

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Malhi v. De Claro*,
2025 BCSC 2136

Date: 20251030
Docket: M221834
Registry: Vancouver

Between:

Manpreet Katrina Kaur Malhi

Plaintiff

And

Edgar Cortez De Claro and Nissan Canada Inc.

Defendants

Before: The Honourable Justice Thomas

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.
September 29,
October 1-3, 6-8 and 10, 2025

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Background

Issues to be Decided

[1] This action involves an assessment of the injuries and associated damages suffered by Ms. Malhi as a result of a car accident that occurred on July 19, 2020.

Position of the Defendants

[2] The defendants accept that Ms. Malhi suffered a broken hand in the accident. However, they dispute that Ms. Malhi suffered any other injuries. The basis for this proposition is that Ms. Malhi's testimony should be rejected in its entirety due to credibility issues such that the court should determine that Ms. Malhi did not suffer:

- a) any injuries based solely on subjective complaints; as well as
- b) any injuries based on objective complaints on the basis that there is no link between the objective injuries and the motor vehicle accident, given the plaintiff's lack of credibility.

[3] As will become apparent, the position taken by the defendants is absurdly extreme, although not uncommon in this type of litigation. Unfortunately, this precludes the court from receiving useful assistance from counsel with respect to realistic issues impacting the assessment of damages.

July 9, 2020 Accident

[4] Ms. Malhi was driving with her sister on a residential street close to her home when the defendant's vehicle turned into her lane at high speed and collided with her vehicle head-on. The collision was significant, knocking Ms. Malhi's car backwards and off the road. The impact destroyed her vehicle.

[5] Ms. Malhi saw the defendant's car coming towards them. She remembers screaming and looking at her sister. The next thing she remembers is being outside of her car. She was disoriented and in pain. It is unclear to me whether Ms. Malhi lost consciousness, but her cognition was impaired and she was disoriented as a result of the accident.

[6] The ambulance arrived, she was put in a neck brace, strapped onto a spine board and was taken to the hospital. She underwent a number of tests at the hospital but does not recall what they were. She was released later that day.

Impact of the Accident

Injuries

[7] Ms. Malhi was dizzy and disoriented following the accident. Her arm was swollen and sore. She required surgery for a spiral fracture to her left hand. She had a large bruise and swelling across her abdomen and shoulder. She was not able to control her bladder and had to wear special underwear for six months after the accident. She had pain and tingling on her right side, shooting down her leg. Her joints were achy and did not feel solid. She had pain in her feet. She suffered significant and constant pain in her neck, shoulders and back.

[8] She had a hard time balancing. She had double vision, vertigo, dizziness, nausea and felt overstimulated. She could not control her emotions. She had a lot of anxiety and intrusive thoughts. She had difficulty focusing and memory problems. She has difficulty sleeping and nightmares. She feels anxious leaving the home and being around people. She became reclusive in the home.

[9] Her symptoms trigger headaches. She had a headache every day, but occasionally her other symptoms would worsen her headaches such that they became debilitating. When this occurs, Ms. Malhi feels like she will pass out or die and is unable to do anything.

September 4, 2020 Wedding

[10] Ms. Malhi got married in September 2020. She was unable to go to Whistler with her sisters before the wedding or participate in her prewedding activities and had to rely on her family. She had to have her wedding gown resized due to the bruising and swelling of her abdomen. She was unable to wear her choora due to her left hand being broken and swollen. She required physical assistance during the

ceremony and was unable to sit cross legged as is traditional. Her memories of this time are blurred due to her symptoms and pain medication.

Practicum

[11] Ms. Malhi was completing a full-time practicum to finish her early childhood educator (“ECE”) at Little Owl Daycare in Langley. This is moderately physical work and requires Ms. Malhi to lift children on a regular basis. She was unable to return to the practicum immediately after the accident. She tried to resume the practicum at the end of August or early September 2020 but was not physically or emotionally ready to do so. It was agreed with the school that she would return in approximately a year after completing her prescribed rehabilitation.

Treatment

[12] Ms. Malhi’s general practitioner assessed her after the accident and advised her to rest and recover before beginning active therapy. She was prescribed massage therapy, referred to a concussion clinic and prescribed pain medication.

[13] She continued with massage therapy, physiotherapy, IMS treatment, chiropractic treatment, active rehabilitation with kinesiologists, vestibular therapy, acupuncture and naturopathic remedies. She had daily nearly daily treatments for the first year or so, which her father drove her to.

[14] She performs a daily stretching regimen and purchased a Peloton bike to try to stay active. Her husband purchased her a dog to motivate and provide her companionship for outside walks.

[15] She has been on a variety of medications for her pain and headaches and on anti-depressants. However, she stopped her medications in 2022 due to her pregnancy and hopes to resume them after her daughter stops breastfeeding. She has been prescribed special glasses and orthotics.

