IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Woo v. Khaira,*
2024 BCSC 1114

Date: 20240626
Docket: M202187
Registry: Vancouver

Between:

Soo Hi Woo

Plaintiff

And

Kuldip Singh Khaira
Yellow Cab Company Ltd.

Defendants

Before: The Honourable Justice B. Smith

Reasons for Judgment

Counsel for the Plaintiff:	J. Harbut S.L. Herra K. Paul
Counsel for the Defendants:	J. McIver C.V. Morcom
Place and Date of Trial:	Vancouver, B.C. October 10–13 and 16-20, 2023 December 13, 2023
Place and Date of Judgment:	Vancouver, B.C. June 26, 2024

INTRODUCTION

[1] This is a personal injury motor vehicle accident matter.

[2] On October 18, 2018, the plaintiff and Mr. Khaira were involved in a motor vehicle accident (the “Accident). The plaintiff was riding a bicycle. Mr. Khaira was driving a taxicab owned by Yellow Cab.

[3] Circumstances of the Accident, liability, injuries, causation, damages and mitigation are all in issue.

[4] The plaintiff claims the Accident was entirely Mr. Khaira’s fault. Mr. Khaira denies this, but says if he is found to have been at fault, the plaintiff was too.

[5] The plaintiff alleges the Accident caused various injuries, including: chronic neck, shoulder and back pain; mechanical right wrist pain and dysfunction; chronic post-traumatic headaches; and depressive disorder. She claims continued significant functional limitations which impair her ability to work as a hairstylist. She claims non-pecuniary damages, past loss of income, loss of future earning capacity, cost of future care, special damages, interest, costs and disbursements.

[6] The defendants say that any injuries to the plaintiff caused by the Accident resolved shortly thereafter, and are not having any ongoing impact on her, or are mild and not impacting her to the extent alleged, such that she is able to function as she did previously. The defendants say the plaintiff had a pre-existing condition, that she should be entitled to only minor damages, and that she has failed in her duty of mitigation.

[7] There were thirteen witnesses in the plaintiff's case: the plaintiff, two independent witnesses to the Accident, four of the plaintiff's former or current co-workers, her partner, and five experts. Mr. Khaira was the only witness in the defendants' case.

[8] For the reasons that follow, I find the plaintiff has proved her claim.

CREDIBILITY AND RELIABILITY

[9] The assessment of credibility and reliability has been the topic of much judicial writing, see *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 8–11, and the cases cited there. The assessment process requires a consideration of factors such as:

- a witness's ability and opportunity to observe events;
- the firmness of their memory;
- their ability to resist the influence of interest to modify their recollection;

- whether their evidence harmonizes with independent evidence that has been accepted;
- whether they change their testimony in direct and cross-examination;
- whether their testimony seems unreasonable, impossible or unlikely;
- whether they have a motive to lie;
- their demeanour generally (although the court must remain mindful of the need to be cautious when considering demeanour, because there is no baseline for assessment, and courtrooms can be unfamiliar and intimidating environments to which different people react differently).

[10] A court may believe some, all, or none of a witness's evidence, and credibility determinations "may not be purely intellectual and may involve factors that are difficult to verbalize": *R. v. M.(R.E.)*, 2008 SCC 51 at para. 49.

Soo Woo (plaintiff)

[11] Plaintiff's counsel submits the plaintiff's evidence is both credible and reliable.

[12] Defence counsel submits the plaintiff's claim is largely premised on her subjective representation, and it therefore requires careful assessment of the credibility and reliability of her testimony. Defence counsel submits the plaintiff's evidence was neither credible nor reliable, that she has repeatedly exaggerated her symptoms, and that when testifying she feigned difficulty understanding English when it suited her to do so.

[13] Defence counsel's cross-examination of the plaintiff focussed generally on certain discrepancies between her evidence at trial and what she said at her examination for discovery, clinical entries made by various treatment providers, surveillance footage of her at work, and her understanding of English.

[14] Defence counsel essentially accuses the plaintiff of fraud and perjury. As I understand the essence of defence counsel's submission, it is that the plaintiff has over a period of time deceived her former and current co-workers and friends, her partner, her treating physicians, the medical experts; and is now attempting to deceive the court, all with the objective of fraudulently claiming that which she is not entitled to. She has allegedly done this by repeatedly exaggerating the symptoms of her injuries to others, and selectively feigning difficulty with English and pain when giving her evidence in court.

[15] As observed by N. Smith, J. in *Edmondson v. Payer*, 2011 BCSC 118 [*Edmondson*], also a case involving a hairstylist, at para. 3:

> …a defendant who accuses a plaintiff of deliberate falsification – an accusation that effectively amounts to one of fraud and perjury – must be prepared to present the court with something more than speculation and innuendo.

[16] I frankly do not credit the plaintiff with the sophistication which would be required to plan and implement a deception as described above.

[17] There are some discrepancies between the plaintiff's evidence at trial and what she said at her examination for discovery, which generally concern her plans about becoming self-employed and her intention to move to Australia. In light of the fact that the plaintiff's evidence at trial on these topics was corroborated by the lay witnesses, I am not concerned by these discrepancies and do not believe them to be evidence of either deception or unreliability.

[18] In *Edmondson*, at paras. 23–39, N. Smith, J. noted the inherent difficulties with statements in clinical records. In particular:

- clinical records are not intended to be a verbatim record of everything that was said;

- there is usually no record of anything else that may have been said and which might in some way explain, expand upon, or qualify a particular doctor's note;

- when there are a number of records over a lengthy period of time, inconsistencies are almost inevitable;

- while the content of a record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything; and

- the introduction of clinical records cannot be used to circumvent the requirements governing expert opinion evidence.

[19] I have considered defence counsel's submissions concerning particular clinical records, keeping N. Smith, J.'s observations in mind, and conclude I cannot place much weight on the discrepancies between the plaintiff's evidence at trial and certain parsed clinical records.

[20] Nor am I concerned about what is depicted in the surveillance evidence. It shows the plaintiff at work with her clients for periods of time over several days. In essence, they depict short snippets of the plaintiff working after the Accident. I give these snippets little weight. The plaintiff has never claimed that she is now unable to work because of her injuries in the Accident. The plaintiff has never claimed that her injuries in the Accident prevent her from a happy presentation when she is with her clients. That she appears happy in the surveillance is consistent with her evidence, and that of the other hairstylists, about how to present professionally when dealing with clients.

[21] I do not agree with defence counsel's contention that at trial the plaintiff was selectively feigning difficulty with English. When she was testifying it was apparent that her facility with English is somewhat limited. She sometimes asked for questions to be repeated or clarified. That is not unusual. The words she used to describe certain things, such as her descriptions of the symptoms of her injuries, at times tended towards hyperbole. I am, however, satisfied that the plaintiff was not feigning difficulty with English, with an intention to deceive, but rather simply attempting to communicate what she was trying to say as accurately as she could within the constraints of her limited facility with the language.

[22] I find the plaintiff credible and her evidence reliable.

[23] I accept the plaintiff's evidence concerning the circumstances of the Accident. It is corroborated by the evidence of Mr. Chow and Mr. Srdanovic.

[24] I accept the plaintiff's evidence about her employment history, future plans, and income losses. It is corroborated by the lay hairstylist witnesses and Mr. Baboomian.

[25] I accept the plaintiff's evidence about her injuries in the Accident, how they have affected her and continue to affect her. It is corroborated by the medical experts and Ms. Craig.

[26] I accept the plaintiff's evidence about the various medical treatments she has received as a result of her injuries in the Accident, and the treatment she is willing to still undergo. It is corroborated by the medical experts and Ms. Craig.

Kuldip Khaira (defendant)

[27] Plaintiff's counsel submits Mr. Khaira's evidence is neither worthy of belief nor reliable, and that I should reject it to the extent it differs on material issues from that of the plaintiff and the two independent eyewitnesses.

[28] Defence counsel made no submission about Mr. Khaira's credibility or the reliability of his evidence.

[29] Plaintiff's counsel's cross-examination of Mr. Khaira extracted a number of damaging admissions from him, and exposed internal inconsistencies between his evidence at trial and what he said at his examination for discovery, as well as external inconsistencies between what he claims happened and the observations of the two independent witnesses.

[30] Mr. Khaira's evidence on the core issue of liability for the Accident was not credible, because he was evasive and not believable. I reject those parts of his evidence to the extent that they conflict with the plaintiff's evidence, or that of the two

independent eyewitnesses. It does not harmonize with evidence which I do accept. I find he was unable to resist the influence of interest to modify his recollection of the events, particularly concerning the moments immediately before the Accident. His version of what happened in the moments before the Accident is mostly uncorroborated, either by the two independent witnesses or otherwise. I place little weight on Mr. Khaira's evidence as a whole, and no weight on his evidence concerning what happened in the moments immediately before the Accident. As I find Mr. Khaira was not credible, I cannot find his evidence reliable.

Peter Chow (eyewitness to the Accident)

[31] Mr. Chow was credible. I believe he was truthful. He has no reason to be biased for or against either party. He does not know the plaintiff in any other capacity.

[32] Mr. Chow's evidence was also reliable. He witnessed the Accident. He was well-situated to observe what he did. His evidence is corroborated by the evidence of the plaintiff and Mr. Srdanovic. I place significant weight on his evidence.

Anthony Srdanovic (eyewitness to the Accident)

[33] Mr. Srdanovic was credible. I believe he was truthful. He has no reason to be biased for or against either party. He does not know the plaintiff in any other capacity.

[34] Mr. Srdanovic's evidence was also reliable. Like Mr. Chow, he witnessed the Accident and well-situated to observe what he did. His evidence is substantially corroborated by the evidence of the plaintiff and Mr. Chow. To the extent his evidence differs from the evidence of the plaintiff and Mr. Chow, I prefer the evidence of the plaintiff and Mr. Chow. I place significant weight on his evidence.

Other Lay Witnesses

[35] The other lay witnesses were all credible. I believe they were all truthful. I recognize that some of them can fairly be characterized as being aligned with the plaintiff: Emily Tjong and Larissa Shulgin are her former colleagues and remain her

friends and Mr. Baboomian is her partner. However, this does not necessarily lead to a finding of bias. None of the lay witnesses displayed any bias in favour of the plaintiff. Nor were any of them seriously challenged on cross-examination. I place significant weight on the evidence of the lay witnesses.

[36] Their evidence was also reliable. It is corroborated, to a greater or lesser degree, by the evidence of the plaintiff and the other lay witnesses, and consistent with the evidence of the expert witnesses. Each of the lay witnesses testified about aspects of the plaintiff's life that they were either a part of or ideally situated to observe, over a period of time. The picture which emerges from their evidence is clear.

Expert Witnesses

[37] I found the evidence of the expert witnesses credible and reliable. With the exception of Dr. Koo, none of them were seriously challenged on cross-examination concerning their findings and opinions. I place significant weight on their evidence.

CIRCUMSTANCES OF THE ACCIDENT

Discussion

[38] The Accident happened at the intersection of Powell Street ("Powell") and Columbia Street ("Columbia") near downtown Vancouver (the "Intersection"). Powell is a one-way street for westbound traffic, with two straight-through lanes and two parking lanes, one on the north side, the other on the south side. Columbia is a one-way street for northbound traffic, with one straight-through lane, one left-turn lane and two parking lanes, one on the east side, the other on the west side. There is a pedestrian sidewalk on the south side of Powell, with a marked crosswalk where the sidewalk intersects with Columbia (the "Crosswalk"). The movement of traffic through the Intersection is controlled by traffic signals.

[39] It is undisputed that the Accident happened in autumn, on a weekday, shortly before 8:00 a.m. Traffic volume in the area was normal for a weekday at that time. The weather was clear and dry.

[40] There were four witnesses who testified about the circumstances of the Accident: the plaintiff; Mr. Khaira; and two independent witnesses, Mr. Chow and Mr. Srdanovic.

Plaintiff's Evidence

[41] The plaintiff was on her way to a volunteer activity. She was riding a black bicycle with reflectors, and wearing dark-grey pants with white stripes, a bright blue jacket and a red hat. She was not wearing a helmet. She could have used a nearby route with dedicated bicycle lanes to get to her destination, but she chose to instead ride her bicycle down the sidewalk on the south side of Powell.

[42] She stopped at the Intersection, because the traffic light was red for traffic on Powell. Around this time, she noticed a pedestrian standing beside or behind her. When what she described as the "white man walking sign" came on, she rode the bicycle onto the Crosswalk and was hit by a taxicab. When the taxicab hit her, she noticed it was turning left on Powell. The taxicab hit her with the "front, middle part" in the area of the license plate. At the point of impact, she was riding at walking speed, and was between the lines of the Crosswalk. She did not see the taxicab before the point of impact. The impact caused her to fall towards her left side. As she fell, the bicycle was still between her legs and she twisted her torso and put out her left arm to break her fall. She landed near a manhole cover. She did not hit her head. She tapped on the front of the taxicab to get the driver's attention. She tried unsuccessfully to free her body. A pedestrian came to help her. She could not stand on her right leg and sat down on the corner of the Intersection. The taxicab driver came over and said he was sorry. He wanted to touch her right leg but she did not let him. He then got in the taxicab and reversed it out of the Crosswalk.

[43] Fire and ambulance services attended. She did not see or speak to any police. She went to hospital by ambulance. She was at the hospital for about four hours before being discharged, following which she made her way home.

Kuldip Khaira's Evidence

[44] Mr. Khaira has a Class 4 B.C. Driver's License. He has been driving taxicabs for almost 30 years. He is employed by Yellow Cab. At the time of trial, he had been off work for 18 months due to a disability.

[45] He was working and driving the taxicab at the time of the Accident. He had dropped off a fare nearby. He was on his way to pick up another fare at the cruise ship terminal at Canada Place. He was not in any rush. His ability to drive was not impaired by alcohol or drugs.

[46] He was in the left lane of Columbia, heading north. There were other vehicles parked in the left lane and the right lane.

[47] As he approached Powell, the traffic light turned red for him. He stopped. He was intending to turn left. He put on his turn signal. He looked left and saw a cyclist. The cyclist rode into the left fender of the taxicab. There was no damage to the taxicab.

[48] He testified that he saw the cyclist two or three seconds before the point of impact. The cyclist was riding in a "wobbling" manner. At the point of impact he was stopped.

[49] After the Accident, an ambulance came and took the cyclist and the bicycle. His dispatcher called the police. The police came. They not give him a ticket. Afterwards, he continued working.

[50] In cross-examination, he acknowledged that he knew:

- the traffic light was red as he approached the Intersection;
- the walk signal came on when the traffic light turned red;
- he had to come to a complete stop, even if there was no traffic or pedestrians;

- it was unsafe to not stop;
- it was risky to roll forward;
- it is important to look for pedestrians at marked crosswalks;
- pedestrians can cross when the walk signal comes on;
- he had to yield to pedestrians in the Crosswalk;
- because Powell is a one-way street he had to look to his right;
- he had to yield to traffic on Powell.

[51] He disagreed with the circumstances of the Accident as testified to by the plaintiff and two other independent witnesses.

[52] He denied the plaintiff's evidence that he hit her, and claimed instead that "cyclist hit me, not me hitting cyclist". He said "I was completely stopped for a couple of seconds" and "I saw Ms. Woo coming at me". When plaintiff's counsel put to him that he did not look left, he said "not true" and claimed that he "had a glance to both sides". He claimed to have not understood a question put to him at his examination for discovery, in which he was asked and answered:

> Q: You did not look to your left prior to the impact with the cyclist?
> A: Yes, I did not look.

Peter Chow's Evidence

[53] Mr. Chow was working at his job as a courier and had just picked up mail for a client. He was standing at the south-west corner of the Intersection waiting for the light to change.

[54] He was standing a little behind a cyclist. The cyclist was straddling the bicycle, with one foot on a peddle and the other on the ground. He cannot remember seeing the taxicab stop at the Intersection. The taxicab definitely did stop but he cannot say for how long. When the light changed, the driver of the taxicab did not

look left. The taxicab entered the Crosswalk. When the walk signal came on, the driver of the taxicab was looking to his right. He did not see the driver of the taxicab look left so he stayed on the sidewalk. The cyclist rode the bicycle onto the Crosswalk and the taxicab hit her. He was not looking at the traffic light for the taxicab. The traffic light for him was green and the walk signal was on. He never heard any horn sound from the taxicab. He thinks the taxicab was "just rolling forward". The cyclist's speed was basically the same as the taxicab. The cyclist was right in the middle of the Crosswalk. The middle of the taxicab hit the right side of the cyclist. The cyclist fell to her left side. She was lying between the lines of the Crosswalk. She was holding her leg. He helped her up and back to the sidewalk. He does not recall seeing anyone else. The taxicab was the only vehicle waiting to turn left. There was a steady flow of traffic on Powell. He did not make any observations of the driver as he was tending to the cyclist. He knows the driver stopped and was outside the taxicab. He did not speak with either the driver or the paramedics. He gave his contact information to somebody. He cannot remember if he spoke with the police.

Anthony Srdanovic's Evidence

[55] Mr. Srdanovic was commuting to work. He is familiar with the Intersection as he always drives through it on his way to work. He was driving to Waterfront Station. His spouse was in the vehicle with him.

[56] He was westbound on Powell in the left lane. There were no vehicles in front of him. He stopped for a red light at the Intersection. A taxicab was approaching on Columbia and the driver apparently wanted to turn left to Powell. The traffic light for the taxicab driver had "just turned red as mine had just turned green". His impression was that the taxicab driver was focussed on him and the vehicle beside him. The taxicab came to a rolling stop and had half completed a left turn when it struck a cyclist. He did not see the taxicab driver look left, and as far as he could tell, he did not. The bicycle was up on the hood of the taxicab and the cyclist was knocked for a metre or two. The taxicab had completed about 45 degrees of the left turn. The centre of the taxicab struck the cyclist. The cyclist was riding at walking

speed. He noticed somebody on the same side as the cyclist. He did not see any other vehicles on Columbia. After the Accident, he got out of his vehicle to see if the cyclist was okay. The cyclist was grabbing at her leg. He gave the cyclist his business card and left. Immediately before the Accident, his focus was on the taxicab. He made eye contact with the taxicab driver and "kinda sensed what he was trying to do".

Findings of Fact – Circumstances of the Accident

[57] I make the following findings of fact:

- the Accident happened on October 18, 2018 at around 8:00 a.m.;
- traffic volume in the area was normal for the time of day;
- the weather was clear and dry;
- the Intersection was controlled by traffic signals;
- the Crosswalk was marked;
- the Crosswalk was controlled by a pedestrian walk signal;
- the plaintiff was riding a black bicycle with reflectors;
- the plaintiff was wearing dark grey pants with white stripes, a bright blue jacket and a red hat;
- the plaintiff was not wearing a helmet;
- in the moments before the Accident, the plaintiff stopped at the Intersection and was waiting for the pedestrian walk signal at the Crosswalk to display;
- when the plaintiff was at the Intersection before riding on to the Crosswalk, she was straddling the bicycle, with one foot on a peddle and the other on the ground;

- immediately before the Accident, the plaintiff was riding the bicycle on the Crosswalk;
- in the moments before the Accident, including immediately before the Accident, the plaintiff was in a position to be seen by Mr. Khaira;
- the taxicab driven by Mr. Khaira was bright yellow;
- in the moments before the Accident, including immediately before the Accident, Mr. Khaira was in a position to be seen by the plaintiff;
- in the moments before the Accident, the traffic signal had turned green for traffic westbound on Powell, and red for traffic northbound on Columbia; and the pedestrian walk signal at the Crosswalk was displayed;
- when the Accident happened, the plaintiff was riding the bicycle at low speed, consistent with the speed of a pedestrian walking at a normal pace within an urban environment, and Mr. Khaira was driving the taxicab at approximately the same speed;
- before the Accident, the plaintiff did not see Mr. Khaira or the taxicab, and Mr. Khaira did not see the plaintiff or the bicycle;
- the plaintiff did not look to her right and Mr. Khaira did not look to his left;
- before the traffic signal turned green for traffic westbound on Powell and red for traffic northbound on Columbia, had the plaintiff looked to her right and Mr. Khaira looked to his left, they would have been able to establish eye contact;
- the point of contact between the plaintiff, or the bicycle, or both, and the taxicab, was somewhere in the western half of the Crosswalk, in the front centre area of the taxicab;
- the plaintiff knew it was unlawful to ride a bicycle in a crosswalk;

- the plaintiff knew she could have used a nearby route with dedicated bicycle lanes to get to her destination, but she chose to instead ride her bicycle down the sidewalk on the south side of Powell before she stopped at the Intersection;

- the defendant knew:

    - the traffic light was red as he approached;

    - the pedestrian walk signal came on when the traffic light turned red;

    - he had to come to a complete stop, even if there was no traffic or pedestrians;

    - it was unsafe to not stop;

    - it was risky to roll forward;

    - it is important to look for pedestrians at marked crosswalks;

    - pedestrians can cross when the pedestrian walk signal comes on;

    - he would have to yield to any pedestrians in the Crosswalk;

    - because Powell was a one-way street he would have to look to his right; and

    - he had to yield to traffic on Powell.

