

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dhaliwal v. Wu*,
2024 BCSC 1380

Date: 20240731
Docket: M202235
Registry: Vancouver

Between:

Megan Dhaliwal

Plaintiff

And

Menghan Wu, Car2Go Canada Ltd., Mercedes-Benz Financial Services Canada Corporation/La Corporation De Services Financiers Mercedes-Benz Canada

Defendants

Before: The Honourable Justice Iyer

Reasons for Judgment

Counsel for Plaintiff:

J.M. Rice, K.C.
H.M. MacDonald

Counsel for Menghan Wu, Car2Go Canada Ltd. and Mercedes-Benz Financial Services Canada Corporation/La Corporation De Services Financiers Mercedes-Benz Canada:

S.N. Baldwin
P.M.J. Arvisais

Place and Date of Trial:

Vancouver, B.C.
April 29 – 30, 2024
May 1-3, 6, 7 and 10, 2024

Place and Date of Judgment:

Vancouver, B.C.
July 31, 2024

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OVERVIEW

[1] The plaintiff, Megan Dhaliwal, was injured in a motor vehicle accident on October 24, 2018, in Vancouver. At the time of the accident, Ms. Dhaliwal was a passenger in a Car2Go rental vehicle being driven by the defendant, Menghan Wu. The other defendants are the driver of the other vehicle and the companies who own the rental vehicle. Ms. Dhaliwal has discontinued the action against the other driver. Ms. Wu has admitted liability and agrees that the accident caused Ms. Dhaliwal’s ongoing injuries.

[2] The trial focused on quantifying damages, and the most contentious issue was loss of earning capacity. This is because, at the time of the accident, Ms. Dhaliwal was in the third year of a Bachelor of Commerce program, intending to complete a major in finance and become a financial analyst or investment banker. Based on what she anticipated would be a high earning career, Ms. Dhaliwal seeks approximately \$8M in loss of future earning capacity. The defendants argue that either Ms. Dhaliwal has not established a substantial likelihood that she will incur any future earning loss or, if she has, an award of \$172,000 is appropriate.

[3] I first set out the uncontroversial background facts and then consider each of the heads of damages to arrive at a final award.

BACKGROUND FACTS

Pre-Accident

[4] Ms. Dhaliwal was born in 1998. She is the youngest of three children of Sarjinder Dhaliwal and Gurmit Dhaliwal. The Dhaliwals have a large extended family and get together often.

[5] Sarjinder Dhaliwal is a chartered accountant, specializing in tax. She has worked for a number of large accounting firms, earning a substantial income. Gurmit Dhaliwal’s background is in business computing and software. Ms. Dhaliwal’s’ parents now started and run their own successful software business, Celayix.

Ms. Dhaliwal's parents and her sister, Kieran Dhaliwal work for Celayix. The parents and children are all shareholders.

[6] At school, Ms. Dhaliwal demonstrated both academic and athletic talent. She was an honour roll student in high school and played competitive field hockey for her high school and in a community league. She attended field hockey recruitment camps at American universities. Ms. Dhaliwal was interested in business from a young age and participated in extracurricular programs in that area. She had an active social life.

[7] At the age of 16, Ms. Dhaliwal was diagnosed with a congenital heart condition called arrhythmogenic right ventricular cardiomyopathy ("ARVC"). An implanted cardio defibrillator ("ICD") was placed in her chest in the fall of 2015. Because of her condition, she had to stop playing competitive field hockey and had to limit her workouts to one hour, keeping her heart rate under 135 bpm. Ms. Dhaliwal continued to be physically active, working out daily and seeing personal trainers three times a week. She focused on activities consistent with her limitations, including weight-training, yoga, Pilates, barre and spin classes. She tried kickboxing but had to stop because of a cardiac incident.

[8] Ms. Dhaliwal's heart condition stabilized. She sees her cardiologist once every two years.

[9] Ms. Dhaliwal started university in the fall of 2016. She had decided not to apply to American schools because of the high cost of health insurance due to her heart condition. Instead, she enrolled in UBC's commerce program. She was given accommodations in the form of extra time for exams and priority registration for courses because of her heart condition.

[10] Ms. Dhaliwal had her own room in a residence, and she joined a sorority. Most of her first-year courses were required for a commerce degree, and her marks were average. As Ms. Dhaliwal explained, she had trouble finding the right balance

between studying and socializing. Ms. Dhaliwal took one class in the summer 2017 term, earning a grade around the class average.

