

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chau v. Farshid*,  
2023 BCSC 1004

Date: 20230609  
Docket: M202936  
Registry: Victoria

Between:

**Lisa Chau**

Plaintiff

And

**Shermina Farshid,  
Navid Shams and Honda Canada Finance Inc.**

Defendants

Before: The Honourable Justice Girn

## Reasons for Judgment

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Place and Dates of Trial:

Victoria, B.C.  
September 26-29  
October 3-5 and 28, 2022

Place and Date of Judgment:

Victoria, B.C.  
June 9, 2023

**Table of Contents**

**INTRODUCTION..... 4**

**EVIDENCE..... 5**

    Credibility..... 6

    Circumstances Before the Accident..... 7

        Work History..... 7

        Physical Activities..... 8

        Housekeeping..... 8

        Family Activities..... 9

        Pre-Existing Medical Conditions..... 9

    The Accident..... 9

    Circumstances After the Accident..... 10

    Lay Witnesses..... 13

        Dr. Lindsay Hawkins..... 13

        Troy Elphick..... 14

        Sally Chalmers..... 16

        Kathy Poole..... 17

    Expert Evidence..... 17

        Dr. Jannice Bowler..... 18

        Dr. Lynne C. MacKean..... 20

        Dr. Kaila Holtz..... 21

        Tania Percy..... 23

        Claudia Walker..... 26

**ASSESSMENT AND FINDINGS..... 27**

    Credibility..... 27

    Causation..... 27

    Failure to Mitigate..... 29

**SUMMARY OF FINDINGS REGARDING MS. CHAU’S ACCIDENT-RELATED INJURIES..... 31**

**DAMAGES..... 34**

    Non-Pecuniary Damages..... 34

    Past Loss of Income Earning Capacity..... 38

    Loss of Future Income Earning Capacity..... 41

1. Does the evidence disclose a potential future event that could lead to a loss of capacity? ..... 42

2. Does the evidence demonstrate that there is a real and substantial possibility that the future event in question will cause a pecuniary loss? ..... 43

3. Assessing the value of the future loss ..... 44

Cost of Future Care ..... 47

Loss of Housekeeping Capacity ..... 52

Special Damages..... 55

**CONCLUSION ..... 55**

**Introduction**

[1] On February 14, 2019, the plaintiff, Lisa Chau was on her way home from work when she was involved in a motor vehicle accident (the “Accident”) on Quadra Street in Victoria, British Columbia.

[2] Ms. Chau was the driver and sole occupant of her vehicle when it was rear-ended by the defendant, Shermina Farshid (“Ms. Farshid”).

[3] The defendants have admitted liability but dispute the quantum of damages.

[4] Ms. Chau seeks damages for injuries and losses sustained as a result of the Accident. She claims to have suffered soft tissue injuries to her shoulder, neck and upper back, and suffers from ongoing headaches.

[5] Ms. Chau submits that the evidence at trial demonstrates her injuries are significant, ongoing, and have substantially interfered with her ability to earn income and to maintain her home, her relationships, and enjoyment of activities.

[6] She seeks damages for pain, suffering, and loss of enjoyment of life, loss of past and future income capacity, loss of housekeeping capacity, cost of future care and special damages.

[7] The defendants submit that the plaintiff suffered a temporary aggravation of pre-existing pain in her shoulder, neck and upper back as a result of the Accident. They submit Ms. Chau is only entitled to a modest award for pain, suffering and loss of enjoyment of life and that there should be no separate award for loss of housekeeping capacity.

[8] They further submit that while Ms. Chau is entitled to very minimal loss of past income, no award should be made for loss of future income and cost of future care. Finally, they argue that any award Ms. Chau receives should be reduced because she failed to mitigate her losses.

[9] The parties also do not agree on the quantum for special damages.

[10] The issues to be decided by the Court are:

- a) The nature and extent of Ms. Chau's injuries arising from the Accident; and
- b) The appropriate damages to be awarded to Ms. Chau.

**Evidence**

[11] The parties have provided a great deal of evidence and material through various lay and expert witnesses. They also made detailed submissions, both oral and written, on the facts and the law they consider to be relevant. While I have considered all of the evidence, material, and the law, in these reasons I will focus on the facts and law that I consider to be most directly relevant to the decision.

[12] In addition to the plaintiff, four lay witnesses testified:

- a) Dr. Hawkins, Ms. Chau's Physician;
- b) Troy Elphick, Ms. Chau's spouse;
- c) Kathy Poole, Ms. Chau's former employer; and
- d) Sally Chalmers, Ms. Chau's friend.

[13] Both Ms. Chau and the defendants relied upon expert evidence.

[14] Ms. Chau was 36 years old at the time of the Accident, and 39 at the time of trial.

[15] Ms. Chau was born in Victoria. Her parents immigrated to Canada from Vietnam and settled on Vancouver Island. Ms. Chau grew up watching her parents, and later on her mother after her parents separated, working hard to make ends meet. They often worked multiple jobs to support Ms. Chau and her two siblings.

[16] Ms. Chau says watching her parents financially struggle provided her with a strong work ethic so that she would be able to provide a better standard of living and more opportunities for her own children.

[17] Ms. Chau resides in Victoria with her common law partner, Mr. Elphick. They have been together since 2007 and have two daughters, born in 2012 and 2014.

### **Credibility**

[18] In making my findings, I must assess the credibility and reliability of Ms. Chau and the other witnesses. I do so throughout my analysis of the evidence below.

[19] Credibility and reliability are two different, but related, considerations. Credibility focuses on a witness's veracity, while reliability is concerned with the accuracy of the witness's testimony, with consideration of the witness's ability to accurately observe, recall, and recount events in issue: *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[20] In assessing credibility, factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), provide guidance:

[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), 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] 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).

[21] Where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the Court must be exceedingly careful in assessing credibility: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.); see also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 24–25.

[22] In this regard, the comments of Justice G.C. Weatherill in *Henry v. Fontaine*, 2022 BCSC 930, are most helpful:

[54] As is generally the case in personal injury actions, the most important witness is the plaintiff himself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.

[55] A plaintiff who accurately describes his symptoms and circumstances before and after the collision, without minimizing or embellishing them, can reasonably anticipate that the court will find his evidence to have been credible and reliable.

## **Circumstances Before the Accident**

### ***Work History***

[23] Ms. Chau has worked full time since graduating from high school, only taking time off when her children were born. She attended esthetics school and worked in the spa industry from the age of 20 years old, both on Vancouver Island and the Lower Mainland. However, her goal was to work in an administrative setting.

[24] It has been a long-term goal of Ms. Chau's to obtain permanent employment with the provincial government. Ms. Chau obtained an office administration certificate at Camosun College. Although she applied for multiple office administration jobs, she was not successful. Ms. Chau wanted to pursue further education to obtain a business diploma.

[25] While working as an esthetician, Ms. Chau also worked additional jobs including as a hostess at Earls and at a Victoria golf course as a banquet server.

[26] After her second daughter was born, Ms. Chau worked full time at Outshine Spa in Victoria from 2015 until 2018.

[27] Eventually, in May 2018, Ms. Chau was successful in landing a receptionist job at the law firm, Mullin DeMeo Wick ("Mullin"). Although her income was less than what she made at Outshine Spa, it allowed her to get into the field of office administration.

[28] Ms. Chau's duties at Mullin involved usual reception and office administrative duties including desk work on the computer and driving to the bank everyday to make firm deposits. She testified that part of her duties entailed assisting fifteen legal

assistants and five lawyers. Ms. Chau regularly worked overtime at Mullin. Prior to the accident, she was able to complete all job duties and they did not cause her any stiffness or pain.

[29] Despite having two young children, in addition to her full-time position at Mullin, she continued to work at Outshine Spa on the weekends. In this role, she performed pedicures, manicures, and other esthetic treatments.

[30] Ms. Chau testified that she also had a side business selling household products and essential oils with Young Living. This work involved hosting parties with her friend, Ms. Chambers, to assist customers on making their own products. This job required reaching out to people in her spare time, setting up events, and selling products.

### ***Physical Activities***

[31] Ms. Chau was a very active person both before and after the birth of her children. Before their children were born, Ms. Chau and Mr. Elphick spent a lot of time outdoors doing activities including hiking, walking, rollerblading, skiing, and camping. Ms. Chau also attended the gym four or five days a week. Ms. Chau and her family spent a lot of time outdoors and enjoy camping throughout Vancouver Island, which they continue to do.

[32] In 2010, Ms. Chau took up running and joined a running club. She ran three to four times a week. Eventually, Ms. Chau began to train for longer runs. She was able to complete two full marathons and many half marathons in the years prior to the Accident.

[33] After Ms. Chau had her two children, she had to stop running for a short period of time, but returned to marathon running shortly thereafter.

### ***Housekeeping***

[34] Ms. Chau testified that she and Mr. Elphick shared in the household chores and that she was able to perform all the chores around the home without any difficulty. This included vacuuming, cleaning the bathrooms, yard work, seasonal cleaning and carrying laundry and the vacuum cleaner up and down stairs.

***Family Activities***

[35] Ms. Chau was also very involved in her children’s routine. She made lunches for her daughters every morning. Ms. Chau’s daughters are very active in extracurricular activities including hockey, softball, and dance. She was very involved in driving them to the various activities and attending out of town tournaments and competitions.

***Pre-Existing Medical Conditions***

[36] For six years prior to the Accident, Ms. Chau attended for massage treatments. Treatment records tendered into evidence by agreement show that Ms. Chau received 22 treatments over the six years. Ms. Chau says she sought these treatments to help with soreness from running long distances on pavement. She says that she suffered from minor neck and/or back stiffness related to her running or breastfeeding after the birth of her children. She denies having any long-term pain related to work that required her to seek massage therapy.

[37] Ms. Chau’s family physician testified that her clinical records do not indicate any record of chronic pain, nor were there any documented record of Ms. Chau seeking treatment relating to running or work. Ms. Chau pursued massage treatments on her own, without consulting her physician.

***The Accident***

[38] On February 14, 2019, Ms. Chau was on her way home from work when she was rear-ended by the defendant, Ms. Farshid. Ms. Chau testified that it was snowing that evening which precipitated her to drive cautiously as she approached the intersection. The impact of the collision was hard and Ms. Chau believes her vehicle was pushed about a half car length forward.

