# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Johal v. Doe,*
2024 BCSC 1597

Date: 20240829
Docket: M207981
Registry: New Westminster

Between:

**Rajbir Kaur Johal**

Plaintiff

And

**John Doe and-or Jane Doe,**
**Insurance Corporation of British Columbia,**
**Humjot Singh Dhindsa, Bodkin Leasing Corporation,**
**Daewoo Transport Ltd. and West Coast Freight Ltd.**

Defendants

Before: The Honourable Mr. Justice Blok

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | B. Mohan<br>G. S. Kang<br>S. Birdi |
| Counsel for the Defendants: | B. Easton<br>M. Aziz<br>H. Dhatt, Articled Student |
| Place and Dates of Trial: | New Westminster, B.C.<br>November 14-17, 20-24<br>and 28, 2023 |
| Place and Date of Judgment: | New Westminster, B.C.<br>August 29, 2024 |

## I. Introduction

[1] Rajbir Kaur Johal (now Dhindsa) was injured in an accident that occurred on January 9, 2017. She was sleeping in the sleeping compartment of a transport truck driven by her (now) husband, the defendant Humjot Singh Dhindsa, when the truck veered off the road and rolled onto its left side into a ditch.

[2] This action has been discontinued against the nominal defendants and liability has been admitted by the remaining defendants.

[3] Ms. Johal changed her surname to Dhindsa when she married in 2018 and so I will refer to her as Ms. Dhindsa in these reasons.

## II. Plaintiff's Case

### A. Rajbir Kaur Dhindsa

[4] Ms. Dhindsa was born in India and immigrated to Canada in 2003. She was 40 years old at the time of trial. She lives in Maple Ridge with her husband and two children as well as various extended relatives.

[5] Ms. Dhindsa's early employment in Canada was with a clothing store, a beauty salon and then at entry-level jobs a senior home facility in Vancouver. She then trained as a care aide and was employed in that capacity at the same facility. In 2013 she completed further training, qualified as a recreation therapist and began work in that capacity at the seniors home.

[6] Her work as a recreation therapist involved helping seniors with daily activities and exercises. She described the work as physical as it required her to "push wheelchairs the majority of the day", help residents sit and stand, and help them up if they have fallen.

[7] Ms. Dhindsa worked at the seniors facility until it closed in February 2016. At that point, she decided to take a "mini break" and do other work while she looked for suitable employment with another care home. From October 2016 to January 2017 she worked in a warehouse in Delta.

[8] Ms. Dhindsa testified that she had every intention of returning to work as a care aide and recreation therapist, as this was her passion and "dream job".

*Pre-Accident Health and Lifestyle*

[9] Ms. Dhindsa said she was in good health prior to the accident. She acknowledged she had health issues in 2014 and 2015 while she was going through a divorce, as she suffered from anxiety and headaches, but these issues ended in mid-2015 after her divorce was finalized.

[10] Prior to the accident, Ms. Dhindsa did all the housework in the home, which included cooking, cleaning, grocery shopping and laundry, and looking after her elderly parents. She said would do housework for three or four hours on workdays, and for six to seven hours on her days off. She went for regular walks, took her son to parks, went on road trips, went to the temple, played cards, shopped at shopping malls and attended Punjabi weddings, where she enjoyed dancing.

*The Accident*

[11] Ms. Dhindsa was 33 years old at the time of the accident, which occurred on January 9, 2017 at about 1:00 am.

[12] Ms. Dhindsa and her husband were in a 2013 International Loadstar truck and trailer, travelling westbound on Highway 1 west of Hope, B.C. The had come from Lethbridge, Alberta and were heading to Surrey/Delta.

[13] The truck had two front seats, with a curtain behind, and there was a sleeping compartment, with bunk beds, behind that curtain. Ms. Dhindsa was in one of the bunks. There were no seatbelts in the sleeping compartment, and no one had told her to use safety netting.

[14] She testified that the weather was a "typical cloudy winter night". Snow had stopped falling a few hours prior, and the roads had been cleared.

[15] Ms. Dhindsa said she woke up as the truck was rolling to its left side. She said "everything fell on top of me" and she hit her left side. She could smell diesel fuel and was scared it would catch fire. She was crying and screaming.

[16] She said "my left wrist bone was hanging out" and she had pain in her left foot. She also had headaches.

[17] She and her husband were trapped inside the truck for two hours. She was very scared that they would not make it out. They were freed when fire personnel cut the front windshield.

[18] She was assisted to a stretcher, then transported to Chilliwack hospital. She was in a great deal of pain in her left wrist, left foot and back. At the hospital, x-rays were taken of her left wrist and foot and her left wrist was placed in a cast. She was discharged the same day with instructions to follow up with her family doctor.

*Early Aftermath*

[19] On her return home, Ms. Dhindsa was in pain and shock. The pain was unbearable. She could not sleep that night, as she could only think about the accident. Her pain was in her left wrist, left foot, neck, upper arm, back and shoulders. She also had headaches, nausea and a "foggy memory".

[20] Over the next 10 days, she was not able to move around much, and she continued to be in pain. Her husband's parents travelled from India to help out.

[21] She did not have a family doctor at the time, but found one, Dr. Sawhney, and saw him 10 days after the accident. Continued swelling in her left wrist prompted Dr. Sawhney to recommend that she get further x-rays. He also recommended she get chiropractic treatment for her neck, back and headaches.

[22] She said x-rays revealed multiple fractures of her left wrist and fractures to the first and third toes of her left foot, although I will note that medical evidence indicates there were three broken toes. She was admitted to hospital, where Dr. Schweigel performed surgery to her left wrist. She remained in hospital from

January 19 to 24, 2017. Her left wrist was again placed in a cast, and she had an air cast boot for her left foot.

[23] She had back pain “on and off” for the first month, but low back pain began after a month.

[24] Ms. Dhindsa began physiotherapy in March 2017 and continued with physiotherapy until July 2020. Therapy focused on her left wrist and forearm, left foot and ankle, and her neck and back.

[25] At an appointment with Dr. Schweigel in April 2017 she was told her left wrist was not healing properly and “the screw was popping out”. She screw was located at the base of her thumb, and it prevented her from extending her forearm. At about that time she began a kinesiology rehabilitation program. Her foot continued to have problems as it was swollen, she could only walk for 10 minutes or so and she could not fully bear her weight.

*Later Status*

[26] By summer 2017 Ms. Dhindsa was still having pain in the same areas, namely her left arm and wrist, neck, foot and lower back. She was undergoing physiotherapy, chiropractic and kinesiology treatments and she was seeing her GP regularly. She started to have issues with low mood, low energy and lack of sleep.

[27] The wrist hardware was removed by Dr. Schweigel in February 2018. She continued to have pain and numbness in her left wrist, as well as pain in her neck and low back. She was capable of light housework by this point, with family help.

[28] Ms. Dhindsa married in July 2018, but by the next month she became depressed, with low mood and sleep disruption. She then started counselling. She later testified that Dr. Sawhney prescribed antidepressants, which she took.

[29] She continued to have pain in her left wrist, and she continued to see Dr. Schweigel. The pain in her neck and shoulder began to radiate to her left forearm, and the pain in her low back started radiating to her right leg.

[30] In 2019 she had an MRI of her neck and back, which revealed a pinched nerve which, from the context, I took to mean in her back. An occupational therapist recommended she consult with a neurosurgeon, and she was approved for massage treatment. She then saw neurosurgeon Dr. Singh.

[31] She was still undergoing counselling during 2019, and she was taking medications, Lyrica and naproxen.

[32] By 2019 she was capable of light cooking and housecleaning, with rest breaks, as well as grocery shopping. She would experience pain in her left wrist if she lifted a four litre milk container.

[33] In 2020, she continued with physiotherapy, chiropractic therapy, massage therapy and kinesiology, although she halted some therapies in November, presumably because she was now pregnant. She continued to see her GP. She saw neurosurgeon Dr. Heran in April for her continuing low back pain. He referred her to a chronic pain clinic.

[34] When asked about her pain level in 2020, Ms. Dhindsa said it was “unbearable” and she had to take a lot of painkillers to cope with it.

[35] Ms. Dhindsa gave birth to her second son in April 2021. She resumed her treatments after that. She was still experiencing pain in her left wrist, neck, shoulders and low back, and was still having headaches. The pain in her left foot was still manageable, but she could not be on her feet for more than 20 minutes. She continued to suffer from low mood and depression.

[36] She continued her various treatments in 2022. By this point, her son weighed about 10 kg and if she held him for 10 or 15 minutes she would experience low back and left wrist pain. She also experienced pain when she lifted him up.

[37] She was able to do grocery shopping by this point, but always took painkillers in advance in order to quell her low back pain. She ensured she was accompanied

by another family member. She was capable of picking up a case of water but she would get pain afterward as a result.

[38] She felt guilty relying on her parents, who assumed much of the care of her younger son. Her mother-in-law did most of the household chores.

[39] Her goal at this point was to return to work and also get a Class 4 driver's licence, but she failed the test because "headaches and stress prevented me".

*Return to Work*

[40] Ms. Dhindsa returned to work in October 2022. When asked why she had not worked from January 2017 to October 2022, she said "because of all the pain and injuries". She also testified that her GP and occupational therapist had told her she was not fit to work.

[41] She secured work with a temp agency, Nurse Next Door, and worked as a care aide in October and November. She found this to be an "intense job" as she had to drive around and the driving aggravated her low back pain, and the work itself was "heavy" insofar as it involved a lot of lifting and bending. It aggravated her symptoms to the extent that she could no longer do any housework.

[42] Working with seniors involves helping them bathe, shower, go to the toilet, transfer them to chairs and help them with meals and recreational activities. The bending twisting and lifting hurts her wrist and back. The amount of lifting done in a day varies, and it also varies with the weights of the residents.

[43] At present, Ms. Dhindsa works two to three days a week.

*Current Status*

[44] Ms. Dhindsa continues to have problems with neck and back pain, which radiates to her legs. Being on her feet all day at work, or sitting for long periods, makes her back very stiff. She cannot sit for Sikh temple prayers for more than 30 minutes. Back stiffness is also a cause of her sleep disruption.

[45] As for her left wrist, her work with seniors aggravates her pain and pushing or pulling creates numbness and stiffness. The pain interferes with her sleep. She noted she has been given a new referral to Dr. Schweigel for further consideration of her wrist issues.

[46] As for her left foot, being on her feet aggravates her foot symptoms and pain recurs when she uses stairs. Her toes are better now and only give her trouble sometimes.

[47] She gets headaches when her back and neck get stiff, or she has a lack of sleep.

[48] These symptoms have rendered her unable, or at least less able, to do house chores because she cannot stand for very long and has to rest. She said that formerly she was a very clean person, and now she does not clean as well or as thoroughly as she did before. Also, Indian cooking often involves lengthy preparations and she does not have the stamina for it due to her various pain issues.

[49] She is also unable to interact with her younger son as she did with her older son. Her limitations prevent her from playing with him, she has no energy and she is impatient and irritable.

[50] There are some work tasks she cannot do, such as repositioning a prone or supine resident, and she is unable lift as much as other aides do, as when helping a resident sit up or stand.

[51] Ms. Dhindsa acknowledged she travelled to India in 2020 for her brother’s wedding, but she had difficulty sitting on the plane for the long flight, she had to stand and walk around to relieve the discomfort, and she took “lots of painkillers”.

[52] As for psychological issues, she gets anxiety and low mood, always has low energy, and she is irritable and impatient. She had bad dreams after the accident. She also has sleep difficulties, which also disrupt her husband’s sleep. She does not feel like socializing and so she no longer has people to her house, and she feels

guilty that she does not spend more time at the Sikh temple. She also feels guilty that she cannot interact and play with her younger son as she would like. She no longer has counselling for her psychological issues.

