

CANADA / JUDGMENT

Dulay v. Lu

2020 BCSC 1989

COURT

Supreme Court of British Columbia

DECIDED

16 December 2020

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2020 BCSC 1989 Dulay v. Lu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dulay v. Lu,

2020 BCSC 1989

Date: 20201216

Docket: M140456

Registry: New Westminster

Between:

Karen Dulay

Plaintiff

And

Hung Lu, Amanda Kuit

And Su Kuit

Defendants

- and -

Docket: M210355

Registry: New Westminster

Between:

Karen Dulay

Plaintiff

And

Rockinder Jeet Sethi

Defendant

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff in both actions:

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Place and Dates of Trial:

New Westminster, B.C.

September 28-October 2, 2020

October 5-6, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 16, 2020

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I. Introduction

- [1] The plaintiff, Ms. Karen Dulay, claims damages for injuries sustained in motor vehicle accidents that occurred on March 2, 2010, and March 18, 2017. Liability for the accidents is admitted by the defendants in these two actions (the "Lu/Kuit action" and the "Sethi action", respectively) which were tried at the same time.
- [2] Among other arguments, the defendants contend that the plaintiff's complaints largely stem from a prior motor vehicle accident ("MVA") that occurred January 10, 2010, for which the plaintiff was at fault, or from other unrelated events, such as other MVAs or injuries.
- [3] The plaintiff's major ongoing complaints are of persistent pain in her upper back, neck, and shoulder areas, headaches, and depressed mood.

II. Background

A. The Plaintiff

- [4] Ms. Dulay graduated from high school in Richmond in 2004. She was 23 years of age on March 2, 2010. She is now 34 years of age. She is single and has no children. She presently lives alone in an apartment in Richmond.
- [5] Since 2007 she has worked as a pre-board screening officer (security screening officer) at Vancouver International Airport ("YVR"). Prior to the January 10, 2010 MVA she was working full-time, which usually consisted of eight-hour shifts, five days a week. She currently continues to work full-time as a pre-board screening officer.
- [6] A pre-board screening officer's duties are somewhat familiar to any air traveller. They involve security screening of passengers and their baggage, including checking boarding passes, x-raying baggage, checking for security threats, patting down or wandling passengers, examining baggage, and associated paperwork.
- [7] Ms. Dulay has a high school education. She attended Kwantlen Polytechnic University for three semesters in 2006 and 2007, primarily taking liberal arts courses, but did poorly and did not continue. In 2007 she unsuccessfully attempted to complete grade 11 math at Vancouver Community College. She returned to Kwantlen in the summer of 2012, when she enrolled in two business courses, which she did not complete. She has no current plans for further post-secondary education.

B. The MVAs and Other Incidents

- [8] The parties entered into a helpful Agreed Statement of Facts ("ASF").
- [9] The ASF indicates that the plaintiff has been involved in a total of six relevant MVAs, and has sustained some unrelated injuries. Although the ASF refers to the compensable accidents as the "first accident" and the "second accident", I will refer to them as MVA #2, and MVA #6.
- [10] Chronologically, the MVAs and other injuries are as follows:
- MVA #1- January 10, 2010 - Richmond, No. 3 Road and Granville Avenue; driver;
 - MVA #2 - (Lu/Kuit action) March 2, 2010 - Richmond, Garden City Road and Lansdowne Road, or Alderbridge Way; driver;
 - October, 2010 - right ankle injury;
 - December 5, 2011 - workplace incident - punch to right shoulder;
 - MVA #3 - February 3, 2012 - Surrey, 152nd Street and 102nd Avenue; driver, side-swipe of another vehicle;
 - MVA #4 - June 23, 2012 - Richmond, shopping plaza parking lot; driver;

- MVA#5 - November 30, 2012 - passenger on a Greyhound bus; and
- MVA #6 - (Sethi action) March 18, 2017 - Richmond, passenger in vehicle at a McDonald's drive-through.

- [11] The plaintiff testified that she believed the actual date of MVA #2 was March 2, 2010, not March 1, 2010, as pleaded. I will therefore utilize the March 2 date. The precise date is immaterial. There are no contemporaneous records in evidence verifying the precise date, one way or another.
- [12] As noted, the defence contends that the plaintiff's injuries and complaints stem from MVA #1, which occurred on January 10, 2010, together with other independent intervening events and injuries. The defence argues that the compensable MVAs (i.e., MVA #2 (March 2, 2010) and MVA #6 (March 18, 2017)) were minor events, resulting in only minor aggravation of her injuries.

C. General Chronology

- [13] Due to the long period of time between MVA #1 and the trial in September and October 2020, and the numerous incidents or events occurring over those years, some general understanding of the chronology of events that may be relevant is necessary.
- [14] When MVA #1 occurred on January 10, 2010, the plaintiff was residing with roommates in Richmond. She was 23 years of age. She had been working as a pre-board screening officer at YVR for about two-and-a-half years, since August 27, 2007.
- [15] There is consistent, reliable evidence that prior to that accident, the plaintiff was healthy, physically fit, active, and outgoing. She suffered from asthma since the age of 10, but it did not generally affect her health or activities. However, she occasionally lost work due to her allergies and asthma, and she was smoking about a half a pack of cigarettes per day.
- [16] MVA #1 occurred at the intersection of No. 3 Road and Granville Avenue in Richmond. The plaintiff was driving a 2001 Integra. She entered the intersection on a red light, striking a large SUV, in a T- type collision. The accident was significant. There was approximately \$3,500 damage to the Integra. The next day, January 11, 2010, she attended Richmond Hospital where she was examined and discharged. She was suffering from neck, upper back, and lower back injuries.
- [17] Three days later, on January 14, 2010, she saw a family physician, Dr. J. Lam, at the Main & Marine medical clinic in Vancouver, for treatment of neck, upper back, and lower back injuries. Dr. Lam recommended she take a month off of work. He recommended that she receive physiotherapy treatment. She did not obtain physiotherapy treatment, but she saw a massage therapist on one occasion: January 22, 2010.

- [18] She returned to see Dr. Lam on February 4, 2010. Dr. Lam prescribed a graduated return to work program, and provided her with a note for her employer describing the program. The program called for her to return to full duties after four weeks of gradual increases, with modified duties. The plaintiff followed the program.
- [19] At trial, she testified that she had not completely returned to full-time duties by the time of MVA #2 on March 2, 2010. She testified that she was working three days per week, ten hours per day, by then. The plaintiff testified that she was feeling fine, and was carrying out full duties at work.
- [20] The ASF states that MVA #2 (March 2, 2010) occurred at the intersection of Garden City Road and Lansdowne Road, but the plaintiff testified that the accident occurred at the intersection of Garden City Road and Alderbridge Way. The discrepancy is not material.
- [21] Ms. Dulay was the driver of a 2006 Toyota Corolla, and was stopped at the intersection for an ambulance approaching from the opposite direction. Her vehicle was hit from behind by the Lu vehicle, which had been struck by the Kuit vehicle, in a chain reaction. After exchanging information with the other drivers, she drove home. No emergency personnel attended the scene.
- [22] There was relatively minor damage to the vehicles. Damage to the plaintiff's vehicle was estimated at \$604. Front end damage to the Lu vehicle was estimated at \$596, and rear end damage was estimated at \$888.
- [23] The plaintiff states that after the accident she suffered from headaches, neck and back pain, and left hip pain. On March 6, 2010, a few days after the accident, she saw her family doctor at the time, Dr. J. Singh. She complained of pain in her neck and entire back. Dr. Singh's records are not in evidence, but they were available to the medical experts who gave evidence at the trial.
- [24] Sometime during March or April 2010, she moved from Richmond to Surrey, to reside with her parents, her father, and stepmother. She began seeing another doctor in Surrey, Dr. Parikh, who became her family doctor, and who gave evidence at the trial. Dr. Parikh saw her for the first time on April 28, 2010.
- [25] At trial, the plaintiff testified that she lost a week of work after MVA #2. Dr. Parikh's report indicates that she missed two days of work.
- [26] The plaintiff received chiropractic treatment from March 10, 2010 to May 25, 2010 - a total of 29 treatments.
- [27] According to Dr. Parikh's CL 19 report to ICBC dated July 22, 2010, the plaintiff was suffering from "Grade 2" soft tissue injuries to her neck and back. This aligns with his subsequent medical reports, diagnosing a moderate strain of her neck and back.