[16] She sees a counsellor and has ongoing occupational therapy to help her manage her activities of daily living and household tasks. She has various adaptive

equipment and housekeeping support. Additionally, her family assists her with managing her children and provides her with breaks so that her symptoms stay controlled. She received a taxi account due to fear of driving and resumed driving approximately a year after the accident. She drives rarely and generally for short local trips.

Activities

Attempted Return to Work

[17] The degree of Ms. Malhi's symptoms and the volume of rehabilitation she required made a return to work in the first year difficult.

[18] Notwithstanding this, she helped her husband's family with sedentary desk or office work on a computer when they needed assistance for four weeks in October and November 2020. She worked 60 hours a week during this time and earned \$25 per hour, totalling \$6,000. However, in my view, this was not a competitive workplace environment. She was working for her family that needed her assistance, and in my view, they accommodated her psychological disabilities in order to obtain assistance from her.

[19] In conjunction with her occupational therapist and her general practitioner, Ms. Malhi prepared for a gradual return to her practicum in August of 2021. The plan was that she would return to work every other day for a maximum of five hours as tolerated. The school made it clear that this would have been approved had they been approached with the plan by Ms. Malhi. Ms. Malhi testified that she was told by the school that she could not return to her practicum on a part-time basis. In my view, this was an assumption Ms. Malhi made and she did not fully explore this with the school.

[20] Ms. Malhi was unable to work full-time and withdrew from her practicum shortly after returning in September 2021. She could not physically or emotionally handle full-time work as an ECE.

[21] She was able to manage some part-time work as an early childhood assistant (an accreditation she had obtained through her ECE schooling) in the fall of 2021— with 10 hours in September, four hours in October, 10 hours in November and 12.5 hours in December. In 2022, she worked 35 hours in June, five hours in August and 20 hours in September. Her employer did not notice a significant change in her ability to work after the accident and would have been happy to continue to employ her on a part-time basis.

Physical Activities

[22] Ms. Malhi was very fit prior to the accident. She introduced her husband to physical activities and they would hike, do yoga and work out together prior to the accident. They also enjoyed travelling by plane and driving to such places as Tofino, Whistler, and the Okanagan.

[23] She was unable to enjoy these activities after the accident as she had before. There was a dramatic change in what she could physically do after the accident. For example, she is now unable to manage grocery shopping, so her husband does this for the family.

Impact on Marriage

[24] Ms. Malhi moved into her husband's family home after her wedding. They moved into their own home several months later. Her husband testified that they moved because they wanted more privacy, which was not available to them in the family home. In my view, they likely would have moved out of the family home had the accident not occurred.

[25] Ms. Malhi was unable to sleep in the same bed as her husband due to her injuries and nightmares. She is more irritable with her husband and relies upon him to do all the shopping. Their love life has dramatically reduced. They no longer do activities together and Ms. Malhi has become more reclusive and does not go out with her husband. He now goes to family events and celebrations without her.

[26] Her husband has to do more than his share around the home. Ms. Malhi feels that he has to work longer and harder to support the family financially since she is not working.

Impact on Family

[27] Ms. Malhi has difficulty breastfeeding her one-year-old daughter due to her injuries and cannot lift her two-year-old son, who weighs approximately 40 pounds. She is unable to play with him as she would like, and he has to do more activities independently because of her physical limitations. Ms. Malhi also does not involve him in as many extracurricular activities as she would prefer because she does not like going outside, feels anxious about driving, and experiences general emotional distress.

[28] Prior to the accident, the family hoped to have up to five children and for Ms. Malhi to homeschool them. Ms. Malhi was 30 years old at the time of the accident. Their son was born on December 28, 2022, and their daughter was born on November 14, 2024. She stated that had the accident not occurred, it would have been her preference to put off having children to a later date. I do not accept that this would have happened. In my view, having a large family was the first priority and Ms. Malhi would have tried to have a family at the same time if the accident had not occurred. If she did not conceive, she would have continued working and continued trying to start a family.

[29] Ms. Malhi and her husband are uncertain if they will be able to care for more children at this time, and are uncertain as to whether they will be able to have more children as they had hoped prior to the accident.

Current Symptoms

[30] Her symptoms have generally improved to some degree since the accident. She has been unable to continue with her medication and her therapies since the birth of her children. She feels this has hindered her progress and is eager to return

to them. She has put on significant weight prior to her first pregnancy and has been unable to lose the weight due to inactivity.

[31] She hopes she can complete her ECE practicum. At the time of trial, she remained under the mistaken impression that this could only be completed working full-time. She believes she can finish the practicum but would prefer to accept the discomfort of her symptoms as part of the effort. She still wants to work as an ECE in some capacity.

Credibility Concerns

Legal Principles

[32] Justice Dillon summarized the factors courts must consider when assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392 as follows:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[33] In assessing the credibility and reliability of Ms. Malhi, I am also cognizant of, and rely on, the principles set out by our Court of Appeal in the recent case of *R. v. S.S.M.*, 2024 BCCA 417 at paras. 659–73:

[65] The credibility of a witness refers to their honesty or truthfulness. Reliability refers to their accuracy. While related, these are distinct concepts. For example, a truthful witness may be mistaken about what they believe they saw or heard.

