

CANADA / JUDGMENT

Lal v. Singh

2021 BCSC 2378

COURT

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2021 BCSC 2378 Lal v. Singh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lal v. Singh,

2021 BCSC 2378

Date: 20211206

Docket: M172411

Registry: New Westminster

Between:

Rita Lal

Plaintiff

And

Gagan Singh and Taranjit Singh Hayer

Defendants

Before: The Honourable Mr. Justice M. Taylor

Reasons for Judgment

Counsel for the Plaintiff:

R.K. Patro

Counsel for the Defendants:

S.L. Markovich

C.L. Linegar

Place and Dates of Trial:

Port Coquitlam, B.C.

May 10-14 and 17-18, 2021

Place and Date of Judgment:

New Westminster, B.C.

December 6, 2021

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I. INTRODUCTION

- [1] The plaintiff, Rita Lal ("Ms. Lal"), was involved in a motor vehicle accident on December 29, 2013 (the "Accident").
- [2] The Accident occurred at about 1:30 pm while Ms. Lal was travelling to work in a northbound direction on 128th Street in Surrey, British Columbia. The defendant, Gagan Singh, exited a strip mall parking lot and collided with the rear right side of Ms. Lal's vehicle, causing her vehicle to veer over the adjacent curb and crash into a metal gate and some bushes in the front yard of a nearby residence. Mr. Singh was ticketed by the RCMP for failing to yield to a through vehicle. Both vehicles were written off as total losses.
- [3] Ms. Lal alleged at trial that, as a result of the Accident, she suffered a mild traumatic brain injury and soft tissue injuries in her back and neck. Ms. Lal alleged that, in the first month after the Accident, she experienced pain in her mouth and face, back, neck, chest, knees as well as shooting pain into her arms and legs. She also alleged that she suffered from headaches, nausea, depression, fatigue, anxiousness and sleeplessness. Ms. Lal admits that many of these symptoms subsequently resolved, including the oral and facial pain, the knee, arm, leg and chest pains. However, she alleges that she continues to suffer in particular from neck and back pain, migraine headaches and depression, fatigue and related mood symptoms, all of which she alleges were caused by the Accident (the "Alleged Injuries").

- [4] Ms. Lal takes the position that the Alleged Injuries have seriously impacted her quality of life, including her ability to fully contribute to a family business she runs with her mother, to participate in many of the sporting, social and family activities she used to enjoy, to maintain relationships with family, friends and potential romantic partners, and ultimately to have children of her own.

II. ISSUES

- [5] Liability was admitted by the defendants, Gagan Singh and Taranjit Singh Hayer. The issues at trial were as follows:

1. Were the Alleged Injuries caused by the Accident?
2. Is Ms. Lal entitled to non-pecuniary damages?
3. Is Ms. Lal entitled to damages for loss of past earning capacity?
4. Is Ms. Lal entitled to damages for loss of future earning capacity?
5. Is Ms. Lal entitled to damages for loss of housekeeping capacity?
6. Is Ms. Lal entitled to damages for the cost of future care?
7. Is Ms. Lal entitled to special damages?
8. Did Ms. Lal mitigate her losses?

III. BACKGROUND

- [6] At the date of trial, Ms. Lal was a 39-year-old woman living in Surrey, British Columbia. Ms. Lal resides with her mother, Rekha Lal, in a single-family home.
- [7] Ms. Lal graduated from high school in 2000, and obtained a diploma in childcare from Kwantlen College in or around 2003. In about 2009, Rita obtained an Associates Degree in Ayurveda (via correspondence), and in 2010 she obtained a B.Sc. (also via correspondence) in Ayurvedic Medicine. Ms. Lal has 3 older siblings: 2 brothers (born in 1973 and 1976), and an older sister, Anita, who was born in 1974. Ms. Lal's father passed away in a car accident in 1984 and her mother Rekha Lal had to raise the four children on her own. Ms. Lal's sister Anita Lal played an active role in helping to raise Ms. Lal, and they have always been close.
- [8] In 2000, Anita married Joe Aikins, and Mr. Aikins moved in with the Lal family for a period. Mr. Aikins and Anita Lal began having children 19 years ago with the birth of their first daughter, and now have four children who are aged: 19, 17, 15, and 10. The Aikins family moved to Arizona in August, 2020.
- [9] At the time of the Accident, Ms. Lal worked full-time for a business that she co-owned with Rekha Lal called Ayur Healing Inc. ("Ayur"), selling herbal products in the Ayurvedic tradition. This business, originally called Herblex Enterprises ("Herblex"), was founded in 2000 when Rekha Lal's sister-in-law came to Canada from India for Mr. Aikins and Anita's

wedding and assisted Rekha Lal in starting her own business. Rekha Lal testified that Ms. Lal helped her on a part-time basis when the business opened and gradually increased her hours until she started working full-time for the business in 2006. Ms. Lal testified that she recalled originally working part-time for the business, as well as working part-time at a gym and in childcare, and then transitioned over to full-time.

- [10] After Ms. Lal obtained her education in Ayurvedic medicine, she became a shareholder in her mother's business. In 2011, Ayur was incorporated with a 55/45 share structure in favor of Rekha Lal, and Ms. Lal being the minority shareholder.
- [11] Rekha Lal and Ms. Lal testified that, prior to the Accident, they were both often present at the business seven days per week. Rekha Lal's evidence was that Ms. Lal handled the computer and clerical aspects of the business, in addition to participating in retail sales and customer service, and that Ms. Lal also conducted consultations with customers and gave massages. Rekha Lal testified that her primary role was to be there for those elderly Punjabi customers that she knew would be uncomfortable talking to a young woman like Ms. Lal about their health problems. All of this was consistent with Ms. Lal's testimony.
- [12] Ms. Lal testified that she enjoyed her work at Ayur prior to the Accident. She testified that she had no other career plans and intended on continuing to run the business after her mother's retirement, while recognizing that she would likely have to hire someone to replace her mother's dwindling contribution to the business.
- [13] Rekha Lal testified that her original plan, prior to the Accident, was to retire in a couple of years to spend more time with her grandchildren, with her expectation being that Ms. Lal would take over the business and hire someone to replace her mother. However, Ms. Lal and her mother had never formalized a retirement or succession plan with respect to Ayur, or a specific timeline for that to take place.

IV. LEGAL ANALYSIS

1. Were the Alleged Injuries caused by the Accident?

- [14] The onus is on Ms. Lal to prove on a balance of probabilities that: (1) she did in fact suffer the Alleged Injuries; and (2) that "but for" the Accident, she would not have suffered the Alleged Injuries. To meet this onus, Ms. Lal must demonstrate that the Accident was a necessary cause of the Alleged Injuries, although not necessarily the sole cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [*Athey*]; *Clements v. Clements*, 2012 SCC 32 at paras. 8-10 [*Clements*], *Ediger v. Johnston*, 2013 SCC 18.

- [15] Ms. Lal need only establish a "substantial connection between the injury and the defendant's conduct", beyond the de minimis range, in order to establish causation: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11. The "but for" test must be applied in a "robust common sense fashion", with no requirement for scientific evidence of the precise contribution of the defendants' negligence made to the injury: *Welder v. Lee*, 2019 BCSC 1328 at para. 76 [Welder]; *Clements* at para. 9.

(A) Evidence of Causation

- [16] Taking into account all the evidence adduced at trial, I conclude that Ms. Lal has met her burden of proving that the Alleged Injuries were caused by the Accident. In reaching this conclusion I have considered the following evidence:

- a) Ms. Lal's Testimony
- b) The Medical Evidence:
 - i. Dr. Chahal: neurologist
 - ii. Dr. Hawkeswood: physiatrist
 - iii. Dr. Parikh: Ms. Lal's family doctor
 - iv. Dr. Grosch: neurologist
 - v. Dr. Riar: psychiatrist
- c) Testimony of Lay Witnesses:
 - i. Anita Aikins
 - ii. Rekha Lal
 - iii. Joe Aikins

(a) Ms. Lal's Testimony

- [17] Ms. Lal testified that she was very dazed and confused after the Accident. She could not recall if she lost consciousness during the Accident, but she believed she hit her head because her head hurt after the Accident, in addition to pain she was experiencing in her chest.
- [18] Ms. Lal testified that, immediately after the Accident, the ambulance staff on scene looked her over and concluded she did not need to go to the hospital. She testified that she was upset and wanted to see her mother so she attended the Ayur workplace during the day after the Accident, although she didn't do much at work and mostly rested that day.
- [19] Ms. Lal testified that she felt more pain later in the day, in particular in her knees and legs, and so a friend took her to the hospital during the evening. At the hospital, she was examined and sent home with a prescription for Tylenol 3s. Over the next month, she testified that other symptoms emerged, including stiffness, neck and back pain, ringing in

her ears, headaches, sleeplessness and irritability. Other initial symptoms included pain and tingling in legs and arms, and facial pain and chest pain. However, she further testified that many of these symptoms have since resolved, including the pain and tingling in her arms and legs, the ringing in her ears, the chest pains, and the facial pain.

- [20] Ms. Lal testified that she had no health problems before the Accident, either mental or physical. In the two years prior to the Accident, she recalled that she had seen a doctor only once for a stomach infection. She also testified that her activity level before the accident was high, and that she was regularly engaged almost every day in activities such as running, yoga, biking, hiking and swimming. Ms. Lal testified that, prior to the Accident, her weight was in the 105-110 lbs range, but that it has now increased to 140 lbs. She attributed the weight gain to being very inactive, not motivated and depressed since the Accident.
- [21] Ms. Lal testified that she continues to suffer from back and neck pain, which restricts both her work and recreation. She testified that she has a hard time standing and sitting for long periods, that she suffers very intense headaches, and is required to do things slowly. She also testified that, due to the alleged injuries, she no longer provides massages for clients, which she used to provide 2-3 times per work at a cost of between \$10 and \$50. Further, she no longer provides consultations with clients, which involved sitting down with clients to discuss health issues and also meal planning.
- [22] Ms. Lal testified that she has taken medications to help with her symptoms and has also employed massage and chiropractic therapy. She also testified that there were periods where she tried to reengage with prior activities, by incorporating yoga, stretching and exercising, but she found it difficult and avoids those activities now. She explained that she now avoids these activities due to pain, depression, headaches and a general lack of motivation, which she attributes to the depression.
- [23] Ms. Lal testified that she experiences back and neck pain now 3-4 days a week, for 2-4 hours at a time, and manages this pain with medication. She described the intensity of the pain as ranging from 4 to 8 out of 10 in pain, with 10 being one of worst days. She testified that she suffers from headaches 3-4 days per week, with each episode lasting several hours and sometimes the whole day. She described her headaches as having gotten a lot worse over time.
- [24] Ms. Lal described the headaches as very painful, with a lot of pain in her eyes, a feeling of heat in her head, and sometimes nausea occasionally resulting in vomiting. She also testified that things that make headaches worse include light and loud noises. When she experiences a severe headache, she testified that her response is to try to take it easy, lie down, rest, and take medication. If she suffers a headache at work, which happens a couple of times a week, she lies down in the massage room.