- [28] Sometime in July 2010 (the precise date is unclear) Ms. Dulay took a medical leave of absence from work, extending to October 2010. She testified that work aggravated her injuries, particularly the mid back injury, but also resulted in headaches and shoulder pain. She was frequently missing days of work.
- [29] The plaintiff received EI sickness benefits for two months, from July 11 to September 12, 2010.
- [30] When she returned to work in October 2010 she continued to have upper back pain radiating into the shoulders and causing headaches. However, her left hip pain and headaches were improving. She advised Dr. Parikh, after the fact, that she had taken this time off of work, and he agreed with her that it had been reasonable to do so.
- [31] The plaintiff testified that following her return to work in October 2010, she was not feeling well, and she continued to frequently miss work due to upper back pain during 2011. She missed various individual days of work, and missed a week of work in July and another week in October 2011.
- [32] Her employer required her to prove that her absences were due to medical reasons by providing a note or letter from her doctor, but she did not always comply with this requirement.
- [33] On August 1, 2011 the plaintiff was required to attend a meeting with her employer regarding her persistent attendance problems. She testified that she did not ask for accommodation for medical reasons because she needed full-time work, and did not want her hours reduced. Her employer sent her a disciplinary letter August 30, 2011, suspending her for one day.
- [34] From September 30, 2011 to May 16, 2012 she attended physiotherapy - a total of 18 sessions.
- [35] On December 5, 2011 there was an incident at work. Ms. Dulay was x-raying luggage. A manager struck her in the right shoulder twice, resulting in a right shoulder injury. The plaintiff testified that she missed a few days of work because of that incident. She made a claim to the Workers' Compensation Board, but recovered within a month or two.
- [36] The plaintiff testified that during 2012, her neck and upper back condition remained very poor. She was reprimanded by her employer again in January 2012 for unsatisfactory work attendance. She received another disciplinary letter January 18, 2012, and another suspension, for three days. After the suspension she returned to work. She continued to frequently be absent from work. She acknowledges that she was not managing her absences well.
- [37] The plaintiff collected EI sickness benefits for six weeks from April 15, 2012 to May 27, 2012.
- [38] The plaintiff took a medical leave of absence from work from July 2012 to December 2012. The plaintiff testified that she was having continued problems with her upper back, shoulders, neck, and headaches. In addition, she was having emotional difficulties. She was

depressed. She was in debt, not socializing, and was forced to move back home with her parents again. During this time, she spent several months residing with her sister-in-law in Prince George, while her brother was temporarily residing in Vancouver for work. Her sister-in-law, Rampy Mahl, testified at trial.

[39] Ms. Dulay was involved in three other MVAs in 2012:

- 1) February 3, 2012;
- 2) June 23, 2012; and
- 3) November 20, 2012.

[40] On February 3, 2012 the plaintiff was the driver of the vehicle. She sideswiped another vehicle. She described this as a "very minor impact". The accident occurred at 152nd Street and 102nd Avenue in Surrey. At the time she was living with her parents in Surrey. She testified that she may have had a sore back for a few days after this MVA.

[41] On June 23, 2012, she was driving a vehicle and was involved in a parking lot incident in a shopping centre plaza in Richmond. Her vehicle was bumped by another vehicle while she was backing out of a parking spot. She felt a "small bump and no injuries".

[42] On November 20, 2012, she was a passenger on a Greyhound bus. The bus was turning into a depot when it hit a car. She fell forward off the seat. She said her existing symptoms were aggravated for a few days.

[43] The plaintiff was cleared to return to work at the beginning of 2013 by Dr. Parikh. However, she was unable to return to work immediately as she needed to renew her security clearance document and passport. Her return to work was delayed until March or April 2013.

[44] The plaintiff testified that she felt rested, but still had upper back pain after she returned to work. She continued to miss days of work "sporadically".

[45] She worked full-time from 2013 to 2017.

[46] She moved out of her parents' home at the end of 2013. As she explained, she had bills to pay and needed to work. She did not keep track of her days missed from work. She testified that her upper back, shoulder, neck pain, and headache conditions all persisted during this time, and were stable, although she had flare-ups from time to time. She testified that she found ways to manage her pain. She continued to avoid social outings. She paced her domestic activities. She ate out more often, and gained weight.

- [47] MVA #6 occurred March 18, 2017. She was a passenger in a vehicle being driven by her then boyfriend. Their vehicle was hit from behind while going through a McDonald's drive-through. According the plaintiff, her existing injuries were aggravated by this accident. She missed three days of work and returned to work after that. She continued to have difficulties at work. She was calling in sick frequently. She was off work again from October to December 2017.
- [48] In 2017, she attended physiotherapy, first with Atlas Physiotherapy and then with Balance in Motion Physiotherapy, from March 28, 2017 to December 19, 2017 - a total of 35 treatments.
- [49] In late 2017 and early 2018 she saw a counsellor, Lana Rados, on six occasions. The focus of the counselling with Ms. Rados was on the plaintiff's driving anxiety. She had given up her driver's license in 2014. Another factor in her decision to give up her license was that she could not afford the insurance. She renewed her driver's licence again in 2018.
- [50] The plaintiff testified that when she returned to work in January 2018 she was feeling somewhat better. Her employer accommodated her by allowing her not to work the "bagger" position, which involves opening and examining baggage. The work is more physical than her other duties. She continued to work full-time in 2018, but missed days sporadically, without tracking the missed days.
- [51] She obtained more physiotherapy with Karp Rehabilitation from June 12, 2018 to January 31, 2019 - a total of 25 sessions.
- [52] She testified that her physiotherapy treatment with Karp Rehabilitation involved active rehabilitation, as did her treatment with Balance in Motion. The treatment was beneficial. The physiotherapists provided her with instructions about exercises that she could do at home involving rubber bands and light dumbbells. She got a gym membership. She testified that the exercises helped, and that she does them consistently.
- [53] Other than the counselling sessions with Ms. Rados, Ms. Dulay received no psychological or psychiatric treatment.
- [54] At trial, Dr. Parikh confirmed that he prescribed an antidepressant, Cipralext, in April 2012, for the plaintiff to take daily for a month. The plaintiff testified that she discussed this with Dr. Parikh and requested to discontinue use of the medication, which she says made her jittery.
- [55] The plaintiff had three sessions of massage therapy, two in 2016 and one in 2019, for upper back pain. She found that the massage therapy provided temporary relief.
- [56] As of the trial, Ms. Dulay has no plans for further medical treatment. She has a gym pass. She exercises at the gym, and at home. She goes for walks.

[57] Her employer will extend her accommodation at work on six-month intervals. She continues to be "under watch" with her employer. She continues to miss work sporadically. Her accommodated work duties cause friction with the other employees on duty, as they must do the work that she would otherwise do.

