

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cox v. Peabody*,  
2026 BCSC 38

Date: 20260112  
Docket: M221914  
Registry: Vancouver

Between:

**Alana Cox**

Plaintiff

And:

**Kluane Thompson Peabody**

Defendant

Before: The Honourable Justice LeBlanc

## **Reasons for Judgment**

Counsel for the Plaintiff:

H.T.H. Chiong  
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Counsel for Defendant:

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Place and Dates of Trial:

Vancouver, B.C.  
November 24–28;  
December 1–5, 2025

Place and Date of Judgment:

Vancouver, B.C.  
January 12, 2026

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**OVERVIEW**

[1] The plaintiff’s claim for damages arises out of a motor vehicle accident that took place on August 23, 2020 (the “Accident”).

[2] Liability for the Accident is not admitted. There are contested claims as to non-pecuniary damages, loss of past and future earning capacity, the cost of future care and loss of housekeeping capacity.

[3] The plaintiff seeks the following:

Non-pecuniary losses:	\$225,000.00
Loss of past earning capacity:	\$91,646.00
Loss of future earning capacity:	\$850,000.00
Loss of housekeeping capacity:	\$45,000.00
Cost of future care:	\$30,000.00
Special damages:	<u>\$12,064.53</u>
TOTAL:	\$1,253,710.53

[4] After considering the totality of the evidence, the applicable legal principles and the parties’ submissions, I have assessed damages in the total amount of \$1,087,110.53 consisting of the following:

Non-pecuniary losses (including housekeeping):	\$225,000.00
Loss of past earning capacity:	\$91,646.00
Loss of future earning capacity:	\$729,000.00
Cost of future care:	\$29,400.00
Special damages (by consent):	<u>\$12,064.53</u>
TOTAL:	\$1,087,110.53

**CREDIBILITY & RELIABILITY**

[5] The defendant raises concerns about the plaintiff’s reliability, and to a lesser extent her credibility. The defendant urges the court to reject her evidence, or at the

very least treat it with caution, concerning her recollection of the Accident, and steps taken to obtain further professional accreditation.

[6] Counsel for the plaintiff submits that the plaintiff has been open and forthcoming in her evidence and truthful about what she remembers and what she does not remember and that her evidence is credible and reliable.

[7] The defendant similarly raises concerns with the evidence of the plaintiff's witnesses, arguing that it should be treated with caution as they all have a close relationship with the plaintiff and want her to be successful in this litigation. The defendant submits that these close friends and family members may present evidence in a manner that favours the plaintiff's position, even if done unconsciously.

[8] Counsel for the plaintiff submit that the defence has failed to discredit any of the plaintiff's witnesses.

[9] The law respecting credibility and reliability is well-settled. In general terms, credibility "involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides": *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296.

[10] Reliability is a distinct but related concept. Rather than focusing on a witness' honesty or truthfulness, reliability is concerned with the accuracy of the witness' testimony for reasons other than honesty, such as faulty powers of observation, recall or narrative skills: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793 at para. 109.

[11] When addressing credibility, this Court frequently cites the guidance in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, where the Court stated "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[12] To assess credibility and reliability, the Court must consider factors such as the witness' ability to observe events, the firmness of their memory, their objectivity, any inconsistencies between pre-trial evidence and testimony at trial or between direct and cross-examination or with other independent evidence accepted at trial, the plausibility of the testimony and the witness' demeanour generally: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 90–92, aff'd 2020 BCCA 130.

[13] In *Bradshaw*, at para. 187, the Court suggested a witness' testimony should first be assessed on a stand-alone basis, and if inherently believable, it should be assessed in the context of the other evidence at trial.

[14] In a personal injury case, there may be reliability concerns especially when the evidence regarding injuries is based predominantly on the plaintiff's subjective reports of pain and limitation. As Justice Abrioux (as he then was) stated in *Buttar v. Brennan*, 2012 BCSC 531 at para. 24:

...the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages: *Price v. Kostryba* (1982), 1982 CanLII 36 (BC SC), 70 B.C.L.R. 397 at 397 (S.C.).

[15] That said, credibility and reliability are not "all or nothing" propositions. It is open to the Court to accept all, part, or none of a witness' evidence, and to attach different weight to different parts of that evidence: *Radacina v. Aquino*, 2020 BCSC 1143 at para. 96.

[16] Overall, the plaintiff was a reliable and credible witness who admitted when she did not recall something and did not take opportunities to elaborate on her post-Accident symptoms. I have assessed the plaintiff's evidence against the other evidence at trial, and after doing so, I accept the plaintiff's evidence concerning her symptomology following the Accident, the difficulties she faces, and her historical recollection concerning professional development as credible and reliable.

[17] The plaintiff's husband, friends, and work colleagues who testified for the plaintiff were similarly credible and reliable witnesses. These witnesses answered questions directly and to the best of their ability. I do not have concerns that they were attempting to craft their answers to assist the plaintiff. The consistency of the evidence among these witnesses demonstrates a consistent pattern of behaviours of the plaintiff before and after the Accident. The defendant has not successfully challenged this evidence.

## **FINDINGS OF FACT**

### ***The Plaintiff's Background***

[18] The plaintiff was born in Comox, British Columbia in 1988 and due to family circumstances moved throughout the province living with different family members in Kelowna, Castlegar, and Campbell River.

[19] While attending high school, the plaintiff kept herself busy with extracurricular activities and after-school employment. The plaintiff joined cheerleading and the Air Cadet Program and spent time after school volunteering in a seniors outreach program. While in high school, the plaintiff first worked at a restaurant bussing tables and then worked at a bakery where she did counterwork, sales and clean-up. Following these two jobs, the plaintiff was hired at the deli department at Quality Foods.

[20] The plaintiff explains that the employment during high school provided her with financial freedom and allowed her to pay for cheerleading competitions. The plaintiff explained that her parents were divorced when she was young, and that they lived on social assistance, and that she wanted to build her skillset and resume when she was young so that she would not be in the same position as her parents.

[21] In 2006, the plaintiff decided to leave where she was staying due to what she describes as a toxic environment. The plaintiff stopped attending grade 12 and moved to Castlegar, British Columbia, where she lived with a friend. The plaintiff was hired at Tim Hortons, and she used her paycheques to pay her rent and other

expenses. In that same year, the plaintiff left Tim Hortons to work at a local grill and then left the local grill to take employment at Subway. Each time changing jobs to increase her hours. While working at the local grill, the plaintiff was attempting to complete her grade 12 through the Online Learning Centre but she stopped in 2006 as she found it too difficult to work full time and complete her studies.

[22] The plaintiff met her husband, William Cox, when she was 17. After dating for a short time, the two moved in together in the basement suite Mr. Cox was renting.

[23] In 2007, the plaintiff and Mr. Cox bought a 3-storey townhouse, where they continue to reside.

[24] In 2007, the plaintiff started a full-time position at JJ Fashion, and she returned to the Cadet Program as a civil instructor which involved volunteering for approximately four hours per week.

[25] The plaintiff's first child was born in 2010 and the second in 2011. The plaintiff and Mr. Cox married in 2014.

[26] In 2011, after the birth of her second child, the plaintiff enrolled in a program to complete her grade 12 and in 2012 she completed the program and graduated.

[27] After completing her maternity leave for her second child, the plaintiff returned to work at JJ Fashion in a part-time role because the family did not have childcare. The plaintiff also found secondary employment at the Sandman Hotel covering the front desk on the night shift. The plaintiff's mother and sister helped the plaintiff with childcare during this period. The plaintiff testified that she wanted to work at the Sandman Hotel because she considered it to be a good stepping stone into other administrative work.

[28] In 2014, the plaintiff stopped working at the Sandman Hotel and continued working at JJ Fashion. She had started applying for administrative jobs and was offered employment at an appraisal company, which she accepted. This job allowed the plaintiff to work five days a week (part time) and pick up the children after school.

