IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Johansen v. Lee,*
2024 BCSC 1310

Date: 20240722
Docket: M1912764
Registry: Vancouver

Between:

Amanda Lee Johansen

Plaintiff

And

Jason Wing Lee

Defendant

- and -

Docket: M213937
Registry: Vancouver

Between:

Amanda Lee Johansen

Plaintiff

And

Arvin Mostafai-Nejad and National Energy Equipment Inc.

Defendants

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:	D.V. Abreu
Counsel for the Defendants:	S. Wang K. Daniels-Addison
Place and Dates of Trial:	Vancouver, B.C. May 27-31 & June 3-5, 2024
Place and Date of Judgment:	Vancouver, B.C. July 22, 2024

Table of Contents

Introduction

[1] Amanda Johansen was injured in two motor vehicle accidents in 2018. The defendants admit liability. At issue is the determination of the damages required to compensate Ms. Johansen for her injuries.

[2] Ms. Johansen is 30 years old. When the accidents took place, she was 24, in a committed relationship with her high school sweetheart, and pregnant. The child would be their first. Ms. Johansen was employed as a construction safety officer (or "CSO") by Harrier Construction ("Harrier"), a company that she liked and that valued her. She had recently purchased a small townhouse. She and her partner envisioned building up equity in the townhouse with a view to eventually purchasing a larger property in which to raise a family. Ms. Johansen's son was born in early 2019.

[3] Ms. Johansen had a history of back pain that caused her discomfort when she sat or stood still for more than about 15 minutes at a time. She did not enjoy driving, especially in the city. These things limited her enjoyment of her work as a CSO, but did not impede her ability to do her job, which paid well and offered good future prospects. She planned to return to work following her maternity leave.

[4] Since the 2018 accidents, Ms. Johansen has experienced pain and stiffness in her neck and right shoulder, and increased pain in her mid and lower back. She has abandoned her career as a CSO. Her relationship with her partner has fallen apart, and financial pressures forced her to sell the townhouse. Now she rents a basement apartment where she lives with her son. Since 2021, she has been employed as a housecleaner, finding that this work offers her a varying mix of physical tasks that she can accommodate. She earns substantially less as a housecleaner than she earned as a CSO.

[5] The defendants dispute that Ms. Johansen's personal and financial difficulties since the accidents are attributable to injuries suffered by her in the accidents. In particular, they dispute that her injuries have caused her financial loss. Alternatively,

they submit that by abandoning employment as a CSO to work as a housecleaner, she has failed to mitigate her damages.

[6] The parties agree that there is no need to apportion damages between the two accidents.

[7] Ms. Johansen claims an award of approximately $1.8 million. The defendants submit that she should be awarded between $60,000 and $80,000. The following heads of damages claimed by Ms. Johansen are in dispute: non-pecuniary loss; loss of housekeeping capacity; past income loss; future income loss; and the cost of future care. Special damages are agreed at $1,618.98.

Background

[8] Ms. Johansen was born and raised in the Lower Mainland of British Columbia and enjoyed a stable home environment growing up. She has a twin sister, Samantha Johansen, and two brothers, one older, and one much younger. Her parents are still married and her brothers still both live with them in their childhood home. Her mother stayed at home with the children until the youngest child was in school, and then went back to school to qualify as a nurse. Her father, Dean Johansen, worked as the project manager for a construction company. He taught the children the value of a dollar, and encouraged them to think about a career in the trades. Ms. Johansen took these lessons to heart. She describes her parents as realistic people and aspires to be a realistic person herself.

[9] From age 11, Ms. Johansen earned money babysitting, and from age 15, she worked at McDonald's every day after school and on weekends. Eventually, she found work waitressing and also worked for her father's company as a labourer engaged in demolition and the removal of hazardous materials. After high school graduation, her father assisted her in obtaining the security clearance required for work at the Vancouver Airport ("YVR") and, with that, a job as a plumber's apprentice with Quadra Mechanical, a company doing site work at YVR.

[10] Harrier is another company working at various sites at YVR. It is owned by Andrew Oliver. In February 2017, it hired Ms. Johansen away from Quadra Mechanical and then arranged for her to be trained and credentialled to work as a CSO. Ms. Johansen's work was supervised by Glyn Davies, who had worked for Harrier from its establishment.

[11] Ms. Johansen had begun dating a classmate, Duncan Konings, in her last year of high school. The relationship quickly deepened and their families became close. Ms. Johansen and Mr. Konings moved in together for a period after high school, but their apartment was infested with roaches and they gave it up and returned to live with their respective parents. Ms. Johansen saved up money. In 2017, she had enough for a down payment on a one bedroom townhouse in New Westminster, which she purchased, and they moved in together again.

[12] In May 2018, Ms. Johansen became pregnant. It was not exactly a planned pregnancy, but Ms. Johansen and Mr. Konings had discussed the possibility and both were aware that, if she became pregnant, she would have and keep the baby. They planned to parent the child together. Their families were excited and supportive.

[13] Ms. Johansen and Mr. Konings discussed that she would take a maternity leave and return to work at Harrier afterwards. Mr.Davies was aware of her intention to return to work at Harrier. Mr. Oliver assumed that she would not return.

[14] The first accident occurred in August 2018 and the second in December 2018. Ms. Johansen returned to work at Harrier between the first and second accidents. She worked for a short time following the second accident. Her last day at Harrier was the day before the company shut down for the Christmas break in December 2018.

[15] The baby was born in early February 2019. Ms. Johansen remained off work until April 2021. She received EI benefits until they ran out in 2020. She says that she delayed her re-entry into the workforce due to the Covid-19 pandemic.

[16] Ms. Johansen's relationship with Mr. Konings deteriorated. Without Ms. Johansen's income, they were unable to afford the mortgage payments on the New Westminster townhouse. They moved in with friends and then with Mr. Konings' parents, and rented the townhouse out for a year. By the end of the year, Ms. Johansen and Mr. Konings were occupying separate rooms within his parents' house. They were fighting and the arrangement was uncomfortable for all concerned. Strata bylaws did not permit Ms. Johansen to continue renting the townhouse to a tenant and she could not afford to live there. She sold the townhouse and moved with the baby into a basement apartment in Cloverdale, where she now resides.

[17] Ms. Johansen did not contact Harrier to discuss a return to work with them. In April 2021, she applied for and obtained work with Busy Girls Cleaning, a business that provides home cleaning services in the White Rock area, close to her apartment. Busy Girls has assigned her a work partner, Tammy Hessian. Together, Ms. Johansen and Ms. Hessian clean three houses a day, five days a week.

[18] Ms. Johansen estimates that she works 30 to 35 hours a week for Busy Girls but that is an over-estimate. Dividing her T4 income by her hourly rate – $20 in 2022 and $21 in 2023 – suggests that she worked 1,322 hours in 2022 and 1,315 hours in 2023. Assuming that she took a month of vacation, she would have averaged about 28 hours a week at work over the remaining 11 months of the year. The shortfall is likely attributable to cancellations by Busy Girl customers, and perhaps to Ms. Johansen's occasional early departures from work occasioned by pain, discomfort, or nausea.

Credibility and reliability of the witnesses

[19] The lay witnesses for the plaintiff were Ms. Johansen, Dean and Samantha Johansen, Duncan Konings, Glyn Davies, and two witnesses with experience in the construction industry, Aaron Randle and Mark Phillips. The lay witnesses for the defendants were Tammy Hessian, and Andrew Oliver.

[20] Putting Ms. Johansen to the side for the moment, all of the lay witnesses are credible. All of them who know Ms. Johansen present her in a sympathetic light from their varying perspectives. Their evidence is generally reliable.

[21] The defence asks me to doubt Mr. Konings' credibility, and also to view his account of the breakdown of his relationship with Ms. Johansen as calling into question her evidence generally. I am not persuaded by either submission.

[22] The attack on Mr. Konings' credibility involves a suggestion that Mr. Konings may have discussed Ms. Johansen's evidence with Ms. Johansen or her counsel before giving evidence himself, and then sought to deny or downplay the discussion under cross-examination. I do not think that any untoward discussion occurred, or that Mr. Konings' evidence under cross-examination was less than honest. Though it may have been unwise, it would not have been wrong for counsel or Ms. Johansen to have described Ms. Johansen's evidence to Mr. Konings, because there was no order for the exclusion of witnesses. It seems that Mr. Konings was told something about Ms. Johansen's evidence concerning their living arrangements at a point during the breakdown of their marriage, which is not a point of any significance, and may well have reflected Ms. Johansen's evidence on discovery rather than her evidence at trial.