[11] Ms. Dhaliwal's marks improved significantly in her second year, and she made the Dean's Honour Roll. She also received an A average on the four courses she took in the 2018 summer term. In December 2017, she began working at Equinox Gym as a front desk attendant. She worked on weekends and two mornings a week.

[12] In her third year, starting in September 2018, Ms. Dhaliwal enrolled in two required commerce courses and two pre-requisite courses for students seeking to major in finance. She decided to major in finance because she was attracted by the prospects of a competitive, fast-paced, high-income career. Her mother had introduced her to people working in that field. Ms. Dhaliwal was accepted into the finance co-op program, which meant that she would have to complete three term-long internships in addition to the course requirements before graduating.

The Accident and Aftermath

[13] The accident occurred on October 24, 2018. It was a two-car collision. The vehicle's airbags deployed, burning Ms. Dhaliwal's face. Ms. Dhaliwal did not immediately notice other symptoms. She went on to participate in a class project at the Vancouver Planetarium.

[14] Later that day, Ms. Dhaliwal's neck and back began hurting, and she left her classes early. She saw her doctor the next day, reporting back and neck pain, difficulty turning her head, as well as poor sleep. She was referred to physiotherapy and massage therapy.

[15] Her discomfort worsened. Ms. Dhaliwal took a one-week leave from class and stayed at her parent's house, trying to rest and recover. When she returned to class, she found it hard to sit in the classroom because of pain in her back, neck and arms. She experienced light sensitivity, making it hard for her to look at screens.

[16] Ms. Dhaliwal found that she was unable to concentrate enough to understand the content of her two finance courses. Despite studying hard, she could not answer questions on the final exam and believed that she had failed it. Ms. Dhaliwal obtained a note from her doctor, and her mother called the Dean of Commerce on her behalf. As a result, Ms. Dhaliwal was permitted to withdraw from those two courses although the withdrawal deadline date had passed.

Post-Accident Events

[17] Ms. Dhaliwal's symptoms worsened after the December 2018 break. She had difficulty sleeping because of pain and became much less physically active because of pain and dizziness. Despite this, Ms. Dhaliwal returned to class. She decided not to try to re-take the finance courses she had dropped. She concentrated on marketing and sustainability courses instead and achieved an A average.

[18] During the summer of 2019, Ms. Dhaliwal did not take any classes. Instead, she participated in a concussion clinic. It did not improve her symptoms.

[19] Ms. Dhaliwal decided to take an exchange program in Copenhagen for the fall 2019 term. She thought it would be easier for her because there was less group work and grades were based on a paper and final exam. However, she had to return to Canada a month early because her symptoms worsened. She moved in with her parents and was able to remotely complete the coursework successfully. Ms. Dhaliwal continues to live with her parents, who provide a lot of help with meals and other activities of daily life.

[20] As Ms. Dhaliwal was no longer in the finance stream, UBC allowed her to switch her co-op placement from a finance internship to a marketing internship. UBC also accommodated Ms. Dhaliwal by reducing the number of co-op terms she had to complete from three to two.

[21] Ms. Dhaliwal got an internship at Copperleaf Technologies Inc. ("Copperleaf"). She started working there at the beginning of January 2020. She drove from her parents' home to Copperleaf's office in Vancouver, putting in a five-

day work week. Ms. Dhaliwal continued to work some weekend shifts at Equinox until about the end of February 2020, when she took a two-week medical leave and did not return.

[22] With the arrival of the pandemic in mid-March 2020, Ms. Dhaliwal started to work for Copperleaf remotely. She completed her two co-op terms in the spring and summer of 2020.

[23] Ms. Dhaliwal returned to complete her fourth year of commerce in September 2020. She obtained a major in marketing and entrepreneurship and a minor in sustainability. She graduated with honours in May 2021.

[24] From the time of the accident on, Ms. Dhaliwal was unable to continue with her previously active life. If she was not occupied with course work or attending specialist appointments and treatments, she was resting. She cut back drastically on working out, withdrew from her volunteer commitments and stopped socializing with her friends and extended family.

[25] In June 2021, Copperleaf hired Ms. Dhaliwal into a permanent position as Marketing Coordinator. Ms. Dhaliwal continued to work remotely, going into the office only on rare occasions. Although her job was full-time, she was able to complete all of her work in about 20 hours each week, allowing her time to nap in the afternoons. Ms. Dhaliwal has received very strong performance reviews and raises in salary. She was promoted to Marketing Manager in January 2023.