[53] Her symptoms have impacted her relationships with her husband. She said they now fight all the time because she cannot do housework or go out with him. Their intimate relationship has also been negatively affected.

[54] She continues with physiotherapy and chiropractic treatments on her work days because she has “so much pain” after work shifts. She feels she will need six or seven more years of these treatments.

*Income*

[55] In the years 2011 to 2015, Ms. Dhindsa earned amounts ranging from about $50,000 to $55,000 each year. She earned $13,668 in 2016, which was the year that her employer closed the seniors facility. In 2017 she earned $530 to the date of the accident (January 9). She had no earnings in 2018, 2019, 2020 or 2021, and she earned $3,313 in 2022 through her six-week temp work.

[56] Ms. Dhindsa started work at Holyrood Manor seniors facility on November 16, 2022. Her wage rate is $25.83 per hour. Ms. Dhindsa said this hourly rate has increased to “almost $29” presently. As of February 2023 she had been working an average of about nine hours per week.

[57] Ms. Dhindsa said that over the 11 months preceding the trial, she had worked an average of about 45 hours for month. Prior to the accident, she was working 50 to 60 hours each week.

*Personal Impact*

[58] When asked how the accident has affected her, Ms. Dhindsa said she still thinks of the events of that night and gets “shocked and scared”. She said the accident has “turned her life upside down” and her injuries “have affected me in every way”. She also said she is unable to work full time where full time work, and

overtime, is readily available, and she feels inadequate because she is unable to properly contribute to the family finances.

*Cross-Examination*

[59] In cross-examination, Ms. Dhindsa acknowledged that her first marriage was an unhappy one, as her husband had substance abuse problems and was abusive to both her and their son. She said she may have experienced depression and anxiety, and some headaches, as a result of these difficulties, but she said these were “situational reactions” and she was getting better by 2015 after she separated from her husband.

[60] She acknowledged she was having trouble with headaches in 2015. She saw a specialist for that issue and also had a CT scan.

[61] She agreed she had attended hospital for headaches, depression and anxiety during this time, but said these attendances related to negative interactions with her ex-husband and her current husband would get worried about her and take her to hospital. She conceded that one hospital attendance in May 2016 was due to over-ingestion of Ativan, which she took to aid her sleep, but said this had been a mere error on her part as she had forgotten she had taken it and then took more.

[62] Ms. Dhindsa agreed she had an anxiety disorder back then, but said this issue did not continue to the date of the accident. She reiterated that her issues were “situational” and related to the conflict she was having with her ex-husband. The last of those events was in 2019, when the ex-husband interacted with their son in a negative way. Her son no longer goes with her ex-husband and she no longer has any dealings with him.

[63] Ms. Dhindsa agreed there is no mention of her three hospitalisations in the report of her expert psychologist, Dr. Thinda, but she said she answered whatever was asked of her and thought he was just asking about matters relating to the accident.

[64] She acknowledged that she could do some limited cleaning and cooking by November 2017, as shown in an occupational therapy assessment report, but said this was light cleaning and the cooking was using a OT-supplied cutting board and attached knife with her right hand only.

[65] She said she is presently able to do light cooking and housework, but only with family help.

[66] She acknowledged that a clinical note of her family doctor from April 2023 indicates she was doing full duties at work, but she said “but when I get home I have so much pain”, meaning back pain and stiffness. She did not tell her employer about her injury problems because she felt she would not have been hired. When, ultimately, her employer was told, the facility director was supportive.

[67] She has tried to work multiple shifts in a row, but found she was unable to sustain it.

[68] In May 2018, Ms. Dhindsa consulted with a gynecologist as she and her husband wanted to have a child and she was having trouble conceiving. A letter from that gynecologist to another specialist said Ms. Dhindsa was not taking any medications. At trial, Ms. Dhindsa said she was in fact taking painkillers at that time and thought the physician was just asking her about gynecological medications.

[69] Ms. Dhindsa had a miscarriage in January 2020. This made her sad, but she did not suffer any sort of anxiety attack. When she subsequently became pregnant, her physician told her to “take it easy” for the first three months. She did not attempt to find work in her later trimesters as no one would have hired her fi they knew she would be leaving shortly.

[70] Ms. Dhindsa acknowledged there were no references in her OT’s clinical notes of any complaints of low back pain in either November 2017 or February 2018, but said it was intermittent and only started to radiate into her legs at a later point. She said nothing happened in 2018 that made things worse. A 2019 MRI showed she had a pinched nerve.

[71] In her October 3, 2022 application to Nurse Next Door, Ms. Dhindsa indicated she was available five days a week and every second weekend, she could travel, and she was “able to do heavy housekeeping”. She said she had looked for work for so long, she did not want to lose the opportunity and “I’d tell them later” about her physical limitations. She said she is able to work for eight hours, but her back will hurt as a result.

[72] The consulting occupational therapist performed a worksite visit and reported Ms. Dhindsa had no work restrictions, but Ms. Dhindsa said the OT never saw her work. That visit took place on her day off and the “work” was merely a 30 minute demonstration.

[73] When asked what her restrictions were, Ms. Dhindsa said bending, kneeling, twisting, turning and pulling the patients. She said she can do these but with pain, the need to take painkillers and with rest during scheduled breaks.

[74] Ms. Dhindsa agreed that she was recommended to use a back brace, but she did not use it at work because she was fearful that her employer would find out about her physical problems.

[75] Ms. Dhindsa said she has continued her search for employment as a recreational aide, but without success. That job is still an active job, and it involves being on one’s feet all day, but there is less lifting. She is not sure if she could do that job full time, but she would like to try.

[76] Ms. Dhindsa was asked about a consultation letter dated October 5, 2020 from Dr. Gavin Gracias, a physician associated with the chronic pain clinic at Burnaby Hospital. In that letter, Dr. Gracias noted Ms. Dhindsa had opted to defer epidural steroid injections until after her pregnancy since “her pain is reasonably well managed now”. At trial, Ms. Dhindsa said that she did not want to proceed while she was pregnant given her prior miscarriage. Also, her pain was “reasonably well managed” because she was not working at that time.

[77] She did not follow up after giving birth. She explained that the injections were expected to give temporary relief at best and so she did not request a later re-referral.

[78] Surveillance video was shown to Ms. Dhindsa, taken on separate days in February 2022. One video shows Ms. Dhindsa in a Costco parking lot, lifting a child into a car seat after carrying him on her hip and moving a few cases of goods from the bottom of a shopping cart into a car. There are two other adults with her, one of whom assists Ms. Dhindsa with one of the cases. There is also video showing her shopping inside the store while carrying a child on her left hip.

[79] Ms. Dhindsa acknowledged she was able to lift these cases, one with assistance, but said she did not have to bend all the way down to do so.

[80] The second video shows Ms. Dhindsa carrying a child down the street and back. The video shows her carrying the child more centrally, with two arms around him, and shifting him at times. She said she had taken her son to the park and in doing so she repositioned him “many times” and she was also able to rest while at the park.

[81] The third video shows a visit to a veterinarian’s office, where Ms. Dhindsa is again shown carrying her son on her hip. At a later point when not carrying the child, she is shown bending over to pick up dog droppings. A final video shows Ms. Dhindsa lifting a toddler’s car seat out of her car with both hands. She said her mother was helping her with this lifting.

[82] Ms. Dhindsa acknowledged she did not tell Dr. Sawhney of issues she had prior to the accident, but she said her purpose in seeing him was to address her accident injuries and did not think to discuss pre-accident matters. She denied that she intentionally withheld relevant pre-accident health details from her treatment providers, reiterating that when she saw her doctors she understood she was doing so in order to get treatment for her current injuries.

[83] Ms. Dhindsa denied that she was capable of full-time work as a care aide.

### B. Jordan Johal

[84] Mr. Johal is the plaintiff's 18 year old son. He is currently a student at BCIT.

[85] Mr. Johal said he has certain medical issues that require him to take medication, and his grandmother is the person who will remind him to take his medications. When asked who looks after him the most, he said it was mostly his grandmother.

[86] He was 11 years old when the accident occurred. He was able to recall that prior to the accident his mother not only went to work but she did everything in the house. He said she was always happy, in a good mood, and energetic.

[87] After the accident, she was sad and "bummed out". He had to take on a bit of responsibility after that. He noticed changes in his mother as she no longer wanted to go out or meet anyone.

[88] After the accident, he and his mother did not do much together. When they tried, she would always get tired.

[89] They live in a large house. It is built on three levels and has six bedrooms and four bathrooms. The housecleaning is done by his stepfather, his grandparents and himself. His grandmother does the cooking. Outside or yard work is done by his stepfather and himself.

[90] In cross-examination, Mr. Johal acknowledged there were disputes between his mother and natural father, and this was stressful for both his mother and himself.

[91] He agreed they went camping in 2023 over a weekend, but his mother did not help set up the tents and she used a folding bed.

### C. Amarjot Randhawa

[92] Mr. Randhawa is an extended family member of Ms. Dhindsa's. He described her as his "sister-in-law" though to be more accurate, Ms. Dhindsa is the wife of Mr. Randhawa's cousin. He has known Ms. Dhindsa for 10 years.

[93] Mr. Randhawa said their respective families are close and they visited regularly prior to the plaintiff's accident, perhaps two or three times a month. They celebrated all religious holidays together.

[94] He said Ms. Dhindsa was always very welcoming and entertaining, "a fantastic lady", and she loved to cook, even those Indian dishes that take all day to prepare. He described her as hardworking and strong, both mentally and physically. She was very active, independent, very proficient at cooking, happy and loved to entertain guests.

[95] Mr. Randhawa said Ms. Dhindsa was healthy and active, and never had any physical complaints.

[96] Early on, Ms. Dhindsa and her husband were living in a basement suite, and so she was working six days a week to help get the funds necessary to buy a house. They bought a house after the accident, then found another house in Maple Ridge, which they share with her family.

[97] They visited the Dhindsas after the accident. Ms. Dhindsa had casts on her wrist and foot, and she was in extreme pain. They visited on a regular basis to help them out, at which point her parents came from India to help.

[98] On their post-accident visits, Ms. Dhindsa always complained about the pain she had, and about how it restricted her. She could not sit long. She was stressed and in a sad mood that she could not contribute financially to the household.

[99] After the Dhindsas moved to Maple Ridge, Mr. Randhawa saw them less often, perhaps every two or three months. They did no activities together. On one visit, she came home from work and instead of socializing, she went to bed.

[100] Mr. Randhawa said Ms. Dhindsa has "totally changed" and is "a different person". Formerly she was welcoming; now she is not. Her personality has "totally changed". She did not want anyone to put on a housewarming party, or a party for her son's birthday. She used to help others but now she has to be helped.

### D. Paramjit Thandi

[101] Ms. Thandi is a long-time friend of the plaintiff. They first met while at college in India 23 years ago and Ms. Dhindsa lived with Ms. Thandi for a time. Ms. Thandi works as a care aide.

[102] Ms. Thandi said that prior to the accident, they saw one another frequently, perhaps once a week, and spoke on the phone "almost daily". Ms. Dhindsa was very active, happy with her work and a happy person generally. She loved to cook and she was particularly close to Ms. Thandi's children. Ms. Dhindsa encouraged Ms. Thandi to become a care aide because she enjoyed he work so much. She did everything in the house, and did her job too.

[103] Pre-accident, Ms. Thandi never observed Ms. Dhindsa with any health problems or physical limitations, and Ms. Dhindsa never raised any complaints along those lines either.

[104] Ms. Thandi learned about the accident when Ms. Dhindsa called her from the hospital. When Ms. Thandi met her at her home, she was very sad, crying and in a lot of pain. After the accident Ms. Thandi stayed in touch by bringing her over for a visit a few times. She was always in a "disturbed" state because of her injuries and her uncertainty about recovery.

