

IN THE MATTER OF AN ARBITRATION PURSUANT TO

Section 148.2(1) of the Revised Regulations to the *Insurance (Vehicle) Act* (includes Amendments up to B.C. Reg. 126/2014, July 31, 2014) and the *Arbitration Act*, R.S.B.C. 1996. C 55

BETWEEN:

B.H.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

PARTIAL FINAL AWARD

Counsel for the Claimant: Thomas O' Mahony
Uzair Hameed
Caleb Perry

Counsel for the Respondents: Sandra Katalinic
Kaelyn Fountain

Arbitrator: Simon B. Margolis, K.C.

Hearing dates: June 3, 4, 6, 7, 10 – 14

Date of Award July 12, 2024

Executive Summary

1. On February 3, 2018, the claimant, while driving a 2015 Nissan Sentra BC, was rear ended suffering injuries.
2. The claimant seeks compensation, pursuant to the revised regulation of the Underinsured Motorist Provisions of the *Insurance (Vehicle) Act*, for damages she alleges she suffered in the accident. In particular, she seeks an award for the non pecuniary heads of general damage, past and future loss of capacity, loss of housekeeping capacity, cost of future care, special damages, an in trust award for care provided by her sister and tax gross up and management fees to be determined post issuance of this partial Award.

3. The parties have also advised that the issue of applicable deductions, if any, is to be determined following issuance of this partial Award.
4. Liability is not in issue.
5. The respondent argues that the credibility of the claimant is suspect and when viewed through that lens, the injuries sustained are much less severe than alleged and consequently any award ought to be modest.
6. The hearing proceeded for 9 days. Considerable evidence was adduced, including from the claimant, a number of family members, friends, her treating family physician and other medical experts who undertook independent assessments at the behest of either counsel for the claimant or the respondent. Evidence from economists was also adduced.
7. Although I may not refer specifically to all the evidence, I have carefully considered it in rendering this partial Award.
8. For the reasons that follow, I conclude that the claimant is entitled to the following award of damages:
 - a. Non pecuniary heads of general damage - \$85,000
 - b. Future Care - \$46,466.24
 - c. Special damages - \$2,106.67**Total: \$133,572.91**

Relevant background

9. The claimant born May 25, 1989, is currently 35 years old. She now lives in Mission with her 3 boys, [REDACTED], born February 10, 2017, [REDACTED], born May 24, 2020 and [REDACTED] born August 31, 2021.
10. The father of the children is her former common law partner, [REDACTED], whom she met in 2015 while working briefly for him as a trimmer at a marijuana facility.
11. The timing of their separation is not clear, but it appears the couple split in or around February 2023.
12. At the time of the collision, the claimant's son [REDACTED] was in the vehicle with her in a car seat. Following the rear end collision, the claimant got out of the vehicle, ensured her son was fine, calmed him down and spoke with the paramedic who attended. She says she wanted to go to the hospital, but the attendant advised her it was unnecessary. She then arranged for [REDACTED]'s brother to pick her up and take her

home. Later that day, as she was not feeling well, she attended at Mission Memorial Hospital where she was diagnosed as suffering soft tissue injuries as a result of the collision.

13. Prior to the accident, the claimant says she was extremely physically active, enjoying long walks, hiking, snowboarding, yoga, attending a gym, roller blading, kayaking, paddleboarding and volleyball, among others.
14. The claimant also enjoyed gardening and has been described as a fastidious housekeeper who was always on the move.
15. Shortly after the accident, the claimant got a headache, her back and hips were in a lot of pain, and she had tingling in her right arm.
16. Now, over 6 years following the accident, the claimant says she continues to experience the effects of the accident. In particular, she gets headaches 2 - 3 times/week and what she describes as migraines every 2 - 3 months. The claimant says her neck still hurts and she can't sit or stand for too long before needing to switch positions. She also says she is unable to walk like she used to.
17. The claimant says her back pain is the most significant remaining injury causing her excruciating pain when she gets up or bends over. She consistently has pain that sometimes radiates into her legs and thighs. She also experiences numbness in her toes every 2 - 3 months.
18. Additionally, the claimant says her mental health has suffered. She was not able to be the same mother to [REDACTED] as she was before the accident. She also says the impact of injuries damaged her relationship with [REDACTED] as he didn't fully understand what she was going through.
19. The claimant says she is often irritable, more emotional during the day and less able to concentrate because her sleep is now so poor.
20. The claimant's last year of formal education was Grade 10. The claimant's work history since then is spotty at best. She claims to have worked as a cleaner for various friends earning \$20 - \$25/ hour although provided no names of people for whom she worked. None of those people testified. She says she also worked full time between 2011 - 2016 as a trimmer at what she insists was a legal medical marijuana facility with the necessary permits and certificates on the walls, earning \$25/hour. She was, however, unable to name the company for whom she worked for 5 years or the full names of the individuals with whom she worked.

