IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Basile v. Doyle,*
2022 BCSC 819

Date: 20220517
Docket: M183106
Registry: Vancouver

Between:

Malia Basile

Plaintiff

And

Elizabeth Elaine Doyle and Steven Michael Doyle

Defendants

Before: The Honourable Mr. Justice Crossin

Reasons for Judgment

Counsel for the Plaintiff:	M. Burtini M. Elliott
Counsel for the Defendants:	P. Harden R. Powell
Place and Dates of Trial:	Vancouver, B.C. September 13-16, 20-24, and 27, 2021
Place and Date of Judgment:	Vancouver, B.C. May 17, 2022

Introduction

[1] The matters before the Court arise from a motor vehicle accident on January 26, 2017. The plaintiff, Ms. Malia Basile, sustained injuries that continue to impact her life. Liability is admitted.

[2] The parties called 17 witnesses; nine of whom provided expert opinion evidence. The evidence of the plaintiff was clearly the focus of the trial. She was in the witness stand for the better part of three days.

[3] I will highlight the evidence and refer to particular evidence as and when required in the course of these Reasons.

The Plaintiff's Evidence

The Plaintiff's Pre-Accident Life and Employment

[4] The plaintiff was born in 1984. She is currently 37 years of age and married with two children—her first child is currently six years old, and her second is four years old. The plaintiff describes her current occupation as a self-employed hairstylist.

Employment

[5] After graduating from high school, the plaintiff worked full-time at a bakery at Superstore where she was quickly promoted to bakery sales manager. However, after realizing she wasn't enjoying this work, she decided to pursue what she describes as her "true passion"—working with hair.

[6] She undertook an 11-month hairdressing diploma program and did well. She graduated in the fall of 2006.

[7] The plaintiff found employment immediately after graduation as a hairstylist at Doria Salon and Spa ("Doria") in Surrey, British Columbia. She liked the environment at Doria, as well as that the employer offered at least two continuing education classes a year.

[8] The plaintiff quickly advanced and began working with her own clientele in relatively short order. She soon had a full clientele; meaning she had clients booked out two to four weeks in advance, as well as a waitlist of clients. It kept her busy. She remained at Doria for the next 10 years.

[9] The plaintiff testified that being a hairstylist is a “very physical job". As a hairstylist, she stood for eight plus hours a day, often in awkward positions, while manoeuvring around the client and performing various services, including cuts, colours, and foils. The plaintiff gave detailed evidence concerning the time that is generally required to perform these services on clients.

[10] The plaintiff says she made good use of the continuing education classes to improve her skills.

[11] The skill set that the plaintiff was most proud of having developed was balayage—a French technique of freeform painting on the hair that relies a great deal on creativity and placement. She says she spent much time researching and pursuing extra education to master the “art” of balayage and that she has become adept at it. She says she was one of the first persons to develop this service at Doria.

[12] From 2007 to 2013, the plaintiff worked approximately 40-hours a week—at first, eight plus hours a day, five days a week, and later, eight to 10 hours a day, four days a week. She maintained a full clientele. She did not suffer from any physical issues that impacted work and she had no lengthy absences from work during this period of time.

[13] The plaintiff earned income on a commission basis. For instance, around the time of the accident, the plaintiff was receiving 48% of her billings, with the balance going to the salon. In addition, she received a 10% retail commission for the products that were sold in Doria. She testified her average tips or gratuities were around 20%, which were not declared on her income taxes.

[14] Her earnings for 2012 and 2013 were approximately $35,000, excluding gratuities.

[15] The plaintiff became pregnant in 2014, but she worked full-time up until going on maternity leave a month prior to the birth of her first son in December 2014. Her income for 2014 was approximately $32,000, excluding gratuities.

[16] The plaintiff's income for 2015, made up of Employment Insurance (“EI”) benefits, was approximately $27,000.

[17] The plaintiff returned to work in February 2016. She returned part-time, meaning 16 to 20 hours a week. Her husband had a day job. He worked four days on and three days off and was available for childcare, as was the plaintiff's sister. The plaintiff and her sister, who had children of similar age, had an arrangement where one would watch both of their children when the other worked.

[18] Although the plaintiff thought about increasing her hours near the end of 2016, she became pregnant with her second child around October 2016. The plaintiff’s income for 2016 was approximately $20,000, including tips. It appears on the evidence that the plaintiff was maintaining this part-time hourly range at the time of the accident.

[19] The plaintiff says that around the time of the accident, she was looking forward to transitioning her career to becoming a self-employed hairstylist. She says that when she and her husband built their current home in 2009, they had asked the builders to rough in a sink in the basement where they hoped they could one day build a home salon. She began finishing the basement for the purposes of building the salon in 2015, and completed it sometime in 2018. Her intention before the accident was to begin splitting her time between Doria and the home salon to maintain an income as she built her clientele.

[20] The plaintiff testified that she thought there were several benefits to building a home salon. A home salon would provide flexible hours for work, allowing her to service clients on days and evenings her husband or sister were available for

childcare. A home salon would save her a 90-minute round-trip to Doria every day. In theory, she would be able to make more money because she would not have to share her income with an employer. She was also looking forward to developing her own business.

[21] The plaintiff envisioned that once her second child started kindergarten in September 2022, she would be able to service her clients between 9 a.m. and 3 p.m. She says she intended to gradually go back to working 40 hours a week. She says her sister would have been available to help with childcare and transportation, as well as her retired in-laws who live a 10-minute drive away.

Lifestyle

[22] The plaintiff also gave evidence concerning her general lifestyle prior to the accident. She liked entertaining and going out to movies and dinners. She had a treadmill and she would run at least five days a week, around five to six kilometers a day. She loved to garden and paint. She also baked.

[23] The plaintiff's home is a four-bedroom, 4,000 square-foot house that contained a one-bedroom suite and the hair salon in the basement. Prior to the accident, the plaintiff was responsible for most of the household tasks. Her husband would participate "occasionally"—generally at an 80/20 split. While he would occasionally vacuum, cook, and mow the lawn, the greater weight of the duties laid on the plaintiff.

[24] Her health, prior to the accident, was excellent. While she did suffer from carpal tunnel during her pregnancies, they dissipated afterwards. She says she sometimes experienced tightness or stiffness in her back after a long day at the salon, given the physical demands of her job. However, she would still be able to get home, cook dinner, and clean.

[25] She testified that prior to the accident, she had no symptoms of anxiety, depression, or any mood disorders.

The Accident

[26] The evidence reveals that the accident was fairly significant. At the time of the accident, the plaintiff was 15-weeks pregnant and driving her older son to the hospital because he had croup. Her son was in the rear passenger side of the vehicle, facing the back, and in his car seat. The plaintiff's vehicle was hit broadside at the intersection of Coast Meridian Road and Greenmount Avenue in Port Coquitlam. The defendants' vehicle collided with the middle of the plaintiff's vehicle on the passenger side—near where her son was seated. The collision spun the plaintiff's car into the lane of oncoming traffic, where there was fortunately no traffic at the time. The plaintiff was taken to Eagle Ridge Hospital by way of an ambulance.

[27] During her description of the accident, it was apparent that the plaintiff remained emotional about the event.

The Plaintiff's Post-Accident Life

Post-Accident Health

[28] The plaintiff was fairly quickly released from the hospital. However, over the following few days, she began to experience pain in her neck and shoulders, as well as headaches. She also experienced intense anxiety around leaving the house and driving. Within a week or so of the accident, she went to visit her doctor. She related all these matters to her doctor, including the fact that she was having a difficult time sleeping and was experiencing nightmares.

[29] Over the next few months, until the birth of her second child in July 2017, she continued to experience headaches, pain in her shoulders and neck, and much difficulty in getting a good night's sleep. Almost everything she tried to do aggravated these symptoms. She had difficulty turning her head while driving. When the plaintiff attempted to go back to working as a hairstylist, she found the physical demands of work exceedingly challenging. She found it difficult to perform her housecleaning tasks, such as vacuuming or cleaning. The focus of the pain appeared to be in her neck, shoulders, and back area.

[30] The plaintiff testified that during these months, she continued to have anxiety around leaving the house and driving. She experienced panic attacks fairly frequently. The nightmares also continued, which disrupted her sleep.

[31] While she pursued various recommended treatments after the accident, she was restricted from certain treatments, such as medications, due to her pregnancy. Consequently, the plaintiff says she did not make much progress with her injuries in 2017.

[32] The plaintiff says that the symptoms “didn't change a lot” after she gave birth to her second child.

[33] It became apparent during her evidence that the plaintiff did not pursue psychological counselling despite being clearly told it was recommended and it would assist with her injuries. The plaintiff attended a few sessions of counselling (seven in total) after the accident but did not resume counselling sessions after April 2018.

[34] She found the trips to her gym and an exercise program very helpful, especially as the gym provided childcare services that she was able to access. The plaintiff first used a personal trainer, and then started carrying on her own after she mastered the exercises that assisted her. Unfortunately, her ability to use the gym was reduced beginning in 2020 as a result of the COVID-19 pandemic. During the gym closures, she attempted to replicate these exercises at home with dumbbells and bands.

Household Duties and Childcare

[35] The plaintiff also addressed how her injuries have impacted her ability to deal with household obligations and caring for her children.

[36] The plaintiff says that since the accident, the household chores have been addressed by herself, her husband, and occasionally, her sister.

[37] The plaintiff is hopeful that Mr. Basile will help create a true partnership in the household in order to relieve some of the plaintiff's burdens. However, according to the defendants:

> the plaintiff's husband took on very little childcare or housekeeping duties before the accident; and there is little evidence he has improved his contribution since the accident despite his observations of her struggles. He has witnessed her struggles, including the plaintiff's difficulty with dealing with her second child resulting in now her having to co-sleep with her son, but done little, on the evidence, to alleviate those struggles.

