
CANADA / JUDGMENT

Duda v. Sekhon

2015 BCSC 2393

COURT

Supreme Court of British Columbia

DECIDED

17 December 2015

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2015 BCSC 2393 Duda v. Sekhon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duda v. Sekhon,

2015 BCSC 2393

Date: 20151217

Docket: M149230

Registry: New Westminster

Between:

Samantha Rae Duda

Plaintiff

And

Manmeet Singh Sekhon, Yellow Cab Company Ltd.

and Hrinderjit Binning

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Plaintiff:

S. Cope

Counsel for Defendants:

G. Sandhu

Place and Date of Trial/Hearing:

New Westminster, B.C.

October 26 - 30, 2015

Place and Date of Judgment:

New Westminster, B.C.

December 17, 2015

Introduction

- [1] This claim arises out of two motor vehicle accidents involving the plaintiff, Samantha Duda. Liability is not in dispute and was admitted by all defendants.
- [2] In the first accident, Ms. Duda's vehicle was stationary at a red light on West Broadway at Granville Street in Vancouver, B.C. when it was struck from behind by a taxi driven by the defendant, Manmeet Singh Sekhon.
- [3] In the second accident, Ms. Duda was riding in the front passenger seat of her own vehicle, then being driven by her sister, eastbound on 16th Avenue in Vancouver. Ms. Duda was not driving at that time for safety reasons because she had taken medication to alleviate pain symptoms persisting from the first accident. Her vehicle was struck in the passenger door area by a vehicle emerging from an alley driven by the defendant, Hrinderjit Binning.
- [4] In relation to both accidents, Ms. Duda claims damages for:
 - a. non-pecuniary loss;
 - b. past loss of income and past loss of capacity;
 - c. future loss of earning capacity;
 - d. cost of future care; and
 - e. costs of the action.
- [5] Ms. Duda also claimed an amount for special damages, which has been agreed to by the defendants.

Ms. Duda's Evidence

- [6] Ms. Duda was raised in Gibsons, B.C., graduating from Elphinstone Secondary School when she was 17. She worked through her latter high school years assisting in her father's glazing business. After high school she attended BCIT and graduated in 2011 with qualifications as a medical radiographer. Following her graduation from BCIT she began working at Burnaby General Hospital as a medical radiographer. She was 25 years old at the time of the accidents. She was married shortly after the second accident to Garret Federeau.
- [7] The work of a medical radiographer includes: taking x-rays in a lab; using a portable x-ray machine in emergency rooms for trauma cases; operating x-ray equipment in operating rooms and performing specialized tasks involving the installation of peripherally inserted central catheters or "PICC" lines in patients; as well as performing digestive system fluoroscopy and video x-rays. A radiographer is required to assist with patient movement and positioning during the x-ray process. The radiographer must wear a lead apron or skirt to protect against x-ray damage. The lead garments are heavy and significantly restrict the movement of the radiographer.
- [8] In 2012, Ms. Duda began to work occasional shifts at Surrey Memorial Hospital.
- [9] She chose to work as a casual employee from the outset of her career as a radiographer, taking approximately three full shifts per week. During summer months and in and around December each year, she would seek out and work additional shifts made available because other radiographers wished to take holidays. She also volunteered in Pioneer Ministries with the Jehovah's Witness church.
- [10] As a youth and up until the first accident, Ms. Duda participated aggressively in a number of pick-up sports including road hockey, volleyball and flag football. She testified that she "checked like a man" playing road hockey. Living near the ocean in Gibsons, she also enjoyed swimming and qualified as a scuba diver. Her parents took her for winter vacations at Manning Park, where she learned to snowboard. As an adult in Vancouver she would snowboard, particularly on Monday evenings when snowboarding was free on local mountains. She would usually snowboard for the entire evening with a short break for dinner.

The First Accident

- [11] The first accident occurred on May 22, 2012. Ms. Duda was driving a 1999 Acura TL, which she owned. She was stopped at a red light eastbound on West Broadway at Granville Street. She was stopped for a short time in the middle lane prior to the collision. There was an open lane to her left and an open lane to her right. Immediately following the collision she was spoken to by a man in a vehicle in the left-hand lane who told her the license plate number of the taxi cab which had struck her from behind.