[23] As to the other point, I do not agree with the defence that Mr. Konings' evidence paints a different picture of their relationship than Ms. Johansen's. Both tell a sad story of two young people whose relationship could not withstand multiple stresses associated with financial difficulties, a pregnancy and the birth of a child, differing expectations as to their roles, and pain, anxiety, and depression suffered by Ms. Johansen since the accidents.

[24] Giving evidence, Ms. Johansen presented as an articulate and self-possessed witness who was restless and frequently adjusted her position in the witness box. This did not appear at all contrived, and it is consistent with her own evidence and that of the lay witnesses who have spent time with her since the

accident. Apart from her frequent adjustments, she appeared fit and healthy. She described some limitations in her range of motion reaching up.

[25] Apart from Mr. Konings' evidence, the defendants ask me to doubt the credibility of Ms. Johansen's account of her symptoms. For the most part, I do not. Her evidence is not noticeably self-serving. She is not prone to over-statement, and is not reluctant to acknowledge conduct that reflects poorly on her. Her evidence is generally corroborated by others, to the extent that they were in a position to observe. Where there are inconsistencies between her evidence and that of others, they concern matters of detail or derive from differences in perspective.

[26] There are reasons to doubt the reliability of portions of Ms. Johansen's evidence, because some of her descriptions of the evolution of her symptoms over time are doubtful. Remembering and reporting on past discomfort is intrinsically difficult, and Ms. Johansen is generally vague about dates. I take my reservations into account in coming to my findings set out in these reasons.

[27] Four expert witnesses testified as independent experts: two physiatrists, Dr. Lawrence Kei and Dr. Michael Berger; and two occupational therapists, Jennifer Lane and Edgar Emnacen. Ms. Lane performed a functional capacity assessment and prepared an estimate of the cost of future care, and Mr. Emnacen critiqued Ms. Lane's report.

The accidents

[28] The first accident occurred on August 14, 2018. Ms. Johansen was driving a Pontiac Wave on Howe Street in downtown Vancouver. She was on her way to work in the morning. She entered the intersection of Howe and Pender Street on a green light and struck the side of an Acura driven by the defendant, Mr. Lee, who had entered the intersection on a red light. Both vehicles had to be towed away and were written off as a result of the accident.

[29] Ms. Johansen was wearing her seatbelt. The impact jolted her forward into the steering wheel. Afterwards, passers-by had to urge her to get out of the car.

That day she felt tense and stiff all over. She called her family doctor, who told her to go to the hospital to get checked out. She was about three months pregnant, the focus of medical investigation was on whether the unborn baby was okay, and she understood that there was some risk to her pregnancy, which caused her concern.

[30] The second accident occurred on December 6, 2018. Ms. Johansen was driving a Toyota Corrolla eastbound on 10th Avenue in New Westminster, approaching McBride Avenue. A Chevrolet Van driven by the defendant, Mr. Mostafai-Nejad, was behind her. Ms. Johansen's vehicle was merging into the right-hand lane, with the rear wheels still in the left lane, when traffic came to a stop. The defendant's vehicle collided with the side of Ms. Johansen's vehicle near the rear while she was stopped.

[31] Ms. Johansen was wearing her seatbelt. The impact jolted her forward. Both vehicles were still driveable, and the drivers pulled into a gas station to exchange information. The cost to repair Ms. Johansen's vehicle was $6,314. At this point, Ms. Johansen was 7 months pregnant. Following the collision, she tensed up again, and experienced further symptoms in her neck, shoulder, and mid and lower back. She was emotional and concerned about her baby. She sought medical attention from her family doctor and at a hospital emergency room the next day.

Analysis

1. Causation and the injuries

1.A Legal framework

[32] The defendants are responsible to compensate Ms. Johansen for injuries resulting from the accidents caused by their negligence. Factual causation is assessed by asking whether she would have suffered a loss, whether physical or financial, but for the accidents. It makes no difference if she was predisposed to suffer injury or loss. Predisposition to injury or loss, and the fact that the accident is not the sole cause of her current difficulties, do not diminish the defendants' legal responsibility to compensate her; *Athey v. Leonati,* [1996] 3 SCR 458 at para. 34.

[33] Conversely, the defendants are not responsible for symptoms or losses that Ms. Johansen would have had to endure in any event; *Athey,* at para. 35. Consideration of what would have occurred involves the assessment of a hypothetical state of affairs. The law requires me to proceed in two stages: first consider whether there is a real and substantial possibility that Ms. Johansen would have suffered symptoms or losses if it were not for the accident; and if the answer is yes, consider the likelihood that she would have suffered the symptoms or losses in any event; *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34–37.

1.B Ms. Johansen's condition prior to the accidents

[34] Ms. Johansen suffered mid and lower back pain prior to the accidents. She was diagnosed with arthritis and a scoliosis in her lower back when she was 15 or 16 years old. She went for physiotherapy and was given stretches and exercises to do. Within a few years, she understood that her scoliosis was cured though she still performed the exercises every now and then. She continued to experience discomfort whenever she had to stand or sit still for more than about 15 minutes. She noticed back pain while she was driving to work and performing household chores such as washing the dishes.

[35] In 2017, she began training to become a CSO and took two weeks of classroom instruction. She recalls that she obtained permission from the instructor to move around instead of always sitting at a desk during classes.

[36] Ms. Johansen's back pain was not at all disabling. It did not prevent her from working as a labourer doing demolition work when she was in high school, or from working as a plumber's apprentice and later as a CSO. There was a physical component to her work as a CSO, in that the job required her to walk long distances over the course of a day, assist with site clean-up, and sometimes to carry tools or otherwise lend a hand to tradespeople on site. Mr. Davies and Mr. Oliver considered her a notably hard-working employee.

[37] Apart from making use of a heating pad and sometimes taking Ibuprofen, in 2017 and early 2018, Ms. Johansen was not pursuing treatment for her back pain.

[38] Ms. Johansen drove to work daily and between job sites in Metro Vancouver for her work as a CSO. While she did not enjoy city driving and found the sitting uncomfortable, neither was the act of driving a problem for her.

[39] Mr. Oliver testified that, prior to the first accident, Ms. Johansen was often sick and on light duties due to her pregnancy. I find that he is mistaken about the timing, if nothing else. Mr. Davies was in much closer contact with Ms. Johansen at work. Ms. Johansen recalls that she was being accommodated by being expected to do less and avoid heavy lifting in the period between the first and second accidents, but Mr. Davies could not recall that there was anything that Ms. Johansen could not do after the first accident and through the course of her pregnancy that she was able to do earlier. I expect that Ms. Johansen's memory is more reliable on this point and that she and Mr. Oliver are correct that some accommodations were made.

1.C Evolution of Ms. Johansen's injuries and symptoms since the first accident

[40] Since the first accident, Ms. Johansen has suffered from neck and shoulder pain, tension, and stiffness, mostly but not entirely on the right side. These are not symptoms she suffered before the first accident. Ms. Johansen obtains symptomatic relief from a heating pad, massage, and IMS treatments administered by a physiotherapist, but the pain always comes back within a day or two. On discovery, Ms. Johansen described her neck and shoulder pain at "the predominant thing that's really bothering me". At trial, she adopted this discovery evidence.

[41] Since the accident, Ms. Johansen experiences tension headaches a couple times a week. She attributes the headaches to her neck and shoulder pain.

[42] Ms. Johansen suffers from mid and low back pain. She associates the pain with standing or sitting still for long periods of time. On discovery, she said that, before the first accident, she could manage 15 minutes before she would begin to experience discomfort and if she didn't move, it would turn to pain. Since the accident, she said that her standing and sitting tolerance were similar. Under

cross-examination at trial, she testified that, since the accidents, while the time period until she experiences discomfort is the same, she has to make accommodations more quickly, she gets symptoms more quickly if she is not accommodating, and her symptoms progress more quickly after they appear. The accommodations she describes are movement, heat, or massage.

[43] I accept Ms. Johansen's explanation that, while the period prior to the onset of discomfort is the same, her mid and low back pain have been more uncomfortable for her since the accidents. While there is some suggestion in her testimony that her symptoms are getting worse every year, considering her discovery evidence, I do not think that is so.

[44] Since the accidents, Ms. Johansen has found that driving makes her anxious in a way that it did not before the accident. On discovery, she described herself as having become paranoid about city driving, though she does not mind driving in the country. Dean and Samantha Johansen have observed that driving makes her anxious, and Mr. Koning states that, in the aftermath of the first accident, the main thing that stood out for him was how stressed out she got.

