IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vujevic v. Parnell*, 2024 BCSC 1372

Date: 20240731
Docket: M1812680
Registry: Vancouver

Between:

Anita Vujevic

Plaintiff

And

Doreen Catherine Parnell

Defendant

Before: The Honourable Justice Doyle

Reasons for Judgment

Counsel for the Plaintiff:	I. Kordic J. Nieuwenburg
Counsel for the Defendant:	D.A. Busch D.J. Mol
Place and Date of Trial:	Vancouver, B.C. January 9-13, 16-17, 2023 September 12, 2023
Place and Date of Judgment:	Vancouver, B.C. July 31, 2024

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I. INTRODUCTION

[1] The plaintiff, Anita Vujevic, claims damages for injuries suffered in a motor vehicle accident. She was the driver of a vehicle on Mount Seymour Parkway in North Vancouver in the early afternoon of February 8, 2018 when a collision occurred between her vehicle and a vehicle driven by the defendant Doreen Catherine Parnell (the “Collision”).

[2] The defendant denies liability for the Collision, or in the alternative, submits that liability should be apportioned equally.

[3] The plaintiff’s claims include general and pecuniary damages, including past and future loss of earning capacity.

[4] The defendant does not dispute that the plaintiff suffered some injuries attributable to the Collision. She describes these as a mild to moderate whiplash.

[5] However, the defendant submits that the plaintiff’s shoulder related injuries were a result of her work as a hairstylist and that the plaintiff was pre-disposed to develop these injuries, in particular rotator cuff tendinopathy, irrespective of the Collision. I understand the defendant to be arguing either or both that:

a) The plaintiff’s shoulder related injuries were not caused or materially contributed to by the Collision; and

b) There is a real and substantial possibility that the plaintiff would have developed shoulder symptoms even had the Collision not occurred, which must be considered when I assess her damages.

[6] The defendant also submits that the plaintiff’s past and future loss of earning capacity claims are minimal, and that general damages are less than the amount sought by the plaintiff.

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II. CREDIBILITY AND RELIABILITY

[7] In finding the facts necessary to resolve the disputed issues in this trial, I must carefully assess the credibility and reliability of the evidence before me.

[8] In the course of these reasons, I will review aspects of the evidence. I will not review it all, but I have considered all of the evidence relevant to the issues at hand, as well as the submissions of counsel.

[9] In assessing the evidence, I will be mindful of the guidelines summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[10] I will also bear in mind the following passage in *Prossegger v. Comer*, 2021 BCSC 2172, where Madam Justice Morellato referred to *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), stating:

> [31] In the seminal and often quoted passage in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), the Court of Appeal provided the following guidance in assessing credibility:
>
>> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[11] Assessing the credibility of the plaintiff is particularly important in a personal injury claim where the plaintiff has little or no objective evidence of continuing injury (for example, where the injuries at issue are soft tissue chronic pain and headaches), and is relying on their own complaints and reports to medical providers: *Jenkins v. Irving*, 2020 BCSC 391 at paras. 100-105, aff'd 2022 BCCA 64, leave to appeal ref'd 40203 (9 February 2023).

III. BACKGROUND

A. The plaintiff's pre-accident circumstances and condition

[12] The plaintiff was 36 years old at the time of the Collision.

[13] She was born in Croatia. During the war there, she moved to the Lower Mainland. She was twelve years old at the time, and spoke no English. She first went to Sir Charles Tupper Secondary School, then transferred to Alpha Secondary School in Burnaby for Grade 11. At Alpha Secondary School, she was bullied for being Serbian, and was transferred to Burnaby South Secondary School where there were more Serbian students.

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[14] She completed Grade 11, but testified that various circumstances at school, including the change in curriculum when she transferred, prevented her from completing Grade 12.

[15] The plaintiff was married in 2004, separated from her husband in 2014, and they were divorced in 2017.

[16] Prior to the Collision, the plaintiff was very active and involved in many fitness activities. She described her various activities outside of work, which included intense workouts, hiking, and walking. She had plans to participate in a bodybuilding competition. She enjoyed an active social life.

[17] The plaintiff trained as a hairstylist from 2003 to 2004, and worked as such up to and after the Collision. She commenced working at Ignite Salon ("Ignite") in 2014. At the time of the Collision, the plaintiff was working at Ignite on an hourly/commission basis. Her usual (pre-Collision) schedule was four days a week, about 10-12 hours a day, with occasional overtime.

[18] The plaintiff's net income for the years 2016 to 2021 is set out in her tax assessments. No pre-2016 tax returns or assessments are in evidence. For 2016 and 2017, the two years prior to the Collision, her net income was $29,523 and $37,318, respectively.

[19] The plaintiff was candid that she underreported her tip income in her tax returns in the same fashion as her colleagues. This was not challenged. The owner of the salon at which the plaintiff is currently working, Mr. Federico, testified that tip income earned in a day is typically "cashed out" to a stylist the following day, after which it is their responsibility to decide what to do with it.

[20] The plaintiff's pre-accident medical history included hypothyroidism as well as benign ovarian tumour and removal. The former has been under control through medication since well before the Collision. The latter resulted in surgery in 2011 and 2012, and after five years, the condition was considered to be in remission.

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[21] The plaintiff acknowledged a history of fatigue and insomnia, which she says were resolved through diet changes well prior to the Collision.

[22] The plaintiff also acknowledged that before the Collision, she experienced headaches as a side effect of using the birth control pill Alesse. She described these headaches (which involved pressure all over) as being quite different than the migraine headaches she experienced post-Collision (sharp, stabbing pain on the left side).

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B. The plaintiff's post-accident condition

[23] Immediately after the accident, the plaintiff began to experience pain in her left shoulder from the seatbelt. Within 48 hours, she had further shoulder pain and back, neck, and left arm pain, as well as headaches and anxiety about driving.

[24] The day after the accident, the plaintiff sought treatment with her family doctor's clinic and was diagnosed with soft tissue injuries.

[25] Shortly after that, the plaintiff started attending physiotherapy and continued with those treatments for about a year. She then did active rehabilitation for about a year, but was not satisfied with her progress. She was frustrated that the focus of her exercises was her core and legs—her shoulder was too sore to exercise.

[26] During the COVID-19 pandemic shutdown (between March and June 2020), the plaintiff was offered virtual sessions by the kinesiologist, but she did not find these useful. As a result, she did not receive treatments for a few months during the pandemic.

[27] In June 2020, she attended Performax Health Group and added massage therapy to her treatment regime at the same clinic in August 2020. She continued these treatments until November 2021, when she commenced a second round of active rehabilitation treatments. However, the kinesiologist ended up leaving the clinic and the clinic struggled to find a replacement.

[28] The plaintiff then began a third round of physiotherapy at Rebounce Physio in January 2022, where she continued to attend at the time of trial. She was also receiving active rehabilitation treatments from Rebounce Physio at the time of trial.

[29] The plaintiff testified that she has daily pain in her left shoulder that wakes her up most nights. The pain is exacerbated by her work as a hair stylist. Her neck, back and arm pain are occasional, and occur several times a week. She experiences headaches weekly. Her driving anxiety has improved but she is still fearful when driving near big trucks.

[30] Soon after the Collision, the plaintiff learned that Ignite, the salon at which she was employed, was closing down. Ignite closed at or near the end of March 2018, after which the plaintiff worked at two other salons before commencing her current work at Workshop Salon. The plaintiff's tax returns indicate that her net income in 2018 to 2021 was as follows:

- 2018: $30,167
- 2019: $30,941
- 2020: $28,270
- 2021: $31,178

[31] I found the plaintiff to be a credible and reliable witness. Her evidence was clear, straightforward, and consistent with the evidence of the lay witnesses, the clinical records, and the expert opinion of Dr. Chen, all of which I will further discuss below.

IV. LAY WITNESSES

[32] A number of lay witnesses testified as to the plaintiff's condition before and after the Collision.

[33] Ms. Cvijeta Stevanovic has known the plaintiff for over ten years, first as a gym mate, then as her hairstylist and ultimately as her friend. Ms. Stevanovic and

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the plaintiff met at a gym in 2012 doing CrossFit. They became gym partners. They also hiked together, including the Chief in Squamish. Ms. Stevanovic testified that pre-Collision, she had difficulty keeping up with the plaintiff on hikes. She described the plaintiff as fit and skinnier than her when they met.

[34] Ms. Stevanovic became one of the plaintiff's hairstyling clients. Pre-Collision, she was pleased with the services she received from the plaintiff. Since the Collision, she still goes to the plaintiff for hairstyling. The first time she went after the Collision, she saw the plaintiff wincing while blow drying her hair. She now blows dries her own hair when she has her hair styled by the plaintiff, and no longer asks the plaintiff to curl her hair.

[35] After the Collision, Ms. Stevanovic stopped going to the gym with the plaintiff. She described the plaintiff trying to hike the Chief again with her in the summer of 2018, but said the plaintiff could not do it, and turned around after five minutes. She testified that the plaintiff no longer works out with her. Ms. Stevanovic said the plaintiff's fitness level has dropped, and she has gained a lot of weight.

[36] Ms. Stevanovic agreed in cross-examination that she was aware of the litigation, was willing to testify and was aware of what she may be asked. Her evidence about the plaintiff's physical condition before and after the Collision was not seriously challenged.

[37] Nikola Lojpur testified that he met the plaintiff approximately ten years ago through his wife, Lana. He said he noticed no physical difficulties prior to the Collison, and that the plaintiff played with their children and could pick them up.

[38] Mr. Lojpur said the plaintiff changed after the Collision. She was no longer picking up the children, and when she visited, she asked for a pillow and brought an ice pack. His observations were not seriously challenged in cross-examination.

[39] Lana Lojpur, who also testified at the trial, met the plaintiff through Ms. Stevanovic. The plaintiff became her hair stylist about ten years ago. They went for walks and to social events, seeing each other at least once a week before the

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Collision. She says the plaintiff was lively, bubbly, optimistic, social, active and looked fit.

[40] Ms. Lojpur says that after the Collision, the plaintiff no longer went on walks or to parties. When they see each other, now only once a month, they mainly watch TV. She says the plaintiff is not as bubbly or optimistic, and gets upset easily. She said the plaintiff is not as active, and when visiting, is not able to play with Ms. Lojpur's six-year old twins. She said that when the plaintiff visits, she needs a pillow and brings an ice pack. She is often cold, and stretches during these visits.

[41] Pre-Collision, Ms. Lojpur was satisfied with the plaintiff as her hair stylist, but now the plaintiff takes much longer to style her hair. It takes the plaintiff five and a half to six hours to do colour and cut, which used to take only three hours. Ms. Lojpur has her hair styled every eight to twelve weeks, seeing the plaintiff at 6 p.m. and getting home between 11 p.m. and midnight. She says she would not go to the plaintiff for hairstyling if she were not her close friend.

[42] Ms. Lojpur was not cross-examined.

[43] Ms. Blanka Vujevic, the plaintiff's mother, also testified regarding the effects of the Collision and the plaintiff's related injuries on the plaintiff's life.

[44] The plaintiff's mother first described the plaintiff's youth, which included various sports. As with the other witnesses noted above, she described the plaintiff as active and having no physical limitations before the Collision. After the Collision, the plaintiff could not do things as she had before. The plaintiff moved in with her in October 2018. While that was supposed to be a temporary arrangement, the plaintiff was still living with her at the time of trial. The plaintiff's mother said she does most of the housework, since the plaintiff lacks strength and cannot reach for things.

[45] There was no serious challenge to Ms. Blanka Vujevic's evidence on cross-examination.

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[46] Finally, some of the plaintiff's former and current hairdressing colleagues testified. Their testimony included evidence about her physical issues and limitations after the Collision. They also gave evidence in support of the plaintiff's past and future loss of earning claims, which I will further discuss when I assess the plaintiff's damages.

[47] I found all of the lay witnesses called by the plaintiff to be credible and forthright.

V. EXPERT WITNESSES

A. Dr. Chen

[48] The plaintiff called one expert witness: Dr. Audrey Chen. Dr. Chen testified and, by consent, was qualified as an expert in physiatry and a person able to provide opinion evidence regarding the diagnosis, prognosis and treatment of injuries and pain arising from traumatic events, in particular from motor vehicle accidents.

[49] Dr. Chen conducted a virtual independent medical exam/assessment of the plaintiff on October 3, 2022, and an in-person physical exam of the plaintiff on October 11, 2022. She also reviewed the plaintiff's clinical records.

[50] Dr. Chen's report (Exhibit 8) states her current diagnosis at page 9:

1. Whiplash associated disorder type II
2. Mechanical neck pain – left side
3. Left shoulder girdle strain/soft tissue injury
4. Left shoulder pain
5. Persistent headache attributed to whiplash
6. Myofascial pain syndrome
7. Driving anxiety symptoms
8. Sleep disruption

[51] Regarding the plaintiff's overall prognosis, Dr. Chen opined that "given the time frame since her car accident, her persistent symptoms despite returning to work and some of her regular activities, and some central sensitization evident, it is more

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likely that she will continue to have persistent symptoms with intermittent exacerbations and flares moving forward" (Dr. Chen's report, Exhibit 8, p. 9, l. 367).

[52] I found Dr. Chen's opinion evidence to be helpful and credible, and I am giving it considerable weight in assessing the extent of the injuries suffered by the plaintiff in the Collision and the plaintiff's prognosis. While Dr. Chen's opinion relies heavily on the plaintiff's self-reporting, I found the plaintiff to be a credible and reliable witness. Overall, my impression of the plaintiff is that she is quite stoic, and not someone who exaggerates her injuries.

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B. Dr. Connell

[53] The defendant also called one expert witness: Dr. Douglas Connell. Dr. Connell was called as a witness by the defendant, following a *voir dire* at which I found his evidence was admissible. His *voir dire* evidence, as well as his report (Exhibit 13), became evidence on the trial proper, by consent.

