

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gaughan v. Egersema*,
2023 BCSC 1579

Date: 20230907
Docket: M31909
Registry: Chilliwack

Between:

Sile Mairead Gaughan

Plaintiff

And

Tyla Michelle Egersema

Defendant

Before: The Honourable Justice Stephens

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

Chilliwack, B.C.
December 5-9, 12-16, 2022, and
April 3-6, 2023

Place and Date of Judgment:

Chilliwack, B.C.
September 7, 2023

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OVERVIEW

[1] The plaintiff, Sile Gaughan, T-boned the defendant’s vehicle in December 2014 after the defendant ran a red light at an intersection going directly into the plaintiff’s path. The plaintiff hit the brakes hard in time to avoid a serious impact collision, so the damage to her vehicle was relatively minor. However, she experienced hip discomfort in the years following the accident, together with some soft tissue injuries, which have since resolved.

[2] At the time of the accident, the plaintiff was 33 years old, fit, strong, and physically active, who worked hard in an arduous and at times dangerous back-country forest industry job. After the accident, she continued to work in that forestry job for another 22 months, though slowed down, until leaving her employment when pregnant with her second child in the fall of 2016.

[3] But her hip pain, later thought to be simply trochanteric bursitis, worsened after the accident. After a medical-legal examination in 2018, she was sent for a magnetic resonance (“MR”) arthrogram, which identified that the plaintiff actually had a torn labrum in her right hip joint. She has not since returned to work in the forest industry, or to any other employment. She is now retraining to be an education assistant.

[4] The plaintiff contends the accident caused her torn labrum and seeks damages for the injuries she says she suffered as a consequence of the defendant’s negligence. Her claim is for approximately \$1 million. The defendant admits the collision was caused solely by her negligence, but does not admit a causal connection between the accident, any alleged injuries of the plaintiff, nor any alleged loss of earnings or capacity.

[5] The defendant contends this was a minor accident that did not cause the plaintiff’s torn labrum, the pain of which she says presented four years later, and was instead likely caused by the plaintiff’s work, active lifestyle, or a prior accident. The defendant says that the plaintiff is physically capable of pursuing work at the same remunerative level as she enjoyed prior to the accident but has chosen not to do so.

The defendant also contends that the plaintiff has failed to mitigate her damages, including by recently declining surgical intervention. The defendant says her damages are approximately \$40,000 to \$100,000.

[6] I find the accident did cause the plaintiff's torn labrum, which has disrupted the trajectory of her life. However, the plaintiff must be put in the position she would have been but for the accident, no more no less. In implementing that principle, a main issue is what contingency deduction is applicable to calculate her losses, given the vigorous nature of her pre-accident physical activities and the likely path of her life without the accident. I apply a negative contingency of 40% (30% in the pre-trial period) to account for several real and substantial possibilities that impact the assessment of damages.

[7] For the reasons that follow, the plaintiff is awarded damages as assessed at \$454,219.55.

BACKGROUND

The Plaintiff's Pre-Accident Circumstances

[8] Prior to the accident, the plaintiff was an active person, enjoying sports, and employed in vigorous back-country work in the forest industry as a forest technologist.

[9] She attended the British Columbia Institute of Technology from 2004 to 2005, and earned a one-year certificate in forest research technology.

[10] She started working in the forest sector as a forest technologist in about 2005. Her son was born in 2008, and she continued in that job.

[11] The plaintiff attended the University of Fraser Valley in the winters of 2011 and 2013 on a part-time basis. She was awarded 43 transfer credits and earned 11 credits towards a Bachelor of Arts degree with a major in geography. She did not pursue this further.

[12] However, in approximately 2011, the plaintiff was certified as a trainee forest technologist through the Association of BC Forest Professionals. She kept that designation until 2016 and has not renewed it.

[13] Her full-time work as a forest technologist, with a business called Infinity Pacific Stewardship Group (“IPSG”), took her to remote back-country locations. She hiked in all seasons in the wilderness, took measurements and surveyed creeks and potential logging areas, and recorded environmental and wildlife features. She drove in with a crew on logging roads or sometimes by boat, and at times had to jump out of a helicopter (while in full power) to access remote locations. She also described “scary” helicopter landings. She operated a brush saw and chainsaw, used an axe, and hiked into work areas carrying a significant amount of equipment on her back. The plaintiff was one of few women in this type of work.

[14] The plaintiff fell down a gulley a number of times at work. On one occasion, she fell down a gulley injuring her ribs and was in significant discomfort, and yet tried to work through the pain until ultimately taken for medical attention.

[15] But, she enjoyed the forestry work, hard as it was, and particularly enjoyed being in the outdoors and having the forest as her office. She greatly enjoyed nature.

[16] I find that before the accident, the plaintiff was, and remains, a strong and resilient person, who carries on without complaint in the face of adversity.

The Plaintiff’s Pre-Existing Medical Conditions

[17] In her job pre-accident, the plaintiff twisted her ankles and injured herself from time to time. She reported aching in her hips in 2013 when getting massage therapy before the accident occurred. The plaintiff describes this discomfort as just wear and tear and not significant; the defendant argues it could have been a pre-existing torn labrum.

[18] But, she pushed through her injuries and worked hard.

[19] The plaintiff was in a motor vehicle collision in 2001, which she described as major, but she was not injured. She was in another accident in November 2011, and visited her doctor for what was described as a C-spine injury. However, she was not significantly injured; she took some time off work, but did not experience lasting pain.

[20] I find that the plaintiff did not have a pre-existing labral tear prior to the subject accident.

The Accident

[21] On December 5, 2014, the plaintiff was driving her 1997 sport utility vehicle through a green light at an intersection when she hit the side of the defendant's vehicle after the defendant had failed to stop at a red light.

[22] The cost to repair the plaintiff's vehicle was approximately \$670.

The Plaintiff's Post-Accident Circumstances

[23] The plaintiff saw her family physician a week later. She reported some pain in her hip and knee.

[24] She returned to work as a forest technologist. She stayed in that job for another approximately 22 months, until October 2016 when she became pregnant with her second child. Her family physician advised that there was "no safe work available".

[25] The plaintiff's hip pain got worse as time went on, with each year. Her supervisor, Luke Robertson, described the plaintiff as "really strong", who worked both well and "faster than most of the guys", really resilient, and not a complainer. After her accident, he testified that she started to slow down, needed more breaks, and noticed a change in her work rate.

[26] Her daughter was born in 2017.

[27] The plaintiff went on maternity leave and raised her daughter as a single mother.

[28] The plaintiff's parents require assistance with their living needs, and the plaintiff has helped them, including during COVID. Her parents have health care needs, and she has prioritized that in her life; of several siblings, the plaintiff is the primary caregiver for her parents.

[29] She lives with her parents in their family home.

[30] The plaintiff underwent an MR arthrogram on February 1, 2019, which indicated that a "complete tear of the anterosuperior labrum is demonstrated". Experts at this trial, Dr. Harpreet Sangha and Dr. Deepak Grover, described this as a full-thickness labrum tear. Dr. Sangha further opined in his testimony that there is a low possibility of it being a degenerative tear, and instead it has the characteristics of a traumatic tear. Dr. Grover similarly opined in testimony that trauma was a more probable cause of the labral tear.

[31] The plaintiff did not consider returning to the work force until 2020.

[32] In April 2021, the plaintiff was accepted into the education assistant program at the College of the Rockies and commenced studies in September 2021.

[33] In the summer of 2022, the plaintiff went on a walking trip with friends to Ireland and had to stop on driving trips frequently to get out and walk around. Her friends described her apparent fondness for nature and the outdoors on that trip.

[34] The plaintiff receives money from her parents. She owns a property in Hope, British Columbia, and runs it as a rental sometimes.

EXPERT EVIDENCE

The Plaintiff's Expert Witnesses

[35] Russell McNeil is an occupational therapist who was qualified as an expert in the field of occupational therapy, capable of giving opinion evidence relating to the cost of future care concerning individuals who may have been injured in motor vehicle collisions. He assessed the plaintiff and prepared a cost of future care report dated July 2017. In his report, he provides recommendations as to items for future

care and homemaking assistance. In a supplemental report, he provides costs for certain items.