Accident-Caused Injuries and Ongoing Conditions

[26] There is no dispute that Ms. Dhaliwal sustained soft tissue injuries to her neck, arms and back in the accident. These have caused headaches, chronic pain, dizziness, sleep disturbance, depression and anxiety. Although a concussion was suspected, this was ruled out.

[27] I heard medical opinion evidence from two psychiatrists. The plaintiff called Dr. Koo. The report by the defendants' psychiatrist, Dr. Simonett, was admitted on

consent. The plaintiff also called Dr. Spivak, a psychiatrist. The reports of the plaintiff's neuro-ophthalmologist, Dr. Sexton, and of the defendants' neurologist, Dr. Robinson, were admitted on consent.

[28] The neurological opinions speak to Ms. Dhaliwal's ongoing headaches. The experts agree that her some of her headaches are migraine-type, causing light sensitivity, and some are tension-type. They also agree that the accident is the most likely cause and that the headaches will persist but not worsen. Dr. Sexton's report recommended Botox injections. Ms. Dhaliwal has recently tried Botox and has found the treatment improves her headaches but does not eliminate them.

[29] The physiatrists agree that the accident-caused soft tissue injuries cause Ms. Dhaliwal pain. Dr. Koo opined that Ms. Dhaliwal has fibromyalgia (or chronic pain syndrome), whereas Dr. Simonett diagnosed myofascial pain. I prefer Dr. Koo's report to Dr. Simonett's report. Dr. Koo's report is more recent (2023 as compared to 2022), and it explains how the constellation of Ms. Dhaliwal's post-accident symptoms, including headaches, dizziness, relative immobility and deconditioning, insomnia and anxiety and depression caused her to develop fibromyalgia, a condition that can include myofascial pain.

[30] Dr. Koo opined that Ms. Dhaliwal's fibromyalgia reduces her capacity for carrying out all normal vocational, personal, domestic and recreational activities. He recommended that she work with a psychiatrist and chronic pain specialists.

[31] Dr. Spivak's psychiatric opinion compliments that of Dr. Koo. He diagnosed Ms. Dhaliwal with major depressive disorder with anxious distress. I found the following passage in his report very helpful:

Her clinical picture is characteristic of what is seen in individuals who have chronic fatigue symptoms and fibromyalgia. In this population of patients, it becomes difficult to delineate whether their symptoms of fatigue, amotivation and preoccupation with their pain is a product of the actual underlying condition, which can result in significant disability, or whether there is contribution from a somatic symptom disorder with predominant pain, which refers to a psychiatric diagnosis where an individual becomes unduly preoccupied by their physical impairment such that it becomes a psychiatric condition in and of itself. It is effectively impossible to discern between these

two diagnoses and to comment with any certainty as to what extent her symptoms are being driven by psychological factors, as the underlying medical condition could account for her symptoms. It is more useful for the reader to appreciate that her clinical picture is suggestive of someone who is substantially impacted by her pain and that there is possibly a psychological underpinning to this preoccupation that is further perpetuating her sense of disability and impairment.

[32] Dr. Spivak also recommended that Ms. Dhaliwal participate in a multidisciplinary pain program with a psychotherapy component.

[33] The medical evidence establishes that Ms. Dhaliwal's primary disabling condition is fibromyalgia, with psychological and physical components. Based on his assessment of Ms. Dhaliwal five years after the accident, Dr. Koo found that Ms. Dhaliwal has likely reached "maximal medical recovery" and that her level of disability will persist and perhaps worsen "if she is not adequately supported in a multidisciplinary chronic pain treatment approach." He added that Ms. Dhaliwal may have some capacity for physical improvement through an active rehabilitation program and deferred to a psychiatrist with respect to her psychological conditions. On cross-examination, Dr. Koo agreed that Ms. Dhaliwal is not fully disabled from work.

[34] Dr. Spivak's prognosis focused on the importance of addressing Ms. Dhaliwal's "fibromyalgia and pain picture." Although he did not say to what extent her physical symptoms, such as pain and fatigue, are driven by psychological factors, he strongly recommended that she work with a psychologist.

[35] In my view, the following passage from Dr. Spivak's report is telling:

Ms. Dhaliwal has not found psychotherapy to be completely helpful thus far, and although the documentation suggests there was some level of benefit, she felt that her time would be best used in treating her physical condition.