- [25] Ms. Lal testified that she has consulted with a few neurologists to address her problem with headaches. She testified that her experience with medication is that it is "Ok at times" and sometimes give temporary relief but it is not always effective.

Credibility and Reliability of Ms. Lal's testimony

- [26] The defendants do not call into question the credibility of Ms. Lal's testimony but do argue that her testimony was unreliable, as they allege that it was at times vague, inaccurate or unreasonable and that she was a poor historian.
- [27] The jurisprudence has made it clear that, where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the court must be exceedingly careful in examining and assessing credibility: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) at 399; *Buttar v. Brennan*, 2012 BCSC 531.
- [28] In *Bradshaw v. Stenner*, 2010 BCSC 1398 [Bradshaw], aff'd 2012 BCCA 296, Justice Dillon summarized the key elements involved in assessing credibility as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of [their] memory, the ability to resist the influence of interest to modify [their] recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes [their] testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB QB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)).

[29] In *Welder* at para. 60, the Court explained the distinction between credibility and reliability:

Credibility is concerned with the veracity of the witness and assessment of reliability involves consideration of the accuracy of the witness' testimony; accuracy engages the ability of the witness to observe, recall and recount: *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal ref'd [2015] S.C.C.A. No. 374.

[30] I start by observing that Ms. Lal's evidence was very consistent with the evidence of the other lay witnesses Anita Aikins, Mr. Aikins and Rekha Lal (summarized further below) with respect to her active and healthy pre-Accident life and the profound change in her life, health and mood after the Accident. Further, there was no evidence adduced at trial that Ms. Lal suffered from any pre-existing health conditions prior to the Accident or that any other intervening events may have caused the Alleged Injuries.

[31] Nonetheless, the defendants allege that Ms. Lal's evidence was unreliable for a number of reasons and I will address them each in turn.

[32] First, the defendants take issue with Ms. Lal's testimony that, prior to the Accident, she saw her nieces and nephews almost every day, socialized with friends, and was active with walking, running, hiking or yoga almost every day. They argue this is inconsistent with her testimony that she was working seven days a week from 11 am to 7 pm. They further allege that her busy work schedule would not have made it feasible for her to carry on these other activities at the same time and that it was highly unlikely she was actually working seven days a week.

[33] While there is no question that Ms. Lal's work schedule, coupled with her social and physical activities, would have made for a busy life, I do not accept the defendants' argument that such a life and schedule was not feasible. With her work day starting at 11 am, this would have left ample time for physical activities and interactions with nieces and nephews in the mornings and also time for social activities after 7 pm. Further, Ms. Lal testified that she would take days off from work from time-to-time and, being a family business shared with her mother, it is clear there was flexibility for her to adjust her work schedule to accommodate other family priorities. Certainly, the defendants adduced no evidence that Ms. Lal's testimony on this point (which was corroborated by all the other lay witnesses) was untrue or incorrect.

[34] Second, the defendants argue that Ms. Lal's recollections about her medication use and attendance for therapy with a counsellor were vague. While it is true that Ms. Lal's recollections were imperfect with respect to the specific medications she was prescribed and the specific nature and schedule of her appointments with various doctors and specialists, I do not accept that this fact alone seriously undermines the reliability of her testimony concerning the key legal issues in this trial.

- [35] In this regard, I note the evidence was clear that Ms. Lal was prescribed a lot of medication after the Accident, including Tylenol 3, Cyclobenzaprine, Naproxen, Elavil and Cipralex, among others. It is not surprising in that light that she would be unable to recall perfectly under cross-examination what medications she was taking at what times. Similarly, the evidence was that Ms. Lal attended many meetings with many doctors over a 7-year period, and it is also not surprising that she may not recall exactly what doctors she saw or contacted and when. The defendants allege that Ms. Lal inaccurately testified that she attended counselling "a couple of times" when they assert the evidence was that she attended only once. However, this argument appears to be largely semantic since the evidence from the medical records was that she did in fact attend two sessions, the first being an assessment appointment and the second being a counseling session. This is certainly not sufficient unto itself to establish unreliability.
- [36] Third, the defendants allege that Ms. Lal's testimony was vague because she could not recall why she had not made a follow-up appointment with a neurologist, Dr. Horton, in 2019. Again, however, this must be seen in the context of the fact that Ms. Lal consulted with three separate neurologists after the Accident over a 7-year period. It is not overly surprising that she was unable to recall the details concerning appointment scheduling with one of them two years earlier.
- [37] Fourth, the defendants allege that Ms. Lal's evidence was vague concerning the time she took off work after the Accident and the impact on the business of the Accident and, later, the impact of the Covid pandemic and family issues arising from her sister's decision to move to the United States in 2020. I agree that Ms. Lal's lack of understanding concerning the financial aspects of her business is surprising given her seven-day-per-week involvement. However, this appears to reflect the fact (as both Rekha Lal and Ms. Lal testified) that they delegated the bookkeeping and financial aspects of the business, including tax-driven decisions about how to allocate revenues and dividends between themselves, to the accountant. I will address this aspect of the evidence, which does create problems for Ms. Lal's claim, in my discussion concerning business losses below.
- [38] Finally, the defendants take issue with Ms. Lal's unclear recollection about a slip and fall in her bathroom in 2019 or 2020, as she stated it was possible it aggravated her neck and back symptoms and headaches for a couple of weeks, but could not be sure. Given the limited time frame of the impact of this later incident (a "couple of weeks"), which took place at least six years after the Accident, it is difficult to give this much significance as weighed against to her overall testimony about the health impact of the Accident over a 7-year time frame.
- [39] As a further general observation with respect to all the defendants' arguments on reliability, I note that Ms. Lal presented as a credible witness who is clearly struggling with depression. Her affect was flat, her responses to questions were brief and often lacking in elaboration, and her demeanour was subdued and almost removed. She did not present as a witness prone to exaggeration or embellishment, or poor memory, indeed, quite the contrary. Taking the foregoing into account, I strongly suspect that at least some of what the

defendants have identified as "vagueness" is attributable to her depressed state and her emotional difficulty in rising to the occasion of a court proceeding. I have taken these observations into account in assessing both her credibility and reliability.

[40] Finally, on the issue of both credibility and reliability, I note that the defendants tendered a report from a private investigator, Anne Robinson of Xpera Investigations, who conducted surveillance of Ms. Lal over 11 days in February and March 2019, and September and October 2020. Ms. Robinson observed Ms. Lal on 7 of the 11 days and spent 63 hours and 37 minutes conducting her surveillance activities over those 7 days. Ms. Robinson also testified at trial and portions of the video from the recorded surveillance were played in court.

[41] In my view, the surveillance evidence did not assist the defendants in undermining the credibility or reliability of Ms. Lal's evidence. To the contrary, it actually in many ways bolstered her evidence for the following reasons:

- Ms. Lal appeared slow, somewhat fatigued and sad in most of the video footage; she did not appear as a healthy, active and fit young woman. She rarely if ever smiles in the video footage. At one point in the video she can be observed shielding her eyes from the sunlight when outside of the store (which is consistent with allegation of light sensitivity);
- The footage did not capture any material examples of Ms. Lal undertaking strenuous physical activities inconsistent with her complaints about back and neck pain. The one exception to this was a segment where she was captured lifting her dog into the back seat of her car and, even there, she did this slowly and with a two-stage lifting method;
- More generally, the surveillance did not capture a single example of Ms. Lal doing something that she testified she was unable to do;
- Ms. Robinson admitted in cross-examination that she never observed Ms. Lal host another individual at her home or visit another individual's home, or socialize with anyone in all of the hours of attempted surveillance. As noted by counsel for Ms. Lal, this is consistent with the lay evidence of social withdrawal, as well as the medical evidence supporting ongoing and persistent depression since the Accident;
- Ms. Robinson admitted under cross-examination that she generally includes "Closing Notes & Recommendations" section in her reports where she identifies recommendations for fruitful further surveillance opportunities, if any exist. However, in this case, neither of her two reports contained any such recommendations.

[42] Taking the foregoing into account, I am unable to accept the defendants' argument that Ms. Lal's testimony should be treated on a wholesale basis as unreliable, nor do I find it to be lacking in credibility. That said, obviously to the extent that portions of her testimony were overly vague or difficult to reconcile with other testimony or evidence, I have taken this into account by giving her evidence correspondingly less weight with respect to those discrete portions of the testimony.

(b) The Medical Evidence

[43] The medical evidence adduced at trial consistently supported a causal link between the Accident and the Alleged Injuries. There was no expert evidence supporting the proposition that such a causal link did not exist, although there was some variation in the evidence with respect to prognosis for the future and the feasibility and likely effectiveness of different treatment options. I will address these variations later in the reasons.

(i) Dr. Chahal

[44] Dr. Chahal was qualified at trial as an expert in the field of neurology and in the diagnosis and treatment of mild traumatic brain injury and headache disorders. Dr. Chahal has been qualified as a neurologist since 2011 and specializes in care for patients with conditions affecting the nervous system, brain injuries and trauma. Dr. Chahal has experience in clinical work at a trauma centre and in muscular medicine, and also has done outpatient clinical work on headaches, concussions and neurological dysfunction.

[45] Dr. Chahal did an independent medical examination ("IME") of Ms. Lal in 2017, which he updated in February, 2021. He has subsequently taken Ms. Lal on as a patient in clinical practice.

[46] In his report of March 1, 2017, following his IME, Dr. Chahal concluded that Ms. Lal had sustained a mild traumatic brain injury ("MTBI") and subsequent post-traumatic headaches, caused by the Accident:

Given Ms. Lal's description of her post-motor vehicle accident symptoms, including hitting her head and feeling "shocked and dazed" immediately following the MVA, along with the ongoing headaches, mood and cognitive symptoms, I am of the opinion that Ms. Lal suffered a mild traumatic brain injury (MTBI, also known as Concussion) as a result of the acceleration/deceleration forces she sustained during the accident.

I am of the opinion that she now has chronic post-traumatic headaches (classified as Persistent headache attributed to traumatic injury to the head in ICHD-3 classification) as a result of the injuries she sustained in the mentioned MVA.

Given the fact that it is now nearly 4 years from the time of the accident, I am of the opinion that she will need ongoing management in regards to these post-traumatic headaches. It is my experience that the majority of patients with post-traumatic headaches tend to improve over the first 9 to 12 months, although a smaller sub-set of patients can be resistant and tend to have ongoing headaches requiring prolonged medical management.

[47] In his report of February 1, 2021, Dr. Chahal confirmed his prior opinion and gave a guarded diagnosis, opining that she continues to be "significantly impaired" as a result of her chronic headaches:

It has been just over seven years since the said Motor Vehicle Accident on December 29, 2013 and she continues to be significantly impaired as a result of her chronic headaches. Given the unrelenting nature of these headaches, I further opine that her prognosis for any significant recovery in these regards remain quite guarded. On the balance of probabilities, she will likely continue to suffer ongoing headaches and require prolonged medical management.

(ii) Dr. Hawkeswood

[48] Dr. Hawkeswood is a physiatrist and was qualified as an expert in physical medicine and rehabilitation, with a special interest in traumatic brain injuries and chronic pain. Dr. Hawkeswood has a clinical practice, is a neural muscular specialist and has a special interest in traumatic brain injury, chronic pain and sports injuries. Dr. Hawkeswood also lectures in the area of traumatic brain injuries and concussions.

