IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brill v. Forsyth,*
2024 BCSC 124

Date: 20240129
Docket: M190456
Registry: New Westminster

Between:

Bonnie Brill

Plaintiff

And

Stephen Charles Forsyth

Defendant

Before: The Honourable Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:	K. Zhuang K.S. Thind
Counsel for the Defendant:	L.G. Harris, K.C. K.C. Burns
Place and Dates of Trial:	New Westminster, B.C. May 1-5, 8-11, 2023
Place and Date of Judgment:	New Westminster, B.C. January 29, 2024

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Introduction

[1] The plaintiff, Bonnie Brill, claims damages for injuries arising from a motor vehicle collision that occurred on April 27, 2015 (the "Collision"), at the intersection of Dominion Avenue and Ottawa Street in Port Coquitlam, British Columbia (the "Intersection").

[2] Ms. Brill was driving her step-father's Honda Civic on the Fremont Connector in Port Coquitlam when she witnessed a pickup truck drive into the back of another vehicle. Ms. Brill suspected that this was an intentional act of "road rage". She turned left onto Dominion Avenue to remove herself from the situation. She stopped at a red light at the Intersection. Another vehicle, a Hyundai, stopped behind her. In her rear-view mirror, she saw the same truck coming towards her and the Hyundai at high speed. It smashed into the Hyundai, sending it into the oncoming traffic, and then hit the driver-side rear-corner of Ms. Brill's vehicle. After the impact, the truck reversed and sat idling. Ms. Brill got out of her car and, as she approached the truck, it accelerated towards her, nearly hit her, and then drove away. There is no dispute that the defendant, Stephen Charles Forsyth, was driving the truck. Liability has been admitted.

[3] Ms. Brill alleges that the Collision caused soft tissue injuries resulting in pain in her neck, shoulder, mid-back, and low back radiating into her legs; tingling and numbness in her fingers; headaches; and psycho-emotional distress. She has experienced some improvement in her symptoms, but she alleges that she continues to suffer from constant or near constant back pain with radicular symptoms, intermittent neck and shoulder pain, driving anxiety and disturbed sleep. She attributes post-Collision weight gain to these symptoms. She says her ongoing symptoms are permanent; have impaired her ability to engage in recreational, social, and housekeeping activities; and have left her competitively unemployable. She claims non-pecuniary damages, past loss of income-earning capacity, future loss of income-earning capacity, and special damages. In total, she quantifies her claim at $880,389.08.

[4] The defendant concedes that Ms. Brill was injured in the Collision; specifically, that she suffered soft tissue injuries causing ongoing pain and related symptoms. However, he says there is a real and substantial possibility that as a result of Ms. Brill's pre-existing conditions (symptomatic spinal degeneration, loss of shoulder function, anxiety and depression, and medication dependency) she would have found herself in a similar condition regardless of the Collision, and the damages assessment must ensure that she is not compensated for effects of these pre-existing conditions which she would have experienced anyway. The defendant concedes that Ms. Brill's Collision-caused injuries prevented her from working for a period after the Collision, and that she is no longer able to work in her pre-Collision occupation of meat wrapper. However, the defendant submits that she has significant residual earning capacity and has failed to mitigate her income loss.

Summary of the Evidence

The Plaintiff's Background

[5] Ms. Brill was 50 years old at the time of the Accident and 58 years old at the time of the trial. She lives with her spouse, Stuart Diggon, in Port Coquitlam.

[6] Ms. Brill and her younger sister were raised by their single mother, Donna Klaus, in Vancouver, until Ms. Brill was about the age of 12 or 13. Ms. Klaus then married William Klaus. Ms. Brill developed a close and loving relationship with Mr. Klaus.

[7] Ms. Brill attended high school at Vancouver Technical Secondary. She was an average student. She started working part-time, at a young age, while also attending school.

[8] Ms. Brill's mother worked at Safeway as a meat wrapper. She enjoyed her work and this influenced Ms. Brill's career aspirations. In 1981, when Ms. Brill was partway through grade 12, she quit school to take a position as a meat wrapper for Safeway.

[9] Soon after quitting school, Ms. Brill married Mr. Diggon. The marriage was short-lived and, ultimately, they divorced.

[10] Ms. Brill and Mr. Diggon reconnected more than twenty years later, in about 2004. They have lived together since then.

[11] Ms. Brill worked as a meat wrapper at a variety of Safeway stores over the years. She enjoyed the work and was employed as a meat wrapper at the Lougheed Town Centre Safeway store at the time of the Collision.

[12] Ms. Brill explained that the duties of a meat wrapper at Safeway are quite physical. Some of the meat must be wrapped entirely by hand. Some of it is wrapped by a packing machine but even then, it must be fed into the machine by hand which requires repetitive bending and lifting. Once wrapped, the packages must be transported to the meat counter and attractively displayed. The job involves a lot of repetitive movements, bending, twisting, walking, standing, and lifting.

[13] In the early 2000s, Ms. Brill injured her left shoulder at work. She was off work for four and a half years before returning to Safeway in a full-time accommodated position as a meat wrapper. The Workers' Compensation Board found her to have a permanent disability and she has been receiving WCB benefits as a result.

[14] Ms. Brill testified that she had shoulder surgery, but she continues to have fairly minor limitations in shoulder function. She testified that before the Collision she was able to do her job, but had difficulty with overhead activities and heavy lifting (for example, loading turkeys into the freezer).

[15] After returning to work following the shoulder injury, Ms. Brill experienced recurring sinus issues for several years. These issues affected her ability to work between 2012 and 2014, but resolved in or around March 2014 after she discontinued using Tramadol for her shoulder pain.

[16] On May 30, 2014, Ms. Brill suffered another workplace injury. While passing through a swinging door, she collided with a co-worker who was pushing a cart

through the door from the opposite direction. Ms. Brill testified she was knocked down, and sustained shoulder, neck and back injuries.

[17] Ms. Brill was off work for a few weeks following the swinging door incident. She initially returned to work, on a gradual basis, in July 2014, but she says her ability to perform her duties was limited by her ongoing symptoms. She went off work again in August 2014 and began attending physiotherapy and active rehabilitation. Physiotherapy records indicate that she was complaining about ongoing significant neck and low back pain in late September 2014.

[18] On October 21, 2014, Ms. Brill returned to work on a second graduated trial. She testified that she resumed full-time duties in November 2014, about five months before the Collision. However, her employment records indicate that she rarely worked a full 40 hours a week. She took accumulated time off (ATOs), sick days and vacation days, as a result of which she worked only 43 of the 78 shifts available to her in the period just prior to the Collison.

[19] Ms. Brill testified that just prior to the Collision, she was feeling well physically, and had no limitations at work other than those associated with her left shoulder (overhead activities and heavy lifting). She testified that she was happy in her career and she assumed she would work to about age 70, as her mother had done.

[20] Ms. Brill was being treated for anxiety and depression prior to the Collision. She did not say much about this, but it was established that she was taking medication for both anxiety and depression in the year prior to the Collision. Mr. Diggon testified that she suffered from significant anxiety prior to the Collision, which he attributed to a traumatic childhood.

[21] Ms. Brill testified that just prior to the Collision, she had an active social life, and enjoyed hiking, walking, gardening, and long drives. She hosted dinner parties and karaoke nights for friends at her home. She and Mr. Diggon took driving trips into Washington State and to Shuswap Lake where her parents had a summer

home. While at Shuswap, she enjoyed playing bocce, cricket and badminton. She also enjoyed pitch and putt golf, bowling, and gardening. She testified that in the period between November 2014 (by which time she says had recovered from the swinging door incident) and the Collison in April 2015, she had no difficulty participating in any of these activities. She testified that she and Mr. Diggon had plans to travel during their retirement.

[22] Ms. Brill has no children. At the time of the Collision, she and Mr. Diggon had three dogs. She testified that prior to the Collision she enjoyed walking the dogs.

[23] Ms. Brill and Mr. Diggon live in a two-level, 2600 square foot house. She testified that before the Collison, she performed most of the indoor household chores, including cleaning, cooking, and laundry, as well as the gardening. She said she had no difficulty performing any of those tasks, except for vacuuming the stairs.

Immediate Aftermath of the Accident

[24] After the Collision, Ms. Brill got out of her vehicle on her own. She called 9-1-1 and waited for emergency services to arrive.

[25] Ms. Brill testified that she did not have any immediate symptoms, but soon noticed soreness in her neck and shoulders. She testified that the pain intensified over the balance of the day, and she went to her general practitioner's clinic the next day.

Post-Accident Condition and Treatment

[26] On April 28, 2015, the day after the Collision, Ms. Brill saw Dr. Clifford Shaw because her own general practitioner, Dr. Gordon Spooner, was away. Dr. Shaw advised her to stay off work for one or two weeks and referred her to physiotherapy.

