IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cheema v. Pandha,*
2025 BCSC 724

Date: 20250417
Docket: M238099
Registry: New Westminster

Between:

Shafaq Cheema

Plaintiff

And

Komal Pandha and Pardeep Pandha

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the plaintiff, Shafaq Cheema:	J. A. Pankiw-Petty M. Pankiw-Petty A. Walia A. Letkemann, Articled Student
Counsel for the Defendants, Komal Pandha and Pardeep Pandha:	M. von Antal
Place and Date of Trial:	New Westminster, B.C. March 25 to 28 and April 2 to 5, 2024
Place and Date of Judgment:	New Westminster, B.C. April 17, 2025

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Introduction and Overview

[1] The plaintiff claims damages for personal injury and financial loss caused by a motor vehicle accident at the intersection of 64 Avenue and 152 Street in Surrey B.C., on May 14, 2019.

[2] Liability for the accident is denied by the defendants. The defendant driver admitted in cross-examination that she could have stopped the vehicle she was driving before the collision.

[3] Certain provisions of the *Motor Vehicle Act*, R.S.B.C 1996, c. 318 [*Act*] are applicable in this case. Of particular importance are ss. 86, 128, and 129, which read as follows:

> Responsibility of owner or lessee in certain cases
>
> 86 (1)In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who
>
> (a)is living with, and as a member of the family of, the owner, or
>
> (b)acquired possession of the motor vehicle with the consent, express or implied, of the owner,
>
> is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.
>
> (1.1) In the case of a motor vehicle that is in the possession of its lessee, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who
>
> (a)is living with, and as a member of the family of, the lessee, or
>
> (b)acquired possession of the motor vehicle with the consent, express or implied, of the lessee,
>
> is deemed to be the agent or servant of, and employed as such by, that lessee and to be driving or operating the motor vehicle in the course of his or her employment with that lessee.
>
> (1.2)In the case of a motor vehicle that is in the possession of its lessee, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who acquired possession of the motor vehicle with the consent, express or implied, of its lessor is deemed to be the agent or servant of, and employed as such by, that lessor and to be driving or

operating the motor vehicle in the course of his or her employment with that lessor.

(1.3)The liability under subsection (1.2) of a lessor is subject to the applicable limit established under section 82.1 of the Insurance (Vehicle) Act.

(2)Nothing in this section relieves a person deemed to be the agent or servant of the owner or lessee and to be driving or operating the motor vehicle in the course of his or her employment from the liability for such loss or damage.

(3)In this section:

"lessee" means a person who leases or rents a motor vehicle from a lessor for any period of time;

"lessor" means the following:

> (a)subject to paragraph (b), a person who, under an agreement in writing and in the ordinary course of the person's business, leases or rents a motor vehicle to another person for any period of time;
>
> (b)if the lessor referred to in paragraph (a) has assigned the agreement, the assignee;

"owner"

> (a)includes a purchaser of a motor vehicle who is in possession of the motor vehicle under a contract of conditional sale by which title to the motor vehicle remains in the seller, or the seller's assignee, until the purchaser takes title on full compliance with the contract,
>
> (b)if a purchaser of a motor vehicle is in possession of the motor vehicle, does not include the seller of that motor vehicle under a contract of conditional sale described in paragraph (a) or the assignee of that seller, and
>
> (c)does not include a lessee of a motor vehicle who is in possession of the motor vehicle under an agreement in writing with the owner, whether or not the lessee may become its owner in compliance with the agreement.

(4)This section, as amended by section 43 of the Miscellaneous Statutes Amendment Act (No. 2), 2007, applies only in relation to loss or damage sustained on or after the date that section comes into force.

Yellow Light
128(1) When a yellow light alone is exhibited at an intersection by a traffic control signal , following the exhibition of a green light,
(a) the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection , unless the stop cannot be made in safety….

Red Light
129(1) Subject to subsection (2), when a red light alone is exhibited at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light must cause it to stop before entering the

> marked crosswalk on the near side of the intersection, of if there is no marked crosswalk, before entering the intersection and subject to the provisions of subsection (3), must not cause the vehicle to proceed until a traffic control signal instructs the driver that the driver is permitted to do so.

Evidence

The Accident

[4] On May 14, 2019, the defendant, Komal Pandha, was driving alone in a 2011 Nissan Rogue SUV with the consent of the owner of that vehicle, Pardeep Pandha (the "Pandha vehicle"). The defendant was driving northbound on 152 Street towards the intersection with 64 Avenue . The collision occurred shortly after 7:00 a.m., it was a daylight, and the roads were wet because of prior rain.

[5] The collision was recorded by video on a City of Surrey Traffic Camera which became an exhibit in this action.

[6] The plaintiff was driving her Chrysler motor vehicle (the "Cheema vehicle") from her home to her workplace. The plaintiff was intending to turn left from 152 Street southbound to 64 Avenue. eastbound.

[7] The intersection of 152 Street. and 64 Avenue is controlled by traffic lights and there are marked crosswalks on all sides of that intersection.

[8] South of the intersection, there is a railway level crossing with a number of safety devices marking the railway crossing. The railway crossing stop line spans 152 Street and controls traffic movement in both northbound and southbound lanes when a train is about to cross or in the act of crossing 152 Street The railway crossing stop line is 21.6 metres south of the centre of the nearest crosswalk line. The railway crossing is controlled by a crossbuck sign mounted on a support post. Attached to the same support post, there are flashing red stop lights and lowering gates also equipped with flashing red lights. There are identical support posts placed in both northbound and southbound lanes of 152 Street. These traffic control devices are visible in Exhibit "X". Drivers are not required to stop at the railway crossing unless the railway crossing lights are illuminated and the gates are lowering. The

safety signals listed above were not illuminated, nor in use at any time material to the collision. Curiously, these traffic control devices, lights and lowering gates are not mentioned in the report filed by Mr. Luker, and this lack will be discussed further in these reasons.

[9] There is a large area of painted markings in a cross-hatched pattern on the roadway on 152 Street between the railway crossing and the crosswalk.

[10] The speed limit on 152 Street is 50 km/h.

[11] Ms. Pandha was driving northbound on 152 Street. in the centre lane. She had a clear view of the intersection without obstruction. The plaintiff approached the intersection southbound in the centre lane of 152 Street and moved into the left turn lane for the purpose of preparing to turn eastbound onto 64 Avenue. She had illuminated her left turn signal but had not yet commenced a turn. As she entered the intersection, the traffic light she was facing was illuminated and was green. She had the left turn signal of her vehicle operating.

[12] The plaintiff assessed oncoming traffic. A truck opposite her turned left onto 64 Avenue westbound. Several vehicles northbound proceeded through the intersection, while the plaintiff waited with her vehicle stationary in the left turn southbound lane.

[13] The plaintiff, at this point, was in the intersection, with her front wheels turned to the left moving slowly. Her left turn signal light was still operating.

[14] The traffic light turned yellow and the Pandha vehicle was required to stop unless it was unsafe to do so. No evidence was called by the defence to support the proposition that stopping would have been unsafe in the circumstances of this case. In the video, the Pandha vehicle is seen in the centre lane and when the light changed to yellow Ms. Pandha's vehicle was located south of the railway crossing and the railway signal stop line. The plaintiff described the Pandha vehicle as "far away", approximately 55.6 metres to the south of the nearest crosswalk and 73 metres south of the point of collision. Ms. Cheema assessed that the defendant,

facing a yellow light, would stop before entering the intersection. With the yellow light illuminated and the distance of the Pandha vehicle south of the intersection, the plaintiff, quite reasonably, did not think that the Pandha vehicle was an immediate hazard.

[15] The traffic signal turned from yellow to red at the point the Pandha vehicle was in the southern crosswalk of the intersection.

[16] Ms. Pandha acknowledged, in cross-examination, that she could have stopped safely before the southernmost crosswalk in response to the illumination of the yellow light. She did not brake but continued accelerating into the intersection. Her average speed was at least 60 km/hour and was therefore exceeding the speed limit.

[17] Per the video, the Pandha vehicle was on the southern crosswalk when the rear brake lights of that vehicle were first displayed. The Pandha vehicle did not stop, but continued northbound across the intersection until it collided with the front right passenger side of the plaintiff's vehicle. The Cheema vehicle was turned to the east by the force of the impact with the larger Pandha vehicle, airbags in the Cheema vehicle deployed and it rolled slowly northbound on 152, eventually coming to a stop nearby.

[18] The speed of the Pandha vehicle increased the force of the impact against the Cheema vehicle and the plaintiff.

The Plaintiff

Circumstances Before the Accident

[19] At the date of the collision, the plaintiff was a 25-year-old woman, born on March 28, 1994. She was born in Pakistan and then moved with her parents and brother to Canada in 2004.

[20] She was a busy high school student with strong academic grades. She worked part time at a McDonald's restaurant and volunteered at her church by

assisting with accounting and musical presentations. She took music lessons in piano, violin and voice. She graduated high school a year earlier than other students of the same age.

[21] Between 2011 and 2012, the plaintiff took a year off school, but continued to study calculus and physics in the hopes of going to medical school. She was accepted to attend medical school in Barbados, but had insufficient financial resources to afford the tuition or student loans. She continued to volunteer in her church and continued with her interest in music. She also pursued her interest in makeup and eyelash care by practising on family members.

[22] From 2012 to 2013, she attended UBC Okanagan where she met her now husband, Gopal Patel. She eventually transferred to Kwantlen Polytechnic University where she graduated with a bachelor of business and accounting. While attending university, she had part-time jobs in sales at “Forever 21”, a fashion clothing store for men and women, and as a server in a banquet hall. Until 2015, she also taught Sunday School. She worked three days per week at Forever 21 for four to five hour shifts, and six to eight hours per week at the banquet hall. Her father’s church closed in 2015, and thereafter her father opened a small used car business. The plaintiff obtained her Salesperson certificate and began working for her father’s business preparing books, picking up required parts for repairs, and dropping off cars for repairs.

[23] While in university, Ms. Cheema worked as a bookkeeper at “One Source”, a business supply company. She had a positive experience with her employers at One Source, and her responsibility in the financial affairs of the company increased across accounting, bookkeeping, payroll and customer support for a minimum of 40 hours per week. Her hourly wage increased from $12.00 per hour in 2016 to $19.00 per hour by 2019. Her tasks increased over that period to include auditing books, reconciling bank statements and credit card statements, monitoring for fraud, as well as accounts receivable and payable. She also exercised control over insurance benefits and administration for employees.

[24] Her work required intense focus and was detail-oriented. She was sitting at her desk throughout her work day, typing at her computer. Frequently she worked more that 40 hours per week prior to the accident.

[25] Ms. Cheema testified that prior to the collision she had no pain, psychological problems, or functional limitations and was an active contributing member of her community and in the business arena.

[26] Ms. Cheema developed an interest in makeup and the placement of artificial eyelashes. She initially provided makeup and eyelash services to her friends and family members. She then took training courses in eyelash extensions and incorporated a company to conduct business as an eyelash technician. The company was successful. In order to achieve further success, Ms. Cheema worked long hours in the evenings and on weekends to make positive monetary results.

