IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bown v. Skogheim,* 2025 BCSC 241

Date: 20250218
Docket: M197993
Registry: New Westminster

2025 BCSC 241 (CanLII)

Between:

Krystle Michaela Bown

Plaintiff

And

Ivor Skogheim,
Gurvinder Sivia and Good Deal Carpets & Flooring Ltd.

Defendants

Before: The Honourable Justice Taylor

Reasons for Judgment

Counsel for the Plaintiff:	T. Dennis
Counsel for the Defendants:	E. Haupt P.K. Klar
Place and Dates of Trial:	New Westminster, B.C. October 16-20, 2023 April 25-26, 2024 September 5, 6, 2024
Place and Date of Judgment:	New Westminster, B.C. February 18, 2025

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INTRODUCTION

[1] The plaintiff, Krystle Michaela Bown, makes a claim for damages arising out of a motor vehicle accident that took place on December 30, 2016, at the intersection of 176th Street and 60th Avenue in Surrey, British Columbia (the "Accident").

[2] Immediately prior to the Accident, the plaintiff entered the intersection with a green light. The defendant, Ivor Skogheim, was attempting a left turn and did not see nor anticipate Ms. Bown's vehicle approaching. Ms. Bown's vehicle collided with Mr. Skogheim's vehicle in the intersection, which in turn caused Ms. Bown's vehicle to collide with the defendant Mr. Sivia's vehicle (owned by the defendant Good Deal Carpets & Flooring Ltd.).

[3] Ms. Bown's vehicle was deemed a total loss as a result of the damage it sustained in the Accident.

ISSUES

[4] The issues at trial were:

1. Liability for the Accident;
2. Whether Ms. Bown's alleged injuries were caused by the Accident;
3. Whether Ms. Bown is entitled to damages under the following categories:
    a) Non-Pecuniary Damages;
    b) Past Income Loss;
    c) Loss of Future Earning Capacity;
    d) Loss of Housekeeping Capacity;
    e) Costs of Future Care; and
    f) Special Damages.

BACKGROUND

Ms. Bown's Testimony

<u>Pre-Accident History</u>

[5] Ms. Bown was born on July 2, 1986, in British Columbia. She is now 38 years old.

[6] Ms. Bown has a daughter, age eight, and a son, age twelve.

[7] She is currently in a relationship with a man named Mr. Kristian Jamieson who she began dating in 2022. Prior to dating Mr. Jamieson, Ms. Bown was married to Mr. Seio Kitagawa, who is the father of her two children. They separated in 2019.

[8] Ms. Bown graduated from high school in 2004 and attended a veterinary assistant diploma program in or around October 2008 through April 2009.

[9] From October 17, 2008 to May 17, 2009, Ms. Bown was employed as a part-time veterinary assistant doing office administrative work at South Point Pet Hospital.

[10] In August 2008 or 2009, Ms. Bown was hired as a server at the Washington Avenue Grill in White Rock, where she continued to work until 2021. While working at the Washington Avenue Grill, Ms. Bown took two maternity leaves when her children were born. Prior to the Accident, Ms. Bown was promoted to an Assistant Manager position.

[11] Following the Accident on December 30, 2016, Ms. Bown missed approximately two weeks of work at the Washington Avenue Grill. She returned to work on January 11, 2016.

[12] At the time of the Accident, Ms. Bown's managerial rate of pay at the Washington Avenue Grill was $15.90 per hour plus 4% holiday pay and tips. She testified that she had no records of exactly how much she was making in tips,

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although she recalled that the “majority” of her income came from tips in the sense that she made more income from tips than from wages.

[13] Ms. Bown testified that she eventually lost her management position at Washington Avenue Grill in or around 2019 due to health issues arising out of the Accident. Thereafter, she worked one to two days a week as a regular server.

[14] While continuing to work part-time at the Washington Avenue Grill, Ms. Bown also commenced employment with the Fraser Health Authority at Peace Arch Hospital as a Food Service Worker I on October 7, 2020, as a casual employee. As a Food Service Worker I, Ms. Bown was a member of the Hospital Employees’ Union.

[15] On October 7, 2020, Ms. Bown’s rate of pay as a Food Service Worker I was $20.56 plus 12.2% of straight time pay in lieu of scheduled vacations and statutory holidays, which increased to $20.97 in 2021. Ms. Bown still works as a casual at Fraser Health Authority picking up shifts from time to time.

[16] Ms. Bown stopped working at Washington Avenue Grill on March 23, 2021.

[17] In around April 2021, Ms. Bown was briefly employed at Glass House Estate Winery for approximately two weeks, earning $17.00 per hour.

[18] Ms. Bown commenced employment with Morgan Creek Golf Course as a server on May 20, 2021. Her starting wage at Morgan Creek Golf Course was $13.95 per hour plus tips, which had increased to $15.65 plus tips by 2022.

[19] At the date of the trial, Ms. Bown continues to be employed as a server at Morgan Creek Golf Course. Mr. Jamieson, her partner, is also her manager at the Morgan Creek Golf Course.

<u>Pre-Existing Conditions and Injuries</u>

[20] Ms. Bown was born with a heart condition and had open heart surgery when she was approximately two months old. She testified that she has had numerous

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surgeries, angioplasties and stints and that the condition must be continuously monitored. Since childhood she has taken the medication Ramipril to manage her long-standing heart condition and to maintain a healthy blood pressure.

[21] Ms. Bown had also experienced problems with headaches periodically during her lifetime.

[22] Despite the heart condition and the headaches, Ms. Bown testified that she had been able to live a normal life prior to the Accident. She testified that at the time of the Accident her heart condition was stable, and she was experiencing no symptoms.

Post-Accident Health History

[23] Ms. Bown testified that the day following the Accident she noticed she had bruises on her hips, knees, and ankles. Photographs of these injuries, taken within a week of the Accident, were adduced as evidence at trial.

[24] Following the Accident, Ms. Bown testified that she was “incredibly sore” at her hips, knees, ankles, back, neck, and collarbone. She testified that she also began experiencing headaches after the Accident that were different from the headaches she had experienced before the Accident. After the Accident, she stated she could feel the headaches come from the base of the neck and up and over her head. Ms. Bown testified that she experienced dizzy spells and had difficulties sleeping.

[25] Ms. Bown also testified that “shortly after” the Accident (although she was uncertain about the exact timing), she developed a rash on her right ankle and fingers she thought was eczema. She testified that some time in “maybe 2017, 2018” her hairdresser told her she had what looked like psoriasis all over her scalp.

[26] Ms. Bown testified that, in the 2016-2018 timeframe, she never made an appointment with a doctor to deal with the rash because “it wasn’t anything that I thought was a big deal”. She testified that she may have mentioned it to doctors

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when she was attending their offices to address other health issues that were “more pressing than a rash”. She testified that she went to see a doctor who told her it was eczema and prescribed a steroid cream, but the cream did not fix the problem.

[27] Ms. Bown testified that by 2019 her pain was worsening to the point that it was noticeable to the owner at the Washington Avenue Grill, who observed she was walking with a limp. He offered to cover her shift and sent Ms. Bown to his wife who was a chiropractor.

[28] Ms. Bown testified that, by then, the pain was “excruciating”. Eventually Ms. Bown went to the emergency ward at the hospital because she was sure she had “a broken bone somewhere”.

[29] After that, Ms. Bown testified that she went “back and forth” with her family doctor searching unsuccessfully for a diagnosis and went to emergency twice. Eventually her family doctor referred her to a rheumatologist, Dr. Huang.

[30] In November 2019, Dr. Huang diagnosed Ms. Bown with psoriatic arthritis and spondylitis. Dr. Huang started Ms. Bown on a treatment right away and eventually, in 2021, Ms. Bown was prescribed biologic drugs. She testified that the biologic drugs are painful to administer and have significant side effects. However, she has also found that they have improved her condition.

ANALYSIS

1. Liability

[31] Ms. Bown took the position at trial that the defendant Ivor Skogheim was 100% responsible for the Accident and should be fully liable. The defence did not formally concede liability but also called no evidence and made no arguments to contest the proposition that Mr. Skogheim was 100% responsible.

[32] Based upon the limited evidence available at trial, it is my view that Mr. Skogheim was 100% responsible for the Accident. The uncontested evidence was that Ms. Bown entered the intersection with a green light, and that

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Mr. Skogheim was attempting a left turn against the light and did not see nor anticipate Ms. Bown's vehicle. There was no evidence that Ms. Bown was speeding, in violation of any traffic laws or otherwise was failing to pay due attention. The defence did not call Mr. Skogheim as a witness or anyone else to rebut Ms. Bown's testimony on the issue of liability.

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[33] There was also relevant uncontested evidence adduced at trial that within an hour prior to the Accident, Mr. Skogheim had "free poured" two vodka drinks before driving 8-10 miles to where the Accident occurred. Following the Accident, Mr. Skogheim received a citation under section 127 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 for failing to yield right of way to the plaintiff in the Accident, and served a 90-day administrative driving prohibition.

[34] On the basis of all the foregoing, I conclude that Mr. Skogheim was 100% responsible for the Accident and should accordingly assume all the liability.

2. Causation

Alleged Injuries

[35] Ms. Bown alleges that, as a result of the Accident, she incurred a range of injuries (the "Alleged Injuries") including soft tissue injuries to her hips, knees, ankles, back, neck, and collarbone, headaches, chronic pain and psoriatic arthritis and spondylitis.

[36] The defence admits that the soft tissue injuries were indeed caused by the Accident. However, the defence also takes the position that the development of psoriatic arthritis and spondylitis was not caused by the Accident and was an unrelated subsequent intervening event.