[27] On May 8, 2015, Ms. Brill commenced physiotherapy. She testified that the physiotherapy helped "to a degree" – she explained that it strengthened her upper body and back but did not really help with the pain.

[28] Ms. Brill had an X-ray of her cervical spine in May 2015, and an MRI of her cervical spine in July 2015. The resulting diagnostic reports indicated some degenerative disc disease.

[29] Ms. Brill testified that during the first six months following the Collision (until about mid-October 2015), she suffered from neck and shoulder pain, mid back pain, low back pain, tingling in her fingers, and headaches. She also experienced severe driving anxiety and fear. She testified that when driving, she took back roads and avoided certain intersections because of the anxiety.

[30] Ms. Brill did not return to work for about a year following the Collision.

[31] In December 2015, Ms. Brill started an active rehabilitation program. She completed 24 sessions, with the last session on March 24, 2016, shortly before she returned to work.

[32] Ms. Brill testified that over the next year, her symptoms worsened. She said she was taking Tylenol 3s consistently for pain, but she was working full-time. However, clinical records indicate that in April 2016 and October 2016, she told Dr. Spooner that she was feeling well. She acknowledged that she likely told him that.

[33] On April 1, 2017, Ms. Brill saw Dr. Spooner. She testified that she had experienced a flare in her symptoms at work, when the packing machine broke and she had to perform a lot of hand wrapping. Dr. Spooner referred Ms. Brill to physiotherapy and advised her to work alternate days. Ms. Brill testified that having the day off between shifts helped manage her symptoms.

[34] Ms. Brill testified that she attended physiotherapy until October 2017, but then she stopped because she was not getting results. She said she decided to do the exercises at home. She used a treadmill and did strength training exercises with light weights.

[35] Ms. Brill resumed full-time work in September 2017, but she said that she struggled to get through her work days, and sometimes asked co-workers for help.

[36] In February 2018, Ms. Brill had a CT scan of her lumbar spine. The resulting diagnostic report indicated degenerative changes in that area, most prominent at L4-5 and L5-S1.

[37] In July 2018, Ms. Brill started attending counselling for her driving anxiety. Around the same time, she transferred to a new Safeway location, Shaughnessy Station, which was very close to her home, and reduced the time she had to spend driving.

[38] Ms. Brill testified that by November 2018, her headaches had resolved, as had the numbness and tingling in her hands. She said the neck pain had improved, and become intermittent. However, she said her low back pain was constant and severe, and the pain was shooting down her legs. She reported this to Dr. Spooner, who renewed her medication and referred her for a back injection. Ms. Brill said that she understood the injection was supposed to numb the pain.

[39] Ms. Brill had the back injection (a lumbar epidural block) on January 18, 2019. Ms. Brill testified that the injection provided little if any relief and by March 2019, her low back pain was intolerable. She said she had a hard time doing anything. She was still taking Tylenol 3s consistently for pain. She said the pain interfered with everything including her ability to stand, sit, walk and drive. Dr. Spooner recommended she stop working and he referred her to a spinal surgeon.

[40] Ms. Brill followed Dr. Spooner's advice and went off work in March 2019. She testified that at this time, she was taking about eight Tylenol 3s per day for pain.

[41] On July 2, 2019, Ms. Brill saw Dr. Daniel Mendelsohn, a neurosurgeon. He prescribed Gabapentin and nerve root blocks, and he requested an MRI of Ms. Brill's cervical and lumbar spine. She received nerve root blocks in her lumbar spine, but Ms. Brill testified that these made her pain worse.

[42] An MRI report indicates that Ms. Brill had an MRI on August 4, 2019 that showed evidence of osteoarthritis within the cervical and lumbar spine.

[43] On August 5, 2020, Ms. Brill started seeing Dr. Pamela Squire, a physician who specialises in musculoskeletal pain. She saw Dr. Squire several times over the next year, and received various injection treatments from her. Ms. Brill said the injections initially reduced her pain, but then Dr. Squire started performing "more invasive" injections, and this made the pain worse.

[44] On September 9, 2020, Dr. Squire referred Ms. Brill to physiotherapy. Between November 2020 and February 2022, Ms. Brill attended 81 physiotherapy treatments.

[45] In January 2021, Ms. Brill started attending active rehabilitation as well as occupational therapy. She testified that by this time, she was having some good days, but other days were unbearable.

[46] Ms. Brill resumed physiotherapy treatments in November 2022.

[47] As at the time of trial, Ms. Brill was continuing to suffer from daily low back pain of varying intensity. However, by March 2023, she was reporting to her physiotherapist that she was felling quite well, and she was walking more than 10,000 steps a day. She continues to take long daily walks. The low back pain and shooting pain down her legs continue to be the most troublesome ongoing symptoms. She has occasional neck and shoulder pain. She continues to suffer from driving anxiety.

Post-Accident Employment and Activities

[48] As mentioned, at the time of the Collision, Ms. Brill was working full-time as a meat wrapper at Safeway, at the Lougheed Town Centre store. She had worked in that position for about 34 years and had little if any other work experience. She was a member of UFCW Local 247.

[49] Ms. Brill was off work for nearly a year following the Collision. She returned to work on a gradual basis on March 1, 2016, and resumed full-time hours on March

28, 2016. She testified that when she returned to work, she was still experiencing pain, but was bored and anxious to get back to work.

[50] Ms. Brill testified that over the next year, her symptoms did not really improve. She said she "was in denial" and pushed through the pain, using pain medication and heat to manage her symptoms. She testified that working essentially took everything out of her, and she ceased virtually all non-work activities. She testified that Mr. Diggon performed some of the indoor household tasks, and he walked the dogs alone.

[51] In April 2017, Ms. Brill reduced her hours at work to part-time due to the exacerbation of her symptoms when the packing machine broke, and Dr. Spooner's subsequent recommendation to work alternate days. She returned to full-time hours on September 10, 2017.

[52] In July 2018, Ms. Brill transferred to the Shaughnessy Station Safeway store. She testified that at the time, she viewed this as her dream job. However, in cross examination she acknowledged that at first she hated the job and she said that for the first few months she was there, it was a toxic environment.

[53] Ms. Brill testified that after moving to the Shaughnessy store, her pain worsened again. She said the pain was tolerable on some days, but there were also days when it was unbearable. She testified she took ibuprofen, extra strength Tylenol, and Tylenol 3s when necessary, but even with the medication it was increasingly difficult for her to perform her work duties.

[54] As mentioned, Ms. Brill stopped working in March 2019. She has not been gainfully employed since then. She has been receiving long term disability benefits.

[55] Between January 2021 and August 2022, Ms. Brill received occupational therapy services from Ms. Yasmine Mackie. In February 2022, she started a training course called Empowered for Employment – Skills Work Program. This included some basic word processing training. She competed that program, but said she struggled to keep up and relied on Mr. Diggon for help. She testified that the courses

were far beyond her ability and, essentially, she got nothing out of them. She said despite completing this program, her computer skills remain limited to searches on Google and sending email, and she is a single finger typist.

[56] Ms. Brill testified that for a couple years after leaving work in March 2019, she assumed she would eventually go back to her job at Safeway, and so she did not think much about an alternative career. She testified that it has been hard for her to accept that she will not go back to a job she enjoyed. She said she looked into working at a dog daycare, but that would be too physical and she would need computer skills. She said she thought about customer service but she would have to take a typing course. She claimed that she wants to go back to work, but is concerned that her age, shoulder injury, and back injury make her an unattractive candidate.

[57] I turn now to activities unrelated to employment.

[58] In 2019, Ms. Brill and Mr. Diggon took a trip to Mexico. Ms. Brill testified that they flew first class so she would have more leg room. She said she was in a lot of pain on the trip. She spent her time in bed and in the pool, and did not participate in any activities or sight seeing. She said she and Mr. Diggon have given up on their plan to travel during their retirement.

[59] Ms. Brill testified that she can perform light duties at home, such as light cooking, folding clothes, sweeping the floor, and emptying the dishwasher, but that she has to pace herself. She will work for about 20 minutes, and then sit and take a break. If she does not take regular breaks, the pain will flare unbearably. She can no longer do laundry or gardening. Mr. Diggon does most of the cooking, as well as the heavier household tasks, and he walks the dogs.

[60] Ms. Brill testified that she no longer goes hiking, and she does not participate in any physical activities, other than walking. She said she rarely entertains because her pain is unpredictable.

[61] Ms. Brill characterized her ongoing driving anxiety as a “huge problem” for her. She and Mr. Diggon drive to Tsawwassen occasionally to see his mother. Ms. Brill said she finds these drives very difficult. Mr. Diggon does the driving and she reclines her seat so she cannot see the road. She said she has had panic attacks during these drives.