LIABILITY

Position of the Parties

[58] The plaintiff claims the Accident was entirely Mr. Khaira's fault. In the alternative, the plaintiff submits any fault on her part was minimal, and should not exceed 15%.

[59] Mr. Khaira denies being at fault for the Accident. In the alternative, Mr. Khaira submits that if he is found at fault, the plaintiff was at fault too. Mr. Khaira submits the plaintiff's fault should be assessed in the range of 25% to 35%.

Did the plaintiff take reasonable care for her own safety? If she did not, was that failure one of the causes of the Accident?

[60] I must determine whether the plaintiff took reasonable care for her own safety and, if she did not, whether that failure was one of the causes of the Accident: *Bradley v. Bath*, 2010 BCCA 10 [*Bradley*] at para. 27.

[61] The plaintiff did not take reasonable care for her own safety, and that failure was a cause of the Accident.

[62] The plaintiff rode the bicycle on the Crosswalk, in violation of s. 183(2)(b) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [MVA] and, therefore, had a heightened duty of care to ensure her own safety and that she was seen by drivers: *Hadden v. Lynch*, 2008 BCSC 295 [*Hadden*], at para. 59; *Dobre v. Langley*, 2011 BCSC 1315 [*Dobre*], at para 39.

[63] The plaintiff did not fully dismount the bicycle at the Intersection. Instead, she stopped and straddled the bicycle, with one foot on a pedal and the other on the ground. She waited for the pedestrian walk signal to display before riding the bicycle on to the Crosswalk. She rode the bicycle at low speed.

[64] Had the plaintiff looked to her right immediately before riding on to the Crosswalk, she would have seen Mr. Khaira and the taxicab, and that Mr. Khaira was looking to his right. Mr. Khaira and the taxicab were there to be seen by the plaintiff.

[65] Given the plaintiff's heightened duty of care as a result of her violation of s. 183(2)(b) of the *MVA*, she should have made eye contact with Mr. Khaira before riding the bicycle on to the Crosswalk.

[66] The plaintiff departed from the standard of care expected of her, when she failed to look to her right immediately before riding the bicycle on to the Crosswalk, and failed to make eye contact with Mr. Khaira. Had the plaintiff maintained a proper lookout the Accident could have been avoided.

Were Mr. Khaira's actions one of the causes of the Accident?

[67] Mr. Khaira's actions were one of the causes of the Accident.

[68] Before the plaintiff rode the bicycle on to the Crosswalk she was stopped at the Intersection. The plaintiff was in a position to be seen by Mr. Khaira. The Crosswalk was marked. When the plaintiff began riding the bicycle on to the Crosswalk the pedestrian walk signal was displayed, and the traffic signal was red for traffic northbound on Columbia.

[69] Although the plaintiff violated s. 183(2) of the *MVA*, and did not have a statutory right-of-way, she was a user of the Crosswalk. Mr. Khaira had a clear duty to give way to a user of the Crosswalk. Mr. Khaira breached his duty of care when he drove the taxicab on to the Crosswalk and hit the plaintiff on the bicycle. Had Mr. Khaira maintained a proper lookout, the Accident could have been avoided.

Apportionment of Fault

[70] Section 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333 states that where damage or loss has been caused by two or more persons the court must determine the degree to which each person is at fault. The apportionment must be on the basis of the degree to which each person was at fault, not on the basis to which each person's fault caused the damage: *Bradley* at para. 24.

[71] I turn now to a consideration of several cases in which vehicles collided with cyclists on sidewalks or on crosswalks.

[72] In *Bradley*, on appeal, the plaintiff and defendant were each found 50% at fault. The plaintiff rode a bicycle on the sidewalk, saw the defendant's vehicle moving toward the exit from a gas station, but did not make eye contact with the

defendant, or stop. The plaintiff assumed the defendant had seen him and would not accelerate.

[73] In *Hadden*, the plaintiff was found 100% at fault. The plaintiff rode a bicycle at speed from a sidewalk on to a crosswalk on a green light without stopping. The defendant's vehicle was already on the crosswalk.

[74] In *Dobre*, the plaintiff was found 15% at fault and the defendant 85% at fault. The plaintiff rode a bicycle on the sidewalk on the wrong side of the street, approached a marked crosswalk, stopped and looked left and right, pushed the button to activate the pedestrian warning light, and pedalled slowly on to the crosswalk. The plaintiff saw the defendant's vehicle approaching, but assumed it posed no hazard because of its distance from him.

[75] In *Callahan v. Kim*, 2012 BCSC 1615 [*Callahan*], the plaintiff was found 15% at fault and the defendant 85% at fault. The plaintiff rode a bicycle on the sidewalk on the wrong side of the street, but this was determined not to be a factor properly considered in the apportionment of fault because he stopped before riding on to the crosswalk. Fenlon, J., as she then was, noted at para. 28: "the sequence of events that informs the allocation of blame for this accident logically begins from the point at which Mr. Callaghan came to a stop before entering the crosswalk".

[76] Finally, in *Niitamo v. ICBC*, 2003 BCSC 608 [*Niitamo*], the plaintiff was found 15% at fault, the defendant 85% at fault. The plaintiff rode a bicycle on to a crosswalk in the dark.

[77] Defence counsel places significance on the fact that the plaintiff knew she could have used a nearby route with dedicated bicycle lanes to get to her destination, but instead chose to ride the bicycle down the sidewalk on the south side of Powell before she stopped at the Intersection. I place no significance on this fact, because like Fenlon, J. in *Callahan*, I am of the view the sequence of events which informs the apportionment of fault in this case logically begins from the point at which the plaintiff came to a stop before riding on to the Crosswalk.

[78] In my view, the facts of this case are most analogous to the facts in *Dobre*, *Callaghan* and *Niitamo*.

Conclusion

[79] The plaintiff's failure to look right and observe Mr. Khaira or the taxicab, or make eye contact with Mr. Khaira before riding on to the Crosswalk, is blameworthy.

[80] Mr. Khaira's failure to look left and observe the plaintiff, or make eye contact with her before she rode on to the Crosswalk, is blameworthy, as is his failure to observe the plaintiff when she was on the Crosswalk.

[81] I find the plaintiff is 15% at fault for the Accident and the defendant is 85% at fault for the Accident.

THE PLAINTIFF – BEFORE AND AFTER THE ACCIDENT

Discussion

[82] The testimony of the plaintiff and several of her current or former co-workers about the plaintiff's life before and after the Accident was comprehensive. I find it credible and reliable. Broadly speaking, they testified about such topics as the plaintiff's lifestyle, physical and mental condition, employment, income and future plans.

Findings of Fact – Before the Accident

[83] Based on the evidence of the aforementioned witnesses, I make the following further findings of fact.

Plaintiff's Evidence

[84] The plaintiff is 41-years old, born and raised in Korea, and the youngest of her parents' four children. Her father is deceased. Her mother, whom she supports financially, lives in Korea.

[85] The plaintiff is self-employed as a sole proprietor hairstylist, and works at Style Lab, a hair salon in downtown Vancouver. She is in a relationship with Arian

Baboomian, whom she met in early September 2018. She does not have children. She has no plans to have children. She is very independent and strong-minded.

[86] The plaintiff got her first job while in high school, and worked over summer and winter breaks. She enjoyed school and the curriculum. She did well with languages, history and art, but not math. She played various sports, including badminton, baseball, basketball, dodgeball and soccer. She graduated high school in 2001.

[87] After high school, the plaintiff decided not to pursue a university education and instead joined a hairstyling academy. She was good with her hands and liked the program. She was hired as an apprentice hairstylist at a local salon. She worked hard, typically from 7:30 or 8:00 a.m. until 9:00 p.m., and then practiced her skills until 11:00 p.m. or midnight. The first few months were really difficult, but she started getting compliments from clients, took some makeup courses, and became an instructor. She worked at the salon until 2005.

[88] In 2005, the plaintiff left Korea and moved to Vancouver in response to an advertisement seeking a Korean hairstylist. She had not previously been to Vancouver and did not speak much English. This was not a problem because the position she had been hired for was at Aqua, a salon with mostly Korean clients. Aqua was located in downtown Vancouver.

[89] The plaintiff lived alone in an apartment in downtown Vancouver. She had a dog, which she loved and cared for. She did everything associated with maintaining a household.

[90] The plaintiff enjoyed a wide variety of sporting and recreational activities. She played the ukulele. She travelled a lot. She volunteered in various capacities working with animals, including at a rescue centre, where she attended to seals. She enjoyed socializing with friends. She had no physical or mental limitations.

[91] In 2011, and again in 2014, the plaintiff had back surgery. She was off work between five and six weeks each time. Between 2014 and 2018, her back did not

trouble her. At the beginning of November 2015, she broke her left wrist while snowboarding. She went back to work after three weeks. She is right-hand dominant. She did not have any issues with her right hand. She did not have any psychological issues, anxiety or depression.

[92] The plaintiff worked at Aqua from 2005 to 2009. She was paid a salary of $1,600 a month. She worked from 10:00 a.m. to 7:00 p.m., six days a week. Sometimes she had overlapping clients. She would start early and finish late. Summers were particularly busy. She performed a variety of services, including haircutting, colouring, perms, hair straightening, hair extensions, and makeup. She left because the owner declined her request to change her compensation from fixed salary to a percentage basis. She moved to Ignite, a salon across the street.

[93] The plaintiff worked at Ignite from 2009 to 2018. She started there on the day she left Aqua. Many of her clients from Aqua moved with her. She was paid on a percentage basis: 50% for a haircut; 70% for a perm; 45% for colouring; and 10% of product sales, with the possibility of a cash bonus. She also received tips. In 2017 to 2018, her average tips were 20%. She worked from 10:00 a.m. to 7:00 p.m., five days a week. Walk-in clients were plentiful. She was very busy. She performed the same variety of services as when she was at Aqua. She did not advertise. Client bookings were done by a receptionist. She had no physical issues doing any of the requirements of her position. In 2017, she took on a managerial role and began working four days a week, from 10:00 a.m. to 7:00 p.m., sometimes later. She took courses to stay current with industry trends and be able to train her colleagues.

[94] In February 2018, she gave her notice at Ignite, but worked there until the end of March 2018. She and Ms. Shulgin left Ignite at the same time. They had decided to rent styling chairs at nearby Style Lab, where their clients could easily find them. She did not have access to client information, nor did she receive it.

[95] Since April 2018, the plaintiff has worked at Style Lab. She signed a styling chair rental agreement, pursuant to which she paid $1,050 a month, including tax, for a workspace consisting of a styling chair, storage for supplies, as well as a

shared shampoo and dryer area, reception area, waiting area and restroom. When she started she opened a bank account, got a business license, ordered business cards, did some advertising, and bought some products. She learned how to run a business as a self-employed sole proprietor hairstylist, including how to set prices, do bookings, deal with cash payments, and manage her schedule.

[96] At Style Lab, there was no receptionist, and no set opening and closing hours. Everyone was involved in chores, including sweeping, laundry, cleaning mirrors, windows and washrooms, throwing out garbage, and recycling.

[97] She planned to work full-time hours or more to build up a client-base. In her first few months, she felt like she was really busy, because she was learning the business. She did not have as many clients as she did before, but they were repeat clients. She estimated it might take a year, or slightly longer, to become as busy as before.

[98] In the six months before the Accident, the plaintiff was working five or six days a week from 9:30 a.m. or 10:00 a.m. until late, Monday through Saturday. She did not have scheduled lunch breaks, and ate between client appointments. Between her start date on April 1, 2018 and the Accident on October 15, 2018, she went to Italy for two weeks in June and to Banff, Alberta for one week in July.

[99] She had no pain or physical issues. She liked the job a lot because it gave her freedom and flexibility in a calm environment. She could grow her business and was “excited to spread [her] wings finally”. She had no plans for retirement. She was trying to build for her future. The job involved long hours and called for physical fitness, with a lot of leaning, raised arms, the ability to work with multiple tools in hand, some tilting and awkward positions, and reaching up. She also had to do some chores. She had to be attentive to clients and, in some ways, a bit like a psychologist, meaning she did a lot of listening to clients talk about themselves and their lives.

[100] The plaintiff's Income Tax and Benefit Returns show her income increased each year between 2013 and 2017.

- In 2013, her income was $39,170.47, not including tips or commissions.
- In 2014, her income was $40,965.83, not including tips or commissions, but including $1,107 of employment insurance and other benefits. She had back surgery.
- In 2015, her income was $36,661.75, not including tips or commissions, but including $778 of employment insurance and other benefits. She broke her left wrist.
- In 2016, her income was $47,557, not including tips or commissions.
- In 2017, her income was $56,150.28, including approximately $2,000 for management duties, and a portion of her tips, but not including commissions.

[101] The plaintiff wanted to work full-time and grow her business on her own hours.

[102] The plaintiff was paid based on the services she provided, or sometimes on an hourly rate, including for men's haircuts and women's haircuts. Men's haircuts typically involved consultation, washing, blow-drying, using clippers and scissors for about 30 minutes, another wash and then styling. The entire process took about 45 minutes. Women's haircuts involved washing, cutting, blow-drying and styling. The entire process took between 65 and 85 minutes. She also performed various colour services, such as balayage, highlights and colour correction. These services typically took several hours to complete. She charged $200 for the first hour and $100 for each additional hour. She did men's perms, which usually took about an hour, charging $80. She did women's perms, which usually took about an hour and a half, charging $120. She did hair straightening, which took between two and a half and three hours, charging $250. She did bridal makeup, which would take between an hour and 45 minutes and two hours, charging $120. She did special effects

makeup, which usually took about two hours, charging $180. She also did several types of extensions, mostly weave hair extensions, charging between $350 and $400. Being a hairstylist never felt like a job, it was her passion and she loved being at work.

Emily Tjong's Evidence

[103] Ms. Tjong is the plaintiff's friend and former colleague.

[104] Ms. Tjong and the plaintiff socialized and travelled overseas together, and engaged in various physical activities.

[105] The plaintiff was able to work quickly. She was very friendly, professional and reliable. She helped others when needed. She offered some services which other stylists did not, such as perms. She had repeat clients. She started at the level of senior stylist, but was promoted to the only director position.

[106] The plaintiff worked full-time hours.

[107] At some point the plaintiff had back surgery. After her recovery, which was about two weeks, she resumed work as before.

[108] The quality of services provided by the plaintiff was good.

Larissa Shulgin's Evidence

[109] Ms. Shulgin is the plaintiff's friend and former co-worker.

[110] Ms. Shulgin and the plaintiff socialized and travelled overseas together, and engaged in various sporting and recreational activities.

[111] Before the Accident, the plaintiff's personality was very energetic. She was "always up for it" and a positive person.

[112] The plaintiff was a good hairstylist. She was a quick worker compared to others. She was energetic, managed her schedule, and accepted walk-in clients. She was one of the busiest hairstylists, able to do men's haircuts quickly, fitting them

in between other clients. She was fashionably dressed, and had good hair, makeup and jewellery.

[113] In 2017, Ms. Shulgin and the plaintiff worked four days a week, ten hours a day.

[114] In the year before the Accident, Ms. Shulgin did not observe the plaintiff struggling to do her work. The plaintiff often did big colour transformation services which take between three and four hours, and involve such tasks as putting in foils and colour, rinsing, washing, cutting, styling and finishing.

[115] Both Ms. Shulgin and the plaintiff had career aspirations to develop their abilities as hairstylists, make more money and have more freedom.

Winnie Cheung's Evidence

[116] Ms. Cheung is the owner of Style Lab.

[117] The plaintiff started at Style Lab in April or May 2018. She had her own clients, many of whom came from her previous employer, although she was still building a client base and did not have enough clients to work full-time, five days a week.

[118] The plaintiff was professional, responsible and very friendly. She wanted to rent a styling chair full-time and signed a one-year contract, with a 30-day notice of cancellation. The plaintiff never gave her any reason to believe she considered Style Lab a temporary arrangement.

[119] Ms. Cheung often saw the plaintiff at work, although she did not monitor her work. She saw how the plaintiff performed and how busy she was. She never saw the plaintiff struggle physically to do her job. Her impression of the plaintiff was that she was very responsible and respectable, and worked well with clients and co-workers.

Arian Baboomian's Evidence

[120] Mr. Baboomian is the plaintiff's partner.

[121] When Mr. Baboomian and the plaintiff began dating, they engaged in various sporting and recreational activities. Their relationship started getting serious around October 2018, by which point they were seeing each other three or four times a week. He never observed the plaintiff exhibit any physical pain or difficulties engaging in any of their various activities. She was "very sweet, very energetic, very happy, very mannered and very friendly." One of the things he really liked about her when they first met was that she was also someone who enjoyed being outdoors. He was looking for a partner with whom he could hike, fish and go camping.

[122] The plaintiff was busy at work and they would usually meet in the evening. Her work was her passion. She was independent, financially and otherwise. She had her own place and paid rent. She financially supported her mother in Korea.

[123] The plaintiff had no plans to go to Korea during the time they were dating. She did mention something about going to Australia, but after her birthday in early October she told him she was no longer planning to go to there and instead wanted to have a relationship with him, build her business and save money.

[124] The plaintiff worked full-time at Style Lab. If she had only been planning on working part-time that would have concerned him, because he wanted his partner to be independent of him. If she had said she was only interested in working part-time he would probably not have stayed with her.

Findings of Fact – After the Accident

[125] Based on the evidence of the aforementioned witnesses, I make the following further findings of fact.

Plaintiff's Evidence

[126] The plaintiff now lives with Mr. Baboomian in an apartment in downtown Vancouver. She no longer has a dog. She tries to avoid painful activities so she is

able to work. Mr. Baboomian does most of the household chores. She does some chores, like folding laundry and loading the dishwasher. If she tries to do more chores she has to “pay the price” afterwards. She feels bad that Mr. Baboomian has to do most of the chores. While she appreciates his efforts, he does not always do the work to her standard. She does not have a housekeeper and cannot afford one.

[127] The plaintiff believes the Accident has negatively impacted her relationship with Mr. Baboomian. She does not go out much any more as she prefers to stay home. She and Mr. Baboomian sometimes go to various events. She does not socialize as much because she does not want to be a bad companion or worry her friends. Her involvement in sporting and recreational activities has changed. She no longer does any of her previous sporting activities. She has tried fishing, but experiences pain when casting. She has also tried camping, but experiences pain when having to go on road trips and cannot sit for long periods of time. She has not ridden a bicycle because she does not feel comfortable and remembers “that terrible moment”.

[128] After the plaintiff was discharged from hospital on the day of the Accident, she could not lift her right arm past her shoulder. She did not want to return to the hospital emergency department that day so she went home. Her body was aching and her shoulder, back, wrist and ankle were hurting. She went to see her family doctor the next day. She took three or four days off work. She felt scared and in shock. She had nightmares in which she dreamed of getting hit by a car and nobody coming to her assistance. She screamed a lot at night. She tried to work as much as possible, but found she had to reschedule clients, some of whom were able to accommodate her, while others could not. She felt a lot of pain, especially when washing hair and standing. She felt a lot of stress. She did not want to disappoint her clients. She was hoping to get better soon.

[129] Within the first few months after the Accident, the plaintiff experienced soreness, pain and aching in her left shoulder, which was “like someone holding [her] really tight”. It particularly hurt when lifting and pulling. She found it hard to

sleep and kept tossing and turning. Her back hurt a lot on the left side and she experienced tingling and numbness in her left leg, and the right side of her body. She could not put her full weight on her right ankle, and experienced pain, including when putting on shoes.

[130] In 2019, there was not much change in the plaintiff's symptoms and she was still struggling at work and taking treatment, such as physiotherapy.

[131] On August 15, 2019, the plaintiff experienced an incident while at home in which she suddenly could not stand or walk and had to lay on the floor. Mr. Baboomian had to come to her apartment and help her. She initially hoped to improve overnight, but the next day was still unable to walk or control her bladder. She was taken to hospital by ambulance, where the doctors gave her medication and recommended she see her family doctor to determine the cause. Mr. Baboomian moved in with her afterwards so he could continue to help her. She missed about a week off work. When she returned to work her activities aggravated her symptoms. She did not work as much as she wanted to because of the pain.

