adrian's and Dr. Sivananthan's opinion in these respects, I prefer the opinion of Dr. Adrian, who is the more experienced of the two experts. This does not mean, however, that I place no reliance on Dr. Sivananthan's opinion in my reasons, whose evidence I place some weight on (in part)—and I will return to this below when I assess contingencies.

Did the Plaintiff Experience Loss or Altered Consciousness After the Two Accidents? Did the Plaintiff Experience a MTBI?

[100] I further accept Dr. Cameron's evidence and find that the plaintiff experienced a MTBI as a result of MVA #1.

[101] I do not find that the plaintiff suffered a loss of consciousness in MVA #1, or that she vomited at the accident scene as she testified. This is at odds with a contemporaneous note of BC Emergency Health Services ("BCEHS") and a hospital triage assessment form on the day of the accident (both of which state a report of no loss of consciousness, and which do not record vomiting at the accident scene). Further, and as stated above, I am concerned with the reliability of the plaintiff's evidence, and this concern extends to this topic in particular.

[102] I do nevertheless find that the plaintiff experienced an altered state of consciousness immediately after MVA #1. Both the BCEHS note (which states she was confused and had disoriented vision immediately after the collision) and a hospital triage assessment form recorded that the plaintiff reported confusion soon

after the accident, which is consistent with her evidence. The existence of an altered state of consciousness is capable of grounding an MBTI diagnosis according to Dr. Cameron's evidence, which I accept in this respect.

[103] I further find, again in reliance on Dr. Cameron's evidence, that the plaintiff experienced symptoms of post-traumatic brain injury syndrome following MVA #1, as well as having suffered soft tissue and musculoskeletal injuries at the time of that accident.

[104] Dr. Webber was skeptical that the plaintiff experienced a MTBI in MVA #1. Where there are differences between Dr. Cameron's and Dr. Webber's evidence in this regard, I prefer Dr. Cameron's evidence. I found Dr. Webber to be a professional, knowledgeable and impressive expert witness. However, I find that Dr. Webber placed significant weight on the plaintiff's medical records, and less weight on the plaintiff's subjective reports. But instead, despite my concerns about the reliability of plaintiff's evidence, I find her evidence of her pain and related limitations post-MVA #1, and post-MVA #2, to be generally accurate. In this regard, I rely, in part, on the evidence of Mr. Pakulak, who opined that during his assessment, and through his testing of the plaintiff, that the plaintiff was trying, and not embellishing her physical limitations.

[105] I am also able to rely on circumstantial evidence to determine if, on a balance of probabilities, an injury or injuries occurred: *Davis v. Jeyaratnam*, 2022 BCCA 273 at paras. 55–58, 61–63. In making my findings as to the plaintiff's accident related injuries in these reasons, I rely on evidence that her employer has, since MVA #1, and subsequently, made accommodations to her work and made staffing changes to support her job duties as a response to her work performance. This is consistent with the plaintiff's evidence as to her pain and limitations while working, and consistent with the existence of the injuries which I have found.

ASSESSMENT OF DAMAGES

[106] In assessing damages, my task is to place the plaintiff in the position she would have been in if the defendants had not been negligent—no better or

worse: *Jenkins v. Casey*, 2022 BCCA 64 at para. 26, leave to appeal to SCC ref'd, 40203 (9 February 2023), citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 32–35, 1996 CanLII 183.

[107] First, I set out the principles informing damage quantification, as set out in the 2021 trilogy. Second, I assess non-pecuniary damages, loss of housekeeping capacity, past and future loss of earning capacity, cost of future care, and special damages.

Trilogy Principles: Hypothetical Future Events

[108] Where the quantification of losses from an accident involves a hypothetical future event or events, this Court's analysis is governed by the principles established in a trilogy of cases: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The trilogy consolidates earlier principles and is foundational for a proper analysis of quantification of personal injury losses: *Davie v. Hill*, 2022 BCSC 2074 at para. 94.

[109] In personal injury cases, a court is confronted not simply with what has happened in the past but must also assess a plaintiff's without-accident future prospects. The court is necessarily faced with an assessment of loss where the damages analysis is attended by hypothetical events.