Applicable Law on Causation

[37] The onus is on Ms. Bown to prove on a balance of probabilities that (1) she did in fact suffer the Alleged Injuries; and (2) that the Accident caused the Alleged Injuries. To establish causation, Ms. Bown must demonstrate that "but for" the

Accident she would not have suffered the Alleged Injuries: *Clements v. Clements*, 2012 SCC 32 at para. 8 [*Clements*]. Inherent in the “but for” test is a requirement that the Accident was necessary to bring about the Alleged Injuries, although not necessarily the sole cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17 [*Athey*]; *Clements* at paras. 8–10; *Ediger v. Johnston*, 2013 SCC 18 at para. 28.

[38] Where there are multiple causes for a plaintiff’s injury, the plaintiff need only establish a “substantial connection between the injury and the defendant’s conduct”, beyond the *de minimis* range, in order to establish causation: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327, 1990 CanLII 70; *Knight v. Zenone*, 2024 BCCA 200 at para. 55.

[39] The “but for” test must be applied in a “robust common sense fashion” with no requirement for scientific evidence of the precise contribution the defendant’s negligence made to the injury: *Welder v. Lee,* 2019 BCSC 1328 at para. 76 [*Welder*]; *Clements* at para. 9.

<u>The Evidence on Causation</u>

[40] Both Ms. Bown and the defence adduced expert medical evidence.

The Plaintiff’s Expert Evidence

[41] Ms. Bown relied upon expert evidence from three medical doctors in support of the claim: Dr. Le Nobel, Dr. Shuckett and Dr. Gladman. Ms. Bown also relied upon evidence from an occupational therapist, Mr. McNeil.

Dr. Le Nobel

[42] Dr. Le Nobel was qualified without objection as a physiatrist. Dr. Le Nobel is in full-time private practice in North Vancouver with hospital privileges at Lions Gate Hospital and G.F. Strong Rehabilitation Centre. He was Medical Director of the Lions Gate Hospital Rehabilitation Ward from 1985 to 2016.

[43] Dr. Le Nobel conducted an independent medical examination of Ms. Bown on October 28, 2019. In his report dated October 28, 2019, Dr. Le Nobel noted that it had been over two years and nine months since the Accident, but that Ms. Bown

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continued to report headaches, shoulder girdle pain, and pains in her low back, hips and knees. Dr. Le Nobel provided the following diagnoses:

- The headaches, spinal and paraspinal pain, hip and knee pains are chronic pain;
- The post-Accident headaches are post-traumatic headaches and may be generated in the cervical spine (cervicogenic headache). Dr. Le Nobel noted that Ms. Bown had pre-collision migraine headaches but opined that these were different from the post-Accident headaches;
- The shoulder girdle, low back, and hip pain are myofascial tissue injuries; and
- The pain aggravation with backward bending implicates posterior structures such as the lumber facet joints as potential pain generators, but further spine imaging is required.

[44] Dr. Le Nobel also identified sleep and psychological difficulties but provided no diagnosis, instead recommending an expert opinion from a psychologist.

[45] With respect to the diagnosed sources of Ms. Bown’s pain, Dr. Le Nobel opined that the Accident was a “causative factor”. Dr. Le Nobel noted that Ms. Bown did have a minor motor vehicle collision in 2017 but observed that she did not report any sustain system aggravation as a result. Dr. Le Nobel also noted that Ms. Bown had no other reported post collision trauma or factor affecting her injuries.

[46] Dr. Le Nobel opined that Ms. Bown’s injuries had impaired her earning capacity, making her less capable of doing restaurant work and less able to manage long hours of physically demanding serving. He also opined that, absent some improvement, the impairment was likely to persist. Dr. Le Nobel further opined that Ms. Bown’s injuries made her less capable of activities of daily living, household tasks, and recreation.

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[47] Dr. Le Nobel recommended active rehabilitation, including a program with a kinesiologist, and also manual therapy and physiotherapy. He opined that there would be some, but not complete, physical restoration and symptom resolution through the outlined treatment.

Dr. Shuckett

[48] Dr. Shuckett was qualified without objection as an expert in internal medicine and rheumatology. Dr. Shuckett is a clinical professor in the Department of Medicine at UBC, teaching in rheumatology, and has worked in private practice for 29 years with hospital privileges at St. Paul's Hospital in Vancouver. She was the head of the St. Paul's Division of Rheumatology in the early to mid 1990s.

[49] Dr. Shuckett conducted an independent medical assessment of Ms. Bown on April 29, 2020. In her report dated May 11, 2020, Dr. Shuckett provided the following opinions:

- Ms. Bown's headaches, including a component of migraine headaches, were causally related to the Accident;
- The right shoulder symptoms were causally related to the Accident and likely reflect myofascial pain;
- Ms. Bown had developed thoracic outlet syndrome related to the neck and shoulder girdle injury, and this was causally related to the Accident;
- Ms. Bown's mid back and low back pain could be related to the left hip bruising in the Accident; and
- The Accident has contributed to Ms. Bown's development of probable fibromyalgia, which was related to an axial spine injury and referred soft tissue pain, sleep disorder, mood disorder, and deconditioning. However, Dr. Shuckett also cautioned that the causal link between motor vehicle accidents and fibromyalgia is a "debatable topic".

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[50] Dr. Shuckett further diagnosed Ms. Bown with psoriatic arthritis and spondylitis. She observed that Ms. Bown was diagnosed by Dr. Huang, a rheumatologist, with definite psoriasis and psoriatic arthritis in November 2019. Dr. Shuckett noted that Ms. Bown had reported a rash on her bruised right ankle within two months after the Accident and Dr. Huang had observed scalp ash and some pitting of the fingernails in 2019. With respect to the gap in time between the Accident and the diagnosis, Dr. Shuckett opined:

> It could be considered that there was quite a lag time between the subject MVA of December 2016 and the diagnosis of psoriatic arthritis in the latter part of 2019. However, as outlined in the above paragraph, it appears that her left hip and right knee were bruised and symptomatic since following the subject MVA. I believe that there probably was some onset of psoriatic arthritis and a closer onset to the timing of the subject MVA. The psoriatic arthritis really manifests itself in the peripheral joints with worsened knee and hip pain and new onset of hand joint arthritis by later in 2019.

[51] Dr. Shuckett continued:

> I have seen multiple patients who develop psoriatic arthritis in the aftermath of an injury such as an MVA. I believe that the subject MVA has probably played a materially contributing role in Ms. Bown's development of psoriatic arthritis and, even more convincingly, of inflammatory back pain and suspected psoriatic spondylitis (although MRI of the SI joints and an HLSA-B27 have not been done regarding the spondylitis).

[52] Dr. Shuckett further explained that Ms. Bown likely fit within the framework of the "Koebner phenomenon", whereby psoriatic arthritis tends to develop later in areas of direct trauma:

> Her right knee and left hip pain began soon after the MVA; some of these areas were bruised at the time of the MVA. In this way, some of her areas of arthritis in areas of direct trauma probably fit within the internal Koebner phenomenon whereby psoriatic arthritis tends to hone in on areas of trauma, much as the rash over her right ankle began where there was some bruising.
>
> […]
>
> While other factors may be operative, I believe that the timing of onset of some inflammatory musculoskeletal symptoms in the aftermath of the MVA, and the onset of a rash that was later diagnosed to be psoriasis over her right ankle, supports a temporal causative role of the subject MVA in the onset of her psoriatic arthritis and psoriatic spondylitis.

[53] With respect to prognosis, Dr. Shuckett opined that Ms. Bown has “multiple ongoing symptoms” relating to the psoriatic arthritis and spondylitis. While these symptoms have improved due to her use of the prescription drug Erelzi, Dr. Shuckett opined that she had persistent fatigue, pain, and decreased activity tolerance and had only been able to work very part time compared to her extended hours before.

[54] Dr. Shuckett opined that Ms. Bown “will be dealing with her psoriatic arthritis and spondylitis for the rest of her life” and would likely require a biologic drug “for the long term”. She is also at greater risk of cardiovascular disease, which is compounded by her pre-existing congenital heart disease. Dr. Shuckett opined that “it is probable that this patient will not return to full time work in the future.”

[55] Dr. Shuckett encouraged Ms. Bown to continue to see a rheumatologist who could help her determine whether to continue with Erelzi or whether to switch to another biologic drug. Dr. Shuckett also encouraged Ms. Bown to exercise.

Dr. Gladman

[56] Dr. Gladman was qualified as an expert physician with a specialization in rheumatology. Dr. Gladman has been practicing rheumatology for 44 years and currently practices at the Toronto Western Hospital. Dr. Gladman has particular expertise in psoriatic arthritis, has treated over 1700 patients with that condition, and has published and taught extensively in the field.

[57] Dr. Gladman did not conduct an independent medical assessment of Ms. Bown but did file a report in response to the expert report of Dr. Badii tendered by the defence (described in more detail below). Dr. Gladman reviewed the other expert reports and the medical file and, on that basis, opined that the Accident was a cause of the psoriatic arthritis:

> Having reviewed all this information, my opinion is that the psoriatic arthritis is related to the trauma of the accident. The psoriasis began two months after the accident, the joint pains began shortly thereafter. There is absolutely no mention of psoriasis or psoriatic arthritis prior to the accident. The fact that the diagnosis of psoriatic arthritis was not made for almost 3 years is not unusual. There is a significant delay in diagnosis of psoriatic arthritis even in patients presenting with musculoskeletal complaints to rheumatologists.

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> Unfortunately, Krystle did not even see a rheumatologist until November of 2019, almost 3 years after the accident. There is evidence that both psoriasis and psoriatic arthritis are triggered by trauma and it may take some time before it develops after the trauma.

[58] In reaching this conclusion, Dr. Gladman criticized Dr. Badii's conclusion, noting in particular that Dr. Badii "does not mention the onset of psoriasis after the accident, nor the fact that she had ankle and knee pain which suggest peripheral arthritis, again occurring only after the accident."