[105] Ms. Dhindsa did not do any household chores. Ms. Thandi helped out by doing some housework for her when she visited.

[106] By 2018, Ms. Dhindsa was somewhat better, but not much better, and she continued to complain of pain. She also spoke of missing her job. In 2019, Ms. Dhindsa was "just okay" but was feeling a lot of guilt that she could not help out around the house.

[107] Ms. Thandi said Ms. Dhindsa's personality has changed. She was sociable before, but not now. Their visits are not at all active as Ms. Dhindsa just wants to sit, and she only talks about her pain. This has impacted their relationship.

[108] Ms. Thandi was asked about the duties of care aides, and she described duties in similar fashion to other witnesses. She said aides need to use a lot of strength with residents, and sometimes all the strength they have to ensure the person does not fall.

[109] In cross-examination, Ms. Thandi said she was aware of the abuse and other problems that Ms. Dhindsa went through with her ex-husband. There were problems associated with the divorce, including social problems, and Ms. Dhindsa had problems with anxiety during this time. She noted, however, that Ms. Dhindsa only got upset during those times when her ex-husband had done something to bother her.

[110] Ms. Thandi did not agree that Ms. Dhindsa's return to work in 2022 was a "happy moment in her life", saying "that's not how it is". Ms. Dhindsa does not work that much, "can't do the work" and complains of pain as a result of work.

### E. Angela Millar

[111] Ms. Miller is the former executor director and administrator of Amherst Private Hospital, the long term care facility where the plaintiff worked from 2006 to 2016.

[112] Ms. Millar said that at those times when their schedules coincided, she probably saw Ms. Dhindsa every day. The organisation was also fairly small, with 50 or 60 care aides and about 100 employees in all.

[113] Ms. Millar said Ms. Dhindsa was "incredibly reliable" and was one of the most conscientious employees they had. She trained across all departments as a casual employee and was always available for casual, last-minute shifts, doing everything to increase her hours. Ms. Dhindsa was one of the few employees who came up from casual status, and from the kitchen at that, to two permanent positions. Ms. Dhindsa was one of the more impressive employees Ms. Millar came across over the ten years she worked there. She was positive, caring, kind and reliable.

[114] As care aide, Ms. Dhindsa was responsible for 8 to 10 seniors, most of which required full care in terms of being wheelchair-bound and needing assistance in getting out of bed, for personal care, and for meals, exercise and activities.

[115] When asked to describe the duties of a recreation therapist, Ms. Millar said the job involves regular day shifts where the therapist helps seniors to and from the activity areas, organizes events and helps with lunch. There is a lot or organisation and planning, and the coordinating of volunteers. The physical aspect is mostly in getting the people to the event and back again.

[116] The role of a care aide is different as there are varying levels of cognitive abilities of the residents. The job is very physically demanding, and it is emotionally demanding as well because the aides form relationships with the people in care, and sometimes the residents do not cooperate. The aides have to work closely with co-workers and nurses.

### F. Beverly Tanseco

[117] Ms. Tanseco is the executive director at Holyrood Manor, the seniors facility where Ms. Dhindsa currently works.

[118] Ms. Tanseco described the duties of a care aide in similar fashion as had already been heard at trial. She said the work was physical in the sense there is lifting, and the need to use lifting equipment, and a lot of movement including carrying and stooping. The physical care of residents involves bathing, toileting, feeding, grooming and general support and interaction.

[119] Ms. Tanseco has had only very limited interaction with Ms. Dhindsa and felt unable to comment on her work ethic. Ms. Dhindsa has “casual” status, meaning she does not have a particular “line”. Call-outs of casual employees are done according to seniority.

[120] Ms. Tanseco said she was contacted by an occupational therapist, who wanted to do a site visit. Ms. Tanseco granted permission to do so. In cross-

examination, Ms. Tanseco said the purpose of the visit was to see how Ms. Dhindsa moves in order to ensure she is able to work safely. She said no limitations were reported to her.

[121] Ms. Tanseco said Ms. Dhindsa never showed a need for any workplace accommodations and never asked for any, although in cross-examination she recalled that it was recommended Ms. Dhindsa be allowed to use a stool for aspects of her work.

### G. Marcella Huberdeau

[122] Ms. Huberdeau is an occupational therapist who in April 2017 was assigned by ICBC to manage Ms. Dhindsa's case. She continued with that case management until October 2019.

[123] Ms. Huberdeau prepared an initial assessment of Ms. Dhindsa dated April 7, 2017. She observed swelling in Ms. Dhindsa's left foot, swelling around her left wrist, movement limitations in her left wrist and decreased grip strength.

[124] She prepared a progress report on April 20, 2018, which was about a year later. There, she concluded Ms. Dhindsa did not demonstrate an ability to tolerate warehouse work.

[125] In a progress report dated February 8, 2019, Ms. Huberdeau noted Ms. Dhindsa's reports of ongoing low back pain.

[126] Ms. Huberdeau said it was difficult to assess Ms. Dhindsa's return to work status because Ms. Dhindsa "had no actual job" then. Ms. Dhindsa had injuries that Ms. Huberdeau believed would impact her ability to work but she did not have the information necessary to determine her functional capacity. Also, she understood that Ms. Dhindsa had not yet been medically cleared to return to work.

[127] In cross-examination, Ms. Huberdeau agreed that she had recorded some improvements in Ms. Dhindsa's ability to perform household tasks, noting she also had adaptive equipment by this time, but she still had limiting pain.

### H. Stephanie Davidson

[128] Ms. Davidson is an occupational therapist who took over the management of Ms. Dhindsa's case in November 2019.

[129] In her clinical notes dated November 4, 2019, Ms. Davidson said "she hasn't been able to make significant progress in many respects, and I believe this is largely due to chronic fatigue from lack of sleep". She noted Ms. Dhindsa was able to do light household duties and cooking, but mostly with her right arm.

[130] Ms. Dhindsa's treatments were put on hold starting in December 2019 on learning she was pregnant. In November 2020, Ms. Dhindsa was using five pound exercise weights, but she had not yet been approved to use more weight than that. Ms. Davidson said a care aide would likely be required to lift up to 20 pounds.

[131] Ms. Davidson wrote a discharge report dated November 27, 2020. She testified that this report "was based on multiple meetings". She wrote:

> In summary, Rajbir is still facing functional limitations from injuries to both her back and left wrist. She has been engaging in active rehabilitation, massage therapy, and chiropractic treatments. Her progress is now very slow and she is also in the second trimester of her pregnancy so an attempt at paid employment is far from being reasonable.

[132] Ms. Davidson recommended that they not proceed with return to work efforts until three months after childbirth. If she needed OT services then, she could ask that they be resumed.

[133] OT services resumed in February 2022. Job search was discussed in March, with Ms. Davidson recommending Ms. Dhindsa pursue a recreation therapist position. Ms. Dhindsa had completed a first aid course, and was contemplating getting a Class 4 drivers licence. She I took the driving test in April but unfortunately did not pass.

[134] In a progress report dated November 21, 2022, Ms. Davidson noted Ms. Dhindsa was now working, but she had been unsuccessful in securing a position

as a recreation therapist. Ms. Dhindsa was experiencing increased pain but was trying to acclimate to the new routine.

[135] At trial, Ms. Davidson said she did not recommend that Ms. Dhindsa work part-time as a care aide because she felt the work was too heavy for her. In a reassessment report also dated November 21, 2022, Ms. Davidson said “the long term feasibility of this role is uncertain to this writer”. At trial, Ms. Davidson noted Ms. Dhindsa had difficulty doing multiple shifts in a row, and she was not able to do bath shifts at all, which involve bathing patients all day. She also would not take any overtime shifts.

[136] In a reassessment report dated January 20, 2023, Ms. Davidson noted that Ms. Dhindsa had taken a three week break due to pain flareups. At trial, Ms. Davidson said the flareups had come about after Ms. Dhindsa attempted to work three days in a row. Ms. Davidson recommended Ms. Dhindsa proceed with a gradual return to work and not work on consecutive days.

[137] Ms. Davidson testified that she regularly advised Ms. Dhindsa that the role of care aide was too heavy for her and that she should instead pursue employment as a recreation therapist.

[138] In cross-examination, Ms. Davidson agreed that all treatments were put on hold in December 2019 and there were no further steps taken towards employment until March 2022.

[139] As for the Class 4 licence, Ms. Davidson said such a licence had evidently not been needed before, but it now seemed to be common. It would have helped Ms. Dhindsa’s qualifications if she had obtained a Class 4 licence.

### I. Agreed Facts – Treatments and Attendances

[140] The parties filed an agreed statement of facts that detailed the nature and number of treatment visits and medical attendances. Ms. Dhindsa had 424 treatments of various types (physiotherapy, massage, chiropractic and occupational

therapy) and 39 counselling sessions. She also had 80 appointments with physicians and two hospital attendances, one of which was a five-day stay.

### J. Dr. Sandeep Sawhney – Family Physician

[141] Dr. Sawhney is the plaintiff's family physician. He provided a report dated May 7, 2019.

[142] Dr. Sawhney's first post-accident appointment with Ms. Dhindsa took place on January 19, 2017. She complained of pain in her neck, back, shoulders, left foot, left arm and left forearm. She had a left wrist fracture. She also complained of headaches and insomnia. On examination, Dr. Sawhney found tenderness and stiffness in her neck, back, shoulders and left arm and forearm.

[143] Dr. Sawhney continued to treat Ms. Dhindsa for her injuries and symptoms, noting continuing pain symptoms in the previously-reported areas, inability to walk, stand or sit for prolonged periods, anxiety and increased stress levels, pain radiating from her back to her leg, headaches, insomnia, left hand paresthesia and memory deficits.

[144] Subsequent investigations and procedures revealed fractures of her first three left toes and an MRI finding of an annular tear at L4/5 with disc protrusion superimposed on a generalized disc bulging. A CT scan showed her left wrist fracture to be a comminuted intra-articular distal right radial fracture with mild to moderate displacement of the fragments, as well as an ulnar styloid fracture. In his testimony, Dr. Sawhney explained that "comminuted" means broken in several places. Here, surgery was required to put the pieces back together.

[145] Dr. Sawhney considered Ms. Dhindsa to be unable to work as of the date of his report.

[146] Dr. Sawhney's description of the effects of Ms. Dhindsa's injuries are essentially consistent with the description given by Ms. Dhindsa in her testimony at trial. He said these injuries and symptoms were caused by the accident.

[147] As for treatment recommendations, Dr. Sawhney recommended Ms. Dhindsa continue with her various therapies to address period exacerbations of her symptoms, although he acknowledged these would be largely palliative in nature. The therapies mentioned were chiropractic, massage therapy, physiotherapy and active rehabilitation. He recommended that Ms. Dhindsa be as active as possible.

[148] Dr. Sawhney also recommended follow-up by a physiatrist for ongoing care of her chronic pain symptoms, pain and insomnia medications as needed, and monitoring of her worsening depression and anxiety.

[149] I have not summarized Dr. Sawhney's opinion on prognosis given its dated nature and the fact that there are more recent reports from specialists. I do note that Dr. Sawhney did not expect Ms. Dhindsa to make a full recovery and thought she would likely experience chronic pain on a long-term basis.

[150] In his testimony at trial, Dr. Sawhney said that he continues to hold the same opinion about his diagnoses.

[151] In cross-examination, Dr. Sawhney acknowledged that he had not met Ms. Dhindsa prior to the accident, and any information concerning her pre-accident status came from her. He did not review any pre-accident clinical records.

[152] He acknowledged that Ms. Dhindsa is no longer receiving massage treatments, but he said they are useful for flareups. He always recommends an exercise program, which can be a home-based program, but it is not a cure-all.