[39] The force of the Accident was confirmed by the evidence of Ms. Farshid. Although Ms. Farshid did not testify at trial, parts of her examination for discovery were read into the record. Ms. Farshid stated that Ms. Chau’s car was stopped and Ms. Farshid was about six to seven car lengths behind hers, driving downhill.

Ms. Farshid said she tried to stop but was unable to avoid hitting Ms. Chau's vehicle and that the impact of the collision caused Ms. Farshid's vehicle airbags to deploy.

[40] Emergency services attended and secured the Accident scene.

**Circumstances After the Accident**

[41] After the Accident, Ms. Chau immediately went to bed and recalled having pain and a headache that night. She recalls being sorer and stiffer the next day. She did not attend work and secured an appointment with the first available physician that day.

[42] Ms. Chau reported to the doctor at the medical clinic that her neck and back soreness and stiffness was a 6/10 and 7/10 and that she had tried ice packs and Epsom salts, as well as Advil. Over the course of that weekend, Ms. Chau remained at home and, for the most part, convalesced.

[43] Ms. Chau returned to work at Mullin after the weekend. She testified that she "needed to go to work" because she did not want to leave her colleagues short staffed. She felt anxious to drive, even when she performed her usual banking duties at work.

[44] Ms. Chau continued with massage therapy treatments soon after her first medical appointment. She also followed up with her own family physician, Dr. Hawkins.

[45] On March 8, she told her physician that her neck as "very stiff" along with her back, as well as experiencing pain at night and headaches. She was given a prescription for Naproxen on that occasion and, on the following visit (March 20) a prescription for a narcotic pain killer, Tylenol #3. On the advice of her doctor, she initiated physiotherapy and continued with massage therapy.

[46] Ms. Chau testified that her symptoms are currently much as they have been over the past three years, i.e. she continues to experience two to three headaches per week, and neck, shoulder, and back pain virtually daily.

[47] Ms. Chau says her ability to perform her work at Mullin was impacted by the Accident.

[48] Ms. Chau missed a number of days of work at Mullin. Although she was not off work for an extended period, she experienced symptoms in her neck, shoulder, and back while working at her desk and found it was difficult to sit for long periods of time. Ms. Chau was also more anxious driving, which she says affected her ability to do bank runs for her employer.

[49] Ms. Chau testified that she had to push through her symptoms to complete her various tasks, which meant that she was exhausted at the end of the day.

[50] Ms. Chau describes that her pain is worse at the end of each day and her contact with her children continues to be limited. Ms. Chau testified that she will often come home in pain and go directly to bed. She routinely misses family meals in the evening as well as bedtime routines. She cannot do many of the evening chores around the house as she used to be able to do, having to leave those to her partner.

[51] Shortly after the accident, Ms. Chau also attempted to return to weekend work at Outshine Spa and only worked until mid-April 2019 when she had to resign because of the pain from the Accident. Ms. Chau's email to her manager corroborates her decision to leave. Ms. Poole, her employer at Outshine Spa, confirms this.

[52] In January 2022, Ms. Chau began working as a dining room server at Dawson Heights Housing Ltd. After a month of work, she had to resign as she was physically unable to sustain that work.

[53] Ms. Chau testified that she was unable to work more than one job, as her symptoms made it too difficult to continue working such a busy schedule. This is something she had no difficulty doing prior to the Accident. Ms. Chau explained this extra money was important to the family because it helped pay for the children's extracurricular activities. Not being able to continue working her extra shifts on the weekends created financial strain for Ms. Chau and her partner.

[54] The pain and limitations have caused both financial and emotional stress and anxiety. Her relationship with her partner has suffered, as has her relationship with her daughters, especially the eldest who "no longer has much to do" with her.

[55] The Accident also affected family activities. About a month after the Accident, the family travelled to Edmonton for their pre-planned Spring Break trip. Ms. Chau did not participate much during the trip. A camping trip to Parksville later that summer after the Accident was cut short because she was unable to sleep in the trailer due to the pain from the Accident. During another camping trip that summer to Saratoga, Ms. Chau took a separate car so that she could leave when her symptoms proved too much.

[56] For the next two years after the Accident, Ms. Chau continued to report neck and back pain. She pursued regular physiotherapy until the therapist discharged her, despite her feeling that she still needed the treatments. She was reluctant to push back. The only therapy she continued with was massage therapy, which she had to terminate as she was no longer able to afford them after ICBC discontinued coverage.

[57] Ms. Chau went back to her running routine. She found that initially the running helped to loosen her neck and back. However, she found that the runs also brought on headaches and it was difficult to run more than 10 kilometers.

[58] With encouragement from her physiotherapist, Ms. Chau participated in the Goodlife half marathon in October 2019. She had registered for this event prior to the Accident and did not want to forfeit the money she had paid. However, following the event, Ms. Chau experienced more pain and had to undertake more treatments to address the pain. Ms. Chau has not able to return to the pre-Accident distances, schedule, or pain-free running.

[59] During the COVID-19 pandemic when she was home with her children, Ms. Chau found that her symptoms significantly improved. However, once she went back to work, the symptoms quickly returned to pre-pandemic levels.

[60] Ms. Chau was unable to continue with Ms. Chalmers on her Young Living work, as she found the extra work outside her normal full-time job to be too much. Mr. Elphick was required to pick up more shifts on the weekends in his landscaping business to make up for the reduction in Ms. Chau's extra income.

[61] Ms. Chau worked at Mullin until April 2021 when she was able to successfully obtain a temporary administrative position with the provincial government. Her temporary contract has been extended several times since then.

[62] Ms. Chau continues to work in this role with the goal to secure a permanent position but experiences symptoms in her neck, shoulder, and back on a daily basis. She has missed various days over the last few years related to obtaining treatments for her neck and back. She has not been successful in her attempts to secure a permanent position with the provincial government.

[63] Ms. Chau had hoped to return to take more courses at Camosun College to improve her chances of advancing in the provincial government. Having to study and attend courses in the evening is a concern for Ms. Chau given her pain and exhaustion at the end of the work day. She worries about not being able to complete the work or attend classes. Mr. Elphick agrees with Ms. Chau's concerns.

[64] In 2021, Ms. Chau was referred to Dr. MacKean by her physician. Dr. MacKean then referred her to Dr. Bowler, a pain specialist.

[65] From that point forward, Ms. Chau's Accident-related symptoms were followed by Dr. Bowler, who she saw for the first time in September 2021 and continues to date.

[66] Ms. Chau has undertaken nerve blocks and platelet-rich plasma ("PRP") treatments, notwithstanding her aversion to needles, a procedure that requires multiple injections into her neck, something she described as being very painful.

### **Lay Witnesses**

#### ***Dr. Lindsay Hawkins***

[67] Dr. Hawkins testified as a fact witness. She has been Ms. Chau's family physician since 2015 and saw Ms. Chau roughly 10–15 times before the Accident. Prior to the Accident, Dr. Hawkins's clinical notes have no documented complaints of neck, back, or musculoskeletal complaints nor any chronic pain.

[68] She was aware that Ms. Chau was involved in the Accident. Dr. Hawkins testified that Ms. Chau was very busy with her job and children and was often reluctant to come in because she did not want to miss work. Dr. Hawkins testified that she was not a “complainer” nor did she exaggerate complaints.

[69] Dr. Hawkins’ testified that her notes indicate she saw Ms. Chau on March 8, 2019, which was a follow up appointment after the Accident. She was aware that Ms. Chau saw another doctor at her medical clinic the day after the Accident. Ms. Chau complained of a stiff neck and back and had pain at night and trouble sleeping. Dr. Hawkins prescribed Naproxen, heat, and referred Ms. Chau to physiotherapy.

[70] In a follow up appointment on May 20, it appeared from her assessment that Ms. Chau’s symptoms were getting worse. Dr. Hawkins prescribed Tylenol #3. On July 19, she prescribed an additional 30 Tylenol #3 pills.

[71] Dr. Hawkins continued to see Ms. Chau regularly and found that she was slowly recovering with flare ups. In March 2021, she made a referral to Dr. Bowler because she had put forward all other options, which had not helped Ms. Chau with her pain.

[72] After April 29, 2021, Dr. Hawkins said there was no need for Ms. Chau to see her further in relation to her pain because she was receiving treatment from Dr. Bowler.

### ***Troy Elphick***

[73] Mr. Elphick is Ms. Chau’s spouse. He is a utility operator with the municipality of Saanich. In addition to his full-time work, he also does landscape work on weekends and holidays to earn extra money to pay for activities for their children and to help with day to day expenses.

[74] Despite not having a formal post secondary education, Mr. Elphick has worked hard in creating a good life for his family. His evidence was that it was usual for him and Ms. Chau to take on additional employment to provide for their family.

[75] Although one may view the evidence of a spouse to be biased, I found Mr. Elphick to be a very sincere, credible and reliable witness. I did not find him to

embellish the facts surrounding his observations of Ms. Chau's symptoms nor his evidence surrounding the division of responsibilities at home and child rearing, both before and after the Accident.

[76] He was honest about that the fact that he does not declare his lawn maintenance income in his tax returns. The defendants submit that his evidence should be given little weight because he has demonstrated a propensity to be intentionally and consciously deceitful and because his evidence is given in anticipation of his spouse receiving an award. They rely on *Kan v. McGill*, 2021 BCSC 843.

[77] With respect, I do not agree. In *Kan*, Justice Walkem found that the plaintiff's credibility was adversely affected because she did not declare income from a very lucrative side business. In that case, the plaintiff relied on unreported income to ground her own claim for loss of future earning capacity. The situation before me is very different. The fact that a witness other than the plaintiff, albeit her spouse, has not declared a small amount of income from his side business, in my view, does not affect his evidence as it relates to Ms. Chau before and after the Accident and how the Accident has affected their family.

[78] His testimony of his first-hand observations corroborates Ms. Chau's evidence.

[79] Mr. Elphick was able to corroborate the extent of the damage to Ms. Chau's vehicle at the time of the Accident. I accept that as days went by, Mr. Elphick observed that Ms. Chau's symptoms of neck and back pain got worse and she started to develop headaches.