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The Defence's Expert Evidence

[59] The defence relied upon the expert evidence of Dr. Badii.

Dr. Badii

[60] Dr. Badii was qualified as an expert in rheumatology. Dr. Badii is a clinical assistant professor of medicine in the UBC Division of Rheumatology and a staff member of the Vancouver General Hospital.

[61] Dr. Badii prepared a report dated May 7, 2021, following an assessment of Ms. Bown on May 3, 2021.

[62] Dr. Badii opined that the Accident caused the soft tissue injuries in Ms. Bown's neck and back and that these soft tissue injuries produced neck pain, shoulder pain and upper and lower back pain. Dr. Badii also opined that these injuries resulted in more severe headaches which he believed were likely cervicogenic.

[63] Dr. Badii opined that any symptoms or functional limitations that Ms. Bown was experiencing were likely most severe during the first several weeks or months after the Accident and that any symptoms or functional limitations she was experiencing after 12 months were likely not causally linked to the Accident.

[64] Dr. Badii opined that Ms. Bown had developed chronic pain as a result of the soft tissue injuries sustained in the Accident:

> Insofar as the MVA injuries are concerned, I believe there was improvement but the improvement was not 100%. Based on Ms. Bown's own self-report, her pain never went away completely. She stated that the pain in the neck and back that she developed after the accident continued to bother her even prior to developing psoriatic arthritis in 2019.
>
> As such I believe Ms. Bown likely had developed soft tissue injuries which became chronic. I believe she had symptoms of mild myofascial pain in her neck, shoulders and upper and lower back left over from the car accident. In my opinion, these soft tissue injuries likely would have interfered with Ms. Bown's ability to do all of her activities in a pain-free fashion. I believe she likely would have been able to work on a full-time basis and do all of her housework, and recreational activities but with some companying pain.

[65] With respect to the psoriatic arthritis, Dr. Badii opined that there was a "remote possibility" that it had a causal link with the Accident but opined that he did not believe it rose to the level of 50% medical probability.

[66] Dr. Badii further opined that, even absent the Accident, he believed that Ms. Bown would have developed psoriatic arthritis in any event. He opined that Ms. Bown had reached the point of maximal medical improvement for her soft tissue injuries in mid-2018 and that the soft tissue injuries were overwhelmed and superseded by the symptoms of the psoriatic arthritis in mid-2019.

[67] Dr. Badii opined that there was some vocational impact from the Accident (noting that Ms. Bown missed two to three weeks of work) but also opined that Ms. Bown would likely have been able to work as a restaurant worker indefinitely into the future. Dr. Badii observed that what eventually led to her significantly reducing her hours and eventually leaving her job at the Washington Street Grill was her developing psoriatic arthritis in 2019.

[68] With respect to housework, Dr. Badii opined that as a result of the Accident Ms. Bown had some difficulty with the much more physical tasks such as vacuuming stairs and doing laundry. When she developed the psoriatic arthritis, she was bedridden for a period and debilitated. Now that the psoriatic arthritis has been stabilized, Dr Badii opined that she has once again returned to her pre-psoriatic arthritis status, namely, doing most of the housework but having difficulty with some physical tasks.

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[69] With respect to treatment, Dr. Badii opined that he did not believe Ms. Bown would benefit from any adjunctive treatments such as chiropractic, physiotherapy, massage or active rehabilitation moving forward or any active interventions such as steroid injections, trigger point injects or surgical intervention. He opined that she has likely plateaued from the Accident injuries.

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Conclusions on Causation

The Soft Tissue Injuries and Headaches

[70] In my view the expert evidence without question supports the conclusion that Ms. Bown incurred soft tissue injuries, myofascial chronic pain, and resulting cervicogenic headaches as a result of the Accident. On these matters there was little disagreement between the experts at trial.

[71] For example, Dr. Le Nobel opined that the Accident caused:

- myofascial tissue injuries to the shoulder girdle, low back, and hip;
- post-traumatic headaches that may be generated in the cervical spine (cervicogenic headaches);
- possibly some injury to the lumber facet joints; and
- chronic pain.

[72] Dr. Shuckett opined that the Accident caused:

- the right shoulder symptoms and likely reflect myofascial pain;
- thoracic outlet syndrome related to the neck and shoulder girdle injury;
- mid back and low back pain that could be related to the left hip bruising in the Accident;
- headaches, including a component of migraine headaches;

- probable fibromyalgia although conceding that fibromyalgia is a “debatable topic”.

[73] Dr. Badii opined that the Accident caused:

- the soft tissue injuries in Ms. Bown’s neck and back, which produced myofascial neck pain, shoulder pain and upper and lower back pain;
- more severe headaches which he believed were likely cervicogenic; and
- chronic pain.

[74] Dr. Badii did not take issue in his report with the conclusions of Dr. Le Nobel or Dr. Shuckett on the soft tissue injuries and cervicogenic headaches, nor did the defence adduce any other expert evidence to rebut those conclusions.

[75] While it is fair to say that Dr. Badii’s prognosis with respect to Ms. Bown’s potential for recovery from the soft tissue injuries was more sanguine than that of Dr. Le Nobel and Dr. Shuckett, Dr. Badii nonetheless conceded that these injuries had not improved 100% as of 2019, that the myofascial pain never went away completely, and indeed that it had become chronic by that time. Dr. Badii opined that, even in the absence of the psoriatic arthritis, Ms. Bown had reached maximal medical improvement for her soft tissue injuries in mid-2018, and these soft tissue injuries likely would have interfered with Ms. Bown’s ability to do all of her usual activities in a pain-free fashion moving forward.

[76] I conclude, therefore, that the Accident caused all of the aforementioned soft tissue injuries resulting in chronic pain and the cervicogenic headaches.

The psoriatic arthritis and spondylitis

[77] In my view, Ms. Bown has not met her burden of proof with respect to proving a causal connection between the Accident and the psoriatic arthritis and spondylitis (which for brevity I will refer to as the arthritis or psoriatic arthritis).

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[78] In contrast to the soft tissue injuries, which manifested almost immediately after the Accident, Ms. Bown was not diagnosed by Dr. Huang with psoriatic arthritis until late 2019, which was nearly three years after the Accident. By any measure, this is a significant gap between an alleged cause and the emergence of an effect.

[79] That said, Ms. Bown did adduce expert evidence in support of the proposition that a three-year gap should not rule out a causal connection. Dr. Gladman stated, for example, that "[t]he fact that the diagnosis of psoriatic arthritis was not made for almost 3 years is not unusual".

[80] Dr. Gladman's statement is helpful to Ms. Bown's case to a degree, but I pause to note here that there is an important distinction between: (1) a three-year gap from the Accident to formal diagnosis of a psoriatic arthritis; and (2) a three-year gap from the Accident to the emergence of any material symptoms of psoriatic arthritis. With respect to (1), a three-year gap prior to a diagnosis is plausible as psoriatic arthritis is apparently difficult to diagnose and it is conceivable that a patient in Ms. Bown's position could simply "slip through the cracks" in the medical system without being provided with an explanation for the symptoms. With respect to (2), a three-year gap prior to the emergence of any material symptoms is much less plausible from a causation perspective, as it implies that the condition lay fully dormant for a considerable period of time after the Accident.

[81] At trial Ms. Bown testified that the bruising from the Accident had disappeared by March 2017. She also testified that she did not return to see a doctor about her Accident-related injuries after March 2017 until the emergence of the psoriatic arthritis-related symptoms in 2019. There was therefore a gap of over 2 and a half years between when the bruising resolved and when Ms. Bown first reported to a doctor symptoms that could be attributable to psoriatic arthritis.

[82] Both Dr. Gladman and Dr. Shuckett in their reports sought to address this obvious causal concern arising from the gap in time by identifying physical conditions experienced by Ms. Bown closer in time to the Accident that they opined could have been symptoms of psoriatic arthritis.

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[83] For example, Dr. Shuckett conceded in her report that “[i]t could be considered that there was quite a lag time” between the Accident and the diagnosis. However, she also opined that this lag time was likely not as long as it might seem because “there probably was some onset of psoriatic arthritis and a closer onset to the timing of the subject MVA”. In this respect she emphasized in particular the knee and hip bruising and the “deep Koebner phenomenon” whereby psoriatic arthritis “tends to hone in on areas of trauma, much as the rash over her right ankle began where there was some bruising.” The reference to the rash on the right ankle was a reference to Ms. Bown’s self-report that this occurred, and not a reference to a medical report. In her report Dr. Shuckett recorded Ms. Bown’s self-report as follows:

> Within about 2 months after the MVA, she developed a scaly rash that would not go away over the right ankle which was hit and directly bruised at the time of the MVA. Her doctor did not make a specific diagnosis of psoriasis. Her family physician gave her topical creams and told her to avoid any irritants that might cause an allergic rash.
>
> Since then, the patient has been diagnosed to have definite psoriasis and she continues to have the same rash over her right ankle. She said that the rash over her right ankle is very similar to the psoriasis rash over other parts of her body.

[84] Similarly, Dr. Gladman in her report also placed significance on Ms. Bown’s “onset of psoriasis after the accident” in addition to ankle and knee pain. This appeared to be a reference to Ms. Bown’s report to Dr. Shuckett above that she experienced a “rash” on her right ankle within two months of the Accident and that it never entirely went away.

[85] The problem with all the above, however, is that there was no credible evidence adduced at trial that Ms. Bown did in fact experience a “rash” on her right ankle within two months of the Accident, or indeed, at any time prior to 2019. As noted by the defence, the first medical report of a rash in the clinical records was the report of Dr. Van Wyk in October 2019, which was 2 years and 9 months after the Accident.

