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CANADA / JUDGMENT

## Helgason v. Bosa

2010 BCSC 1756

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COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1756 Helgason v. Bosa

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Helgason v. Bosa,

2010 BCSC 1756

Date: 20101208

Docket: M084365

Registry: Vancouver

Between:

Donna Corene Helgason

Plaintiff

And

Natalia R. Bosa

Defendant

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Plaintiff:

Valmon LeBlanc

Counsel for the Defendant:

Amanda Meade, Mark Gibson

& Jeffrey Joudrey

Place and Date of Trial:

Vancouver, B.C.

October 20-22, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 08, 2010

## INTRODUCTION

- [1] This trial and judgment concern an assessment of damages arising out of a motor vehicle accident ("MVA").
- [2] Liability is admitted.
- [3] The plaintiff claims damages in the following categories:
  - 1. Non-pecuniary damages;
  - 2. Past wage loss;
  - 3. Loss of future earning capacity;
  - 4. Future care;
  - 5. Loss of homemaking capacity;
  - 6. Special damages.
- [4] The plaintiff gave evidence, as did her husband, two friends, and a human resources advisor for the plaintiff's employer. Her general practitioner, Dr. Nordahl, also gave evidence. Dr. Nordahl's report of May 11, 2009 was entered as an exhibit.
- [5] The defendant questions the plaintiff's reliability and credibility. It is argued that she was evasive and that she attempted to shape her evidence to what best served her claim. It is argued that she exaggerated her evidence when it suited her and used overly dramatic language to inflate her claim. It is also noted that, on occasion, her evidence was directly contradicted by Dr. Nordahl.
- [6] I agree with the defendant that the plaintiff made a number of errors in her evidence and that these affect her reliability, at least in those areas where the errors occurred. I also agree that she sometimes used emotional and dramatic language. However, none of these findings lead me to question her credibility. I am satisfied that she has tried to tell me the truth and that any errors which she made were simply errors, and not attempts to mislead me. Where she has erred, I am satisfied it is due to the passage of time sometimes affecting her

memory, and the impact of her emotional reaction to her situation. I accept that her reliability is in question with respect to various individual answers, such as when her evidence is inconsistent with that of Dr. Nordahl. However, these instances are infrequent and of insufficient significance to lead me to question her overall credibility or reliability. Generally, I believe her evidence, and accept that it was given to the best of her ability.

- [7] The defendant argues that the evidence of the plaintiff's husband, Mr. Patton, was "not particularly helpful".
- [8] With respect to one of the plaintiff's friends, the defendant argues that the greater part of her evidence was based on what the plaintiff had told her about her condition, rather than on the witness' actual observations. With respect to the other friend, the defendant argues that this witness was "uncooperative, argumentative and an obvious advocate for the plaintiff."
- [9] I do not agree with the defendant. While these witnesses were not impartial witnesses, in the same sense that all friends and spouses of parties to litigation are partial, I am satisfied that they attempted to tell me the truth to the best of their ability. Generally, I believe their evidence. Wherever their evidence was based on what the plaintiff told them, as opposed to what they observed, I agree that evidence is not admissible for the truth of what they were told.

## THE MVA

- [10] The MVA occurred on November 8, 2006 at 4:15 p.m. at the intersection of Victoria Drive and Hastings Street in Vancouver. The plaintiff was southbound on Victoria Drive, on her way home from work. She was stopped at a red light prior to entering the intersection at Hastings. When the light turned green, she proceeded into the intersection. The defendant was driving westbound on Hastings and did not stop at the red light. Her vehicle hit the front, driver's side, quarter panel of the plaintiff's vehicle.
- [11] There was no evidence as to the speed of the defendant's vehicle at the time of impact.
- [12] The plaintiff does not remember the impact.
- [13] Her vehicle was not driveable and was towed away.
- [14] She called 9-1-1. Police and paramedics arrived shortly afterward. She was offered medical treatment at the scene. She did not think it was necessary. She did not attend at a hospital. Her husband arrived and she went home with him.
- [15] The cost of repairing the damage to the plaintiff's vehicle was \$6,539.73, including tax. The cost of repairing the damage to the defendant's vehicle was \$3,545.35 including tax.

**PRE-MVA HEALTH AND ACTIVITIES**

- [16] The plaintiff was 51 years old at the time of the MVA. She is now 55 years old. She married in September 2007. She has one adult child from a former marriage.
- [17] She testified that she was healthy, energetic and active before the MVA.
- [18] She said that she had no pre-existing condition that, but for the MVA, would likely have given rise to the kind of symptoms she has experienced since the MVA. These include: optical or ocular migraines, pain in her neck and shoulder, and anxiety about driving, which began almost immediately after the MVA and continue until the present day.
- [19] She does not recall ever complaining before the MVA about headaches or pain in her neck or back. Her two friends testified that they do not remember any complaints of that sort from the plaintiff.
- [20] She acknowledged that she had the following problems before the MVA:
1. Occasional headaches.
  2. Occasionally, in very stressful situations, she would experience a migraine involving numbness, and a very severe headache, on the left side of her face.
  3. In her early 20s, she had problems with her knees which caused her to stop running and playing squash. At the time of the MVA, she was taking Advil and Tylenol sometimes for pain in her knees before or after exercising.
- [21] She had been involved in three rear-end accidents between 1998 and 2000, suffering only minor injuries that resolved within one or two days.
- [22] She was very involved in a variety of physical activities, including:
1. She went to the gym two to four times a week.
  2. She and her husband used to go for long walks and long bicycle rides, sometimes for as long as three or four hours. Her husband testified that it was difficult to keep up with her.
  3. At the time of the MVA, she was training for a two-day charity walk and was exercising almost every day.
  4. She was able to keep her weight under control.
  5. Her friends described her as very motivated, very physical and very busy. They described her as being spontaneous, bubbly, optimistic, and fun to be around.

- [23] Keeping her house clean was very important to her. She would spend 10 to 12 hours a week on household tasks. She found this activity satisfying and relaxing. Her husband tried to help, but acknowledged that her standards were much higher than his. She did all the laundry and ironing. She describes herself as a "perfectionist" when it came to housework. She also did the cooking.
- [24] She helped her husband paint their home before the MVA.
- [25] Before the MVA, her husband described her as a careful driver. When she was a passenger and he was driving, she would sometimes say that he drove "like an old lady". One of her friends also described her as a very confident driver and as a comfortable and untroubled passenger.
- [26] The defendant questions whether the plaintiff's pre-MVA health was completely devoid of the types of difficulties which post-dated the MVA. The defendant notes that the plaintiff did suffer from certain types of headaches before the MVA and argues that these should affect my view of the plaintiff's headaches after the MVA. Similarly, she did suffer from prior neck injury in at least one of the prior MVAs. Finally, she suffered several sports related injuries prior to the MVA which affected her activities, and she was taking Advil for those injuries.