[80] In regards to household duties, Mr. Elphick confirmed that he and Ms. Chau split the work including seasonal cleaning and that he did the majority of the cooking and lawn care, save and except the planters on the deck.

[81] I accept his evidence that Ms. Chau did not have any difficulties doing her share of the chores, but that after the Accident he had to take on more household chores including all of the bathrooms and mopping of floors. Mr. Elphick stated that although

Ms. Chau is able to vacuum, he must carry the vacuum up and down the stairs for her. It is the same for laundry baskets as the washer and dryer are located downstairs.

[82] Mr. Elphick has noted that the cleanliness of their home now has caused some strain in their relationship because he is unable to keep up with the extra work put on him as result of Ms. Chau's inability to do her share of the chores around the home.

[83] Mr. Elphick confirmed that Ms. Chau is not as involved in family activities as she was prior to the Accident. Bedtime routines have been most significantly affected.

[84] He notes that prior to the Accident, they shared bedtime routines for their daughters. Since the Accident, he is solely responsible most nights because Ms. Chau will most often go straight to bed after dinner and sometimes immediately after she comes home from work because of the pain she suffers.

[85] I accept this has put a strain on their relationship and Ms. Chau's relationship with her daughters.

[86] Mr. Elphick testified about Ms. Chau's health prior to the Accident. He noted that she did have headaches prior to the accident but the frequency was once or twice a month, usually dependent on the services Ms. Chau was providing at Outshine Spa.

[87] In regards to Ms. Chau's running, Mr. Elphick confirmed that she had ran two full marathons prior to the Accident – one in 2013 and the other in 2015. He supported her choice to run competitively. He also confirmed that after running the half marathon in 2019, Ms. Chau was very sore and has not participated in any competitive runs since.

### ***Sally Chalmers***

[88] I found Ms. Chalmers's limited evidence both reliable and credible. Ms. Chalmers testified that she is Ms. Chau's friend who introduced her to working with Young Living. She confirmed that Ms. Chau was a vibrant and energetic person who was very active with her daughters.

[89] Ms. Chalmers testified that they worked together and ran classes instructing individuals to create healthy products from essential oils. She described the physical element involved, which includes lifting heavy boxes to and from cars and homes. Ms. Chalmers observed Ms. Chau experiencing neck pain after the Accident which has resulted in Ms. Chalmers having to take on more of the physical work in their business.

### ***Kathy Poole***

[90] Ms. Poole is co-owner of Outshine Spa. She confirmed that Ms. Chau worked for her for a number of years and then Ms. Chau worked part time on the weekends after she started working at Mullin in May 2018, until she ultimately left in April 2019.

[91] I found Ms. Poole's evidence both reliable and credible in terms of Ms. Chau's work at Outshine Spa. Ms. Poole described Ms. Chau's work as being diverse, including providing pedicures, manicures, waxing, and facials. She noted that the job can be physical depending on which type of treatment is being administered. Ms. Chau was also responsible for certain cleaning tasks at the salon.

[92] Ms. Poole said Ms. Chau was paid \$13.50 per hour or 50% commission on the services she provided, whichever was greater. She confirmed that Ms. Chau was a good employee and is welcome to come back at any time as there is a shortage of estheticians. Ms. Chau would have a lot of work if she were to come back.

[93] Ms. Poole acknowledged that it is possible to accommodate employees but noted that it would restrict the estheticians from performing a broad range of services, which may result in them not being fully booked or not being as busy. This in turn would affect their remuneration.

### **Expert Evidence**

[94] Ms. Chau tendered reports from and called the following experts:

- a) Dr. Jannice Bowler, Pain Specialist;
- b) Dr. Lynne C. MacKean, Psychiatrist; and

c) Tania Percy, Occupational Therapist.

[95] The defendants tendered reports from and called the following experts:

a) Dr. Kaila Holtz, Physiatrist; and

b) Claudia Walker, Occupational Therapist.

***Dr. Jannice Bowler***

[96] Dr. Bowler is a family physician who has additional training and specializes in the treatment of musculoskeletal pain, an area that she has worked in exclusively since 2014. Dr. Bowler has been treating Ms. Chau since September 2021 and met with her on at least 10 occasions. She was qualified to give opinion evidence in the area of pain management.

[97] Dr. Bowler's evidence was given by deposition. She authored a report dated September 11, 2022. Her report was based not only on Ms. Chau's reported symptoms but also her own findings based on various assessment tools and questionnaires. Dr. Bowler noted that she first saw Ms. Chau for neck and upper back pain and headaches with symptoms of photophobia with no nausea or vomiting.

[98] Dr. Bowler's initial diagnoses was that Ms. Chau suffered from the following:

a) Chronic sprain right shoulder girdle and neck;

b) Probable right capsular or ligamentous anterior shoulder sprain; and

c) Post-traumatic unilateral migraines/headaches.

[99] Dr. Bowler noted that Ms. Chau underwent PRP injections to her right shoulder, upper back and neck in November 2021 and February 2022. She also received nerve blocks in December 2021, January and March 2022 for her persistent headaches and neck pain. Ms. Chau reported that the injections did help to reduce the pain but only temporarily.

[100] Regarding Ms. Chau's prognosis, Dr. Bowler opined:

Ms. Chau continues to have right-sided headaches, neck and shoulder pain. Prognosis for improvement is guarded because:

- symptoms have been going on for over 3 years;
- Nerve blocks have provided symptomatic relief but are a temporary treatment and not a cure;
- Other treatment modalities such as physiotherapy have only given temporary relief.

[101] Dr. Bowler concluded that Ms. Chau has a strong likelihood of some permanent symptoms as a result of the Accident.

[102] Dr. Bowler's recommendations are:

- a) stay as physically active as she can by doing exercises and obtain a gym membership or help from a trainer);
- b) undertake periodic peripheral nerve blocks;
- c) undertake on-going intramuscular stimulation, physiotherapy, or massage for muscle pain relief;
- d) Take Further PRT, if efficacious with two treatments per year for the next three years;
- e) Take Tylenol 3 "on occasion" for pain;
- f) Botulinum A toxin for migraine or the CGRP-receptor antagonist medications;
- g) Seek help with heavier tasks at home and in the yard.

[103] Of all of the medical experts that testified in this trial, Dr. Bowler was the only one that met with Ms. Chau in person on more than one occasion, seeing her on ten occasions.

[104] In that respect, I am inclined to give her evidence considerable weight. While Dr. Bowler did not testify in person, I found her to be an impressive witness who was well prepared and did not in any way lean towards advocating for Ms. Chau. Her evidence was helpful to the Court. I accept her opinions and recommendations without hesitation.

***Dr. Lynne C. MacKean***

[105] Dr. MacKean is a specialist in physical medicine and rehabilitation. She assessed Ms. Chau on January 20, 2021 via video conference and in person on February 4, 2021.

[106] Dr. MacKean opined that Ms. Chau suffered from “grade 2 whiplash associated disorder, neck, upper back and midback” and post traumatic headaches due to injuries sustained in the Accident. Dr. MacKean also opined that Ms. Chau is probably close to the point of maximal medical improvement given that it had been almost two years since the Accident (at the time she was assessed).

[107] Dr. MacKean’s recommendations were that Ms. Chau:

- a) continue with massage therapy treatment once or twice a month;
- b) continue with regular exercises;
- c) continue with her regular running as tolerated between 5 to 10 km;
- d) receive an ergonomic assessment and setup of her workstation to optimize her position for sitting and working at the computer;
- e) take breaks to get up and move around and stretch and get away from the computer during the day;
- f) avoid heavy lifting, heavy pushing or pulling activities or heavy carrying activities; and
- g) avoid working with her arms in an overhead position for sustained periods of time.

[108] Dr. MacKean also suggested that Ms. Chau be referred to Dr. David Bowler or Dr. Jannice Bowler for a trial of trigger point injections for the myofascial pain and tightness in her neck, upper, and midback region.

[109] Dr. MacKean did not review all of the clinical records relating to Ms. Chau, including the report of Dr. Holtz. In cross-examination, Dr. MacKean was asked whether it would have been helpful to see pre-Accident medical treatment records including massage therapy records and whether they could possibly change her opinion. Dr. MacKean replied that it is possible.

[110] In re-examination, Dr. MacKean testified that she was able to review these additional medical records, including massage therapy records, a few weeks prior to testifying and they did not change her opinion.

[111] The defendants say that this evidence should not be relied on as it offends Rule 11-6 of the *Supreme Court Civil Rules* and the principles articulated in *Pedersen v. Degelder* (1985), 62 B.C.L.R. 253, 1985 CanLII 430 (S.C.). I do not agree.

[112] In any event, as I will explain later in these reasons for judgment, I find the fact that Ms. Chau attended for massage therapy treatments prior to the Accident does not impact on my assessment of whether she had any pre-existing conditions.

[113] As well, Dr. MacKean would not have the benefit of reviewing Dr. Holtz' report given that that report was written after Dr. MacKean's assessment of Ms. Chau.

[114] I find that Dr. MacKean's diagnosis, prognosis, and recommendations are not that different than Dr. Bowler's opinion and to some extent, Dr. Holtz' opinion. I accept Dr. MacKean's opinion and recommendations over those of Dr. Holtz, which I will explain below.

***Dr. Kaila Holtz***

[115] Dr. Holtz is a specialist in physical medicine and rehabilitation. She assessed Ms. Chau on May 18, 2022 and prepared her report on June 22, 2022 based on the available documentation, interview, and examination of Ms. Chau.

[116] Dr. Holtz also confirmed that throughout her history taking, and time with Ms. Chau, she never had any indication or sense that Ms. Chau was trying to mislead her, or be anything less than truthful.

[117] Dr. Holtz diagnosis is that Ms. Chau probably suffered cervicothoracic and lumbar strain injuries due to the Accident.

[118] Dr. Holtz opined:

- her examination findings suggest she (Ms. Chau) has probably recovered from her accident-related injuries and is left with myofascial stiffness that worsens with “higher intensity activities”;
- Ms. Chau’s documented right sided myofascial pain post-accident was probably due to the accident rather than a worsening of her pre-existing neck and upper back tension;
- her headaches are probably related to her neck and upper back myofascial pain rather than a separate post-traumatic migraine disorder;
- It is unclear if Ms. Chau’s persistent symptoms are due to the accident or whether she has recovered to her baseline.

