
CANADA / JUDGMENT

Johal v. Bhullar

2021 BCSC 427

COURT

Supreme Court of British Columbia

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2021 BCSC 427 Johal v. Bhullar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johal v. Bhullar,

2021 BCSC 427

Date: 20210310

Docket: M177382

Registry: Vancouver

Between:

Tejinder Kaur Johal

Plaintiff

And

Sukhwinder Singh Bhullar

Defendant

- and -

Docket: M201763

Registry: Vancouver

Between:

Tejinder Kaur Johal

Plaintiff

And

Jacob Murray Carvery

Defendant

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

S.J. Turner

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Place and Dates of Trial:

Vancouver, B.C.

January 18-22, 25-27, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 10, 2021

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Introduction

- [1] The plaintiff claims damages for injuries allegedly suffered in two motor vehicle collisions (collectively, the "Accidents").
- [2] The first of the two collisions (MVA #1) occurred on September 5, 2015 on 88th Avenue at or near King George Boulevard, Surrey, BC when the vehicle the plaintiff was driving was rear-ended by a vehicle owned and operated by the defendant in Vancouver Registry Action M177382, Sukhwinder Singh Bhullar ("Bhullar").
- [3] The second collision (MVA #2) occurred on March 26, 2018 on 137 Street at or near 71A Avenue, Surrey, BC when the vehicle in which the plaintiff was a passenger was rear-ended by a vehicle owned and operated by the defendant in Vancouver Registry Action M201763, Jacob Murray Carvery ("Carvery").

- [4] By Consent Order entered on November 6, 2020, the trials of the actions were ordered to be heard at the same time, with the evidence in each being admissible in the other.
- [5] Liability has been admitted in respect of each of the Accidents. Counsel for the defendants in both actions confirmed at the outset of the trial that all of the injuries found to have been caused by the Accidents are indivisible and that an apportionment of damages between the defendants is not required.

Evidence at Trial Tendered by the Plaintiff

The Plaintiff

- [6] The plaintiff is 28 years old. She was 23 years old at the time of MVA #1. She testified that she had a longstanding career goal of becoming a police officer with the City of Vancouver Police Department ("VPD").
- [7] She testified that, prior to MVA #1, she was physically active and fit, spending four to five days each week working out at a gym. She enjoyed dancing, wearing high heels, and travelling. The plaintiff testified during her examination in chief that, other than having experienced one minor incident when she fainted and hit her head while waiting in line at a coffee shop, she had no pre-existing medical issues. She attributed the fainting to not having eaten. On cross-examination, the plaintiff acknowledged a history of dizziness and fainting episodes in addition to the one incident she had mentioned during her direct evidence and that she had undergone investigations including a consultation with a cardiologist.
- [8] The plaintiff testified about the importance of family to her and her culture. She lives with her mother and her grandmother. Her grandmother has dementia as well as a number of other physical disabilities and has significant care needs. The three of them live in the upper floor of a house owned by the plaintiff's mother where there are five bedrooms. The lower level of the house has two suites that are rented to tenants. There is at least one other bedroom on the lower floor that, since September 2020, has been occupied by Prince Bains, the plaintiff's boyfriend of 11 years.
- [9] The plaintiff testified that prior to the Accidents, she structured her work schedule around ensuring that either she or her mother was available to care for her grandmother. She testified that she performed the majority of the housekeeping work and caregiving because her mother worked long hours in one full-time and two part-time jobs. Since September 2020, the plaintiff, her boyfriend, and her mother have shared the grandmother caregiving duties by adjusting their respective schedules as required.

- [10] After graduating high school, the plaintiff attended university to acquire the academic credentials she considered were necessary to become a police officer. She enrolled at Kwantlen Polytechnic University for two years and at Simon Fraser University ("SFU") for another two years. She testified that, while at both universities, she maintained her physical fitness by challenging herself in the gym four to five times a week. She also participated in "police judo" sessions. She volunteered as a "big sister" for four years.
- [11] To assist her single-parent mother, the plaintiff worked throughout her high school and university years. Commencing February 2014, she worked essentially full-time as a corrections officer at the Surrey Pre-Trial Facility, taking her courses at SFU on-line.
- [12] The plaintiff graduated from SFU at the end of August 2015 with a degree in criminology. She testified that she was preparing to submit her application to the VPD and was confident she would be accepted and begin her training as a VPD officer commencing January 2016. However, on cross-examination she adopted her examination for discovery evidence to the effect that she did not have a specific timeline for the submission of her application.

