

CANADA / JUDGMENT

Toora v. Caldwell

2023 BCSC 1985

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1985 Toora v. Caldwell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Toora v. Caldwell,

2023 BCSC 1985

Date: 20231115

Docket: M174296

Registry: Victoria

Between:

Indu Toora

Plaintiff

And

Nicole Caldwell and Mario Gedicke

Defendants

- and -

Docket: M174298

Registry: Victoria

Between:

Indu Toora

Plaintiff

And

Michelle Leeann Popoff

Defendant

Before: The Honourable Justice Donegan

Reasons for Judgment

Counsel for the Plaintiff:

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J. Ip

Place and Date of Trial:

Victoria, B.C.

October 17-21; 24-27, 2022; February 15-16 and April 13, 2023

Place and Date of Judgment:

Victoria, B.C.

November 15, 2023

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Introduction

- [1] On December 3, 2015, the plaintiff, Indu Toora (now Bhatia), was involved in two motor vehicle accidents that occurred only minutes apart in downtown Victoria (the "Accidents"). Neither collision was her fault.
- [2] Ms. Toora claims damages for injuries she sustained in the Accidents. She claims to have suffered musculoligamentous and myofascial injuries of the neck and back and post-traumatic headaches that now cause her chronic pain and impact all aspects of her life. She seeks awards for non-pecuniary and various pecuniary losses in the global amount of approximately \$580,000.
- [3] The defendants acknowledge that Ms. Toora was injured in the Accidents, but take issue with the extent and chronicity of the injuries alleged, the alleged impact on her life, and the amount of damages claimed. Allowing for modest awards for non-pecuniary losses and some pecuniary losses, the defendants urge the court to award damages in the global amount of approximately \$100,000.

General Credibility and Reliability Findings

- [4] Ms. Toora testified over the course of five days, with some interruptions to accommodate the scheduled testimony of other witnesses. She called several witnesses in support of her case: Fatimah Banki, a friend; Sandi Costello, a former employment supervisor; Rahul Bhatia, her husband; and Dr. Lynne MacKean, a physiatrist.

- [5] The defendants called several witnesses as well. They called Dr. Catherine Paramonoff, a psychiatrist; Stephanie Kapoor and Komal Bath, both clients of Ms. Toora's hair and makeup business; and Kelly Bailey and Cindy Rainey, two former employment supervisors.
- [6] The court's fact-finding role requires an assessment of credibility of witnesses and reliability of their evidence. Credibility refers to truthfulness or honesty and reliability refers to accuracy. Both credibility and reliability are to be assessed in the context of the evidence as a whole. I recently summarized the principles and factors that inform my assessment in *Asleystyne v. Stobbart*, 2021 BCSC 26 at paras. 4-8. As well, as this case involves subjective complaints of chronic pain, I find helpful guidance in my assessment of the plaintiff's evidence from Justice Abrioux, as he then was, in *Karim v. Li*, 2015 BCSC 498:
- [89] In addition, the following principles should be taken into account by the trier of fact:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
 - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
 - where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
 - it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and
 - in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.
- See also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 23-25.
- [90] Where injuries contain a psychological component - which is often the case in situations of chronic pain - the principles set out in *Maslen v. Rubinstein* (1993), 83 B.C.L.R. (2d) 131 at 133-135 (C.A.), should also be considered. These will be dealt with below in the analysis of the causation of a psychological injury.

- [7] My assessment of Ms. Toora's evidence involves an additional challenging feature. Ms. Toora's testimony differed from the evidence she gave at her examination for discovery, more than once. Ms. Toora admitted to being untruthful at her examination for discovery. In these circumstances, I find additional guidance from Justice Dickson, as she then was, in *Hardychuk v. Johnstone*, 2012 BCSC 1359:
- [9] Where, as here, 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 the evidence and assessing credibility: *Price v. Kostyba* (1982), 70 B.C.L.R. 397. If deliberate falsehood is established it may be difficult to disentangle truth from deceit and some truthful aspects of the plaintiff's testimony may lose their force, particularly in the absence of corroboration. That being said, when a plaintiff is accused of deliberate deceit more than speculation or innuendo is required. A charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated or lightly made: *Halteren v. Wilhelm*, 2000 BCCA 2; *Edmondson v. Payer*, 2011 BCSC 118; *Vasiliopoulos v. Dosangh*, 2008 BCCA 399.
- [10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.
- [11] The presumption of truthfulness will be displaced by convincing evidence of deliberate falsehood. Such evidence may take many forms. There is no hard and fast rule as to how falsehood on a plaintiff's part may be demonstrated in a personal injury action. In my view, however, in most such cases fairness will require that a plaintiff be given an opportunity to respond directly to an assertion of deliberate untruthfulness before his or her credibility, as distinct from reliability, is successfully impeached: *R. v. Lyttle*, 2004 SCC 5; *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.).
- [12] If Ms. Hardychuk's account of her pre and post-accident condition is not convincing then the hypothesis upon which the expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431. In consequence, the opinions proffered will have little, if any, evidentiary value. To varying extents, all of the experts who assessed Ms. Hardychuk relied on her to describe or demonstrate her history and condition in a truthful and reliable manner. If she failed to do so, the resulting opinion lacks foundation and is thus not entitled to weight.

- [8] With all of these principles in mind, I turn to my assessment of the witnesses' evidence in light of the evidence as a whole. I will begin with the lay witnesses other than the plaintiff.

Lay Witnesses Other Than the Plaintiff

- [9] I find that all of the lay witnesses other than the plaintiff were credible and their evidence was mostly reliable. They were all honest witnesses who were doing their best to provide truthful and accurate evidence to the extent of their memories. While some of the witnesses aligned with Ms. Toora, I find they did not advocate for her. Some of the witness' memories were less than firm in certain areas, but this does not undermine their credibility. Their memory challenges were understandably due to the passage of time and/or the relative unimportance of the event or information they were being asked to recall. When assessed against the evidence as a whole, and other than some discrete areas which I will identify in the course of my reasons, I find these witnesses were trustworthy and reliable and that I can rely upon most of their evidence.
- [10] The defendants urge me to conclude that Mr. Bhatia was a biased witness, whose evidence about his wife's injuries and limitations was so significantly exaggerated that I should give it no weight. While I agree with some of the defendants' criticisms, I do not conclude that Mr. Bhatia's evidence was so compromised that I should reject it entirely. Mr. Bhatia was, generally, a credible witness. However, the reliability of some of his evidence, particularly pertaining to his wife's injuries and limitations, was undermined by some inconsistencies.
- [11] After Mr. Bhatia's direct examination, I was left with the impression that his wife's daily injury-related limitations were quite significant, but cross-examination revealed internal inconsistencies and inconsistencies with the objective evidence I accept, which cause me to conclude that his earlier evidence was embellished. To be clear, I do not conclude that Mr. Bhatia was deliberately dishonest; rather, from the whole of his evidence I think he, at times, unconsciously indulged in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. I find that the reliability of his evidence in this area has been undermined such that I must exercise caution when considering it.

The Plaintiff

- [12] My assessment of Ms. Toora's credibility and the reliability of her evidence is a central feature in this case. It is critical in determining her pre and post-Accidents states, the causation of her injuries, their nature and severity and, ultimately, her damages. It is also important to the weight to be given to the medical opinions of Drs. MacKean and Paramonoff, to the extent that their opinions rely on Ms. Toora's reporting and representation of her pre and post-Accidents conditions.

- [13] The defendants challenge Ms. Toora's credibility and the reliability of her evidence in many areas. They submit that Ms. Toora tailored her evidence to suit her claims by exaggerating her complaints and limitations, misleading both medical experts, being misleading and untruthful in her examination for discovery evidence, and altering her evidence at trial. They point to various inconsistencies, omissions, and untruths and ask me to reject or discount Ms. Toora's evidence in many material areas affecting every aspect of her claim.
- [14] The plaintiff submits that she was a credible witness and that her evidence was reliable. She urges me to accept her evidence in its entirety. She argues that, throughout her many hours of testimony, I came to know her and her good character. She points to consistencies between her evidence and that of the two medical experts, her husband, and the other lay witnesses, including those witnesses called by the defendants. She says her evidence was, overall, in harmony with the surrounding circumstances and should be accepted.
- [15] Ms. Toora acknowledges that she lied while under affirmation at her examination for discovery regarding her hair and makeup business, but she argues that this should not undermine her credibility or the reliability of her evidence, in part or at all. Rather, she asks me to consider her untruths not as deliberate falsehoods told in order to gain some financial or litigation advantage, but rather as out of character, impulsive, and foolish errors in judgment that occurred for understandable, psychological or "human" reasons related to her feelings of shame, circumstances of stress, and a "degree of cognitive impairment" arising from years of chronic pain and difficult life events.
- [16] I have found the assessment of Ms. Toora's credibility and reliability to be quite challenging.
- [17] To borrow Justice Tucker's words in *Campbell v. Peter Kiewit Infrastructure Co.*, 2020 BCSC 805 at para. 175, a credibility assessment is "rarely a black and white proposition". Ms. Toora's evidence had some strengths, but it also suffered from some significant shortcomings. Overall, while I do not conclude Ms. Toora was entirely lacking in credibility and find some of her evidence was reliable, I find that her credibility was significantly compromised in certain areas. Therefore, while I accept some of Ms. Toora's evidence, particularly where it is supported by other evidence I accept, I find I cannot accept other aspects of her evidence. I will identify those aspects during the course of my reasons.
- [18] Ms. Toora testified over a period of five days and I therefore had the opportunity to observe her demeanour and learn much about her life. Ms. Toora showed patience and stamina. She exhibited some physical discomfort at times under the toll of testifying. While I note the potential deceptiveness of a witness' demeanour or physical presentation, I find that Ms. Toora's discomfort seemed genuine.
- [19] Ms. Toora is an intelligent, articulate person. She was raised in a hard-working, close family. She learned good values and is devoted to her family. She respects her parents. She contributes to her community. She has a very good work ethic. At the time of the Accidents she was holding down two jobs, saving money and earning positive reviews from her supervisors. In some areas of her evidence, I could see that she was making an honest effort

to provide truthful and accurate evidence. She acknowledged some personally difficult facts and admitted some memory frailties. When she remembered something she had inadvertently omitted from an earlier answer, she volunteered the information. As well, some of her evidence was consistent with other evidence I accept.

- [20] These are the strengths of Ms. Toora's evidence. I turn now to the rather significant shortcomings.
- [21] I will begin with describing the ways in which Ms. Toora's evidence at trial differed from that given at her examination for discovery, held only four months before trial. There are differences in several notable areas, namely: (a) her involvement in her hair and makeup business; (b) her involvement in kickboxing after the Accidents; (c) her use of a housecleaner after the Accidents; (d) her time away from work as a result of her injuries; and the trips she took after the Accidents.
- a) Toora Hair and Makeup Artistry
- [22] At the time of the Accidents, Ms. Toora was working two jobs, one as an auditor with the Ministry of Finance (the "Ministry") and the other as a supervisor in the Food Services Department at the University of Victoria ("UVic"), (respectively, the "Ministry Job" and the "UVic Job"). She left the UVic Job in February 2017. A few months later, after obtaining the necessary certification, she started a small business, outside of her regular full-time employment at the Ministry Job, called Toora Hair and Makeup Artistry. The evidence establishes that Ms. Toora operated this business, providing hair and makeup services to clients, between 2017-2022 inclusive, including a contract for service shortly before trial on September 3, 2022.
- [23] Cross-examination revealed that Ms. Toora gave much different, and untrue, evidence about this business at her examination for discovery.
- [24] At her discovery, Ms. Toora denied having had any other employment or income aside from the Ministry Job and the UVic Job. She denied taking any other courses or receiving any other certifications since the Accidents. Then, in later questioning, Ms. Toora said she had obtained a certification and had started up a hair and makeup business after the Accidents, but said it did not really work out. She said she had only done a couple of bookings and was unable to continue with the business due to her injuries. She said that when she attempted to run the business, her husband had to carry her "kit and everything" because she was unable to do so. She also claimed the last time she had done anything in relation to her business was about two or three years earlier.
- [25] In cross-examination at trial, Ms. Toora agreed all of these answers were untrue. Indeed, the evidence adduced at trial establishes that Ms. Toora had been consistently operating this business since the summer of 2017, including at the time of her July 21, 2022 examination for discovery. She had recently completed a contract for services on June 6, 2022 and had another scheduled for August 4 and 5, 2022. Her husband testified that he had only maybe

"once or twice" assisted his wife, before the COVID-19 pandemic. Surveillance photos show Ms. Toora handling her makeup bags. Ms. Toora also agreed that she had not, until shortly before trial, reported any of the revenue she derived from this business to the Canada Revenue Agency ("CRA").

- [26] Ms. Toora gave a few inconsistent explanations for this inaccurate discovery evidence. She initially testified that she mistakenly thought the questioner was asking her about another "job", so her business did not occur to her. She then testified that her business was "just something [she] didn't want to speak about", offering that she was ashamed and uncomfortable speaking about it. Later yet, Ms. Toora blamed her memory, testifying that at the time of the examination for discovery she had "a lot going on" and "a lot of things were very foggy".
- [27] I agree with Ms. Toora's counsel that people are complex and will often do things, like tell lies, for a multitude of reasons, some of which may not be obvious or rational. I also agree that a careful, balanced and contextually sensitive consideration, in light of the evidence as a whole, of the likely reason(s) for Ms. Toora's lies is required. When I do so, I come to the regrettable conclusion that Ms. Toora gave untrue answers at her examination for discovery about her business not for any of the reasons she now advances, but rather in an effort to conceal it from the defendants.
- [28] There is no evidence to support the notion that Ms. Toora was "foggy" or somehow cognitively impaired at the time of her discovery. She did not appear that way during the trial a few months later, a far more stressful and grueling experience. She is not claiming a loss for any alleged memory/cognitive problems arising from the defendants' negligence, nor did she call any evidence to support the argument that any post-partum issues led to memory loss or cognitive impairment at her discoveries. The two medical experts who testified, both of whom were psychiatrists and assessed the plaintiff a short time before her discovery, made no mention of the memory or cognitive issues claimed by the plaintiff. Issues related to any alleged cognitive impairment, decreased sleep or lack of judgment are outside the scope of the expertise of these witnesses. The bottom line is that this is not a situation of poor or impaired memory. Ms. Toora had worked in this business every year for several years at the time of her discovery. She claimed the Canada Emergency Response Benefit in 2020. She had just recently finished a job and had a two-day job coming up at the time of her examination for discovery.
- [29] As well, in light of her multiple untruths to clearly articulated questions, there can be no realistic argument that her untrue answers were somehow related to a misunderstanding in relation to one question. I also do not accept the other reason Ms. Toora offered for her untruths--shame. I accept that Ms. Toora may actually feel shame or embarrassment about her business' lack of financial success, but I reject her assertion that these feelings led her to lie about continuing her business at her discovery. If it were truly the case that Ms. Toora felt so uncomfortable or embarrassed about discussing her failed business that she felt she had to lie about it, why reveal it all? Ms. Toora did not conceal the fact she had operated this

business at her discovery; rather, she lied about continuing to operate it.