[45] Ms. Johansen has not sought treatment for her driving anxiety.

1.D The expert evidence

[46] Dr. Kei diagnoses the following "as a result of the motor vehicle accidents":

1. Cervical spine sprain-strain injury (whiplash injury) resulting in chronic neck pain.
2. Cervicogenic headaches and dizziness.
3. Lumbar spine sprain-strain injury with aggravation of pre-existing symptomatic lumbar discogenic pain resulting in chronic mid and lower back pain.
4. Symptoms of anxiety related to driving.

[47] In Dr. Kei's opinion, it is more likely than not that the first three injuries were caused by the accidents. He declines to further discuss Ms. Johansen's symptoms

of anxiety, preferring to defer to a specialist in mental health. Unfortunately, Ms. Johansen has not been assessed by a psychiatrist or psychologist.

[48] Dr. Kei is of the opinion that Ms. Johansen has reached the point of maximal medical improvement with respect to her neck and lower back pain. Her prognosis of returning to her pre-accident state is poor.

[49] Dr. Berger believes that there is a possibility that Ms. Johansen's lower back pain has a different cause, resulting not from a soft tissue injury but from an inflammatory condition. He does not diagnose inflammatory back pain, but he strongly recommends investigation of the possibility by a rheumatologist. A diagnosis of inflammatory back pain would have implications for Ms. Johansen's prognosis, positive if it is appropriately treated, and most definitely negative if it is not.

[50] Dr. Kei disagrees with Dr. Berger, because Ms. Johansen has been investigated for a suspicion of inflammatory back pain by a rheumatologist, Dr. Yang, who did not testify. Dr. Yang's investigation concluded with a clinical note dated March 9, 2020, offering an impression of chronic mechanical (not inflammatory) back pain and stating an intention to follow up with Ms. Johansen in person. A follow up visit was scheduled in October 2020 but did not take place.

[51] Dr. Berger's medical opinion is that further rheumatological investigation is warranted. As he explains it, the possibility of inflammatory back pain is sufficiently serious that there is a low threshold for further investigation. He would rather be wrong, than miss something serious. His opinion is not an opinion as to the cause of Ms. Johansen's back pain. It is an opinion as to what further investigations should be undertaken.

[52] On the evidence before me, the possibility that some part of Ms. Johansen's back pain is inflammatory in origin is speculative. Dr. Kei is well qualified, his opinion to the contrary is cogent and grounded in the evidence, and I am bound to accept it. I think that Ms. Johansen would be well advised to speak with Dr. Yang or

another rheumatologist and show them Dr. Berger's report, for the reasons he gives, but the speculative possibility of inflammatory back pain does not rise to the level of a real and substantial possibility bearing on the damage assessment I must undertake in these reasons.

[53] Ms. Lane's functional capacity assessment of Ms. Johansen led her to the somewhat surprising conclusion that Ms. Johansen is not competitively employable as a house cleaner. She based her conclusion on her observations of Ms. Johansen while she engaged in various repetitive activities intended to simulate the physical demands of cleaning work in a clinic setting, and on measurements of the time taken by her to complete the simulated tasks. She also noted Ms. Johansen's report of pain and fatigue during a post-assessment interview conducted the next day.

[54] I do not accept Ms. Lane's assessment that Ms. Johansen is not competitively employable as a house cleaner. Ms. Lane assumes that Busy Girls is accommodating shortcomings in Ms. Johansen's performance as compared to that of an employee without her symptoms, but the evidence does not bear that out. Ms. Johansen is able to cope with the work at Busy Girls. She does it competently and well, and takes satisfaction from it. Her employer has not criticized her work. Her work partner, Ms. Hessian, has no complaints. She says that they divide up the work 50:50, she has never observed Ms. Johansen having difficulties, and Ms. Johansen has never slowed her down.

[55] Given Ms. Johansen's track record, I do not think there is any likelihood that she would experience difficulty finding and maintaining work as a house cleaner with another employer or working independently, without accommodations. House cleaners do not usually work under direct supervision. What matters is whether they are able to do the work quickly enough and well enough to satisfy the persons who are paying for the service. Ms. Johansen is able to satisfy this market-driven standard.

[56] Ms. Lane makes the point that, based on Ms. Johansen's report of her symptoms after testing, and her report of her life overall, she is working through pain

and this comes at some personal cost. Mr. Emnacen maintains that Ms. Lane's post-testing assessment took place too quickly, only the day after testing, when it was to be expected that she would be recovering from the testing procedures, as opposed to three to five days later. While I accept that a later post-assessment interview would have been more revealing, based on the entirety of Ms. Johansen's evidence, I share Ms. Lane's view that she is working through pain at some personal cost. This does not make her competitively unemployable as a house cleaner, but it does bear on an assessment of her non-pecuniary loss.

[57] Ms. Lane also opines that Ms. Johansen "may experience difficulties meeting all of the job demands competitively" for the role of CSO having regard to her limitations standing and sitting for extended periods, and the possibility that wearing a hard hat would aggravate her headaches and neck and shoulder pain. This is a question I address later in these reasons.

1.E Conclusion: what injuries and symptoms were caused by the accidents?

[58] I accept Dr. Kei's opinion evidence and find that Ms. Johansen has suffered the injuries he describes, namely, in lay terms, soft tissue injuries to the neck and lower back and persistent tension headaches and dizziness caused by the accidents. I find that Ms. Johansen is likely to continue to experience these symptoms indefinitely.

[59] Although I do not have a convincing expert opinion to this effect – Dr. Kei's opinion is ambiguous on this point – I find that Ms. Johansen has also suffered and continues to suffer heightened anxiety while driving in the city, which is caused by the accidents. On this point, I do not have a medical prognosis and am inclined to doubt that the anxiety will persist indefinitely, especially if Ms. Johansen undertakes a course of counselling or treatment by a qualified medical professional.

2. Non-pecuniary damage

[60] Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability, and loss of enjoyment of life. The court must take into

account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 100. In *Stapley*, at para. 46, the Court noted a non-exhaustive list of factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism as a factor that should not, generally speaking, penalize the plaintiff.

[61] An award must be fair and reasonable, and fairness is measured against the awards made in comparable cases, recognizing that other cases provide only a rough guide. Each case must be decided on its own facts; *Trites v. Penner*, 2010 BCSC 882 at para. 189.

2.A Positions of the parties

[62] Ms. Johansen seeks non-pecuniary damages of $175,000. The defendants submit that there should be an award in the range of $80,000 to $95,000.

2.B Stapley considerations

[63] Ms. Johansen was 24 years old at the time of the accidents and is now 30. As described above, she suffered soft tissue injuries causing her pain and inconvenience that will likely trouble her for the rest of her life. The pain is not debilitating, but undoubtedly it takes a toll on her enjoyment of life. Her sleep is disturbed. She does not clean her apartment to the standard she formerly maintained.

[64] Ms. Johansen is less outgoing and limits her participation in activities that were important to her before the accidents. For example, Ms. Johansen's social life, prior to the accidents, centred on weekly get togethers with friends to play card and board games late into the night. She still meets with the same friend group, but no longer participates to the same extent, because she does not enjoy sitting at a table for a long time. The game nights likely would have tailed off in any event, once she

had a child, but the point remains that she is no longer pursues a species of activity she used to enjoy.

[65] Ms. Johansen's neck and shoulder pain interfered with her breastfeeding her child, and led her to cut short breastfeeding after six months. I accept her evidence that she would have wanted to breastfeed for longer, and stopped breastfeeding when she did because of her injuries.

[66] Ms. Johansen goes on family trips involving lengthy flights. She can still endure the flights, but Dean and Samantha Johansen notice that she suffers episodes of vomiting and dry heaving that were not present before the accidents. There is also an annual family trip to Christina Lake. The family drives together and used to make the trip in about 5.5 hours, but now takes about 7.5 hours incorporating breaks requested by Ms. Johansen. Ms. Johansen is more limited in her participation in family activities at the lake.

[67] I find that Ms. Johansen's injuries contributed to the breakdown of her relationship with Mr. Konings although, as noted above, they were not the only cause.

[68] Ms. Johansen's anxiety, verging on paranoia, about driving in the city limits her activities and her sense of what is possible. This has had a real adverse effect on her life although, as noted above, I do not think it is a condition that will necessarily continue indefinitely.