[49] Dr. Hawkeswood conducted an IME of Ms. Lal and prepared three reports that were adduced in evidence, dated August 28, 2017, November 16, 2017, and January 29, 2021.

[50] In his November 16, 2017 report, Dr. Hawkeswood opined that Ms. Lal had more likely than not sustained a concussion with resulting migraines as a result of the Accident:

it is my opinion that Ms. Lal more likely than not sustained a concussion on account of the subject accident. Furthermore, on the balance of probability, I find it likely that Ms. Lal's initial and ongoing migraines were a direct result of the subject accident.

[51] In his report of August 28, 2017, Dr. Hawkeswood also opined that Ms. Lal meets the clinical definition for chronic migraine:

It is my opinion Ms. Lal meets the ICHD-III (International Classification of Headache Disorders-III) criteria for chronic migraine, based on her frequency of headaches, severity of symptoms, duration of symptoms, associated nausea, vomiting, light and sound sensitivity, plus the need to rest during episodes of increased pain. It is her most disabling condition and she estimates having headaches four to five days in a given week, most of them being severe.

[52] In his report of January 29, 2021, Dr. Hawkeswood updated his opinion, opining that Ms. Lal continues to suffer from chronic neck and back pain and that a complete recovery is a "low probability":

Ms. Lal's diagnoses and differential diagnoses include:

- Myofascial neck pain
- General upper interscapular pain, likely a referral pattern from the lower cervical spine, as well as having a predominant 'soft tissue' component
- Mechanical low back pain
- Deconditioning is probably not a major factor in this case, recognizing Ms. Lal has consistently exercised at various times since the subject accident without much symptom improvement.

Based on the duration of Ms. Lal's symptoms and today's clinical presentation, a complete recovery from the subject accident is of low probability. She presents with a complex symptom profile with both physical pains and secondary mental health issues, all refractory to various treatments trialed thus far.

Ms. Lal has developed a degree of chronic pain on account of the subject accident. As mentioned above in the last paragraph in the section "Causation," there is an interrelated component of pain and mood symptoms that appears to have become quite a problem for Ms. Lal. She probably has not reached maximal medical improvement in that there is opportunity for some mental health improvements and the chronic headache management. That having been said, I still find it probable Ms. Lal has developed a degree of chronic pain on account of the accident, noting the above suggestions are unlikely to be curative.

As the years progress, there is a reasonable chance Ms. Lal's low back pain will worsen.

[53] However, in the same report, Dr. Hawkeswood also concluded that Ms. Lal has largely if not entirely recovered from the concussion:

Ms. Lal's diagnoses and differential diagnoses include:

- Mild concussion. This was addressed in my addendum report, noting the relatively dangerous mechanism of the MVA was taken into consideration.
- Headaches notwithstanding, I find it probable she has largely - if not entirely - recovered from the concussion.

[54] In direct examination, Dr. Hawkeswood clarified that this aspect of his opinion represented a "significant grey zone" because there is no clear way for him determine if Ms. Lal's ongoing headaches are secondary to her whiplash injury or concussion.

(iii) Dr. Parikh

[55] Dr. Parikh is Ms. Lal's family doctor. Dr. Parikh testified that he has treated over 3000 patients, and has extensive clinical experience treating patients with chronic pain, migraine, and depression problems in addition to a lot of experience treating injuries arising from auto vehicle accidents.

[56] Dr. Parikh testified at trial that he has been seeing Ms. Lal since 2014. Dr. Parikh testified that Ms. Lal paid 42 visits to his clinic during that time frame, and that he referred her to numerous specialists including two neurologists and a psychiatrist. Dr. Parikh reviewed his clinical notes in his testimony, which reflect a consistent and continuing pattern of Ms. Lal reporting neck, spine, tailbone and back pain, muscle tenderness, migraines, depression and sleeplessness from the date of the Accident up to the date of trial.

[57] Dr. Parikh testified that he reviewed the reports of Dr. Hawkeswood and the summary of Ms. Lal's clinical history in those reports was accurate.

(iv) Dr. Grosch

[58] Dr. Grosch is a neurologist. In a report dated March 21, 2019, Dr. Grosch opined that Ms. Lal's concussion, headaches and chronic pain are attributable to the Accident:

Headaches. This is her most distressing symptom. I believe her headaches are posttraumatic migraine in nature

Concussion. I believe she probably did have a mild traumatic brain injury when her head struck the driver's window. She cannot remember the moment of impact and has a very brief retrograde amnesia. She does have some postconcussional symptomatology including depression, anxiety, headache, trouble focusing, and mild difficulty with recent memory.

I believe the plaintiff's current complaints are directly related to the subject motor vehicle accident.

I believe she will have ongoing disability in terms of headache, mild cognitive and memory complaints, and chronic myofascial pain.

This is likely to extend into the unforeseeable future as I believe it is now likely a permanent situation.

(v) Dr. Riar

[59] Dr. Riar was qualified as a psychiatrist. Dr. Riar has been qualified since 1993, is in clinical practice, and has an expertise in forensic psychiatry

[60] In a report dated March 26, 2018, Dr. Riar opined that Ms. Lal suffers from depression and anxiety, and a mild somatic symptom disorder, and further opined that these symptoms were caused by the Accident:

I feel that she has somatic symptom disorder and at the time of my interview it was that of mild in nature.

Following the accident, she has experienced symptoms of anxiety and depression. I believe that her anxiety is in the form of either generalized anxiety or unspecified anxiety disorder. Her depression again is either adjustment disorder with depressed mood or major depressive disorder. Regardless of the diagnostic categories, she has suffered at least moderate symptoms of anxiety and depression over the years in varying intensity. Even at the time of my interview I felt that she had at least moderate symptoms of anxiety and depression

As far as causation, I feel that the accident in question was responsible for bringing on the pains, but with passing time her anxiety, depression, personality profile and other stressors like not functioning to her expectations all contributed to perpetuating and aggravating her somatic symptom disorder over the period of time.

As far as causation for her depression and anxiety, in the absence of any previous history of anxiety and depression, it is my view that if she was not involved in the accident in question she most likely would not have suffered the anxiety and depression which did afterwards. I feel that they have fluctuated in time, but remain poorly treated since the beginning. I feel that her change and demeanour and cognitive complaints are related to her ongoing chronic pains, anxiety and depression rather than any other organic cause.

[61] Dr. Riar explained that a somatic symptom disorder arises when patients experience psychological distress because of pain symptoms, and that distress persists even at times when there is no pain being experienced. Dr. Riar opined that Ms. Lal suffers from psychological distress in the form of increased anxiety due to her headaches, even when she is not having a headache.

[62] In his report, Dr. Riar recommended active exercise and optimization of medication and counselling through either a psychiatrist, or a combination of psychotherapy with a psychologist and medication optimization through her family doctor.

[63] Dr. Riar updated his report of February 4, 2021, and provided both a guarded short-term diagnosis and a long-term diagnosis that, with treatment, Ms. Lal will achieve remission:

As far as disability, I still do not believe that she is disabled, but some aspects of her life are limited due to ongoing anxiety and depression. As far as short-term prognosis for the next four to six months, without the abovementioned treatment, this is very much guarded. However, with the proper treatment, the outcome can be different. As far as long-term prognosis, at this time, it is difficult to give any firm prognosis, as she has not been given proper psychiatric treatment. I still believe that with treatment, she will benefit and achieve remission. I make this prediction looking at the fluctuating course of her illness, which sometimes is quite stable.

I believe that once there is control of her anxiety and depression, there will be improvement in her headaches and somatic symptom disorder.

[64] Dr. Riar clarified the term "remission" in direct examination, and said that this occurs when the symptoms abate, or go away, but that this was not a permanent state of affairs and the symptoms could recur if the patient encounters any stressful situation. He explained that this is a vulnerability that is created in the person, and that one cannot predict the risk of recurring illness.

(c) Lay Witnesses

(i) Anita Aikins

[65] Ms. Aikins is Ms. Lal's sister. Ms. Aikins testified that, before the Accident, she saw her sister on a regular basis and usually daily. She testified that, before the Accident, Ms. Lal was very active, being involved in shopping, hiking, running, swimming, jogging, going to the gym, walking and yoga. She also testified that Ms. Lal would join Ms. Aikins and her family for outdoor trips on the weekends like boating and hiking.

- [66] Ms. Akins testified that Ms. Lal was "born maternal" and "cared for my babies like they were her own". She testified that due to the busy work schedule of Ms. Aikins and her husband, Ms. Lal was often the primary caregiver for their three children, and was very involved in birthday parties, activities and sports.
- [67] Ms. Aikins testified that, prior to the Accident, Ms. Lal had no health problems that limited her activities and was "very fit and strong". She observed that Ms. Lal was conscious of her body and her diet and was involved with natural remedies and healing products.
- [68] Ms. Aikins testified that, on the day of the Accident, Ms. Lal called her and was hysterically crying. In the weeks following the Accident, Ms. Aikins recalled that Ms. Lal was quiet, complaining of headaches and walking slowly and stiffly. She testified that Ms. Lal's relationship with both her and Ms. Aikins' kids changed after the Accident. She observed that Ms. Lal became quieter and distanced herself. She testified that when she would ask Ms. Lal to go for a walk or a hike or to spend time with the family Ms. Lal would increasingly decline, stating that she was not feeling well or had a headache and was feeling tired.
- [69] Ms. Aikins also testified that she could observe changes in Ms. Lal's behaviour when having a headache, noting that she would be tense looking, avoiding eye contact, and her visits were very short and non-engaging. Ms. Aikins observed that Ms. Lal would complain she was suffering from migraines and that light and noise, including the sunlight, affected her. When Ms. Lal attended the kids' sporting events, Ms. Aikins testified that the next day Ms. Lal had to go into hibernation, and would suffer migraines associated with the noise and light. Ms. Aikins testified that "it was very sad to see".
- [70] When Ms. Aikins was able to convince Ms. Lal to join her for a hike or walk, Ms. Aikins testified that Ms. Lal would appear irritable and in pain and would sometimes leave partway through the activity. She also observed Ms. Lal's "fuse was shorter" with the kids and she stopped playing games with them, which she used to enjoy.
- [71] Ms. Aikins testified that she noticed a change in Ms. Lal's mood after the Accident, as she "always seemed down", had not much expression on her face, and did not get excited about activities like she used to. Instead, Ms. Lal always wanted to be home alone.
- [72] Ms. Aikins testified that, before the Accident, Ms. Lal would regularly talk with her about getting married and having children, and was socializing with men. She testified that Ms. Lal asked Ms. Aikins to keep her children's clothes so that Ms. Lal in future could use them for her own children.
- [73] However, after the Accident, Ms. Aikins testified that Ms. Lal "wanted no part of socializing" with men and had no interest in the dating scene, even turning down invitations from her mother to be introduced to men. In addition, Ms. Aikins testified that Ms. Lal isolated herself from the many friends she had before the Accident and opted out of social gatherings. Ms. Aikins testified this was "very sad" for the family members who were observing the changes in Ms. Lal.