#### POST-MVA HEALTH

#### The Plaintiff's View

- [27] The plaintiff did not experience major pain until the day after the accident. She attended a walk-in clinic that day and was prescribed a muscle relaxant and an anti-inflammatory medication. She experienced pain in her neck, shoulder, collarbone and lower back and between the thumb and first finger of her right hand. She developed headaches and optic migraines, and experienced balance difficulties.
- [28] Mr. Patton observed that the plaintiff was unable to move normally and looked "dozy". She appeared fatigued, and he took over some of the household tasks, such as some of the cooking and laundry. He also noticed that she had difficulty being in the car.
- [29] She saw her family doctor, Dr. Nordahl, eight days after the accident. Dr. Nordahl diagnosed a Grade II whiplash and a soft-tissue injury of the lower back.
- [30] The pain in her right hand resolved after about a year and the collarbone pain in about 1½ years. She had pain in her lower back for approximately a year. She still experiences lower back pain perhaps twice a month, if she has been sitting for a long time.
- [31] The plaintiff's most significant complaints of injury fall into three categories:
1. neck and shoulder (and headaches);
  2. migraines;

3. anxiety while driving.

[32] With respect to her neck and shoulder complaints, the plaintiff submits the following:

1. Dr. Nordahl diagnosed a Grade II whiplash.
2. In the first year after the accident, the neck and shoulder pain was continuous. She rates the pain at eight or nine out of 10 during that period. Currently, the pain is still continuous, but not always bad. For two or three days a week it is at its worst, which she rates at seven or eight out of 10, and she is unable to ignore it. She has observed that her pain tends to increase when she has been engaged in repetitive movement or has been sitting in one position too long, or when she has been experiencing stress at work. Sometimes it increases for no apparent reason.
3. She also has had a balance problem which caused her to fall once and she aggravated her neck injury. The neck pain was aggravated again in October 2007 when Mr. Patton came to a sudden stop while she was in the car.
4. When she gets a headache, it is always in conjunction with the neck pain. She testified that there is a burning sensation running from her shoulder into the base of her skull which feels like hot poker boring into the bones of her neck on the right side. The headaches are brought on primarily by working at the computer, and sometimes by being jarred when driving, such as by sudden braking. The headaches were continuous for about a year after the accident. Now, they occur two or three times a month, lasting for one or two days at a time. Mostly they come on when she is at work or driving.
5. Things improve when she has been away on vacation for two weeks, but when she returns to work, the headaches return.

[33] With respect to the migraines, the plaintiff submits as follows:

1. Since the accident she has had occasional episodes when she is working at a computer or reading and finds that half the words are blurred and the other half clear. There is also a continuous flashing kaleidoscope effect, almost always in her left eye. This phenomenon lasts anywhere from 10 to 30 minutes and has no pain associated with it.
2. She has had these optic migraines no more than six times since the accident. They improved over time, and she has not had one within the last year. Dr. Nordahl referred her in January 2007 to an ophthalmologist, Dr. Boyd, who reported to Dr. Nordahl that her prior migraines were a more likely precipitating factor for the optic migraines than the accident. Dr. Nordahl also referred her in October 2008 to Dr. Bozek, a neurologist, who termed the optic migraines a "migraine equivalent". However, while Dr. Nordahl deferred to their expertise when asked directly, her own view is that there is a relationship between the MVA and the optic migraines.

[34] With respect to the claim of anxiety about driving, the plaintiff submits as follows:

1. Immediately after the accident, the plaintiff started to experience anxiety about being in a vehicle, whether as a driver or as a passenger. Mr. Patton's evidence is that there has been a 180-degree change in her attitude to driving. When a passenger, she cries out whenever something happens, such as another driver changing lanes, to the point that she is a distraction to Mr. Patton. He describes her as the worst passenger he has ever had. One of her friends describes her as being a lot more cautious as a driver. She slows down markedly and is nervous about passing through intersections. The other friend has been a passenger in her car twice since the accident, and describes her as a "skittish" driver. The plaintiff says that she drives only in her "comfort zone" to and from work and shopping.
2. From March to June 2009, she had four driving anxiety counselling sessions. She found attending these sessions after work stressful, both because of the driving and because she would not get home until 8:00 p.m. and would be tired. The counsellor taught anxiety-reducing techniques. She found these techniques helpful and still uses them. She thinks that it would be beneficial for her to have further sessions in future. Mr. Patton says that the sessions helped her a bit, but she still panics when in the car.

[35] With respect to treatment:

1. Dr. Nordahl recommended that the plaintiff start massage therapy and a swimming program. She did not go swimming because she cannot swim and is terrified of the water.
2. She does not like taking the muscle relaxant that her doctor had prescribed for her. Prescription drugs in general disagree with her.
3. She takes Advil and Tylenol, uses a heat pad and does stretches. Initially she took two to six Advil a day, but recently she has been taking about three a month. She tries not to take them because they make her "cranky" at work.
4. Shortly after the accident she also began pole walking, which Dr. Nordahl told her was a good activity for the kind of injuries she had. She did this in a group until January 2007. From June 2007 on, she went pole walking with Jenny Parmley, a personal trainer she consulted on ICBC's recommendation.
5. She also had 30 training sessions with Ms. Parmley in 2007 and would like to have more, but the sessions are expensive and she would have to pay the cost herself.
6. After her sessions with Ms. Parmley ended, she continued to do exercises on her own at home. She also does yoga stretches at home.
7. Dr. Nordahl also recommended supervised exercise, but felt that it was sufficient for the plaintiff to be doing exercises with the aid of the personal trainer.
8. No one ever suggested to her that she try chiropractic treatment or acupuncture or naturopathy.

9. At Dr. Nordahl's recommendation, she has been receiving massage therapy regularly since the accident. The sessions involve the application of heat, followed by massage and stretching. At first she went two or three times a week, and now she goes about once a month. She has found the massage very beneficial, as it alleviates the pain for two or three days. She intends to continue with it, and believes that that she will need it as long as she does computer work.
  10. There have been several lengthy periods during which the plaintiff did not see Dr. Nordahl. The plaintiff was asked on cross-examination about the period from March 2008 and January 2009 and a later period of about a year when she did not go to see the doctor. She explained that there was no reason to see her when she was continuing with the same treatment and her condition had not changed. She did not go to the doctor every time she had neck pain. When she saw Dr. Nordahl in January 2009, Dr. Nordahl recommended only that she continue with massage therapy. Dr. Nordahl says that she advises her patients to come in only when they need to, or if their condition changes, or if after six to 12 months they have had not experienced an anticipated improvement.
- [36] She has gained about 10 pounds since the accident due to inactivity. One friend says that weight was not an issue for the plaintiff before the accident, but she has struggled with it since. Her spirit has gone down and she is not as happy and upbeat as she was. The other friend says that she got discouraged at being out of shape.

#### The Defendant's View

- [37] With respect to the plaintiff's claims of neck symptoms:
1. The plaintiff agreed that there had been improvement in the neck symptoms since the time of the accident.
  2. Dr. Nordahl's notes indicate that by March 2007, four months after the accident, the plaintiff was describing her symptoms as "occasional back and upper shoulder stiffness". She testified that by that time, the plaintiff's injuries were resolving. In contrast, the plaintiff's testimony in court indicated that her neck pain reached eight or nine on a scale of 10 continuously for the first year, and seven or eight thereafter.
  3. The plaintiff testified that there was no discernible pattern to when she had symptoms in the neck, with work or other activities.
  4. She testified that her neck symptoms resulted in headaches two to three times a month. She claimed that they had been occurring since the time of the accident. In contrast, Dr. Nordahl's records do not indicate that the plaintiff specifically mentioned headaches until November 29, 2007, more than a year after the MVA.