[153] Dr. Sawhney was aware Ms. Dhindsa was working part-time as a care aide, but said she has issues with that and so she needs days off in between her shifts. Her wrist and back pain interfere with her work. He said "I think she should look for a new line of work".

### K. Dr. Bertrand Perey – Orthopedic Surgeon

[154] Dr. Perey is an orthopedic surgeon who specializes in the field of hand, wrist and elbow surgery. He prepared a report dated June 23, 2020.

[155] In his report, Dr. Perey recounted the history of treatment of Ms. Dhindsa's left wrist fracture, noting that it was placed in a cast initially, operated on by Dr. Schweigel on January 24, 2017, where a volar plate was used to secure her left distal radius, and the subsequent removal of the plate by Dr. Schweigel on February 1, 2018.

[156] Dr. Perey noted Ms. Dhindsa's ongoing complaints of pain in the volar ulnar area of her left wrist, which she reported was aggravated by use or through rotation of her forearm. These symptoms occurred daily. She also reported associated grip weakness and forearm numbness.

[157] Dr. Perey noted Ms. Dhindsa's report that her current worst issues were related to her low back, as she was having daily low back pain. She said this was a more significant impairment than her wrist.

[158] On examination, Dr. Perey noted the 65 mm surgical scar and a reduced range of motion in her left wrist as compared to the right. From the various x-rays available, Dr. Perey noted that the fracture was a displaced intraarticular fracture of the left distal radius, and involved a significant dorsal displacement, shortening and comminution of the articular surface. Later x-rays showed a healed distal radius fracture, but with a 4 mm articular step, which Dr. Perey later explained meant it had healed but not to normal, and a 2-3 mm of radial shortening with consequent misalignments.

[159] Dr. Perey concluded as follows:

> Ms. [Dhindsa] sustained a significantly displaced, intraarticular fracture of the distal radius. Her fracture reduction and plate fixation did improve the overall anatomy but did not restore it to normal. She has residual boney anatomy abnormalities, involving shortening of the radius and irregularities of the articular surface that are quite common following these types of injuries.

[160] Dr. Perey opined that Ms. Dhindsa's residual symptoms were associated with the relatively longer ulna, as compared to the now-shortened radius, and that her symptoms could be improved through surgery that would shorten the ulna. However, he also said:

> I am not certain, however, that the degree of her pain about the wrist is significant enough to warrant intervention. Her loss of motion and grip weakness will be permanent. It is highly unlikely that her symptoms will ever worsen in the future.
>
> …
>
> I do not believe that any further physiotherapy or any kind of rehabilitation to Ms. [Dhindsa's] left wrist will be of any benefit.

[161] In his testimony, Dr. Perey said the shortened radius may cause pain in the (longer) ulnar area given that the bone lengths do not match. An irregularity in the articular surface can lead to a loss of wrist range of motion as well as weakness, but it rarely causes pain.

### L. Dr. Navraj Heran – Neurosurgeon

[162] Dr. Heran prepared two reports in this matter, the first dated November 23, 2020 and the second dated September 14, 2022.

[163] Dr. Heran first saw Ms. Dhindsa on April 28, 2020, at which time he noted her history of left arm fractures and problems with pain in her neck, mid back and low back, and pain extending from her neck into her shoulders. Her low back pain extended into both hips.

[164] An MRI scan done on January 5, 2019 showed "a broad-based bulge of the disc at L4-5, resulting in a narrowing of the nerve root opening (to use non-technical terms) and some pressure or impingement on the L5 nerve roots. He also noted an annular tear (or rupture of the lining) of the disc.

[165] Dr. Heran concluded Ms. Dhindsa presented with myofascial pains but probably also had "discogenic low back pain with some intermittent radiculopathy". He concluded:

> I felt she would benefit from epidural steroid injections for her low back first and foremost. There was obviously an indication for surgery if her symptoms did not settle but the natural history of most disc problems is they do get better as time goes on.

[166] Dr. Heran made arrangements for a referral to Dr. Gracias.

[167] Dr. Heran next saw Ms. Dhindsa on October 24, 2020. He again noted her "myofascial type discomfort" in her trapezius, interscapular and paralumbar areas. Her low back had almost full range of movement but both flexion and extension produced low back pain and some radiating pain down the right leg. One test in particular was supportive of nerve irritation being the cause.

[168] Dr. Heran made the following diagnoses:

a) multiple orthopedic fractures;

b) myofascial injuries involving neck and upper torso, which in testimony he explained would be categorized as "whiplash, grade II" injuries;

c) myofascial injuries involving low back;

d) mechanical low back pain arising from structural spinal sources, with right great than left L5 radiculopathy, and right-sided L4 radiculopathy;

e) cervicogenic headaches;

f) features of depression/anxiety as a consequence of functional impairments, pain/discomfort and sleep disturbance.

[169] Dr. Heran attributed all of these issues to the motor vehicle accident.

[170] In terms of prognosis, Dr. Heran deferred to others on Ms. Dhindsa's orthopedic injuries, but said the following about the myofascial and mechanical or structural issues:

> From the myofascial source of symptoms, she has almost certainly plateaued at this point in time, as typically these types of issues are typically plateaued by two to three years following an injury or impairment… With respect to her low back mechanical sources of pain, this is an area that one cannot declare as being plateaued and does appear to actually have worsened as time has gone on, prompting the need for imaging. There seems to have been a transition from myofascial to more prominent mechanical structural sources of pain.

[171] As for treatment recommendations, Dr. Heran said treatment thus far had been reasonable, and he noted the arrangements that had been made for epidural steroid injections that he had recommended. Given the lack of improvement, "if anything just some marginal worsening", surgery was now a stronger consideration for her low back.

[172] Surgery would involve recovery time of three to six months with no heavy lifting, bending or twisting activities prior to resumption of normal activities. He said, "The goal of the surgery is to give her about a 70-85% chance of 70% or more reduction in [her] pain". He described the surgery risks as "small".

[173] Dr. Heran said that, from a functional perspective, "the limitations that she has had have been reasonable". He added:

> One would not have anticipated her being able to return back to her previous work with an aggregate of symptoms that she has. Her main limitations are really in her low back. I would anticipate though after corrective remediation of her low back, that after appropriate rehabilitation period of three to six months, she would be able to return back to work in some capacity. It would likely not be a capacity where she has to do anything of sustained postural or positional nature or requiring any loadbearing endeavors. Sedentary type of work would probably be that she would be capable of.

[174] Dr. Heran provided an updated report in September 2022 with the benefit of an updated history and clinical records and a further physical examination he conducted on September 9, 2022.

[175] Ms. Dhindsa reported that her neck and upper torso symptoms, and headaches, were unchanged, but her low back pain had "definitely worsened".

[176] Dr. Heran said his opinion on diagnoses and causation was unchanged from his earlier report. As to prognosis and recommendations, he said:

> My opinion her remains unchanged from previous, but I will add that, in my opinion, she should have a repeat MRI scan of her lumbar spine. This will help ascertain any deterioration that has occurred given the worsened right leg radiating pain she outlines, as well as the worsened low back pain in general. My opinion is stronger at this point in time that surgical management for her low back definitely should be offered.

> With respect to the functional capacity, she is hoping to get back to work for her own mental health perspectives in order to be reintegrated back into society to a degree. I still think this is of guarded prognosis in terms of what she will be able to do unless she has remediation of her low back pain established first. I do think she should try, at least in a sedentary to light type capacity. As noted, light type activities will likely be difficult for her unless she can optimize break taking, postural adjustments and even have opportunities for lying down and resting at times.

[177] At trial, Dr. Heran said he has performed about 600 surgeries a year over the last 19 years. Forty percent of those surgeries are to the lower back and include cases involving nerve root issues.

[178] At trial, Dr. Heran made reference to a “cultural tendency to emphasize pain”, something with which he is familiar, but he said he took that into account and Ms. Dhindsa’s “situation was nonetheless valid”.

[179] In cross-examination, Dr. Heran said he gave only limited consideration to any mental health issues or stressors that might have been present in Ms. Dhindsa’s case, as these are not really his concern.

[180] Dr. Heran said the steroid injections he recommended could confirm the diagnosis he had made and might also assist her with her symptoms.

[181] Dr. Heran was not aware that Ms. Dhindsa had returned to part-time work as a care aide, but was glad to hear it.

### M. Dr. Sundeep Thinda – Registered Psychologist

[182] Dr. Thinda prepared a report dated November 17, 2022. In that report he said Ms. Dhindsa reported a mix of depression and anxiety symptoms, and the persistence of her headaches and pain symptoms “make it difficult in terms of her depression and anxiety management”. He said “she reported she experiences numerous ongoing symptoms that affect her focus and concentration and cause sleep difficulties”.

[183] Dr. Thinda diagnosed the following disorders:

a) somatic symptom disorder, with predominant pain, persistent, mild (SSD); and

b) major depressive disorder, recurrent episode, mild to moderate (MDD).

[184] He noted Ms. Dhindsa had a pre-existing depression diagnosis that predated the accident. He found no residual symptoms related to PTSD or trauma from the accident. In his testimony, he said the earlier depression was not disabling, and it had resolved by the time of the accident.

[185] He noted that although Ms. Dhindsa had undergone counselling post-accident, “there does not appear to be a significant change from her pre-counselling functioning”.

[186] Dr. Thinda concluded these diagnoses were directly related to the changes in functioning following the accident. Her prior depressive disorder was related to the psychosocial or situational stressors associated with domestic conflict with her ex-husband. This prior history of depression made her vulnerable to the development of a further depressive episode, as well as SSD, and the current depression could be seen as an aggravation of a pre-existing diagnosis of depression, but Dr. Thinda noted her current depression diagnosis was qualitatively different than the prior one. Also, had the accident not occurred, it is unlikely she would have developed SSD.

[187] Dr. Thinda made the following recommendations:

> It is recommended she continue monitoring her mood with her physician with consideration of medication trials as deemed appropriate by her medical specialists. Psychological/counselling treatment for supportive purposes is recommended.

[188] In terms of vocational disability, Dr. Thinda said:

> Ms. Dhindsa’s symptoms of depression combined with her pain experience make it unlikely she is vocationally competitive in a similar job (to her pre-MVC job) or would be able to return back to the workforce in the near future.

[189] In terms of general disability, he said:

> I estimate that continuing to cope with her pain and emotional symptoms on an ongoing basis will continue to have a negative effect on her current and/or future functional in social and recreational areas. Chronic pain can also lead to some memory, attention and concentration difficulties, which is the current case (mild level). The depression related difficulties would similarly negatively impact her pace and persistence (due to low motivation, interest, fatigue, and low energy). Overall, I anticipate that Ms. Dhindsa will be challenged in any activities with deadlines, time pressures, high expectations for productivity, etc. due to symptoms of depression and anxiety and interference from her pain experience. Based on the current assessment these difficulties are likely to persist into the future.

[190] Dr. Thinda said the following concerning treatment recommendations:

> Based on the file notes and current assessment, it appears Ms. Dhindsa has reached maximal clinical recovery; she should continue to monitor her mood and anxiety functioning with her physician. For supportive/maintenance therapy, it is recommended she have approximately 12 sessions per year of counselling, on an ongoing basis as needed.

[191] In cross-examination, Dr. Thinda acknowledged a physician's note that there was a cultural context to her pre-accident domestic stressors insofar as divorce was contrary to both her culture and her family's wishes. He agreed that her issues with her ex-husband had been a significant stressor in her life.

[192] Dr. Thinda agreed that incidents of suicidal ideation would be potentially significant, but he said he would need more details about it. He said Ms. Dhindsa did not report that she had ever felt suicidal.