[74] While recognizing that Ms. Aikins is the sister of Ms. Lal, and not a third party independent witness, I found her evidence nonetheless to be credible, as it was highly consistent with the evidence of Ms. Lal and the other witnesses, yet did not appear rehearsed or contrived.

(ii) Rekha Lal

[75] Rekha Lal is Ms. Lal's mother. In her testimony she reviewed the history of how the family business was established, which I have summarized above at paras. 9-13.

[76] Rekha Lal testified that, prior to the Accident, Ms. Lal was spending 8-9 hours a day, seven days a week, at the Ayur business. She testified that, as Rekha Lal does not speak or write English or know how to use computers, she would handle the clients (many of whom speak only Punjabi) while Ms. Lal would handle all tasks involving writing and computers, including ordering goods and stocking inventory. Rekha Lal testified that Ms. Lal also did massage for clients and consultations. Rekha Lal testified that, prior to the Accident, Ms. Lal was doing 60-70% of the work and Rekha Lal was doing 30-40% of the work.

[77] After the Accident, Rekha Lal testified that Ms. Lal came into the business very few times for the first 2-3 months, and when she did she would often have to lie down in the back to rest. Since that time she testified that Ms. Lal comes in regularly for 8-9 hours per day, although some days Ms. Lal is unable to come in due to migraines and back pain. Rekha Lal testified that, on other occasions Ms. Lal will come in but still has to lie in the back of the store for periods during the day due to the migraines.

[78] Rekha Lal testified that Ms. Lal has been less energetic that she was before the Accident at work and also helping with chores at home. She testified that Rita is not the same personality and has "no happiness". She testified that Ms. Lal often has angry outbursts (which she did not have before the Accident). She testified that Ms. Lal has lost interest in marriage and kids, and that Ms. Lal's relationship with her and other family matters has been detrimentally affected due to her anger and mood issues.

[79] While Rekha Lal is Ms. Lal's mother, and also not a third-party witness, I found her evidence to be credible and heartfelt, particularly with respect to the emotional impact that Ms. Lal's declining health has had on their relationship. Her memory was somewhat unreliable on some issues and I have taken that into account in weighing her testimony.

(iii) Joe Aikins

[80] Joe Aikins, the husband of Anita, also testified at trial. He was a customs and immigration officer in Blaine, Washington for 19 years and is currently a Manager at Amazon in Phoenix, Arizona.

[81] Mr. Aikins testified that on the day of the Accident, he received a call from his wife who asked him to go right to the scene. He testified that, when he arrived, the scene was chaotic and messy, as Ms. Lal's car had skipped over the sidewalk, knocked over a lamppost and ended up on the lawn in front of house. He testified that there was major damage to the car.

- [82] Mr. Aikins testified that Ms. Lal was not in a good state at the scene of the Accident and that she complained to him about a headache, and that her back and neck were sore. He testified that he accompanied her to his vehicle because she could not walk properly, and wanted to rest and lie down. He testified that Ms. Lal was dazed, confused, and she appeared traumatized.
- [83] Mr. Aikins testified that Ms. Lal was very active prior to Accident, and was a very gregarious, talkative person. He testified that, prior to the Accident, Ms. Lal loved their kids and was almost a second mother to them; she would come over and take the kids for ice cream or to the mall, in addition to escorting them to sporting activities. He testified that she was often a caretaker for the kids due to his and Ms. Aikins' busy work schedules.
- [84] Mr. Aikins testified that, in the weeks following the accident, Ms. Lal started isolating herself and had a change of mood. He noticed that she wasn't talking or expressing herself, and he saw a "big change" in her personality.
- [85] Mr. Aikins also testified that there was also a big change in Ms. Lal's activity level after the Accident. He testified that, before the Accident, she was skinny and very active, exercised regularly and did a lot of hiking. He stated that she was healthy, fit, energetic, motivated, and paid close attention to her diet. However, after the Accident, he testified that "it all came to a stop" and she was falling into a depressive state. Mr. Aikins noticed that Ms. Lal started gaining weight, was complaining about migraines and her moods were swinging back and forth. Mr. Aikins noticed that after the accident, she did not come over as much and spent less time with the kids. When she did come over, he observed she was quiet and withdrawn, which he found concerning.
- [86] I found Mr. Aikins' testimony to be credible, specific and straightforward. Mr. Aikins gave the impression of being a serious, thoughtful and honest individual. His testimony was also generally consistent with the evidence of the other witnesses.

(B) Conclusion on Causation

- [87] On the basis of all the foregoing, I find that Ms. Lal has met the burden of proving that the Alleged Injuries were caused by the Accident. The medical evidence, supported by the lay witness evidence, establishes that she continues to suffer in particular from neck and back pain, migraine headaches and depression, fatigue and related mood symptoms, somatic symptom disorder and sleeplessness.

2. Is Ms. Lal entitled to non-pecuniary damages?

- [88] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities: *Welder* at para. 82. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out an inexhaustive list of factors to consider when assessing non-pecuniary damages:

...

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;
- ...
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).

[89] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at paras. 54-56.

[90] The evidence is clear that Ms. Lal suffered serious injuries from the Accident and has been suffering from symptoms attributable to the Accident for seven years. The medical prognosis for her full recovery into the future is very poor. Specifically:

- Dr. Hawkeswood, a physiatrist, opined that Ms. Lal's neck and back pain is "chronic" and that a complete recovery is a "low probability";
- Dr. Grosch, a neurologist, opined that Ms. Lal will have an ongoing disability in terms of headache, mild cognitive and memory complaints, and chronic myofascial pain, and that "[t]his is likely to extend into the unforeseeable future as I believe it is now likely a permanent situation";
- Dr. Chahal, also a neurologist, opined that Ms. Lal's prognosis for any significant recovery from her prolonged headaches is "quite guarded" and stated that, on the balance of probabilities, she will likely continue to suffer ongoing headaches and require prolonged medical management;
- Dr. Riar, a psychiatrist, opined that Ms. Lal suffers from depression and anxiety, and a mild somatic symptom disorder. His short-term prognosis is guarded with respect to the mental health components of her condition (as distinct from the areas falling within the expertise of the neurologists and the physiatrist referenced above), although his long-term mental health prognosis is more optimistic, given proper medication and counselling.

- [91] Ms. Lal is still a relatively a young woman and yet, faces a long-term future of managing chronic neck and back pain, migraine headaches, fatigue and related depression. I have reviewed this evidence at paras. 21-25 and 43-64 above.
- [92] Her condition has affected her enjoyment of every other aspect of her life. Ms. Lal, Anita Aikins and Mr. Aikins all testified at trial that, before the Accident, Ms. Lal played a very active role in helping to raise the Aikins children, who were heavily involved in athletics. They testified that Ms. Lal was included on family vacations and often accompanied the Aikins children to their sports practices and games. They also testified that Ms. Lal was herself very active and participated in hiking, yoga, watersports, and working out, both with the Aikins family and on her own.
- [93] Ms. Lal and Anita Aikins testified that, prior to the Accident, Ms. Lal had aspirations to raise a family of her own. Ms. Lal had been in a six-year romantic relationship that ended in about 2012, but Ms. Lal and the other family members testified that while Ms. Lal was sad for a period, she did not become depressed and was ready to move on with meeting other men prior to the Accident. Ms. Lal testified that, prior to the Accident, she remained interested in pursuing a relationship (and ultimately a family) and continued to explore her options. She had an active social life and would meet new people in different settings, and she also considered more traditional options presented by her mother. The evidence was clear that Ms. Lal's injuries have impaired her relationship with her nephews, her siblings, mother and her friends, and she has gone from being a social person to a socially isolated person. She is no longer able to help her mother with chores around the house as she used to. Perhaps most importantly, Ms. Lal's injuries have caused her to lose interest in socializing with men, getting married and fulfilling her dream of having children of her own.
- [94] It must be acknowledged that Ms. Lal is not fully disabled and continues to work seven days a week. However, the evidence is that she is not able to do as much as work as she used to and has to take rest breaks or days off when she needs them to manage her headaches and fatigue. She testified that she has a hard time standing and sitting for long periods and is required to do things slowly. Her injuries have clearly diminished her enjoyment of her work, although she has continued to work in a stoic manner.
- [95] Ms. Lal relies upon the following authorities:
- (a) *Ranahan v. Ocegüera*, 2019 BCSC 228 (non-pecuniary award: \$160,000). In that case, the 45-year-old female plaintiff sustained injuries similar to Ms. Lal's, including chronic headaches, MTBI with cognitive struggles, mood symptoms, and chronic neck and back pain. The plaintiff had a very active life before the accident, including a range of physical and social activities and a busy work life as a physiotherapist. The plaintiff's enjoyment of life was impacted, including a diminishment of the quality of her life with her husband, a loss of social and recreational activities, diminished ability to carry out housework, and reduced capability at her work as a physiotherapist. However, the Court also noted that she was able

to carry on with work and certain other activities due to her "stoic" qualities.

- (b) *Dubitz v. Knoebel*, 2019 BCSC 1706 (non-pecuniary award: \$185,000). The 31-year old female plaintiff, who was a full-time administrative assistant, was described by the Court as "vivacious, energetic and active" and type of person "who could brighten a gloomy day" before her vehicle accident. It was found that she suffered from chronic pain due to soft tissue injuries, MTBI, headaches, Generalized Anxiety Disorder, PTSD, and depression. After the accident, the Court described her as a "shell of her former self". By the time of trial, the plaintiff's condition had plateaued, and her MTBI was no longer limiting her level of function but the Court concluded that her injuries would still have a serious impact on all aspects of her life into the future. The Court also found that there was no suggestion that the plaintiff had failed to mitigate.
- (c) *Gauthier v. Dubois*, 2018 BCSC 229 (non-pecuniary award: \$145,000, \$152,000 in 2021 dollars). The 32-year old male plaintiff sustained a MTBI with associated cognitive impairments, as well as back and knee injuries, occasional headaches, and emotional suffering, all of which continued to bother him by the time of trial five years later. However, the Court rejected his argument that the impact on his lifestyle had been "severe", noting that he continued his occupation as an entrepreneur and manager and also continued to engage in the same recreational activities as before, such as surfing, only not at the same level. The Court noted that some of the drop in performance was likely attributable to aging.
- (d) *Pearson v. Savage*, 2017 BCSC 1435 (non-pecuniary award: \$175,000, \$188,000 in 2021 dollars). The 21-year old female plaintiff suffered soft tissue injuries to her neck, back and left knee resulting in chronic pain as well as disabling headaches, depression, anxiety, and PTSD. The plaintiff was described by the Court as energetic, ambitious, and enthusiastic prior to the accident. The Court found that the soft tissue and psychological injuries impacted all areas of her life, including her ability to work, to pursue a university education and to enjoy recreational and social activities and emphasized that she would "never be pain free".
- (e) *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 (non-pecuniary award: \$185,000, \$223,000 in 2021 dollars). The plaintiff, a lawyer, suffered a MTBI as a result of a dance floor injury and subsequent motor vehicle accident, resulting in bad headaches. Although she returned to work, the Court found that the injuries detrimentally affected her work performance and enjoyment of work, her recreational activities and her social life. The Court also found that the prognosis for diminishment of her headaches and chronic pain was "not good".