21. Prior to 2017, the claimant also never filed tax returns. Indeed, when she first filed tax returns in 2017, she acknowledged that any income attributable to her was a result of income splitting with [REDACTED] and not to any income she earned from employment.
22. After becoming pregnant with [REDACTED], the claimant quit work after approximately 6 months and says her plan had been to return to work about one year after her son's birth. She says she was unable to do so because of the accident in early February 2018. She then became pregnant twice in relatively short succession. The latter two pregnancies were much harder than the first. Indeed, the second pregnancy was high risk as a result of which she was prohibited from doing much before [REDACTED]'s premature C- section birth. The third pregnancy appears to have been a bit of a surprise and the claimant did not intend to work during that pregnancy. The claimant says that her ongoing injuries also made her ability to function and recover from the pregnancies much more difficult.
23. It is clear that the claimant was the primary care giver to the children even during those times she was still living with [REDACTED].
24. Curiously, while living with [REDACTED] in Mission after the accident, the claimant says she also took an apartment in White Rock where her sister [REDACTED] was living at the time "in order to be closer to her." The claimant says she would travel between Mission and White Rock with [REDACTED] – approximately a 50 minute car ride – regularly. Sometimes she says [REDACTED] came to White Rock; more often she drove back to Mission.
25. The claimant was pregnant with her second child when she says she gave up the apartment and moved back in full time with [REDACTED] in Mission.
26. Overall, the claimant describes her life since the accident as barely hanging on and needing to rely on others, in particular, her sister [REDACTED] (also the mother of three children) for assistance.
27. She says she tried doing some cleaning jobs but has been unable to continue with that.
28. In November 2022, the claimant and [REDACTED] incorporated and started an online fish distribution business, which had apparently been a long time dream of the two of them, having grown up around the industry through their father and grandfather. The business remains in its infancy and apparently is not yet profitable. The claimant says she assists with the online presence, has undertaken some deliveries to customers and has attended some farmers' markets but has been unable,

because of her injuries, to fully participate. She wonders if staying involved in the business will be sustainable.

29. [REDACTED], her former partner, [REDACTED], her stepmother [REDACTED], and her father [REDACTED], all testified on the claimant's behalf. The essence of their evidence is that the claimant was hard working, upbeat, driven, diligent and an outstanding mother. Since the accident, there has been, according to these witnesses, a noticeable decline in her abilities in all respects, including emotionally.
30. Ms. [REDACTED] also testified that she was in a position to hire the claimant for various projects in the film industry but that as a result of the claimant's injuries, the claimant was not able to accept these assignments.

Medical Evidence

31. The claimant has been treated by her family physician Dr. Erik Baasch and has been seen at the behest of her counsel by Dr. Raphael Chow, physiatrist, Dr. Navraj Heran, neurosurgeon, and Raph Kowalik, who undertook a functional capacity evaluation and provided cost of future care recommendations.
32. At the request of the respondent, the claimant was assessed by Dr. Zeeshan Waseem, physiatrist, Dr. Navjot Chaudhary, neurosurgeon, and Tania Percy, who undertook a functional/ work capacity evaluation and provided care recommendations.
33. Dr. Baasch prepared three reports dated January 29, 2022, September 1, 2023, and February 28, 2024
34. Dr. Baasch has been the claimant's family physician since September 1999 and accordingly, is very familiar with her medical background and history.
35. Dr. Baasch first saw the claimant following the accident on February 8, 2018. In his report of January 29, 2023, he noted that she had objective findings including pain behaviours and tenderness in multiple areas. He noted the findings were consistent with Grade 2 Type Whiplash Injury affecting her neck, lower back and both her hips and buttocks including left arm pain. He considered the headaches of which she complained to be a result of her neck injury. Dr. Baasch noted that X-ray findings were consistent with soft tissue injury.
36. Dr. Baasch recommended physiotherapy and active rehabilitation. He did not suggest chiropractic or massage therapy treatments but at the claimant's request he provided a letter authorizing chiropractic and massage therapy treatments.