[119] In regards to causation, Dr. Holtz noted:

Causation: It is possible, Ms. Chau has returned to her baseline level of neck tension and discomfort and that some of her ongoing limitations are due to fear avoidance behavior (i.e., avoiding activities that were previously painful for fear of aggravating symptoms).

[120] In regards to her recommendations, Dr. Holtz notes the following:

- It is reasonable she be provided a gym pass for the next 12 months to resume community exercise. There is no medical reason I can identify why she would require further active rehabilitation at this time.
- It is reasonable she seeks out massage therapy intermittently for the management of her predominant symptom of stiffness as she did prior to the accident.
- It would be reasonable she has a sit-to-stand workstation there as well as at her office.
- I would not recommend repeat PRP or prolotherapy injections for neck and upper back symptoms.
- It would be reasonable for her to use Voltaren (i.e., a topical anti-inflammatory cream) for activity dependent myofascial pain for the foreseeable future as needed.

[121] Ms. Chau argues that Dr. Holtz opinion should not be accepted over the opinion of Dr. MacKean for a number of reasons. Firstly, she points to Dr. Holtz’ experience – Dr. MacKean’s 28 years of experience compared to Dr. Holtz’s three years.

[122] More importantly, Ms. Chau points to a number of issues in Dr. Holtz’ report that Ms. Chau submits are fundamental flaws and of little assistance to the Court.

[123] When comparing the report to Dr. Holtz’ notes, Ms. Chau says I should be concerned about Dr. Holtz’ expert opinion and give it very little weight.

[124] While I do not agree with every point advanced by Ms. Chau as it relates to Dr. Holtz, I do find the following parts of Dr. Holtz' report in terms of recording incomplete information concerning:

- Her conclusion that Ms. Chau's pain is activity-dependent and/or that she is "left with myofascial stiffness". In Dr. Holtz' notes she records Ms. Chau as describing her pain as "ongoing" with severity of 6/10 while in her pain questionnaire, Dr. Holtz records that Ms. Chau reported pain between 7/10 and 4/10 in the preceding 24 hours. Nowhere in Dr. Holtz notes does she indicate there are periods when Ms. Chau is pain free.
- Her conclusion that Ms. Chau has probably returned to her baseline level of fitness post-accident if she can run half-marathons and do pull-ups as part of her fitness. Dr. Holtz concludes that Ms. Chau has returned to her preferred recreational activities. This is in spite of the fact that Dr. Holtz' notes show that Ms. Chau reported that she was running shorter distances and less frequently per week and had not returned to the gym.
- Dr. Holtz's conclusion that her examination findings suggest that Ms. Chau has probably recovered from her accident related injuries and is left with myofascial "stiffness" that worsens with higher intensity activities. This is in light of the clinical records of Dr. Hawkins and Dr. Bowler that Dr. Holtz says she reviewed. More importantly, given the vast information Ms. Chau related to and recorded by Dr. Holtz in her notes it is unclear how Dr. Holtz could arrive at this conclusion.

[125] Where Dr. Holtz' opinion is inconsistent with Dr. MacKean and Dr. Bowler, I prefer the evidence of Dr. MacKean and Dr. Bowler.

### ***Tania Percy***

[126] Ms. Percy is an occupational therapist. She assessed Ms. Chau on June 10, 2022, which consisted of an interview and functional and work capacity testing. Ms. Percy's testing looked at Ms. Chau's tolerance for those activities endemic to her work, her ability to work beyond those specific physical tasks, and her durability for

work, including those beyond the usual work day as well as beyond the usual work week.

[127] Although she did not conduct a home evaluation, Ms. Percy tested Ms. Chau's ability to perform regular household tasks as well more significant cleaning. Ms. Percy also reviewed the various medical reports for Ms. Chau.

[128] After her testing, Ms. Percy wrote a comprehensive Functional/Work Capacity Evaluation ("FCE") and future care assessment along with recommendations, which included costing and insight into items that would assist Ms. Chau in managing her symptoms over the course of her life. That report is dated June 29, 2022.

[129] Based on her testing, Ms. Percy opined on Ms. Chau's work capacity:

- Testing revealed the Plaintiff is not capable of overhead reaching activity or continuous reaching at or above shoulder level for more than 2 to 3 minutes at a time.
- She is limited for tasks that require prolonged looking down or up.
- In terms of overall work endurance, she is presently physically capable of performing full-time work within the Sedentary / Limited strength category with informal accommodations for work tasks (i.e. shifting between computer and non-computer-based work and opportunity to take postural / movement breaks) and attention to ergonomics.
- Ms. Chau is capable of continuing to work full-time in her current role as a Program Assistant for the Public Services Agency of the BC Government in the context of persisting daily complaints of headache, neck, shoulder girdle, and right upper extremity complaints, and some degree of struggle with her mood, sleep disruption, irritability and coping with chronic pain.
- [It is] my opinion that she is not suited for additional demands for extended hours or overtime work.

[130] Ms. Percy further states:

- Overall it is my opinion that the accident-related diagnoses and prognosis continue to negatively impact Ms. Chau's tolerance for employment. While she continues to work on a full-time basis if she experiences any notable decline in functioning over time she will have difficulty fulfilling her current job demands in terms of the schedule and may have to consider shorter days or a day off (or portion of a day off) mid-week to manage complaints.
- She is no longer able to perform overtime work on a regular basis or supplement her income with part-time work as an aesthetician due to the cumulative demands of combined employment and the specific physical

demands as an aesthetician in terms of static neck positioning and use of her upper extremities for cumulative reaching.

[131] As to housekeeping, Ms. Percy writes:

- She is not suited for the full range of regular, heavy or seasonal housekeeping tasks that are classified in the Medium strength category.

[132] Ms. Percy’s recommendations regarding Cost of Future Care was based on her interview findings, results of functional testing and review of the medical reports which she relied on for diagnostic information and deferred to the medical experts regarding long term medical prognosis.

[133] Ms. Percy recommended the following:

ITEM	COST	REPLACEMENT TIME
Botox Trial:	\$3,000.00	N/A
Kinesiology:	\$1,200.00	N/A
Fitness Facility - Adult:	\$480.00	Annual to age 59
Fitness Facility – Senior:	\$360.00	Annual age 60+
Occupational Therapy:	\$613.60 to \$920.40	N/A
Supportive Therapies:	\$1,080.00 to \$1,380.00	Annual to retirement
	\$540.00 to \$690.00	Annual after retirement
Psychological Counselling:	\$2,000.00 to \$2,700.00	N/A
Housekeeping: *	\$3,536.00 to \$5,304.00	Annual to age 75-80
Cervical Pillow and Pain Management: *	\$120.00	Every 3 years
Ergonomic Equipment:	\$1,350.00	N/A
Ergonomic Equipment - Future:	\$250.00	Every 10 years (start 2032) until retirement
Non-Prescription Medications: */**	\$31.20 to \$46.80	Annual
Prescription Medication: **	\$11.44	Annual
Diclofenac or Compounded Cream:	TBD	N/A

\*plus, GST or applicable taxes

\*\*Based on current intake; does not include any coverage from any sources

[134] The defendants submit that Ms. Percy's evidence should be given limited weight because she only met with Ms. Chau once and did not conduct a home evaluation.

[135] Generally, I found Ms. Percy to be a credible witness. Most of her recommendations were reasonable, supported by sound and thorough testing, and consistent with recommendations of medical experts. However, I do not agree with some of her recommendations as pointed out by Ms. Walker. I will address this in the future cost of care analysis below.

### ***Claudia Walker***

[136] Claudia Walker was called by the defence as an expert in occupational therapy. Ms. Walker has practiced as an Occupational Therapist for 35 years. She wrote a rebuttal report, dated August 22, 2022, to Ms. Percy's report. Ms. Walker did not meet with or do an independent assessment of Ms. Chau. Ms. Walker's report is brief and agrees with many of Ms. Percy's recommendations.

[137] Ms. Walker notes that her report does not provide an alternative opinion nor rely upon documents which the original assessor was not provided with.

[138] Ms. Walker notes that she has no concerns with Ms. Percy's background, training, and experience as an Occupational Therapist. As well, she has no concerns with the conventional tools used by Ms. Percy to conduct her FCE and that Ms. Percy's opinion on Ms. Chau's fitness for her work is consistent with the findings of the FCE.

[139] Ms. Walker opined that the following recommendations made by Ms. Percy were, in principle, reasonable: 12 sessions with a kinesiologist; annual fitness pass; occupational therapy; supportive therapies; psychological treatment; and cervical pillow and ergonomic equipment.

[140] She takes issue with some of the recommendations made by Ms. Percy.

[141] Overall, I am inclined to give only some weight to Ms. Walker's report. The purpose of a rebuttal report, properly done, is to critique the adherence of another expert to the best practices of their field: *Bains v. Innes*, 2021 BCSC 2037 at para. 345;

*Lin v. Koszmider*, 2023 BCSC 752 at paras. 129–136. Ms. Walker, having never met or examined Ms. Chau, is unable to provide her own opinion of Ms. Chau’s injuries from the Accident: *Dhaliwal v. Bassi*, 2007 BCSC 549 at paras. 2–3; *Preston v. Kontzamanis*, 2015 BCSC 2219 at para. 129. Overall, I find that Ms. Walker’s critiques did undermine some of the recommendations of Ms. Percy, but not all, and I still largely accept the report and evidence of Ms. Percy.

## **Assessment and Findings**

### **Credibility**

[142] Overall, I found Ms. Chau to be a credible and reliable witness. She was able to provide detailed evidence on the many aspects of her life that have been affected by the Accident. I did not find her to embellish her symptoms, but rather she provided her evidence in a matter of fact way.

[143] The Defendants submit that Ms. Chau has proved to be a selective historian in that she remembers some events but not others. I do not agree. For example, not knowing exactly much her spouse earned in 2018 to 2021 or the value of her home does not make her a selective historian.

### **Causation**

[144] Ms. Chau is required to establish on a balance of probabilities that the defendants’ negligence caused or materially contributed to her injuries. Each case must be determined on its own facts.