It also meant that she could be home with the children at night. When the children started school, the plaintiff commenced full-time employment at the appraisal company. The plaintiff enjoyed working there and said that she did not have any difficulties with the job demands.

[29] In 2019, the plaintiff's friend and neighbour told her about a possible employment opportunity at Castlegar Dental. The plaintiff applied for the job and was hired in September 2019. During her interview, she was told that there was opportunity to become a certified dental assistant and then hygienist. Although the pay was less than she was making at the appraisal office, the plaintiff accepted the position as there was more potential for professional growth.

[30] The plaintiff's starting salary at Castlegar Dental was \$18.00/hour whereas she was making \$19.50/hour at the appraisal office.

[31] The plaintiff was hired as a Dental Assistant (dental side) and Administrative Support (administrative side) at Castlegar Dental. The plaintiff's role as an Administrative Assistant was to work on the front desk and she was primarily answering phones, processing payments and greeting patients. As a dental assistant, the plaintiff was responsible for cleaning rooms and dental instruments, taking chart notes, working chairside with the dentist, and patient care. The plaintiff did not have any difficulties with the tasks associated with either position.

[32] After a short period at Castlegar Dental, the plaintiff started to research what was necessary to complete the certified dental assistant program and plan for childcare while she was attending the program. The plaintiff said she investigated the institutional options and required prerequisites and learned that she would be required to complete a grade 11 or 12 social sciences course and a CPR course. Once she had the prerequisites, she could apply to the program. This would require the support of a dentist, which she had.

[33] Before the plaintiff could take steps to complete the prerequisites, the COVID-19 pandemic shut down the province which had a huge impact on the lives

of many, including the plaintiff. Castlegar Dental was shut down in March 2020 and reopened as restrictions lifted on dental offices. The plaintiff did not return to work when Castlegar Dental reopened as she was required to stay home to assist the children with their online schooling and general care.

[34] The plaintiff was scheduled to return to Castlegar Dental in September 2020 when the children were permitted to return to school.

[35] Shortly after moving to Castlegar, the plaintiff and Mr. Cox developed a community of friends that the plaintiff described as her chosen family. This friend group would spend at least one night together each week, which they called "Nerd Night". During a Nerd Night the wives would make a large dinner for everyone and play with the kids while the men stayed downstairs playing games. These nights were generally loud with lots of activity and the plaintiff did not experience any difficulty participating. Generally, the plaintiff would take an active or lead role in the cooking and at times planned an elaborate activity that the kids could participate in.

[36] The plaintiff has had no prior health issues that are material to this action. She was involved in a motor vehicle accident in 2009, from which she sustained no injuries.

[37] The plaintiff was not taking any medication prior to the Accident.

[38] The plaintiff was highly social and participated in the community, including participation in her church and volunteering for events. The plaintiff's friends describe her as being friendly, bubbly, and full of energy prior to the Accident.

[39] The plaintiff led an active lifestyle prior to the Accident. Her regular activities included yoga, fitness classes, hiking, and playing on the beach with her children. Physical activity was important to the plaintiff.

[40] The plaintiff gave evidence that prior to the Accident she expected to complete the training to become a certified dental assistant and wanted to work as long as she was able.

***The Accident***

[41] The Accident occurred at the intersection of Highway 3A and Highway 6 (the “Intersection”). The plaintiff was a passenger in a vehicle driven by her friend, Bryanne Labute. Ms. Labute’s vehicle was travelling southbound on Highway 3A and was about to enter the Intersection on a green light when the defendant’s vehicle travelling in the opposite direction on Highway 3A initiated a sudden left turn across the path of Ms. Labute’s vehicle. Both vehicles sustained considerable damage.

[42] Ms. Labute’s dashcam recorded the events leading up to the Accident and after. Ms. Labute had previously watched the dashcam video without audio. The plaintiff has not watched the dashcam video and did not watch it during the trial.

[43] Ms. Labute testified that she was travelling at highway speed before the Accident and would not have been speeding as she was pregnant. On cross-examination, Ms. Labute testified that she did not slow down while approaching the intersection as the highway indicator lights were not indicating that the light would be turning yellow and the traffic light was a solid green.

[44] Ms. Labute noticed the defendant’s vehicle start initiating a left turn immediately before impact. In the audio of the dashcam footage, there is a gasping sound which was the time when Ms. Labute realized that the defendant was turning left. At this moment, Ms. Labute “slammed” on the brakes.

[45] The plaintiff testified to wearing her seatbelt and had adjusted her headrest to her height. She explained that she often has to adjust seats and the headrests in vehicles considering her height, which she described as short.

[46] The defendant did not testify at trial. At discovery, the defendant said that the glare from the sun was blocking her view of oncoming traffic and that she did not see Ms. Labute’s vehicle until the Accident. She agreed that Ms. Labute had no chance to avoid the Accident.

[47] The plaintiff recalls the sound of the impact and was able to recall portions of what transpired immediately following the Accident which was confirmed by the dashcam video. The plaintiff testified that:

- a) she does not recall bracing herself for the Accident;
- b) she heard the sound of impact which was an intense boom sound;
- c) her main concern was for Ms. Labute as she was pregnant;
- d) she has no memory of her body hitting anything in the vehicle but her knees were bruised badly;
- e) she does not know if she lost consciousness but she does not think so;
- f) the vehicle she was travelling in stopped in the intersection leading to Castlegar/Nelson and was still on the pavement;
- g) she was feeling delirious and seeing stars and recalls leaving the vehicle but didn't know where she was going and started walking into traffic;
- h) the airbags deployed and the passenger side door was damaged so she had difficulty opening the door;
- i) she felt like she was in shock and she was hyperventilating; and
- j) an ambulance arrived and took her to the hospital.

[48] The defendant submits that the plaintiff's evidence concerning a "gap in memory" is inconsistent with what the plaintiff told first responders, treating physicians, and medical experts retained for the purpose of this trial. With respect to the plaintiff's description of a "gap in memory", the plaintiff has been markedly consistent in her evidence, as summarized below:

- a) The emergency room records report a significant accident with significant bruising on the plaintiff's chest from the seatbelt. They further report no

loss of consciousness but report a gap in memory or disorientation. There is no diagnosis of concussion.

b) as reported to Dr. Chow:

At the time of the accident, she was looking down on her cell phone and just moments before impact, she looked up and did not have time to brace. The airbag deployed. She was unsure if she had direct body impact with the interior of the vehicle, but she had some bruising and swelling of both knees. She was able to exit the vehicle. She had to kick the door open, but she felt “delirious” and had difficulty focusing. She was seeing stars and was walking into the traffic.

c) as reported by Dr. Fung:

...she self-extricated from the vehicle. She felt unbalanced and “saw stars” She felt like she was in shock and started to walk into traffic on the highway.

d) as reported to Dr. Medvedev:

Ms. Cox does not recall her head striking any surface and does not recall loss of consciousness, but she experienced immediate post-accident symptoms of imbalance and visual disturbance. She recalls being on her phone at the time, looking up just before the impact. After the collision, she checked on her pregnant friend (the driver), noted no visible injuries, and then attempted to exit the vehicle. Her door was stuck; she eventually exited and felt off balance, seeing visual spots. Visibly disoriented, she reportedly walked, hunched over, into traffic and was assisted by a bystander.

e) as reported to Dr. McDowell:

... She then smelt the smoke of the air bag and thought that the car was on fire and urged them to get out of the car. She felt somewhat confused about where to go when she got out of the car she reports a witness helped her to some green area on the side of the road. At that point she knew where she was, what had happened and was not disorientated. She does not think she lost consciousness but does think that there is some brief gap in her memory of an unknown period of time as she doesn't recall the precise impact, specifically hitting her knees, or the airbags being deployed.