- [12] After the stop light turned green, she and the taxi pulled over into the left curb lane where they exchanged information. Immediately following the accident, Ms. Duda began to experience pain and stiffness in the left shoulder girdle region. Following the exchange of information with the taxi driver, she phoned her parents and I.C.B.C. Dial-A-Claim. She also told the Dial-A-Claim operator that her left shoulder was bothering her. While Vancouver General Hospital was located closer to the accident, she attended at Burnaby General Hospital because she worked there and was more comfortable going there. At the emergency unit at Burnaby General Hospital, she complained of shoulder pain and general stiffness. Her shoulders were hurting bilaterally and across the shoulder blades. X-rays were not taken on that day but were taken later. She was advised to rest, take Advil, apply ice and take at least three days off of work.
- [13] The day after the accident, Ms. Duda saw a clinic doctor at the First Care Medical Clinic on Commercial Drive, located near her home. Ms. Duda reported that her neck, shoulders, mid-back and low-back were stiff and painful and she could not bend forward. She continued to attend the clinic on several occasions following the first accident and prior to the second accident. The clinic doctor reported that her back muscles were too inflamed to treat with physical therapy. Ms. Duda was advised to return home, rest, take Advil and apply heat. The clinic doctor told her to take time off work and, once she was comfortable enough to receive treatment, to obtain physiotherapy and massage treatments.
- [14] On May 29, 2012, Ms. Duda began to attend for treatment at Physio Room Stay Strong, a physiotherapy clinic located at 18th Avenue and Main Street in Vancouver, which was close to her home. The physiotherapist who treated Ms. Duda was Jesse Wong. At Exhibit 4, Tab 1, is a summary of records and payments made for that treatment; there are also photos and the invoice for repairs to Ms. Duda's Acura at a cost of \$681.
- [15] After approximately six weeks off of work to allow for some healing following the first collision, Ms. Duda's employer, Burnaby General Hospital, provided a Gradual Return To Work program ("GRTW"); accommodations were made for her physical disability through the assignment of light duties as well as a reduction in the number of hours and shifts worked per week.

The Second Accident

- [16] The second collision occurred on July 31, 2012. Ms. Duda was in a vehicle being driven by her sister as they were on their way to attend a weekly Bible meeting. They were heading eastbound on 16th Avenue near Main Street when a vehicle driven by the defendant, Ms. Binning, came out of the alley and struck the Ms. Duda's vehicle on the passenger side. The Acura sustained damage to the frame post near the driver's door, and there was also damage in a dragging pattern down the passenger side of Ms. Duda's vehicle. The damage to that vehicle is shown in Exhibit 4, Tab 2, and the cost of repairs was \$4,631.49.

- [17] Areas of complaint which remained unhealed after the first accident were aggravated in the second accident, and there was a noted worsening of both mid and low-back pain. An I.C.B.C. CL19 form dated September 25, 2015, recorded complaints by Ms. Duda of mid and low-back pain extending into the buttocks, more painful on the left side than on the right side. Ms. Duda's essential work functions, including wearing lead aprons and transferring patients, were causing pain; as were bending and overhead reaching to adjust X-ray equipment.
- [18] Ms. Duda did not take time off of work after the second collision, but the GRTW program was extended to permit her to heal from the injuries received in the second collision. She was given two prescriptions which are referred to in Exhibit 4, Tab 2, and in addition she obtained over-the-counter medications for pain, including Robaxacet, which her sister was able to obtain without charge from her employment.
- [19] In most years Ms. Duda worked additional shifts in the months of July and August due to the need to cover vacations for other radiographers, but in 2012 she was unable to do so because she was involved in the GRTW program.
- [20] At the same time, Ms. Duda also missed on-call shifts where a radiographer simply has to be available by telephone to be called to attend the hospital and receives an additional payment for that activity. Further, she was unable to obtain shifts where she would be paid additional amounts per hour for the insertion of a PICC line or G-tube in specialty operating rooms. She also did not receive pay for weekend shifts as those were not included in GRTW program.
- [21] By April 2013 Ms. Duda had taken a position and began working at the Children's Hospital for two significant reasons: the patients, children, were smaller and lighter to move; and the Children's Hospital had mechanical lifts for transferring patients. She continued working at Burnaby General Hospital and the Children's Hospital in Vancouver, which was closer to her home than Surrey Memorial Hospital. As a result, she was not required to take longer drives to Surrey Memorial Hospital, which she found uncomfortable due to the stiffness and pain in her back and shoulders.
- [22] Ms. Duda maintained a calendar of lost days from May 2012 through to August 20, 2012, where she was unable to work due to her physical condition. Lost days reflect lost income. Based on the records she maintained, Ms. Duda estimated that her total loss of wages for the period from May 23, 2012 through to August 20, 2012, was approximately \$5,000 without taking statutory holidays or on-call dates into account, which would have increased the amount that she lost.