[145] In *Jenkins v. Casey*, 2022 BCCA 64 at para. 75, leave to appeal to SCC ref’d, 40203 (9 February 2023), the Court of Appeal noted that the trial judge correctly summarized the general principles of causation:

- a) If the defendant’s negligence is one cause of an injury, or if it exacerbates or aggravates an existing condition, then the defendant is liable for causing the resulting injury: at para. 115, citing *Athey* at para. 47.
- b) The primary test for causation asks: “but for the defendant’s negligence, would the plaintiff have suffered the injury?”: at para. 116, citing *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.

- c) Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person: at para. 117, citing *Athey* at para. 34.
- d) The general principles of causation in law apply to psychological injury just as they apply to physical injury: at paras. 119–120, citing *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.); *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 74.

[146] I have spent considerable time reviewing the medical evidence on the issue of causation and pre-existing injuries. My review leads me to conclude that although each used somewhat different terminology, the opinions of both Dr. Bowler and Dr. MacKean, which I accept, indicate that Ms. Chau suffered injuries to her back, neck, and shoulder and suffers from post traumatic migraines/headaches as a result of the Accident. As well, I find that Dr. Hawkins' clinical records are extensive and consistent in this regard.

[147] The defendants submit that Ms. Chau suffered from headaches, neck pain, shoulder pain and upper back pain before the Accident and that this pain was caused and/or contributed to by her running and her job as an esthetician. They further submit that when the Accident occurred, this caused a temporary aggravation of Ms. Chau's pre-existing conditions, which resolved within two years.

[148] I am puzzled with the defendants' position given that it is contrary to the opinion of the one medical expert they tendered and asked the Court to accept. To reiterate, Dr. Holtz opined:

- Ms. Chau's documented right sided myofascial pain post-accident was probably due to the accident rather than a worsening of her pre-existing neck and upper back tension.
- her headaches are probably related to her neck and upper back myofascial pain rather than a separate post-traumatic migraine disorder.

[149] As well, Dr. Holtz concluded that the clinical records supported Ms. Chau's assertion that she did not have ongoing neck and upper back pain prior to the Accident.

[150] I agree with Ms. Chau that by tendering Dr. Holtz' opinion, causation has been effectively admitted by the defendants.

[151] At this juncture I will also address the massage therapy sessions Ms. Chau received prior to the Accident. The parties agreed that from January 3, 2014 to February 5, 2019, Ms. Chau attended 22 sessions for massage therapy. This works out to just over 4 sessions per year. I find that this is not indicative of someone who was suffering from pre-existing conditions that were caused by long distance running or working as an esthetician. I accept that long distance and marathon runners routinely receive supportive therapies after their events. A few massage appointments per year, without more, does not persuade me that Ms. Chau was suffering from a pre-existing medical condition.

[152] In considering all of the evidence, I also conclude on a balance of probabilities that the severity, continuity, persistent nature of her neck, back, and shoulder symptoms have been established and that they were caused by the Accident.

### **Failure to Mitigate**

[153] In this case, the defendants submit that Ms. Chau failed to mitigate her losses by failing to attend kinesiology sessions recommended by Dr. Hawkins in December 2019.

[154] A plaintiff is required to take reasonable steps to reduce her damages, including by taking recommended treatment. Whether a plaintiff acted reasonably is a question of fact: *Gilbert v. Bottle*, 2011 BCSC 1389 at paras. 201–202.

[155] A reduction is appropriate where the defendant is able to satisfy the two-part test set out in *Chiu v. Chiu*, 2002 BCCA 618:

[57] ... In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[156] It is a subjective/objective test of a reasonable person in the position of the plaintiff: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

[157] Recently, in *Huag v. Funk*, 2023 BCCA 110 at paras. 72–76, the Court of Appeal confirmed that the onus upon the defendant for the second part of the *Chiu* test is a balance of probabilities.

[158] I accept Ms. Chau’s explanation that she did not attend kinesiology sessions as suggested by her physician because she could not afford the additional expense. I note that Ms. Chau also attempted to continue with massage and physiotherapy sessions after ICBC stopped paying for them. Eventually, she could no longer afford to attend those sessions as well.

[159] I find that due to her financial situation, Ms. Chau did not act unreasonably: *Noori v. Hughes*, 2018 BCSC 965 at para. 101; *Brown v. Raffan*, 2013 BCSC 114 at paras. 121–126.

[160] I am unable to agree with the defendants that Ms. Chau made a conscious choice to spend money on her children’s activities rather than pay for her medical treatments. No doubt it must have been a difficult decision for Ms. Chau. But it is one many parents make everyday, sacrificing their own needs so they can provide more opportunities for their children. She cannot be faulted for making that choice and I do not accept this choice as amounting to a failure to mitigate her losses.

[161] It must be remembered that this is the defendants’ burden on a balance of probabilities. I am unable to accept the defendants’ submission that it is a reasonable inference that if she had followed the recommendations, Ms. Chau would have likely improved. I find there is no evidence that Ms. Chau’s failure to attend for kinesiology and/or massage and physiotherapy sessions would have resulted in a reduction to her damages or some likelihood that Ms. Chau would have received substantial benefit.

[162] I am satisfied that the defendants have not met the burden of establishing Ms. Chau failed to mitigate her damages.

**Summary of Findings regarding Ms. Chau's Accident-Related Injuries**

[163] The evidence has persuaded me to conclude that from a young age Ms. Chau had an excellent work ethic and was a go-getter. She set goals to further improve herself so that she could provide her children with opportunities that she unfortunately did not have growing up.

[164] There is no dispute that Ms. Chau suffered injuries from the Accident and continues to suffer. She has been stoic and a non-complainer.

[165] Based on all of the evidence including experts, I accept that she did not have any significant or relevant pre-existing medical issues prior to the Accident other than usual tension headaches and aches and pains that athletes have after strenuous exercising or events. I also accept that she did not suffer from long-standing musculoskeletal pains prior to the Accident. None of the medical experts testified that Ms. Chau had any pre-existing medical issues, including Dr. Hawkins. As well, Dr. Holtz accepted this and agreed that Ms. Chau's medical records supported that conclusion.

[166] I find that Ms. Chau suffered soft tissue injuries to the neck, shoulder and back and post-traumatic unilateral migraines/headaches as a result of the Accident.

[167] Despite receiving various different types of treatments, her symptoms continue to persist. I accept that the symptoms are now chronic given that the Accident occurred over three years ago.

[168] I accept the expert opinion of Dr. Bowler that Ms. Chau's prognosis for improvement is guarded and that there is a strong likelihood of some permanent symptoms as a result of the Accident.

[169] Everyday life for Ms. Chau has become harder since the Accident. The evidence supports that she is not back to her pre-Accident condition and I accept will likely not be in the future. This chronic pain has had a negative impact on her physical and mental health which has resulted in pain and suffering, loss of enjoyment of life, loss of past

and future income capacity, housekeeping capacity and costs associated to her future care.

[170] I am satisfied that Ms. Chau has followed through with all of the medical advice, save and except the kinesiology referral. I have found that her not attending kinesiology was not unreasonable given her financial resources. She participated in other treatments, even going as far as undertaking painful treatments of PRP injections and nerve blocks.

[171] In spite of her pain, she has been able to function reasonably and push through with the demands of her job, most household activities, and family responsibilities. However, I accept that it has come at the expense of exhaustion and pain at the end of work day resulting in her missing out on family routines.

[172] This has strained relationships with her children and spouse. Her relationship with her daughters has been affected, especially with her eldest. In this regard, I accept Ms. Chau's evidence without reservation.

[173] I am satisfied that Ms. Chau is not able to perform her share of the household responsibilities as she once did before the Accident. Her home is not as clean and orderly as it was prior to the Accident. This is based on my acceptance of Ms. Chau's evidence as well as that of Mr. Elphick's, who I found to be credible and reliable.

[174] Ms. Chau is now in a position with the provincial government, albeit temporary, that has been extended a number of times. The defendants argue that she will likely be successful in obtaining a permanent position with the provincial government. In my view, this is speculative and no evidence was led to support otherwise. What is clear is that she has not been able to secure a permanent position and her reduced work capacity is known to her employer. I agree with Ms. Chau that one could also ask, given that Ms. Chau's temporary positions have been extended a number of times since the Accident, why she has not yet landed a permanent position.

[175] I accept that it will be difficult for her to move into roles with more responsibilities (and increased pay) in the provincial government as she had aspired to do. Given her

inability to do much else after working all day, it is very unlikely that she will be able to pursue the educational path she had planned on prior to the Accident. Mr. Elphick's evidence supports this. In my view, he is in the best position to observe Ms. Chau each and everyday after work.

[176] As a result of injuries sustained from the Accident, I accept that Ms. Chau was forced to quit her job at Outshine Spa on the weekends. She worked hard, she was good at it, and was able to make extra money that contributed greatly to her family's needs.

[177] I also accept that Ms. Chau attempted to take on additional work after the Accident with Dawson Heights and was forced to quit because of the pain associated to the Accident.

[178] The fact that Ms. Chau and her spouse chose to take on additional work on the weekends to provide opportunities to their children should not be viewed negatively.

[179] Finally, I accept that the one activity from which Ms. Chau derived much pleasure and worked hard to excel in, she is no longer able to. While she competed in a half marathon and ran her best time in October 2019, it was at the encouragement of and advice of her treatment provider. Regrettably, it was the last half marathon, let alone any long race, she ran.

[180] Since the Accident, her running has been confined to shorter distances than what she was able to do prior to the Accident. For those who have not experienced the adrenaline rush and gratification from running long distances, including marathons, these losses may be difficult to measure. For someone like Ms. Chau who dedicated the time and effort to excel in this sport, they are a very significant loss.

[181] Finally, I am not satisfied that the defendants have met the burden establishing Ms. Chau failed to mitigate her damages.

**Damages**

[182] Ms. Chau seeks compensation for the injuries she suffered in the Accident under the following heads of damages:

a) Non-pecuniary Damages	\$160,000.00
b) Past Wage Loss	\$14,010.04
c) Future Income Earning Capacity	\$200,824.00 to \$251,030.00
d) Cost of Future Care	\$254,190.92
e) Loss of Housekeeping Capacity	\$50,000.00
f) Special damages	\$1,622.80

[183] It should be noted that the defendants did not make submissions regarding loss of past income earning capacity. But rather, they argue that Ms. Chau missed one day of work, plus some additional time for appointments. At trial, the plaintiff estimated this to be the equivalent of ten days in total. However, Ms. Chau is not seeking an award for this particular lost time.