[36] Dr. Colleen Quee Newell was qualified as an expert in vocational rehabilitation. She saw the plaintiff to assess her vocational potential and prepared a vocational assessment report dated July 22, 2022.

[37] Among other things, Dr. Quee Newell opined that being a teacher, which would involve completion of a Bachelor's undergraduate degree, is not likely a probable long-term career for the plaintiff. I accept this finding. For similar reasons, I find the plaintiff would not have, without the accident, likely obtained a Bachelor's degree in forestry, which is one of the earning capacity scenarios presented by the plaintiff at trial (nor is obtaining a Bachelor of forestry a likely scenario with the accident).

[38] Dr. Barry Turchen is the plaintiff's primary physician and was qualified as an expert in family medicine. He prepared a report in March 2018, which described her visits to him after the accident, including his diagnosis of trochanteric bursitis in January 2018.

[39] Dr. Sangha is a physiatrist and was qualified as an expert in physical medicine and rehabilitation, capable of giving opinion evidence concerning individuals who may have been involved in motor vehicle collisions and who suffer from musculoskeletal problems, chronic pain conditions, and disabilities. Dr. Sangha was qualified to opine upon issues of diagnosis, causation, treatment recommendations, and prognosis for such patients. He has experience with labral tear injuries. He prepared two reports, the first one dated October 2, 2018, after his initial independent medical examination, and the second report dated March 5, 2019, following the plaintiff's MR arthrogram, which identified a torn labrum.

[40] Dr. Sangha opined that the plaintiff has a torn labrum, which was caused by the accident, and she is "at least partially disabled and at a competitive disadvantage". He opined that she is "at risk for early degenerative changes as a

result of this collision derived impairment”. He opines the plaintiff’s prognosis is at best “guarded”, and that she will continue to have persistent difficulties as a direct result of the injuries that were sustained.

[41] Sergiy Pivnenko was qualified as an expert in the field of labour economics, capable of testifying regarding calculations of income losses for individuals who may have been injured in motor vehicle accidents, including the calculation of present values and multipliers for future earnings and calculations of the present values of costs of future care. He prepared a report with respect to loss of earning capacity (modified in an addendum, marked as Exhibit 34), and a supplemental report on cost of future care.

[42] Dr. Grover is an orthopaedic surgeon who was qualified as an expert in orthopaedic surgery, capable of giving opinion evidence concerning individuals who may have been involved in motor vehicle collisions and who suffer from diseases and problems of muscles, joints, ligaments, and tendons of the body, including opining on issues of causation, diagnosis, treatment recommendations, and prognosis. Dr. Grover’s expertise includes the ability to review and interpret X-ray, computerized tomography (“CT”), and MR imaging (“MRI”) scans. He opines, among other things, that the plaintiff’s prognosis is guarded.

[43] Dr. Grover prepared three reports dated March 14, 2019, April 24, 2022, and June 19, 2022. He prepared a fourth report, dated December 11, 2022, (during the trial) that changed an opinion expressed in his third report as to the existence of arthritis in the plaintiff’s hip. Specifically, in his second report, Dr. Grover opined the plaintiff had premature secondary osteoarthritis in her right hip; in his third report, he opined she does not have evidence of premature secondary osteoarthritis of her right hip, based on a CT scan that had been performed recently; and in his fourth report, he opines that, after reflection, he stands by the opinions in his second report of April 2022 that the plaintiff does currently have osteoarthritis.

The Defendant's Expert Witnesses

[44] Mark Szekely was qualified as an expert in the field of economics, capable of giving opinion evidence on the estimation of economic losses for individuals who may have been injured in motor vehicle accidents, including present values and multipliers for future earnings or loss of earnings. Mr. Szekely prepared a report dated September 7, 2022, which commented on Mr. Pivnenko's economic loss report particularly with respect to the issue of labour market contingencies.

[45] Mr. Szekely disagreed with Mr. Pivnenko's adjustment applied to census-based data to reflect an assumption that the plaintiff would have had a strong and persistent work attachment, when providing earning projections. Among other things, Mr. Szekely describes Mr. Pivnenko's concept of strong and persistent work attachment as "entirely subjective". He opines that using average labour market contingencies reduces Mr. Pivnenko's estimates by approximately 20%.

[46] I find that Mr. Pivnenko's area of expertise does not extend to valuing an adjustment to the data for work attachment and afford his evidence less weight in this regard. I prefer Mr. Szekely's evidence in this regard and make an adjustment to Mr. Pivnenko's earning projection estimates accordingly.

[47] Dr. Douglas Connell is a radiologist who was qualified as an expert in radiology, with a specialization in diagnostic radiology, capable of giving opinion evidence regarding individuals who may have been injured in motor vehicle accidents and who suffer from disease, injury, or problems as a result. The scope of Dr. Connell's qualifications include (a) the diagnosis of medical conditions by the use of medical imaging and radiological techniques, including the degree of arthritis and osteoarthritis, (b) the use of diagnostic imaging, including the conditions in which it is used, the frequency with which it is used, and the benefits of its use as compared with other diagnostic tools, and (c) diagnosis and treatment. He prepared a report dated January 31, 2023, a redacted version of which was admitted at trial, which opined that no changes indicative of osteoarthritis are present in certain imaging studies of the plaintiff's hip.

[48] I do not place evidentiary weight on the article referred to in footnote two in Dr. Connell's report—Brad Register et al., "Prevalence of Abnormal Hip Findings in Asymptomatic Participants: A Prospective, Blinded Study" (2012) 40:12 American J of Sports Medicine 2720 (Exhibit 50)—to make inferences as to the nature and cause of the plaintiff's labrum tear. The defendant did not demonstrate on a balance of probabilities that it has any reliable evidentiary value and applicability to the plaintiff or her personal circumstances, or to the existence of labrum tear injuries in the general population in British Columbia.

[49] Dr. Mark Trump was qualified as an expert in orthopaedic surgery, capable of giving opinion evidence concerning individuals who may have been injured in motor vehicle collisions and who may suffer from disease, injury, and problems as a result. Dr. Trump was qualified to provide opinion evidence as to (a) the diagnosis and treatment of diseases, injuries, and problems of the bones, muscles, joints, ligaments, and tendons; (b) the manner of diagnosis, including the commonality of use of medical imaging or other techniques; (c) the availability, success rate, and frequency of employment of various surgical and other interventions and treatments in respect of labral tears and other physical diseases, injuries, and problems; and (d) issues relating to causation, diagnosis, treatment, and prognoses; and (e) the review and interpretation of medical imaging, including MRI, CT scans, and X-rays, in respect of the above. He prepared a report, a redacted version of which was admitted at trial that, among other things, responds to and disagrees with Dr. Grover's fourth report (December 11, 2022) as it relates to the existence, if any, of osteoarthritis in the plaintiff's right hip.

POSITION OF THE PARTIES

The Plaintiff's Claim

[50] The plaintiff submits her labrum was torn in the accident and that she currently experiences osteoarthritis in her right hip. She contends that but for the accident, she would have returned to work in September 2020 and then continued in work as a forest technologist (although in a different position to accommodate her

family responsibilities). Her claim for past and future loss of earning capacity is approximately \$800,000. She also contends her life has been significantly disrupted by the accident. Her total claim, including heads of damage for non-pecuniary damages, loss of earning capacity, cost of future care, and special damages, is \$998,736.

The Defendant's Position

[51] The defendant submits that this was a minor accident that did not cause the plaintiff to suffer any lasting injuries. She contends that while the plaintiff does have a torn labrum, it was not caused by the accident (it could have been caused by the plaintiff's other activities, for example, her work) and that the plaintiff does not experience osteoarthritis. Among other things, the defendant submits that there was a significant period of time after the accident before the plaintiff experienced groin pain associated with a torn labrum.

[52] The defendant contends, among other things, that the plaintiff could return to forest technologist work and the same employment she had before at IPSC, and she has suffered no loss of earning capacity. The defendant maintains that there is no evidence that the plaintiff has lost capacity to work as a forest technologist, and her not doing so is because of her personal choices—not anything to do with the subject accident. The defendant contends that the plaintiff's case is speculative. The defendant further contends that the plaintiff has failed to mitigate her damages.