[110] The organizing principle of damage quantification is to put the plaintiff in the same financial condition they would have been in had the accident not occurred. The court's central task is to compare the likely future of the plaintiff's working life if the accident had not occurred with their likely future working life after the accident: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 33, citing *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.

[111] At law, a hypothetical event may be taken into consideration if there is a "real and substantial possibility" of an event occurring, and not "mere speculation": *Grewal v. Naumann*, 2017 BCCA 158 at para. 48, Justice Goepel dissenting but not on this

point. A real and substantial possibility is a risk that is "measurable" on the evidence: *Dornan* at paras. 63–64; see also *Rab* at paras. 27–28. This standard of proof is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative: *Ploskon-Ciesla* at para. 15, citing *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

[112] Hypothetical events can be relevant to assessing contingency deductions: *Dornan* at paras. 62–64. A contingency deduction can be applicable to non-pecuniary damages, future earning capacity, or past loss of income: *Dornan* at paras. 143–145, 174–178. Hypothetical events are also relevant to assessing the existence and quantum of past or future loss of earning capacity: *Rab* at para. 28.

[113] Under *Dornan*, a proper analysis of a hypothetical event proceeds this way: first, what happened to the plaintiff in the past? This is assessed on a balance of probabilities standard: para. 94. Second, the court must consider what might happen to the plaintiff in the future. The trial judge need only consider the possibility of such events occurring if there is a "real and substantial possibility" (not mere speculation): paras. 63, 94. In doing so, the court can consider evidence of past facts proven on a balance of probabilities (paras. 94, 105) and common sense (para. 122). Finally, if the hypothetical event has a real and substantial possibility of occurring, the court must consider the relative likelihood of the possibility: paras. 64, 95, 105.

[114] The court must be mindful that the existence of a specific contingency must be proven on sufficient evidence "capable of supporting the conclusion that the outcome of the contingency is a real and substantial possibility, as opposed to a speculative possibility": *Lo* at paras. 51–52, 74–75, 77–79 (evidence not capable of establishing a measurable risk of a major depressive disorder occurring in future even without an accident); *Rab* at para. 50. This Court in *Pascuas v. Leung*, 2022 BCSC 1469, states: "It is not enough to say that because something happened once it could happen again; in the absence of a measurable risk arising on the evidence, that is a matter of speculation": para. 64, citing *Rab* at para. 76.

[115] An example of a negative contingency arises from a possibility that, even with an accident, a plaintiff's physical condition will improve in the future, permitting them to obtain higher paying work: *Gaughan v. Egersema*, 2023 BCSC 1579 at para. 136.

[116] A fundamental component of the plaintiff's claim is based on her contention that, without the accident, she would have worked as a manager in a jewellery store until age 67 or 68.

[117] As discussed below, I find that the plaintiff's hypothetical future work as a manager at a jewellery store should, at law, form the basis of her assessment of damages. However, a related issue is whether a negative contingency should be applied to account for the possibility that, in the future, her pain and limitations will improve relative from that at trial.

[118] In short, I must determine if a negative contingency should apply to any calculations made for the plaintiff's claimed heads of damages, and, if so, how much. I do so below.

NON-PECUNIARY DAMAGES

Legal Framework

[119] As summarized by Justice Horsman (then of this court) in *Kim v. Baldonero*, 2022 BCSC 167:

> [79] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those he will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39 [*Tisalona*].
>
> [80] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100 [*Stapley*], the Court of Appeal listed common factors influencing an award of non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. Generally, stoicism should not penalize the plaintiff.
>
> [81] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured in part against awards made in comparable cases. However, other cases only serve as a rough guide as each case must

> be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The amount of the award does not depend only on the seriousness of the injury, but rather also on the loss in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.
>
> [Emphasis added.]

Discussion

[120] The plaintiff seeks a non-pecuniary damages award of $200,000 based on *Antignani v. Heaney*, 2022 BCSC 228; *Wallman v. John Doe*, 2014 BCSC 79; *Carmody v. Druex*, 2022 BCSC 891; and *Steinlauf v. Deol*, 2021 BCSC 1118, aff'd 2022 BCCA 96.