**Non-Pecuniary Damages**

[184] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The Plaintiff is to be placed back into the position she would have been in, but for the injuries and losses caused by this accident. The plaintiff must be placed in the position he or she would have been in not for the defendant’s negligence; no better or worse: *Jenkins* at para. 75.

[185] The award should be fair to all parties and fairness requires reviewing comparable cases. However, each case must be assessed on its own unique set of circumstances: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[186] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined a non-exhaustive list of factors to consider in assessing 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...

[187] Ms. Chau submits that the focus should be on the effect of the injuries suffered on her life, which necessarily includes her family – not the anatomical details of the injury. She also submits that in making this assessment, the fundamental task is in measuring the difference between her original position and her current life with limitations. In this regard, she relies on *Rizzolo v. Brett*, 2010 BCCA 398 at para. 37:

... trial judges have assessed non-pecuniary damages at well over \$100,000 where there is an element of significant ongoing pain and, particularly, where the Plaintiff had previously enjoyed an active lifestyle or a physical vocation.

[188] Recent decisions from our Court of Appeal have cautioned against relying on cases more than 10 years old for non-pecuniary awards because simply adjusting for inflation to current levels “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, leave to appeal to SCC ref'd, 40442 (30 March 2023); *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 at para. 18.

[189] Ms. Chau submits that non-pecuniary damages of \$160,000 would be consistent with other awards made to plaintiffs in comparable circumstances, and therefore appropriate in all the circumstances.

[190] Ms. Chau says that the injuries and limitations she has sustained as a result of the Accident go to the core of who she is: a hard working and devoted parent. They have touched upon every meaningful part of her life, including her ability to provide for

her family; her relationship with her daughters; her ability to keep her house as she wants; her main source of exercise and enjoyment; and her common law relationship. The evidence, which I accept, supports this.

[191] I accept that Ms. Chau has been limited not only as to the amount of work she can do, but also in her ability to improve herself and/or upgrade her schooling, impacting her career aspirations. In this regard, I also accept that her family has been and will be impacted financially and this has added more burden on Mr. Elphick.

[192] I find that her prognosis is guarded and she will continue to experience these same symptoms into the future. I accept Dr. MacKean's opinion that Ms. Chau has reached "maximum medical improvement". I also accept Dr. Bowler's conclusion that Ms. Chau "has a strong likelihood" of permanent symptoms, including headaches, neck, back and shoulder pain.

[193] Ms. Chau submits the following cases are useful for the assessment of non-pecuniary damages in this instance:

- *Clayton v. Barefoot*, 2018 BCSC 239 (\$130,000);
- *Moreira v. Crichton*, 2018 BCSC 1281 (\$130,000);
- *Gill v. Lai*, 2018 BCSC 101 (\$140,000), var'd 2019 BCCA 103 on the issue of loss of future earning capacity; and
- *Mattson v. Spady*, 2019 BCSC 1144 (\$150,000).

[194] The defendants submit that Ms. Chau experienced an aggravation of pain in her neck and upper back and headaches as a result of this Accident, all of which have since resolved or substantially resolved. They point to the fact that Ms. Chau continues to run multiple times per week.

[195] They also point to Ms. Chau's evidence that although she is less able to do certain housekeeping and seasonal chores at her home, she shuttles her children to

and/or from activities six or more days a week. The defendants say that she has simply switched tasks with her husband.

[196] The defendants argue that Ms. Chau suffers from muscle tension primarily related to her busy lifestyle and her athletic endeavors, not due solely to the Accident.

[197] The defendants submit that the non-pecuniary damages should be assessed between \$35,000 and \$75,000 and rely on the following cases:

- *Callow v. Van Hoek-Patterson*, 2021 BCSC 1423 (\$35,000), var'd 2023 BCCA 92 to a pecuniary damage award of \$55,000 as \$35,00 was "inordinately low";
- *Connolly v. Cowie*, 2012 BCSC 242 (\$50,000);
- *Findlay v. Sun*, 2020 BCSC 1330 (\$55,000);
- *Harle v. Williams*, 2021 BCSC 107 (\$55,000);
- *Kan v. McGill*, 2021 BCSC 843 (\$57,000); and
- *Mollica-Lazzaro v. Leung*, 2021 BCSC 4 (\$75,000).

[198] Ms. Chau was 36 years at the time of the Accident. I have already found that her prognosis is guarded and that she has been and will be restricted in her day to day activities.

[199] While Ms. Chau has been able to work full time since the Accident and is earning more in positions where she receives accommodation, it does not mean that she does not suffer from chronic pain while at work and in particular after work.

[200] I have accepted Ms. Chau's evidence that she struggles on a daily basis to do the activities she did prior to the Accident and her career aspirations have been affected due to her injuries.

[201] I will not address each and every case relied on by the parties, but I have considered all of them. While the parties submit that the cases are similar, in my view and not surprisingly, they are all very factually different.

[202] I find that in most of the cases relied on by the defendants, the plaintiffs had made considerable recoveries from their injuries. I have found that is not the case with Ms. Chau.

[203] In regards to the cases relied on by Ms. Chau, I do find that they are more similar to the case at hand. Although there are differences, I find *Clayton* and *Gill* are the most comparable of the cases. However, these cases serve only as a rough guide.

[204] The impact of Ms. Chau's condition has been significant, chronic and she will likely live with pain for the rest of her life and that has affected her professionally and personally.

[205] Taking into account the authorities and my findings of fact, I am satisfied that \$140,000 will properly compensate Ms. Chau for her pain and suffering and loss of past and future enjoyment of life, and is fair to all parties.

### **Past Loss of Income Earning Capacity**

[206] A plaintiff is entitled to loss of the value of work that they would have – not could have – performed but for the injuries sustained as a result of the defendants conduct: *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[207] A plaintiff may only recover damages for her past net income loss: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98.

[208] Projecting what a plaintiff would have earned in the past had they not been injured is a hypothetical exercise. Establishing a real and substantial possibility means that any hypothetical loss must be shown to be realistic considering the plaintiff's likely circumstances without the injury. The plaintiff's claim must have an evidentiary foundation: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34, 36.

[209] If the plaintiff establishes a real and substantial possibility, the Court must then assess the relative likelihood of the hypothetical event and adjust the damages accordingly: *Gao* at para. 37.

[210] A fair and reasonable award is an assessment rather than a purely mathematical calculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 54.

[211] There is no dispute that at the time of the Accident, Ms. Chau was working two jobs – as a receptionist at Mullin and as an esthetician at Outshine Spa. She was able to do that despite having a busy life with her children and her running activities.

[212] There is no dispute that Ms. Chau worked long hours despite having a busy schedule. There is no evidence that she was anything but fully functioning without persistent pain.

[213] She was a hard working, driven, and motivated individual who focused on providing better opportunities to her children. Something she did not have growing up with a single mother. This is evident from that fact that not only did she work overtime at Mullin but continued to work at Outshine Spa. Even after the Accident, she attempted to take on additional work at Dawson Heights as a server in January 2022. But for the pain she was experiencing as a result of the Accident, Ms. Chau says she would have continued working at Dawson Heights.

[214] The defendants submit that Ms. Chau would have eventually had to stop working extra hours given her children's busy schedule. The evidence does not support this proposition.

[215] I am satisfied that but for the Accident, Ms. Chau would have continued to work all of the overtime offered to her at Mullin and she would have continued to take on shifts at Outshine Spa. However, I am not convinced that she would have also continued working at Dawson Heights given that she had already quit working at Outshine Spa when she began working at Dawson Heights. The question then becomes how to determine how many hours of work she has lost.

[216] Ms. Chau's counsel provided documented evidence in support of her position on how many hours of work she lost based on her work and overtime in the preceding years.

[217] I accept that between October 2018 and February 2019, she worked on average approximately 9 hours per month at Outshine Spa (8.9375 hrs). Ms. Chau testified that she also worked overtime at Mullin. Records indicate that Ms. Chau worked an average of 5.2 hours per month during the first seven months of her first year with the law firm in 2018. In 2019, notwithstanding the Accident, she averaged 7.15 hrs per month.

[218] Accordingly, in the months leading up to this accident, Ms. Chau worked the following overtime at Mullin and shifts at Outshine Spa:

- October 2018 – 16.5 hours (9 at Outshine; 7.5 at Mullin);
- November 2018 – 14 hours (8.5 at Outshine; 5.5 at Mullin);
- December 2018 – 11 hours (8 at Outshine; 3 at Mullin); and
- January 2019 – 13.35 hours (10.25 at Outshine; 3.15 at Mullin).

[219] As I have indicated above, I am not convinced that Ms. Chau would have continued to work at Dawson Heights in addition to her other work without the Accident.

[220] I am satisfied, however, that there is a real and substantial possibility that Ms. Chau would have continued to work at Outshine Spa but for the Accident. Ms. Poole's evidence corroborates Ms. Chau's evidence on this point. She testified that Ms. Chau was a valuable employee and would have been able to return to work at Outshine Spa as estheticians are currently in high demand. Ms. Poole also confirmed that estheticians currently earn \$20/hr (or 50% of the commission for the services that she provides, if higher).

[221] I am also satisfied that there is a real and substantial possibility that she would have continued to work overtime at Mullin but for the Accident. Ms. Chau left Mullin in May 2021 and began working for the provincial government in a temporary position. No

evidence was led that Ms. Chau worked or was offered to work any overtime after she commenced her employment with the provincial government, but could not do overtime due to her injuries from the Accident.

[222] I am satisfied that on the evidence as a whole Ms. Chau has demonstrated a real and substantial possibility that she had to forego extra work, namely overtime at Mullin and shifts at Outshine Spa due to her Accident-related injuries.

[223] I accept that during the months she worked at Outshine and Mullin, Ms. Chau averaged 13.71 hrs of extra work per month.

[224] However, Ms. Chau's submission that I ought to award her loss of income from February 2019 to the trial, October 2022, cannot be accepted. She left Mullin in May 2021 and no evidence was led that she was offered overtime with her current job but was unable to do it due to her injuries.