[38] Mr. Basile gave evidence that he would do better in order to allow the plaintiff to pursue her dreams. Unfortunately given his history, I am skeptical. However, as I stated, the plaintiff is hopeful this dynamic might change.

[39] The plaintiff retained the help of a housecleaning service from February 2017 to November 2017. While she would have liked to continue receiving this assistance, she had to end the service due to financial considerations.

[40] In regards to how her injuries impacted her children, she testified as follows:

> I apologize, I – I have a lot of guilt so it's hard for me to talk about. You know, there was a lot of things that changed, you know, that I could no longer do with my kids, and, you know, I feel very guilty about.
>
> With my older son, you know, I was able to do so many things with him that I can't – I could not do with my second. I told you that [my first child] was a really fussy baby and he didn't sleep well, but I persevered through that and he – you know, I did everything I could. He slept in his own bed, he never once slept with me. You know, I – I would walk him hours back and forth and calm him and put him to sleep in his own bed because I just – I never wanted to have that, like, co-sleeping.
>
> You know, I was able to play with him, and carry him everywhere. You know, I would often lift him in the air and give him, like, airplane rides.
>
> And with [my second child], I wasn't able to lift him in and out of the crib so I would just lay him down next to me and nurse him and he would fall asleep. So he actually never even slept in his own crib because I – I just couldn't physically do it. You know, it's hard when, like, your kids are asking you to pick them up and play, and I – you know, especially, I guess, with my older one because he was used to that, like, it's hard to tell your kids no to something that's just like a basic need.

The Plaintiff's Post-Accident Employment

[41] The plaintiff did not return to work after her second maternity leave ended in July 2018. She testified that she didn't think it was feasible, given that she didn't feel she would be able to physically do the required work, and because Doria was unable to accommodate her requirements for shorter shifts. She kept busy, however, and focused some of her attention on pursuing the home salon.

[42] In any event, aside from parental EI, the plaintiff did not generate any income in 2018. She says that but for the accident, she would have gone back to work after her maternity leave in 2018, although on a part-time basis. The plaintiff suggests she would have worked three days a week, given that her husband had three full days off per week. She testified she would have worked either at Doria or the home salon.

[43] In 2019, the plaintiff began seeing clients at her home salon. She testified she had no difficulty securing clients; the issue was accommodating the work from a physical point of view. She averaged around two to six clients a month. She did colours, haircuts, and foils. She kept records of her clients and her income in 2019. The records reflect that she had 41 appointments in 2019. She says she had a limited amount of energy and ability to deal with her pain on a daily basis. She believes she only performed one balayage in 2019, because the physical requirements were too much for her. Her gross income for 2019 was $6,590. Her tips averaged closer to 15% instead of 20%.

[44] The plaintiff testified that in 2019, but for the accident, she would have arranged childcare, worked 30 hours per week, and relied on her ability to provide hairstyling services in the evening when her husband was off work. She says that in 2019, her husband arrived home around 5 p.m. or 5:30 p.m., which would be when she would have arranged for him to assist with childcare. She says other family members would have also assisted with childcare to allow her to work.

[45] The plaintiff's difficulties increased in 2020 with the impact of the COVID-19 pandemic. All the salons were shut down for several months and once health restrictions eased, the flow of clientele was erratic. In addition, the plaintiff says she

continued to suffer a degree of pain that impacted her ability to fully function at her job. Her appointments in 2020 only totaled 18. Her business income for 2020 was approximately $3,000.

[46] In relation to the pain, the plaintiff testified:

> Q What happens when you try and push through it?
>
> A I'm just in a lot of pain, you know? I – I do try to push through, and I do try to do things, but it ends up, you know, affecting other areas of my life. You know, like I sort of said before, you know, after some things like this where it's physically exhausting, I'll usually have to lay down. And, you know, if I was to have anything else on the agenda, that usually doesn't end up happening. So it takes out of other areas, you know, when I have to put all my energy and my focus into one thing, you know, I may not be able to put it into another area of my life.
>
> Q What other areas are you referring to?
>
> A My kids, you know, my – my family, my housework, tasks that I have to do, all of those kinds of things.

[47] The plaintiff was asked what would have happened in 2020 if the pandemic hadn't happened. She says that her ability to attract clients to her home salon would have been strong. However, the plaintiff says her daily pain would have continued to hold her back in 2020.

[48] The year 2021 started off similarly in the sense that she continued to pursue her business; recovering from the pandemic and attempting to see more clients. She agrees that the pandemic impacted her business but that it was difficult for her to parse its impact due to the fact that she also felt impeded by her pain. As of September 2021, the time of the trial, she had had 26 appointments in 2021.

[49] The plaintiff expressed what her expectations would have been for her home salon and income by the time of the trial but for the accident:

> Q Assuming the accident had never happened, what did you expect to be working by this point in time, in terms of schedule?
>
> A Well, a few things have happened in the last year. You know, my mother-in-law has retired from her job, as well as my father-in-law is semi-retired so, you know, with my husband's days off and knowing that now they were able to give care, [one son] is in school for

> kindergarten, and [the other] just started preschool, it frees me up to be able to fit in much more clients. So while the kids are at school, I could fit in a client, for sure, and after, when they're -- when they're done and my husband comes on, I could fit in a client in the evening, as well as, you know, his days off. So you know, I would expect to be working at least 30-plus hours right now.
>
> Q Sorry, is that on a weekly or a monthly basis?
>
> A I'm sorry?
>
> Q 30 hours on a week or a monthly basis?
>
> A No, a week.
>
> Q How about -- so sorry, preschool is when to when, how many hours a day?
>
> A His preschool is 9:00 to 1:00. It's a six-minute drive from the house so --
>
> Q Right.
>
> A -- I could certainly fit in a colour client in that time, even supposing, you know, that I had to drop him off, but I would also have child care available with my in-laws right in the morning so, you know, if -- if I needed to fit a longer service in, I could certainly do that, too.
>
> Q Okay. How about next year, when both the kids are in kindergarten, what did you expect to be working by then?
>
> A By that point, I would expect to be fulltime, 40-plus hours a week and, hopefully, plus, you know, again, the ability to work from home and have clients come, really, any time of the day, and having so much freedom with time there, the kids being in, you know, roughly, 9:00 to 3:00, there's a large block of time where I could do clients while they're at school and then, you know, fit them in in the evening on my husband's days off. There's lots of opportunity to be very successful with having lots of clients and -- so 40-plus, for sure.

[50] In response to the question of whether or not the plaintiff would be interested in doing work other than hairstyling, she stated that she loved working with hair and that she couldn’t think of anything she would really want to do more than hair.

[51] Prior to the accident she had no plans to retire early; she wasn't thinking about it. The plaintiff and her husband are not and were not planning on having any more children. She states that based on her earnings at Doria and anecdotal evidence from others in the business, she expected to easily gross $75,000 to $100,000 per year.

[52] In summary, the plaintiff states that her biggest losses as a result of the accident are two-fold: her dashed expectations in contributing to the family income with her business, and her diminished relationship with her husband and kids as she cannot be the mother or wife that she was and wants to be.

[53] The cross-examination largely involved pressing the plaintiff on the realities of raising a young family and attempting to pursue a full-time career with the home-based salon.

[54] Upon it being suggested to the plaintiff that her goal might have been to work part-time so that she could spend more time with her growing family, her answer was as follows:

> A So that was not my goal. You know, if I was to make a home-based salon, I would want to be working as much as possible and be doing as well as possible. I don't think anyone would turn away the possibility of more clients, that's serious about their business, and the possibility of more money. So I still believe I could be present with my family. And when I say that -- "present," I mean quality time. So the time that I have with them, I want to laugh, and play, and have fun. I want to show a good example for my kids so that's what I mean by "quality time."

The Current State of the Plaintiff's Injuries

Physical and Psychological Injuries

[55] The plaintiff testified that her neck pain is currently "pretty constant" and that it is always there. She says the pain still makes it hard for her to do certain tasks—particularly when she has to raise her arms for extended periods of time, which is often required for foiling and other similar hairstyling work.

[56] She continues to get headaches three to five times a week. Sometimes they last an hour or so and "puts her over the edge" on top of everything else.

[57] Her shoulder pain comes with the neck pain. Attempting to do certain tasks such as reaching up, putting dishes away, or shampooing a client aggravate her shoulders. Her upper and mid-back area pain comes and goes, although she has seen some improvement through her active rehab in the gym. While her lower back

has also seen some improvement, standing for lengths of time doing hair increases her lower back pain.

[58] Her sleep issues remain difficult. She has a hard time falling asleep and says she'll sometimes wake at night because of pain or an occasional nightmare. She also experiences what she referenced as 'mom guilt' because she is unable to do the things she really wants to do with her children.

[59] It appears on the evidence that while the plaintiff still experiences daily driving anxiety, some of her driving issues have improved. For instance, the plaintiff either walked or drove her older son to school in 2021.

Future Treatments and Assistance

[60] The plaintiff testified that she is willing to pursue the recommended treatments, such as occupational therapy, where a therapist would come to her home and create a plan to assist with her in-home issues.

[61] The plaintiff is open to attending driver rehabilitation for her anxiety around driving and receiving consultation for her sleep. She is very interested in continuing with kinesiology coupled with her own gym exercises. She expects to continue taking Sertraline for her anxiety as well as Tylenol for pain.

[62] The plaintiff expects to need continued assistance with regular and seasonal household cleaning. She will not be seeking future childcare costs.

[63] The plaintiff also testified that she is willing to undergo the recommended psychological treatment and that she had already booked an appointment.

[64] The defendants were concerned by the fact that the plaintiff had not pursued certain recommendations made in relation to her injuries, most prominently, the recommendation for psychological counselling. The plaintiff appreciated this was a failing in terms of doing all she could do to improve and provided her reasons as follows:

> A There was multiple reasons. You know, there was -- I was very overwhelmed with a lot of my appointments. You know, I was trying to focus my time and energy on things that were -- to help me feel better, where as my sessions with Tabasom, you know, I often felt worse. You know, there's definitely a fear, I think. You know, it's hard to relive the same thing over and over again and -- and, you know, a traumatic thing for me. It's hard to relive that. So you know, I think, a -- a bit of me, you know, was having, you know, fear and afraid to sort of face those again and feel really awful and sent me back to a really dark place. So you know, I want it to go away, but it's a hard thing.