ISSUES

[53] The main issue to be resolved is the quantum of damages to which the plaintiff is entitled from the defendant as a result of the accident.

[54] The issues in this case are:

- 1) What amount of general non-pecuniary damages should be assessed?
- 2) Has the plaintiff established entitlement to past loss of earning capacity, and if so, what amount should be assessed under this head?

- 3) Has the plaintiff established entitlement to future loss of earning capacity, and if so, what amount should be assessed under this head?
- 4) What amount, if any, should be assessed for loss of housekeeping capacity?
- 5) What amount, if any, should be assessed for cost of future care?
- 6) Should a contingency deduction be applied and if so, how much?
- 7) Did the plaintiff fail to mitigate her damages?

DISCUSSION

Credibility

[55] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), as follows:

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

[56] I found the plaintiff credible in her testimony. She did not embellish her symptoms, and her description of hip pain matches that which Dr. Sangha described as consistent with a labral tear.

[57] I do find her testimony at times lacked reliability. For example, she did not recall when she received the forest technologist designation. Further, she testified that when she fell down a gulley and injured herself at work prior to the accident, she did not recall seeking medical attention for her rib pain; however, her supervisor, Mr. Robertson, testified that she went to see a doctor about her bruised ribs.

Adverse Inferences Sought

[58] Both parties asked the Court to draw adverse inferences against the other party. The plaintiff asked the Court to draw an adverse inference from the defendant's failure to call an expert, Dr. Robert Froh, who had apparently prepared a report prior to trial (that report was not tendered in evidence). The defendant asked the Court to draw an adverse inference from the plaintiff's failure to call her father and sister to testify and by not obtaining a functional capacity expert report.

[59] In *Kim v. Baldonero*, 2022 BCSC 167, Justice Horsman, then a member of this Court, describes that an adverse inference:

[71] ... may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound. The inference is not to be drawn if the witness was equally available to both parties and unless a *prima facie* case is established: *Thomasson v. Moeller*, 2016 BCCA 14 at para. 35; *Singh v. Reddy*, 2019 BCCA 79 at para. 27.

[60] I am not satisfied that any adverse inference should be drawn against either party.

[61] The defendant was entitled to obtain an expert report but not rely on it at trial and call that witness to testify. I am not satisfied it is the case that Dr. Froh would have provided "important supporting evidence" for the defendant "if their case was sound": *Kim* at para. 71.

[62] Nor am I satisfied the plaintiff ought to have tendered a functional capacity report at trial. Expert evidence to demonstrate a plaintiff's capability to do certain work is not required to establish damages for loss of future earning capacity: *Wood*

v. Kim, 2023 BCCA 156 at paras. 10–11. I find there is sufficient evidence before me to assess the plaintiff’s damages.

[63] Further, the plaintiff’s family members’ evidence was not in the exclusive control of the plaintiff. The defendant could have sought details of their evidence on discovery, and the defendant could have, but did not, issue a subpoena for the family members to provide testimony at trial. I decline to draw an adverse inference against the plaintiff for failing to call her family members.

The Plaintiff’s Post-Accident Circumstances

[64] The trial of this action commenced eight years from the date of the accident, and the plaintiff was 41 years old. She is now 42.

Findings Regarding the Plaintiff’s Accident-Related Injuries

Was the Plaintiff’s Right Hip Labral Tear Caused by the Accident?

[65] The plaintiff has a labral tear. Dr. Sangha opined that the labral tear was caused by the accident. I accept his evidence and find that is so. Dr. Sangha was an impressive and knowledgeable witness, with experience assessing and treating labral tears.

[66] His evidence was consistent with that of Dr. Grover (an orthopaedic surgeon) on this point, whose evidence I accept in this respect.

[67] Further, I am also able to rely on circumstantial evidence to determine if an injury occurred: *Davis v. Jeyaratnam*, 2022 BCCA 273 at paras. 55–58, 61–63. The plaintiff’s supervisor at work described how she started to slow down and experience discomfort at work after the accident. Her friends also noticed her having difficulty, noting that before the accident, she was athletic and vigorous and then had difficulty with previously normal forms of physical exercise.

[68] I do not place much weight on the fact that her labral tear was not discovered for approximately four years after the accident. Dr. Sangha testified that torn labrums

are at times difficult to diagnose and the pain comes in different places, which tracks the plaintiff's experience.

[69] Nor do I place much weight on the fact that the accident caused little damage to the plaintiff's car. Dr. Sangha testified that there is little correlation between the value of damage and significance of injuries, an opinion Dr. Grover echoed. I accept their evidence on this point. I find it is possible that in the process of stopping quickly, hitting the brakes hard, bracing, and from impact, the plaintiff tore her right labrum—and that she did so.

[70] Nor do I place weight on evidence in medical records that the plaintiff had some pre-existing hip pain, or that post-accident, her medical records did not sometimes describe hip pain at all or in the same places or until some time after the accident. Medical records are not always reliable evidence of the existence, or non-existence of injuries: *Edmondson v. Payer*, 2011 BCSC 118 at paras. 34–37, aff'd 2012 BCCA 114.

[71] I place more weight on the expert evidence before me, and relying on that evidence, including that of Dr. Sangha and Dr. Grover, I find that the plaintiff's labrum tear was a traumatic injury that was caused by the accident.

Was the Plaintiff's Right Knee Injured in the Accident?

[72] I find the plaintiff did not experience a significant right knee injury in the accident, and any injury to her knee has since recovered.

[73] The plaintiff does experience discomfort in her right knee. As stated by Dr. Sangha in his evidence, a likely explanation for the plaintiff's ongoing knee pain is that it is radiating pain associated with and part of the clinical picture of the plaintiff's labral tear.

Does the Plaintiff have Osteoarthritis in Her Right Hip?

[74] The expert evidence conflicts on this point. Dr. Grover opines in his report dated December 11, 2022, and his testimony at trial that the plaintiff does have

osteoarthritis in her right hip, but in doing so, he withdraws a previous report dated June 19, 2022, where he opined that she did not.

[75] Dr. Connell and Dr. Trump opine that the plaintiff does not have osteoarthritis.

[76] I find the evidence equally balanced on this point and thus that the plaintiff has not proven on a balance of probabilities that she currently experiences osteoarthritis.

[77] However, I do accept the evidence of Dr. Sangha and find that having a torn labrum puts the plaintiff at increased risk of developing osteoarthritis in future.

If the Plaintiff Does Have Osteoarthritis, Was It Caused by the Accident?

[78] Since I have found the plaintiff has not proven she currently experiences osteoarthritis, it is unnecessary to address this issue.

Did the Plaintiff Suffer a Loss of Functional Capacity as a Result of the Accident, Leading to Less Remunerative Work?

[79] The defendant contends that the plaintiff should have adduced a functional capacity expert report in support of her claim for damages. However, I find I am able to evaluate the plaintiff's functional capacity without such a report for the purposes of assessing damages.

[80] For example, Dr. Grover opined that the plaintiff, with a torn labrum, would not likely be able to do heavy labouring work.

[81] I have little evidence of the universe of jobs that are suitable for a forest technologist, and the description of the all the work that may be done in the National Occupational Classification ("NOC") class 2223 (Forestry Technologists and Technicians). However, I do have evidence from Barry Mayo, a witness at trial, that an urban forester, for example, can at times involve heavy physical work.

[82] I find it is reasonable for the plaintiff to not currently choose to work outdoors as a forest technologist, as she did before, having a torn labrum. I refer to and

accept the evidence of Dr. Sangha, Dr. Grover, and Dr. Quee Newell in regard to the plaintiff's physical capabilities.

[83] I need not decide the question whether the plaintiff is unable to do any work at all as a forest technologist. In the sphere of damage quantification, the court must consider and assess hypothetical events. The plaintiff need not prove on a balance of probabilities that after the accident she is unable to work as a forest technologist. The question before me, at steps one and two below, is whether there is a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery, or risk of arthritis) and whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss: *Rab v. Prescott*, 2021 BCCA 345 at para. 47. I will return to that analysis below.