[96] The defendants rely upon the following authorities:

- (a) *Johnson v. Randhawa*, 2020 BCSC 708 (non-pecuniary award: \$70,000, or \$71,537 in 2021 dollars). The 45-year old plaintiff suffered various injuries, including neck pain and stiffness, due to cervical facet arthropathy, occipital neuralgia and myofascial pain. However, the Court found that there was "little or no evidence of continuing injury" in that case, that her condition was not considered permanent or chronic, and that her condition was expected to

improve. There was also an opinion from a doctor, accepted by the Court, that the plaintiff did not have chronic pain syndrome at the time of trial.

- (b) *Naiodro v. Gill*, 2019 BCSC 1857 (non-pecuniary award: \$70,000, or \$72,171 in 2021 dollars). The 33-year old plaintiff suffered soft tissue injuries to her neck, left shoulder, lower back, jaw and chest as a result of the accident, as well as aggravation of migraines, headaches, depression, sleep issues and anxiety. The Court found that the accident did cause a "wholesale change" to the plaintiff's life and her injuries had affected her interactions with her son, her ability to perform household responsibilities effectively, socialize with her friends and return to working five days a week. However, the Court also noted that the plaintiff had managed to advance her career and increase her income despite the accident and that the impacts on her social and personal life were not as great as in certain other cases cited. Further, there was disputed evidence at trial about whether the headaches and migraines were causally connected to the accident and the Court found that the plaintiff had failed to prove certain other alleged injuries.
- (c) *Bischoff v. Gudaitis*, 2019 BCSC 2169 (non-pecuniary award: \$70,000, or \$72,171 in 2021 dollars). The 29-year old plaintiff suffered a whiplash injury to her back and neck, soft tissue injuries to her right knee, hip and left clavicle, migraines and headaches, a concussion and depression. The Court found that the plaintiff had not returned completely to her pre-accident levels of recreation or fitness by the date of trial, but had "made great improvements", including skiing on black runs, ski touring, mountain biking and hiking distances of 20-25 kilometres, in addition to attending Pilates three times a week. The Court noted that the plaintiff did not report excessive pain or difficulty after engaging in these activities a year after the accident. The Court also found that she was "closer to full recovery" at the time of trial, and that, although she continued to suffer from neck pain and headaches resulting from the accident, these injuries were not permanent.
- [97] In my view, the range of damages in the cases proposed by the defendants are too low, as these cases involved plaintiffs who did not have chronic or permanent pain, had made substantial improvements in their condition prior to trial, or who had better long-term prospects for recovery than Ms. Lal.
- [98] On the other side, my view is that the upper end of the cases proposed by Ms. Lal is too high, as it involved plaintiffs with more substantial injuries and greater career impacts than Ms. Lal, taking into account in particular the fact that Ms. Lal continues to be able to work seven days a week. In my view, Ms. Lal's situation falls within the mid-range of the cases proposed by Ms. Lal and a fair and reasonable assessment of non-pecuniary damages is \$165,000.
3. Is Ms. Lal entitled to damages for loss of past earning capacity?
- [99] The law with regards to past loss of earning capacity claims was helpfully summarized by Madam Justice Devlin recently in *Welder* at paras. 103-110:

- [103] An award for past loss of income earning capacity is intended to compensate the plaintiff for the loss of an asset that is the capacity to earn: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 18 [Ibbitson].
- [104] Damages under this head are quantified based on what the plaintiff would have earned, had the injury not occurred. In other words, the value of the plaintiff's capacity to earn is equivalent to the value of the earnings that she or he would have received over time but for the tort: *Ibbitson* at para. 18; see also *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32 [Gregory].
- [105] A claim for what is often described as "past loss of income: is actually a claim for loss of earning capacity, or a claim" for the loss of the value of the work that the injured plaintiff would have performed but cannot do so now because of the injury: *Ibbitson* at para. 18.
- [106] The value of such loss of work or capacity can be measured in many different ways. The measurement of the value may be accomplished by reference to the plaintiff's actual earnings that she or he would have received; replacement cost evaluation of tasks which the plaintiff cannot now perform; reduced company profits if applicable; and secondary income lost such as shared family income: *Ibbitson* at para. 18.
- [107] The plaintiff's burden of proof related to actual past events must meet the standard of a balance of probabilities. Assessing the loss of both past and future earning capacity involves a consideration of hypothetical events; the plaintiff is not required to prove these to the standard of a balance of probabilities: *Rousta v. MacKay*, 2018 BCCA 29 at paras. 14, 17 [Rousta]. Instead, the standard for the proof for hypothetical past events, like hypothetical future events will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. These will be given weight according to their relative likelihood: *Athey* at paras. 27, 28.
- [108] In assessing impairment of earning capacity, the plaintiff must demonstrate as "an initial threshold issue", the existence of "a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss": *Rousta* at para. 15; see also *Gill v. Lai*, 2019 BCCA 103; see also *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Gao v. Dietrich*, 2018 BCCA 372.
- [100] Ms. Lal admits that, due to the efforts of Rekha Lal in reassuming additional responsibilities at Ayur while Ms. Lal was managing her injuries, there was no income loss during the period from December 29, 2013 to the date of trial. To the contrary, as indicated by the table that follows, gross and net income at Ayur has grown every year since the Accident, and Ms. Lal's individual T4 and dividend income has also grown or remained consistent from year-to-year:

YEAR

CORPORATE INCOME

SALARIES & DIVIDENDS PAID BY COMPANY

T4 & DIVIDEND INCOME OF

RITA LAL

T4 & DIVIDEND INCOME OF

REKHA LAL

2010

Gross: \$58,079.00

Net: \$3,907.00

\$67,469.00

T4: \$28,878.66

Div: NIL

Not Available

2011

Gross: \$360,149.00

Net: -\$29,694.00

\$34,768.00

T4: \$16,373.00

Div: NIL

T4: \$8,673.00

Div: Not Available

2012

Gross: \$65,044.00

Net: \$17,525.00

\$44,146.00

T4: \$18,000.00

Div: NIL

T4: \$14,400.00

Div: Not Available

2013

* Rekha Lal turns 65 (Nov. 9)

Gross: \$111,215.00

Net: \$48,697.00

\$46,802.00

T4: \$18,000.00

Div: NIL

T4: \$14,400.00

Div: Not Available

2014

Gross: \$166,001.00

Net: \$42,055.00

\$61,574.00

T4: \$33,500.00

Div: NIL

T4: \$20,000.00

Div: Not Available

2015

Gross: \$180,109.00

Net: \$17,700.00

\$82,012.00

T4: \$48,000.00

Div: NIL

T4: \$27,000.00

Div: Not Available

2016

Gross: \$216,380

Net: \$36,614.00

\$91,440.00

T4: \$54,000.00

Div: NIL

T4: \$30,000.00

Div: Not Available

2017

Gross: \$257,585.00

Net: \$52,629.00

\$86,818.00

T4: \$54,000.00

Div: NIL

T4: \$30,006.84

Div: Not Available

2018

Gross: \$277,325.00

Net: \$51,652.00

\$68,182.00

T4: \$54,000.00

Div: NIL

T4: \$30,407.00

Div: Not Available

2019

Gross: \$286,798.00

Net: \$18,316.00

\$115,666.00

T4: \$59,500.00

Div: \$3,984.00

T4: \$41,000.00

Div: \$5,685.00

2020

Gross: Not Available

Net: Not Available

Not Available

T4: \$59,254.30

Div: \$218.55

T4: \$20,136.80

Div: \$218.55

- [101] However, Ms. Lal does submit that she suffered a loss arising from the fact that she discontinued doing massage treatments after the Accident. Her evidence was that, prior to the Accident, she was doing massage 2-3 times per week and charging \$10-\$50 per massage. Ms. Lal argues that this equates to a gross loss of \$3,750 per year, assuming that this pace was maintained for 50 weeks a year (assuming 2.5 massages per week at an average cost of \$30 per massage). Over a period of 7.4 years from December 29, 2013 to the date of trial, she claims a gross loss of \$27,750.
- [102] Based on the evidence of Ms. Lal and Rekha Lal concerning her pre-Accident practice of providing massage services to clients, and her ceasing to so do completely after the Accident, I am satisfied that there was more than a real and substantial possibility of a diminishment in her earning capacity which resulted from a loss of the massage revenues.
- [103] However, the further question is whether there is also a real and substantial possibility this resulted in a pecuniary loss. The challenge in this respect is that there was no clear evidence as to whether the massage revenues were paid directly to Ms. Lal or to the company, although it appears under all the circumstances that they were paid to the company. As noted in *Everett v. King* (1981), 34 B.C.L.R. 27 (S.C.) [Everett], the fact that lost income would have been payable into a closely-held family company as opposed to the plaintiff does not necessarily preclude recovery. However, despite *Everett*, I must take into account the fact that any revenues paid into the business were divided between Ms. Lal and her mother and thus Ms. Lal would not have personally benefited from all the massage revenues but only a portion.
- [104] A further challenge with the analysis is that I must also take into account as a contingency the realistic possibility that the lost massage revenues may have been replaced at least in part by other activities conducted by Ms. Lal which may have been equally or possibly more remunerative for the company. In this respect, I note that, although Ms. Lal ceased to give massages, she did continue to work seven days a week, presumably engaging in activities

that were otherwise beneficial to the company bottom line. This certainly appears to be borne out by the fact that company revenues grew considerably from 2013 to 2019, even though she was not offering massages.

[105] That said, the above contingency must be balanced against the contrary contingency that Ms. Lal could conceivably have grown the company revenue stream even more if she had continued to provide massage on top of the other services offered by Ayur. The fact that company revenues did grow from 2013 to 2019 does not preclude the reasonable possibility that such growth could have been higher during that period absent her injuries (and that Ms. Lal would have shared in a portion of that growth with her mother).

[106] Recognizing that this is an assessment not a calculation, and taking into account the positive and negative contingencies, I assess the loss at \$10,000 for loss of past earning capacity.

4. Is Ms. Lal entitled to damages for loss of future earning capacity?

[107] Mr. Justice Savage, in *Parker v. Lemmon*, 2012 BCSC 27, summarized the principles applicable to the loss of future earning capacity analysis as follows:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss is more easily measurable;
- (9) The capital asset approach will be more useful when the loss is not easily measurable.