[86] Ms. Bown testified at trial that she did mention the rash to her family doctor prior to October 2019 but explained that it was always an aside and not her chief

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complaint. Under cross-examination, Ms. Bown conceded that those alleged earlier complaints of a rash were not recorded in any medical record. Of course, this is not fatal to her claim because the courts have made it clear on many occasions that a failure to report a condition or symptom to a doctor is not necessarily evidence of the absence of that condition or symptom and also that caution is appropriate when weighing clinical records as evidence. As noted in *Edmondson v. Payer,* 2011 BCSC 118, aff'd 2012 BCCA 114:

> [36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.
>
> [37] The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.
>
> [Emphasis Added.]

[87] However, the more fundamental problem with Ms. Bown's position at trial was that, even setting aside the medical records, the other evidence supporting the development of arthritis-related symptoms on Ms. Bown's body prior to 2019 was minimal.

[88] For example, Ms. Bown's own testimony at trial on this point was highly equivocal. Ms. Bown testified that "shortly after" the Accident (although she was uncertain about the exact timing), she developed a rash on her right ankle and fingers that she thought was eczema. She described it as an "itchy red blotch" that would come and go, to be replaced with a scaly raised surface. She testified that some time in "maybe 2017, 2018" her hairdresser told her she had what looked like

psoriasis all over her scalp. Ms. Bown also testified that the rash on her hands started in “maybe 2018” but did not deny that it could have been 2019, except to state that it was “well before the pain set in”.

[89] Unfortunately, Ms. Bown’s equivocal testimony on this very important point was completely uncorroborated. In particular:

- the hairdresser did not testify at trial and Ms. Bown did not remember her name, nor did she have a record of the date of that interaction;
- Ms. Bown testified that she had shown the rash to her sister, a registered nurse, but Ms. Bown’s sister did not testify at trial;
- Dr. Van Wyk, the family doctor who might have been in a position to recall some of the conversations with Ms. Bown, also did not testify at trial.

[90] Further, Mr. Kitagawa, Ms. Bown’s romantic partner at the time, was questioned about his observations of Ms. Bown in the weeks following the Accident. In direct examination, he was specifically asked the following:

> Q: Did you see any marks or anything, following the accident, on her?
> A: There was a lot of bruising.

[91] Notably, as emphasized by the defence, Mr. Kitagawa did not mention the “rash” that the plaintiff alleges appeared in the weeks or months following the Accident, which one might have expected from an intimate partner with whom Ms. Bown was living at the time. On direct examination it was never put to Mr. Kitagawa whether or not he observed the rash. Instead, under cross examination, Mr. Kitagawa testified that it was between May and October 2019 when he observed “a heavy amount of rashing around her foot”. It is significant in my view that this 2019 time frame was consistent with Dr. Van Wyk’s clinical records, which first identified eczema/rash on her hands in the 2019 time frame, but not earlier.

[92] The defence argues that I should make an adverse credibility finding with respect to Ms. Bown’s account of her development of rash and eczema symptoms

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prior to 2019. I have weighed her testimony, and also the testimony of her corroborating witnesses, in light of the principles most recently summarized by Justice Mayer in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 87–93. I am not persuaded that Ms. Bown's account was lacking in credibility as she was honest on the stand about her lack of recollection of dates and details relating to these symptoms.

[93] However, I do find that Ms. Bown's account was materially lacking in reliability, in the sense that she was a poor historian about the details and timelines relating to her health condition, in particular prior to 2019. As a result, in my view, her uncorroborated testimony was insufficient to establish that she did in fact experience symptoms relating to psoriatic arthritis, such as a rash or eczema, prior to October 2019. I therefore conclude on the balance of probabilities that October 2019 was indeed when she first reported the issue.

[94] In light of the foregoing finding, the conclusions in the reports of both Dr. Shuckett and Dr. Gladman must in my view be approached with considerable caution. This is because both of these doctors grounded their opinion on a factual assumption not proven on the evidence at trial, namely, that Ms. Bown had symptoms of psoriasis, such as a rash, within a few months after the Accident. To the extent that Ms. Bown has failed to prove the facts supporting this assumption at trial, I find that the conclusions in the reports of Dr. Shuckett and Dr. Gladman are entitled to considerably less weight. For example, Dr. Shuckett addressed the concern about the significant "time lag" between the Accident and diagnosis by specifically referencing "symptoms" and "onset" of psoriatic arthritis "since following the subject MVA" and with "a closer onset to the timing of the subject MVA":

> It could be considered that there was quite a lag time between the subject MVA of December 2016 and the diagnosis of psoriatic arthritis in the latter part of 2019. However, as outlined in the above paragraph, it appears that her left hip and right knee were bruised and symptomatic since following the subject MVA. I believe that there probably was some onset of psoriatic arthritis and a closer onset to the timing of the subject MVA.
>
> [Emphasis added.]

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[95] In light of the above passage, it is a reasonable inference in my view that Dr. Shuckett's opinion on a causal connection would likely have been different if she had based it upon the factual assumption that no symptoms at all had developed on Ms. Bown's body until late 2019.

[96] To be fair, I note that Dr. Shuckett and Dr. Gladman referenced not only rashes but also ankle and knee bruising as part of their analysis relevant to causation. However, the evidence at trial was that the bruising had largely resolved by March 2017, with the result that these symptoms were apparently not present for a period of over two years. Further, divorced from a connection to a skin condition, this evidence of bruising (which taken alone would be common in most motor vehicle cases) becomes logically unmoored from the "deep Koebner phenomenon" theory proposed by these experts whereby (in the words of Dr. Shuckett) psoriatic arthritis "tends to hone in on areas of trauma, much as the rash over her right ankle began where there was some bruising." Obviously, to the extent that the bruising (and therefore trauma area) had resolved more than two years before the onset of psoriatic arthritis, the "deep Koebner phenomenon" theory becomes much more difficult to accept. Quite simply, there was no pre-existing bruising after 2017 that the psoriatic arthritis could have "honed in" on in 2019, to use Dr. Shuckett's words.

[97] Taking the foregoing into account, I therefore find the conclusion of Dr. Badii more persuasive on the evidence, as he accurately based his report on the assumption that no symptoms of psoriatic arthritis had in fact emerged until 2019. Dr. Badii emphasized the causal importance of this time gap and also highlighted some of the factual inconsistencies in the "deep Koebner phenomenon" as it pertained to Ms. Bown's circumstances, particularly with regard to the lack of a clear connection between the areas of bodily injury from the Accident and the areas where psoriasis ultimately emerged on her body. As explained by Dr. Badii:

> In my opinion, the main issue for causation comes down to the length of time that had passed between the traumatic injury and the onset of symptoms. Typically I consider a period of up to 12 months as being reasonable for an event to be causally linked to some other event.

> Ms. Bown's arthritis appears to have come on over two and a half years following her car accident. Moreover the areas where she reportedly developed psoriasis were not where she had the initial bruising.
>
> She did not have any obvious injury directly to her scalp, where she reportedly had psoriasis observed by her hairdresser. She complained of bruising over her flank, which did not develop psoriasis. She had some bruising on her right ankle. The psoriatic rash apparently happened over her right shin, which may have been in the same area or in a separate area…
>
> […]
>
> In other words, if one were to accept the car accident as the cause of the psoriatic arthritis two and a half years later, then any other physical or psychological traumatic events in the patient's lifetime could be considered to have contributed to onset of psoriatic arthritis later in life.
>
> It is known that most patients with psoriatic arthritis do not describe any traumatic event bringing on their condition. Any type of stress, physical surgery, pregnancy, work injury or psychological or physical painful event could, in theory, then be considered to have caused psoriatic arthritis later in life.
>
> In particular, given that Ms. Bown's arthritis had such an acute onset and it was so severe around October and November 2019 to have rendered her bedridden, I believe it is unlikely that this was a continuation of lingering symptoms that she had coped with since the Accident.

[98] Taking into account all the foregoing evidence, I find that the alleged causal link between the Accident and the development psoriatic arthritis is simply too temporally and medically remote.

[99] In reaching this conclusion I have also considered the recent decision of Justice Kirchner in *Sankey v. Balabag*, 2023 BCSC 1727 [*Sankey*]. In that case, the plaintiff suffered neck, shoulder, and back pain as a result of a motor vehicle accident, and claimed, as in this case, that the accident was a cause of her rheumatoid arthritis that was diagnosed about a year-and-a-half after the accident (a year shorter than the time gap in this case). As in this case, the plaintiff relied upon an expert report from Dr. Shuckett.

[100] Justice Kirchner found that the scientific literature upon which Dr. Shuckett's opinion was based supported only a "possibility and not a probability" of a causal link:

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> [91] I am not persuaded by Dr. Shuckett's report, including her literature review, that anything more than a possible causal link worthy of further study exists between emotional or physical trauma from something like a car accident and the onset of rheumatoid arthritis.
>
> [92] I find the evidence in this case is not substantially different than that which was considered by Justice Ball in *Kabani v. Lee*, 2014 BCSC 2336 where he found the medical evidence fell short of establishing a causal link between trauma from a car accident and the onset of rheumatoid arthritis in the plaintiff. There the medical evidence identified the accident as playing a "possible role" in the development the rheumatoid arthritis. Here, while Dr. Shuckett believes there is probably a causal link, I find the basis for that opinion is supported only by a possibility and not a probability. While Dr. Shuckett sincerely holds a subjective belief that the accident "probably played a triggering contributory role" in the development of Ms. Sankey's rheumatoid arthritis, I find the basis for that sincere belief insufficient to meet the civil standard of proof.
>
> [93] In reaching this conclusion, I am not holding Ms. Sankey to a scientific standard of proof, but one where the balance of probabilities is all that is required. However, in my respectful view, Dr. Shuckett's belief in the probability of the link is not enough to meet this standard when the foundation for that belief is carefully examined. For these reasons, I find that Ms. Sankey has not established on a balance of probabilities that the accident was a cause or a contributing factor in her development of rheumatoid arthritis.