[54] Following cross-examination on his qualifications, counsel for the plaintiff agreed that Dr. Connell was qualified as an expert in radiology with subspecialty training in musculoskeletal radiology, and a witness able to provide opinion evidence regarding diagnostic imaging, in particular images and treatment of musculoskeletal disorders.

[55] Dr. Connell did not examine the plaintiff, nor did he review her clinical records.

[56] In his report, Dr. Connell opined that there is a "very high likelihood that someone in the hairdressing industry will develop shoulder symptoms". His opinion in this regard was based largely on one medical journal article he read about 44 studies into the prevalence of musculoskeletal disease in hairdressers.

[57] As will be further discussed later in these reasons, I found Dr. Connell's opinion evidence to be of limited value.

VI. FINDINGS WITH RESPECT TO THE PLAINTIFF'S INJURIES

A. The plaintiff's credibility

[58] During the trial, the defendant sought to challenge the plaintiff's credibility, both generally and on specific issues, including her post-accident condition and her pre and post-accident earning capacity. The defendant pointed to a number of examples that she alleged called the plaintiff's credibility into issue. I will briefly note some of these examples below, and explain why they did not change my overall positive assessment of the plaintiff's credibility.

1. Plaintiff's pre-collision income

[59] The defendant takes issue with the vagueness of the plaintiff's recollection of income prior to 2016. The plaintiff's testified she did not remember if her income at a salon called Gloss (where she worked from 2006 to 2009) was the same as her 2016 income, and said her income went up and down from 2004 to 2016.

[60] The plaintiff's income tax returns are in evidence from 2016 to 2021. My impression was that the plaintiff was responding as well as she could about her earnings going back seven or more years in a situation where she was not referred to any tax returns for those prior years.

2. Plaintiff's pre-accident living situation

[61] The defendant notes that Dr. Chen's report refers to the plaintiff living on her own in October 2022, contrary to the evidence of the plaintiff and her mother at trial that they were living together at that time. Counsel for the defendant acknowledged that this may be merely Dr. Chen's misapprehension.

3. Plaintiff's pre-accident psychological condition

[62] The defendant also points to a statement in Dr. Chen's report that the plaintiff "denied a prior history of depression" (para. 25). The defendant says this is not accurate and puts the plaintiff's credibility at issue.

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[63] Select clinical records were put to the plaintiff in cross-examination from various dates. The plaintiff agreed that a “Subjective Note” in those records was based on what she told her doctor at the time. The complete clinical records were not tendered in evidence by either party.

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[64] Below is a summary of the “Subjective Notes” from some of those select clinical records that mentioned depression or anxiety:

- March 27, 2017 notes “not depressed” under the heading “Subjective Note”;
- December 13, 2017 includes “not depressed” under the heading “Subjective Note”;
- December 14, 2020 notes “would like to start antidepressents” under the heading “Subjective Note” and “depression and anxiety” under the heading “Assessment Note”;
- December 22, 2020 notes “mood much better though!!!” under the heading “Subjective Note” and “anxiety – and depression – decided cont on 5 mg and reassess” under the heading “Assessment Note”; and
- September 20, 2021 notes “depression” under the heading “Assessment Note”.

[65] Counsel asked no other question of Dr. Chen about paragraph 25 of her report, in particular whether “prior” meant prior to the consult in October 2022 or prior to the Collision. Only the first two of the above clinical records are prior to the Collision.

[66] When asked about the above entries in December 2020, the plaintiff explained these were short term mood issues of the nature described in that note, not clinical depression.

[67] The plaintiff then asked counsel “do you want to know why” (with respect to why she was on medication as noted in the December 2020 record), and explained that she was recommended anti-depressants to “reset” her brain after contracting COVID-19. She went on to say that she had tried anti-depressants as a teen shortly after coming to Canada from the war in Croatia, where many of her relatives still were at the time, and that she had seen therapists at that time in high school. Rather than undermining her credibility, in my view, the plaintiff tried to be as thorough and complete as she could.

[68] The evidence of the other witnesses called by the plaintiff is inconsistent with any significant depression leading up to the Collision.

[69] It must also be noted that this lengthy cross-examination evidence regarding depression did not relate to any of the diagnoses found by Dr. Chen at page 9 of her report (Exhibit 9). Dr. Chen had reviewed the clinical notes upon which the plaintiff was cross-examined.

[70] The defendant also submits that the plaintiff “denied anxiety other than being anxious around vehicles resembling that of the defendant”, noting pre-Collision medical record entries regarding anxiety.

[71] Dr. Chen expressly notes at para. 22 of her report that the plaintiff had a prior history of anxiety “as noted by her family doctor, and she has previously seen a psychologist”, as well as noting that a month prior to the Collision, the plaintiff had increased anxiety related to public speaking for her work at L’Oreal.

[72] Moreover, the plaintiff agreed in cross-examination that anxiety and depression had been issues in the past—“not all the time, sometimes”—and she explained this further when responding to evidence from her examination for discovery, saying that she was then in a bad relationship that caused her a lot of stress, and she referred to her work with L’Oreal and agreed she had anxiety at that time.

[73] I do not find that any of this testimony undermines the plaintiff’s credibility.

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[74] The only diagnosis of Dr. Chen related to anxiety is “Driving Anxiety Symptoms” (page 9).

[75] In direct examination, the plaintiff said she initially avoided driving briefly after the Collision, and still clenches her teeth at times if driving near trucks. She said that otherwise she has no ongoing psychological issues. Dr. Chen reports exactly that at paragraphs 24 and 25. This is hardly a situation where the plaintiff is overstating the psychological ramifications of the Collision, and it does not adversely affect my view of her credibility.

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4. The plaintiff’s refusal of certain treatments

[76] The defendant submits that the plaintiff’s refusal of certain treatments, including corticosteroid injections and Naproxen (an anti-inflammatory pain-relieving medication), reflects upon her credibility. The plaintiff testified that she was afraid of injections, and avoided Naproxen because it upset her stomach.

[77] Dr. Chen refers to Botox, corticosteroid injections and diagnostic blocks, noting the plaintiff is afraid of needles and injections (Exhibit 9, page 13).

[78] I do not view the plaintiff’s refusal of these treatments as impacting her credibility. She was candid in explaining why she did not receive these treatments.

5. The plaintiff’s pre-accident iron deficiency

[79] The defendant submits that the plaintiff was dismissive of her long-time doctor’s reference to iron deficiency and anemia in clinical records from September 19, 2016 and August 16, 2016, shortly after she returned from Europe. The plaintiff said her doctor can be “dramatic”. The plaintiff testified that she had blood work done which showed she had low iron but was not anemic. She said her history of fatigue and insomnia resolved when she changed her diet.

[80] Dr. Chen touches on these and other matters at paras. 26 and 43 of her report. Of them, only “sleep disruption” is part of Dr. Chen’s diagnosis of injuries as a

result of the Collision, and that relates to the plaintiff being awakened by shoulder pain.

[81] I do not view this aspect of the plaintiff's testimony as adversely impacting her credibility.

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6. The plaintiff's pre-accident headaches

[82] The defendant suggests the plaintiff had a pre-Collision history of migraine headaches that she downplayed in her testimony.

[83] The plaintiff acknowledged experiencing headaches prior to the Collision. She described the different nature of the headaches she had pre-Collision from those post-Collision. With regard to the former, she said they were pressure all over, as opposed to those after the Collision being sharp, stabbing pain on the left side. Her evidence at her examination for discovery was that she had occasional headaches pre-Collision, but they were "nothing like – I didn't have migraines which happened after the car accident". She explained in direct examination that she now knows what a migraine is.

[84] Dr. Chen was asked about the clinical records pre-Collision which were part of her review. The entry on December 22, 2020 includes the word migraine. However, this was post-Collision.

[85] In cross-examination and re-direct examination, Dr. Chen noted that patients often call headaches migraines when they are not. She testified that migraines have specific criteria, upon which she elaborated following a clarifying question from me.

[86] The defendant also submitted that the plaintiff did have migraines pre-Collision. In cross-examination, the plaintiff was asked about birth control side effects, and described headaches as one side effect of Alesse.

[87] Counsel for the defendant put a medical record to the plaintiff from March 27, 2017. The March 27, 2017 "subjective note" in that clinical record reads: "Alesse caused water retention, wt gain, fatigue, bloated, migraines".

[88] In re-direct examination, Dr. Chen said she understood the pre-Collision “migraines” were from medication. The above clinical record confirms that.

[89] In my view, this is an example of the plaintiff providing credible testimony, corroborated by the clinical record.

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7. Underreporting of tips

[90] One area not stressed by the defendant regarding the plaintiff’s credibility relates to her underreporting of tip income. The evidence was that the plaintiff conducted herself in that manner, just like her hairdressing colleagues.

[91] The defendant does not challenge this aspect of her credibility, perhaps further to the plaintiff’s submissions which noted the comments of Mr. Justice Fitch, then of this Court, in *Wong v. Hemmings*, 2012 BCSC 907 at paras. 104 to 106.

[92] While I acknowledge underreporting of tips is dishonest conduct, that conduct, in isolation, does not lead me to generally doubt the plaintiff’s honesty. I do not believe that it warrants an adverse credibility finding.

B. The plaintiff’s injuries

[93] Having considered all the evidence, including the testimony of the plaintiff, the lay witnesses, and the expert evidence, I accept that the plaintiff sustained the injuries diagnosed by Dr. Chen in her report, set out again for ease of reference:

a) Whiplash associated disorder type II
b) Mechanical neck pain – left side
c) Left shoulder girdle strain/soft tissue injury
d) Left shoulder pain
e) Persistent headache attributed to whiplash
f) Myofascial pain syndrome
g) Driving anxiety symptoms
h) Sleep disruption

[94] The plaintiff continues to suffer from persistent headaches. She continues to experience neck pain on the left side—a constant aching pain that occasionally

radiates to her shoulder blades, and is exacerbated by her work as a hair stylist. The plaintiff also suffers from left shoulder pain, in the shoulder joint and in her upper back. It is an aching pain that is intermittent when she is at rest but fairly constant when she is working. She continues to suffer from some driving anxiety, particularly when driving near big trucks. Her sleep is disrupted—she is woken up at night from the pain in her shoulder. Her injuries and ongoing symptoms have had significant impacts on both her working and personal life.

[95] I will address the defendant's arguments about the plaintiff's shoulder injuries (relating to causation and crumbling skull) later in these reasons.

VII. THE COLLISION

A. Overview of the Collision

[96] The Collision occurred somewhat east of the intersection of Mount Seymour Parkway and Fairway Drive. Mount Seymour Parkway runs east and west, and slopes downhill to the east.

[97] The east and westbound lanes are divided by a solid yellow line. In the area where the Collision occurred, there is one lane eastbound and two lanes westbound. Broken white lines separate the two westbound lanes.

[98] The plaintiff was driving her Mazda 3 car eastbound on Mount Seymour Parkway. Her then boyfriend, Igor, was in the front passenger seat of her car.

[99] The defendant was 68 years old at the time of the Collision. She was driving a Dodge Ram truck. Her husband was in the front passenger seat of her truck.

[100] Only two witnesses to the actual Collision testified at trial: the plaintiff and the defendant. An RCMP officer subsequently attended the scene and testified in that regard.

[101] The plaintiff's former boyfriend Igor did not testify. The plaintiff explained that they are no longer in a relationship, parted on bad terms, and no longer speak. He resides in Germany and told her on January 6, 2023 that he did not want to testify.

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[102] The defendant's husband did not testify. He was present with the defendant the day she testified, after the plaintiff had closed her case. He was excluded from the courtroom in the event that he may have been called to testify.

[103] There is no traffic analysis in this matter, and unfortunately, very few photographs of the scene of the Collision.

[104] The limited photos of the Collision scene were taken by the plaintiff after the Collision.

[105] The defendant drew a sketch of the Collision scene dated February 13, 2018 (Exhibit 11).

[106] Exhibit 2, photo 2, shows the Mazda straddling what appears to be a white line. The back end of the Mazda is not visible.

[107] Exhibit 2, photo 3, shows the defendant standing outside her truck on her phone. Her truck is facing east. Her truck is partially blocking a driveway of the house to the south. The defendant testified that she moved it to that position after the Collision. The solid yellow line and part of the broken white line are visible.

[108] Exhibit 2, photo 1, taken after police attendance, shows a different view of the rear of the defendant's truck, with its right-side wheels on the raised curb/sidewalk.

[109] The damage to each vehicle is consistent with an impact by the left front bumper and left front side of the truck with the right-side passenger doors of the Mazda.

[110] The most severe damage to the Mazda is to the front passenger door, with damage extending to the rear passenger door. The plaintiff says that latter damage was caused when the defendant reversed after the Collision.

[111] The defendant noted damage to her truck on Exhibit 11, including to the left front bumper, the front quarter panel and the left front hubcap.

[112] Although the general location of the Collision is not in dispute, nor is the damage to each vehicle, the plaintiff and the defendant gave conflicting testimony about how the Collision occurred.

B. The plaintiff's evidence regarding the Collision

[113] The plaintiff says she was driving eastbound on Mount Seymour Parkway following an SUV. She testified that just prior to the Collision, as she was proceeding down the eastbound lane, she observed the defendant's truck on her right, pulled over at the side of the road just east of Fairway Drive. She recalled that the right tires of the defendant's truck were off the pavement, a description not dissimilar to how the truck was parked after the Collision (Exhibit 2, photo 1).

[114] As the plaintiff passed Fairway Drive at 50 to 55 kilometres per hour, she saw a vehicle in the corner of her eye and her boyfriend alerted her. She testified that the left side and left bumper of the defendant's truck hit her Mazda on the passenger side. The plaintiff said that after the initial impact, it appeared that the defendant kept hitting the gas, resulting in the defendant's truck pushing the Mazda to the left and partially into the oncoming westbound lane.