[193] Some of his testing results indicated Ms. Dhindsa was managing negative impressions, but he noted that this was a characteristic of accident victims and he had moderated the severity of his diagnosis to reflect that factor.

[194] Dr. Thinda was unaware that Ms. Dhindsa had returned to work as a care aide.

### N. Jeff Padvaiskas – Occupational Therapist

[195] Mr. Padvaiskas conducted a six-hour work capacity evaluation of Ms. Dhindsa on September 6, 2022 and prepared a report dated October 11, 2022. His report is lengthy, and so I will summarize it selectively.

[196] Through a combination of formal effort testing and clinical observations, Mr. Padvaiskas concluded Ms. Dhindsa participated in testing with “competitive levels of physical effort within her pain tolerance”. From that, he concluded test results were an accurate measure of her physical capacity.

[197] Mr. Padvaiskas noted the plaintiff had deficits with grip strength (which was highly asymmetrical), durability for reaching with her left arm, repeated stair climbing, balance-intensive activity (due to her use of a closed stance to limit leg pain), left-side strength for lifting, carrying, pushing and pulling, sitting tolerance (one hour before needing a break), prolonged walking (30 to 40 minutes tolerance only) and standing (30 to 60 minutes).

[198] Tests of the plaintiff’s strength for lifting carrying, pushing and pulling showed she was “capable of work activity in the sedentary, select light and select entry level medium strength categories as for the DOT definitions”. In testimony, Mr. Padvaiskas said Ms. Dhindsa was capable of “isolated medium strength tasks at the lower end, but not constant”. More specifically, he said the plaintiff has a comfortable lifting and carrying limit of 10-11 pounds, but she “has to be more strategic beyond that”.

[199] As for overall endurance, Ms. Padvaiskas said:

> In terms of overall work endurance Ms. Dhindsa is able to perform full time work consistent with the abilities and limitations as outlined in the body of this report. She is best suited to activities which allow more or less upright postures; opportunity to sit and stand and otherwise take breaks or change positions at her discretion; close range reaching and handling; and light strength.

[200] Mr. Padvaiskas considered four categories of employment that might be proposed for Ms. Dhindsa, and commented on each of these:

a) Recreation aide: Testing results indicated that Ms. Dhindsa is capable for work as a recreation therapy aide with suitability limitations. She would have limitations moving equipment, sitting and standing. She might also have difficulty handling any resisted movement by patients.

b) Care aide: Tests showed Ms. Dhindsa is not suited to this work. She did not demonstrate the required strength tolerances (needed for handling of patients, among other things), tolerances for reaching and handling, minimum body positioning abilities (such as bending or stooping) or likely demands for prolonged sitting and walking. At trial, Mr. Padvaiskas said she did not demonstrate durability for full time work of this type and he had concerns about her long term durability even on a part time basis. He said care aide was “a poor long-term job option” for her.

c) Kitchen aide or housekeeper: Mr. Padvaiskas considered these options given Ms. Dhindsa’s past work in these fields. He said:

> Similar to reasons outlined for care aide above, work/functional capacity findings indicate that she does not demonstrate minimum suitability for the potential strength, upper limb coordination or body position expected physical requirements.

d) Warehouse worker: Mr. Padvaiskas said Ms. Dhindsa did not meet the strength demands, limb coordination requirements, or standing and bending tolerances for this type of work.

[201] Mr. Padvaiskas testified that the range of suitable jobs would be limited, as they would have to be low strength jobs with no prolonged postures. He said that a vocational consultant might have to be engaged to identify suitable employment.

[202] In cross-examination, Mr. Padvaiskas said workplace accommodations would help, but it would still depend on the overall demands of her job as the most significant concern is her durability.

## III. Defence Case

### A. Dr. Simon Horlick – Orthopedic Surgeon

[203] Dr. Horlick assessed Ms. Dhindsa on June 8, 2022 and wrote a report bearing that same date.

[204] After a review of the plaintiff's history, Dr. Horlick outlined the several areas of physical complaints, those being her left wrist, left foot, bilateral shoulder pain, neck pain and lumbar spine pain. He noted she had no current complaints concerning her left foot.

[205] At the time of the assessment, Ms. Dhindsa was not working but Dr. Horlick noted she was keen to return to work as a care aide and recreation therapist. He reported her as saying she was able to do most of her domestic duties without limitation or restriction.

[206] I will not summarize Dr. Horlick's physical examination findings in detail as many of them were recorded as normal, but a few bear mention:

a) The plaintiff had full grip strength in her left hand and full range of motion in her left wrist;

b) She had full range of motion in her cervical spine but had "elicitable trigger points" in the areas of pain she described in her neck, shoulder and upper back; and

c) Similarly, she had no range limitations in her thoracic and lumbar spine areas, but had "elicitable trigger points" in areas of her reported pain.

[207] Under the heading "Assessment", Dr. Horlick said the following about the plaintiff's neck and upper back issues:

> With respect to her neck and upper back complaints she has some residual intermittent discomfort in this region. Her physical examination elicited some trigger points in keeping with a diagnosis of myofascial-related pathology. She would benefit from further treatments directed towards this area and this will be discussed with regard to her lumbar spine.

[208] As for the plaintiff's lumbar spine issues, Dr. Horlick said:

> Regarding the latter she continues to have a focal area of discomfort in the right and left paralumbar region which is her present biggest ongoing area of musculoskeletal complaint. The physical examination of her lumbar spine is devoid of any measures of impairment except for elicitable trigger points in the right and left paralumbar region. Although she has imaging studies

> suggestive of a possible disc protrusion and some possible compression on exiting lower lumbar nerve roots, particularly S1, she has no evidence of radiculopathy or measures of nerve root compression in the lumbar sacral spine. Her ongoing residual complaints are more in keeping with residual myofascial pathology as per her cervical and thoracic region and treatments directed towards this type of pathology is primarily through physiotherapy with IMS. She has not been subject to the latter and I would strongly recommend she seek out a knowledgeable physiotherapist in this regard.

[209] Dr. Horlick did not recommend ulnar-shortening surgery, saying that given her mild symptoms and the potential gains, "it is likely not worth the time, effort and potential risk" of further surgery.

[210] As to employment capacity, Dr. Horlick said:

> However, it is clear at present that she is capable of returning to work, initiating a graduated return program based on her present examination, she would also endorse this as well. I would see no contraindication to her returning to work and no need for specific accommodations in her employment with her residual musculoskeletal complaints.

**Cross-Examination**

[211] In cross-examination, Dr. Horlick rejected the suggestion that his report implied "there is nothing wrong with her". He said she had:

a) Clinically measurable and observable alterations in the structure and function of her musculoskeletal system;

b) Elicitable trigger points in her trapezius and scapular areas, as well has her lumbar spine; and

c) A noticeable forearm scar that was sensitive and tender.

[212] Dr. Horlick acknowledged that Dr. Perey had significantly more experience in wrist injuries than he did. He also said he did not review the left wrist -x-rays of June 10, 2017, which Dr. Perey said depicted several abnormalities in the wrist post-surgery, but he said the x-rays he reviewed showed the same things. He agreed Ms. Dhindsa's wrist injury was a complicated wrist fracture. He disagreed that Ms. Dhindsa was likely to have wrist pain in future, noting that he saw her two years

after Dr. Perey's report and there are differences in what Ms. Dhindsa has reported in the way of wrist problems.

[213] He agreed that surgery to shorten the ulna might be warranted at some point, but said this depended on what was causing her subjective wrist pain.

[214] Dr. Horlick agreed that the plaintiff was very straightforward and credible in his dealings with her. Later, he said he did not believe the plaintiff was "faking".

[215] Dr. Horlick was not aware that the plaintiff continued to receive physiotherapy, chiropractic and massage treatments to the time of trial. He was generally aware she had received some treatments, but he said it appeared these had not been particularly useful. He did not agree that this left him with a "half picture" as his opinion was based on his examination.

[216] Dr. Horlick agreed that the plaintiff has chronic back pain as a result of the accident, and that one possible cause of that is damage to the muscle fibres, which has to be assumed since there is no way to measure that. He said he agreed with what he saw as Dr. Heran's primary finding, that the plaintiff's pain complaints were myofascial in nature. He also agreed that myofascial pain can be just as debilitating as mechanical back pain.

[217] While he agreed the imaging showed the plaintiff had a bulging disc, he did not agree that she had nerve impingement as his findings did not support that.

### B. Aman Rangi – Occupational Therapist

[218] Mr. Rangi provided a critique report in this case, commenting on aspects of the report of the plaintiff's occupational therapy expert, Mr. Padvaiskas. Mr. Rangi did not assess the plaintiff.

[219] I summarize Mr. Rangi's comments in the paragraphs that follow.

[220] Qualifications in the use of the EPIC lift capacity test: Mr. Padvaiskas said this is a battery of six tests "designed to be a safe, reliable, valid and practical test of

lifting and lowering capacity. Mr. Rangi said "use of the ERPC lift capacity test requires a rigorous process of certification to ensure safety, reliability and validity between test administrators". He noted that Mr. Padvaiskas was not EPIC certified.

[221] I note that the qualifications of Mr. Padvaiskas were not challenged during the qualification process and he was not challenged on this point in cross-examination.

[222] Physical effort: Mr. Rangi emphasized the importance of physical effort in functional testing, and noted the "distinctly guarded" wording on physical effort used by Mr. Padvaiskas. Mr. Rangi referred to several examples of results which he said suggested Ms. Padvaiskas' conclusion about "competitive levels of physical effort" were not fully supported.

[223] Reliability of subjective reports: Mr. Rangi provided examples of what he saw were matters inconsistent with the Mr. Padvaiskas' conclusion that the plaintiff's self-reports were consistent with clinical measures of her capacity.

[224] General errors: Mr. Rangi noted there were 15 errors over the 42 pages of Mr. Padvaiskas' report, including 13 gender inaccuracies (he/him instead of she/her). He said this suggests a lack of care in reviewing the report "potentially affecting accuracy of opinions".

[225] Inconsistency between demonstrated abilities and FCE conclusions: Mr. Rangi noted that the results of the plaintiff's Valpar reaching tests, which are done at three different levels, showed normal results in terms of work speed, yet Mr. Padvaiskas concluded the plaintiff's exposure to higher-level reaching ought to be confined to short periods.

[226] I digress momentarily to note that Mr. Padvaiskas dealt with this in his testimony, noting Ms. Dhindsa had to sit after transfer tasks, frequently repositioned herself, and made complaints of pain during the testing.

## IV. Positions of the Parties

### A. Plaintiff

[227] The plaintiff emphasizes the seriousness of her injuries, which include multiple orthopedic fractures, chronic neck and back pain, headaches, pain due to a herniated disc, and diagnosed psychological disorders of major depression and somatic symptom disorder. Ms. Dhindsa may need surgery in future to address both the mismatched bones in her forearm and the herniated disc in her back.

[228] The plaintiff's chronic pain continues to negatively impact her domestic life, limiting her ability to do housework and cleaning, and her ability to work. She is limited in her ability to do heavy lifting; sit, stand or walk for prolonged periods; or do any squatting. She is likely to have some degree of impairment in her general abilities permanently.

[229] The plaintiff says non-pecuniary damages should be assessed at $300,000, citing *Bhullar v. Logan*, 2021 BCSC 1060; *Zacher v. Prescesky*, 2019 BCSC 500; *Gill v. Apeldoorn*, 2019 BCSC 798; and *Parmar v. Rink*, 2019 BCSC 1626. The plaintiff says that while these cases involve similar types of injuries as Ms. Dhindsa has, Ms. Dhindsa's situation is worse as she has all of those injuries together.

[230] The plaintiff claims $282,676 for past wage loss, a figure derived by her expert economist, Nicholas Coleman.