ASSESSMENT OF DAMAGES

[84] In assessing damages, my task is to place the plaintiff in the position she would have been if the defendant had not been negligent—no better or worse: *Jenkins v. Casey*, 2022 BCCA 64 at para. 26, leave to appeal to SCC ref'd, 40203 (9 February 2023), citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 32–35, 1996 CanLII 183. First, I set out the principles informing damage quantification, as set out in the 2021 trilogy. Then, I assess non-pecuniary damages, past and future losses of earning capacity, loss of housekeeping capacity, cost of future care, special damages, and the plaintiff's failure to mitigate.

Trilogy Principles: Hypothetical Future Events

[85] Where the quantification of losses from an accident involves a hypothetical future event or events, this Court's analysis is governed by the principles established in a trilogy of cases: *Dornan v. Silva*, 2021 BCCA 228; *Rab*; and *Lo v. Vos*, 2021 BCCA 421. The trilogy consolidates earlier principles and is foundational for a proper analysis of quantification of personal injury losses: *Davie v. Hill*, 2022 BCSC 2074 at para. 94.

[86] In personal injury cases, a court is confronted not simply with what has happened in the past but must also assess a plaintiff's without-accident future prospects. The court is necessarily faced with an assessment of loss where the damages analysis is attended by hypothetical events. The case before me is an example of such a situation, since I have found that the plaintiff experienced a torn labrum in the accident when she was 33 years old, and prior to the accident, she worked in the forest sector, which involved physical labour.

[87] The organizing principle of damage quantification is to put the plaintiff in the same financial condition they would have been had the accident not occurred. The central task is to compare the likely future of the plaintiff's working life if the accident had not occurred with their likely future working life after the accident: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 33, citing *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.

[88] At law, a hypothetical event may be taken into consideration if there is a "real and substantial possibility" of an event occurring, and not "mere speculation": *Grewal v. Naumann*, 2017 BCCA 158 at para. 48, Goepel J. dissenting but not on this point. A real and substantial possibility is a risk that is "measurable" on the evidence: *Dornan* at paras. 63–64; *Rab* at paras. 27–28. This standard of proof is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative: *Ploskon-Ciesla* at para. 15, citing *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

[89] Hypothetical events can be relevant to assessing contingency deductions: *Dornan* at paras. 62–64. A contingency deduction can be applicable to non-pecuniary damages, future earning capacity, or past losses of income: *Dornan* at paras. 143–145, 174–178. Hypothetical events are also relevant to assessing the existence and quantum of past or future loss of earning capacity: *Rab* at para. 28.

[90] Per *Dornan*, a proper analysis of a hypothetical event proceeds this way: first, what happened to the plaintiff in the past? This is assessed on a balance of probabilities standard: para. 94. Second, the court must consider what might happen to the plaintiff in the future. The trial judge need only consider the possibility of such events occurring if there is a “real and substantial possibility” (not mere speculation): paras. 63, 94. In doing so, the court can consider evidence of past facts proven on a balance of probabilities (paras. 94, 105) and common sense (para. 122). Finally, if the hypothetical event has a real and substantial possibility of occurring, the court must consider the relative likelihood of the possibility: paras. 64, 95, 105.

[91] The court must be mindful that the existence of a specific contingency must be proven on sufficient evidence “capable of supporting the conclusion that the outcome of the contingency is a real and substantial possibility, as opposed to a speculative possibility”: *Lo* at paras. 51–52, 74–75, 77–79 (evidence not capable of establishing a measurable risk of a major depressive disorder occurring in future even without an accident); *Rab* at para. 50. This Court in *Pascuas v. Leung*, 2022 BCSC 1469, states: “It is not enough to say that because something happened once it could happen again; in the absence of a measurable risk arising on the evidence, that is a matter of speculation”: para. 64, citing *Rab* at para. 76.

[92] A fundamental economic component of the plaintiff’s claim is based on her contention that without the accident, she would have worked as a forest technologist.

[93] As discussed below, I find that the plaintiff’s hypothetical future work as a forest technologist should at law form the basis of her assessment of damages. However, a significant issue is whether a negative contingency should be applied to account for: the possibility she could, in future, even after the accident, still work as a forest technologist in some capacity; that she would likely have ceased working as a forest technologist anyway due to a combination of family responsibilities and associated personal choices; or that she might have suffered a torn labrum injury

anyway, which could have altered the trajectory of her work in forestry as the accident has done.

[94] In short, I must determine if a negative contingency should apply to any calculations made for the plaintiff's claimed heads of losses and if so how much. I do so below.

Non-Pecuniary Damages

Legal Framework

[95] As summarized by Horsman J. in *Kim*:

[79] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those he will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39 [*Tisalona*].

[80] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100 [*Stapley*], the Court of Appeal listed common factors influencing an award of non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. Generally, stoicism should not penalize the plaintiff.

[81] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured in part against awards made in comparable cases. However, other cases only serve as a rough guide as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The amount of the award does not depend only on the seriousness of the injury, but rather also on the loss in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.

[Emphasis added.]

Discussion

[96] The plaintiff seeks an award of \$175,000 based on *Rouse v. Lamarque*, 2022 BCSC 1131 at para. 36 (\$150,000); *Firman v. Asadi*, 2019 BCSC 270 at para. 231 (\$170,000); *Hubbs v. Escueta*, 2013 BCSC 103 at para. 136 (\$130,000); and *Javorovic v. Booth*, 2021 BCSC 336 at para. 87 (\$120,000 before deductions for failure to mitigate).

[97] The defendant submits that the non-pecuniary award should be \$35,000 in respect of the plaintiff's injuries in the motor vehicle accident as the defendant sees them (primarily soft tissue injuries, resolved within 3 years); or in the alternative \$75,000. The defendant relies on a series of cases: *Perren v. Lalari*, 2010 BCCA 140 (\$50,000); *Bansi v. Pye*, 2012 BCSC 556 at para. 52 (\$75,000); *Barn v. Bird*, 2021 BCSC 389 at para. 103 (\$85,000); *Mcrae v. Canada (Attorney General of)*, 61 B.C.L.R. (3d) 83 at paras. 62–70, 1998 CanLII 3196 (S.C.) (\$50,000); *Strazza v. Ryder*, 2012 BCSC 1693 at paras. 74–81 (\$60,000); *Ireland v. Webber*, 1997 CanLII 1909 at paras. 16–22, [1997] B.C.J. No. 749 (S.C.) (\$30,000); *Balcom v. Madsen*, 1996 CanLII 2205 at paras. 27–32, [1996] B.C.J. No. 235 (S.C.) (\$25,000); *Kartz v. Carlson & Champagne*, 2006 BCSC 716 at paras. 42–52 (\$30,000); *Blazs v. Boyarski*, 1996 CanLII 3078 at paras. 18–22, [1996] B.C.J. No. 221 (S.C.) (\$2,000); *Bell v. Behan*, 1998 CanLII 6312 at para. 17, [1998] B.C.J. No. 2429 (S.C.) (\$20,000); *Marcelino v. Francesutti & Others*, 2002 BCSC 1711 at para. 54 (\$20,000); *Phosy v. Island Pacific Transport Ltd.*, 1996 CanLII 1595 at para. 18, [1996] B.C.J. No. 1037 (S.C.) (\$4,000 and \$6,000 for two plaintiffs); *Unti v. Nielsen*, 2001 BCPC 104 at para. 46 (\$4,500); *Jones v. Kowalska*, 2001 BCPC 251 at para. 40 (\$3,000); *Grant v. Gonella*, 2008 BCSC 1454 at para. 43 (\$70,000); and *Good v. Buljan*, 2021 BCSC 2255 at para. 134 (\$40,000).

[98] Having regard the factors set out at para. 46 of *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), I find that:

- a) The plaintiff was 33 years old at the time of the accident and 41 at the time of commencement of trial;
- b) The plaintiff suffered a labral tear, and as a result, has had and will continue to have pain in her hip as a consequence;
- c) The plaintiff is likely to have a hip arthroscopic surgery or hip replacement surgery the next ten years, which would have the prospect of success but also a risk of complications;

- d) This pain has and will impede her work performance and quality of her working life;
- e) The plaintiff was able to continue through work for almost two years after the accident, but at the time of trial, she is likely unable to return to her previous job;
- f) She has not suffered a mental health injury, but experiences anxiety when driving as a consequence of the accident;
- g) She can continue to travel, although her stamina is reduced and she must take breaks when driving;
- h) Her ability to engage in recreational activities, such as jogging and hiking, which were previously a source of pleasure, has been limited;
- i) She can engage in some household activities, although is limited in some respects (e.g. using a ladder, cleaning gutters) and experiences pain when doing so;
- j) The plaintiff is and has been stoic and should not be penalized for that; and
- k) She will likely experience diminished capacity to engage in physical work in future due to her labral tear, even after she has hip surgery.