[132] The plaintiff believes the August 15, 2019 incident may have been as a result of trying too hard to work. Afterwards, she changed her client bookings to allow longer time for breaks between clients. Previously her schedule had always involved back-to-back client bookings.

[133] After the August 15, 2019 incident the plaintiff "did not feel like a woman" or that she would be attractive any more. It was humiliating and remains a hurtful memory.

[134] The plaintiff believes her condition has not improved well since the Accident. She has greater difficulty walking and standing. Her neck and right shoulder are stiff "like someone biting my neck" and "striking a knife in my upper arm". In her lower back, on the left side, she has intermittent pain; on the right side she has pain radiating to her buttocks and thigh, as well as on the top of her thigh radiating down to her knee. Her right wrist hurts even more. She cannot weight-bear on her right

wrist and, when lifting, experiences pain radiating down to her elbow, and pain and tingling in her upper arm. In the few months before trial, she experienced a knife-like pain in her ankle with tingling and numbness in the top of her foot every day. She experiences headaches every day. She has jaw pain. Her jaw makes a clicking sound and sometimes locks in the open position. She has experienced some incontinence. She does not sleep well because of her pain, and keeps turning in order to feel comfortable. When she wakes up, she feels awful from having slept poorly, which negatively affects her mood. She is irritable, has negative thoughts, does not recognize achievements and feels useless. She feels happier when she is with clients. She takes a variety of pain medications, but only when she feels the pain is too much to bear.

[135] The plaintiff has seen a variety of medical professionals and specialists. Her treatments since the Accident have included physiotherapy, acupuncture, kinesiology, Pilates and Reiki. She has seen a counsellor for emotional distress. At the time of trial, she was doing physiotherapy, acupuncture, Pilates and Reiki on a weekly basis. She believes these treatments and activities are somewhat helpful for pain management. She does the exercises assigned to her by her physiotherapist in the gym in the building where she lives. She is willing to undergo treatments and activities recommended by her medical professionals, including: physiotherapy, acupuncture, kinesiology, occupational therapy, psychological counselling; and use of a gym, pool and massage chair. She is willing to continue to use a wrist splint and receive Botox injections. She is willing to attend at a private sleep clinic and a pain clinic, and receive assistance for heavier housework. She is willing to take prescription medication, although some medication has caused her stomach problems in the past.

[136] From the time of the Accident until the end of December 2018, the plaintiff could not work much due to the pain. Work remains a struggle. She tries to work longer hours, but if she does she finds she is unable to work the next day, and has to work less the following week. She wants to work full-time, but now works less than half-time. She feels her symptoms have affected the quality of the service she

provides to her clients. She loses control of her tools or drops them, and worries she is not looking professional. She began wearing a wrist guard almost immediately after the Accident, but the wrist guard has a metal support which impedes her ability to work because it covers her palm and her hand.

[137] The plaintiff's clients are like friends and family, and her job is more than just a job. She has reluctantly told a small number of clients about her injuries, and she fears losing them, and does not want them to worry or feel guilty that they might be contributing to her pain. Her clients have noticed the changes in her performance. Some of her clients have begun declining some services. She cannot do full blow-drying, which means that the styling does not last as long. She has taken on a couple of new clients since the Accident, but not as many as she wants to. She has also lost some clients, and believes this is attributable to her limited schedule and the fact that she has had to compromise on her level of service. Overall, her services have been reduced. She now does quicker services, less major services, less straightening, and no weave extensions.

[138] When the plaintiff is in pain at work, she tries to take breaks and do stretching. This means she has to book appointments for longer time periods. Now, a long day is only five to six hours and she is in a lot of pain afterwards and has to just lay down and do nothing. She would like to be able to work full-time, meaning 10:00 a.m. to 7:00 p.m., five days a week, but because of her injuries she cannot. When she is finished work she does not know what to do with herself. She feels horrible and hurts everywhere. She feels she cannot do the same work any longer, but is not interested in doing other work because she has no training for anything else. She has no idea what she would do if she cannot be a hairstylist. She asked rhetorically, "Who is going to hire me, part-time?"

[139] Since the Accident, the plaintiff's income has decreased.

- In 2018, she had employment income of $12,532.58 from Ignite and gross business income of $40,441.16 from Style Lab (net income of $14,325.02).

- In 2019, she had gross business income of $47,531.09 (net income of $12,772.70), not including tips.

- In 2020, her income was negatively affected by the pandemic. Style Lab had to close for three months, during which time she did not work. She received CERB benefits of $2,000 a month from the federal government. Style Lab re-opened in June 2020, and she went back to work. She worked from home from mid-July to December. She did not pay rent to Style Lab during this time. Her pain prevented her from working the hours she wanted to work. She earned gross business income of $59,587.65 (net income of $37,007.73), plus $6,000 other income, including tips.

- In 2021, she had gross business income of $41,738.68 (net income of $22,914.56), not including tips. She worked from home from January to March. She did not pay rent to Style Lab during this time. When she returned to Style Lab, her rent was increased to $1,155 per month. She was feeling the same as before and not working as much as she wanted to. She felt she could work about half-time, but wanted to work full-time. She continued to struggle with the pain.

- In 2022, her Tax Return Summary indicates that she had a gross business income of $59,083.20 (net income of $25,316.87), including tips. She worked about half-time, because she was still struggling with pain. When she pushed herself to work harder she suffered the next day.

- In 2023, she worked about the same as she did in 2022, but feels like she is working less. She does not know how to resolve the injury and feels she has not found the proper treatment.

[140] The plaintiff believes she could have gross business income of about $120,000 a year, plus tips of approximately 25%. Her business expenses are approximately $30,000 to $35,000 a year. Her main business expenses are rent and products.

[141] After the Accident, it takes the plaintiff longer to perform all services: balayage and highlights now take between three and a half and four hours, men's perms about one and a half hours and women's perms about two and a half hours. Straightening takes about four hours. She does not do full extensions any more because the required hand functions cause too much pain. She does micro bead extensions instead.

Emily Tjong's Evidence

[142] Ms. Tjong tries to see the plaintiff as much as she can, but it is not as easy to do so because of Ms. Tjong's family obligations. They no longer go dancing or travelling together. They had agreed to travel overseas to celebrate a birthday, but never did. She does not engage in any physical activities with the plaintiff, because she feels it would inconvenience the plaintiff and cause her pain.

[143] The plaintiff's demeanour and mood has changed. She is not as outgoing. She is more reluctant to hang out or do things. She was always up for anything. Now she is always at home.

[144] The plaintiff seems uncomfortable when standing for long periods of time. She sometimes goes home with wet hair when the plaintiff does her hair to avoid having the plaintiff stand for longer to dry it, because she does not want the plaintiff to be in pain. She notices that the plaintiff is uncomfortable, wears a wrist guard, and is fidgety with her position and posture.

Larissa Shulgin's Evidence

[145] Ms. Shulgin and the plaintiff worked together until February 2020. During this time, the plaintiff was at work a lot less and would leave early. The plaintiff did minimal work and Ms. Shulgin felt like she was working by herself. The plaintiff's appearance had changed. Unlike before, she now dresses in plain and comfortable clothes. Her impression was that the plaintiff was hurt and in pain. The plaintiff wore a wrist brace. When the plaintiff took breaks, she either sat or did stretching. The plaintiff talked a lot less with clients, appeared to have less energy, and was not as

quick as before. She appeared to have difficulty with equipment like the blow dryer. Ms. Shulgin helped the plaintiff do clean up.

[146] Since Ms. Shulgin left Style Lab, she and the plaintiff have seen each other less and less. The plaintiff does not initiate activities and often declines invitations. She last saw the plaintiff about two months before trial. They now only see each other about three times a year. The plaintiff is not the same person, she does not hang out, her energy level has changed, she is reserved, and closed off. They have not gone snowboarding, biking, or any road trips. They tried dancing a couple of times, but the plaintiff was not able to stay on her feet for long and they left early. They have not gone to any workout classes. Ms. Shulgin does not invite the plaintiff on trips any more, because she now has a new friend whom she travels with.

[147] Ms. Shulgin saw the plaintiff on the day of the Accident. She believes the plaintiff was in shock. She asked the plaintiff how she was feeling and she said, “I don’t know”. She also saw the plaintiff in the weeks after the Accident, when the plaintiff came in to try and service clients.

[148] In 2019, Ms. Shulgin and the plaintiff went to Cuba and Costa Rica for a few weeks, which was very different to their other travel trips, because the plaintiff could not dance much and would have to do stretching.

[149] The plaintiff never returned to consistent full-time hours. She helped the plaintiff with some of her appointments, and took referrals from the plaintiff for both male and female clients when the plaintiff was not available. During this time, she was growing her client base and her business, and was getting busier, but the plaintiff was not doing either.

[150] The biggest changes in the plaintiff, apart from her injuries, are that her personality has changed, and she is not accomplishing her goals.

Winnie Cheung's Evidence

[151] Ms. Cheung has noticed the plaintiff's energy level is lower than before. She is quiet, but still friendly, although more withdrawn compared to before the Accident. She is now moody, not as energetic, more careful in her movements around the salon, with no apparent sense of urgency, and slower to complete her various services. She wears a wrist brace. At times she is smiling, engaging and happy with her clients.

[152] Ms. Cheung first learned that the plaintiff had been in the Accident when she noticed that she was not coming in to work. The plaintiff tried to keep full-time hours and still paid for the full-time chair rental, but she does not think the plaintiff has ever been back to full-time hours since the Accident. She took a lot of time off after the Accident. She worked shorter days. Sometimes she worked for a couple of hours, or broke up the day, and then missed a few days. She looked like she was in a lot of pain, and complained of back, shoulder and wrist pain when standing for long periods of time. She would sit down often and stretch a lot, particularly her shoulders, back and wrist. She would sit and rest for ten to 15 minutes after work.

[153] The plaintiff's hours vary between two or three days a week, for two or three hours at a time and, when she takes a break, it is for three or four hours, whereas other stylists book appointments back-to-back.

[154] The other stylists have accommodated the plaintiff by moving her tool cabinet to make it easier to access, moving the working trolley closer to her chair, and covering her chores.

[155] Style Lab gets walk-in customers occasionally because it is close to hotels and the area is very walkable. Sometimes the plaintiff services walk-in clients.

[156] In the period soon after the Accident, she noticed the plaintiff refer some of her clients to other stylists.

[157] The plaintiff still has the qualities of a good stylist, but she is not busy.

Orla Walsh's Evidence

[158] Ms. Walsh considers the plaintiff a very talented hairstylist who has a friendly manner and repeat customers.

[159] Ms. Walsh only knows that the plaintiff was involved in a motor vehicle accident. She has seen the plaintiff in apparent pain at work. She has never heard the plaintiff complain about it to clients.

[160] The plaintiff is not working full days. Her hours are sporadic. She needs a lot of breaks. She does not do back-to-back client bookings. She has never seen her work an eight-hour day. She moves at a slow pace and cannot work as long during the day.

[161] Ms. Walsh has not referred any potential clients to the plaintiff because she can see the plaintiff is in pain and she does not want to add to the plaintiff's workload.

Arian Baboomian's Evidence

[162] Mr. Baboomian saw the plaintiff on the evening of the day of the Accident. She said "Don't worry, I'm ok" and "I'm coming back normal soon". Although she would typically not show pain or complain, he saw her moving her right shoulder, grabbing her right wrist, shifting a lot while sitting, unable to sit for long periods of time, and limping. She had scratches and cuts on her ankle. She could not do as many household chores around her apartment. He helped her with some of the household chores, such as cleaning, taking out the garbage, buying groceries and walking her dog.

[163] They did not go running or for long walks. She tried, but could only last between 10 and 20 minutes.

[164] On a road trip they took to Nelson, they had to stop four or five times so she could stretch and walk a bit, and the trip took longer than it otherwise would have.

When they were in Nelson, she did not want to go out to the lake or the river, which he found a little strange.

[165] He moved in with the plaintiff after the incident in August 2019 when he came over and found her on the ground beside her bed unable to move. He took her to the hospital the next day. He could see how scared she was and said the incident "scared the hell out of [him] and her." About ten days after the incident, the plaintiff realized she was not going to get better soon and became moody, grumpy and spent time alone in her room. By this point, she could do almost nothing, and he had to help her with almost everything: going to the bathroom, getting dressed, doing household chores and groceries. She would do the laundry, but it would take her the whole day.

[166] On two other occasions they took road trips to Kamloops to a campground at Kamloops Lake. The plaintiff could not participate in fishing, and had to lie down after for about half an hour.

[167] The plaintiff has days in which she seems better and days in which she seems worse. Overall, his impression is that she is getting worse. She drops things, cannot open a water bottle, has difficulty opening her front door and working in the kitchen. On good days, she tries to push herself and on bad days she is grumpy, quiet, withdrawn and less active. He has seen swelling on her wrist, and noticed her holding onto her arm. His impression is that "she's not doing good." He now cannot hug her because of her pain, or hold her hand, and this "takes the happiness away". She always wears her wrist brace at home, and is always rubbing her right shoulder and slightly down the right side of her neck. She cannot carry groceries or do "anything that has to do with lifting something." She struggles with sitting and shifts around a lot and lays on her side. She has trouble getting into his pick-up truck. She always sleeps on her back with a pillow under her knees. Sometimes she screams and cries in her sleep. She wakes up early and tosses and turns a lot. He has noticed she has ankle pain. She slows down, limps and puts her leg up. She gets tearful when talking about the future. His impression is that "slowly she's realizing it's

not the way she thought it would be". She is depressed and quiet and he believes she has lost hope.

[168] He is not sure if the plaintiff applied for a visa to go to Australia, but remembers there was some talk about it. He said if the plaintiff had wanted to go to Australia, they would likely have gone their separate ways.

THE WORK OF A HAIRSTYLIST

Discussion

[169] The testimony of the plaintiff and her current or former co-workers about the work of a hairstylist in downtown Vancouver in the years leading up to and following the Accident was comprehensive. I find it credible and reliable. Like the plaintiff, the lay witnesses are all either currently hairstylists in hair salons in downtown Vancouver, or have worked in that capacity, either as paid employees or sole proprietors. Broadly speaking, they each testified about such topics as the work environment, the physical and emotional requirements, hours and pricing for services.

Findings of Fact – Work of a Hairstylist

[170] Based on the evidence of the aforementioned witnesses, I make the following further findings of fact.

[171] A hair salon is a busy work environment. It is a viable business model for self-employed sole proprietor hairstylists to rent a chair at a hair salon, on either a part-time or full-time basis. It is viable for them to make up income loss from being away from work due to vacations by working longer hours. They have business expenses, which can include paying for a business license, insurance, a point of sale device, a client-booking system, product and equipment. A good hairstylist can generate clients through word of mouth referrals and does not need to advertise.

[172] After Ms. Shulgin left Ignite, it took her approximately one year to build up her business. She is now as busy as she was at Ignite. The plaintiff is at least as talented a hairstylist as Ms. Shulgin.

[173] Style Lab sets the styling chair rental price and the hairstylist sets the price for services. Each hairstylist at Style Lab has a key and can come and go as they please. In addition to providing styling services, hairstylists at Style Lab do other activities, including taking care of clients by booking appointments, collecting payment for services, and salon maintenance. The work is done on a co-op model in which the hairstylists are collectively responsible for cleaning, sweeping, taking out garbage and general housekeeping. The plaintiff was involved in all of these activities before the Accident. The plaintiff is one of nine self-employed sole proprietor hairstylists at Style Lab.

[174] Hairstylists have to be physically strong. They stand or sit all day. They work with their arms and shoulders raised above shoulder level with lots of wrist movement when cutting hair, bending over when shampooing, and sideways twisting for extended periods. Hairstylists also have to be emotionally strong. They must be energetic, friendly, approachable, engaged, good conversationalists, work well in a team environment, interested in their clients, of happy disposition, possess good time management skills and able to educate their clients on products. Before the Accident, the plaintiff had the physical and emotional requirements for a hairstylist.

[175] A full-time hairstylist typically works five days a week, eight to ten hours a day, or four days a week, ten hours a day for a total of 40 hours a week. Hairstylists tend not to book breaks during the day, in order to maximize their income-generating time in the salon.

[176] In downtown Vancouver, prices for hairstyling services have increased in recent years. As at the time of trial, at a hair salon in downtown Vancouver, the price for a haircut was between $85 for a female client and $45 for a male client; balayage was between $275 and $335; a full head of highlights for a female client was between $180 and $260; and colouring services were priced around $120 an hour. Colour correction was $150. Other services such as extensions were priced between $150 and $250. These are average prices and some hairstylists charged more. Before the Accident the plaintiff performed all these services.

[177] Female hairstyling clients typically require longer appointments than male clients and there is less cleanup afterwards.

EXPERT EVIDENCE

[178] Plaintiff's counsel called five experts at trial, all of whom are well qualified in their respective fields of professional expertise: a physiatrist, a plastic surgeon who is a hand and wrist specialist, a psychiatrist, a physiotherapist who is a functional capacity evaluator, and an economist. Defence counsel did not call any experts at trial.

Discussion

Dr. Koo's Evidence

[179] Dr. Koo is a physiatrist. I qualified him as an expert in the field of physical medicine and rehabilitation.

[180] Dr. Koo assessed the plaintiff on September 30, 2022 and July 4, 2023. By assessing her twice, he gained a stronger foundation upon which to predict her future condition.

[181] In Dr. Koo's initial report of October 20, 2022, following his first assessment of the plaintiff, he opined that the Accident likely resulted in the following injuries and conditions:

- soft tissue injuries to the cervical spine and periscapular region with chronic mechanical neck and right shoulder pain, myofascial origin;
- chronic mechanical right wrist pain, combination of triangular fibrocartilage complex ("TFCC") tear, scapholunate ligament pinhole tear, and chronic wrist tendonitis with De Quervain's tenosynovitis;
- chronic mechanical low back pain from myofascial injury and left leg radiculopathy;
- right ankle abrasion with sprain and contusion;

- adjustment disorder with mild depression and moderate anxiety;
- pain and anxiety-related insomnia;
- deconditioning with relative loss of strength, endurance and activity tolerances;
- aggravation of temporomandibular joint ("TMJ") pain (worsening of pre-accident vulnerability); and
- post-traumatic headaches, likely cervicogenic related to chronic neck and TMJ injuries.

[182] Dr. Koo's opinion remained unchanged in his supplemental report of July 11, 2023, following his second assessment of the plaintiff.

[183] In Dr. Koo's initial report he provides this prognosis:

> It has been almost four years since the accident in question, and Ms. Woo's treatment program has been comprehensive to date.
>
> Prognosis regarding Ms. Woo's overall recovery is poor in that she is likely to have ongoing permanent activity-limiting pain related to her neck, right shoulder, right wrist and residual low back injuries.
>
> In my opinion, the treatment recommendations that I have outlined will likely provide further symptomatic support on a temporary basis but are unlikely to achieve a cure.
>
> In my opinion, she is likely to have ongoing moderate levels of disability and functional restrictions on a permanent basis as revealed through my clinical examination and her recent Functional Capacity Evaluation.
>
> Ms. Woo's triangular fibrocartilage complex tear is permanent and will not spontaneously heal. She will likely have ongoing right wrist pain that is proportional to the amount of flexion, extension or repetitive wrist and hand activity that she subjects it to. In my opinion, there is a real risk that she will experience increased pain and stiffness in the right wrist as she ages with this tear to the TFCC. This will likely require increased periods of relative rest and decrease her capacity for gripping, scissoring, washing hair, providing scalp massages, blow drying and general lifting, reaching and carrying down the road.
>
> In my opinion, her ongoing employment as a hairstylist with the significant upper extremity demands involved, likely increases her risk for further degenerative changes to the right wrist and triangular fibrocartilage complex due to the repetitive stresses that are involved from her occupation.