[101] As in *Sankey*, I find in this case that the evidence of Dr. Shuckett and Dr. Gladman supports only a "possibility and not a probability" of a causal link between the trauma caused by the Accident and the arthritis. While it is true that in *Sankey* there was evidence that the plaintiff was experiencing some symptoms before the accident that were potentially indictive of the onset of rheumatoid arthritis (albeit undiagnosed at the time) a similar argument could be made in this case, as Ms. Bown admitted in her testimony that she had experienced nail pitting before the Accident, which Dr. Badii opined could be an early indication of psoriatic arthritis. Thus, the two cases are not distinguishable on that basis.

[102] Where causation deals with whether a defendant is liable to a plaintiff for an injury, the assessment of damages requires the court to consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his or her original position and therefore the plaintiff should not be compensated for any damages he

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or she would have suffered anyway: *Khudabux v. McClary*, 2018 BCCA 234 at para. 30, citing *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

[103] Since I have found that the psoriatic arthritis and spondylitis are not causally related to the defendant's negligence, then the psoriatic arthritis and spondylitis take on the status of an independent intervening event, as my conclusion is that Mr. Bown would have developed this condition in any event independent of the Accident. The treatment of independent intervening events is outlined by Justice Elwood in *Pannu v Behnke*, 2024 BCSC 362 at paras. 61-63:

> 61 Independent intervening events are taken into account in the same way as pre-existing conditions. If the intervening event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the defendant's negligence will not be as great and damages are reduced proportionately. The defendant need not prove that the independent intervening event would have inevitably led to the plaintiff's current condition. Intervening events that might realistically cause or contribute to the loss claimed regardless of the negligence of the defendant are relevant to the assessment of damages. They are a contingency that should be accounted for in the award. Such a contingency does not have to be proven to a certainty. It should be given weight according to its relevant likelihood.
>
> 62 Past facts must be proven on a balance of probabilities. Hypothetical events or future events need not be proven on a balance of probabilities. The standard of proof of hypothetical or future events is a "real and substantial possibility". This is a lower threshold than a balance of probabilities, but a higher threshold than something that is only possible and speculative: *Athey,* at para. 31-33, *Gao v. Dietrich*, 2018 BCCA 372, at para 34.
>
> 63 Accordingly, damages for indivisible injuries may be reduced if the defendant proves on a balance of probabilities that an intervening event - such as a slip and fall - caused or contributed to the loss claimed regardless of the defendant's negligence (a past fact). Damages may also be reduced if the defendant proves a real and substantial possibility the plaintiff would have incurred the loss claimed in any event regardless of the defendant's negligence (a hypothetical contingency).

[104] While I am sympathetic to Ms. Bown's condition, and the significant cost of the biological medication that she must take, my role here is to base my decision on the evidence. In my view, the evidence adduced by Ms. Bown was insufficient to meet the burden of proof in this context. Conversely, the defence has demonstrated on a balance of probabilities that Ms. Bown would have developed the arthritis in any

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event absent the Accident. I will address the impact of this conclusion more fully in my damages analysis.

3. Damages

a. Non-Pecuniary Damages

[105] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Welder* at para. 82. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006) [*Stapley*], the Court of Appeal set out an inexhaustive list of factors to consider when 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 (as a factor that should not, generally speaking, penalize the plaintiff. . .
>
> [Citation omitted.]

[106] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at para. 56.

[107] The non-pecuniary award should compensate for more than direct injuries. As explained by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260:

> [95] The underlying purpose of non-pecuniary damages is to "make life more endurable" … In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

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> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".

[Internal citations omitted.]

[108] Ms. Bown is currently 38 years old. Prior to the Accident, Ms. Bown had a busy and productive life. She was a mother and primary caregiver to two children. She was working as a server and manager at the Washington Grill, which was a physically demanding job. She enjoyed physical activities, including horseback riding, softball, and walks with her dogs and family. She testified that she was happy.

[109] After the Accident, Ms. Bown has continued to have a busy life, involving work and raising two children, although she has had to manage considerable pain in undertaking those tasks that she did not have to manage before. Ms. Bown testified that, after the Accident, she experienced ongoing physical pain, in particular in her collarbone, and also headaches, dizziness, and nausea. She testified that she returned to work after three weeks because she had no choice and needed the money. After returning to work, she had to modify her duties to avoid heavy lifting and to enable more sitting. She was taking four Tylenol or Advil per shift to manage her pain upon her return. She was managing despite the pain but her quality of life was clearly reduced.

[110] Ms. Bown's testimony about the period between her return to work in 2017 and the onset of the arthritis in 2019 was somewhat vague. It appears she was experiencing pain and discomfort caused by the Accident but was able to manage. After the diagnosis of arthritis in 2019, her condition deteriorated significantly. She testified that, at its worst, she could only work one to two days per week and her partner had to drive her to work even though she lived a block away. She could not

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carry more than two plates because “everything hurt so bad”. She lost her management role, and her shifts were rapidly cut down. However, as noted in my causation analysis above, this decline in her physical condition attributable to the arthritis is not causally attributable to the Accident and therefore cannot form a basis for a damages award in this case.

[111] After the Accident, Ms. Bown reduced her recreational activities, although it is noteworthy that Ms. Bown acquired a horse shortly after the Accident, which indicates that her condition was not so bad prior to 2019 that it precluded her from any recreational activities. That said, Ms. Bown testified that she found that she was unable to sit properly on the horse due to back pain and that she would have headaches and soreness afterward. She found that horseback riding was not enjoyable anymore and decided to sell the horse in the period leading up to 2019 at a loss of $7,000.

[112] As the pain increased in 2019, she became stressed and depressed and had thoughts of self-harm. Her marriage “dissolved” due to the stresses created by her physical condition, including a lack of intimacy. Ms. Bown also missed a lot of family events and her social life, which centred around work, became more limited due to spending less time at work. Again, however, only a portion of this can be causally attributed to the Accident, with the majority of it, in my view, being attributable to the arthritis.

[113] Ms. Bown also testified that her ability to do housework since the Accident (and in particular since 2019) is limited. She is able to do some light jobs such as folding laundry, maintenance, and picking up the kids, but is unable to do heavier jobs such as vacuuming, which cause headaches and pain. As a result, her current partner, who has a high standard, does a majority of the housework.

[114] Currently, Ms. Bown is able to work while managing her pain. She testified that she was “good days and bad days” depending on stress and workload. On a bad day she feels about 50% healthy and on a good day about 80%.

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[115] At trial, while on the stand, she testified that she was feeling pain in her back at a level of 4/10 and also felt pain in the neck, hip, and right collarbone, although she admitted that she is better now than she was in October 2018.

[116] Ms. Bown submits that an appropriate award for her non-pecuniary damages is $325,000. The defence submits that the range of an award should be between $65,000 to $75,000.

[117] Ms. Bown relies upon the following cases: *J.F.C. v. Ladolcetta*, 2009 BCSC 1151 [*J.F.C.*] (award of $150,000 reduced to $120,000 for failure to mitigate, $211,987.79 in 2024 dollars); *J.J. v. Barton*, 2017 BCSC 1196 [*J.J.*] (award of $175,000 or $210,383.14 in 2024 dollars); *Hubbs v. Escueta*, 2013 BCSC 103 [*Hubbs*] (award of $130,000 or $170,691.06 in 2024 dollars); *Sebaa v. Ricci*, 2015 BCSC 1492 [*Sebaa*] (award of $180,000 or $229,206.60 in 2024 dollars); and *Khosa v. Kalamatimaleki*, 2014 BCSC 2060 [*Khosa*] ($140,000 or $180,540.97 in 2024 dollars).

[118] The defence relies upon the following cases: *Jansson v. Malone*, 2021 BCSC 585 [*Jansson*] ($55,000 in non-pecuniary damages adjusted for inflation $62, 652.85); *Allen v. Figueira*, 2020 BCSC 1864 [*Allen*] ($60,000 in non-pecuniary damages, adjusted for inflation to $70,889.21); *Sankey v. Balabag*, 2023 BCSC 1727 [*Sankey*] ($90,000.00).

[119] The authorities cited by Ms. Bown are largely distinguishable in my view because they involved cases where the courts had made findings of a causal link between an accident and arthritis or comparably serious conditions. I have found that such a link was not established in this case.

[120] For example, *J.F.C.* is distinguishable because the Court in that case had found a causal connection between the accident and the exacerbation or aggravation of psoriatic arthritis as a pre-existing condition. That causal link was not proved in this case, although the soft tissue injuries and chronic pain were proved.

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[121] Similarly *J.J.* also involved a finding of a causal link between wrists broken in the accident and osteoarthritis. In addition, the injuries suffered by the plaintiff in that case were more significant, with devastating psychological consequences, including multiple suicide attempts, and resulting in a total loss of earning capacity in the first year and a significant diminishment of future earning capacity.

[122] *Hubbs* is also to be distinguished, as that case involved a “life changing” injury resulting in a “lifetime of limitation and disability”, a “future of increased deterioration and vulnerability to injury” and a substantial impairment of the plaintiff’s ability to earn his living: *Hubbs* at para. 135. These consequences were more serious for the plaintiff than they have been for Ms. Bown.

[123] For similar reasons, the decisions in *Sebaa* and *Khosa* are also distinguishable.

[124] There are parallels in my view between this case and *Sankey*, which involved a 42 year old female who suffered soft tissue injuries to her neck, shoulder, and upper back which continued to cause her pain at the time of trial, chest and hip pains which had resolved at the time of trial, and emotional trauma and driving anxiety. While the plaintiff in *Sankey*’s development of driving anxiety was a factor in that case not present in the case at hand, both Ms. Sankey and Ms. Bown developed depression that was, in part, caused by the Accident.