[121] The defendants submit that a potential non-pecuniary award should instead be $80,000, relying on *Findlay v. Sun*, 2020 BCSC 1330; *Hinder v. Yellow Cab Company Ltd*., 2015 BCSC 2069; *Singer v. Guidi* 2023 BCSC 837; and *Lewis v. Rubboli*, 2018 BCSC 17.

[122] Having regard to the factors set out in para. 46 of *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), I find that:

(a) The plaintiff was 38 years old at the time of MVA #1;

(b) She suffered soft tissue injuries, an injury to her spinal column, and a MTBI and, as a result, has had, and continues, to experience mechanical neck and back pain, including after MVA #2, and other symptoms, such as headaches, dizziness, nausea, low mood, and anxiety;

(c) The pain has been severe at times, though she has worked through her pain and continues in the same job, though with some work modifications and accommodations;

(d) Her pain has, and will, impede her work performance and the quality of her life;

(e) The plaintiff experiences low mood and less desire to socialize with friends and family;

(f) Her ability to engage in pre-accident recreational activities, such as swimming and hiking, has been limited;

(g) Her ability to perform household tasks, including cooking, cleaning, and shopping, is limited;

(h) The plaintiff has been stoic and should not be penalized for that; and

(i) She will likely continue to experience diminished capacity to engage in work activities in the future, subject to my consideration of contingences – discussed below.

[123] Based on my consideration of the *Stapley* factors, and the cases cited by the parties, I consider that $180,000 (including for loss of housekeeping capacity), before any contingency reduction, is a fair and reasonable award of non-pecuniary damages to the plaintiff.

[124] In this case, as a result of two motor vehicle accidents, the plaintiff has experienced a marked decrease in the quality of enjoyment of her life and her ability to work as she did before, although she has been able to continue in her pre-accident job for seven years after MVA #1.

[125] I find that this case bears close resemblance with *Antignani*, where a 43-year-old baker was awarded $200,000 in non-pecuniary damages after experiencing injuries and symptoms similar to the plaintiff. However, in *Antignani*, the plaintiff's symptoms were such that he did not believe he could continue with his position much longer (para. 3), which has not been the case for the plaintiff, who, despite difficulty, has continued to work basically full time in her pre-accident employment for seven years after MVA #1 (albeit with some modifications and accommodations). Therefore, using *Antignani* as a jurisprudential reference point, I adjust the amount

of non-pecuniary damages from that case and award her $180,000 (including loss of housekeeping capacity).

[126] I found the other cases relied on by the parties to be either dated or not analogous to the one before me (or both in some cases): *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 at paras. 17–19.

[127] I apply a 10% negative contingency (see discussion of contingencies below) to the $180,000 non-pecuniary damages amount, resulting in an award of $162,000 ($180,000 x 0.9).

Future Loss of Housekeeping Capacity

[128] The principles to be considered when valuing loss of housekeeping capacity are set out in *Kim v. Lin*, 2018 BCCA 77 [*Kim CA*]. Loss of housekeeping capacity may be considered as a pecuniary or non-pecuniary loss: *Kim CA* at para. 30; *Ker v. Sidhu*, 2023 BCCA 158 at para. 23, leave to appeal to SCC ref'd, 40816 (11 January 2024). The court retains ultimate discretion to address housekeeping claims under either type of award, but, in general, a non-pecuniary damages award is more appropriate when there is a loss of amenities or increased pain and suffering: *Kim CA* at para. 33. Conversely, when a plaintiff has enlisted paid or unpaid housekeeping services, a pecuniary award is appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101.

[129] In the present case, the plaintiff experiences limitations to "perform[ing] usual and necessary household work" beyond mere "difficulty or frustration in doing so": *McKee v. Hicks*, 2023 BCCA 109 at para. 112. However, her other family members, including her now adult son, now assist with the completion of household chores, and the plaintiff continues to perform some, albeit more limited, household activities, although with some associated pain.