5. She made several references in her evidence to "fatigue" interfering with her recreational activities and her work. However, there is no mention of "fatigue" reported anywhere in Dr. Nordahl's notes or report. Dr. Nordahl acknowledged that other factors can sometimes cause symptoms of fatigue.
6. She was never sent for any diagnostic testing of her neck symptoms. She was never referred to a specialist for her neck symptoms.

[38] With respect to the plaintiff's claim about migraines:

1. The plaintiff complains of optical migraines since the MVA.
2. She has a history of both migraines and regular headaches. Prior to the accident, she had headaches that lasted as long as a week. Symptoms from the pre-MVA migraines included left-sided face numbness, sensitivity to bright lights, and a very bad headache on one side. She could not recall whether any of these had caused her to miss work prior to the MVA.
3. After the MVA, Dr. Nordahl, referred the plaintiff to a specialist in ophthalmology, and a specialist in neurology, for the optical migraines. Both experts were of the opinion that the optical migraines were not the result of the MVA.
4. The plaintiff admits that this injury has resolved.
5. In her report, Dr. Nordahl expressed an opinion contrary to that of the two specialists. She opined that the plaintiff's complaints of optical migraine are caused by the MVA. In her testimony, she deferred to the experts on that point.

[39] With respect to the plaintiff's claim regarding driving anxiety:

1. The plaintiff complains of some anxiety with driving. She has never been prescribed medication for anxiety since the MVA, although she was prescribed Ativan prior to the MVA for other stressors.
2. She admits that she did not mention this problem to Dr. Nordahl until two and a half years after the MVA. During this time, she was able to commute to and from work every day. She was also able to drive around for errands, and to drive to North Vancouver and back twice a week for personal training sessions.

Expert Evidence to May 11, 2009

- [40] The only medical expert who provided evidence was the plaintiff's general practitioner, Dr. Nordahl.
- [41] Dr. Nordahl prepared a report dated May 11, 2009, which was entered as an exhibit at the trial. She was also called to give evidence.
- [42] Her report detailed her involvement and opinion to May 11, 2009. The report includes the following opinions:

1. The plaintiff suffered a moderate soft-tissue injury to her neck, right shoulder and lower back.
  2. The neck injury "will take two to five years to reach full recovery status".
  3. The plaintiff has not "reached maximum medical improvement and she will continue to improve over the next 18 - 24 months."
  4. Despite the contrary opinion from an ophthalmologist, the progression of a prior history of migraine headaches was "exacerbated by the motor vehicle accident."
  5. She had a "very high underlying basic fitness level" before the MVA.
  6. She did not think it was unreasonable that the plaintiff was having difficulty with some homemaking activities such as vacuuming or overhead cleaning, and anticipated that these difficulties "will probably persist for the next six to 12 months."
  7. Her present employment as a yard planner has a "potential to exacerbate her symptoms."
  8. She did not advise that the plaintiff change her current employment but did "agree that her current employment does exacerbate her symptoms to a moderate degree."
- [43] The defendant argues that Dr. Nordahl's report and opinion are of limited value for a number of reasons:
1. When preparing the report, Dr. Nordahl was not aware of a number of key factors that were revealed in the evidence, or, if she was aware of them, she did not consider them when preparing her report. These include the following:
    - (a) that the plaintiff had suffered a whiplash injury in a 1997 motor vehicle accident;
    - (b) that the walk-in clinic where the plaintiff attended the day after the MVA, had diagnosed a lesser degree of soft tissue injury to the neck;
    - (c) an incident in June 2007, wherein the plaintiff fell causing problems to her neck that lasted for several weeks;
    - (d) the plaintiff had not attended for physiotherapy, although the doctor had recommended it.
    - (e) the plaintiff had not taken the medication which the doctor had prescribed;
    - (f) she did not pursue swimming as an exercise/therapy although her doctor had recommended it.
  2. Dr. Nordahl's report fails to mention several visits from the plaintiff that the defendant argues are clearly relevant to an evaluation of her condition. Although not mentioned in her report, these visits are noted in the doctor's clinical records. It was not until asked in cross-examination that she agreed that these visits may have had relevance in assessing her post-MVA injuries:

- (a) A visit of October 11, 2007, where the plaintiff told Dr. Nordahl that she had suffered a "re-injury two nights ago when she had to make a sudden stop." The records note an exacerbation of her neck, back and shoulder pain.
- (b) She failed to note that from June 2008 to March 2009, the plaintiff had attended the doctor's office twice without mentioning her injuries.
- 3. Dr. Nordahl admitted that there were several comments in her report, and in her oral evidence, where her statements were not supported by entries in her clinical notes.

### Expert Evidence After May 11, 2009

- [44] The plaintiff's attempt to lead evidence, with respect to all issues concerning the future, met with an obstacle in the form of an evidentiary ruling which I made earlier in the trial. Before the first witness was called, the defendant took objection to a supplementary report of Dr. Nordahl dated October 6, 2010. I ruled it to be inadmissible for non-compliance with the Rules. My oral ruling was given on the second day of trial pursuant to Rules 11-6 and 11-7.
- [45] That inadmissible evidence purported to express an opinion of Dr. Nordahl's which was contrary to the opinion in the admissible report of May 11, 2009 with respect to the plaintiff's future capabilities. I also ruled inadmissible, for the same reasons, Dr. Nordahl's oral evidence with respect to the same contrary opinion.
- [46] The defendant relies upon the opinion of Dr. Nordahl as expressed in the May 11, 2009 report, with respect to the plaintiff's future capabilities. While the heart of the opinion literally deals with the question of loss of earning capacity, the defendant argues that it necessarily is applicable to all issues concerning the plaintiff's future capabilities and abilities.
- [47] The report provides the following opinion:

You have asked me to comment with regard to [the plaintiff's] loss of earning capacity. I do not feel that [the plaintiff] is less capable overall from earning income from all types of employment and I do not feel she is less marketable or attractive as an employee to potential employers as a result of the motor vehicle accident.
- [48] It does not follow from my ruling that I must conclude that the doctor's opinion as of May 11, 2009, was still her opinion at trial. Clearly, it was not. However, the most significant consequence of my ruling is that there is no expert opinion in evidence with respect to future issues to support the plaintiff's argument that I should be awarding damages for various of the plaintiff's future concerns.
- [49] It does not necessarily follow from that, that the plaintiff is unable to mount an argument that there is still a sufficient basis for me to make the findings that she argues are appropriate. The plaintiff argues that there is still sufficient evidence for me to draw the inferences which she argues I should draw, even without the opinion expressed in the

inadmissible report. It is noteworthy, in that regard, that when the defendants argued for the ruling with respect to admissibility, one prong of its argument was that the non-compliant report was not "necessary" because there was already other evidence with respect to the various future issues.

[50] I am satisfied that indeed there is other evidence from which various inferences about the future might be drawn. That other evidence consists of the following:

1. Comments in the admissible report that do make projections into the future which are consistent with the position that the plaintiff takes:

"I do not think that [the plaintiff] has reached maximum medical improvement and she will continue to improve over the next 18 - 24 months."