[62] Ms. Brill testified that she has gained about 30 pounds since the Collision, which she attributes to not being physically active at all for about a year after leaving work for the last time in 2019. She now exercises at home on the treadmill. She also does some strength training, using light weights and elastic bands. As mentioned, she started walking, almost daily, in 2022. She walks with her mother. Initially, they walked slowly and took breaks. They have built up their tolerance and, by the time of the trial, their routine was to walk for 45 minutes to Walmart, rest at Walmart for 20 minutes, and then walk about 45 minutes home. At the time of the trial, Ms. Brill and her mother were walking more than 10,000 steps a day, and Ms. Brill had resumed physiotherapy once a week.

[63] The dogs Ms. Brill had at the time of the Collision have since passed away. She and Mr. Diggon have two new dogs. Although Ms. Brill can walk long distances, she said she cannot walk the dogs because holding a leash aggravates her symptoms.

[64] Since 2019, Ms. Brill has tried a variety of treatments for the pain but with little success. At present, she suffers from constant, or near constant, low back pain. Most days it is manageable if she sticks to her routine of exercise, walking, and housework, while making sure to pace herself and take regular breaks. However, at times the pain is incapacitating. She continues to take Tylenol 3s daily. She takes half a tablet every two hours, so she has some medication in her system at all times. She continues to take anxiety medication.

Expert Medical Evidence

[65] Ms. Brill relied on the expert medical evidence of Dr. Harpreet Sangha, a physiatrist, who conducted an independent medical examination on October 18,

2022 and authored a report dated November 17, 2022. The defence relied on the expert medical evidence of Dr. Andrew Travlos, also a physiatrist, who conducted an independent medical examination on November 25, 2021 and authored a report dated November 25, 2021.

[66] Both doctors expressed the view that Ms. Brill had pre-existing degenerative disc disease. Although the diagnostic imaging that revealed this condition was performed after the Collision, there was no disagreement that the changes observed would have taken decades to develop and pre-dated the Collision. Both doctors expressed the opinion that the Collision was a cause of Ms. Brill's post-Collision symptoms and her current condition. The only material differences in the opinions of the two medical experts concerned the extent to which the pre-existing degenerative disc disease contributes to Ms. Brill's current condition, and the likelihood that the pre-existing degenerative disc disease would have eventually resulted in symptoms similar to those that Ms. Brill currently experiences, regardless of the Collision.

[67] Dr. Sangha diagnosed Ms. Brill with:

- cervicothoracic strain resulting in chronic regional myofascial pain syndrome;
- lumbosacral strain resulting in chronic regional myofascial pain syndrome and aggravation of underlying degenerative changes with intermittent radicular features;
- disordered sleep;
- psycho-emotional distress; and
- post-traumatic weight gain.

[68] Dr. Sangha opined that as a result of her current condition, Ms. Brill is restricted from:

- prolonged static postures of the head, neck, upper and lower back;

- activities that involve full truncal mobility; and
- activities that place strain through the neck and back, including lifting, bending, pushing, and pulling.

[69] In his report, Dr. Sangha attributed Ms. Brill's condition to the Collison. In cross-examination, he said that "but for" the Collision, she would not be in her current situation. He opined that the underlying degenerative condition is also a casual factor in that it left Ms. Brill susceptible to trauma-related injury. He agreed that it is possible that Ms. Brill would have eventually become similarly symptomatic in the absence of the Collision as a result of the underlying condition, but he did not think this would be likely.

[70] Dr. Sangha expressed the opinion that Ms. Brill's current condition is unlikely to improve and that her condition is likely permanent. He recommended pain medication, physiotherapy and other passive therapeutic modalities for symptom flareups, as well as ongoing exercise and conditioning. He also recommended that Ms. Brill transition to a different line of work and that she undergo a psycho-vocational assessment, a functional capacity assessment, and vocational upgrading or retraining.

[71] Dr. Travlos diagnosed Ms. Brill with:

- pre-existing degenerative disc disease;
- symptomatic degenerative changes prior to the Collison following the swinging door incident in May 2014;
- mechanical neck pain and associated myofascial symptoms caused by the Collision;
- mechanical low back pain with radiating symptoms caused by the Collision; and

- a history of mental heath issues that likely were worsened, for a period, by the Collision.

[72] Dr. Travlos noted in his report that Ms. Brill told him that the symptoms from the swinging door incident in May 2014 fully resolved before the Collision. However, he expressed the opinion that it is more likely she still had some intermittent neck and lower back complaints at the time of the Collision. When challenged on this opinion in cross-examination, he said that in expressing this opinion he relied on his decades of experience during which he has learned that patients are not always reliable historians. He said this opinion is based on the combination of Ms. Brill's pre-existing degenerative condition, her age, and the relatively long duration of her symptoms following the May 2014 incident.

[73] Dr. Travlos opined that as a result of her current condition, Ms. Brill is restricted from heavy lifting, bending, squatting, kneeling, and "other such actions". He stated she would be "challenged to return to any type of work at Safeway", but with training she "might be able to work in an office environment". He opined she is restricted to lighter chores and household activities, and limited in her recreational pursuits.

[74] Dr. Travlos expressed the opinion that it is likely that the Collision is a cause of Ms. Brill's current condition, but other causes are the 2014 swinging door incident and the April 2017 aggravation, and the "predominant source and cause" is her underlying degenerative disc disease. It was clear from his report and oral testimony that, in his opinion, Ms. Brill was essentially destined to develop similar symptoms as a result of her pre-existing degenerative disc disease regardless of the Collision.

[75] Dr. Travlos expressed the opinion that Ms. Brill's current condition is unlikely to improve to any marked degree, and it is probable that her low back symptoms will slowly worsen as part of the natural history of her underlying condition. He emphasized the importance of ongoing pain medication, exercise and physical conditioning to her ability to manage her condition.

Other Expert Evidence

[76] In addition to the medical evidence summarized above, Ms. Brill relied on the opinion evidence of Andrew Hosking, a physiotherapist and functional capacity evaluator, and Darren Benning, an economist. The defence relied on the opinion evidence of Crystal Wong, a clinical counsellor and vocational rehabilitation consultant.

[77] Mr. Hosking conducted a functional capacity evaluation of Ms. Brill on October 26, 2022, and he authored a report dated December 15, 2022. He opined that Ms. Brill provided mostly consistent and full physical effort during the testing, but that she reported her pain at a level that exceeded her demonstrated functional limitations. As a result, he explained that he placed greater emphasis on his objective findings than on Ms. Brill's subjective complaints in forming his opinions.

[78] Mr. Hosking expressed the opinion that Ms. Brill demonstrated limitations that likely preclude her from meeting the physical demands of a meat wrapper at Safeway. He opined that she demonstrated the capacity for working in a sedentary position with some light physical strength demands, but poor pain management would likely preclude her from being competitively employable. In cross-examination, he agreed that Ms. Brill's more recent (2023) subjective reports of improvement in her pain indicate she is likely capable of part-time sedentary work.

[79] Mr. Hosking expressed the view that Ms. Brill cannot meet the full physical demands of regular household cleaning, seasonal household cleaning, regular yard care, seasonal yard care, or household maintenance activities.

[80] Mr. Hosking recommended that Ms. Brill resume physiotherapy, continue with self-directed exercise, and receive assistance with household cleaning and other heavier household tasks.

[81] Mr. Benning prepared a report providing estimates of Ms. Brill's past loss of employment income, future loss of employment income, and future loss of pension income, based on certain assumptions including that Ms. Brill now has no residual

earning capacity. He also explained the use of future loss multipliers to express the present value of a future income stream.

[82] Ms. Wong authored a report dated March 13, 2023. She did not conduct an assessment of Ms. Brill. Rather, she reviewed several documents, including the reports of Dr. Sangha, Dr. Travlos, and Mr. Hosking, as well as Ms. Brill's employment and WorkSafeBC records. Ms. Wong agreed with Dr. Sangha's recommendations for a vocational assessment and functional capacity evaluation, but she expressed the view that before undertaking retraining, Ms. Brill should exhaust options for less physical work within Safeway and more generally within the service industry, such as in a cashier, retail clerk, or parking lot attendant role. She also provided statistical data pertaining to the earnings associated with those kinds of positions.

Credibility and Reliability

[83] The plaintiff's credibility and reliability are vitally important in any personal injury case involving subjective symptoms such as those upon which Ms. Brill's case is based. The court must be very careful when assessing a plaintiff's testimony "when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery": *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.).

[84] The factors identified by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, play a role in assessing whether the evidence of a witness is truthful and accurate. These factors include the ability of the witness to resist being influenced by his or her interest in recalling the relevant events; the internal and external consistency of the witness's evidence; whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence; whether his or her evidence seems unreasonable, improbable, or unlikely, bearing in mind the probabilities affecting the case; and the witness's demeanour, meaning the way he or she presents while testifying.