MVA #1

- [13] MVA #1 occurred on September 5, 2015, soon after the plaintiff had obtained her degree in criminology from SFU. She was stopped for a red light at an intersection when her vehicle was bumped by Bhullar's vehicle. Neither vehicle sustained anything other than negligible damage. The photographic evidence depicts that the damage to the plaintiff's vehicle was comprised of, at most, two or three slight and barely visible black scuff marks on her vehicle's rear bumper. There was no denting.
- [14] The plaintiff testified that she heard a "big thud and crash" and her body was jolted forward. She testified on cross-examination that she did not know whether her head came into contact with her steering wheel or whether the Bhullar vehicle had simply rolled into her vehicle, but conceded she did not believe that her vehicle moved on impact. She testified that she was "in shock".
- [15] The plaintiff testified that in the ensuing minutes, hours, and days, she felt sharp pain in her lower back and glutes as well as pain in her mid-back, shoulders and neck and that she was unable to attend her work as a corrections officer. Her family doctor recommended she take Tylenol for pain and take some time off from work. She testified that she took Tylenol for a short period and thereafter only occasionally for flare-ups. She has never taken any other pain medication. She testified that she does not like to have to rely on medication.
- [16] The plaintiff testified that her pain symptoms have persisted with very little, if any, improvement despite her having followed the recommendations of her family doctor regarding rehabilitation, including attending physiotherapy, massage therapy, chiropractic treatments and working with a kinesiologist.

- [17] The plaintiff testified that her pain symptoms have been physically exhausting for her. Sitting, lying, walking, running, and cold weather aggravates her pain. Her sleep has been disrupted. She has been unable to work out at the gym with the intensity she did prior to MVA #1. The motivation she previously had to maintain a high level of physical fitness has significantly diminished due to her pain. She no longer wears high heels or dances and only engages in limited activities when travelling on vacation.
- [18] The plaintiff testified that her pain was such that she did not believe she would pass the VPD's police officer physical ability testing ("POPAT"). She decided to delay her application until her pain symptoms subsided and she was physically fit once again.
- [19] In October 2015, while off work as a corrections officer, the plaintiff asked her superiors at Surrey Pre-Trial to move her from "operations" as a floater to "programs". She wrote:

I was informed that for the staff rotation I will be staying in operations as a float and with CS Parks. I had put in for an expression of interest for programs, I was wondering why I was not able to get into this department. This leaves me in a very difficult situation as I explained when I first got rolled over, it is difficult for me to do graveyards because I cannot leave my grandma at home alone, she is 74 and has many different illnesses, for instance, she has very poor vision - end stage glaucoma, osteoporosis - prior hip fracture, chronic hepatitis, chronic renal failure, and has bad knees; she has gotten both knees replaced and has had surgeries, her feet also swell up to the point where she can no longer walk .As a result, either my mother or I have to be home at night and my mother also continuously does graveyard shifts at her job I really hope we can work something out.

- [20] The plaintiff did not return to her job as a corrections officer after MVA #1 until January 2016, at which time she returned on a graduated program until April 14, 2016 when she resumed working full-time. The plaintiff testified that the physical demands of her work exacerbated her pain symptoms and she found the work difficult. She testified that, at the end of each four-day block of shifts, she was exhausted and spent her four days off recuperating and attending to her rehabilitation rather than otherwise enjoying the pleasures of day-to-day life as she had done before MVA #1, such as hiking and going to the gym with her boyfriend. She agreed on cross-examination that she continued to work her regular shifts performing her full regular duties after returning to work full-time.
- [21] The plaintiff attended eight practice POPAT sessions with a retired police officer. She conceded on cross-examination that, absent MVA #1, she likely would have only attended two such sessions.
- [22] The plaintiff applied to the VPD on January 11, 2017. She passed the POPAT on her first attempt, although she testified that she found it to be "excruciating" due to her accident-related pain symptoms and her deteriorated physical conditioning. On cross-examination, she acknowledged the accuracy of the statement in her application that she was, at the time, "physically fit and active with ability to work for long hours". She also agreed that the POPAT was extremely rigorous, and required considerable physical strength and endurance.

Ultimately the plaintiff reluctantly agreed that, by March 2017, she was back to her pre-MVA #1 physical condition.

[23] The plaintiff entered the VPD's nine-month police recruit academy program in May 2017.

[24] On January 19, 2018, the plaintiff hit her head during police "use of force simulations" when she was body-slammed to the floor. During her evidence-in-chief, she testified that the dizziness and other symptoms were fleeting. However, on cross-examination, it became clear that the symptoms lasted for more than two months and did not begin to settle until some time in March 2018. They were such that her family doctor, Dr. Daljit Claire, diagnosed that she had suffered a mild traumatic brain injury ("MTBI"). The plaintiff denied that she was excused from taking a final POPAT in March 2018 due to the MTBI, insisting that she was excused solely because of her back pain.