[66] The fundamental approach [is] to [assess] the credibility of a witness and the reliability of their evidence was articulated in *Faryna v. Chorny* . . .

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[67] The assessment of both credibility and reliability is context-specific and multi-factorial. Factors that inform the assessment include: the opportunity and capacity of the witness to observe or perceive the events; the ability to remember those events; whether, or the extent to which, a witness can resist being influenced by an interest in a particular outcome when recalling those events; inconsistency in the witness's evidence at trial or between prior accounts; whether the witness's evidence harmonizes with, or is contradicted by, other reliable evidence; whether the evidence seems unlikely, unreasonable, or improbable in light of the probabilities affecting the case; and the witness' demeanour, meaning the way they presented while testifying . . .

[68] Regarding the last of these, demeanour, it is well-recognized that grounding credibility or reliability determinations solely, or primarily, on this factor carries significant risks. . . .

. . .

[70] How a witness answers questions and some of the factors . . . in *Stenner* are captured by the notion of balance . . . Balance exists when a witness shies away from exaggeration or minimization, acknowledges memory frailties, admits personally difficult facts, or credibly acknowledges weaknesses in their evidence. A balanced witness does not answer questions strategically, in the sense that they answer the questions asked and without attempt to unreasonably control the narrative. They do not appear to have an agenda . . .

[71] Credibility and reliability assessments can be the most important, and often the most difficult, determinations in a criminal trial, particularly in sexual assault cases which frequently involve the contradictory testimony of two witnesses about events that occurred in private. The difficulty lies not only in the challenge of the assessment itself, but in articulating the reasons.

[72] The assessment itself is challenging because it requires the trial judge to simultaneously ground the assessment in the totality of the evidence, while also evaluating the testimony of each witness and making determinations that are entirely personal and individual to that witness. The task is further complicated by the ability of the trial judge to accept some, all, or none of a witness's testimony, and to ascribe different weight to different aspects of their evidence: *R. v. Kruk*, 2024 SCC 7 at para. 81.

[73] Described as “more of an art than a science” (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 1997 CanLII 324 at para. 128), the assessment is also challenging to articulate because the exercise “may not be purely intellectual and may involve factors that are difficult to verbalize”: *R. v. R.E.M.*, 2008

SCC 51 at para. 49. It involves a “complex intermingling of impressions that emerge” from the experience of observing and listening to the witness in the courtroom: *R. v. Gagnon*, 2006 SCC 17 at para. 20.

General Comments

[34] The findings that I have set out are based upon a compilation of all of the evidence and of the chronology of events. I have found that Ms. Malhi’s testimony is generally consistent with and collaborated by the other witnesses and evidence. I did find that she tended to overestimate her pre-accident abilities and underestimate her post-accident level of function. In cases of a discrepancy between her account of these issues and other evidence I have preferred the more independent and objective evidence. For example, I preferred the evidence of her employer as to her ability to work after the accident and found that her attendance records and medical records more accurately portrayed her condition prior to the accident.

Position of the Defendants

[35] The defendant argues I should not accept that Ms. Malhi suffered any injuries outside of her broken hand due to the fact that her evidence is entirely unreliable due to credibility concerns. Counsel focused on the following examples; Ms. Malhi:

- a) denied that she had been in any other motor vehicle accidents. In direct examination, Ms. Malhi testified that she had not been in any prior motor vehicle accidents. When confronted with her examination for discovery evidence in which she had disclosed the previous motor vehicle accident to defence counsel, she agreed that her evidence in direct examination was mistaken. She agreed that the clinical records showed that she had suffered some injuries and was referred to physiotherapy and massage therapy as a result of the prior accident. However, the clinical records indicated that she did not have any ongoing issues shortly after the prior accident. She did not believe that she sought any rehabilitation treatment as a result of the accident. There was no indication that she had.

- b) denied that she had any physical injuries prior to the accident. It is true that Ms. Malhi had suffered some physical injuries prior to the accident. However, all her physical injuries had resolved well before the accident. All her clinical records had been provided. She was erratic in the disclosure of her previous conditions in discovery and independent medical examinations. In my view, this was due to the nature and circumstances of the questions, which seemed to focus on whether she had ongoing symptoms at the time of the accident.
- c) stated that she and Janos Stiasny, then Director of Wise Owl Montessori Childcare Inc., had discussions about purchasing a childcare centre in Coquitlam. The owner of the centre agreed that he may have had some preliminary discussions of the possibility of a purchase, but the parties discussed nothing beyond a possibility. There was clearly a difference in opinion about the scope of the discussions; all parties agreed that there were some discussions, but no firm offers. The offer of employment was consistent with Ms. Malhi being concerned for a management position, which would be the first step in such a purchase.
- d) stated that her school denied her request to complete her practicum on a part-time basis. I have already commented on this and have found that Ms. Malhi was mistaken about this and that she did not make reasonable inquiries with her school into the possibility of completing her practicum on a part-time basis.
- e) stated that she had made a further attempt to continue her practicum after September 2021. Ms. Malhi believed that she tried to continue her practicum after September 2021 but generally deferred to the school records, which I note were far from clear on this issue.
- f) did not testify in direct examination that she worked for her husband's parents' company for 60 hours per week for four weeks beginning October 14, 2020. Ms. Malhi disclosed this employment to defence counsel. She did not deny that it occurred in cross-examination. The fact that she was not

asked about the issue in direct examination, in my view, is not a credibility issue but represents a strategic choice with respect to how her counsel chose to present her case.