[125] The award in *Jansson* is distinguishable in my view as the plaintiff had a history of myofascial pain from previous accidents and had a good prognosis for recovery from her soft tissue injuries, provided she received appropriate treatment. This is to be contrasted with the less optimistic prognosis in this case with respect to the soft tissue injuries and the diagnosis of chronic pain.

[126] There are some parallels with *Allen*, which involved a diagnosis of chronic myofascial pain syndrome, thoracic outlet syndrome, and a worsening of pre-existing headaches as a result of the collision. A significant factor in that case was that the plaintiff was able to continue many of her activities and maintain her income, though

with pain. This is to be contrasted with Ms. Bown, who has had to curtail her work activities, working hours, and also her housekeeping tasks.

[127] I have also reviewed the recent decision of the Court of Appeal in *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 [*Callow*], and the authorities cited therein. I note that all of the cases cited at para. 21 of that decision involve plaintiffs in their late teens or 20s (not late thirties like Ms. Bown) and most of them involved injuries which had fully or substantially resolved. In my view, to the extent that the symptoms from Ms. Bown's soft tissue injuries have persisted, and due to the constant chronic pain and loss of lifestyle that the Accident caused, this case justifies an award above the range suggested in *Callow* and closer to the amount awarded in *Sankey*.

[128] After considering all the *Stapley* factors, the relevant authorities, and the impact of inflation with respect to the quantum of prior comparable awards, I conclude that an appropriate award of non-pecuniary damages in this case is $95,000.

b. Past Income Loss

[129] Ms. Bown seeks an award of $80,000 for past income loss. The defence takes the position that the amount of this award should be in the range of $0-$30,000.

[130] In *Singh v. Paquette*, 2022 BCSC 1579, Justice Walker helpfully summarized the legal analysis to be applied with respect to a past income loss claim:

> [162] Past income loss is a component of loss of earning capacity. The award is meant to compensate an injured plaintiff for the loss of the value of the work that the plaintiff would have performed but was unable to because of the injury caused by the tortfeasor's negligence: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at paras. 28–30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45; *X. v. Y.*, 2011 BCSC 944 at para. 185; *M.B. v. British Columbia*, 2003 SCC 53 at paras. 47, 49; *Wainwright* at para. 171. Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 130.

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[163] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the plaintiff's recovery is limited to net income loss: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, aff'd 2020 BCCA 398; *Wainwright* at para. 172.

[164] While the standard of proof for proving a past event is on a balance of probabilities, any hypothetical events, past or future, will be taken into consideration as long as it is a real and substantial possibility and not mere speculation, and will be given weight according to its relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 27-28; *Smith v. Knudsen*, 2004 BCCA 613 at paras. 27–29; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 14, 27-28.

[165] In *Falati*, Justice Saunders summarized the principles governing the assessment of pre-trial lost earning capacity caused by the tortfeasor:

> [39] Though pre-trial losses are often spoken of as if they are a separate head of damages, e.g. "past loss of income" or "past wage loss", it is clear that both pre-trial and future losses are properly characterized as a component of loss of earning capacity – *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141. The principles governing the evaluation of capacity claims have been articulated most clearly in judgments dealing with future losses, that is to say, loss of future earning capacity: for example, the recent decision of the Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, in which the alternative "real possibility" and "capital asset" approaches to assessment are reviewed and discussed.
>
> [40] The full assessment of damages for such losses may involve, at least to some extent, consideration of hypothetical situations and contingencies – what might have happened, or what might yet happen, had the accident not occurred, as distinct from what actually has happened. However, particularly where the claimed losses are derived from something other than a measurable, conventional income stream, the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity: "The only difference is that knowledge of events occurring before trial takes the place of prediction" – Prof. Waddams, *The Law of Damages*, Looseleaf Ed. (2008) para. 3.360. When considering hypotheticals and contingencies in the context of a pre-trial loss, the same general principles which govern the assessment of lost future earning capacity may be equally applicable – Waddams, *ibid.* As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,
>
>> "What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than

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> applying the balance of probabilities test that is applied with respect to past actual events."

[41] Those general principles involved in the process of assessment include the following:

> * The task of a court is to assess damages, rather than to calculate them mathematically – *Mulholland (Guardian ad litem of) v Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43;
>
> * The standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are to be weighed according to their relative likelihood – *Athey v Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at para. 27;
>
> * Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong – *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.);
>
> * Any assessment is to be evaluated in view of its overall fairness and reasonableness – *Rosvold*, at para. 11.

[42] A trial decision of Finch J., as he then was, *Brown v. Golaiy*, 1985 CanLII 149, 26 B.C.L.R. (3d) 353, which has been frequently cited, sets out a list of further specific considerations which may be taken into account in making an assessment:

> "The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> > 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> >
> > 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> >
> > 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to

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> him, had he not been injured;
> and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market."
>
> [43] Having said that, one cannot lose sight of the rule that the determination of what has in fact happened in the past is on the basis of the balance of probabilities – *Steenblok v. Funk*, [1990] 5 W.W.R. 365, 46 B.C.L.R. (2d) 133 (B.C.C.A.); see also *Smith v. Knudsen*, at para. 36. In the present case the plaintiff must prove that each of the various claimed losses of opportunity by which he says the loss or earning capacity is to be evaluated was, more likely than not, actually caused by the accident. If the plaintiff succeeds on that issue, then the potential value of each of these opportunities, adjusted for various contingencies, may be weighed in determining the value of the plaintiff's lost earnings capacity, both past and future.

[131] As stated above, I am satisfied on a balance of probabilities that the Accident did in fact cause the soft tissue injuries, headaches, and chronic pain, but not the psoriatic arthritis.

[132] I am also satisfied based on all the evidence that, as a result of these injuries, all four of the *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) considerations were operative with respect to Ms. Bown during the period between the Accident and 2019, when she was ultimately diagnosed with psoriatic arthritis.

[133] Between 2019 and the date of trial I am further satisfied that Ms. Bown continued to experience the chronic pain and headaches caused by the soft tissue injuries which, as confirmed in the medical evidence, did not fully resolve. Ms. Bown took at least two weeks off work immediately after the Accident to recover, which is clearly a loss caused by the Accident. Thereafter, Ms. Bown testified that she returned to work because she needed the money (and was not offered a longer leave by her employer) but emphasized that her capacity to work as a server at full capacity was diminished due to pain and discomfort prior to 2019. She testified that she was "off and on" in terms of attendance at work and relied on assistance from her partner to help her lift heavier items such as ice buckets.

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[134] Thus, Ms. Bown clearly experienced a partial loss of capacity from the date of the Accident up until 2019, making her less competitive and detrimentally affecting her earning capacity. Due to the chronic pain, there is a measurable risk that this partial loss of capacity would have persisted after 2019 even absent the psoriatic arthritis. However, it is also my assessment based upon the evidence that Ms. Bown did not suffer a full loss of capacity during that period and was nonetheless able to work and continue to earn an income.

[135] There was also medical evidence from Dr. Badii that Ms. Bown has reached maximum recovery with respect to her chronic pain, with the result that there is a real and substantial possibility she would have continued to experience the effects from the soft tissue injuries after 2019, even without the onset of the psoriatic arthritis in that year.

[136] However, the evidence also clearly demonstrated that the impact of the psoriatic arthritis symptoms on Ms. Bown's work capacity after 2019 were considerably more consequential than the soft tissue injuries.

[137] Ms. Bown testified that her capacity to work deteriorated significantly in 2019 and thereafter. She testified that by 2019 her pain was worsening to the point that noticeable to owner at the Washington Avenue Grill, who observed she was walking with a limp. He offered to cover her shift and sent to his wife who was a chiropractor.

[138] She lost her position as a manager after 2019 and was assigned more clerical and administrative tasks, which resulted in less tips. She also reduced the number of days she was able to work. On evenings when she did work, she was assigned less customers than she serviced prior to the Accident, resulting in a loss of tips.

[139] Ms. Bown recalled that, just prior to the onset of Covid in 2020, she was no longer able to fulfill her duties at Washington Avenue Grill. Her shifts, and the number of tables she was serving in each shift, were cut down rapidly to the point where she recalled that management at the Washington Avenue Grill felt that she

was “useless to them”. As a result, Ms. Bown decided to leave the Washington Avenue Grill.

[140] The significant and dramatic decline in Ms. Bown’s work capacity in 2019 and 2020 was in my view attributable principally to the onset of the psoriatic arthritis symptoms and related treatment, and not the Accident-caused soft tissue injuries. This additional post-Accident decline in loss of capacity due to the onset of psoriatic arthritis symptoms as an unrelated intervening event (as distinct from the soft tissue issues and chronic pain) is not compensable.

[141] Nonetheless, after receiving treatment for the psoriatic arthritis, Ms. Bown was able to resume work as a server and, as of the date of trial, was employed in that capacity at Morgan Creek Golf Course. However, her capacity remains diminished as compared to her pre-Accident state, which is at least partly attributable to the soft tissue injuries.

[142] Taking all the foregoing into account, I conclude that Ms. Bown’s work capacity as a server would have been impacted even absent the Accident due to the psoriatic arthritis, but not to the degree that it has been given the soft tissue injuries incurred as a result of the Accident. I assess the additional marginal impact of Ms. Bown’s soft tissue injuries on her past work capacity at 25% of the total reduction of the value of the capital asset, with the remaining 75% being attributable to the psoriatic arthritis.

[143] Having found a loss of past earning capacity, the next issue to be addressed is how the value of Ms. Bown’s loss prior to the date of trial should be assessed. In valuing the loss, I must next decide between an earnings-based and capital asset approach. In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 [*Ploskon-Ciesla*], the Court explained the difference as follows:

> [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.

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> [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.

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[144] In the context of this case, I find that the capital asset approach is more appropriate as there is no clear loss of income at the time of trial, evidenced in Ms. Bown's tax returns. This is explained in part by the fact that Ms. Bown had been working only part-time prior to the Accident due to caring for her young children and her career path was still somewhat unsettled.