Circumstances After the Accident

Injuries and Functional Limitations

[27] The injuries suffered by Ms. Cheema include chronic and functionally limiting pain in her neck, shoulders and back. The pain which she experiences radiates into her right arm, right hand and right leg. There is evidence that she experiences traumatic stress disorder, anxiety, major depressive disorder and she has on occasion experienced suicidal ideations.

[28] Immediately following the collision, the plaintiff's left hand was splinted, and her left knee was bandaged. Her vision was blurry, and she had sensitivity to loud noises and bright lights. She required crutches to walk.

[29] She continued to experience neck pain, shoulder pain, back pain, and headaches. Her pain in her left wrist improved over the five years post-collision. She also experienced pain in her right jaw which radiated down her right side into her right hand, arm, leg and into her right foot. She developed numbness and tingling in the fingers of her right hand, particularly numbness and tingling in her thumb, middle, index and pinky finger.

[30] The plaintiff gave compelling evidence about the functional limitations these injuries have had on her, including the lower back and shoulder pain which restrict her movements. She testified that headaches do not occur as often as they occurred immediately after the accident, but the frequency increases if she increases her activity level. Her lower back and shoulder pain restrict her from her former activities. She also has lumbar and leg pain each day.

[31] She finds her energy level is low and she experiences fatigue every day, which was not present before the accident. The low energy and fatigue make it difficult to focus on the many tasks she participated in pre-collision, including her work. She has issues falling asleep and if she wakes during the night, often caused by pain, she has difficulty returning to sleep. She finds it difficult to concentrate if she is tired and has not had sufficient sleep.

[32] The plaintiff has experienced anxiety, irritability, low mood and low energy post-collision. She experienced flashbacks of the collision. She had problems with concentration and depression which prevented or reduced her capacity to work.

[33] Ms. Cheema also experienced suicidal ideation; feeling that she had become useless and had no positive future. In October 2019, following a severe panic attack, she was treated in Surrey Memorial Hospital. She describe feeling useless, hopeless, and feeling like there was no point in living. These thoughts occurred several times per week.

[34] She is embarrassed as she has gained between 20 and 30 pounds over the last five years and has difficulty regulating her diet. Her appetite is poor and inconsistent, and she often experiences nausea.

[35] Her right hand continues to be painful and cramps regularly during activities including typing or holding a telephone. It is sometimes painful when she is holding the steering wheel of a car.

[36] In terms of treatment, the plaintiff frequently visits her family doctor. Since the collision, she has attended a concussion clinic, physiotherapy, massage therapy,

occupational therapy, active rehabilitation, and counselling. When she is able to work, she must use a therapeutic heating pad daily. She receives treatments with a massage therapy gun and uses foam rollers to treat both her legs, particularly the right one. Special pillows assist with her sleep.

[37] Ms. Cheema has been prescribed a significant amount of medication, including Naproxen, Advil, melatonin, and amitriptyline. She describes her current health as poor.

Employment

One Source

[38] The plaintiff's ability to type and enter data on a computer have diminished considerably. She testified that she even has difficulty opening mail. She finds she can only focus on one activity at a time in the office and cannot multitask as she did pre-collision.

[39] She has difficulty sitting for long periods of time and is compelled to take frequent breaks and stand or walk repeatedly. She has found that mental arithmetic, a practice in which she showed some considerable skill, is no longer available to her particularly when she has a headache, which is frequent. The noise in her office is irritating and as a result she works on the lower floor where there are fewer people present.

[40] While she has returned to One Source on a part-time basis, she has not been able to return to full-time.

Eyelash Installation

[41] The plaintiff made several attempts to continue her eyelash business but found it impossible. The pain in her shoulder, neck, and back was significant, and the plaintiff found she was unable to maintain the body positioning for the length of time required to apply the eyelashes.

[42] The installation process requires precision and the use of her fine motor skills. The pain in her hands, shoulders, and neck simply prevent any attempts to restore her skills in that area. The pain and cramping in her hand make this work impossible.

[43] As a result, the plaintiff has ceased this business entirely.

Other Activities and Social Life

[44] The plaintiff noted a marked loss in her non-employment interests post-collision. The plaintiff has lost her interest in music and finds it difficult to find the energy necessary for singing. Before the accident, the plaintiff sang daily, and she testified that this change in her life saddens her. Prior to the accident, Ms. Cheema was a social organizer in her community, however, she now prefers to stay home. The plaintiff has lost any pleasure in driving and now dreads it. She only drives to and from work.

[45] Ms. Cheema described the beginning and development of her relationship with Gopal Patel, her now husband, whom she met while they were both attending UBC Okanagan from 2012 to 2013. She described their strong relationship pre-collision. They enjoyed doing many activities together including hiking, kayaking, ziplining, jet skiing, long drives and walks, mall visits and workout sessions at gyms.

[46] The plaintiff's relationship with her husband is still positive, however, it has become less intimate, and they engage in fewer activities outside their home. Prior to the collision, they would frequent go to a restaurant for dinner to socialize with friends. However, that activity is now rare, and the plaintiff has difficulty with the noise or background music in restaurants or at family events.

[47] The couple were married in October 2022 and their families held a formal Hindi ceremony in March 2023. The plaintiff was very disappointed that she was unable to prepare her makeup, eyelashes and other adornments for herself. Her makeup was provided by someone else. The ceremony includes a traditional dance performed by the couple. For the plaintiff's wedding, the traditional dance had to be

reduced in length because she did not have the capacity to perform the dance for the traditional length of time. She was extremely disappointed by this.

Lay Witnesses

Gopal Patel

[48] Gopal Patel is the plaintiff's husband. He described how he and the plaintiff met in 2012 and began dating in 2013. He stated that they were very happy together, deeply in love and that they engaged in a variety of activities together.

[49] Mr. Patel described the plaintiff as having a bubbly personality and that pre-collision, she was a strong and energetic person without physical limitations. He described how she worked full-time at One Source and was working to expand an eyelash and makeup application business called "Lashes By Shaffy". He considered the plaintiff to be ambitious, energetic and always busy.

[50] Mr. Patel received a telephone call from the plaintiff advising him of the accident. At that time, he was in St. Lucia. Upon his return, the plaintiff was wearing a cast, using crutches, was emotional and displaying a low mood. He described her behaviour as withdrawn. He testified that she was anxious and stressed for more than a year post-collision and was on one occasion hospitalized due to a panic attack.

[51] After their marriage in October 2022, the couple began living together. Mr. Patel noted that his wife had difficulty sleeping and would awake frequently during the night.

[52] Their formal wedding ceremony in March 2023 marked the 10 year anniversary of their relationship. Mr. Patel was aware that Ms. Cheema was disappointed that she had to shorten their traditional Hindi wedding dance.

[53] Mr. Patel testified that he witnessed the plaintiff experience pain and discomfort frequently in a variety of activities. These included travel, energetic activities in the gym, hiking, and attending social events. The plaintiff was unable to

complete these activities and would express the need to lie down or return home early to relieve from pain. Mr. Patel stated that the plaintiff often expressed disappointment and stress about her lost career goals.

Emmanuel Cheema

[54] Emmanuel Cheema is the plaintiff's father. Mr. Cheema is a church pastor and the owner of a used car dealership.

[55] He described his daughter as vibrant and independent with a developed interest in makeup and fashion clothing. She was involved in his church and community as a musician. She would sing and play piano, violin, and guitar. She was very involved in the church community and took part in organizing events, including family gatherings, hiking, and exercising in the gym. He told the Court that her nickname "Sherni", translates as "Lioness". He stated this was an indication of her ambition.

[56] Mr. Cheema testified that the plaintiff set up a studio in his home to begin providing eyelash extensions to friends and relatives. This quickly became a commercial business which he understood his daughter had every intention of growing.

[57] Mr. Cheema went to the collision scene on the day of the accident. He found the plaintiff trembling in her car, and he noted her hand and knee were bleeding. He followed her in the ambulance to the hospital.

[58] In the months which followed the accident, he observed his daughter in constant pain. She suffered panic attacks and nightmares. Unlike the pleasant out-going person he knew before the accident, Ms. Cheema frequently wanted to be left alone. Pain made her daily tasks challenging and she simply did not participate in family events like birthdays, dinners and even Christmas celebrations due to her discomfort. When she did attend family events, she often left early.

[59] Mr. Cheema noted a marked difference in the plaintiff's interest and enjoyment in fashion and makeup. Before the accident, this was a source of joy, however, post-collision she rarely dressed up or did makeup for herself. Mr. Cheema found this to be a reflection of how severe the effect of the accident was on her. He noted that since the accident her emotional state has improved but described her as "still a very unhappy girl".

Gazal Cheema

[60] Gazal Cheema is the plaintiff's cousin and a close companion of hers. They have had a close relationship for their entire lives. Ms. Cheema described the plaintiff as an energetic organizer of family events where she enjoyed dancing with younger children and entertaining the family by playing piano or guitar. Ms. Cheema would assist the plaintiff to arrange sound systems and microphones in the church prior to services and then take them to the Cheema home thereafter.

[61] The two women liked to bowl, walk on the beach, dance and enjoy meals together. Ms. Cheema described the plaintiff as her own personal "Uber" service, because the plaintiff would so frequently provide a ride to Ms. Cheema from her home to any activity and return her home when the activity was complete. This reversed post-collision, and Ms. Cheema became the one to drive the plaintiff.

[62] Ms. Cheema described how the plaintiff would style her hair, apply makeup, and provide eyelash extensions. She noted that other friends admired the eyelash extensions installed by the plaintiff, and she would refer her friends to the plaintiff's business.

[63] Further, Ms. Cheema testified that pre-collision, the plaintiff would also style her own hair and do her own eyelashes and makeup. Post-collision, the plaintiff wore her hair in a simple bun and Ms. Cheema would apply makeup for the plaintiff.

[64] Ms. Cheema described the plaintiff as having no physical limitations before the accident, and that she was outgoing and always open to a new activity. Post-collision, Ms. Cheema noted that the plaintiff was physically limited and

regularly fatigued. She noted that the plaintiff could not lift anything heavy. At the plaintiff's birthday, which occurred during the trial, the plaintiff was unable to hold the camera still enough to take a picture.

[65] Ms. Cheema testified that the plaintiff did not attend many family events after the accident, but when she did attend, she appeared to be tired and would either leave early to take a break to lie down during the event.

[66] Ms. Cheema testified that her cousin constantly uses a heating pad and massage gun at her own home for pain relief. Ms. Cheema's impression was that while her cousin is calmer than she was immediately after the accident, the plaintiff remains quite depressed because her rehabilitation has not produced the desired result. The plaintiff is constantly fatigued, and the two women do not spend as much time together as they had enjoyed before the accident.

Laina Beckawoo

[67] Laina Beckawoo is an eyelash technician, the same age as the plaintiff. She operates her business in her home under the name "Laina and Co. Lash Studio". Ms. Beckawoo was certified as an eyelash technician in 2018 and opened her business in 2019. Her start up costs were about $4,000. Ms. Beckawoo has two children, the youngest being two years old. She testified that the work of eyelash extensions was physically demanding as it was difficult to take breaks as the technician had to use tweezers in both hands to glue artificial lashes to natural lashes up to 200 times in each service. Individual services by Ms. Beckawoo were priced as follows: Classic $120.00 (2 hours), Hybrid $165.00 (2.5 hours), Volume $165.00, and Maintenance Fills from $55.00 to $100.00. Her expenses took 10% of her revenue.