[36] I have enumerated these issues highlighted by the defence because I disagree that they raise substantial credibility concerns. In my view, they establish, in general, that Ms. Malhi was attempting to provide accurate evidence about events that occurred many years ago. When she was mistaken, with minor exceptions, she provided an appropriate explanation or she adopted the documentary evidence. Given the nature of many of the questions and the amount of time that has passed, in my view, Ms. Malhi's testimony was generally credible and reliable.

Injuries

Diagnosis

Dr. Chow

[37] Dr. Chow is a physiatrist who conducted independent medical examination of Ms. Malhi. The main issue raised by the defendants is that Dr. Chow relied, in part, on Ms. Malhi's subjective complaints for his assessment. Defence counsel urges me to reject Dr. Chow's opinion on this basis. For reasons stated earlier, I reject this position.

[38] Defence counsel also takes the position that Ms. Malhi's complaints could pre-date the accident. I agree with Dr. Chow that there is no evidence that this is the case and that the injuries and clinical examination, in addition to the clinical records and Ms. Malhi's subjective complaints, are consistent with the injuries suffered in the accident.

Soft Tissue Injuries Cervico Thoracic Spine

[39] Ms. Malhi has ongoing pain in her neck and shoulder girth. The documentation and mechanism of injury are consistent with a mechanism of injury from a front-end collision resulting from an acceleration/deacceleration injury to the cervico thoracic spine. Physical examination showed decreased range of motion of

the cervical spine with pain and tenderness reproducing her symptoms. I accept his diagnosis of soft tissue injury.

Soft Tissue Injury Lumbosacral Spine and Myofascial Pain Syndrome

[40] Ms. Malhi was complaining of low back pain, as noted in the records. The presentation is consistent with the mechanism of injury from a front-end collision. Physical examination revealed pain during the range of motion of the spine, with tender points and trigger points over the right lumbosacral paraspinal. This is consistent with findings of soft tissue injury and myofascial pain syndrome. I accept his diagnosis of soft tissue injury and myofascial pain syndrome.

Left Metacarpal Fracture

[41] Ms. Malhi suffered a spiral fracture requiring open reduction and internal fixation, which has helped to some degree. Her fracture healed and her symptoms have subsided; however, there is residual tenderness.

Concussion and Post-Concussion Syndrome

[42] Ms. Malhi fulfils the criteria for concussion based on the 2023 American Academy of Rehabilitation diagnostic criteria for concussion. She suffered from an acceleration/deceleration injury followed by impaired mental functioning. She suffers from both balance and ocular impairment and posttraumatic headache. I accept his diagnosis of post-concussion syndrome and post-traumatic headache.

Dr. Waisman

[43] Dr. Waisman is a clinical and forensic psychiatrist who conducted an independent medical examination of Ms. Malhi. His opinion was limited to psychiatric issues.

[44] As with Dr. Chow, the main issue raised by the defendants is that Dr. Waisman relied, in part, on Ms. Malhi's subjective complaints for his assessment. The defendants urge me to reject Dr. Waisman's opinion on this basis. For reasons stated earlier, I reject this position.

[45] Defence counsel takes the position that Ms. Malhi could have suffered post-traumatic stress disorder from the previous accident. I agree with Dr. Waisman that there is no evidence that this is the case and that the injuries and clinical examination, in addition to the clinical records and Ms. Malhi's subjective complaints, are consistent with this injury being suffered in the accident that is the subject of this trial.

[46] Defence counsel suggests that Dr. Waisman is an advocate who cherry picked entries from the clinical records that portrayed Ms. Malhi in a worse psychological state in an attempt to make her seem worse than she actually was. I reject this assertion; in my view, Dr. Waisman fairly summarized Ms. Malhi's condition as fluctuating.

[47] The detailed inclusion of entries in a report suggested by defence counsel in cross-examination would not be appropriate in a medical-legal report. In my view, Dr. Waisman's brief summary of the records was accurate, appropriate and consistent with the directions of this court in *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109.

Post Traumatic Stress Disorder & Chronic Pain

[48] Dr. Waisman diagnosed Ms. Malhi with post-traumatic stress disorder and chronic pain. He notes:

Ms. Malhi is trapped in a cycle of chronic pain and depression, resulting in frustration and lack of motivation to manage daily stresses. She frequently becomes overwhelmed and experiences a worsening of her symptoms in response to specific triggers. Activities that she perceives as too demanding are likely to exacerbate her symptoms and are met with avoidance and withdrawal. Situations that remind her of or are associated with the subject accident easily provoke her.