[49] While the actual words used may have differed, it is apparent that the plaintiff reported very early on not having any memory of her body coming into contact with anything during the Accident. The defendant has not put any evidence before me to contradict the plaintiff's recollection. Accordingly, I find as a fact that the plaintiff experienced a gap in memory at the time of impact.

***Post-Accident***

[50] At the Trail, B.C. hospital, the plaintiff was taken for x-rays and prescribed painkillers before being discharged.

[51] The plaintiff gave evidence that she was incredibly sore upon returning home, particularly in the neck area and felt hunched over. She had a large lump on her neck, bruising on her knees and other bruising from the seatbelt. She recalls crying a lot over the first few days. The plaintiff said that she stuck to her room as it was quieter in there and she was sensitive to light. She describes having head pressure, ringing ears and headaches. The plaintiff required assistance going up and down the stairs, getting in and out of bed and the bathtub.

[52] Three days after the Accident, the plaintiff attended at her doctor's office and saw a locum doctor. Thereafter she continued treatment with her family doctor, Dr. Vasil.

[53] Soon after the Accident the plaintiff experienced forgetfulness, irritability, difficulty concentrating and focusing. The medical records demonstrate a consistent pattern of the plaintiff complaining of light sensitivity, headaches, forgetfulness, ringing in the ears, irritability, difficulty focusing, balance issues, tearfulness and crying, feelings of being overwhelmed, and sore shoulders and back.

[54] The medical records are consistent with the plaintiff's observed change in behaviours following the Accident. The plaintiff's friends and husband describe the plaintiff as being a shell of her pre-Accident self. A summary of the changes include:

- a) no longer actively participating in "Nerd Night" – the plaintiff will lay down in the bedroom as it is quieter for her;
- b) quick to become irritable with her kids and husband;
- c) severe change in mood – depressed and anxious;

- d) no longer able to watch movies unless they have been screened for car accident scenes and sudden loud noises;
- e) has difficulty being in public places for very long;
- f) witnessed panic attacks (often triggered by loud noises or driving);
- g) no longer experiencing joy;
- h) not able to watch fireworks; and
- i) loss of train of thought and difficulty with conversation.

[55] The plaintiff's co-workers also reported the plaintiff's difficulty with concentration and memory and say that it continues to impact her ability to perform her job. In addition, they report the plaintiff's difficulty with sitting for long periods of time and lifting heavy objects. Accommodations have been made for the plaintiff, including a reduced work schedule, breaks when needed and rotating between administrative tasks that she may find less difficult.

[56] The plaintiff is presently working a modified work schedule of 26 hours per week from a regular 40-hour work week. The plaintiff says that this current schedule leaves her feeling exhausted at the end of the day and she has limited capacity to attend to the household chores or cook dinner.

[57] In June 2024, the plaintiff signed a contract with Castlegar Dental to be paid \$23.00 per hour.

[58] The plaintiff reports the following ongoing symptoms:

- a) variable headaches that can occur multiple times daily or several times per week with some headache-free days;
- b) brain fog and difficulty with concentration;
- c) intermittent tinnitus;

- d) balance difficulties which are improved with vision therapy and the use of prism glasses;
- e) severe and persistent fatigue;
- f) anxiety in unfamiliar and noisy environments - especially while driving;
- g) neck, shoulder, lower back and hip pain; and
- h) sensitivity to noise or multiple stimuli.

[59] The plaintiff has gained weight since the Accident. Her pre-Accident weight was approximately 130 pounds which has increased to 190 pounds as of February 2025.

[60] The plaintiff and her husband spoke to the difficulties they are having in their marriage. The Accident has had a negative impact on their relationship that is significant.

[61] The plaintiff has undertaken the following to treat her symptoms: physiotherapy (21 sessions), massage (88 sessions), chiropractic care (16 sessions), kinesiology (50 sessions), vision therapy (20 sessions), treatment at the Advance Concussion Clinic (72 sessions), counselling, occupational therapy, regular family physician visits. The defendant accepts that the plaintiff has taken the appropriate steps with respect to her post-Accident treatment.

[62] Following the Accident, the plaintiff was prescribed Aventyl and Escitalopram, at different times, in varying dosages. The plaintiff has taken and continues to take over-the-counter pain medication when she experiences back and neck pain or headaches that will not resolve quickly.

[63] In the months leading up to the trial, the plaintiff participated in a sleep study as recommended to her. The sleep study revealed that the plaintiff suffers from moderate sleep apnea. Within a month of the trial, she tested a CPAP therapy

machine and had difficulty wearing it throughout the night. The plaintiff is awaiting further information on obtaining her own CPAP machine for regular use.

**SUMMARY OF EXPERT WITNESSES**

**Medical Experts**

***Dr. Kathryn Fung***

[64] Dr. Fung was qualified as a medical expert in psychiatry. Dr. Fung assessed the plaintiff on May 6, 2025, by video, and testified as an expert for the plaintiff. Dr. Fung's report is dated May 26, 2025.

[65] Dr. Fung diagnosed the plaintiff with posttraumatic stress disorder and in her opinion the Accident was more likely than not the event that caused the plaintiff to develop the disorder.

[66] Dr. Fung opined that the plaintiff's post-Accident trauma-related symptoms are specific to the Accident, with vehicles being the primary trigger.

[67] Dr. Fung scored the plaintiff's Sheehan Disability Scale ("SDS") for school/work, social life and family life/home responsibilities at a 7 and remarked that a score of 5 or greater in any area is cause for concern and a measure of functional impairment. The plaintiff's Lam Employment Absence and Productivity Scale ("LEAPS") score is 11, indicating moderate work impairment.

[68] Dr. Fung's opinion is that the plaintiff has been partially disabled at work, home and recreationally due to the combination of her physical and psychiatric injuries. Dr. Fung opined that the combination of chronic pain and posttraumatic stress disorder results in reduced workplace capacity, consistent with her SDS and LEAPS scores. Dr. Fung found that posttraumatic stress disorder does not restrict her from working as a dental assistant and administrator, but it does decrease her sustainability tolerance. If the plaintiff attempts to push past her sustainable tolerance, she will be at higher risk of developing major depressive disorder of increased symptoms of posttraumatic stress disorder.

[69] Dr. Fung's prognosis was guarded noting that recovery from posttraumatic stress disorder typically occurs within two years of the traumatic event.

[70] Dr. Fung's recommendation for future treatment included: exercise; testing for sleep apnea; lifetime antidepressant treatment; tapering psychotherapy with an emphasis on self-management; and couples' counselling.

[71] On cross-examination, Dr. Fung testified that her diagnosis would not change if the plaintiff was diagnosed with sleep apnea.

***Dr. George Medvedev***

[72] Dr. Medvedev was qualified as an expert in neurology. Dr. Medvedev assessed the plaintiff on June 5, 2025, and testified as an expert for the plaintiff. Dr. Medvedev's report is dated July 4, 2025.

[73] Dr. Medvedev diagnosed the plaintiff with the following:

- a) Persistent post-concussion syndrome following a mild traumatic brain injury;
- b) Chronic post-traumatic headache;
- c) Musculoskeletal pain (neck, left shoulder, lower back, hips);
- d) Weight gain (likely multifactorial: reduced activity, medication side effect, mood).

[74] Dr. Medvedev also diagnosed the plaintiff with secondary anxiety and depression but admitted that was not his area of expertise and could not provide that diagnosis.

[75] Dr. Medvedev's opinion is that the Accident is the principal cause of the plaintiff's current symptoms and complaints as the temporal relationship and evolution of symptoms are consistent with post-concussion syndrome and associated sequelae.