Ms. Duda's Recovery

- [23] Ms. Duda continued receiving physiotherapy coupled with massage treatments for the following year because it made her more comfortable and made it possible for her to continue working. Had she not received that treatment, work would have been impossible for her as she became tired and stiff after relatively brief periods of work. She was also required to do an active exercise program prescribed by her physiotherapist, which required about 15 or 20 minutes each day at home in the evening, in addition to a stretching program.
- [24] As evidenced at Exhibit 4, Tab 1, Page 5, eventually I.C.B.C. refused to pay for additional physiotherapy and massage treatments.
- [25] In October 2013, Ms. Duda had a flare-up of symptoms and return of pain caused by a high workload day. She was receiving intramuscular stimulation treatments ("IMS"), where a needle is used to insert electrical impulses into muscles to get them to relax. Ms. Duda found this therapy achieved its goal and helped her return to work more readily.
- [26] Unfortunately, from May 2012 to the date of trial, Ms. Duda has not fully healed and has only achieved about 75% of her pre-accident physical state and level of fitness. She has had flare-ups of symptoms and return of pain from time to time, which has not changed since 2013.
- [27] A physiatrist, Dr. J. Wiebe, saw Ms. Duda on two or three occasions and advised her to do stretching and build up muscle with an exercise program, which Ms. Duda continued to perform.
- [28] Dr. Hirsch gave Ms. Duda instructions to take Pilates classes and work with a physiotherapist or kinesiologist. She did both of those. She attended 12 kinesiology sessions between June 9, 2014, and November 24, 2014, at a cost of \$567. She participated in 30 Pilates exercise sessions beginning on July 5, 2013, at Exhale Studio at a cost of \$353.50. Fifteen of these Pilates sessions took place after May 13, 2014. Pilates is an active core strengthening exercise program designed to encourage building musculature. Ms. Duda described hour long Pilates classes which she took at a rate of at least one per week. She also performed Pilates exercises at her home after a work day. On June 9, 2014, she had aggravated muscle pain while taking the therapy from the kinesiologist and therefore discontinued that particular course of treatment. She continues regularly to do active exercises and Pilates exercises at her own home.
- [29] Ms. Duda continues to record at least one missed shift per month, although because of heavy workloads in emergency rooms or orthopedic clinics, the workload is extremely heavy. If Ms. Duda works a very high demand shift, her experience since the accidents demonstrates that she will have a hard time working the following day and will be obliged to call in sick.

- [30] Ms. Duda has travelled on several occasions since the accidents; twice to New York and once to Honduras. The headquarters of her church are in New York City, and she attended there on the first occasion alone and on the second occasion with her family. She finds travel by aircraft unpleasant due to the limited movement that is available. She attended in Honduras for a wedding of a friend and to help with Bible promotion there. While she was in Honduras, she did some swimming and snorkelling, which she finds therapeutic.
- [31] Ms. Duda was married on May 22, 2015.
- [32] Ms. Duda has had to reduce her pre-accident sports activities. She attended a functional capacity evaluation in June 2015 and a report was filed in relation thereto, which will be discussed below. The functional evaluation helped her understand how much the injury had affected her at work, especially when she needed to use both hands and where she had to reach or bear weight.
- [33] After she saw Dr. Hirsch, he recommended that she try snowboarding again. Ms. Duda found that she did not have much endurance and only went snowboarding once, where she performed a couple of runs rather than the three or four hours of runs that she would have done previously. She was concerned that if she had a fall while snowboarding her symptoms of pain and stiffness would be re-aggravated.
- [34] Her volunteer work consists of canvassing on behalf of the Jehovah's Witness Church; and she has had some involvement in lighter aspects of the construction of a Kingdom Hall in Surrey and one on Oak Street in Vancouver. The tasks that she performed at the construction site included helping with cooking in the kitchen some blocks away, cleaning around the site and tying rebar together with a number of volunteers, which was then moved by others to locations where concrete was poured.
- [35] She described her circumstances following the first collision as gradually starting to improve but once she was involved in the second accident both of her shoulders hurt. She had painful shoulders, a headache, and her sacroiliac was very uncomfortable. As a result of the second accident, her recovery was much slower and, as noted above, she believes she achieved only a 75% recovery by the end of 2013, which has not changed subsequently.

Expert Evidence

[36] Ms. Duda led several expert reports in support of her claim:

- James W. Bowler - Collision Investigation Report
- Alyssa DeMarco - Injury Biomechanics Report
- Dr. G.H. Hirsch - Physiatrist
- Jesse Wong - Physiotherapist
- Jeff Padvaiskas - Work Capacity Evaluation

- [37] Each of these individuals were qualified as an expert in the field indicated, most by consent, and each was cross examined. In no case was the opinion of the expert materially altered or diminished by cross-examination.
- [38] The defendants also led an expert report from Dr. John Watterson, an expert in rheumatology.