[85] The defence submits that Ms. Brill's evidence was generally credible but unreliable. Defence counsel referred, in particular, to examples where Ms. Brill's subjective account of her symptoms and abilities did not align with documentary evidence or with her demonstrated abilities. I agree with that submission.

[86] I did not form the impression that Ms. Brill was intentionally dishonest or misleading. In other words, I did not have concerns about her credibility. However, I found some aspects of her evidence unreliable. Her evidence about the onset and progression of her symptoms following the Collison was vague. For example, she mentioned a constellation of symptoms but from her testimony alone it was not clear whether all the symptoms presented simultaneously, and it appeared that she did not have a reliable memory of the progression of her symptoms. She demonstrated a tendency to overstate her subjective symptoms and to understate her pre-Collision condition. Some of her testimony was objectively unreasonable. I will give a few examples.

- On Mr. Hosking's intake questionnaire, Ms. Brill described her pain, using a pain scale, in terms that corresponded with severely or very disabling pain, but this characterization was inconsistent with her actual performance during Mr. Hosking's physical testing.

- Ms. Brill asserts that there is no real possibility of her ever working again, in any capacity, but that is inconsistent with her ability to do paced housework and to walk 10,000 steps a day.

- Ms. Brill testified that before the Collision, she took anti-anxiety medication very rarely, perhaps once every six months or so. However, in cross-examination it was demonstrated that in 2014 and early 2015 she regularly filled 30 tablet prescriptions for Alprazolam, which she acknowledged was for anxiety.

- Ms. Brill testified that her symptoms progressively worsened between March 2016 and April 2017. However, clinical records indicate that in April 2016 and October 2016, she told her GP, Dr. Spooner, that she was feeling well.

- Ms. Brill initially testified that Dr. Mendelsohn did not prescribe any treatment or diagnostic testing. When she was prompted by her counsel, she claimed that she did not remember that he had prescribed Gabapentin and nerve root blocks, and she did not recall having an MRI. Her lack of recall of these events, which occurred less than four years before the trial, suggests that she has a very poor memory.

- Ms. Brill became overtly emotional when testifying about her inability to return to her job at Safeway, and said that without a job she feels she has no purpose. Yet, she has made minimal efforts to secure alternative employment.

- Ms. Brill claimed that it was only in the months just before the trial that she realized she is unlikely to return to her job at Safeway, but that was more than four years after she last worked at Safeway and more than two years after she started occupational therapy with Ms. Mackie.

[87] None of the specific problems with Ms. Brill's testimony, on its own, would be overly concerning, but taken together they left me with significant concerns about the reliability of her account of the nature and progression of her symptoms. It appeared to me that Ms. Brill's perception of the impact of the Collision has become distorted, perhaps by her interest in advancing her case, although not intentionally so. In the circumstances, I have concluded that I must be cautious about accepting her testimony where it is not corroborated by objective evidence.

[88] The testimony of Ms. Brill's lay witnesses as it pertained, in general terms, to her physical condition after the Collison was helpful and I accept it. However, none of them provided a reliable, detailed account of the progression of her symptoms

and, with one exception, their testimony was not helpful in establishing Ms. Brill's condition immediately before the Collison.

[89] Mr. Diggon generally corroborated Ms. Brill's evidence of her pre-Accident physical capabilities and recreational pursuits. However, I did not find his account of the progression of her symptoms to be reliable. He testified that after the swinging door incident, in the "few months" prior to the Collision, they went boating and fishing on Shuswap lake. However, the timeline that emerges from other evidence indicates that it is unlikely they were boating and fishing in the "few months" before the Collision. The swinging door incident was in May 2014 and Ms. Brill was still complaining about significant neck and low back pain in late September 2014. She did not resume full-time duties at work until November 2014. The Collison occurred on April 27, 2015. Mr. Diggon's account would have Ms. Brill boating and fishing in the period from about December to February or March, which seems unlikely given the season. Mr. Diggon also testified that the biggest issue for Ms. Brill in the initial weeks following the Collision was low back pain. From the whole of the evidence, including that the only evidence of diagnostic imaging in 2015 was of the cervical spine and there is no evidence of diagnostic imaging of the lumbar spine until February 2018, it is more likely that the neck symptoms were the biggest issue, initially.

[90] I wish to be clear that, as with Ms. Brill, I did not form the view that Mr. Diggon was intentionally misleading. He was candid about issues such as Ms. Brill suffering from significant anxiety prior to the Collision, and I accept his evidence about changes in their lifestyle since the Collison. However, his recall of the specific nature and progression of Ms. Brill's symptoms after the Collision was not reliable.

[91] Ms. Brill's mother, Donna Klaus, corroborated Ms. Brill's testimony about the physical nature of the job of meat wrapper, but that is not in dispute. She said Ms. Brill's health was good in the few years before the Collision. She mentioned the shoulder injury and the sinus condition, and said that, otherwise, Ms. Brill was happy and active. However, it appears Ms. Klaus did not have detailed knowledge about

Ms. Brill's pre-Collision health. For example, she was unsure about whether the sinus condition caused Ms. Brill to miss work (when, according to Ms. Brill, it caused her to miss a lot of work), and she did not see Ms. Brill often in the period following the swinging door incident. Between 2017 and 2020, Ms. Klaus did not see Ms. Brill often because Ms. Klaus was caring for her husband who was ill. Ms. Klaus confirmed that she and Ms. Brill started walking together in March of 2022. She testified Ms. Brill takes pain medication during their break at Walmart. I accept that evidence.

[92] Jasmeet Dhillon, Ms. Brill's friend, testified that before the Collison, she did not notice Ms. Brill engaging in behaviours associated with pain, but after the Collison, she always appeared to be in pain. She corroborated Ms. Brill's testimony about Ms. Brill experiencing driving anxiety after the Collision. However, it was not at all clear how often Ms. Dhillon saw Ms. Brill in the year or so prior to the Collision and, in cross-examination, she acknowledged she did not even know about the 2014 swinging door incident.

[93] Similarly, Pia Fidanza, another friend of Ms. Brill, testified that prior to the Collision, Ms. Brill was in good health, and after the Collision she was a different person. She specifically mentioned observing that Ms. Brill had no physical difficulties at her 50th birthday party in May 2014. This must have been before the swinging door incident on May 30, 2014, because Ms. Brill's evidence is she was in significant pain after that incident. Ms. Fidanza did not testify about any observations of Ms. Brill in the period between June 2014 and the Collision on April 27, 2015.

[94] Marten Sinclaire, a co-worker of Ms. Brill's at Safeway, did provide some helpful evidence about Ms. Brill's condition just prior to the Collision. They worked closely together at the Lougheed Mall location. He testified that Ms. Brill was a good worker. He corroborated Ms. Brill's testimony about the physical nature of the job of meat wrapper, but that is not in dispute. He testified that before the Collision, the only limitation he noticed in Ms. Brill's capacity to perform her duties was her inability

to load turkeys into the freezer. He said in the month prior to the Collison he saw no limitations in her work capacity. He said when she returned to work after the Collision she was not the same. He said she cried often and took a lot of pain medication. He confirmed that he was aware of the swinging door incident in 2014, and he testified that when Ms. Brill returned to work after that she was doing fine. In cross-examination, he agreed that Ms. Brill's condition deteriorated over time after she returned to work in March 2016. As he put it, her pain seemed to get worse and worse.

[95] Before leaving this section on credibility and reliability, I note that the defence relied on surveillance video of Ms. Brill. I did not find any of that video to be helpful. Surveillance video of Ms. Brill walking was not inconsistent with her testimony. Similarly, video of Ms. Brill shopping at a garden centre showed Ms. Brill bending down a few times and lifting a few trays of plants. She did not say she could never lift anything or that she could never bend over. The occasional lifting and bending seen on the video is not at all the same as the kind of repetitive bending and lifting that Ms. Brill was required to engage in while working as a meat wrapper.

Findings on the Plaintiff's Condition and Causation

[96] In *Kallstrom v. Yip*, 2016 BCSC 829, Justice Kent summarized the legal principles applicable to determining causation where there is more than one potential cause of a plaintiff's condition:

> [318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, [1996] 3 S.C.R. 458, repeated many times since, and which include:
>
> 1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
> 2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
> 3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and

4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[Justice Major's emphasis.]

[319] The above paradigm addresses principles of liability. It does not address principles related to the assessment of damages in tort. The latter requires consideration of conditions or events unrelated to the tort(s) which occurred either before or after the plaintiff's injury and which impact the nature or extent of the compensation that should be awarded for the tort. In such situations, *Athey* reminds us to consider first principles:

> [32] ... The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence ("the original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position" which is the plaintiff's loss. ...
>
> [Justice Major's emphasis.]