[76] Dr. Medvedev's prognosis for full recovery was guarded and recovery to the pre-Accident level of function is unlikely. It is Dr. Medvedev's opinion that the plaintiff will likely experience difficulty with any form of retraining, novel employment, or increased stress in the workplace; that she will likely continue some degree of ongoing functional limitation; she remains at increased risk for exacerbation of symptoms with physical or cognitive overexertion; and, as a result of the concussion will harbour an increased risk of developing chronic neurological and psychiatric conditions. Mr. Medvedev noted that the plaintiff may experience some improvement with optimized management of sleep apnea and headache prevention.

[77] Dr. Medvedev's recommendations for ongoing treatment include: CPAP therapy; alternative headache prophylactic medication or Botox; ongoing kinesiology and physiotherapy; continued use of prism glasses and vision therapy, as needed; ongoing counselling/psychological support for mood and adjustment; weight management support once sleep and pain are better controlled; regular follow-up with primary care provider.

***Dr. Raphael Kian-Tho Chow***

[78] Dr. Chow was qualified as an expert in physical medicine and rehabilitation (physiatry) with a specialty in that field in medical pain management and concussion management. Dr. Chow assessed the plaintiff on June 26, 2025, and testified as an expert for the plaintiff. Dr. Chow's report is dated June 26, 2025.

[79] Dr. Chow's opinion was that the plaintiff suffered a soft tissue injury of the cervical and lumbar spine, and SI joints resulting in residual neck and back pain due to the Accident. It was Dr. Chow's opinion that the plaintiff would fulfill the suspected concussion criteria based on the 2023 American Congress of Rehabilitation criteria for concussion.

[80] Dr. Chow was also of the opinion that the plaintiff is disabled in performing physical demand tasks at or beyond the light physical demand level and needs to limit prolonged postural neck and trunk tasks. He concluded that she is disabled in doing her previous full time Dental Assistant/Administrative job. He recommended a

functional capacity assessment to determine the plaintiff's level of function without aggravation.

[81] Dr. Chow's treatment and management recommendations included those focused on controlling her symptoms as recovery seems to be plateauing or has plateaued. Dr. Chow was of the opinion that the plaintiff may benefit from: concussion rehabilitation therapy; sleep management (CPAP machine); occupational therapy intervention; referral to a headache specialist; acupuncture and massage; active rehabilitation program; continued pharmacotherapy; weight reduction program and intervention therapy.

[82] On cross-examination, Dr. Chow opined that posttraumatic stress disorder and obesity are the two main factors associated with sleep apnea.

[83] Dr. Chow's prognosis for the plaintiff was poor finding that she has permanent impairment of the cervical and lumbar spine and SI joints with chronic neck and back pain and persistent post-concussion symptoms. Dr. Chow concludes that the plaintiff's ongoing symptoms will continue to substantially interfere with her normal life activities and will have negative impact on her future housekeeping and work abilities and that she may have to take time off work as flare-ups occur. Dr. Chow's opinion is that the plaintiff will likely experience worsening of her symptoms and associated decrease in functional ability with the aging process and she will likely have to take an early retirement.

***Dr. Timothy McDowell***

[84] Dr. McDowell was qualified as an expert in the field of neurology. Dr. McDowell assessed the plaintiff on July 17, 2025, and testified as an expert on behalf of the defendant. Dr. McDowell's report is dated August 12, 2025.

[85] Dr. McDowell's clinical diagnosis of the plaintiff was:

- a) Concussion/mild traumatic brain injury;
- b) Post-traumatic headache; and

c) Functional neurological disorder.

[86] Dr. McDowell relies on the plaintiff's brief gap in memory in the immediate aftermath of the Accident as being an objective sign of concussion, along with her subjective symptoms.

[87] Dr. McDowell's opinion is that sleep apnea is likely contributing significantly to her symptoms, as it is a known cause of fatigue, headaches and cognitive complaints.

[88] On cross-examination, Dr. McDowell testified that not much weight could be placed on the lack of concussion diagnosis being made at the emergency room and he would put greater emphasis on the violent nature of the Accident and the objective signs of concussion.

[89] Dr. McDowell agreed that the plaintiff's injuries would impair her functioning.

***Dr. Joshua Muhlstock***

[90] Dr. Muhlstock was qualified as an expert in physiatry with a speciality in that field in chronic pain and musculoskeletal. Dr. Muhlstock examined the plaintiff on July 22, 2025, and his report is dated August 11, 2025. Dr. Muhlstock provided an October 10, 2025 responding report to the June 26, 2025 report of Dr. Chow.

[91] Dr. Muhlstock agreed that the plaintiff has been reporting consistent symptoms; however, it was his opinion that there were no objective findings of impairment that would demonstrate non-recovery from the Accident. Dr. Muhlstock concluded that the Accident-related symptoms would have normally recovered in three to six months and any pain the plaintiff is presently experiencing is due to mechanical/myofascial symptoms (the kind of pain most people experience).

[92] On cross-examination, Dr. Muhlstock said that he could not say that none of the plaintiff's symptoms have to do with the Accident but assessing the medical probabilities, it was his opinion that the plaintiff's ongoing symptoms are not caused by the Accident. Dr. Muhlstock further agreed that, while it is rare, it is possible not to

recover from a soft-tissue injury, but it was his opinion that the plaintiff was not one of those individuals.

[93] Dr. Muhlstock does not have experience treating patients with concussions and traumatic brain injuries and does not provide an opinion on how these diagnoses may impact the plaintiff's pain.

[94] Dr. Muhlstock did not provide an opinion on the plaintiff's prognosis as his opinion was that she was fully recovered.

[95] The basis on which Dr. Muhlstock asserts the plaintiff's injuries are fully resolved is not clear and for this reason I have placed little weight on Dr. Muhlstock's opinion. Dr. Muhlstock was unable to provide a timeline of when the plaintiff's Accident-related symptoms resolved other than by reference to the typical recovery timeline (three to six months). Further, Dr. Muhlstock did not adequately explain how the plaintiff's consistent and ongoing reports of pain to her neck and back, which she first reported soon after the Accident, transitioned into the kind of pain everyone experiences.

### **Non-Medical Experts**

#### ***Mr. Dominic Shew***

[96] Mr. Shew is an occupational therapist and was qualified as an expert in functional capacity. Mr. Shew assessed the plaintiff on February 25 and 26, 2025. Mr. Shew's report is dated March 28, 2025. Mr. Shew testified as an expert witness of the plaintiff.

[97] Mr. Shew summarized his test findings as indicating that, from a physical standpoint, the plaintiff is likely safe and able to continue with her present work, as she met the basic physical/functional requirements. From a cognitive perspective, the plaintiff met aspects of the cognitive requirements.

[98] Mr. Shew was of the opinion that due to the plaintiff's physical and cognitive limitations, she will require ongoing accommodations, including appropriate

ergonomics, the ability to take breaks to rest, stretch, and change positions, the ability to request assistance with heavier demands, the ability to work reduced hours, and understanding of a reduced level of productivity when her symptoms are aggravated.

[99] Mr. Shew finds that the plaintiff's residual capacity is more compatible with reduced hours in order to achieve a balance between her work and non-work activities.

[100] Mr. Shew defers to the appropriate experts concerning any limitations the plaintiff may experience due to her psychological and/or emotional difficulties, her headaches and difficulties with vision.

### **LIABILITY**

[101] The basis upon which the defendant denies liability is twofold. First, the defendant says that Ms. Labute materially contributed to the Accident by operating her vehicle on cruise control. Second, the defendant says that she failed to reduce her speed when approaching the intersection. The defendant further argues that if any liability is found against the defendant, it must be reduced to reflect the degree to which the loss was caused by the negligence of a non-party tortfeasor.