Expert witnesses

Craig Luker

[68] Craig Luker is an expert witness, called by the defendants, qualified in the field of engineering and accident reconstruction in both criminal and civil matters. He

holds a Bachelor of Engineering from the Royal Military College and a Master of Science in Engineering from Purdue University. He is also qualified in Measurement Systems and Advanced PC-Crash. Mr. Luker is a member of the Association of Professional Engineers and Geoscientists of B.C. and a member of the Accreditation Commission for Traffic Accident Reconstructionists, among other certifications. He has been involved as a forensic engineer since 2008.

[69] Mr. Luker testified that if the defendant had been travelling at 50 km/hr when she first saw the yellow light illuminated, her reaction time would have been between 0.9 and 1.1 seconds, during which she would have travelled between 12.5 and 15.3 metres. He also calculated the average deceleration or braking force in response to an illuminated yellow light was 0.32 g to 0.44 g.

[70] Mr. Luker then calculated the stopping distance would have been between 22.3 and 30.7 metres. Using the slowest average reaction time and the least stopping force, the defendant's vehicle would have stopped within 46 metres and using the fastest average reaction time and highest stopping force, the defendant's vehicle would have stopped within 34.8 metres.

[71] Mr. Luker also testified that Ms. Pandha was travelling at an average speed of 60 km/h on a roadway where the posted speed limit was 50 km/h. In other words, Ms. Pandha was driving over the speed limit. He also noted that she accelerated before braking and the brake lights on her car were not illuminated before the traffic signal lights in the intersection had turned red. This is shown in Exhibit 4, tab 2, p. 11 a photo frame with a time stamp of 07:12:06, where the Pandha vehicle is at the south edge of the intersection.

[72] At page 4 of Mr. Luker's report dated December 22, 2023, he states:

> Notice that the presence of the railway crossing extended the intersections southbound leg with the northbound stop line located south of the railway tracks.

[73] Mr. Luker also agreed that he had no experience nor qualification with the design of motor vehicle intersections. He gave evidence that this was an "unusual

intersection". He failed to note that there were traffic control signals which control motor vehicles approaching the railway tracks when there is a railway vehicle present in or approaching the intersection. The railway-related control devices and markings are only engaged when a railway vehicle is present, and the safety equipment is engaged. The foregoing statement in Mr. Luker's report about the extension of the southbound leg of the intersection is incorrect and of no value at all as a matter of evidence based on the foregoing. The railway signals were not illuminated and there was no railway vehicle present or approaching. The railway stop line was not a line which required vehicles to stop unless there was a railway train in the immediate vicinity and the flashing lights were illuminated. As a matter of fact, there was no extension of the "southbound leg" of the intersection created by the railway stop line. No train was present in the case at bar.

Dr. Navraj Heran, Neurosurgeon

[74] The plaintiff called Dr. Navraj Heran, an experienced neurosurgeon, who prepared an expert neurological report where in the injuries sustained by Ms. Cheema caused by the accident were diagnosed, as follows:

a) Myofascial injuries involving the neck and upper torso eccentric towards the right side.

b) Myofascial injuries involving the low back eccentric towards the right side.

c) Probable mechanical neck pain arising from structural spinal elements, right sided.

d) Likely C6 radiculopathy versus post-traumatic neurogenic-type thoracic outlet syndrome involving the upper trunk.

e) Mechanical low back pain arising from structural spinal elements with associated right-sided L5 or S1 radiculopathy.

f) Cervicogenic headaches.

g) Soft tissue injuries to the left wrist and left knee.

h) Right shoulder pain (not yet diagnosed).

i) Psychological impairments with features of post-traumatic stress disorder, driving anxiety, depression, and generalized anxiety as a consequence of the accident itself, as well as the sequelae of chronic pain, functional limitations, socioeconomic disruption, and sleep impairments.
[Ex. 2, tab19, pg. 7]

[75] Dr. Heran prepared two reports dated October 30, 2023, and December 21, 2023. In his second report, marked as Exhibit 2 at trial at the bottom of page 2, Dr. Heran stated:

> Review of the above imaging supports my diagnosis of mechanical pain arising from the neck and low back. These changes are consistent with the C5-6 level as previously speculated and in the lumbar spine, the L5 - S1 level. There is no Frank nerve root compression; however, this does not exclude the presence of a more prominent discursive herniation in the past that has since regressed.
>
> Therefore, my diagnosis overall remains as previously outlined with additionally structural mechanical pain with reference source of symptoms in the low back accounting for the right-sided pseudo-radiation. There is nothing to suggest that there is an operative condition in the low back for certainty based on the imaging studies; however, L5-S1 facet joint blocks should be performed and, if beneficial, oblations can be conducted and, even more aggressively, fusion. In the cervical spine, similarity this would be targeting the C5-6 and sequentially C4-5 given the changes identified at the sites. Here too surgery may be an option if benefit from the facet joint blocks is established. Right now, I would not jump into any surgical interventions until confirmation has been established.
>
> Dr. Ganesan's assessment has clarified psychological impairments as outlined. I defer to him in commentary further. Either way, these are consistent with what I have outlined under my diagnosis #8.
>
> With respect to the right shoulder, there are some changes in the scan with tendinitis or tendinopathy that support structural sources of pain generation. I will defer this to an orthopaedic specialist.

[76] In his examination in chief, Dr. Heran explained that post-traumatic headaches which occurred after the accident had resolved but that cervicogenic headaches also a result of the accident continued for an extended period. This was in response to the number of medical records pertaining to the plaintiff which indicated she suffered headaches for the months and years following the collision.

[77] Dr. Heran found that the plaintiff, as a result of the accident, presented with persisting low back pain with radiating pain into her right leg, a condition that was progressively worsening as well as notable and dominant right-sided neck pain extending down her right arm. Her right shoulder showed discrete pain. These symptoms had shown improvement but had not resolved; aside for left wrist pain.

Cervicogenic headaches and central neck pain had also improved and had knee pain but these injuries were not resolved.

[78] In his first report, Dr. Heran recommended further Magnetic Resonance Imaging (MRI) to further delineate pain originators in her cervical spine, lumbar spine and right shoulder. Dr. Heran recommended against active rehabilitation or exercise programs given the extent of the neural type of pain distribution the plaintiff had shown. The mainstay of treatment at that time was neuromodulating medications for chronic pain management including Lyrica, Gabapentin, Amitriptyline, Nortriptyline, and Cymbalta. In addition, the use of anti-inflammatories and acetaminophen was strongly recommended, if any activities exacerbated pain.

[79] Dr. Heran noted that from a functional perspective, the plaintiff was totally disabled for a period of two years following the accident and partial disability thereafter which continued thereafter that has not allowed return to full time work hours. Similar limitations were noted in domestic and recreational activities.

[80] Dr. Heran described that the plaintiff can tolerate sedentary to light duties with break taking, posture adjustments and the use of an ergonomic environment, wherein she cannot work full-time, a circumstance that is expected to continue indefinitely into the future. He states in the report: “Therefore, she will continue to be in the capacity she is now and will have to refrain from and require assistance from others for tasks that she has difficulties with. Hired assistance in home environment is strongly recommended particularly for any deeper cleaning, moving purposes and seasonal activities where needed.”

[81] The foregoing paragraph from the first report of Dr. Heran demonstrates there was significant evidence that the plaintiff’s vocational and avocational activities had to be reduced because of pain or exacerbated pain which she experienced as a result of the collision. Dr. Heran also noted that the plaintiff was definitely at increased risk for exacerbation and aggravation of all sources of pain that continued to the date of the first report.

[82] In his second report, Dr. Heran's review of MRI imaging which confirmed mechanical pain originating at C5-6 and L5-S1.

Dr. Soma Ganesan, Psychiatrist

[83] The plaintiff also called Dr. Soma Ganesan, a medical doctor since 1975 and a specialist psychiatrist since 1988, to provide an independent medical-legal report after examination of Ms. Cheema on October 11, 2023. Dr. Ganesan gave evidence as an expert physiatrist. The following is a pertinent except of his report:

> (104) as a result of the indexed accident [s]he suffered from the following:
>
> (105) 1. Pain syndrome, which has now lasted for more than four years and is likely impinging on chronicity. She has accessed several treatment modalities and some pain symptoms improved but others have continued to persist, and this continues to cause a barrier to her work life, social life, and family life, as stated above....
>
> (106) 2. She has a history of blurred vision and altered consciousness at the time of the accident, and she continues to have cognitive function difficulty, as stated above. She had difficulty in performing the concentration test and had an issue with short-term recall, as well as issues with visuospatial executive function, as mentioned above.
>
> (107) She also has difficulty performing multitasking at work and difficulty with data entry because of wrist pain as well as feeling exhausted when working with numbers constantly. She had concussion symptoms and was referred to the Concussion Clinic for education. She continues to have cognitive function difficulties and therefore the possibility of mild traumatic brain injury needs to be evaluated. It is also likely that her current cognitive function difficulties potentially have a multifactorial effect because she is overwhelmed with anxiety, depression, and sleep difficulty. Further investigation needs to be carried out to identify her deficits so that a potential treatment plan can be implemented.
>
> (108) 3. Emotionally suffers from the following as per DSM-5 diagnosis:
>
> (109) (a) Post-traumatic stress disorder. The details of the accident still bother her and she was a very anxious and confused after the accident, which he saw as a life-threatening accident because the air bags deployed and several symptoms developed afterward. She had moderate to severe PTSD symptoms after the accident but is now showing improvement, likely from the benefit of counselling as well as a gradual sensitization when she tried to expose herself to challenging events such as driving.
>
> (110) (b) Major depressive disorder, currently moderate, with the signs and symptoms as documented above. Her depressive symptoms were more prominent in 2020 and have slowly become reduced in intensity, although they are still at a moderate level. The depressive symptoms are associated with significant anxiety symptoms as documented above. Her major

> depression has significant overlapping symptoms of anxiety. The anxiety symptoms were more prominent and 2020 and are now reduced to the mild to moderate level.
>
> (111) She continues to have difficulty at work, in her social life and her family life, as mentioned above.
>
> [Ex.2.Tab 18, p. 12-13]

[84] Dr. Ganesan provided the following prognosis:

> (121) Given the prolongation of her symptoms until now, expecting a full recovery is almost impossible.
>
> (122) It is unlikely that she will become pain-free. However, an expert opinion in this field would be needed.
>
> (123) Expecting her to become emotionally symptom-free is also challenging. However, hopefully with appropriate treatment her symptoms can be reduced so she can continue to maintain her functioning.
>
> (124) Expecting her to increase her work to full-time is extremely challenging. She is performing the best she can so can be classified as partially disabled in the current work she does. She also gave up her side business, as stated, after the accident.
>
> (125) If she decides to go ahead with having a family, continuing observation post-partum would be important to monitor her emotional well-being and prevent the development of more aggravated symptoms of depression and anxiety post-partum. This needs to be done through a specialized clinic.

[85] Dr. Ganesan's evidence was that, prior to the accident, Ms. Cheema was functioning well in her office job and her sideline business of eye lash treatments, both of which were performed without physical or emotional difficulty documented.