[320] In *Blackwater v. Plint*, 2005 SCC 58, the Court put it this way:

> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway. ...

[321] It is in the above context that the so-called doctrines of "thin skull" and "crumbling skull" come into play. In that regard *Athey* held:

> [34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

> [35] 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. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; *Cooper-Stephenson*, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
>
> [Justice Major's emphasis.]

[97] I accept Ms. Brill's evidence to the effect that during the first six months following the Collision (to about mid-October 2015), she suffered from quite severe neck and shoulder pain, mid and low back pain, tingling in her fingers, and headaches. She also experienced severe driving anxiety. All of this was corroborated by Mr. Diggon and some of the other lay witnesses.

[98] As mentioned, much of the evidence of the progression of Ms. Brill's symptoms is vague and unreliable. From the fact that she returned to work in March 2016 and told Dr. Spooner she was feeling well on two occasions in 2016, I find that her symptoms had improved significantly within a year or so of the Collision. I accept Mr. Sinclaire's evidence to the effect that Ms. Brill demonstrated behaviours consistent with pain when she returned to work in March 2016 and, over time, her condition appeared to deteriorate. On the basis of this evidence, I find that although her symptoms had significantly improved by March 2016, they had not resolved, and eventually (most likely starting in early 2017) they subsequently worsened again.

[99] In April 2017, Ms. Brill's symptoms were significantly exacerbated by an event at work—the unavailability of a packing machine and resulting increase in hand wrapping required by Ms. Brill. She reduced her hours to part-time. The

exacerbation resolved by about September 2017, when she returned to full-time hours.

[100] By November 2018, Ms. Brill's headaches and the numbness and tingling in her hands had largely resolved; and her neck pain had improved and become intermittent. However, I accept Ms. Brill's evidence to the effect that her low back pain gradually worsened, ultimately resulting in her ceasing work in March 2019, as this was corroborated by Mr. Sinclaire.

[101] I accept that at present Ms. Brill continues to suffer from ongoing, fairly consistent pain in her low back that waxes and wanes in intensity but is intolerable at times. I accept that she continues to suffer from occasional neck and shoulder pain. I also accept that she has suffered from ongoing significant driving anxiety since the Collision.

[102] As mentioned, both of the medical expert witnesses, that is Dr. Sangha and Dr. Travlos, diagnosed Ms. Brill as having sustained soft tissue injuries in the neck and back in the Collision, which caused pain in those areas and associated psycho-emotional distress. Both medical experts expressed the opinion that the Collision was a cause of Ms. Brill's post-Collision symptoms and her current condition. I accept that evidence and find that the Collision caused those injuries and the symptoms described above.

[103] As noted, both medical experts also expressed the view that Ms. Brill had pre-existing degenerative disc disease. The only material difference in their opinions is the likelihood that the pre-existing degenerative disc disease would have eventually resulted in similar symptoms regardless of the Collision. Dr. Sangha expressed the view that it is "possible" Ms. Brill would eventually have become similarly symptomatic in the absence of the Collision as a result of the underlying condition, but he did not think this was "likely". In contrast, Dr. Travlos expressed the view that the predominant cause of Ms. Brill's current condition was the underlying degenerative disc disease, and that she was essentially destined to develop similar symptoms as a result of that condition irrespective of the Collision.

[104] As explained in the excerpt from *Kallstrom* quoted above, it is essential to distinguish between causation as the source of a loss, on the one hand, and the rules of damage assessment in tort, on the other. Where there may be a tortious cause and a non-tortious cause (such as a pre-existing condition), so long as the tortious act is a cause of the plaintiff's loss, the defendant is fully liable. However, in assessing the appropriate quantum of damages required to return the plaintiff to their original condition, it is necessary to take account of any measurable risk that a non-tortious cause, such as a pre-existing condition, would have detrimentally affected the plaintiff, regardless of the defendant's negligence.

[105] At this stage, I am determining only whether Ms. Brill has established that it is more likely than not that the Accident was a cause of her post-Collision symptoms and her current condition. For the reasons expressed above, I have found that the Collision caused soft tissue injuries to Ms. Brill that are a cause of the symptoms described above.

Damages

General Principles

[106] In *Meckic v. Chan*, 2022 BCSC 182, Justice Kent reviewed the legal principles governing the assessment of damages in personal injury cases, including the analytic framework endorsed by a trilogy of decisions decided by our Court of Appeal:

> **A. The "Simple Probability" Standard of Proof**
>
> [109] The assessment of damages in a personal injury case necessarily deals not only with past events but also with hypothetical and future events. The standard of proof for past events is, of course, the balance of probabilities and, once proven, such matters are treated as certainties. Hypothetical or future events, on the other hand, need not be proved on a balance of probabilities standard; instead, future or hypothetical possibilities are taken into account so long as they are "real and substantial possibilities and not mere speculation, and they are given weight according to their relative likelihood": *Athey v. Leonati*, [1996] 3 SCR 458, paras. 27-29; *Grewal v. Naumann*, 2017 BCCA 158, paras. 44-49.
>
> [110] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absence of the defendant's negligence. This is the plaintiff's "original" or "without-

accident" position. This is then compared with the plaintiff's "injured" or "with-accident" position and the difference between the two represents the plaintiff's loss: *Athey*, para. 32.

[111] There are thus four scenarios which the Court is required to assess:

1. What actually happened to the plaintiff in the past to the date of trial, a determination that includes life events between the accident and the trial, all of which, once proven on a balance of probabilities, is treated as a certainty;
2. What would have occurred to the plaintiff between the date of the accident and the trial, had the accident not occurred (a past hypothetical "without-accident" scenario);
3. How would the plaintiff's life have proceeded in the future if the accident had not occurred (a future hypothetical "without-accident" scenario); and,
4. How will the plaintiff's life proceed in the future now that the accident and resultant injury has occurred (the future hypothetical "injured" or "with-accident" scenario).

[112] Scenarios 2 to 4 above involve past or future hypothetical possibilities which, as noted, will be taken into consideration so long as they are "real and substantial possibilities" as opposed to "mere speculation". This of course begs the question: how does one determine the difference between the two and, once the former is established, how does it apply to the quantification of damages?

[113] The leading text on personal injury damages in Canada is Ken Cooper-Stephenson & Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Carswell, 2018). Chapter 2 of that text addresses "Proof of Damages" and discusses the "simple probability" standard of proof and its application to the assessment of damages contingent upon chance. The word "probability" is used in its statistical sense, i.e. denoting <u>any</u> degree of chance.

[Emphasis added by Kent J.]

[114] Some of the substantive principles set out in the text include the following (citations omitted):

- The "simple probability" standard of proof evaluates the degree of probability that any sequence of events will occur or would have occurred, and therefore the degree of probability that the plaintiff will suffer or would have suffered the material loss. It then awards damages for the material loss proportionate to the established degree of probability;
- The Court thus estimates what are the chances that a particular event will or would have happened, usually expressed as a percentage, and reflects those chances in the amount of damages which it awards;

- All contingencies, positive or negative, that are established on the evidence as realistic as opposed to merely speculative possibilities must be given effect;
- However, there comes a point when a chance or probability is so small that it might be characterized as "speculative", or "too remote" and thus excluded from consideration; and,
- The plaintiff recovers damages in proportion to the likelihood that the event and its consequences might have or may occur; this is done by scaling the award downwards or upwards in accordance with the percentage likelihood.

[115] In *Athey* the example of the simple probability standard being applied was:

> if there is a 30% chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30% of the anticipated extra damages to reflect that risk (para. 27).

B. The BCCA Trilogy

[116] In 2021, the BC Court of Appeal issued a trilogy of judgments clarifying the above principles and illustrating their application to the assessment of damages in personal injury cases. The cases include *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 and *Lo v. Vos*, 2021 BCCA 421. They involved hypotheticals and contingencies related to pre-existing injuries, past and future loss of earning capacity, future care costs, as well as non-pecuniary general damages for past and future pain and suffering.

[117] In *Dornan*, the Court noted in para. 92 that contingencies fall into two categories namely,

- "general contingencies" which simply as a matter of human experience are likely to be experienced by everyone and which are often "not readily susceptible to evidentiary proof" but which "may be considered in the absence of such evidence" nonetheless; and,
- "specific contingencies", ones peculiar to the particular plaintiff which must be supported by evidence that their occurrence is actually realistic as opposed to simply a speculative possibility.

[118] Insofar as general contingencies are concerned, the Court must be mindful that they can be positive as well as negative i.e. that everyone's life has "ups" as well as "downs" and that any allowance premised only on general contingencies "should be modest".

[119] Insofar as specific contingencies are concerned, however, whether positive or negative in nature, the Court must go beyond a determination of their existence to also analyze the evidence and decide the relative likelihood of their occurrence and their consequences.