2.C Comparable cases

[69] Only one of the cases reviewed below involved a plaintiff who suffered from a significant, pre-existing, ongoing injury, as is the case with Ms. Johansen's back mid and lower back. She cannot be compensated for pain and suffering she would have experienced in any event and the cases must be read with that in mind.

[70] The plaintiff offers 10 cases for consideration. In my view, the following cases are not useful comparators, because all of them involved plaintiffs diagnosed with a

significant psychiatric condition in addition to their physical injuries: *Knight v. Zenone,* 2022 BCSC 99; *St. Jules v. Cawley,* 2021 BCSC 1775; *Enns v. Corbett,* 2020 BCSC 1680; *Sidhu v. Baturin,* 2022 BCSC 102; *Palani v. Lin,* 2021 BCSC 59; and *Gill v. Borutski,* 2021 BCSC 554. Ms. Johansen's driving anxiety is not comparable to the psychiatric injuries described in these cases.

[71] In addition, I reject *Broad v. Clark,* 2018 BCSC 1068, as a case in which the plaintiff's injuries "profoundly impacted" her life (para. 274), so that she "now spends a large portion of her life in pain and on the 'sidelines', unable to avail herself of opportunity for active engagement and advancement" (at para. 275), including in her relationship with her children where "she has become an observer and has to stand by while her partner, sisters and others engage" (at para.283). This is not an apt description of Ms. Johansen's position.

[72] That leaves three cases, two involving injuries and effects on the plaintiff more serious than in this case, and the third less serious.

[73] The more serious cases are *Slater v. Gorden,* 2017 BCSC 2265 and *Anderson v. Steffen,* 2021 BCSC 2248.

[74] In *Slater,* the plaintiff was a 41 year old RCMP officer who suffered soft tissue injuries to her neck, shoulder, lower back and left hip, migraine headaches, and depression and mood changes. Her symptoms were not expected to improve. She had been but was no longer a physically active individual. She remained employed by the RCMP, but was now confined to a desk job, which she found less satisfying. Her injuries contributed to the end of her common-law relationship, limited her participation in her children's activities, and adversely affected her sleep and her mood. Justice Forth awarded her $135,000 (approximately $166,000 in 2024). There was a separate $25,000 award for loss of housekeeping capacity.

[75] In *Anderson,* the plaintiff was a 31 year old crane operator who suffered soft tissue injuries to his neck, shoulders and back, along with headaches. These symptoms were not expected to improve. He was unable to continue as a crane

operator and unable to find stable alternative employment for which he was qualified, which caused him stress and uncertainty. Justice Skolrood (then of this Court) awarded him $130,000 (approximately $149,000 in 2024), inclusive of compensation for loss of housekeeping capacity.

[76] The less serious case is *Nguyen v. O'Neill,* 2020 BCSC 2036, in which a 24 year old plaintiff suffered soft tissue injuries to her neck, shoulders and back, along with headaches. Her symptoms were not expected to improve. She did not take time off work in consequence of her injuries, but was prevented from pursuing competitive cheerleading and her aspiration to pursue a career in volunteer emergency services. Her social life was affected, though it was likely to recover. At the time of trial, she was enrolled in a post-secondary business administration course, carrying a full course load, and spending as much as 12 or 14 hours a day studying and working on her computer. I awarded her $75,000 (approximately $89,000 in 2024), inclusive of any consideration of loss of housekeeping capacity.

[77] The defendant offers four cases for consideration: *Bansi v. Pye,* 2012 BCSC 556; *Strilec v. Leila,* 2015 BCSC 1515; *Peterson v. Verma,* 2014 BCSC 2622; and *Zappala v. Beaumond,* 2022 BCSC 1913. They feature non-pecuniary awards ranging from, in 2024 dollars, $77,000 to $105,000. I will review them in order from the lowest to the highest non-pecuniary award.

[78] *Peterson* featured a 28 year old plaintiff who worked as a trainee dispatcher for the RCMP. As in this case, there were two accidents and the injuries in the first accident – soft tissue injuries to the neck, shoulders, back and chest – were exacerbated by the second accident. Her injuries limited the plaintiff's ability to carry on with her training and, ultimately, she lost her job with the RCMP for reasons unrelated to the accident. The injuries somewhat limited the plaintiff's social and recreational activities, but do not appear to have damaged an intimate or family relationship. Justice Dickson, (then of this Court), awarded the plaintiff $60,000 (approximately $77,000 in 2024), inclusive of any consideration of loss of housekeeping capacity.

[79] Again in *Bansi,* the plaintiff, who was 37 years old at the time of trial, was injured in two accidents, and the second accident aggravated the injuries suffered in the first as well as previously asymptomatic changes in his lumbar spine. As a result of the accidents, the plaintiff suffered soft tissue injuries to his shoulders, neck, and back, sleep disturbances, dizziness and, after the second accident, depression and anxiety. The plaintiff was a widower who lived with members of his extended family. His productivity in his work as a construction manager suffered, as did his involvement in the community and with members of his extended family. Justice Jenkins awarded him $75,000 (approximately $98,000 in 2024). The decision does not address any injury to housekeeping capacity.

[80] In *Zappala,* the plaintiff was 23 years old at the time of trial having been injured four years earlier in 2018. She had experienced a difficult childhood before settling into employment as a prep sander at a millwork shop. She suffered soft tissue injuries to her neck, shoulder, and back in the accident, as well as scapular winging and the activation of a previously asymptomatic thoracic scoliosis, all of which left her with pain, discomfort, and functional limitations in the use of her neck and shoulder. These limitations ultimately prevented her from carrying on at the millwork shop and she was unemployed at the time of trial. Justice Blok awarded the plaintiff $95,000 (approximately $102,000 in 2024) and, separately, $30,000 (approximately $32,000 in 2024) for a loss of housekeeping capacity. The plaintiff had a history of pre-accident low back pain, and Blok J. took it into account in making these awards.

[81] Justice Blok's reasons include the following helpful discussion of cases he reviewed pertaining to the quantum of damages in cases such as this:

> [186] Due to the limited number of pertinent cases cited to the Court on non-pecuniary damages, with just two cases involving younger plaintiffs, I have looked to some other cases as a broad check on quantum. Those cases are: *Kang v. Sahota*, 2021 BCSC 624; *Reddy v. Enokson*, 2021 BCSC 412; and *Floris v. Castillo*, 2020 BCSC 1447. Each of those cases involved plaintiffs in their 20s who suffered injuries that caused them continuing pain, limited them in their employment and in other ways, and who were unlikely to recover. The awards of non-pecuniary damages in those cases ranged between $80,000 and $90,000.

[82] Finally, *Strilec* is another case involving two accidents causing soft tissue injuries, but in this case the plaintiff had substantially recovered from injuries suffered in the first accident by the time of the second and Duncan J. assessed damages separately. The plaintiff was 32 years old at the time of the trial and worked as a carpenter and foreman in the construction industry. The second accident in particular left him with chronic pain in his neck and upper back, low back pain, and left sacroiliac joint dysfunction, all of which were expected to persist indefinitely. The pain and discomfort contributed to difficulties in his relationship with his former spouse and adversely affected a subsequent relationship with a girlfriend. They restricted his leisure activities, disrupted his sleep, affected the quality of his relationship with his daughter, and contributed to but were not the major cause of emotional difficulties he experienced. Justice Duncan awarded $7,500 in damages for the first accident and $75,000 for the second; the total is $82,500 (approximately $105,000 in 2024). There was no consideration of an injury to housekeeping capacity.

2.D Assessment of non-pecuniary loss

[83] It is important always to bear in mind that one compensates for the injury suffered by this particular plaintiff, and the extent of that injury may have little to do with medical diagnoses. Different plaintiffs may experience the same physical injuries very differently, requiring different awards. This helps to explain the disparate range of awards for apparently similar physical injuries revealed in the cases reviewed above. This is why a review of the cases only takes one so far.

[84] The plaintiff's comparable cases span a range from $89,000 to $166,000 in 2024 dollars, bearing in mind that the case at the low end, *Nguyen,* involved injuries with less of an impact on the plaintiff. Of the comparable cases put forward by the defendants, I view *Peterson* as an outlier because the award appears low by comparison to the other cases. Moreover, it is inconsistent with the range identified by Blok J. in *Zappala* of awards equivalent to $85,000 to $95,000 in 2024 dollars in cases involving plaintiffs in their 20s who suffered injuries that caused them

continuing pain, limited them in their employment and in other ways, and who were unlike to recover. The remaining defendants' cases span a tight range of $98,000 to $105,000, bearing in mind that Blok J awarded a further $32,000 for injury to housekeeping capacity in *Zappala.* Including the housekeeping capacity award brings the total awarded to $134,000, which is not far from the $149,000 awarded in *Anderson.*

[85] Some features of this case push this case above the range suggested by the defendants' cases, though not to the extent of the awards in *Slater* and *Anderson*. Ms. Johansen's injuries materially contributed to difficulties in her relationship with Mr. Konings and ultimately to its failure. They hampered her ability to bond with her newborn child by breastfeeding him. They played their part along with other factors I have described in the financial debacle that led to Ms. Johansen losing her toehold in the real estate market in Metro Vancouver.