- [30] Simply put, Ms. Toora made bad decisions at her discovery. She decided to lie, under affirmation, about not continuing her business. Answering questions may have been a stressful experience. As a new mother, she certainly may have been tired. It also may have been an impulsive decision that worked against her own interest, but that does not change the fact that it was a deliberate decision to give untruthful answers under affirmation.
- [31] Ms. Toora's explanation for failing to meet her reporting obligations to the CRA over the years further undermined her credibility. She asserted that she did not believe she had to report her business revenue in any of those years because she was operating at a net loss. Leaving aside that in one of those years the business did not suffer a loss, this explanation is entirely inconsistent with Ms. Toora's background and experience.
- [32] Ms. Toora is a very intelligent, educated person. Her evidence, and even a cursory review of her curriculum vitae, shows that she has extensive work history, experience and skills in business practices, managing accounts receivable, bookkeeping, auditing and the like. She has a sophisticated understanding of taxes and how small businesses work as a result of her experience, including her involvement with her parents' and husband's businesses, over many years. In these circumstances, her explanation for failing to report her business revenue to the CRA defies belief and I do not accept it.
- [33] Ms. Toora was also untruthful at her examination for discovery about the extent of her post-Accidents activities. I turn to these now.
- (b) Kickboxing
- [34] Ms. Toora had been involved in kickboxing prior to the Accidents. At trial, she testified that she tried this sport again in the fall of 2017, but had to stop because of her injuries. Evidence from Ms. Toora's social media account, tendered by the defendants, establishes that she attended kickboxing sessions with SKILLZ Canada on 19 occasions between October 25 and November 29, 2017.
- [35] Ms. Toora's trial evidence is inconsistent with her discovery evidence. At her discovery, Ms. Toora said she had been involved in kickboxing before the Accidents--two weeks with SKILLZ Canada and then at home. After the Accidents, she said she tried to do kickboxing at home, but discontinued due to her injuries. She said the last time she tried it, at home, was "maybe two, three years ago". She denied going back to SKILLZ Canada after the Accidents.
- [36] In cross-examination at trial, Ms. Toora admitted that her examination for discovery answers in this area were not true, blaming inadequate preparation and a faulty memory. When it was suggested to her that she changed her evidence at trial as a result of the defendants' discovery and disclosure of her social media accounts shortly before trial, Ms. Toora denied the suggestion, but then went on to provide a non-responsive explanation about why she tried kickboxing at that time, the meal plan that was involved and other things.

- [37] Ms. Toora told similar untruths to both Drs. MacKean and Paramonoff. She told Dr. MacKean on May 16, 2022 that she used to do kickboxing prior to the Accidents but did not "get back" to doing the activity after the Accidents. She also told Dr. Paramonoff on May 31, 2022 that she had just started kickboxing prior to the Accidents, but did not return to it post-Accidents.
- [38] Ms. Toora's explanation for her false discovery evidence again lacks the ring of truth. One might understand a witness forgetting about a class or two some years ago, but Ms. Toora attended 19 classes over a one-month period nearly two years after the Accidents. She clearly enjoyed these classes, as demonstrated by her social media comments. Her untruth at discovery and her unacceptable explanation for it both further undermine her credibility and the reliability of her evidence.
- c) Housecleaner
- [39] Ms. Toora testified at trial that she has retained a housekeeper since the fall of 2020 to clean her home once every few weeks, and do the work she would be doing but for her Accidents-related injuries. This evidence is somewhat inconsistent with her husband's evidence that their housecleaner comes in once every four to six weeks, but more importantly, it is entirely inconsistent with Ms. Toora's examination for discovery evidence.
- [40] At her discovery, Ms. Toora was asked whether she had hired anyone to help with inside chores or whether it was just her and her husband who did them. She said that it was just her and her husband and added that it was "really difficult just with finances to kind of make it work", suggesting that they did not have the financial means to hire a housekeeper. In cross-examination, Ms. Toora admitted her examination for discovery evidence was untrue.
- [41] Ms. Toora has said two different things, both under affirmation, on this topic. She has adduced no receipts for any housecleaning services and her trial testimony differs somewhat from her husband's. This makes it very difficult to determine where the truth actually lies. In any event, Ms. Toora's inconsistent answers under affirmation further undermine her credibility and the reliability of her evidence.
- d) Impact of injuries on work attendance
- [42] At her examination for discovery, Ms. Toora was asked about the amount of time she missed from her employment in the Ministry Job after she returned to work following the Accidents. She discussed having to take time off due to flare-ups and gave evidence that from the time she went back to work until the time she started working from home in 2019, her injuries caused her to miss work "maybe two to three days a week" and "sometimes it could've been up to five days a week".
- [43] This evidence is inconsistent with Ms. Toora's trial evidence. Ms. Toora testified that a February 9, 2021 letter from Canada Life, marked as an exhibit in this trial, accurately records the time she was away from the Ministry Job as a result of her Accidents-related injuries. The letter includes a wage loss calculation sheet for the time period December 3, 2015 to January 18, 2020 (the "Wage Loss Calculation Sheet"). This record does not reflect

anywhere near the time Ms. Toora claimed to have missed from work at her discovery. As the defendants highlight, it shows that Ms. Toora did not miss any time from work between May 2, 2016 (when she was back to work full-time) and November 2, 2016 and only missed 39.10 hours between August 30, 2017 and January 4, 2018. Ms. Toora clearly exaggerated the severity of her flare-ups and the time she was taking away from her job at her examination for discovery.

e) Trip to Europe

- [44] Ms. Toora was asked about places she had travelled since the Accidents at her examination for discovery. She did not give evidence about a trip to Europe in 2019. At trial, it was revealed that Ms. Toora and her husband travelled to Europe from May 19 to June 11, 2019, a vacation Ms. Toora called the "trip of a lifetime". While there were some inconsistencies in their evidence (Ms. Toora painted a much less active picture of this trip than her husband), it was clear that this trip was a very significant one for both of them. They spent time in Paris where they met friends, and also went to Lisbon, Barcelona and Nice. Like the business she was operating, I do not accept this is something Ms. Toora could simply forget.
- [45] In addition to the areas of inconsistency described above, Ms. Toora's credibility and the reliability of her evidence was further undermined by her failure to give Drs. MacKean and Paramonoff complete and accurate information about material aspects of her history. She concealed her activities surrounding her hair and makeup business from both experts. She failed to tell Dr. MacKean that she had been doing work for her family's businesses at the time of the Accidents. She did not tell either doctor about the full extent of her post-Accidents activities and specifically told them that she had been unable to return to kickboxing after the Accidents. Not only do these omissions and untruths undermine Ms. Toora's evidence, they have the effect of undermining the reliability of the experts' opinions as well.
- [46] The shortcomings in Ms. Toora's evidence exceed its strengths. In these circumstances, I find I must approach all of Ms. Toora's evidence with caution. In the end, while I accept some of her evidence, particularly where it is supported by other evidence I accept, I find there are other aspects I do not accept. I will identify those areas during my fact-finding process and throughout my examination of the issues.

Facts

- [47] I will organize my general factual findings in chronological order and make further specific factual findings as I consider the various issues. I derive some of my factual findings from an agreed statement of facts.

Prior to the Accidents

- [48] Ms. Toora was born in March 1987. She is now 36 years old. She grew up in Victoria, graduating from high school in 2004. She and her brother were raised in a loving home by her parents and extended family. Her parents worked very hard to provide for the family. Both worked two jobs and owned commercial and residential rental properties. From when she was a teenager, Ms. Toora assisted her parents with the administration of those properties. Ms. Toora's parents instilled in her the value of hard work and commitment to family.
- [49] After graduating from high school in 2004, Ms. Toora began working part-time for UVic in the Food Services Department as a casual student worker. She also attended Camosun College in Victoria, studying in the area of general sciences.
- [50] In 2007, Ms. Toora started working summers for the provincial government as a Rural Property Tax Clerk. She held this summer job until 2011.
- [51] In 2009, Ms. Toora transferred her course of studies to the University of Northern British Columbia in Prince George. In 2012, she transferred to Thompson Rivers University in Kamloops where she completed her studies, obtaining a bachelor's degree in biochemistry and molecular biology in May 2012.
- [52] On May 3, 2012, Ms. Toora accepted an auxiliary position with the provincial government as a Low-Income Grant Supplement Clerk. At the time, her goal was to continue her studies in the field of medicine, but a full-time position with the provincial government soon took her in a different direction. In August 2012, Ms. Toora began working in a temporary, full-time position as a Revenue and Collections Agent in the Ministry. She never went back to school.
- [53] After her temporary position ended on July 12, 2013, Ms. Toora continued to work for the Ministry. Three days later, she began the Ministry Job, a permanent full-time position as a Revenue and Collection Agent for the Ministry in the Collection and Loan Management Group ("CLMG").
- [54] Ms. Toora continued to work part-time at UVic and full-time in the Ministry Job. In September 2014, UVic promoted her to the UVic Job, a supervisory position that saw her responsible for supervising food services in two restaurants on campus, Cap's Bistro and Village Green. Her new position saw her working three-day blocks, with a guaranteed 22.5 hours, each week. Although the "normal" shift hours for the UVic Job were 4 p.m. to 12 a.m., Ms. Toora was allowed to start at 5 p.m. to accommodate the travel time from her Ministry Job. Her position subjected her to layoff periods due to breaks in the academic calendar. These breaks included a three to four-day period in November, a winter break from mid-December to early in the new year, spring break in February and summer break from mid-April to September each year. Although a supervisory position, there were many physical aspects of this job.

- [55] In the time leading up to the Accidents, Ms. Toora continued to live at home with her parents. She also continued to work full-time (Monday to Friday 8:15 a.m. to 4:35 p.m., with "flex days" every second Friday) at the Ministry Job and part-time (Monday to Thursday from 5 p.m. to 12 a.m. during the September to April university term) at the UVic Job. Payroll records from the fall of 2015 show that she was then working an average of 28.7 hours a week at the UVic Job. Ms. Toora was receiving more than her appointed 22.5 hours each week during this time because she was filling in for a person on maternity leave. During summers, Ms. Toora also worked in catering at UVic.
- [56] By living at home and working two jobs, Ms. Toora was able to save \$34,000 in RRSPs by the time she was 28 years old.
- [57] As she had done since she was a teenager, Ms. Toora also assisted her parents with their business, without remuneration. At the time of the Accidents, she held the position of Assistant Manager, helping them out on an "as needed" basis, with things such as recruitment, training and supervising employees, bookkeeping, managing accounts payable/receivable and the like.
- [58] Prior to the Accidents, Ms. Toora engaged in regular fitness and social activities. She worked out regularly with her friend, Ms. Banki, and engaged in activities with her large extended family, including dinners, picnics and various sporting activities. Other than anemia, for which she was receiving treatment, and a short-term knee and wrist injury arising from a slip and fall in August 2015, Ms. Toora had no health concerns prior to the Accidents. She had no pre-existing neck or back pain.
- [59] In 2014, Ms. Toora earned \$49,620 at the Ministry Job and \$11,961.07 at the UVic Job.

The Accidents

- [60] On December 3, 2015, Ms. Toora decided to run an errand on her lunch break. At about 12:57 p.m., she was stopped in her vehicle at a red light at the intersection of Government Street and Chatham Street in downtown Victoria. When the light turned green, Ms. Toora began to move her vehicle forward, but stopped immediately when she saw a vehicle coming from her left. Her vehicle was then rear-ended by a vehicle driven by the defendant, Mario Gedicke, and owned by the defendant, Nicole Caldwell.
- [61] Upon impact, Ms. Toora felt her body move forward and back. No part of her body came into contact with the interior of her vehicle. The air bag did not deploy. She got out of her vehicle, looked at the damage, which was not significant, and quickly exchanged information with the other driver. She felt a little shaken up by the experience, but gathered herself and proceeded on her way.

- [62] The second collision occurred within minutes, only a few blocks from the first. Ms. Toora was again stopped at a red light, behind other vehicles. She was driving northbound on Douglas Street where it intersects with Finlayson Street. While waiting for the light to change and the traffic ahead of her to proceed, she looked in her rear-view mirror and saw a van approaching. The driver, the defendant, Michelle Popoff, was looking down. Her vehicle struck Ms. Toora's vehicle from behind.
- [63] Upon impact, Ms. Toora felt her neck jerk forward and back. No part of her body came into contact with the interior of her vehicle. The air bags did not deploy. She got out of her vehicle and examined the damage to her vehicle. There was more damage now, but nothing significant. She and the other driver exchanged information. Ms. Toora was more shaken now, but managed to drive back to work.