[130] I find that the plaintiff has experienced a "loss of amenities" or "increased pain and suffering" (*Kim CA* at para. 33) in this regard, and I find that including her future

loss of housekeeping capacity in the non-pecuniary award is appropriate in the circumstances.

PAST AND FUTURE LOSS OF EARNING CAPACITY

Legal Framework

[131] An award for future loss of earning capacity represents compensation for a future loss. It is an assessment, not a mathematical calculation (*Steinlauf v. Deol*, 2022 BCCA 96 at para. 55, aff'g 2021 BCSC 1118, citing *Gregory* at para. 32 [*Steinlauf CA*]), and while not amenable to precise calculation, the court is obliged to make the best estimate it can (*Dunn v. Heise*, 2022 BCCA 242 at para. 33).

[132] This approach applies to the analysis of both past and future loss of earning capacity since both involve hypothetical events: *Rab* at para. 28, citing *Grewal* at para. 48.

[133] The approach for considering claims for loss of future earning capacity is set out in *Rab*:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown* [*v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.
>
> [Emphasis added.]

See also *Steinlauf CA* at para. 52; *Davie* at paras. 114–120; *Pascuas* at para. 80.

[134] More specifically, the second step requires the assessment of a future or hypothetical possibility of an event giving rise to future loss: is there a real and substantial possibility of an event occurring leading to a future loss: *Rab* at

paras. 29, 33; *Steinlauf CA* at para. 53. If so, the court proceeds to the third step and assesses the likelihood of that event, then quantifies the loss by way of an earnings or capital asset approach: *Rab* at paras. 28, 31; *Ploskon-Ciesla* at paras. 16–17.

[135] Broadly, the quantification of the "value of future loss" requires a comparison of "the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened": *Steinlauf CA* at para. 71, citing *Gregory* at para. 32; *Dornan* at paras. 156–157. This has also been referred to as comparing the "without-accident" earning potential of the plaintiff and what the plaintiff was likely to earn as a result of the accident—being mindful that it is not the loss of earnings but the loss of earning capacity for which compensation must be made: *Steinlauf CA* at paras. 55–56, citing *Gregory* at para. 32, citing *Andrews v. Grand & Toy Alberta Ltd*, [1978] 2 S.C.R. 229 at 251, 1978 CanLII 1.

[136] The Court of Appeal in *Ploskon-Ciesla* identified the two methods of valuation under the third step – the earnings and capital asset approaches:

> [16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[137] As a final step in the damages assessment process, the court must determine whether the damages award is fair and reasonable: *Lo* at para. 117.

Discussion

Steps 1 and 2: Real and Substantial Risk of a Pecuniary Loss

[138] In *Ploskon-Ciesla*, the Court of Appeal elaborated on the first and second steps of the *Rab* analysis in cases where the evidence is clear that an accident has rendered the plaintiff unable to work:

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

[139] As to *Rab* step one, "[i]n cases … where the event giving rise to a future loss is manifest and continuing at the time of trial, that evidentiary step is a given": *Steinlauf CA* at para. 52.

[140] The defendants dispute that the injury has rendered the plaintiff less able to work in her pre-accident occupation and contends that she is fully able to work full-time at the same level of remuneration as she did before the accidents. I consider this argument in the context of the *Rab* analysis below.

Step 1: Event(s) Giving Rise to an Impairment of Capacity

[141] The following factors assist in determining whether the plaintiff has suffered an impairment of her income earning capacity:

a) Is the plaintiff less capable overall from engaging in all types of employment;

b) Is the plaintiff less marketable or attractive as an employee;

c) Has the plaintiff lost the opportunity to take advantage of all job opportunities had she not been injured; and

d) Is the plaintiff less valuable to herself as a person capable of earning money in a competitive labour market?

See *Rab* at para. 35, citing *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at paras. 7–11, 1985 CanLII 149 (S.C.); *Ploskon-Ciesla* at para. 13.

[142] These factors do not provide a formula but instead comprise a means to assess whether there has been an impairment of a capital asset, which can be helpful in assessing the value of the asset lost: *Rab* at para. 36; *Ploskon-Ciesla* at para. 12.