> In my opinion, in the next 10-15 years, Ms. Woo's right wrist injuries will require reevaluation from a surgical risk perspective as supportive symptomatic treatments and intraarticular injections are likely to only be temporarily helpful, if at all, and her occupation is particularly wrist and dexterity-intensive. I would defer to an orthopedic surgeon to discuss the risks and likelihood of benefit of surgical repair of a triangular fibrocartilage complex in this scenario.
>
> Ms. Woo remains at increased vulnerability for reinjury or repetitive strain by way of a fall, a subsequent motor vehicle accident or resumption of inappropriate sport or pain aggravating activities through work as it relates to her ongoing chronic soft tissue pain in the neck, right shoulder, right wrist, lower back and right ankle.
>
> Reinjury to her neck, right shoulder, right wrist, and lower back and right ankle would likely result in a protracted recovery and predict a poorer prognosis than if she did not have these chronic soft tissue vulnerabilities from the accident in question.
>
> Prognosis regarding her depression and anxiety is deferred to a mental health professional who has had a chance to assess to treat Ms. Woo. However, in my opinion, her ongoing post-accident conditions of chronic pain, recurring headaches, barriers to full-time employment and subsequent financial restrictions and loss of sport and leisure activity pursuits are all likely negative factors related to Ms. Woo's future emotional health and resilience.
>
> Prognosis regarding her TMJ dysfunction is deferred to a TMJ specialist. In my opinion, Botox into the masseters will likely provide some degree of benefit but to what degree is uncertain. Botox is a self-limited injection and would likely need to be repeated every three to four months in order to maintain a therapeutic level of benefit as its duration would eventually wear off.

[184] In Dr. Koo's supplemental report his prognosis is consistent with his initial report:

> It has been more than 4-½ years since the accident in question, and Ms. Woo's treatment program has been comprehensive and reasonable.
>
> In my opinion, prognosis regarding Ms. Woo's overall recovery is poor in that she is likely to have ongoing permanent activity-limiting pain involving her neck, right shoulder, right wrist and low back injuries. Her deterioration in the last several months as she has attempted to increase her workload, suggests she is vulnerable to worsening pain, depression and anxiety if subjected to inappropriate work demands, which are the most consistent trigger for her pain day to day.
>
> In my opinion, the treatment recommendations I have outlined in this report will provide symptomatic support on a temporary basis but are unlikely to be curative.
>
> In my opinion, she will likely have ongoing moderate levels of disability, if not worse, on a permanent basis.

> She has had, as expected, increased right wrist pain in response to her hairstyling demands, which now also involves pain to the back of her hand and non-specific sensory changes. As I previously opined, she will likely have ongoing right wrist pain that is proportional to the amount of flexion, extension, or repetitive wrist and hand activity that she subjects it to. In my opinion, her worsening right wrist pain and new hand pain is a consequence of the initial accident, and the ongoing aggravation of her upper extremity demands from working as a hairstylist that involves gripping, scissoring, washing hair, scalp massaging, blow drying, as well as general lifting, reaching and carrying.
>
> In my opinion, her ongoing employment as a hairstylist with significant upper extremity demands involved, will increase her risk for further degenerative changes and ongoing pain in the right wrist and triangular fibrocartilage complex due to the repetitive stressors that are inherent to her occupation.
>
> Ms. Woo has had only temporary and very limited response to injection of the triangular fibrocartilage with corticosteroid. She has not responded well to various wrist splint trials. In my opinion, she is likely to have ongoing pain and disability involving the right wrist with future conservative treatment.
>
> I would defer to a wrist-hand surgeon to discuss the risks and likelihood of benefit of surgical repair of her right wrist pain in this scenario.
>
> My 2022 discussion about future risks remains pertinent and unchanged based on my reevaluation. If anything, her risks for increasing pain and emotional decline in response to inappropriate activity progression and inadequate pain management have been borne out with her recent physical and mental health decline. Her future risks are reiterated here in italics for ease of the reader's reference.

[185] Plaintiff's counsel submits Dr. Koo was a credible expert who provided reliable evidence. Defence counsel submits Dr. Koo assumed the role of advocate for the plaintiff and I should give his opinions no weight.

[186] I find Dr. Koo was a credible expert who provided reliable evidence. I accept the contents of Dr. Koo's reports and place a lot of weight on his evidence.

[187] Dr. Koo's manner of testifying was entirely consistent with an expert's role to assist the court and he did not advocate on behalf of the plaintiff. Dr. Koo's reports specifically indicate he is aware of his duty to assist the court and not to be an advocate for any specific party, that he prepared his reports in conformity with that duty, and would continue to do so in any further report or in-court testimony.

[188] There is a difference between an expert who advocates for a party and one who advocates for their opinion: *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2007 BCSC 899 at paras. 15–16.

[189] Dr. Koo was entitled to defend his opinion and he did. The contents of Dr. Koo's reports, about which he was cross-examined, may not be to defence counsel's liking, in that they are unhelpful to the case for the defence, but that does not mean either the reports or his evidence in cross-examination can be fairly characterized as advocating on behalf of the plaintiff. I listened carefully to Dr. Koo's evidence. He did not attempt to avoid answering questions through non-responsiveness, evasiveness or obfuscation. On the contrary, I found Dr. Koo's expansiveness in answering some of defence counsel's questions in cross-examination helpful to my understanding of important aspects of his evidence.

[190] Defence counsel strongly takes issue with Dr. Koo's statement in cross-examination about "what this case is about" and says it evidences him going beyond the proper role of an expert. Considering Dr. Koo's comment in the context of his evidence as a whole, I am satisfied he made it while commenting on what he clearly perceived to be defence counsel's misunderstanding of some of his evidence.

[191] Defence counsel says that Dr. Koo was largely incapable of answering simple questions. I was left with the impression that Dr. Koo sometimes felt that certain questions were not amenable to a simple "yes" or "no" answer; and that answering what defence counsel characterizes as simple questions in that way would have prevented me from reaching a proper understanding of his evidence. I found Dr. Koo's sometimes expansive responses to the questions he was asked entirely appropriate.

Dr. French's Evidence

[192] Dr. French is a plastic surgeon and hand and wrist specialist. I qualified him as an expert in the field of plastic surgery, particularly hand and wrist surgery, to give opinion evidence regarding diagnosis, prognosis, causation and treatment of hand and wrist injuries, within the context of a personal injury claim.

[193] Dr. French assessed the plaintiff on March 14, 2023. He derived the information in his June 21, 2023 report from his history and physical examination of the plaintiff, evaluation of relevant radiological examinations, and review of documents provided to him.

[194] Dr. French diagnosed the plaintiff as having the following medical conditions of the right wrist:

- suspected occult ganglion of the right wrist scapholunate interval secondary to a small pinhole tear of the scapholunate ligament; and
- right wrist TFCC partial central tear related to ulnar-positive variance in the wrist.

[195] As Dr. French explains in his report, under the heading “Explanation of Medical Condition” (diagrams omitted):

> **Wrist ganglions** are common lumps that form around the wrist, almost always overlying the scapholunate joint. They occur most commonly on the backside (*known as the dorsum*) of the wrist, or more rarely on the palm side (*or volar surface*) of the wrist. When they bulge outside the joint ligaments can be visible (***shown as left*** as a dorsal wrist ganglion), they can get quite large, change in size, and are usually not painful. They can be thought of as similar to a water balloon that is filled with water except that ganglions are filled with joint fluid and are “outpouching” of the joint. They are connected to the joint via a thin stalk that most commonly originates from a very small defect in the scapho-lunate ligament (***shown to the right***). When a ganglion remains within the joint region it is termed an “occult ganglion” as it cannot usually be seen. Being under pressure, with a definitive mass to them, and stuck within the joint they are commonly painful especially at the extreme of wrist extension, such as the wrist in a push-up position. At times when Ms. Woo increased her activity levels, she had increased swelling in the wrist. This is consistent with a ganglion as these can increase and decrease in size relative to activity levels.
>
> **Ulnar Positive Variance:** The forearm bones of the radius and ulna meet at the wrist level and form a joint known as the distal radioulnar joint. In the normal wrist, the very end of the ulna sits essentially level with the end of the radius. This is known as an ulnar-neutral variance, in that the ulna is not varied in any way from the length of the radius. This is outlined (sic) this in the ***diagram at right.***
>
> Most patients have an ulna-neutral variance, as seen in the middle image above. Some patients have an ulna-negative variance, where the ulna is slightly shorter (or a negative length) than the radius, as seen on the upper

> right. In other patients, we can see an ulna-positive variance, as noted in the above left. Changes in the relative lengths of these bones can also occur after trauma or can be a normal anatomical variation such as in Ms. Woo.
>
> Ms. Woo has a natural **ulnar positive variance**. As such, her ulna will be "tenting" the major ligament at the wrist which holds the ulna to the radius, the triangular fibrocartilage complex or TFCC. The TFCC is highlighted with the white arrow (**diagram on right**) with the head of the ulna sitting just beneath it.
>
> The TFCC will degenerate to some degree in most humans over time due to its very poor blood supply. After the age of 40, 100% of patients will have a finding of a Class IA tear (a small perforation) because of this. One must be cautious therefore when reading MRI reports in the absence of a history and physical exam as these findings are more likely than not an unrelated asymptomatic condition.
>
> The TFCC can also be torn because of trauma. This occurs in specific anatomic patterns, outlined in the Palmer Classification shown diagrammatically **on the left**. Based on the clinical examination and MRI, Ms. Woo has a Palmer Class IA tear, circled by the red box.

[196] In Dr. French's opinion, it is not a given that the plaintiff's wrist injury will worsen over time.

[197] In cross-examination, Dr. French acknowledged he partly relied on the information given to him by the plaintiff, but disagreed with defence counsel's suggestion that it would affect his opinion if the plaintiff gave him incorrect information. If something is not in his report, it is because the plaintiff did not complain about it. He suspected the plaintiff had a tear in the TFCC.

[198] Regarding the plaintiff's past medical history, he noted a set of x-rays in a medical record authored by a Dr. Towari in May 2014, indicating the plaintiff had a right wrist x-ray associated with a FOOSH injury, that the wrist was of normal appearance, with no evidence of fracture, but there was a "slight positive ulnar variance." There were no other medical records to indicate what occurred, the severity of the FOOSH injury, or what any lingering issues have been.

[199] He conducted a Watson's test, which is an indirect assessment of the scapholunate ligament. The test was negative, meaning that there was no complete tear. The test was also negative for any pain, meaning no partial tear.

[200] There was no obvious abnormality between the two hands and wrists other than a slightly increased prominence of the right ulnar head. There was normal flexion and extension of all digits.

[201] X-rays done on the day after the Accident indicate the plaintiff has ulnar-positive variance, which occurs in approximately 20% of the population.

[202] I find Dr. French was a credible expert who provided reliable evidence. I accept the contents of Dr. French's report and place a lot of weight on his evidence.

Dr. Kroeker's Evidence

[203] Dr. Kroeker is a psychiatrist. I qualified him as an expert in the field of psychiatry, to give opinion evidence about complex mood disorders with multiple comorbidities.

[204] Dr. Kroeker assessed the plaintiff on November 2, 2022. He arrived at his diagnoses through a lengthy interview with the plaintiff, including a mental status examination, which he described as the most objective component of a psychiatric examination, the "psychological version of taking vital signs". He also reviewed documentation provided to him.

[205] Dr. Kroeker made the following diagnoses:

- Depressive disorder due to a medical condition. Symptoms include irritability, loss of enjoyment, low self-esteem, and sleep disturbance.
- Unspecified trauma and stressor-related disorder, with heightened anxiety around traffic, and avoidance of traffic situations. This is a limited-symptom variant of post-traumatic stress disorder.
- Pain symptoms including headaches, shoulder pain, neck pain, wrist pain, and lower back pain.

[206] Dr. Kroeker opines that the prognosis for Ms. Woo's depressive disorder is strongly connected to the prognosis of her pain symptoms. In other words, if Ms. Woo's physical condition does not improve, neither will her mood symptoms.

[207] Dr. Kroeker opines that the plaintiff's post-traumatic stress symptoms have a good chance of improvement with time and treatment, but she is vulnerable to relapse if she is exposed to another traumatic incident, like an accident, and is likely to have a worse post-traumatic outcome if that happens.

[208] Dr. Kroeker recommended that Ms. Woo rule out other health conditions which could be complicating her ongoing sleep issue, such as low ferritin and sleep apnea, although the risk of sleep apnea in persons such as the plaintiff is less than 1%. He also recommended the plaintiff continue with psychotherapy and consider pharmacotherapy with a selective serotonin reuptake inhibitor if her symptoms do not improve.

[209] In cross-examination, Dr. Kroeker agreed that early treatment always improves the chance of better recovery, but clarified in re-examination that early therapy will not improve the chance of recovery where the individual is not ready for treatment. He stated that:

> In order for psychological therapy to be effective it requires the person to have good insight and to be ready and not feeling pushed. If you push on someone who isn't ready for it, it can be counterproductive or waste of time. For some people it can really take time to come around.

[210] I find Dr. Kroeker was a credible expert who provided reliable evidence. I accept the contents of Dr. Kroeker's report and place a lot of weight on his evidence.

Ms. Craig's Evidence

[211] Ms. Craig is a physiotherapist and functional capacity evaluator and has a lot of experience assessing hairstylists. I qualified her to give opinion evidence about the plaintiff's functional capacity, life care planning and cost of future care.

[212] Ms. Craig evaluated the plaintiff on September 1, 2022.

[213] In Ms. Craig's Functional Capacity Evaluation report dated September 8, 2022, under the heading "Opinion on Functional Capacity" she states:

> Based on the data and information contained in this report I have determined Soo Woo's functional capacity. This section outlines my opinion with respect to Soo Woo's abilities and limitations and capacity for work domestic activity.
>
> 1. **Work capacity:** During this functional capacity evaluation, Ms. Woo demonstrates the capacity to partially meet the physical demands of her pre-collision occupation as a Hairstylist (National Occupational Classification Number 6341.1).
> 2. Ms**.** Woo is limited for work as a Hairstylist by the sustained neck and upper back positions required, the requirement for constant reaching and handling and the constant static standing demands. Ms. Woo reports that since the collision she has attempted to resume work in her prior capacity but is now working 3 days per week, while she builds up her clientele and work tolerance.
> 3. Currently Ms. Woo demonstrates limitations for her work, and this causes her to break, stretch, alter position, and employ other management strategies such as continuing with regular treatment to help manage her pain in response to work. During this assessment I completed standardized tests for reaching and body positions as well as work simulation test with a mannequin head that simulated regular hair styling appointments (i.e. 1 hour 15 minutes). She states that sometimes she uses a stool to cut long hair but she usually just crouches because this is faster. She states that she cannot do back-to-back long hair blow drying. It was apparent that Ms. Woo is limited for this work and that working in this role challenges her capacity. Ms. Woo is no longer suited to full-time work as a Hairstylist and part-time work is recommended. Based on this assessment Ms. Woo is better suited to 4 to 6-hour days, rather than 8-hour days, three to four days per week, with a break day recommended after one or two consecutive days. If she works 4 to 5 hours, it is likely she can work consecutive days. If she works 6 hours, she requires a day off in between. Her present capacity is in the range of 20 to 25 hours per week. Reduced exposure to the sustained neck and upper/lower back positioning, reaching and standing is expected to assist Ms. Woo in better managing her pain and allow her to work within her residual limitations.
> 4. Ms. Woo demonstrates an intra-articular wrist injury (as seen on the MRI of her wrist) that may become worse over time. A medical opinion is required to determine the prognosis of this injury. Should the condition of her wrist deteriorate, her capacity for hairstyling will be impacted directly and would likely further, and possibly significantly, limit her capacity for washing, cutting and colouring hair and using styling tools (blow dryer, curling iron, brush, colour applicator, etc).
> 5. **Competitive employability**: Ms. Woo demonstrates limitations that reduce her ability to work at sedentary, light and more physically demanding jobs. Occupations with sedentary to light physical strength

demands (although more in keeping with her current physical capacity) will require accommodation allowing for frequent positional and task changes, regular stretching, avoidance or minimized exposure to some tasks and proper ergonomics to best manage symptom aggravation. As such, the scope of occupations once viable from a physical perspective for Ms. Woo is reduced, leaving her with reduced competitive employability.

6. **Ms. Woo's limitations/abilities are as follows**: She demonstrates the capacity for sedentary to light physical strength demands (lifting floor to knuckle up to 201b, lifting knuckle to shoulder up to 101b, carrying is up to 101b, pushing or pulling up to 12 to 141b). She demonstrates weaker than average handgrip strength compared to population norms for her age and gender. She demonstrates faster than average pace for medium manual dexterity. She is able to reach at all levels with limitations for sustained and upper level reaching. She performs whole-body reaching tasks at a pace that is mostly below industry standards (i.e., not a competitive pace). She is able to balance on the right leg and is able to balance on the left leg. She is able to negotiate stairs without handrail support requirements. She is limited for prolonged periods of sitting due to symptom aggravation and neck/back stiffness. She is limited for longer periods of standing. She is not limited for occasional walking. She demonstrates satisfactory cardiovascular fitness. She is able to assume all body positions, but is limited for activity in crawl and stooped posture to short durations. She shows limited capacity for sustained stooped posture, head-forward posture, and neck extension posture while reaching overhead.

7. **Repetitive movement testing and response to the assessment activities**: This evaluation shows that occasional sedentary to light activity results in decline in function and increased pain. On repeat test measures, comparing performance at the start of the evaluation and at the end of the evaluation, Ms. Woo demonstrates measurable functional decline, indicating a reduced capacity for test activities and for activities similar to those that are encountered at work and home. Ms. Woo shows a loss of speed for rapid reaching at shoulder level (decline of 45 percent), loss of speed for rapid reaching overhead (decline of 46 percent), and loss of speed for rapid stooping (decline of 18 percent), indicating reduced capacity for work and test activities. Ms. Woo shows loss of speed, ease and range of cervical and lumbar movements over the course of the evaluation further indicating reduced capacity for test activities. She reports pain increase over the course of the evaluation.

8. **Effort testing**: Based on the analysis of consistency, reliability and validity protocols outlined in this report, my opinion is that Ms. Woo provided a consistent and full physical effort during this evaluation.

9. **Reliability of reports of pain and level of disability**: Based on the evaluation findings and my clinical observations Ms. Woo's self-reports of pain and her perceived level of disability are generally consistent with objective findings and are considered reliable.

10. **Comment on physical rehabilitation status**: Based on the findings of this assessment Ms. Woo is likely at or close to maximum physical rehabilitation and while further treatment may assist in the management of symptoms, it is unlikely to substantially improve her functional abilities.
11. **Comment on capacity for self-care:** Based on the findings of this assessment Ms. Woo is found to be independent with activities of self-care and while some activities are aggravating to her symptoms, she remains independent.
12. **Comment on capacity for domestic activity:** Based on the findings of this assessment Ms. Woo does not meet the full physical demands for regular household cleaning, seasonal household cleaning, regular yard care, seasonal yard care or household maintenance activities and requires assistance.

[214] In cross-examination, defence counsel asked Ms. Craig mostly about the process by which she obtained the information forming the basis for the content of her report, including that she relied on information provided by the plaintiff when completing various forms and from what the plaintiff told her.

[215] I find Ms. Craig was a credible expert who provided reliable evidence. I accept the contents of Ms. Craig's report and place a lot of weight on her evidence.

Mr. Benning's Evidence

[216] Mr. Benning is an economist. I qualified him to give opinion evidence about future income loss multipliers and future cost of care multipliers, within the context of a personal injury claim.

Findings of Fact – Expert Evidence

[217] Based on the expert opinion evidence of Dr. Koo, Dr. French, Dr. Kroeker and Ms. Craig, I make the following further findings of fact.

[218] The plaintiff is experiencing the following injuries and conditions:

- Soft tissue injuries to the cervical spine and periscapular region with chronic mechanical neck and right shoulder pain, myofascial origin.

- FOOSH with chronic mechanical right wrist pain, combination of TFCC tear, scapholunate ligament pinhole tear, and chronic wrist tendonitis with De Quervain's tenosynovitis. The TFCC tear is related to ulnar-positive variance in the right wrist. The occult ganglion of the right wrist scapholunate interval is secondary to the scapholunate ligament pinhole tear.
- Chronic mechanical low back pain from myofascial injury and left leg radiculopathy.
- Right ankle abrasion with sprain and contusion.
- Adjustment disorder with mild depression and moderate anxiety.
- Pain and anxiety-related insomnia.
- Deconditioning with relative loss of strength, endurance and activity tolerances.
- Aggravation of TMJ pain (worsening of pre-Accident vulnerability).
- Post-traumatic headaches, likely cervicogenic related to chronic neck and TMJ injuries.

[219] The plaintiff can only partially meet the physical requirements of her pre-Accident occupation as a hairstylist. She is limited for work as a hairstylist by the sustained neck and upper back positions required, the requirement for constant reaching and handling, and the constant static standing demands. She is working three days a week as a hairstylist, with a work capacity of between 20 and 25 hours. She is likely at or close to maximum physical rehabilitation, and while further treatment might assist in the management of symptoms, it is unlikely to substantially improve her functional abilities.