III. Diagnosis and Prognosis - Expert Evidence

1. Dr. A. Parikh - Family Medicine

[58] As noted, Dr. Parikh became the plaintiff's general practitioner ("GP") on April 28, 2010, when he saw her for the first time, several weeks after MVA #2. He has remained her GP since that time. He provided two medical/legal reports, dated March 26, 2012 and May 6, 2013, regarding the effects of MVA #2. In addition, he testified at the trial.

[59] In his first report, Dr. Parikh noted tenderness in the plaintiff's neck and upper back muscles, tenderness and pain in the muscles of the thoracic and lumbar spine, and pain on movement of the lumbar spine. He prescribed a course of chiropractic treatments.

[60] His evidence about his examination of the plaintiff for purposes of the second report is similar, except there were no findings with respect to the lumbar spine area.

[61] He provided an identical diagnosis in both reports, as follows:

1. moderate strain of the neck and back ("soft tissue" injury);
2. likely, compressive injury to the facet joints and joint capsules of the spinal bones; and
3. "chronic pain", by definition, since the pain persisted.

[62] Dr. Parikh noted that the plaintiff was involved in a prior MVA (MVA #1) on January 10, 2010, for which she received medical treatment. A cervical lumbar strain was diagnosed. When the plaintiff first saw Dr. Parikh on April 28, 2010, she claimed that she had recovered from the injury sustained in MVA #1 by the time of MVA #2.

[63] In his first report, Dr. Parikh recommended that she continue to have ongoing treatment for control of pain, at a minimum of 12 sessions a year, consisting of her choice of physiotherapy, chiropractic, or massage therapy.

[64] His prognosis is similar in both reports. In the second report, he noted that the plaintiff still complained of upper back pain, more than three years after MVA #2. He considered it more likely than not that the plaintiff would have some degree of back pain indefinitely. He added, "I would not expect a return to pre-accident state inside of three to five years". Dr. Parikh did not expect complete resolution, given the nature of her symptoms and the time elapsed since the accident.

- [65] By the time of his second report, Dr. Parikh had available the report of Dr. J.S. Arthur, orthopedic surgeon, who examined the plaintiff March 28, 2013. Dr. Arthur disagreed with Dr. Parikh's recommendation of 12 sessions per year of her choice of physiotherapy, chiropractic, or massage therapy. In Dr. Arthur's opinion, the plaintiff did not require further passive treatment and it would not benefit her. He recommended some supervision and direction regarding appropriate exercise therapy.
- [66] Dr. Parikh seems to have agreed with Dr. Arthur. In Dr. Parikh's second report, he recommended an active rehabilitation physiotherapy program. He noted that she had gained 15 pounds since the accident (MVA #2) and that she required further strengthening of core musculature, as she was deconditioned.

2. Dr. J.S. Arthur - Orthopedic Surgery

- [67] Dr. Arthur is an orthopedic surgeon who saw the plaintiff at the request of the defence on March 28, 2013. He provided a medical/legal report and testified at trial.
- [68] The plaintiff advised Dr. Arthur that she had been involved in MVA #1, as well as three MVAs in 2012. She stated that she had recovered from MVA #1 by the time of MVA #2, and denied that the three 2012 MVAs caused injury. Dr. Arthur noted that her headache complaint had resolved, and she had no low back pain. Her complaint was intermittent neck pain, involving both sides of the neck, with radiation of the pain into her upper back and both shoulders. On examination, Dr. Arthur noted tenderness to palpation over the shoulder muscles, as well as between the shoulder blades.
- [69] Dr. Arthur stated "there were really no objective findings on examination today". He recommended an active rehabilitation program with supervision by either a kinesiologist or physiotherapist, over the course of four to six weeks. As noted previously, he disagreed with Dr. Parikh's recommendation for passive treatments in Dr. Parikh's first medical report. In Dr. Arthur's opinion, the plaintiff's prognosis was good, in view of her age, but she needed appropriate exercise therapy. He expected that this would result in improvement in her condition, which should resolve over the next one or two years.

3. Dr. R. O'Connor - Physiatry

- [70] Dr. O'Connor is a physiatrist who saw the plaintiff at the request of plaintiff's counsel on two occasions: April 2, 2013 and six years later, on October 22, 2019. He provided two medical/legal reports and testified at the trial.
- [71] Dr. O'Connor's first examination on April 2, 2013 occurred within a few days of Dr. Arthur's examination on March 28, 2013.
- [72] In his April 2, 2013 report, Dr. O'Connor noted the following symptoms as described by the plaintiff:

1. mid back pain, between the shoulder blades. Described as daily, anywhere from mild to moderate and sometimes severe. When severe, it is associated with neck and shoulder pain. (Doctor O'Connor's description of "mid-back" pain seems to equate to what the plaintiff and others generally refer to as "upper-back" pain);
2. neck and shoulder pain across the trapezius area, about once a week, mild to moderate. Worse only when the mid back pain gets worse;
3. headaches - resolved;
4. low back pain - resolved; and
5. hip pain, occasional discomfort.

[73] On examination, Dr. O'Connor noted tenderness in the neck and mid back, "in keeping with non-specific musculoskeletal strain and now deconditioning and some mechanical limitations with regards to how weak her muscles are in these areas." He also noted tenderness in the low back.

[74] Dr. O'Connor reviewed the available records with respect to MVA #1. Ambiguously, he reported that Ms. Dulay told him "her symptoms were largely improving" yet were "totally resolved" by the time of MVA #2.

[75] Dr. O'Connor diagnosed non-specific musculoskeletal strain. He stated that as a result of MVA #2, the plaintiff suffered:

1. aggravation of neck pain;
2. aggravation of headaches;
3. aggravation of mid back pain;
4. aggravation of low back pain;
5. aggravation of left hip pain; and
6. fear of driving.

[76] Since Dr. O'Connor stated that MVA #2 caused aggravation of pre-existing musculoskeletal problems, it is apparent that he did not conclude that her injuries from MVA #1 had totally resolved by the time of MVA #2.

[77] Dr. O'Connor noted that her primary problem was worsening of her mood, and anxiety, adding:

mood and anxiety became a major issue and led to the main limiting factor with regards to her ability to return to work in my opinion. She did have ongoing discomfort and pain, but it is my opinion that she would have been capable of graduated return to work had she not been bothered with increasing mood and anxiety problems.

[78] Dr. O'Connor stressed that she was significantly deconditioned, and needed a conditioning program to build up the muscles of her neck, mid back, and low back. He also suggested that she see a psychologist for anxiety, panic-type symptoms, and anxiety with driving.

[79] Dr. O'Connor noted that the three 2012 MVAs caused short-term aggravation of her symptoms and helped perpetuate her problems, particularly her anxiety and her non-specific musculoskeletal symptoms.

[80] In Dr. O'Connor's opinion in 2013, Ms. Dulay had not reached maximum medical improvement. She needed to work on strength and conditioning. There was a 30% chance her symptoms would persist indefinitely.

[81] Dr. O'Connor's October 2019 report is the only reasonably current medical/legal report in evidence.

[82] When Ms. Dulay saw Dr. O'Connor in 2019, she complained of:

1. mid back pain, daily, from moderate to severe intensity;
2. headaches - two to three days a month, with associated nausea;
3. moderate depression; and
4. poor sleep.

[83] On examination, he noted tenderness in the neck, upper, mid, and lower back areas.

[84] His overall prognosis was chronic soft tissue pain in the upper and mid back.

[85] In his 2019 report, Dr. O'Connor added "problems with mood and anxiety symptoms" to the list of injuries that he noted in his 2013 report.