[145] In terms of valuing the loss, the challenge in this case is that the evidentiary record at trial with respect to Ms. Bown's actual and potential income was very thin. Ms. Bown's income tax line 150 income over the period from 2014 to 2022 was as follows:

> 2014: $13,257
>
> 2015: $10,992
>
> 2016: $14,465
>
> 2017: $22,080
>
> 2018: $22,176
>
> 2019: $25,905
>
> 2020: $24,681
>
> 2021: $16,249
>
> 2022: $37,933

[146] The above summary reveals no noticeable drop in employment income for Ms. Bown either in 2016-2017 (after the Accident) or in 2019-2020 (after the development of the arthritis). On its face that would appear to indicate no loss.

[147] However, Ms. Bown also explained in her testimony that a substantial source (at least half in her words) of her income over the relevant period was derived from tips and she kept no records of the amount of tips she earned. In addition, Ms. Bown argued that her reported income was artificially low on her tax returns because, on the advice of a tax consultant, she only reported 10% of her tips or less on her income tax return.

[148] On this basis, Ms. Bown argued that her true loss of income was actually reflected in a reduction of the amount of tips she was receiving as a result of her diminished capacity, compared to what she could have earned if she was in full health.

[149] Ms. Bown did testify that, when she was working full-time, she was earning between $150 and $200 a day in tips in addition to her hourly income. She argues, relying on *Doberstein v. Zhao*, 2020 BCSC 1788, that the court can consider the plaintiff's own evidence of total income, both reported and unreported, "as long as the plaintiff does not have significant credibility problems", which in my view Ms. Bown did not have in this case. Accordingly, I am prepared to consider Ms. Bown's unreported income in the analysis (which was not opposed by the defence at trial).

[150] On this basis, Ms. Bown proposes a calculation of losses from the Accident to May 20, 2021 (when she commenced employment with Morgan Creek Golf Course) on the basis of working full-time earning tips of $175 per night average, working on average 4 days per week with her income of approximately $16.50 per hour = [($16.50/h x 8 hours) + $175/day] x [228 weeks Accident to May 20, 2021] = $209,988 gross (which is a gross yearly salary of $47,833 had she reported all of her income). Assuming an average income tax for this range of salary of 20%, Ms. Bown's past net income from Accident to May 20, 2021, would be $209,988 x 0.80, or $167,990.40.

[151] Based upon Mr. Jamieson's testimony (as a manager at Morgan Creek Gold Course) that top servers there earn at least $65,000 per year (including tips),

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Ms. Bown submits that after she moved to that job from May 20, 2021 and in the period leading up to trial (October 16, 2023) (2.40 years), her income would have increased to at least $65,000 gross per year if she was in full health. Ms. Bown therefore proposes calculating the net loss for that period as $65,000 x 2.40 = $156,000 gross income. Assuming a tax rate of 23% for an income of $65,000/year, the net income is $156,000 x 0.77 = $120,120.

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[152] Adding the two periods together, Ms. Bown argues that the income she would have earned but for the Accident to trial is therefore $167,990.40 + $120,120 = $288,110.40.

[153] Ms. Bown concedes that the income she actually earned must be subtracted, proposing the following income levels (intended to include both base income and estimated tips):

> 2017: $30,000
>
> 2018: $30,000
>
> 2019: $32,000
>
> 2020: $14,000
>
> 2021: $20,000
>
> 2022: $45,000
>
> 2023: $38,000
>
> Total: $209,000

[154] On this basis, Ms. Bown proposes that the net past loss of capacity is $288,110.40 - $209,000 = $79,110.40 rounded to an assessed $80,000.

[155] The defence takes issue with these suggested income levels, noting that these estimates assume only about $8,000 in tips for each year, which is almost certainly too low. The defence notes that, assuming this amount is spread over 4 shifts per week or approximately 16 shifts per month, that works out to only about

$45 in tips per shift. This is only a third to a quarter of the amount that Ms. Bown recalled earning in tips, which was about equal to her salaried income.

[156] In my view the defence argument is well founded, meriting at least a doubling of the estimated $8000 amount for tips for at least five years (excluding the Covid period when tips would have been very low). That would add $40,000 to Ms. Bown's actual income resulting in a drop in the value of her claim to $40,000. To this I must add the total loss of income for the first two weeks after the Accident, which I estimate at about $3000-$5000, minus a 75% deduction for the effects of the arthritis after 2019 as a contingency.

[157] As a result, the award for past income loss is assessed at $18,000.

c. Future Income Loss

[158] Ms. Bown submits that her future loss of earning capacity is equal to $775,000. The defence submits that amount of $60,000 is appropriate.

[159] In *Ploskon-Ciesla*, Justice Harris set out the legal principles relevant to determining future loss of earning capacity:

> […]
>
> **Operative Principles**
>
> [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.
>
> [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.
>
> [9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to

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quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55–56.

[10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:

> [47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

First Step

[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.

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

> [36] … are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.
>
> [37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision include whether:

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

> [14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.
>
> ***Second Step***
>
> [15] The reference to paras. 93–95 of *Dornan v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. 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": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.
>
> ***Third Step***
>
> [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.

[160] With respect to the first step of the *Rab v. Prescott*, 2021 BCCA 345 [*Rab*] test, this is one of the "less clear-cut cases" discussed in *Ploskon-Ciesla*, in which Ms. Bown's injuries have led to continuing deficits but her income at trial is similar to what it was at the time of the accident. In this case, in my view, there is evidence

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which discloses a potential future event that could lead to a loss of capacity, which is the continued persistence of the chronic pain and headaches resulting from the soft tissue injuries (as distinct from the arthritis which is not causally connected to the Accident).

[161] Taking into account the *Brown* factors, I note that Dr. Le Nobel opined that Ms. Bown's injuries had impaired her earning capacity, making her less capable of doing restaurant work and less able to manage long hours of physically demanding serving. He also opined that, absent some improvement, the impairment was likely to persist. Similarly, Mr. McNeil opined in his functional capacity report that Ms. Bown has demonstrated a limitation in the ability to perform light to medium duty strength work, which is the category of work required of a server. Thus, she is this less capable overall as a server and less marketable or attractive to employers as a result of the soft tissue injuries. That said, I note that the injuries did not prevent her from obtaining new employment as a server at Morgan Creek Golf Course after she left the Washington Street Grill, although her testimony was that her injuries and pain have limited her maximum earning capacity at Morgan Creek Golf Course.

[162] With respect to the second step of the *Rab* test there is in my view a real and substantial possibility that the loss of capacity associated with the soft tissue injuries will cause a pecuniary loss resulting from a reduced numbers of shifts and assigned tables, and a resulting loss of potential tips. Again, however, this loss must be differentiated from the loss of capacity relating to the arthritis, which is an independent supervening event unrelated to the Accident.

[163] Turning to the third step of the *Rab* analysis, the valuation of the possible future loss, I must next decide between an earnings-based and capital asset approach. As I explained in my analysis on past income loss, a capital asset approach is more appropriate in this case.

[164] Ms. Bown proposes that her lifetime residual earnings can be calculated with a discount rate used to calculate the present value of future earnings of 1.5%: *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Law and Equity Regulation*, B.C.

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Reg. 352/81, as amended by B.C. Reg. 74/2014. Ms. Bown suggests that the Court should assume that she would retire at age 70, as she testified she had no plans to retire and had other incentives to remain in the workforce. Given her age of 37 at the start of trial, this results in 33 years of employment left.

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[165] Applying the multiplier of 25.8790 for the period of 33 years at 1.5% from Appendix E of *CIVJI: Civil Jury Instructions, 2nd ed.* (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2019 update) ("CIVJI"), the present value of Ms. Bown's lifetime future earnings in a without-Accident scenario is $65,000 x 25.8790 = $1,682,135 (the lifetime residual earnings but for the Accident).

[166] Taking into account all the evidence, I assess Ms. Bown's capital asset loss attributable to the soft tissue injuries (as distinct from the arthritis) at 10%, which is equivalent to $168,213. This assessment is also consistent with a number of recent authorities including *Pelley v. Fredrickson*, 2021 BCSC 82; *Martin v. Fredrickson*, 2021 BCSC 1424; and *Monga v. Smith*, 2021 BCSC 1430.

[167] This assessment assumes a permanent loss of capacity to the age of retirement. However, in terms of contingencies, I must take into account the possibility that Ms. Bown's soft tissue-related condition could improve with treatment and exercise. I must also take into account the likelihood that Ms. Bown's earning capacity would, in any event, have declined with advancing age and associated declining physical capacity. In this regard, I have some skepticism about the plaintiff's assumption that Ms. Bown would have been able to continue working without a diminution in capacity as a server, a physical job, until the age of 70.

[168] Taking into account all the foregoing contingencies, in my view a 25% reduction is appropriate to the assessment, thereby resulting in an assessed award of $126,000.

d. Loss of Housekeeping Capacity

[169] The plaintiff submits that an award of $43,000 is appropriate for diminished past housekeeping capacity and $169,000 for future diminished housekeeping capacity.

[170] The applicable analysis was set out in *McKee v. Hicks*, 2023 BCCA 109 at paras. 106, citing with approval the decision of Justice Gomery in *Ali v. Stacey*, 2020 BCSC 465 at para. 67:

> […]
>
> a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
>
> b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
>
> c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
>
> d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.
>
> […]
>
> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[171] In my view, the evidence at trial supports the conclusion that Ms. Bown's soft tissue injuries have not resulted in her being unable to perform usual and necessary household work but rather have resulted in her having difficulty or frustration in doing so.

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[172] Ms. Bown testified that she was primarily responsible for the housekeeping in her household prior to the Accident, as well as taking care of two young children. Following the Accident and later the onset of the arthritis in 2019, Ms. Bown testified that she had to have her partner, Mr. Kitagawa, assist her.