James Bowler - Collision Investigation Report

- [39] Mr. Bowler opined that in the first accident the taxi driven by the defendant Mr. Sekhon collided with the rear of the vehicle driven by Ms. Duda and left markings. The taxi left a vertical mark to the right of the rear license plate, within the license plate recess pocket, and a license plate bolt imprint was left to the right of the license plate recess pocket; in addition, there were marks between the bolt imprint and the vertical scuff.
- [40] Mr. Bowler opined that based on his review of the damage the speed change in the collision was less than 11 km/h. During cross-examination he also opined that he would expect no vehicle damage to the Acura at a speed change of less than 8 km/h. There was some damage to the Acura, as described above.
- [41] With respect to the second collision, Mr. Bowler described that the damage to Ms. Duda's vehicle was centred to the right centre pillar where the rear of the front door meets the front of the rear door, which indicated in his opinion that the BMW driven by the defendant struck the side of the Acura angled to the left at 10 degrees. The contact between the vehicles lasted over the period that the Acura moved past the BMW. Mr. Bowler opined that the speed change, in the order of 4 or 5 km/h, was directed primarily leftward but with an additional "rearward component because the Acura was moving forward when it was struck on the right side".

Alyssa DeMarco - Injury Biomechanics Report

- [42] Ms. DeMarco assumed that the taxi rear-ended the Acura driven by Ms. Duda, which was stationary at that time. She assumed a speed change of less than 11 km/h. Ms. Duda was wearing a properly functioning seatbelt and did not anticipate the collision. Based on the assumptions aforesaid, Ms. DeMarco opined that Ms. Duda suffered a whiplash injury consistent with collision exposure: "Based on these data, Ms. Duda's reported neck, headache, fatigue, shoulder, low back, mid back/interscapular and extremity symptoms are similar to those reported by other whiplash patients and therefore generally consistent with her collision exposures."
- [43] Ms. DeMarco also opined that symptoms are more likely to persist longer following side collisions than following rear-end collisions. Ultimately Ms. DeMarco concluded that the whiplash related injuries and symptoms reported by Ms. Duda were consistent with the May 22, 2012, rear-end collision exposure; that Ms. Duda's whiplash related injuries and symptoms were consistent with her July 31 side collision exposure; and Ms. Duda's gender

increased the risk of her whiplash related symptoms and injuries in both her collision exposures.

Dr. G.H. Hirsch - Rehabilitation Medicine Specialist

- [44] Dr. Hirsch, a rehabilitation medicine specialist, conducted an examination of Ms. Duda on January 8, 2014. Dr. Hirsch assumed that: (a) Ms. Duda was physically, emotionally and psychology well prior to the first accident; (b) was not in the care of a physician or therapist; (c) was also not taking medication before the first accident; (d) was working as a medical radiographer at Burnaby General Hospital and Surrey Memorial Hospital without any limitations or modifications; and (e) was also doing volunteer work as a Jehovah's Witness and playing soccer, snowboarding and swimming.
- [45] Dr. Hirsch included in his examination of Ms. Duda, her history and a review of her forwarded clinical records. He concluded that Ms. Duda sustained injuries to her neck, shoulder girdle region, thoracic spine and lumbar spine as a result of the first motor vehicle accident.
- [46] The injuries involved were to soft tissue structures such as muscles, tendons and ligaments. Dr. Hirsch opined that Ms. Duda made a partial symptomatic recovery by the time of the second motor vehicle accident and because of lingering axial skeletal symptoms, "she was probably more susceptible to any superimposed trauma."
- [47] With respect to the second accident, the doctor opined that Ms. Duda suffered "additional injuries primarily to her thoracic spine and lumbar spine, in the second motor vehicle accident, which caused temporary aggravation of her pre-existing neck pain."
- [48] In terms of her neck and shoulder injuries, the doctor opined that Ms. Duda had made an excellent recovery. As for her mid and low-back symptoms, Ms. Duda had made a partial symptomatic recovery estimated at 75%: "she continues to have intermittent interscapular pain and low back pain brought on or aggravated by activities which excessively biomechanically stress her spine". He further opined that "Ms. Duda's mid-back and low-back pain is probably mechanical in nature exacerbated by activities that stress or load the back"; "hence, it is my opinion that the onset and persistence of these symptoms is causally related to the injuries Ms. Duda incurred to her thoracic spine and lumbar spine in the two subject motor vehicle accidents."
- [49] Dr. Hirsch recommended that Ms. Duda carry out an exercise program including core truncal strengthening exercises, truncal stretching exercises, upper and lower body strengthening exercises with a focus on repetition versus resistance, and an appropriate cardiovascular workout routine with potential additional input from either a physiotherapist or kinesiologist.
- [50] At page 7 of his report Dr. Hirsch stated:

it is my opinion that Ms. Duda's reported abrupt decline in function and resultant compromised participation in her pre-May 2012 social, vocational and recreational endeavors in 2012 were causally related to the injuries she sustained in the two subject motor vehicle accidents.

He was of the view that she could continue with her current workload or an occupation with a similar physical demand, and that she might return to snowboarding.