[220] The prognosis for the plaintiff's recovery is poor, and she is likely to have ongoing permanent activity-limiting pain related to her neck, right shoulder, right wrist and residual low back injuries. Various treatment recommendations will likely

provide further symptomatic support on a temporary basis, but are unlikely to achieve a cure.

[221] The plaintiff is likely to have ongoing moderate levels of disability and functional restrictions on a permanent basis.

[222] The plaintiff's right wrist TFCC tear is permanent and will not spontaneously heal. She is likely to have ongoing right wrist pain proportional to the amount of flexion, extension or repetitive wrist and hand activity that she subjects it to. With the TFCC tear there is a real risk the plaintiff will experience increased pain and stiffness in the right wrist with aging. This will likely require increased periods of relative rest and decrease her future capacity for gripping, scissoring, washing hair, providing scalp massages, blow-drying and general lifting, reaching and carrying.

[223] The plaintiff has depressive disorder due to a medical condition and unspecified trauma and stressor-related disorder, with heightened anxiety around traffic, and avoidance of traffic situations. This is a limited-symptom variant of post-traumatic stress disorder.

[224] The plaintiff is no longer suited to full-time work as a hairstylist. She is better suited to part-time work, four to six hours a day, three to four days a week, with a break recommended after one or two consecutive days. If she works four to five hours, she can likely work consecutive days. If she works six hours, she requires a day off in between. Reduced exposure to sustained neck and upper/lower back positioning, reaching and standing will assist her in better managing her pain and allow her to work within her residual limitations.

[225] The plaintiff has reduced competitive employability, because the scope of occupations once viable from a physical perspective is reduced. She demonstrates limitations that reduce her ability to work at sedentary, light and more physically demanding jobs. She will require accommodation allowing for frequent positional and task changes, regular stretching, decreased exposure to some tasks, and proper ergonomics to perform occupations with sedentary to light physical strength

demands. She experiences decline in function and increased pain when engaging in occasional sedentary to light activity.

[226] The plaintiff's condition has deteriorated when she has attempted to increase her workload. She is vulnerable to increased pain, depression and anxiety if subjected to inappropriate work demands, which are the most consistent trigger for her day-to-day pain.

[227] The plaintiff's occupation as a hairstylist is particularly wrist and dexterity-intensive.

[228] The plaintiff is at increased vulnerability for re-injury or repetitive strain by way of a fall, a subsequent motor vehicle accident or resumption of inappropriate sport or pain-aggravating activities through work as related to her ongoing chronic soft tissue pain in the neck, right shoulder, right wrist, lower back and right ankle. Re-injury to her neck, right shoulder, right wrist, lower back and right ankle is likely to result in a protracted recovery and poorer prognosis than if she did not have these soft tissue vulnerabilities.

[229] The plaintiff's ongoing post-Accident conditions of chronic pain, recurring headaches, barriers to working full-time and subsequent financial restrictions, and loss of sport and leisure activity pursuits, are likely all negative factors related to her future emotional health and resilience.

[230] If the plaintiff's physical condition does not improve, neither will her depressive disorder mood symptoms.

[231] The plaintiff's post-traumatic stress symptoms have a good chance of improvement with time and treatment, but she is vulnerable to relapse if she is exposed to another traumatic incident, like an accident, and is likely to have a worse post-traumatic outcome if that happens.

[232] The plaintiff is independent with activities of self-care.

[233] The plaintiff does not meet the full physical demands for regular household cleaning, seasonal household cleaning, regular yard care, seasonal yard care or household maintenance activities and requires assistance.

[234] The plaintiff's response to injection of the triangular fibrocartilage with cortico-steroid has been very limited and only temporary. She did not respond well to various wrist splint trials. Supportive treatments and intra-articular injections are likely to be only temporarily helpful, if at all. With future conservative treatment she is likely to have ongoing right wrist pain and disability.

[235] Botox injections to the plaintiff's masseters will likely provide some degree of benefit but to what degree is uncertain. Botox injections would likely need to be repeated every three to four months.

[236] The plaintiff's work as a hairstylist involves gripping, scissoring, washing hair, blow-drying hair, massaging scalps, and general lifting, reaching and carrying. Her ongoing right wrist pain will likely be proportional to the amount of flexion, extension or repetitive wrist and hand activity involved.

[237] The plaintiff's treatment program up to July 4, 2023 was comprehensive and reasonable.

CAUSATION

Law

[238] A plaintiff must establish on a balance of probabilities that a defendant's negligence caused or materially contributed to an injury. The defendant's negligence does not have to be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation does not have to be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [*Athey*] at paras. 13–17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[239] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation

for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23. In special circumstances, the "but-for" test proves unworkable, and the law has applied a "material contribution" test: *Clements v. Clements*, 2012 SCC 32 at para. 46.

[240] Causation must be established on a balance of probabilities before damages are assessed. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

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

[242] Defendants can and often do argue that a plaintiff's damages ought to be reduced to account for any "measurable risk" that a pre-existing condition would have detrimentally affected the plaintiff even absent the tortious event: *Athey* at para. 36. The defence bears the burden of proof for a deduction of damages to be made on this basis. Measurable risk must be based on the accepted evidence and must rise above speculation: *Zacharias v. Leys*, 2005 BCCA 560, at para. 16.

Position of the Parties

[243] The plaintiff's position is that the evidence establishes a causal connection between the Accident and the plaintiff's current injuries and conditions.

[244] The defendants' position is that the Accident resulted in soft tissue injuries from which the plaintiff has long since recovered.

Discussion

Dr. Koo's Evidence

[245] In Dr. Koo's opinion, the Accident caused the plaintiff's current injuries and conditions. Rather than attempting to summarize the relevant portion of Dr. Koo's very detailed report, and thereby risk over-simplification of its content, I have excerpted it below.

[246] In Dr. Koo's first report, under the heading "Whether the accident caused or contributed to those injuries and conditions", he opines:

> In my opinion Ms. Woo was in her previous state of good physical health. She had made a full recovery from previous lumbar disc protrusions at L4-5 and L5-S1 with previous right L4-5 microdiscectomy (July 4, 2011) and left L5-S1 microdiscectomy (October 6, 2014). Following recovery from these two spinal procedures, Ms. Woo had complete and satisfactory recovery with regard to her low back and sciatica. She did not have back pain or stiffness at baseline and her pain and sensory abnormalities in the legs had fully resolved.
>
> She denied any residual headaches, neck, shoulders, back, wrist or ankle concerns at baseline and did not require ongoing therapy or medications for pain prior to the accident in question.
>
> Ms. Woo was previously capable of working full-time as a master hairstylist and spending extended periods of time on her feet wearing high heels and using her arms outstretched on a repetitive and ongoing basis for cutting, blow drying, clippering and coloring hair. At the time of the accident, she had moved to a new salon with only a portion of her previous clients and was working on building her clientele back to a full-time state.
>
> She had been offered additional work by working on a movie set and had accepted a higher paying position at a salon in Australia and was in the process of obtaining a work visa.
>
> She volunteered at the Marine Mammal Rescue Society with physically demanding tasks that included filling water at the tanks, washing the tubs, feeding fish, making food formula, bottle feeding animals, dragging large hoses and scrubbing animal enclosures.
>
> She was physically active and ran 4km regularly, and up to a 10 km Sun Run. She enjoyed snowboarding, skiing, biking, rollerblading, dancing in high heels, surfing, golfing and backpacking trips. She normally slept soundly for 7 to 8 hours per night.
>
> She lived independently in a one-bedroom, one-bathroom apartment. She was previously pain-free and unrestricted with her activities of daily living and housekeeping needs.
>
> In my opinion, if it were not for the effects of the accident in question, Ms. Woo would still be capable of functioning at or around the same level of pain-free locational, domestic, athletic and active leisure capability.

In my opinion, the accident as described is entirely causal for Ms. Woo's [post]-accident concerns with pain and stiffness involving her neck, shoulders, lumbar spine and pain, numbness and tingling traveling down the left more so than right leg, recurring non-migrainous headaches, and pain-related sleep disruption.

As a consequence of her ongoing injuries, reduced income earning capability, chronic pain and decreased ability to participate in her normal leisure and sport activities, Ms. Woo has likely developed post-accident depression and anxiety as she lives with the effects of her chronic injuries.

Ms. Woo's post-accident imaging of the right wrist has identified a tear in the articular disc of 1105 the right triangular fibrocartilage complex, as well as a pinhole tear in the dorsal aspect of the scapholunate ligament. These MRI findings correlate significantly with her wrist examination and the mechanism of injury of her falling onto an outstretched hand during the accident. She has additional tenderness along the insertions of the flexor carpi radialis and ulnaris tendons and a positive Finkelstein's test consistent with De Quervain's tenosynovitis. In my opinion, Ms. Woo's mechanical right wrist pain is a combination of the triangular fibrocartilage tear, pinhole tear of the scapholunate ligament, as well as wrist strain and associated tenosynovitis of the radial and ulnar tendons related to wrist movement, that have resulted from the accident.

Ms. Woo has had several post-accident lumbar spine imaging by way of CT scan and MRI scan without gadolinium. These show mild changes of lumbar spondylosis most pronounced at L4-L5 and L5-S1 with mild facet arthropathy and no evidence of central canal stenosis or tieuroforaminal narrowing. In my opinion, these degenerative changes are likely age related and post-surgical in nature and were not caused by the accident. However, prior to the accident, these degenerative changes were previously asymptomatic and would likely have remained so absent the superimposed trauma from the accident in question.

In my opinion, Ms. Woo's mechanical low back pain is temporally and mechanistically related to the accident in that she likely incurred a combination of twisting and compressive forces through the low back as she fell to the side in a twisting motion. Her subsequent left greater than right lower extremity pain with numbness and tingling likely represents post-traumatic radiculopathy, which I suspect is related to traction and/or compression predominantly of the left SI nerve root given her loss of left ankle reflex. The radiologic absence of a significant disc bulge or herniation to compress the left S1 nerve root is reassuring and she is not surgical candidate. I suspect that her SI radiculopathy symptoms likely resulted from post-surgical epidural fibrosis that became traumatically irritated as a result of the fall, through traction and/or compression effects.

Ms. Woo had a significant aggravation of her low back and sciatica symptoms in August of 2019 and during this time, she had issues with intermittent urinary dribbling, infrequent stool incontinence and was eventually found to have a loss of her left ankle reflex, which is a new neurologic finding. There was no other antecedent trauma or cause for this significant aggravation of her back pain and bilateral leg numbness. Repeat imaging on January 21,

2020 of the CT lumbar spine demonstrated stable changes compared to the February 18, 2019 MRI.

Ms. Woo had a significant aggravation of her low back and sciatica symptoms in August of 2Q19 and during this time, she had issues with intermittent urinary dribbling, infrequent stool135 Incontinence and was eventually found to have a loss of her left ankle reflex, which is a new neurologic finding. There was no other antecedent trauma or cause for this significant

In my opinion absent the effects of the accident in question, these pre-existing degenerative changes of the lumbar spine would likely have remained asymptomatic given Ms. Woo's normal feeling back and activity tolerances prior the accident in question. These lumbar degenerative changes may have increased her propensity towards injury to the back and a poorer prognosis for recovery but would not have become spontaneously or abruptly painful or stiff or caused radiculopathy symptoms into the legs, absent the effects of the injuries from the accident.

Ms. Woo's post-traumatic headaches are non-migrainous in nature. They are more likely to be present when she has aggravated neck or shoulder symptoms and have improved following physiotherapy addressing her neck and TMJ dysfunction. In my opinion, her post-traumatic headaches are likely tension-type headaches and secondarily related to pain and irritation to her neck, shoulders and TMJ joints resulting in referred secondary headache phenomenology. There is no history of loss of consciousness or feeling dazed after the accident to suggest that she had a concussion or traumatic brain injury at the time of impact.

Ms. Woo's initial pain diagram indicated bilateral lower extremity pain around the ankles. This is a likely a combination of being struck by the taxi and then subsequently falling to the ground. Over time, her lower extremity complaints have largely resolved but she continues to have some mild dorsal right ankle discomfort when she wears high heels or when she significantly plantar flexes the ankle. This likely represents some residual chronic soft tissue injury from her initial ankle abrasion and sprain.

In the course of her treatment, Ms. Woo required significant non-steroidal anti-inflammatories and other pain medications to help manage her back and radiculopathy symptoms. In early 2020, she had significant episodes of emesis, abdominal pain and 10 kg weight loss. Her symptoms improved with empiric treatment of H. pylori (even though she was never confirmed to have this), alongside avoidance of non-steroidal anti-inflammatories and the use of antacid medications. She gradually gained back her 10 kg of weight. In my opinion, her gastritis was more likely than not related to her non-steroidal anti-inflammatory medication use, and this would bear future caution when looking at treatment options for Ms. Woo in the future.

Ms. Woo was known to have pre-accident TMJ dysfunction for which she had been fitted with a nightguard and recommended Flexeril (muscle relaxant) and Naprosyn (non-steroidal anti-inflammatory). Although Botox injections were discussed as a potential future treatment, this was only to be revisited as needed. Ms. Woo reports increased pain and discomfort related to her TMJ dysfunction following the accident. In my opinion, her associated whiplash injuries to the neck, combined with anxiety and reduced ability to

> soundly sleep have likely increased muscle tension in the neck and jaw and aggravated her bruxism/clenching tendencies. Her aggravated TMJ symptoms following the accident likely represents an aggravation of pre-accident vulnerability. Dr. Ng's recommendation to consider Botox injections into the masseters is reasonable given the increased TMJ symptoms she is experiencing despite adjustments to her nightguard.
>
> Mr. Woo's ongoing pain, activity restrictions, decreased capacity for work and leisure have likely contributed to post-accident depression, anxiety and reduced socialization. These negatively impacts her self-image as she cannot wear the clothes or the high heels that she would normally be accustomed to.
>
> The combined effects of her recurring neck and shoulder pain, headaches, increased TMJ symptoms, as well as depression and anxiety have likely contributed to ongoing post-traumatic insomnia with afternoon fatigue and lowered energy levels as an additional source of disability in addition to the physical injuries she sustained.
>
> Ms. Woo is significantly less active than prior to the accident. She has likely lost strength, endurance and activity tolerances and is relatively deconditioned compared to her pre-accident state.

[247] I accept Dr. Koo's opinions concerning causation.

Dr. French's Evidence

[248] In Dr. French's opinion, the Accident caused both of the plaintiff's medical conditions of the right wrist. As with Dr. Koo's report, and for the same reason, rather than attempting to summarize the relevant portion of Dr. French's report, I have excerpted it below.

[249] In Dr. French's report, he opines:

> ***Causation analysis of diagnosis: 1) Suspected occult ganglion secondary to pinhole tear of the right wrist scapholunate ligament***
>
> Applying Genovese's criteria to the suspected occult ganglion secondary to pinhole tear of the right wrist scapholunate ligament and the October 15, 2018, motor vehicle collision, the evidence indicated that:
>
> i. **Temporal relationship:** The day after the Accident on October 16, 2018, Ms. Woo saw her family physician, Dr. Peyman Saleheh-Shoshtari where it was recorded "Patient has severe tenderness in right wrist" and she was sent for x-rays. Clearly there was a time relationship between falling on the outstretched hands and the development of right wrist pain. Although there was no noted wrist pain in the emergency department records, this is not uncommon that there is a delayed presentation of pain. Also, the patient was quite concerned about her prior low back pain and the two surgeries

she has had and, it is more likely than not, that she was more focused on that as a concern.

ii. **Mechanism:** This was a Fall On Out-Stretched Hands (known as a FOOSH injury). Albeit this occurred at a low speed, she did fall onto a hard tarmac surface. There would have been at least some forward momentum since she was peddling a bicycle even though she admits it was at walking speed. This forward momentum combined with the fall onto the hard surface is a mechanism consistent with partial tears to the scapholunate ligament or the development of dorsal wrist complaints.

iii. **Contiguity:** For the reasons noted above in **mechanism,** the Accident appears to have been severe enough.

iv. **Consistency:** This criterion is equivocal. While the mechanism is plausible, it is not entirely common that symptoms would result in every patient sustaining a fall in this manner. This criterion is neither positive nor negative.

v. **Specificity:** There is documented in the medical record that on May 26, 2014, Ms. Woo had x-rays [tab 7f, pg 13] on the right wrist with the reports stating “History: FOOSH.” There are no other medical records to identify how severe this injury was or whether symptoms persisted for any length of time. It is possible that this may have predisposed her to her current injury, although this is not probable. Even had there been a minor “wrist sprain” at the time of the 2014 injury, the Accident on the date in question may have aggravated the condition. This category is therefore equivocal. On the balance of probabilities, it would be more likely than not that the right wrist complaints are specific to the current complaint but this is in the absence of the ability to analyze previous medical records.

vi. **Coherence:** The medical literature is quite consistent that falling on the outstretched hands is the most common cause of scapholunate ligament pathology.

Conclusion: The evidence indicated that **FOUR OUT OF SIX** of Genovese’s criteria were **positive** for the assertion that a causal relationship exists between the October 15, 2018, motor vehicle accident and Ms. Woo’s suspected occult ganglion secondary to pinhole tear of the right wrist scapholunate ligament. There were two categories that were equivocal, specifically consistency as to whether or not others would expect to have this same type of injury from such a fall, and whether her injury is specific to this Accident. There was one prior history of a fall on the outstretched hand that warranted x-rays. I do not have medical records dating back far enough to assess the nature of that injury. However, on the balance of probabilities and as four out of six criteria are positive, I am of the opinion that there is a causal relationship that exists between the motor vehicle accident and the dorsal right wrist complaints.

Causation analysis of diagnosis: 2) Right wrist partial TFCC tear secondary to ulnar-positive right wrist variance of 3 mm.

Applying Genovese's criteria to the right wrist partial TFCC tear secondary to ulnar-positive right wrist variance of 3 mm and the October 15, 2018, motor vehicle collision, the evidence indicated that:

i. **Temporal relationship:** The day after the Accident on October 16, 2018, Ms. Woo saw her family physician, Dr. Peyman Saleheh-Shoshtari where it was recorded "Patient has severe tenderness in right wrist" and she was sent for x-rays. Clearly there was a time relationship between falling on the outstretched hands and the development of right wrist pain. In spite of the fact that there was no noted wrist pain in the emergency department records, this is not uncommon that there is a delayed presentation of pain. Also, the patient was quite concerned about her prior low back pain and the two surgeries she has had and it is more likely than not that she was more focused on that as a concern.

ii. **Mechanism:** Hyperextension of the wrist while under a forceful load is a known mechanism of injury to the TFCC tear. Generally, this is associated with some sort of torsional force at the same time. Since Ms. Woo was struck from one side of the body, her right, and fell to her left, it is more likely than not that there was a torsional type of component as she reached across her body with the right hand to brace as she fell to the left side. If this is indeed a central tear of the TFCC, any person over age 30 is more likely than not to have a central TFCC perforation as a result of normal wear and tear. Furthermore, patients such as Ms. Woo with an ulnar-positive variance are more predisposed to this. However, the fall on the outstretched hand and wrist can aggravate preexisting symptoms that were asymptomatic and this is much more common in patients who have this ulnar-positive variance that Ms. Woo has.

iii. **Contiguity:** A fall onto a hard surface with the wrist in extension can be a cause of TFCC pathology.

iv. **Consistency:** It is more likely than not that the TFCC tear in an age-related condition (see the above section **Explanation of Medical Conditions),** because of the type of tear present and the ulnar-positive variance in the wrist. At least some of the symptoms are consistent with ulnar impaction syndrome from the ulnar-positive variance but this criterion is equivocal, neither positive nor negative.

v. **Specificity:** Ms. Woo's age of greater than 30, her ulnar-positive variance, and the absence of pain in the TFCC make it difficult to ascribe that this is a condition specific to the Accident alone. She has prior x-rays in 2014 indicative of a fall on her outstretched right wrist at that time. She was noted to have ulnar-positive variance at that time. Again, I would note that this category is equivocal, as neither positive nor a negative criterion for causation.

vi. **Coherence:** The TFCC is more likely than not to be strained when a torsional force occurs during wrist extension. She does have ulnar-

> positive variance to the wrist which puts her more at a predisposition for symptom aggravation and as such I would deem this as a positive criterion.
>
> **Conclusion:** The evidence indicated that **FOUR OUT OF SIX** of Genovese's criteria were **positive** for the assertion that a causal relationship exists between the October 15, 2018, motor vehicle accident and Ms. Woo's right wrist TFCC partial tear.