37. Dr. Baasch noted that whenever he saw the claimant in follow-up, she claimed that she was no better - if anything worse. Despite this, Dr. Baasch noted that in his opinion, the claimant's injuries do not prevent her from working in the future. He stated that there were no specific medical restrictions in place but that it was rather more an "issue of tolerating work due to her discomfort."
38. Dr. Baasch remained of the view that the claimant should be encouraged to do home exercises and work on her own self-management of her symptoms. Given that 4 years had by then elapsed from the accident, he noted that "ongoing treatments are unlikely to make a significant difference" and that she is "encouraged to stay as active as she can in order to stay in the best shape she can and to stay as fit as she can."
39. In cross examination, Dr. Baasch was referred to his clinical record of February 8, 2018 where he noted the claimant had marked pain behaviour. He confirmed the note referred to the fact that the claimant demonstrated behaviors that were pain related but that in recording it, he was relying on the claimant to be truthful and was not assessing the veracity of the behaviours. He also confirmed that where he stated that it was his opinion that the claimant was at a plateau and not expected to show any significant improvements, it was primarily based on her reports to him.
40. In cross examination, Dr. Baasch indicated that the claimant has long suffered from anxiety and he has helped her deal with a difficult family situation with her mother, substance abuse issues and dysfunctional family issues. He confirmed that the claimant's issues with anxiety never completely went away before the accident. Indeed, he noted that her relationship and ultimate separation from Mr. [REDACTED] have been an ongoing source of psychological stress for her.
41. On June 2, 2017, the claimant wanted Dr. Baasch to document that she and Mr. [REDACTED] had been fighting a lot and that he had become mentally abusive, telling her that she was useless and that she is a 'mental case' and that her family are a 'mental case.' She advised Dr. Baasch that she was finding it very difficult to take. The claimant confirmed in cross examination that she wanted Dr. Baasch to document the abuse she was experiencing.
42. In cross examination, the claimant was referred to a note in Dr. Baasch's clinical record of November 5, 2018, where Dr. Baasch recorded that the claimant was a "single mom." She expressed surprise at this note saying she was not single and did not tell him that. During his cross examination, Dr. Baasch, while clearly trying to be protective of his long-standing patient finally conceded that following her testimony, the claimant called him before he was set to testify on the following Monday questioning him about why he had recorded that she was single at that time. He

indicated that his understanding at least was that she and Mr. [REDACTED] were not consistently living together.

43. Dr. Baasch's understanding as well when he prepared his first report was that the claimant was a mother looking after her children and not working. Most of her appointments with him focused on her social situation and her anxiety. Dr. Baasch had no knowledge of the claimant having worked between 2014 – 2016. All he recalled was that she had done various odd jobs. Dr. Baasch acknowledged that when the claimant called him on the Friday before his testimony, she also wanted him to remind him of her involvement in the seafood business with her sister and that she had lost work opportunity in the film industry.
44. Dr. Chow assessed the claimant on January 17, 2022 and again on October 18, 2023 and prepared reports on those dates.
45. Dr. Chow had the claimant fill out a questionnaire outlining her physical and psychological complaints, medication record and her work history. He relied on the information she provided. He noted in his first report that she advised that her sitting tolerance was in the range of 30 -60 minutes and up to 60 minutes in his second report. He did not record any observations of shifting while the claimant was sitting.
46. In his January 17, 2022, report, Dr. Chow opined that in his view, the claimant sustained soft tissue injury to the cervical, thoracic and lumbar spine and suffered from myofascial pain syndrome. He noted that the claimant had gained about 32 lbs since the accident which he attributed to her pregnancies and from the accident since "she had not returned to her pre-accident functional and physical level." When she was assessed the second time, the claimant reported that she was no better and in fact worse. She was, however, back down to her normal weight although reported doing minimal exercise.
47. Dr. Chow noted in both reports the presence of trigger points but there did not appear to be any neurological or other physical abnormalities on any of the tests administered.
48. In his report of January 17, 2022, Dr. Chow offered a number of treatment recommendations to hopefully maximize her function including a dedicated exercise program designed to deal with stretching and strengthening of the core muscles of her neck, back, and trigger points and to improve her fitness and functional level. Dr. Chow's recommendations did not appear to have been followed by the claimant by the time he saw her for the second time.