[86] I accept that Ms. Johansen has been frustrated by her inability to keep her apartment and previous residences clean and tidy to the standard she used to maintain. Housekeeping is important to her. She is quite fiercely independent, and it irritates her that she ends up asking family members such as her sister for help with tasks that cause her pain, such as washing accumulated dirty dishes. I take the injury to Ms. Johansen's housekeeping capacity into account in the assessment of her non-pecuniary loss. For reasons set out below, I do not make it the subject of a separate award.

[87] If it were not for the question of Ms. Johansen's pre-existing lower back pain, taking everything into account, I would award her $120,000. I reduce the award to $105,000 to avoid compensating her for loss consequent on the mid and lower back pain that she likely would have experienced in any event.

3. Loss of housekeeping capacity

3.A Positions of the parties

[88] Ms. Johansen seeks a pecuniary award of $50,000 for loss of housekeeping capacity. The defendants submit that there should be no such award.

3.B Legal framework

[89] The legal framework for consideration of a claim for loss of housekeeping capacity was restated in *McKee v. Hicks,* 2023 BCCA 109 at paras. 94-112. Speaking for the Court, Justice Marchand (as he then was) addressed and reconciled *Kim v. Lin,* 2018 BCCA 77 at paras. 27-37 and *Riley v. Ritsco,* 2018 BCCA 366. *Kim* was a case in which the plaintiff's injuries made it unreasonable for her to perform household tasks; such claims are typically addressed through an award of pecuniary damages, assessed with a view to the cost of obtaining replacement services on the open market. However, a trial judge retains a discretion to assess the damages as non-pecuniary, taking the inability to perform household tasks into account in the award of general, non-pecuniary damages. On the other hand, *Riley* establishes that, where the plaintiff can perform usual and necessary household work, a pecuniary award is not appropriate and the judge must assess the damages as non-pecuniary.

[90] Provided that the case passes the threshold of an injury making it unreasonable for the plaintiff to perform household tasks, the following summary of principles from *Ali v. Stacey*, 2020 BCSC 465 at para. 67 is accurate:

> a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
>
> b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
>
> c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.

> d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

3.C Analysis

[91] Ms. Johansen is able to perform usual and necessary household chores, though she performs some, such as dishwashing, less often than she would if she were not injured. Indeed, for the past three years, she has been employed in performing household chores for others. There is no realistic prospect of Ms. Johansen hiring an outsider to perform household chores that she herself performs competently for others. A pecuniary award is not appropriate.

[92] To reiterate, none of this is to say that Ms. Johansen does not experience pain and inconvenience resulting from her injuries when she performs household chores. The point is that her injury is not pecuniary. It is compensated by the non-pecuniary award described earlier in these reasons.

4. Past income loss

4.A General legal framework

[93] Assessing compensation for past economic loss requires a comparison between a hypothetical past state of affairs and what actually occurred. The damages are assessed, not calculated; *Ibbitson v. Cooper,* 2012 BCCA 249 at para. 19. As with all hypotheses, the court must assess both what would most likely have occurred, and the existence of real and substantial contingencies that things might have turned out differently. Contingencies may be positive or negative. They may be general, that is, contingencies arising as a matter of human experience as generally applicable, or specific, that is, grounded in the evidence as particularly likely to arise in the circumstances of this case; *Steinlauf v. Deol,* 2022 BCCA 96 at paras. 86-91.

[94] An award for past economic loss arising from a motor vehicle accident must be determined on an after-tax basis; *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231, ss. 95, 98.

4.B Positions of the parties

[95] Ms. Johansen seeks an award of $125,000 for past income loss, based on the hypothesis that, but for the accidents, she would have taken a shorter maternity leave and returned to work at Harrier, where she would have earned more money than she earned in fact, working at Busy Girls.

[96] The defendants submit that there should be an award of $1,140 to compensate Ms. Johansen for 52 hours of time taken off at Harrier immediately following the first accident, and 8 hours taken off immediately following the second accident. The defendants submit that she failed to mitigate the further loss claimed by Ms. Johansen by returning to work at Harrier.

4.C Law pertaining to the mitigation issue

[97] The onus of proof that a plaintiff failed to take reasonable steps to avoid or mitigate her loss lies on the defendant. The defendants must satisfy two requirements: first, prove that Ms. Johansen acted unreasonably; and second, prove that her damages would have been reduced had she acted reasonably, and the extent of the reduction; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Haug v. Funk,* 2023 BCCA 110 at para. 61.

[98] A plaintiff may fail to mitigate by failing to pursue medical treatment that was recommended that would have alleviated her symptoms. That is not the defendants' argument in this case. Their argument is that she failed to mitigate her past wage loss by returning to work at Harrier at the end of the maternity leave she would have taken in any event.

[99] Concerning the second requirement of the defence of a failure to mitigate, in a case involving a failure to follow a prescribed treatment, in *Haug,* Bauman C.J. gave judgment for the court and stated, at para. 75:

> … a defendant must establish on a balance of probabilities the causal link between an unreasonable failure to follow a prescribed treatment and a reduction (of some degree) in the plaintiff's damages. If they do, then the trier of fact goes on to assess the likelihood of the degree of a reduction.

[100] The same analysis is necessary in a case involving an alleged unreasonable failure to pursue more gainful employment. The defence must establish, on a balance of probabilities, that the plaintiff's income loss would have been smaller, had she acted reasonably. If that is established, the court must assess the extent of the likely loss, taking contingencies into account.

4.D Has Ms. Johansen suffered a past income loss through the loss of a career as a CSO?

[101] Ms. Johansen earned income as follows in the years 2017 through 2023. The following chart excludes RRSP withdrawals in each of 2020 through 2023:

Year	**Sources of income**	**Total**
2017	Employment (Harrier, $37,171)	$41,439
2018	Employment (Harrier)	$40,329
2019	Employment (Harrier, $611) EI maternity benefits ($22,644)	$23,255
2020	CERB	$4,000
2021	Employment (Busy Girls)	$11,868
2022	Employment (Busy Girls)	$26,433
2023	Employment (Busy Girls)	$27,624

[102] In 2018, Ms. Johansen was working 40 hours a week for Harrier at $21 per hour. She received a $2,000 year-end bonus. Her total pay for the year of $40,329 is smaller than the annual income of $45,680 suggested by these numbers. The difference is partly due to the $1,140 in lost time at work in the immediate aftermath

of the accidents, as acknowledged by the defendants. The rest of the difference in 2018 is unexplained, and I do not attribute it to the accidents.

[103] But for her injuries suffered in the accidents, I find that Ms. Johansen would have returned to work at Harrier after 12 months on maternity leave at the beginning of 2020. She did not suffer lost income in 2019. It is possible that she would have commenced her maternity leave at the end of January 2019 and ended it at the end of January 2020, but the alternative approach does not make a significant difference in the determination of the loss, and for simplicity of exposition, I will ignore it.

[104] There is no evidence that Harrier ceased operations during the pandemic later in 2020 or in 2021. Accordingly, subject to the mitigation issue, she suffered a loss commencing in January 2020 because, but for the accidents, she would have earned income from Harrier at a greater rate than she has achieved since 2020.

[105] Mr. Oliver testified that he planned to increase Ms. Johansen's rate of pay to $24 per hour commencing in 2019, and she would have received an annual bonus in the range of $3,000 to $5,000. Taking the midpoint of the range of bonuses, I accept the plaintiff's calculation that, but for the accident, she could have expected to earn $53,920 annually from Harrier in the years 2020 through 2024. The calculation is conservative, because it assumes no further increases in the rate of pay after 2019, and Mr. Oliver's evidence is that in 2024 he would expect to pay Ms. Johansen an hourly rate of between $35 and $40 an hour with an annual bonus in the same range. At this current rate of pay, Ms. Johansen could expect to earn about $82,000 annually for a 40 hour work week.