[250] I accept Dr. French's opinions concerning causation.

Dr. Kroeker's Evidence

[251] In Dr. Kroeker's opinion, the Accident caused the plaintiff's unspecified trauma and stressor-related symptoms, and her depressive symptoms, due to increased physical pain, reduced functions and interference with her career ambitions.

[252] In Dr. Kroeker's report dated November 13, 2022, he opines:

> 7. The unspecified trauma and stressor-related disorder symptoms (anxiety around traffic etc.) were caused entirely by the October 15, 2018 accident.
>
> 8. Her depressive symptoms (irritability, reduced enjoyment, and sleep disturbance) were caused by the accident via increased physical pain, reduced function, and in particular interference with her ambitions regarding her career. Her sleep disturbance alone is a major cause of other mood symptoms such as irritability; the sleep disturbance is due to accident-induced pain symptoms as well as psychological upset.
>
> 9. The death of her dog in 2020 added to her psychological upset. Her ongoing pain symptoms and functional limitations due to the accident have prevented her from acquiring a new pet, since caring for a dog is physically demanding.
>
> 10. If the October 15, 2018 accident had not occurred, it is very unlikely that Ms. Woo would have had any major psychological problems since then, since she had previously had excellent mental health, no risk factors for mental health, and no family history of mental health problems.

[253] I accept Dr. Kroeker's opinions concerning causation.

Findings of Fact - Causation

[254] I make the following further finding of fact:

- The Accident caused the plaintiff's injuries and conditions attributed to the Accident in the reports of Dr. Koo, Dr. French and Dr. Kroeker.

Conclusion

[255] The plaintiff has proven on a balance of probabilities that but-for Mr. Khaira's negligence, she would not have sustained the injuries and conditions attributed to the Accident in the reports of Dr. Koo, Dr. French and Dr. Kroeker.

NON-PECUNIARY DAMAGES

Law

[256] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[257] In *Stapley v. Hejslet*, 2006 BCCA 34 [*Stapley*], the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

> The inexhaustive list of common factors cited in *Boyd v. Harris*, [2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and

> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

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

[259] The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) by McEachern C.J. (quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In referring to an earlier decision, McEachern C.J. said:

> In *Butler v. Blaylock*, [1981] B.C.J. No. 31, decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery. An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent – that his complaints of pain are true reflections of a continuing injury.

Position of the Parties

[260] Plaintiff's counsel submits the Accident had a profound impact on the plaintiff's physical and psychological health. At all times, her goal has been to get better and return to her former life. To that end, she has comprehensive treatments since the Accident, has modified her work schedule, and avoided all injury-exacerbating activities. Her ongoing symptoms and sequelae continue to limit her recovery in every aspect of her life, and the expert evidence overwhelmingly establishes she will not return to her pre-Accident functionality.

[261] Plaintiff's counsel referred to a number of factors the court should consider in assessing the plaintiff's non-pecuniary damages.

[262] Plaintiff's counsel submits that the consequences of the Accident for the plaintiff have been life-changing: her injuries have negatively affected everything of value to her, her daily pain and functional restrictions eliminate any chance of her working other than part-time hours, or being competitive in a work environment which places a premium on physical ability, or being able to participate in an active lifestyle.

[263] Plaintiff's counsel submits the court should award non-pecuniary damages of $170,000, having regard to awards in other cases, and the plaintiff's negative prognosis. Plaintiff's counsel relies on the following cases:

- *Basile v. Doyle*, 2022 BCSC 819 [*Basile*];
- *Mattson v. Spady*, 2019 BCSC 1144 [*Mattson*];
- *Marcon v. Lacasse*, 2022 BCSC 1133 [*Marcon*]; and
- *Morlan v. Barrett*, 2012 BCCA 66 [*Morlan*].

[264] In *Basile*, the plaintiff was awarded $135,000 (now approximately $140,127). The plaintiff was a 37-year-old hairdresser. She suffered neck and shoulder pain, chronic headaches and sleep issues, and had driving anxiety, all as a result of a motor vehicle accident. The accident had a significant impact on her physical and psychological health and occurred in the prime of her working years.

[265] In *Mattson*, the plaintiff was awarded $150,000 (now approximately $174,559). The plaintiff was a 35-year-old kinesiologist. She suffered soft tissue neck and shoulder pain, and headaches. By the time of trial, her condition had plateaued and was unlikely to materially change. The trajectory of her career was significantly altered because of her reduced work hours, her recreational activities were nominal and she was unable to attend to her household duties.

[266] In *Marcon*, the plaintiff was awarded $170,000 (now approximately $176,457). The plaintiff was a 31-year-old registered nurse. She suffered chronic neck, back and right shoulder pain, as well as depression, which limited her ability to do her work as a nurse, but she was still able to work as a patient care coordinator. She had been physically fit and active. Her prognosis was guarded.

[267] In *Morlan*, the plaintiff was awarded $125,000 (now approximately $169,482). The plaintiff was a 46-year-old female. She suffered chronic pain and fibromyalgia as a result of a motor vehicle accident. The Court of Appeal upheld the award of $125,000, noting that the accident had robbed the plaintiff of her energy and lifestyle.

[268] Defence counsel submits that as a result of the Accident the plaintiff suffered only soft tissue injuries, from which she has long since recovered, and an appropriate award for non-pecuniary damages is in the range of $25,000, having regard to “any pain complaints she may have had due to this incident.”

[269] Defence counsel referred to the following cases:

- *Wallner v. Uppal*, 2012 BCSC 1602 [*Wallner*];
- *Green v. International Cosmeticare Inc.*, 2020 BCSC 1187 [*Green*];
- *Tisalona v. Easton*, 2015 BCSC 565 [*Tisalona*];
- *Sharma v. Bhullar*, 2020 BCSC 379 [*Sharma #1*];
- *Tull v. Gillett*, 2021 BCSC 724 [*Tull*];
- *Borth v. Lee*, 2005 BCSC 1517 [*Borth*];
- *Michaud v. Machtaler*, 2004 BCSC 829 [*Michaud*];
- *Sharma v. Didiuk*, 2010 BCSC 280 [*Sharma #2*];
- *Dhugga v. Poirier*, 2020 BCSC 914 [*Dhugga*];

- *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 [*Callow*].

[270] In *Wallner*, the plaintiff was awarded $20,000 (now approximately $26,059). The plaintiff was a 37-year-old female. The reasons for judgment do not indicate her occupation. At the time of trial, she continued to experience intermittent pain in her neck, upper back, shoulder and left arm. She also reported numbness and tingling in her left arm and fingers; as well as pain and discomfort while commuting to work, at work, doing household chores and during recreational activities. The trial judge found that the plaintiff's subjective complaints were not objectively verifiable and her injuries were minor and of minimal impact on her life. She did not miss any work and had no claim for past wage loss or loss of future earning capacity.

[271] In *Green*, the plaintiff was awarded $30,000 (now approximately $34,751). The plaintiff was a 55-year-old male machinist. The court found he had soft tissue injuries to his neck, shoulders and back. His ongoing low back symptoms were attributed to a pre-existing injury.

[272] In *Tisalona*, the plaintiff was awarded $32,000 (now approximately $39,893). The plaintiff was a 47-year-old female lab technician. She claimed injuries to her neck, left shoulder, upper back and mid back. She experienced headaches and numbness and tingling in her left arm and hand, and her sleep was interrupted due to pain, which caused her to feel exhausted much of the time. She was unable to perform household tasks that required lifting. At the time of trial, she was still experiencing headaches, neck and shoulder pain.

[273] In *Sharma #1*, the plaintiff was awarded $38,000 (reduced from $40,000 for failure to mitigate, now approximately $44,018). The plaintiff was a 26-year-old female pharmacy assistant. She sustained injuries in two motor vehicle accidents.

[274] The court found she sustained a mild to moderate whiplash-type injury with intermittent headaches. At the time of trial, most of her injuries had resolved, except for ongoing discomfort. She had no medical issues before the first accident. In the first accident she sustained injuries to her neck, right shoulder and upper, mid and

low back, headaches, low mood, anxiety and lack of sleep. The second accident aggravated her injuries and conditions and also injured her left shoulder. Her duties at work did not change as a result of the accidents and she was able to perform them all, albeit with pain, for which she took medication. The court found the plaintiff was not credible and her evidence was not reliable. Her evidence regarding the severity and frequency of her injuries and pain symptoms, as well as the effect on her ability to function, was exaggerated.

[275] In *Tull*, the plaintiff was awarded $45,000 (now approximately $50,080). The plaintiff was a 21-year-old female university student. She claimed various injuries, including neck pain and headaches. She had several relevant pre-existing medical conditions. Her ongoing symptoms did not have a significant ongoing impact on her lifestyle. The trial judge found the plaintiff sustained a mild to moderate whiplash-type injury which would require intermittent treatment.

[276] In *Borth*, the plaintiff was awarded $35,000 (now approximately $51,669). The plaintiff was a 51-year-old female part-time bank teller. She sustained a right wrist injury, for which she received surgery, following which her long-term prognosis was excellent. The trial judge found the plaintiff had failed to discharge the burden on her of establishing the extent and effect of her wrist pain on a balance of probabilities.

[277] In *Michaud*, the plaintiff was awarded $35,000 (now approximately ($53,000). The plaintiff was a 19-year-old male video store clerk. He sustained a soft tissue injury to his neck and lower back and a broken scaphoid bone in his right wrist. He had other less serious injuries, which included abrasions to his face, soreness in his hip, and some discomfort in his ankle, all of which had healed more than two years before trial. He was completely disabled for two months after the accident. The plaintiff was left hand dominant. The trial judge found the plaintiff generally credible but that he overstated the effect of his injuries. His complaints about the effects of the injuries to his low back and his wrist were not corroborated by the medical experts or some of the lay witnesses.

[278] In *Sharma #2*, the plaintiff was awarded $30,000 (now approximately $40,674). The plaintiff was a student at a hairdressing school. She suffered various soft tissue injuries. She was already suffering from some intermittent neck, shoulder and mid to low back pain, principally in cold weather, as a result of a previous accident in which she fell from a scooter. At the time of trial, most of her injuries had resolved, except for ongoing discomfort. She was able to continue her schooling full-time and afterwards to continue working close to full-time as a hairstylist. The court found she had a mild to moderate whiplash injury with headaches.

[279] In *Dhugga*, the plaintiff was awarded $65,000 (now approximately $75,295) for injuries sustained in the first of two accidents. The plaintiff was a 41-year-old female medical office assistant. She performed most of her household chores, was active in the lives of her three children and their activities, and engaged in various recreational activities and travel. She had a degenerative disc condition since birth, which caused occasional pain and was treated with painkiller medication, stretching and reduction in activity. She also had juvenile dermatomyositis, which caused pain in her hands and wrists, but had not been a problem since several years before the accident. She remained able to work full-time, but would have preferred to work part-time because of her pain. The trial judge noted the *Stapley* factor of “disability” was “significant” but declined to find the plaintiff disabled. Before the accidents, the plaintiff was experiencing prior episodic pain that was not affecting her functioning at that point, and would have likely continued to experience infrequent pain in her back.

[280] In *Callow*, the plaintiff had a $35,000 award at trial for non-pecuniary damages increased on appeal to $55,000. The plaintiff was a male municipal employee. There was no dispute the accident caused moderate soft tissue injuries to his neck, upper back and shoulders which, despite treatment, remained symptomatic. He had no pre-existing injuries to his neck, back and shoulders. At para. 22, the Court “at a high level of abstraction” described his situation as:

> A person in their 20s who sustained moderate soft tissue injuries to their neck, back, and shoulders which, despite treatment, remained symptomatic for years. Although their condition has improved, they will continue to experience some pain flare-ups and the likelihood of future improvement is

> poor. With caution, can continue to participate in previous activities, while monitoring physical exertion for pain.

[281] The Court identified the present range for non-pecuniary damages in the type of case described to be $50,000 to $60,000.

Discussion

Findings of Fact

[282] Having considered the evidence of the plaintiff, and the lay and expert witnesses, I make the following further findings of fact.

[283] The plaintiff:

- suffers daily chronic pain, which the expert witnesses do not expect will improve;
- dedicates significant time to treatment to sustain only part-time work;
- cannot continue the active lifestyle she enjoyed before the Accident;
- is dependent upon Mr. Baboomian for most household assistance;
- experiences constant stress about her future, and her ability to continue to work in her chosen occupation as a hairstylist;
- suffers from a loss of self-identity, self-worth, self-confidence and hope for the future;
- is irritable, anxious and depressed;
- is socially withdrawn.

[284] At the time of the Accident, the plaintiff was a similar age to the plaintiffs in *Basile* and *Mattson*, and only a few years older than the plaintiff in *Marcon*.

[285] As in *Mattson*, the trajectory of the plaintiff's career has been significantly altered by the Accident, her physical and recreational activities are now nominal, and she is mostly unable to perform household duties.

[286] The plaintiff is a talented hairstylist who because of the Accident has lost the enjoyment she got from her life-long chosen career. The Accident has had a major effect on her physical and psychological health. Her life has been profoundly changed.

[287] The awards in the cases referred to by defence counsel reflect the fact that the injuries suffered by the plaintiffs were less serious, and less seriously affecting the plaintiffs in terms of function, than the seriousness and effect of the plaintiff's injuries from the Accident. Unlike in this case, *Sharma #1* involved a plaintiff who was not credible and whose evidence was not reliable, while *Borth* involved a plaintiff who failed to prove the extent and effect of her injuries. Unlike in this case, *Michaud* involved a plaintiff whose description of the effects of his injuries was not corroborated by either the medical experts or lay witnesses. This case is much more serious than the type of case described in *Callow*. More recent decisions may be of more persuasive value in determining the present range: *Callow*, at para. 18. With the exception of *Morlan*, in which the Court of Appeal upheld an award of $125,000, all of the cases relied upon by counsel for the plaintiff were decided within the past three years. The decisions in *Wallner*, *Borth* and *Michaud*, relied upon by defence counsel, were all decided more than a decade ago.

Conclusion

[288] Based on the evidence, the *Stapley* factors, and the cases submitted by counsel, in particular those referred to above, I assess the plaintiff's non-pecuniary damages at $165,000.

PAST LOSS OF INCOME/LOSS OF EARNING CAPACITY

Law

[289] Compensation for past loss of earning capacity is determined based on what the plaintiff would have earned, not could have earned, but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[290] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only their net past loss of income. This means that ordinarily the court must deduct the amount of income tax payable from gross past loss of income: *Hudniuk v. Warkentin*, 2003 BCSC 62. The court has discretion to determine what period(s) of time are appropriate for the determination of net past loss of income: *Lines v. W.D. Logging Co. Ltd.*, 2009 BCCA 106 [*Lines*] at paras. 181–186. In exercising this discretion, the court should keep in mind that insofar as is possible the plaintiff is to be put back in the position they would have been if not for the injuries caused by the defendant's negligence: *Lines* at paras. 184–185.

[291] The burden of proof of actual past events is a balance of probabilities. An assessment of past loss of income can involve consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27. There must be an evidentiary foundation to the plaintiff's claim: *Morlan* at para. 59.

[292] In assessing damages for past loss of income, the court must make an assessment rather than a calculation and base its decision on what is reasonable in all the circumstances: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 36, and the cases cited there.

Position of the Parties

[293] Plaintiff's counsel submits the plaintiff has suffered past loss of income of $328,002.

[294] Plaintiff's counsel submits the evidence establishes that the plaintiff would have worked full-time if the Accident had not happened and that she suffered limitations at work that have resulted in past loss of income.

[295] Defence counsel submits the plaintiff has suffered no past loss of income, apart from missing a few days of work after the Accident.

[296] Defence counsel submits:

- the plaintiff's claim to have been working full-time pre-Accident, five days a week, from 10 a.m. to 7 p.m., is not corroborated by her appointment summary calendar;
- the plaintiff's pre-Accident hours approximate her post-Accident hours;
- the plaintiff's pre-Accident hours had begun to decline, because she wanted to only work part-time, and may have been suffering from back pain;
- there is uncertainty about whether the plaintiff was planning on staying in Canada or had commenced the process of moving to Australia; and
- the plaintiff's one-year contract at Style Lab, was terminable on 30 days notice.

Discussion

Would the plaintiff have worked full-time if the Accident had not happened?

[297] I am satisfied the plaintiff would have worked full-time if the Accident had not happened.

[298] The evidence establishes that pre-Accident the plaintiff's career trajectory as a self-employed hairstylist was on the rise and she would have achieved full-time hours at Style Lab no later than October 2019, a year after the Accident, after which she would have continued to work full-time if the Accident had not happened.

[299] The plaintiff had the same career aspirations as Ms. Shulgin. They left Ignite at the same time and started at Style Lab at the same time. It took Ms. Shulgin a year to build her clientele to a full book of business. It took Ms. Cheung, two years, but in her experience, most hairstylists only take between one and two years. Significantly, unlike Ms. Cheung, the plaintiff started at Style Lab with an existing clientele.

[300] That the plaintiff's plan to work full-time was realistic is supported by the evidence of Ms. Shulgin and Ms. Walsh, who were similarly situated to the plaintiff and successful in doing exactly what the plaintiff wanted to do, as well as by the evidence of Ms. Cheung.

[301] The plaintiff had an almost continuous attachment to the workforce since arriving in Canada in 2005, and her work history was one of working full-time, not part-time. Without exception, the plaintiff's former colleagues describe her as a talented, hard-working hairstylist who worked full-time, was able to establish a clientele and was passionate about hairstyling as a career.

[302] The plaintiff's financial situation was such that it was not viable for her to work only part-time and she needed to work full-time. Before the Accident, she lived alone and rented an apartment in downtown Vancouver. She financially supported her mother in Korea. She had other expenses, such as caring for her dog. When she started at Style Lab, she had the option to choose to rent a styling chair part-time, but instead chose full-time.

[303] The plaintiff's evidence is corroborated by the evidence of the lay hairstylist witnesses and Mr. Baboomian.

Has the plaintiff suffered limitations at work that have resulted in past loss of income?

[304] The evidence of the lay hairstylist witnesses establishes that the plaintiff has suffered limitations at work that have resulted in past loss of income.

[305] Ms. Shulgin testified that the plaintiff missed work after the Accident and that while she worked, she was visibly uncomfortable, not working as quickly as she did before, and working less hours.

[306] Ms. Cheung testified that since the Accident the plaintiff is slower performing services and moving around the salon generally. In her observation, the plaintiff has less energy and is moody. She has noted the plaintiff's hours have been drastically reduced. The plaintiff works shorter days, takes longer breaks between clients, and sometimes does not come in to work at all. On some days when she works for a few hours, she takes an extended break outside of the salon and returns later for a few more hours. At work, the plaintiff appears to be in a lot of pain and, while she is "not a complainer", Ms. Cheung can see that it is difficult for her to stand. She sits down a lot more than the other stylists do. She stretches her back, shoulder and wrist often. When she works a longer day, she sits down to rest before leaving, which is not something the other stylists do. Ms. Cheung has made workplace accommodations for the plaintiff, including by modifying a cabinet, moving her trolley closer to her chair and not requiring her to fully participate in the chores.

[307] Notably, Ms. Cheung testified that if she operated her salon on a commission model, she would not hire the plaintiff because the plaintiff is not physically able to keep busy. As a business owner, she wants hairstylists who can work all day and make money, and the plaintiff is not able to do that.

[308] Ms. Walsh testified she has observed the plaintiff in visible pain while working. She testified that while the plaintiff is a talented hairstylist who does quality work, she cannot work as fast as before and cannot see as many clients, or work the same hours as the other hairstylists. Ms. Walsh works five days a week, approximately 38 hours per week and has never observed the plaintiff work a full

day. She has observed the plaintiff's hours to be sporadic and include breaks, and that there are long periods of time when the plaintiff leaves the salon.

[309] Mr. Baboomian testified that the plaintiff comes home from work with a swollen wrist and is depressed, quiet, moody and in pain. He testified that when the plaintiff pushes herself to work more, she "pays for it" later.

[310] None of these witnesses have observed any lasting improvements in the plaintiff's function since the Accident.

[311] The expert evidence also establishes that the plaintiff has suffered significant limitations at work that have resulted in a past loss of income.