[231] On the matter of loss of future earning capacity, the plaintiff says the evidence establishes she cannot work as a care aide on a sustainable basis. The alternative, recreation therapist, is job with few openings.

[232] The plaintiff submits that with her "myriad of limitations", the only employment she could hope to sustain would be with an employer with "near limitless empathy and understanding" who would allow substantial flexibility in her hours and working conditions. As such an employer may not exist, the reasonable conclusion is that the plaintiff is not competitively employable on a full-time basis.

[233] Based on these observations, and on the fact that Ms. Dhindsa's current work hours are about 25 percent of full-time, the plaintiff submits that her vocational disability stands at 75 percent. Applying that level of disability to the figures set out in Mr. Coleman's report brings about the figure of $766,436.

[234] The plaintiff advances a substantial claim for loss of housekeeping capacity. She did all household tasks prior to the accident, and now these are done by older family members, thus reversing a cultural dynamic in Indian families. This assistance should be reflected in the plaintiff's damages rather than as an in-trust claim for the unpaid caregivers: *Kim v. Lin*, 2016 BCSC 2405, aff'd 2018 BCCA 77.

[235] Mr. Coleman has assessed the present value of Ms. Dhindsa's household services at $1,042,713. Assuming the plaintiff can now manage 50 percent of the household duties reduces the figure to $521,356. However, the plaintiff says the prospect of future surgeries must also be taken into account, and she submits this is appropriately done by increasing the award to $750,000.

[236] Mr. Coleman also provided present values for future care costs, which total $309,500, to which, the plaintiff submits, a further allowance ought to be added to account for future surgeries, bringing about a total claim of $400,000 under this head of damages.

[237] The plaintiff's claim is summarized in the following table:

| | |
|---|---:|
| Non-pecuniary damages: | $300,000.00 |
| Past wage loss: | $282,676.00 |
| Loss of future earning capacity: | $766,436.00 |
| Loss of Homemaking Capacity: | $750,000.00 |
| Cost of future care: | $400,000.00 |
| Special damages (agreed): | $8,889.74 |
| Total: | $2,508,001.74 |

### B. Defendants

[238] The defendants were highly critical of the plaintiff, submitting she was an unreliable witness who failed to make straightforward concessions, gave flimsy explanations for her apparent capacity shown in the surveillance videos, provided varying answers about her ability to do housework, withheld important medical history from treating doctors and experts, and failed to avail herself of back injections and wrist surgery that might have offered relief.

[239] The defendants submit that the plaintiff's lumbar radiculopathy, whether intermittently symptomatic or not, is not a limiting feature, nor is her back pain generally a limiting feature in light of the evidence of her function as revealed in the surveillance videos.

[240] As for the plaintiff's mental health symptoms, the defendants say the accident cause a temporary exacerbation of her pre-existing mental health issues, which resolved by the time of her wedding in 2018 and the birth of her son in 2021.

[241] In light of the plaintiff's variable evidence as to her ability to engage in housekeeping, the accommodations (such as a lighter vacuum cleaner) that have improved her ability with housekeeping activities, and the extended family that is available to help with these tasks, the defendants submit there should be not award of loss of housekeeping capacity. Alternatively, it should be compensated as part of non-pecuniary damages.

[242] The defendants note that the plaintiff did not lead any confirmatory evidence that she was looking for employment at the time of the accident, as she asserted.

[243] The defendants were also very critical of the evidence of the medical and other professionals called by the plaintiff, and critical of some of the professionals themselves, arguing they lacked key information (Dr. Sawhney, Dr. Perey, Dr. Thinda, Dr. Heran, Mr. Coleman and Mr. Padvaiskas), lacked real expertise for some of the opinions proffered (Dr. Sawhney), had been found to have given

evidence of minimal value in another personal injury case (Dr. Sawhney), prepared a report containing errors (Mr. Padvaiskas), or engaged in advocacy (Dr. Thinda).

[244] Similarly, the defendants said the evidence of each of the various lay witnesses called by the plaintiff should be given little or no weight, for various reasons given.

[245] Turning to non-pecuniary damages, the defendants submit that the plaintiff's credibility issues and the "self-serving nature of the evidence as a whole" ought to be considered, together with the evidence that the plaintiff is functioning adequately in terms of her wrist and back insofar as she is capable of lifting and working as normal "albeit with some subjective pain". Her issues with mental health and headaches were pre-existing, and this must also weigh heavily in the assessment.

[246] The defendants cited four three cases in which non-pecuniary awards of $111,000, $115,000 and $140,000 were made (adjusted to current dollars) and argued the award here should be similar.

[247] Past income loss should be assessed using a two-year earnings average (2015 and 2016), which would capture income she earned at Amhurst care home and from the warehouse company. The award should reflect the time off taken for other things, being three months following the 2019 miscarriage and 12 months for the 2020-21 pregnancy and childbirth, for 15 months in all. Thereafter, the plaintiff took no steps to apply for work, only returning to work in October 2022.

[248] The defendants say the resulting range of $126,722 to $130,000 is an adequate award for past income loss.

[249] As for loss of future earning capacity, the defendants submit there should be no damages awarded at all as Ms. Dhindsa is currently capable of working full-time as a care aide, as the surveillance video demonstrates. The defendants submit that the plaintiff's part-time work reflects a choice on her part, reflecting her improved life circumstances post-marriage, not any disability.

[250] The defendants also submit that the plaintiff failed to mitigate her damages by undergoing the wrist surgery outlined by Dr. Perey and proceeding with the lumbar steroid injections recommended by Dr. Heran. In this regard, the defendants cite *Kaur v. Tse*, 2021 BCCA 137 and *Nagaria v. Dhaliwal*, 2018 BCSC 569.

[251] Finally, the defendants argue that there is no evidence supporting an award for future care costs. The only report on the subject is that of Dr. Sawhney, but his report dates from 2019 and his cost figures are unsubstantiated. The defendants acknowledge that their own expert, Dr. Horlick, recommended further treatment (IMS treatment, with massage therapy during that treatment course and kinesiology afterward), but take the position the plaintiff has since “undertaken these modalities”.

[252] The following is a summary of the defendants’ position on damages:

| | |
|---|---|
| Non-pecuniary damages: | $111,000 to $140,000 |
| Past loss of earning capacity: | $126,722 to $130,000 |
| Loss of housekeeping capacity: | $0 |
| Loss of future earning capacity: | $0 |
| Cost of future care: | $0 |
| Special damages: | $8,889.74 |
| Total: | $246,611.74 to $278,889.74 |

### C. Plaintiff’s Reply

[253] The plaintiff made submissions in reply to the non-pecuniary damages cases cited by the defendants, and to the defence argument on failure to mitigate.

[254] On the latter point, the plaintiff cited *Pearson v. Savage*, 2020 BCCA 133, and argued she did not unreasonably refuse lumbar injections given that she was in her first trimester of pregnancy at the time. When it was again appropriate for her to engage in active rehabilitation, she did so. In any event, there was no evidence that the injections would have improved her overall functional ability.

## V. Discussion

### A. Credibility

[255] Credibility is obviously a key issue in this case. While I agree there are some valid concerns with the plaintiff's credibility, I do not agree that these concerns go near the level of criticism levelled by the defendants.

[256] In this regard, I bear in mind that the plaintiff has been diagnosed with major depressive disorder, an affliction which affects her view of herself and her disabilities.

[257] That said, I agree it is concerning that Ms. Dhindsa failed to disclose pre-accident health issues to medical professionals on more than one occasion. Ms. Dhindsa explained that she did not think her pre-accident situation was relevant to the assessment of her post-accident injuries, which is not inherently disbelievable but, inconsistently, she also speculated that it might have been the result of a language difficulty, an explanation I do not accept given the circumstances.

[258] Ultimately, this issue does not affect my findings of fact, but it is a matter that has caused me to be cautious in drawing conclusions based solely on Ms. Dhindsa's credibility.

[259] I agree that Ms. Dhindsa was inconsistent in aspects of her testimony, stating certain things in seemingly absolute terms and later conceding some ability to do those activities, but I took this to be her manner of describing things and not an outright falsification, as the defendants contend. Her testimony to the effect "I can't do housework" is an example, as clearly she could and can do light housework, but not the level housework she did before.

[260] I turn now to the surveillance evidence. I agree that this indicates Ms. Dhindsa is capable of driving a car, shopping for some period of time, bending over, and lifting one or two items of moderate weight, and it is important evidence from that standpoint. However, this evidence was hardly the conclusive answer to the plaintiff's case that the defendants made it out to be because a principal issue in

this case is not just the plaintiff's intermittent ability to do these things, but her ability to lift, move and maneuver patients and be on her feet for an eight-hour work shift, and to do so on successive days, or to do anything other than light housework for short periods of time.

[261] As I have said, I conclude it is appropriate to be cautious with Ms. Dhindsa's testimony and, where possible, to look for confirmation in other evidence when making findings of fact.

### B. Findings of Fact

[262] I begin with those findings that are not controversial. As a result of the accident, Ms. Dhindsa suffered the following injuries:

a) a significantly displaced, comminuted intraarticular fracture of the distal radius of her left wrist and forearm, which required surgical reconstruction and the fixation of a plate, which was removed a year later as it was interfering with wrist movement. She is left with residual boney anatomy abnormalities, involving shortening of the radius, and irregularities of the articular surface.

   I accept Ms. Dhindsa's testimony that pushing or pulling with her left arm creates pain, numbness and stiffness;

b) Three broken toes in her left foot, which required her to wear an air cast boot for a number of weeks and which caused pain and limited her ability to walk or bear weight;

c) Myofascial injuries to her neck and upper back. These injuries have caused, and continue to cause, chronic pain;

d) A broad-based bulge of the disc at L4-5, with an annular tear of the disc and disc protrusion superimposed on a generalized disc bulging; and

e) Headaches, likely cervicogenic in nature.

[263] There is also a medical consensus (that is, from Dr. Heran and Dr. Horlick) that Ms. Dhindsa also suffers pain from myofascial injuries to her lower back, but Dr. Heran concluded Ms. Dhindsa's back pain was also due to "mechanical" or disc and nerve related issues. Dr. Horlick did not agree with Dr. Heran on that point.

[264] I prefer the opinion of Dr. Heran over that of Dr. Horlick. There was a curious divergence between the written opinion of Dr. Horlick and his testimony at trial. A fair reading of his report left the impression that there was little wrong with Ms. Dhindsa, that any issues were ones of "discomfort" only, with "discomfort" being a word he repeated throughout his report. By contrast, in his testimony at trial he agreed Ms. Dhindsa had chronic back pain and although it was myofascial in origin, myofascial pain can be just as debilitating as mechanical back pain. The contrast between his report and his testimony was very noticeable.

[265] In his report, Dr. Horlick did not really engage with or address either Dr. Heran's conclusions concerning mechanical low back pain or with the degree of Ms. Dhindsa's ongoing difficulties with neck, shoulder and low back pain, particularly given that he had found her to be "straightforward and credible". On a related and more specific point, although he concluded from his examination finding that there was no radiculopathy present in the low back, he did not address the fact that the radiculopathy issues were said to be intermittent, a point noted by Dr. Heran.

[266] For these reasons, I prefer Dr. Heran's opinion, which I accept, and I therefore conclude that, as a result of the accident, Ms. Dhindsa suffered an injury to her lumbar disc at L4-5 that contributes to her low back pain and intermittently causes pain radiating into her right upper leg. This injury may require surgical intervention in future, a prospect I assess at 25 percent. I assess the prospect of future wrist surgery at the same percentage.

[267] Finally, I address the plaintiff's psychological issues. The defendants say the plaintiff's psychological issues are mere continuations of her pre-accident issues. This submission does not accord with the only expert psychological evidence called at trial, that of Dr. Thinda, who said the plaintiff's earlier depression was not

disabling, it had resolved by the time of this accident, and while her earlier depression made her vulnerable to the development of a further depressive episode, her post-accident depression was qualitatively different than the current one.