[106] Accordingly, unless Ms. Johansen has failed to mitigate, she has suffered a gross income loss for the years 2020 through 2024 as follows:

Year	**Assumed income from Harrier**	**Actual income**	**Loss**
2020	$53,920	$4,000	$49,920

2021	$53,920	$11,868	$42,052
2022	$53,920	$26,433	$27,487
2023	$53,920	$27,624	$26,296
2024 to June 30	$26,960	$14,470	$12,490

(The actual income for 2024 from Busy Girls is based on 2023 income, pro-rated to one-half year and adjusted to reflect a 5% increase in the rate of pay from $20 to $21 per hour.)

[107] I turn to the mitigation issue. The first question is whether Ms. Johansen acted unreasonably in failing to return to work at Harrier in 2020 or at all.

[108] I am not persuaded that it was unreasonable for Ms. Johansen not to return to work before April 2021, when she applied to Busy Girls. She was coping with various challenges, including the pandemic, all made more difficult by her injuries.

[109] On the other hand, I think it was unreasonable for Ms. Johansen to abandon Harrier in favour of working as a cleaner at Busy Girls. She liked Harrier and they liked her. Mr. Davies viewed her as an awesome employee and a great worker. He would not have hesitated to hire her back. He testified on cross-examination that they could almost certainly have accommodated her, though the questioning did not get into details. Mr. Oliver viewed Ms. Johansen as a great employee, hard working and proactive. He would be happy to hire her back today.

[110] Ms. Johansen offers the following explanation for her decision not to return to work at Harrier. She was uncomfortable driving between YVR and other job sites. The driving exacerbated her symptoms. She was reluctant to return to work that caused her pain. She felt that she would not do a good job, would be limited in what she could do, and would disappoint her bosses. She stressed that she was the first woman to work for Harrier and viewed herself as a standard-bearer. She feared

that, by needing accommodations, she would give women in the trades a bad reputation.

[111] Ms. Johansen was afraid that she would not be able to manage the tasks she was given, particularly stationary tasks. As a CSO, she was required to wear personal protective equipment, including a hard hat, and to spend extended periods in one place monitoring the work of tradespeople. She was sometimes required to undertake tasks such as painting site hoardings or putting in protective flooring. She did a fair amount of heavy lifting.

[112] In my view, Ms. Johansen's decision was unreasonable because she made no attempt at all to seek or discuss accommodations that would have enabled her to return to work for Harrier on a basis she could manage. She had no reason to doubt that Harrier would take her back. She knew that accommodations were possible, because they had accommodated her in 2018, while she was pregnant and after the first accident. Nothing in her previous dealings with Harrier gave her reason to assume that anyone would think less of her for requesting further accommodations because her condition had not improved, as she had hoped in 2018 that it would with time. It was, with respect, presumptuous for her to assume that the request would cause Mr. Davies and Mr. Oliver to wonder whether women are truly suited to work in the trades. They were dealing with her as a person, not a symbol.

[113] Ms. Johansen's expressed concern about wearing a hard hat was mostly theoretical. She did not testify that wearing a hard hat caused her particular difficulty in the period after the first accident. Her concern about the discomfort associated with driving between sites was genuine, but she has been able to manage longer periods of sitting still driving in other contexts since the accidents and she was able to cope with the driving she had to do in 2018 after the first accident. Her concerns about stationary tasks and heavy lifting could have been raised in discussions about accommodations.

[114] Ms. Johansen did not and does not perceive herself as disabled by her injuries. House cleaning is physical work that she is able to manage. In her

application letter to Busy Girls, she described herself as “physically fit”. Under cross-examination, she characterized this statement as an embellishment offered to get the job, but there is a kernel of truth to it. She is fit enough to work full time in a physical occupation.

[115] I turn to the second question that must be addressed regarding the mitigation defence. Has the defence established, on a balance of probabilities, that Ms. Johansen’s income loss would have been smaller in the period since April 2021, had she returned to work at Harrier? If that is established, I must assess the extent of the likely loss, taking contingencies into account.

[116] I find that Harrier would have hired Ms. Johansen back with accommodations for her injuries despite her impairments caused by the injuries. On that basis, she should have earned more than she earned working for Busy Girls.

[117] The difficult question is the assessment of contingencies, because there is no guarantee that the accommodations Harrier would have offered would have been sufficient to permit Ms. Johansen to continue there, over the long term. If things did not work out with Harrier, it is relatively unlikely that she would have been able to find a more accommodating employer for work as a CSO, because other employers would lack the positive personal experience that grounded Harrier’s eagerness to work with Ms. Johansen.

[118] Relevant considerations include the following:

a) Several witnesses testified to an increasing focus on safety in the construction industry, and an increasing emphasis on the need for and role of CSOs;

b) The labour market for CSOs is increasingly tight;

c) Witnesses offered examples of CSOs who have continued working into their seventies;

d) Harrier had difficulty finding a CSO to replace Ms. Johansen and, while it eventually found someone, even today it would still hire her back as an additional CSO;

e) The role of a CSO depends on company, worksite, project, and client. In smaller companies, such as Harrier, CSOs are more likely to be asked to help out tradespeople, but the position is inherently flexible;

f) Ms. Johansen testified that, at most locations, her main role as a CSO was to observe what was going on and intervene where necessary;

g) Although Ms. Johansen expresses concern that she should not, as a CSO, move about too much to avoid distracting the tradespeople doing their jobs, the role of an observer is not inconsistent with a certain amount of positional change such as Ms. Johansen was able to manage, within a confined space, while giving evidence;

h) Returning to Harrier would have required Ms. Johansen to work significantly longer hours than at Busy Girls; and

i) Working for Harrier, Ms. Johansen would not have been able to avoid a certain amount of driving from site to site.

[119] The longer working hours and driving in particular would have challenged Ms. Johansen. While Harrier would have been motivated to make it work, there is a significant risk that Harrier and Ms. Johansen would have parted company after a period of, say, a year. I assess that contingency at 50%.

[120] Accordingly, for the period from May 2021, I find that Ms. Johansen failed to mitigate her income loss and that, had she mitigated by returning to work at Harrier, she would have fully mitigated her loss for one year (through April 2022) and from May 2022 would have had a 50% likelihood of fully mitigating her loss and a 50% likelihood of suffering the losses described in the table at para. [106] above. The numbers in the table must be adjusted to allow for the inclusion of partial years.

4.E Conclusion as to past income loss

[121] Ms. Johansen's past income loss must be calculated on an after-tax basis. The evidence only discloses her average, not her marginal tax rates, which probably results in an over-estimate, but that is all there is to go on. In 2018, taxes amounted to 12% of her income, and her net income was 88% of her gross. In 2022, her net income was 92% of her gross. For simplicity's sake, overall, I assume that she incurred a net after-tax loss equal to 90% of her gross loss.

[122] Based on the preceding analysis, and taking her failure to mitigate into account, I assess the loss at $80,000 based on the following table.

Year	**Gross loss**	**Net after-tax loss**
2018	$1,140	$1,026
2019	$0	$0
2020	$49,920	$44,928
2021 Jan-April May-December	$14,017 $0	$12,615
2022 Jan-April May-December	$0 $4,581	 $4,123
2023	$13,148	$11,833
2024 to June 30	$6,245	$5,621
Total	$89,051	$80,146

5. Loss of future earning capacity

5.A Legal framework

[123] An award for future economic loss requires the plaintiff to prove that there is a real and substantial possibility of a future event causing an income loss; *Rab v. Prescott,* 2021 BCCA 345 at paras. 47-49. The underlying question is whether, in the oft-quoted words of Justice Finch (as he then was) in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at 356, 1985 CanLII 149 (S.C.), Ms. Johansen's injuries make her "less valuable to [herself] as a person capable of earning income in a competitive labour market".

[124] A three-part test emerges from the authorities; *Rab* at para. 47. First, the evidence must disclose a potential future event that could lead to a loss of capacity. Second, the court must be satisfied that there is a real and substantial possibility that the future event in question will cause a pecuniary loss. Third, if that possibility exists, the court must assess the value of that possibility, taking into account the likelihood that it will come to pass and the financial consequence if it does.

[125] As with past economic loss, the assessment is a matter of judgment, not mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[126] In some cases, such as *Brown*, *Letourneau v. Min*, 2003 BCCA 79, and *Kralik v. Mount Seymour Resorts Ltd.*, 2008 BCCA 97, courts have awarded damages for loss of future earning capacity in an amount equal to one or two years' earnings. In other cases, such as *Westbroek v. Brizuela*, 2014 BCCA 48, courts have adopted an earnings approach, forecasting potential earnings with allowances for contingencies.