[225] I accept Ms. Chau's calculation of \$20/hour. Accordingly, I assess the following:

Time Period	Rate per hour	Hours per month	Total
February 2019 to May 2021 (27 months)	\$20/hr	13.71	\$7,403.40
June 2021 to October 2022 (16 months)	\$20/hr	9	\$2,880
<b>Combined Total</b>			<b>\$10,283.40</b>

[226] Accordingly, I award \$10,283.40 for past loss of earning capacity.

### **Loss of Future Income Earning Capacity**

[227] Assessing a parties' loss of future earning capacity involves comparing a plaintiff's likely future, had the accident not happened, to their future post-accident. This assessment will depend on the type and severity of the plaintiff's injuries, and the nature

of the anticipated employment in issue but should not be a mathematical exercise: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[228] As stated in *Rab v. Prescott*, 2021 BCCA 345 at para. 47, a tripartite test should be used to assess damages for loss of future earning capacity. I have found Justice Burke's summary in *Choi v. Ottahal*, 2022 BCSC 237 at para. 182, of the three steps most helpful and will reproduce it below:

- a) First, does the evidence disclose a potential future event that could result in a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues which may affect their ability to maintain gainful employment or remuneration.
- b) Second, does the evidence demonstrate that there is a real and substantial possibility that this potential loss of capacity will cause pecuniary loss? Having established that the plaintiff may suffer from long-term health issues which could affect their earning potential at the first stage, the trial judge must assess the likelihood that the plaintiff's loss of capacity will affect their ability to earn income.
- c) Third, having established that there is a real and substantial likelihood that the plaintiff will suffer from ongoing loss of capacity, and that this loss of capacity will result in a loss of income, the trial judge must assess this possible future loss. It is at this stage that the trial judge should consider the basis for compensation (*i.e.*, capital versus earnings approach), contingencies, and the relative likelihood of the loss occurring. The damages award should be reduced based on the relative likelihood that the potential future would not occur.

[229] The Court must also ensure that the award is fair and reasonable. The assessment is a matter of judgment, not a mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

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

[230] In *Steinlauf v. Deol*, 2022 BCCA 96 at para. 52, the Court of Appeal noted that the first step is an evidentiary one. It is a matter of common sense that constant and ongoing pain will no doubt take a toll and over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations are made: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41. Such is the situation with Ms. Chau.

[231] In my view, the event giving rise to a future loss in this case is manifest and continuing at the time of trial. Ms. Chau has demonstrated a real and substantial possibility of a capacity reduction in the future. This evidentiary step is a given.

**2. Does the evidence demonstrate that there is a real and substantial possibility that the future event in question will cause a pecuniary loss?**

[232] A real and substantial possibility is the standard of proof for admitting hypothetical events, both past and future, into the evidentiary record as if they already happened. As Courts have consistently stated, it is a lower threshold than a balance of probabilities but a higher threshold than something only possible and speculative: *Dornan v. Silva*, 2021 BCCA 228 at para. 94; *Gao* at para. 34. The onus is not a heavy one but it must be met: *Kim v. Morier*, 2014 BCCA 63 at para. 7.

[233] In *Sandhu v. Sandhu*, 2022 BCSC 727 at para. 117, Justice G.C. Weatherill listed a number of factors relevant to determining whether there is a real and substantial risk of pecuniary loss, citing *Dornan* at paras. 67, 119–120 and *Rab* at paras. 60–62. These factors include:

- a) the plaintiff's intention to keep working and what they intend to do for work;
- b) where the potential event precludes income from a particular occupation the plaintiff does not intend to pursue, there will not be a real and substantial possibility, because that income would never have been earned;
- c) inability to devote the same energy or hours to her pre-accident occupation;
- d) work history;
- e) medical condition; and
- f) the plaintiff's intentions concerning their future lifestyle, and the risk inherent in those plans.

[234] I have found that prior to the Accident, Ms. Chau was a hardworking, energetic, and competitive person. There is uncontroverted evidence that Ms. Chau intended to continue to work for the provincial government with goals to improve herself so that she could move into roles with more responsibilities, which would ultimately result in more income. Her plans to continue advancing her skill set is not speculative as the defendants argue.

[235] It has been over three years since the Accident and the medical evidence is that her symptoms, as they now exist, are chronic and are likely to remain in the future and her prognosis is guarded.

[236] Testing by Ms. Percy also confirms, which I accept, that Ms. Chau is now only capable of sedentary work with accommodations (including freedom to control her positioning/work space). Ms. Chau has a “work capacity budget” of 7 hours per day, 5 days per week. She is currently working to her maximum capacity.

[237] Evidence has demonstrated that Ms. Chau was and still is very motivated to maximize her income, to the greatest extent possible, but due to her injuries, she is now unable to do so.

[238] She will not be capable of taking on the extra work she did prior to the Accident at Outshine Spa, take on overtime at her current position with the provincial government (if offered), or any other work including roles similar to her position at Dawson Heights.

[239] Accordingly, Ms. Chau’s future life with-accident trajectory is that she will likely continue to work in a position like the one she is now in. Ms. Chau’s future losses as to her income will occur in three separate ways: her inability to take on any overtime with her existing employer; her inability to work an ‘extra’ job on her off-time; and her inability to upgrade her training and certification, or education, so as to enable her to secure higher paying positions.

[240] I conclude that there is a real and substantial possibility that Ms. Chau’s chronic pain will lead to a future income loss.

### **3. Assessing the value of the future loss**

[241] In *Ploskon*, the Court discussed the capital assets and earnings approaches:

[16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the “earnings approach” or the “capital asset approach”: *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

[17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[242] Under both approaches, the amount arrived at must be adjusted to account for the relative likelihood of the pecuniary loss occurring, taking into consideration relevant contingencies. Factors relevant to determining what the relative likelihood of the risk is include:

- a) history and nature of the sources of past income;
- b) profitability and nature of the plaintiff's intended future economic activities;
- c) plaintiff's pre-existing limitations concerning capacity to work due to age or health;
- d) strength of the evidentiary basis for the amount whereby the plaintiff's income is alleged to have been reduced; and
- e) level of continuing exposure to risk given the plaintiff's intentions concerning their future activities, and the risk inherent in those plans.

See *Rab* at para. 80; *Dornan* at para. 135.

[243] I considered positive contingencies, such as promotion or advancement, and obtaining additional training or education; and negative contingencies, such as general labour market contingencies and illness, and expected absences from the workforce. In the absence of any evidence or submissions from counsel on any of the possible contingencies, I am unable to account for any contingencies, negative or positive, in Ms. Chau's situation.

[244] I am of the view that Ms. Chau has been rendered less capable overall from earning income from all types of employment.

[245] Given her chronic pain and her inability to improve her skills, in my view, Ms. Chau is less marketable or attractive as an employee to potential employers. She has also lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured.

[246] Finally, as a result of her injuries sustained from the Accident, I accept that Ms. Chau is less valuable to herself as a person capable of earning income in a competitive labour market, which in her case are positions with the provincial government.

[247] In my view, this is an appropriate case to apply the capital assets approach. Although Ms. Chau's income exceeds her pre-Accident level, it is only because she was able to secure a temporary position with the provincial government. However, it does not mean that she has not suffered an impairment that will likely affect her future earning capacity.

[248] In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), the Court of Appeal identified three acceptable methods for assessing a capital loss:

43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income...

See also *McKee v. Hicks*, 2023 BCCA 109 at para. 80; *Deegan v. L'Heureux*, 2023 BCCA 159 at para. 84.

[249] Ms. Chau's income tax returns for the past three years were:

Year	Income
2019	36,946.00
2020	36269.00

2021	43,077.27
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[250] Ms. Chau says her 2022 income will be in excess of \$50,000. She submits an award for future capacity between 4 to 5 years of her existing salary (\$200,824.00 to \$251,030.00) best reflects the difference between her with-accident path and her likely without-accident career path. I have also taken into consideration the submissions made by the defendants that Ms. Chau has not established a future loss of capacity to earn income. I note they have not put forward an alternative position.

[251] Taking into account Ms. Chau's age and her health after the Accident, her employment background and injuries she sustained as a result of the Accident, I conclude that four years of her salary (based on an average of her last three years of reported income) is fair and reasonable compensation for her diminished income earning capacity. Accordingly, I award \$155,000 under this head.

### **Cost of Future Care**

[252] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Justice Adair summarized the principles that apply to the assessment of future cost of care claims:

[107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[253] The purpose of an award for cost of future care is to restore the injured party to the position they would have been in, but for the accident. Assessing future care costs is not a precise accounting exercise, rather, it is a matter of prediction: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. A common sense approach must be taken: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13.

[254] Ms. Chau submits that these costs are medically reasonable to promote her long-term health and that she is likely to incur them.

[255] I find that Ms. Chau has provided a sufficient evidentiary link between her chronic Accident-related injuries and the need for the various treatments and assessments and other pain management items listed below.

[256] Given my finding that I prefer Ms. Percy’s opinion over Ms. Walker’s on certain aspects of the functional capacity assessment and cost of future care, I am inclined to agree with most of Ms. Percy’s recommendations. I note that for many of the recommendations made by Ms. Percy, Ms. Walker agreed as being reasonable.

[257] The following is assessed as agreed by both Ms. Percy and Ms. Walker to be reasonable:

<b>Item</b>	<b>Cost</b>	<b>Replacement Time</b>
Occupational Therapy:	5 hours @ \$118/hour	N/A
Supportive Therapies:	12 sessions per year at budget of \$100/session  6 sessions per year at budget of \$100 per session	Annual to retirement (age 65)  Annual after retirement till age 75
Cervical Pillow and Pain Management: *	\$120.00	Every 3 years
Ergonomic Equipment:	\$1,350.00	N/A
Ergonomic Equipment - Future:	\$250.00	Every 10 years (start 2032) until retirement

[258] Ms. Walker takes issue with Botox treatments for Ms. Chau’s migraines. Dr. Bowler recommended that it would be appropriate for her to either try Botox injections or CGRP-receptor antagonist medications. As I have accepted Dr. Bowler’s opinion and recommendations, I will make the award of \$3,000 (\$1,000 every three months).

[259] The medical experts agree that Ms. Chau should try to remain active as possible. While Ms. Walker agrees with Ms. Percy's recommendation that a fitness pass is appropriate to support Ms. Chau's exercise program, she does not agree with the duration.