[102] Section 174 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 provides:

Yeilding right of way on left turn

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[103] Ms. Labute was approaching the intersection on a green light and clearly presented an immediate hazard. I find that Ms. Labute was the dominant driver with the right of way: *Miller v. Dent*, 2014 BCCA 234 at para. 16.

[104] The burden rests on the defendant: *Pacheco (Guardian of) v. Robinson* (1993), 1993 CanLII 383 (BC CA) at para. 18; *Lozinski v. Maple Ridge (District)*, 2015 BCSC 1277, at para. 68.

[105] Based on the dashcam video available to me, I find that the defendant acted without due care and attention when they initiated the left turn in front of Ms. Labute's vehicle. The defendant's left-hand turn signal was not activated and there was an immediacy of impact following the initiation of the left-hand turn by the defendant. Ms. Labute was not in a position to avoid the Accident and took appropriate steps to mitigate any loss by immediately applying the brakes when it was visibly apparent that the defendant would be making a left-hand turn. The defendant has failed to establish that Ms. Labute ought to have known that the defendant was going to turn left in front of her any sooner than the audible gasp heard on the dashcam video.

[106] The defendant did not tender evidence to suggest that Ms. Labute was speeding or that operating her cruise control contributed to the Accident. I agree with the plaintiff, by the time the defendant had initiated their left turn, the impact was unavoidable and inevitable. Ms. Labute did all that she could to minimize the impact by forcibly applying her brakes as soon as the threat was apparent.

[107] I find that the defendant was solely responsible for the Accident. I reject the defendant's suggestion that Ms. Labute contributed to the Accident.

### **CAUSATION**

[108] The basic legal principles respecting causation are set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183. The general test for causation is the "but for" test requiring the plaintiff to prove on a balance of probabilities that her injury and loss would not have occurred but for the negligence of the defendant: *Athey* at paras. 13–14.

[109] The causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328.

[110] It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable. The contribution to the cause of the injury must be material, in the sense that there is a substantial connection between the accident and the injury, beyond a *de minimus* range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9–11.

[111] A plaintiff is only to be restored to her original position, and not a better position. A defendant is not required to compensate a plaintiff for any debilitating effects arising from a pre-existing condition that the plaintiff would have experienced anyway, and if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, this is to be taken into account in reducing the overall award: *Athey*, at para. 35.

[112] The defendant does not seriously dispute the Accident caused injuries to the plaintiff. Instead, it is argued that the plaintiff's current symptoms are not from the Accident. In particular, the defendant argues that the plaintiff is experiencing sleep apnea unrelated to the Accident and that is the main contributor to the plaintiff's symptomology.

[113] The plaintiff did not experience any symptoms related to sleep apnea prior to the Accident and was in good health. I accept the evidence that obesity and posttraumatic syndrome are contributing factors to developing sleep apnea. The plaintiff has been diagnosed with posttraumatic stress syndrome specific to the Accident and weight gain as a secondary symptom of the Accident. On a balance of probabilities, I find that the plaintiff's sleep apnea was developed because of the Accident and not independent of the Accident.

[114] On the totality of the evidence, I find the Accident caused the following injuries (some of which are interrelated):

- a) Posttraumatic stress disorder;
- b) Persistent post-concussion syndrome/mild traumatic brain injury;
- c) Post-traumatic headache;
- d) Functional neurological disorder;
- e) Ongoing musculoskeletal pain (neck, left shoulder, lower back, hips);
- f) Soft tissue injury of the cervical and lumbar spine and SI joints;
- g) Weight gain;
- h) Sleep apnea resulting from Accident-related injuries; and
- i) Bruising and abdominal wall hematoma which resolved within months of the Accident.

**ASSESSMENT OF DAMAGES**

**Non-Pecuniary Damages / Loss of Housekeeping Capacity**

[115] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide and damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26..

[116] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (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).

[117] An award for non-pecuniary damages is determined by a functional approach that depends not only on the gravity of an injury but also on the plaintiff's circumstances: *McCliggot v. Elliott*, 2022 BCCA 315 at para. 44; *Matthews* at para. 44.

[118] Assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[119] Prior to the Accident, the plaintiff enjoyed socializing, caring for her family, and organizing events. She was described as kind, bubbly, energetic, and talkative. Following the Accident, the plaintiff's social and family life changed dramatically. The plaintiff is no longer able to tolerate loud noises or chaotic social situations. The plaintiff's husband described her as "needy and difficult". The plaintiff can no longer enjoy bonding activities that used to be enjoyed by her and her friends and family. This includes watching movies, participating in Nerd Night, going to farmer's markets and attending restaurants and dinner parties. The plaintiff is not able to participate

fully in her children's lives and feels like she has let them and her husband down. The plaintiff has had suicidal thoughts as she feels she is a burden to her family and friends.

[120] The plaintiff cannot participate in strenuous activity and is limited to walking short distances. The lack of ability to exercise combined with the plaintiff's other symptoms and medication have resulted in a significant weight gain of approximately 60 pounds.

[121] The Accident has negatively impacted the plaintiff's relationship with her husband, and her husband has considered getting a divorce as he harbours resentment for having to pick up where the plaintiff is no longer able to contribute.

[122] The plaintiff experiences pain on a near daily basis, and she plans her workday and home life around pain and energy management. Enduring pain, even when it is intermittent and mostly mid to low-grade, can exact a toll on everyday living and interfere with the pleasures of life. Taking care not to aggravate her symptoms and trying to manage her pain has become part of the plaintiff's everyday life.

[123] It is unlikely that the plaintiff will be able to advance educationally or professionally due to her Accident-related injuries. The plaintiff's confidence has diminished due to her loss of concentration and memory.

[124] The plaintiff's posttraumatic stress disorder is not likely to resolve itself, requiring the plaintiff to adapt her behaviours and take medication to control the symptoms.

[125] Overall, the plaintiff's life will be dramatically different because of the Accident. Her symptoms will be something that she must live with and manage daily.

[126] The plaintiff submits that a proper award for non-pecuniary damages is \$225,000. In support of this position, counsel relied on the following case authorities:

- (a) *Kingston v. Mann*, 2020 BCSC 1889: \$225,000

- (b) *Hans v. Volvo Trucks North American Inc.*, 2016 BCSC 1155: \$278,000 adjusted for inflation
- (c) *Gabor v. Boilard*, 2015 BCSC 1724: \$220,000 adjusted for inflation and including loss of housekeeping
- (d) *St Denis v. Turner*, 2020 BCSC 603: \$200,000.

[127] The defendant submits that a proper award for non-pecuniary damages is in the range of \$85,000 to \$120,000. In support, counsel relied on the following case authorities:

- (a) *Walt v. Vick*, [2021] BSSC No. 246: \$85,000
- (b) *Warren v. Biswal*, 2023 BCSC 1318: \$120,000
- (c) *Reaume v. Rossetta*, 2024 BCSC 61: \$120,000 including loss of housekeeping.

[128] Of the cases provided to me, and recognizing that no two cases are identical, I find the circumstances in *Gabor* to be the most closely analogous to the factors before me. In reaching this conclusion, I have relied on the similarities concerning the impact on daily life arising from the plaintiff's mild traumatic brain injury and ongoing back, shoulder and neck pain.

[129] In *Gabor*, the plaintiff sustained a mild traumatic brain injury with psychological symptoms, severe fatigue, and cognitive deficits with regards to attention, information processing, and memory. The plaintiff was diagnosed with chronic pain and an adjustment disorder. The plaintiff was 29 at the time of the accident and became isolated, avoided large and noisy settings and suffered from extreme fatigue. She was unable to pursue her educational and career aspirations and it was found that the injuries suffered from the accident would have a lasting lifelong impact on the plaintiff's life.

[130] The plaintiff seeks a separate award for loss of housekeeping capacity in the sum of \$45,000 calculated at 50 hours per year at \$25 per hour until the age of 75 and adjusted pursuant to B.C. Reg. 352/81 amended by B.C. Reg. 74/2014.