After the Accidents

- [64] When Ms. Toora arrived back at work following the Accidents, her supervisor recommended that she seek medical attention. She saw her family doctor, Dr. Amarjit Nirwan, the same day. She was starting to feel a little stiff. Dr. Nirwan prescribed Naproxen and Tramadol. She saw him again on December 7, 2015 and he recommended she start massage therapy and physiotherapy.
- [65] Ms. Toora was unable to go back to work at either of her jobs for a time after the Accidents. She was experiencing muscle pain and stiffness in her neck, mid back, trapezius and shoulders. Ms. Toora began to experience headaches, sometimes leading to migraines as well, but the timing of their onset is a matter of controversy as a result of Ms. Toora's inconsistent accounts.
- [66] Ms. Toora told the two medical experts who gave opinion evidence in this case that her headaches/migraines developed fairly quickly after the Accidents. To Dr. MacKean she said her headaches developed within a week of the Accidents. To Dr. Paramonoff she said the onset of migraines and nausea occurred within a week or so after the Accidents.
- [67] Ms. Toora gave inconsistent evidence at her examination for discovery and at trial on this topic. In examination-in-chief, Ms. Toora included headaches/migraines in the list of symptoms she said prevented her from returning to work after the Accidents. She returned to the UVic Job in January 2016. In cross-examination, she first testified that she could not remember when the headaches/migraines began. Ms. Toora later agreed that her examination for discovery evidence was true where she said that she first started to experience headaches "a few months later" after the Accidents, saying "It wasn't right away. Maybe two, three months later." Later yet, when shown that Dr. Nirwan's clinical records from her first visits did not record any headache complaints, Ms. Toora recalled her headaches were "not happening in the beginning".

- [68] These inconsistencies reflect negatively on Ms. Toora's evidence in this area. Other witnesses touched on the timing of Ms. Toora's headache complaints, but their evidence is of limited assistance. Ms. Costello observed that Ms. Toora, after she returned to the Ministry Job on March 21, 2016, left early on some occasions complaining of pain or headaches. Mr. Bhatia recalled that Ms. Toora had headache and migraine complaints after the Accidents, but he did not see her often then and was not asked to pinpoint when he first recalled Ms. Toora making such complaints. In the end, I am left with Ms. Toora's inconsistent accounts. In consideration of the evidence as whole, I find that her headaches, sometimes leading to migraines, began a few months after the Accidents.
- [69] On Dr. Nirwan's recommendation, Ms. Toora began attending massage therapy sessions a short time after the Accidents on December 9, 2015. She continued with regular massage therapy sessions thereafter until the end of 2016. Also on Dr. Nirwan's recommendation, she began attending physiotherapy sessions in late January 2016, continuing them regularly until the end of November that year. Some of these sessions involved a supervised exercise program with a kinesiologist.
- [70] In 2015, Ms. Toora earned \$51,869 in the Ministry Job and \$18,449.23 in the UVic Job.
- [71] Ms. Toora had her vehicle repaired at the beginning of January 2016. The cost of the repairs, including both labour and materials, was \$753.30. Ms. Toora agreed her vehicle did not suffer any significant damage in the Accidents.
- [72] After a few weeks off work and on her doctor's recommendation, Ms. Toora decided to tackle returning to work, one job at a time. She started with the more physical of the two, the UVic Job. Ms. Toora returned to work at UVic, on a gradual basis, in January 2016. She had modified duties and less than her appointed hours. Co-workers were made aware of the Accidents and Ms. Toora's need for assistance with heavy lifting. They helped out where needed.
- [73] In the first week of February 2016, Ms. Toora successfully completed a five-day occupational first aid certification program.
- [74] On February 16, 2016, Ms. Toora was cleared to return to full duties at the UVic Job by her doctor and did so, modifying her duties and asking co-workers for help as needed. She returned back to her regular appointment of 22.5 hours per week. As the new supervisor that had been hired in November 2015 was now trained and working, Ms. Toora did not need to pick up any additional shifts.
- [75] Ms. Toora returned to the Ministry Job, which was more sedentary, on March 21, 2016. Here, too, she returned on a graduated basis, working half days at first and slowly increasing her hours until she was back at full-time by May 2, 2016. Ms. Toora received short term disability benefits during the time she was off work and during her graduated return. The Ministry accommodated her by implementing changes recommended in an ergonomic review.

- [76] Although she was then back to working both jobs, I am satisfied Ms. Toora continued to struggle with symptoms arising from her Accidents-related injuries. She was sore and experiencing headaches, which sometimes evolved to migraines involving nausea and vomiting. Ms. Costello noted Ms. Toora had to leave early from the Ministry Job on occasion due to pain or headaches. Ms. Banki recalled noticing Ms. Toora appearing very "robot-like", in the sense that she could not really move her neck. Eventually though, Ms. Toora's symptoms began to improve over time.
- [77] After she completed her gradual return to work and returned to her regular schedule at the UVic Job, Ms. Toora was informed by her supervisors that she was to notify them if she had any continuing issues from the Accidents. She did not do so.
- [78] In May 2016, Dr. Nirwan recommended that Ms. Toora continue with physiotherapy and undertake an exercise rehabilitation program. He advised her to see a chiropractor, as well.
- [79] Ms. Costello is a supervisor with the CLMG in the Receivables Management office of the Ministry. Her team is responsible for collecting non-tax revenue. In the summer of 2016, her group implemented a new system for records and processing payments. Because of Ms. Toora's experience and knowledge, she was assigned to assist the group with the transition. She found that Ms. Toora did a good job implementing the new system and trained everyone to use it.
- [80] In the fall of 2016, Ms. Toora reconnected with Mr. Bhatia, who is now her husband. The couple had dated several years earlier (2007 to 2009), but had not seen each other much after that. They started dating again, but owing to Ms. Toora's traditional upbringing and her work schedule, the two spent very limited time together in person.
- [81] In early December 2016, roughly one year following the Accidents, Ms. Toora reported to her family doctor that she felt she was about "80% recovered" from her Accidents-related injuries.
- [82] In 2016, Ms. Toora earned \$66,349 in the Ministry Job and \$15,964.11 in the UVic Job.
- [83] In early February 2017, Ms. Toora obtained her Occupational First Aid Level 2 certification after five days of training. She did this on her own accord, taking time off work to do so.
- [84] Ms. Toora resigned from the UVic Job on February 13, 2017. Why she left is a significant area of controversy between the parties. Ms. Toora testified that she left because she was unable to perform her job as a result of her Accidents-related injuries. She claims she sought accommodation from her employer in the form of a less physically demanding position or fewer hours, but her employer was unable or unwilling to provide such accommodations. She says that she was effectively forced to resign. The defendants urge me to reject Ms. Toora's claims in this regard. They point to Ms. Toora's lack of credibility overall, as well as other evidence that shows Ms. Toora resigned for reasons unrelated to the Accidents, including changing circumstances, priorities in her personal life and the Ministry Job. I agree with the position taken by the defendants.

[85] Ms. Toora says her evidence in this area is supported by a January 12 to February 2, 2017 email chain between herself and two of her supervisors, Ms. Bailey and Ms. Rainey (the "Email Chain"). Although not explicitly stated in the Email Chain, Ms. Toora asserts that the intent of those communications was to obtain accommodation. I do not accept her evidence in this regard, for a number of reasons.

[86] First, Ms. Toora's evidence is inconsistent with the words used by the participants in the Email Chain. Ms. Toora began the Email Chain on January 12, 2017. She wrote to Ms. Bailey (Senior Operations Manager, Food Services) and Ms. Rainey (Coordinator of Residence Dining) as follows:

Good Afternoon Kelly and Cindy,

I enjoy working at Uvic and absolutely love my job and my staff; however, I feel I am no longer able to commit to my appointed work days.

I do not believe there are any other options available that would allow me to keep my appointed position and work different days in different areas or even anything until 8 or 9 PM.

I wanted to send you an email to see if anything of that nature might be available?

If nothing is available, I will give notice to end my appointment at Uvic and possibly continue on a casual basis.

Thanks,

Indu Toora

[87] Ms. Bailey and Ms. Kelly both replied fairly quickly, expressing how sorry they were to hear this and asking for some time to allow the two of them to discuss the matter. Ms. Toora followed up with them on January 18, 2017, asking if they had a chance to discuss the matter. Ms. Bailey replied quickly and asked that they all meet the following day. The next day Ms. Bailey was away from work, sick, so the meeting did not occur. Ms. Rainey communicated this to Ms. Toora and advised they would reschedule the meeting with her as soon as possible.

[88] When the meeting had not been rescheduled by January 30, Ms. Toora wrote to her supervisors:

I regret to inform you that as I have not heard back about a possible accommodation for my position that it is with great emotion that I have attached my resignation letter.

[89] Ms. Bailey replied that same day, January 30, apologizing for the delay and explaining that she had been off work until the previous Thursday. She asked Ms. Toora if she would consider staying on until March 31 to close the term, but if this was not possible, wondered if she would be interested in staying on as a casual employee. She also suggested that there may be an opportunity in retail for her as well. She ended her email by writing that she

would "like to chat in person as I've been negligent this semester in getting face time with the evening staff".

- [90] Ms. Toora responded on February 2. She declined the offer to stay until the end of March, citing her vacation to India from February 27 to March 18. Nowhere in the Email Chain does Ms. Toora suggest that she was asking for options because of her injuries, nor do any of the responses by Ms. Bailey or Ms. Rainey reasonably suggest this is the case.
- [91] Second, Ms. Toora's evidence is inconsistent with that of Ms. Rainey and Ms. Bailey. These two witnesses were called by the defendants. They were both highly credible and reliable witnesses. While they had some slight memory challenges in areas that required some historical detail, I find this was minor, to be expected and did not detract from the force of their evidence. Both witnesses spoke very highly of Ms. Toora as an employee. They called her trustworthy, hardworking, honest, detailed, excellent and a person possessing very good communication skills.
- [92] These witnesses gave evidence about the required process for an injured worker to return to work and how that process was invoked and followed when Ms. Toora returned in early 2016. They also testified about Ms. Toora's employment history, job duties, work environment, her graduated return to work after the Accidents and what they knew of her resignation.
- [93] I accept the evidence of these two witnesses. They testified that at no time from when Ms. Toora was cleared to return to full duties in February 2016 to when they received her resignation letter a year later, were they made aware by Ms. Toora, or any other staff member, that Ms. Toora was continuing to experience symptoms of her Accidents-related injuries or having difficulty carrying out her job duties. At no time were either of them contacted by Ms. Toora to request modified duties and/or accommodation due to symptoms relating to her injuries. They, reasonably in my view, did not interpret Ms. Toora's request in the Email Chain as a request for accommodation due to her injuries. If they had thought this, their response would have been different. They would have followed the same process as before.
- [94] Given Ms. Toora's awareness of workplace safety policies, her awareness of her responsibility to keep her employer informed of difficulties of this nature, her good relationship with her supervisors, her enjoyment of her job, her very good communication skills, and her direct and confident personality, there can be no doubt that if Ms. Toora was indeed experiencing symptoms to the extent she felt she had to resign if not accommodated, as she claims, she would have told her supervisors about this. She would have told them before the Email Chain and she certainly would have told them in the Email Chain.

- [95] Third, Ms. Toora's explanation for failing to advise her supervisors about having continuing issues related to the Accidents that were affecting her ability to do her job is not, in light of the evidence as a whole, capable of belief. She claimed, in cross-examination, that after she was cleared for full duties in February 2016 she tried to tell her supervisors about her continuing issues related to the Accidents, but never got the chance to see them.
- [96] It defies belief that Ms. Toora did not have even one opportunity to discuss this issue with either of her supervisors during this one-year period. Ms. Rainey and Ms. Bailey both testified to having had in-person and telephone conversations with Ms. Toora during this time. They testified about Ms. Toora's good communication skills and about their known open-door policy. Both witnesses received email communications from Ms. Toora numerous times. During all of these meetings, calls and email communications, Ms. Toora did not once mention the need for accommodation of her Accidents-related injuries.
- [97] Given all of the above, I have no difficulty accepting Ms. Bailey's and Ms. Rainey's evidence that they did not think the accommodation Ms. Toora sought in the Email Chain was related to the Accidents. Rather, they reasonably thought that Ms. Toora wanted to change her hours for other reasons known to them, like her full-time day job and her upcoming trip to India. Indeed, I find this was, in fact, the case.
- [98] Ms. Toora left the UVic Job when she did for reasons unconnected to the Accidents. She had a number of things going on in her life. She had a big trip planned during the school term. She now had a serious relationship and struggled to make time for Mr. Bhatia outside of her two jobs and her family commitments. She was thinking about starting her hair and makeup business. She was looking for advancement in her career with the government and knew it would possibly require an increased time commitment. While I accept Ms. Toora was still experiencing some symptoms related to her injuries during this time, they were not to the extent she claims. Nor were they the reason she resigned from UVic.
- [99] Ms. Toora's last day of work at UVic was February 13, 2017. From March 1 to March 18, 2017, she travelled to India to attend festivities in relation to a relative's wedding. She had no pain or flare-ups during this trip.
- [100] On March 29, 2017, Ms. Toora took a training course in relation to the Ministry Job. She attended another training workshop on April 5, 2017.
- [101] By the summer of 2017, Ms. Toora decided to turn her interest in hair and makeup into a business. On June 23, 2017, Ms. Toora obtained a certificate in makeup art and hair design from the Pink Orchid Studio Ltd. in Langley following her successful completion of a 90-hour course over the previous two weeks. Since her certification, Ms. Toora has provided makeup and hair design services on an intermittent basis, mainly catering to the summer wedding season. She has publicly promoted her business on Facebook under the name "Toora Hair and Makeup" and on Instagram under the name "toora.hair.makeup". She employed her cousins as her assistants. They provided hair services for her clients and she did their makeup.