49. Dr. Zeeshan Waseem, assessed the claimant on April 5, 2022. In his report of May 4, 2022, he reviewed the claimant's history and his examination and noted that based on the claimant's narrative, "she has struggled to regain her footing in the workforce due to her injuries..." In his opinion, the prospects for re-entry into the workforce at some point is "favorable" with the adoption of a number of treatments he recommended, noting that there are "no medical restrictions to engaging in her pre-accident domestic and recreational activities" although if her pain persists, she will remain limited on the basis of her pain tolerance.
50. Dr. Chow agreed with Dr. Waseem's recommendations except that "the prognosis may not necessarily show that symptom resolution is expected."
51. Dr. Heran assessed the claimant on October 20, 2023. At the time of his assessment, the claimant indicated her sitting tolerance was 10 minutes. Dr. Heran noted that low back pain was the claimant's dominant complaint. He confirmed that going forward the mainstay of medical management will be a swimming and exercise program with light weights and conditioning exercises and routines as tolerated. He believed that the claimant would be a good candidate for Botox treatments with respect to probable neurogenic -type thoracic- outlet syndrome in the upper extremities and piriformis syndrome in the lower extremities.
52. Dr. Heran also opined that the claimant would probably be a good candidate for cervical facet joint blocks and lumbar facet joint blocks at L4 -5 and that an argument for surgery could also be made for her low back at the L4-5 level. He noted the success rate for marked improvement following the proposed surgery is approximately 70 – 85% of individuals having 70% or more reduction in pain although he noted there was a significant potential that her symptoms would continue.
53. Dr. Heran stated that the claimant is capable of sedentary to light duties with frequent break taking, postural adjustments and guarded behaviors, yet he acknowledged in cross examination that the report of a ten minute sitting tolerance impacted his assessment of her abilities and that he assumed she was a stay at home mother so did not focus on her employability.
54. Dr. Chaudhary assessed the claimant on March 4, 2024 and produced two reports, dated March 8, 2024 and April 19, 2024 respectively. In her report of March 8, 2024, Dr. Chaudhary indicated that the claimant's headaches were consistent with cervicogenic headaches and that the neck and back pain and referred pain in her left arm and leg are secondary to the soft tissue injuries to the neck and back. Dr. Chaudhary noted some disc degeneration but that all the neurological tests were negative. Unlike Dr. Heran, Dr. Chaudhary does not believe that surgery is

indicated. Dr. Chaudhary also noted that the distribution and characteristic of pain was different when the claimant was assessed by her and when she was assessed by Dr. Heran.

Assessment of Damages

Credibility

55. With this background, I now turn to the various heads of damage.

56. In this case, the credibility of the claimant is much in issue. In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave ref'd [2012] SCC No 392, Justice Dillon outlined at paragraph 186 how the issue should be approached:

“Credibility involves an assessment of the trustworthiness of a witness’ testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides [citation omitted]. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness’ testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanor of the witness generally [citations omitted]. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.”

See also *Faryna v. Chorny* 91952) 2. D.L.R 354.

57. With these principles in mind, I have evaluated the evidence of the claimant and the lay witnesses. The claimant was a poor witness. She gave varying and misleading histories to the experts who assessed her. For example, when she was reassessed by Raph Kowalik in October 2023, she reported that most of the household chores were being done by the nanny; yet she hadn’t had one since March 2022. She minimized her preexisting psychological and anxiety issues. She claimed that her relationship with Mr. [REDACTED] only deteriorated after the accident yet in cross examination confirmed that in June 2017 – before the accident – she specifically requested Dr. Baasch to record the fact that he was mentally abusive to her. She told various experts that she had been working full time but at no time mentioned that she had apparently worked for 5 years as a trimmer in a medical marijuana

facility. Neither did she mention in her evidence that she actually met Mr. [REDACTED] when she worked briefly for him on his medical grow op. The claimant did not graduate from high school but left the impression with some experts that she had graduated by saying that she had finished school.