[86] Dr. Ganesan diagnosed a major depressive disorder, currently moderate where the signs and symptoms, more prominent in 2020, have slowly reduced in intensity, although still continue at a moderate level, symptoms overlapping with significant anxiety.

[87] The prognosis for this patient according to Dr. Ganesan, given the length of time her symptoms have persisted, is that expecting a full recovery is almost impossible, it is unlikely that she will become pain-free or for her to become emotionally symptom-free is also challenging. The doctor also noted that expecting her to increase her workload to full-time is extremely challenging. She is performing

the best she can and can be classified as partially disabled in the current work she does. She also gave up her side business, eyelash placement, as stated above after the accident.

Dr. Desai, Neurologist

[88] The Defendants called a single expert witness, Dr. Desai, whose report was dated July 8, 2023. Dr. Desai confined his analysis and opinion to neurological issues. However, I find that the report has only marginal utility because the opinion given did not reflect the factual circumstances of this case. Dr. Desai opined that "from a neurological perspective the reports of initial continuous headaches for the first three months following the motor accident was likely due to whiplash sustained in the subject accident in question". These headaches continued for a period exceeding four months, a period unexplained by Dr. Desai's opinion. Dr. Desai also deferred to specialists in other medical specialities, when asked about evidence given by the plaintiff respecting injuries; specialists whose evidence was not called by the defendants.

[89] Dr. Desai engaged in argument with counsel and to an extent with the Court on the issue of duration of headaches. With respect to headaches reported long after the four-month period after the accident, in fact years later, Dr. Desai's report included references to clinical records of ongoing headaches, experienced by the plaintiff on October 22, 2019 (an Emergency Room record); October 29, 2019, records of the plaintiff's General Practitioner; further records dated December 12, 2019, indicating ongoing issues with sleep and headaches; further records recording medical treatment on February 3, 2020 with reference to neck pain, left knee pain and headaches; reports of headaches in other medical records dated June 9, 2020 and July 20, 2020; and the report of the Occupational Therapist dated August 12, 2020.

[90] Further medical records of the plaintiff were shown to Dr. Desai, and with respect to those records, he had not seen them at the time he wrote his report. These records included counselling records from the No Fear counselling clinic

dated April 26, 2020, referring to continuing headaches and chronic pain; further references to records in November 24, 2020, with respect to headaches including migraine headaches and pain management; documents of Prana Physiotherapy which referred to the plaintiff experiencing further headaches in records dated January 11, 2023 and May 2023, the latter referring to neck pain accompanying headaches preventing the plaintiff from focusing activities; as well as records of Move Health and Wellness dated September 10, 2023, and Swift Health recording pain and headaches in an occupational therapy report dated November 15, 2023.

[91] Rather than deal with the contents of the noted records explaining the presence of headaches, Dr. Desai demonstrated a real inability to acknowledge the existence of headaches reported in the various records and suggested those who recorded headaches that somehow failed to conduct complete investigations of the plaintiff's ongoing head pain. Dr. Desai suggested he was not prepared to make conclusions about the contents of third-party medical records; but at the time he was not being asked to draw conclusions about the records referred to above; simply to acknowledge the references to headaches contained therein.

[92] Dr. Heran conducted a series of medical tests including the Spurlings Test, the tripod test, and the straight leg test, all of which had positive tests. Dr. Desai acknowledged that these tests, if positive, could indicate radiculopathy or an impingement of the lumbar spine. Dr. Desai did not conduct these tests. Dr. Desai, after some resistance, agreed that the plaintiff possibly did suffer a C6 radiculopathy.

[93] I find Dr. Heran's approach was more fulsome and thorough. Dr. Desai did not perform the degree of testing Dr. Heran conducted. Dr. Desai's evidence was argumentative at times, and he was unwilling to accept the results of other testing. I prefer and accept the report of Dr. Heran and give the report of Dr. Desai scant weight.

Russel McNeil, Occupational Therapist

[94] Russel McNeil, an Occupational Therapist and Work Capacity Evaluator, who testified as an expert witness, assessed the plaintiff on November 20 and 29, 2023

and then prepared an expert report dated December 23, 2023. That report became an exhibit at trial. Mr. McNeil conducted two days of functional capacity testing which are discussed in his report.

[95] The plaintiff demonstrated a good understanding and recall of test instructions. A number of test protocols were undertaken to assess functional cognition, which demonstrated functional strengths and weaknesses, weaknesses which would likely have a negative impact on aspects of her work function. Testing revealed scores on the ONET Ability Profiler as below average in computational ability; a considerable negative change from her work experience prior to the accident. On other testing modalities she scored below average in coordination and perception, as well as the plaintiff had specific weaknesses in processing speed, contextual memory, working memory, non-verbal memory, focused attention and updating which adversely impacted her work during the assessment, so that in a faster paced work place in noisy conditions and facing new learning requirements these weaknesses would lead to increased errors and a slower work place.

[96] In comparison to the American Medical Association (AMA) Guidelines, the plaintiff demonstrated measured restrictions in cervical lateral flexion left and rotation right. There were also measured restrictions in trunk extension, rotation left and rotation right. A number of other tests revealed that she had limited functional mobility of the cervical and lumbar spine and sufficient functional shoulder mobility bilaterally. Compared to women her age, right hand strength was below average and with her right hand, there were restrictions performing repetitive grasping and accommodations were required for rest to manage right forearm pain. Comparing right side to left side strength in extension, the right shoulder was 33% weaker than the left. In abduction, the right shoulder was 19.2% weaker than the left. This weakness continued throughout the testing. These demonstrated weaknesses revealed asymmetric strength which has a functional impact on tasks requiring bilateral arm use, in this case, carrying or moving file boxes is one example, and resulting in increased mechanical load on one side of the body.

[97] Ms. Cheema also demonstrated one-sided weakness on the right with flexion and in abduction of both the hip and right knee. Trunk Muscle Endurance testing showed muscle endurance in flexion and extension was below average compared to other women.

[98] Testing also revealed a restriction intolerance to perform vertical reaching using her right arm and the necessity of using accommodations to manage increased pain. Her capacity to perform shoulder to head level lifting work was limited to a modified occasional basis for short periods of time only and her capacity to perform static and dynamic horizontal reaching on a modified frequent basis. Even with accommodations she struggled to maintain a productive work pace.

[99] Mr. McNeil found that reports of pain by the plaintiff in reaching tests were consistent with physical findings. Specifically, he stated in his report that when "cross correlating test results and analysing a repeat performance of tests that required sustained and repetitive reaching, there was a consistent and high level of effort."

[100] In relation to sustained spinal positioning, the plaintiff demonstrated restrictions in her capacity to perform activity requiring static and dynamic spinal positioning in trunk flexion or bending, neck extension (looking up) or neck flexion (looking down). The demonstrated capacity of the plaintiff during testing revealed that her capacity to perform below waist work required accommodation to manage increased pain in order to complete the testing cycle. Her longest period of static bending (13 seconds) was below the 5th percentile compared to workers in sedentary or light physical demand categories.

[101] Mr. McNeill found there was a restriction in the plaintiff's capacity to perform activity requiring static neck flexion (looking down) and accommodations were required to manage increased pain. Overall, her reports of physical pain and restrictions were consistent with physical findings. Testing of two-handed lifting, two-handed carrying and sitting tolerance were all in very low percentiles compared to other women her age. The testing showed the plaintiff had restrictions in her

capacity to perform vocational activities and household tasks such as daily housekeeping including dishwashing, loading the dishwasher, shopping, and doing laundry.

[102] Mr. McNeil's report set out "Conclusions" and "Overall Work Capacity" at page 13. These are summarized as follows:

a) Sedentary Work – Ms. Cheema is physically capable of working a sedentary job, however, she will struggle with cognitive aspects of work as well as sitting in a working position associated with this work, with prolonged static spinal positioning and reaching. She would be able to manage by pacing herself and would benefit from ergonomic accommodations. With accommodations to help manage pain and cognitive restrictions, she has the capacity to work but will struggle to maintain a competitively employable or productive work pace which may adversely affect her ability to compete for work in the open job market.

b) Light Work – Ms. Cheema did not demonstrate the capacity to obtain the full strength demands of light work. She would be restricted in her capacity to perform prolonged standing requirements of light work and restricted in performing work that required static and dynamic vertical reaching (above shoulder level) or static horizontal reaching (below shoulder level). Her ability to maintain a productive work pace would also be restricted. Overall, she would struggle to obtain a productive work pace, restricting her ability to compete for employment in the open job market.

c) Medium Work and Heavy Work – Ms. Cheema would not be capable of working in occupations in either of these categories.

[103] Mr. McNeil also opined on the ability of the plaintiff to work as: (a) an Accounting Technician and Bookkeeper managing the day-to-day financial record of a business in a sedentary capacity and (b) as an Esthetician/Nail Technician/Eye

Lash Technician; her working positions prior to the accident. His opinion on those matters is summarized as follows:

a. Mr. McNeil stated that based on biometrical measurements and resulting physical and cognitive restrictions, Ms. Cheema had not demonstrated the capacity to perform her work as a bookkeeper on a full time basis. She did demonstrate the capacity to do this work on a part time basis with accommodations, but will struggle to be competitively employable. In particular, prolonged sitting resulted in increased pain and fatigue which affected her capacity to handle the cognitive requirements of work, planning, problem solving and memory.

b. Again, based on biometrical measurements and physical restrictions displayed, Ms. Cheema had not demonstrated the capacity to perform work as an esthetician, nail technician, or eyelash technician on a competitively employable or productive work pace. While Ms. Cheema demonstrated the ability to perform the strength requirements of this job, she could not demonstrate the capacity to sit for prolonged periods with static spinal positioning when bending forward or looking down.

Liability

[104] As previously stated, the defendant denies liability for the collision. However, the defendant driver admitted that she saw the yellow light and she could have stopped safely prior to entering the intersection. Otherwise the defendant was unclear on how or why the accident occurred.

[105] The traffic intersection had identical sized stop lines on all four sides and vehicles waiting for right of way moved up to the stop lines. Unless there was a railway train in the immediate vicinity of the level crossing stop line and safety signals have been activated, the railway stop line is not used and vehicles are not required to stop there. In that circumstance, drivers approaching the intersection are required to obey the customary three coloured light signals and, when indicated, stop at the stop line at the edge of the intersection.

[106] In the case of *Yang v. Croin*, 2021 BCSC 955, at paras. 4 and 5, Justice Jackson states the following with respect to the importance of the light signals in a collision of this nature:

> [4]…In cases involving a collision in an intersection between a left-turning driver and a straight-through driver, it is the colour of the lights that determines which of the drivers has the right-of-way: *Lozinski v. Maple Ridge (District*), 2015 BCSC 1277 at para. 70.
>
> [5] A driver approaching an intersection facing a red light must stop and not proceed until their light turns green: *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*], s. 129(1). A driver approaching an intersection facing a yellow light must stop, unless the stop cannot be made in safety: *MVA*, s. 128(1). When a vehicle is in an intersection and its driver intends to turn left, the left-turning driver must yield the right-of-way to opposing traffic that is either in the intersection or so close to the intersection as to constitute an immediate hazard: *MVA*, s. 174. However, a left-turning driver is not without rights: *Bailey v. Jang*, 2011 BCCA 146 at para. 16. Having yielded to traffic in the intersection and traffic so close as to constitute an immediate hazard, a left-turning vehicle that has signalled their left turn (as required under the *MVA*) may complete the turn, and traffic approaching from the opposite direction must yield: *MVA*, s. 174.