[115] The plaintiff testified that after the defendant's truck pushed the plaintiff's Mazda partly into the oncoming lane, the defendant reversed, further scraping the passenger side of the plaintiff's car.

[116] The plaintiff took a photo of her car after the Collision (Exhibit 2, photo 2), which shows a portion of the Mazda over a road line. The plaintiff testified that the mid and back of her car were still in the eastbound lane after the Collision.

[117] The plaintiff testified that the Mazda and Dodge stopped after the Collision, as did the SUV which the plaintiff was following. The SUV parked and the defendant parked her truck just down the street.

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[118] The plaintiff testified that the defendant got out of the truck and said words to the effect that she: knew what she did, was sorry, was doing a U-turn, was in a hurry, did not see the plaintiff, and that she had to go.

[119] The plaintiff said that when she went to ask a person down the road if she had seen anything, the defendant came up, yelled at her, and told her not to ask anything, and said she (the defendant) had already admitted what she did and “I didn’t see you”.

[120] The plaintiff called the police. Before the police arrived, the plaintiff testified that she took some photos and the parties exchanged information.

[121] The plaintiff said that before the police arrived, the defendant called someone on her cell phone. The plaintiff testified that she overheard the defendant telling the person she was speaking to what had happened, and saying words to the effect of: “Ok, I shouldn’t say that, what should I say?”

[122] When the police officer arrived, he separated people and spoke to them individually. The tenor of the plaintiff’s evidence is that emotions were running a bit high among those present. The police could not speak to her boyfriend Igor, who did not speak English.

[123] In cross-examination, the plaintiff maintained that the SUV that was travelling down the eastbound lane of Mount Seymour Parkway ahead of the plaintiff’s Mazda was able to pass the defendant’s truck without going “around it” since the eastbound lane is pretty wide. She agreed the defendant’s vehicle was stopped just prior to the Collision. She confirmed various portions of her direct examination.

[124] In cross-examination, the plaintiff was not challenged on the inculpatory statements she attributed to the defendant.

C. The defendant’s evidence regarding the Collision

[125] The defendant testified that she was fully in the eastbound lane, intending to turn left across the westbound lanes and into the driveway of the residence at 4158

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Mount Seymour Parkway that she depicted in her sketch. Shortly prior, she had turned right onto Mount Seymour Parkway from Fairway Drive. She said she and her husband were inquiring about the house at that address for their granddaughter to rent.

[126] The defendant says she signalled a left turn, and when she turned, she hit the Mazda which she said was passing her on the solid yellow line. She clarified that the Mazda was to her left, over the solid yellow line, and then further clarified that the Mazda was half in the eastbound lane and half in the westbound lane when the Collision occurred.

[127] After the Collision, the defendant said she tried to speak to the plaintiff's passenger, but he did not respond and his window was up.

[128] Someone from a truck behind her impolitely asked her to move her truck to the side of the road and she did so, parking it as shown in Exhibit 2, photos 1 and 3.

[129] The defendant recalled that at one point, she and the plaintiff were swearing at each other.

[130] When asked in cross-examination what she and the plaintiff said to each other right after the Collision, she said she could not recall. She firmly denied plaintiff's counsel's suggestion that she told the plaintiff the Collision was her fault, or that she was attempting a U-turn.

[131] The defendant also denied calling anyone from the scene aside from her abandoned call to the police, wondering out loud who she would call since everyone was at work.

[132] She denied ever speaking to her husband about the Collision over five years, saying they forgot about it because of what ICBC told them and that was the end of the story.

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[133] She rejected the suggestion that just prior to the Collision, she was pulled partially off the road, with her right wheels on the sidewalk, waiting to do a U-turn because she had gone past the driveway of the residence for rent.

[134] She maintained that her left turn signal was on before she turned.

[135] The defendant agreed that her memory was better when she made the rough diagram which became Exhibit 11. That diagram shows the plaintiff’s vehicle fully in the southern westbound lane, and depicts the defendant’s truck along with her handwriting which she says includes: “Left front Bumper + where my truck struck Her passenger side on both doors”. The driveway to 4158 Mount Seymour Parkway is depicted as directly across from where the defendant’s truck is located.

D. The RCMP Officer’s evidence regarding the Collision

[136] The police officer’s evidence about his post-Collision attendance was of limited value. He decided not to issue a violation ticket to either party. He believes he took photos, since his notes indicate “damaged or lost”, but he does not recall. In any event, those photos are not available and, accordingly, were not tendered in evidence.

VIII. ISSUES

[137] The issues I must decide are as follows:

a) Liability: Who is liable for the Collision?

b) Causation: Has the plaintiff established that the Collision caused her shoulder-related injuries? For clarity, I note the defendant concedes the Collision caused the “whiplash” injuries.

c) Crumbling skull: Did the plaintiff have a pre-disposition to shoulder problems (in particular rotator cuff tendinopathy), and is there a measurable risk that her pre-disposition would have caused her to suffer the shoulder pain/symptoms she is now experiencing irrespective of the Collision?

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d) Damages: What damages should the plaintiff be awarded?

i. What amount of general non-pecuniary damages should be assessed?

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

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

iv. What amount, if any, should be assessed for loss of housekeeping capacity?

v. What amount, if any, should be assessed for cost of future care?

vi. What amount should be assessed for special damages?

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IX. LIABILITY

[138] Below, I will:

a) Summarize the parties' positions with respect to liability;

b) Explain why I prefer the plaintiff's evidence regarding the Collision to the defendant's;

c) Make factual findings about the Collision; and

d) Set out my findings with respect to liability for the Collision.

A. Position of the parties on liability

[139] The plaintiff submits that the defendant was negligent and is wholly liable for the Collision. Her position is that the Collision occurred because the defendant carelessly pulled out from her stopped position on the roadway, likely to do a U-turn, without signalling or making the appropriate checks. The plaintiff cites various

precedents and the provisions of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*] for the proposition that they inform the standard of care owed by each party. These include ss. 169, 144 and 166.

[140] The plaintiff submits that her evidence regarding the Collision was credible, in contrast with the memory gaps and inconsistencies in the defendant's evidence.

[141] The defendant submits that the plaintiff is fully liable for the Collision, and that the plaintiff failed to drive with due care and attention. Her position is that the plaintiff negligently attempted to pass her on the left (driving partially over the yellow line dividing the eastbound and westbound lanes of Mount Seymour Parkway) while the defendant was in the eastbound roadway, about to execute a left turn.

[142] In the alternative, the defendant submits that if this Court cannot determine the parties' respective degrees of liability, apportionment of liability to each party on a 50/50 basis would be appropriate.

[143] The defendant says the plaintiff's reliability is hampered by her acknowledgment that her recollection of how the accident happened is limited, and that her credibility is generally suspect (for the reasons I have already discussed and rejected above).

[144] The defendant submits that Exhibit 2, photo 2, shows the plaintiff's vehicle straddling the broken white line after the Collision, not the solid yellow line. She submits the plaintiff's contention that the defendant's truck pushed her Mazda all the way from the eastbound lane to the centre of the westbound lanes stretches credulity.

[145] The defendant further submits that the accident report (Exhibit 12) and photos show damage which corroborates that it was not a 90-degree impact, but was more of an acute angle.

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B. Credibility findings

[146] The plaintiff and the defendant gave different evidence about how the Collision occurred. In order to resolve the inconsistencies in their testimony, I must assess the credibility of their evidence using the guidance from the authorities I referred to earlier in these reasons.

[147] Having considered the evidence as a whole, I prefer the plaintiff's evidence regarding the Collision to that of the defendant. The plaintiff's testimony was straightforward and clear. She was largely unshaken in cross-examination in any regard, often readily agreeing with suggestions put to her. Overall, the plaintiff's testimony was "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as a reasonable in that place and in those conditions" (*Prossegger*, para. 31, citing *Faryna*).

[148] The defendant's evidence with respect to the Collision was troubling in a number of respects. Below, I will outline my substantial credibility concerns with respect to defendant's evidence on some of the key facts relating to the Collision.

1. Width of the eastbound lane

[149] The defendant testified that she was in the eastbound roadway, waiting to execute a left turn, when the plaintiff unexpectedly tried to pass her on the left (over the yellow line, partially driving in the oncoming lane), at which point the Collision occurred. The plaintiff denied this, saying she was driving in the eastbound roadway, when the defendant (who had pulled over and stopped on the right side of the roadway) suddenly pulled into the roadway, hitting the right passenger side of the plaintiff's Mazda.

[150] At first, the defendant said the plaintiff's version of events could not be correct, because the width of the eastbound lane would not accommodate two cars side by side. The defendant initially denied that it would have been possible for the plaintiff to pass by the defendant's truck, even if it was parked on the right side of the

roadway, without the plaintiff's Mazda going over the yellow line into the oncoming lane.

[151] It is clear from Exhibit 2, photo 3 that the eastbound lane was quite wide. In that photo (in which the defendant is standing next to her truck on her cellphone), the defendant's truck is minimally on the raised curb/sidewalk (see also photo 1), and there is significant distance between her truck and the solid yellow line in photo 3.

[152] The defendant ultimately agreed in cross-examination that with her truck positioned as in photo 3, a car could pass it without leaving the eastbound lane.

2. Did other cars pass the defendant on the left?

[153] Initially, the defendant's evidence was that she did not recall or did not remember whether other vehicles passed her on the left just prior to the Collision. Later in cross-examination the following transpired:

> Q: I'm going to suggest to you that just before this collision happened a dark SUV vehicle passed you on your left. Is that correct?
>
> A: Just before?
>
> Q: Correct. Just before this collision happened another dark SUV passed you on your left?
>
> A: No. Not correct.
>
> Q: You told me earlier that you don't remember if another SUV passed you on your left.
>
> A: I'm telling you it's not correct then.
>
> Q: But earlier you said that you can't remember.
>
> A: Ok, I can't remember. It's still not correct.

[154] Counsel's reference to "another SUV" was perhaps confusing.

[155] Regardless, the defendant's last responses above compromise her evidence. At first blush, one might call these careless or frustrated answers, but in my view, there is a motivation underlying those answers.

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[156] Plaintiff's counsel was challenging the defendant's new and clear assertion that an SUV did not pass her just before the Collision. Confronted by her earlier testimony that she did not remember if an SUV passed just her prior to the Collision, the defendant nonetheless insisted twice more that it did not.

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[157] The defendant wanted it to be incorrect that an SUV passed her just prior to the Collision. She was motivated to provide that testimony even though she did not remember. Such persistence in those circumstances is not a hallmark of a credible and reliable witness.

[158] The defendant went on to deny suggestions that she was waiting for the dark SUV to pass before commencing her turn and that the dark SUV was blocking her view of the plaintiff's vehicle.

3. Was the defendant's truck stopped or moving just prior to the Collision?

[159] The defendant gave different evidence at different points about whether her truck was fully stopped as she waited to turn left, or was still partially moving. At the conclusion of her direct examination, her evidence was clear that she had not stopped, and started to execute a left turn after going "dead slow" while watching for oncoming westbound traffic. Her rough and somewhat confusing estimate of "dead slow" was 10-15 kilometres per hour.

[160] However, by the conclusion of cross-examination, her evidence was just as clear that she had stopped for some period of time (as much as 10 or 15 seconds). Moreover, she stated that during that time, she was doing various checks, including checking her rear view mirror, her left side view mirror, and doing a left shoulder check. It was also during this period of time that she was allegedly signaling the left turn.

[161] There is a stark, irreconcilable difference between continuing to move forward at approximately 10-15 kilometres per hour then starting to make a left turn, and,

conversely, fully stopping for as much as 10-15 seconds, performing various checks, and then starting to make that left turn.

4. Position of the plaintiff's car post-Collision

[162] The plaintiff testified that the impact from the Collision pushed the Mazda she was driving partially into the oncoming westbound lane. She testified that after the Collision, the middle and rear portions of the Mazda were still partly in the eastbound lane.

[163] In Exhibit 2, photo 2, the road line looks to be white, not yellow, particularly when contrasted with photo 3, also taken by the plaintiff. Photo 3 shows two road lines, one white and one yellow.

[164] The back of the plaintiff's car is not visible in photo 2, nor is the yellow line. The middle of her vehicle is visible, and it is near the broken white line. Accordingly, I find the plaintiff is incorrect that the middle portion of her vehicle was in the eastbound lane after the Collision. However, because I cannot see either the back of her car or the solid yellow line, I cannot reliably determine based on this photo whether or not the back end of her vehicle also remained in the eastbound lane.

[165] This is a minor disparity based on an interpretation of a photo. However, as I understand it, the defendant does not focus on that disparity, but rather contends that the defendant's vehicle, if stopped before the turn, must have been at a low speed when it hit the plaintiff's vehicle. As such, the defendant says the force of her vehicle could not have been sufficient to push the plaintiff's vehicle to the resting point shown in the photo unless the plaintiff was at least partially over the yellow line at impact.

[166] I have no evidence about how far the plaintiff's vehicle might be expected to travel after the defendant's larger truck hit it from the side. Absent such evidence, the resting place of the plaintiff's vehicle in relation to the solid yellow line does little, if anything, to inform where the point of impact was in relation to the yellow line.

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5. Defendant’s assertion she did not discuss the Collision with her husband

[167] The defendant testified that she did not speak to her husband about what happened in the Collision. While I accept that the defendant has spent a limited amount of time thinking about the accident over the years, I find it difficult to believe that she never discussed it with her spouse, particularly since he was with her at the time, the two of them dealt with the police, and he accompanied her to court for her, and potentially his, testimony.

C. Findings of fact regarding the Collision

[168] During the trial, I heard submissions on whether I should draw an adverse inference against the defendant that, had her husband testified, he would not have supported her evidence. He was a passenger in the defendant’s truck and was physically present at the courthouse during the trial. Given my adverse credibility findings with respect to the defendant, I do not find it necessary to consider whether I should draw an adverse inference against the defendant as a result of her failure to call her husband as a witness.