[25] On March 20, 2018, the plaintiff was assessed by Dr. Steven Helper, a physiatrist. Dr. Helper prescribed clinical Pilates for the plaintiff. She did not follow that recommendation until June 2020, more than two years later.

MVA #2

[26] MVA #2 occurred just as the plaintiff had finished her police training and was about to start work as a patrol officer.

[27] The plaintiff testified that she was a passenger in the vehicle driven by Prince and their vehicle was one of several vehicles that were approaching a four-way stop. One of the vehicles that was ahead of their vehicle stopped on the side of the street to let a passenger out. The vehicles ahead of their vehicle manoeuvred around the stopped vehicle. Prince followed. She testified hearing a crash as their vehicle was impacted from behind and felt her body being "jolted". She testified that she and Prince got out of their vehicle and took pictures. She stated on cross-examination that she "was obviously in shock" and immediately felt the same "shooting pain" sensations in her lower back that she had felt after MVA #1.

[28] Photographs of the collision depict no more than minor damage to the vehicles, comprised of scuffs and scrape marks on the rear left bumper corner of the plaintiff's boyfriend's vehicle and cracking and scratches to the right corner of the Carvery vehicle.

[29] The plaintiff conceded on cross-examination that she did not miss any work as a result of MVA #2.

Life After MVA #2

[30] The plaintiff started her police career as a patrol officer in the Downtown Eastside area of Vancouver. She is now working in the more affluent West Side of Vancouver. She works an 11-hour shift, four-days on/four-days off, starting at either 6:45 a.m., 1:45 p.m., 3:45 p.m., or 6:45 pm.

- [31] In August 2018, the plaintiff started "kick boxing" but maintained that she only took "a handful" of lessons.
- [32] On January 9, 2019, the plaintiff was assessed by another physiatrist, Dr. Kim Waspe. Dr. Waspe also recommended that the plaintiff take a clinical Pilates program and return for a follow-up consultation in four months. The plaintiff did neither.
- [33] The plaintiff testified that, because she is not able to sufficiently exercise due to her Accident-related pain symptoms, her weight increased from 135 to 140 pounds to 155 to 160 pounds, which not only detrimentally affected her self-confidence, but also her relationship with Prince. However, on cross-examination, she conceded that she advised Dr. Waspe in January 2019 that her weight was approximately 140 pounds.
- [34] On March 27, 2019, the plaintiff sustained an injury to her right ankle/foot while subduing an unruly individual. She testified during her evidence-in-chief that the injury resulted in her being off work "for a bit" followed by light duties before she returned to her regular full-time duties as a patrol officer. However, on cross-examination, she acknowledged that her ankle/foot injury had limited her from performing her regular police duties for more than four months.
- [35] On cross-examination, the plaintiff also acknowledged that she injured her right shoulder while subduing a suspect on April 19 and again on April 23, 2020. She reported to her doctor that she experienced "shooting pain" in her shoulder and arm. She did not mention these injuries during her evidence-in-chief.
- [36] The plaintiff began taking clinical Pilates on June 11, 2020.
- [37] The plaintiff testified that she injured her right shoulder again on December 25, 2020 while subduing a suspect. Although she worked the following day, she was off work until January 24, 2021.
- [38] The plaintiff testified that there has been no improvement in her pain symptoms since MVA #2. She testified that her low back pain is "very aggressive" when she is active. She testified that she is exhausted after her shifts because the pain wears her down and that she is "just getting by". She testified that she continues to have sleepless nights due to pain.
- [39] The plaintiff testified that her accident-related shoulder pain has and will likely continue to prevent her from taking a bean bag shotgun course that she would otherwise have taken in order to advance her career. On cross-examination, she denied that the shoulder injuries she sustained in April and December 2020 have had or will have any effect on whether or not she takes the course.
- [40] The plaintiff receives annual performance development reviews from her superiors at the VPD. Her review for 2018 indicates that she met all of her job's core competencies. Her review for 2019 indicates that she is motivated, that she constantly strives to do her duties to the best of her ability and that she exceeded expectations in all categories.