[99] Based on my consideration of the *Stapley* factors, and the cases cited by the parties, I consider that \$150,000 (including for loss of housekeeping capacity), before any contingency reduction, is a fair and reasonable award of non-pecuniary damages to the plaintiff. *Rouse* is a recent and analogous case to this one, where a hip injury resulting in a permanent loss of certain recreational activities and a real prospect of losing a further activity (rowing), which was a central joy of the plaintiff's life, resulted in an award of \$150,000 (including for housekeeping inconvenience): para. 36. Here, the plaintiff has lost the ability to engage in activities and a real

prospect of the loss of work as a forest technologist, in an area of employment in the outdoors and that was her passion.

[100] I find the other cases relied on by the plaintiff and those relied on by the defendant to be either dated or not analogous to the one before me (or in some cases, both): *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 at paras. 17–19.

[101] For examples of non-analogous cases: in *Good*, the court assessed non-pecuniary damages at \$40,000 but in so doing referred to previous caselaw (at paras. 130-134) relating to instances where injuries had been temporary and had resolved, which is not the case here as to the plaintiff's hip injury. And in *Barn*, where non-pecuniary damages were assessed at \$85,000, the plaintiff was able to carry out his pre-accident job duties as bus driver (paras. 101-103), which is not the case with the plaintiff here. Neither *Barn* nor *Good* were cases where the plaintiff experienced a torn labrum injury as a result of an accident, as in this case.

[102] I apply a 30% negative contingency (see discussion of contingencies, below) to the \$150,000 non-pecuniary damages amount, resulting in an award of \$105,000 ($\$150,000 \times 0.7$).

Past & Future Loss of Earning Capacity

Legal Framework

[103] An award for future loss of earning capacity represents compensation for a future loss. It is an assessment, not a mathematical calculation (*Steinlauf v. Deol*, 2022 BCCA 96 at para. 55, citing *Gregory* at para. 32), and while not amenable to precise calculation, the court is obliged to make the best estimate it can (*Dunn v. Heise*, 2022 BCCA 242 at para. 33).

[104] This approach applies to the analysis of loss of both past and future earning capacity since both involve hypothetical events: *Rab* at para. 28, citing *Grewal* at para. 48.

[105] The approach for considering claims for loss of future earning capacity is set out in *Rab*:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown [v. Golaiy]* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.)). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dorman* at paras 93–95.

[Emphasis added.]

See also *Steinlauf* at para. 52; *Davie* at paras. 114–120; *Pascuas* at para. 80.

[106] More specifically, step two requires the assessment of a future or hypothetical possibility of an event giving rise to future loss: is there a real and substantial possibility of an event occurring leading to a future loss: *Rab* at paras. 29, 33; *Steinlauf* at para. 53. If so, the court proceeds to step three and assesses the likelihood of that event, then quantifies the loss by way of an earnings or capital asset approach: *Rab* at paras. 28, 31; *Ploskon-Ciesla* at paras. 16–17.

[107] Broadly, the quantification of the “value of future loss” requires a comparison of “the likely future of the plaintiff if the accident had not happened and the plaintiff’s likely future after the accident has happened”: *Steinlauf* at para. 71, citing *Gregory* at para. 32; *Dorman* at paras. 156–157. This has also been referred to as comparing the “without-accident” earning potential of the plaintiff and what the plaintiff was likely to earn as a result of the accident—being mindful that it is not the loss of earnings but the loss of earning capacity for which compensation must be made: *Steinlauf* at paras. 55–56, citing *Gregory* at para. 32; *Andrews v. Grand & Toy Alberta Ltd*, [1978] 2 S.C.R. 229 at 251, 1978 CanLII 1.

[108] The Court of Appeal in *Ploskon-Ciesla* identified the two methods of valuation under the third step: the earnings and capital asset 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.

[109] As a final step in the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo* at para. 117.

Discussion

Steps 1 & 2: Real & Substantial Risk of a Pecuniary Loss

[110] In *Ploskon-Ciesla*, the Court of Appeal elaborates on the first and second steps of the *Rab* analysis in cases where the evidence is clear that an accident has rendered the plaintiff unable to work:

[11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff’s injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[Emphasis added.]

[111] As to *Rab* step one: “[i]n cases ... where the event giving rise to a future loss is manifest and continuing at the time of trial, that evidentiary step is a given.”: *Steinlauf* at para. 52.

[112] Here, the defendant disputes that the injury has rendered the plaintiff less able to work in her pre-accident occupation and contends she is fully able to work at the same level of remuneration as she did prior to the accident, either as a forest technologist or a lab technician. I consider this argument in the context of the *Rab* analysis, below.

Step 1: Event(s) Giving Rise to an Impairment of Capacity

[113] The following factors assist in determining whether the plaintiff has suffered an impairment of her income earning capacity:

- a) Is the plaintiff less capable overall from engaging in all types of employment;
- b) Is the plaintiff less marketable or attractive as an employee;
- c) Has the plaintiff lost the opportunity to take advantage of all job opportunities; and
- d) Is the plaintiff less valuable to herself as a person capable of earning money in a competitive labour market?

See *Rab* at para. 35, citing *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at paras. 7–11, 1985 CanLII 149 (S.C.); *Ploskon-Ciesla* at para. 13.

[114] These factors provide no formula but comprise a means to assess whether there has been an impairment of a capital asset, which can be helpful in assessing the value of the asset lost: *Rab* at para. 36; *Ploskon-Ciesla* at para. 12.

[115] Since the plaintiff did return to her forestry job for approximately 22 months after the accident, and since the defendant disputes that the plaintiff has experienced any loss of capacity, I consider it appropriate to consider the *Brown* factors.

[116] I find that the plaintiff meets all four of the *Brown* criteria. As a result of the torn labrum:

- a) She is less capable overall from engaging in all types of employment, particularly especially those involving physical activities or more than light lifting;
- b) She is less marketable or attractive as an employee for certain jobs;
- c) She has lost the opportunity to take advantage of all job opportunities;
- d) While the plaintiff may be capable of engaging in other remunerative work that could pay at or near what she did as a forest technologist, such as a lab technician, that is not work she did and enjoyed doing prior to the accident. She is therefore less valuable to herself as a person capable of earning money in a competitive labour market.

Step 2: Real and Substantial Possibility of a Pecuniary Loss

[117] Turning to step two, I further find that there is a real and substantial possibility that the plaintiff's hip pain symptoms will continue and result in a reduction in her earning capacity and result in a pecuniary loss.

[118] I find that the future loss of earning capacity is not merely speculative, but is a measurable risk in light of the evidence.

[119] The defendant contends there were other jobs available to the plaintiff that would provide her equal remuneration to that she would obtain as a forest technologist. The defendant contends that a lab technician job, for example, would be suitable for the plaintiff, despite her torn labrum, and that this pays the same as a forest technologist. But, the plaintiff has instead chosen to pursue work as an education assistant, which pays less. The defendant says any loss of earning capacity is simply her choice—not caused by the injury—and that she could obtain employment as a lab technician without taking less money as she would as an education assistant.

[120] At *Rab* step two, I reject the defendant's argument. The plaintiff, post-accident, has made reasonable employment choices based on her value system and capabilities. She has chosen to be an education assistant, which aligns with her values of community participation. I do not find it unreasonable for the plaintiff to have chosen not to train for and seek employment as lab technician when it has no nexus to her value system, prior work experience, or prior work capabilities.