[86] In commenting on his earlier opinion and updating his views, he stated:

It was my opinion that as a result of the March 2010 motor vehicle accident she struggled with aggravation of her pain in the neck, mid and low back and this led to a substantial deterioration in her overall ability to function. It was my opinion that she had soft tissue strains to the areas mentioned above, but this was being perpetuated or aggravated by her mood and anxiety and deconditioning. I recommended more active rehab and strength and conditioning. It was my opinion that she had not reached maximal medical improvement yet. Since I last saw her, the symptoms have improved to some extent. She was still maintaining full-time employment, but was doing so with a similar pattern of being on and off work anywhere from a few days a month to one to two days a week.

[87] He noted that she continued to be socially withdrawn and to struggle with her mood, but felt that there was a slight improvement in these areas.

[88] As noted previously, in 2013 Ms. Dulay had reported to Dr. O'Connor and to Dr. Arthur that her headaches had resolved.

[89] Dr. O'Connor noted that headaches had reoccurred sometime after MVA #6, on March 18, 2017. In his opinion, her neck pain and tension was contributing to her headaches, and therefore the MVA (by which he means MVA #2, as I interpret his evidence) was causing the headaches, in part. He stated that other factors could be contributing to her headaches, such as work stress, financial stress, and other life stresses.

[90] As to the March 18, 2017 MVA (MVA #6), Dr. O'Connor stated that she was still symptomatic, and MVA #6 caused:

1. aggravation of her mid back pain; and
2. possible aggravation of mood or anxiety symptoms.

[91] As to prognosis, in his second report Dr. O'Connor stated that her mid back pain and headaches were fairly well entrenched and it was unlikely that they would completely resolve.

[92] As with his first report, Dr. O'Connor emphasized the need for conditioning, as the plaintiff continued to be "moderately to severely deconditioned". Conditioning would increase her tolerance for activities such as bending, twisting, or lifting. He noted that she had just started going to the gym recently. Improvement in her conditioning would likely improve her mood and anxiety.

[93] However, Dr. O'Connor added:

At this stage it is unrealistic to expect her to suddenly focus on more aggressive strength and conditioning given the duration of her symptoms to date. She has had plenty of time to focus on this and to date this has not occurred. Should she do so and become stronger and work more regularly on strength and conditioning it is my opinion that her mood would improve and it is also my opinion that her strength, conditioning and tolerance to mechanical loading of the neck and upper back would also improve. It is for this reason that I would not provide restrictions to her recreational activities at this point. It is prudent to restrict repetitive bending, twisting or lifting at work currently as her tolerance to these activities is lower as a result of her deconditioning and chronic pain.

[Emphasis added.]

[94] In terms of overall prognosis, Dr. O'Connor stated that her present limitations would continue given the passage of time and "her several trials at active and passive treatments". However, in his view, she would be able to maintain her employment. She was capable of doing her duties at work, but with discomfort and pain and modification of tasks. If her conditioning would improve, she would be more capable. He did not restrict her from a recreational point of view.

4. Dr. R.J. Ancill - Psychiatry

[95] Dr. Ancill is a psychiatrist who saw the plaintiff September 3, 2013, and provided a report dated December 4, 2013. He testified at trial.

[96] Dr. Ancill diagnosed:

1. post trauma anxiety after MVA #2, which appears to have been exacerbated by the three subsequent, but minor, accidents (i.e., the three 2012 MVAs);
2. insufficient symptoms for a formal diagnosis of Post-Traumatic Stress Disorder;
3. Adjustment Disorder with anxiety - chronic type, brought on by exposure to traffic and driving;
4. Major Depressive Episode - moderate in severity for which she was receiving no treatment; and
5. Pain Disorder, associated with both Psychological Factors and General Medical Condition - classified as a somatoform disorder.

[97] Dr. Ancill explained that her Adjustment Disorder is at the lower end of the spectrum, as it involves anxiety brought on by exposure to traffic and driving.

[98] Dr. Ancill explained that a pain disorder is when a patient experiences chronic pain, thought to be related, at least in part, to psychological or emotional factors, stating:

This disorder often occurs after an accident caused pain, and this pain then takes on 'life of its own', as in this case.

[99] Dr. Ancill stated that pain disorders can last for years, as has happened in this case. He added:

Typically, the complaints and/or level of disability typically cannot be fully accounted for by the medical diagnoses

[100] Dr. Ancill recommended:

1. treatment for depression, including use of medications and possible referral to a psychiatrist;
2. cognitive behavioural therapy from a psychologist; and
3. possibly other chronic pain management techniques, such as acupuncture, massage, meditation, yoga, music and art therapy; although these are usually of limited benefit.

[101] Dr. Ancill considered Ms. Dulay to be a reasonable historian, and did not notice signs of exaggeration or dramatization. He stated:

I would view the severity of her level of pain assessments as being affected by her depressed state and that successful treatment of her depression and anxiety might result in a lower perceived level of pain.

5. Mr. M. Amel - Functional Capacity Evaluation

[102] Mr. Amel is a kinesiologist who carried out a functional capacity evaluation of the plaintiff on October 29, 2019.

[103] Mr. Amel noted that Ms. Dulay's job as an airport security screening representative involves light physical demands, in terms of lifting, carrying, pushing and pulling, walking, and standing. The plaintiff was working full-time on modified duties with some restrictions. Ms. Dulay advised him that she is sore in her neck and mid back when she stands or sits for too long or lifts heavy weights.

[104] On physical capacity testing, she met the job demands with some restrictions, such as lifting and standing for long periods of time.

[105] Mr. Amel noted poor conditioning, poor strength, poor posture, and poor muscular endurance. He recommended an active fitness, stability, posture, and conditioning program, under the supervision of a kinesiologist with a minimum of ten years' experience. The program should address her sitting and standing tolerance, lifting and carrying ability, strength, and posture. In other words, he recommended an active work conditioning program.

IV. Analysis

A. Commentary re Diagnosis and Prognosis

[106] The medical and opinion evidence regarding the plaintiff's injuries is quite consistent.

[107] As noted, the only relatively recent report is Dr. O'Connor's second report dated October 22, 2019. Dr. O'Connor struck me as a careful, precise, and fair witness. I accept the opinion of Dr. O'Connor in his first and second reports that in the March 2, 2010 MVA (MVA #2) the plaintiff suffered aggravation to the injuries she had sustained in MVA #1 (aggravation of pre-existing neck pain, headaches, mid back pain, low back pain, and left hip pain), and that she also suffered from fear of driving, and problems with mood and anxiety.

[108] As her GP Dr. Parikh noted, she suffered a moderate strain of the neck and back. Dr. Parikh added that she also likely sustained a compressive injury to the facet joints and joint capsules of the spinal bones. However, this particular diagnosis does not add anything to the overall picture.

[109] Dr. O'Connor diagnosed a non-specific musculoskeletal strain. Dr. Arthur's opinion is not fundamentally inconsistent with that of Drs. O'Connor and Parikh. Dr. Arthur found only tenderness to palpation over the upper back area. Other than that, he noticed no objective findings on examination. He did not disagree with Dr. Parikh's diagnosis. As noted, he disagreed with Dr. Parikh's recommendation for passive treatment, and Dr. Parikh amended that recommendation in his second report, to align better with the opinion of Dr. Arthur.