[131] The defendant submits that the plaintiff's injuries do not render the plaintiff incapable of doing housework completely as she has started cooking again and doing the laundry, with adaptations and more slowly. The defendant submits that any loss of housekeeping ought to be reflected in the non-pecuniary damages award.

[132] An award for the loss of housekeeping capacity is meant to compensate the plaintiff for her diminished loss of capacity – the loss of her asset – and is not a precise mathematical calculation: *Gabor* at para. 579. Because the award reflects the loss of personal capacity, which is an asset, the issue of whether she had used replacement services or is likely to hire such assistance in the future does not inform the analysis. That distinguishes this head of damages from future cost of care awards: *O'Connell v. Yung*, 2012 BCCA 57 at para. 67; *Kroeker v. Jansen* (1995), 1995 CanLII 761 (BC CA), 4 B.C.L.R. (3d) 178 (C.A.); *McTavish v. MacGillivray*, 2000 BCCA 164.

[133] The plaintiff and her husband both testified to the plaintiff's diminished capacity to perform household tasks due to either the plaintiff's fatigue or her inability to carry or lift heavy items. Other than relying on her husband and children, the plaintiff has not sought assistance with the housekeeping before this trial. I accept that the plaintiff's capacity to accomplish household tasks has been negatively impacted by the Accident-related symptoms the plaintiff experiences; however, the full extent of the impact is not known on the evidence before me. I also accept that the plaintiff will continue to experience difficulties with completing household tasks, however, the full extent of the diminishment is difficult to assess based on the evidence before me.

[134] In the circumstances, I conclude that the evidence does not justify a stand-alone award of damages for loss of housekeeping capacity. Instead, I have considered it as a factor in my assessment of the plaintiff's non-pecuniary damages.

In doing so, I rely on the decision of Justice Crerar in *Warnock v. Wijdeman*, 2021 BCSC 553.

[135] Considering the cases to which I was referred, the factors set out in *Stapley*, and the individual impacts on the plaintiff, I find the appropriate award for non-pecuniary damages, including loss of housekeeping capacity, is \$225,000.

### **Loss of Earning Capacity**

[136] In *Bhardwaj v. Wang*, 2025 BCSC 213, the Court provided the following succinct summary of the principles that govern claims for loss of earning capacity:

[91] Claims for both past and future loss of earning capacity are for the loss of the value of the work the plaintiff was or will be unable to perform as a result of the accident: *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45.

[92] The plaintiff must demonstrate that the injuries and symptoms caused by the accident have impaired his capacity to earn income, resulting in a pecuniary loss. Past events must be proven on a balance of probabilities. Hypothetical events, including what would have happened in the past but for the accident and what would have and will occur in the future, will be considered where there is a real and substantial possibility the events would occur. A hypothetical event is then given weight according to its relative likelihood: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38. Compensation is awarded based on an estimation of the chance the event would have occurred or will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44 – 48. at paras. 44 – 48.

[137] The plaintiff advances a claim for past wage loss and loss of future earning capacity.

### **Past Wage Loss**

[138] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Clayton v. Barefoot*, 2018 BCSC 239 at para. 119; citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[139] The Court assesses damages for past loss of earning capacity instead of calculating them mathematically. While in many cases the actual lost income will be

the most reliable measure of the loss, it is not the actual lost income but the lost capacity that is compensable: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. Ultimately, the award must be fair and reasonable taking into account all of the circumstances: *Sangha v. Read*, 2019 BCSC 1761 at para. 113.

[140] The parties have agreed that that plaintiff's employment earnings from 2016 to 2024 were:

2016	\$33,445
2017	\$36,203
2018	\$36,672
2019	\$38,461
2020	\$ 8,406
2021	\$ 5,811
2022	\$23,110
2023	\$25,526
2024	\$24,831

***Position of the Plaintiff***

[141] The plaintiff submits that in September 2019, the plaintiff's hourly rate was \$18.00 and increased to \$23.00 in June 2024 to match inflation.

[142] The plaintiff seeks to have an average rate of \$20.50 per hour to be applied to the calculation of the plaintiff's wage loss from the date of the Accident to the date of trial. Based on a rate of \$20.50, the plaintiff's full time yearly earnings would be \$41,000 and her past loss of earnings would be \$114,588. Adjusting this number further for taxes (20% combined marginal tax rate) results in a claimed net past wage loss of \$91,646.

***Position of the Defendant***

[143] The defendant agrees that the plaintiff lost some time from work as a consequence of the Accident. The defendant submits that any past wage loss shall be calculated based on the plaintiff's hourly rate that she was making when she was laid off due to the pandemic shutdowns. That rate was \$18.00 per hour for a 40-hour work week.

[144] The defendant submits that the period of unemployment following the Accident occurred between September 2020 and June 2021, representing nine months. The loss for the period the defendant submits would be 37.5 weeks (considering a year has 50 work weeks). This would be \$27,000 at a rate of \$18.00 per hour.

[145] For the remainder of 2021, the defendant submits that the plaintiff returned to full time work and made \$5,811.01 in that six-month period. The defendant calculates the loss for the remainder of 2021 as \$12,188.99 (\$18,000 less \$5,811.01).

[146] Continuing to use a rate of \$18.00 per hour, the defendant submits the wage loss for 2022 is \$12,890 (\$36,000 less \$23,110) and for 2023 is \$10,474 (\$36,000 less \$25,526).

[147] On June 13, 2024, the plaintiff's wage increased to \$23.00 per hour and for that year, the defendant submits the wage loss is \$14,169.

[148] For the year 2025, the defendant submits that at the plaintiff's current rate of \$23.00 per hour her yearly salary would be \$46,000 if working full time. As she is currently working 26 hours per week the difference in income is 14 hours per week until the first day of trial (45.8 weeks). The defendant submits the wage loss for 2025 to the commencement of the trial is \$14,747.60.

[149] The gross income loss the defendant submits is \$87,468.60.

#### ***CERB Benefits***

[150] There is agreement between the parties that the plaintiff received CERB benefits in the sum of \$12,000. Some of these payments were received post-Accident and may be deductible. The plaintiff testified that she was required to pay back a portion of the CERB benefits, but she was not sure how much was paid.

[151] The parties have agreed that any CERB benefit received and retained by the plaintiff post-Accident shall be deducted from the award and that the actual figure can be settled following release of these reasons.

### ***Analysis***

[152] The plaintiff started her position at Castlegar Dental with the reasonable expectation that her salary would increase as she gained experience and based on inflationary pressures. Between the date of the Accident and the date of trial, I find that it would have been reasonable for the plaintiff's salary to have increased beyond her starting salary of \$18.00 per hour. I find on a balance of probabilities that the plaintiff's hourly rate would have experienced gradual increases starting in 2021 had she not been experiencing Accident-related difficulties at work. I make this finding based on the representations made to the plaintiff at the time she accepted employment at Castlegar Dental that there would be opportunity for professional and financial advancement, along with the other evidence before me concerning salaries at Castlegar Dental. To find an award that is fair in all the circumstances, I find it reasonable to apply the average rate of \$20.50 as sought by the plaintiff. I accept this as a fair and reasonable assessment of the plaintiff's past loss of earning capacity.

[153] Accordingly, the plaintiff is entitled to an award for past loss of earnings of \$91,646 which has been discounted by the combined marginal tax rate of 20%. If there were CERB Benefits received after the date of Accident that have not been paid back, those amounts are to be deducted from the amount of this award.