"Her present employment as a yard planner has a potential to exacerbate her symptoms."

"I am not advising that [the plaintiff] change her current employment, but I will agree that her current employment does exacerbate her symptoms to a moderate degree."

2. The plaintiff's own evidence at trial of her ongoing difficulties.
3. The doctor's oral evidence about various visits of the plaintiff since May 11, 2009, and the observations which she made (although her opinion arising from those visits was not admissible).

[51] Dr. Nordahl's oral evidence about the plaintiff's visits subsequent to May 11, 2009, was supplemented by her clinical records relating to those visits. Her evidence revealed the following:

February 10, 2010

The doctor discussed with the plaintiff the question of changing jobs.

### **April 28, 2010**

The doctor noted that the plaintiff had pain in the base of her skull and neck, a spasm in her lower back, a decrease in range of motion due to pain in her neck and back. She also advised massage therapy.

### **July 28, 2010**

The doctor noted neck pain and that she would discuss with the plaintiff the question of early retirement. The plaintiff raised this subject.

**September 7, 2010**

The doctor noted that she did not feel that a short period of time off work would be helpful. She noted that the plan was for the plaintiff to continue with her present job, but attempt to arrange part-time employment, or a change of employment.

[52] I am satisfied from the foregoing that the injuries, and other difficulties caused by the MVA, are ongoing and will continue to be ongoing, and will negatively affect the plaintiff's capabilities and abilities in the future.

**Mitigation**

[53] The defendant argues that the plaintiff failed to mitigate her damages by failing to take steps which would have caused her injuries to improve at a faster rate. In particular: she did not follow her doctor's instructions; she did not swim as recommended by her doctor; she did not take the medication as recommended by her doctor; she did not go to physiotherapy as recommended by her doctor; and she did not attend at her doctor's office for MVA-related issues for lengthy periods between visits.

[54] In response, relying on her own evidence and that of Dr. Nordahl, the plaintiff argues as follows:

1. She did not swim because she is unable to and is afraid to.
2. She did not take prescribed muscle relaxants because they do not agree with her, and she generally does not like to take medication.
3. Instead of physiotherapy, she went to a personal trainer, did yoga, and supervised pole walking. She also attended for massage therapy and counselling for driving anxiety.
4. She did not attend at the doctor's office for long periods because there was nothing new to report. Dr. Nordahl confirmed that she discourages visits in such situations, and also discourages discussion of MVA-related issues when a patient has attended for some other purpose.

[55] I am satisfied on the basis of Dr. Nordahl's evidence that the plaintiff's failure to swim, take medication, or attend at the doctor's office did not slow the progress of her recovery. I am also satisfied that the steps she did take adequately replaced whatever benefits would have been achieved by the steps she did not take.

[56] The defendant bears the onus of proving that the plaintiff has failed to mitigate her damages. It has not met that onus.

## Conclusion

- [57] I have already indicated that, generally, I believe the plaintiff. I do consider the impact of her evidence to be diminished where it is inconsistent with the doctor's evidence. However, I am also satisfied that, even though the doctor agreed with a number of suggestions by the defendant about having not considered various factors, she did not consider that her opinion would have been different in any material way if she had considered those factors.
- [58] Generally, I am satisfied that the plaintiff's injuries are less significant than indicated in her evidence and as suggested by her counsel during submissions, but more significant than suggested by counsel for the defendant during submissions.
- [59] I am satisfied that the neck and shoulder injuries of the plaintiff are ongoing and continue to bother her on a regular basis, particularly when she is trying to engage in the physical activities which she enjoyed before the MVA, and when she is at work. I come to this conclusion based upon her evidence, the comments of Dr. Nordahl in her report of May 11, and the evidence of her observations of the plaintiff during her attendances after the report of May 11, 2009.
- [60] I am satisfied that the plaintiff's anxiety while driving was caused by the MVA and is ongoing. I am also satisfied that it is less significant than the plaintiff indicated in her evidence and submissions, but much more significant than is suggested by the defendant.
- [61] I am not satisfied, in view of the doctor's evidence of several referral reports from other doctors, that the optical migraines were caused by the MVA. I will disregard these entirely in assessing damages.
- [62] I am satisfied that the plaintiff's injuries will continue to cause her problems into the future, impacting upon her leisure activities and upon her work.

## POST MVA ACTIVITIES

### The Plaintiff's View

- [63] The evidence of both Mr. Patton and the plaintiff is that she "wants to have her life back", but after four years that is not happening.
- [64] Her ability to do work around the house has been affected:
1. The plaintiff no longer has the energy to do housework to the same extent as before the accident. It fatigues her and irritates her neck. She cleans because she has to, and it is no longer a form of relaxation for her.

2. In 2009, she hired an outside cleaner to come in for four hours every second week and clean the bathrooms, windows, floor and deck, and do vacuuming and dusting. She paid the cleaner \$20 per hour. The cleaner did not do a very good job and also was not always available. On one occasion, the cleaner almost ruined the laminate floor. The plaintiff stopped calling her after several months. She estimates that she paid the cleaner about \$800 in total.
  3. Mr. Patton does three to four hours a week of housework, including cleaning, laundry and ironing.
  4. Mr. Patton also does more of the meal preparation now. The plaintiff no longer makes the kinds of meals she used to, and the dishes she prepares are simpler.
  5. After the accident Mr. Patton and the plaintiff renovated their former home by installing new shelves, removing carpeting and installing laminate flooring and doing plumbing work. Previously, she would have been able to participate to some extent but could not because of her injuries.
  6. In the summer of 2010, they moved to their current home, which is larger than their former suite. Mr. Patton did the packing. Friends moved some items, then hired movers did the rest. The plaintiff was able only to put dishes into boxes. She would have helped more but for her injuries. They would like to paint their current home, but the plaintiff will not be able to help with this.
- [65] The plaintiff submits that her relationship with her husband has been affected.
1. Mr. Patton and the plaintiff no longer go on weekend or vacation road trips. They went to Seattle once, but she was anxious during the trip and in pain afterward.
  2. Mr. Patton's evidence is that their sexual intimacy has been affected because the plaintiff is tired and falls asleep early in the evening.
  3. They can no longer enjoy walks together to the extent that they used to.
  4. She no longer enjoys dancing the way in which she used to. She does not feel up to dancing at parties anymore because her energy is lower. She will have perhaps one dance, rather than going all night.
- [66] The plaintiff's physical fitness activities have been affected:
1. Since the accident, she has gone biking a few times with Mr. Patton. Each time she has been very uncomfortable the next day. In 2009, she went out perhaps twice, and in 2010 not at all.
  2. It has been four years since she has been in a gym. She and Mr. Patton try to go for walks, but they are not as long or as fast as before the accident, and she has trouble keeping up with him.