[120] *Dornan* explains the difference between a contingency that is a real and substantial possibility as opposed to mere speculation:

> A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable (para. 63).
>
> [Emphasis added [by Kent J.].]

[121] Elsewhere in the judgment, the Court stated that,

> the risks commonly encountered on this rather dangerous planet [e.g. car accidents, tripping and falling, etc.] will not suffice to establish a real and substantial possibility..... such events can happen to anyone but....are not predictable..... [and thus] would not give rise to a measurable risk (para. 77).
>
> [Emphasis added [by Kent J.].]

[122] In *Dornan*, the trial Court applied a 30% reduction to the awards for non-pecuniary damages, past wage loss, loss of future earning capacity and future care costs to reflect the negative contingency that, given his lifestyle and history, the plaintiff was at risk of suffering a concussion with serious consequences in any event. The Court of Appeal upheld the finding that a further without-accident concussion was a real and substantial possibility for the plaintiff, however reduced the contingency deduction from 30% to 15% for future losses (and to only 10% for past losses) based on its own analysis of the second step in the process, namely determining the relative likelihood that the real and substantial possibility would actually materialize (an analysis that the Court of Appeal said the trial judge did not actually undertake: "in this case, the judgment addresses the real and substantial possibility analysis only implicitly, and is silent on the relative likelihood", para. 135).

[123] The Court of Appeal acknowledged that the task confronting the trial judge was "not easy":

> By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence (para. 134).
>
> [Emphasis added [by Kent J.].]

[124] The "right process" insofar as specific contingencies is concerned (in *Dornan*, the possibility of the plaintiff incurring a serious concussion injury regardless of the accident) is:

- Step one: determine with reference to the evidence whether the hypothetical future event is a real and substantial possibility (i.e. a measurable or predictable risk as opposed to mere speculation), and if so,
- Step two: determine, again with reference to the evidence, the relative likelihood [i.e. the chances] of that event actually occurring in order to arrive at an appropriate contingency deduction (*Dornan*, para. 113, emphasis added [by Kent J.]).

[125] *Lo v. Vos* is another case where the trial judge applied an "across-the-board" 20% contingency deduction to the awards for nonpecuniary damages, future care costs and loss of future earning capacity on account of the plaintiff's pre-existing back conditions. The trial judge found that the accident

> caused physical injuries that contributed to chronic pain, which in turn lead to depression, anxiety and post-traumatic stress disorders rendering her totally disabled from working. However, the trial judge also concluded there was a "measurable risk" the plaintiff would have developed a major depressive disorder consequent on pre-existing lower back pain and leading to a level of pain and disability similar to the sort experienced at trial. Hence the 20% contingency deduction.
>
> [126] The Court of Appeal set aside the contingency deduction on the basis that the evidence at trial did not establish any contingent risk that was a real and substantial possibility, as opposed to simply an impermissible speculative possibility. There was no expert evidence that, absent the accident, the plaintiff had any inherent vulnerability to, or any risk of developing mental health problems because of her pre-accident conditions. While it was essential for the trial judge to consider the plaintiff's pre-existing state in the assessment of damages, whether that original state gave rise to a measurable risk of her developing, mental health problems in any event (a future hypothetical event) was "a different question requiring additional evidence" (paras. 74-78, emphasis added [by Kent J.]).

[107] I agree with and adopt Kent J.'s description of the applicable legal principles.

Impact of the Plaintiff's Pre-existing Condition(s)

[108] In my view, Ms. Brill's pre-Collision shoulder injury, general anxiety, and medication use do not give rise to contingencies that affect the assessment of her damages. These are aspects of her "original" or "without-accident" position. The damage awards must reflect the comparison between that original position and her "with-accident" position. However, there is no evidence of any measurable risk that Ms. Brill would have suffered worsening impacts from these pre-existing conditions regardless of whether the Collision occurred. This is in contrast to the pre-existing spinal degeneration.

[109] As noted, both Dr. Sangha and Dr. Travlos expressed the view that Ms. Brill had pre-existing degenerative disc disease. Their opinions differ on the likelihood that the pre-existing degenerative disc disease would have eventually resulted in symptoms similar to those caused by the Collision, even if the Collision had not occurred.

[110] Again, Dr. Sangha expressed the view that it is possible Ms. Brill would have eventually become similarly symptomatic in the absence of the Collision as a result

of the underlying condition, but he did not think this was likely. He testified that when degenerative changes become symptomatic in the absence of a traumatic event, this occurs slowly and gradually. In his view, although the degenerative condition left Ms. Brill more susceptible to injury, the condition itself was not a cause of her symptoms. He accepted Ms. Brill's account of the progression and resolution of her 2014 workplace injury; fundamentally, that it had resolved before the Collision. He characterized the Collision as a separate event, essentially causing fresh injury. I took from his evidence that, at least in those circumstances, he did not consider the 2014 workplace injury to be relevant to a determination of the likelihood that the degenerative condition would have become symptomatic regardless of the Collision.

[111] In contrast, Dr. Travlos expressed the view that the predominant cause of Ms. Brill's current condition is the underlying degenerative disc disease and that she was essentially destined to develop similar symptoms as a result of that condition irrespective of the Collision. Although he acknowledged that Ms. Brill claimed to have fully recovered from the 2014 workplace injury before the Collision occurred, in his view it is more likely she still had some intermittent neck and lower back complaints just prior to the Collision. He explained that in his decades of experience he has learned that patients are not always reliable historians, and his view that Ms. Brill was likely experiencing intermittent neck and lower back complaints just prior to the Collision was based on the combination of her pre-existing degenerative condition, her age, and the relatively long duration of her symptoms following the 2014 workplace injury.

[112] As noted by Kent J. in the portion of *Meckic* quoted above, in *Dornan v. Silva,* 2021 BCCA 228, in assessing whether the contingency deductions applied by the trial judge were sustainable on the evidence, the Court of Appeal adopted the distinction between general and specific contingencies as articulated by the Ontario Court of Appeal in *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1, 1990 CanLII 7005 (O.N.C.A.). Again, general contingencies are likely to be experienced by everyone, are often not readily susceptible to evidentiary proof, and may be considered in the

absence of such evidence. In contrast, the Court in *Graham* said the following about specific contingencies:

> If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.

[113] Ms. Brill testified that she had fully recovered from the 2014 injury before the Collision in April 2015. As a result of the significant concerns I have about the reliability of her evidence, that testimony provides an insufficient foundation for me to find it more likely than not that she did in fact fully recover prior to the Collision. Again, I accept her description of the general nature and severity of her symptoms, but her account of their progression was not reliable.

[114] Mr. Sinclaire was aware of the 2014 injury. He testified that he did not observe Ms. Brill to have limitations at work in the period immediately leading up to the Collision, except in relation to lifting turkeys (which Ms. Brill attributes to the historical shoulder injury). On the basis of his evidence, I find that Ms. Brill's symptoms from the 2014 accident had improved by the time of the Collison, but his testimony does not establish that they had fully resolved.

[115] The injury Ms. Brill sustained in the May 30, 2014 workplace accident was serious enough to result in her being off work for much of the next five months. She was continuing to complain about significant neck and low back pain stemming from that injury as late as September 2014. Although she technically returned to work full-time, she took a lot of time off in the months leading up to the Collison in the form of ATOs, sick days and vacation days.

[116] To recap, it is Dr. Sangha's opinion that as a result of the underlying degenerative condition, it is possible Ms. Brill would have eventually become similarly symptomatic in the absence of the Collision; while it is Dr. Travlos's opinion

that as a result of the underlying degenerative condition, it is very likely, essentially inevitable, that she would eventually become similarly symptomatic.

[117] Dr. Sangha's opinion appears to depend, at least to some extent, on his assumption that the 2014 injury fully resolved before the Collision. He accepted what Ms. Brill told him in that regard without question which, of course, is an appropriate approach for an expert to take.

[118] In contrast, Dr. Travlos's opinion depends, at least to some extent, on his view that it is more likely Ms. Brill still had some intermittent neck and lower back complaints just prior to the Collision. I took Dr. Travlos to be saying that if Ms. Brill's account of the state of her recovery just prior to the Collision is not reliable then, given her age, the nature of the pre-existing degenerative condition, and the relatively long duration of her symptoms following the 2014 workplace injury, it is more likely than not that she was still experiencing some symptoms at the time of the Collision. That specific opinion was not challenged. In other words, Dr. Sangha did not express an opinion about Ms. Brill's likely condition just prior to the Collision based on the assumption that her own account was unreliable.

[119] No basis for rejecting Dr. Travlos's opinion was established. I found him to be a credible and reliable witness and I place substantial weight on his evidence in concluding that it is more likely than not that Ms. Brill was experiencing intermittent neck and lower back pain just prior to the Collision and it is likely that, as a result of her pre-existing degenerative condition, Ms. Brill would have eventually developed symptoms similar to those that she currently experiences even had the collision not occurred.