[169] I make the following findings about the Collision after considering all the evidence:

a) The plaintiff was driving eastbound on Mount Seymour Parkway. She was following an SUV.

b) The defendant was in front of the plaintiff. She had stopped her truck on the right side of the eastbound roadway in the vicinity of the driveway of the residence for rent on the opposite side of the road. I accept the plaintiff’s evidence that the defendant’s right wheels were to some extent on the curb/sidewalk.

c) With the defendant’s truck stopped in that position, the truck only needed to be slightly on the curb/sidewalk (similar to how it was parked after the

Collision, as shown in Exhibit 2, photos 1 and 3) to permit other vehicles to pass the truck without leaving the eastbound lane.

d) I find that there was room for the plaintiff to pass the stopped defendant, and that is what the plaintiff was doing when the defendant, likely without signalling and certainly without having conducted the appropriate checks, suddenly attempted to make a U-turn or turn left from her position on the right side of the roadway, and immediately hit the plaintiff's vehicle which by then was right next to the defendant's.

e) The left side and left bumper of the defendant's truck struck the plaintiff's Mazda on the passenger side, pushing it into the oncoming lane of traffic. The defendant then reversed, scraping the plaintiff's vehicle again on the passenger side.

f) Soon after the Collision, the defendant pulled her truck over to the side of the eastbound roadway, again parking with the truck's right wheels slightly on the curb/sidewalk.

g) After exiting the truck, the defendant approached the plaintiff and made comments to the effect of: she knew what she did, was sorry, was doing a U-turn, was in a hurry, and did not see the plaintiff. I accept those admissions are true.

h) When the plaintiff approached a person down the road to ask if they had seen anything, the defendant came up to the plaintiff and yelled at her that she (the defendant) had already admitted what she did and "I didn't see you". I accept that the defendant said that.

i) Before the police arrived, the defendant called someone using her cell phone, and the plaintiff overheard her telling someone what had happened, and saying words to the effect of: "OK, I shouldn't say that, what should I say?" Again, I accept the defendant said this.

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D. Liability analysis

[170] Having found that the defendant, just prior to the Collision, was in a stopped position on the right shoulder of the road, and suddenly attempted to make a U-turn or turn left from the shoulder, I agree with the plaintiff that a few sections of the *MVA* are potentially engaged:

> **Careless driving prohibited**
>
> **144** (1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
>
> …
>
> **Turning left other than at intersection**
>
> **166** A driver of a vehicle must not turn the vehicle to the left from a highway at a place other than an intersection unless
>
> (a) the driver causes the vehicle to approach the place on the portion of the right hand side of the roadway that is nearest the marked centre line, or if there is no marked centre line, then as far as practicable in the portion of the right half of the roadway that is nearest the centre line,
>
> (b) the vehicle is in the position on the highway required by paragraph (a), and
>
> (c) the driver has ascertained that the movement can be made in safety, having regard to the nature, condition and use of the highway and the traffic that actually is at the time or might reasonably be expected to be on the highway.
>
> …
>
> **Reverse turn**
>
> **168** Except as provided by the bylaws of a municipality or the laws of a treaty first nation, the Nisg̱a'a Nation or a Nisg̱a'a Village, a driver must not turn a vehicle so as to proceed in the opposite direction
>
> (a) unless the driver can do so without interfering with other traffic, or,
>
> (b) when the driver is driving
>
> (i) on a curve,
>
> (ii) on an approach to or near the crest of a grade where the vehicle cannot be seen by the driver of another vehicle approaching from either direction within 150 m,
>
> (iii) at a place where a sign prohibits making a U-turn,

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(iv) at an intersection where a traffic control signal has been erected, or

(v) in a business district, except at an intersection where no traffic control signal has been erected.

…

Starting vehicle

169 A person must not move a vehicle that is stopped, standing or parked unless the movement can be made with reasonable safety and the person first gives the appropriate signal under section 171 or 172.

[171] Whether or not the defendant had her left turn signal on, and regardless of whether she intended to do a U-turn or a left turn as she pulled out from the shoulder where she was stopped, her return into the roadway had to be made reasonably safely. The resultant immediate impact with the plaintiff's vehicle speaks for itself.

[172] The left shoulder, side view mirror and rear view mirror checks which the defendant described making during her testimony make perfect sense if the defendant's truck was stopped on the shoulder as described by the plaintiff. The defendant's evidence about when she completed those checks varied. If she did make them, it is clear that her checks were deficient: the defendant turned her truck and immediately hit the plaintiff's vehicle. If she did not make them, or did not make them in a timely way in relation to commencing her turn, the legal impact is the same.

[173] Justice Morellato stated in *Prossegger*:

[47] I have considered the legislation and common law advanced by the parties as well as their respective submissions. I find, on a balance of probabilities, that Mr. Shukur caused the Accident; that is, after being parked on the curb, he moved his Truck to the left into the eastbound flow of traffic, without checking his mirror and without signalling, and then collided into Ms. Prossegger's car.

[174] Even if the defendant was signalling, her turn was not made with reasonable safety (s. 169). If it was a reverse turn, it was not made without interfering with other traffic (s. 168). One way or the other, it was made without due care and attention (s. 144).

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[175] I appreciate that violations of the *MVA* are not determinative of negligence. Again, I note the comments of Morellato J. in *Prossegger*:

> [48] Drivers must comply with the *Act*. While not determinative, not complying with the *Act* may be a significant factor when assessing fault in a motor vehicle accident: *Uy v. Dhillon*, 2019 BCSC 1136 at para. 11. In this regard, s. 169 and s. 144(1) of the *Act* are instructive and inform my analysis.
> …

[176] I have considered the legislation and the common law. On the evidence before me, I am satisfied that the defendant owed a duty of care to the plaintiff. I find that her actions did not meet the requirements of the *MVA*, nor did she meet the requisite common law standard of care.

[177] The Collision was foreseeable and avoidable. Pulling out to the left from a stopped position and into a lane of travel without checking for oncoming traffic falls short of the requisite common law standard of care and is contrary to the *MVA*. Making the same maneuver after checking so inadequately that one does not see oncoming traffic leads to the same result. The defendant's negligent actions caused the Collision.

[178] I find the defendant is liable for the Collision.

E. Contributory negligence/apportionment of liability

[179] The provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333 include:

> **Apportionment of liability for damages**
>
> **1**(1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
>
> (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.
>
> …
>
> **Liability and right of contribution**
>
> **4**(1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

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(2) Except as provided in section 5 if 2 or more persons are found at fault

(a) they are jointly and severally liable to the person suffering the damage or loss, and

(b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

…

Further application

8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

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[180] Considering the evidence as a whole, I find that the plaintiff was not at fault for the Collision to any degree.

[181] There are a number of cases in which the Court has confirmed that drivers are entitled to expect other drivers to obey the rules of the road. They are not required to anticipate another driver's negligent maneuver: *Prossegger* at para. 59-61.

[182] The plaintiff was not required to anticipate the defendant's careless and negligent re-entry from a stopped position into the roadway. The defendant's truck struck the plaintiff's car which was immediately to the left of the defendant's vehicle. The plaintiff had no ability to evade the Collision in these circumstances, and did not fail to take reasonable care for her own safety.

[183] Having found the defendant to be solely liable for the Collision, I need not address the defendant's submissions on apportionment of liability.

X. CAUSATION

A. Relevant legal principles

[184] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at

paras. 15, 17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9. Causation need not be determined with scientific precision: *Athey* at para. 16; *Zwinge v. Neylan*, 2017 BCSC 1861 at para. 44.

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[185] The primary test for causation asks the following question: but for the defendant's negligence, would the plaintiff have suffered the injury? This "but for" test recognizes that compensation for negligent conduct should only be made where there is a "substantial connection" between the injury and the defendant's conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.

[186] Where a defendant's conduct is found to be a contributing cause of an injury, the defendant is liable for the plaintiff's injury even if the injury is unexpectedly severe owing to a pre-existing condition: *Athey* at para. 34. This is known as the "thin skull" rule.

[187] The "thin skull rule" may be contrasted with the "crumbling skull" rule, which affects the assessment of damages and is distinct from the causation (the source of the loss). Under the "crumbling skull" rule, a defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway: *Athey* at paras. 32–35; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

B. Positions of the parties on causation

[188] The defendant concedes that the plaintiff suffered injuries due to the Collision. The defendant characterizes those as mild to moderate soft tissue injuries, or WAD II STI, based in part on the report of Dr. Chen (Exhibit 8, page 9), as well as Dr. Chen confirming in cross-examination that the plaintiff's scale rating was 2 out of 4, 4 being the most serious. The mild to moderate range aligns with the case authorities cited in the defendant's closing.

[189] However, the defendant disputes causation of what she characterizes as the plaintiff's shoulder injury. In particular, as summarized in the outline of her closing submissions, she says it is "[a]s likely as not" that tendinopathy was "embedded in

the plaintiff's personal health" regardless of the Collision. I understand the defendant to be challenging whether the plaintiff has established that the Collision caused, or materially contributed to, her shoulder injury and symptoms.

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[190] The plaintiff's position is that there is no evidence that she had any shoulder issues or shoulder pain prior to the Collision. She submits that there is no support in the evidence for the defendant's suggestion that her shoulder issues were not caused by the Collision.

C. Analysis

[191] I am satisfied, based on all of the evidence, that the Collision was the sole cause of the plaintiff's injuries including her shoulder injuries.

[192] I accept the plaintiff's evidence that:

a) She had no history of left shoulder pain or problems since becoming a hair dresser in 2004 to the date of the accident (a 14-year period);

b) She experienced immediate pain in her left shoulder from the seatbelt at the scene of the accident;

c) She noticed a decline in the function of her shoulder in the weeks following the accident;

d) She started physiotherapy a few days after the accident for her shoulder problems; and

e) She started taking Advil and Tylenol for her shoulder pain after the accident.

[193] The plaintiff's evidence that she had no pre-existing shoulder symptoms is consistent with the evidence given by the lay witnesses called by the plaintiff, none of whom described the plaintiff having any physical limitations or restrictions prior to the Collision. It is also consistent with what the plaintiff reported to Dr. Chen, who

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states at page 10 of her report that despite the repetitive nature of the plaintiff's work, she did not have shoulder pain prior to the Collision.

[194] No clinical record put to the plaintiff in cross-examination mentions any shoulder pain pre-Collision.

[195] I have significant concerns about the opinion evidence given by Dr. Connell. However, even if I did not have such concerns about his evidence, I would not view his generic opinion (which boils down to "hairdressers have a high likelihood of shoulder symptoms") as being helpful or relevant to the factual question of what caused the plaintiff's specific injuries in this case.

XI. CRUMBLING SKULL

A. Relevant legal principles

[196] At para. 35 of *Athey*, the Supreme Court of Canada articulated the "crumbling skull" rule as follows:

> The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway….
>
> [Emphasis in original.]

[197] The "crumbling skull" rule may be addressed in a number of ways, including as a percentage reduction on damages awards. Such a reduction reflects the likelihood that a pre-existing injury or condition would result in similar losses: *Booth v. Gartner*, 2010 BCSC 471 at paras. 28–31; *Beardwood v. Sheppard*, 2016 BCSC 100 at paras. 105, 134.

B. Positions of the parties on the "crumbling skull" rule

[198] The defendant's position is that even if the plaintiff can show that the Collision caused or materially contributed to her shoulder injury (and I have found that it did), the assessment of her damages must account for the real and substantial possibility

that she would have developed shoulder symptoms/pain in any event because of her pre-disposition to rotator cuff tendinopathy.

[199] In advancing this “crumbling skull” argument, the defendant is relying heavily on the report of Dr. Connell.

[200] The plaintiff says that the defendant has failed to meet the burden of proving there is a measurable risk that the plaintiff’s pre-existing condition (an alleged pre-disposition to shoulder rotator cuff tendinopathy, which the plaintiff denies) would have detrimentally affected her in the future. Again, the plaintiff points to her unchallenged evidence that she had no history of shoulder pain or problems pre-accident, and that post-accident, she immediately experienced a decline in her shoulder function and shoulder pain.

[201] The plaintiff submits that the opinion evidence of Dr. Connell does not establish that she is a “crumbling skull” plaintiff. While Dr. Connell’s report suggests that a person employed in hairdressing has a high likelihood of developing shoulder complaints, it does not say:

a) That the plaintiff would likely have developed shoulder complaints irrespective of the Collision;

b) What type of shoulder complaints, if any, the plaintiff could be expected to develop had the Collision not occurred; or

c) Whether, if at all, any such shoulder complaints would be disabling.

[202] The plaintiff also submits that Dr. Connell’s opinion about the prevalence of shoulder complaints in hairdressers was undermined by the inherent limitations of the journal article on which he relied.

C. Analysis

[203] I am not persuaded by the defendant’s “crumbling skull” argument.

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[204] Dr. Connell's opinion, as stated in his report, is that there is a "very high likelihood that someone in the hairdressing industry will develop shoulder symptoms". His opinion in this regard is based entirely on one 14-page journal article that he reviewed, which reviewed 44 studies exploring the prevalence of musculoskeletal disease in hairdressers. None of the studies is in evidence.

[205] I find Dr. Connell's report to be of limited value for a number of reasons.

[206] First, Dr. Connell agreed in cross-examination that he did not review the plaintiff's clinical records, nor did he meet with her or physically examine her. He further agreed in cross-examination that those last three steps would be crucially important for him to form conclusions as to diagnosis, causation and treatment. Dr. Connell acknowledged that he only reviewed the plaintiff's MRI report and the actual images, as well as Dr. Chen's report. I agree with plaintiff's counsel that courts have commented unfavourably on reports by medical experts who did not examine the plaintiff in other cases: see *Ehirchiou v. Esguerra*, 2021 BCSC 39 at paras. 68-71 and the cases cited therein.