3. Before the accident she used to go for a walk or a bike ride or to the gym after work, but now she just sits on the sofa and is falling asleep by 8:00 p.m.
- [67] Her relationship with her friends has been affected:
1. One friend has seen more of the plaintiff since the accident because she no longer goes cycling or to the gym. She has cancelled some get-togethers because of headaches. She has observed that the plaintiff's level of activity has reduced "dramatically".
  2. Since the accident, the other friend has not been to the gym with the plaintiff. They have not gone dancing or on road trips together. When they garden, the plaintiff tells her what to do and she does it. They go shopping or for a walk or meal together, but nothing active. The plaintiff has cancelled plans with this friend because of pain.
  3. She is more negative than she was before. She recently expressed her frustration at the realization that she will not improve and will not get her life back.

#### The Defendant's View

- [68] The evidence establishes that the plaintiff has remained physically active since the MVA.
- [69] She has been on trips to the Bahamas and Hawaii three times. She was married in September 2007. She has taken up yoga. She has been bike riding, an activity which she also enjoyed prior to the MVA. She has taken up Nordic pole walking. She took this up on her own initiative, in the same month as the MVA. This activity requires swinging the arms and "uses the shoulders to propel you". Her husband gave evidence that she had been looking for an activity to do besides running, which she had given up prior to the MVA due to pain in her knees.
- [70] Starting in June 2007, only seven months after the MVA, she worked out regularly with a personal trainer, twice a week, for several months. She did this in part to lose weight for her upcoming wedding. The training included weight training, medicine ball training, and sit-ups.
- [71] She testified that she was unable to bike regularly and attend the gym because of her injuries. However, Dr. Nordahl's clinical records indicate that the plaintiff told the doctor, even before the MVA that her knees caused problems with biking and walking. At trial, she admitted that her ability to do recreational activities is impacted at times by the pre-existing condition of her knees, and by her husband's work schedule. Even so, she agreed that she had been biking a number of times since the MVA.
- [72] While taking part in various of the foregoing activities since the MVA, the plaintiff never reported to her doctor that these activities ever caused her any neck pain. She did, however, report that they caused her knee pain. Dr. Nordahl's evidence confirmed this.
- [73] The plaintiff testified that she suffered from "fatigue" as a result of the MVA, yet there were no notations of that in Dr. Nordahl's notes.

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WORK**Pre-MVA Work**

- [74] The plaintiff has always worked in the shipping industry. She has worked for Terminal Systems Inc. (TSI) since 2002. At the time of the MVA, she was working as a yard planner at what was then TSI's only shipping terminal. Her job involved assembling information on cargo containers coming into the terminal by truck and rail, and allocating places for the containers in TSI's yard until they were loaded on to ships. She worked at a desk with a computer, two monitors and a telephone headset. Her job involved computer work, as well as daily communication with the longshoremen doing the actual placement of the containers. About 80 percent of her time was spent on the computer. The job is very fast-paced. Her usual shift was 8:00 a.m. to 4:30 p.m., together with overtime when necessary to finish the work she had to do. There was also some Saturday work.
- [75] Her salary at the time of the accident was about \$48,000. Her overtime before and after the accident was about 150 to about 270 hours per year. In addition to her pay, she usually received a yearly bonus amounting to about one month's salary, less deductions. Her employer also provided a medical plan and long-term and short-term disability benefits, for which deductions were made from her pay.
- [76] She has no recollection of losing any time off work before the accident as a result of headaches.
- [77] She has worked in the shipping industry since age 20 or 21. The plaintiff asks "What else can she do at this point in her life?"

**Post MVA Work****The Plaintiff's View**

- [78] The accident occurred on a Wednesday before a long weekend. The plaintiff was scheduled to work on the holiday Monday. She stayed off work at the recommendation of the doctor at the walk-in clinic. She returned to work the following Tuesday.
- [79] Since the accident, her injuries have affected her ability to do her work. Her neck and shoulder get very sore after working on the computer and she also gets headaches at the base of her skull. As a result, she has to get up and stretch periodically. In an attempt to alleviate the pain she uses a different mouse and a footstool, both of which she brought in herself. She also uses a heating pad on her neck while at her desk. She does the best she can to work full days, but on occasion when the pain is too great she has left work. She has taken this time off as sick time and has been paid for it.

- [80] She calls Mr. Patton frequently from work to tell him that she cannot do her work because she is in so much pain. He advises her not to go in when she is in pain, or to come home if it gets to be too painful, but he says that she is reluctant to do so because she feels a great sense of responsibility for "her ships".
- [81] Although some of her co-workers sometimes ask her if she is feeling all right, or tell her that she looks tired, she does not tell them that she is hurting from her injuries.
- [82] She has told her supervisor and Jennifer Kim, Senior Advisor of Human Resources at TSI, of the effect her injuries have had. She has not asked her employer to make accommodations for her injury because that is not her way.
- [83] In June 2009, TSI began a process of restructuring, including merging the staff at what were now two terminals, which would have involved the plaintiff doing yard planning for both terminals. She would have had to do shift work. She would also have had to put in overtime on evenings and weekends in order to learn a new system. Currently, only two yard planners, both in their late 20s or early 30s, are fully trained for both terminals and another is being trained.
- [84] Because of the difficulties she was having at work, and having discussed the matter with Dr. Nordahl, she began to consider looking for a different position at TSI. If there had been no choice, she would have done shift work to keep her job, but she did not want to do so and wanted work that would be easier on her physically. Her motivation was twofold: her age and her injuries.
- [85] In about November 2009, she approached Ms. Kim and told her that because of her neck pain and fatigue she was struggling with how she was going to cope with her job. She had previously mentioned her injuries to Ms. Kim but had never said she could not do her job, as she had believed that she would get better. They discussed the possibility of another position with less overtime and stress. Ms. Kim later advised her of a vacant position in a different department.
- [86] The plaintiff applied and was selected. In January 2010, she started in this new position, which is considered by TSI to be an entry-level customer service-type job that is not as demanding or stressful as the yard planner job. It involves doing computer data entry 80 percent of the time as well as telephone work. Ms. Kim says that the plaintiff made a slow transition into the job, but TSI did not want to push her too hard. Three of the other employees were new to TSI, but in Ms. Kim's view were still quicker at the training than the plaintiff, despite her greater knowledge of the company.
- [87] Her work day is still 8:00 a.m. to 4:30 p.m. with a Saturday shift, but with much less overtime than before (although initially there was increased overtime in the spring of 2010 due to the training for the new job). She finds that she is still busy in the new job, which has not turned out to be easier on her injuries. She is quite concerned because she was hoping for a lot of improvement in her condition but has experienced none. She has complained to Ms. Kim

about soreness and being very tired at the end of the day and needing to go home. She is sometimes angry and short with her co-workers.

- [88] In 2007, the plaintiff's salary was about \$50,000. She received no bonus that year. In 2008 and 2009, her salary was about \$57,000. All employees received similar salary increases. Her current job is in a category with a potential salary ranging from \$39,000 to \$59,000. A yard planner is in a higher category, with a potential salary ranging from \$45,000 to \$67,000. Employees move up the range based on their performance, and generally at a rate of about three percent per year.
- [89] In 2009, the plaintiff's salary of \$57,000 was approximately mid-range in the category in which she worked as a yard planner. When she switched to the new category of job, this \$57,000 was almost at the top of the available range. When she changed jobs, TSI did not reduce her salary. Instead, she was kept at her previous salary of \$57,000, however, that salary was then frozen for the next two or three years. If she had stayed as a yard planner, she would have continued to receive a three percent increase per year, an increase which was not available to her as the result of her transfer to a category of job in which her salary was already almost at the top of the available range.
- [90] The plaintiff acknowledges that she missed no more than a few days of work immediately after the accident. Her wage loss (as agreed by the defendant) for this loss is \$447.34. In addition, she claims \$1,700, representing an estimate of the three percent increase in salary she lost when she changed categories of jobs in January of 2010, and her salary was frozen as a result.
- [91] The plaintiff argues that she has continued to work, while in pain, because she has a strong work ethic. If she had quit working, on the basis that it was physically too difficult, three or four years ago, she would be in a position to claim a lengthy past wage loss claim. Should she be penalized because she has made great efforts to continue working and to mitigate her loss?