### ***Lost of Future Earning Capacity***

[154] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the Court of Appeal set out a three-step analysis to guide the consideration of claims for loss of future earning capacity:

- a) Does the evidence disclose a *potential* future event that could lead to a loss of capacity (e.g. chronic injury, future surgery, risk of arthritis);

- b) On the evidence, is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If a real and substantial possibility of loss exists, what is the value of that possible future loss, taking into account the relative likelihood of the possibility occurring?

[155] The first two steps address the plaintiff's entitlement to an award for loss of future earning capacity. The plaintiff bears the burden, but as noted, the plaintiff only needs to prove the hypothetical future event is a real and substantial possibility. The general factors relevant to the Court's consideration of whether there has been an impairment of earning capacity were set out at para. 8 of *Brown v. Golaiy*, 1985 CanLII 149 (B.C.S.C.), 26 B.C.L.R. (3d) 353:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[156] The Court's objective is to determine what a particular plaintiff would realistically have done in the future had the injuries not occurred. The ability to earn income is an asset, and to the extent there is a "real and substantial possibility" that asset has been taken away or impaired by the injuries, the plaintiff is entitled to fair and reasonable compensation for that loss.

[157] If the plaintiff establishes their entitlement to an award, then at the third step of the *Rab* test, the Court must assess, rather than calculate, the value of the

possible future loss by comparing the likely future of a plaintiff's working life without the injury to their likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 at para. 25. As a final step, the Court must also review the overall fairness and reasonableness of any award: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[158] There are two possible approaches to assessing the value of a possible loss of future earning capacity: the earnings approach and the capital asset approach. The earnings approach is generally more useful when the loss is easily measurable (although, it remains the loss of *capacity* that is being compensated). Where the loss, though proven, is not easily measurable in a pecuniary way – such as where the plaintiff's income at trial is at or near their pre-accident earnings – the capital asset approach is more appropriate: *Perren v. Lalari*, 2010 BCCA 140 at paras. 12 and 32. In either case, the approach taken to the assessment of loss must be based on the evidence: *Rab* at paras. 74–75.

#### ***Position of the Plaintiff***

[159] The plaintiff submits that the plaintiff has chronic injuries for which the prognosis is negative and that the four factors in *Brown* are satisfied.

[160] The plaintiff submits that absent the Accident, she would have continued to work full-time and progressed in her career as a dental assistant, until her retirement. The plaintiff seeks an award based on her prospective earnings as a certified dental assistant.

[161] The plaintiff submits that applying the earnings approach is appropriate in the circumstances.

[162] The plaintiff relies on the current hourly wage of Ms. MacGillivray, a certified dental assistant, of \$35.00 and seeks the following:

$$\text{\$35/hour} \times 45 \text{ hours/week} \times 50 \text{ weeks/year} = \text{\$78,750}$$

$$\text{\$78,750} \times 24.6461(\text{CIVJII PVM for 31 years}) = \text{\$1,940,880}$$

[163] The plaintiff agrees that a 40% contingency should be applied to account for the possibility that the plaintiff did not complete the qualifications to become a certified dental assistant. With this contingency, the sum is reduced from \$1,940,880 to \$1,741,246. The plaintiff then agrees to a further reduction in this amount of \$679,528 to account for her with Accident earnings based on her current reduced schedule for a sum of \$1,061,718.

[164] The plaintiff has provided other alternative positions which put her future loss based on the court's findings concerning the plaintiff's likelihood of completing the certified dental assistant training.

[165] The plaintiff submits that a mid-range of \$850,000 for loss of future earning capacity is reasonable considering the assessment is not a pure mathematical one.

#### ***Position of the Defendant***

[166] The defendant takes the position that the plaintiff meets the functional demands to capably work as a dental assistant, and the plaintiff should only be entitled to an award for future loss of earning capacity for potential losses that meet the threshold of a "real and substantial" possibility and not mere speculation.

[167] The defendant submits that the plaintiff's position that she would have become a certified dental assistant but for the Accident does not meet the threshold of a "real and substantial possibility" and it is merely "possible and speculative". The defendant relies on the decision of this court in *Frankson v. Neely*, 2020 BCSC 786, wherein the plaintiff asserted a claim that she would have advanced from her existing occupation as a certified dental assistant to a dental hygienist. The plaintiff's claim was rejected on the basis that the plaintiff had not completed high school-level math and sciences courses, being the prerequisites required, and she had failed to take any concrete steps to move forward with this training. The defendant submits that a similar reasoning applies in this case.

[168] The defendant submits that the plaintiff's risk of a future loss of earnings should be weighed against the following non-accident contingencies:

- (1) The possibility that the sleep apnea treatment could improve her cognitive and fatigue symptoms, and she could increase her hours at work by treating this non-tortious condition; and
- (2) A general contingency to account for variables of the labour market, including possible market shortages, layoffs, voluntary decision to leave the labour force or pursue a different line of employment. In this regard, the defendant relies, in part, on the plaintiff's unsuccessful attempts to obtain employment in the government.

***Analysis***

[169] I find as a fact that the plaintiff's return to work has plateaued as of the commencement of the trial and I find on a balance of probabilities that the plaintiff will continue to experience opportunities to earn employment income.

[170] With the exception of Dr. Muhlstock, the medical experts all agree that the plaintiff's Accident-related injuries are limiting her ability to work and there is unlikely to be substantial improvement going forward.

[171] While the plaintiff is stoic in her efforts to return to work, after her modified workday, she returns home exhausted and incapable of accomplishing anything more than cooking a simple dinner for the family before she has to retreat to a quiet room and rest. This is a drastic contrast to the plaintiff's pre-Accident ability to work full time (and at times beyond full time), manage a busy household, and remain connected with friends.

[172] I find that the plaintiff will experience ongoing loss of employment income because of the Accident. The question to be determined next is whether there is a real and substantial possibility that the plaintiff would have completed the certified dental assistant qualifications if the Accident had not occurred.

***Certified Dental Assistant Training***

[173] Before the Accident, the plaintiff was a driven individual. The plaintiff was motivated to be a financial provider for her family and wanted to expand her skills in pursuit of better employment.

[174] Prior to the Accident and the pandemic, the plaintiff had commenced employment at Castlegar Dental. The plaintiff accepted the position at a reduced rate on the understanding that she would have an opportunity for growth, which included the support she needed to complete the certified dental assistant program.

[175] The plaintiff had discussed her desire to enroll in the certified dental assistant program and had discussed the steps required with her friends and employer. The plaintiff acknowledged that she had to complete a life sciences high-school level course and obtain her CPR certificate before she could enrol in the program. She testified that she did not have difficulty completing her Dogwood Certificate while caring for a newborn child and did not anticipate any difficulties completing the life sciences course. The plaintiff further testified that she had previously completed the CPR course and needed to get re-certified.

[176] The plaintiff researched institutions to complete the program with her friend and had made arrangements for childcare with another friend for the period of time she would be required to travel for the practicum portions of the program.

[177] The plaintiff's plans to enrol in the program were curtailed when the pandemic struck the world in 2019. The plaintiff was laid off from work and was required to facilitate her children's homeschooling and extracurricular activities. That, the plaintiff said, kept her busy most of the day, and she would have not been able to complete the prerequisites during that time. While the pandemic was an intervening factor, I find it reasonable in the circumstances for the plaintiff not to have moved forward with her further educational pursuits during this period. The plaintiff, and much of the world, was navigating the unknown and adapting to changing protocols.

[178] The plaintiff was in an upward trajectory when the Accident occurred, and her past demonstrated that she had the work ethic to continue to advance her skills and training. I find on a balance of probabilities, that had the Accident not occurred, the plaintiff would have completed her prerequisites and training to be a certified dental assistant soon after the pandemic restrictions lifted and her children returned to school.