[207] Second, the journal article's heading "Outcomes" makes it clear that "shoulder complaints" or "shoulder symptoms" are very broad terms which admit a wide array of musculoskeletal disorders, including tingling. The broad definition of "shoulder complaints" or "shoulder symptoms" in the studies reduces their value as a basis for the formation of an expert opinion relating to this plaintiff's predisposition to disabling future shoulder symptoms and the likelihood of such future symptoms (in particular tendinopathy).

[208] Third, when pressed in cross-examination, Dr. Connell readily acknowledged the limits of his own expert opinion. When asked how many of the 44 studies reviewed in the journal article related to: hairdressers; the ages of those hairdressers with "shoulder symptoms"; or whether those with shoulder symptoms continued to work as hairdressers, Dr. Connell replied that one would need to look at each study for those details. He could not and did not provide that evidence, and those details are not otherwise in evidence. When asked by the plaintiff's counsel about which

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studies in the journal article identified tendinitis in the rotator cuff complaints in particular, as opposed to generic shoulder pain, Dr. Connell said one would have to review each study. He had not done that.

[209] In summary, I have no evidence of the percentage, whatever it may be, or the number, if any, of hairdressers who were the subjects of these studies that had shoulder pain as a result of tendinitis in their rotator cuff.

[210] In my view, Dr. Chen's report provides a more reliable assessment of the plaintiff's shoulder issues at page 10:

> Ms. Vujevic's left shoulder pain appears to be secondary to a mix of shoulder girdle myofascial pain in her trapezius and pectoralis, as well as tendinopathy of her supraspinatus rotator cuff tendon resulting in impingement-related symptoms. Her MRI completed in December 2019, demonstrated mild supraspinatus tendinopathy. Despite the repetitive nature of her work, she did not have prior shoulder pain with this only beginning after her motor vehicle accident on February 8, 2018. Given the type of work she completes which is relatively repetitive, it is possible that she would eventually have developed rotator cuff tendinopathy. However, she was not having symptoms at the time of her motor vehicle accident and only developed this afterwards. Therefore, it is more likely than not, that her left shoulder impingement symptoms developed as a result of her motor vehicle accident on February 8, 2018.
>
> [Emphasis added.]

[211] While Dr. Chen says in her report that "it is possible" that the plaintiff would eventually develop rotator cuff tendinopathy, in her testimony, Dr. Chen confirmed her opinion that it was only possible, and that not all hairdressers develop tendinopathy.

[212] I agree with the plaintiff that the unchallenged evidence in this case is that the plaintiff had no prior shoulder symptoms. No clinical record put to the plaintiff in cross-examination mentions any shoulder pain pre-Collision. I accept that her shoulder symptoms arose after and due to the Collision.

[213] On the evidence before me, it is mere speculation, and not a real and substantial possibility, that the plaintiff would have developed tendinopathy in her left rotator cuff. I find that there is no pre-existing condition, and the defendant must

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return the plaintiff to the position she would have been in but for the defendant's negligence. The defendant is fully liable for what she characterizes as the plaintiff's shoulder injuries.

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XII. DAMAGES

A. Non-pecuniary damages

[214] Non-pecuniary damages are awarded to compensate the plaintiff, as best as money can, for pain, suffering, loss of enjoyment of life, and loss of amenities caused by the defendant. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and for those the plaintiff will suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.

[215] Non-pecuniary damages are assessed based on a non-exhaustive list of factors set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34. The factors, discussed at para. 46 of *Stapley*, include the following:

a) age of the plaintiff;

b) nature of the injury;

c) severity and duration of pain;

d) disability;

e) emotional suffering;

f) loss or impairment of life;

g) impairment of family, marital and social relationships;

h) impairment of physical and mental abilities;

i) loss of lifestyle; and

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

[216] Determining the appropriate range for an award of non-pecuniary general damages "entails ascertaining the upper and lower range for damage awards in the same class of case": *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 at para. 19 (emphasis in original). As no two cases are alike, defining the class is a generalized exercise that takes place at a high level of abstraction: *Callow* at para. 19.

[217] The plaintiff submits that a fair award of non-pecuniary damages for a plaintiff in her circumstances would be $150,000. She relies on a number of decisions to support that conclusion, including *Leach v. Insurance Corporation of British Columbia*, 2022 BCSC 557; *Barre v. Dupasquier*, 2020 BCSC 524; *Firman v. Asadi*, 2019 BCSC 270; and *Basile v. Doyle*, 2022 BCSC 819.

[218] The defendant has referred the Court to the following decisions, in which plaintiffs were awarded non-pecuniary damages ranging from $40,000 to $85,000: *Sehra v. Randhawa*, 2020 BCSC 752; *Szostakiwskyj v, Launay*, 2020 BCSC 653; *Griffioen v. Arnold*, 2017 BCSC 490; *Nagra v. Stapleton*, 2017 BCSC 2225; *Parker v. Martin*, 2017 BCSC 446; *Dhaliwal v. Randhawa*, 2016 BCSC 2005; and *Pavan v. Guolo*, 2016 BCSC 324.

[219] In my view, the cases provided by counsel for the plaintiff are more appropriate to the circumstances of this case than the cases provided by the defendant. The cases provided by the defendant were less helpful because they involved plaintiffs whose professional ambitions, hobbies, and overall enjoyment of life were less significantly diminished by their injuries, and were more consistent with the defendant's position that the Collision caused only the "whiplash" injuries.

[220] I accept that the plaintiff's injuries and their consequences have had a substantial effect on her life.

[221] Though persevering with her work, clients and colleagues have noticed the difficulties she has had. The evidence of several witnesses, including the plaintiff's mother, was summarized earlier.

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[222] The plaintiff's current employer, Mr. Federico, who did not know the plaintiff prior to the Collision, testified about seeing the plaintiff struggling at work. He reported seeing her in the back room of the salon hunched over with a headache or needing to take a break when doing foils, which require her arms and hands to be up at shoulder level. He says her colour appointments take about an hour longer than other stylists and that she cannot do cuts between other work. He said she tries to make that up by working longer hours. He enjoys working with her, and despite all this, says she is one of their top stylists. He did not know initially about her injuries, but now realizes how much the plaintiff hides her problems and "sucks it up". Despite her struggles, she does not complain and is always positive, with a "happy face". Mr. Federico was not cross-examined.

[223] Ms. Woo, another former colleague, worked with the plaintiff at Ignite before the Collision. She said the plaintiff was talented and was hired because she had the high standards Ignite sought, all the skills needed, and had no difficulty doing the work. These observations were not seriously challenged in cross-examination.

[224] All of these observations, and those of the witnesses referred to earlier, harmonize with the plaintiff's evidence.

[225] Dr. Chen's overall diagnosis is set out above. It aligns with the plaintiff's and other evidence set out earlier.

[226] Dr. Chen's prognosis, at page 9 of her report, is:

> Ms. Vujevic's accident was nearly 4 years ago and she has continued to have persistent headaches, and pain in her neck, shoulders and upper back. Despite her pain, she has continued to work but is unsure if she will be able to continue in this profession into retirement. She has had physiotherapy treatment that appears to be mainly passive type treatments. Her previous active rehabilitation did not appear to the most effective treatment as it was focused more on her lower extremities and core, was inconsistent, and she has not been able to attend further treatments. Therefore, with more consistent physiotherapy, focused active rehabilitation on her areas of pain and regular progression and guidance, along with possible interventions and medications, I am optimistic that she may have improvement in her symptoms. However, given the time frame since her car accident, her persistent symptoms despite returning to work and some of her regular activities, and some central sensitization evidence, it is more likely that she

> will continue to have persistent symptoms with intermittent exacerbations and flares moving forward.

[227] Dr. Connell agrees with Dr. Chen's comments regarding treatment. His view is that the plaintiff's long-term prognosis cannot be determined until the types of treatment indicated by Dr. Chen are undertaken.

[228] The whole of the evidence proves that the injuries to the plaintiff have significantly impacted the quality of her life. Previously, she was a physically active, social person, who worked hard to learn and advance as a hairstylist. She was valued by her clients and respected by her colleagues. Now, she struggles with her work as a hairstylist. It is not clear whether she is going to be able to continue working in that profession. She is no longer able to engage in the challenging fitness activities she used to pursue. She is less social than before.

[229] The long-term prognosis for the plaintiff is guardedly optimistic.

[230] The plaintiff in *Leach* was a 40-year-old hair stylist who, at the time of her accident, had plans to become a chair renter and work independently. Her injuries, which arose from a motor vehicle collision, were somewhat different than Ms. Vujevic's (involving more psychological components), and in my view, more serious: they included a fractured foot, alcohol use relapse, anxiety, depression, PTSD, and a loss of self-worth and self-esteem. Ms. Leach also suffered from mild tinnitus, headaches, sensitivity to light, smell, and loud noise, and ongoing pain in her neck, shoulder and low back. Her non-pecuniary damages were assessed at $180,000. They were not awarded since she was found fully liable for the accident.

[231] The plaintiff in *Barre* was a 33-year-old hair stylist. Unlike Ms. Vujevic, Ms. Barre was not an avid exerciser prior to her accident; however, she did enjoy walks with her husband and dog and had an active social life. As the result of her accident, Ms. Barre suffered injury to her left neck and upper back/shoulder. In my view, Ms. Barre's injuries were somewhat less serious and less limiting than those suffered by Ms. Vujevic, and her prognosis was more positive. She was awarded $90,000 in non-pecuniary damages.

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[232] The plaintiff in *Firman* was a 40-year-old barber and fitness instructor. She suffered injuries as a result of a broadside vehicle collision. Her injuries were more extensive and more serious than Ms. Vujevic's—they included: left hip injury (including torn labrum, requiring surgery); thoracic outlet syndrome (requiring surgery, and with further surgery recommended); whiplash injuries (myofascial pain syndrome, mechanical spine pain) and resultant chronic pain, particularly in her upper back, left shoulder, and arm; left shoulder tendinopathy; chronic headaches; and mood or psychological/psychiatric disorders, including depression, somatic symptom disorder, and anxiety.

[233] The trial judge found Ms. Firman's prognosis for substantial improvement was poor (worse than Ms. Vujevic's, in my view). Her pre-accident condition was not perfect (she had symptomatic spinal degeneration and headaches). Her non-pecuniary damages were assessed in the amount of $170,000.

[234] I found the *Basile* decision of Mr. Justice Crossin particularly helpful in assessing the plaintiff's damages. The plaintiff in *Basile* was a 37-year-old hair stylist. Ms. Basile's circumstances at the time of her accident (other than the fact that she had a young child and was pregnant with her second) were strikingly similar to those of Ms. Vujevic. Ms. Basile attained a hairdressing diploma in her early 20s and spent years training and gaining proficiency in that field. As I have found with Ms. Vujevic, Ms. Basile did not suffer from any physical issues that limited her hairdressing work prior to the accident.

[235] Like Ms. Vujevic, Ms. Basile was very fit at the time at the time of her accident and enjoyed active hobbies. She had a treadmill and she would run at least five days a week, around five to six kilometres a day. She also liked entertaining and going out to movies and dinners. She enjoyed gardening, painting, and baking.

[236] Ms. Basile's injuries, and the impact of her injuries on her work and lifestyle post-accident, were similar to Ms. Vujevic's experience. Post-accident, she suffered from headaches, continuing pain in her shoulders and neck, and difficulty sleeping. Many of her usual activities seemed to aggravate her symptoms, including the

physical demands of hairdressing. While she eventually began seeing hairstyling clients again after her accident, she found it difficult to push through the pain. While Ms. Basile's childcare obligations also impacted her ability to work, her evidence was that but for her injuries, she would have arranged more care for her children and worked significantly longer hours as a stylist.

[237] Like Ms. Vujevic, Ms. Basile had limited education outside her chosen field, and no alternate career prospects that would not require a significant amount of education and re-training. Mr. Justice Crossin found that Ms. Basile's efforts to continue working in her field despite her limitations demonstrated her stoicism rather than her robust capabilities after the accident—I would say the same for Ms. Vujevic.

[238] Mr. Justice Crossin found that while the evidence indicated that Ms. Basile could expect some improvement in her injuries over time (particularly if she adhered to the recommended treatment), the extent of that improvement was "somewhat guarded" as at the time of trial. As noted above, the evidence in Ms. Vujevic's case suggests a similar prognosis. Ms. Basile was awarded $135,000 in non-pecuniary damages. (I note Ms. Basile was separately awarded $11,940 for regular and seasonal housecleaning services as future care costs.)

[239] For the reasons discussed with regard to "crumbling skull", in my view, the evidence does not support any reduction on the basis of a negative contingency in relation to the plaintiff's shoulder injuries, most notably the speculation that she would have developed tendinopathy in her left rotator cuff in any event.

[240] Considering the factors noted above, including Ms. Vujevic's age, the nature and severity of her injuries, the duration of her physical and psychological complaints, and the impact of her injuries on her recreational and fitness activities, social life, and career, I find the appropriate award of non-pecuniary damages is $150,000. As will be further explained below, I have taken Ms. Vujevic's diminished housekeeping capacity into account in assessing her non-pecuniary damages.

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B. Loss of housekeeping capacity

[241] The plaintiff seeks an award of $25,000 for loss of housekeeping capacity in addition to an award for non-pecuniary damages. In the alternative, the plaintiff submits that should I find an award for housekeeping capacity is best subsumed into an award for non-pecuniary damages, her award for non-pecuniary damages should be increased by this amount.

[242] As explained by the Court of Appeal in *Kim v. Lin*, 2018 BCCA 77 at para. 33, whether a loss of housekeeping capacity should be considered as part of a plaintiff's non-pecuniary loss or as a segregated head of damages is a matter of discretion, having regard to the nature of the loss and how it may be most fairly compensated.