### The Defendant's View

- [92] The defendant argues that the plaintiff missed very little work, which is inconsistent with her claim that she is in great pain and has had great difficulties completing her work.
- [93] The defendant agrees that the plaintiff's wage loss for the several days of work that she missed immediately after the MVA is \$447.34.
- [94] In her first week back to work, she was able to do shifts of seven to eight hours. By her second week back, she was working her regular overtime hours. Less than three weeks after the MVA, the plaintiff was back to working her 12-hour shift on Tuesdays. By that time, she was back to working the hours worked prior to the MVA. She continued working these hours until January 2010 when she changed her position within the same company. The defendant argues that this was not because of MVA-related injuries; rather, it was to avoid shift work.

[95] Although the plaintiff gave evidence that she left work on several occasions because of symptoms in her neck and headaches, this assertion is not borne out by her attendance records.

## Conclusion

[96] The plaintiff's lost wages for several days of work missed immediately after the MVA is \$447.34.

[97] I am satisfied that the reason the plaintiff changed categories of jobs was not to avoid shift work, but rather, was because she was hoping to find work that would be more compatible with her physical difficulties arising from the MVA.

[98] It follows, that the plaintiff has lost the otherwise likely increase in salary she would have received had she remained in her previous employment, with a higher category of pay. Since she changed jobs in January of 2010, she is entitled to receive that pay only for one year to the point of this judgment. I am satisfied that she is entitled to \$1,700 for that loss.

[99] Consequently, her past wage loss is \$447.34 plus \$1,700 for a total of \$2,147.34

## LOSS OF FUTURE EARNING CAPACITY

### The Plaintiff's Argument

[100] After discussion with Dr. Nordahl, the plaintiff finds herself seriously considering part-time work, taking early retirement, or looking for a different job with another employer. The plaintiff would like to stay with TSI, but there are no part-time employees doing the type of work that the plaintiff is now doing. She will not go back to yard planning because it is too stressful. She is worried that she will not be able to continue working at TSI and has spoken to Ms. Kim about taking early retirement.

[101] Ms. Kim advised the plaintiff that her pension would be reduced by five percent per year for retirement before age 62, TSI's mandatory retirement age. The pension is based on the five highest years of salary out of the last 10 worked. The plaintiff is not sure if she has been working for TSI long enough for early retirement to be beneficial to her.

[102] Ms. Kim says that there is a current tendency to make the container business more efficient by introducing technology. TSI is trying to do more with fewer people, and in fact has not filled 17 positions made vacant by a layoff and early retirements since January 2009.

[103] It is clear from the plaintiff's own evidence about the difficulties she is having at work, together with the comments of Dr. Nordahl in her report and the observations of Dr. Nordahl in the plaintiff's visits subsequent to the report, that the plaintiff will continue to have difficulties with her work going into the future.

- [104] The plaintiff argues that there is a legitimate and genuine concern about whether she can continue doing this work. There is a danger that she will not be able to do it and will have to take early retirement. There is also a danger that there will be layoffs in the future at TSI and the plaintiff, because of her age and her injuries, may be more likely to be laid off than if she were healthy.
- [105] On the evidence, the plaintiff has proved that a loss of future earning capacity has already manifested itself. Her injuries caused her to change jobs. The consequence has been that she is now in a lower pay category and has already missed one pay increase that she would have received were she still a yard planner. Her salary will be frozen until at least early 2012 and possibly until early 2013. Her opportunity to earn overtime income has also been diminished. Over the next seven years, the gap between what she earns now, and what she would be earning at her previous job, will therefore grow.
- [106] Moreover, her new job has not, in fact, proved to be easier physically, and her injuries still interfere with her ability to do it. Her superiors have observed that she has been slower to learn her new job than others hired at the same time and that she works at a slower pace. They have also observed that her injuries have adversely affected her behaviour toward her co-workers.
- [107] As an older female employee, almost at the top of the salary scale for her position, she would be vulnerable to layoff in any event, but this is even more the case given her injuries. If she is laid off before she turns 62, not only will she lose her salary, her pension will be reduced by five percent per year, and it will also be calculated on a lower salary base. Her injuries may also render her unable to work at all at some point before age 62.
- [108] Finally, whether her job at TSI ends before or at age 62, she will find herself on the job market as an older woman with impaired energy and stamina and physical injuries that will make it difficult for her to do the kind of work she has been doing for many years. Her potential employment opportunities at that age will be much more limited than they would have been had the accident not occurred.
- [109] The plaintiff submits that considering the foregoing, as well as the usual positive and negative contingencies, a reasonable award under this head would be \$100,000.

### The Defendant's Argument

- [110] The only evidence supporting the plaintiff's claim for loss of future earning capacity is her own. It is self-serving, and Ms. Kim's evidence is largely based on what the plaintiff told her, rather than her own observations.
- [111] There is no expert opinion that could lead to the conclusion that the plaintiff has lost any earning capacity or will suffer any lost earnings in the future as a result of the MVA. The only expert opinion before the court is that of Dr. Nordahl in her report of May 11, 2009, referred to earlier in this judgment.

- [112] At the time of the MVA, the plaintiff was employed as a yard planner, a sedentary job. She continues to work there. As of age 52, she has been eligible for early retirement with a reduced pension. She testified that her intention is to remain at TSI until retirement. Mandatory retirement at TSI is age 62.
- [113] At no time, did the defendant testify that she has ever had an intention to work past age 62.
- [114] The plaintiff missed only two working days after the MVA. Less than three weeks after the MVA, she was back to working her regular overtime, which included her 12-hour shift on Tuesdays. These were her pre-MVA hours and she continued to work them until she changed departments in January 2010, when her salary was frozen.
- [115] She was physically able to do her job as yard planner after the MVA. She was never placed on modified duties. She did not complete a graduated return to work. Her employer did not have to accommodate her in any way. Her workload was not reduced. Her productivity was not affected by her injuries. She received four salary increases since the MVA.
- [116] She testified that she was sometimes asymptomatic at work. Yet, she was able to complete her shifts even when allegedly symptomatic.
- [117] The evidence shows that in the summer of 2009, TSI began going through some restructuring. The plaintiff testified that as a result of that restructuring, she would have to undergo extensive training to learn a new system. In addition, her position as yard planner would now require shift work, both afternoon and graveyard. She testified that she was not prepared to do shift work. It was at this time that the plaintiff began considering transferring to other departments in which there would be no shift work. She denied that shift work was the reason for her changing departments. However, Ms. Kim testified that the plaintiff first discussed changing departments in November 2009, some three years after the MVA, and only after she became aware that TSI's restructuring was clearly going to cause changes to her job as a yard planner.
- [118] The defendant argues that the reason the plaintiff changed departments was because she would now have to do shift work if she stayed in the same position, not because of her injuries. That she did not tell Ms. Kim that was her reason is hardly surprising.
- [119] Ms. Kim testified that the plaintiff did not specifically request a change in jobs. Rather, Ms. Kim suggested it, when it became known to her that there was an opening in another department. The plaintiff transferred departments in January 2010.
- [120] Ms. Kim testified that there was nothing in the plaintiff's file indicating that the employer had any performance concerns relating to the plaintiff's injuries. She also testified that her understanding of the plaintiff's difficulties was based on the self-reporting of the plaintiff.
- [121] Ms. Kim gave evidence that 13 people were laid off from TSI as of January 2009, because of economic troubles. The plaintiff kept her job. Ms. Kim testified that TSI had had hired 15 new employees in 2010 and that no further layoffs are presently anticipated.