Jesse Wong - Physiotherapist

[51] Ms. Wong was the physiotherapist who treated Ms. Duda from May 29, 2012, up to and including October 8, 2014, with a total of 92 appointments. Ms. Wong's report detailed each of the examinations and treatments Ms. Duda received over that period. Initially, Ms. Wong accepted a self-report of neck, left shoulder, mid back/thoracic pain, low back/lumbar pain and right hip pain. Ms. Duda complained of continuing back and shoulder pain during the treatments by Ms. Wong. Heavy or continuous days of employment and prolonged sitting were both reported to cause pain and stiffness. Wearing lead protective clothing in the hospital or clinic settings was the source of increased back discomfort as reported by Ms. Duda to Ms. Wong. At the end of her report, Ms. Wong noted that there was improvement in Ms. Duda's overall functional strength, endurance and proprioception and a decrease in overall pain and stiffness. Symptoms of pain and tightness along Ms. Duda's cervical and lumbar spines were continuous to the end of physiotherapy treatment by Ms. Wong, and were exacerbated with greater physical demand and endurance. Ms. Wong recommended that Ms. Duda's continued rehabilitation should include: (a) exercises in overhead positions to mimic work movements, (b) cuing the pelvic floor and transverse abdominis muscles activated in moving patients or equipment, (c) remaining low in a neutral posture, and (d) preventing overuse of upper fiber trapezius by activating middle and lower trapezius muscles to improve pain response. After the second motor vehicle accident, Ms. Wong told Ms. Duda to decrease overhead movements or heavy workloads, if possible. It was also suggested that suspenders should be worn by Ms. Duda to support the lead clothing worn for radiation protection.

Jeff Padvaiskas - Work Capacity Evaluation

[52] On June 16, 2015, a work capacity evaluation of Ms. Duda was conducted by Mr. Padvaiskas. After reviewing the facts of the case and the work performed by Ms. Duda, the work capacity evaluation was conducted over the next six hours. The evaluation noted that Ms. Duda had difficulty sitting for extended periods of time; "Ms. Duda is capable of work activity in the sedentary, light and select entry level medium strength categories" following the Dictionary of Occupational Titles definitions.

- [53] Mr. Padvaikas concluded that Ms. Duda's current work involves demands for which she is not well-suited, including non-neutral body positions, prolonged standing and reaching tasks under load. She had reported that she would experience pain and fatigue/fogginess with prolonged work efforts, particularly with increasing work shifts over the course of a week: "her performance during work capacity testing was consistent to her reported challenges with managing current part-time activities."
- [54] Mr. Padvaikas concluded that Ms. Duda was capable of working part-time, but not longer. In other words, she had lost the ability to take up additional shifts during those periods of the year when additional shifts were readily available to her and would increase her income. She simply does not have the ability to challenge working further hours as she had done prior to the motor vehicle accidents.

Dr. John Watterson - Expert in Rheumatology

- [55] Counsel for the defendants placed the medical opinion of Dr. Watterson before the Court. Dr. Watterson is an expert in rheumatology and was accepted as such by the Court. Dr. Watterson noted that Ms. Duda is currently involved in a self-directed exercise program. She is focusing upon strengthening, conditioning and returning to her usual physical activities. This program was also recommended in the opinion of Dr. Hirsch.
- [56] During cross-examination, Dr. Watterson was questioned concerning the contents and conclusions of the work capacity evaluation report filed in this proceeding. Dr. Watterson agreed that a work capacity evaluation was a gold standard for patient assessment, which was not usually covered as a benefit in patient care plans. Ultimately, Dr. Watterson's evidence did not suggest any departure from the report prepared by Dr. Hirsch. There was no dispute that Ms. Duda had not fully recovered and that her recovery had plateaued at about 75%. Because of the duration of the plateau in recovery, Dr. Watterson's prognosis of a significant future improvement was guarded and he stated that a significant positive future change would be unlikely.

Analysis

The Confrontation Principle

- [57] The principle from *Browne v. Dunn* (1893), 6 R. 67 (H.L.) came under consideration in this case. Ms. Duda testified in her examination-in-chief that she stopped her vehicle at a red light at the intersection of West Broadway and Granville Street in the centre lane. She remained stopped at the red light for a short period of time. She testified that her vehicle was then struck from the rear by the taxi driven by the defendant Mr. Sekhon. Ms. Duda was not cross-examined on any of the details of the accident referred to above. Liability was also admitted.