- [102] Ms. Toora saw her first client on July 5, 2017. She had eight clients in 2017.
- [103] Ms. Toora continued to work full-time in the Ministry Job. Ms. Toora made her supervisors aware that she was interested in pursuing a leadership position and such an opportunity came her way in the fall of 2017 when she was offered a lateral transfer into a new acting position as a Senior Collections Analyst. She accepted the position, which saw her lead an accounts receivable team.
- [104] In the fall of 2017, Ms. Toora and Mr. Bhatia travelled to Edmonton for a wedding. While there, they became engaged to be married. After their engagement, the time they spent together increased a little, but as Ms. Toora came from a traditional family, they did not see each other frequently.
- [105] Also in the fall of 2017, Ms. Toora attended 19 kickboxing classes in a one- month period.
- [106] In December 2017, Ms. Toora travelled to India to visit her grandfather who was ill. She was there for two weeks and, while there, also attended a wedding.
- [107] In 2017, Ms. Toora earned \$56,073 in the Ministry Job. Until the time she resigned, she earned \$2,463.08 in the UVic Job.
- [108] After nearly a year of planning, Ms. Toora married Mr. Bhatia at the end of June 2018. The wedding festivities included multiple events commencing five days before the wedding. The wedding event itself was held over two days. The couple moved in together a few days later, and then honeymooned in Mexico during the last two weeks of July. There they enjoyed laying by the pool, sightseeing, swimming with turtles, parasailing and dining out. Mr. Bhatia portrayed a much more active honeymoon than Ms. Toora. She did not have any flare-ups of her symptoms during this time.
- [109] Ms. Toora continued her hair and makeup business in 2018. A largely seasonal business, she only saw four clients that year. She attributes the reduction in clients to the toll she claims it took on her physical health and her desire to limit the opportunities for flare-ups while she prepared for, and enjoyed, her own wedding and honeymoon that year.
- [110] Ms. Toora went to Las Vegas with some of her cousins for a bachelorette party. When precisely she took this trip is unclear from the evidence, but Mr. Bhatia believes it was after they were married.
- [111] In 2018, Ms. Toora attended a number of training workshops related to her employment, including one in April, one in May, one in September and a Leadership Learning Lab on December 18. Ms. Toora agreed that the purpose of all this training was to advance her career.
- [112] Ms. Toora had, since 2017, held the position of Senior Collections Analyst in an acting role. When a permanent position was created, Ms. Toora was the successful candidate appointed to the position on March 19, 2019. Her annual salary was set at \$58,898.95.

- [113] In 2018, Ms. Toora earned \$60,273 in the Ministry Job.
- [114] In early 2019, Ms. Toora was granted permission to work remotely from home. She was one of the first in her group to be granted such permission, and she has worked remotely ever since. She has found working from home helpful as it saves her commuting. It also gives her the flexibility to take microbreaks and to take steps to treat any symptoms as they arise, such as stretching, lying down, and using a heating pad.
- [115] Ms. Toora continued with her hair and makeup business in 2019. She had 12 bookings that year.
- [116] Ms. Toora also took another extended international trip in 2019. Ms. Toora and her husband travelled in Europe from May 19 to June 11, 2019. They stayed in Paris, Nice, Lisbon and Barcelona. They enjoyed many of the sights, ate wonderful food, met friends in Paris, walked and relaxed.
- [117] On December 23, 2019, Ms. Toora was involved in another motor vehicle accident. Her husband was driving and she was the front seat passenger. They were travelling on a dark highway and unfortunately struck a deer that had run across the road, causing their vehicle to come to a sudden stop. No air bags deployed. The accident aggravated Ms. Toora's neck and upper back symptoms for a time, and caused her some temporary hip pain.
- [118] In 2019, Ms. Toora earned \$69,107 in the Ministry Job.
- [119] In the fall of 2020, the couple moved to their current home and decided to rent out their condominium. Ms. Toora also travelled to Ontario in 2020 for two weeks to attend a relative's wedding.
- [120] Ms. Toora continued with her hair and makeup business in 2020. She had six bookings that year.
- [121] In 2020, Ms. Toora earned \$66,044 in the Ministry Job.
- [122] Ms. Toora became pregnant in 2020, but tragically lost the child in her second trimester in January 2021. She took maternity leave and received employment insurance benefits from January 3 to May 1, 2021. In April, she had to undergo a surgery. Adding to her emotional trauma that year, the couple also lost a new family pet in the summer of 2021.
- [123] Ms. Toora continued with her hair and makeup business in 2021. Given all she was going through, she understandably only had three bookings that year.
- [124] In 2021, Ms. Toora earned \$49,969 in the Ministry Job.
- [125] Ms. Toora became pregnant again, eventually delivering a healthy child in March 2022. She found her symptoms to be much improved during her pregnancies. On March 30, 2022, she commenced an 18-month maternity leave from her employment.

[126] In May 2022, Ms. Toora was assessed by both experts who gave opinion evidence in this trial. In July she travelled to Ontario. On July 21, she attended her examination for discovery.

[127] Ms. Toora continued with her hair and makeup business in 2022 as well. She had four contracts for service at the time of trial.

Expert Evidence

Dr. MacKean

[128] Dr. MacKean is a medical doctor, specifically a physiatrist, qualified to give expert opinion evidence in the area of physical medicine and rehabilitation. Dr. MacKean assessed Ms. Toora on May 16, 2022 and prepared an independent medical report outlining her opinions that same day. She also testified.

[129] The plaintiff asked Dr. MacKean to provide opinions regarding the nature of her Accidents-related injuries, her present condition, her prognosis, treatment recommendations and the like. In addition to her roughly hour-long interview and assessment of Ms. Toora on May 16, 2022, Dr. MacKean reviewed the medical records sent to her and relied upon the facts and assumptions counsel supplied to provide her opinions.

[130] Dr. MacKean opined that Ms. Toora suffered a "grade 2 whiplash associated disorder" involving the cervical spine, upper to mid-back and shoulder girdle region; chronic myofascial pain involving her neck and upper to mid-back; and post-traumatic headaches as a result of the Accidents. She believes Ms. Toora's condition has reached the point of maximal medical improvement as it has been over six years since the Accidents. She added that some of Ms. Toora's stiffness and decreased mobility at the time of her assessment was a result of deconditioning and having gone through a recent caesarean section.

[131] Dr. MacKean opined that Ms. Toora should be able to return to her work as an auditor following her current maternity leave. She also offered that she thought it was appropriate for Ms. Toora to have stopped working at UVic when she did "due to ongoing neck pain, upper back pain and headaches". Dr. MacKean recommends physiotherapy and exercise therapy, regular walks, proper ergonomic set-ups for work and perhaps a pain clinic where Ms. Toora might be given treatments such as trigger point injections.

Dr. Paramonoff

[132] Dr. Catherine Paramonoff is also a medical doctor and physiatrist qualified to give expert opinion evidence in the area of physical medicine and rehabilitation. She assessed Ms. Toora on May 31, 2022 and prepared an independent medical report outlining her opinions dated July 20, 2022. She also testified.

- [133] The defendants asked Dr. Paramonoff to provide opinions regarding the nature of Ms. Toora's Accidents-related injuries, her present condition, her prognosis, treatment recommendations and the like. In addition to her interview and assessment of Ms. Toora on May 31, 2022, Dr. Paramonoff reviewed the medical records sent to her and relied upon the facts and assumptions counsel supplied in providing her opinions.
- [134] Dr. Paramonoff diagnosed Ms. Toora as suffering from the following conditions as a result of the Accidents: (a) musculoligamentous injuries at the neck and myofascial injuries at the back; and (b) multifactorial headaches with contribution from cervicogenic and myofascial sources. She explained that the cervicogenic sources of the headaches are associated with the musculoligamentous injuries at the neck, which can have a migrainous component, and the myofascial sources are associated to the muscle tension at the neck and upper back.
- [135] Dr. Paramonoff explained that Ms. Toora's clinical presentation was most consistent with having sustained those injuries in the Accidents, with likely contribution from muscle imbalance/deconditioning. In her view, the muscle imbalance/deconditioning occurred for a number of reasons, including the Accidents and decreased activity as a result of her pregnancies and their complications. Dr. Paramonoff explained that pain limitation results in altered mechanics of movement and decreased activity, which then leads to ongoing and additional myofascial sources contributing to the symptoms. She opined that there is likely also contribution from confounding factors such as psychological/behavioural factors, non-organic weakness on testing at the upper extremities and from kinesiophobia, or fear of movement generally associated with pain and fear of re-injury. Dr. Paramonoff explained that the experience of pain is subjective, and that these types of factors can contribute to an ongoing (or chronic) pain presentation.
- [136] In terms of prognosis, Dr. Paramonoff opined that Ms. Toora will likely have a prolonged course of recovery given the cumulative effect of superimposed soft tissue injuries, the potential contribution from underlying degenerative spine changes, and the multifactorial muscle imbalance/deconditioning and confounding factors outlined above. In her view, Ms. Toora's prognosis for moderate symptom/symptom management improvement is positive, notwithstanding the time that has passed. She expects that Ms. Toora will see a moderate improvement in her symptoms as she gradually builds an independent strengthening program and manages the noted confounding factors. While her symptoms are unlikely to go away completely, Dr. Paramonoff is optimistic there will be some improvement.
- [137] Dr. Paramonoff also opined that, while there is no medical reason that Ms. Toora cannot participate in activities as a result of her soft tissue injuries, she requires some activity adaptations such as taking microbreaks, pacing, prioritizing activities, and optimal ergonomics. She is of the view that Ms. Toora reasonably required some assistance with heavier homemaking activities initially after the Accidents, but that if Ms. Toora undertakes the recommended strengthening, conditioning and adaptations, she will reasonably be able

to carry out homemaking activities without assistance.

- [138] In terms of work, it is Dr. Paramonoff's opinion that the initial four months Ms. Toora took off from work were medically appropriate given her injuries, but felt there was no contraindication to continuing work thereafter.
- [139] Dr. Paramonoff recommends Ms. Toora engage in a physiotherapist-driven exercise program, followed by an independent exercise program. Recognizing that Ms. Toora may have flares of pain from time to time in the future (with such flares related to the Accidents expected to decrease over time), she also recommends massage or physiotherapy as needed to address those symptoms. She further recommends Ms. Toora see an occupational therapist for one or two sessions for strategies and equipment to help optimize her functioning.

Causation

- [140] Ms. Toora bears the burden of proving, on a balance of probabilities, that the defendants caused or contributed to the injuries, and the resulting impacts, for which she seeks compensation.
- [141] In *Borgfjord v. Boizard*, 2016 BCCA 317, leave to SCC ref'd 37210 (9 February 2017), Justice Savage summarized the law on causation as follows:
- [54] Causation is a two-step consideration. First, the plaintiff must establish the damage was caused in fact by the conduct of the defendant: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54. The test for factual causation was restated by the Supreme Court in *Ediger*:
- [28] This Court recently summarized the legal test for causation in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181. Causation is assessed using the "but for" test (*Clements*, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). That is, the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred (*Clements*, at para. 8). "Inherent in the phrase 'but for' is the requirement that the defendant's negligence was necessary to bring about the injury -- in other words that the injury would not have occurred without the defendant's negligence" (para. 8 (emphasis deleted)).
- [55] Scientific proof of causation is not required; common sense inferences from the facts may suffice: *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 at paras. 38, 46. However, inferences must be based on proven facts and cannot be simply guesswork or conjecture: *Kerr (Litigation Guardian of) v. Creighton*, 2008 BCCA 75 at paras. 58-62; *Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.) at 279-80, 305.

- [56] Second, the plaintiff must establish causation in law. This has been described as proving the defendant was a proximate cause of the loss, the damage was not too remote from the factual cause, or the damage suffered was reasonably foreseeable: *Hussack* at para. 54. Overall the inquiry asks whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paras. 11 and 12.
- [57] It is not necessary for the plaintiff to show the precise injury or the full extent of the injury was reasonably foreseeable, only that the type or kind of injury was reasonably foreseeable: *Hussack*, at para. 71.
- [142] The parties agree the evidence establishes that Ms. Toora sustained musculoligamentous injuries in the neck, myofascial injuries of the back and cervicogenic and myofascial headaches as a result of the Accidents. However, they disagree on whether Ms. Toora's current chronic pain presentation, and its alleged impacts, were caused by the Accidents.
- [143] The plaintiff submits that I should accept her evidence about the frequency and extent of her current pain presentation, and its impact on her functionality. She says I ought to rely upon the opinions of the experts who say that her pain arising from her Accidents-related injuries is now chronic and unlikely to resolve, or at least fully resolve.
- [144] Regarding the chronicity of her pain, she points to Dr. Paramonoff's evidence that the experience of pain is subjective--all people experience pain differently. Some people will experience more pain than others but, even so, their pain is real. There are distinct but interrelated physical and psychological components to chronic pain. The first is the severity of the pain. The second is the ability to manage or cope with the pain. The former is a physical feeling of pain, the latter is a psychological reaction to it which is unconscious and beyond an individual's control. Ultimately, she argues that if her psychological makeup plays a role in her chronic pain (i.e., makes her pain feel more severe than it might for others, or causes her greater difficulty in coping with the pain than others might have), these tortfeasors must take their victim as they find her.
- [145] Emphasizing her frailties as a witness, the defendants submit that Ms. Toora's depiction of her current pain presentation is greatly exaggerated and should not be believed. They say the evidence fails to establish her pain is chronic. However, in the event Ms. Toora is found to have any ongoing symptoms relating to her injuries, they submit that these symptoms are caused or contributed to by confounding factors that resulted in Ms. Toora's maladaptive coping mechanisms and kinesiophobia as described by Dr. Paramonoff--the 2019 collision with the deer, and her two pregnancies in 2021 and 2022 involving the loss of a child and then a C-section. They argue that these confounding factors are all intervening events that were unrelated to the Accidents, and for which they cannot be held responsible.
- [146] I accept Ms. Toora's evidence about the pain she experienced in the immediate aftermath of the Accidents and the impact it had on her during the initial time she was off work. She was unable to do her usual activities and unable to work for a time. She engaged in treatment

and was then, gradually and on doctor's advice, able to return to full duties first at one job, and then the other. She continued to experience symptoms, but they gradually improved to the point that, in December 2016, roughly a year after the Accidents, she was about 80% improved.