[243] In determining whether a loss of housekeeping capacity should be assessed as pecuniary or non-pecuniary loss, the guiding principle is as follows: where the plaintiff is capable of performing the housekeeping tasks but with difficulty, or decides they do not need to be done, a non-pecuniary award is usually appropriate; where the plaintiff must have others perform or assist in the housekeeping tasks, through a paid service provider or gratuitously by friends or family members, a pecuniary award may be appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at paras. 100-101, citing *Liu v. Bains*, 2016 BCCA 374 at paras. 25-26.

[244] The plaintiff testified that she now struggles with housekeeping tasks that she used to be able to perform. Shortly after the accident, the plaintiff moved in with her mother. My understanding of the plaintiff's evidence and her mother's evidence is that since the plaintiff moved in, her mother has been performing more household work than the plaintiff, particularly the more physically demanding tasks such as vacuuming and scrubbing the bathtub. However, I find the plaintiff has continued to perform some housekeeping tasks albeit with more difficulty than before. She testified that she becomes fatigued more easily, and that bending over is more difficult for her now. It takes the plaintiff longer to do certain tasks now as she has to break them into components rather than performing them all at once.

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[245] While the evidence on this point is somewhat mixed, I find that the plaintiff is still capable of performing most housekeeping tasks but with considerably more difficulty than before. Therefore, my preference is to address the impacts of the accident and her related injuries on her housekeeping capacity through a global non-pecuniary damages award, which I have done above.

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C. Past loss of earning capacity

1. Relevant legal principles

[246] An award of damages for loss of earning capacity, whether in the past or the future, compensates for a plaintiff’s pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would, not could, have earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[247] While the plaintiff must prove actual past events on a balance of probabilities, assessing both past and future earning capacity involves consideration of hypothetical events. A hypothetical event will be taken into consideration where it is a real and substantial possibility (a lower threshold than the balance of probabilities standard) and not mere speculation: *Dornan v. Silva*, 2021 BCCA 228 at paras. 63-64, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. The weight to be given to a hypothetical event depends on its relative likelihood: *Athey* at para. 27.

[248] Section 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 states that a plaintiff can only recover the net past wage loss arising from an accident.

[249] I will discuss:

a) What actually happened with the plaintiff’s earnings between the Collision and date of trial; and

b) What would have happened with the plaintiff’s earnings during the same period had the Collision not occurred.

2. The plaintiff's pre-trial with-Collision earnings

[250] Below I will set out my findings regarding the plaintiff's actual earnings between the date of the Collision and the date of trial. I note that much of the plaintiff's evidence with respect to her actual earnings between the date of the Collision and the date of trial was not seriously challenged by the defendant. The defendant primarily challenges the plaintiff's comparison of herself to the other hairstylists who testified.

a) February 8, 2018 to March 2018

[251] The Collision occurred on February 8, 2018. At that time, the plaintiff was employed as a hair stylist at Ignite, where she had worked since mid-2014. She was paid $18/hour or commission (50% on hair cuts and 45% on other services), if the commission exceeded the hourly rate. Before the Collision, the plaintiff worked at least 40 hours a week and occasionally took on an extra shift or two per month.

[252] In the two years prior to the Collision, the plaintiff's net income (as reported for tax purposes) was $29,523 in 2016 and $37,318 in 2017, plus tips, which the plaintiff claimed were largely unreported.

[253] After the Collision, the plaintiff took a week off of work. When she returned to Ignite, she was given notice by the owner that that the salon would be closing permanently at the end of the following month (March 2018). She testified that while she would have preferred to take more time off to recover, she did not feel she could do so—she needed to reach out to her clients about the closure of the salon, and plan her next move. She also felt pressure to continue serving her existing clients so as not to lose their business.

[254] As a result of these concerns, the plaintiff continued to work at Ignite from mid-February 2018 until the salon closed in March 2018. Her evidence was that she worked a bit less than usual during this period. Because her injuries remained painful and were exacerbated by her hairdressing work, she avoided staying at the salon longer than she needed to in order to meet the needs of her existing clients.

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[255] I do not understand the plaintiff to be seeking compensation for loss of income earning capacity in respect of this brief period.

b) April 1, 2018 to March 15, 2020

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[256] In April 2018, following the closure of Ignite, the plaintiff moved to Brush Salon (“Brush”). When she began working at Brush, she worked Wednesdays to Saturdays, 10 to 12 hours a day. As a new employee, she was required to complete a probationary period.

[257] The plaintiff testified that after moving to Brush, she was reluctant to immediately seek reduced hours or to bring up her injuries. Her hope was that once she had passed probation, and proven herself as a stylist, she would be in a better position to request a less demanding schedule.

[258] With respect to the pay structure at Brush, the plaintiff recalled earning commission of 45% for all services or minimum wage if her earnings through commission did not exceed minimum wage.

[259] Soon after passing her probationary period at Brush (after about three months), the plaintiff reduced her hours to between about 32 and 36 hours a week, still working four days a week. The plaintiff testified that while working at Brush, she was often in pain (due to how she had to constantly raise both arms in the air), and completed tasks much more slowly than before. For example, while before the accident, it took her two to two and half hours to put highlights in a client’s hair, after the accident, it took her about one or one and half hours longer because her injuries slowed her down. She could no longer help with certain tasks around the salon (like lifting boxes to take an inventory of supplies, or getting supplies out of the salon’s storage area).

[260] The plaintiff’s evidence about the impact of her injuries on her ability to work was consistent with the testimony of other witnesses such as Ms. Stevanovic and Ms. Lojpur, who were friends and clients of the plaintiff before and after the accident:

a) Ms. Stevanovic testified that before the plaintiff's accident, the plaintiff had no difficulty performing any hair styling tasks. When she went to the plaintiff for services, she would get a head massage, wash, colour, cut and style. After the accident, she observed the plaintiff struggling with certain activities. As noted earlier, after the Collision, when the plaintiff cuts and colours her hair, Ms. Stevanovic blow dries her own hair—she had noticed the plaintiff wincing when holding the blow dryer. Ms. Stevanovic no longer asks the plaintiff to curl her hair.

b) As also noted earlier, Ms. Lojpur testified that pre-Collision she was happy with the plaintiff's hair styling services, but since the Collision, the plaintiff takes significantly longer to do her hair: five and half to six hours, instead of three hours, for a cut and colour. Ms. Lojpur only continues seeing the plaintiff because of their close friendship.

[261] The plaintiff's position is that during this period, she earned, on average, $30,000 annually (net income) plus unreported tips of between $5,000 and $10,000.

[262] I accept the plaintiff's evidence that she did not report all her tips on her income tax returns. She said her tips varied, but could not provide a firm number, aside from them being up to $10,000 at Brush. The plaintiff's uncontested evidence was that she claimed tips in the manner that her co-workers did, one of whom estimated $10,000 at a different salon and one as much as $15,000 - $20,000.

[263] The plaintiff has no reliable record, by way of a tax filing or otherwise. She has her estimate from Brush. In the circumstances, I find her tips from 2018 to 2023 were approximately $10,000 per year.

[264] Based on my review of the evidence, I am satisfied that during the period of April 1, 2018 to March 15, 2020, the plaintiff's annual earnings were approximately $30,000 (net) plus tips of $10,000, for a total of $40,000.

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c) March 15, 2020 to June 15, 2020

[265] The plaintiff testified that salons were closed for about three months during the COVID-19 pandemic. She is not advancing a claim for loss of past income for this period of time.

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d) June 15, 2020 to end of 2020

[266] After Brush reopened in mid-June 2020, the plaintiff went back to work. Her employment was terminated in October 2020 following a contractual dispute with her employer.

[267] After she was let go from Brush in October 2020, she took about one and a half to two weeks off (she did not collect EI) then worked at another salon called Pink Lime for a few months. She was unhappy there due to disagreements with the owner about scheduling and pay structure, and decided to look for another position. She left there in January 2021.

[268] Based on my review of the evidence, I am satisfied that during the period of June 15, 2020 to December 31, 2020, the plaintiff's annual earnings were approximately $30,000 (net) plus tips of $10,000, for a total of $40,000.

e) January 2021 to January 2023

[269] After leaving Pink Lime in or about late January 2021, the plaintiff moved to Workshop Salon, where she continues to be employed at the time of trial. She took about a week off between leaving Pink Lime and starting at Workshop (again, she did not collect EI).

[270] The plaintiff testified that since moving to Workshop, she has been working about 32 to 36 hours a week, Wednesday through Saturday. She is not required to be at the salon unless she is expecting a client. Her pay structure at Workshop is 45% commission or hourly, whichever is higher. She stated that while the hourly rate set out in her contract is $18, she is actually paid an hourly rate of $16 when she is not paid based on commission. The owner of Workshop, Mr. Federico, agreed that $16 per hour was the correct rate.

[271] The plaintiff testified that things have been going well at Workshop—she likes her boss and her co-workers. However, prior to and up to the date of trial, her injuries have continued to limit her at work.

[272] The plaintiff's current employer, Mr. Federico, testified that he has witnessed her hunched over in the back room of the salon due to migraine pain. He sees her taking pills and trying to stretch between clients. His evidence was that she takes more and longer breaks than other stylists.

[273] Mr. Federico, who has extensive experience at all levels of the industry and is now a salon owner, was a clear and helpful witness. He estimated that the plaintiff is about 30% less efficient than other stylists, such that she is losing out on about one-third of daily opportunities for work. I will refer to his evidence further in these reasons because I find it credible and reliable in every respect. He was not cross-examined.

[274] Based on my review of the evidence, I am satisfied that during the period of January 2021 when she moved to Workshop and the commencement of the trial in mid-January 2023, the plaintiff's annual earnings were approximately $30,000 (net) plus tips of $10,000, for a total of $40,000.

[275] In summary, I find that the plaintiff actually earned about $30,000 annual net income for the period April 2018 to January 2023, plus $10,000 annually in tips, for an annual income of $40,000. That is approximately $3,300 per month.

[276] April 1, 2018 to January 15, 2023 is 54.5 months (excluding the COVID-19 pandemic lockdown from March 15 to June 15, 2020). $3,300 per month for 54.5 months is approximately $180,000.

[277] I assess the plaintiff's actual earnings for that time period as $180,000.

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3. The plaintiff's pre-trial without Collision earning capacity

[278] In my view, the plaintiff's Collision-related injuries diminished her capacity to work and negatively impacted her earnings due to her reduced efficiency and inability to work long days during the pre-trial period.

[279] This is clear from the evidence of Ms. Stevanovic and Ms. Lojpur, who were both friends and clients of the plaintiff, and who were not challenged in this regard. The same is clear from Mr. Federico's evidence, including, for example, that during gaps when the plaintiff was performing styling services on one client, she could not do haircuts on other clients. He also testified that the plaintiff misses about one-third of the daily opportunities for work.

[280] The more contentious issue is what would have happened with the plaintiff's earnings in the pre-trial period had the Collision not occurred.

[281] The plaintiff testified that she took one week off work after the Collision. After that, the owner of Ignite gave notice that she was closing the business at the end of March 2018.

[282] The plaintiff testified that shortly before the accident, she was exploring the possibility of renting a chair at a salon, rather than continuing to work as an employee earning income on a commission/hourly model. While renting a chair would have required her to pay a monthly chair rental fee (between $1,200 to $2,000), and cover the costs of her own supplies and expenses, it would also have allowed her to keep 100% of the amounts she was charging to clients for services.

[283] The plaintiff contends that but for the accident and the injuries she sustained, she would have become an independent chair renter in or about April 2018 following the closure of Ignite salon. The plaintiff submits that but for the accident, she would have enjoyed a significantly higher income between April 2018 and the date of trial as a chair renter.

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[284] One of the plaintiff's former colleagues at Ignite, Ms. Shulgin, testified that she herself was excited about ceasing to work as an employee at Ignite and renting a chair at Style Lab due to the increased income. She felt she could make a lot more money. She testified that she told the plaintiff and two other colleagues (Ms. Woo and another stylist) words to the effect that "this is great, we can make a bunch of money and work for ourselves". She noted that since the owner of Ignite was not a stylist, they would not be perceived as "stealing" clients.

[285] Ms. Shulgin testified that the plaintiff, who had just been in the Collision, was a bit hesitant and worried. The plaintiff's evidence is that during this time, she was physically injured and under stress. In the end, she did not rent a chair. She moved to Brush salon as an employee.

[286] In contrast, Ms. Shulgin and Ms. Woo took their clientele from Ignite and rented chairs at Style Lab after Ignite closed.

[287] Ms. Shulgin testified that while working independently was more strenuous (both mentally and physically), it was also more lucrative. She estimated that once she became a chair renter at Style Lab, her net income rose to about $70,000 per year, plus about $10,000 tips. She left Style Lab in 2020, and worked at home for several years, recently moving to a new salon. At home, she worked similar hours, but with reduced expenses (including no chair rental), and thus earned more income. At the time of trial, she had recently moved to a salon in Yaletown, where she was again renting a chair, with projected expenses of about $30,000, "yearly earnings" of about $100,000 (I infer gross on all the evidence) and $1,500 per month in tips.

[288] Ms. Woo also began renting a chair at Style Lab soon after the closure of Ignite, and was still working there at the time of trial. Ms. Woo testified that currently, while working about half-time at Style Lab, she earns about $50,000 per year, gross of expenses, plus $10,000 in tips. She estimated the expenses of a full time chair renter are about $20,000 to $30,000, "if you are really busy". Given Ms. Woo's half-time work schedule, I am assuming her expenses are in the $10,000 to $15,000

range. Therefore, my understanding from her evidence as a whole is that she is earning (half-time), as a chair renter at Style Lab, about $35,000 to $40,000 net per year, plus $10,000 in tips.

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[289] The defendant disputes the plaintiff's contention that but for her Collision, she would have followed a similar trajectory as Ms. Shulgin and Ms. Woo and struck out on her own in April 2018 as a chair renter.