- [58] Some days later during the trial, Mr. Sekhon was called as a witness. His evidence was in direct conflict with that of Ms. Duda. He testified that he was driving, following her in her vehicle on West Broadway, and that she suddenly "jammed on her brakes", coming to an abrupt stop facing a yellow traffic control light on Granville Street.
- [59] In addition to calling this evidence, which contradicted that given by Ms. Duda rather completely, the evidence of Mr. Sekhon was repeated in the written submissions filed on his behalf. Counsel asserted that he did not intend to challenge the credibility of Ms. Duda but was putting forward the evidence of Mr. Sekhon to demonstrate the minor nature of the rear-end collision. The Court cannot draw upon Mr. Sekhon's evidence without concluding that the evidence is credible; and in this circumstance, that evidence is neither credible nor reliable. Counsel did not seem to appreciate that the use of this contradictory evidence for any purpose would necessitate the Court weighing the evidence of Ms. Duda against that of Mr. Sekhon. Rather than repeating the lengthy speeches of Lord Herschel at pp. 70 and 71 or Lord Morris at p. 79 from the *Browne v. Dunn* decision it is sufficient to quote *R. v. Henderson*, (1999), 134 C.C.C. (3d) 131 at 141 (Ont. C.A.):

this well-known rule stands for the proposition that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given a chance to address the contradictory evidence in cross-examination while he or she is in the witness box

(Also see *R. v. Lyttle*, 2004 SCC 5 at para. 65.)

- [60] In the case at bar, given the admission of liability and the lack of cross-examination of Ms. Duda on the factual circumstances of the first accident, Ms. Duda had no notice on the record or elsewhere that this challenge to her evidence was to be mounted. To consider Mr. Sekhon's evidence, concerning the factual details of the accident which he caused, would be manifestly unfair and an affront to the orderly presentation of evidence.
- [61] It was agreed that the evidence given by Mr. Sekhon would not be considered for any purpose by this Court. This Court will proceed in that fashion, although the evidence of Mr. Sekhon would have received negligible weight if it were to have been considered.

Discussion of Minor Motor Vehicle Accidents

- [62] Counsel for the defendants spent considerable time and effort making the submission that the two accidents did not cause significant motor vehicle damage. However, it has been clearly established in Canadian law that minimal motor vehicle damage is not "the yardstick by which to measure the extent of the injuries suffered by the plaintiff". Mr. Justice Macaulay stated in *Lubick v. Mei and another*, 2008 BCSC 555 at para. 5:

The Courts have long debunked as myth the suggestion that low impact can be directly correlated with lack of compensable injury. In *Gordon v. Palmer*, [1993] B.C.J. No. 474 (S.C.), Thackray J., as he then was, made the following comments that are still apposite today:

I do not subscribe to the view that if there is no motor vehicle damage then there is no injury. This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has no application in court. It is not a legal principle of which I am aware and I have never heard it endorsed as a medical principle.

He goes on to point out that the presence and extent of injuries are determined on the evidence, not with "extraneous philosophies that some would impose on the judicial process". In particular, he noted that there was no evidence to substantiate the defence theory in the case before him. Similarly, there is no evidence to substantiate the defence contention that Lubick could not have sustained any injury here because the vehicle impact was slight.

Position of the Parties

[63] Ms. Duda was injured in two motor vehicle accidents which took place on May 22, 2012, and July 31, 2012. She was not at fault for either accident and liability has been admitted by both defendants.

[64] Ms. Duda claims: non-pecuniary damages of \$80,000; loss of past earning capacity of \$20,000; future loss of earning capacity of \$75,000; special damages of \$6,545.45; and cost of future care of \$1,600, for a total of \$183,145.45 plus costs and taxable disbursements.

[65] The defendants say that the amounts awarded should be: \$37,500 for non-pecuniary damages; \$3,827 for loss of past earning capacity; \$0 for future loss of earning capacity; \$6,545.45 for special damages, by agreement; and \$1,000 for cost of future care, for a total of \$48,872.45 plus costs and taxable disbursements.

Credibility Assessment

[66] Credibility of witnesses involves the consideration of factors summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296. Reviewing the factors considered, the evidence of Ms. Duda is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356 (B.C.C.A.).

[67] I find Ms. Duda to be entirely credible. She did not seek to exaggerate and her evidence was presented in a direct manner. She was responsive to questions, including questions posed in cross-examination. I accept her evidence with regard to her symptoms, both past and present. There was no evidence at all of any pre-existing injury or condition. I am satisfied beyond any doubt that her injuries and ongoing symptoms were caused by the two accidents in 2012. While the accidents were not significant and the damage to the vehicles was slight, the evidence points to no other cause of the injuries and symptoms experienced by Ms. Duda.