- [147] Despite my concerns about her credibility and the reliability of her evidence overall, I accept that Ms. Toora's life has been disrupted by occasional painful flare-ups and headaches, sometimes leading to migraines, since the Accidents. Ms. Costello witnessed some evidence of this in the workplace. Her husband witnessed some evidence of this at home. Her friend noticed some evidence of this in her recreational life. The medical evidence supports this finding as well. However, from the whole of the evidence, I find I cannot accept that these ongoing symptoms occurred, or continue to occur, with the frequency and severity Ms. Toora claims, nor that they impact her functionality to the degree she claims. I reach this conclusion for a number of reasons.
- [148] As previously discussed, Ms. Toora's credibility and the reliability of her evidence has been seriously undermined by the untruths she told at her discovery and the inconsistencies in her evidence. These untruths were related to her functionality and tended to paint a more dire picture of her life than is actually the case. Her evidence has been further undermined by the untruths she told (or omissions she made) to the experts about key events or activities in her history, untruths or omissions that again portrayed her life in more negative terms than is actually the case. I will discuss these in a moment. As well, from the whole of the evidence, I find that Ms. Toora's evidence about the frequency, severity and impact of her flare-ups, headaches and/or migraines (she claims they occur every few weeks and take her off work a few days to a week at a time) is inconsistent with the whole of the evidence that shows Ms. Toora has not missed that much work and has led a much richer and more functional life than the claimed frequency, severity and duration of her flare-ups would suggest. She has participated in activities; taken several trips, a few of them extended international trips; engaged in a new business venture; and advanced in her government career.
- [149] Finally, I also consider Dr. Paramonoff's unchallenged, objective finding from Ms. Toora's physical examination that "there was non-organic weakness on testing of the upper extremities", referring to a neurologic exam where Ms. Toora demonstrated generally decreased strength with some "give-way weakness throughout the upper extremities" on motor testing. This weakness was not due to organic or neurologic findings, nor any pain limitations. Dr. Paramonoff explained, and I accept, that this shows that Ms. Toora was not giving full effort on testing. This supports the finding that Ms. Toora is exaggerating her ongoing limitations.

- [150] The reliability of the experts' evidence in this case is based on the assumption that the subjective account Ms. Toora provided to them is accurate. As discussed, my assessment of Ms. Toora's credibility and the reliability of her evidence has led me to the conclusion that Ms. Toora exaggerated the frequency, severity and impact of her ongoing symptoms.
- [151] Dr. MacKean opined that Ms. Toora's prognosis is poor. Dr. Paramonoff's opinion was more optimistic. While the reliability of both their opinions was undermined by Ms. Toora's exaggeration of the frequency, severity and impact of her symptoms and inaccurate reporting of her functionality, I find Dr. MacKean's undermined more substantially, to the point I can give her opinions little weight. I reach this conclusion for a few reasons.
- [152] Ms. Toora failed to provide Dr. MacKean with quite a bit of relevant information. For example, she did not tell Dr. MacKean about the full extent of her post-Accidents activities, such as her involvement in dodgeball, volleyball, basketball and Indian dance classes. Nor did she tell Dr. MacKean about the kickboxing sessions she had done after the Accidents, instead she said specifically that she "had not gone back to doing that" after the Accidents. Ms. Toora also failed to tell Dr. MacKean about the hair and makeup business she had been operating since 2017. These are all aspects of Ms. Toora's history that are relevant to Dr. MacKean's understanding of Ms. Toora's functionality and, ultimately, her opinions regarding functionality and prognosis.
- [153] I also find that Dr. MacKean did not include in her report relevant and material medical history that showed features of Ms. Toora's positive recovery. For example, she did not include a December 2016 clinical note where Dr. Nirwan recorded Ms. Toora telling him that "She feels 80% recovered (1 year later)", a note Dr. Nirwan particularly emphasized, and that he also noted in his CL-19 report. She also did not include a March 2017 clinical note, again emphasized by the clinician who wrote it, that Ms. Toora "reported having no pain during her recent trip to India".
- [154] As well, it became clear in cross-examination that Dr. MacKean had not explored any details about Ms. Toora's functional limitations that prevented her from returning to work, or limitations that Ms. Toora alleged were the reasons why she left the UVic Job in 2017. Dr. MacKean simply relied on Ms. Toora's self-reporting, which I have found to be unreliable in certain respects.
- [155] I also find Dr. MacKean's reliance on a particular whiplash study regarding the "two-year mark for maximum medical improvement" unhelpful to her opinion about Ms. Toora's unique circumstances, for the reasons expressed by the defendants in closing argument: namely that the study was decades old, based on a different demographic population and not focused on maximum medical improvement timelines from whiplash injuries. In all of these circumstances, I find I am unable to give much weight to Dr. MacKean's opinions.

- [156] Dr. Paramonoff's opinions were not undermined nearly to the same degree, if at all. Although Ms. Toora also failed to tell Dr. Paramonoff about some of her post-Accidents activities (kickboxing and her hair and makeup business, for example), she omitted less than she had with Dr. MacKean.
- [157] Dr. Paramonoff was cross-examined extensively. I agree with the defendants' characterization of her as an impressive witness. It became clear, particularly in cross-examination, that Dr. Paramonoff took a more detailed approach in reviewing and analyzing the clinical records on which her facts and assumptions were based than Dr. MacKean had done. For example, Dr. Paramonoff was cross-examined on her opinion about the nature of Ms. Toora's headache diagnosis. Her opinion did not change, but her answers showed how thoroughly she reviewed the clinical records, revealing that Mr. Toora's headache complaints were not featured much in them.
- [158] It also became clear that Dr. Paramonoff made greater efforts to obtain fuller details not only from these records, but from her interview and physical examination of Ms. Toora. She also gave thoughtful consideration, within the realm of her expertise, to factors that may influence Ms. Toora's experience and management of pain. Dr. Paramonoff made appropriate concessions in cross-examination. She appropriately deferred to other experts when questions were outside her field of expertise, but overall stood by her opinions and provided well-reasoned explanations for them.
- [159] For all of these reasons, where the opinions of Dr. Paramonoff and Dr. MacKean differ, I prefer and accept the opinions of Dr. Paramonoff.
- [160] In summary, Ms. Toora was not a credible or reliable witness in some respects, including regarding the severity, frequency and impact of her pain symptoms. However, I am satisfied that she has established, on the basis of the aspects of her evidence I accept and the expert medical evidence I accept, that the Accidents caused, both in fact and at law, musculoligamentous injuries at her neck, myofascial injuries at her back and related cervicogenic and myofascial headaches. I am satisfied these injuries caused her considerable pain, particularly in the first few months after the Accidents. Her symptoms continued, but improved over time to the point she felt 80% improved one year later. Thereafter, she has experienced extended pain-free periods of time with occasional painful flare-ups of her symptoms, including headaches (and sometimes migraines), that impact her life.
- [161] Ms. Toora's prognosis for moderate symptom/symptom management improvement is positive, notwithstanding the time that has passed. Given my findings about Ms. Toora's exaggeration of her symptoms and inaccurate reporting of the extent of her functionality, her prognosis is likely to be even more optimistic than Dr. Paramonoff's optimistic view that Ms. Toora will see a moderate improvement in her symptoms as she follows the recommended treatment. While Ms. Toora's symptom flare-ups may not go away completely, they are likely to decrease in frequency and severity over time.

- [162] I do not agree with the defendants' argument that Ms. Toora has failed to discharge her burden of establishing either step of the causation analysis. They argue the plaintiff has not met this burden because of the likely contribution of muscle imbalancing/deconditioning and "confounding factors", identified by Dr. Paramonoff, to Ms. Toora's current experience and management of pain. I am satisfied the evidence establishes that but for the defendants' negligence, these injuries would not have occurred. I am also satisfied the harm suffered by Ms. Toora is not too unrelated to the wrongful conduct to hold these defendants fairly liable.
- [163] The confounding factors to Ms. Toora's pain presentation as described by Dr. Paramonoff are unique to Ms. Toora. Her pain experience and her coping skills are psychologically driven. They are part of her makeup and the defendants must take their victim as they find her. As well, there is no doubt that the difficult life events Ms. Toora experienced recently, events similar to what we all experience, were challenging and impacted Ms. Toora emotionally, mentally and physically. However, I am convinced on the evidence that Ms. Toora would have been more resilient in the face of those challenges had she not spent the preceding years coping with, and worrying about, the symptoms arising from her Accidents-related injuries.

Intervening Events

- [164] Similar to the above argument, the defendants also argue that Ms. Toora's damages should be reduced as a result of intervening events that factor into her current condition.
- [165] The intervening act principle absolves an original tortfeasor of legal liability where a later event or act occurs that breaks the chain of causation. Whether a subsequent act or event is of significant magnitude to break the chain of causation is a question of fact. The reasonableness of a plaintiff's actions can be considered in determining whether the chain of causation has been broken: *Allen v. Luca*, 2021 BCSC 14 at para. 79, citing *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 76-77 and 87-88.
- [166] As the Court of Appeal held in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, unrelated intervening events are treated in a manner similar to pre-existing conditions:
- [36] Unrelated intervening events must be taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately (*Athey v. Leonati* ¶ 31-32).
- [167] In *Allen*, Justice MacDonald explained when an intervening event has broken the chain of events:

- [78] Therefore, I must consider whether the intervening events were sufficient to break the chain of causation, often referred to as the principle of novus actus interveniens. In the words of A.T.W.N. at para. 36, I must determine whether the subsequent events "would have affected the plaintiff's original position adversely in any event."
- [79] This principle arises from the concept that defendants should not be liable for harm to the plaintiff that comes from objectively unforeseeable events. Whether a subsequent act is of significant magnitude to break the chain of causation is a question of fact: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 76-77, 87-88 [*Hussack*]. The reasonableness of a plaintiff's actions can be considered in determining whether the chain of causation has been broken: *Hussack* at para. 82; *Safdari v. Buckland*, 2020 BCSC 769 at paras. 136-137 [*Safdari*].
- [80] If the chain of causation has been broken, the defendant is correct that a reduction to Ms. Allen's damage award must be made similar to a reduction in a "crumbling skull" situation: see, e.g. *L.A.F. v. G.M.F.C. Ltd.*, 2019 BCSC 2252 at para. 144.
- [168] I am satisfied that none of the events pointed to by the defendants are intervening events.
- [169] I have found that Ms. Toora's injuries arising from the Accidents continue to cause her pain, in the form of occasional flare-ups and headaches (sometimes migraines). Not to the extent she claims, but nevertheless these symptoms occasionally occur. The confounding factors to her pain presentation as described by Dr. Paramonoff are unique to her. Again, her pain experience and her coping skills, are psychologically driven. They are part of her makeup and cannot be considered intervening events.
- [170] The 2019 deer collision aggravated Ms. Toora's pain condition for a time, but I am satisfied this was not an intervening event that would have adversely affected Ms. Toora's original position in any event.
- [171] I am also satisfied that the tragedy she suffered in 2021, her surgeries thereafter, and the 2022 C-section birth of her child are not intervening events that would have adversely affected her original position in any event either. As I discussed earlier, there is no doubt that difficult life events such as these would impact anyone, mentally, emotionally and physically. They impacted Ms. Toora to be sure, but, again, I am convinced on the evidence that she would have been more resilient in the face of those challenges had she not spent the preceding years coping with, and worrying about, flare-ups, headaches and migraines arising from her injuries. I am not satisfied that these events broke the chain of causation from the Accidents, and there is no justification for a deduction to her assessed damages to account for such events.

Damages

Non-Pecuniary Damages

- [172] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for losses suffered by the plaintiff to the date of trial and those she will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.
- [173] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd [2006] S.C.C.A. 100, the Court identified common factors influencing an award of non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the duration and severity of the pain; the level of disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. Generally, stoicism should not penalize the plaintiff.
- [174] An award of non-pecuniary damages must also be fair and reasonable to each party. Fairness is measured, in part, against awards made in comparable cases. However, other cases only serve as a rough comparator, as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The amount of the award does not depend only on the seriousness of the injury, but also on the loss in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.
- [175] Ms. Toora seeks an award of non-pecuniary damages in the range of \$110,000 to \$120,000. She relies, asking that the awards be considered in 2022 dollars, on the following authorities in support of her position: *Griffith v. Larsen*, 2014 BCSC 1687 (\$75,000, adjusted to \$92,200); *Kodelja v. Johal*, 2017 BCSC 164 (\$80,000, adjusted to \$93,600); *Stapleton v. Andrew*, 2019 BCSC 678 (\$75,000 adjusted to \$84,200); *Rabiei v. Oster*, 2019 BCSC 733 (\$70,000, adjusted to \$78,600); *Baird v. Lam*, 2020 BCSC 615 (\$95,000, adjusted to \$106,600); *Watkins v. Harder*, 2016 BCSC 2078 (\$100,000, adjusted to \$119,200); and *Dhugga v. Poirier*, 2020 BCSC 914 (\$65,000, adjusted to \$72,400). While she submits all of these authorities are reasonable comparators to her case, she says the closest comparators are the last two.
- [176] The defendants submit that an award for damages in the range of \$60,000 to \$75,000 is fair and reasonable. They rely on the following authorities in support of their position: *McLean v. Redenbach*, 2023 BCSC 8 (\$60,000); *Carleton v. Warner*, 2020 BCSC 436 (\$60,000); *Sandhu v. Morris*, 2023 BCSC 35 (\$40,000); *Djukic v. Geirsdottir*, 2022 BCSC 1026 (\$75,000); *Sharma v. Bhullar*, 2020 BCSC 379 (\$38,000); and *Prasad v. Dhadda*, 2022 BCSC 781 (\$61,750).
- [177] I find the authorities relied on by both sides distinguishable. Ms. Toora's authorities involve plaintiffs who experienced more significant, or additional, injuries and whose lives were impacted more significantly than hers. While Ms. Toora has demonstrated some stoicism, the plaintiffs in some of the cases she relies upon were generally more stoic individuals. The authorities relied upon by the defendants, particularly those where the plaintiffs were found to have credibility and reliability issues, are a bit more comparable, but they generally involve plaintiffs with less significant injuries and more positive prognoses.