- [122] The plaintiff testified that she has begun considering early retirement because of her injuries, and has spoken to Ms. Kim about it.
- [123] The defendant submits that the plaintiff's decision to change departments is really a lifestyle choice; similarly, the plaintiff's consideration of early retirement.
- [124] The fact that she has continued to work for the last four years with only two days off immediately following the MVA suggest that she is more than able to continue her work.
- [125] There is no evidence that the injuries will worsen in the future. The only expert opinion is that stated in Dr. Nordahl's report, which expressly states that the plaintiff's symptoms will not worsen.
- [126] She is currently earning a higher annual salary than she had in her pre-MVA career. She has received four incremental pay increases since the MVA. She has not missed any job opportunities or promotions since the MVA. There are no complaints about the quality of her work.
- [127] The defendant submits that:
1. if the plaintiff was going to lose her employment because of her injuries, it would have already happened;
  2. if she was going to lose her employment in the future, it would be because of reasons other than her injuries;
  3. it is speculation to conclude that she would lose her employment because of her injuries;
  4. she was not laid off during a time period when 13 other employees were laid off;
  5. the real reason she changed her job was to avoid doing shift work;
  6. if she takes early retirement, it will likely be for lifestyle reasons, rather than for her injuries; and
  7. she has demonstrated a continued ability to perform her work.
- [128] The defendant submits that, in this case, there is no real possibility of a future event leading to an actual income loss.
- [129] The plaintiff has not demonstrated that she has suffered impairment in her ability to work or that such an impairment might occur in the future.
- [130] Her symptoms have not affected her work capacity. Her performance remains the same as before the MVA. She continues to do her work effectively and fully. She is able to manage symptoms by simply getting up and stretching. She is not prevented from doing her job.
- [131] She has not proven that she has a permanent partial physical disability.

[132] The defendant refers to a number of cases where similar facts resulted in a finding that the plaintiff was not entitled to be compensated for any lost earning capacity: *Fillmore v. McKay*, 2010 BCSC 140; *Fata v. Heinonen*, 2010 BCSC 385; *Schmidt v. Hawkins*, 2010 BCSC 115; and *Stewart v. Berezan*, 2007 BCCA 150.

[133] The plaintiff is not entitled to any award under this head of damages.

## Conclusion

[134] A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari* (2010), 3 B.C.L.R. (5th) 303 (C.A.), 2010 BCCA 140, at para. 32.

[135] A plaintiff may still be compensated for loss of future earning capacity where, although she has continued in her former occupation, she does so at a reduced level of performance and income: *Sinnott v. Boggs* (2007), 69 B.C.L.R. (4th) 276 (C.A.), 2007 BCCA 267, at paras. 14-15.

[136] I am satisfied that there is a real and substantial possibility of a future event leading to an income loss. I make that finding based on the following:

1. The evidence of the plaintiff with respect to her ongoing difficulties at work, which I am satisfied are the result of her injuries from the MVA. I am satisfied that her decision to change jobs was a direct result of the MVA injuries.
2. The evidence of Ms. Kim.
3. The comments of Dr. Nordahl in her report of May 11, 2009, indicating that the plaintiff's employment as a yard planner had a potential to exacerbate her symptoms.
4. The evidence of Dr. Nordahl about the visits that the plaintiff made to her in February, April, July and September of 2010, previously referred to in this judgment.
5. The ongoing consequences to the plaintiff of remaining in a job in a category with a lower pay range than was previously the case. The \$1,700 which she lost in the first year in which her salary was frozen will continue to be lost in subsequent years, and will in fact increase for as long as her salary remains frozen.
6. The ongoing consequences of being in a job in a lower paid category which receives much less overtime than in her former job.
7. The possibility that the plaintiff may have to retire early as the result of her injuries, with the consequence that there will be a reduction in her pension of five percent per year, and that it will be based on a lower salary.

[137] In coming to my conclusion, I give no consideration to the argument that the plaintiff may have less difficulty finding employment after age 62 when she would be entitled to full retirement from her current employment. There was no evidence at presented at trial that the plaintiff ever had an intention of continuing to work after age 62.

[138] While I am satisfied that all of the foregoing lead to the conclusion that there is a real and substantial likelihood of one or more events leading to an income loss, that loss is not capable of being determined with mathematical precision. Weighing all of the evidence and all of the considerations, I am satisfied that the appropriate amount to be awarded is \$45,000.

## NON PECUNIARY DAMAGES

### The Plaintiff's Argument

[139] The plaintiff relies upon the evidence and arguments referred to earlier in this judgment.

[140] In *Unger v. Singh* (2000), 72 B.C.L.R. (3d) 353 (C.A.), 2000 BCCA 94, the Court of Appeal said that in cases involving primarily soft-tissue injuries with some emotional problems such as sleep disruption, nervousness or depression, the awards ranged from \$35,000 to \$125,000. In that case, the injuries to the plaintiff's neck, shoulder, lower back and knee, together with her difficulties in sleeping and "coping", had largely resolved at the time of trial two years after the accident. The Court of Appeal reduced a jury award to \$90,000.

[141] The plaintiff also relies on the following cases: *Foran v. Nguyen*, 2006 BCSC 605, at paras. 183-186, 194 - award of \$90,000; *Pelkinen v. Unrau*, 2008 BCSC 375, at paras. 88-90, 113 - award of \$81,000; *Pascoa v. Xue*, 2008 BCSC 791, paras. 52-53, 59, 63 - award of \$75,000; and *Ashmore v. Banicevic*, 2009 BCSC 211, at paras. 114-116, 129 - award of \$80,000.

[142] The plaintiff argues that the appropriate award should be in the amount of \$80,000 to \$100,000.

### The Defendant's Argument

[143] The defendant relies on the evidence and arguments referred to earlier in this judgment.

[144] When all is said and done, the plaintiff has sustained a moderate soft tissue injury and it is on that basis that her damages should be assessed.

[145] Her injuries are intermittent in nature, she has substantially recovered from them, and they are causing minimal impact on her life as a whole.

[146] The defendant reminds me that the court must be "exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery period": *Price v. Kostryba*, [1982] B.C.J. No. 1518.