[108] The courts have made it clear that a reasoned approach to quantifying a future pecuniary loss, taking into account the specific facts of the case and informed by statistical or economic evidence where available, is required, and that an award cannot simply be "at large". As noted in *Pelley v. Frederickson*, 2021 BCSC 82 at para. 106 [Pelley]:

- [106] Irrespective of the approach used, the Court is required to quantify a pecuniary loss, and the quantification must be grounded in the evidence and the particular facts of the case. There must be a "reasoned analysis to explain and justify the award": *Schenker v. Scott*, 2014 BCCA 203 at para. 56. The loss need not be calculated with mathematical precision but mathematical, statistical, and/or economic evidence will inform the assessment. This reflects the fact that an award for loss of earning capacity, irrespective of the quantification approach adopted, is "not simply at large": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 20.
- [109] The first question to be addressed is whether there is a real and substantial possibility of a future event leading to an income loss in Ms. Lal's case. Ms. Lal submits that there is such a real and substantial possibility since the evidence is that Rekha Lal is getting close to retirement and, once Rekha Lal retires, Ms. Lal will no longer be able to rely on her mother to carry the extra load at the business to compensate for Ms. Lal's reduced capacity.
- [110] With respect to reduced capacity, Rekha Lal testified that, prior to the Accident, Ms. Lal was doing 60-70% of the work and Rekha Lal was doing 30-40% of the work. After the Accident, she testified that she has been doing 55% of the work and Ms. Lal has been doing 45%. This equates to a 15-25% shift in the workload.
- [111] Ms. Lal testified that, before the Accident, she was doing 80-90% of the work, and now she is doing less than 50% and Rekha Lal is doing 60-70%. This equates to a 50-60% shift in the workload at the high end, although closer to 30-60% if one focusses on the "less than 50%" aspect of her testimony. Although both women were consistent in their testimony that there has indeed been a shift in workload from Ms. Lal to Rekha Lal, the extent of that shift differs quite substantially.
- [112] Both Rekha Lal and Ms. Lal had some difficulties with their recollections concerning their specific respective relative contributions both before and after the Accident. This confusion may be attributable in part to translation issues relating to Rekha Lal's testimony and also to the fact that both women deferred to their accountant concerning the annual distribution of revenues and other business matters. For example, counsel for Ms. Lal posited in argument that Rekha Lal may have been confused in her testimony about the distinction between relative workload contribution to the business and shareholder interests. However, this was only a theory and was not supported by the evidence. Further, I found Ms. Lal's estimated range to be more uncertain than her mother's and too broad in range to be fully reliable as a basis for analysis.
- [113] Accordingly, in my view the reasonable approach under the circumstances is to prefer Rekha Lal's testimony, which was more specific and reliable, but also to accept the high end of her estimate to reflect the likelihood, taking into account Ms. Lal's much higher range, that Rekha Lal's was on the conservative side. In my view, a 25% reduction in Ms. Lal's productivity is a reasonable metric under the circumstances.

- [114] To date, the reduction in Ms. Lal's productivity has been absorbed by Rekha Lal, who has supported Ms. Lal through her injuries and taken on the additional work at Ayur with the result that the business has not suffered a loss of revenues. However, Rekha Lal is currently 73 years old and testified that, prior to the Accident, she had a plan to retire within 2-3 years on the assumption that Ms. Lal would continue the business and hire someone else to replace Rekha Lal. Following the Accident, Rekha Lal's timeline for her retirement plans are somewhat uncertain. However, given her age and the fact that she has expressed a strong desire to move to Arizona to be close to Ms. Aikins and her family, there is in my view a very high probability that she will retire within the next five years, and will, thereafter, no longer be able to absorb Ms. Lal's 25% loss of productivity. There is, therefore, a real and substantial possibility of an income loss to Ms. Lal once Rekha Lal retires.
- [115] In reaching that conclusion, I emphasize that Rekha Lal's retirement is not in itself a future event which is in any way caused by the Accident (since she testified that she would have retired within 2-3 years even if no Accident had occurred and that the effect of the Accident has in fact been to delay her retirement). However, the evidence in my view establishes that the Accident has made Ms. Lal substantially less capable to manage the business on her own without her mother's support after retirement than she was before the Accident. Moving forward, the possibility of income loss in this case arises from the fact that, as a result of the Accident, Ms. Lal is physically and psychologically less capable to carry on the business without the support of her mother than she would otherwise have been. Once her mother retires, it appears very likely that the business will suffer, necessitating at a minimum the hiring of an employee who can replace Ms. Lal's lost productivity (over and above the lost productivity arising from Rekha Lal's departure which is not in itself compensable). The need to hire an employee would increase business costs, resulting almost certainly in an income reduction to Ms. Lal and possibly even necessitating the sale or discontinuance of the business.
- [116] Having found that Ms. Lal has discharged the burden of proving a real and substantial possibility of a future income loss, I must now quantify the loss. I find that a capital asset approach is appropriate in this case for two reasons. First, I emphasize that the evidence was clear that the annual salaries and dividends paid by the company to Ms. Lal and Rekha Lal were not reflective of relative contribution to the business. Rather, both women testified that these amounts were allocated by their accountant solely for the purpose of maximizing their respective tax positions and taking into account Rekha Lal's other sources of income. Thus Ms. Lal's annual T4 and dividend income cannot be interpreted as a metric of her productivity or serve as an accurate basis for an income-based approach.
- [117] Second, and in any event, there are a number of unknown factors concerning the future impact of the injuries on Ms. Lal's earning capacity which make an income-based approach inappropriate in this case. These include:
- The length of time until Rekha Lal's retirement, which remains uncertain;

- The terms of any buyout of Rekha Lal's interest, which were not clarified at trial, and apparently have not yet been negotiated between them;
- The likelihood that Ms. Lal will have to hire an employee to replace her lost productivity, and the potential cost of such a hiring;
- The value of the capital and debt in the company, and its potential impact on future earnings, which is not specified in the evidence;
- The possibility that the business could be sold, discontinued or go bankrupt upon Rekha Lal's retirement, with the result that a future stream of revenues is uncertain;
- the possibility that Ms. Lal may have to look for employment on the open market if the business does not continue upon her mother's retirement; and
- the possibility that Ms. Lal may decide to join the rest of the family in Arizona and may be required to look for employment or commence a new business there.

[118] The above range of potential outcomes also entail different income implications, which makes the loss difficult to measure. Accordingly, a capital asset approach is appropriate in my view.

[119] The capital asset approach requires the court to consider the four factors set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), in the context of the particular facts of this case. The four factors are:

- a) whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) whether the plaintiff is less marketable or attractive as an employee to potential employers;
- c) whether the plaintiff has lost the ability to take advantage of job opportunities which might otherwise have been open; and
- d) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive market.

[120] In my view, the answer to all of the above questions is clearly "yes". Ms. Lal has training in Ayurvedic medicine and massage, which obviously restricts her marketability to a fairly narrow niche. It appears clear that the business she has developed with her mother is the optimal channel for her to maximize her income potential at least in the short term, as revenues have grown consistently in the business since 2010. If she is unable to manage the business without her mother's support, this will clearly have a detrimental impact on her income potential, as there was no evidence that employment opportunities in the area of Ayurvedic medicine and massage are common. While Ms. Lal has acquired transferable retail skills relating to inventory, ordering and customer relations, these skills would put her merely in the position of competing for relatively low wage retail positions, which would likely entail a reduction of income from her present level at Ayur.

- [121] I must now proceed to value the loss. As stated above, T4 and dividend payments to individual shareholders in this case are not reliable indicators of Ms. Lal's contribution to the business as they were tax-driven. However, in my view, total salaries and dividends do provide more reliable indicators of the health of the business as they indicate the approximate amount of cash generated by the business annually and paid to both shareholders collectively. That said, I note that the total amounts recorded in the financial statements as being paid to shareholders did not correspond exactly to net income for the business and no accounting evidence was adduced at trial to explain the discrepancy. Accordingly, I approach these numbers with considerable caution and only as an approximate measure.
- [122] Total salaries and dividends paid by Ayur between 2010 and 2019 averaged \$70,000 annually. Applying the 25% loss in workload productivity I have attributed to the Accident above corresponds to \$17,500 annually, which I find to be the annual value of the productivity in the business lost by Ms. Lal as a result of the Accident. This lost productivity has been absorbed by Rekha Lal in the short term but will cease to be absorbed after her retirement. Since Rekha Lal does not have a planned date of retirement, we will have to project into the future. As noted above, I have found there is a very high probability that Rekha Lal will retire within 5 years and I also find that it is more likely than not that she will retire within 3 years or less. Taking into account these probabilities, and employing an approximate average, I conclude that an assumption that Rekha Lal will retire within 3.5 years is fair.
- [123] Ms. Lal was 39 years old at the date of trial, and I add 3.5 years to that to conclude that the future losses will likely commence at the age of 42.5 years. Assuming a retirement age of 65 years, the number of years of losses is, therefore, 22.5 years. Applying a 1.5% discount rate under s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253, results in a multiplier of approximately 18.9 (see Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2021 update)). At \$17,500 a year that amounts to \$330,750.
- [124] However, a significant discount would have to be applied to account for the fact that, independent of the Accident, Ms. Lal will likely have to purchase Rekha Lal's holdings in the business in future, with a resulting financing or buyout cost that would in any event negatively affect future revenues flowing to Ms. Lal. Failing to take into account this inevitable cost would in my view unjustifiably result in a windfall to Ms. Lal since this buyout would have been required independent of the Accident, and any loss in Ms. Lal's productivity has been approximately split with Rekha Lal up to this time, and not borne by Ms. Lal alone. Thus, in my view, the fair approach is to apply a discount equivalent to Rekha Lal's shareholding in the business (which is 55%) to the \$330,750 lost future productivity amount, resulting in an amount of \$148,837.50, which can be attributed as a future loss to Ms. Lal alone.

- [125] In *Dunn v. Heise*, 2021 BCSC 754, Madam Justice Matthews explained that the CIVJI multipliers can be used absent economic evidence from the parties but subject to the caveat that they do not account for contingencies:
- [202] In *MacGregor v. Bergen*, 2019 BCSC 315 at para. 116, Mr. Justice Branch applied the multipliers found at Appendix E of the CIVJI in the absence of evidence from the parties. In *Erickson v. Bowie*, 2007 BCSC 1465 at para. 51, which Branch J. cites, Madam Justice Brown similarly relied on the CIVJI multipliers notwithstanding the fact that they do not provide for contingencies. She pointed out that the discount rate required by s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253 does not provide for contingencies; it is simply the difference between investment returns and inflation. Contingencies are applied by the court based on evidence. Where there is no specific evidence regarding contingencies, the court often assesses a negative contingency of 20%; where there is evidence, the deduction is tailored or eliminated in accordance with the evidence: *Milina v. Bartsch*, (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (S.C.), which is cited with approval in *York v. Johnston* (1997), 1997 CanLII 4043 (BC CA), 37 B.C.L.R. (3d) 235 (C.A.).
- [203] I consider it appropriate to use the CIVJI multipliers and to apply contingencies separately.
- [126] Accordingly, I must consider the positive and negative contingencies that may apply looking into the future. In my view, the future contingencies that may tend to reduce Ms. Lal's potential loss include the following:
- Rekha Lal delays her retirement beyond 3-5 years, which also delays any loss of income (and resulting losses) to Ms. Lal, although as stated above I consider this a low probability;
 - A successful employee is hired who is able to replace both Rekha Lal and Ms. Lal's productivity in a manner which drives future profitability of the business and offsets at least to an extent any future losses arising from Ms. Lal's lost productivity; and
 - Ms. Lal's Botox treatment, and a consistent exercise and physiotherapy regime, improves her health and mood to a point where her personal productivity materially increases, decreasing the need for a full-time employee. However, this contingency must be assessed in light of the poor prognosis for Ms. Lal's full recovery, even if she follows all recommended medical advice.
- [127] On the other hand, the following contingencies which may tend to increase Ms. Lal's future losses must also be taken into account:
- The Botox treatment is ineffective and/or the physiotherapy and exercise are not helpful, and Ms. Lal's health declines;
 - The business does not survive after Rekha Lal's retirement due to Ms. Lal's physical and emotional inability to carry on alone, resulting in an even greater loss of future income than the loss of productivity set out above;

- Even if the business survives, Ms. Lal decides to downsize the business due to her health not improving, resulting in shrinking revenues; and
- The possibility that Ms. Lal may decide to abandon the business for any of the above reasons, seek employment elsewhere upon her mother's retirement, or possibly to move to Arizona with the rest of the family and start fresh. There was no evidence adduced at trial with respect to what employment opportunities might be available to Ms. Lal and what compensation range she could reasonably expect for these opportunities. However, in my view, it is more than likely that, given Ms. Lal's very niche skill set, a total career reset in the retail space would likely involve a significant reduction in compensation, at least in the short to medium term.