[143] I find that the plaintiff meets all four of the *Brown* criteria. As a result of her injuries:

a) She is less capable overall from engaging in all types of employment, particularly those involving physical activities or lifting;

b) She is less marketable or attractive as an employee for certain jobs;

c) She has lost the opportunity to take advantage of all job opportunities; and

d) She is less valuable to herself as a person capable of earning money in a competitive labour market.

Step 2: Real and Substantial Possibility of a Pecuniary Loss

[144] Turning to step two, I further find that there is a real and substantial possibility that the plaintiff's injuries have and will continue to result in a reduction of her earning capacity and result in a pecuniary loss.

[145] I find that the future loss of earning capacity is not merely speculative, but is a measurable risk in light of the evidence.

[146] The defendants contend that the plaintiff has exaggerated her injuries and limitations, as demonstrated by the fact that since MVA #1 to the date of trial, she has kept the same job working as a manager of a jewellery store.

[147] I reject this argument. The plaintiff's employer has made accommodations for her since MVA #1, including modifying her job duties, distributing her job duties to other staff members, and placing an additional staff member at the store to support the plaintiff's inventorying tasks. Further, I accept the plaintiff's evidence that since MVA #1 to the date of trial, she has experienced pain and anxiety, fatigue from poor sleep, and other limitations (including discomfort performing some physical activities, and difficulty with close reading and concentrating) when working at the jewellery store.

[148] Overall, I find that the plaintiff, who is a main income-earner for her family, has pushed through her pain to maintain steady employment despite her injuries. I find that the fact she has kept a steady job since MVA #1 is evidence of her stoic nature and a product of economic circumstances requiring her to be a provider for her family.

[149] I need not find on a balance of probabilities that the plaintiff will suffer a pecuniary loss. Rather, I need only find that, on the evidence, there is a real and substantial probability that this will occur. I find that there is.

[150] In summary, following the *Rab* approach, I find as follows:

> a) **Step 1**. There is a potential future event—pain and associated physical and other limitations, as well as low mood and anxiety—that could lead to a loss of capacity. Put another way, I find that the potential future event is a loss of capacity as articulated in *Rab* at para. 48.

b) **Step 2**. On the evidence, there is a real and substantial possibility that this future event will cause a pecuniary loss to the plaintiff.

[151] Having found a reasonable and substantial possibility of a loss of capacity leading to an income loss, I must now undertake an analysis of the quantification and relative likelihood of the loss occurring, both in the period after MVA #1 to the trial, and in the future.

Step 3: Earnings Approach to Valuation

[152] I adopt an earnings approach to assessment loss of earning capacity. Such an approach is appropriate where a "plaintiff has an established work history and a clear career trajectory": *Ploskon-Ciesla* at para. 16. I find that the plaintiff did have an established work history and clear career trajectory as the manager of a jewellery store. I further find that, given her work limitations following MVA #1, and subsequently MVA #2, there has been an identifiable loss of income at the time of the trial, which also supports an earnings approach.

[153] I decline to adopt a capital asset approach, which can apply in cases where income loss is difficult to measure (*Kringhaug v. Men*, 2022 BCCA 186 at para. 43, citing *Perren v. Lalari*, 2010 BCCA 140 at paras. 12, 32) — I find that this is not the case here, given the plaintiff's clear career trajectory, both with and without the accident.

Negative Contingencies

[154] However, when valuing that pecuniary loss on an earnings approach, "it [is] still … necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies": *Ploskon-Ciesla* at para. 11.

[155] While I find that the plaintiff suffers from pain and other limitations, the issue remains as to whether a negative contingency should apply, and, if so, what percentage. *Rab* is instructive on this point:

> [29] Some claims for loss of future earning capacity are less challenging than others. In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies.
>
> [Emphasis added.]