[107] Section 128(1)(a) of the *Act* expressly sets out the duty of a driver when approaching a yellow light:

> Yellow Light 128(1) When a yellow light alone is exhibited at an intersection by a traffic control signal , following the exhibition of a green light, (a) the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection , unless the stop cannot be made in safety.

[108] The defendant in this case was a driver facing a yellow light, which was illuminated and visible when she was more than 55 metres from the stop line at the south edge of the intersection. That stop could have been made safely, as she has admitted. This is demonstrated not only based on the photographs in Exhibit 1, but also by the defendant's own admission that she could have stopped before the stop line when she saw the yellow light illuminated.

[109] Further, Mr. Luker testified that, based on the average deceleration/braking force and stopping distance was a total of 46 metres at the slowest reaction time and

34.8 metres at the fastest reaction time, the defendant had 73 metres available to make this stop.

[110] Based on the video, the yellow traffic light had been illuminated for 4.1 seconds prior to the Pandha vehicle reaching before the southern crosswalk of the intersection. As noted, the Pandha vehicle had not slowed nor stopped prior to reaching that crosswalk. In fact, it had accelerated.

[111] In either scenario, the defendant could have safely stopped prior to the intersection stop line, as the distance from her entry into the camera image and the intersection signal stop line was at least 55.6 metres. The video recording revealed that there was no vehicle behind the Pandha vehicle as it approached the stop line which might have created a situation where stopping was not safe. I find that the defendant could have and should have safely stopped at the intersection stop line.

[112] If Ms. Pandha had stopped at the intersection signal stop line, as the law required her to do, there would not have been a collision. I find that she was in contravention of s. 128 of the *Act* and was liable for the collision.

Causation

[113] In the well-known case of *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 Justice Major explained the causation as it relates to liability for a plaintiff's injuries:

> [12] The respondents' position is that where a loss is created by tortious and non-tortious causes, it is possible to apportion the loss according to the degree of causation. This is contrary to well-established principles. It has long been established that a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability.
>
> […]
>
> [17] It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (The Law of Torts (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match,

> but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[114] The plaintiff is required to establish that the defendant's negligence caused her injuries on a balance of probabilities. Causation is not a matter of scientific precision; the test is whether, but for the defendant's negligence, the plaintiff would have suffered the injury: *Jenkins v. Casey,* 2022 BCCA 64 at para. 75; *Thiessen v. Kepfer*, 2023 BCSC 1593 at para. 86 [*Thiessen*].

[115] The plaintiff in this case had no previous injuries or prior conditions. I have found that the defendant was liable for the accident and caused the collision to occur by failing to adhere to the yellow traffic light, and red traffic stop light while travelling through the intersection above the speed limit. Based on the foregoing, I find that the defendant caused the plaintiff's injuries. But for the defendant's negligence, the plaintiff would not have sustained the described injuries.

Failure to Mitigate

[116] The defendant submits that the plaintiff had failed to mitigate her losses. The defendant submits that this failure should result in a reduction of the plaintiff's damages. The factual basis submitted by the defendants was that the plaintiff failed to take psychotropic medication recommended by her doctor for chronic pain management. The plaintiff reported her concern about her desire to start a family with her husband and the potential adverse effect of psychotropic medicine on pregnancy.

[117] A reduction is appropriate where the defendant shows that there were steps the plaintiff could have taken to mitigate their losses, that those steps were reasonable, and the extent to which the damages would have been reduced had the claimant acted reasonably: *Donaldson v. Grayson*, 2023 BCSC 1675 at para. 159; *Riascos v. Raudales*, 2024 BCSC 26 at paras. 158–160.

[118] The defendant bore the burden to establish failure to mitigate on a balance of probabilities. I find that the defendant's submissions did not meet the standard of proof. The psychotropic medication was not appropriate for the plaintiff due to other medical considerations. I am unable to find any reasonable basis in the evidence that establishes the plaintiff failed to mitigate her damages.

Assessment of Damages

Non-Pecuniary General Damages

Law

[119] In a personal injury lawsuit, the Court may award non-pecuniary damages to compensate for pain and suffering, loss of amenities and loss of enjoyment of life experienced by the plaintiff. The Supreme Court of Canada speaks of a "functional approach" to the assessment of such damages. Following this approach, because non-pecuniary damages are intangible and not readily susceptible to evaluation, any such award should be designed to provide reasonable "solace" for the loss suffered by the plaintiff, where "solace" is viewed in the sense of funding things that might make life more bearable or enjoyable.

[120] In 1978, the Supreme Court of Canada limited these types of general damages to a limit of $100,000, a limit which is subject to an upward adjustment to account for the effects of inflation. At the present time, the upper limit is in the vicinity of $400,000, which is only awarded in cases of extremely severe injury and disability and were maximum solace must be recognized. Our Court of Appeal has noted that relying on prior cases for ranges of non-pecuniary damages and then adjusting for inflation ignores that awards for non-pecuniary damages have continued to increase over the years in addition to the inflationary component: *Valdez v. Neron*, 2022 BCCA 301 at para. 58.

[121] Our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [*Stapley*] set out a non-exhaustive list of factors to consider in an assessment of non-pecuniary damages:

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

[122] While there is no "tariff" on such awards, their fairness and reasonableness are measured with reference to awards made in other cases involving similar injuries in circumstances. In each case an appreciation of the plaintiff's specific circumstances is required as the need for solace does not necessarily correlate with the seriousness of injury.

See *Andrews v. Grand & Toy Alberta Limited*, [1978] 2 S.C.R. 229, 1978 CanLII 1; *Thornton v. School District No, 57 (Prince George) et al.*, [1978] 2 S.C.R. 267, 1978 CanLII 12*; Arnold v. Teno*, [1978] 2 S.C.R. 287, 1978 CanLII 2; and *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 1981 CanLII 35.

Party Submissions

[123] The plaintiff seeks an award of $275,000 for non-pecuniary damages. The defendant submits an appropriate award for non-pecuniary damages is between $105,000 and $125,000, less a contingency deduction of 5% for failure to mitigate.

[124] The plaintiff submitted a number of cases to establish a range for the appropriate award for non-pecuniary damages. Among those cases were:

a) *Grabovac v. Fazio*, 2021 BCSC 2362: The Court awarded $350,000, inclusive of loss of housekeeping capacity, to a 26-year-old plaintiff who

suffered chronic pain and was unable to work full time due to injuries or participate in snowboarding.

b) *Sirna v. Smolinski*, 2007 BCSC 967: The Court awarded $200,000 for a 25-year-old plaintiff who experienced significant pain and fatigue following soft tissue injuries and a mild traumatic brain injury. Her limited ability to work was aided by an accommodating employer.

c) *Donaldson v. Grayson*, 2023 BCSC 1675: $250,000, inclusive of loss of housekeeping capacity, was awarded to a 49-year-old plaintiff who suffered chronic neck pain as well as back and shoulder pain, headache, fatigue, light sensitivity and ongoing neurocognitive disorders. Family events with young children were curtailed and volunteer activities were significantly limited.

d) *Gark v. Lauzon*, 2023 BCSC 1930: $220,000, inclusive of loss of housekeeping capacity, was awarded. The plaintiff had qualified for a diploma in aesthetics and had begun a nail business and was instructing at an academy for hair design. The plaintiff's pre-accident activities were completely curtailed following the collision and experienced headaches, spinning, dizziness, neck, back, shoulder, and hip pain, a spinal disc injury, as well as mood and psychological impacts.

[125] The defendants provided references to a number of cases, including:

a) *Harnett v. Leischner & ICBC*, 2008 BCSC 1589: The Court awarded $60,000 to a 43-year-old plaintiff who sustained moderate injuries, some of which continued to plague the plaintiff on a substantial and regular basis. The injuries resulted in lifestyle changes, reduced ability to participate both in recreation and home maintenance activities, reduced ability to play with his children, and negative impacts on his personal life and relationships.

b) *Anderson v. Rizzardo*, 2015 BCSC 2349: The Court awarded $60,000. The plaintiff's injuries initially were not disabling, however they became more aggravated and resulted in a depletion of his energy, a low mood, and a compromised ability to perform his "dream job". The injuries had no adverse impact on the plaintiff's ability to do housework, yard maintenance, or participate in leisure, social, or athletic activities.

c) *Sen Laurenz v. Napoli*, 2019 BCSC 1379: $90,000 to a 25-year-old plaintiff who sustained soft tissue injuries to her neck, back, and shoulder and suffered from headaches, focus and concentration issues, and disturbed sleep. The Court found that she would suffer from chronic pain on a regular basis. She had returned to many of her pre-accident physical activities, though with less frequency and rigour.

d) *LaRocque v. LaRocque*, 2019 BCSC 655 [*LaRocque*]: The Court awarded $90,000 in non-pecuniary damages, which was reduced to $72,000 for failure to mitigate. The plaintiff was 27 years old and had experienced significant pain and reduction in capacity in the year immediately following the accident but had recovered most of her function and had returned to most of her pre-accident activities. She continued to experience pain, low mood, and headaches.

e) *Crozier v. Insurance Company of British Columbia*, 2019 BCSC 160 [*Crozier*]: An award of $125,000 was given to a plaintiff who suffered pain in the neck, back, shoulders, ribs, and chest, headaches, dizziness, nausea, post-traumatic stress disorder, depression, anxiety, fatigue, concentration and memory issues. The remaining issues included residual headaches, rib and chest pain, fatigue, and psychological issues. She could only complete limited physical activity and housework. The Court noted that there was a real and substantial possibility of significant improvement in the plaintiff's psychological and physical symptoms.

f) *Singh v. De Santis*, 2022 BCSC 35: The Court awarded $115,000 to a plaintiff who was 22 years old at the time of the first motor vehicle accident. The plaintiff continued to experience jaw, neck, shoulder, back, hip, right arm and leg pain, headaches, anxiety when driving, and sleep disruption. The Court found that these symptoms moderately impacted the plaintiff's personal and work life and she would likely experience the symptoms for the rest of her life, to some extent. There were moderate functional limitations in her ability to function in the workplace.

Analysis

[126] The injuries suffered by the plaintiff as a result of the collision have been very significant. The plaintiff was 25 years old at the time of the collision and celebrated her 30th birthday during this trial. She will likely suffer the rest of her life with chronic pain and psychological injuries.

[127] The plaintiff's capacity to work, enjoy her life and family, complete household chores, or otherwise engage in the activities she did pre-collision is significantly curtained by her neck pain, shoulder pain and back pain. She suffers from post-traumatic stress disorder, anxiety, major depressive disorder and has experienced suicidal ideation. She suffered injuries and lacerations on her left hand and left knee. Her vision was blurred. Expert witnesses have found, after testing, that she has cognitive and concentration problems as well as problems with multitasking and memory.