- [110] I accept the opinion of Dr. O'Connor, expressed in both of his reports, that the plaintiff is very deconditioned and would benefit from an exercise, strength, and conditioning program.
- [111] The plaintiff has developed chronic pain. Her chronic pain problems have a substantial psychological aspect, as explained in detail in the opinion of Dr. Ancill, psychiatrist, which I accept. As noted, he recommended treatment for her mental health symptoms. The lack of significant physical findings in the report of Dr. Arthur is not surprising, given Dr. Ancill's diagnoses of a Major Depressive Episode, untreated, and Pain Disorder. Dr. O'Connor's report is consistent with this.
- [112] Unfortunately, the plaintiff has had little or no psychological or psychiatric treatment. She tried an antidepressant medication (Cipralex) for a month or two in April 2012, but then discontinued it. The treatment recommendations made by Dr. Ancill in 2013 were not pursued. She saw a counsellor, Lana Rados, for six sessions seven years after MVA #2. I have no evidence from Ms. Rados, and no information as to her qualifications or the scope of treatment she provided.
- [113] The plaintiff began active rehabilitation comparatively recently, in 2017. It appears that these efforts, perhaps together with the counselling and the passage of time, have resulted in some improvement in her condition.
- [114] The plaintiff testified that in the past year she continues to suffer from upper back pain, pain in the shoulders, neck, and headaches. However, her mood is much better. In cross-examination she agreed that by late 2017 her upper back pain, which is her major complaint, was improved and she was feeling stronger. She was regularly pain free.
- [115] Dr. O'Connor's prognosis, which I quoted previously, is generally negative, although this is partly driven by the plaintiff's failure to vigorously pursue strength and conditioning efforts.
- [116] In his 2019 report, Dr. O'Connor continued to advocate for fitness, strength, and conditioning efforts, and he noted that her mood-related problems have been a substantial factor in her symptoms, as outlined in Dr. Ancill's report, which Dr. O'Connor clearly accepts.

B. Causation - Assessment

- [117] I accept the plaintiff's evidence that, while she was not back to work full-time by the time of MVA #2, she had followed the graduated return to work program directed by Dr. Lam, and was nearing a return to full-time work.
- [118] I also accept the plaintiff's evidence that she was largely, but not completely, recovered from the effects of MVA #1 when MVA #2 occurred. In other words, she was still suffering from the effects of MVA #1 when MVA #2 occurred.

- [119] This is consistent with the evidence of Dr. O'Connor, which I referred to earlier, who mostly diagnosed aggravation of her pre-existing symptoms in MVA #2, and with the other medical evidence.
- [120] On the totality of the evidence, I conclude that the plaintiff suffered significant soft tissue injuries in MVA #1, and that these injuries were aggravated by MVA #2, resulting in chronic pain and the psychological conditions diagnosed by Dr. Ancill. On the evidence as a whole, the subsequent MVAs including MVA #6 were all relatively minor events that generally caused transient injuries and did not significantly change the plaintiff's condition.
- [121] The defendants point to various inconsistencies or discrepancies in the plaintiff's evidence, contending that her evidence is not reliable and not credible.
- [122] In my view these are generally minor matters.
- [123] There is some ambiguity in her evidence about the extent to which she was recovered from MVA #1 when MVA #2 occurred. This is understandable given the passage of time, but in any event, on my view of the matter, precision is not required.
- [124] The plaintiff was uncertain about the dates of MVA #2. In cross-examination she said that she thought it may have occurred March 2 rather than March 1. This is obviously immaterial. She initially informed Dr. Parikh that the accident occurred March 9, but corrected that, and Dr. Parikh notes that she said it was March 2.
- [125] Her reports of time lost from work after the first and second accidents have been somewhat variable. This is not unusual in cases of this nature. She had difficulty recalling some other minor injuries that she had over the years.

C. Causation

1. Causation - Legal Principles

- [126] I adopt the concise summary of the applicable legal principles set out in the decision of Justice Riley in *Cook v. Kang*, 2020 BCSC 526, at paras. 189- 194, which was relied upon by the defendants in their submissions:
- [189] There are in my view six points of law that serve to define the parameters of the legal analysis in this case, the first of which is the basic test for causation. To establish causation, the plaintiff must demonstrate on a balance of probabilities that "but for" the tortious conduct of each defendant, the injuries suffered by the plaintiff would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey] at para. 14; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 21, 29; *Clements v. Clements*, 2012 SCC 32 at para. 8.
- [190] The second point of law has to do with situations where there are multiple or competing causes at play. The law provides that where there are said to be causes for the plaintiff's injury other than the conduct of the defendants, including pre-existing conditions, the requirement for causation is made out where it is shown that the tortious conduct was a

contributing cause to the plaintiff's injury. Thus although the "but for" analysis continues to apply in the sense that the plaintiff must show that he or she would not have suffered the injury "but for" the defendant's tortious conduct, the test can be met by proof that the defendant's tortious conduct was "a contributing cause" to the plaintiff's injury: *Athey* at paras. 12, 17. To sum it up in one phrase, "a defendant is liable for any injuries caused or contributed to by his or her negligence": *Athey* at para. 12.

- [191] This leads to a third point, which has to do with pre-existing conditions. The law of causation provides that where the defendant's conduct is found to be a contributing cause of an injury, the defendant is liable and that liability is not reduced or apportioned due to the presence of other contributing causes. Thus, the defendant tortfeasor is liable for the plaintiff's injuries even if those injuries are unexpectedly severe due to a pre-existing condition: *Athey* at para. 34.
- [192] The fourth point has to do with the legal distinction between causation and damages as discussed in *Blackwater v. Plint*, 2005 SCC 58 at para. 78. On the one hand, for the purpose of the causation analysis the tortfeasor must take the victim as is, such that the tortfeasor is liable for all of the plaintiff's injuries even if they are unexpectedly severe due to a pre-existing condition: *Athey* at para. 34. On the other hand, when it comes to assessment of damages the law requires the tortfeasor to restore the victim to his or her original position, but no better position. Thus in assessing damages, it is the difference between the victim's "original position" prior to the tortious conduct, including any pre-existing conditions, and the victim's "injured position" after the tort that is used to measure the loss: *Athey* at para. 32.
- [193] A fifth point of law at play in this case is the manner in which "independent intervening events" are treated in the assessment of damages. The overarching objective of tort law is to place the victim in the position that he or she would have been in absent the defendant's tortious conduct: *Athey* at para. 32. Where the victim's position is altered by some intervening event that would have occurred independent of the defendant's tortious conduct, it is necessary to account for the effect of that event on the victim's position in assessing damages for the defendant's tortious conduct.
- [194] A sixth and final legal point at play in this case is the distinction between divisible and non-divisible injuries. In a case involving multiple tortfeasors, there may be debate as to which defendant is liable to compensate the victim for which injuries. On this point, the law holds that where the plaintiff suffers "separate and distinct" injuries from the tortious acts of two different defendants, then each defendant is liable only for the injury he or she caused: *Athey* at para. 24. By contrast, where the plaintiff's injuries are "indivisible", then each defendant found to have negligently caused or contributed to the plaintiff's injuries will be liable for those injuries: *Athey* at para. 25.

2. Causation - Analysis

[127] The plaintiff's injuries are indivisible.

[128] The causation question is analysed by asking whether the plaintiff would have suffered from her injuries but for MVA #2. In my view, it is more likely than not - therefore, it is established - that but for MVA #2, the plaintiff would not have suffered from the injuries that she complains of.

[129] MVA #1 and MVA #2 were each substantial causative factors. However, but for MVA #2, she would likely have recovered fully from MVA #1. MVA #1 rendered her vulnerable to re-injury. The timing of MVA #2 is important. The timing was unfortunate. Although she was somewhat recovered from her injuries from MVA #1, she was not fully recovered. Had MVA #2 not occurred when it did, there is no reason to suppose that her injuries from MVA #1 would not have resolved fully in due course.

[130] This is supported by the opinion of Dr. O'Connor, as I interpret it, and which I accept. He stated:

It is my opinion that the March 2010 accident perpetuated her prior problems that she had prior. She had gotten back to work. She had not required any therapy. She had not gotten back to her previous level of physical activity after the January 2010 accident however.

It is my opinion that had the March 2010 accident not occurred more likely than not she would have been able to maintain her ability at work, at least for the short term.