[65] She says that she aims to pursue the recommendations for both her physical and psychological injuries and is hopeful that this will allow her to work more hours in the future.

[66] Finally, the credibility of the plaintiff is not placed in issue by the defendants in this trial. In any event I find the plaintiff a most credible witness. The defendants however submit aspects of her evidence suffer from poor memory and unrealistic expectations. As such, says the defendants, the reliability of certain parts of her evidence should be viewed with caution. In the event material parts of her evidence may be impacted in this regard, I will deal with the issue at that point in the analysis. Generally, however, I find the plaintiff a reliable witness. She was clearly physically uncomfortable throughout her time in the witness stand and she remained emotionally sensitive when testifying to aspects of this matter. Nevertheless she remained internally consistent and consistent with other witnesses regarding material points. She freely conceded appropriate suggestions against her self-interest. There were occasions where her memory failed her relating to how her life has unfolded over the last few years, particularly relating to her extensive interactions with medical professionals. I do not find these failings have impacted my overall assessment of her credibility or reliability.

The Plaintiff's Expert Evidence

Dr. Suzanne Clutterham – Family Doctor

[67] Dr. Clutterham has been the plaintiff's family doctor since January 2015. Dr. Clutterham was accepted as a general practitioner qualified to give expert evidence in the field of family medicine.

[68] Dr. Clutterham confirmed that the plaintiff has continuing pain in her neck, upper thoracic region, left thoracic paraspinal area, and lumbar and sacral regions, in addition to suffering from anxiety, nightmares, and headaches. While Dr. Clutterham's report from 2018 takes the view that a prognosis of a full recovery is uncertain, she agrees that the plaintiff has had improvement since her report.

[69] Dr. Clutterham pointed out that the plaintiff faced some barriers to her treatment and medications for her injuries in the months following her accident due to her pregnancy and the fact that she then breast-fed.

[70] It was apparent from Dr. Clutterham's records that the plaintiff was referred to counselling to assist her on many occasions since the accident but that the plaintiff had not taken advantage of the referrals since 2018. She confirmed that the plaintiff had not undergone further counselling since April 2018.

Dr. Daniel DeForge – Physiatrist

[71] Dr. DeForge was called by the plaintiff, having assessed the plaintiff on May 25, 2019. Dr. DeForge prepared a report dated June 12, 2019, as well as a responsive report to the medical-legal reports of the defendants' experts dated July 22, 2021. Dr. DeForge was accepted by the Court as a physiatrist who was qualified to give expert evidence in the field of physical medicine and rehabilitation.

[72] Dr. DeForge has worked on the medical staff at the GF Strong Rehabilitation Centre ("GF Strong") since 2009. GF Strong is the provincial centre for specialized rehabilitation.

[73] Dr. DeForge testified that the plaintiff displayed no inconsistent signs or symptoms during his assessment and that she displayed good effort during the physical examination.

[74] It is Dr. DeForge's view that the plaintiff has developed a central pain disorder known as fibromyalgia as a result of the accident. He recommends that the plaintiff be treated by a rehabilitation team experienced with treating chronic pain disorders

through occupational therapy, psychology, kinesiology, and appropriate medications. Dr. DeForge's report characterizes the plaintiff's diagnosis as secondary fibromyalgia, and states that movement and activity in reconditioning are part of the treatment. He states that in his view, the plaintiff has been under-treated in both the physical and psychological aspects of her pain syndrome. He attributes the cause of her under-treatment to childcare and the pain she suffers from the injuries.

[75] Dr. DeForge opines that the plaintiff will need to plan for more rests and breaks going forward as a hairstylist, as she will be working at a reduced capacity.

[76] Dr. DeForge confirmed in cross-examination that, but for the accident, the plaintiff would not have developed chronic pain.

[77] In addition, Dr. DeForge conceded that on balance, it appears that the plaintiff is showing improvement.

Dr. Mitchell Spivak – Psychiatrist

[78] Dr. Spivak was accepted by the Court as a psychiatrist qualified to give expert psychiatric evidence relating to the diagnosis, prognosis, and treatment of psychiatric injuries. Dr. Spivak assessed the plaintiff on February 14, 2019, and his medical-legal report is dated February 15, 2019.

[79] It should be noted that the defendants called a psychiatrist, Dr. Kathryn Fung. I will address her evidence momentarily, but, in essence, Dr. Fung and Dr. Spivak did not differ in any significant way concerning their assessment of the plaintiff.

[80] Dr. Spivak opined that the plaintiff suffers from an adjustment disorder with anxiety and depressive symptoms. He also notes that the plaintiff has been under-treated, at least from a psychiatric perspective. He recommends psychotherapy.

[81] Dr. Spivak states that in his view, the plaintiff's functional limitations relate more to physical injuries than they do to psychological injuries. It is clear, however, from the report, that both physical and psychological injuries play a role in impacting her capacity.

[82] Dr. Spivak notes that the level of her impairment has ranged between mild to moderate, and that the most severe symptoms manifest themselves in her phobic concerns regarding driving. She still experiences panic attacks within motor vehicles, both as a passenger and a driver, and she continues to experience intrusive thoughts concerning the accident. Dr. Spivak says that the plaintiff's prognosis for recovery, from a psychiatric perspective, is "guarded to fair".

Ms. Louise Craig – Physiotherapist and Functional Capacity Evaluator

[83] Ms. Craig was qualified as a functional capacity evaluator and life care planner, and she provided expert evidence in functional capacity evaluation and the cost of future care analysis. She prepared a functional evaluation report at the behest of the plaintiff on April 20, 2021.

[84] Ms. Craig testified in direct examination that she has much experience in assessing hairstylist and estheticians, which provided specific insight into the case at bar.

[85] In addition, Ms. Craig prepared a response report to the report of Dr. Colleen Quee Newell—a functional capacity evaluator called by the defendants. I observe at this point that again, there is little difference between the two reports.

[86] Ms. Craig offered the view that the plaintiff is currently limited from work as a hairstylist due to the neck, upper back, and lower back positions required by the vocation. The plaintiff is additionally limited by the vocation's requirements for stooping, constant reaching, and standing. Ms. Craig's view is that the plaintiff is currently not suited to full-time work as a hairstylist, and she recommends part-time work. Ms. Craig anticipates that the plaintiff would be able to work towards performing either two long appointments, or four to five short appointments per week. She says that she "expect[s] that with moderately improved pain management and conditioning, [the plaintiff] would be able to work for four hours, four days per week".

[87] Ms. Craig testified that overall, the plaintiff's competitive employability is reduced on account of her injuries. She is not as attractive to prospective employers in the hair-salon industry. She testified that colour services (two to three hours in duration) are too demanding for the plaintiff and that shorter services would be more manageable in terms of pain.

[88] Finally, Ms. Craig responded to Dr. Quee Newell's alternative job recommendations. In Ms. Craig's opinion, the plaintiff would either not be a functional match or will only be a partial match—which would lead to part-time work—for the alternative positions suggested by Dr. Quee Newell. I will address the details of Dr. Quee Newell's recommendations and Ms. Craig's response further below.

[89] I pause to note that the defendants submit that Ms. Craig's evidence should be looked at with skepticism because she acted as an advocate for the plaintiff—particularly when she offered her opinion as to the plaintiff's prognosis for improvement. In this regard, Ms. Craig offered evidence that the plaintiff, with proper treatment going forward, could continue to have moderate improvement. The defendants say this opinion is outside the scope of Ms. Craig's expertise. I agree with the defendants. However, I do not take the view that it otherwise impacts the reliability of other aspects of Ms. Craig's evidence.

Mr. Darren Benning – Economist

[90] Mr. Benning is an economist who was retained by the plaintiff to draft a cost of future care report. This report essentially tallies up Ms. Craig's care recommendations and applies the appropriate discount rate. Mr. Benning's cost of future care lifetime multiplier is 30.48478.

The Plaintiff's Non-Expert Witnesses

Ms. Krista Albert

[91] Ms. Albert was the general manager of Doria Salon from 2014 to 2020 and had worked closely with the plaintiff. Both parties agreed Ms. Albert was a helpful and reliable witness.

[92] Ms. Albert confirmed that the plaintiff worked part-time, between 16 and 20 hours a week, after her first maternity leave and prior to the accident. Ms. Albert described the difficulties the plaintiff had in returning to work after the accident, and the physical and emotional toll it appeared to take on the plaintiff.

[93] Ms. Albert testified that in her view, prior to the accident, the plaintiff was well on her way to becoming a level-four stylist and a member of the so-called "$100,000 Club"—a group of stylists who earned $75,000 to $100,000 or more.

[94] The defendants submit that Ms. Albert's evidence on the $100,000 Club was unclear and that it is more likely that the $100,000 Club referred to stylists generating $75,000 to $100,000 or more in revenue for their salon, rather than as their take-home pay after the commission split. In my view, Ms. Albert's evidence was clear. Her evidence conveyed that the $100,000 Club was an indication of stylists who earned a take-home pay of $75,000 to $100,000 or more.

Ms. Lindsay Beal

[95] Ms. Beal worked with the plaintiff from 2006 to 2011 at Doria and was called to testify about the changes she observed in the plaintiff's personality and lifestyle in relation to the accident. Ms. Beal says she observed negative changes in the plaintiff's personality after the accident.

Ms. Mililani Kell

[96] Ms. Kell is the plaintiff's older sister. They are close and Ms. Kell testified about the plaintiff's behavioural changes following the accident. Ms. Kell says the

plaintiff became more withdrawn, was less willing to go on outings, and seemed to struggle with raising her children and completing her household chores.