[147] The defendant refers me to three cases with what are arguably similar injuries and consequences: Baas v. Jellema, [1998] B.C.J. No. 918, Lo v. Chow, 2009 BCSC 17 and King v. Horth, 2009 BCSC 1114.

[148] The defendant argues that the cases relied upon by the plaintiff all involve injuries more serious than those in the case at bar.

[149] The defendant submits that an appropriate range is \$30,000 to \$40,000.

## Conclusion

[150] I am satisfied that the appropriate award for non pecuniary damages is \$60,000.

## COST OF FUTURE CARE

## The Plaintiff's Argument

[151] At the recommendation of Dr. Nordahl, the plaintiff has been receiving massage therapy once a month. As she finds it helpful, it should continue. The cost is \$50 per session, or \$600 per year, plus HST of \$72.

[152] The plaintiff had four sessions with a counsellor for her anxiety about driving. She found them helpful and thinks it would be beneficial to have more. A further six sessions would cost \$900, plus HST of \$108. The plaintiff also benefited from the services of a personal trainer, and would like to have more sessions with her. A further 20 sessions would cost \$1,300, plus HST of \$156.

[153] The total projected cost of these treatments is \$8,288. The plaintiff submits that a reasonable award under this head would be \$5,000.

## The Defendant's Argument

[154] The defendant submits that no award for cost of future care is warranted.

[155] There is no evidence to suggest that the plaintiff requires additional massage therapy. Dr. Nordahl's report of May 11, 2009, suggests massage therapy for 18 months. That period of time expires next month.

[156] The plaintiff's evidence was that further counselling sessions "might be helpful". This is in contrast with the evidence of her husband, who was of the view that counselling had not been particularly helpful in the past. In any event, there is no medical evidence to support future counselling needs.

## Conclusion

[157] On the basis of the evidence, I am satisfied that additional treatments for massage therapy, and for anxiety counselling would assist the plaintiff in continuing to recover from her MVA-related injuries. I am satisfied that the appropriate amount of that award is \$3,500.

## LOSS OF HOMEMAKING CAPACITY

### The Plaintiff's Argument

- [158] A claim for damages in relation to homemaking tasks performed by others will lie even where the services have been replaced gratuitously by a family member. Such damages may be assessed on a replacement cost basis: *McTavish v. MacGillivray* (2000), 74 B.C.L.R. (3d) 281 (C.A.), 2000 BCCA 164, at paras. 8, 48-49, 68.
- [159] With respect to future loss, it is not necessary for the plaintiff to establish that someone will actually be employed to do the work in order to be entitled to an award for pecuniary loss of future homemaking capacity: *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 (Sask. C.A.), 1991 CanLII 3965, at p. 28 and *McTavish v. MacGillivray*, *supra*, at paras. 43, 46.
- [160] Damages for the difficulty the plaintiff has or will have in performing her usual household tasks with less efficiency and comfort than she did before the accident, or where the tasks have never been and will never be done, or for the loss of the amenity of an orderly and functioning home, should be assessed as non-pecuniary or general damages for a loss of amenity: *Fobel v. Dean*, *supra*, at p. 25-26; *McTavish v. MacGillivray*, *supra*, at para. 69; and *McIntyre v. Docherty* (2009), 308 D.L.R. (4th) 213 (Ont. C.A.), 2009 ONCA 448, at paras. 63, 73.
- [161] The damages awarded for pecuniary and non-pecuniary loss of homemaking capacity should be assessed in separate amounts: *Fobel v. Dean*, *supra*, at p. 26.
- [162] The evidence establishes that as a result of the plaintiff's injuries, the plaintiff's husband now does three to four hours of housework a week that he would not otherwise be doing. The plaintiff paid \$20 an hour for the work done by the cleaners, and that would be a reasonable value to attribute to Mr. Patton's replacement labour. Assuming a loss of three hours a week, or 156 hours a year, the yearly loss to the plaintiff is \$3,120. It has been almost four years since the accident. The plaintiff submits that a reasonable award for past loss of homemaking capacity would be \$12,000.
- [163] As for loss of future homemaking capacity, the evidence establishes that the plaintiff's loss will likely continue indefinitely into the future. The plaintiff submits that a reasonable award for loss of future homemaking capacity would be \$30,000.

### The Defendant's Argument

- [164] The plaintiff submitted that she used to spend 10 to 12 hours per week on housekeeping prior to the MVA. Her husband also testified to this. The defendant submits that this is unlikely.

[165] The plaintiff acknowledges that she did not retain a housekeeper until May or June 2009, that is, two and a half years after the MVA. She acknowledges that she was handling the housework in her condominium to that point.

[166] She admits that she is a "neat freak".

[167] She admits that she had periodically used housekeeping services before the MVA.

[168] She could not recall how often the housekeepers cleaned her home , nor when the last time was that they did so. But she admits that it was "a very long time" ago.

[169] In *Travis v. Kwon*, 2009 BCSC 63, the court held that while "The defendants cannot expect a family member to take on an unreasonable burden created by injuries to another member of the family, it is not reasonable to expect defendants to pay to have someone perform services that can and should reasonably be taken on by members of the family."

[170] There was no medical reason for the plaintiff to require housekeeping services.

[171] The defendant submits that housekeeping tasks can and should reasonably be taken on by the plaintiff's husband, rather than hired help.

## Conclusion

[172] I am satisfied that it is reasonable to expect that the husband will take on certain of the household duties. However, on the evidence of this case, it is also reasonable to expect the defendant to pay to assist the plaintiff with her inability to perform housekeeping duties in the manner in which she used to, and which used to provide her with enjoyment and relaxation. For past loss of homemaking capacity, I award the amount of \$5,000, inclusive of the \$800 previously paid for housekeeping. For loss of future homemaking capacity, I award the amount of \$10,000.

## SPECIAL DAMAGES

[173] The plaintiff seeks reimbursement for the cost of the various treatments she received and other items that she has had to purchase as a result of her injuries.

[174] These payments include the following:

Paid by the Plaintiff

Paid by ICBC

Paid by Great West Life Insurance

1. an orthopaedic pillow; 30 personal training sessions and various fitness accessories;

\$2,402.82

0

2. numerous massage therapy sessions

\$ 903.04

0

\$1,707.24

3. various prescription medications

\$11.93

\$46.59

Total amount paid by the plaintiff:

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\$3,317.79

Total amount paid by Great West Life:

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\$1,753.83

**Total by both is: \$5,071.62**

[175] The plaintiff claims that she is entitled to be reimbursed for the full amount of \$5,071.62, and that the amount paid by the insurance company represents collateral benefits.

[176] I agree. The award for special damages is \$5,071.62.

#### DECISION

[177] A summary of the various awards is as follows:

1. Non pecuniary damages - \$60,000
2. Past Wage Loss - \$2,147.34
3. Lost Earning Capacity - \$45,000
4. Cost of Future Care - \$3,500
5. Loss of Homemaking Capacity - Past: \$ 5,000

and Future: \$10,000

6. Special Damages - \$5,071.62

TOTAL: \$130,718.96

[178] If the parties are unable to agree upon costs, they may set the matter down at a convenient time.

"Silverman J."

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The Honourable Mr. Justice Silverman

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