[128] The defendants submitted that the plaintiff has sustained "some injuries" in the accident and that those injuries have had an impact on her "enjoyment of life".

[129] It is clear on the evidence called by the plaintiff that, contrary to the submissions made by the defendants, there are significant ongoing physical and emotional injuries caused by the accident. Further, based on the plaintiff's testimony and the medical and rehabilitative evidence, the plaintiff has lost time from work and has ongoing vocational and avocational restrictions.

[130] While no two cases are identical, I find the defendant's cases to be more clearly distinguishable. In *Sen-Laurenz v. Napoli*, 2019 BCSC 1379, the plaintiff was able to return to the physical activities she enjoyed, like hiking and running, though at a lower frequency and intensity. This continued to improve. In fact, her recommended therapy was to engage in as much activity as possible, despite having pain: at para. 56. Ms. Sen-Laurenz travelled domestically and internationally after her accident and intended to begin medical school the following year. She did not anticipate being unable to attend school on account of her injuries. Overall, I find the plaintiff in the case at bar has sustained more serious injuries than that in *Sen-Laurenz*.

[131] The plaintiff in the case at bar has not had the same success in her recovery as the plaintiff in *LaRocque*, who had recovered most of her function within one year and returned to most of her pre-accident activities, with some modifications. Nor does the plaintiff in the case at bar have the same prospect of successful recovery as the plaintiff in *Crozier*. In *Crozier*, there was a real and substantial possibility of significant improvement in the plaintiff's psychological and medical symptoms. No such opinion has been provided in the case at bar. The differences between these cases and the seriousness of the injuries should be reflected in the award for non-pecuniary damages.

[132] I am required to consider the contingency that the pain and suffering the plaintiff experiences on an ongoing basis may improve: *Thiessen* at para. 110. The medical evidence in this case has not shown that this is likely; on the contrary, the evidence has shown that the plaintiff's condition is chronic. My assessment of non-pecuniary damages nonetheless takes into account the prospect, albeit very low, of meaningful recovery.

[133] I have reviewed the cases cited by the parties, the principles and factors set out in *Stapley*, as well as the evidence presented. I am satisfied that the appropriate award for non-pecuniary damages in this case is $225,000.

Loss of Housekeeping Capacity

Law

[134] Our Court of Appeal recently addressed loss of housekeeping capacity in *Blackburn v. Lattimore,* 2023 BCCA 224. At para. 22, the Court described this head of damages as not one that inherently compensates the plaintiff for loss of money, but rather as a specific award to compensate for loss of capacity to do housework. Such a loss of capacity may be compensated by a pecuniary award, which can be assessed with reference to the cost of replacement services: at para. 30. The plaintiff's personal choice to hire or not hire outside help does not affect their entitlement to damages for this loss of capacity. The claim for loss of homemaking capacity is for the loss of the value of the work, which is an asset, which would have been rendered by the plaintiff if not for their injuries.

[135] In *Prasad v. Ross-Smith*, 2023 BCSC 513, Justice Basran summarized the legal principles of loss of housekeeping capacity as follows:

> [129] The principles applicable to the loss of housekeeping capacity are:
>
> • Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
>
> • A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
>
> • Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
>
> • As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
>
> • Evidence of the loss of housekeeping capacity is provided by the work being performed by others, even if done gratuitously.
>
> • Evidence of a plaintiff's incapacity resulting in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for, supports a separate award of pecuniary damages.
>
> • "[…] pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are

> typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities."
>
> See: McTavish v. MacGillivray, 2000 BCCA 164 at para. 63; Kim v. Lin, 2018 BCCA 77 at paras. 28–34; Riley v. Ritsco, 2018 BCCA 366 at para. 98; McKee v. Hicks, 2023 BCCA 109 at para. 112.

Analysis

[136] The first question is whether the award for loss of housekeeping capacity ought to be pecuniary or non-pecuniary. When considering whether to compensate loss of housekeeping as an aspect of pain, suffering and loss of enjoyment of life or assess it as pecuniary award, it is appropriate to consider whether the plaintiff has suffered a true loss of the capacity, understood as a capital asset, or whether the loss is "more in keeping with loss of amenities, or increased pain and suffering": *Kim v. Lin*, 2018 BCCA 77, at para. 33. The former would result in its own pecuniary award, and the latter would result in the award being subsumed in the overall assessment of non-pecuniary damages.

[137] The plaintiff testified that prior to the accident, she lived at her parents' home in Surrey and she performed a wide range of household chores such as vacuuming, mopping, cleaning bathrooms, taking out the garbage, washing laundry, buying groceries, cooking, and washing dishes. She also performed outdoor tasks including mowing lawns and planting gardens. All of these tasks were performed without physical limitation prior to the collision.

[138] The plaintiff submits that she is now unable to perform most of the household chores due to pain. Her husband has taken over most chores and physical activities. No one else has been hired to assist with cleaning or other activities in the home.

[139] The defendant submitted that no discrete award for loss of housekeeping capacity had been established on the evidence.

[140] In my view, this loss falls more appropriately into the category of non-pecuniary damages. While certainly there are some household tasks that the plaintiff is now unable to complete, she and her husband have adjusted their roles

accordingly. Further, the comparison of the plaintiff's household tasks when she lived with her parents is not fully reflective of what her household tasks would be when she moved in with her husband, had she not been injured. I exercise my discretion to include the loss of housekeeping capacity in the award for non-pecuniary damages and, as such, it is included in the above stated amount under that head.

Past and Future Loss of Earning Capacity

[141] A plaintiff is entitled to the loss of the value of work that the plaintiff would, not could, have performed but for the accident-related injuries: *Rowe v. Bobell Express Ltd*, 2005 BCCA 141 at para. 30; *Lamarque v. Rouse*, 2023 BCCA 392 at para. 29. The damages recoverable are only the past net income loss: *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231, s. 98. This is a hypothetical exercise. The standard of proof for past hypothetical events is whether there is a real and substantial possibility that the events would occur: *Lamarque* at para. 29; that is, any hypothetical loss of income must be realistically possible, considering the plaintiff's likely circumstances without the injury: *Gao v. Dietrich*, 2018 BCCA 372 at para. 36.

[142] If the claimant establishes a real and substantial possibility, then the court must determine the likelihood of the event and adjust the measure of damages accordingly: *Lamarque* at para. 29.

[143] Based on the evidence, I find that the plaintiff's capacity to work, enjoy her life and family, complete household chores, or otherwise engage in the activities she did pre-collision is significantly curtailed by her injuries caused by the accident. Her injuries cause her neck pain, shoulder pain and back pain.

[144] I also find, based on clear evidence of expert witnesses called by the plaintiff, that the accident and the resulting injuries have caused the plaintiff severe cognitive and psychiatric symptoms including a major depressive disorder with intense subjective distress which has an occasion triggered suicidal ideation. It has further caused chronic physical pain where there is little chance of overall improvement to the plaintiff's chronic pain condition.

[145] Given the chronicity of the plaintiff's injuries and the opinions of Dr. Heran and Dr. Ganesan, I find the plaintiff's injuries have had and continue to have a significant impact on her functional capacity and accept Mr. McNeil's findings regarding the extent of those limitations. The plaintiff does not have physical capacity to perform her previous occupations except on a guarded part-time basis in respect of office work and there is no likelihood of return to the occupation relating to eyelash placement.

[146] Further, based on the evidence adduced at trial, I find that there is a real and substantial possibility that the plaintiff would have continued to work at OneSource and continued to operate her eyelash placement business if she had not suffered the accident-related injuries.

Past Loss of Earning Capacity

[147] With respect to loss of past earning capacity, the plaintiff, in final submissions, has put forward that her without-accident earning capacity for the period between May 14, 2019 and March 25, 2024 was a total of $566,456.44, comprised of $346,201.44 from One Source and $220,255 from Lashes by Shaffy.

[148] The defendant submits that the plaintiff, after two years where she was totally unable to work at all, has made "significant progress". The defendant acknowledged that the plaintiff is only working three days a week, not the five days per week suggested in the defendants' written submission. The defendant characterized the plaintiff as working in a "sustained capacity". This mischaracterizes the plaintiff's situation – she is unable to return to full time work and has lost the Lashes by Shaffy business entirely.

[149] The defendants submitted that an award of $157,000.00 would fully compensate the plaintiff for any past loss of earning capacity from both her work as an eyelash technician and at One Source.

[150] On the issue of past loss of income earning capacity, the difference between the plaintiff's submission and the defendants' submissions is $409,456.44.

One Source

[151] The plaintiff's full-time working capacity was five days a week in 2019 with more than eight hours per day worked in busier periods, such as month end and financial statement preparation. This evidence was provided by the plaintiff and Martin Tai, the manager of One Source, as well as Kelly McKay, a colleague who reported her working hours as five days a week at more than eight hours per day or more than 40 hours per week.

[152] Mr. Tai explained that he was planning to offer Ms. Cheema a management position as early as 2021, depending on her return to full-time employment. He intended, as he explained, to assign her more of his office responsibilities and allow her to take on new tasks. He wished to focus on growing the business. He anticipated that her salary would be between $70,000 and $80,000 with a bonus based on 0.7% of gross profits (see Exhibit 2, Tab 21) for an average yearly bonus of $17,343.14. Ms. Cheema gave evidence that she would have accepted the management job in early 2021 and would have continued to do run her eyelash business on a part-time basis.

[153] The defendant has made no particular submission for a deduction of a contingency in relation to the loss related to the One Source employment, subject of course to a deduction for the amount of income tax payable from the lost gross earnings from net income. The defendants have argued that the "plaintiff has changed her trajectory a number of times in her life. She is still comparably young and may do so again." Ms. Cheema has since the start of 2016 been a valuable, hard working, employee at One Source. I find it is highly unlikely that the plaintiff would have left her employment with One Source from the date of the accident to the date of this trial.

[154] Dealing with lost income from full time work at One Source for the period from May 14, 2019, to May 15, 2021, when the plaintiff was totally disabled, I assess her gross earnings would have been $82,137.00.

[155] Dealing with lost income for the period from May 15, 2021 to March 25, 2024, the evidence supports a finding that but for the accident, Ms. Cheema would have been earning a management salary at One Source in early 2021. The plaintiff submits, based on the evidence of Mr. Tai and Ms. Cheema, averaging the salary range provided by Mr. Tai to $75,000, together with annual bonuses calculated for the period between May 15, 2021 and March 25, 2024, together with the $82,137.00 noted above results in a loss of earning capacity at One Source, for the periods mentioned, in the amount of $346,201.44.

[156] The plaintiff, as disclosed in the evidence, was disabled and had no income from May 14, 2019 to May 2021. Thereafter for the years 2021 through 2024 she actually earned $90,080 from part-time work at One Source. Therefore, her actual income loss for One Source from May 14, 2019 to March 25, 2024 is $256,121.44.

Lashes by Shaffy

[157] With respect to loss of earning capacity for Lashes by Shaffy, the actual income including tips was:

> January 2019: $710.
> February 2019: $645.
> March 2019: $1,660.
> April 2019: $1,020.
> May 2019: $1,260. (Ending at May 13, 2019. Accident occurred May 14, 2019 in the early morning.)