[173] At present, Ms. Bown testified that her current partner, Mr. Jamieson, does the “majority” of the household tasks and “a lot” falls on Mr. Jamieson. For example, she cannot come home after a shift and do vacuuming, which causes headaches and pain. That said, she testified that she is good at home maintenance, folding laundry, and picking up after the kids. On cross-examination, she also admitted to “…cleaning up with the dishes after dinner. I wipe down counters. I help with the laundry, folding laundry…we cook together.”

[174] Mr. Jamieson testified that “there’s no split” between them and he has to do pretty much all of the housekeeping, which is a source of fights between them. That said, Mr. Jamieson qualified this testimony by noting that Ms. Bown does indeed participate in some household tasks “here and there” around the house, that they grocery shop together and both take care of their respective children.

[175] Further, both Mr. Jamieson and Ms. Bown testified that he is “kind of OCD” about housekeeping and prefers to “keep a clean home”. As noted by the defence, it is a reasonable inference from this that Mr. Jamieson has a high standard of cleanliness and therefore his preference to carry out a majority of the household tasks are a matter of choice attributable to his personal preference for cleanliness as opposed to the plaintiff’s alleged functional limitations with respect to household tasks.

[176] Most importantly, however, Mr. Jamieson testified quite extensively and graphically about the extent to which Ms. Bown’s physical condition, and resulting ability to do housework, relates to her regime of administering Erelzi shots for the arthritis, indicating that it is the arthritis and not the soft tissue injuries which is the principal limiting factor for Ms. Bown with respect to housekeeping.

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[177] In this respect, I note that there was no medical evidence adduced at trial that Ms. Bown's soft tissue injuries, as distinct from the arthritis, have rendered her unable to perform all her pre-Accident housekeeping tasks, nor was there any evidence that she has had to spend money to hire a housekeeper.

[178] In my view, taking into account all the evidence, this is not a case where Ms. Bown is incapable of performing any housekeeping tasks, but rather one where she performs them with difficulty.

[179] Accordingly, I do not make a separate award under this category but instead exercise my discretion to adjust the amount of the non-pecuniary award upward to account for the loss of enjoyment Ms. Bown has suffered by being unable to take care of her household without pain and discomfort.

e. Costs of Future Care

[180] Ms. Bown seeks an award for costs of future care in the amount of $1,508,000. The defence takes the position that no award is appropriate.

[181] The courts have made it clear that an award for the cost of future care should have medical justification and should be reasonable. In *Chavez-Salinas v. Tower*, 2022 BCCA 43, Abrioux J.A. set out the legal framework for future care awards:

> [83] The judge set out the applicable legal principles: Reasons at paras. 490–502. These were recently summarized by Justice Voith in *Pang v. Nowakowski,* 2021 BCCA 478:
>
> > [56] The legal framework that is relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:
> >
> > > [43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.
> > >
> > > [44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award

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> for future care must have medical justification and be reasonable.
>
> [57] Several additional principles are relevant:
>
> i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item;
>
> ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred;
>
> iii) The court must be satisfied that there is no significant overlap in the various care items being sought.
>
> [58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss.
>
> [Citations omitted.]

[182] While medical evidence for each item of care is not strictly required, the award must be based upon the medical evidence as a whole. In *Langille v. Nguyen*, 2013 BCSC 1460 at paras. 231–235, aff'd on appeal 2014 BCCA 430, Justice Fitzpatrick summarized the applicable approach:

> [231] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. <u>The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health:</u> *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104.
>
> [232] The test for determining the appropriate award under the heading of cost of future care is an objective <u>one based on medical evidence</u>. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* at 84.
>
> [233] Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. The award of damages

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is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.

> [234] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required: *Tsalamandris* at paras. 64-72. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.

> [235] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

> [Emphasis added.]

[183] In *Warick v. Diwell,* 2017 BCSC 68 (aff'd 2018 BCCA 53) [*Warwick*], Justice Schultes, in reviewing the applicable principles for a cost of future care claim, noted at para. 202:

> With respect to the standard of proof to be met, "[a] plaintiff who seeks compensation for future pecuniary loss need not prove on a balance of probabilities…that she will require future care because of the wrong done to her. If the plaintiff establishes a real and substantial risk of future pecuniary loss, she is entitled to compensation…" *Graham v Rourke* (1990), 74 DLR (4th) 1 (Ont CA).

[184] Citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); Justice Schultes noted at para. 204 in *Warwick*:

> This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v Sangha,* 2011 BCSC 1035, at para 151.

[185] Ms. Bown claims the following cost amounts for future care:

a)	Pain Management (pillows, heat pad)	$30.00
b)	Assistive devices (mop, scrubber, etc.)	$30.00
c)	Gym pass	$410.00

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d)	Massage/ Chiropractic treatment	$0
e)	Counselling ($220 x 6)	$1,320.00
f)	Physiotherapy	$1,080.00
g)	Ramipril	$83.68
h)	Methotrexate	$345.50
i)	Sulfasalazine	$2,215.40
j)	Erelzi (biologic)	$12,746.04
k)	Contingency Biologic ($10,000-$500,000)	$38,000.00
l)	Mileage	$200.00
	TOTAL ANNUAL CARE COSTS	**$56,430.62**

[186] Pursuant to s. 56(2)(b) of the *Law and Equity Act* and s. 1(b) of the *Law and Equity Regulation*, the discount rate used to calculate the present value of future losses (other than income) is 2.0%. The CIVJI multiplier for 38 years at 2.0% is 26.4406. Extrapolated to age 75 ($56,460.62 x 26.4406), these claims amount to $1,492,852.67.

[187] I have found that the psoriatic arthritis was not caused by the Accident. Accordingly, the costs related to methotrexate, sulfasalazine, Erelzi, and the contingency biologic cannot be justified on the evidence.

[188] With respect to the costs related to Ramipril, the evidence was that Ms. Bown has had a long-standing heart condition since her childhood that pre-dates the Accident. She testified that took Ramipril before the Accident and will continue to take it for the remainder of her life for the heart condition and to maintain a healthy blood pressure. This medication is therefore unrelated to the Accident, as she would have been required to take it even in the absence of the Accident.

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[189] With respect to the costs related to physiotherapy, counselling, and the gym pass, the evidentiary challenge for Ms. Bown is that she has not used these in the past. Ms. Bown testified that, even prior to the Accident, she was not a regular user of a gym. She also testified that, after the Accident, her doctor recommended physiotherapy but she did not attend any sessions. She explained that the cost was too high, that the location was too far away, and she was too busy. That said, Ms. Bown indicated a willingness to attend in the future if she could afford it and find the time.

[190] Similarly with respect to counselling Ms. Bown testified that if she had access, she would attend because it “could not hurt” and stated that she “hoped” she could find the time. She also stated she would not take anti-depressants. While these comments indicate a willingness to try a few treatments on an experimental basis, they are certainly not the comments of someone who appears committed to a lifetime of counselling and physiotherapy as claimed.

[191] In my view, a more balanced approach, as opposed to the lifetime of treatment sought by Ms. Bown, is to award an amount for physiotherapy and counselling that is capped at a reasonable number of sessions. For example, Dr. Le Nobel recommended an active rehabilitation program in consultation with a kinesiologist “several times monthly”.

[192] Ms. Bown estimates an annual cost of $1,320 for counselling (6 sessions) and $1,080 for physiotherapy. In my view an award of three years for treatment for each of these categories is appropriate, resulting in an amount of $7,200, rounded down to $7000 to account for the CIVJI multiplier. The cost of the gym pass is not justifiable in my view given Ms. Bown’s testimony that even prior to the Accident and certainly afterward she did not regularly attend the gym.

[193] With respect to the pain management and assistive devices, while recommended by Mr. McNeil, these are not justifiable on an annual basis for life, since they only need to be purchased every few years. Ms. Bown estimates a cost of

$60 per year and assuming a purchase every five years, this would result in a rounded amount of $320, rounded down to $280 to account for the CIVJI multiplier.

[194] Ms. Bown also claims a variety of one-time costs noted in Mr. McNeil's first report, including consultation with an occupational therapist ($2,016), a kinesiology program ($888) and pain management program ($12,500). These claims amount to $15,400.

[195] In my view these one-time costs are justifiable but must be subject to a 75% reduction based upon the fact that the majority of Ms. Bown's pain is attributable to the arthritis and not the soft tissue injuries, resulting in an award of $3,850.

[196] Taking into account all the above, the total award for costs of future care is assessed at $11,130.

f. Special Damages

[197] The plaintiff claims $1,125.66 in special damages.

[198] The defence agrees with the Ms. Bown's list of special damages with two exceptions:

- The defendants submit that Ms. Bown should not be reimbursed for expenses relating to her treatment with Dr. Huang on the basis that the psoriatic arthritis was not caused by the Accident, and in any event many of the Dr. Huang visits were carried out virtually.

- Further, deductions should be made for the mileage to and from Dr. Van Wyk's office to take into account, that as Ms. Bown admitted, not all of the visits pertained to Accident-related injuries.

[199] Taking into account these deductions, the defence argues that an award of $584 is appropriate, which is about half the amount claimed.

[200] In my view the defence argument is well founded. I therefore award $584.

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ORDER

[201] I conclude that Ms. Bown is entitled to the following award of damages against the defendant Mr. Skogheim:

Head of Damage	**Award**
a. Non-pecuniary damages	$95,000
b. Damages for Loss of Past Income	$18,000
c. Damages for Loss of Future Income	$126,000
d. Housekeeping Costs	$0
e. Costs of Future Care	$11,130
f. Special Damages	$584
TOTAL	$250,714

[202] I grant the parties leave to speak to the issue of costs and pre- and post-judgment interest.

"M. Taylor J."

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