[120] It is now necessary to determine, with reference to the evidence, the relative likelihood of that real and substantial possibility actually materializing, and its consequences, in order to arrive at an appropriate contingency deduction. Obviously, this cannot be projected with exactitude: *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2012 BCCA 331 at para. 21.

[121] Dr. Travlos expressed the opinion that Ms. Brill was destined to develop the symptoms that are currently manifest irrespective of the Collison, but he did not express an opinion about the likely timing or progression of the symptoms absent the Collision. While I am satisfied that the defendant has established a real and substantial possibility, indeed a high likelihood, that Ms. Brill would have eventually developed symptoms similar to those that she currently experiences even in the absence of the Collision, the evidence does not permit me to determine with any degree of precision when and at what pace that would likely have occurred. In these circumstances, it would not be appropriate to limit Ms. Brill's recoverable losses to those sustained over two to three years on the basis that by about three years post-Collision she would have been in the same state irrespective of the Collision, as the defendant urges me to do. In my view, the application of a 30 percent contingency reduction to future losses is appropriate given the state of the evidence, which is intended to reflect an increasing likelihood that the contingency would have occurred as Ms. Brill aged.

[122] Ms. Brill was 50-years-old at the time of the Collision and 58-years-old at the time of the trial. Assuming a life-expectancy of about 80 years, the eight years between the Collision and the trial represents about 27 percent of her likely post-Collision lifetime. With that in mind, I would apply a contingency deduction of 15 percent to non-pecuniary damages to reflect:

- 73 percent of her post-Collision lifetime (22 years from the trial) with a 30 percent likelihood of the contingency occurring and 27 percent of her post-Collision lifetime (8 years between the Collision and the trial) with a 10 percent likelihood, the weighted average of which is 24.6, and
- a reduction to that weighted average to reflect the reality that much of the pain and suffering to be compensated by the non-pecuniary award occurred in the pretrial period.

[123] On the same reasoning, I would apply a 10 percent contingency deduction in the assessment of Ms. Brill's past income loss.

Non-Pecuniary Damages

[124] An award of non-pecuniary damages is intended to compensate for pain, suffering, and loss of enjoyment of life prior to the trial and into the future. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle. I have taken these factors into consideration.

[125] Awards of non-pecuniary damages in other cases provide a useful guide, however, the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by a specific individual.

[126] Ms. Brill's pre-Collision life was marked by periods of pain and disability. She suffered from shoulder pain and limitations for several years, starting in the early 2000s. She was plagued with sinus problems between 2012 and 2014. She suffered from shoulder, neck and back pain caused by the 2014 workplace injury. These issues were, collectively, serious enough to have caused her to be off work for about seven of the 14 to 15 years prior to the Collision. She also suffered from pre-Collision anxiety. Nevertheless, Ms. Brill was a fairly active and energetic person before the Collision. She enjoyed her job; she was not materially limited in her ability to perform housekeeping tasks; she participated in outdoor activities such as hiking, walking, bocce, and badminton; and, she enjoyed hosting parties for friends.

[127] Following the Collision, Ms. Brill suffered from severe pain for about a year before she returned to work in March 2016. Her symptoms improved to some extent such that she was able to work for about a year, but then worsened. She suffered a flare in her symptoms causing her to reduce her work to part-time hours for several

months. Over the next year and a half she struggled to work full-time while pursuing treatments. Although some of her symptoms resolved or significantly improved, she continued to suffer from severe low back pain that caused her to cease work entirely in March 2019. She underwent further treatments but her condition has plateaued. In addition to her physical symptoms, Ms. Brill has had to contend with significant and ongoing driving anxiety.

[128] Ms. Brill's condition is likely permanent and the prognosis for improvement is poor.

[129] The Collision-caused injuries had a negative effect on most aspects of Ms. Brill's life. She has suffered from the physical pain and the driving anxiety I have already mentioned. She has had to divert time and energy to attending a large number of physical therapy sessions and she has undergone painful injection treatments. At present, Ms. Brill does have some good days and she is able to take long walks, most days, but she depends on medication for pain relief. While she suffered from general anxiety before the Collision, there was no suggestion that she had any pre-existing driving anxiety. She is not able to work at a job that brought her a great deal of pleasure for many years prior to the Collision, and there is no dispute that she is permanently disabled from meeting the demands of that job. Her housekeeping capacity is limited to light duties and she has to pace herself. She does not participate in physical activities other than walking. She rarely entertains.

[130] Ms. Brill quantifies her non-pecuniary damages claim at $150,000. She relies on the following cases as comparators:

- *Lee v. MacLean*, 2022 BCSC 312 ($130,000 awarded in non-pecuniary damages);
- *Ferguson v. Watt*, 2018 BCSC 1587 ($140,000 awarded in non-pecuniary damages, which Ms. Brill says equates to about $164,000 in current dollars); and
- *Wong v. Au*, 2021 BCSC 58 ($120,000 awarded in non-pecuniary damages).

[131] The defence submits that an award of about $100,000 less a reduction to reflect the contingencies associated with Ms. Brill's pre-existing conditions, is appropriate, citing the following cases:

- *Klimek v. Lockhart*, 2023 BCSC 582 (non-pecuniary damages of $86,250 awarded based on an assessment at $115,000, less 25 percent for contingencies);
- *Page v. Roy*, 2022 BCSC 1802 ($100,000 awarded in non-pecuniary damages);
- *Abkari v. Trac*, 2022 BCSC 910 ($100,000 awarded in non-pecuniary damages); and
- *Lorenz v. Pabla*, 2021 BCSC 1553 ($90,000 awarded in non-pecuniary damages).

[132] The cases relied on by Ms. Brill are appropriate comparators. The plaintiffs in these cases each experienced a loss of enjoyment of life similar to the degree of loss suffered by Ms. Brill. Additionally, all the plaintiffs in these cases were impaired from performing certain aspects of a pre-accident job that had brought them significant pleasure. With the exception of *Wong*, the nature of the injuries in each case were similar to the injuries sustained by Ms. Brill.

[133] In contrast, some of the cases relied on by the defence concerned plaintiffs whose injuries had a less severe ongoing impact. For example, in *Abkari* the plaintiff's physical injuries had largely resolved by the time of trial: para. 84. In *Page* it was found that the plaintiff would be able to resume most if not all of her pre-accident recreational activities: para. 85. *Lorenz* concerned a plaintiff who was older than Ms. Brill, and her more advanced age was a factor in the granting of a smaller non-pecuniary damages award: para. 145.

[134] The most significant factors in this case are the severity and duration of Ms. Brill's initial symptoms; the near certainty that she faces many years of ongoing symptoms, including driving anxiety; the fact that her prognosis for improvement is poor; the loss of her ability to work in a job that previously gave her much pleasure;

and the ongoing and almost certainly permanent limitation on her ability to participate in physical activities she previously enjoyed.

[135] Having considered all the authorities, before application of the contingency deduction, I would have assessed Ms. Brill's non-pecuniary damages at $130,000. After applying the contingency deduction of 15 percent, I award her non-pecuniary damages of $110,500.

Past Loss of Income-Earning Capacity

[136] A claim for past loss of income-earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of their injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[137] A common method of assessing this value is to project the income the plaintiff would have earned in the period between the injury and the trial had the injury not occurred, and to award the difference between the projected income and the actual income the plaintiff did earn or was capable of earning during that period, while taking into account all realistic contingencies.

[138] As noted, Ms. Brill was off work for about a year following the Collision. She then returned to work on a gradual basis, progressing to full-time within a month. She worked full-time until March 2019, except for the four to five months following the flare up in her symptoms in April 2017, during which she worked part-time. She stopped working in March 2019 and has not worked since.

[139] Ms. Brill says that but for the Collision, she would have continued to work full-time as a meat wrapper at Safeway in the period between the Collision and the trial, and as a result of the Collison-related injuries she had no earning capacity during that period. She testified that when she stopped working as a meat wrapper in March 2019, she thought she would eventually return to that occupation and, as a result, she did not think much about an alternative career. As noted, she eventually took some basic computer courses but her position is that she is incapable of improving her essentially nonexistent computer skills.

[140] Both Dr. Sangha and Dr. Travlos opined that, as a result of her Collision-caused injuries, Ms. Brill is not capable of working as a meat wrapper. Dr. Sangha recommended she transition to a different line of work (clearly implying that he considered her to have some residual capacity for more sedentary work). Dr. Travlos opined that, with training, she "might" be able to work in an office environment, which I interpret as an opinion that she might be able to perform in a sedentary role.