[158] The average monthly income actually earned by the plaintiff for the approximately four months the business operated was $1,323.75 per month, and it appears that the number of clients to whom service was provided gradually increased.

[159] In the closing submissions of the plaintiff, a table was included at page 87 which set forth that the number of clients the plaintiff could see weekly was 10, at an average revenue per client service of $116. The table set forth that Ms. Cheema

would have worked 33 weeks in 2019, 50 weeks in each of 2020, 2021, 2022, and 2023, with 12 weeks worked in 2024 up to the trial date. The total revenue for this time period is shown as $284,200 less expenses at 22.5% of revenue, for a total of $220,255, or approximately $899 per week.

[160] In November 2018, the plaintiff successfully completed two professional lash extension training courses: Classic Lash Extension Technician Training and Volume Lash Extension Training, from Langley Blink & Brow in the installation of false eyelashes. Ms. Cheema purchased the necessary equipment for a lash extension business including a massage table or Lash bed, appropriate lighting, necessary hand tools and tweezers as well as cleaning supplies for a studio which she set up in the home of her parents. The business was advertised on multiple platforms. I find it highly unlikely that, without the accident, she would have scaled back her work hours at Lashes by Shaffy in the period following the accident leading to the trial herein

[161] Based on the evidence, I assess the plaintiff's net loss of income related to Lashes by Shaffy from the date of the accident to the date of the trial to be $200,000.

[162] The loss of opportunity to earn past income from One Source is assessed at $256,121.44 and together with the $200,000 loss from the lash business results in a past loss of employment income opportunity in the total of $456,121.44 for this head of damages.

Future Loss of Earning Capacity

[163] Our Court of Appeal has set out a three-step framework for the assessment of damages for loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345 [*Rab*], the Court stated:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to

> the sort of considerations discussed in Brown). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in Dornan at paras 93–95.

Step 1: Does the evidence disclose a potential future event that could lead to a loss of capacity?

[164] In *Steinlauf v. Deol*, 2022 BCCA 96, the Court outlined that the first step is an evidentiary one. Further, in cases where the event giving rise of a future loss is "manifest and continuing at the time of trial, that evidentiary step is a given": *Steinlauf* at para. 52.

[165] The plaintiff has satisfied the first step. Based on the evidence discussed above, the plaintiff's ability to earn income has been substantially diminished and full time work or promotions are highly doubtful. Her injuries have resulted in ongoing and severe physical and psychological pain which will continue to impact her ability to work.

Step 2: Does the evidence demonstrate that there is a real and substantial possibility that the future event will cause a pecuniary loss?

[166] The Court in *Rab* described the assessment of a real and substantial possibility as follows:

> [29] Some claims for loss of future earning capacity are less challenging than others. In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies.

[167] I am satisfied that the plaintiff's injuries have deprived her from any earning opportunity in the eyelash business in the future, a real and substantial possibility based on the evidence of the permanence of the inability of the plaintiff to perform eyelash services for customers. Likewise, there is a real and substantial possibility

based on the evidence that the plaintiff will not be able to maintain anything approaching full-time work at One Source throughout a normal working career. There is a real and substantial possibility of persistent and ongoing pain, and that the plaintiff will continue to need breaks and to take advantage of accommodations from her employer which allow her to persist with her sedentary office work. These deficiencies in the plaintiff's ability to work will result in a loss of promotion and career growth at One Source.

[168] The defendants submit that the plaintiff has "some ongoing injuries with some physical and emotional complaints". With respect, this is a remarkable understatement of the significance of the injuries and ongoing psychiatric and psychological issues faced by the plaintiff as a direct result of the accident. The defence also argues that "the plaintiff has made considerable improvement and has returned to her pre-accident vocation". No expert witness has suggested the foregoing statement is the current situation of the plaintiff. Prior to the accident, the plaintiff was working hard and consistently at two jobs. Her return to work is limited to three days per week with One Source and she cannot return to the eye lash business at all. The defendant's submission that the plaintiff has returned to her pre-accident vocation simply mischaracterizes the reality of the plaintiff's circumstances.

[169] The evidence, particularly of Mr. McNeil, demonstrates that the plaintiff is not competitively employable, nor can she work at a productive pace even in circumstances where she is allowed a modified dress code, takes a number of breaks, continually uses a heating pad or massage gun, in an office where other ergonomic accommodations have been provided. Opportunities to increase income have passed her by because she has had a significant reduction in working hours. She now works three days a week and is unlikely to achieve a promotion to management status, as was previously anticipated by her employer, because she is unable to work full time. Ms. Cheema is no longer competitively employable and is unable to work at a competitive pace. It is difficult to imagine that another employer would find her limitations desirable in a new hire.

[170] The work performed by the plaintiff at One Source was extremely positive and successful, with her employer intending to move her into a management position all while she was advancing her own business in Lashes By Shaffy after obtaining certification with training and opening a studio. While she is trying to continue work at One Source, the evidence from medical experts is that her medical conditions are significant, disabling, and permanent. Her injuries continue to impair her ability to work at her pre-accident capacity.

[171] I accept the medical evidence relating to the likelihood of the plaintiff returning to work. Specifically, Dr. Heran, Dr. Ganesan, and Mr. McNeil all opined that the plaintiff's injuries and pain will continue, potentially indefinitely. They further opined that her capacity to work is significantly impaired and that return to full-time work, in light of the chronic nature of her physical and psychological symptoms, was not possible, but that part-time work with various environmental and ergonomic accommodations, was possible.

Step 3: What is the value of the possible future loss?

[172] The Court in *Steinlauf* discussed the third step of the framework as follows:

> [55] As for the quantification, this Court described the process in *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32:
>
> > …An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop,* 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8….
>
> [56] Accordingly, as discussed in *Dornan* at para 156, it became necessary to assess the respondent's without-accident earning potential, and what the respondent was likely to earn as a result of the accident. At the same time, as discussed in *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 251: "It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made".

[173] Future earning capacity is based on an assessment of the plaintiff's without-accident earning capacity against her with-accident actual earnings.

[174] Ms. Cheema's T4 earnings for the year 2023 might be considered an overstatement of earnings considering she has since reduced her working hours to three days per week, in which the plaintiff had acquired most of the accommodations available from her employer, her family's contribution to her needs and ongoing medical and physical treatments. In any event, this was her most recent full year actual earnings

[175] Her actual T4 earnings from One Source for the year 2023 were $41,831.09. Her without-accident earnings as part of her past earning capacity assessment included a salary of $75,000 and a bonus of $17,343.14 for a total of $92,343.14.

[176] Income from Lashes by Shaffy, which the plaintiff submits should be calculated on 10 clients per week at $116 per client equals total revenue of $58,000 less expenses of 22.5% of revenue or $44,950.

[177] The total yearly loss claimed by the plaintiff is $95,462.05.

[178] I pause here to make a note on the law relating to contingencies. There are two types: general contingencies and specific contingencies. Specific contingencies relate specifically to the plaintiff and may be positive or negative and must be grounded in the evidence. A specific contingency must be based on evidence that there is a real and substantial possibility it will occur, as assessed by the trial judge.

[179] General contingencies, relate to "the risk that things do not always turn out as expected": *Steinlauf* at para. 90. A trial judge, may, not must, adjust a future pecuniary loss award for general contingencies and "where an adjustment is based only on general contingencies it should be modest": *Steinlauf* at para. 91.

[180] The Court must be aware of the dangers of undercompensating a plaintiff due to an overreliance on negative contingencies: *Barsky v. Simons,* 2023 BCSC 1826 at para. 173; *Keizer v. Hanna and Buch*, [1978] 2 S.C.R. 342 at para. 35. The trial judge must consider contingencies which decrease or increase the ultimate award, with the ultimate goal that the award to be fair and adequate. In *Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229, 1978 CanLII 1, the Court stated, at p 253, that

while the percentage deduction may be proper to apply to reflect general contingencies, which will depend on the facts of the case, “generally it will be small”.

[181] The plaintiff put forward the proposition that general contingencies, such as missing time from work or early retirement, are not applicable to the plaintiff because she was working extra hours across two jobs, was punctual and hard-working, and had expressed interest in continuing to work.

[182] Mr. Darren Benning, expert economist, referred to a reduction for labour market contingencies of 34%. This general contingency is in my view too high, considering the guidance in the case law of modest reductions where they are based solely on general contingencies.

[183] The evidence was clear that, were it not for the accident, Ms. Cheema would have been offered a salary of between $70,000 and $80,000, with a promotion to management status, plus a bonus each year. The accident occurred when she was 25 years old and had at least 40 years left in a working future when further promotions and larger bonuses would be anticipated. Ms. Cheema’s eyelash business was, though new, going well and her client base was growing. It is noteworthy that both of her parents were working well after 70 and she expressed no intention to retire at 65 years.

[184] Negative contingencies such as illness or missing work for other excuses were not in the evidence. She was a punctual employee and had no intention of early retirement.

[185] The defendant also seeks a deduction of 10% of this proposed award for a failure to mitigate damages for an alleged failure to pursue therapies that may assist in achieving a better function in her vocational and avocational pursuits. This submission was made without reference to the particulars of the “therapies” which might have assisted the plaintiff in achieving a better function in her future pursuits and is of little assistance in deciding issues in this case. The defendant must, in order to make a mitigation defence succeed, establish on the balance of

probabilities: 1) there were steps that the plaintiff could take to mitigate her loss, 2) that such steps were reasonable for her to take in the circumstances, and 3) the extent to which the loss would have been avoided or reduced by taking these steps. The defendant offered no proof of these steps. Therefore, no deduction for this proposed negative contingency will be granted in this case.

[186] I consider the facts of *Suthakar v. Humble*, 2016 BCSC 155, to be useful with regard to contingencies. In *Suthakar,* the plaintiff held two jobs in an exceptional fashion prior to the accident. Similarly, the plaintiff in the case at bar successfully pursued two careers pre-accident. Ms. Cheema is no longer able to continue these two careers on parallel tracks as a result of the accident. She has been able to recover a part time portion of her One Source office job.

[187] A question which remains is whether the plaintiff would have maintained the eyelash business for the full period of her working career. In *Suthakar*, Justice Ballance noted there was a real and substantial possibility that the plaintiff would not have been able to maintain her demanding pre-accident work pace for the remainder of her working years. Justice Ballance acknowledged that while the plaintiff was driven and a stand-out employee who at the time of the accident worked two jobs, she was in her 20's and had only endured working two jobs for 42 weeks prior to the accident. There was a high likelihood that she would have chosen to reduce her hours at her second job or worked less in general as she aged: at paras. 104–107.

[188] It also may have been that Ms. Cheema would have chosen to work less or given up the eyelash business altogether for any number of reasons, but there was no evidence led in support of this reduction. That said the plaintiff may have found herself unable to work in two jobs for most of each year until she retired. I take this negative contingency into account when assessing the loss of future earning capacity and balance it with the plaintiff's work ethic and without-accident likelihood of promotion and career advancement.

[189] As submitted by the plaintiff, Mr. Benning's actuarial multiplier was 29.373 per $1000, which when applied to a yearly loss of $95,462.05 to age 70 yielded a

present value of future loss of earning capacity in the sum of $2,804,006.79. The defendant submits that an award of $500,000.00 sufficiently compensates the plaintiff for any future wage loss and loss of earning capacity at One Source and the eyelash business. The defendant's submissions referred to the plaintiff returning to "nearly full-time hours" at One Source and that her trajectory as an eyelash technician was "at best uncertain".