- [68] Ms. Duda was completely off of work for about six weeks following the first accident and then returned to work under a GRTW, where she worked fewer hours, fewer days and was assigned lighter work. Because of this, she received reduced income.
- [69] She undertook treatments which were recommended by her physicians, in particular physiotherapy treatment. In addition to the physiotherapy, Ms. Duda was actively involved in exercise and stretching to promote healing. One of the features in her case was that she has "joint hyper mobility" which was thought to be a contributing factor in prolonging her soft tissue symptoms following the accidents.
- [70] It was clear on all the evidence that the second accident exacerbated the unhealed injuries from the first accident and also caused new injuries. The second accident was not a rear-end collision but was a collision where force was applied on the left or passenger-side of her vehicle resulting in a lateral flexion-extension whiplash injury. The restraining effect of a seatbelt is not designed to reduce lateral movement by a vehicle passenger.
- [71] Luckily, Ms. Duda was able to change hospitals, leaving the heavier duties at Surrey Memorial Hospital to take on lighter duties in a closer location at the Children's Hospital. The two unique features involved in her decision to change workplaces were the lighter weight of the patients, being children, and the availability of mechanical patient lifts.
- [72] Ms. Duda continued working on a reduced schedule in the sense that she did not pick up additional shifts during the portions of the year when other radiographers typically take vacations and she did not take on-call shifts because she found that her symptoms were aggravated and did not heal quickly. Nowhere in the medical evidence was there any indication that she had healed beyond the 75% level, with 100% being her pre-accident condition.
- [73] Based on all the evidence the Court is satisfied that Ms. Duda has lost the ability to work beyond that 75% recovery plateau. The medical evidence was consistent that the onset and persistence of her pain symptoms were causally related to the injuries to her thoracic and lumbar spine that were sustained in the motor vehicle accidents.
- [74] In the most recent expert report, prepared by Mr. Padvaiskas, the employment capacity expert, his opinion was that Ms. Duda was not fully suited for her current work and that she was only capable of maintaining her current part-time level of approximately three days a week; any work beyond that which she had been able to do prior to the accidents would exacerbate symptoms and require her to take further time off of work.
- [75] While conducting the employment capacity testing it was noted that she involuntarily showed signs of pain doing work-related activities including: sitting, standing, strength activities and loading sustained above shoulder-reaching and stooping bending positions. This evidence was not challenged.

Past Loss of Income

- [76] For the period between May 23, 2012, and July 27, 2012, Ms. Duda has claimed the sum of \$5,000. Defence counsel indicated that sum was not the subject of dispute, but took the position that it should be the entire post-accident wage loss.
- [77] In addition, Ms. Duda also claimed that from October 2012 to October 2015, she lost 10 cancellation days in each year for a total of 30 days at \$28 per hour plus 12% in lieu of benefits for a total of \$6,720; and 12 annual passes on extra shifts from October 2012 to October 2015 for a total of 36 days at \$28 per hour plus the same 12% in lieu of benefits which totals \$8,150.
- [78] Counsel for Ms. Duda submitted these are conservative estimates of loss and do not include callouts, statutory holidays, evening shift differentials or on-call pay differentials, to which the plaintiff would have been entitled.
- [79] Without making any adjustment for the days not included in the foregoing, on a simple mathematical basis Ms. Duda would be entitled to just under \$20,000. If the adjustment for the shifts referred to in the foregoing paragraph were added to the total it would exceed \$20,000 by a good measure. Ms. Duda seeks only \$20,000 under this head of damage and the Court is satisfied in the circumstances of this case that the pre-trial income loss award should be \$20,000.

Special Damages

- [80] The parties were in agreement on the special damages which are contained in Exhibit 4. That figure will be awarded: \$6,545.45.

Cost of Future Care

- [81] Ms. Duda claimed a future care allowance of the very modest sum of \$1,600, for IMS treatments at \$75 per session and for 10 headache massage sessions at a total of \$600. The defendant said the cost of future care should be limited to \$1,000. Ms. Dudas has put forward a very conservative figure for the cost of future care which is consistent with the circumstances of this case, and I award \$1,600 for the cost of future care.

Non-Pecuniary Damages

- [82] With respect to non-pecuniary loss, without repeating the foregoing description of her pain and suffering, Ms. Duda submits she is entitled to an award of \$80,000 based on four cases cited: *Kwong v Leonard*, 2012 BCSC 1818; *Griffith v. Larsen and others*, 2014 BCSC 2256; *Blackman v. Dha*, 2015 BCSC 698; and *Strilec v. Leila*, 2015 BCSC 1515. Ms. Duda referred to these cases to support the assertion that the appropriate quantum of non-pecuniary damages in this case is \$80,000. The cases cited bear similarities to the case at bar and all involve injuries from motor vehicle accidents where the injuries did not heal quickly and pain symptoms persisted for periods of years.