[156] I find that a negative contingency of 10% should apply to the assessment of damages: that even with the accident, the plaintiff's pain symptoms may improve and increase her earning capacity. I rely on that aspect of Dr. Sivananthan's evidence that it is possible the plaintiff's pain will improve in the future, which I consider to be a "real and substantial possibility," meaning a risk that is measurable and not mere speculation. I add that, in her cost of future care claim, the plaintiff seeks an annual gym cost, which I find could increase the likelihood she may engage in exercises that Dr. Sivananthan opined could improve her physical well-being and pain symptoms.

[157] I find that the likelihood of this is not significant and assess the relative likelihood of improving to be relatively small at 10%, taking into account the fact that the potential improvement would not be to a completely pain-free state.

[158] I have also considered the possibility that the plaintiff is overusing Tylenol and Advil which is exacerbating her headaches. This was the opinion of Dr. Webber, who recommended that she reduce her use and try an alternative preventative strategy, including natural supplements and other medications, or Botox. The plaintiff was taking Tylenol and Advil daily in 2017 and 2018, and in June 2021, her doctor's note indicates that she takes too much Tylenol and Advil. The plaintiff testified that since January 2023 to the trial, she still took these non-prescription medications three to four times in a week, which, in Dr. Webber's opinion, can result in medication overuse headaches. However, I am not satisfied that the evidence establishes a real and substantial possibility which is measurable that the plaintiff's headaches would

improve in the future if she took less Tylenol and Advil and instead tried other strategies. Instead, I find that this possibility is merely speculative and accordingly do not assign a negative contingency in this respect.

[159] The plaintiff contends that there were potential positive contingencies that would offset any possible negative contingencies, and argued that there should be no allowance for negative contingencies in her damages assessment.

[160] I do not accept the plaintiff's argument, and instead I find the existence of any positive contingencies (e.g., the plaintiff's risk of future injury, or that the plaintiff would have taken on more remunerative work or a second job without the accident) to represent hypothetical events which are not measurable and constitute mere speculation.

[161] In all the circumstances, I find that a 10% reduction for the contingency that the plaintiff's headaches and other neck and back pain (and other symptoms) may improve in the future should be made.

Past Wage Loss: Quantification and Relative Likelihood

[162] The defendants contend that significant aspects of this claim were not verifiably documented. However, the assessment of loss of income capacity is not a mathematical calculation, and the court must do the best it can. In addition, I find that the plaintiff's evidence concerning her experience at work, including the degree to which she had to leave early or miss shifts at times, is generally reliable. I do not find that the letter from the plaintiff's employer setting out her days missed in 2017 (but not other years), or the ICBC Certificate of Earnings (dated March 20, 2017) to be conclusive of the extent or the amount of time the plaintiff missed work due to her MVA #1 and MVA #2 injuries to the date of the trial, as the defendants argued.

[163] The plaintiff testified that she missed two shifts per month on average due to her injuries from August 2018 to the trial, and I accept this evidence. I generally accept the plaintiff's calculations for past income loss (with some adjustments, which are incorporated in the table below), which are generally consistent with her

evidence and which I find to be reasonable, and which makes a reduction for lost hours during COVID-19. I do, however, adjust the hourly rate for 2017 to be $17.00 as the defendants contend (and not $17.50 as claimed), although I use an 8.5 hour work day.

[164] The following amounts are allowed for past loss of earning capacity:

Year	Loss of Income	Hours Lost	Effective Rate of Pay
2017	$12,571.50	739.5 = 87 days x 8.5-hour day	$17.00
2018	$9,793.97	425.27	$23.03
2019	$3,896.16	162.07	$24.04
2020	$1,948.08 (assessed at ½ hours lost in 2019, for the COVID-19 pandemic)	-	N/A
2021	$4,115.50	142.80	$28.82
2022	$5,820.39	216.05	$26.94
2023	$6,157.36	234.12	$26.30
TOTAL	**$42,354.88**		

[165] I apply no contingency to this amount, which reflects the plaintiff's past loss of earning capacity, and is not affected by the negative contingency risk I have found that her condition may improve in future.

Future Loss of Earning Capacity: Quantification and Relative Likelihood

[166] For the reasons set out above, I reject the defendants' submission that the plaintiff has not met the test for a real and substantial possibility of future loss.