Had the March 2010 accident not occurred, more likely than not she would have been able to maintain work based on this history and the absence of any other supporting information to the contrary.

[131] Dr. Parikh stated simply: "On a balance of probabilities, the subject motor vehicle accident of March 2, 2010 is the cause of these injuries."

[132] Dr. Ancill's report is consistent. He stated:

It is my opinion that Ms. Dulay was injured in the MVA of March 2010 and presents 42 months later with the persistence of functional and emotional symptoms that were not present prior to the accident in question.

[133] Dr. Arthur did not directly opine on this question, but did not offer a different opinion. He was aware of MVA #1, and had available the records of Dr. Lam relating to treatment for MVA #1. He stated that the injuries she sustained were as a result of MVA #2.

[134] The defence argues that MVA #1 was much more serious, in relation to the severity of the collision, than was MVA #2. From this I am asked to infer that it is more likely that her injuries stemmed from MVA #1, and that MVA #2 was a minor, temporary, aggravating event. I do not make that inference in this case.

- [135] It is well-known that the extent of injuries sustained by a person correlates poorly, if at all, with the severity of the accident and the presumed forces involved. More importantly, even if I were to accept that her physical injuries sustained in MVA #1 would have been more severe than those sustained in MVA #2, this does not change the overall conclusion that I reach. That is, her injuries result from a combination of both accidents. The relative severity of each accident does not make a difference to that conclusion, in the circumstances of this case.
- [136] The defence also argues that the plaintiff suffered from a number of other injuries, which may have affected her health in any event; that is, even absent the injuries sustained in the compensable MVAs.
- [137] The defence relies upon my decision in *Firman v. Asadi*, 2019 BCSC 270, at paras. 137-138:
- [137] If unrelated intervening events would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately: T.W.N.A. at para. 36. T.W.N.A. states that unrelated intervening events must be taken into account in the same way as pre-existing conditions, in that if the intervening event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately. More recently, in *Khudabux v. McClary* 2018 BCCA 234, the Court of Appeal has said that the issue of intervening events is more properly approached through the lens of causation (at para. 37). Whether the issue is classified as an issue of causation or assessment of damages does not matter. The analysis is the same: if unrelated events would have affected the plaintiff's condition in any event, then the defendant has not caused the loss attributable to the unrelated events, and an apportionment of the plaintiff's damages should be made.
- [138] Since determination of the plaintiff's original position depends upon hypothetical events and future events (what would have been the plaintiff's state of health and what consequences may flow from that), then the analysis is based upon matters that are proven to be measurable risks or realistic possibilities: T.W.N.A. at paras. 39, 78; *Athey* at paras. 27, 35-36; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62 (S.C.C.) at para. 42.
- [138] The other injuries include ankle injuries occurring December 5, 2009 and October 2010, a right hip injury sustained in November 2010, injuries sustained in the other MVAs (MVAs # 1, 3, 4, and 5), the injury to her shoulder occurring December 5, 2011 when she was struck by her manager, and a few other minor incidents.
- [139] In my view, these matters should be addressed in the context of the assessment of damages.

D. Defence Failure to Mitigate Argument

- [140] I adopt my discussion of the legal principles regarding failure to mitigate in the context of a claim for personal injuries as set out in *Forghani-Esfahani v. Lester*, 2019 BCSC 332:

- [58] In *Chiu v. Chiu*, 2002 BCCA 618 [Chiu], Low J.A. stated, for the court:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things:
- (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and
 - (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
- [60] In *Athey*, the Supreme Court cites *Janiak* for the proposition that hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities; instead, they are simply given weight according to their relative likelihood. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey*, at para. 27.
- [66] In *Bhatti (Litigation Guardian of) v. Ethier*, 2018 BCSC 1779 [Bhatti], I stated:
- [131] The first of these issues (whether the plaintiff acted unreasonably in eschewing the recommended treatment) depends upon an evaluation of past facts, which must be proven on a balance of probabilities. However the second issue (the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably) depends on past hypothetical events, which the court will weigh according to their relative likelihood, provided the possibility is real and substantial: *Gao v. Dietrich*, 2018 BCCA 372, at para. 39; *Gill v. Lai*, 2018 BCSC 101, at para. 73; *Evans v. Keill*, 2018 BCSC 1651, at para. 121.
- [69] I conclude that in order to meet the second part of the *Chiu* test for failure to mitigate (the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably) the defendants must, first, establish a real and substantial possibility that any part of the losses could have been avoided. If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.
- [141] In summary, the defence has the onus of establishing:
- 1) that the plaintiff acted unreasonably in failing to follow recommended treatment; and
 - 2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably.
- [142] In order to meet the second part of this test, the defendants must establish a real and substantial possibility that any part of the losses could have been avoided. If so, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.

[143] The defence argues that the plaintiff failed to mitigate her loss as follows:

- 1) failed to reduce the severity of her injuries by not attending physiotherapy in 2010;
- 2) not obtaining accommodation at work in 2010;
- 3) not asking for accommodation at work in August 2011;
- 4) failing to take part in active rehabilitation from 2013 to 2017; and
- 5) failing to obtain mental health treatment.

[144] The first point has to do with Dr. Lam's recommendation for physiotherapy treatment in January 2010. Dr. O'Connor interpreted this as the plaintiff not requiring such treatment. I accept this interpretation. The defence has not established that the plaintiff acted unreasonably in failing to attend physiotherapy after MVA #1.

[145] Points two and three are also not established. What might have happened had the plaintiff requested further work accommodation does not rise above speculation. The plaintiff's concerns about losing money were reasonable.

[146] However, the fourth and fifth points have merit. Dr. O'Connor's first report is quite emphatic about the need for conditioning and strengthening. Dr. Arthur disagreed with Dr. Parikh's initial recommendation for further passive treatment, and Dr. Parikh amended his opinion to align with that of Dr. Arthur. Dr. Parikh's second report states that Ms. Dulay would benefit from an active rehabilitation physiotherapy program, as well as stretching and a "gym supervised program". He noted that she requires strengthening and conditioning and that she had gained weight.

[147] Despite these recommendations, the plaintiff did very little in this regard. When she began active rehabilitation in 2017, she noticed some improvement, both physically and with respect to her mood symptoms. I conclude that earlier efforts at active rehabilitation and conditioning, and following the recommendations of Dr. O'Connor in his April 2013 report, would likely have resulted in improvement in both her physical and mental health.

[148] Dr. Ancill noted that the plaintiff had become depressed after MVA #2, and indeed had taken nine months off of work for depression in July 2012 to April 2013. (Some of this time was due to her paperwork problems.) It appears she was resistant to taking antidepressant medication that Dr. Parikh prescribed for her. Dr. Ancill noted that she became distressed when he discussed antidepressant medications with her. Dr. Ancill noted that "she has limited insight and does not report depression although she appears objectively depressed". Although she may have had limited insight when she saw Dr. Ancill, she was capable of following his recommendations. As noted, Dr. Ancill recommended psychological treatment, with antidepressant medication, possible referral to a psychiatrist for treatment of anxiety and depression, and cognitive behavioural therapy with a psychologist, as well as treatment specifically directed at chronic pain. These recommendations were not pursued.

[149] I infer that treatment for her psychological condition, and active rehabilitation with conditioning and strength training, could have made a significant difference to her condition. Therefore, to an extent, the plaintiff failed to mitigate her loss. This must be addressed within the assessment of damages.

V. Assessment

A. Non-Pecuniary Loss

1. Legal Principles

[150] I adopt my summary of the applicable legal principles set out in *Gillam v. Wiebe*, 2013 BCSC 565, at paras. 68 to 71, which includes a reference to the leading decision of the British Columbia Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100. I do not need to repeat that here.