[121] I accept there is a measure of uncertainty as to whether the plaintiff will be able to do forest technologist work in the future, in that whether she lacks and will continue to lack the physical capacity to do so with or without hip surgery. However, there is a real and substantial possibility she does and will continue to lack that functional capacity to do work in the forest technologist sector. Dr. Grover's evidence is that with a torn labrum (assuming no osteoarthritis), there is a likely impact on her ability to do heavy labouring jobs or physically demanding work and high impact activities, but will not impact her ability to do light labouring jobs or office-based sedentary jobs, and this was consistent with Dr. Sangha's opinions. I lack evidence on the universe of jobs available as forest technologists in British Columbia. However, given the existence of real and substantial possibility of a loss of capacity after the accident, in that she would be unable to work as forest technologist, the "speculative aspect" of the plaintiff's future earning capacity goes to quantification and would relate to the third step of assessing the relative likelihood of the possibility of the loss occurring: *Rab* at para. 62.

[122] I need not find on a balance of probabilities that the plaintiff will suffer a pecuniary loss. Only that, on the evidence, there is a real and substantial probability she will do so. I find that there is. I conclude there is evidence that, without the accident, the plaintiff would have continued on in some capacity as forest technologist. With the accident and her labrum injury, she has chosen not to do so since the birth of her second child. She now pursues employment as an education assistant. The likely annual remuneration for an education assistant is less than that of a forest technologist with a college education, statistically speaking. In addition, there is evidence that the plaintiff is precluded from taking on jobs that require

physical exertion and heavy labour of the sort she did prior to the accident. All of this totals a real and substantial possibility of a pecuniary loss caused by the accident.

[123] In summary, following the *Rab* approach, I find as follows:

- a) **Step 1.** There is a potential future event—hip pain and associated lack of strength and endurance required for physical activity—that could lead to a loss of capacity. Put another way, I find the potential future event is a loss of capacity as articulated in *Rab* at para. 48.
- b) **Step 2.** On the evidence, there is a real and substantial possibility that this future event will cause a pecuniary loss to the plaintiff.

[124] Having found a reasonable and substantial possibility of a lack of capacity leading to an income loss, I must now undertake an analysis of the quantification and relative likelihood of the loss occurring, both in the period after the accident to trial, and in the future.

Step 3: Earnings Approach to Valuation

[125] As to valuation, the “earnings approach is often appropriate where there is an identifiable loss of income at the time of trial... Often, this occurs when a plaintiff has an established work history and a clear career trajectory.”: *Ploskon-Ciesla* at para. 16.

[126] I find that the plaintiff did have an established work history and a clear career trajectory. She enjoyed working as a forest technologist in the outdoors, and was interested in, and passionate about, the forest environment.

[127] I find that absent the accident, she likely would have continued working in a forestry-related occupation, in a position falling with NOC 2223 as a forest technologist.

[128] I have expert evidence of this trajectory from a financial perspective in Mr. Pivnenko’s economic loss report and his evidence. I have considered and use

that economic evidence in the loss of earning capacity assessment: *McKee v. Hicks*, 2023 BCCA 109 at paras. 83–85.

[129] I therefore choose to assess the earnings approach using a without-accident earning potential as a forest technologist.

[130] I use a with-accident earning potential as an education assistant (subject to contingencies). Dr. Quee Newell opined, and I find, that an education assistant job is vocationally suitable for the plaintiff.

[131] I decline to use a capital asset approach, since that methodology is appropriate where the plaintiff is not experiencing any income loss at the time of trial (*Antignani v. Heaney*, 2022 BCSC 228 at para. 109; *Rab* at paras. 30; 34) or where the income loss is not easily measurable (*Kringhaug v. Men*, 2022 BCCA 186 at para. 43), which is not the case here where the plaintiff has experienced an income loss.

Negative Contingencies

[132] However, when valuing that pecuniary loss on an earnings approach, “it [is] still ... necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies”: *Ploskon-Ciesla* at para. 11.

[133] While I find that the plaintiff suffered a significant injury to her hip, there remains the issue as to whether a negative contingency should apply and if so, what percentage. This is what *Rab* instructs:

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

[Emphasis added.]

[134] I find the plaintiff would have continued in a career as a forest technologist. The questions are for how long, and would circumstances in her life or those related to the physical nature of her pre-accident lifestyle have interrupted that career trajectory even without the accident.

[135] There are two applicable categories of contingencies: (a) a contingency that could bring the plaintiff's with-accident earning potential up; or (b) a contingency that could bring the plaintiff's without-accident earning potential down. I deal with them together and assess an overall contingency percentage for all of them.

[136] Specifically, I identify the following potential negative contingencies:

- (a) The possibility that even with the accident, the plaintiff will be able to work as a forest technologist in the future, including due to the potential for surgical intervention to repair her torn labrum or by finding work suitable for her abilities, and will thus be able to obtain higher paying work (e.g. *Wood* at paras. 14–17); and
- (b) The possibility that even without the accident, the plaintiff would have ceased working as a forest technologist anyway due to her family responsibilities, or another injury, and pursued a new career as an education assistant.

The Plaintiff's With-Accident Ability to Work as a Forest Technologist in the Future

[137] The plaintiff has options to repair her torn labrum. There is either arthroscopic surgery or a complete hip replacement. Both have risks of potential complications, and potential benefits. While there is a high patient satisfaction rate for hip replacement surgery (though not complete resolution), there can be potential complications with this procedure. Dr. Sangha testified, "there is a lot that can go wrong" and "redos are ... complicated"; in addition, according to Dr. Grover, hip arthroscopic surgery to repair or debride a torn labrum, while less invasive than a replacement, can also not uncommonly result in recovery "issues" post-procedure.

[138] During a visit to an orthopaedic surgeon in October 2022 where hip replacement was discussed, the plaintiff told Dr. Parth Lodhia that she wanted to continue managing her symptoms non-surgically. She testified that right now she has “too many people that rely on me”. The plaintiff chose to not have a hip replacement and wanted to wait until she reaches age 50, which I find is a reasonable choice.

[139] Having osteoarthritis would likely make the plaintiff ineligible for arthroscopic hip surgery. I have found the plaintiff has not proven she currently has osteoarthritis. However, I have found that, with a torn labrum, she is at increased risk of developing it. I therefore, further take into account the risk that the plaintiff will develop osteoarthritis, which will preclude her from arthroscopic surgery.

[140] I must also consider that, for a period of 22 months after the accident, the plaintiff did continue to work as a forest technologist with IPSC doing back-country work—although her supervisor did notice she slowed down and seemed less robust in her work performance. More generally, it is possible that even with her current injury, she could find employment in a job under NOC 2223 (Forest Technologist and Technician). The NOC defined such jobs as light strength, but noted jobs can differ. I find that since there is evidence there may be a suitable job in NOC 2223 for the plaintiff, there is a real and substantial possibility that she will return to that sector, although that possibility is small.

[141] In summary, I find there is a real and substantial possibility that the plaintiff will be able to work as a forest technologist in the future, including by having surgery (arthroscopic surgery or a hip replacement), which—after a recovery period—could possibly render her able to work in a physical manner as forest technologist, or by finding a job that suits her ability before she has hip surgery. I find the percentage to be low. I find it is 10%, and apply a negative contingency for this reason.

The Plaintiff's Without-Accident Possibility of Leaving a Forest Technologist Role

[142] I also find there is a real and substantial possibility that, even without the accident, the plaintiff would have left the forest industry and ceased working as a forest technologist, for two reasons.

[143] First, she has had increased family responsibilities since the accident, both to care for her children and parents. These events would have happened (and are proven on a balance of probabilities) even without the accident. I may consider past events when considering if a contingency is appropriate: *Dornan* at para. 94. In addition, the plaintiff's evidence is that after working in the forestry industry for many years, she was interested in moving to an office job, which would accommodate her child care responsibilities. It is possible she may have gravitated to an education assistant job, even without the accident.

[144] Second, there is a risk the plaintiff would have injured herself if she continued in her prior job as a forest technologist, even without the accident. She did suffer some injuries, and on one occasion, fell down a gulley and injured her ribs. The job at IPSG occasionally entailed jumping out of a helicopter, and she at times fell down a gulley. Dr. Grover testified that falls and jumping out of a helicopter could potentially have resulted in a torn labrum. There was an element of material physical risk to the plaintiff's job at the time of the accident, which could have led to an injury including a torn labrum, causing her to leave a forest technologist job anyway.