[128] Overall in light of the evidence, in my view the positive and negative contingencies balance in this case. Accordingly, having fully accounted for both, in my view no further adjustments are required to the damages amount of \$148,837.50, which is a fair and reasonable award under all the circumstances.

[129] I am comforted in this conclusion by the fact that, using the approach from *Pallos v. Insurance Company of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), two years of gross salaries and earnings would be approximately equivalent to \$140,000, which is close to the award in this case.

5. Is Ms. Lal entitled to damages for loss of housekeeping capacity?

[130] In *Kim v. Lin*, 2018 BCCA 77 [Kim], the Court of Appeal explained that a trial judge has discretion whether to compensate a plaintiff for costs relating to household assistance as a pecuniary or a non-pecuniary damages award depending upon the circumstances. The consideration is whether the plaintiff has suffered a true loss of capacity: *Kim* at paras. 33-34.

[131] In *Abbott v. Gerges*, 2014 BCSC 1329 at para. 88, Madam Justice Warren stated as follows:

A loss of homemaking award is properly characterized as an award for loss of capacity, distinct from a cost of future care claim. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred: *Westbroek v. Brizuela*, 2014 BCCA 48, at paras. 72-78. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss.

[132] A relatively minor adjustment of duties within a family will not justify a discrete assessment of damages: *Campbell v. Banman*, 2009 BCCA 484 at para. 19. In *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 29, Madam Justice Newbury cautioned as follows:

"Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services - were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond that level?' - and with respect to causation - were the services necessitated by the plaintiff's injuries or would they have been provided in any event?"

[133] I note that there was very little evidence at trial about the amount of housekeeping that Ms. Lal performed both before and after the Accident. Under direct examination, Ms. Lal did not testify about this topic at all. However, under cross-examination she admitted that she is physically capable of sweeping, mopping and cleaning the store premises, which indicates that she is capable of doing the same at home. She also admitted that she has done raking and gardening around the house and shovelled snow.

[134] Rekha Lal testified that there has been a change in the amount of household chores that Ms. Lal does since the Accident, but her testimony on this topic was not very specific. For example, she testified that, before the Accident, Ms. Lal did the chores and cleaning and Rekha Lal did all the cooking, but after the accident Rekha Lal does "most" of the cleaning and Ms. Lal does "some". She also testified that Ms. Lal does some of the shopping but, as with the other chores, she appears unmotivated due to her depression.

[135] The expert evidence was also not compelling on this issue and somewhat equivocal. For example, Dr. Hawkeswood opined that she has "no specific household limitations" in his report of August 28, 2017:

Looking to the future, I render the following further conclusions:

- No specific household limitations, although when Ms. Lal has a migraine headache I quite doubt she will be heavily involved in household chores.

[136] In his report of January 29, 2021, Dr. Hawkeswood opined as follows:

Looking to the future, I render the following functional prognoses:

- No household or outdoor chore limitations in absolute terms, recognizing Ms. Lal is probably much less productive during episodes of worsened pain.

[137] Dr. Grosch, in his report of March 21, 2019, opined that Ms. Lal was "somewhat disabled" with respect to daily living and homemaking duties but did not specify in what respect or to what extent:

I believe Ms. Lal is somewhat disabled from her activities of daily living and homemaking duties. This is likely to extend into the unforeseeable future as I believe it is now likely a permanent situation.

[138] In my view, the changes with regard to Ms. Lal's contribution to housekeeping fall within the category of relatively minor adjustments of duties within the family and do not justify a separate award. It appears that Ms. Lal has the physical capacity to contribute to household chores but that her issues with depression have limited her enthusiasm and motivation. But

this may change if her mood improves and she would then be in a physical position to contribute more. In other words I am not convinced that there has been a true loss of capacity. Further, even if there was evidence that she was unable to perform certain chores, there was insufficient evidence with regard to the frequency and nature of the chores that she is unable to perform to properly put a value on the loss.

[139] Accordingly, I conclude that this issue is best addressed as part of the award for non-pecuniary loss and not as a separate pecuniary loss. I make no award for loss of housekeeping capacity.

6. Is Ms. Lal entitled to damages for the cost of future care?

[140] In *Dzumbur v. Davoody*, 2015 BCSC 2316 at para. 244, Mr. Justice Kent summarized the principles applicable to costs of future care as follows:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- * the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;

- * the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;

- * the test for determining the appropriate award is an objective one based on medical evidence;

- * there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;

- * the concept of "medical justification" is not the same or as narrow as "medically necessary";

- * admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;

- * however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;

- * still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and

- * no award is appropriate for expenses that the plaintiff would have incurred in any event.

[141] In *Smith v. Chui*, 2020 BCSC 745, Harvey J. provided some additional helpful principles which have application to this case:

[176] It is not necessary for a physician to provide opinion on the medical necessity of the future care items claimed, but there must be an evidentiary basis for the connection: *Warick v. Diwell*, 2017 BCSC 68, at para. 206.

[177] Damages representing the costs of future care are assessed, not mathematically calculated: *Uhrovic v. Masjhuri*, 2008 BCCA 462, at paras. 28-31.

[178] There is an inherent degree of uncertainty and discretion in making such awards. Because awards are made "once and for all" at the time of trial, judges must "peer into the future" and fix the damages "as best they can". This includes allowing contingencies for the possibility that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.

[142] Ms. Lal submits that the medical evidence supports the following ongoing treatments into the future:

- Dr. Hawkeswood endorses the need for migraine medication, gabapentin to control pain, as well as Botox;
- Dr. Chahal endorses the need for Botox and migraine medications;
- Dr. Grosch supports Botox in his report;
- Dr. Riar endorses the need for long term psychotropic medications to be optimized by a psychiatrist or family doctor, as well as psychotherapy;
- Dr. Parikh has implicitly endorsed pain medications through his numerous prescriptions for Tylenol #3.

[143] The defendants concede in their argument that Ms. Lal requires the following future care items: Botox injections, 12-14 sessions of psychotherapy and anti-depressant and migraine medications. However, the parties disagree on the anticipated future cost of these treatments. I will address each in turn:

(a) Medications

[144] Ms. Lal submits that the plaintiff's List of Special Damages indicates that she has spent \$1,466 on pain medications, migraine medications, and antidepressant medications from December 23, 2016 to April 8, 2021 (a period of 4.3 years), which equates to annual costs of \$340.

[145] The defendants suggest a yearly expense of \$188 for anxiety and depression medicine, a yearly cost of \$135 for migraine medications, and a 60 pill cost of \$22.39 for Tylenol 3 (which would produce an annualized cost of about \$125). This would result in annual costs of approximately \$450, which actually exceeds the estimate of Ms. Lal. However the defendants also argue that the need for these medications should be reduced over time if the Botox treatment are effective.

[146] The average 40-year-old female in Canada can expect to live for another 43.3 years based on Statistics Canada figures. The CIVJI discount rate indicates a multiplier of 28.6616 as per the Present Value table, referenced previously as Appendix E of CIVJI. Applying the mid-point between the annualized costs estimated by the two parties (\$395), the present value of Rita's claim for cost of medications amounts to \$11,320 for the remainder of her life.

[147] However, a discount must be applied to account for the approximately 50-60% chance that the Botox treatments may be effective which could reduce (but not necessarily eliminate) her need for these medications. Here I note the testimony of Dr. Chahal that, even if Ms. Lal is fortunate enough to be one of the 50-60% of patients who will gain a benefit from Botox injections, the average benefit is still only a 50% reduction in headaches. Thus, even if the treatment is successful, it appears likely that Ms. Lal will continue to require medications but perhaps at a slightly reduced level. Accordingly, I assess the damages for medications at \$8,500.

(b) Botox Injections

[148] Further, Ms. Lal submits that the evidence of Dr. Chahal is that Botox injections will cost Rita anywhere from \$1,200 to \$1,400 per treatment. He recommends that a trial of 5 to 6 treatments be administered over a period of approximately 1.5 years. Using an average figure of \$1,300 per treatment, Ms. Lal estimates that the recommended Botox trial will cost her \$6,500 to \$7,800, resulting in a mean figure of \$7,150.

[149] Ms. Lal argues that, if effective, Botox treatments may be continued indefinitely and, on that basis, estimates an annual cost for Botox treatments over the remainder of her life in the range of \$4,767.

[150] The defendants argue, correctly, that there was no evidence at trial with respect to Ms. Lal's ongoing need for Botox treatment in terms of frequency and duration. Certainly, none of the medical experts gave evidence that a lifetime of Botox treatments would be appropriate, or even that more than one round of such treatments would be appropriate. Further, I must take into account the 40% to 50% chance that the initial Botox treatment would be ineffective, which would likely result in a discontinuation of any further such treatments.

[151] In my view, a fair assessment in this context, taking into account the contingencies would correspond to the full cost of the initial 6 treatments, which amounts to \$7,800.

(c) Therapy

[152] The defendants concede that 12-14 psychotherapy sessions are justified and I conclude that this is justified by the evidence. Although no evidence was provided to the court on the cost of such treatment, this does not preclude an award. A conservative estimate for psychology services is \$150 per hour resulting in a cost of \$1,800 to \$2,100. I assess this cost at \$2,000.

[153] Thus the total award for cost of care amounts to \$18,300.

7. Is Ms. Lal entitled to special damages?

[154] The parties have agreed to special damages in the amount of \$7,284.96.

8. Did Ms. Lal mitigate her losses?

[155] The plaintiff has an obligation to take all reasonable measures to reduce her damages, including undergoing treatment to alleviate or cure injuries: *Gilbert v. Bottle*, 2011 BCSC 1389 [Gilbert] at para. 201. The law does not require a plaintiff to do that which cannot be controlled, nor does it require perfection in pursuit of rehabilitation. However, it does require the plaintiff to make reasonable and sincere efforts to limit her loss: *Gilbert* at para. 203.

[156] The onus of proof with respect to failure to mitigate is on the defendants. In *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, the Court stated, following *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, that in a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably.