[97] Ms. Kell concedes that life with two children, as opposed to one, can change one's life, and that caring for her own two children was her full-time job.

Ms. Ingrid Magana

[98] Ms. Magana was the plaintiff's co-worker at Doria until Ms. Magana left in 2018 to begin her own business—Magna Hair Studio, a storefront studio very near Doria. It is approximately 1300 square feet and has three chairs. Ms. Magana has two employees; namely, a fellow hairstylist, and a dedicated cleaning person. Ms. Magana testified she earns between $8,000 to $10,000 per month at her salon, plus her share of her employees' revenue from their commission agreement. Ms. Magana also offered evidence that her customers were more comfortable going to a studio, rather than to someone's home.

Mr. Jeff Roberts

[99] Mr. Roberts is the plaintiff's current kinesiologist and has been treating the plaintiff since late 2019. He works at Coast Therapy.

[100] Mr. Roberts explained the differences between a physiotherapist, a kinesiologist, and a personal trainer. He also discussed the various exercises that the plaintiff undertakes in order to advance her recovery. He says that the plaintiff's sessions are once a week for 45 minutes. In his view, he has noticed notable improvement in the plaintiff.

Katherine Deaust

[101] Ms. Deaust currently works as an assistant to a financial advisor, but she has known the plaintiff for many years and worked with the plaintiff at Doria in 2012.

[102] She noted that following the accident, the plaintiff seemed fearful. Ms. Deaust described the plaintiff as exhibiting general anxiety and concern about her future.

Ms. Deaust also testified as to her observations of the plaintiff's anxiety concerning driving.

[103] Ms. Deaust gave evidence that her average gratuity at Doria Salon was approximately 20%. While this evidence related to events approximately 10 years ago, it nevertheless coincides with the plaintiff's evidence on the issue of gratuities.

Mr. Renato Basile

[104] Mr. Basile is the plaintiff's husband. Mr. Basile works as a security manager at the Hard Rock Casino in Vancouver, BC. He testified that he has a somewhat flexible work schedule, although historically it has been fairly fixed. Prior to the pandemic, he worked Sunday to Wednesday from 7 a.m. to 5 p.m. Since the pandemic, he works Sunday to Thursday from 7 a.m. to 3 p.m. He anticipated, at the time of trial, returning to his pre-pandemic hours and schedule.

[105] Mr. Basile says he observed changes in the plaintiff's mood since the accident. He testified that she is anxious, depressed, and emotional. He conceded that a big part of what was affecting the family's current dynamic was the plaintiff's ongoing emotional symptoms. She didn't have the same kind of patience as she did before the accident and became easily upset.

[106] Mr. Basile says that he has observed, since the accident, that while the plaintiff is still able to do the household chores she used to do before the accident, it exhausts her and takes much more time.

[107] Mr. Basile says that notwithstanding his observations of the plaintiff's upset, anxiety, and difficulty in performing the household chores, the prior division of labour has remained more or less the same, and that the plaintiff also remained primarily responsible for preparing dinners and lunches.

The Defendants' Evidence

Dr. Kathryn Fung – Psychiatrist

[108] Dr. Fung was called by the defendants and was qualified as a psychiatrist and provided expert psychiatric evidence relating to the diagnosis, prognosis, and treatment of the plaintiff's psychiatric injuries. Dr. Fung assessed the plaintiff on May 21, 2021.

[109] Dr. Fung agrees with Dr. Spivak and diagnoses the plaintiff with an adjustment disorder with mixed anxiety and depressed mood.

[110] Dr. Fung opines that the plaintiff's prognosis ranges from guarded to fair. Dr. Fung confirmed that early intervention leads to better outcomes because over time, if symptoms are untreated, counterproductive behaviours such as avoidance settle in. Dr. Fung defines counterproductive behaviours as including actions such as avoiding the area where the trauma occurred, avoiding activities related to the trauma, and an unwillingness to discuss the events related to the trauma. In my view, the evidence disclosed that the plaintiff displayed some of these indicia.

[111] While Dr. Fung conceded in cross-examination that her opinion was limited to psychiatric conditions of the plaintiff, she agreed in re-examination that if the plaintiff's physical injuries were due to a condition that was caused by intertwined physical and psychosocial factors, the psychiatric condition would impact the plaintiff's physical recovery. Dr. Fung described it as a feedback loop in which psychiatric symptoms aggravate physical symptoms in chronic pain cases.

Dr. Benjamin Clark – Physiatrist

[112] Dr. Clark is a physiatrist retained by the defendants. He assessed the plaintiff on May 19, 2021. He prepared a final report on June 18, 2021 and provided *viva voce* evidence at trial.

[113] Dr. Clark was the most controversial witness, at least from the plaintiff's perspective.

[114] Dr. Clark, upon examination of the plaintiff, observed that she had no trigger points, that her range of motion appeared inconsistent between testing and idle activity, and that she had no clear indication of objective injury. He also observed that the plaintiff refused to complete a fibromyalgia diagnostic worksheet or complete a pain diagram.

[115] He finds that the plaintiff's physical examination was objectively normal. He observed she had good muscle bulk and definition throughout. He opines that if she does have some lingering stiffness related to the original strain injuries, the nuances of this are lost due to the manner of presentation.

[116] Dr. Clark testified that the plaintiff's above-average muscle definition indicates she does not have a pain-related disuse deconditioning. Dr. Clark acknowledges that if he were to assume that the plaintiff does have fibromyalgia, then routine medications normally trialed for this condition, such as Lyrica, amitriptyline, and gabapentin, ought to be implemented. Dr. Clark states that in his view, the prognosis for the plaintiff was excellent.

[117] The cross-examination of Dr. Clark cast a somewhat lurking uncertainty concerning the reliability of his evidence.

[118] When asked in cross-examination about his report concerning the plaintiff's prognosis—that she had "no restrictions or limitations… placed on her activity"—Dr. Clark indicated that he did not mean she was unlimited in her activities.

[119] Dr. Clark was asked whether the complaints of the plaintiff, in his view, were caused by the accident, and stated that "the initial complaints were caused by the accident". After being pressed, Dr. Clark conceded that the accident was also a contributing cause to the plaintiff's current pain experience.

[120] Dr. Clark offered the initial view that the plaintiff was "not disabled from working at her regular job as a hairstylist". However, Dr. Clark later resiled somewhat and stated that what he meant was that the plaintiff was not completely disabled from her job as a hairstylist.

[121] Dr. Clark also agreed that a person could have good muscle definition and still have a chronic pain condition.

[122] I found the evidence of Dr. Clark somewhat troubling. In fairness, Dr. Clark was at a disadvantage in that he was dealing with certain issues in a hypothetical fashion due to the fact that the plaintiff did not perform the fibromyalgia diagnostic worksheet or complete a pain diagram. Nevertheless, I prefer, on balance, Dr. DeForge's evidence.

Dr. Colleen Quee Newell

[123] Dr. Quee Newell was qualified as a registered clinical counsellor and expert vocational rehabilitation consultant qualified to provide expert evidence in the areas of vocational assessment, career counselling, and job-search counselling. The defendants entered two reports from Dr. Quee Newell: the first dated June 11, 2021, and an addendum report dated July 22, 2021.

[124] The vocational assessment consisted of a one-hour interview with the plaintiff, followed by the plaintiff completing four hours of vocational testing which gauged her interests and aptitudes for certain jobs.

[125] While Dr. Quee Newell opined in her report that operating a home-based salon was a reasonable employment option for the plaintiff in the absence of the accident, she noted that she was unable to offer an informed opinion as to the plaintiff's earning capacity in the context of her home-based business. Consequently, Dr. Quee Newell provided tables setting out the average revenue and net income for unincorporated salons in British Columbia in 2019. The tables set out the average annual net profit for unincorporated salons in four quartiles. The lowest quartile was $17,100, the lower-middle quartile was $23,400, the upper-middle quartile was $32,700, and the top quartile was $62,800. The average of all these quartiles was $34,000. These incomes were pre-tax.

[126] Dr. Quee Newell concluded her report with a list of alternative careers for which the plaintiff may be suited. However, Dr. Quee Newell did not perform any

physical testing during the assessment and did not have a functional capacity evaluation of the plaintiff at the time she prepared her report. In the end, due to the lack of information she had at her disposal, Dr. Quee Newell confirmed on cross-examination that she could not offer an opinion as to whether the plaintiff would be able to work full-time or part-time at any of these alternative employment positions. Dr. Quee Newell concedes that the statistics she provided in her report were simply "some data" that could be considered by the Court, which was, in her view, "better than no data at all".

[127] Ms. Craig, as previously referenced, prepared a responsive report to Dr. Quee Newell's report, and offered the view that the plaintiff is either not a functional match, or would be limited to part-time work for all of Dr. Quee Newell's recommendations.

Mr. Mark Szekely – Economist

[128] Mr. Szekely is an economist retained by the defendants. He prepared a report dated June 17, 2021, which provided multipliers with which to assess the plaintiff's potential future earning capacity losses. In his report, Mr. Szekely provided two tables to assess this loss: an actuarial table and an economic table. Mr. Szekely testified that an actuarial table does not factor in contingencies such as workforce attachment, while an economic table of multipliers does factor in such contingencies. Mr. Szekely explained that Mr. Benning's cost of future care multipliers was developed in the same way as his actuarial multipliers, except that Mr. Szekely's included the discount rate prescribed by the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[129] Mr. Szekely concluded that the appropriate actuarial multiplier for the plaintiff, as a self-employed individual, is 23.293. The economic multiplier recommended by Mr. Szekely is 14.861.