[290] The defendant's position is that there is no real and substantial possibility that the plaintiff would have followed this path had the Collision not occurred. The defendant asserts that the plaintiff was an underperformer at work even before the Collision, and was content to be an hourly/commission employee, given that she worked in that model for the 14 years leading up to the Collision.

[291] The defendant characterizes the plaintiff as an underperformer who was unlikely to ever transition to renting a chair and working for herself. In my view, there was ample evidence showing that the plaintiff was a hard-working, focused, talented hair stylist who excelled at her job and took it seriously. The defendant's characterization of the plaintiff's work ethic is also in stark contrast to Mr. Federico's testimony. I reject it.

[292] I accept the plaintiff's evidence that:

a) Up until 2018, she had not ventured out on her own because she did not have the requisite clientele due to moving salons every few years; and

b) Just prior to the Collision, she was actively exploring moving to the chair rental model.

[293] In this case, there is a confluence of two major incidents: the Collision and the injuries to the plaintiff, followed shortly after by notice from the owner that Ignite would close at the end of March 2018. The plaintiff had to make a career decision immediately after suffering injuries from the Collision, and facing a new and uncertain future.

[294] In these unusual circumstances, my view is there is more than a real and substantial possibility that but for the accident, the plaintiff would have started renting a chair at a salon in April 2018 (just like her colleagues Ms. Shulgin and Ms. Woo). I believe that absent the Collision, that course of action was a probability.

[295] It would have been the perfect opportunity for the plaintiff to embark on the path she had been contemplating before the Collision, and the same path her colleagues took, to their financial advantage. The plaintiff had built up her clientele after working for four years at Ignite, and could have taken her clients and started working independently. Her clients could not stay at Ignite; Ignite was closing, and the owner was not a hairstylist. Absent the intervening uncertainty and additional challenge created by the injuries she sustained in the Collision, there would have been an obvious incentive for the plaintiff to follow the path of her colleagues, Ms. Shulgin and Ms. Woo.

[296] Mr. Federico, who owns Workshop, said it took him 5 or 6 years to establish the base clientele needed to rent a chair. The plaintiff had worked close to that amount of time at Ignite—she had been there since 2014 and had a client base. I accept her evidence that she was seriously considering transitioning to renting a chair just before the Collision.

[297] Mr. Federico also noted that the industry is very competitive, especially in downtown Vancouver. In his experience prior to being an owner, he lost 15 to 20% of his clientele when he moved salons, losing 10 to 20% on one occasion when he moved a mere three blocks. In part, this can be due to steps taken by a stylist's former salon to prevent clients from leaving with the stylist, including tactics such as offering incentives to remain at the former salon. The plaintiff was immune from such tactics since Ignite was closing.

[298] I find that, but for the Collision, the plaintiff would likely have seized this unique opportunity. On all the evidence, it is probable that the plaintiff would have struck out on her own in April 2018 as a chair renter, and enjoyed the increased income that Ms. Shulgin predicted. The timing of the Collision scuppered that result.

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[299] However, if the plaintiff did not rent a chair in April 2018, I find she would have moved to another salon as a commission/hourly employee, working full-time and occasional overtime as she did before the Collision. Indeed, that is what she did in moving to Brush (until she completed her probationary period, at which point she reduced her hours). While I view this hypothetical scenario as less likely than the plaintiff becoming a chair renter in April 2018, I believe it is a sufficiently real and substantial possibility that I should take it into account in assessing the plaintiff's past loss of earning capacity.

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[300] I find that there is no real and substantial possibility that, had the Collision not occurred, the plaintiff would have suddenly or later reduced her working hours between the Collision and the trial, as the defendant suggests. Without the limitations created by the Collision-related injuries, I believe that had the plaintiff continued to work as an employee at another salon, she would have done so with no reduced workload or efficiency (similar to how she worked at Ignite before the Collision). I am therefore declining to account for that possibility.

4. Assessing the plaintiff's past loss of earning capacity

[301] The plaintiff seeks an award of $210,000 for past loss of earning capacity. In my view, the plaintiff's assessment is overly optimistic. It is based on her assumption that she would have (with certainty) become a chair renter following the closure of Ignite, and earned as much as her colleagues, Ms. Shulgin and Ms. Woo, during the pre-trial periods at issue: $70,000-80,000 net income, plus tips, from April 1, 2018 to December 31, 2020 (with no claim for the three-month lockdown after March 15, 2020) and $90,000 net income, plus tips, from January 1, 2021 to trial.

[302] In my view, the plaintiff's position fails to account for the possibility that she might have carried on as an hourly employee. It also fails to account for the likelihood that the plaintiff might not have immediately earned as strong an income as Ms. Shulgin and Ms. Woo had she become a chair renter. Until the closure of Ignite, Ms. Shulgin and Ms. Woo (who were then hourly/commission employees like the plaintiff) earned more than the plaintiff.

[303] The defendant submits that any award for past loss of earning capacity should be minimal because the plaintiff was an "underperformer" before and after the Collision. I disagree with the defendant's position which, in my view, is unsupported by the evidence.

[304] Below, I will seek to quantify the plaintiff's past loss of earning capacity, taking into account the two hypothetical past scenarios I have accepted above, and my views as to the relative likelihood of each possibility.

[305] In my view, the best evidence of what the plaintiff would have earned had she become a chair renter following the closure of Ignite is the evidence of Ms. Shulgin and Ms. Woo.

[306] While I am relying on Ms. Shulgin and Ms. Woo's income as chair renters to assess what the plaintiff's earnings would have been had she become a chair renter in April 2018, I remain mindful of the fact that the plaintiff was earning less than Ms. Shulgin and Ms. Woo prior to the closure of Ignite. I do not think the plaintiff earned less than her colleagues during this period because she was an "underperformer" (as asserted by the defendant) or a less skilled stylist, but rather because she was newer to the salon and less established. Ms. Woo had been working at Ignite since 2009, Ms. Shulgin since 2012, and the plaintiff since 2014.

[307] It seems reasonable that the plaintiff would have increased her income by renting a chair at Style Lab, as both Ms. Woo and Ms. Shulgin did, but not immediately to the same total income level as those two, who were earning more than the plaintiff at Ignite, had been at Ignite longer, and likely had stronger client bases. Ms. Shulgin and Ms. Woo's net income at Style Lab, before tips, was in the $70-80,000 range on an annual basis.

[308] I find that had the plaintiff rented a chair at Style Lab starting in April 2018, she would have earned approximately $60,000 net, plus tips of $10,000, during the pre-trial period. This would be $70,000 annually and approximately $5,800 monthly.

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[309] I do not understand the plaintiff to be seeking compensation for the pandemic closure.

[310] Excluding the three-month lockdown, April 1, 2018 to January 15, 2023 is 54.5 months. At $5,800 per month, the total income for that period, if the plaintiff rented a chair, is approximately $316,000.

[311] I must also consider the hypothetical that the plaintiff would not have rented a chair commencing in April 2018, but continued as an hourly/commission employee, at Brush or elsewhere. In those circumstances, the plaintiff would have continued in that mode of employment, but without the injuries from the Collision, she would have been able to work 40 or more hours per week, as she did at Ignite, with no physical limitations to her work or efficiency.

[312] An assessment of what the plaintiff would have earned in that hypothetical scenario can begin with her 2017 earnings of just under $40,000 net, plus $10,000 tips.

[313] While I acknowledge that her net income in 2016 was lower than 2017, and that the evidence about her pre-2016 income is vague, the plaintiff had more experience and more clients by the date of the Collision. Even if she did not rent a chair, unlike other salon moves about which Mr. Federico testified, Ignite was shutting down and the owner was not a stylist. The plaintiff was not going to lose 15 to 20% of her clients to the shuttered Ignite or its owner.

[314] Perhaps the best measure of what the plaintiff's income would have been for this hypothetical comes from her current employer, Mr. Federico. He estimates that the plaintiff currently misses out on approximately one-third of her daily opportunities. There was no cross-examination or challenge to that evidence.

[315] The plaintiff's tax assessments show approximately $30,000 net income per year from 2018 to 2021. If $30,000 annual net income represents two-thirds of the plaintiff's earning capacity between 2018 and 2021, simple math reveals that her full earning capacity for that time period would be approximately $45,000 net income per

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year. Adding estimated tips of $10,000 per year, her total full capacity income would be $55,000 per year, or approximately $4,600 per month.

[316] This total amount ($55,000 per year) is a bit lower than the income that Ms. Shulgin and Ms. Woo said they earned as hourly/commission stylists at Ignite prior to the closure of that salon ($54,000 - $60,000 per year, plus tips). However, I think that is reasonable given how experienced and established Ms. Shulgin and Ms. Woo were when they were earning income as employees at Ignite at that point in time.

[317] Excluding the three-month lockdown, April 1, 2018 to January 15, 2023 is 54.5 months. At $4,600 per month, the total income for that period, but for the injuries she sustained in the Collision, is approximately $250,000.

[318] Accordingly, under these two hypotheticals of the plaintiff's without-accident earning capacity, I find that her income would be as follows:

a) Chair rental: $316,000

b) Employee: $250,000

[319] As set out above, the plaintiff's approximate actual income for April 2018 to January 2023 was $180,000. That is $136,000 less than the chair rental hypothetical and $70,000 less than the employee hypothetical.

[320] I have considered whether there any other positive or negative contingencies that I should take into account for this time period.

[321] Absent the injuries from the Collision, there is no evidence that the plaintiff would have reduced her workload but for the Collision, nor that she had any intention of changing her occupation. The evidence is to the contrary. The plaintiff was cross-examined about some historical health issues unrelated to her shoulder injuries post-Collision. Some had resolved well before the Collision. This included cross-examination about fatigue and anxiety in 2017, but those are hardly indicative of the plaintiff throttling back on her work: 2017 was her best earnings year despite any impact from those issues.

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[322] I have considered the positive contingency that Ms. Vujevic may have enjoyed even stronger earnings as an employee in the post-trial period after leaving Ignite (closer to what Ms. Shulgin and Ms. Woo were making as employees at the top of their game at Ignite), as well as the negative contingency that she might have experienced lower earnings as an employee stylist. In my view, the likelihood of these possibilities is roughly the same, such that they balance each other out.

[323] The assessment of a loss of earning capacity is not a mathematical calculation, and though simple math is set out above for comparison purposes, my assessment must be based on all the evidence and make an award that, overall, is fair and reasonable.

[324] In all the circumstances, I award the plaintiff $120,000 for her past loss of earning capacity. This assessment is based on my findings that:

a) The likelihood that plaintiff would have rented a chair as of April 2018, and earned income similar to, but a bit less than, her colleagues Ms. Shulgin and Ms. Woo; and

b) The lesser (but still real and substantial) possibility that the plaintiff would have carried on as an hourly/commission employee, working at least 40 hours a week and some overtime.

[325] In my view, this award will restore the plaintiff to the position she would have been in but for her Collision-related injuries during the pre-trial period. I am satisfied that this award is fair and reasonable.

D. Future loss of earning capacity

1. Relevant legal principles

[326] An award for the loss of future earning capacity is compensation for a pecuniary loss. As is the case with past earning capacity, the award is an assessment rather than a calculation, and requires a comparison between the

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plaintiff's likely future earnings if the accident had not happened and the plaintiff's likely future earnings given the accident has happened: *Dornan* at paras. 156–157.

[327] The proper approach to assessing damages for loss of future earning capacity was clarified by the Court of Appeal in the trilogy of *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. At para. 47 of *Rab*, Justice Grauer described a three-step process for considering claims for loss of future earning capacity:

a) Does the evidence disclose a potential future event that could lead to a loss of capacity?

b) On the evidence, is there a real and substantial possibility that the future event in question will cause a pecuniary loss?

c) If such a real and substantial exists, what is the value of that possible future loss? To properly assess the value of the possible future loss, consideration must be given to the relative likelihood of the possibility occurring.

[328] The third step may involve one of the two accepted bases for compensation: the "earnings approach" or the "capital asset approach". The earnings approach is more appropriate where there is an identifiable loss of income at the time of trial, often because the plaintiff has an established work history and a clear career trajectory: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 16.

[329] Where there has been no loss of income at the time of trial, courts should generally undertake the capital asset approach. This approach reflects the fact that in such cases, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Ploskon-Ciesla* at para. 17.

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2. Positions of the parties

[330] The plaintiff submits it is clear that her capacity to work has been diminished by the injuries she sustained in the accident, and that her diminished capacity is going to continue to impact her earnings in the future.

[331] In her written submissions, the plaintiff says that but for the Collision, she would "likely have worked as an independent hair stylist until the age of retirement, likely 65".

[332] The plaintiff further submits that there is a real and substantial possibility that her continuing symptoms and restrictions may require her to switch careers, either soon or at some point in the future. The plaintiff points to Dr. Chen's report, in which Dr. Chen opines:

> Given her current symptoms, and the repetitive nature of her work and the aggravating positions of her work on her symptoms, it is unlikely that she could continue in this profession for more than the next 5-10 years, and certainly not into retirement. However, perhaps with treatment recommendations such as more strength-based exercises on her rotator cuff, interventional treatments for her neck and shoulder pain, or chronic pain medications, she could bring her pain down to a more tolerable level and continue her work at a reduced capacity. However, should these treatments fail, it is likely she could not continue with this profession.

[333] The plaintiff submits that Dr. Chen's opinion regarding the plaintiff's capacity loss, which was unchallenged on cross-examination, satisfies the first step of *Rab* and reveals two possible future events:

a) The plaintiff may continue to work as a hair stylist for a further 5 to 10 years and then retrain and switch careers; or

b) The plaintiff may undertake further treatment, reducing her symptoms and pain to a more tolerable level, such that she is able to continue working as a stylist employed by a salon until retirement at age 65.

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[334] The plaintiff says there is also a third possible future event that I should consider: she may choose to retrain and switch careers sooner than 5 to 10 years from now.