[312] Dr. Koo opines that the plaintiff is disabled from working as a full-time hairstylist. He is of the opinion that the plaintiff's current employment at half of her normal client load is likely at, or approaching, her maximal doable work capacity, and that if she were to work more hours "this would result in significant pain aggravation and further worsening of her mood and sleep, as well as an increased need for pain relief by way of physiotherapy, massage therapy and/or acupuncture." He states that the plaintiff's ability to work even part-time as a hairstylist is "guarded in light of her multiple areas of soft tissue injury from the accident in question." Dr. Koo expects the plaintiff will have "moderate levels of disability, if not worse, on a permanent basis."

[313] Dr. French opines that the plaintiff has reached maximum medical improvement, aside from exacerbation of symptoms with activity and that this will probably require her to maintain her current work level of 20 to 25 hours a week.

[314] Ms. Craig's Functional Capacity Evaluation indicates that the plaintiff only partially meets the physical demands of her occupation as a hairstylist and is "no longer suited to full-time work." Ms. Craig states that the plaintiff's present capacity is in the range of 20 to 25 hours a week.

[315] The defence did not lead any evidence to undermine or call into question the evidence of either the lay hairstylist witnesses, Mr. Baboomian, or the experts.

[316] Defence counsel's submissions are not persuasive.

[317] The plaintiff's appointment calendar and appointment list report were admitted in evidence at trial upon the agreement of counsel that I can consider them for the truth of the following:

- the booked appointments took place on the day as indicated;
- where there are no appointments booked on a day, then no appointments took place on that day; and
- where the appointment calendar or appointment list report indicates a number of minutes per day, per month or per appointment, this represents the total number of minutes allotted for the appointments, not the actual time it took to complete the service/appointment.

[318] It is accurate to say that the plaintiff's claim to have been working full-time pre-Accident, five days a week, from 10 a.m. to 7 p.m., is not corroborated by her appointment summary calendar, but the calendar only provides part of the picture of her time spent working.

[319] First, the time the plaintiff was unable to work during the day due to her injuries, and taking breaks or time away from the salon, which but for her injuries she would not have taken, was effectively time at work, although not remunerative. This time must be taken into consideration in her claim for past loss of income.

[320] Second, the calendar does not reflect the fact that the plaintiff was also trying to build her business, and some of her time would have been engaged in activities related to the accomplishment of that objective. Those activities were not client appointments, and thus would not have been in her appointment book, but they were still work, although also not remunerative. I recognize the plaintiff would have

engaged in these activities in any event, and am cognizant of the fact that this time should not be considered in her claim for past loss of income.

[321] I make the same comments concerning defence counsel's submission that the plaintiff's hours before the Accident are approximately the same as her hours after the Accident.

[322] Defence counsel's submission that the plaintiff's hours before the Accident had begun to decline because she wanted to only work part-time, and may have been suffering from back pain, is inconsistent with the weight of the evidence to the contrary and speculative.

[323] I make the same comments concerning defence counsel's submission that there is uncertainty about whether the plaintiff intended to move to Australia.

[324] There is no uncertainty about whether the plaintiff intended to move to Australia. Based on the evidence of the plaintiff and the lay witnesses, in particular the evidence of Mr. Baboomian, I am satisfied that whatever the plaintiff may at some point have been contemplating about moving to Australia, at some point before the Accident, she had decided to stay in Canada. I reach this conclusion for two reasons. The first is the fact that she had signed a one-year contract at Style Lab. It would not make sense for her to have done so if she was planning on moving to Australia, even though the contract was terminable on 30 days notice, when she could simply have entered into a month-to-month agreement. The second reason is that she had embarked on a relationship with Mr. Baboomian, and his unchallenged evidence is that she told him that she had decided to stay in Canada, be in a relationship with him, and build her business.

[325] I do not give any weight to defence counsel's submission about the plaintiff's contract at Style Lab being terminable on 30 days notice. As noted above, if the plaintiff wanted to minimize her contractual commitment to Style Lab, she could have entered into a month-to-month agreement rather than a one-year contract.

[326] The evidence overwhelmingly leads to the conclusion that the plaintiff has met the burden of establishing a real and substantial possibility of the past hypothetical that she would have worked full-time had the Accident not happened.

[327] The evidence likewise overwhelmingly leads to the conclusion that the plaintiff has met the burden of establishing a real and substantial possibility of the past hypothetical that she suffered limitations at work that have led to past loss of income.

What was the plaintiff's past loss of income?

[328] The evidence establishes that if the Accident had not happened, the plaintiff's gross business income working full-time would have been in the range of $138,000 to $144,000 per year, including tips. Her business expenses would have been approximately $36,000.

[329] This conclusion is supported by the earnings and expenses of the hairstylist lay witnesses, and the plaintiff's 2023 income to the start of trial, which shows her income from working approximately half-time, providing less profitable services.

[330] The plaintiff's hours and earnings in the six months before the Accident are not an appropriate basis from which to determine her income if the Accident had not happened, because she was then in the early stages of building her business and her income was trending upwards.

[331] Before the Accident, the plaintiff earned income several ways: providing services as a hairstylist; tips; and commissions on product sales.

Earnings of Lay Hairstylist Witnesses

[332] The evidence of the lay hairstylist witnesses, in particular that of Ms. Shulgin, provides direct relevant and recent information upon which to determine what the plaintiff's income would have been if the Accident had not happened.

[333] Ms. Shulgin moved from Ignite to Style Lab at the same time as the plaintiff, had a similar history, skill set and career plans. Ms. Shulgin testified that her gross

average monthly income at the salon in downtown Vancouver where she currently works, is approximately $11,500, including tips ($500 to $700 a day). Vacation does not affect her total income because she schedules more work to make up for the shortfall before or after going on vacation.

[334] Ms. Cheung testified that her income is approximately $600 a day, including tips.

[335] Ms. Walsh, who also rents a chair at Style Lab, testified that her income is approximately $12,000 a month, including tips ($600 a day). Like Ms. Shulgin, vacation does not affect her total income because she schedules more work to make up for the shortfall before going on vacation.

[336] The prices which the lay hairstylist witnesses charge for the various hair services they provide are comparable to those charged by the plaintiff. There is no evidence that any of them possess any special skill set the plaintiff does not. The plaintiff has more experience than both Ms. Shulgin and Ms. Walsh.

[337] The plaintiff testified that her tips average 20%. This is consistent with the evidence of the lay hairstylist witnesses, who testified that their tips have ranged between 15% and 30% (Ms. Shulgin, 20%; Ms. Cheung, 20% to 30%; Ms. Walsh, 15% to 20%).

[338] The business expenses of Ms. Shulgin, and Ms. Walsh, who currently rents a chair at Style Lab for the same amount as the plaintiff, indicate that if the Accident had not happened, the plaintiff's business expenses would have been approximately $36,000 a year.

The plaintiff's 2023 income

[339] I am satisfied, based on the calculations provided by plaintiff's counsel, that if the Accident had not happened, the plaintiff's 2023 income to the start of trial would have been approximately $80,400.

[340] However, this amount likely under-represents what the plaintiff would otherwise have earned, because she was performing more of the shorter, less lucrative services, such as men's haircuts, and had decreased or eliminated a number of the longer, more lucrative services she would have continued to provide.

Conclusion

[341] Using annual gross income of $140,000 and business expenses of $36,000, the plaintiff's net business income would have been $104,000 a year. Based on the evidence of Ms. Shulgin and Ms. Cheung that it took them one and two years respectively to reach a full client load, it is reasonable to conclude that the plaintiff would have begun earning this amount by at least October 2019, which is one and half years after she started at Style Lab.

[342] Plaintiff's counsel provided the following table of calculations of the plaintiff's year-by-year past loss of income:

Year	**Income (Net Of Business Expenses, Including Tips) – No Accident**	**Income (Net Of Business Expenses, Including Tips) – Actual**	**Loss**
2018	$40,000	$21,538	$18,462
2019	$80,000	$22,529	$57,471
2020	$78,000	$37,008	$40,992
2021	$104,000	$31,263	$72,737
2022	$104,000	$25,317	$78,683
2023	$80,400	$20,743	$59,657
TOTAL			**$328,002**

[343] It is net of business expenses, but includes tax liability. Counsel have agreed that any award will be adjusted to deduct the amount of income tax payable.

Findings of Fact

[344] I make the following additional findings of fact.

[345] When the Accident happened, the plaintiff was in the process of building her business in downtown Vancouver as a self-employed sole proprietor hairstylist. In light of her training, experience, skills and career ambitions, her career objectives were reasonable and realistic. There were no obstacles to her success in accomplishing her career objectives, such as health concerns or the need to care for children. She would have worked full-time as soon as her client volume was sufficient for her to do so, but in any event by not later than October 2019, if not for her injuries in the Accident. She would have achieved gross business income of approximately $140,000 a year. Her business expenses would have been approximately $36,000 a year. She would have achieved net business income of approximately $104,000 a year. She would have maximized her income by performing the most profitable services if not for her injuries in the Accident. Her past loss of income because of the Accident is at least $328,002.

Conclusion

[346] I award the plaintiff $335,000 for past loss of income/loss of earning capacity.

LOSS OF FUTURE EARNING CAPACITY

Law

[347] The applicable legal principles in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

> The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end

> of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79.

[348] The assessment of a plaintiff's loss of future earning capacity involves comparing their likely future had the accident not happened to their actual future after the accident. While this is an assessment that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment at issue, and is not a mathematical exercise, economical and statistical evidence can help determine what is fair and reasonable: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 [*Gregory*].

[349] In *Rab v. Prescott*, 2021 BCCA 345 [*Rab*] at para. 47, Grauer, J. set out a three-step test that the court must undertake when assessing a plaintiff's loss of future earning capacity.

[350] First, does the evidence disclose a potential future event that could lead to a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues that may affect their ability to meaningfully gain employment or remuneration.

[351] Second, does the evidence demonstrate that there is a real and substantial possibility that the potential loss of capacity will cause a pecuniary loss? After establishing that the plaintiff may suffer from a long-term loss of capacity at the first step, the court here evaluates the likelihood that this loss of capacity will affect their ability to earn income.

[352] Third, what is the value of the possible future loss? After establishing a loss of capacity and that this loss of capacity will result in a loss of income, the court must assess this possible future loss. The court should consider the basis for

compensation, contingencies, and the relative likelihood of the loss occurring. The damages award should be reduced based on the relative likelihood that the possible future loss would not occur.

[353] The assessment must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*]; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) [*Pallos*]; *Pett v. Pett*, 2009 BCCA 232. The assessment is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[354] Insofar as possible, a plaintiff should be put in the position they would have been in but for the injuries caused by a defendant's negligence: *Lines* at para. 185. The essential task of the court is to compare the likely future of a plaintiff's working life if the accident had not happened with their likely future working life after the accident: *Gregory* at para. 32.

[355] There are two accepted approaches to assessment of loss of future earning capacity: the "earnings approach" from *Steenblok v. Funk*, [1990] 5 WWR 365, and the "capital asset approach" from *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari,* 2010 BCCA 140 [*Perren*] at para. 32. The "capital asset" approach is more appropriate when the loss "is not measurable in a pecuniary way": *Perren* at para. 12.

Position of the Parties

[356] Plaintiff's counsel submits the plaintiff has proven loss of future earning capacity.

[357] Concerning the first and second steps of the *Rab* three-part test, plaintiff's counsel submits the plaintiff has established a real and substantial possibility of various future events leading to an income loss.

[358] Plaintiff's counsel submits that without the Accident, the plaintiff would likely be working full-time hours, as evidenced by her history in the workforce before the Accident, her plans to build her business, passion for hairstyling and financial realities. The plaintiff would have achieved the same level of success as Ms. Shulgin and Ms. Walsh. The evidence of the plaintiff and various lay hairstylist witnesses, indicates a hairstylist such as the plaintiff could earn gross business income of between $138,000 and $144,000 a year, and net business income of approximately $104,000, after accounting for business expenses of approximately $36,000 a year.

[359] Plaintiff's counsel submits that with the Accident, the plaintiff is limited to working approximately half time, with her hours depending on how she is feeling. Some days she works more than other days. Some days she does not work at all. Whenever she feels stronger she tries to increase her hours, but when she does she typically experiences increased pain and decreased functioning in the following days. With the support of Ms. Cheung, she has modified her hours and limited the services she provides. That she has an ongoing disability is supported by the evidence of Ms. Cheung, Ms. Shulgin, Mr. Baboomian, Dr. Koo, Dr. French, and Ms. Craig. She is making her best effort to work as much as she can, whenever possible. There is no defence evidence to the contrary. She cannot work full-time even providing services less likely to engage her disability, such as men's haircuts, because they too aggravate her wrist pain, causing her to make mistakes. She has tried to increase her hours but has been unable to do so. Between September 2022 and September 2023, her appointment list reports indicate 59% of her work was doing men's haircuts, which is significantly less profitable than other services she was previously providing. She has made reasonable efforts in all areas of her life to work around her injuries and maximize her income. Despite following Ms. Craig's recommendations, she remains in pain and unable to durably increase her time working. It would be unreasonable to expect her to do more than she is already doing. She is already working beyond what would allow her to participate in her pre-Accident activities, including household chores.

[360] Plaintiff's counsel submits that, overall, the evidence of the medical experts indicates the plaintiff has an ongoing partial disability which has, and will continue to have, a profound effect on her.

[361] Concerning valuation of the claim, plaintiff's counsel submits the earnings approach, using a male economic multiplier, is the appropriate method of assessment of the plaintiff's future loss of earning capacity.

[362] Plaintiff's counsel submits that contingencies which increase the plaintiff's future loss include:

- The likelihood her prices would have increased over time.
- The possibility she would have earned more than expected.
- The possibility her condition would worsen and cause her to decrease her hours or stop working all together.
- The possibility her current arrangement at Style Lab will become unavailable and she has to seek work as a hairstylist in the open market.
- The possibility hairstylist work becomes no longer available to her and she has to re-enter the workforce in an alternative occupation.
- The possibility she will work less on account of her injuries as she gets older.
- The possibility she will retire earlier because of her injuries.

[363] Plaintiff's counsel submits contingencies which decrease the plaintiff's future loss include:

- The possibility she will get better.
- The possibility she will increase her hours as she gets older.
- The possibility she would have earned less than expected.

[364] Plaintiff's counsel submits the positive contingencies at best balance out the negative ones.

[365] Plaintiff's counsel submits $900,000 would be an appropriate award for loss of future earning capacity.

[366] Defence counsel submits the plaintiff has not proven any loss of future earning capacity, for the same reasons her claim for past loss of income should be dismissed.

[367] In the alternative, defence counsel submits the capital asset approach would be more appropriate for assessing an award, because of:

- uncertainties about the plaintiff's medical condition;
- the strenuous nature of her work as a hairstylist; and
- her desire for a flexible and free work schedule.

[368] Defence counsel submits that if I am satisfied the plaintiff has proved her claim for loss of future earning capacity, a "rough and ready" manner of assessment using the capital asset approach would be to award her annual income for one or two years.

[369] Defence counsel submits that if I am satisfied the earnings approach would be more appropriate for assessing an award, the female multiplier should be used.

[370] Defence counsel submits any award to the plaintiff based on the earnings approach should be reduced by 70% for contingencies:

- the plaintiff's condition may improve over time, which the medical experts cannot rule out;
- the plaintiff may leave the country and pursue hairstyling in Australia, and there is no evidence of what she might have earned there;
- a reduction of 20% for female labour market contingencies;

- a further deduction for part-time work, in light of the plaintiff's pre-Accident hours;

- a deduction for the plaintiff's prior physical complaints, in particular, her lower back, about which she complained as late as May 2018, and for which she underwent two surgeries;

- a deduction for the fact the plaintiff could rearrange her services to reduce any aggravation of her injuries;

- a deduction for the likelihood of the plaintiff retiring at an earlier age, because of her pre-existing back issues and the strenuous nature of her work as a hairstylist.

Discussion

[371] Regarding the first and second steps of the *Rab* three-step test, the evidence overwhelmingly discloses a potential future event that could lead to a loss of capacity, and that there is a real and substantial possibility that the potential loss of capacity will cause a pecuniary loss. I am satisfied on the evidence that the plaintiff will suffer long-term medical issues due to her injuries from the Accident, which will result in a loss of capacity, and that the loss of capacity will cause her loss of income.

[372] The expert evidence establishes that the plaintiff has suffered significant limitations at work.

[373] Dr. Koo opines that the plaintiff is disabled from working as a full-time hairstylist. He is of the opinion that the plaintiff's current employment at half of her normal client load is likely at, or approaching, her maximal doable work capacity, and that if she were to work more hours "this would result in significant pain aggravation and further worsening of her mood and sleep, as well as an increased need for pain relief by way of physiotherapy, massage therapy and/or acupuncture." In Dr. Koo's opinion, the plaintiff's ability to work even part-time as a hairstylist is

"guarded in light of her multiple areas of soft tissue injury from the accident in question." Dr. Koo expects the plaintiff will have "moderate levels of disability, if not worse, on a permanent basis."

[374] Dr. French opines that the plaintiff has reached maximum medical improvement, aside from exacerbation of symptoms with activity, and that this will probably require her to maintain her current work level of 20 to 25 hours a week.

[375] Ms. Craig's Functional Capacity Evaluation indicates that the plaintiff only partially meets the physical demands of her occupation as a hairstylist and is "no longer suited to full-time work." Ms. Craig states that the plaintiff's present capacity is in the range of 20 to 25 hours a week.

[376] In determining the loss of earning capacity, I will first consider which assessment approach should be used (earnings versus capital asset), then which multiplier should be used (actuarial versus economic) and whether it is more appropriate to use male statistics or female statistics. Finally, I will consider contingencies.

Which Assessment Approach to Use – Earnings or Capital Asset?

[377] The earnings approach involves a form of math-oriented methodology such as a) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or; b) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.

[378] The capital asset approach involves considering factors such as a) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; b) whether the plaintiff is less marketable or attractive as a potential employee; c) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and d) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Gilbert*, at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 [*Morgan*]

at paras. 53 and 56. Though the capital asset approach is not a “mathematical calculation”, the trial judge must still explain the factual basis of the award: *Morgan* at para. 56.

[379] The earnings approach will generally be more useful when the loss is easily measurable, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate the plaintiff’s future earning capacity: *Perren v. Lalari*, 2010 BCCA 140 [*Perren*], at para 32. Where the loss “is not measurable in a pecuniary way”, the capital asset approach is more appropriate: *Perren*, at para. 12.

[380] I am satisfied that the earnings approach is the more appropriate method of assessment of the plaintiff’s possible future loss, because the evidence allows me to reasonably estimate the plaintiff’s future earning capacity.

Which Future Income Loss Multiplier To Use – Actuarial or Economic?

[381] As described in Mr. Benning’s expert report, future income loss multipliers are a convenient, shorthand way of expressing the present value of a future income loss stream, where the value of that stream is constant in real (net of inflation) dollars over some specified time period.

[382] For calculating the present value of the plaintiff’s future income loss, Mr. Benning provided an actuarial multiplier as well as an economic multiplier, expressing per thousand dollars of annual loss in 2023 dollars through to age 67. At the request of plaintiff’s counsel, Mr. Benning used statistics for males.

[383] An actuarial multiplier makes provision only for the contingency of premature death. An economic multiplier makes provision for labour market contingencies as well as for premature death.

[384] The actuarial multiplier is 21.076.

[385] The male economic multiplier is 13.464, which makes explicit allowance for the negative labour market contingencies of non-participation in the labour force and unemployment.

Should Statistics For Males Be Used?

[386] The issue of whether to use statistics for males rather than statistics for females was addressed by the Court of Appeal in *Gill v. Lai*, 2019 BCCA 103 at paras. 52–56:

> [52] The respondent's expert economist, Mr. Benning, used labour market statistics for males in British Columbia when making an allowance for the negative contingencies of part-time employment and non-participation in the workforce. The trial judge accepted this approach and rejected the submission statistics for females should be used. He did so for two reasons: factors specific to the respondent and a reluctance to use statistics that have the effect of perpetuating discrimination. He wrote:
>
> > [130] In adopting the male labour market approach, I note:
> >
> > a) since a young age, the plaintiff has shown a particular adherence to the work force and, in particular, the pharmacy profession;
> >
> > b) the plaintiff values financial independence (she saved the funds for the down payment for the Cloverdale home while her future husband studied dentistry in Manitoba); and
> >
> > c) the plaintiff's parents are in their mid-sixties and are still working.
> >
> > [131] I am also reticent to give weight to female labour market contingencies which may have embedded discrimination: see Justice Morellato's discussion in *Jamal v. Kemery-Higgins*, 2017 BCSC 213 at paras. 96–99.
>
> [53] The appellants say there was no evidence of any such embedded discrimination. They say Mr. Benning confirmed statistically females are more likely than males to work on a part-time basis and, the appellants say, "there was no suggestion in the evidence such difference arose because of any issues relating to discrimination". The appellants argue the only evidence before the judge was female labour market contingencies accurately reflect the real and substantial possibilities for the respondent.
>
> [54] Judges can and do recognize income statistics may incorporate historic and inequitable gender-based pay differences and, as such, have increasingly taken a cautious approach to gender-based income statistics. In *Crimeni v. Chandra*, 2015 BCCA 131, this Court said:
>
> > [23] Experts are frequently asked to estimate the income losses by using gender-specific historical income figures. Such figures may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings. However, there is authority for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. There is also authority for taking judicial notice of convergence in gender incomes: *Steinebach v. O'Brien*, 2011 BCCA 302.