Non-Pecuniary Damages

[130] Non-pecuniary damages are intended to compensate plaintiffs for the pain, suffering, disability, and loss of enjoyment of life that they suffered both to the date of trial and those they will suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39. *Stapley v. Hejslet*, 2006 BCCA 34, continues to provide the leading guidance on the principles to consider in assessing non-pecuniary damages. The inexhaustive list is found at para. 46:

> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: ***Giang v. Clayton***, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[131] It is common ground between the parties that the plaintiff suffered neck and shoulder pain, headaches, and psychological injury as a result of the accident. The evidence also reveals that while there is expected to be some improvement of the plaintiff’s injuries, the extent of that improvement is somewhat guarded at this stage.

[132] There is no doubt that the collision in this matter had a significant impact on the plaintiff's physical and psychological health; occurring, as it did, in the prime of her working years, and as she was embarking upon raising a young family. In my view, her functioning continues to be clearly impacted, both in her ability to earn an income as a hairstylist and in her ability to function within her family dynamic. For instance, as referenced earlier, when the plaintiff's younger son had sleep issues as a baby, the plaintiff was unable to lift him in and out of his crib due to her injuries.

Consequently, she says she had no choice but to start allowing him to sleep in her bed. This son, who is now four years of age, continues to sleep in her bed, which among other things affect her sleep and the family dynamic. It is not apparent on the evidence how, if at all, Mr. Basile assisted in this regard.

[133] The trajectory of her life prior to the accident has been clearly and adversely impacted and her future remains uncertain. While the plaintiff's prognosis is guarded, the weight of the evidence allows for a finding that her injuries will likely improve, particularly with adherence to recommended treatment. That said, the evidence also demonstrates that the plaintiff has not found relief from daily suffering since the accident.

[134] The defendants, while conceding the plaintiff's injuries have clearly impacted the plaintiff, submit that her current capacity is somewhat more robust than it has been portrayed by the plaintiff and some of the plaintiff's witnesses. The defendants point to the fact that following the accident, and for the ensuing five or six months prior to the birth of her second child, the plaintiff continued to work essentially part-time hours at Doria—which the defendants say is a demonstration of the plaintiff's more robust capabilities after the accident.

[135] I do not find the circumstances of her efforts to return to work after the accident as being inconsistent with her evidence as to how she is currently limited in her abilities to perform. In my view, the plaintiff's efforts to return to work was a demonstration of her stoicism—for which she should not be penalized—rather than a demonstration of her robust capabilities after the accident. The plaintiff's effort in those months after the accident was clearly not sustainable.

[136] The parties have placed before the Court a variety of authorities with similarities to the case at bar.

[137] The comparable authorities I find most helpful for measuring a fair award include *Jarrett v. Wold*, 2021 BCSC 302 ($90,000); *Achan v. Jin*, 2020 BCSC 1430 ($90,000); *Chahal v. Righele*, 2014 BCSC 1086 ($120,000); and *Mattson v. Spady*,

2019 BCSC 1144 ($150,000). These cases capture the general range of non-pecuniary damages that ought to be awarded for these kinds of injuries, in these kinds of circumstances. Such cases, though helpful in measuring fairness, serve only as a rough guide as each case turns on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[138] It is my view that the plaintiff in the case at bar struggled more than plaintiffs with similar injuries and outcomes due to the fact that the accident coincided with her pregnancy and new responsibilities concerning two young children. These unique circumstances, on the evidence, has proved to be overwhelming for the plaintiff at times.

[139] Therefore, I conclude a fair and proper award for nonpecuniary damages is $135,000.

Loss of Past Earning Capacity

[140] The plaintiff claims for damages for loss of past earning capacity. The role of the court is to assess what a plaintiff would have, not could have, earned in the pre-trial period but for the plaintiff's injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[141] The approaches for assessing past loss of earning capacity is summarized in *Bricker v. Danyk*, 2015 BCSC 2404 as follows:

a) The plaintiff must prove the loss of actual past events on a balance of probabilities;

b) The objective is not to compensate actual lost income—although it may sometimes be the most accurate measure of the damages suffered—but rather, the lost capacity to earn;

c) The measure of loss of capacity may vary where the circumstances so require;

d) The approach requires an assessment, not a calculation according to mathematical formulas, of damages; and

e) The overall fairness and reasonableness of the award must be considered in all the evidence.

[142] The assessment also involves the estimation of a pecuniary loss by weighing the possibility and probabilities of hypothetical events—that is, how a plaintiff's life would have proceeded before the time of trial without the injury. The plaintiff need not prove these hypotheticals on a balance of probabilities. Instead, the hypotheticals are given weight according to their relative likelihood as long as the hypothetical is a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48–49. This assessment will often require a certain degree of logical extrapolation that must be reasoned and based upon the evidence and findings of fact.

[143] It is common ground the plaintiff suffered a loss of past-earning capacity as a result of her injuries. There is no suggestion that this claim rests simply on speculation.

[144] The plaintiff's fundamental premise is that she maintained the legitimate and reasonably held goal of one day operating a hair salon from the basement of her home. The evidence clearly demonstrates it was not unrealistic that the plaintiff would move from being an employee with Doria to operating a salon in the basement of her home. The prospect of this event was not resisted by the defendants.

[145] The evidence demonstrates that the plaintiff was highly regarded and had the potential to keep and attract clients, if she had proceeded with her plans.

[146] Finally, there is a good deal of evidence that the plaintiff's ability to operate a home salon, as a more or less full-time business, was not simply wishful thinking. Family members and friends provided evidence that they were willing and able to do

what they could—in terms of childcare-related issues—to assist the plaintiff in her endeavours.

[147] The real issue is in assessing the prospects and contingencies associated with operating a small business with a new and growing family. It is apparent on the evidence that the plaintiff was charged with the bulk of the child-rearing and household obligations. As I have indicated, I am skeptical that the division of labour between the plaintiff and her husband would have changed to the degree hoped for by the plaintiff.

[148] The task of the Court is to assess the loss of past earning capacity from the accident in January 2017 to trial in September 2021. While the various scenarios, assumptions, and extrapolations put forward by the parties for this time period are helpful, they each surrender in part to self-interest.

[149] The plaintiff missed some work following the accident but carried on as best she could until June 2017. Her fortitude mitigated her loss. On the evidence before me, I assess that the plaintiff's loss of income for the year 2017 is $1,500.

[150] The plaintiff returned from maternity leave in the summer of 2018. While she earned no income in 2018, the plaintiff submits it is reasonable to conclude that but for the injuries, the plaintiff would have worked part-time hours (defined as 16 to 20 hours per week) between Doria and her home salon.

[151] The plaintiff says that she would have taken up part-time employment with Doria for the balance of 2018 (approximately six months) and earned what she earned for her part-time endeavours in 2016; approximately $20,000. In addition, she says she would have also serviced clientele at her home salon. The plaintiff submits that when assessing an average income per client in the amount of $185 (including tip), serving around four clients per week, she would have earned another $20,000 from her home salon for the balance of 2018. This would amount to $40,000 as the plaintiff's loss for 2018. The suggestion of $185 per client as a price

point arises out of averages from the plaintiff's 2019 income when she began servicing clients at her home salon.

[152] In my view this scenario is not realistic. The evidence does not support an assessment based upon the plaintiff's ability to earn the same amount of income at Doria for the balance of 2018 as she did in 2016. Unlike 2016, the plaintiff would have had two children as well as a budding new business to look after in 2018. In my view, the plaintiff's prospects were closer to half the amount she could have earned at Doria working part-time.

[153] I also conclude that it would be unrealistic to accept the number of home salon clients as suggested by the plaintiff this early in the business endeavour, especially at $185 per client. The figure of $185 per client does not consider sufficient contingencies, particularly for services done at lower rates than are reflected in the 2019 data. I do accept the plaintiff's evidence that her gratuities were around 20% at this time. Consequently, I measure the plaintiff's loss in 2018 at $13,000.

[154] I also find the plaintiff's submissions regarding her potential income for 2019 to be too optimistic. The plaintiff earned approximately $6,600 in 2019, which, including gratuities, comes to approximately $7,900. On the plaintiff's calculation she seeks a loss of approximately $95,000 for 2019. The plaintiff's submission assumes that but for the injuries, the plaintiff would have fully transitioned to the home salon, and would be seeing ten clients per week at $185 per client.

[155] The defendants submit the plaintiff would have continued to work the same hours as she did in 2016 in 2019—partly at Doria and partly at home, earning $439.57 per week. According to the defendants:

> [t]he actual hours that the plaintiff worked are not available. However, we know that as of June 9, 2017, the plaintiff had worked 600 insurable hours in the 52 weeks prior in order to qualify for maternity EI benefits. The plaintiff testified that she needed to return for one additional hour in order to reach the 600 insurable hours. Over 52 weeks, this is 11.54 hours per week. If we assume 50 weeks, this is 12 hours per week.

The defendants suggest that given her total income in 2016, coupled with the number of weeks she worked in 2016, $439.57 per week is the appropriate measurement for the plaintiff's loss.

[156] I also find this assessment unpersuasive. I find the plaintiff would have been able to work more hours in 2019 than she did in 2016. The plaintiff testified she would have been moving towards full-time hours in 2019 around "September 2022 if not before". I accept that the promised support of her family and friends would have, to a degree, come to fruition and allowed her to make this transition. It may well be that she would have been content to carry on just working at her home salon to whatever degree possible. However, I do not accept that she would have been able to service 10 clients per week in 2019, nor at $185 per client.

[157] In my view, the income for 2019 would have been more modest. The business would have required logistical planning that would have unfolded more gradually than the plaintiff suggests. Her youngest would have been 18 months old at the beginning of 2019. In my view, a more realistic prospect is an income around half of what is suggested; that is, approximately $50,000 including gratuities. This amount, less the $7,900 earned, equates to a loss of approximately $42,000.

[158] The submissions concerning 2020 took into account the uncertainty of the pandemic. There was some anecdotal evidence from Ms. Magana that her storefront salon business was reduced by 20% in 2020 due to the pandemic.