[36] Ms. Dhaliwal's perspective is understandable. It is extraordinarily hard to accept that physical symptoms of the nature and severity she experiences could have anything other than a physical cause. Ms. Dhaliwal's testimony revealed her very negative self-image that is dramatically different from her sense of self before the accident. No doubt that contributes to her belief that her condition will not

improve and that psychological treatment cannot assist her. However, I understand Dr. Koo and Dr. Spivak to be saying that, if Ms. Dhaliwal is able to find in herself the resiliency and determination that characterized her pre-accident life, and draw on that in an integrated approach to her pain, she could see significant improvement in the symptoms of her complex condition.

DAMAGES

Non-Pecuniary Damages

[37] The well-known list of non-exhaustive factors governing the assessment of non-pecuniary damages is set out in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46. The factors relevant in this case include the age of the plaintiff, the nature of the injury, the severity and duration of pain, disability, emotional suffering, and impairments of family and social relationships, physical and mental abilities, and lifestyle. In approaching this assessment, the court must keep in mind the particular circumstances of the plaintiff and their situation in order to make an award that, as far as money can, addresses their unique circumstances.

[38] Ms. Dhaliwal is young (19 at the time of the accident and 25 at the time of trial). For the past six years she has been living with significant psychological and physical injuries that have dramatically impaired all aspects of her life, including her vocational expectations and aspirations, her family and social relationships, and, perhaps most importantly, her sense of herself. The stoicism she demonstrated in finishing her degree and obtaining employment do not reduce the severity of her injuries: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at paras. 54-55.

[39] Following the usual practice, the plaintiff and defendants each refer to cases that they consider comparable to the case at bar in order to establish a range. Ms. Dhaliwal relies on cases with awards of \$175,000-\$200,000 (or roughly \$215,000 to \$234,000 in 2024 dollars) and seeks an award of \$225,000. The defendants rely on

cases with awards of \$100,000-\$127,500 (or roughly \$131,000 to \$150,000 in 2024 dollars) and say \$140,000 is appropriate.¹

[40] Having reviewed these cases, I agree with the plaintiff that *Pearson v. Savage*, 2017 BCSC 1435 (aff'd 2020 BCCA 133) is the most analogous. Ms. Dhaliwal has suffered a substantial decline in virtually every aspect of her life. I consider an award of \$225,000 justified for non-pecuniary damages.

Loss of Income Earning Capacity

[41] Loss of income earning capacity is divided into two parts. Loss of past earning capacity runs from the date of the accident to the date of trial and is restricted to net income loss under s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. The court must determine, on the real and substantial possibility standard, what income the plaintiff would have earned in the pre-trial period but for her injuries: *Lamarque v. Rouse* 2023 BCCA 392 at paras. 29 and 34.

[42] Loss of future earning capacity (from the date of trial onwards) is not limited to net earnings. The framework of analysis is set out in *Rab v. Prescott*, 2021 BCCA 345 at para. 47. First, the plaintiff must first prove a potential future event that could give rise to a loss of capacity; second, she must prove there is a real and substantial possibility that the future event will cause a pecuniary loss; third, she must lead evidence to establish the value of that possible future loss, having regard to the

¹ Plaintiff's cases:

Fletcher v. Biu, 2020 BCSC 1304: \$200,000.
Pololos v. Cinnamon-Lopez, 2016 BCSC 81: \$180,000.
Sebaa v. Ricci, 2015 BCSC 1492: \$180,000.
Kim v. Lin, 2016 BCSC 2405: \$175,000.
Pearson v. Savage, 2017 BCSC 1435: \$175,000.

Defendant's cases:

McWilliams v. Hardy, 2023 BCSC 1259: \$127,500
Parhar v. Clarke, 2017 BCSC 550: \$110,000
Crozier v. Insurance Corporation of British Columbia, 2019 BCSC 160: \$125,000
Quezada v. Quezada, 2019 BCSC 1732: \$125,000
Prince-Wright v. Copeman, 2005 BCSC 1306: \$100,000

relative likelihood of the possibility occurring. Usually, the court chooses between an earnings approach and a capital asset approach.

[43] The principles governing assessment of loss of future earning capacity set out in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, are also helpful:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

Loss of Past Earning Capacity

[44] Ms. Dhaliwal graduated in May 2021, four years after commencing her degree program. She claims that, but for the accident, she would have graduated

one term earlier, starting her professional career in January 2021. In my view, the evidence does not support her position.

[45] Absent the accident, Ms. Dhaliwal would not have participated in the one-term Copenhagen exchange program, but she would have had to complete a third co-op term. Thus, as she acknowledged in her closing, this change did not delay her graduation.

[46] With respect to obtaining the necessary number of credits, Ms. Dhaliwal says that she would have obtained all the credits she needed by taking courses in the summer of 2019. However, there is no evidence that the finance courses she would have been required to take for a finance major were offered that summer.