[179] I have evidence that a certified dental assistant hourly rate in Castlegar is in the range of \$35 per hour based on Ms. MacGillivray's salary of \$35 per hour and offer of \$40 per hour. I accept the defendant's submission that Ms. MacGillivray has accumulated more experience than the plaintiff, and I will apply the low-end rate of \$35 per hour to my assessment:

$$\text{\$35/hour} \times 40 \text{ hours per week} \times 50 \text{ weeks/year} = \text{\$70,000}$$

$$\text{\$70,000} \times 22.7267 \text{ for 28 years} = \text{\$1,590,869}$$

$$\text{\$1,590,869 less } \text{\$679,528 (with Accident earnings)} = \text{\$911,341}$$

[180] While the plaintiff suggested she would likely work past the typical retirement age, I have applied a retirement age of 65.

### ***Contingencies***

[181] I have no expert evidence in this trial as to what the appropriate labour market contingencies would be for a person of the plaintiff's age and education. However, the plaintiff concedes that a discount beyond the 1.5% present value discount required under the *Law and Equity Act*, R.S.B.C. 1996, c 253, would be appropriate. The plaintiff proposes a moderate contingency discount to reflect the contingency that the plaintiff would not complete the certified dental assistant training. The defendant submits that the appropriate contingency should be 40% representing a general contingency and 20% representing a case-specific contingency for the sleep apnea condition.

[182] In *Montazamipoor v. Park*, 2022 BCSC 140 at paras. 105–110, Justice Marzari applied a 20% labour market contingency in the absence of expert evidence. This approach was also adopted by Justice Matthews in *Dunn v. Heise*, 2021 BCSC 754 at para. 202.

[183] The plaintiff is young enough that there are significant contingencies that must be considered as potentially arising between trial and her anticipated retirement. The contingencies are both positive and negative. These include voluntary and involuntary labour contingencies, the possibility that the plaintiff did not complete the certified dental assistant training, the possibility that the plaintiff would have continued in her training beyond that of a certified dental assistant or found more lucrative lines of work, the possibility of early or late retirement. When I consider these contingencies, I find 20% to be reasonable and in line with reasoning of Justice Marzari in *Montazamipoor* and Justice Matthews in *Dunn*. I would decline to provide any additional contingency related to whether the plaintiff completed the certified dental assistant training as I find that contingency is adequately accounted for in the 20% applied. I do not accept that a contingency shall be applied for the plaintiff's sleep apnea as I have found this to be developed as a consequence of the Accident and there is insufficient evidence before me to conclude that treatment of the sleep apnea will have any significant improvement on the plaintiff's recovery.

#### ***Award***

[184] Overall, and for the reasons expressed above, I am of the view that an award of \$729,000 provides a fair and reasonable approximation of the plaintiff's loss of future earning capacity based on the earnings approach.

#### **Cost of Future Care**

[185] An award for the costs of future care is based on the principle of restitution and is meant to reflect what is reasonably necessary, on medical evidence, to promote the mental and physical health of the plaintiff: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68–69. The test for an award of future care is whether a

reasonably-minded person of sufficient means would be ready to incur the expense: see *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124.

[186] To establish a claim for future care, the plaintiff must show that there is medical justification for the claim, the claim is reasonable and the expense is one the plaintiff is likely to incur: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113–115; *Lo v. Matsumoto*, 2015 BCCA 84 at para. 20. Medical justification does not require evidence of medical necessity, but there must be an evidentiary link between the medical assessment of injury and recommended treatment on the one hand, and the care recommended by a qualified health professional on the other: *Gregory* at para. 39. Awards for costs of future care are subject to a 2% discount rate: *Law and Equity Act*, s. 56.

[187] The plaintiff's claim for costs of future care is based on the recommendations of her treating and expert health care providers. Some of the costs are based on the evidence of Mr. Shew while some are based on the actual past costs incurred by the plaintiff. The plaintiff seeks \$30,000 for the cost of future care which would include the following recommended treatments:

- (a) counselling/psychologists/behavioral therapy = \$2,640 based on one session every three weeks at \$165 per one hour session.
- (b) kinesiology = \$4,316 based on a session every week at \$83 per session.
- (c) physiotherapy = as recommended by provider at \$100 per 30 min session.
- (d) occupational therapy = \$1,560 - \$1,680 plus travel fee of \$468 - \$504 for 12 sessions at \$140 per hour and 30% travel allowance.
- (e) massage therapy = \$4,680 - \$7,280 based on a session per week at \$140 per session.
- (f) sleep therapy = \$225 per session and \$2,500 for CPAP therapy.

- (g) weight management support = \$300 - \$1,000 per month.
- (h) Botox = \$1,000 per session.
- (i) vision therapy = \$1,800 for 10 sessions.
- (j) acupuncture = as needed (cost unknown).
- (k) ergonomic assistance:
  - i) \$455 for the assessment plus travel costs;
  - ii) \$1,440 for equipment
- (l) vocational assessment = \$1,890.
- (m) medications (Cipralex/Sertraline) = as needed (cost unknown).

[188] The plaintiff submits that she has not commissioned a cost of future care report as the combination of the 6% disbursement cap and the operation of s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 renders the valuation nearly moot. The plaintiff asks the court to apply a commonsense approach to determining an appropriate amount for the cost of future care. The plaintiff directs my attention to *Meckic v. Chan*, 2022 BCSC 182 at para. 186 and *Bennett v. Leschuk*, 2020 BCSC 681 where such an approach was applied.

[189] The defendant submits that it is speculative and the evidence does not support a finding that the plaintiff will make use of kinesiology, occupational therapy, vocational assistance, or ergonomic assistance. The defendant submits that a proper award ought to be \$5,400 representing \$2,400 for massage therapy, \$1,000 for counselling, and \$2,000 for pharmacotherapy. The defendant further submits that the 20% contingency should be applied.

[190] In my view, the defendant's assessment of the plaintiff's cost of future care is grossly inadequate. Taking the overwhelming recommendation that the plaintiff should participate in weight management support, the plaintiff's yearly cost for that

alone will be \$4,000 – \$12,000 per year. The plaintiff will likely also require ongoing pharmaceuticals, treatment for ongoing pain, counselling, and occupational therapy.

[191] It is easy to conclude, based on the evidence before me, that the plaintiff’s cost of future care will easily exceed the claimed amount of \$30,000. In making this determination, I have applied the commonsense approach to the evidence before me and accept that in circumstances where the plaintiff is seeking a cost of future care at the lowest end of the spectrum, a costly valuation report should not be required.

[192] I find no reason to apply a contingency discount in the circumstances as I am of the view that the amount awarded has already been largely discounted.

[193] I award the plaintiff \$30,000 in cost of future care which shall be discounted to \$29,400, after applying the 2% discount rate.

**Special Damages**

[194] The parties agree that the plaintiff has incurred expenses in the sum of \$12,064.53 and there will be an award in that amount.

**AWARD**

[195] Based on my findings above, I make the following award in favour of the plaintiff:

Non-pecuniary losses (including housekeeping):	\$225,000.00
Loss of past earning capacity:	\$91,646.00
Loss of future earning capacity:	\$729,000.00
Cost of future care:	\$29,400.00
Special damages (by consent):	<u>\$12,064.53</u>
<b>TOTAL:</b>	<b>\$1,087,110.53</b>

[196] The parties agreed that any tax gross up, management fees and CERB Benefits adjustments could be assessed post-trial. If the parties are unable to

resolve this issue, they may appear back before me by submitting a request to appear within 14 days of these reasons.

**COSTS**

[197] With respect to costs of the trial, the plaintiff is presumptively entitled to her costs, which I would order be paid at Scale B. She is also entitled to her reasonable disbursements.

[198] If either party wishes to make further submissions on costs, they may do so in writing by filing submissions not exceeding seven written pages to the Supreme Court Registry within 14 days of these reasons. The responding party shall file a response in the same manner within 14 days of receiving the filing parties' submissions.

“Justice LeBlanc”