[157] The defendants submit that by failing to follow the advice and recommendations of her treating physicians, Ms. Lal has failed to mitigate in three ways. First, by failing to seek Botox treatment in a timely manner. Second, by failing to commit herself to an exercise program and active rehabilitation. Third, by failing to consistently take anti-depressant medications and attend psychological counselling sessions. The defendants submit that Ms. Lal acted unreasonably in failing to follow the recommended treatments and also argue that her damages would have been reduced had she acted reasonably.

[158] In my view, the defendants have met their burden with respect to Ms. Lal's failure to mitigate, although not to the full extent that they allege. I will address each of these arguments in turn.

(a) Failure to Undergo Botox Treatment

[159] The defendants argue that Ms. Lal failed to follow the recommendation of Dr. Chahal after her independent medical examination on March 1, 2017 that she undergo a Botox trial. Under cross-examination, Ms. Lal confirmed being advised at that time about the Botox trial recommendation and also confirmed that she received this recommendation from other specialists on separate occasions since that time.

[160] Ms. Lal was subsequently advised to pursue this treatment on August 2, 2017 and December 17, 2020 by Dr. Hawkeswood, in March 2019 by Dr. Grosch and again by Dr. Chahal on January 14, 2021. Ms. Lal confirmed in her testimony that these recommendations were indeed made to her.

- [161] Under cross-examination, Ms. Lal testified that she could not recall exactly why she did not pursue the Botox trial recommendations between 2017 and 2020, other than to state that she was experimenting with different migraine medications first. However, as noted by counsel for the defendants in argument, Ms. Lal filled no prescriptions for migraine medications in 2017 and only one prescription for 6 pills on May 28, 2018. She did not fill another prescription until April 26, 2019, almost a year later. This is difficult to square with her testimony that she was delaying Botox to pursue a course of medication. Rather, I conclude that she was simply not ready in 2017 and 2018 to move forward with a Botox treatment.
- [162] To be fair to Ms. Lal, I note that the defendants have perhaps overstated their argument that Dr. Chahal's reference to Botox treatment on March 1, 2017 was a firm "recommendation". Rather the evidence reveals that, at that time, it was one of several options being proposed, which included migraine medication, and was not a clearly recommended course of action. Further, as noted by counsel for Ms. Lal in argument, all recommendations of medical specialists were referred back to Ms. Lal's family doctor, Dr. Parikh, who did not firmly push Ms. Lal in the direction of Botox treatment until much later (namely, early 2021). To the extent that any Botox treatment had to be endorsed and then scheduled by Dr. Parikh, and that Ms. Lal had no direct control over this process, I have taken this into account in my analysis.
- [163] Nonetheless, I cannot ignore the 4-year gap between the initial medical recommendation of Botox treatment and any action on Ms. Lal's front in that respect, nor can I ignore the fact that Ms. Lal still had not commenced Botox treatment as of the date of trial. Moreover, the defendants argue correctly that there was clear evidence about the benefit that Botox treatment could have had. Dr. Hawkeswood opined in both his report and in cross-examination that Ms. Lal had not reached maximal medical improvement and that there was an opportunity for her headaches to improve. On cross-examination, Dr. Hawkeswood testified that Botox will not eliminate a patient's migraines but the expectation is that Botox will reduce the frequency and intensity of migraines, and reduce Ms. Lal's score on the Headache Impact Test.
- [164] Dr. Chahal testified that the literature indicates a 50-50% possibility of migraine patients experiencing improvement as a result of Botox treatment, with a response rate of 50% reduction in improvement of headaches, including improvements in intensity and duration.
- [165] In *LaRocque v. LaRocque*, 2019 BCSC 655 [LaRocque] at para. 89, the Court found that a failure to undergo Botox treatments which had been recommended seven months before trial was unreasonable, given the medical evidence that they would be beneficial to the plaintiff, and this was one of the bases for concluding that she had failed to mitigate. In this case, the delay between initial recommendation and actual treatment was much longer than in *LaRocque*. I conclude that Ms. Lal should have moved more quickly to commence this treatment, and doing so would likely have reduced her damages.

(b) Failure to Exercise Consistently

- [166] The defendants argue that Ms. Lal has received numerous recommendations from specialists that she should pursue active rehabilitation and regular aerobic exercise.
- [167] On January 13, 2015, Dr. Singh, a neurologist, recommended that she pursue an active rehabilitation program or, in the alternative, do her own exercise program to include walking and then jogging. In August, 2017, Dr. Hawkeswood recommended stretches for Ms. Lal's neck, back and hamstrings twice a day, core-based activity and postural exercises and regular non-impact aerobic exercise such as biking, elliptical or swimming most days of the week. In December, 2020, Dr. Hawkeswood again recommended aerobic activity and dynamic stretches.
- [168] Dr. Riar also recommended in his first report that "it is important that Ms. Lal should start doing active exercises in order to strengthen her musculature and avoid any further deconditioning". Dr. Parikh also testified that he encouraged Ms. Lal to exercise, which was confirmed in Ms. Lal's testimony, but that he did not know how frequently she was doing so.
- [169] Ms. Lal testified that she did not pursue active rehabilitation until April 2018 because she was doing stretching and walking on her own, although she admitted that she was not consistent. Following her commencement of active rehabilitation, Ms. Lal admitted that she saw improvements in her physical symptoms and mood while regularly attending a gym, but also admitted that she stopped active rehabilitation due to family issues relating to her sister's move to Arizona and depression.
- [170] That said, there was evidence that, during certain significant periods after the Accident, Ms. Lal did make a serious effort to exercise and rehabilitate herself. For example, Ms. Lal began physiotherapy on March 13, 2014 and attended 52 sessions between that time and June 17, 2015. In addition to physiotherapy, Ms. Lal attended 15 chiropractic sessions between November 13, 2015 and February 19, 2016 and 92 massage therapy sessions between April 22, 2016 and June 13, 2019. Ms. Lal also participated in an active rehabilitation program from April to June, 2018 for 8 sessions.
- [171] Having considered all the evidence, and considered Ms. Lal's testimony and the testimony of Dr. Riar with respect to her psychological condition, I conclude that a significant reason for Ms. Lal's failure to maintain a consistent exercise and rehabilitation regime was her depression, which in my view severely limited her capacity, optimism and enthusiasm for following the program recommended by doctors. I have considerable sympathy for Ms. Lal's emotional suffering and am prepared to take this into account as a legitimate explanation for her inability to fully follow an exercise and rehabilitation regime but I cannot accept this as a complete response to the defendants' argument. As a plaintiff, Ms. Lal did have a duty to take all reasonable steps to improve her condition and I find that she failed to do so.

[172] Further, the defendants correctly argue that there was evidence that, had Ms. Lal pursued a physical conditioning and rehabilitation regime more consistently, it could have improved her chances of recovery. In Dr. Hawkeswood's first report, he opined that he expected exercise would improve Ms. Lal's conditioning, reduce pain levels, improve her mood, lessen the intensity of her headaches and improve her sleep. Further he recommended stretching to Ms. Lal on the basis that it would reduce her muscle tension and improve her pain-free range of motion. Similarly, Dr. Riar testified under cross-examination that he recommended exercise in 2017 because it would improve Ms. Lal's strength and also create endorphins and hormones which would uplift her mood and help control anxiety.

(c) Counselling and Anti-Depressants

[173] The defendants also argue that Ms. Lal failed to mitigate her damages by following the advice of Dr. Parikh and Dr. Riar that she take antidepressant medication and attend a psychologist for therapy and, in particular, cognitive behavioural therapy.

[174] Dr. Sidhu first prescribed her Cipralext in February, 2014. Ms. Lal testified that she did not consistently take Cipralext because she sometimes felt uncomfortable taking it as it made her feel "different". The records adduced at trial indicate that Ms. Lal filled between 180 and 330 tablets per year since 2014, even though Dr. Parikh confirmed this was a daily use medication. Thus it is clear she was not taking that medication every day as recommended.

[175] In his second report, Dr. Riar opined that Ms. Lal took antidepressant medication on a sporadic basis and not in an optimal dosage or time frame to see any real impact of benefit from the medication.

[176] With respect to psychotherapy, Dr. Riar recommended in his first report that Ms. Lal attend a psychologist for 10-12 one hour sessions. When Ms. Lal saw Dr. Riar for a second time on January 6, 2021, he recommended 12-14 sessions of CBT. There was no evidence at trial that Ms. Lal ever attended a CBT sessions, and the evidence was that she attended only three sessions with a counsellor or psychologist since the Accident.

[177] In *Barron v. Wine*, 2021 BCSC 711 at para. 102-103 [Barron], Madam Justice Douglas reduced the plaintiff's award for damages due to a failure to pursue counselling in a timely manner, after first recommended. The plaintiff had testified that she did not pursue counselling because she had not been to a counsellor before and was not sure if the treatment would be helpful and also due to concerns about the cost. Madam Justice Douglas rejected this argument:

[102] On all the evidence, I conclude that Ms. Barron would reasonably have known by March 2016 that she might derive some benefit from psychological counselling. In cross-examination, Dr. Anderson admitted that the benefits of timely psychological counselling in the first six to twelve months after the Accident would have been significant. Accordingly, I conclude that Ms. Barron has failed to mitigate her damages. Ms. Barron catastrophises her pain and has developed an entrenched fear of moving which has

resulted in weight gain, physical deconditioning, more limited social engagement, and low mood. I conclude that her enhanced perception of pain negatively affects her overall function.

[103] I conclude that Ms. Barron's emotional response to pain, her pain catastrophisation, and her ongoing anxiety, are her most disabling problems. Drs. Wasti and Yeung recommended that Ms. Barron pursue counselling after the Accident. On the evidence of her own psychiatrist expert, Dr. Anderson, she would likely have derived significant benefit from pursuing timely counselling following the Accident. I conclude that Ms. Barron's damages are appropriately discounted by 20% to reflect her failure to mitigate.

[178] In *Repin v. Aam Ventures Ltd.*, 2020 BCSC 227 [Repin], the Court reduced the plaintiff's award for damages by 25% for failing to seek psychological treatment following the recommendation of her doctor. The plaintiff attended one appointment with a psychologist but offered no explanation as to why she had not sought additional treatment.

[179] In my view, there are important parallels between Ms. Lal's situation and the Barron and Repin decisions. While I am sympathetic to the depression symptoms suffered by Ms. Lal and have taken those into account in my analysis, I also conclude that she could and should have taken more proactive steps to treat her symptoms (including the depression), exercise and rehabilitate herself, which the evidence demonstrates would likely have reduced her damages. Her depression alone is not a justification, nor can she lay all of these decisions at the feet of her family doctor. In my view, taking into account the foregoing, a 20% reduction to Ms. Lal's claim should be applied for a failure to mitigate.

V. ORDER

[180] I conclude that Ms. Lal is entitled to the following award of damages against the defendants:

Head of Damage

Award

Non-pecuniary damages

\$165,000

Damages for Loss of Past Earning Capacity

\$10,000

Damages for Loss of Future Income

\$148,837.50

Costs of Future Care

\$18,300

Special Damages

\$7,284.96

SUBTOTAL

\$349,422.46

20% discount for failure to mitigate

\$69,884.49

TOTAL

\$279,537.97

[181] I grant the parties leave to speak to the issue of costs and pre- and post-judgment interest.

"M. Taylor J."

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