[127] Under an earnings approach, future economic loss must be assessed based on a comparison of hypothesized events. There are hypotheses on both sides of the comparison. The court must evaluate the likely future for the plaintiff but for the accident, and compare it to the likely future taking the injuries suffered in the accident into account, allowing for real and substantial positive and negative contingencies in both cases.

[128] In recent cases, while not insisting on the use of an earnings approach in every case, the Court of Appeal has stressed that the assessment of future economic loss must be grounded in rigorous and evidence-based consideration of the contingencies; *Dornan v. Silva,* 2021 BCCA 228 at paras. 160-161; *Rab* at para. 47; *Lo v. Vos*, 2021 BCCA 421 at paras. 71-74. Consideration of the contingencies flows naturally from the comparison that is central to the earnings approach.

[129] In addressing contingencies, it is necessary to distinguish general from specific contingencies. General contingencies involve the ups and downs that may be encountered by anyone, as a matter of human experience, and are modest; *Dornan* at para. 92, citing *Graham v. Rourke,* 74 D.L.R. (4th) 1, 1990 CanLII 7005 (Ont. C.A.) and *Hussack v. Chilliwack School District No. 33,* 2011 BCCA 258 at para. 93; *Steinlauf v. Deol,* 2022 BCCA 96 at para. 91; *Dunn v. Heise,* 2022 BCCA 242 at para. 63; *Kringhaug v. Men,* 2022 BCCA 186 at para. 90. Specific contingencies pertain to the plaintiff in particular and must be grounded in evidence that establishes them as more than speculative possibilities; *Dornan* at para. 92.

[130] Notwithstanding repeated assertions in four recent decisions of the Court of Appeal for British Columbia (*Dornan, Steinlauf, Dunn* and *Kringhaug*) that an adjustment to reflect general contingencies should be “modest”, there is a line of authority favouring a 20% general contingency deduction to reflect labour market contingencies; *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 79, 1985 CanLII 179 (S.C.); *Dunn v. Heise,* 2021 BCSC 754 at para. 202 [*Dunn BCSC*], (rev’d 2022 BCCA 242); *Montazamipoor v. Park,* 2022 BCSC 140 at paras. 105-109; *Hann v. Lun,* 2022 BCSC 1839 at paras. 111-113. While these are all trial decisions, *Milina* in particular is a case of formidable persuasive authority, both because it is a judgment of McLachlin J., when she was a judge of this Court, and because it is acknowledged as a leading case, having been cited in reported reasons more than a thousand times. The reference in *Milina* to a practice of assessing a general negative contingency of 20% was approved, in *dicta*, in *York v. Johnston*, 37 B.C.L.R. (3d) 235, 1997 CanLII 4043 (C.A.).

[131] Having regard to the recent appellate caselaw, I doubt that a 20% adjustment for general labour market contingencies could now be justified as a general rule but note that the recent cases that have applied such an adjustment in this Court all involved young plaintiffs like Ms. Johansen who were at or near the start of their working careers. The risks of future disability or early retirement may loom larger in such a case; *Montazamipoor* at para. 108; *Dunn BCSC* at para. 206; *Hann* at paras. 10 and 111.

5.B Positions of the parties

[132] Ms. Johansen seeks an award of $1.425 million for future loss of income. Her submission assumes that, but for the accidents, she would be earning $82,000 annually so that she is suffering an ongoing annual loss of about $54,000. She submits that she will continue to suffer that loss until age 60, and that from age 60 to 65, the annual loss will be larger because her injuries make it probable that she will retire at age 60 when she would have continued to age 65 but for the accident. In oral submissions, plaintiff's counsel acknowledged that his calculation over-estimated the value of the five-year stub period after age 60, but the details of the over-estimation are unimportant for present purposes. He proposed a 15% reduction for general contingencies.

[133] The defendants submit that there should be no award because, in their submission, Ms. Johansen's loss can be fully mitigated. Alternatively, they submit that there might be an award in the range of $40,000 to $80,000 reflecting one to two years of Ms. Johansen's pre-accident earnings. This alternative submission does not attempt to grapple with the earnings-based approach proposed by Ms. Johansen.

5.C Real and substantial possibility of a future economic loss

[134] As with the determination of past economic loss, I must approach future economic loss on the basis that the defendants are only obliged to compensate Ms. Johansen for losses that are reasonably incurred. That is, I must assume that,

going forward, she will make reasonable efforts to secure more remunerative employment that she is capable of obtaining and retaining, given her injuries.

[135] I find that the first two steps of the three-part test in *Rab* are satisfied.

[136] On the evidence, it is still open to Ms. Johansen to return to work as a CSO at Harrier. If she applies to them, they will hire her. There is a real and substantial possibility that this will not work out for her. Ms. Johansen is suffering an ongoing economic loss by virtue of this possibility. It will continue. If she goes to work for Harrier as a CSO, there is a real and substantial likelihood that it will not pan out. Given the accommodations she requires, over the long term there is a real and substantial risk that she will have difficulty finding alternate employment as a CSO or otherwise that pays equally well.

5.D Quantification of Ms. Johansen's claim

[137] I turn to the difficult question of quantification of the claim and begin with an earnings approach.

[138] I accept Ms. Johansen's submission that the difference between what she is earning at Busy Girls and what she would be earning at Harrier at this time is approximately $54,000 per year.

[139] An earnings approach requires a forecast retirement date. In my view, it is most likely that Ms. Johansen would have and still will retire at age 65. She testifies that she had planned to retire at age 65. Her counsel points to a passage in Dr. Kei's report suggesting that her injuries may force her to retire earlier, so that her annual loss would increase in the final years before her retirement. I am not persuaded that an early retirement is significantly more likely by reason of her injuries.

[140] Consistently with my assessment of past economic loss, one approach would be to discount the present $54,000 annual income loss by 50%, calculate the present value of that annual loss over the next 35 years until Ms. Johansen is 65

years old, and then make a deduction for general contingencies. Assuming a 20% general contingency deduction, that approach yields a future income loss of approximately $585,000. The calculation is based on a 35 year multiplier based on a discount rate of 1.5% as set out in Appendix E of *CIVJI: Civil Jury Instructions, 2nd ed.* (Vancouver: Continuing Legal Education Society of British Columbia). The multiplier is 27.0756.

[141] In my opinion, this approach overstates the loss, because the $54,000 annual difference between what Ms. Johansen is earning at Busy Girls and what she could be earning at Harrier is too stark, over the long run. I think that Ms. Johansen is less likely to suffer the future equivalent of a $54,000 annual loss in 5, 10 or 20 years' time than she is now.

[142] Ms. Johansen is intelligent, well-spoken, has strong social skills, and is possessed of a good work ethic and a somewhat stoic disposition. Notwithstanding her injuries, these qualities should gain her the opportunity to earn more than she makes cleaning houses for Busy Girls. As previously noted, I think that her driving anxiety is unlikely to persist over the long run. She would benefit from counselling in this regard, and from vocational counselling. I assume that, as a reasonable person acting in her own self-interest, she will seek such counselling out.

[143] Ms. Johansen has been buffeted by circumstances mostly beyond her control over the past several years. She is still relatively young. In time, it is most likely that she will improve her financial circumstances.

[144] All of this is not to say that it is likely that the contingent loss I am assessing disappears after five or ten years. It is better to say that the likely magnitude of the contingent loss gets smaller.

[145] I view the following as a helpful indicative calculation. It begins with the $54,000 present difference in income, discounted by 50%, and assumes that it will continue for five years. Applying a multiplier of 4.7826, the five year contingent loss is $129,130. For years 6 to 35, it should be assumed that, if Ms. Johansen is unable

to work at Harrier (or find equivalent employment) as a CSO, she will be able to find employment earning her a present equivalent of $62,000 annually, reducing the annual loss to $20,000. Discounting this amount by 50%, the appropriate multiplier is 22.293 (the difference between the 35 year multiplier and the 5 year multiplier) and the contingent loss for is $222,930. The total of the two amounts is $352,060. Applying a 20% deduction for general contingencies reduces the loss to $281,648.

[146] The assumptions underlying this calculation are realistic and grounded in the evidence. I cannot improve on them. The calculation demonstrates that the defendants' proposed award based on one or two years of pre-accident earnings is inordinately low and the plaintiff's proposed award of $1.425 million is much too high. I think it is in the ballpark.