[49] I accept Dr. Waisman's opinion that Ms. Malhi suffers from post-traumatic stress disorder and chronic pain with their associated sequela as set out in the previous paragraph.

Treatment

Dr. Chow

[50] Ms. Malhi has been unable to pursue all of the recommended treatment due to her pregnancies. Dr. Chow recommends Botox injections and medication for headaches. In addition, nerve block injections and, if indicated ablation therapy could treat her neck pain.

[51] With respect to her other injuries, Dr. Chow recommends a course of six to eight weeks of physiotherapy, chiropractic treatment, or massage therapy to treat flare-ups of her condition.

[52] The plaintiff needs to maintain her current exercise program within her tolerance. It would be helpful for her to lose weight.

[53] Ms. Malhi should continue and follow the recommendations of her counsellor.

Dr. Waisman

[54] Dr. Waisman recommends psychotherapy using cognitive behavioural, mindfulness and interpersonal modalities once per week for two years and as needed thereafter. He also recommends a trial of serotonin-norepinephrine reuptake inhibitor (“SNRI”) antidepressant medication to address chronic pain, depressive symptoms and post-traumatic stress disorder.

[55] Although Ms. Malhi has tried some antidepressants, I am not satisfied that she has had a full trial of SNRI antidepressant medication. In addition, she has not pursued the recommended psychotherapy, although she has been seeing her counsellor on an ongoing basis.

Prognosis

Dr. Chow

[56] I agree with Dr. Chow that Ms. Malhi is unlikely to experience full recovery or complete symptom resolution with treatment, considering the chronicity of her

symptoms. However, in my view, there is reason for optimism with respect to Ms. Malhi's headaches and neck pain as she has yet to pursue the standard treatment of Botox injections, medication, and nerve blocks / ablation therapy for these conditions.

Dr. Waisman

[57] Dr. Waisman's prognosis is guarded and depends on Ms. Malhi's response to recommended treatment and to her physical prognosis. However, in my view, there is reason for optimism with respect to the reduction in her psychiatric symptoms, as she has not pursued the recommended treatment for her psychological symptoms or for her headaches and neck pain. Although she is seeing a counsellor, I am not satisfied that she is receiving the psychotherapy described by Dr. Waisman.

Functional Limitations

Dr. Chow

[58] I disagree with Dr. Chow's opinion that Ms. Malhi cannot work as an ECE and cannot continue her practicum. This opinion was based on Dr. Chow's understanding that Ms. Malhi was unable to perform this work. His opinion does not account for the fact that Ms. Malhi was able to work on an on-call basis. I agree that Ms. Malhi is unable to work full-time in this profession, but in my view, this would not prevent her from completing her practicum and working on a part-time basis.

[59] I agree with Dr. Chow's opinion that Ms. Malhi has a partial disability when doing some of the housework, especially heavier household tasks; and that she is also disabled from doing many of the recreational activities which would exceed her injured tissue tolerance.

[60] I agree with Dr. Chow's opinion that Ms. Malhi can perform sedentary to light physical demand tasks but will need to restrict prolonged and repetitive neck, trunk/postural, and left-hand tasks.

Dr. Waisman

[61] I accept Dr. Waisman opinion that in addition to the sequela associated with her psychological dysfunction:

Difficulties with emotional regulation, limited stress tolerance, reduced endurance, fatigue, chronic pain, and irritability further impair her ability to manage the demands of the workplace. These limitations are likely to result in absenteeism, interpersonal conflicts, mistakes, and an inability to handle unpredictability and the pace of the work environment.

[62] Ms. Malhi was frank in her testimony that she felt that her emotional sequela was one of her greatest challenges. I agree with this assessment.

Mr. McNeil

[63] Mr. McNeil is an occupational therapist and work capacity evaluator who assessed Ms. Malhi's functional capacity and costs of future care.

[64] I have concerns that Mr. McNeil's assessment does not accurately reflect Ms. Malhi's level of function.

[65] At the start of the assessment, Ms. Malhi reported that she was in moderate to severe pain when she arrived for testing. The testing had to be discontinued halfway through the day when her pain rose from five to seven out of 10. Ms. Malhi then returned on another day to continue the testing, but her baseline level of pain was not obtained. Mr. McNeil was unaware that Ms. Malhi had only a few hours of sleep on the days before the testing.

[66] In my view, this raises a concern that Ms. Malhi's symptoms were already aggravated prior to the testing and that the test results do not adequately represent her baseline level of function.

[67] These concerns are reinforced by the fact that Mr. McNeil refused to accept that Ms. Malhi could perform the sedentary work of 60 hours a week for four consecutive weeks, or perform the requirements of an early child educator on an on-call basis, given her results on his testing. He opined that these activities are inconsistent with Ms. Malhi's performance on his functional capacity evaluation.