- [41] The plaintiff testified that, despite her accident-related pain, working for the VPD as a police officer is her "dream job" and she enjoys it very much. The plaintiff's current rank is "Constable 2nd Class". She anticipates that she will become a "Constable 1st Class" in April 2021. The plaintiff testified that she plans to work as a patrol officer for a total of approximately five years, after which she intends to advance her career in the VPD. She testified that she considers herself to be a good leader and that her ultimate goal is to achieve the rank of sergeant. However, she feels that her accident-related injuries may impact her career opportunities.
- [42] The plaintiff testified that working overtime at double pay is commonplace within the VPD and that, but for her Accident-related pain symptoms and the need to recuperate after her regular work shifts, she would have worked overtime during two of her four days off while she was still young, unmarried, and without children.
- [43] The plaintiff conceded on cross-examination that she is very family oriented and is committed to providing ongoing care for both her grandmother and her mother. She denied having not volunteered to work overtime because of these caregiving duties. When asked to explain how she would have been able to work overtime when her mother was also working long hours she stated that "it would have worked out".
- [44] The plaintiff testified that the intensity of her pain makes it difficult for her to provide the housekeeping and caregiving she did prior to MVA #1. Her mother was involved in a motor vehicle accident in May 2020 and has been off work since. The plaintiff's mother now pays for a cleaning service to come into the home once every two weeks. The plaintiff testified that her mother also pays for a "care aide" to come to the house one day each week to assist with her grandmother's bathing needs because neither the plaintiff nor her mother are physically able to provide this care.
- [45] The plaintiff testified that she and Prince plan to marry and have children.

Prince Bains ("Prince")

- [46] Prince has been the plaintiff's boyfriend since July 2009. Since September 2020, he has lived in the same house as the plaintiff and her mother and grandmother.
- [47] Prince has worked as a corrections officer at the Surrey Pre-Trial facility since August, 2015 where he has been assigned to "operations". He obtained his criminology degree from Kwantlen Polytechnic University in August 2017.
- [48] Prince testified that, while he and the plaintiff worked together as corrections officers, the plaintiff worked the majority of her time in the "programs" department because the work did not involve graveyard shifts which allowed her to be at home during night time to care for her grandmother. He also confirmed that the plaintiff's work in the "programs" department involved working at a desk and did not involve much physical activity.

- [49] Prince testified that, prior to MVA #1, he and the plaintiff did many activities together, including running, jogging, working out at the gym and hiking. He testified that he encouraged her to go for physiotherapy and chiropractic treatments but does not specifically know the extent to which she did.
- [50] Prince testified that, after MVA #1, the plaintiff was "in a lot of shock" and complained about pain in her lower back, neck and shoulder areas. She no longer wanted to go running, jogging or to the gym with him.
- [51] Prince testified that, immediately prior to MVA #2, he and one or two cars that were ahead of him had manoeuvred around a vehicle that had stopped on the side of the street to let a passenger out just before a four-way stop. After rounding the stopped vehicle, his vehicle and the vehicles ahead of him came to a complete stop at the four-way stop and he had his foot on the brake. He testified that it "felt like a bang" as his vehicle was impacted from behind and jolted forward. On cross-examination, he denied that the impact was a "tap", but he agreed that the damage to his vehicle was confined to what looked like scuffs and some paint transfer from the Carvery vehicle. He testified that "I don't know whether there was a dent". Initially he stated that it was not raining at the time of the accident, but changed his testimony when shown the photographs he took which showed rain water on the vehicles and the roadway. He did not suggest that he was injured as a result of MVA #2.
- [52] Prince testified that, following MVA #2, the plaintiff complained of back pain and that the accident set her back from the progress she had made after MVA #1.
- [53] During his evidence-in-chief, Prince commented on the plaintiff's January 2018 concussion injury as having lasted "a week or two". He testified that he did not hear the plaintiff complain about her 2019 ankle/foot injury. He also testified that he heard very little from the plaintiff about her shoulder injuries.
- [54] Prince testified that the plaintiff was unable to dance with him at a wedding in August 2019.
- [55] Prince testified that, since moving into the plaintiff's house in September 2020, he does most of the housework and yard work. He confirmed that the plaintiff has made a significant commitment to care for her grandmother.
- [56] Prince testified that he too has aspirations of becoming a police officer and applied to the VPD two weeks ago. He testified that he is confident his application will be accepted and that he will begin his police training in May 2021. Prince testified that he is in good physical condition and, although he has never attempted it, considers the POPAP as not being particularly difficult.
- [57] Prince testified that he and the plaintiff plan to marry and have children but are waiting until after he finishes his police academy training.