[147] Damages are assessed, not calculated. Doing the best I can with the evidence, I assess Ms. Johansen's damages for future economic loss at $280,000.

6. Cost of future care

6.A Legal framework

[148] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30, citing *Milina* and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[149] An award should only be made in respect of costs that may reasonably be expected to be incurred; *O'Connell v. Yung,* 2012 BCCA 57 at para. 70. If the evidence does not establish that it is reasonably likely that the plaintiff will incur an expense, she cannot be compensated for it. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell,* 2018 BCCA 53 at para. 55.

[150] The law requires me to assess each element in the claim separately; *Zenone v. Knight,* 2024 BCCA 200 at paras. 107-111. At the end of the day, an award for the cost of future care is assessed, not calculated mathematically.

[151] If there is doubt as to whether future costs will be incurred, in principle the court should evaluate the possibility in the same way as it addresses all hypothetical events for the purpose of assessing damages: first, by determining whether the event is a real and substantial possibility; and if it is, by assessing the likelihood of the event and discounting it accordingly; *Athey* at para. 27, 1996 CanLII 183; *Grewal v. Naumann,* 2017 BCCA 158 at paras. 48-49. This is the approach taken by the court in *O'Connell* at paras. 55-56 and 72.

6.B Positions of the parties

[152] Ms. Johansen seeks an award of $65,000 for the cost of future care. She arrives at this amount by totalling fixed costs and the present value of future annual costs and then making a reduction equal to about 27% of the present value to account for contingencies.

[153] The defendants submit that there should be an award in the range of $10,000 to $15,000. It is not clear how they arrive at this range because the total of the claims they do not oppose exceeds it and they do not criticize the plaintiff's methodology.

6.C Analysis

Multidisciplinary pain program

[154] Ms. Johansen seeks $13,775 for the cost of a private multidisciplinary pain program. The defendants object that such programs are available at public expense, through MSP. The objection is well founded. Referral to a multidisciplinary pain program is recommended by Dr. Kei, who indicates that such a program can be accessed through public facilities such as St. Paul's Hospital or the Jim Pattison Pain Clinic. There is nothing to suggest why a private referral at the defendants' expense should be necessary in this case.

Registered Clinical Counsellor assessment

[155] Ms. Johansen seeks $185 for an assessment by a registered clinical counsellor. The defence objects that the claim is not supported by medical evidence, and that Ms. Johansen has declined to pursue counselling to this point.

[156] The assessment is recommended by Ms. Lane, who testifies that it is within the scope of her professional expertise as an occupational therapist to recommend that a patient be assessed to determine whether the patient would benefit from a course of counselling. The cost of such an assessment is what is claimed in this case. I find that Ms. Lane's recommendation satisfies the requirement that the claim be supported by medical evidence. While Ms. Johansen has not pursued counselling in the past, based on a discussion with her reported by Ms. Lane, I am satisfied that she is now likely to pursue an assessment.

Physiotherapy

[157] Ms. Johansen claims for two kinds of physiotherapy: sessions to manage her symptoms at an annual cost of $1,092 to $2,184; and for 12 sessions of vestibular physiotherapy at a fixed cost of $1,410 The defendants object only to the vestibular physiotherapy, on the ground that it relates to a condition, dizziness, that is not attributable to the accidents.

[158] I allow the claim to which the defendants do not object at the midpoint of the range provided by Ms. Lane, that is an annual cost of $1,638.

[159] I reject the objection and allow the claim for vestibular physiotherapy as well. I have accepted Dr. Kei's opinion that Ms. Johansen suffers from cervicogenic headaches and dizziness caused by the accidents. He recommends that Ms. Johansen receive all of the physiotherapy treatments, including the vestibular treatments, giving rise to her claim. Ms. Johansen has pursued physiotherapy treatments for symptomatic relief, and I am satisfied that she will continue to do so until age 70. She testifies to her experience of dizziness on a flight in 2022, and her father and sister describe episodes of vomiting and dry heaving following flights

which would likely be related. Having been alerted to the possibility of vestibular treatment for her dizziness, I think it likely that Ms. Johansen will follow up.

Ergonomic assessment and equipment

[160] Ms. Johansen claims $1,767 to $2,067 for the cost of an ergonomic assessment and equipment recommended by Ms. Lane. The premise of the recommendation is that an occupational therapist should review her workplace and the fit for a sit-to-stand desk "to allow for movement to be built into Ms. Johansen's workday".

[161] I reject the claim because Ms. Lane's recommendation is unrealistic. Ms. Johansen does not need a sit-stand desk for her work as a housecleaner, and she would not need one to work as a CSO.

Vocational assessment and counselling

[162] Ms. Johansen claims $1,200 to $1,500 for a vocational assessment, and $3,000 to $3,750 for 20 to 25 hours of vocational counselling. The defendants object that the assessment and counselling are not specifically recommended by Dr. Kei.

[163] I agree with the defendants that Dr. Kei's evidence does not provide much support for the claim. He suggests that, while Ms. Johansen is able to manage in her current position as a housecleaner, she may not be competitively employable in that role, and that she would be better suited to a desk job. I have rejected the proposition that Ms. Johansen is not competitively employable as a housecleaner. Having heard her evidence over two days, I think that she is strongly inclined not to pursue a desk job.

[164] However, on the whole of the evidence, and considering my analysis of her future prospects, it is clear that that Ms. Johansen would benefit at least from a vocational assessment and some counselling. In my view, the requirement that an element in a claim for the cost of future care be supported by medical evidence is

attenuated in the case of a claim for care that is not strictly medical in nature. There is a risk of unfairness to a plaintiff whose damages are assessed on the basis of a real and substantial likelihood that she can obtain better paying employment if she is not compensated for the costs she will incur to identify suitable possibilities.

[165] Accordingly, I allow the claim and award $1,350 for the cost of a vocational assessment and $2,250 for 15 hours of vocational counselling at $150 an hour. The total is $3,600.

Kinesiology

[166] Ms. Johansen claims for the cost of kinesiology sessions recommended by Dr. Kei. He recommends a trial of 12 sessions, costed by Ms. Lane at $1,056. Ms. Johansen claims for further sessions afterwards to age 70 at an annual cost of $352 to $528. The defendants do not oppose this claim. I think it likely that Ms. Johansen will incur the expenses claimed, though at the low end of the range of annual costs reflecting four follow-up sessions annually after the first year. Accordingly, I allow a fixed cost of $1,056 and an ongoing cost of $352 from the first year to age 70.

Conclusion as to the cost of future care

[167] To summarize, I allow claims for the cost of future care as follows:

Cost	**Fixed**	**Annual**
Counselling	$185	
Physiotherapy	$1,410	$1,638 from age 30 to 70 (40 years)
Vocational assessment & counselling	$3,600	

Kinesiology	$1,056	$352 from age 31 to 70 (39 years)

[168] The fixed cost items total $6,251.

[169] Applying the 2% discount rate mandated under s. 56(2) of the *Law and Equity Act,* R.S.B.C. 1996, c. 253, the multiplier (again taken from App. E to CIVJI) to calculate the annual cost of the physiotherapy treatments for 40 years is 27.3555. Mathematically, the present value of the cost is therefore $44,808.

[170] The multiplier to calculate the annual cost of the kinesiology treatments, beginning in 1 year's time and continuing for 39 years, is 26.3751. Mathematically, the present value of the cost is therefore $9,284.

[171] I agree with Ms. Johansen that the total of the present valued amounts should be subject to a generous reduction for contingencies. I allow $40,000 in respect of ongoing costs rather than the arithmetic total of $54,092.

[172] Adding up the fixed costs and the $40,000 allowed in respect of annual costs, the total is $46,251 which should be rounded to $46,000 to reflect the cumulative uncertainties in the assessment.

Disposition

[173] For these reasons, I award Ms. Johansen damages totalling $512,618.98 under the following heads:

a) General damages of $105,000;

b) No pecuniary award for loss of housekeeping capacity;

c) Past economic loss of $80,000;

d) Future economic loss of $280,000;

e) Cost of future care of $46,000; and

f) Special damages of $1,618.98.

[174] If issues arise as to deductions required by s. 83 of the *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231, counsel may request a hearing to address them.

[175] Unless there are matters that must be brought to my attention, Ms. Johansen is entitled to costs. If the parties wish to make submissions as to costs, they may do so in writing. Their submissions should not exceed five pages in length (excluding appendices) and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 28 days of the release of these reasons under cover of a letter setting out the schedule to which counsel have agreed.

"Gomery J."