58. The claimant was also unable to provide the name of the individual for whom she apparently worked as a personal assistant.
59. The claimant also said she had an interest in the film industry and but for the accident anticipated that she would, through Ms. [REDACTED], have had opportunities to begin a career as a set decorator or dresser. Despite the apparent closeness of the two, the claimant knew very little about the industry or what was required. When she was in her twenties, she apparently attended a film set on one occasion when Ms. [REDACTED] was working but took no steps at any time before the accident to understand the requirements for working in the industry or joining the union. She understood that when Ms. [REDACTED] worked as set decorator, she would set up rooms for the requisite scenes but had no knowledge of what role a set dresser filled. She also never applied for any position in the industry.
60. Further, although she testified that her first pregnancy was normal with no difficulties, she was referred to the hospital chart from Mission Memorial Hospital confirming a hospital visit in August 2016 where she complained of lower back pain radiating down her legs bilaterally. She also complained of neck and arm pain after the C- section when giving birth on February 10, 2017. She conceded these complaints when challenged but minimized the severity of them.
61. Following her testimony, she also called Dr. Baasch in advance of his attendance at the arbitration to admonish him over several entries in her chart and to provide him with information about certain job opportunities she said were lost and of which she had never previously spoken.
62. The witnesses [REDACTED], [REDACTED], [REDACTED] and [REDACTED], claimed to be extremely close to the claimant and to know how the accident impacted her but were very vague when it came to details. Perhaps most telling was when [REDACTED], who both she and the claimant described as best friends, each other's support system and "other half" professed to have no knowledge of the claimant's long-standing issues with anxiety or the issues the claimant was reporting with respect to her relationship with Mr. [REDACTED].
63. Overall, I found the evidence of these witnesses to be overly enthusiastic and specific when describing the claimant's abilities prior to the accident and the impact

of the accident on her and yet surprisingly vague when cross examined on certain issues these close individuals ought to have known.

64. There was also video evidence of the claimant shopping with her children in tow and carrying at least one of them, pushing a shopping cart and loading groceries.
65. While no one of these examples are definitive, collectively they raise significant questions regarding her credibility and the veracity of the evidence regarding the impact of the accident on her functioning.

Non pecuniary heads of general damage

66. Both parties refer to *Stapley v. Hejslet* 2006 BCCA 34 as illustrative of the framework by which the assessment should proceed and highlighting that it is an appreciation of the individual's loss that is necessary.
67. The claimant cites a number of cases suggesting that given the claimant's injuries and the impact upon her, an appropriate award should be \$220,000. The respondent on the other hand suggests an award in the range of \$60,000 - \$80,000 is a more appropriate assessment of this head of damage and cites numerous cases in support.
68. As is often the situation, counsel are able to cite decisions they say are similar and thus appropriate comparators. The challenge, however, for the decision maker is that each of the awards are fact specific and many turn on whether the court finds the evidence adduced to be credible and supportive of the losses claimed.
69. Given my comments regarding my assessment of the claimant's credibility and that of the lay witnesses, I do not accept that the impact of the accident on the claimant has been as severe as claimed. The claimant has suffered throughout much of her life with anxiety and psychological issues arising from traumatic events prior to the accident, has been in a tumultuous and abusive relationship with Mr. [REDACTED] and suffered a recent traumatic event the claimant did not discuss, and which was only reluctantly raised by Dr. Baasch.
70. In addition, while all the medical experts testified in a straightforward and professional manner, their opinions were founded in part on the history provided by the claimant, which as I have noted, was not reliable.
71. Accordingly, given the length of time he has been the claimant's family physician and his detailed knowledge of her history and personality, I accept that Dr. Baasch is in the best position to assess her injuries. I accept his diagnosis that the claimant sustained soft tissue injuries to her neck and back affecting her hips and buttocks

and has suffered from cervicogenic headaches. At the same time, while he noted the claimant's ongoing complaints, at no time has he suggested that there ought to be any specific medical restrictions in place and has always encouraged the claimant to be as active as possible.