[68] I accept that Ms. Malhi's real-life performance is inconsistent with her test results. However, in my view, this is because the test results do not accurately reflect Ms. Malhi's level of function, as her symptoms were above her baseline at the time of testing.

[69] Therefore, I find Mr. McNeil's functional capacity evaluation of little assistance.

[70] However, I do find Mr. McNeil's opinion that working as a homemaker and mother is different from working in a work environment. Working in the home environment provides much greater opportunities for pacing and working incrementally on tasks to mitigate against aggravating symptoms.

Past Loss of Income

[71] A claim for past loss of income is a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the accident: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[72] In *Bolgar v. Fraser*, 2023 BCSC 468 [*Bolgar*], Justice Hughes summarized the proper approach to assessing the value of past income loss. Actual past events must be proven on a balance of probabilities. The assessment of past loss of earning capacity also includes accounting for hypothetical past events, which must be shown to be real and substantial possibilities—as opposed to mere speculation—which the court must then weigh according to their relative likelihood: *Bolgar* at para. 80.

[73] Ms. Malhi was working full-time at her practicum at the time of the accident and had a firm offer of employment at the day care where she was performing her practicum to begin upon completion at the end of September 2020. It was her intention to work as an early child educator at least until the time that she would begin her family. I have found that she would have had her first child on December 28, 2022, and her second child on November 14, 2024.

[74] Ms. Malhi did some on-call work after her accident in December 2024 despite her late pregnancy. In my view, had the accident not occurred, she would have continued full-time until December 2024.

[75] Ms. Malhi was clear that she felt financial pressure to work to relieve some of the financial burden on her husband to financially provide for them. I accept that it is not uncommon for early child educator to bring their children into the daycare facility where they work at a reduced rate in order for them to work while they have children. However, based on the evidence at trial, this arrangement is not economically feasible for more than two children.

[76] Given the strong family support available to Ms. Malhi and the fact that workers can bring their children into the daycare while they are working, in my view, Ms. Malhi would have returned to full-time work by June 2023. However, there would have to be a deduction in her earnings for the cost of obtaining childcare for her son.

[77] I am satisfied that Ms. Malhi would have worked full-time until the birth of her daughter in November 2024. Ms. Malhi's daughter was anxious and very attached to Ms. Malhi such that in October 2025 it remained difficult for Ms. Malhi to be away from her for lengthy periods of time. There is no evidence to suggest that this was due to the accident. In addition, I am not satisfied that Ms. Malhi would have earned more money than she would have had to pay for childcare had she returned to work. Therefore, in my view, Ms. Malhi would not have returned to work prior to October 2025 had the accident not occurred.

[78] Therefore, but for the accident, Ms. Malhi would have been employed as follows:

- a) from October 2020 to December 2022, full-time as an ECE; and
- b) from June 2023 to November 2024, full-time as an ECE.

[79] In September 2022, Ms. Malhi was physically capable of working as an ECE and completing her practicum on a part-time basis absent her psychological injuries.

However, given the degree of her psychological sequela and its interrelationship with her physical injuries, in my view, she remains essentially unable to maintain full-time employment, with the ability to only work sporadically.

[80] Therefore, I assess her loss of past earning capacity as follows:

Year	ECE income	Childcare expenses	Income actually earned	Gross income / After tax income
2021	\$13,325	n/a	\$9,438	\$3,887 / \$3,887
2022	\$40,000 (12 months)	n/a	\$1,500	\$38,500 / \$30,000
2023	\$20,000 (6 months)	\$10,000	\$212.50	\$9,787.50 / \$9,787.50
2024	\$35,000 (10.5 months)	\$17,500	n/a	\$17,500 / \$17,500
2025	n/a	n/a	n/a	n/a
Total				\$61,274.50

[81] I have adjusted for income tax pursuant to the dicta in *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 174 – 175. In addition to this amount, Ms. Malhi is entitled to pre-judgment interest on these amounts.

Future Loss of Earning Capacity

[82] In *Bolgar*, Justice Hughes also summarized the proper approach to assessing damages for future loss of earning capacity, including the three-part test affirmed by the recent trilogy of decisions on this issue from our Court of Appeal:

[106] The proper approach to assessing damages for loss of future earning capacity was clarified by the Court of Appeal in the trilogy of *Dornan; Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The approach to this assessment post-trilogy was aptly summarized in *Rattan* as follows:

[146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).

[107] The three-step process for considering claims for loss of future earning capacity is as follows:

- a) Does the evidence disclose a potential future event that could give rise to a loss of capacity;
- b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff; and

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

See *Rattan* at para. 148, citing *Rab* at para. 47.

1. Is there a potential future event that could give rise to a loss of capacity?

[83] In my view, Ms. Malhi is physically unable to work full-time as an ECE but physically capable of sedentary work. However, she is completely unable to work in any capacity due to her psychological issues combined with her physical disabilities.

[84] However, there is reason for optimism for an improvement in her physical disabilities through Botox and nerve block therapies, and optimism for improvement in her psychological issues through medication, psychotherapy and improvement in her physical symptoms.