- [83] With respect to non-pecuniary damages, the defendants accept that Ms. Duda has suffered some degree of soft tissue injury and this injury has affected her ability to work and enjoy life for a period of time. The defendants characterize her ongoing difficulties as, "some minor lingering effect". With respect, that statement is not supported by the medical evidence. Both medical doctors agreed that a recovery of about 75% was what was achieved and, although her ongoing treatment and exercise program might alleviate that ongoing pain, it was unlikely that Ms. Duda's recovery plateau will change for the better in the near future.
- [84] It is certainly not supportable on the evidence in this case for the Court to accept the suggestion that somehow Ms. Duda's exercise program is not sufficient to achieve positive results. All of her evidence indicates she is a person with a strong character that will not permit herself to remain in a disabled state could she achieve less disability through exercise. I am satisfied she is the determined sort that would do everything possible to improve her circumstances.
- [85] Defence counsel relied on a number of cases including: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.); and *Edmondson v. Payer*, 2012 BCCA 114. Those cases are well-known and reflect the proposition that care should be taken where there is little or no objective evidence of continual injury and where complaints of pain persist for long periods extending beyond the normal and usual recovery timeline.
- [86] In the case at bar, however, there was significant evidence, particularly from Ms. Wong and Mr. Padvaiskas, that this plaintiff continues to suffer particular pain caused by injuries from the two motor vehicle accidents, which were not completely healed and are aggravated by Ms. Duda's ongoing work activities as a medical radiographer.
- [87] The defendants also referred to: *Hunter v. Yuan*, 2010 BCSC 1526; *Christoffersen v. Howarth*, 2013 BCSC 144; and *Nair v. Cindric*, 2013 BCSC 2128. Considering all of those cases, the defendants submit that Ms. Duda's award should be \$37,500 for non-pecuniary damages. No two cases are identical or "on all fours" with the present case. The case of *Hunter* is distinguishable as being less serious than the case at bar, it being noted that within 14 months of the accident, Ms. Hunter trained for and ran a half-marathon. The case of *Christoffersen* involves a single low impact rear-end collision rather than the rear-end and side collisions in the case at bar. In the case of *Nair*, the plaintiff was injured in a low impact rear-end collision but continued to participate in high school volleyball and community club volleyball to the extent that, following the accident, she was twice named the most valuable player on her high school team. Ms. Nair also participated in high level Indian cultural dancing. It is noteworthy that the court in *Nair* distinguished the case of *Christoffersen* as a case more serious than *Nair*. None of these cases compares in terms of the seriousness of the injury to the case at bar; they are therefore of limited value to the Court in assessing the quantum of non-pecuniary damages.

- [88] I find the submissions of Ms. Duda on the issue of non-pecuniary loss persuasive and consistent with the evidence and the cases she cited. I therefore find that an award of \$80,000 for non-pecuniary damages is justified based on these facts.

Future Loss of Earning Capacity

- [89] With respect to loss of income earning capacity, the defendants submit that the expert opinions do not support any loss of future earning capacity. However, it is noted that Ms. Duda was symptomatic for at least three years. Dr. Watterson's evidence was that her length of symptomatic circumstances would predict a future with a limited ability to improve beyond the current partial recovery.
- [90] Relying on the test set out in *Perren v. Lalari*, 2010 BCCA 140, Ms. Duda led evidence that she has lost and will continue to lose work time and income because of the injuries she sustained in the two accidents. In the past, Ms. Duda chose to work on a part-time basis but she was able to select shifts up to full-time hours that were paid at premium rates. She was also able to sign up for "stand by shifts" and select periods during the year to work extra days, particularly in the summer months and in December. As a result of the persistent injuries caused by the accident, which have not fully healed, she can only work three shifts per week. She has lost the ability to work full-time. In effect she submits she has lost a significant capital asset, being her ability to work full-time including shifts at higher rates and in more advantageous positions. Ms. Duda claims damages of \$75,000 for this loss. I find based on the evidence which I have heard that this submission is supported by that evidence and has merit.
- [91] This Court has heard consistent evidence that Ms. Duda continues to suffer pain and stiffness from two different types of whiplash injuries, which are exacerbated by heavy workloads and continuous days of work beyond three per week. She no longer has the ability to work without discomfort for more than three days per week and has lost the ability to choose to take on additional shifts of varying kinds with implications for increased pay. Ms. Duda has lost a capital asset in the loss of that right to choose to perform more work or higher paid work which she could do before the accidents occurred. This is a real loss for which she must be compensated.
- [92] Based on the submissions of Ms. Duda and the evidence of her limited prospects for complete recovery in the future, I find that the \$75,000 claimed for loss of future capacity is appropriate in the circumstances of this case.

Conclusion

- [93] Taking into account the evidence in this case as a whole, including the findings made herein, and after considering all of the cases cited by counsel and the arguments advanced by counsel, the award of damages in this case will be as follows:

Non-pecuniary damages \$80,000.00

Past loss of income and past loss of capacity \$20,000.00

Future loss of earning capacity \$75,000.00

Cost of future care \$1,600.00

Special damages (agreed) \$6,545.45

TOTAL \$183,145.45

[94] Costs of the action will follow the event.

"Ball J."

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