[268] I am satisfied that the plaintiff's pre-accident depression was due to the issues she was having with her ex-husband, which I have not detailed in these reasons out of courtesy, but which were abusive and extreme in nature. These were situational factors that had essentially ended by the time of the accident.

[269] To address one specific point: I accept the plaintiff's evidence that she was never suicidal prior to the accident, which testimony was supported by the Surrey Memorial Hospital document that was put to her in re-examination.

[270] I also note the defendants' submission does not address Dr. Thinda's diagnosis of SSD, which he said would likely not have developed absent the accident.

[271] The defendants submit that the psychological issues must have abated by the time of the plaintiff's wedding in 2018, presumably because she testified this was a happy occasion for her, as was the birth of her son in 2021. I do not accept that an ability to be happy on specific occasions means that a person must not be suffering from a depressive disorder. For such a proposition to have had any weight, the defendants would have had to lead expert evidence.

[272] In summary on the psychological issues, I accept Dr. Thinda's evidence that, as a result of the accident, the plaintiff developed both MDD and SSD. Both of these disorders have had a significant impact on the plaintiff and on her ability to enjoy life. As several witnesses said, she is no longer a happy and social person but instead is depressed and withdrawn.

[273] As for the plaintiff's physical capabilities, I am satisfied she is not reasonably capable of full-time work as a care aide. I accept the opinion of Mr. Padvaiskas in this regard, whose evidence survived cross-examination entirely intact. I am comforted in this conclusion by the evidence of Ms. Davidson and Dr. Sawhney, two

witnesses who have had interactions with Ms. Dhindsa over extended periods. Ms. Davidson, the occupational therapist who was in charge of Ms. Dhindsa's case for about a year, doubted Ms. Dhindsa's ability to manage the work of a care aide, and she confirmed Ms. Dhindsa had difficulty doing multiple shifts in a row, or any bath shifts. Dr. Sawhney has been the plaintiff's family doctor since January 2017. He succinctly stated, "I think she should look for a new line of work".

[274] From the evidence as a whole, I conclude Ms. Dhindsa is capable of light or sedentary work on a full-time basis, at a position that allows her to take breaks, change positions or move around as she requires.

[275] From this same general body of evidence, including the evidence of the collateral witnesses, I accept that Ms. Dhindsa is capable of light housework, provided she can take breaks while doing so.

## VI. Damages

### A. Non-Pecuniary Damages

[276] The assessment of non-pecuniary damages is a very individual exercise, and so the cases cited by the parties only provide basic guidance. I will not address them individually, but each has both comparable and distinguishing facts.

[277] Based on the findings of fact detailed in the preceding section, I assess non-pecuniary damages at $160,000.

### B. Failure to Mitigate

[278] The defendants submit the plaintiff failed to mitigate her damages by undergoing the wrist surgery and lumbar injections suggested by medical professionals.

[279] The Court of Appeal has recently reconsidered the test to be applied where failure to mitigate is alleged. In *Haug v. Funk*, 2023 BCCA 110, a case not cited by either party in this case, the court rejected the notion that a defendant merely had to show a real and substantial possibility that the plaintiff would be better off had they

taken the treatment in question. The court referred to *Chiu v. Chiu*, 2002 BCCA 618, and then said:

> [56] The test for a plaintiff's failure to mitigate their losses is set out in *Chiu*. This Court stated at para. 57:
>
>> The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) <u>the extent, if any, to which the plaintiff's damages would have been reduced</u> had he acted reasonably.
>>
>> [Emphasis added.]
>
> [57] This test is drawn from the principles in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62. …
>
> …
>
> [61] In my view, the correct approach to mitigation is still based on the first principles set out in *Janiak*. This Court's decision in *Gregory* rightly interprets the wording in the second branch of the *Chiu* test as requiring the defendant to prove on a balance of probabilities that the plaintiff's injuries would have been reduced to some degree had they acted reasonably. Only once this is established does the Court go on to assess the reduction to the damages award based on the extent to which the injuries would have been avoided, which is the true hypothetical.
>
> …
>
> [69] *Janiak* imposes a not insignificant burden of proof on a defendant seeking to reduce a plaintiff's damages on the basis of a failure to mitigate. This is appropriate when one appreciates that a successful plea of mitigation completely denies the plaintiff that portion of their damages attributed to the failure. There is no apportionment of liability for this portion of the loss; mitigation and contributory negligence are distinct concepts leading to different assessments.
>
> …
>
> [71] This is all to say that a successful plea of failure to mitigate has a very significant impact on an otherwise successful plaintiff. It is fitting that the threshold set by *Janiak* in respect of both parts of the test be met.
>
> [72] The appropriateness of the high burden on the defendant is further demonstrated by distinguishing failure to mitigate from past and future loss of income, which are hypothetical losses that the plaintiff must prove. As *Smith* provides, when a hypothetical loss is being assessed, the plaintiff must first establish on a balance of probabilities a causal link between the events leading to the hypothetical loss and the accident, before the court will assess the chances of the loss having occurred. The plaintiff only has to prove those chances to a standard of a real and substantial possibility, which is appropriate given they have already discharged their causation burden. This

> is quite different from mitigation, in which the defendant bears the onus of showing that the plaintiff could have avoided a portion of their injuries.
>
> …
>
> [76] I note that the *Chiu* test is worded so as to absorb the hypothetical into the second branch of the test, by incorporating the words “the extent, if any, to which the plaintiff’s damages would have been reduced”. If this is misinterpreted by trial judges as conflating the assessment of the reduction of damages with the assessment of the failure to mitigate on a balance of probabilities, it may lead to situations where reductions are applied when it is not probable that treatment would have actually reduced the plaintiff’s damages. This must be avoided by keeping the stages of the analysis distinct.
>
> …
>
> [78] It is not enough to say that there is “a real and substantial possibility that the plaintiff would not be in her present condition but a better one instead, had she taken timely treatment.”

[280] Here, the evidence does not establish, on a balance of probabilities, that Ms. Dhindsa’s damages would have been reduced had she proceeded with the surgery to her wrist and the lumbar injections. Dr. Perey’s evidence was equivocal on the former point, as he stated her wrist deformity could be improved but questioned whether the degree of pain was significant enough to warrant intervention. He said the loss of wrist motion and grip strength would be permanent.

[281] As for the lumbar injections, they would address only the mechanical or radiculopathy issues which, in any event, were intermittent in nature, and would provide temporary relief at best. Those injections would not address the myofascial component of the plaintiff’s low back pain. If Dr. Horlick was correct in his opinion that all the plaintiff’s lumbar issues were myofascial in nature, then lumbar injections would not help.

[282] For these reasons, I conclude the defendants have not met their burden in proving the plaintiff failed to mitigate her damages.

### C. Past Loss of Income

[283] The plaintiff bases her claim on the calculations of her economist, Mr. Coleman. He prepared calculations of income loss, net of taxes, using three

scenarios: (1) employment as a warehouse worker, which resulted in an income loss figure $140,464; (2) employment as a care aide/recreational therapist ($282,676); and (3) employment as a warehouse worker until December 31, 2017 and then as a care aide/recreational therapist after that ($260,274). The plaintiff submits the second scenario is the most appropriate.

[284] Mr. Coleman later provided a report that incorporated further amounts earned by Ms. Dhindsa in the pre-trial period.

[285] The defendants say the first scenario is the most appropriate, and argue that there are several life events which would have interrupted the plaintiff's earnings even absent the accident, those being her 2019 miscarriage and her 2020-2021 pregnancy. They also argue that the non-wage benefits included in Mr. Coleman's calculations should not be included as there is no proof that these were paid to casual workers by all employers.

[286] I consider the third scenario to be the most appropriate. I accept that Ms. Dhindsa liked working as a care aide but wanted, and took, a break from it in February 2016. Her positive attitude toward care aide work, and her strong work ethic generally, were confirmed by the evidence of Ms. Miller. I expect she would have returned to work as a care aide by the end of 2017.

[287] Ms. Dhindsa said that while working at the warehouse she was looking for a suitable care aide position, but her evidence was not supported by copies of job applications or anything similar, so I conclude her job search had not begun in earnest, and from that I conclude the assumption she would have worked at the warehouse until the end of 2017 is a fair one.

[288] Given Ms. Dhindsa's experience as a care aide, I expect any care aide position obtained would have been one governed by an industry collective agreement, which includes non-wage benefits.

[289] I agree with the defendants that an adjustment ought to be made to reflect the fact Ms. Dhindsa took time away from work for personal matters during the period of

time in question. I also agree with the defendants' submission that this adjustment should be 15 months in total. I conclude the most straightforward way of addressing this is to reduce the claim proportionately. The loss period to the valuation date (February 13, 2023) is 2,227 days, the time out of the workforce is 450 days (15 months x 30 days) and so the resulting reduction is 20.2 percent (450 divided by 2,227).

[290] Mr. Coleman provided a second report to take into account further earnings in 2022 and 2023 that were not included in his first calculations. This reduced the net of tax income loss figure in the relevant scenario from $260,274 to $255,299. That figure must be reduced by 20.2 percent, and the resulting figure is $202,197.

[291] There is one loose end on this particular head of damages, which is the additional fact, introduced late in the trial, that the wage rate under the industry agreement had been increased by seven percent in 2023. However, no revised calculations were supplied to the Court. Accordingly, I leave it to the counsel to address any necessary adjustments between them.

[292] Finally, I note that the valuation date used by Mr. Coleman was February 23, 2023, reflecting an earlier trial date that had been lost due to no fault of the parties. Neither counsel took issue with this, or provided materials to enable the Court to reflect the actual trial date, presumably because it is also the start date for the assessment of loss of future earning capacity and the plaintiff's loss must be accounted for one way or the other. As Mr. Coleman said, using the actual trial date instead of the former trial date simply means that some of the future losses are moved to the past.

### D. Loss of Housekeeping Capacity

[293] The plaintiff claims $750,000 for loss of housekeeping capacity. This figure is based on figures developed by the plaintiff's economist, Mr. Coleman, who provided estimates of the annual number of hours provided by females for household services (excluding child care) and also the number of hours spent doing child care.
Mr. Coleman then applied a "housekeeper rate" to the household service hours and

a “child care” rate to the child care services, and provided present value calculations for those figures as they projected into the future. The resulting total (to age 100) is $1,042,743.

[294] Although Mr. Coleman then adjusted that figure to reflect an assumed 25 percent disability, the plaintiff submits the disability figure ought to be 50 percent, resulting in a claim of $521,357, but with a further adjustment to $750,000 to reflect the prospect of further surgeries.

[295] The plaintiff did not cite any authority endorsing this method of assessing loss of housekeeping capacity.

[296] In *Goss v. Sull*, 2021 BCSC 1853, I summarized the law on damages for loss of housekeeping capacity as follows:

> [197] The law relating to lost housekeeping capacity has been addressed by the Court of Appeal in two cases: *O’Connell v. Yung*, 2012 BCCA 57 [*O’Connell*] and *Kim v. Lin*, 2018 BCCA 77 [*Kim*].
>
> [198] In *O’Connell*, the court said:
>
>> [67] … As I understand the principle, it is the loss of a capacity – an asset – that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required … .
>
> [199] In *Kim*, the court said:
>
>> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff’s circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu* [*Liu v. Bains*, 2016 BCCA 374], “it lies in the trial judge’s discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage”: at para. 26.