[141] As mentioned, Mr. Hosking conducted a functional capacity evaluation of Ms. Brill on October 26, 2022. In his report, he expressed the opinion that Ms. Brill demonstrated limitations that likely preclude her from meeting the physical demands of a meat wrapper at Safeway but that she showed the capacity for working in a position with sedentary and some light physical strength demands. Although he initially opined that poor pain management would likely preclude her from being competitively employable, in cross-examination he agreed that Ms. Brill's more recent (2023) subjective reports of improvement in her pain indicate that she is likely capable of part-time sedentary work.

[142] The defendant accepts that Ms. Brill worked to her capacity until March 2019 and that she is now permanently disabled from working as a meat wrapper. The defendant submits that within about two years of leaving her position as a meat wrapper (that is, by 2021) she ought to have accepted that returning to that occupation was not an option and she should have obtained alternative employment.

[143] The first step in the analysis is to project the income Ms. Brill would have earned in the period between the Collision and the trial had the Collision not occurred. Subject to the contingency associated with Ms. Brill's pre-existing spinal degeneration, I accept that but for the Collision she would have worked full-time at Safeway as a meat wrapper during that period.

[144] Using wage rates derived from Ms. Brill's employment file with Safeway, and assuming pay increases consistent with the collective agreement governing her position, Mr. Benning estimated Ms. Brill's "without accident" employment income in the period between the Collision and the trial at about $55,000 per year, totaling

$440,593 (gross) over the period. His approach was not challenged by the defence and I accept it in finding that, again subject to the contingency associated with the pre-existing spinal degeneration, Ms. Brill likely would have earned gross income of $440,593 in the pretrial period had the Collision not occurred. For reasons I have already explained, it is necessary to apply a 10% reduction to that amount to reflect the contingency, leaving Ms. Brill with a pretrial without accident earning capacity of $396,534 (gross).

[145] The next step in the analysis is to ascertain the income Ms. Brill did earn in the pretrial period. Based on her T4s, Mr. Benning calculated her gross income during the pretrial period at $157,730. His approach was not challenged by the defence and I accept it.

[146] It is now necessary to determine whether Ms. Brill was capable of earning more than $157,730 and, if so, assessing how much she was capable of earning.

[147] The evidence of Dr. Sangha and Mr. Hosking supports the conclusion that Ms. Brill is now physically capable of performing part-time sedentary work, and Dr. Travlos opined that she “might” be so capable. Between 2019 and 2021, Ms. Brill was consulting specialists, receiving nerve blocks, and undergoing injection treatments. Commencing in about January 2021, she started active rehabilitation and occupational therapy. I took from her evidence as a whole that from about 2021 her focus shifted from searching for a “cure” to managing her symptoms. She started her daily walking program in March 2022. By the spring of 2023 she was walking as much as 11,000 steps per walk. Since about 2022, the barrier has been pain control. Ms. Brill testified that she is most often able to control her pain by pacing her pain medication, and this has contributed to the success of her walking program. All of this leads me to conclude that by about mid 2022, Ms. Brill was physically capable of working in a part-time sedentary job.

[148] The next step in the analysis requires me to project what Ms. Brill could have earned. The evidence established that due to her limited education, limited work experience, and lack of transferable skills, her options were and are limited. She did

not excel in the computer course she took and I am satisfied that significant retraining is not a realistic option for her.

[149] Ms. Wong expressed the view that, in light of Mr. Hosking's assessment of Ms. Brill's physical capacity, and without any retraining, Ms. Brill could explore alternative positions within Safeway, and if that did not bear fruit she could pursue certain types of seated cashier, salesclerk and parking lot attendant roles. Ms. Wong cited federal government statistics indicating pay rates of between $15.65 per hour (minimum wage in British Columbia at the time of the trial) and $26.75 per hour for such roles.

[150] The evidence does not permit me to find that an alternative position within Safeway was a realistic option for Ms. Brill. However, for the reasons I have expressed, I am satisfied that by mid 2022 she was physically capable of working in a part-time sedentary job. This would include the types of roles identified by Ms. Wong, provided she had the flexibility to shift between sitting and standing. However, in my view, Ms. Brill's age and limited work experience leave her relatively uncompetitive for positions near the top of the pay range identified by Ms. Wong.

[151] In all the circumstances, I find that Ms. Brill's residual earning capacity is appropriately assessed at $15,000 a year (gross) from mid-2022 (or $1,250 per month). This reflects earnings of about minimum wage for 20 hours of work a week, for 48 weeks a year. There are eleven months between mid 2022 and the commencement of the trial. On this basis, I find she could have earned $13,750 (gross) during that period.

[152] The difference between Ms. Brill's projected, pretrial, without accident, earning capacity ($396,534) and the combination of the income she did earn ($157,730) and what she could have earned ($13,750) is $225,054, before accounting for income taxes and EI premiums. I assess her damages for past loss of earning capacity at $225,054, subject to appropriate deductions. If counsel can not agree on the net amount they may apply for a more precise determination.

Future Loss of Income-Earning Capacity

[153] The Court of Appeal has discussed the principles governing claims for loss of earning capacity in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305, Justice Garson, writing for the Court, cited its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, and described the approach at para. 53 as follows:

> [53] … [I]n *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages.
>
> [Emphasis in original.]

[154] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 7–10, the Court of Appeal recently restated the operative principles which had previously been revisited in *Dornan*, *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421:

> [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.
>
> [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.
>
> …
>
> [10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
>
> > [47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the

> relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.
>
> [Emphasis added by Grauer J.A.]

[155] I have no difficulty concluding that Ms. Brill has established a potential future event that could lead to a loss of capacity. Her Collision-caused injuries have left her incapable of working at her previous occupation as a meat wrapper, and her condition is likely permanent. As a result, she has become less valuable to herself as a person capable of earning income in a competitive labour market. There has been an impairment of the capital asset: see *Rab* at paras. 36 and 60.

[156] There is a real and substantial possibility, indeed a near certainty, that this loss of capacity will cause a pecuniary loss. I accept that, but for her physical condition, Ms. Brill would have continued to work full-time as a meat wrapper at Safeway. She can no longer do that. She is limited to part-time sedentary work at minimum wage. The loss of capacity will have future economic consequences. She has established a real and substantial possibility of a pecuniary loss.

[157] The next step involves assessing the value of that future loss, which must include assessing the relative likelihood of contingencies.

[158] Ms. Brill testified that before the Collision she had no clear plan for retirement, but assumed she would work to age 70, as her mother had done. That is an insufficient foundation upon which to base any finding about her likely retirement age. Mr. Diggon testified he planned to retire at age 65 (when Ms. Brill would be 64) and they planned to travel, which indicates a retirement age of 70 for Ms. Brill was not likely. The defendant submits that Ms. Brill likely would have retired by age 62, but, in my view, the evidence does not support that position either. I find Ms. Brill likely would have retired at the typical age of 65. There is a possibility she would have worked a bit longer but an offsetting possibility she would have retired a bit earlier.

[159] Mr. Benning estimated the present value Ms. Brill's future employment income had she continued to work full-time as a meat wrapper at Safeway to age 65

as $296,142. His analysis applied a contingency for premature death and labour market contingencies. His approach was not challenged by the defence and I accept it in finding that, subject to the contingency associated with the pre-existing spinal degeneration, the present value of Ms. Brill's without accident future earning capacity is $296,142.

[160] For the reasons I have already expressed, Ms. Brill has a residual earning capacity of about $15,000 a year (plus increases commensurate with future increases in the minimum wage). Using Mr. Benning's future loss multipliers, it is possible to calculate the present value of $15,000 per year from the trial to Ms. Brill's 65th birthday as $76,155 (($15,000/1,000) x 5,077)), where 5,077 is the economic multiplier (which provides for the contingency of premature death and labour market contingencies). To reflect the high likelihood of future increases in the minimum wage, I would round that up to $80,000. That is the present value of Ms. Brill's with accident future earning capacity.

[161] Before applying a deduction for the contingency associated with Ms. Brill's pre-existing spinal degeneration, her future loss of earning capacity would be valued at $216,142, which is the difference between her without accident future earning capacity ($296,142) and her with accident future earning capacity ($80,000). For the reasons I have already expressed, a reduction of 30 percent to future losses is appropriate to account for that contingency. For these reasons, I assess her damages for future loss of earning capacity at $151,299.

Special Damages

[162] Ms. Brill's claim for special damages of $5,131.75 is agreed to by the defence.

Conclusion

[163] In summary, the damages awarded to Ms. Brill are:

Non-pecuniary damages:	$110,500

Past loss of earning capacity:	$225,054 (less appropriate deductions)
Future loss of earning capacity:	$151,299
Special damages:	$5,131.75

[164] Subject to further submissions, Ms. Brill is entitled to her costs. If the parties cannot agree or if there are circumstances of which I am unaware, they may make arrangements through Supreme Court Scheduling to speak to that issue.

"Warren, J."