72. It is perhaps understandable though that with 3 young children the claimant has been preoccupied and been unable to be as physically active as might have been ideal.
73. In my view, an appropriate award with respect to the non pecuniary heads of general damage within the context of the claimant's individual circumstances is \$85,000.

Loss of earning capacity

a. Past loss of earning capacity

74. The claimant asserts that while she was off work caring for [REDACTED] at the time of the accident, her intention had been to return to work after approximately one year. She claims that as a result of the injuries sustained she has been unable to return to work as either a cleaner or pursue her interest in the film industry.
75. The claimant relied on the report of Nicholas Coleman, Economist, dated March 1, 2004. He had proceeded on the understanding that the claimant was a high school graduate. Accordingly, his estimates of potential earnings were overstated. In argument, the claimant suggested that the starting point for the assessment of past loss of earning capacity should be \$137,568 which is the average of four scenarios put forth by the respondent's economic consultant, Thomas Steigervald, in his report of April 29, 2024. The claimant noted that as the calculations of both experts were similar once the discount for not finishing high school was applied, the Steigervald figures could be taken as illustrative.
76. The four scenarios Mr. Steigervald used to estimate potential earnings to arbitration were: light duty cleaner, motion pictures, broadcasting, photography and performing arts assistants and operators, retail and wholesale trade managers and BC females with no certificate, diploma or degree.
77. In considering this aspect of the claim, I must consider whether the claimant has demonstrated both an impairment of earning capacity and a "real and substantial possibility" that the impairment has resulted in a pecuniary loss.
78. Even if I concluded that the soft tissue injuries would have precluded her from work for a period of time, I am unable to find that there was a "real and substantial possibility" that any impairment resulted in pecuniary loss.

79. At the time of the accident, the claimant was a stay at home mother. Although she said that her intention was to have returned to work a year after [REDACTED]'s birth, she then had two further children. Even if the claimant had returned to work in early 2018, she would likely have had to cease work again shortly after becoming pregnant with her second child, given the difficulty of that pregnancy. Moreover, it appears that the child rearing responsibilities primarily fell to the claimant even before she officially separated from Mr. [REDACTED] in February 2023.
80. As noted in *Lannone v. Hoogenrand* [1992] B.C.J. No. 682, the burden of establishing a claim for loss of income will be more difficult to discharge, but not impossible to discharge "where there is no corroborating evidence such as income tax returns."
81. In this case, the claimant never filed any income tax returns in support of the income she claims to have earned and provided no corroborating evidence of her claim for past loss of income and called no evidence from anyone for whom she claims to have worked. She was unable to even provide the full names of the employers.
82. I also do not accept that the claimant missed any opportunity in the film industry. The claimant knew very little about what Ms. [REDACTED]'s job or what any of the jobs really entailed and took no steps at any time to investigate them.
83. Indeed the only opportunity that appears to have been available to the claimant was an opportunity to work on a non union Hallmark film "A Family Christmas Gift" in fall 2019. While the claimant and Ms. [REDACTED] testified that the claimant was unable to participate in the project, Ms. [REDACTED], the daughter of a lifelong friend of Ms. [REDACTED]'s testified that she took the short-term job but that the claimant apparently declined having gone to Whistler instead.
84. Given my views on the claimant's credibility and the complete absence of credible corroborating evidence, I am unable find that the claimant has demonstrated any loss of income to date.
- b. Loss future earning capacity**
85. The claimant asserts that but for the injuries to her neck and shoulder, she would "have continued to work at a high level, accruing success by more easily meeting deadlines and project deliverables, and continuing her advance up the career ladder in her industry."
86. The claimant argues that an earnings approach is appropriate in this case and seeks an award in the sum of \$420,889.00. This figure is proposed as 62.5% of the

average of the 4 scenarios outlined by Mr. Steigervald. The claimant argues that presently, her durable part time capacity has been exhausted by her childcare and household responsibilities. She argues she will be able to use this part time capacity to work once the future care recommendations she seeks are implemented.