[167] I assess loss of future income on the basis that the plaintiff will likely experience a 25% loss of capacity until the age of retirement of 67 or 68 years of age. This equates to an annual loss of income of $16,224, which I find to be reasonable (using $24.00 per hour as the rate of pay, and a $64,896 annual income, as submitted by the plaintiff).

[168] I find a 25% reduction for loss of capacity based on my finding that the plaintiff experienced, and will continue to experience, a material amount of pain and other limiting symptoms in her work, but also that she has been able to reasonably cope and maintain relatively steady work since MVA #1. (The plaintiff sought a reduction of earning capacity of 30%, but I instead use 25% in light of my finding as to the reliability and weight of the plaintiff's evidence.) Using the future income loss multiplier of $17,870 (for $1,000 per year to age 67) yields a loss of income in the amount of $289,922.88 ($16,224 / $1,000 x $17,870), which I round to $290,000.

[169] Applying a negative contingency of 10% yields a net amount for loss of earning capacity of $261,000 ($290,000 x 0.9).

Step 4: Fairness and Reasonableness

[170] I consider the award fair and reasonable. The plaintiff has and continues to experience significant pain, low mood, anxiety, and other symptoms associated with two motor vehicle accidents, as I have found above. This has negatively impacted her quality of life and productivity at work in a material way. She has been stoic, maintaining steady employment at her job as a manager of a jewellery store since MVA #1 (with some absences from work, and with assistance from her employer's work accommodation measures). There is a small possibility that her pain and other symptoms will improve, but she will likely remain permanently partially disabled until her retirement. MVA #1 occurred when she was 38 (she is currently 46), and without the accident, she would have likely maintained steady remunerative employment as a jewellery store manager until she retires at age 67 or 68.

[171] I find that an award of $42,354.88 (for past loss) and $261,000 (for future loss) is fair and reasonable to compensate her for the loss of earning capacity,

having regard to the future uncertainties, and the possible hypothetical event of a future improvement in her symptoms.

COST OF FUTURE CARE

[172] The principles for an award of cost of future care are set out in *Kallstrom v. Yip*, 2016 BCSC 829 at para. 429:

> • the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
>
> • the focus is on the injuries of the innocent party… Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
>
> • the test for determining the appropriate award is an objective one based on medical evidence;
>
> • there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
>
> • the concept of "medical justification" is not the same, or as narrow as, "medically necessary";
>
> • admissible evidence from medical professionals … can be taken into account to determine future care needs;
>
> • however, specific items of future care need not be expressly approved by medical experts… It is sufficient that the whole of the evidence supports the award for specific items;
>
> • still, particularly in non-catastrophic cases, a little common sense should inform the analysis, despite however much particular items might be recommended by experts in the field; the court should have regard for whether any particular expense will actually be incurred and an allowance can be made for any contingency, any real and substantial possibility, that the cost may not in fact be incurred;
>
> • in motor vehicle cases, given the distinction between mandatory and discretionary benefits under s. 88 of Part 7 of the *Insurance (Vehicle) Regulation*, BC Reg. 447/83 and the requirement of mandatory deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, it is desirable for the trial court, where possible, to assign specific amounts for each future care item claimed;
>
> • properly considered, homemaking costs are awarded for loss of capacity and are distinct from future cost of care claims; and
>
> • no award is appropriate for expenses that the plaintiff would have incurred in any event.

See also *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244; *Wishart v. Mirhadi*, 2023 BCSC 627 at para. 117.

[173] The plaintiff relies on Mr. Pakulak's cost of future care recommendations in support of her claim; Mr. Lakhani's multipliers as set out in his report; and Dr. Cameron's and Dr. Adrian's treatment recommendations. For example, Dr. Cameron recommended botulinum toxin injection therapy (Botox injections) as a prophylactic treatment, and I accept the plaintiff's evidence that she would like to take this treatment if she can afford to do so.

[174] Dr. Sivananthan also recommended physical conditioning, which, in his opinion, could improve the plaintiff's physical and functional tolerances.