[47] I conclude that Ms. Dhaliwal has not proved that there is a real and substantial possibility that, absent the accident, she would have completed her degree at the end of December 2020.

[48] Prior to the accident, Ms. Dhaliwal was working at Equinox, earning minimum wage. There is no dispute that, but for the accident, she would have continued to work for Equinox until the start of the pandemic in mid-March 2020. I find that she has established that there was a real and substantial possibility she would have continued to work there until the pandemic and would have returned to work once Equinox was in a position to bring her back until her graduation.

[49] Quantifying Ms. Dhaliwal's loss is challenging because the evidence is insufficient to compare accurately Ms. Dhaliwal's with-accident and without-accident earnings' scenarios. Equinox reports that, on average, she earned \$184.88 per pay period from December 2017 to October 2019. Ms. Dhaliwal's 2018 tax return shows that she earned a net income of \$5,817 from Equinox. This would include a lower number of shifts than what she would have worked had the accident not occurred. There is no evidence of the number of shifts she missed after the accident. Ms. Dhaliwal's 2019 tax return shows she earned a net income of \$1,780.49 from Equinox.

[50] In light of this, Ms. Dhaliwal proposes that her 2019 income be deducted from her 2018 income and seeks an award of \$4,037.37 for past wage loss from Equinox.

[51] The defendants submit that the only reliable evidence about loss of past earnings from Equinox is Ms. Dhaliwal's doctor's note authorizing a two-week leave from Equinox in the wake of the accident, which would equate to lost earnings of \$184.88. Their position disregards the evidence that Ms. Dhaliwal continued to work some shifts at Equinox after the accident and the fact that she was clearly unable to work at Equinox when she was in Copenhagen (a move that would not have occurred but for the accident). The defendants' position on loss of past earnings is unsustainable.

[52] Bearing in mind that loss of income earning capacity is an assessment, not a calculation, I award \$3,500 for loss of past earning capacity.

Loss of Future Earning Capacity

[53] The defendants concede that Ms. Dhaliwal has established some loss of capacity in that she has no "realistic ability to do manual labour of any sort" and is "less marketable to employers who have no ability to accommodate remote work."

[54] This concession is unhelpful in that Ms. Dhaliwal's capacity to do manual labour was never an issue. More importantly, it implies that her loss of capacity is fully address by a job that allows her to work remotely. As I have found, Ms. Dhaliwal's ongoing accident-caused health conditions that compromise her physical stamina and mental concentration, qualities necessary for a career in the wealth management sector.

[55] The untenability of the defendants' position becomes even clearer at the second step of the *Rab* analysis. They say that there is no real and substantial possibility that Ms. Dhaliwal's accident-caused conditions will preclude her from pursuing her intended career, meaning that there will be no pecuniary loss. The defendants point to the evidence of Mr. Pion, a portfolio and investment manager at a large investment firm, and Mr. Montian, who works in commercial banking,

specializing in the technology sector – both of whom are associated with the Dhaliwal family. These witnesses agreed that a finance specialization is not a prerequisite for entry-level positions in these areas, and Mr. Montian said that Ms. Dhaliwal's physical disability will not likely be an obstacle to her applying for a financial analyst job at one of the big five banks.

[56] The Defendants ignore the main thrust of these witnesses' evidence, which was about the intense level of energy and dedication, and extremely long hours, necessary to achieve, maintain and advance in a high-income position in this area. For example, Mr. Montian testified that in the first couple of years, financial analysts are expected to work 100 or more hours per week. Mr. Pion testified that certification as a chartered financial analyst requires at least three years of self-study and rigorous examinations while working full-time.

[57] The defendants also say that Dr. Quee Newell's expert vocational report (the only vocational report in evidence) establishes that that there is no real and substantial possibility that the impairment of Ms. Dhaliwal's earning capacity will lead to a loss of income. I disagree.

[58] As Dr. Quee Newell herself conceded, her report was limited to a review of the records provided to her. She had no contact with Ms. Dhaliwal and did not administer the normal battery of tests associated with a full vocational assessment. Dr. Quee Newell simply described the requirements for a financial analyst certification and provided incomes in this field. She provided statistics on earnings in that job bank category of marketing specialist. Based on that, she concluded Ms. Dhaliwal has competitive employability in the field in which she works and does not require additional vocational assistance.