[297] The Court of Appeal revisited the issue in *McKee v. Hicks*, 2023 BCCA 109, a case not referenced by counsel in this case. There, the court said:

> [94] Because the decisions of this Court in *Kim v. Lin*, 2018 BCCA 77 and *Riley v. Ritsco*, 2018 BCCA 366 ("Riley") appear to have engendered some confusion as to the proper approach to awards for loss of housekeeping capacity, I will review the development of the basic principles in the area.
>
> …
>
> [108] It is important to recognize that *Kim* and *Riley* dealt with somewhat different issues. *Kim* considered a situation of genuine incapacity – one where the injuries made it unreasonable to expect the plaintiff to perform some household tasks. *Kim* established that such claims are typically to be dealt with by awarding pecuniary damages. Further it states that such damages should generally be assessed with a view to the cost of obtaining replacement services on the open market.
>
> [109] *Kim* recognizes, however, that the preference for awarding pecuniary damages in such cases is not absolute. A judge retains discretion to assess damages as non-pecuniary, where it is considered appropriate to do so. The case also suggests (citing *McIntyre v. Docherty*, 2009 ONCA 448) that, in some cases, full compensation for the loss of housekeeping capacity may require an award of both pecuniary and non-pecuniary damages.
>
> [110] Especially in light of this Court's unanimous decision in *Riley*, I do not read *Kim* as suggesting that there is a discretion to award pecuniary damages in cases where the plaintiff remains capable of performing all household tasks but encounters some frustration or difficulty in doing them. Such cases are cases where the damages are non-pecuniary in nature.
>
> [111] *Riley* was such a case. The Court acknowledged that the plaintiff's difficulties had to be considered in assessing the amount of non-pecuniary damages but rejected the idea that a segregated non-pecuniary award was necessary. It also suggested that segregated non-pecuniary awards should not be made absent special circumstances.
>
> [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.

[298] I accept that Ms. Dhindsa has suffered a "true loss of capacity" here, as she no longer has the full physical capacity to do all household tasks. She has also suffered a loss in the nature of a loss of amenities as she is a person who took pride

in her housekeeping and cooking abilities and standards. I have taken the latter into account in my assessment of non-pecuniary damages, but I consider it appropriate to make a pecuniary award for her loss of physical homemaking capacity.

[299] The excerpt from *McKee*, quoted above, confirms that pecuniary damages for loss of homemaking capacity "should generally be assessed with a view to the cost of obtaining replacement services on the open market home and cooking". In other words, these pecuniary damages should not be assessed by attempting to value the economic loss of the plaintiff's services. I see other fundamental difficulties with the defendants' approach, including the question of what services have been included in the survey figures used by the economist (for example, is the time spent reading a book with your child included in "child care" hours?), but given the clear direction of the Court of Appeal in *McKee*, it is unnecessary to say more.

[300] I turn now to quantification of the pecuniary damages. Given the positions taken, the parties have been of little assistance to the Court on this issue. While I do not have firm evidence that is directly relevant on this point, I am satisfied there is a loss, it is pecuniary in nature, and the plaintiff should be compensated for it.

[301] The facts in *Goss* were similar. There, a 46 year old woman was found unable to do heavier household work, which was being done by her partner and son. I found the claim of $100,000 for weekly housekeeping assistance to be excessive, but accepted that compensation to allow some regular assistance was appropriate. The award was $20,000.

[302] Using that as a general guideline, I assess damages for loss of homemaking capacity at $35,000. The figure is more than that awarded in *Goss* because Ms. Dhindsa is younger than the plaintiff in *Goss* and the cost of outside help has no doubt increased since 2021.

### E. Loss of Future Earning Capacity

[303] The plaintiff's quantification of her loss of future earning capacity is based on the straightforward application of a percentage for work capacity reduction to the

plaintiff's expected lifetime earnings as a care aide or recreational therapist. The defendants, having taken the position that the plaintiff's work capacity or income-earning capacity was not in any way reduced, did not engage in this issue at all.

[304] The assessment of damages for lost future earning capacity is particularly challenging in this case because the plaintiff has lost the capacity to work full time as a care aide but is capable of full-time work in sedentary or light employment. As a result, this plaintiff's situation does not lend itself readily to the "percentage of disability" approach using her current beyond-her-capacity employment. Instead, what was needed was evidence of earnings that might be associated with viable alternative employment, which evidence was not led in this case.

[305] To put it another way, while it is possible to assess a percentage in terms of the plaintiff's capacity to work as a care aide, this does not necessarily mean this reflects her loss of capacity to earn income because she is capable of full time work at less physically demanding jobs.

[306] The future loss of capacity formulation set out in *Rab v. Prescott*, 2021 BCCA 345 has been repeated and applied many times. The Court of Appeal provided a succinct summary in *Steinlauf v. Deol*, 2022 BCCA 96:

> [52] In *Rab v Prescott*, 2021 BCCA 345 at para 47, this Court referred to a three-step process for considering claims for loss of future earning capacity, "particularly where the evidence indicates no loss of income at the time of trial". The first step was an evidentiary one: "whether the evidence discloses a potential future event that could lead to a loss of capacity". In cases like this one, where the event giving rise to a future loss is manifest and continuing at the time of trial, that evidentiary step is a given.
>
> [53] The second step, which in practical terms may prove to be the first, is whether, on that evidence, the plaintiff has established entitlement by demonstrating that there is a real and substantial possibility of an event giving rise to a future loss: see, for instance, *Perren v Lalari*, 2010 BCCA 140 at para 32. As this Court explained in *Rab* at para 29, establishing that threshold question, too, is less challenging in some cases than others:
>
>> … In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and

> likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. *Dornan* [*v Silva*, 2021 BCCA 228] was such a case.

> [54] As in *Dornan*, the existence in this case of a real and substantial possibility of an event giving rise to a future loss was obvious, and the assessment of its relative likelihood superfluous. There was no doubt that the respondent would suffer a significant loss of future earnings. Where the appellants say the judge erred here is in failing to go on to assess the possibility and relative likelihood of future hypothetical events that may affect the quantification of the loss, as discussed in the above passage from *Rab*.

> [55] As for the quantification, this Court described the process in *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32:

>> …An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8….

> [56] Accordingly, as discussed in *Dornan* at para 156, it became necessary to assess the respondent's without-accident earning potential, and what the respondent was likely to earn as a result of the accident. At the same time, as discussed in *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 251: "It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made".

[307] Those comments apply here. The "existence … of a real and substantial possibility of an event giving rise to a future loss" is obvious, with the plaintiff clearly meeting all the factors set out in *Brown v. Golaiy*, 1985 CanLII 148 (B.C.S.C.), and thus it is necessary to assess the plaintiff's without-accident earning potential. And ideally, with evidence of that earning potential.

[308] The authorities establish that in cases involving a loss of capacity but also a difficulty in identifying or assessing a specific pecuniary loss, the assessment of damages for loss of future earning capacity is more at large than it is a calculation or similar measurement: *Sinnott v. Boggs*, 2007 BCCA 267, at para. 16. In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), Finch J.A. said (at para. 43) that in some cases the assessment of this type of loss may be made by awarding the plaintiff's annual income "for one or more years". In that case, the court awarded the equivalent of about one year's income.

[309] In *Tigas v. Close*, 2024 BCCA 223, the court said:

> [47] This may well have been a case in which the judge could have decided he lacked sufficient evidence of actual and potential earnings, as well as a clear sense of future employment possibilities, and that he should make his assessment on the basis of the capital asset approach favoured by the Tigases and outlined in *Pallos*. I observe that the actual award is about three times Ms. Close's actual salary at the time of the accident. While awards under the *Pallos* approach often reflect one- or two-years' salary, the court may award more as appropriate. Indeed, awards of three years are not unheard of: see, e.g., *Oliver v. Loewen*, 2024 BCSC 604 at para. 142; *Sharma v. Sagoo*, 2023 BCSC 1136 at para. 148; *Patterson v. Solymosi*, 2019 BCSC 1508 at para. 105. An award of three years salary under the *Pallos* approach would, I think, have been immune to appellate intervention.

[310] That is the approach that I conclude ought to be used here.

[311] Mr. Coleman provided a 2022 notional earnings figure of $64,399, based on employment as a care aide. Evidence showed wage rates had increased by 7 percent from 2022 to 2023, so that figure would have increased to $68,906 by the time of trial. I consider three years to be an appropriate basis for the award given the nature and extent of the plaintiff's difficulties, the prospect that the plaintiff might have to take time away from work even at a sedentary job, and also to reflect the 25 percent prospect of future surgery. The resulting figure is $206,721.

### F. Cost of Future Care

[312] The defendants correctly note that the evidence on this claim is less than satisfactory. The evidence certainly does not support an award of $400,000, as claimed by the plaintiff.

[313] Dr. Sawhney's report is very dated (May 2019) and Ms. Dhindsa has since had most, if not all, of the treatments he recommended in his report. However, in his testimony, Dr. Sawhney recommended Ms. Dhindsa have ongoing access to massage treatments to deal with flareups.

[314] Dr. Thinda recommended that Ms. Dhindsa have approximately 12 counselling sessions per year, on an ongoing basis as needed.

[315] Dr. Horlick recommended IMS-directed physiotherapy treatments once a week for one month, followed by similar treatments once every two weeks for a further two months. He said that during treatment, the plaintiff should have massage therapy every two weeks for three months. After treatment, she should have six to 12 kinesiology treatments. The defendants submit that these treatments have already been carried out, but they did not support that position with any evidence.

[316] I accept these recommendations.

[317] Mr. Coleman quantified some of these items based on figures supplied by Dr. Sawhney, using $1,080 as the annual cost for massage therapy, but this was based on 18 sessions per year. I consider that 12 sessions per year would suffice. I therefore reduce Mr. Coleman's lifetime present value figure of $33,558 by one-third, to $22,372 (12/18 x $33,558).

[318] Dr. Thinda recommended counselling, "approximately 12 sessions per year, as needed". This is a somewhat inexact recommendation, but I conclude that eight sessions per year for five years would capture the essence of his recommendation. At the minimum fee for a registered psychologist ($200 per hour), this would total $1,600 per year, or $8,000 for five years.

[319] Dr. Horlick's recommendations are for IMS physiotherapy (eight sessions), massage therapy (already addressed) and nine (an average) kinesiology treatments. The plaintiff's list of special damages indicates a 2023 physiotherapy cost of about $90 per session, so eight sessions would total $720. I use the same per-session cost for kinesiology, which for nine sessions would total $810.

[320] I accept there is a prospect for further surgeries and attendant care costs. Dr. Perey indicated a six-week recovery time following wrist surgery, and I conclude that post-operative physiotherapy would almost certainly be required. Two sessions per week for six weeks would cost $1,080, but this would have to be discounted by 75 percent to reflect my earlier assessment of the likelihood this surgery will take place. The resulting figure is $270.

[321] The same considerations apply in the case of back surgery. Dr. Heran estimated a three to six month recovery time. Taking the average (19.5 weeks) and assuming physiotherapy twice a week (39 sessions in total), the resulting figure is $3,510. Applying the likelihood factor of 25 percent reduces the figure to $877.50, or $878, rounded.

[322] The total award under this head of damages is $33,050 ($22,372 + $8,000 + $720 + 810 + 270 + 878).

### G. Special Damages

[323] Special damages are agreed at $8,889.74.

## VII. Conclusion

[324] I assess damages as follows:

| | |
|---|---:|
| Non-pecuniary damages: | $160,000.00 |
| Past wage loss (net): | $202,197.00 |
| Loss of future earning capacity: | $206,721.00 |
| Loss of homemaking capacity: | $35,000.00 |
| Cost of future care: | $33,050.00 |
| Special damages (agreed): | $8,889.74 |
| Total: | $645,857.74 |

[325] The parties have leave to address any matters necessary to finalize the award. Costs are to the plaintiff unless there are matters which the parties wish to draw to my attention.

"Blok J."