[151] In *Sendher v. Wong*, 2014 BCSC 140 [Sendher], I added:

[147] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56, at para. 25.

[152] As the Court of Appeal noted in *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410, at para. 123, serious mental injuries can have grave consequences. The court quoted *Saadati v. Moorhead*, 2017 SCC 28, wherein Justice Brown for the Court wrote:

[23] I add this. As to that first necessary element for recovery (establishing that the defendant owed the claimant a duty of care), it is implicit in the Court's decision in [*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27] that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. That right is grounded in the simple truth that a person's mental health -- like a person's physical integrity or property, injury to which is also compensable in negligence law -- is an essential means by which that person chooses to live life and pursue goals ... And, where mental injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury ... To put the point more starkly, "[t]he loss of our mental health is a more fundamental violation of our sense of self than the loss of a finger" ...

[References omitted.]

2. Assessment - Non-Pecuniary Loss

[153] The plaintiff continues to suffer from upper back pain, together with associated pain in her shoulders, neck, headaches, and depressed mood.

- [154] I accept the plaintiff's evidence and that of the collateral lay witnesses that prior to MVA #1, she was healthy, active, outgoing, and sociable. Her only significant pre-existing condition was asthma, for which she used an inhaler, but the condition was not significantly limiting. She ran daily, usually by herself, or sometimes with friends. She hiked with friends frequently, in local venues such as Buntzen Lake, White Pine Beach, Rainbow Lake, and other places. She enjoyed hip-hop dancing and going to clubs with friends. She socialized with friends on a daily basis. She took hip-hop dancing classes with friends. She went clubbing regularly, primarily for dancing. She was working full-time at YVR as a pre-board screening officer.
- [155] Her injuries have detrimentally affected all of these activities. She does not run anymore. She tried to run several times but suffered from pain in her back. She tries to use the stair and elliptical machines at the gym but finds she cannot do more than about 10 minutes. She stopped going out and socializing regularly. She attempted a hike in summer 2019 at Rainbow Lake, but this caused a flare-up in her back pain, and she has not attempted it again. This was her first attempt to return to hiking since she was injured. She no longer goes camping regularly, mostly because she lost touch with the friends that she used to go with. This past summer she went camping for the first time since she was injured, with her parents, who took care of most of the camping work.
- [156] Currently she goes for walks regularly.
- [157] In 2019, after attending Karp Rehabilitation, she obtained a gym membership and has been going to the gym for about a year now.
- [158] Her injuries have caused serious and persistent problems with her work. She has taken several long leaves of absence from work and missed many individual days of work. She has also turned down (refused) overtime work opportunities, regularly. Her employer has continued to accommodate her need for reduced or modified work duties. This has resulted in friction with her coworkers. As I interpret the evidence, her employment is in jeopardy, to some extent. The evidence about this is somewhat unclear, but she has received warnings and some kind of progressive discipline program is being applied to her.
- [159] The consequences to the plaintiff of her injuries is supported by the evidence of the collateral lay witnesses.
- [160] The plaintiff's sister-in-law, Rampy Mahl, has known her since about 2004. She has spent time with her very regularly since then. Ms. Mahl confirmed that, prior to the MVA, the plaintiff was very social, and enjoyed dance, running, socializing with friends, clubbing, camping, and shopping. The plaintiff had no noted physical limitations or problems and no physical complaints. Ms. Mahl noted that the plaintiff seemed very depressed around the time of Ms. Mahl's wedding in October 2010, and was not engaging in activities. Ms. Dulay lived with her for six to nine months in Prince George in 2012, but was very unenergetic, sedentary, and depressed. Ms. Mahl moved back to the Lower Mainland from Prince George in 2017 and continues to see Ms. Dulay regularly. She still seems depressed, but Ms.

Mahl has noticed some improvement in her emotional state in the last few months.

- [161] Hardeep (Ricky) Pahal is a screening officer and co-worker of the plaintiff. He has known the plaintiff since they were in high school together. They grew up in the same neighbourhood. He first met her in 2002. He confirmed the evidence of the plaintiff and of Ms. Mahl concerning the plaintiff's pre-accident activities, such as running, hiking, and social outings. He confirmed that prior to the accident she was a good worker, who was able to work overtime and regularly did so.
- [162] According to Mr. Pahal, after the accident she was a "completely different person". She is no longer able to do all the things required of her at her job, such as lifting bags. She seems depressed and anxious. Subsequent to March 2010 she stopped her activities, seemed depressed, and gained weight. Mr. Pahal and the plaintiff continue to socialize. He noted that lately, this year, she seems a bit better and is getting out more.
- [163] Another screening officer co-worker of the plaintiff at YVR, Ms. Rashminder Dosangh, testified. She has known Ms. Dulay for the last four or five years. She testified about the demands of their work, and the plaintiff's difficulties in performing all of her work duties. She noted that the plaintiff appears to be in pain, and that she has refused overtime work when offered.
- [164] As a result of MVA #2, together with the continuing consequences of MVA #1, the plaintiff sustained soft tissue injuries to her neck, and her upper, mid, and lower back, as well as her left hip, that resulted in chronic pain, primarily to her upper back, together with persistent headaches. As noted by Dr. O'Connor, in particular, the main feature of her injury became mental health injuries, such as driving anxiety and depressed mood. MVA #6 exacerbated her injuries.
- [165] Dr. Ancill diagnosed significant and persistent mental health injuries and symptoms.
- [166] Although she continues to suffer from chronic pain and depression, her condition has finally begun to improve in the past two or three years. Emotionally, she feels she is "much stronger". She is able to better manage her pain. She has been able to work full-time, although on modified duties. Some days she is free of pain.
- [167] Her recreational activities are far more limited than they used to be. Domestically, she is able to look after herself and her home, with difficulty, by pacing her activity activities. Her social life remains very limited.
- [168] As noted, the only relatively current prognosis is that of Dr. O'Connor in his October 2019 report. I accept his opinion that her mid back pain and headaches are fairly well entrenched and it is unlikely that they are going to completely resolve.
- [169] However, he continues to advocate for efforts to improve her conditioning and strength, which would improve her physical and mental situation. He does not recommend restrictions on her recreational activities, due to the importance of improving her strength

and conditioning. She can continue to work full-time on modified duties. He states she will need assistance with heavier seasonal work due to her deconditioning. Work on reconditioning and building up her strength would eliminate this need. She has no need for further investigations or any surgical intervention.

[170] The plaintiff suggests that the appropriate range of non-pecuniary general damages is \$85,000-\$110,000 (for both actions).

[171] The plaintiff relies on the following authorities:

1. Chong v. Nguyen, 2017 BCSC 1564 - \$110,000;
2. Bergeron v. Malloy, 2020 BCSC 963 - \$85,000; and
3. Dabu v. Schwab, 2016 BCSC 613 - \$95,000.

[172] The defence submits that non-pecuniary damages should be assessed at \$60,000-\$70,000 (for both actions), with a reduction of 50% for pre-existing injury and intervening events, and a further reduction of 15% for failure to mitigate, resulting in a net non-pecuniary damages award of \$25,500-\$29,750.

[173] In relation to non-pecuniary loss, the defence relies upon the following authorities:

1. Li v. Gill, 2020 BCSC 1298 - \$120,000, less 35% for measurable risks of pre-existing neck issues and dizziness causing problems without the accident - net award of \$78,000;
2. Leung v. Mok, 2020 BCSC 1456 - \$70,000, less 35% for risk of pre-existing conditions and symptoms causing problems without the accident- net award of \$45,500;
3. Liu v. Conn, 2020 BCSC 1195 - \$50,000;
4. Fiorda v. Say, 2011 BCSC 1293 - \$40,000, less 20% for failure to mitigate - net award of \$32,000; and
5. Findlay v. Sun, 2020 BCSC 1330 - \$55,000.