[85] I am optimistic that Ms. Malhi will be capable of part-time work as an ECE and/or full-time sedentary work through further treatment. If she improves, she would be able to complete her ECE training in a period of six months. However, there is no significant financial difference between being able to work as an ECE or the sedentary work for which Ms. Malhi is qualified.

[86] Despite this optimism, Ms. Malhi remains with a permanent functional disability of both a physical and psychological nature. This satisfies the first part of the *Rab* test.

[87] My optimism for improvement is tempered by the chronicity of her symptoms and the fact that many of her symptoms are permanent to various degrees.

[88] Considering these factors, I set the likelihood of Ms. Malhi being able to return to work in some capacity at 30%.

2. Is there a real and substantial possibility that the loss of capacity will cause a pecuniary loss?

[89] Ms. Malhi intended to have a large family, ideally five children, and wished to homeschool them. Although this is a lifestyle choice, it also makes economic sense

as childcare expenses would exceed what Ms. Malhi would earn either an ECE or in the sedentary jobs for which she is qualified.

[90] The implication of these findings is that there would have been a significant period of time during which Ms. Malhi would not be in a position to return to the workforce had the accident not occurred because of her childcare and educational responsibilities. However, in my view, after the children had finished school, there is more than a real and substantial possibility that she would have returned to the workforce but for the accident.

3. What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[91] In my view, an appropriate wage for working full-time as an ECE or in a sedentary job for which Ms. Malhi is qualified is \$42,900. I agree with defence counsel that an appropriate general contingency to apply to the present value calculations is 20%. I say this because Ms. Malhi's work pattern prior to the accident contained numerous absences from the workforce. I refer to the discussion on this issue in *Omerovic v. Merced*, 2023 BCSC 727 at paras. 104–106 and 118 and 2021 BCSC 754 at para 216.

[92] This leads to the following economic calculations:

Period of Time	Present Value based on \$42,900 per year	General contingency adjustment of 20%
October 2025 to October 2055 (30 years work from date of trial to 65)	\$1,000,000 (rounded)	\$800,000
October 2035 to October 2055 (20 years work from 10 years after trial to 65)	\$725,000 (rounded)	\$580,000

October 2045 to October 2055 (10 years work from 20 years after trial to 65)	\$400,000 (rounded)	\$320,000
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[93] In my view, it is likely that Ms. Malhi would have had more children and would have returned to the work force on a full-time or part-time basis somewhere between 10 and 20 years after the date of trial. This leads to a present value of \$450,000 $(\$580,000 + \$320,000) / 2$ for full-time work and \$225,000 $(\$450,000 / 2)$ for part-time work. I assess the overall present value of her non-accident future earning capacity at \$325,000.

[94] Given my finding that there is a 30% that Ms. Malhi will be able to return to work with further treatment, this leads to a mathematical calculation of a loss of earning capacity of \$227,500.

[95] Using these calculations as a starting point, and considering the difficulties in assessing these future possibilities given the large number of variables, I assess her loss of future earning capacity at \$200,000.

Special Damages

[96] Ms. Malhi claims \$9,745.97 for out-of-pocket expenses. The defense takes no issue with the expenditures *per se*, but says that expenses for acupuncture and Chinese medicine were not prescribed by her physician and therefore not appropriate.

[97] In my view, there is no merit to this position. These are specialties recognized under the *Medical Practitioners Act*, R.S.B.C 1996, c. 285. Ms. Malhi reasonably sought relief for her symptoms and looked to recognized areas to seek relief. In my view, her claim for special damages is appropriate.

Housekeeping Services

[98] Ms. Malhi claimed housekeeping services under her claim for cost of care items, but in my view, it is more appropriate to deal with this as a separate head of damages.

[99] Housekeeping services are appropriately awarded in situations where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work: *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34 [*Kim*].

[100] This is to be distinguished from circumstances where a plaintiff is able to perform housekeeping tasks with some difficulty or decides they need not be done because performing the work causes discomfort. This type of loss is more properly compensated as part of non-pecuniary damages: *Kim* at para. 33.

[101] In this case, Dr. Chow opines that the plaintiff is partially disabled from heavier household tasks and needs to avoid activities that would aggravate her symptoms. In my view, this provides a basis for a claim for housekeeping assistance.

[102] Mr. McNeil opines that Ms. Malhi requires two hours of homemaking assistance a week, with once yearly seasonal cleaning assistance to assist with other heavier items. In my view, this is appropriate for Ms. Malhi care needs and consistent with Dr. Chow's opinion.

[103] Therefore, I award two hours of homemaking assistance per week and an annual seasonal cleaning assistance to age 65. In my view, since Ms. Malhi will continue to be unable to complete from these tasks even if she improves with further treatment, a contingency deduction is not appropriate. The homemaking assistance is costed at \$4,160 a year, which I assess at \$4,000 a year and a present value cost of \$90,00 and the seasonal assistance has a yearly cost of \$700 and a present value of \$14,500.