[159] The defendants suggest that an appropriate reduction would be 46%. This percentage arises from the fact that the plaintiff's actual earnings in 2020 was down 46% from 2019. The defendants also suggest it is appropriate to proceed on the basis that her hours in 2020 remain as they did in 2016. This, of course, does not take into account the likelihood that the plaintiff's hours will continue to increase.

[160] I place some weight on Ms. Magana's evidence. It does not appear unreasonable to me to build in a 20% reduction in the plaintiff's putative business operation in 2020. In my view, the appropriate contingencies would be such as to

keep her income (prior to the 20% reduction) at around the same level as 2019, including gratuities. The actual income including gratuities was $3,600. I fix the loss for 2020 at $36,400.

[161] Finally, the assessment for 2021 traverses nine months to the time of trial. I considered that the plaintiff was on track for working full-time hours by September 2022, and I accept her ability to service clients at her home salon would have grown by this time. I conclude the calculation of $437.36 per week is wholly unhelpful for 2021. I also continue to conclude $185 per client is a figure that is too generous. Furthermore, I must factor in the ongoing pandemic and the resulting difficulties, such as the continuation of the health regulations concerning small businesses, in 2021.

[162] I set the income that the plaintiff could have earned for the year 2021 at $60,000. Accounting for the fact the plaintiff worked until September 2021 (nine months of employment) the amount I calculate she would have earned is $45,000 less 15% (rather than 20%) to account for the impacts of the pandemic. Therefore, I conclude the plaintiff's income up to the time of the trial in 2021 would have been $38,250. When reduced by what was actually earned in 2021—approximately $5,500 including tips—I find the plaintiff’s loss in 2021 to the time of trial is $32,750.

[163] Although there is some evidence that gratuities may be closer to 10 to 12%, I have accepted, for the purpose of these calculations, the plaintiff’s evidence and have fixed gratuities around 20%.

[164] As a result, I find that fixing the total loss of past earning capacity in the amount of $125,650 is fair and reasonable on the evidence.

Loss of Future Earning Capacity

[165] An award for the loss of future earning capacity represents compensation for a pecuniary loss. It seeks to compensate the plaintiff’s loss of capacity to earn, rather than their earnings itself.

[166] As is the case with past earning capacity, the award is not strictly a calculation—it is an assessment. That said, it is an assessment that requires a comparison between the plaintiff's likely future earnings if the accident had not happened and the plaintiff's likely future earnings given the accident has happened: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157.

[167] This assessment necessarily engages a consideration of hypothetical events. The court will first determine whether the hypothetical event of future income loss is a real and substantial possibility and not mere speculation. Such a finding must be based on some evidentiary foundation. Once the real and substantial possibility of a hypothetical event is established, the court must measure damages by assessing the likelihood of the event. As the awards are based on assumptions that may prove to be wrong, this exercise necessitate an allowance for either positive or negative contingencies that can impact the assumptions: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[168] Recently, our Court of Appeal in *Rab v. Prescott,* 2021 BCCA 345 at para. 47, reaffirmed the process referenced in the jurisprudence in this area. Justice Grauer, writing for the court, set out again the questions for considering claims for loss of future earning capacity:

a) Does the evidence disclose a potential future that could give rise to a loss of capacity?

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?; and

c) What is the value of the possible future loss, having regard to the relative likelihood of the possibility occurring?

[169] The final step in the damage assessment process is a determination by the court, in all of the circumstances, as to whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[170] There are two approaches to assessing damages for loss of earning capacity: an earnings approach and a capital assets approach. The earnings approach is often used for valuating future loss in cases that use expert actuarial or economic evidence and the plaintiff's past income history to determine the plaintiff's without-accident future earning capacity. The capital asset approach is often used in cases where the loss is "not measurable in a pecuniary way", such as where the plaintiff continues to earn income at or near pre-accident levels, and the loss may be valued through various methods, such as the use of one or more years of the plaintiff's pre-accident income as a tool: *Kim v. Baldonero*, 2022 BCSC 167 at para. 91; *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[171] In addition, life's contingencies must be taken into account in ultimately assessing damages. The nature of contingencies differ and the parties must account for that fact. Certain general contingencies are very likely common to the future of most people; for instance matters relating to employment or health. The Court may take into account general contingencies, but in the absence of evidence relating to the particular plaintiff in this regard, any adjustment should be made with moderation.

[172] The plaintiff, as well, may have specific contingencies informed by her own personal circumstances. In this regard, there must be evidence that tends to support the suggestion of contingencies, whether they be positive or negative contingencies. See *Steinlauf v. Deol*, 2022 BCCA 96.

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

intends to keep working as a hairstylist, her injuries will limit her hours and capabilities for the foreseeable future.

[174] The real contest at bar is the analysis of the third-step—assessing the value of that possible future loss, having regard to the relative likelihood of the possibility occurring.

[175] The plaintiff's position is that her employment future is tied to her home salon business. However, the home salon was not operational at the time of the accident. Since the accident, the plaintiff has pursued the home salon business in a limited way and it is where she intends to stay and earn her future income.

[176] In these circumstances, both parties submit the capital asset approach is the most appropriate approach for assessing damages for loss of earning capacity.

[177] A general recap of the evidence concerning the plaintiff's employment history is an appropriate starting place in the analysis. It is beyond dispute that the plaintiff, fairly early on in her adult life, pursued what she considered her passion—working as a hairstylist. She viewed the vocation, as did many of the witnesses in the same line of work, as much an art form as a technical exercise.

[178] The plaintiff graduated from a reputable hairstyling school and almost immediately began work at Doria Salon in Surrey, British Columbia. She worked steadily and successfully at Doria for the next decade. I accept that during this time, the plaintiff honestly held realistic aspirations to start her own business.

[179] The plaintiff and her husband built a home in Port Coquitlam around 2009, while she was working for Doria. They roughed in plumbing in the basement with the thought of one day pursuing her business there. While the salon did not take shape for some years due to financing, it was completed with all of the usual accoutrements of a hair salon, with two chairs, in approximately 2018. Although the dates of completion is somewhat unclear on the evidence, it is perfectly clear that the plaintiff's aspirations of a home salon were real, realistic, and had its origins well before the accident.

[180] Her first child was born in December 2014. She took maternity leave and came back to Doria, part-time, at the beginning of 2016. She was still working part-time and pregnant with her second child on the day of the accident, January 26, 2017.

[181] After some time off, approximately three weeks later, she came back to Doria to work part-time. The evidence reveals, and I accept, that the plaintiff struggled with her work upon her return.

[182] The aftermath of her injuries caused the plaintiff both pain and dysfunction. The evidence clearly discloses that the physical requirements of working as a hairstylist were daunting. She required much accommodation. She could not adequately perform. She was seen often crying and despondent at the end of the day. She was frustrated that the injuries diminished her ability to perform to the standard she had placed upon herself over the years.

[183] She carried on with her work at Doria until June 2017. After the birth of her second child in July 2017, she commenced another maternity leave to the summer of 2018. However, she did not return to work after the second maternity leave. She says that it was because she knew she wasn't able to perform the required work at Doria due to her injuries. The management of Doria told her that they could not accommodate her requirements for shorter shifts and the plaintiff's ability to perform her duties there was uncertain. She was "no longer a good fit" with the work at Doria.

[184] Coincidently, the plaintiff's home salon was ready for operation. In the circumstances, including having to take care of two children, there were obvious advantages to the plaintiff working at the home salon. For instance, the plaintiff would be able to keep all the profits from her sales instead of paying Doria a commission. She would also be able to be flexible on her price points and hours of operation.

[185] As previously referenced, the plaintiff began her home salon business in 2019. The plaintiff says her injuries impacted her ability to service the number of

clients she wanted. The evidence discloses that she saw 41 clients in 2019. This averaged approximately three to four clients a month. The plaintiff concedes that in 2020, aside from the issues with her injuries, the pandemic impacted her business and she had a total of 18 clients. In 2021, it appears the plaintiff made some improvement in this regard. The plaintiff saw 26 clients by the time of this trial in September 2021. One can reasonably conclude that the plaintiff was on track to seeing 35 to 36 clients in 2021, which places the plaintiff almost back to her earning capacity in 2019, even with the pandemic restrictions still in place.

[186] The plaintiff submits that as a starting point, she, but for the accident, would have pursued her home salon and gradually reached working full-time by September 2022. The plaintiff says she would have had the time she needed to pursue her home salon full-time when both her children started attending school in September 2022.

[187] The plaintiff submits the evidence supports a finding that absent the accident, and considering all reasonable contingencies, she would have earned, on a full-time basis from her home salon, “at least $100,000 per year”. This amount is founded upon Ms. Albert’s evidence.

[188] The defendants submit that due to the timing of the plaintiff’s career change, it is impossible for anyone to assess her earning capacity in her home salon absent the accident. The defendants submit that the totality of the evidence suggests the plaintiff was likely to continue earning a similar amount as she earned in 2014 at Doria.

[189] The defendants say the contingencies and vagaries of the matter simply do not allow for a starting point anywhere near $100,000 per annum in the without-accident scenario. The defendants say that an income of $40,000 - $50,000 per year including gratuities at 10-12% is more likely. This is the amount that coincides with her full-time income at Doria in 2014.

[190] In terms of actual capacity going forward, the plaintiff submits that she continues to function at a much-reduced level compared to her pre-accident life. The plaintiff currently manages two to three clients a week, or eight hours per week. The plaintiff submits this partial disability will be ongoing.

[191] The plaintiff submits that her working future compared to before the accident is now diminished by 60 to 80%.

[192] In addition, the plaintiff says that the option of the plaintiff pursuing another vocation, as outlined in the report of Dr. Quee Newell, is flawed. For instance, the plaintiff notes that it is in fact Dr. Quee Newell's opinion that the best and least disruptive option for the plaintiff is to pursue her own hairstyling business. In addition, she says Dr. Quee Newell offers no opinion as to whether the plaintiff could meet the physical demands of the alternative vocations listed in her report. As previously referenced, Dr. Craig, in her reply report, provides the uncontradicted opinion that the plaintiff is either not a functional match or would be limited to part-time work for the suggested alternative vocations.