[59] Almost all of the medical/rehabilitation information Dr. Quee Newell summarised dates back to 2019, and does not say Ms. Dhaliwal has fibromyalgia, chronic pain, depression or anxiety. The Quee Newell report tells me almost nothing about Ms. Dhaliwal, let alone her post-accident capacity to succeed in her career aspirations. It is unhelpful and I do not rely on it.

[60] The medical evidence (in particular, that of Dr. Koo and Dr. Spivak), and that of Ms. Dhaliwal and her family about her current limitations, coupled with Mr. Pion's and Mr. Monteith's evidence about the demands of their finance careers, establish that there is a real and substantial possibility that Ms. Dhaliwal will suffer a pecuniary loss. This is because her accident-caused conditions render her substantially less capable of achieving her intended career. It is useful to recall how the court applied this step of the analysis to the facts in *Rab*:

[62] Here, there was, according to the judge's findings, a direct correlation between the accident and the respondent's inability to devote the same time and energy to her marketing ventures. There was at least some evidence to support those findings. That the amount of income the two entrepreneurial ventures might produce was speculative does not by itself equate to the absence of a real and substantial possibility, any more than it would in the case of an infant whose career path is obviously uncertain. Rather, in this context, that speculative aspect goes to quantification, and would relate to the third step of assessing the relative likelihood of the possibility of loss occurring.

[61] The same is true here. Just as in *Rab*, the evidence shows a sufficient connection between the accident-caused impairments and Ms. Dhaliwal's ability to work as a financial analyst/investment banker. The loss is speculative, not the connection. That means the real challenge is to quantify "the relative likelihood of the possibility of the loss occurring."

[62] The parties disagree about whether to use an earnings approach or a capital asset approach. Ms. Dhaliwal acknowledges that a capital asset approach is usually appropriate when a plaintiff does not have an established career. However, she cites eight recent decisions of this court that used an earnings approach in such cases.

[63] In *Lamarque*, the Court of Appeal cited its previous decision in *Perren v. Lalari*, 2010 BCCA 140, and affirmed that an earnings approach is often more useful where the loss is easily measurable: para. 38. Neither case rules out using an earnings approach even without an established record of earnings in a particular career.

[64] The cases cited by Ms. Dhaliwal illustrate when an earnings approach is appropriate even when a plaintiff does not have a traditional track record of

earnings. In four cases (*Helgason v. Rondeau*, 2022 BCSC 1330; *Huang v. Young*, 2021 BCSC 2276; *Tench v. Van Bugnum*, 2019 BCSC 1877; and *Fletcher v. Biu*, 2020 BCSC 1304), the parties did not suggest using a capital asset approach. In *Theobald v. Coffey-Lewis*, 2021 BCSC 2491; *C.M.G. v R.M.G.*, 2021 BCSC 1661; and *Morgan v. Ziggioiti*, 2021 BCSC 106, the Court found the evidence sufficient to establish the plaintiff's pre-accident career trajectory and earnings. In *Chirhei v. Kachmar*, 2021 BCSC 1720, the plaintiff had started working in her desired career as a naturopath at the time of trial, but in a more limited way because of her injuries. The Court rejected the defendant's position that a capital asset approach should be based on her earnings in her first year as a naturopath because it would not fairly capture her without-accident career trajectory: para. 101. How to value loss of future earning capacity depends on what evidence the parties decide to put before the court and what inferences can fairly be made from it.

[65] Here, Mr. Benning's report provides census data of earnings for BC-resident males working as Financial and Investment Analysts and similar information for Banking and Investment Managers. Mr. Montian and Mr. Pion gave evidence based on their knowledge of earnings in such jobs in Vancouver. I also have evidence of Ms. Dhaliwal's current annual salary at Copperleaf, which is \$92,000. I consider this evidence sufficient to adopt an earnings approach. The evidence establishes that, absent the accident, Ms. Dhaliwal was on track to commence a career in wealth management/investment banking. Her ability to succeed in it is a contingency that must be addressed.

[66] Ms. Dhaliwal submits that her without accident career should be based on a full-time career in finance with an average income of \$500,000 per year until age 67, using the actuarial multiplier. This figure is not based on earnings data for the two applicable National Occupation Classification jobs reported by Mr. Benning. That figure would have been \$207,000 per year. Ms. Dhaliwal says this undervalues what her earnings would have been because her family connections and her pre-accident "track record" creates a real and substantial possibility that she would have been earning much more than that.

[67] Ms. Dhaliwal also submits that her current salary at Copperleaf of \$92,000 per year overestimates her residual earning capacity. She says that she only has the capacity to earn \$50,000 per year to age 67, again using the actuarial multiplier. She proposes an award of just under \$8M.