[174] I have also considered several of my own previous decisions, all of which involved a combination of physical and psychological injuries:

1. Minhas v. Peltonen, 2020 BCSC 1836 - \$95,000;
2. Walls v. Ocampo, 2020 BCSC 499 - \$100,000, less 20% for failure to mitigate - net award of \$80,000;
3. Forghani-Esfahani v. Lester, 2019 BCSC 332 - \$90,000; and
4. Firman v. Asadi, 2019 BCSC 270 - \$170,000.

- [175] Considering, in particular, the plaintiff's youth, the severity of the consequences of the injuries to her, the negative overall prognosis, but also the recent positive signs and viable treatment avenues (both psychologically and physically), and the guidance provided by the foregoing authorities, I assess non-pecuniary loss at \$105,000.
- [176] I do not reduce that assessment for measurable risks that her pre-accident condition (essentially, the injuries she sustained in MVA #1) could have affected her condition, even without MVA #2.
- [177] As noted, I accept that by the time of MVA #2, the plaintiff was well on the road to recovery. Absent that accident, there is really no reason to conclude that the effects of MVA #1, standing alone or in combination with unrelated subsequent injuries, would have resulted in the plaintiff's injuries, nor is there any medical evidence to this effect.
- [178] Similarly, in my view, no deduction or allocation is warranted for the effects of discrete unrelated intervening events, such as the workplace shoulder injury, and the non-compensable accidents. As I have stated, these were relatively minor events, which did not contribute significantly to her consistent long-standing complaints for which damages are being assessed.
- [179] However, a reduction for failure to mitigate loss is applicable. The plaintiff did not follow reasonable treatment recommendations in relation to both her physical and mental health.
- [180] By 2013, her chronic pain and mood disorders were well established. She declined further use of antidepressant medication suggested by Dr. Parikh. Dr. Ancill noted her reluctance to accept psychiatric medical treatment. Her physical injuries were relatively minor, and it seems likely that had she followed the advice of Doctors Parikh, O'Connor, Arthur, and Ancill in 2013, her condition could have been substantially improved. In my view a 20% reduction is appropriate.
- [181] Therefore, the net non-pecuniary damages are assessed at \$84,000.
- [182] The plaintiff does not seek a separate and distinct pecuniary award for loss of domestic or housekeeping capacity, and none is justified in this case.

B. Loss of Earning Capacity

1. Legal Principles

- [183] The defence relies upon the principles set out in my decision in *Carlton v. Warner*, 2020 BCSC 436, at paras. 82-83, wherein I referred to *Sendher*. I adopt that passage here, without repeating it.

2. Past Loss of Earning Capacity

- [184] The plaintiff is paid on the basis of hourly wages. In 2010 she earned \$17.04 per hour. Her hourly wage has since risen to \$20.82.

[185] The plaintiff contends that, while the records are incomplete, a reasonable estimate of the number of hours of work she has lost since March 2, 2010 is 3,553 hours, which, when multiplied by the applicable hourly rate, is a loss of \$65,454.81. The plaintiff concedes that some of the work hours lost were due to unrelated matters. An example is the delay in returning to work in 2013 due to not having current security clearance documents and a passport. The plaintiff submits that a conservative estimate of her past income loss is therefore \$32,500.

[186] The defence contends that the plaintiff's evidence concerning work loss is unreliable, there were other causes for work loss, and that the past loss of income is not established on the medical evidence. The defence also notes that, on the basis of her income tax returns, her income in recent years has averaged well above the amount she earned in 2009, the only pre-injury year for which there is evidence.

[187] I accept the evidence of the plaintiff she has missed substantial amounts of work as a result of her injuries, and that, in substantial measure, the work loss was due to her injuries. Precision is not possible. The limited pre-accident information available provides no helpful guidance.

[188] I accept the estimate of time lost from work since 2010 as set out in the submissions of the plaintiff, together with the plaintiff's estimate of the value of the lost time.

[189] The table and hours and wages is as follows:

680 hours @ \$17.04 =

\$11,587.20

2163 hours @ \$18.07 =

\$39,085.41

710 hours @ \$20.82 =

\$14,782.20

3553 hours

\$65,454.81

[190] I accept the plaintiff's submission that a reasonable and perhaps conservative estimate of her past loss of income, on this basis, is \$32,500.

[191] A reduction for failure to mitigate loss is appropriate. However, the deduction is less applicable for 2010 through 2012 than it is for later periods of time. I therefore reduce the assessment by 12.5%, to \$28,437.50. I round this up to \$28,500.

3. Loss of Future Earning Capacity

- [192] The plaintiff contends that her work capacity remains restricted and limited, and that she continues to miss shifts and to refuse overtime opportunities. The evidence establishes that prior to the Covid-19 pandemic this year, overtime was regularly available. She submits that an award of \$25,000 should be made, on the capital asset approach. She argues that this is approximately one-half years' income.
- [193] The defendants argue that no future loss of earning capacity award is justified. They point to an apparent increase in her income since prior to her injury, and to the medical evidence that she can continue to do her job, with accommodations.
- [194] I accept that the plaintiff's work limitations continue, and that she continues to lose some shifts as a result, and to turn down overtime. I accept that she can continue with the work she does presently, with accommodations. There has been some improvement in her condition, and there are treatment options. In my view, the plaintiff's submission of \$25,000 is reasonable. The award is reduced by 20% for failure to mitigate, resulting in a net award of \$20,000.

C. Costs of Future Care

- [195] The applicable principles were summarized by the Court of Appeal in *Gao v. Dietrich*, 2018 BCCA 372, as follows:
- [69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.
- [196] The plaintiff seeks an award of \$2,400, based upon the report of Mr. Amel. He recommends a work conditioning program for ten weeks, three times a week, for a total of 30 sessions, at a total cost of \$2,400.
- [197] This is a very modest claim which is amply supported by the medical and expert evidence, including that of Mr. Amel. There should be no deduction for failure to mitigate, as this is the kind of expense that the plaintiff ought to have incurred in the past. I award \$2,400 as costs of future care.

D. Special Damages

- [198] The plaintiff claims special damages in the amount of \$6,336.90. The defence does not disagree with any particular item, but says that the award should be reduced to \$3,168.45, for pre-existing injuries, intervening events, and failure to mitigate.

[199] The expenses claimed are for actual out-of-pocket monies, such as chiropractic treatment, physiotherapy, counselling, taxis, and medical notes. All of these expenses are established on the evidence. No reduction is appropriate. Again, had the plaintiff taken more active measures to mitigate her loss, the expenses would have been higher. Therefore, special damages are allowed in the sum of \$6,336.90.

VI. Conclusion and Summary

[200] Based on the foregoing reasons, the assessment of damages is as follows:

Head of Damage

Award

Non-pecuniary damages

\$84,000

Past Loss of Earning Capacity

\$28,500

Loss of Future Earning Capacity

\$20,000

Costs of Future Care

\$2,400

Special Damages

\$6,336.90

TOTAL

\$141,236.90

[201] The defendants did not seek an allocation of the damages as between the two actions.

[202] The defendants state that s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 applies, and that awards for special damages and future care are subject to s. 83 deductions. Counsel advised me that they would likely be able to sort out this matter once the decision is released.

[203] The plaintiff is entitled costs, subject to the effect of any formal offers to settle. If necessary, counsel may make arrangements to address costs via written submissions, through a request to Supreme Court Scheduling, made within 30 days of the issuance of these reasons for judgment.

"Verhoeven J."

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Prepared on 29 October 2026 · Esheria