> [24] It is certainly not an error, in my view, for a trial judge to recognize that the use of historical data can reflect such bias and, to the extent, the circumstances giving rise to the bias may be expected to diminish, to view the evidence as conservative.
>
> [25] I can see no error in the judge's consideration of the plaintiff's pre-injury earning potential.
>
> [55] In my view, the same can be said of labour market contingencies. It is not an error to recognize gender-based contingencies can incorporate bias. Having said that, we must bear in mind the quantification of damages necessitates an individual approach.

[387] I am satisfied that the male economic multiplier of 13.464 is more appropriate in this case, because of factors specific to the plaintiff, in particular:

- she is 41 years old, does not have children and has no plans to have children;
- since arriving in Canada in 2005, she has demonstrated a strong attachment to the workforce without any periods of unemployment. When one job ended, she immediately began the next;
- her attachment to the workforce has been exclusively as a hairstylist;
- her only time off work between 2005 and October 2018 was related to discreet medical issues, which the evidence establishes had resolved before the Accident.

Application of the Earnings Approach

[388] Based on the plaintiff's net income in 2022, and her projected net income in 2023, she is suffering income loss of approximately $77,000 a year. The net present value of an ongoing loss of $77,000 a year to age 67, using a male economic multiplier of 13.464, results in a loss of $1,036,728.

Contingencies

[389] In *Dornan v. Silva*, 2021 BCCA 228, at paras. 92–93, Grauer, J.A. discussed the role of contingencies in the analysis:

> [92] In approaching this part of the appeal, it is useful to remember that we are dealing with specific contingencies, not general contingencies. The

importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):

> 46 …[C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
>
> 47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.
>
> [Emphasis added.]
>
> [93] The process, then, as discussed above at paras 63–64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.

[390] The application of a specific contingency, whether positive or negative, engages the “real and substantial possibility” analysis, and not simply the “relative likelihood” analysis that follows: *Verma v. Friesen*, 2024 BCSC 13 at para. 200. If the contingency is a real and substantial possibility, the process becomes one of assessing its relative likelihood: *Boal v. Parilla*, 2022 BCSC 2075, at para. 166.

[391] The burden of proof in establishing that a contingency should apply lies on the party seeking to assert it: *Lo v. Vos*, 2021 BCCA 421 at para. 39.

Positive Contingencies

[392] The evidence establishes there is a real and substantial possibility that the prices the plaintiff charges for her services would have increased over time, but, in my view, because of increases in the cost of doing business, rather than attributable to the plaintiff's skill as a hairstylist. I decline to make an adjustment for this as a positive contingency.

[393] The evidence establishes there is a real and substantial possibility the plaintiff's injuries and condition will worsen and cause her to decrease her hours or stop working all together, because they are directly related to her ability to work as a hairstylist. I consider the relative likelihood of this occurring to be as likely as not. I decline to make an adjustment for this as a positive contingency.

[394] The evidence fails to establish that there is a real and substantial possibility the plaintiff's current arrangement at Style Lab will become unavailable. Nor is there any evidence that the plaintiff would be unable to find the same type of arrangement at another hair salon, although Ms. Cheung's evidence suggests the plaintiff might be less attractive to a potential employer if she were seeking employment as a hairstylist on a commission-basis. I decline to make an adjustment for this as a positive contingency.

[395] The evidence establishes there is a real and substantial possibility hairstylist work will be no longer available to the plaintiff and that she has to re-enter the workforce in an alternative occupation, because her injuries from the Accident already significantly affect her ability to work as a hairstylist, and her condition may yet worsen. I consider the relative likelihood of it occurring to be as likely as not. I decline to make an adjustment for this as a positive contingency.

[396] The evidence establishes there is a real and substantial possibility the plaintiff will work less on account of her injuries from the Accident as she gets older, because the chronic pain she is suffering will take a toll on her. Similarly, there is a real and substantial possibility the plaintiff will retire earlier on account of her injuries

from the Accident. I consider the relative likelihood of either occurring to be as likely as not. I decline to make an adjustment for either as a positive contingency.

Negative Contingencies

[397] I decline to make any deduction for the possibility that the plaintiff will increase her hours as she gets older, because the evidence discloses no real and substantial possibility that she will do so.

[398] I decline to make any deduction for the possibility that the plaintiff would have earned less than expected, because the evidence discloses no real and substantial possibility of that occurring.

[399] I decline to make any deduction for the possibility the plaintiff's condition may improve, notwithstanding it is something which the medical experts cannot rule out, because the evidence discloses no real and substantial possibility of that occurring.

[400] I decline to make any reduction on the basis the plaintiff may leave the country and pursue hairstyling in Australia, because, for the reasons already indicated, there is no real and substantial possibility of that occurring.

[401] I decline to make any reduction for female market contingencies, because, for the reasons already indicated, the male economic multiplier is more appropriate in this case.

[402] I decline to make any deduction for what defence counsel characterizes as part-time work in light of the plaintiff's hours before the Accident, because it would give effect to a mischaracterization of the nature of the plaintiff's work. She was not working part-time at the date of the Accident. She was building her business. That she had not yet achieved the quantity of hours typically associated with full-time hours does not mean she was working only part-time. Her intention throughout was to work full-time.

[403] I decline to make a deduction for the plaintiff's alleged pre-existing conditions, because, with the exception of her TMJ issue, the evidence establishes they had

resolved by the time of the Accident. I note too that even if the plaintiff's alleged pre-existing conditions had remained unresolved, because the economic multiplier already accounts for time off due to factors such as illness, even if she were to have reduced employment because of something like a pre-existing back issue, there is no evidence her work absences would be greater than in the average population. Absent such evidence, it would likely constitute a double deduction to discount the plaintiff's future earnings because of any such alleged pre-existing conditions.

[404] I decline to make any deduction for the possibility that the plaintiff could provide services which were less likely to aggravate her injuries, because the evidence discloses no real and substantial possibility of this occurring.

[405] I decline to make any deduction for the likelihood of the plaintiff retiring earlier due to the strenuous nature of her work as a hairstylist, because there is no evidence that hairstylists cannot and do not typically work to retirement within the same age range as the general workforce. Consequently, other than the related positive contingency discussed above, which I found as likely to occur as not, there is no real and substantial possibility of the plaintiff not doing so either.

Conclusion

[406] I make no adjustments for contingencies.

Findings of Fact

[407] I make the following further findings of fact.

[408] As a result of her injuries from the Accident, the plaintiff is now partially disabled from working as a hairstylist. She has limitations in her ability to work at sedentary, light and physically demanding jobs. She is less competitive in the labour market, both as a self-employed hairstylist and as an employee hairstylist. As a result of her injuries from the Accident, she has little energy to do anything other than work. She can now only work part-time hours because of her injuries from the Accident. She is doing her best to work as much as she can. She schedules breaks between clients, breaks up her work day, limits her services, has stopped providing

services she finds most limiting, has reduced her long appointments, and her female clientele. Despite taking these steps, she remains in pain and unable to durably increase her hours worked. Her injuries from the Accident will need to be managed for the rest of her life. As a result of the Accident, her effective hourly earnings are lower than before the Accident, because she now provides less profitable services. She does more haircuts for men and provides less haircutting and styling services for women. She could not work full-time even if she were to provide only less profitable services.

Conclusion

[409] Being mindful of the need for me to compare the likely future of the plaintiff's working life if the Accident had not happened with her likely working life after the Accident, and that any award must be both fair and reasonable, I award the plaintiff $850,000 for loss of future earning capacity.

COSTS OF FUTURE CARE

Law

[410] A plaintiff is entitled to compensation for the costs of future care based on what is reasonably necessary to restore them to their pre-Accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo,* 2012 BCCA 351 at paras. 29–30.

[411] The test for determining the appropriate award for costs of future care is objective and based on medical evidence. Costs must have medical justification and be reasonable: *Milina v. Bartsch* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63. Generally, there must also be evidence that the plaintiff is likely to incur the costs in the future: *Montazamipoor v. Park*, 2022BCSC 140 at para. 112.

[412] The extent, if any, to which a costs of future care award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[413] An assessment of damages for costs of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[414] The standard of proof to establish a claim for costs of future care is the same as for any future pecuniary loss, namely, "substantial possibility". All that has to be established is a real and substantial "risk" of pecuniary loss. It is not necessary for the plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur: *Athey* at para. 27.

Position of the Parties

[415] Plaintiff's counsel submits the plaintiff has established her claim for an award for costs of future care, and seeks an award of $179,125. These costs are as follows:

Treatment	One-Time Cost	Annual Cost	Multiplier	Lump Sum Present Value
Kinesiology	$1,920 – $2,880			
Psychotherapy	$2,700 - $8,580			
Gym/Pool Pass		$500	29.221	$14,610

Physiotherapy/Massage Therapy		$2,160 – $3,240 Average $2,700	29.221	$78,896
Housekeeping Assistance		$1,200	29.221	$35,065
Botox Injection Treatment		$2,004	29.221	$58,558– discounted by 50% to $29,279
Private Pain Clinic	$13,800 – $14,500			
Occupational Therapist Visit	$450			
SUBTOTALS	**$18,870 – $23,680** **Average $21,275**			$157,850
			TOTAL	**$179,125**

[416] The plaintiff is willing to undergo all of the above treatments, and has already been receiving many of them.

[417] Defence counsel submits the plaintiff is not in need of any future care and is able to carry out her activities without the aid of treatment. Defence counsel further submits that if the plaintiff does require treatment, she would have required it in any event to address her prior back complaints or the general wear and tear associated with her work as a hairstylist, as described by the lay hairstylist witnesses.

Discussion

[418] I am satisfied, based on the evidence of the plaintiff, the lay witnesses, the medical experts and Ms. Craig, that the plaintiff is entitled to an award for the costs of future care.

The Multiplier

[419] As described in Mr. Benning's expert report, future cost of care multipliers are a convenient, shorthand way of expressing the present value of a future cost of care expenditure stream, where the value of that stream is constant in real (net-of-inflation) dollars over some specified time. Mr. Benning determined the cumulative lifetime multiplier is 29,221, expressed per thousand dollars of annual cost of care expenses in year 2023 dollars over the plaintiff's remaining lifetime.

Kinesiology

[420] The plaintiff claims between $1,920 and $2,880.

[421] Dr. Koo recommended 24 to 36 kinesiology sessions over the next few years. Ms. Craig recommended 24 supervised exercise sessions with a kinesiologist to work on strengthening, flexibility and postural correction over the next year, with periodic review in the next two to three years. According to Ms. Craig, each session would cost approximately $80.

[422] The range of amount claimed is $1,920 (24 sessions) to $2,880 (36 sessions), which would cover the next year and a half.

[423] I find $2,880, being the cost associated with 36 sessions, medically justified and reasonable.

Psychotherapy

[424] The plaintiff claims between $2,700 and $5,850.

[425] Dr. Koo recommended 12 sessions of psychotherapy. Dr. Kroeker recommended 26 sessions over six months. According to Ms. Craig, each session

would cost between $140 and $225. The range of amount claimed is between $2,700 and $8,580.

[426] Concerning the number of recommended sessions, I prefer Dr. Kroeker's estimate as a psychiatrist to that of Dr. Koo as a physiatrist.

[427] I find $7,800, being the cost reasonably associated with psychotherapy, medically justified and reasonable.

Gym/Pool pass

[428] The plaintiff claims $500 a year, which applying a multiplier of 29.221, results in a total claim of $14,610.

[429] Dr. Koo recommended a gym pass. The plaintiff testified she does her exercises in the gym at the apartment building where she lives. There is no evidence of any cost to the plaintiff associated with her use of that gym. There is no evidence the plaintiff has or will use a pool as part of her treatment.

[430] I decline to include the costs of a gym pass or pool pass in the award for costs of future care, because I am not satisfied the plaintiff has established a real and substantial risk of pecuniary loss in this regard.

Physiotherapy/massage therapy

[431] The plaintiff claims an average of $2,700 a year, which applying a multiplier of 29.221, results in a total claim of $78,896.

[432] Dr. Koo recommended 24 to 36 sessions of contingency physiotherapy, chiropractic treatment; massage therapy; and/or acupuncture a year. Ms. Craig recommended 12 sessions of physiotherapy and massage therapy a year. According to Ms. Craig, each session would cost between $75 and $95. The range of amount claimed is between $2,160 and $3,240, with a mid-range amount of $2,700, which applying a multiplier of 29.221 results in a total claim of $78,896.

[433] I find $78,896, being costs of $2,700 a year associated with physiotherapy/massage therapy twice a month, medically justified and reasonable.

Housekeeping assistance

[434] The plaintiff claims $1,200 a year, which applying a multiplier of 29.221, results in a total claim of $35,065.

[435] Ms. Craig's functional testing demonstrated that the plaintiff does not meet the full physical demands for regular household cleaning or seasonal household cleaning, and she recommended the plaintiff receive regular assistance for household cleaning and end of year and seasonal cleaning.

[436] Ms. Craig's recommendation is supported by the evidence of the plaintiff and Mr. Baboomian. Prior to the Accident, the plaintiff had primary responsibility for housekeeping chores. Mr. Baboomian now performs most of the housekeeping chores because the plaintiff's injuries from the Accident prevent her from doing so.

[437] The range of amount claimed is $1,200 a year, which applying a multiplier of 29.221, results in a total claim of $35,065. The $1,200 amount is based on a rate of $25/hour, with a two-hour $50 minimum, twice a month.

[438] Although Ms. Craig's report mentions costs associated with end of year and seasonal household cleaning, it is not included in the plaintiff's claim, and there is no evidence she engages in that activity or plans to move to a single-family residence, where it might reasonably be required.

[439] I find $35,065, being costs of $1,200 a year associated with household cleaning twice a month, medically justified and reasonable.

Botox

[440] The plaintiff claims $2,004 a year, for 100 units of Botox three times a year, which applying a multiplier of 29.221, results in a total claim of $58,558. However, plaintiff's counsel submits the $58,558 should be discounted by 50%, because while

Botox has given the plaintiff some relief from jaw pain, she has not yet tried it to treat her headaches. Applying a 50% discount, the plaintiff claims $29,279.

[441] In Dr. Koo's supplementary report of July 11, 2023, he noted that the plaintiff was "thinking about Botox injections" to treat her jaw pain, which existed pre-Accident, and that after her TMJ specialist adjusted the plaintiff's nightguard device her jaw pain had lessened and become intermittent.

[442] In Dr. Koo's opinion, the plaintiff may benefit from Botox injections for her headaches, however, Botox injections, if helpful at all, would have only a partial rather than curative effect, and would likely need to be repeated every three months or so, as the duration of effect is not permanent.

[443] I decline to include the costs of Botox injections in the award for costs of future care, because I am not satisfied the plaintiff has established a real and substantial risk of pecuniary loss in this regard.

Private pain clinic

[444] The plaintiff claims between $13,800 and $14,500.

[445] In Dr. Koo's supplementary report of July 11, 2023, he recommended a private pain clinic "for review of psychopharmacology regarding her chronic insomnia, depression and anxiety and chronic pain with potential prescription medication interventions". In Dr. Koo's opinion, "a chronic pain clinic would also be useful for education, therapy and medical intervention to help reduce the risk of further deterioration and pain worsening over time and to develop skills and strategies with living with chronic pain".

[446] Ms. Craig testified that while a free public chronic pain clinic could be an option for the plaintiff, there is an 18-month to two-year waiting time, and a free clinic may not be multi-disciplinary in nature.

[447] I find $14,150, being the cost associated with a private pain clinic, medically justified and reasonable. This amount is the mid-point in the provided range, namely $13,800 to $14,500.

Occupational Therapist visit

[448] The plaintiff claims $450.

[449] Dr. Koo recommended a occupational therapist home visit “to look at ergonomic strategies and lighter weight housekeeping equipment to help reduce pain aggravation through Ms. Woo’s participation in her normal domestic upkeep”. According to Ms. Craig, a four-hour visit would cost between $460 ($115/hour) and $480 ($120/hour).

[450] I find $450, being the cost associated with a four-hour visit by a occupational therapist ,medically justified and reasonable.

Conclusion

[451] I award the plaintiff $139,241 for costs of future care.

SPECIAL DAMAGES

[452] The parties agree the plaintiff’s special damages are $5,859.20.

MITIGATION

Law

[453] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[454] Once the plaintiff has proved the defendant’s liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert*, at para. 202.

[455] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:

> 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.

(Also see *Wahl v. Sidhu*, 2012 BCCA 111 at para. 32; and *Morgan v. Galbraith*, 2013 BCCA 305 at para. 78.)

Position of the Parties

[456] Defence counsel submits the plaintiff has failed to mitigate, essentially because she did not comply with recommended stretching and delayed in getting psychotherapy.

[457] Plaintiff's counsel submits the defendants have failed to prove the plaintiff's alleged failure to mitigate.

Discussion

[458] Concerning the failure to do stretching, the evidence is poorly developed and, for the reasons expressed earlier about inherent difficulties with statements in clinical records, I am not satisfied the defence has met its burden of proof.

[459] Concerning the psychotherapy, as Dr. Kroeker testified, early therapy will not improve the chance of recovery where the individual is not ready for treatment. Again, I am not satisfied the defence has met its burden of proof.

[460] I accept the plaintiff's evidence about her work limitations. Her testimony concerning her desire to work full-time, and her attempts to increase her hours, is both credible and reliable, because it is supported by the reports of Dr. Koo, Dr. French and Ms. Craig, and corroborated by the evidence of Ms. Shulgin, Ms. Cheung and Ms. Walsh.

[461] Even if the plaintiff were to change the profile of the type of services she offers, such as to do more men's haircuts, she would still not be able to work full-time. Her appointment list reports indicate she is already providing the majority of her services for men, and doing so is challenging for her.

[462] Ms. Shulgin would not confine her business to just doing men's haircuts, because it is hard on her wrists to just do men's haircuts back-to-back, there is more clean-up required between appointments, and she can earn more money from doing female hair services.

[463] The plaintiff has made all reasonable efforts with respect to her work and personal life in order to try and maximize her earnings after the Accident. She has already implemented many changes to her schedule and services in order to maximize her income and work around her injuries. She schedules breaks between clients. She works for a few hours and then takes an extended break before returning to continue work. She limits the most challenging services, for example she no longer performs full blow-dries for female clients. She has stopped doing weave extensions and permanent straightening, both of which are lucrative services. She has reduced her number of longer appointments. She has reduced her number of female clients.

[464] There is no evidence to suggest that there is any basis to believe that the plaintiff could be sustainable working in any other way to increase her income. On the contrary, the plaintiff has made reasonable efforts to increase her function and maximize her income. It would be simplistic to find that the plaintiff could simply increase her time at work, working the same number of hours as before, but spread over a longer period of time. The plaintiff is in the service industry and does not have complete control of her own schedule because she must accommodate clients and their schedules.

Conclusion

[465] The defence has failed to prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated her damages.

SUMMARY

[466] In summary, I award the plaintiff damages as follows:

Non-Pecuniary Damages:	$165,000.00
Past Loss of Earning Capacity:	$335,000.00
Future Loss of Earning Capacity:	$850,000.00
Costs of Future Care:	$140,000.00
Special Damages:	$5,859.20.00
Subtotal:	**$1,495,859.20**
Less $224,378.88 (15% contributory negligence):	<$224,378.88>
Total:	**$1,271,480.32**

INTEREST AND COSTS

[467] The plaintiff is entitled to pre-judgment interest at the prevailing rate and costs. If the parties are unable to agree on costs, they may speak to the issue.

CONCLUSION

In conclusion, I wish to express my appreciation to counsel for the professionalism with which they conducted this case, and for their assistance to the court.

"B. Smith J."

B. SMITH J.