[145] Considering the evidence before me, I assess this contingency risk of leaving the forest technologist job, even without the accident, to be 30%.

Summary of Negative Contingencies

[146] I therefore find that for the plaintiff's claim of future loss of earning capacity, a 40% (30% + 10%) contingency deduction should apply.

[147] For the past loss of earning capacity claim, I have some evidence of what has in fact occurred since the accident to the trial. Given the shorter time period (eight

years: 2014 to 2022), the time in which it can take and has taken to diagnose the plaintiff with a torn labrum, and the fact that the plaintiff has not yet had any surgical procedures for her torn labrum, I find the only contingency applicable is that for family responsibilities and risk of injury, and apply only the 30% contingency: *Dornan* at para. 145. (I also find 30% is the appropriate contingency amount to be applied to the plaintiff's claim for non-pecuniary damages.)

[148] I find these contingencies are specific to the plaintiff and apply in addition to (and not in substitution of) the labour market risks and contingencies considered by Mr. Pivnenko (as adjusted in my reasons, including having regard to Mr. Szekely's evidence) and incorporated into my loss of earning capacity assessment above.

Positive Contingencies

[149] The plaintiff also sought a positive contingency of 7% for loss of earning capacity. I am not satisfied the plaintiff has demonstrated a real and substantial possibility that would lead to a positive contingency, and decline to apply one. I find the plaintiff's proposed positive contingency for the possibility that she would have outperformed her colleagues over the course of her career to be "speculative" within the meaning of the caselaw: *Dornan* at paras. 75, 77, 92–93; *Lo* at para. 74. Further, the plaintiff did not establish that the statistics employed in the expert evidence to calculate loss of earning capacity reveal a gender or other bias that could result in a positive contingency: *McColl v. Sullivan*, 2021 BCCA 181 at paras. 41–43. Relatedly, the plaintiff did not prove on a balance of probabilities on the evidence at trial that the plaintiff had been paid less than men for the same work as a forest technologist.

Past Wage Loss: Quantification & Relative Likelihood

[150] For past loss of earning capacity, I rely on the evidence of Mr. Pivnenko, adjusted to account for the evidence of Mr. Szekely, and use the contingency adjustments I have found.

[151] I find the plaintiff is likely to have sought to return to work in September 2020 without the accident.

[152] I assess the plaintiff's past loss of earning capacity using \$121,846 from Mr. Pivnenko's evidence, minus 20% to make Mr. Szekely's proposed adjustment with respect to attachment rates to instead employ average labour market contingencies (which I find is an appropriate adjustment), equalling \$97,477.

[153] I am not satisfied that Mr. Pivnenko's proposed 15% adjustment for "non-wage benefits" has been proven as a real and substantial possibility (or on a balance of probabilities), and I decline to adjust the plaintiff's earning capacity on this basis. Mr. Pivnenko opined in his report as to non-wage benefits referencing a 2005 Statistics Canada report, which was not in evidence, and stated that certain non-wage benefits "may or may not be provided by employers".

[154] To \$97,477, I apply a negative contingency of 30% to reflect the possibility that the plaintiff would have left the forest technologist role without the accident, equalling \$68,234. There is no deduction for with-accident earnings since the plaintiff has not yet started in an education assistant role.

[155] The plaintiff in closing submissions performed her past loss of earning capacity calculation differently than I have. She relied wholly on Mr. Pivnenko's calculations (not all of which I have employed) and then applied a 50% contingency for past loss of earning capacity. I have arrived at a contingency in a different manner, have adjusted Mr. Pivnenko's calculations, and arrive at a past loss of earning capacity that is approximately similar to that advanced by the plaintiff at trial.

Future Loss of Earning Capacity: Quantification & Relative Likelihood

[156] For future loss of earning capacity, I also rely on the evidence of Mr. Pivnenko, adjusted to account for the opinion evidence of Mr. Szekely, and use the contingency adjustments I have found.

[157] I assess the plaintiff's with-accident earning capacity as a forest technologist using Mr. Pivnenko's calculation of \$1,093,917, minus 20% to make Mr. Szekely's proposed adjustment with respect to attachment rates (which I find is an appropriate

adjustment), equalling \$875,134. (As also found above, I decline to apply Mr. Pivnenko's 15% non-wage benefits increase adjustment.)

[158] From this, I assess the plaintiff's with-accident earning capacity as an "elementary and secondary teacher assistant", as \$590,059, based on Mr. Pivnenko's calculations. As above, I reduce \$590,059 by 20% to reflect Mr. Szekely's proposed adjustment with respect to attachment rates to yield a total with-accident future earning capacity of \$472,047.

[159] The difference between the earning capacity of a forest technologist and education assistant being $\$875,134 - \$472,047 = \$403,087$.

[160] To this, I apply a negative contingency of 40%, equalling \$241,852 ($\$403,087 \times 0.6$).

Step 4: Fairness & Reasonableness

[161] I consider the award fair and reasonable. The plaintiff suffered a torn labrum as a result of the accident, which occurred when she was 33 years old—relatively early in her working life. She was then in a physical job, with inherent risks of injury, and was soon entering a phase of life where child care and care for her parents would figure prominently in her life, even without the accident. But she has lost an opportunity to continue as a forest technologist and pursue it with the vigour she once did, and continue to work in an area she enjoys and is passionate about, and was good at; and her physical recreational capabilities, being an important part of her self-identification, have been compromised. There is a good prospect, in the next decade, she is likely to undergo a hip replacement or other surgery to try to ameliorate these adverse effects, which could be successful but have risks and will likely leave her with some remaining physical limitations.

[162] I find that, having regard to past events and taking into account the potential future risks, uncertainties, and hypothetical events, an award of \$68,234 (for past loss) and \$241,852 (for future loss) is fair and reasonable to compensate her for the loss of earning capacity.

Loss of Housekeeping Capacity

[163] The plaintiff seeks an award of \$93,000. The defendant submits that the plaintiff has not established an entitlement to an award under this head of damages.

[164] The plaintiff testified she does all the cleaning in the house, which involves all laundry and sweeping floors. She further testified that recently before the trial commenced (in November 2022), she hired a cleaner for extra support.

[165] The principles to be considered when valuing loss of housekeeping capacity are set out in *Kim v. Lin*, 2018 BCCA 77 [*Kim CA*]. Loss of housekeeping capacity may be considered as a pecuniary or non-pecuniary loss: *Kim CA* at para. 30; *Ker v. Sidhu*, 2023 BCCA 158 at para. 23, citing *McKee* at para. 112. The court retains ultimate discretion to address housekeeping claims under either type of award, but, in general, a non-pecuniary damages award is more appropriate when there is a loss of amenities or increased pain and suffering: *Kim CA* at para. 33. Conversely, when a plaintiff has enlisted paid or unpaid housekeeping services, a pecuniary award is appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101.

[166] The plaintiff has experienced a loss of amenities or increased pain and suffering as result of the accident. Although she has recently hired professional assistance, the plaintiff can still “perform usual and necessary household work, but with some difficulty or frustration in doing so”: *McKee* at para. 113. I find that including loss of housekeeping in the non-pecuniary award is appropriate in the circumstances of this case, and I decline to make a pecuniary award under this head of damage.