[68] The defendants did not address the earnings approach. They say Ms. Dhaliwal has not proved a real and substantial possibility of a future pecuniary loss, a position I have rejected. In the alternative, they propose applying a two-year multiplier to Ms. Dhaliwal's current salary, without explaining why a two-year multiplier should be used. This is not helpful I consider the evidence sufficient to support an earnings approach.

[69] That said, Ms. Dhaliwal's submission does not adequately address the contingencies in this case. It does not apply a negative contingency to the possibility that Ms. Dhaliwal would not have succeeded in a finance career at the level to which she aspired and it does not apply a positive contingency that, with treatment and time, Ms. Dhaliwal's health may improve and allow her to pursue more lucrative and rewarding work than her current position.

[70] I disagree with the plaintiff that the medical evidence rules out future improvement to Ms. Dhaliwal's condition. Despite five years having passed since the accident, Dr. Koo's and Dr. Spivaks' reports recommend treatment that Ms. Dhaliwal has not yet tried: a multidisciplinary pain clinic with a psychotherapy component. Pre-accident, Ms. Dhaliwal demonstrated an unusual level of tenacity, energy and determination in all aspects of her life. This creates a non-speculative possibility that, despite her current limitations, Ms. Dhaliwal can achieve an intellectually and financially rewarding career.

[71] I turn to the contingencies.

[72] I am not persuaded that, on the without accident scenario, Ms. Dhaliwal would have earned \$500,000 per year to age 67. I consider Mr. Benning's average earnings figures, of \$207,000 per year far more realistic for a person who has no

proven earnings record. Since Ms. Dhaliwal did not need to major in finance to work as a financial analyst/investment banker, I do not discount for the possibility that she would not have obtained good grades in those courses. However, I do discount for the possibility that Ms. Dhaliwal would not have obtained the CFA certification necessary to achieve the lucrative and extremely competitive career she wanted. Further, Ms. Dhaliwal's pre-accident accomplishments and abilities do not establish that she would have remained in that career. I apply a discount of 10% for these contingencies.

[73] On the with accident scenario, I disagree with Ms. Dhaliwal that her current earnings of \$92,000 should be discounted to \$50,000. There is no objective indication that she will leave Copperleaf or fail to continue to progress financially. The evidence shows that Copperleaf is happy with Ms. Dhaliwal's work, and that she was able to absorb a significant increase in her workload after her former manager, Ms. Palumbo left. Copperleaf has other employees who work remotely in Canada and in other countries. Ms. Dhaliwal has been promoted and her salary has increased from \$55,000 when she started in June 2021 to \$92,000 at the time of trial.

[74] Ms. Dhaliwal's perception that her current manager does not like her and that her job may not be secure is speculative, reflecting her current depressed mental state, not reality. If Ms. Dhaliwal left Copperleaf, there is no evidence that her need to work remotely would pose a barrier to employment at or above the level she currently works. The high level of her job performance despite her disabling condition also supports an inference that she has the potential to progress.

[75] In light of this, I apply a positive contingency, using \$120,000 to age 67 as the measure of Ms. Dhaliwal's with-accident earning capacity.

[76] I agree with the plaintiff that male earnings should be used with the actuarial rather than the economic multiplier. Although bearing a genetically-related child is not the only way to have children, and Ms. Dhaliwal is young, her pre-accident activities satisfy me that it is unlikely that she would take significant time away from

her career to care for children. The evidence does not persuade me that Ms. Dhaliwal's heart condition would impair her earnings capacity on the without-accident scenario.

[77] Accordingly, I award Ms. Dhaliwal \$2,018,000 for loss of future earning capacity.

COST OF FUTURE CARE

[78] Ms. Dhaliwal did not provide a functional capacity evaluation. She did provide a report from Mr. Benning that explains how to calculate the cumulative lifetime multiplier for Ms. Dhaliwal, upon which I rely.

[79] The defendants do not dispute Ms. Dhaliwal's claims for a \$524 occupational therapy assessment or a \$3,500 multidisciplinary pain assessment at CHANGEpain. I agree that she is entitled to these amounts.

[80] The defendants do not address Ms. Dhaliwal's claim for psychological counselling at a total cost of \$5,642, including an initial assessment plus 23 further sessions, calculated at ICBC-approved rates. Dr. Spivak made this recommendation, and I agree that it is warranted.

[81] The defendants agree that some award should be made for Botox injections. However, they disagree on the amount. The defendant's expert, Dr. Robinson, wrote in his report that the cost is \$425-\$850 and the treatment needs to be repeated every three months, usually indefinitely.