87. The respondent argues that the earnings approach is not well suited to this case given the absence of any stable pre accident working history. The respondent says in this circumstance, the “capital asset approach” is preferable and more appropriate here where the claimant has no clear earning history or where the loss is not measurable in a pecuniary way. See *Dabu v. Schwab* 2016 BCSC 613 at paragraphs 72-3.
88. In assessing this aspect of the claim, the approach to be taken is summarized in the decision in *Rab v. Prescott*, 2021 BCCA 345. First, it must be determined whether there is any impairment of earning capacity; if an impairment is found, the court must assess whether that impairment will result in a loss of income; lastly, the court must assess the relative likelihood of the loss occurring.
89. In this case, there is no credible evidence before me to support an award on either an earnings basis or on the basis of a loss of a capital asset.
90. For the reasons stated earlier, I do not accept that the claimant has any ongoing impairment of her ability to earn income. She continues to complain of issues but given my findings on credibility I do not accept that she will be inhibited in her ability to work. In any event, even if I am wrong on this assessment, I do not find that there is any real and substantial possibility that the claimant will suffer a loss of income as a result of any injuries.
91. The claimant has only a grade 10 education, has never taken steps to complete high school, considered taking a virtual assistant course but did not complete it, claims to be interested in work in the film industry as a set decorator or dresser but, apart from one visit to a film site in her early twenties where Ms. [REDACTED] was working, has never taken any steps to explore options in the industry or union or to even understand what is required in those positions.
92. The most realistic opportunity appears to be the seafood distribution business she started with her sister [REDACTED], which they had long discussed as a way of continuing the family tradition in the industry. Indeed, the fact that the claimant and her sister decided to start the seafood business in 2022 supports the notion that the claimant is capable of working. It strains credulity for them to have launched a new venture if the claimant was incapable of participating fully. Further, while it is early days for them in the business and they claim not to be making any profits, the evidence, like

much of the balance of the lay evidence, was vague. The flexibility afforded by this position appears a good fit for her. Moreover, her father, [REDACTED], is in the process of winding up his business and testified that he intends to turn over his business to his daughters.

93. Finally, even the experts who relied on her evidence considered the claimant capable of working at least part time in sedentary positions.
94. Further, despite the accident and the injuries claimed, the claimant did not have any help in the house until April 2020, just before the birth of her second son, [REDACTED], and while in the midst of a challenging pregnancy. She again did not have any help from the end of May 2020 until February 2021 when [REDACTED] was hired as a nanny and remained in that position until the end of March 2022. Ms. [REDACTED] testified that while she did some household cleaning her primary duties were to take care of the children. She noted that once [REDACTED] was born in August 2021, the claimant needed some time to recover from the c-section and birth.

Future Care

95. The claimant is entitled to compensation for the cost of future care based on what is reasonably necessary to restore the claimant to her pre accident condition in so far as it is possible.
96. The test to determine the appropriate care award has been described in numerous cases as requiring:
- a. a medical justification for the items proposed;
 - b. the claims must be reasonable
- see (*Milina v. Bartsch* (1985) 49 B.C.L.R.(2d) 33 and *Tsalamnadriss v. Mcleod*, 2012 BCCA 239
97. Further, although the award must have medical justification, it is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. (*Chen v. Crystal Computer Ltd.* 2022 BCSC 1051.
98. The claimant relies on the report of Raph Kowalik of December 27, 2023 and seeks an award of \$610,064.00.
99. I do not intend to review each item suggested. Clearly Mr. Kowalik's report is premised on the basis that the claimant is permanently partially disabled as a result of the accident, which is not in accord with my findings on the evidence.

100. As noted above, the claimant has had her hands full as the primary care giver to her three young children and has suffered throughout much of her life with anxiety and psychological issues arising from a variety of traumatic events in her life including a recent one. She was also in an abusive relationship with Mr. [REDACTED]. It is perhaps understandable that she has not focused on her physical conditioning since the accident.
101. In my view it is reasonable to provide the cost of care required to assist the claimant in regaining her conditioning through an active rehabilitation program.
102. Taking into account the recommendations of Dr. Baasch, Dr. Waseem, with whom Dr. Chow agreed, Raph Kowalik, Ms. Percy and my own assessment of the evidence, I make the following award, which in my view is generous:
- a. Active rehabilitation program - \$4,700.00
 - b. Three year gym and pool membership \$1,373.00
 - c. Occupational Therapy - \$3,000.00
 - d. Home exercise equipment - \$471.00
 - e. Physio/massage - for three years while claimant is engaged in active rehabilitation and regaining her conditioning - \$16,934.74
 - f. Housekeeping assistance for three years while claimant is engaged in active rehabilitation and regaining her conditioning - \$19,987.50
- Total: \$46,466.24**