[175] The defendants agreed to $30,000 for cost of future care but without a breakdown of what amount would be for each future care item (which is not an approach endorsed in *Rab* at para. 91).

[176] I find as follows with respect to the items claimed.

[177] I apply a negative contingency of 50% to the claimed kinesiology treatments and 30% for gym expenses to account for the real and substantial possibility that all of the claimed expenses will not be incurred: *Ker* at para. 66. Since MVA #1, the plaintiff has not consistently gone to the gym; while this may have been partly for cost reasons, I find that there is nevertheless a real and substantial possibility that she will not in fact engage in gym activities to the extent claimed to the age of 75. Rather, since MVA #1, the plaintiff has been more inclined to engage in exercising and stretching at home, instead of at the gym or with physiotherapists or kinesiologists. Further, the plaintiff has not engaged in sustained kinesiology treatments, even though it was recommended to her in 2019 and she tried it, since she did not find it to be helpful.

[178] I also apply a negative contingency of 30% for massage therapy treatments. The plaintiff received a recommendation to obtain massage treatments in 2018 but did not do so on a sustained basis.

[179] I accept the plaintiff's evidence that she intends to follow Dr. Adrian's recommendations, including to obtain massage therapy. However, the plaintiff did

not furnish sufficiently strong evidence at trial to substantiate the premise of Dr. Adrian's recommendation for massage therapy that she "experiences temporary relief of her symptoms with massage treatments." I am not satisfied that the plaintiff would attend massage therapy 12-15 times per year until age 67 as Mr. Pakulak estimated. I therefore apply a contingency deduction of 30% for massage treatments to account for the real and substantial possibility that the plaintiff would engage in less than this number of massage treatments.

[180] I also disallow the cost of housekeeping assistance, which I have included in the non-pecuniary damages award.

[181] I am satisfied that the other claimed items are appropriate and should be awarded.

[182] In sum, I allow the plaintiff's cost of future care claim as set out in this table:

	Description of Future Care Cost Item Claimed	**Claimed Cost (accounting for future care multiplier)**	**% Contingency Applied**	**Amount Awarded**
1.	Kinesiology Sessions (one-time session and annual cost to age 67)	$7,412.12	50%	$3,706.06
2.	Gym Membership (to age 75)	$10,811.08	30%	$7,567.76
3.	Massage Therapy (to age 67)	$30,641.81	30%	$21,449.27
4.	Botox Treatments	$6,640	-	$6,640
5.	Sitting Donut (one-time and replacement cost)	$447.91	-	$447.91
6.	Household Chores (to age 67 at $3,378.37 per annum)	$60,857.96	N/A	$0
7.	Medication (to age 75)	$11,400.45	-	$11,400.45

	TOTAL AWARDED			**$51,211.45**

SPECIAL DAMAGES

[183] The defendants agree to $3,281.54 in special damages, but not any additional amounts. However, I find that the plaintiff's claimed amount for $3,651.27 (set out in Exhibit 4 Tab 11) to be reasonable, and I award special damages in this amount.

CONCLUSION AND ORDERS

[184] In summary, I award the plaintiff, Amritpal Kaur Dhillon, the following damages:

Non-Pecuniary Damages:	$162,000
Past Loss of Housekeeping Capacity:	$0
Loss of Earning Capacity:	
(a) Past Loss of Earning Capacity:	$42,354.88
(b) Future Loss of Earning of Earning Capacity:	$261,000
Cost of Future Care:	$51,211.45
Special Damages:	$3,651.27
TOTAL	**$520,217.60**

[185] My award is subject to tax gross-up for cost of future care and loss of earning capacity, if applicable.

[186] My award is also subject to the application, if any, of s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

[187] The parties have liberty to apply to me within 30 days of the date of these Reasons for a decision on these points if agreement cannot be reached.

[188] The plaintiff further seeks court order interest on past loss of income and earning capacity and special damages, as well as costs at Scale B in accordance with the tariff.

[189] If the parties cannot agree on costs, or the appropriate order as to interest, they have leave to request a further hearing from me on the issue of costs or interest within 30 days of the date of these Reasons.

"Stephens J."