[104] Keeping in mind the circumstances and the difficulties inherent in estimating exact costs, in my view Ms. Malhi is entitled to an award of \$100,000 for loss of housekeeping and seasonal assistance.

Cost of Future Care

[105] The “test” for future care awards is essentially that there must be a medical justification for the claim and the award must be reasonable in the circumstances: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.), aff’d (1987) 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 at paras. 210–211.

[106] I agree with defence counsel that the plaintiff must prove her case both in terms of need and the opportunity to utilize the item sought: *O’Connell v. Yung*, 2012 BCCA 57 at paras. 67–68. Where the costs claimed are not matters of absolute necessity, a plaintiff cannot assume that the court will simply accept the recommendations of occupational therapists or even of medical practitioners.

[107] I also accept the comments of Justice Newbury in *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 13–15 that “a little common sense should inform claims under this head, however much that may be recommended by experts in the field.”

[108] Mr. McNeil provides recommendations for a number of sleeping, cleaning and exercise items. I am not satisfied that they will be utilized by the plaintiff, nor am I satisfied that they are items that would not generally be found in a household already.

[109] Ms. Malhi has an established fitness and stretching program that meets her needs with the items she has. In addition, she has been awarded ample housekeeping assistance to ensure that she does not aggravate her symptoms by performing medium and heavy household tasks. In my view, the circumstances of this case do not merit additional care items.

[110] Dr. Chow recommends care from a chiropractor, physiotherapist or massage therapist for six to eight weeks to treat flare-ups. In my view, 12 sessions of one of these therapists is appropriate per year until age 65. Based on Mr. McNeil's report, I value these treatments at \$1,400 per year. This has a present value of \$31,355. In my view, an appropriate award would be \$30,000.

[111] No costing estimate was provided for the Botox injections, nerve block and ablation therapy. Therefore, I assume that this is available to Ms. Malhi free of cost. If this is not the case, the parties are invited to make further submissions on this point.

[112] Dr. Waisman recommends 104 sessions of psychotherapy over two years, valued at \$235 per session for a total of \$24,440. In my view, an appropriate award for this would be \$30,000, as I expect that she will require additional sessions after the initial two-year period.

[113] In summary, I have determined that the appropriate award of damages is \$60,000 under this head.

Non-Pecuniary Damages

[114] Both parties relied upon the factors and methodologies set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34. I will not review counsel's submissions on the law. The principles are non-disputed and well-known.

[115] Ms. Malhi is 34 years old. I have set out the injuries caused by the accident, her functional limitations and the impact that the injuries have on her life. I will not repeat them. It is clear that the injuries she sustained in the accident have dramatically affected her life.

[116] Defence counsel takes the position that the plaintiff has not proven that she suffered any injuries in excess of the fracture to her left arm and provided case law consistent with this analysis. As noted, this position has been rejected with the result that the cases referred are not applicable.

[117] Ms. Malhi's counsel referred me to three cases to provide support its position that a range of non-pecuniary damages from \$235,000 to \$265,000 would be appropriate.

[118] The first case is that of *Gark v. Lauzon*, 2023 BCSC 1930 [*Gark*] in which the plaintiff received \$220,000 in non-pecuniary damages. In my view, this case represents an award for injuries that had a slightly greater impact on the plaintiff than is the case with Ms. Malhi. I have determined that there is a reasonable chance that Ms. Malhi will be able to return to full-time work. In addition, the non-pecuniary award in *Gark* included compensation for loss of housekeeping capacity, which I have provided a separate award for.

[119] The second case is *Steinlauf v. Deol*, 2021 BCSC 1118 [*Steinlauf*] in which the plaintiff received \$265,000 in non-pecuniary damages, when adjusted for inflation. In that case, the plaintiff lost his career as an RCMP officer and all aspects of his life were impacted. In my view, Ms. Malhi was not as significantly injured as the plaintiff in *Steinlauf* and the impact on her life was not as severe as she is able to look after and homeschool her children, which she had hoped would be a significant part of her life prior to the accident.

[120] In my view, the closest case to Ms. Malhi's circumstances is the case of *Fletcher v. Biu*, 2020 BCSC 1304, in which the plaintiff was awarded \$238,000, adjusted for inflation, in general damages. However, this award also included compensation for loss of household services.

[121] In considering the nature of Ms. Malhi's injuries and the personal impact that they had on her; and upon considering the cases provided by her counsel, in my view \$200,000 represents a fair assessment of Ms. Malhi's non-pecuniary loss.

Summary of Award

[122] I award the following damages to Ms. Malhi:

- a) \$200,000 non-pecuniary loss;

- b) \$60,000 cost of future care;
- c) \$100,000 for loss of housekeeping services;
- d) \$9,745.97 special damages;
- e) \$200,000 loss of future earning capacity; and
- f) \$61,274.50 (net) plus pre-judgment interest, for past loss of income.

Costs

[123] The parties may apply to appear before me within 60 days if they are unable to resolve the issue of costs and/or deductibility of benefits.

“Thomas J.”