Special Damages

103. The claim for special damages is presented at \$58,793.66 comprised of various categories:
- a. **Physiotherapy, Massage Therapy and Chiropractor treatments** - I allow the amount claimed of \$1,686.70.
 - b. **Miscellaneous** - This category includes a total of \$2,860 paid on various occasions by the claimant to her sister [REDACTED] identified as cleaning services. The claimant testified that these payments were to reimburse [REDACTED] for the help she provided. [REDACTED] testified that the payments included reimbursement for ferry fares and groceries she purchased for the claimant. The claimant kept no records of the services provided or the hours spent and no receipts were produced identifying the expenses incurred and for which reimbursement was required. Given the lack of any records, the claimant simply says she gave her sister money from time to time, ranging from \$50 to \$400. The payments appear simply to have been gratuitous payments from the claimant to [REDACTED] perhaps as [REDACTED] noted because her own financial

circumstances had changed and she needed money. The claimant acknowledged as well that a payment for \$115 on February 14, 2024 related to the claimant's move to a townhouse and that an invoice for \$120 on April 29, 2024 was actually a business expense. MRI invoices in the amount of \$4,245 were actually paid by the claimant's law firm and therefore are not properly special damages. A claim for a back brace is also denied as it was not recommended by any physician and simply something the claimant decided to purchase. I therefore allow under this category the sum of \$419.97 with respect to a car seat that needed to be replaced following the accident.

- c. **Nanny payments** – A total of \$49,311.00 is claimed under this category for payments to two nannies – ■ – in April and May 2020 and to ■ between February 15, 2021 and March 26, 2022. The evidence establishes that the hiring of a nanny was not as a result of the accident but rather a result of the claimant experiencing a difficult pregnancy with her second child while also dealing with a toddler. Indeed, ■ did not commence work until April 2020, less than two months before ■'s birth and stopped work in May 2020, apparently following ■'s birth on May 24, 2020. Ms. ■ then commenced employment in February 2021 when the claimant was already pregnant a third time. Ms. ■ employment ceased on March 26, 2022. No replacement was hired at that point. Moreover, the claimant confirmed that she did not incur the expenses. The costs were apparently borne by Mr. ■. Accordingly, I deny this claim in its entirety.
104. The claimant is therefore entitled to an award of **\$2,106.67** with respect to special damages.

Loss of housekeeping capacity

105. The claimant seeks a separate award in the sum of approximately \$70,000 on the basis she has sustained a reduction in her ability to do household chores. The claimant cites a number of cases in which the court has made an award under this heading. The essence of the decisions appears to be that a pecuniary award may be appropriate where a reasonable person is unable to perform the usual and necessary household work. On the other hand, loss of housekeeping ability can be seen as part of the non pecuniary heads of general damage where a claimant can perform the usual and necessary household work, albeit with difficulty (see *McKee v. Hicks*, 2023 BCCA 109).
106. At paragraph 112, the court stated:

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.

107. Given my view of the evidence and the claimant's abilities, I decline to make a pecuniary award under this heading. Further I have considered the claimant's loss in this regard in my award of the non pecuniary heads of general damage.

In Trust

108. An In Trust award for [REDACTED] of \$64,140 is sought (\$66,000 less \$2,860 already paid to her).

109. The claimant argues that although various family members have provided extensive assistance since the accident, [REDACTED] in particular "had to significantly modify her lifestyle to provide assistance." Given my views on the quality of the evidence and the credibility of the lay witnesses, I decline to make an in trust award.

Conclusion

110. The claimant is entitled to the following award:

- a. Non pecuniary heads of general damage - \$85,000
- b. Future Care - \$46,466.24
- c. Special damages-\$2,106.67

Total: \$133,572.91

111. If there are any issues arising with respect to deductions or costs, I ask the parties to advise within 30 days and a schedule for dealing with those issues will be determined in consultation with counsel.

Dated: July 12, 2024



Simon B. Margolis, K.C.
Arbitrator