- [178] As discussed, despite the credibility and reliability issues with Ms. Toora's evidence, I have found, on the basis of those aspects of her evidence I do accept and the other evidence I accept, that Ms. Toora suffered musculoligamentous injuries at her neck, myofascial injuries at her back and related cervicogenic and myofascial headaches, with occasional migraines as a result of the Accidents. I am satisfied these injuries caused her considerable pain, particularly in the first few months after the Accidents. Her symptoms continued but improved over time to the point she began to experience extended pain-free periods that are occasionally disrupted by flare-ups of her symptoms. Unlike the plaintiff in Sharma whose prognosis for a full recovery was found to be very good, Ms. Toora's prognosis, although optimistic for at least moderate recovery, is a bit more guarded. Unlike the plaintiff in Prasad, Ms. Toora's flare-ups, headaches and migraines continue to impact her life in ways that are not insignificant. Again, I do not accept her flare-ups, headaches and migraines occur with the frequency and severity she describes, but I am satisfied they do continue to occur and when they do, they impact her life in meaningful ways.
- [179] Ms. Toora was 28 years old at the time of the Accidents. She was busy, healthy and active. After the Accidents, she was unable to work and engage in her pre-Accidents activities for a time. She continued to have symptoms after her return to work. These symptoms gradually improved over time, but never completely resolved, as she continued to experience occasional flare-ups, headaches and migraines. Since she began working from home a few years ago, she has been able to reduce the occurrence of these symptoms by making adjustments as needed. While she has extended pain-free times, when her flare-ups, headaches and migraines occur, they are painful and limiting. They impact her enjoyment of life, her ability to care for her child, her engagement in work, and her ability to do certain activities and certain housekeeping tasks. I also accept that during the times she is pain-free, she is fearful of doing things that may trigger a flare-up, making her more cautious in how she approaches her life. All of this naturally undermines her mood and sleep from time to time.
- [180] While Ms. Toora's life has been affected in the negative ways described above, many aspects of her life have remained positive. She is able to work full-time from home. Her relationships with her husband, child and extended family remain strong. While not as active as before the Accidents, she has engaged in some sporting activities, such as Indian dance classes, dodgeball, Pilates, basketball, kayaking, and kickboxing. She has attended training courses to advance her career. While not as successful as she would have liked, she has turned one of her passions into a small business. She has travelled extensively and attends family events regularly.

- [181] I have discussed Ms. Toora's prognosis. By following recommended treatment, I am satisfied she will see at least moderate improvement in her flare-ups, headaches and migraines. I am satisfied that she will engage in the exercise program Dr. Paramonoff recommends and as she strengthens, she will see their occurrence decrease even more over time. While she may never be completely back to her pre-Accidents health, there is good reason to be optimistic for these improvements.
- [182] Taking into account Ms. Toora's age, injuries, limitations, level of function, the duration of her symptoms, her prognosis, and the chronicity of her complaints, I assess general damages in the amount of \$95,000. This amount includes damages for a loss of housekeeping capacity. I have not reduced this award for any failure to mitigate.

Failure to Mitigate

- [183] The defence submits that any non-pecuniary damages awarded in this case should be reduced by 10% or 15% for Ms. Toora's failure to mitigate her losses by stopping all treatment therapies in 2017 and 2018. As Dr. Paramonoff opined, the sooner Ms. Toora builds up her strength, the sooner her symptoms and tolerance of activities will improve. They argue that ceasing treatment when she did was an unreasonable failure to mitigate.
- [184] A plaintiff in a personal injury action has a duty to take reasonable steps to mitigate her loss. The onus is on the defendant to prove that the plaintiff would, on the balance of probabilities, have avoided all or a portion of her loss with proper treatment. In this regard, the defendant must prove (1) the plaintiff acted unreasonably, on a subjective/objective standard, 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: *Gill v. Lai*, 2019 BCCA 103 at para. 14, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.
- [185] In regard to the first prong, the subjective/objective standard to be applied takes into account the knowledge possessed by the plaintiff in considering the advocated step: *Gregory* at para. 56. In determining the reasonableness of a refusal of medical treatment, the trier of fact will take into account the degree of risk to the plaintiff from the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at 162-63. The plaintiff's personal circumstances can be taken into account in terms of (a) whether the plaintiff understood, appreciated, and was capable of following the advice given; and (b) what a reasonable person in the plaintiff's circumstances would do: *Gill* at para. 26.
- [186] Shortly after the Accidents, Ms. Toora's family doctor, Dr. Nirwan, recommended that she attend physiotherapy and massage therapy. Dr. Nirwan's records also show that in May 2016, in addition to continuing physiotherapy, he also recommended that she engage in an exercise rehabilitation program. His records show that he continued to regularly encourage her to exercise and remain active thereafter. In May of 2016, Dr. Nirwan recommended she

see a chiropractor. By late October 2016, he (on the advice of her physiotherapist) advised Ms. Toora to stop going to physiotherapy.

- [187] During the first year after the Accidents, Ms. Toora regularly saw massage therapists and physiotherapists. Some of her later physiotherapy sessions included a supervised exercise program with a kinesiologist, as Dr. Nirwan had recommended. Regarding massage therapy, Ms. Toora attended 26 sessions between December 9, 2015 and June 23, 2016 and another four between August 12, 2016 and December 12, 2016. For physiotherapy, she attended 37 sessions between January 27 and November 4, 2016. She saw a chiropractor on four occasions in June 2016, shortly after Dr. Nirwan recommended that she do so.
- [188] Ms. Toora stopped attending physiotherapy and massage therapy in 2017 and 2018. She resumed in 2019. That year, she attended six physiotherapy sessions. During the month of January she also attended three Pilates sessions. She started massage therapy again in April. Between April 12, 2019 and June 18, 2021, she attended 17 massage therapy sessions.
- [189] I am not persuaded that Ms. Toora acted unreasonably in relation to physiotherapy. She followed Dr. Nirwan's recommendations. She resumed these sessions at the beginning of 2019. During 2020 and 2021, the world was dealing with the COVID-19 pandemic and Ms. Toora was doing what she could through her pregnancies and her tragic loss. The evidence does not support the conclusion that there was a material failure to follow Dr. Nirwan's advice regarding physiotherapy.
- [190] I am not persuaded that Ms. Toora acted unreasonably in relation to passive treatment either, such as massage therapy and chiropractic treatments. Dr. Nirwan recommended these treatments and she engaged in them. She attended many massage therapy treatments in the year following the Accidents and discontinued them for a time for the reasons expressed above. She resumed them in 2019. The evidence does not support the conclusion that there was a material failure to follow Dr. Nirwan's advice here either.
- [191] I am also not persuaded that Ms. Toora acted unreasonably in relation to her active rehabilitation program either. Through Dr. Nirwan's advice, Ms. Toora knew the importance of exercise and staying active. Ms. Toora's physiotherapy in the year following the Accidents involved a supervised exercise program with a kinesiologist. She discontinued physiotherapy at a time when her doctor recommended that she do so. Thereafter, she continued to remain active in many ways, including attending the gym, attending dance classes, walking, participating in kickboxing and, later, participating in Pilates for a time. She played on a few team sports from time to time as well. She resumed physiotherapy in 2019.
- [192] The defendants criticize Ms. Toora's failure to adequately pursue active rehabilitation in recent years. I am satisfied that during those difficult years, Ms. Toora remained as active as she could, under the circumstances. From 2020 to the time of trial, Ms. Toora was dealing with pregnancies, a devastating loss, surgeries, the loss of a pet, and then giving birth by way of C-section. She went through all of this during the COVID-19 pandemic and all while

maintaining employment. A reasonable person in her circumstances would have been unable to pursue active rehabilitation as vigorously as others might have. Dr. Paramonoff now recommends Ms. Toora engage in an active rehabilitation program again. Ms. Toora has followed medical advice in the past. I am satisfied that Ms. Toora is in a position to follow Dr. Paramonoff's advice and will do so.

- [193] The defendants have not met their burden here and I decline to make any reduction to Ms. Toora's non-pecuniary damages award, or any other award, for failure to mitigate.

Pecuniary Damages

Past Loss of Earning Capacity

- [194] An award of damages for loss of earning capacity, whether in the past or in the future, compensates a plaintiff's pecuniary loss. Compensation for past loss earnings is based on what a plaintiff would have, not could have, earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [195] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity is challenging as it involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44, 48 and 49.
- [196] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Insurance (Vehicle) Act], the plaintiff's recovery is limited to net income loss: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, *aff'd* 2010 BCCA 398.
- [197] Ms. Toora seeks a global award for her pre-trial loss of earning capacity, prior to reductions to reflect a net loss, in the amount of \$148,241. Her claim has three components.
- [198] First, Ms. Toora first seeks the wages she claims she lost as a result of her injuries from the Ministry Job, from the time of the Accidents to January 18, 2020 (as particularized in the Wage Loss Calculation Sheet). She seeks a total gross amount of \$27,703.66. She argues that all of the leave identified in this record (other than those times where she took leave without pay) was time she was unable to work as a result of her injuries.
- [199] Ms. Toora next seeks the wages she claims she lost from the UVic Job in the gross amount of \$110,538. Here she argues a high likelihood of a real and substantial possibility that she would have continued to work at the UVic Job, at the same hours, from the time of the Accidents to the birth of her child in March 2022. Based upon her earnings in 2015 up to the point of the Accidents, she submits there is a high likelihood of a real and substantial possibility she would have earned \$20,900 in each year from 2015-2022. Compared to her

actual with-Accidents earnings, she says she suffered a loss of \$2,499 in 2015 and \$4,936 in 2016. If found to have resigned in 2017 as a result of her injuries, she claims further losses of \$18,437 in 2017; \$20,900 in each of 2018, 2019 and 2020; \$14,469 in 2021; and \$7,497 in 2022. If anything, Ms. Toora says her approach likely undervalues her losses because it does not reflect the real and substantial possibility that she would have received wage increases during this time.

- [200] Finally, Ms. Toora seeks an award to compensate her for a loss of capacity in relation to her hair and makeup business in the pre-trial period. She submits that, absent the Accidents, there is a very high likelihood of a real and substantial possibility that she would have pursued this business more vigorously and with fewer sub-contracting expenses than she did. In other words, she says there is a real and substantial possibility that her business would have been successful than it was in the pre-trial period. It would have made money over the last five years, not lost it. She seeks an award of \$10,000 to compensate her for this loss of capacity.
- [201] The defendants acknowledge Ms. Toora has established that there should be an award for past loss of earning capacity, but say the generous award she seeks is simply not supportable on the evidence. With respect to her Ministry Job, the defendants accept that Ms. Toora missed time due to her injuries and therefore suffered a pecuniary loss. They are prepared to acknowledge, based on Dr. Paramonoff's opinion evidence, Ms. Toora working full-time and her feeling 80% recovered by the end of 2016, that the sick time shown in the Wage Loss Calculation Sheet accurately reflects the time she missed due to her injuries from the date of the Accidents to January 7, 2017. They say this results in a gross income loss of \$18,581.18.
- [202] With respect to the UVic job, the defendants are also prepared to acknowledge that Ms. Toora missed the time reflected in the plaintiff's certificate of earnings, completed by her employer, in December 2015, January 2016, and February 2016 due to her injuries, in the total gross amount of \$2,171.92. They say no further award is justified from the time Ms. Toora returned to full duties in February 2016 to the time she resigned for unrelated reasons in February 2017 because there is no evidence about any additional income lost during this time. No further award is justified after February 2017 either because she left the UVic Job for reasons unrelated to the Accidents.
- [203] Regarding Toora Hair and Makeup, the defendants submit there is no credible or reliable evidence to support any award for past loss of income, capacity or opportunity.
- [204] I will organize my assessment of this claim in the same manner as the parties.

The Ministry Job

- [205] I am satisfied that Ms. Toora has established there is a very high likelihood of a real and substantial possibility that, absent the Accidents, she would have continued working, full-time, in the Ministry Job during the pre-trial period. She would have taken some sick time

for common illnesses and for dental and medical appointments, such as appointments to address her long-standing anemia. She would have taken the same leave without pay she took for vacations and other things. She would have taken the same time off related to her pregnancies. All of this is effectively conceded by the defendants.

- [206] Ms. Toora has established that she suffered a loss of capacity leading to a pecuniary loss in relation to her Ministry Job as a result of the injuries she suffered in the Accidents in the pre-trial period. Although Ms. Toora seeks to simply have her loss assessed as wages lost from sick time taken up to January 2020, part of the assessment is nevertheless challenging.
- [207] I will start with the part that is not challenging. The defendants concede, and I accept, that Ms. Toora lost income as a result of her injuries from the time of the Accidents until the beginning of 2017. Her injuries caused her to be incapable of working from the time of the Accidents until mid-March 2016 when she returned to work on a graduated basis, eventually returning to full-time work on May 2, 2016. Although back to work full-time and experiencing improvements, she continued to experience some symptoms related to her injuries that caused her to be unable to work her full-time hours from time to time. Ms. Costello's evidence supports this. By December 2016, Ms. Toora reported feeling about 80% recovered.
- [208] I accept, on the basis of the evidence as a whole, that the Wage Loss Calculation Sheet accurately records the hours Ms. Toora missed as a result of her injuries from the time of the Accidents to the beginning of January 2017. Ms. Toora is entitled to be compensated for that lost income, in the total gross amount of \$18,581.18.
- [209] The challenge lies in assessing whether Ms. Toora suffered any pecuniary loss arising from her injuries in the Ministry Job after January 2017. To support her assertion that she did, Ms. Toora primarily relies on two things--her own evidence about the time she missed due to her injuries and the information recorded on the Wage Loss Calculation Sheet. Both suffer from frailties.
- [210] Ms. Toora's evidence on this topic was inconsistent. She first testified that the Wage Loss Calculation Sheet (other than the leave without pay section) accurately records the time she took off work due to her Accidents-related injuries. This evidence was inconsistent with her examination for discovery evidence where she said that, after she returned to full-time duties on May 2, 2016 and until she started working from home in early 2019, she was taking two, three and sometimes five days per week off work as a result of her flare-ups. The Wage Loss Calculation Sheet, which she testified was accurate, does not support that she took anywhere near that amount of sick time, for any reason. For example, the Wage Loss Calculation Sheet shows that Ms. Toora took no sick time at all for the first six months after she returned to full-time work and only 39.10 hours thereafter until the beginning of January 2017. She only took 35.35 hours of sick time (some of which was most likely unrelated to the Accidents as I will explain) between January 7, 2017 and August 30, 2017.