[335] At the time of trial, the plaintiff was studying to complete grade 12, which may open up further education, subject to work demands. She has minimally looked into alternative employment. One job was as a longshoreman, for which her friend's husband tried to assist her, hoping she could clear the hurdle of the physical requirements and obtain a position, but be assigned to a more sedentary role. This was a kind and compassionate gesture, but ultimately not feasible. The plaintiff said she has also considered nursing, but it also involves physical demands.

[336] The plaintiff believes that more sedentary occupations, such as human resources or accounting, may eventually be possible for her, but they would require further training/education.

[337] With respect to weighing contingencies, the plaintiff submits:

a) It is equally possible that the plaintiff's injuries may get better, worse, or stay the same;

b) The plaintiff has always been a hairstylist and is likely to choose a path forward that involves hairstyling for at least another substantial period of time (such as 10 years); and

c) Although the plaintiff has had a number of health challenges in her life, she has persevered through them, and if any happen again, she is likely to do so again.

[338] The plaintiff submits that the positive and negative contingencies in this case weigh each other out and no further deduction is warranted from her future losses.

[339] She claims it is most likely she will suffer a future loss of income earning capacity in the order of $600,000. In my view, the plaintiff's assessment of the value of her future loss of earning capacity claim is slightly on the high side, as in all the

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hypothetical scenarios that she discusses in her submissions, her starting place seems to be that she would have become a chair renter in April 2018 and earned a strong income (similar to Ms. Shulgin and Ms. Woo's income as chair renters) since that point in time.

[340] The defendant submits that any award made to the plaintiff for future loss of income earning capacity should be minimal.

[341] The defendant questions whether the plaintiff has even met the first step of the *Rab* analysis. The defendant says that while the plaintiff's injuries may limit her physically, she has continued to work, and her post-accident income is scarcely diminished from what it was pre-accident.

[342] With respect to the second step in *Rab*, the defendant says that even if the plaintiff's injuries have impaired her capacity to work, she has failed to show she is going to suffer a pecuniary loss as a result. The defendant says the plaintiff has not seriously explored other career options.

[343] The defendant notes that the plaintiff has not adduced evidence from a vocational expert or economist to show available future career options and reduced income compared to her present employment. The defendant says it is as likely as not that the plaintiff could find comparable income elsewhere if she was to retrain and seriously pursue new employment.

3. Analysis

[344] I am satisfied that the plaintiff's future income earning capacity has been, and will continue to be, impaired by the Collision. In my view, there is ample evidence (including from both the lay witnesses who described the plaintiff's abilities before and after the accident, and the physiatrist Dr. Chen, whose functional and vocational evidence is set out at pages 11 and 12 of her report) to support this conclusion. The evidence of Mr. Federico resonates on this point: he says the plaintiff is currently at two-thirds of her capacity.

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[345] The plaintiff's prognosis is guarded. It is difficult to know at this point whether her pain and symptoms will improve with time (particularly if she pursues some of the treatments recommended by Dr. Chen), worsen (Dr. Chen notes the aggravating nature of her work on her symptoms), or stay the same.

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[346] I find this case is similar to *Basile*, where at para. 173, Mr. Justin Crossin states:

> [173] The evidence in the case at bar is clear that the lingering impact of the plaintiff's injuries gives rise to a loss of her earning capacity in the foreseeable future. The plaintiff is not currently suited to full-time work as a hairstylist, and while her injuries are likely to improve with continued treatment, it will take her both time and effort to realize significant improvement. This is clear on the evidence. I also find the evidence demonstrates a real and substantial possibility that the lingering injuries will cause a pecuniary loss to the plaintiff in the future. Although the plaintiff intends to keep working as a hairstylist, her injuries will limit her hours and capabilities for the foreseeable future.

[347] In my view, given the ongoing nature of the plaintiff's injuries, there are two "real and substantial" possibilities for her future working life, both of which involve pecuniary loss:

a) Due to the manner in which hairdressing aggravates her symptoms, the plaintiff decides to retrain and switch careers in 5 to 10 years; or

b) The plaintiff's symptoms stay about the same or improve somewhat, and she continues to work as an hourly/commission employee, at the same reduced hours/efficiency that she had at the time of trial, until she retires around age 65.

[348] I have considered the third hypothetical advanced by the plaintiff, in which the plaintiff decides to retrain and switch careers in the very short term. Having considered all the evidence before me (including the limited vocational evidence, and the lack of evidence from the plaintiff that she is actively exploring other career paths), I view this scenario as speculative rather than a real and substantial possibility. It is inconsistent with what the plaintiff wants to do and has persevered in doing since 2018. Thus, I decline to take it into account.

[349] I agree with the plaintiff that the earnings approach is appropriate here, given that there is an identifiable loss of income at the time of trial (*Ploskon-Ciesla*, para. 16).

[350] Below, I will address the relative likelihood of the two hypothetical future scenarios I have accepted above. Then, I will attempt to quantify the pecuniary loss that would result from each scenario.

[351] In my view, the most likely of the two hypothetical scenarios is that the plaintiff carries on working as a stylist employed by a salon, working a reduced schedule, and at approximately two-thirds her pre-accident capacity, as she was doing at the time of trial. As counsel points out, hair styling is all the plaintiff has known. Her own and other evidence is that hairstyling is what she enjoys doing, she is very good at it and, thus far, she has been willing to make the sacrifice to remain in a vocation in which, at the time of trial, she has practised for almost twenty years, remaining positive and professional and maintaining her quality of service to her clients at a high level, as noted by Mr. Federico.

[352] I think it is less likely, but still possible, that the plaintiff will eventually be unable to continue on as a hairdresser, such that she is forced to retrain in the next 5 to 10 years. Whether this comes to pass may depend on the success of certain treatments. Despite the plaintiff's determination to carry on, at some point, the physical toll of her work on her injuries from the Collision may prove too much, especially as the plaintiff gets older. As noted by plaintiff's counsel, she would then have to find a new career, with limited education and experience.

[353] To assess the plaintiff's pecuniary loss in these two hypotheticals, I need to compare what the plaintiff likely would have earned had the Collision not occurred, to what the plaintiff will likely earn in the future given that the Collision has occurred.

[354] In the previous section, when I assessed the plaintiff's past loss of earning capacity, I made certain findings that I will also rely on in assessing the plaintiff's future loss of earning capacity. In particular, I found that had the Collision not

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occurred, there was a likelihood that the plaintiff would have become a chair renter, earning $70,000 net annually (including $10,000 in tips), and a lesser possibility that the plaintiff would have remained an hourly/commission employee, working full time and occasional overtime, and earning about $55,000 net annually (including $10,000 in tips).

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[355] Going forward post-trial, I would estimate the plaintiff's likely future earnings, had the accident not occurred and she had transitioned to chair renting, as being in the range similar to Ms. Shulgin and Ms. Woo's earnings as chair renters: $70,000 - $80,000 plus tips of $10,000, for a total of $80,000 - $90,000 net annual earnings.

[356] In assessing the plaintiff's past loss of earning capacity, I did not accept that she would immediately have made as much as Ms. Shulgin and Ms. Woo on transitioning to the chair rental model in the pre-trial period. However, I find that the plaintiff's earning capacity as a chair renter would have risen over time and eventually been roughly comparable to Ms. Shulgin and Ms. Woo's, such that in the post-trial period, having had more time to develop her business, she would have been earning in the range of $80,000 - $90,000 net (including tips) as a chair renter. To use Ms. Woo's words from when the plaintiff was hired at Ignite, the plaintiff had "all the skill sets we needed".

[357] Had the plaintiff continued as an employee in the hourly/commission mode, I find that her earning capacity in that mode would also be somewhat higher in the post-trial period vs. the pre-trial period, as the plaintiff became more experienced and established. In assessing what the plaintiff would have made between the time of trial and retirement but for the Collision, I believe her earnings would have been roughly equal to what Ms. Shulgin and Ms. Woo were earning at Ignite as high-performing employees: between $54,000 and $60,000 per year, plus $10,000 tips, or $64,000 to $70,000 total. Their decision to leave to rent chairs when Ignite was about to close is indicative of them being at the higher end of the model of an employee in the hourly/commission mode.

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[358] Below is a summary of my view of the possible range of the plaintiff's pecuniary loss in the two hypothetical future scenarios I have accepted. The annual net income figures are the difference between the hypothetical income and the actual income found earlier of $30,000 net, plus $10,000 tips:

a) Scenario 1 (plaintiff retrains and changes careers in the next 5 to 10 years)

   i. Renting: $40,000 - $50,000 difference for 5 years (PV 4.7826): $191,304 - $239,130

   ii. Employee: $24,000 - $30,000 difference for 5 years (PV 4.7826): $114,782 - $143,478.

   iii. Renting: $40,000 - $50,000 difference for 10 years (PV 9.222): $368,880 to $461,110.

   iv. Employee: $24,000 - $30,000 difference for 10 years (PV 9.222): $221,333 - $276,666.

b) Scenario 2 (plaintiff continues to work as a hairdresser for 24 years to age 65)

   i. Renting: $40,000 - $50,000 difference for 24 years (PV 20.0304): $801,216 - $1,001,520.

   ii. Employee: $24,000 - $30,000 difference for 24 years (PV 20.0304): $480,730 - $600,912.

[359] In terms of other contingencies, as explained under past loss, absent the injuries from the Collision, there is no evidence that the plaintiff would have reduced her workload but for the Collision, nor that she had any intention of otherwise changing her occupation.

[360] Absent one week off after the February 8, 2018 Collision, the plaintiff has continued to work, despite the challenges.

[361] The evidence of Dr. Chen does point to a limited future as a hair stylist, even if treatments lead to the more positive results referred to by both her and Dr. Connell. Dr. Chen seems somewhat pessimistic that treatments will still limit the plaintiff to hair styling “at a reduced capacity”.

[362] The situation at present is that the plaintiff’s prognosis is uncertain, with an array of treatments suggested that have not yet been tried and for which the outcomes cannot be predicted on the evidence before me.

[363] Again, the assessment of a loss of earning capacity is not a mathematical calculation, and though simple math is set out above for comparison purposes, my assessment must be based on all the evidence and I must make an award that, overall, is fair and reasonable.

[364] I consider it most likely that, but for the Collision, the plaintiff would have rented a chair as of April 2018, or shortly thereafter, and that she would have continued to do so for the balance of her career.

[365] I have considered the possibility that she may have remained an employee, or perhaps returned to being an employee in her later years, when the additional burdens of self-employment are not worth the additional earnings it may hold. This would tend to reduce her annual earnings.

[366] I must also balance the unknown prognosis, upon treatment, when considering which of scenario #1 or #2 will unfold, and if so, for how long. The 5-10 year estimate of Dr. Chen is helpful for context, but is a rough estimate at best, particularly with untested treatments yet to be undertaken.

[367] In all the circumstances, and considering the various negative and positive contingencies, I award the plaintiff $550,000 for future loss of earning capacity.

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E. Special damages

[368] Claims for special damages are subject to a standard of reasonableness, taking into the injuries suffered: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[369] The plaintiff seeks special damages of $2,988.29. These are mainly treatment-related expenses; for example: physiotherapy, medication, massage therapy, kinesiology services, and exercise equipment. The defendant has conceded that the amounts sought by the plaintiff are properly recoverable as special damages as they were reasonable expenses incurred as a result of the plaintiff's injuries. I agree, and the award will be $2,988.29.

F. Future care

[370] The principles that guide awards for costs of future care were helpfully summarized by Justice Norell in in *Wishart v. Mirhadi*, 2023 BCSC 627 as follows:

> [117] An award for cost of future care is intended to provide a plaintiff with physical care or assistance in order to maintain or promote the plaintiff's health as a result of injuries. There must be medical justification for the items claimed, and the items claimed must be reasonable: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68–70. The medical necessity may be established by health care professionals other than a physician but there must be a link between the physician assessment and the other health care professional's recommendation: *Gao* at para. 70. The Court must consider positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 64–72. The standard of proof for assessing cost of future care is real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209. If it is shown by the evidence that a plaintiff is unlikely to participate in a program, it cannot be said that an award for such a program is reasonably necessary: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 28.

[371] The plaintiff is seeking $16,800 in future care costs, itemized as follows:

Item	**Cost**	**Frequency**	**Lump-sum present value**
Physiotherapy services	$100/session	2/month for 2 years	$4,800

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Kinesiology services	$100/session	2/month for 2 years	$4,800
Personal trainer	$100/session	2/month for 2 years	$4,800
Botox	$800/treatment	2-3 treatments in first year	$2,400

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[372] The plaintiff notes that she may incur some costs for equipment, consults, therapy and some medication (Dr. Chen's report, page 13). There is no clear evidence regarding the amount.

[373] At trial, the defendant conceded the future care costs award sought by the plaintiff was appropriate, subject to any apportionment of liability.

[374] As I am satisfied that the future care costs presented by the plaintiff are medically justified and can reasonably be expected to be incurred, I am awarding the future care costs sought by the plaintiff in the amount of $16,800.

G. Conclusion

[375] In the result, I find that the plaintiff is entitled to the following:

a) Non-pecuniary damages $150,000.00

b) Past loss of earning capacity: $120,000.00

c) Loss of future earning capacity: $550,000.00

d) Cost of future care: $16,800.00

e) Special damages: $2,988.29

[376] My award is subject to tax gross-up for cost of future care and loss of earning capacity, if applicable. Of particular note, the loss of earning capacity awards, past and future, were based primarily on net income, but a portion includes tip income.

[377] My award is also subject to the application, if any, of s. 83 of the *Insurance (Vehicle) Act*.

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

[379] As the successful party, the plaintiff is presumptively entitled to her costs from the defendant, at scale B. If either party seeks an alternative costs order, they have leave to request a further hearing before me on the issue of costs within 30 days of the date of this judgment.

"Doyle J."

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