[82] The plaintiff uses the \$850 figure and applies Dr. Benning's cost of care multiplier to claim \$117,357.80. The defendants do not rely on Dr. Robinson's report. They point to Ms. Dhaliwal's schedule of special damages, which records a Botox treatment fee of \$175 on March 14, 2024, and use that to calculate a net present value of \$24,161.90. No one addressed this discrepancy.

[83] The best evidence of the cost of a Botox injection is what Ms. Dhaliwal actually paid for it a few months ago. I award Ms. Dhaliwal \$24,161.90 for this item.

[84] The defendants also agree that an award for ongoing massage therapy is justified. Dr. Koo recommended treatment every one to two weeks. Ms. Dhaliwal quantifies this item based on her current massage therapist's fee, which she says is \$115.50 per session for 52 weeks a year, continuing indefinitely. By contrast, the defendants again rely on Ms. Dhaliwal's massage therapy receipts, which record \$152.25 per session and say she is entitled to twice monthly treatments.

[85] Again, I rely on the evidence of what Ms. Dhaliwal has actually paid, and award \$184,000, based on 35 weeks per year and the applicable multiplier.

[86] Ms. Dhaliwal also seeks an award of \$471,157.05 for the costs of continuing to train twice a week with her current personal trainer, Mr. Arenas, who charges \$130.25 per session. The defendants say that the evidence that Ms. Dhaliwal trained with other personal trainers and with Mr. Arenas before the accident shows that she would have incurred these expenses anyway and say no award should be made for them. I agree and make no award for personal training expenses.

[87] The parties also disagree about Ms. Dhaliwal's claim for housekeeping expenses. Ms. Dhaliwal seeks two hours of paid housekeeping per week for life at \$30/hr, which is the rate the family pays its housekeeper. The defendants say that this item has not been proved.

[88] There is no evidence that Ms. Dhaliwal required housekeeping assistance when she was living in Copenhagen.

[89] Dr. Koo writes:

In my opinion, Ms. Dhaliwal's injuries likely preclude her from performing heavier housework, exterior yard maintenance, gardening and home renovation to any notable degree. In my opinion, her ability to participate in light housekeeping is affected by her reduced energy and pain tolerances after she is finished work with very little energy for extracurricular or nonvocational priorities.

[90] Ms. Dhaliwal currently lives with her parents in a large family home. The family has a housekeeper, and Ms. Dhaliwal's parents perform virtually all housekeeping tasks, including care of her dog. She does not incur any

housekeeping expenses. There is no evidence that this living arrangement will change. Absent a functional capacity evaluation of what housekeeping assistance Ms. Dhaliwal would need if she were living on her own and some evidence that this is a real possibility, an award under this heading is speculative. I decline to make an award for loss of housekeeping capacity.

[91] Finally, Ms. Dhaliwal claims the lifetime cost of anti-depressant medication, quantifying it at \$40,000. The defendants do not address this item. In his report, Dr. Spivak wrote that Ms. Dhaliwal had tried at least three antidepressants and found them ineffective. He opined that she might find a benefit from a different type of such medication. In light of this, I would discount this item by 25% to reflect the risk that the medication is not effective and award \$30,000.

[92] In summary I award Ms. Dhaliwal \$242,185.90 for the cost of future care.

SPECIAL DAMAGES

[93] In her closing submissions, Ms. Dhaliwal revised her special damages claim to eliminate certain items. She now seeks special damages of \$50,074.87. The defendants dispute her claim of \$31,087.74 for personal training with Mr. Arenas, and argue based on this Court's decision in *Gorval v. Quan*, 2023 BCSC 1757, that her mileage before 2021 should be reimbursed at \$0.50, not \$0.61, decreasing her claim by \$797.06.

[94] For the reasons stated above, I agree that Mr. Arenas' training fees are not compensable. The plaintiff did not dispute the mileage issue. I therefore award \$18,190 for special damages.

CONCLUSION

[95] In conclusion, I award Ms. Dhaliwal the following:

- 1) \$225,000 in non-pecuniary damages;
- 2) \$3,500 for loss of past earning capacity;

- 3) \$2,018,000 for loss of future earning capacity;
- 4) \$242,185.90 for the cost of future care; and
- 5) \$18,190 for special damages.

The total damage award is: **\$2,506,875.90**

[96] If the parties are unable to settle costs, they may apply to me in writing, with submissions no longer than five pages.

“Iyer J.”