- [211] In cross-examination, Ms. Toora testified that her examination for discovery evidence was incorrect. She tried to suggest that she had not intended to say she missed that much time from work, but I find this is just another example of Ms. Toora's tendency to exaggerate her symptoms and their effect on her life.
- [212] Ms. Toora's evidence that the Wage Loss Calculation Sheet accurately represents the time she missed work as a result of her injuries is also unreliable, in some respects. Other than from the time of the Accidents to her return to full-time duties on May 2, 2016, Ms. Toora has no recollection of the dates and times she was off work due to her injuries. She relies on the document. The difficulty here is that the Wage Loss Calculation Sheet is simply a summary of sick time/wage loss for certain broad periods. It is derived from payroll records, which is in turn derived from online entries made by Ms. Toora at the time she took the leave. She did not require approval from her supervisor. The Wage Loss Calculation Sheet does not record the precise days or portions of days that were missed, exactly when the hours were missed within the broad timeframe, or the reason for the sick time.
- [213] One example will suffice to demonstrate the document's unreliability as an accurate reflection of Ms. Toora's injury-related sick time.
- [214] The Wage Loss Calculation Sheet shows that from March 20, 2017 to March 23, 2017, Ms. Toora took 27.53 hours in sick time. It does not record the reason(s) for the sick time. If Ms. Toora's initial testimony was to be believed, she was off sick during this time as a result of her injuries. However, the frailty of this testimony was revealed in cross-examination. Ms. Toora took leave without pay immediately before this sick time, to accommodate her extended holiday to India. She had no pain or flare-ups on this vacation. In cross-examination, Ms. Toora confirmed that she returned to Canada on March 18, 2017. She testified that the trip was long and included a long layover in another city. The time change was significant. She testified that she was sore when she returned, but that she was also sick, suffering from the effects of her long-term anemia, which causes fatigue. She received iron injections for this condition a short time later. In other words, it became clear in cross-examination that not all of the sick time she took in that three-day period immediately following her vacation was due to her injuries.
- [215] Undermining the document's reliability as an accurate reflection of her injury-related sick time even further, Ms. Toora conceded in cross-examination that she had never seen the Wage Loss Calculation Sheet before and was simply accepting it must be accurate. She had not taken any steps to confirm its accuracy. She did not review her time sheets or the online entries. These documents and entries would have given her some insight into the reasons why she took the sick time. The online entry gave Ms. Toora an option to check a box indicating the sick time she was taking was in relation to a motor vehicle accident.

- [216] In all these circumstances, I find Ms. Toora's evidence and the Wage Loss Calculation Sheet are not entirely reliable indicators of the time she missed due to her injuries after January 7, 2017. I accept, on the basis of the evidence as a whole, that some of the sick time recorded in the document reflects time she missed due to her injuries, but I do not accept that all of it was. I have previously found that Ms. Toora's symptoms were improving throughout that first year and beyond, but that she continued to experience occasional flare-ups, headaches and migraines. I am satisfied, particularly with the support of Ms. Costello's evidence, that these symptoms, occurring after January 2017, caused her to occasionally lose some hours from work thereafter. As well, the documentary evidence shows that Ms. Toora attended doctor's appointments and, in 2019, various therapy appointments in relation to her injuries.
- [217] While it is impossible, on the state of the evidence, to be precise about the number of hours she missed due to her injuries after January 2017, I accept she missed some time. I would allow for a modest number of hours, and thus a modest pecuniary loss, after January 2017. Adding this modest loss to the loss I have found above, I assess Ms. Toora's total gross loss from her Ministry Job in the entire pre-trial period at \$23,000.

The UVic Job

- [218] I am satisfied that Ms. Toora has established a very high likelihood of a real and substantial possibility that, absent the Accidents, she would have continued to work her appointed hours at the UVic Job throughout and until her resignation in February 2017. She would have taken some sick time for common illnesses and for dental and medical appointments, such as appointments to address her long-standing anemia. She would have taken the same leave without pay she took for vacations and other things. The defendants concede as much.
- [219] However, having found that Ms. Toora resigned from the UVic Job in February 2017 for reasons unrelated to the Accidents, I find there is clearly no real and substantial possibility that she would have continued working at the UVic Job after that. Because she resigned for reasons unrelated to the Accidents, she has not suffered any losses related to the Accidents after that time.
- [220] Ms. Toora has, however, established that she suffered a loss of capacity leading to a pecuniary loss in relation to her UVic Job as a result of the injuries she suffered in the Accidents until the time of her resignation.
- [221] I find a convenient way to assess the value of this loss is to break it into two periods: (a) December 3, 2015 to mid-February 2016 when Ms. Toora returned to full duties; and (b) mid-February 2016 to mid-February 2017 when she resigned.

- [222] From the time of the Accidents until her return to full duties in mid-February 2016, I am satisfied on the evidence that Ms. Toora suffered a loss of capacity that prevented her from working all of the hours she would have otherwise worked. The parties take different approaches to assessing the value of this loss, but I find the most reliable way to do so is that advocated by the defendants.
- [223] Ms. Toora's certificate of earnings is a reliable document completed by her employer. It shows that in December 2015, January 2016 and February 2016, Ms. Toora missed a total of 104.5 hours of work, for a gross loss of income in the amount of \$2,171.92. I am satisfied this loss is all due to her injuries and fairly represents her loss in this time period.
- [224] Ms. Toora's method of assessing her loss in this time period would result in over-compensation. For example, Ms. Toora argues that she should be compensated for four weeks of lost earnings in the month of December 2015, based on her earnings that fall. There are, respectfully, two problems with this approach.
- [225] First, this approach fails to account for the annual Christmas break where Ms. Toora would have not have been working, Accidents or not. In other words, there is no real and substantial possibility that Ms. Toora would have worked and earned income from the UVic Job over the academic Christmas break and she therefore suffered no loss during that time. Second, Ms. Toora relies upon a weekly average earning of \$624.80 per week to quantify her loss. This average is based upon a period of time where she was working additional hours to cover for a co-worker on maternity leave. Ms. Toora returned to her appointed hours when she returned to full duties.
- [226] I turn now to the second time period, from mid-February 2016 to mid-February 2017. For this time period, I am not satisfied on the evidence that Ms. Toora suffered a loss of capacity leading to a pecuniary loss at the UVic Job. Ms. Toora led no evidence about any lost income during this period. Rather, she relies on a comparison between her estimated 2015 without-Accidents earnings (\$20,900) to her actual 2016 earnings (\$15,964.11) to argue that her loss was approximately \$4,900. Leaving aside that her 2015 without-Accidents earnings are over-estimated as I explained, there is no reliable evidence to support a real and substantial possibility that she would have earned \$20,900 in 2016 absent the Accidents. Ms. Toora earned \$11,961.07 in 2014. Her earnings increased in 2015 (\$18,499.23 in the first 11 months) as a result of the additional hours she worked filling in for a co-worker on leave. She did not need to work these additional hours upon her return.
- [227] For all of these reasons, I assess Ms. Toora's pecuniary loss in the pre-trial period from the UVic Job at \$2,171.92.

Toora Hair and Makeup

- [228] I dismiss the plaintiff's claim for damages for past loss of capacity in relation to her business. I cannot rely on Ms. Toora's evidence in this area. Ms. Toora lied about continuing this business at her examination for discovery to keep it from the defendants. Her records,

including her amended tax returns filed shortly before trial, are unreliable. The evidence of two of her clients called by the defendants, Ms. Bath and Ms. Kapoor, do not support her claim of having experienced difficulties in providing her services. She failed to adduce evidence from those she purports to have to pay to assist her. There is, simply put, no reliable evidence from which I could draw any conclusions to support this aspect of her claim.

[229] In total then, I award Ms. Toora the sum of \$25,171.92 for past loss of earning capacity. This is a gross figure, and I expect the parties will be able to reach agreement on the adjustments that must be made per s. 98 of the Insurance (Vehicle) Act to arrive at the net loss.

Future Loss of Earning Capacity

[230] The assessment of an individual's loss of future earning capacity involves comparing the plaintiff's likely future had the accident not happened to their actual future after the accident. While this is an assessment that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment at issue, and is not a mathematical exercise, economical and statistical evidence can help determine what is fair and reasonable: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7, citing Gregory.

[231] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, Grauer J.A. set out a three-step test that a trial judge must undertake when assessing a plaintiff's loss of future earning capacity. Justice Burke summarized the three steps in *Choi v. Ottahal*, 2022 BCSC 237 at para. 182.

[232] First, does the evidence disclose a potential future event that could lead to a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues that may affect their ability to meaningfully gain employment or remuneration.

[233] Second, does the evidence demonstrate that there is a real and substantial possibility that the potential loss of capacity will cause a pecuniary loss? After establishing that the plaintiff may suffer from a long-term loss of capacity at the first step, the court here evaluates the likelihood that this loss of capacity will affect the plaintiff's ability to earn income.

[234] Third, what is the value of the possible future loss? After establishing a loss of capacity and resultant loss of capacity to earn income, the court should consider the appropriate basis for compensation, contingencies, and the relative likelihood of the loss occurring. The court should reduce the damages award based on the relative likelihood that the hypothetical future would not occur.

[235] The third step may involve one of the two accepted bases for compensation: the "earnings approach" or the "capital asset approach". The earnings approach is more appropriate where there is an identifiable loss of income at the time of trial, often because the plaintiff

has an established work history and a clear career trajectory: Ploskon-Ciesla at para. 16. Where no loss of income has occurred at the time of trial, the capital asset approach is generally more appropriate. The capital asset approach allays the risk of under-compensation where the plaintiff lacks a settled career path by creating a more holistic picture of the plaintiff's potential future: Ploskon-Ciesla at para. 17.

[236] Justice Grauer, for the Court, discussed the third step in *Steinlauf v. Deol*, 2022 BCCA 96 as follows:

[55] As for the quantification, this Court described the process in *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32:

An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8 .

[56] Accordingly, as discussed in *Dornan* at para 156, it became necessary to assess the respondent's without-accident earning potential, and what the respondent was likely to earn as a result of the accident. At the same time, as discussed in *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 251: "It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made".

[237] In *Dornan v. Silva*, 2021 BCCA 228, Grauer J.A. discussed the role of contingencies in the analysis:

[92] In approaching this part of the appeal, it is useful to remember that we are dealing with specific contingencies, not general contingencies. The importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):

46 [C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

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

[Emphasis added.]

[93] The process, then, as discussed above at paras 63-64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.

[238] Therefore, the application of a specific contingency, whether positive or negative, engages the "real and substantial possibility" analysis, and not simply the "relative likelihood" analysis that follows. "If the contingency is a real and substantial possibility, the process becomes one of assessing its relative likelihood": *Boal v. Parilla*, 2022 BCSC 2075 at para. 166.

[239] The burden of proof in establishing that a contingency should apply lies on the party seeking to assert it: *Lo v. Vos*, 2021 BCCA 421 at para. 39

[240] Following this three-step test, the court must determine whether the proposed damages award is fair and reasonable: *Lo* at para. 117.

[241] Ms. Toora submits the evidence discloses a potential future event that could lead to a loss of capacity. She has chronic pain, with no prospect of complete recovery. She says the evidence also demonstrates that there is a real and substantial possibility that this loss of capacity will cause a pecuniary loss. She says she is no longer able to work the hours she could prior to the Accidents, has less stamina, is unable to work in jobs that have a physical aspect, has to rely on assistants in her business, and is less likely to be promoted with the Ministry as a result of her limitations and the fact that working from home keeps her "out of sight and out of mind". Relying on the capital asset approach to value the loss, she submits that an award of \$200,000 is fair and reasonable.

[242] The defendants disagree. They submit Ms. Toora has failed at the first step in that she has failed to lead sufficient evidence to support a finding of a potential future event that could lead to a loss of capacity. In the event I find she has met the first step, the defendants argue that the claim must fail at the second step as there is no real and substantial possibility that her loss of capacity will cause a pecuniary loss.

[243] I find that Ms. Toora has met the first step. She has established a potential future event that could lead to a loss of income earning capacity. She will continue to suffer from occasional flare-ups, headaches and migraines into the future, although not to the extent she claims and her prognosis is more positive than she accepts. I am satisfied that Ms. Toora is

rendered less capable overall of earning income from all types of employment, less marketable or attractive as a potential employee, less valuable to herself as a person capable of earning income, or that she has lost the ability to take advantage of all job opportunities that might otherwise have been open to her.

[244] Ms. Toora's claim fails, however, at the second step of the analysis. On the evidence, I am unable to find that there is a real and substantial possibility that any limitation from ongoing pain associated with the injuries she sustained in the Accidents will cause a pecuniary loss, in any of the ways advanced by Ms. Toora.

[245] Ms. Toora claims there is a real and substantial possibility that her limitations will cause future pecuniary losses in three ways: (a) at the Ministry in the form of lost promotions and corresponding pay increases; (b) in her inability to hold a second job like she had at UVic; (c) and in her inability to make her business successful.

a) The Ministry

[246] Here, Ms. Toora points to two disadvantages arising from her injuries that she says create a real and substantial possibility of career advancement losses: her remote work and her inability to work long hours.

[247] Regarding the former, Ms. Toora says she has lost the advantage of in-office networking opportunities and normal day-to-day interactions with her peers and supervisors. She points to Brian, a co-worker, who once shared the same job duties and title. As someone who worked in the office while Ms. Toora worked from home, he became the go-to person for other co-workers and superiors. He was recently promoted, with a pay increase. Ms. Toora argues that were it not for her being "out of sight and out of mind" she would have had an "equal shot" at this promotion. She submits that there is no reason to expect there will not be the potential for other future lost opportunities and pay increases.

[248] Regarding the second disadvantage, Ms. Toora submits that positions of leadership and responsibility are obtained by drive, dedication and hard work. As those in management generally work longer hours and she is no longer able to give her best and work long hours, her ability to compete for these positions has been impaired.