[190] Given the review of her earning capacity pre-accident and the devasting results of the accident causing a substantial loss of that capacity over the better part of her working life, I find the appropriate assessment of loss in this case is $2,200,000.00.

Cost of Future Care

[191] An award for cost of future care must be based on what is reasonably necessary to promote the mental and physical health of the plaintiff. This must be based on medical evidence: *Gao v. Dietrich*, 2018 BCCA at para. 69. The medical evidence may be presented by a health care professional other than a physician if there is a link between a physician's assessment and the health care professional's recommendation: *Gao* at para. 70. The standard of proof required to establish that a treatment is reasonable is the same as for any future pecuniary loss, that is, simple probability.

[192] The plaintiff claims that she will require ongoing medical care, housekeeping, and medication to manage her symptoms as noted in Exhibit 3 to the Schedule of Special damages where over $70,000 has already been expended and a further $9,081.44 has been agreed still owing for such expenditures. The variety of therapies that Ms. Cheema has received to the date of trial include occupational therapy, active rehabilitation, physiotherapy, massage therapy, chiropractic treatment and counselling. She has been prescribed and taken medications which included Naproxen, Advil, Amitriptyline and Melatonin.

[193] There has been no dispute by the defence concerning prescribed medication nor treatments.

[194] The expert opinions of Dr. Heran, Dr. Ganesan, and Mr. McNeil in this case, which I accept, recommend future treatment for the plaintiff's injuries which include: (a) consultation with a dietitian to assist with management of weight gain; (b) counselling to deal with symptoms of PTSD and depression as well as counselling with a qualified specialist to deal with depression, anxiety, fear, and PTSD; (c) a referral to the women's health program to get proper advice concerning use of antidepressants with the least side effects on weight gain in pregnancy; (d) the long-term use of Fetzima, an antidepressant for treatment of major depressive disorder in adults; (e) treatment by an occupational therapist for the specific assessment of the plaintiff's cognitive function to identify issues with memory gaps; (f) cognitive function treatment to reduce depressive symptoms; (g) continuing to work on a partially disabled basis; and (h) if she decides to raise a family, ongoing observation postpartum to monitor her emotional well-being and prevent the development of more aggravated symptoms of depression and anxiety postpartum. This needs to be done through a specialized clinic.

[195] More specifically, Dr. Heran stated that from a treatment standpoint, anything the plaintiff is currently utilizing is reasonable. Dr. Heran opined that her mainstay treatment should be neuromodulating medications for chronic pain management. Dr. Heran recommends continuing with Amitriptyline as a reasonable course in addition to the use of anti-inflammatories and acetaminophen prior to any activities that would worsen her pain. He also prescribed 75 mg of Lyrica twice daily and CBD with THC combination.

[196] Mr. McNeil recommended several items including:

a. a body pillow;

b. a contour pillow to assist with therapeutic sleep and nighttime pain management to be placed every two years;

c. a portable TENS (Transcutaneous Electrical Nerve Stimulation) machine, priced between $45 and $90.00, to assist with pain management;

d. a Heated Vest to be worn during the working day to apply neck and back heat to assist with pain management, priced at $73.99, to be replaced every three years;

e. several devices to assist with homemaking, including a combined electric floor scrubber/steam mop at a cost of $188.02 every five years and a cordless electric bathroom scrubber at a cost of 69.99 every five years;

f. weekly homemaking assistance by a Molly Maid or a similar service two hours per week for 52 weeks per year, to perform heavier household cleaning, priced at a rate of $35.00 per hour or $3,640.00 per annum;

g. seasonal cleaning assistance to manage pain and limited activity tolerance is recommended at eight hours twice per year or 16 hours per annum by the services aforesaid for an amount of $560.00 per annum;

h. ergonomic assistive devices at work to allow the management of pain and the need to remain productive with minimal interruption with work flow. Such devices include a sit stand desk approximately $950.00 with height adjustable keyboard tray at $285.00 and an adjustable computer monitor arm at a cost of $169.00 to $238.00 as well a footrest with a message surface at $55.95;

i. a multidisciplinary pain management programme was recommended by Dr. Ganesan, which programme would be administered by a multidisciplinary health care provider team at a cost of $10,000 to $15,000;

j. continue to exercise independently under the supervision of a kinesiologist and she should continue exercising in a pool to reduce impact. Six sessions per year supervised by a kinesiologist at $89.00 per session would cost $534.00 and may be required for more than one year;

k. home exercise equipment including a stability ball at a cost of $69.95, renewed every three years; a yoga mat at a cost of $26.39 renewed every three years; resistance bands renewed every three years at a cost of $62.66; training wet vest for water walking or running exercise at a cost of $239.95 replaced every five years, together with a fitness pass for access by the plaintiff to a pool and a gym at a cost of public fitness facilities of $555.00 each year;

l. massage and physiotherapy to be used as ongoing passive modalities to manage periods of exacerbated pain especially as the plaintiff tries

to increase her activity level. Massage Therapist sessions cost $2,640.00 per annum and Physiotherapy sessions cost $2,880.00;

m. Psychological Counselling to deal with cognitive/behavioural pain management and mood where 100 sessions over three years at a cost of $22,500.00 were recommended by Dr. Ganesan;

n. occupational therapy sessions were recommended to address biomechanical management at work and in daily household chores and to address cognitive and biomechanical pain management strategy. Six sessions were recommended for an estimated cost of $1,512.00.

[197] The plaintiff testified that she was involved and intended to continue with many of the therapies listed above.

[198] Based on present prescriptions continuing into the future would be $500.00 per annum until death for a total of $16,547.50. The lump sum present value of future care expenses above as calculated by Mr. Benning is $404,805. That sum combined with medication expenses of $16,547.50 equals $421,352. I accept that the medical evidence supports that these treatments are reasonably necessary for the plaintiff's future care and management of her symptoms related to her injuries. The plaintiff is awarded this amount.

[199] The defence did not file any expert evidence which responded to the report of Mr. Benning

In Trust Award

[200] The Court in *Meckic v. Chan*, 2022 BCSC 182. described in-trust awards as follows:

> [213] The parties agree that the Court has jurisdiction to make an in-trust award as a separate head of damages to compensate any individual who provides to the injured plaintiff care and services such as housework, nursing and other assistance made necessary by the plaintiff's injury. The claim is usually brought on behalf of family members providing the assistance and support but in-trust awards can also be made to non-family members.
>
> [214] Generally speaking, the requirements for making such an in-trust award include the following:
>
> • the assistance provided must be necessary for the care of the plaintiff as a result of her injuries;

> • the services must be over and above what might be ordinarily expected from a family member or friend;
>
> • quantification of the award should reflect the true and reasonable value of the services performed, taking into account the time required and the quality and nature of the work;
>
> • the maximum value of such services will generally be the cost of obtaining them from a professional third-party service provider; and,
>
> • it is not necessary for the person providing the services to have foregone other income in order to qualify for an award.

[201] The plaintiff in this case has made two claims for in-trust awards: the first for Gopal Patel and the second for Emmanuel Cheema.

[202] As noted above, Mr. Patel is Ms. Cheema's husband. He owns and operates a water filtration company, where he works long hours on week days and approximately five hours on Saturdays. He also performs additional responsibilities for Ms. Cheema that involve driving, such as buying groceries, picking up prescriptions, and taking her to and from medical appointments when he is available.

[203] Mr. Patel has, since the injuries suffered by the plaintiff in the accident, performed the majority of household chores including vacuuming, mopping, garbage disposal, general cleaning, dishwashing and laundry. These are tasks which the evidence supports were conducted by Ms. Cheema prior to the accident. While this couple, according to the evidence, rarely cooks meals in their own home, when they do, it is Mr. Patel who performs such tasks as chopping vegetables and lifting pots and pans to and from the stove. The evidence of Ms. Cheema was that she performed these tasks prior to the accident.

[204] Emmanuel Cheema, the plaintiff's father, testified that, prior to the accident, Ms. Cheema was a confident driver and was largely independent in the conduct of household chores and gardening as well as other household tasks. He observed his daughter helping her mother in the kitchen, vacuuming the house, taking out the garbage, and doing laundry all without physical limitation.

[205] Following the accident, Emmanuel Cheema observed the plaintiff experience significant limitations with brushing teeth, bathing, and self grooming where her

mother provided assistance. He observed his daughter attempt tasks such as vacuuming where she had to stop because of pain reactions. She stopped driving due to a combination of pain and anxiety. Emmanuel Cheema stepped in to assist her by frequently driving her to medical appointments, family events and work-related tasks until she moved out of the family home, at the time of her marriage, in October 2022. Emmanuel Cheema estimated that he dedicated seven to eight hours per week driving his daughter to medical appointments, events and work-related tasks over a period of 179 weeks. Calculated at the rate of $25.00 per hour for seven hours per week, a rate employed by the Court of Appeal in *Howes v. Liu*, 2023 BCCA 316 at para. 42, for 179 weeks equals $31,325.00.

[206] The submissions of the defendants do not provide a basis to overcome the plaintiff's submissions which support the two in trust awards referred to above. I am satisfied that both Mr. Patel's and Mr. Cheema's roles and responsibilities have increased as a result of the plaintiff's injuries and gone above and beyond what would otherwise be expected.

[207] The assessment of the in-trust award for Mr. Patel is $15,000 and the award for Emmanuel Cheema is $30,000.

Special Damages

[208] The parties have agreed that the special damages outstanding at the time of trial were $9,081.44 and that amount will be paid by the defendants. The total special damages which were already paid by or for the plaintiff set forth in Exhibit 3 were a total of $71,924.51. The plaintiff asserts that this significant sum is an indication of the extent of treatment the plaintiff has undergone because of her injuries and an indication to the extent of treatment that the plaintiff will require in the future.

Summary of Damages Awarded

[209] I find the defendants jointly and severally liable in this action and have found that the plaintiff suffered significant damages, listed below, inflicted upon the plaintiff

as a result of the motor vehicle accident which occurred on May 14, 2019, where the defendant driver failed to follow the rules of the road. The plaintiff has suffered the significant losses awarded as follows:

a) Non-pecuniary damages – $225,000.00

b) Past Loss of Earning Capacity – $456,121.44

c) Loss of Future Earning Capacity - $2,200,000.00

d) Costs of Future Care - $421,352.00

e) In Trust Claims – for Gopal Patel $15,000. and for Emmanuel Cheema - $30,000.00

f) Special Damages - $9,081.44 as agreed.

g) Pre-Judgment Interest, Tax Gross-Up, and Management Fees – if the parties are unable to agree on the amount of pre-judgment interest or any other adjustments mandated by the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, they are at liberty to apply for further directions within 30 days after the date of this judgment.

h) Costs – Should anything have occurred between the parties that might affect any award of costs in this case, the parties may make submissions in writing within 30 days of the date of this judgment. Otherwise, costs will follow the event and are awarded to the plaintiff pursuant to the Supreme Court Civil Rules as a matter of ordinary difficulty.

"Ball J."