Cost of Future Care

[167] The plaintiff claims for approximately \$73,300. This includes the cost of \$3,000 for viscosupplemental injections and platelet-rich plasma infusions. The plaintiff’s breakdown (para. 466 of her written submissions) is as follows:

- a) Injections: \$3,000 + \$150 GST = \$3,150

- b) Heat pad for pain management: $\$698 + \$84 \text{ GST} = \$782$
- c) TENS machine for pain management: $\$387 + \$46 \text{ GST} = \$433$
- d) Ergonomic chair: $\$3,155 + \$379 \text{ GST} = \$3,534$
- e) Sit/stand desk: $\$2,305 + \$277 \text{ GST} = \$2,582$
- f) Footrest: $\$54 + \$7 = \$61$
- g) Gym pass: $\$15,186 + \$759 \text{ GST} = \$15,945$
- h) Physiotherapy post surgery: $\$4,276$
- i) Kinesiologist (initial): $\$998 + \$50 = \$1,048$ (the plaintiff's written submissions incorrectly used a total for this item of $\$1,038$)
- j) Chiropractic and/or physiotherapy and/or massage therapy (based on just the highest of the three): $\$41,652$

[168] The principles for an award of cost of future care are set out in *Kallstrom v. Yip*, 2016 BCSC 829 at para. 429:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same, or as narrow as, "medically necessary";
- admissible evidence from medical professionals ... can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;

- still, particularly in non-catastrophic cases, a little common sense should inform the analysis, despite however much particular items might be recommended by experts in the field; the court should have regard for whether any particular expense will actually be incurred and an allowance can be made for any contingency, any real and substantial possibility, that the cost may not in fact be incurred;
- in motor vehicle cases, given the distinction between mandatory and discretionary benefits under s. 88 of Part 7 of the *Insurance (Vehicle) Regulation*, BC Reg. 447/83 and the requirement of mandatory deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, it is desirable for the trial court, where possible, to assign specific amounts for each future care item claimed;
- properly considered, homemaking costs are awarded for loss of capacity and are distinct from future cost of care claims; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See also *Wishart v. Mirhadi*, 2023 BCSC 627 at para. 117.

[169] Mr. McNeil is an occupational therapist who prepared a cost of future report on the plaintiff's need for future care, pain management, homemaking assistive devices, homemaking assistance, yard work and maintenance, ergonomics, and rehabilitation/health maintenance (including a gym pass, kinesiologist, and physiotherapy).

[170] The defendant opposes any award for cost of future care. She submits the plaintiff has not established an entitlement to an award under this head of damages. The defendant relies on s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, and seeks leave to make further submissions on appropriate deductions.

[171] I find that gym expenses—if the plaintiff incurs them in future—given her pre-accident athletic disposition, would have been incurred even without the accident, and decline to award this claim.

[172] Further, the plaintiff has not attended physiotherapy to a significant extent since 2017 and there is evidence of a significant risk that this expense for physiotherapy (other than post-surgery) and kinesiology will not be incurred.

Accordingly, I apply a 50% contingency deduction for this to account for the real and substantial possibility that this expense will not be incurred: *Ker* at para. 66.

[173] With respect to proposed injections, Dr. Sangha stated that the plaintiff “could trial” certain specified “image-guided injections” for a torn labrum. In his second report and in cross-examination, he did not recommend a trial of one type of injection, in light of more recent evidence as to its side-effects. In addition, one of the types of injections (platelet-rich plasma) was characterized by Dr. Grover as “fairly controversial”. The plaintiff had not yet spoken to any treating physician about receiving any such injections.

[174] There is insufficient evidence for me to conclude that the two non-Medical Services Plan (“MSP”) covered injections are standard treatments in Canada for labral tears. And, I do not find the plaintiff has proven that these injection treatments are medically justified and reasonable for the plaintiff given her circumstances, and that there is a real and substantial risk of incurring these costs in the future. I decline to award an amount for cost of future care for non-MSP covered injections (i.e. viscosupplemental injections and platelet-rich plasma infusion).

[175] The other claimed items I am satisfied are appropriate and should be awarded.

[176] I allow cost of future care as claimed as set out in this table:

Description of Claim	Total Amount Claimed (including GST)	% Contingency Applied	Amount Awarded
Injections	\$3,000 + \$150 GST = \$3,150		\$0
Heat pad for pain management	\$698 + \$84 GST = \$782		\$782
TENS machine for pain management	\$387 + \$46 GST = \$433		\$433
Ergonomic chair	\$3,155 + \$379 GST = \$3,534		\$3,534
Sit/stand desk	\$2,305 + \$277 GST = \$2,582		\$2,582
Footrest	\$54 + \$7 GST = \$61		\$61
Gym pass	\$15,186 + \$759 GST = \$15,945		\$0
Physiotherapy post surgery	\$4,276		\$4,276
Kinesiologist (initial)	\$998 + \$50 GST = \$1,048	50%	\$524

Chiropractic and/or physiotherapy and/or massage therapy	\$41,652	50%	\$20,826
Total Claimed:	\$73,463		
Total Awarded			\$33,018

Special Damages

[177] The defendant agrees to an amount of \$4,120.45 as special damages.

[178] In addition to this amount, the plaintiff further seeks special damages for the cost of her tuition to train as education assistant, medical-related travel expenses, and the cost of yard work, in the total amount of \$7,985.81.

[179] The defendant opposes the plaintiff's claim for tuition (in the amount claimed of \$2,850.14) to retrain as an education assistant. The defendant contends that, "based on the evidence ... [the plaintiff] would have had to re-train anyways, regardless of the accident".

[180] I consider it appropriate to apply the 30% contingency deduction to the tuition claim to account for the possibility that the plaintiff would have left the forest technologist work even without the accident. Had she done so, she would likely have retrained as an education assistant. I therefore allow \$1,995.10 (0.7 x \$2,850.14) for the tuition claim.

[181] I therefore award \$6,115.55 (\$4,120.45 + \$1,995.10) for special damages.

Mitigation

[182] *Chiu v. Chiu*, 2002 BCCA 618, holds that:

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. 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.

See also *Haug v. Funk*, 2023 BCCA 110 at paras. 56–57.

[183] The defendant contends the plaintiff has failed to mitigate her damages by not having surgery for her torn labrum, and by not pursuing more remunerative work as a forest technologist than what she has done since the accident.

[184] The defendant has not discharged her onus to demonstrate that the plaintiff has failed to mitigate her damages. The plaintiff has not acted unreasonably by not proceeding with recommended treatment. It is not unreasonable for the plaintiff to have declined hip replacement surgery last fall, given that she was then 41 years old and that this is a procedure one would reasonably intend to have only once due to potential complications with a second surgery. The defendant has not proven it is unreasonable for the plaintiff to wish to wait until she is 50 before she obtains hip replacement surgery.

[185] Nor do I find there has been a failure to mitigate damages by not returning to the forest technologist sector for employment, given the expert evidence before me that with a torn labrum, she should engage in light labouring duties but not the heavy labour that forest technologist work can require. Nor has the defendant proven that the plaintiff failed to mitigate damages by not pursuing a job as lab technician, in work that was not consistent with her interests or similar to her prior work experience.

[186] Further, Dr. Sangha opined, and I accept, that a torn labrum is at times difficult to diagnose, which is consistent with the plaintiff's experience. The plaintiff was not dilatory seeking medical advice as to her injury. The plaintiff cannot reasonably be faulted for the passage of time in obtaining medical advice or treatment for a torn labrum when she was only diagnosed with it four years after the accident.

Cost of Dr. Trump's Attendance Sought by the Defendant

[187] The plaintiff did not cross-examine Dr. Trump, an expert called by the defendant, and the defendant seeks costs for his attendance pursuant to Rule 11-7(4) (providing the Court with a discretion as to such costs).

[188] The medical evidence in this trial had a measure of complexity. Parts of Dr. Trump's report as initially served on the plaintiff were later redacted prior to its admission into evidence. In the circumstances, I do not find it necessary or appropriate for the plaintiff to pay costs for Dr. Trump's attendance despite not cross-examining him on his evidence.

CONCLUSION & ORDERS

[189] In summary, I award the plaintiff, Sile Gaughan, the following damages:

Non-Pecuniary Damages:	\$105,000
Loss of Housekeeping Capacity:	\$0
Loss of Earning Capacity:	
(a) Past Wage Loss:	\$68,234
(b) Future Loss of Earnings:	\$241,852
Cost of Future Care:	\$33,018
Special Damages	\$6,115.55
Total	\$454,219.55

[190] My award is subject to deductions under Part 7 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83.

[191] In addition, the parties did not address in their submissions whether any tax gross up was applicable. My award is subject to tax gross up for cost of future care and future loss of earnings capacity, if applicable.

[192] My award is also subject to the application, if any, of s. 83 of the *Insurance (Vehicle) Act*.

[193] The parties have liberty to apply to me within 30 days of the date of this judgment for a decision on these points if agreement cannot be reached.

[194] If the parties cannot agree on costs, they have leave to request a further hearing from me on the issue of costs within 30 days of the date of this judgment.

“Stephens J.”