[249] On the evidence, I find Ms. Toora's claims in this regard do not rise above the level of mere speculation.

[250] Ms. Toora has been working with the Ministry, in a stable job, for many years. She enjoys her job. She enjoys the flexibility she has working from home. She plans to return to the Ministry Job, at full duties, following her maternity leave. Dr. Paramonoff opined that there is no contraindication from Ms. Toora continuing to work in the Ministry Job after the initial four months away after the Accidents.

- [251] Ms. Toora gave no evidence about any plans to change her occupation or employer in the future. There is no evidence to suggest that she will lose her current position or will not have opportunities to advance her career. In fact, the evidence shows the opposite. Ms. Toora has not only continued to work in her stable job following the Accidents, she has continued to advance in her career. Ms. Costello's evidence makes it clear that she will continue to have opportunities for advancement into the future.
- [252] Ms. Toora's earnings with the Ministry have generally increased since the Accidents. She aspired to leadership roles and was chosen, first in an acting role and then as the successful applicant, for one after the Accidents. Other than a time where Ms. Costello noticed changes to her mood, she spoke in glowing terms about the quality of Ms. Toora's work, both before and after the Accidents. When Ms. Toora returns from her current maternity leave, Ms. Costello expects she will have a warm welcome and will continue to do her job once she has had an opportunity to get back up to speed. Ms. Costello will continue to support Ms. Toora's advancement in leadership when she returns and into the future.
- [253] Using a particular co-worker's career advancement as evidence to support her position is not reasonable. Brian obtained his promotion, a temporary appointment, in the summer of 2022 when Ms. Toora was on maternity leave. There is no evidence to suggest that Ms. Toora wanted this position, or even applied for it. There is no evidence about Brian's personal circumstances, work hours, work history, courses or programs he may have taken, his future plans, or any other characteristics unique to him and his qualifications for this particular position. There is also no evidence about other applicants for the position.
- [254] Further, there is no evidence to support the inference that Ms. Toora seeks to draw--that Brian was advantaged and she was disadvantaged because he was in the office and she was working from home. In fact, I find Ms. Costello's evidence supports the opposite inference. As she described, Ministry positions are awarded through a process based upon qualifications and performance. The process is expected to be fair, and would not penalize someone for working remotely. Ms. Costello also testified that the workplace environment after the COVID-19 pandemic has changed. Whereas only a few workers had been working from home before, remote work is the new norm and attitudes toward it have changed. Strategies now exist, supported and implemented by management, to ensure remote workers are more engaged and visible.
- [255] For all of these reasons, I find there is a no real and substantial possibility that Ms. Toora's limitations will cause future pecuniary losses at the Ministry.

b) The Second Job

[256] Ms. Toora's claim here is based upon her assertion that she was forced to give up her second job due to her injuries. I have found this was not the case and that she left the UVic Job when she did for reasons unrelated to the Accidents. Even so, Ms. Toora asserts there is evidence to support a real and substantial possibility that, were it not for her injuries, she would have pursued and/or held a second job after she left UVic and into the future.

[257] I do not agree. No evidence was led with respect to Ms. Toora's intention, or plans, to find a second job. Moreover, Ms. Toora's life circumstances have changed significantly since she left the UVic Job. She has married and now has an infant child. When she returns from maternity leave, she will return to the Ministry Job. On the evidence, I find Ms. Toora's claims in this regard do not rise above the level of mere speculation.

c) Toora Hair and Makeup

[258] For all of the reasons I expressed in my assessment of past loss of earning capacity in relation to this business, I find there is no reliable evidence to ground any real and substantial possibility of Ms. Toora's limitations causing a future loss here.

[259] I dismiss Ms. Toora's claim for damages in relation to future loss of earning capacity.

Future Care Costs

[260] The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the injured plaintiff to the position they would have been in had the accident not occurred. The award is based on what the medical evidence shows to be reasonably necessary to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.).

[261] The test for determining the appropriate award is an objective one based on medical evidence. For an award of future care, claims must be reasonable and have a medical justification: *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63, citing *Milina* at 84. Generally, there must also be evidence that the plaintiff is likely to incur these costs in the future: *Montazamipoor v. Park*, 2022 BCSC 140 at para. 112.

[262] Awards for the cost of future care may be adjusted for positive or negative contingencies depending on the plaintiff's specific care needs. The court may decrease an award based on the chance of the plaintiff's condition improving, or increase one based on the chance that the plaintiff will need additional care. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[263] Ms. Toora seeks an award of \$40,000, representing the cost of one physiotherapy and one kinesiology treatment each month, for the next 25 years. She adds that she may also incur costs for Pilates, exercise and trigger point injections. She submits the medical evidence shows these costs are reasonably necessary to promote her mental and physical health, and that they are costs she is likely to incur.

[264] The defendants submit that if an award is to be made here, it should be based on Dr. Paramonoff's recommendations, to the extent the court can be satisfied Ms. Toora would incur the costs and/or follow the recommendations through to completion. They say an award in the range of \$4,697 to \$6,723 is justified on the evidence.

a) Physiotherapy Related to an Exercise Program

[265] Dr. Paramonoff, whose opinions I prefer over those of Dr. MacKean, recommends that Ms. Toora undertake, as the cornerstone to managing her symptoms and optimizing her functioning, a regular, independent exercise program. Dr. Paramonoff recommends that Ms. Toora have access to a total of 24-36 sessions with a physiotherapist to support her engagement with such a program, ensure correct techniques, provide "hurt versus harm" education, and to "check-in" on a decreasing frequency basis over time. The parties agree that a physiotherapy session costs \$84.

[266] Given the extent of Ms. Toora's deconditioning and the importance of a proper exercise program, I am satisfied on the evidence that a total of 36 sessions with a physiotherapist is reasonably necessary to promote her mental and physical health. I am also satisfied these are costs she is likely to incur. Ms. Toora has followed medical recommendations in the past and I am satisfied she will continue to do so.

[267] The medical evidence does not support Ms. Toora's contention that two physiotherapy/kinesiology sessions per month for the next 25 years is reasonably necessary to promote her mental and physical health. Moreover, I cannot be satisfied she would continue to incur such costs over such long period of time.

[268] I award the sum of \$3,024 for the cost of 36 physiotherapy sessions related to Ms. Toora's exercise program.

b) Home Exercise Equipment

[269] Dr. Paramonoff recommends that Ms. Toora's independent exercise program consist of exercises she enjoys, as long as she includes enough of the recommended strengthening to address the regional symptoms and muscle imbalance that are contributing to her ongoing symptoms. Such a program can be carried out with home equipment or at a gym, depending on Ms. Toora's preference. I am satisfied on the evidence that costs related to an independent exercise program are reasonably necessary to promote Ms. Toora's mental and physical health. I am also satisfied these are costs she is likely to incur.

[270] Ms. Toora has not been specific about her choice of exercise options in the future. Nor is there any specific evidence about the cost of home exercise equipment that might be needed, or the cost of a gym membership. Given that strengthening exercises do not require specialized equipment, her full-time employment at home and her family responsibilities, I find it more likely that Ms. Toora will undertake her independent exercise program at home and will incur modest expenses in relation to such a program. I accept the defendants' suggestion of \$500 to cover these costs and award this sum.

c) Adjunctive Passive Therapy

[271] Dr. Paramonoff does not recommend that Ms. Toora rely on passive treatments, but does recommend them for symptom relief when she experiences the occasional flare-up (decreasing over time) and for any temporary increases in pain due to the independent exercise program. She recommends that Ms. Toora have access to six to eight treatments of adjunctive passive therapy (such as passive physiotherapy or massage therapy) per year for the next two years. The parties agree that the cost of a physiotherapy session is \$84 and the cost of a massage therapy session is \$85.

[272] I am satisfied on the evidence that this type of passive therapy, in the maximum amount and duration recommended by Dr. Paramonoff, is reasonably necessary to promote Ms. Toora's mental and physical health. I am also satisfied these are costs she is likely to incur.

[273] I award \$1,360 to cover the maximum amount of recommended treatment.

(d) Medication

[274] Ms. Toora has taken over-the-counter medications, like Tylenol and Advil, from time to time to manage her symptoms. She does not take "heavier" medications as she does not respond well to them. Dr. Paramonoff believes Ms. Toora will reasonably need over-the-counter analgesics or anti-inflammatory medications from time to time for future flares of pain. I am satisfied that such things are reasonably necessary to promote her physical and mental health, and are costs she is likely to incur. Without evidence about the cost of such medications, I will award the fair and reasonable amount suggested by the defendants--\$200.

[275] I decline to make any other awards in respect of future care costs. In submissions, Ms. Toora's counsel suggested that she may pursue trigger point injections in the future. Even if I were satisfied that such a course of treatment was reasonably necessary to promote her physical and mental health (which I am not), I am not satisfied Ms. Toora would incur such costs. As well, there is no evidence about the cost of such treatment. Ms. Toora does not seek any costs associated with other recommendations made by Dr. Paramonoff, such as sessions with an occupational therapist or a psychologist. Although the evidence could support a finding that these costs are reasonably necessary to promote her physical and mental health, I cannot be satisfied that Ms. Toora would incur these costs.

[276] In total, I award \$5,084 for the cost of future care.

Loss of Housekeeping Capacity

[277] Ms. Toora claims \$70,000 for a loss of housekeeping capacity. The defendants submit no award should be made.

[278] 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 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.

[279] A cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss. Where the usual and necessary household work can be performed, but with some difficulty or frustration, it may be more appropriate to reflect that by augmenting the non-pecuniary award to properly and fully reflect a plaintiff's pain, suffering and loss of amenities, rather than make a separate pecuniary award for loss of housekeeping capacity: *McKee v. Hicks*, 2023 BCCA 109 at para. 112.

[280] The legal framework addressing claims for loss of housekeeping capacity was recently summarized by Justice Gomery in *Chirhei v. Kachmar*, 2021 BCSC 1720 at para. 108:

[108] In *Ali v. Stacey*, 2020 BCSC 465, I considered two recent considered decisions of the Court of Appeal addressing claims for loss of housekeeping capacity; *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37, and *Riley v. Ritsco*, 2018 BCCA 366 at paras. 96-103. I concluded:

[67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

- [281] In this case, I agree with the position taken by the defendants and find Ms. Toora has not suffered a true loss of housekeeping capacity. The loss she has suffered is more in keeping with a loss of amenities to be compensated by the non-pecuniary damages award.
- [282] I have found that Ms. Toora's evidence about the extent of her physical limitations was exaggerated. As some of her evidence regarding her homemaking limitations is supported by the opinion of Dr. Paramonoff, I accept that she was unable to do heavier homemaking tasks for a time initially after the Accidents. I accept Dr. Paramonoff's opinion that with the recommended strengthening, reconditioning and activity adaptations for comfort, it is reasonable to expect Ms. Toora to carry out homemaking activities in the future.
- [283] I also accept, as supported by Mr. Bhatia's evidence, that Ms. Toora currently struggles with the heavier, professional grade cooking equipment they own, but that she is able to perform many other tasks such as wiping counters, folding laundry, and sweeping. She also cares for their infant child, including feeding him, lifting him while crying and into the stroller, and changing his diaper. From Ms. Toora's inconsistent evidence on the topic, I am unable to reach any conclusions about whether she actually has a housekeeper or, if she does, the frequency, extent, or cost of such a service.
- [284] Overall, I am not persuaded there is a real and substantial possibility that Ms. Toora will require assistance with household chores beyond the ordinary sharing that occurs within almost all shared households. To the extent her injuries cause her pain and inconvenience while she is doing housework, I find that this loss is in the nature of a loss of amenities and properly addressed as part of the non-pecuniary award I have made. Accordingly, I award no pecuniary damages for loss of housekeeping capacity.

Special Damages

- [285] Special damages must be both reasonable and necessary. While not every expense needs to have been recommended by a healthcare professional, there must be a medical justification for each expense claimed: *Taylor v Peters*, 2021 BCSC 2444 at para. 86, *aff'd* 2023 BCCA 391.
- [286] The parties agree that Ms. Toora attended for the treatments listed and incurred the costs stated as set out in the special damages lists provided at trial, totalling \$6,994.38. The defendants agree that \$6,730.38 of this amount is reasonable and necessary. They dispute the reasonableness of \$264 incurred for massage therapy amounts in excess of the maximum visit allowance of \$100 per visit.
- [287] This disputed amount relates to four message therapy sessions (on December 2, 2020; March 4, 2021; April 28, 2021; and June 18, 2021) that Ms. Toora chose to have in her home. These mobile sessions cost, in total, \$264 over what the service would have cost in a clinic.

- [288] Ms. Toora does not claim she required a mobile massage therapy service during this time due to her injuries, or for health and safety reasons related to COVID-19. Rather, she submits this additional cost is reasonable because the massage therapist she had been seeing before the COVID-19 pandemic shut their studio and started a new business offering a mobile service instead.
- [289] Approaching her evidence with caution as I have found I must, I find I cannot accept Ms. Toora's unsupported evidence on this point. It does not reconcile with the massage therapy records she has adduced. These records show that before the pandemic struck, Ms. Toora's regular massage therapist was Kelly Renwick of Lakeside Massage Therapy. There has been no evidence adduced that this clinic, or other clinics she attended in the past, had not yet re-opened after the initial set of pandemic restrictions. More importantly though, the records show that contrary to her evidence, Ms. Toora saw an entirely different massage therapist for those four mobile sessions.
- [290] In the end, I am not satisfied the additional costs Ms. Toora incurred in relation to those four in-home massage therapy sessions was reasonable or necessary. I award \$6,730.38 for special damages.

Summary of Orders

[291] In summary, I award damages as follows:

Non-pecuniary damages

\$95,000

Past Loss of Earning Capacity

\$25,171.92 [subject to deductions]

Future Loss of Earning Capacity

\$0

Future Care Costs

\$5,084

Special damages

\$6,730.38

TOTAL:

\$131,986.30

Interest and Costs

[292] The plaintiff is entitled to pre-judgment interest at the prevailing rate. If the parties are unable to agree on costs, they may speak to the issue.

"S.A. Donegan J."

DONEGAN J.

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