[260] Ms. Walker suggests that a fitness pass for the rest of Ms. Chau's life is not appropriate given that "almost everyone stops regular attendance by age 75". While I do not agree with Ms. Walker's comment, I am of the view that awarding a fitness pass for the rest of Ms. Chau's life is also not reasonable. Accordingly, the cost of a fitness pass will be awarded until age 80.

[261] Ms. Walker agrees that Ms. Percy's recommendation of 12 sessions with a kinesiologist is reasonable. However, her research suggests the hourly rate for local kinesiologists is lower than Ms. Percy's recommendation. Accordingly, I will make the award as agreed by both occupational therapists but the rate will be reduced to \$80 per hour.

[262] Ms. Walker takes issue with Ms. Percy's recommendation of 2-3 hours per week of housekeeping for regular and seasonal tasks until age 75. Ms. Walker says that Ms. Percy did not do a home evaluation but she testified that her testing was similar to the type of movement one would do if evaluated at home.

[263] I note that Ms. Chau's evidence along with photographs tendered at trial sufficiently support that these expenses are medically reasonable.

[264] While I agree with Ms. Walker that 2-3 hours weekly for housekeeping is significant, I am not inclined to agree with her that cleaning services should be stepped down by 50% once the youngest child reaches 16 years old or when they leave home. In my view, it would be speculative to assume that the children would be able to assist with the housework once they reach age of 16 or that they will leave home at the age of 18 or 20. Accordingly, housecleaning will be awarded at 7 hours per month at the rates suggested by Ms. Percy but only until age 75.

[265] Regarding psychological counselling, there was no evidence that Ms. Chau sought this type of treatment after the Accident nor was there a recommendation made by any of the medical experts. While Ms. Walker agrees with Ms. Percy's recommendation, neither are qualified to make this recommendation. Accordingly, I decline to make an award for psychological counselling.

[266] Regarding prescription and non-prescription medications, Dr. Bowler recommended that Ms. Chau continue to take prescribed pain medication as necessary. Ms. Chau testified that she takes some medication on days when her symptoms have flared up. As well, Dr. Holtz recommended topical creams. Accordingly, an award of \$2,000 is reasonable.

[267] I must also calculate the present value of the award for cost of future care, which will cover different durations of several years. In doing so, I will apply the set rate of interest of 2% pursuant to s. 56(2)(b) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and the *Law and Equity Regulation*, B.C. Reg. 352/81. Below, a present value is not calculated where the award represents a lump sum.

[268] I assess Ms. Chau's entitlement to the following under the cost of future care, calculated as follows:

Item	Cost	Replacement Time	Total with Present Value
Botox Trial	\$3,000	N/A	<b>\$3,000</b>
Kinesiology	\$960	N/A	<b>\$960</b>
Fitness Facility – Adult	\$480.00	Annual to age 59 (20 years)	Total: \$16,800 <b>Present value: \$11,810.15<sup>1</sup></b>
Fitness Facility – Senior	\$360.00	Annual age 60+ till age 80 (20 years)	
Occupational Therapy	5 hours at \$118/hour	N/A	\$590

<sup>1</sup> In calculating this number, I have adapted the formula used in *Rich v. Hamilton*, 2022 BCSC 1134 at paras. 118–121.

Supportive Therapies	12 sessions per year at \$100/session  6 sessions per year at budget at \$100/session	Annual to retirement (age 65) (26 years)  Annual after retirement till age 75 (10 years)	Total: \$37,200  <b>Present Value: \$27,365.88<sup>2</sup></b>
Housekeeping	7 hours monthly at \$34/hr	Annual to age 75 (36 years)	Total: \$102,816  <b>Present Value: \$72,796.02</b>
Cervical Pillow and Pain Management	\$120  \$1,350	Every 3 years  N/A	<b>\$3,530</b>
Ergonomic Equipment	\$250	Every 10 years (start 2032) until retirement	
Ergonomic Equipment - Future			
Non-Prescription and Prescription Medications	\$2,000	N/A	<b>\$2,000</b>

2023 BCSC 1004 (CanLII)

[269] In summary, Ms. Chau is entitled to the following under cost of future care:

<b>Item</b>	<b>Amount</b>
Botox Trial:	\$3,000
Kinesiology and Fitness Pass:	\$12,770.15
Occupational Therapy:	\$590
Supportive Therapies:	\$27,365.88
Housekeeping	\$72,796.02
Cervical Pillow and Pain Management	\$3,530
Medications	\$2,000
<b>Total</b>	<b>\$122,052.05</b>

<sup>2</sup> *Supra.*

[270] In light of this award for cost of future care, the defendants have asked the Court that this must be “subject to all deductions required pursuant to s. 83 of the *Insurance (Vehicle) Act*” and that this wording ought to be included in any order made.

Accordingly, I make such an order.

### **Loss of Housekeeping Capacity**

[271] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal explained that the loss of housekeeping ability is a loss of capacity, first and foremost.

[272] The defendants submit that there should be no separate award under this head of damages because Ms. Chau simply traded tasks with her spouse.

[273] The defendants say that loss of housekeeping capacity should be treated as non-pecuniary loss when the claimant is still able to perform household tasks with difficulty, takes longer to do them, or decides they need not be done. For this proposition they rely on *Liu v. Bains*, 2016 BCCA 374 at para. 26.

[274] The decision to award a distinct amount for loss of housekeeping capacity is at the discretion of this Court, based on the facts of each case. I agree that duplication between non-pecuniary damages, cost of future care, and loss of housekeeping capacity must be avoided.

[275] Ms. Chau submits that this head of damage is separate and distinct from any award made as part of the future cost of care award or non-pecuniary award. They rely on Chief Justice Bauman’s comments in *Kim* at para 27:

The difficulty with these types of cases arises from the challenge of understanding the true nature of the loss a Plaintiff suffers when they are unable to perform household tasks.

[276] In *Kim*, the Court further explained the difference between a true loss of capacity and the cost of replacing those tasks the Plaintiff is no longer able to perform:

[31] This distinction is consistent with this Court’s decision in *O’Connell v. Yung*, 2012 BCCA 57, where Kirkpatrick J.A. clarified that loss of housekeeping capacity was just that, a loss of *capacity*, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement

services which are used to value the loss and determine the quantum of the award are actually purchased ...

[34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a Plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[Emphasis added].

[277] Ms. Chau submits that she has lost her ability to perform household tasks that would have been of value to herself as well as others in the family unit but for the Accident.

[278] She relies on *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 74, wherein the Court held that this is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff, rather than by the plaintiff.

[279] In *Westbroek* at para. 76, the Court further noted that “damages for loss of capacity to complete homemaking tasks are not dependent upon whether replacement costs are actually incurred because what is being compensated is the loss of capacity itself.”

[280] Turning to the evidence, I accept Ms. Chau’s submission that there is unchallenged evidence from her and her spouse that she is limited in her abilities around the home including the following:

- a) Cleaning up around the home after work because her symptoms are aggravated;
- b) She is unable to help out in the yard as much as she did prior to the Accident;
- c) She is unable to carry the vacuum and laundry upstairs;
- d) She is unable to clean the bathrooms as she did prior to the Accident; and

- e) Performing seasonal chores, including cleaning out behind the appliances; and cleaning the blinds.

[281] I also accept that Ms. Chau is unable to sustain any type of work with her arms extended, involving looking down for extended periods or while on her knees. Ms. Percy's testing supports this. She tested Ms. Chau her reaching abilities, which included sustained reaching and handling and concluded that Ms. Chau is not suited for regular or heavy housekeeping tasks that require bilateral or right unilateral prolonged or extended reaching, heavy or prolonged lifting/carrying (e.g. greater than 15 to 20 lbs), or overhead reaching due to functional limitations stemming from accident-related injuries.

[282] I accept that Ms. Chau is unable to perform some of the household tasks that she was ordinarily able to perform prior to the accident. In that regard, she has lost an asset of intrinsic value to her and is entitled to a loss of housekeeping capacity award.

[283] In this regard I am guided by the comments of the Court in *Westbroek* at para 74. This is an award for the loss of an asset, i.e. the plaintiff has lost "her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident". It is to be awarded above any future care costs for housekeeping, where what is being compensated is the value of services that are reasonably expected to be rendered to Ms. Chau rather than by Ms. Chau.

[284] The defendants submit there is no evidence that Ms. Chau has hired any housekeepers after the Accident, and she has not made any special damages claim for these expenses. However, as noted above, this head of damages is not contingent on the plaintiff actually incurring replacement costs.

[285] Accordingly, I make an award of \$25,000 for past and future loss of housekeeping capacity.

### Special Damages

[286] Ms. Chau submits that she is to be restored to the position she would have been but for the Accident: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).

[287] Justice Davies in *MacIntosh v. Davison*, 2013 BCSC 2264 stated:

[128] In summary, I am satisfied that when assessing special damages the standard is the reasonableness of the expense claimed in the context of the injuries suffered. Medical justification for any expense is a factor to be considered, but not the only one. Subjective factors can also be considered including whether the plaintiff believed the treatments were reasonably necessary.

[288] Ms. Chau claims physiotherapy and massage therapy sessions that she incurred as a result of the Accident. ICBC had been paying for physiotherapy and massage therapy but then declined to pay any further. Dr. Hawkins and Dr. Bowler recommended that she continue with these types of treatments.

[289] Ms. Chau followed medical advice and continued to attend sessions until she could no longer afford the expense. Ms. Chau submits that given she was not cross-examined on these expenses and there is no evidence to suggest that these costs were not incurred the award should be made. I agree. Accordingly, I award special damages in the amount of \$1,622.80.

### Conclusion

[290] In summary, I award the following damages:

a) Non-pecuniary Damages	\$140,000
b) Past Wage Loss	\$10,283.40
c) Future Income Earning Capacity	\$155,000
d) Cost of Future Care	\$123,012.05
e) Loss of Housekeeping Capacity	\$25,000
f) Special damages	\$1,622.80

**Total: \$454,918.25**

[291] The Parties have agreed that evidence and submissions on tax gross ups, pre-judgment interest, and management fees will be presented at a later date if appropriate.

[292] In my view, Ms. Chau has been substantially successful and I would be inclined to award her costs at Scale B.

“Girn J.”