[193] The Court was provided with actuarial multipliers and economic multipliers. These are helpful in assessing, along with all the evidence, the reasonable assessment of future lost capacity. Economic multipliers are helpful when a plaintiff's circumstances are likely to approach those of the average person, while actuarial multipliers are helpful when a plaintiff's circumstances do not approach those of the average person. The plaintiff submits a multiplier that strikes a balance between these two multipliers is appropriate in this case. Specifically:

> [t]he plaintiff submits that a multiplier in between the actuarial multiplier and the female economic multiplier would be appropriate. The [p]laintiff has a strong work ethic and work history. Prior to the [c]ollision she loved to work and keep busy. She has no history of being out of the workforce involuntarily or voluntarily (paid maternity leave does not count in the economic definition of labour participation rate). Every lay witness that testified spoke of her being a hard worker who is very driven. She does not plan on having any more children.

[194] The plaintiff submits that the multiplier of 17—which falls between the actuarial multiplier (23.293) suggested by Mr. Szekely, the defendants' economist, and the economic female multiplier (14.861) provided by Mr. Benning, the plaintiff's economist—is the appropriate compromise.

[195] The plaintiff's assessment takes the suggested income of $100,000 to age 65 with a multiplier of 17, which results in $1.7 million as the net present value of lost income. The plaintiff submits that being restricted to eight hours per week is an 80% diminishment of full-time employment, and 16 hours per week (which the plaintiff puts at her maximum) is a 60% diminishment of income. As such, the plaintiff submits 75% diminishment as the appropriate calculation, which leaves a net present value of $1.275 million. Finally, the plaintiff submits that after taking all of the positive and negative contingencies into account, her future loss of income earning capacity amounts to $1,250,000.

[196] The defendants submit that the plaintiff has testified that she can currently perform between one and three appointments per week. The defendants say that her capacity is not actually this limited and that it is significantly higher—especially if the Court accepts that the best indication of the plaintiff's pre-accident capacity is the five and a half months immediately after the accident, which demonstrates an ability to work much more than she currently claims. In addition, the defendants say that her capacity is expected to continue to improve. While the defendants admit she faced some difficulties in returning to work, they say that her performance in these months indicates she was still able to work on multiple clients for multiple consecutive days.

[197] The defendants also submit that the evidence shows if the plaintiff continues her treatment, she is likely to return to either her pre-accident capacity, or very close to it.

[198] As such, the defendants submit that the plaintiff's current earning capacity is reduced by $25,000, compared to what it would have been absent the accident. The

defendants additionally submit that within five years, the plaintiff's loss of capacity will be reduced to no more than $10,000 per year.

[199] The defendants therefore conclude that the Court ought to look at a compromise between the following actuarial and economic multipliers:

> Using the actuarial multipliers at the assumed loss of $25,000 per year for the next four years, followed by a $10,000 loss per year her remaining career, the [plaintiff's] lost capacity is approximately $310,000. Using economic multipliers, however, the [plaintiff's] annual losses would come to a total of approximately $190,000 in lost earning capacity.

[200] Finally, the defendants say that given the uncertain nature of the plaintiff's business, and the plaintiff's relatively low hours when she worked part-time before the accident, a total future earning capacity loss of no more than $250,000 is appropriate in the plaintiff's case.

[201] In my view, the use of the plaintiff's efforts to return to work post-accident as a framework for her capacity and capability is artificial in the extreme. The defendants' submission ignores common sense and human insight. It is plain to me on the evidence that what the plaintiff underwent to carry on with her employment in those five to six months post-accident was not sustainable. I accept her evidence on the unsustainability of that model.

[202] While the experts agree the plaintiff's current circumstances concerning her injuries are likely to improve, the defendants' submission that the plaintiff is likely soon to return to either her pre-accident capacity, or very close to it, is not supported by the evidence.

[203] That said, the plaintiff's vision of a life that not only provides her with the balance in her personal life she desires, but also includes earning $100,000 a year, is unrealistic on the evidence. The plaintiff's submissions concerning her income going forward, on a without-accident basis, does not properly account for the vicissitudes in the life of a working parent who seeks fulfilment in employment as well as parenting and life generally. Her submissions also do not account for the time and practicalities of managing her own business.

[204] Further, while I accept the plaintiff has or can develop a network of friends and family to help her have the time to pursue her goal of $100,000 per year, the achievement of this goal cannot be guaranteed.

[205] While I accept the plaintiff would have been able to pursue her aspirations of providing high quality hairstyling services with great satisfaction, I am not persuaded it is feasible that the plaintiff's life, without the accident, would have operated in a manner that generated a $100,000 annual salary going forward. To be clear, I do accept that she had the potential Ms. Albert saw in her, as well as the skill sets that would have translated into client loyalty. It is also common ground that servicing less clients in a home salon can generate as much, or perhaps more, income than was generated at Doria. What I remain troubled with is that the plaintiff's without-accident model is tied to a perfectly coordinated daily schedule that does not sufficiently take into account the unexpected contingencies that occur while helping to raise a family or managing a business.

[206] In my view, taking these contingencies into account, I find her baseline moving forward without accident would have been closer to the range of $65,000 to $75,000 per year.

[207] I accept that going forward the plaintiff's capacity is diminished. The weight of the evidence suggests that her capacity will improve; particularly given that she will undertake psychological counselling. In addition, the evidence on the whole does not support a conclusion her maximum improvement over the course of her working life will halt at 16 hours per week. Finally, in my view, considering all the positive and negative contingencies, her capacity is reduced by 50%.

[208] As I mentioned above, loss of earning capacity is assessed, not calculated. The award must fully make up for the harm and loss as if the loss had not occurred. The award must place the plaintiff in the same position she was in the day before the collision.

[209] In my view, when considering the overall fairness and reasonableness of an award—taking into account all of the evidence and contingencies, the mid-range multiplier, and the 50% contingency deduction—the plaintiff's claim for future loss of income earning capacity is $600,000.

Future Care Costs

[210] An award for future care costs aims to restore plaintiffs, as far as possible with a monetary award, to their pre-accident position. The assessment is based on what is reasonably necessary on the medical evidence to promote the plaintiff's mental and physical health: *Gill v. Borutski*, 2021 BCSC 554 at para. 107.

[211] An award for future care must thus be medically justified and reasonable in the evidence before the Court: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.); aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[212] Similar to the awards for loss of earning capacity, this award involves an assessment rather than a precise calculation. Further, as the award is not based on certainty and involves an exercise of prediction, the court must allow for contingencies depending on the specific needs of the plaintiff: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[213] The plaintiff claims for the following:

- psychological counselling;
- occupational therapy;
- driver rehabilitation;
- physiotherapy;
- kinesiology;
- Sertraline;
- Tylenol;
- saddle stool;
- sleep-training consultation; and

- gym membership.

[214] It is my conclusion that the evidence generally supports an award relating to the treatments and assistance as outlined above by the plaintiff, with certain exceptions.

[215] The plaintiff submits the following treatments and supports as one-time costs, as opposed to costs for ongoing treatments that extend over her lifetime: psychological counselling, occupational therapy, driver rehabilitation, saddle stool(s), and sleep-training services. These one-time costs, based on the evidence, value approximately between $7,100 and $11,000.

[216] I find that there is no need to apply a contingency deduction to these awards for several reasons. First, they apply to one-time costs that are likely to occur in the near future. Second, I expect the plaintiff will be highly motivated to participate in these treatments for her recovery, especially after being provided with the financial resources to do so.

[217] Therefore, the reasonable valuation for the one-time costs on the medical evidence are as follows:

Psychological counselling	$3,500
Occupational therapy	$2,500
Driver rehabilitation	$840
Three saddle stools	$1,500
Sleep training sessions	$900
TOTAL	**$9,240**

[218] The plaintiff submits the following treatments and supports as ongoing costs: physiotherapy sessions, Sertraline, gym membership, Tylenol, assistance with regular cleaning, assistance with seasonal cleaning, and kinesiology sessions.

[219] In terms of the plaintiff’s claim for physiotherapy sessions, I find that the plaintiff has not pursued physiotherapy since 2018. Instead, she has “moved on" to

the more robust and active rehabilitation at her gym. Consequently, I make no award for physiotherapy.

[220] The defendants submit that while it is clear that Sertraline is recommended and is a helpful medication for the plaintiff, it cannot form part of the award because there is no evidence as to its cost. However, I find that there is sufficient evidence to conclude that the annual cost of Sertraline is approximately $350.

[221] The defendants also submit that the plaintiff's evidence in relation to the benefits of kinesiology was vague and, in any event, the effects were not lasting. While it is true there was some suggestion from the plaintiff that the benefits of the kinesiology sessions were not entirely clear, in my view, the evidence demonstrates that it is of some benefit, particularly when coupled with her gymnasium regime.

[222] However, I do not accept the plaintiff’s invitation that the evidence supports the conclusion that she will likely need the above-noted ongoing treatment for the remainder of her life. In my view, the evidence comes nowhere near allowing for this possibility. Instead, the evidence supports the conclusion that while the future remains uncertain, the plaintiff’s injuries will likely improve. Based on the whole of the evidence, I find awarding these ongoing costs for the next ten years is reasonable.

[223] After considering the plaintiff’s submissions concerning annual sessions and the cost of those sessions, and applying a contingency as discussed below, an award in the amount of $9,390 is appropriate in the circumstances.

[224] The medical evidence, and indeed the evidence of the plaintiff, provides reason to be optimistic about the improvement of the plaintiff’s injuries with the appropriate treatment. Therefore, I find that a contingency deduction of 40% should be applied. A reasonable award on the evidence, when rounded to the nearest dollar, is as follows:

Sertraline	$2,100

Gym membership	$2,703
Tylenol	$144
Kinesiology	$9,390
TOTAL	**$14,337**

Housecleaning

[225] The plaintiff also claims for future care costs concerning housekeeping—specifically, assistance with both regular and seasonal cleaning. Courts may award, at their discretion, pecuniary damage awards to plaintiffs when they suffer an actual loss of capacity that would make a reasonable person in their circumstances unable to perform usual and necessary household work: see *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34. In my view, in these circumstances it is appropriate to assess this claim in the context of future care, rather than an aspect of non-pecuniary damages; and this is what I have done.

[226] While the plaintiff has been able to perform her household duties since the accident, her injuries cause her pain and the tasks take her much longer than before. The level of this difficulty is demonstrated by the fact that the plaintiff received the assistance of a housecleaning service in the year of the accident, which could not be sustained due to financial reasons. Therefore, I find that it is reasonable to find an award for regular and seasonal housecleaning assistance on the evidence. In my view, a reasonable person in the plaintiff's circumstances should not be expected to perform certain tasks for the next five years, during which the plaintiff should be viewed as having suffered a true loss of capacity. However, I also find that significant contingency deductions should be made to account for the real and substantial possibility that the plaintiff's condition will improve to the point that such a service is no longer medically necessary. In this regard I impose a 40% reduction for contingencies.

[227] Based on the evidence, I find that a reasonable award on the evidence is as follows:

Assistance with regular cleaning	$10,140

Assistance with seasonal cleaning	$1,800
TOTAL	**$11,940**

[228] Based on the above reasons, I find that the award for future care is $35,517.

Mitigation

[229] The defendants make a broad submission on this issue. The defendants submit that the plaintiff's non-pecuniary damages, in addition to her past and future earning capacity, ought to be the subject of deductions due to the plaintiff's failure to mitigate her damages.

[230] The law relating to mitigation has recently been revisited and re-articulated by the BC Court of Appeal in *Pearson v. Savage*, 2020 BCCA 133 :

> [74] Mitigation limits recovery based on the unreasonable failure of an injured party to take steps to limit the loss: *Graham v. Rogers*, 2001 BCCA 432 at para. 35, leave to appeal ref'd [2001] S.C.C.A. No. 467. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant argues that the plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on the issue.
>
> [75] Where a plaintiff has not pursued a course of recommended medical treatment, the defendant must prove that the plaintiff acted unreasonably in eschewing the recommended treatment, and the extent, if any, to which the plaintiff's damages would have been reduced had he or she acted reasonably: *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
>
> [76] The test set out in *Janiak* is objective. If a plaintiff had capacity to make decisions about treatment that ought to have been pursued, and the advice to pursue a particular form of treatment was sound, the question is what would be expected of a reasonable person in the circumstances considering the plaintiff's medical condition at the material time: *Cassells v. Ladolcetta*, 2012 BCCA 27 at para. 26. If, through no fault of her own, the plaintiff did not have the capacity to make the decision, the issue of mitigation does not arise.
>
> [77] Determining what is "reasonable" to mitigate a loss involves both a question of fact and law: *The Owners, Strata Plan K855 v. Big White Mountain Mart Ltd.*, 2017 BCCA 438 at para. 66. A defendant is not entitled to complain of a failure to mitigate that is caused, or materially contributed to, by the defendant's own actions: *2438667 Manitoba Ltd. et al. v. Husky Oil Limited et al.*, 2007 MBCA 77 at 18, cited with approval in *The Owners, Strata Plan K855.*

[231] In the context of the case at bar, the defendants have focused primarily, but not exclusively, on the plaintiff's failure to pursue counselling relating to the psychological aspect of her chronic pain.

[232] While the plaintiff did attempt counselling—specifically, seven counselling sessions over approximately 18 months after the accident—these sessions ended in 2018. Her counsellor for these sessions was not a registered psychologist, nor one that she had been recommended or referred to by a doctor or specialist.

[233] It is common ground that she received medical advice, including from her family doctor over the years, that recommended psychological counselling would be helpful to her recovery.

[234] It is also common ground that since her last attempt at counselling in 2018, she has not attended counselling, notwithstanding the consistent recommendations that she do so.

[235] I also find that the plaintiff knew, or ought to have known, that the recommendations she was receiving for psychological counselling were intended to assist in the quality and efficiency of her recovery. At the latest, after her assessment with Dr. Spivak in February 2019, she was referred to counselling for the psychological dimension of her fibromyalgia.

[236] The plaintiff offered a constellation of factors that caused her to be reluctant to pursue counselling. She says that the counselling sessions were draining, that they were traumatic, and that it was overwhelming to re-live the circumstances of the accident in order for, presumably, effective counselling to unfold. In the plaintiff's view, they did “more harm than good”. Furthermore, she was overwhelmed with all of her other treatments. It appears that by way of rough estimates from the data before the Court, she attended approximately 150 sessions for various treatments over the years since the accident.

[237] In addition, she says there were financial and time constraints to receiving counselling, especially given her childcare obligations and related matters.

[238] The defendants submit that in addition to counselling, the plaintiff failed to properly, and more importantly reasonably, pursue recommendations for medication that may have assisted her psychological injuries.

[239] Dr. Spivak recommended antidepressant and pain management medication in tandem with counselling. However, the plaintiff did not begin taking therapeutic doses of Sertraline—an antidepressant—until July 2021. The plaintiff had completed two months of Sertraline by the time of the trial, which the defendants say is not a full course of treatment. In regards to pain management medication, Dr. Clutterham noted that because the accident happened when the plaintiff was pregnant, she did not initially recommend many of the pain management medications that would have normally been available to the plaintiff. It is unclear on the evidence whether or not the plaintiff has pursued pain management medication over the course of the last two or three years.

[240] I am not persuaded that the defendants have proven that the plaintiff acted unreasonably in avoiding the recommendations for counselling and related medication. Any failings of the plaintiff in regards to her psychological injuries was not the product of recklessness, heedlessness, or indifference. It is plain to me on the evidence that the plaintiff reasonably struggled with her decision to not attend counselling, and that her decision was a result of her genuinely not being able to cope with what the sessions required.

[241] In addition, while it could be argued that she ought to have pursued different options concerning counselling as well as shown a little more courage in this regard; in my view, the plaintiff's resistance to counselling was largely a result of the emotional frailty brought on in large part as a result of the injuries suffered in the accident. Finally, it cannot be said the plaintiff acted unreasonably in the context of her medical circumstances.

[242] Given this finding, it is not necessary to determine whether the defendants have met the burden of proof on the extent to which the injuries would have been lessened. In any event, the evidence falls short in this regard. While there is some

evidence that had the plaintiff consistently pursued counselling, coupled with certain appropriate medication, there may have been better results, I cannot conclude, on the whole of the evidence, that undergoing such treatment and medication would have reduced the impact of the injuries, nor to what extent the injuries would have been lessened.

[243] The defendants also submit, in the particular, the plaintiff's failure to pursue a regime of antidepressant medication provides an adequate evidentiary foundation to conclude the plaintiff unreasonably failed to take steps to mitigate her loss. It was only in July 2021 that the plaintiff began medication in this regard.

[244] I come to the same finding concerning this point as I have found concerning counselling, although upon slightly different reasoning.

[245] I find on the evidence antidepressant medication was recommended and I also find the plaintiff acted unreasonably; at least following her second maternity leave, in resisting this medication.

[246] My conclusion, however, is that the evidence falls well short of establishing the extent, if any, the plaintiff's damages would have been reduced had she acted reasonably in this regard. The medical evidence in this regard was simply not developed to a sufficient degree to allow for such a finding.

[247] Therefore, I find that the defendants have not established that the plaintiff has failed to mitigate her non-pecuniary damages.

[248] I come to the same conclusion regarding mitigation relating to past and future loss of earning capacity.

[249] There is an obligation on a plaintiff to seek out alternative employment or pursue retraining within the limits of their abilities in order to mitigate their losses in earning capacity. It is the plaintiff’s duty to seek, if at all possible, a line of work that can be pursued in spite of her injuries. I conclude the evidence demonstrates it was not reasonable in the plaintiff’s circumstances to have discovered and pursued

employment or retraining in another field given the debilitating nature of her injuries as I have previously discussed.

[250] As mentioned above, Dr. Quee Newell's evidence is that the best and least disruptive option for the plaintiff was and is to continue her pursuit of self-employment as a hairstylist. This is the path the plaintiff pursued as best she could.

[251] Dr. Quee Newell provided other career options that theoretically could be available to the plaintiff. However, Dr. Quee Newell offered no views as to whether the plaintiff was at all physically capable of performing any of these alternative suggestions.

[252] I find the weight of the evidence reveals that the plaintiff's attempts to pursue full-time or part-time employment other than her home salon would have inevitably been met with difficult challenges, such as requiring significant employer accommodation, given the extent of the plaintiff's ongoing pain.

[253] I am of the view, on the evidence, that the most reasonable and realistic course of employment for the plaintiff was, and continues to be, the path the plaintiff is now travelling—developing her home salon.

[254] I find the defendants have not established the plaintiff's failure to mitigate in this regard. Further, I find the plaintiff has established, on the balance of probabilities, her inability to mitigate her injuries by seeking retraining or alternative employment.

Special Damages

[255] The parties have agreed to special damages in the amount of $6,830.54.

Conclusion

[256] To conclude, I find that the plaintiff is entitled to the following award of damages:

Non-Pecuniary Damages	$135,000
Loss of Past Earning Capacity	$125,650
Future Loss of Earning Capacity	$600,000
Future Care Costs	$35,517
Special Damages	$6,830.54
TOTAL	**$902,997.54**

Costs

[257] Costs will follow the event and are awarded to the plaintiff at Scale B. The award of costs is subject to any party advising there are circumstances relevant to the issue of costs that ought to be brought to my attention. In that event, the parties may contact Trial Scheduling and so advise.

"Crossin J."