Cst. David Waterfield

- [58] Cst. Waterfield met the plaintiff while they were training together at the VPD's police academy. Commencing in the summer of 2019, they worked in the same squad and, since March 2020, they have been regular patrol partners.
- [59] Cst. Waterfield testified that, as their four-day shifts progress, he has observed the plaintiff exhibiting signs of increased discomfort. He testified that "things seem to bother her more than they bother me".
- [60] Cst. Waterfield confirmed the plaintiff's evidence that overtime at the VPD is readily available for officers that want to do it.
- [61] On cross-examination, Cst. Waterfield testified that the standard issue equipment belt worn by VPD officers weighs approximately 18 pounds and is uncomfortable.
- [62] Cst. Waterfield testified that he attended multiple practice POPAT sessions prior to carrying out his POPAT and that such practice sessions were not uncommon for prospective police recruits.
- [63] Cst. Waterfield testified that the plaintiff was "absolutely a good teammate", "absolutely goes above and beyond", and is an "effective constable".

Cst. Michael Wu

- [64] Cst. Wu met the plaintiff as one of the 48 recruits at the police academy in May 2017 and, like the plaintiff, has been a police officer with the VPD since March 2018.
- [65] Cst. Wu testified that police officers are frequently able to work overtime if they indicate they are available to do so. He has worked an average of one to two overtime shifts during his four days off since July/August 2018.
- [66] On cross-examination, Cst. Wu indicated that he was not aware of the plaintiff having been injured during her police academy training.

Dr. Daljit Claire

- [67] Dr. Claire has been the plaintiff's family doctor since 2009 when the plaintiff was 17 years old. He is also the plaintiff's mother's and grandmother's family doctor. He was qualified without objection as an expert in family medicine.
- [68] Dr. Claire authored three reports dated May 6, 2018, May 23, 2020, and October 12, 2020.

- [69] Dr. Claire was cross-examined extensively. He testified that he knows the plaintiff's family and their circumstances well. He testified that the plaintiff and her mother are the primary caregivers for the grandmother who has gradually deteriorated physically and cognitively over the course of the past five years. He described the grandmother as having mild to moderate memory issues.
- [70] Dr. Claire testified that, prior to MVA #1, the plaintiff had a history of multiple episodes of presyncope (lightheadedness) and syncope (temporary loss of consciousness) for which she had been referred to a cardiologist.
- [71] Dr. Claire testified that he examined the plaintiff two days after MVA #1. Upon examination, he found no significant loss of range of motion to her neck, shoulder and back and diagnosed that she sustained a mild soft tissue injury to those areas. He prescribed a pain killer (Toradol) and recommended that she stay home from work for two weeks.
- [72] Dr. Claire testified that the plaintiff advised him on December 21, 2015 that her shoulder and neck pain had resolved and that her low back pain, although persistent, was slowly improving. He testified that when he examined her on November 30, 2016 she was exhibiting "a good level of day-to-day functioning". He agreed that the plaintiff presented as an industrious, hardworking person who was ready for the POPAT. He assessed her as having no physical limitations arising from MVA #1 and endorsed her desire to "train as hard as she could" in order to achieve her goal of becoming a police officer.
- [73] On February 8, 2017, Dr. Claire provided his certification to the VPD that the plaintiff was medically fit and could perform the POPAT. Dr. Claire agreed that the POPAT would be difficult for the plaintiff to perform if she had back pain.
- [74] Dr. Claire confirmed that the plaintiff likely suffered an MTBI (concussion) during her academy physical combat training and recommended that she not participate in such training for approximately 6 weeks.
- [75] Dr. Claire confirmed that he saw no reason why the plaintiff was unable to continue to work after MVA #2. He opined in his first report that:
- [The plaintiff] has persistent lower back pain, although functionally through a lot of effort via exercise and personal training, she has regained her functional ability with regard to lower back demands in terms of stamina, lifting capability, etc. However, she is continuing to be troubled by persistent and chronic pain.
- [76] Dr. Claire agreed on cross-examination that, by the date of his first report (May 6, 2018), the plaintiff had regained full and unlimited functional capacity, albeit with lower back pain.
- [77] Dr. Claire confirmed that, on July 17, 2018 the plaintiff advised him that she was taking kickboxing training, which he agreed was a vigorous form of exercise.

- [78] Dr. Claire did not see the plaintiff again until April 5, 2019, after she had suffered a right ankle and foot injury on March 27, 2019 while subduing a suspect. He confirmed that this injury affected the plaintiff's ability to function until at least July 19, 2019.
- [79] Dr. Claire confirmed that the plaintiff consulted him regarding two separate shoulder injuries she sustained while arresting suspects on April 19 and April 23, 2020.
- [80] Dr. Claire opined in his second report (May 23, 2020) that the plaintiff's low back pain did not impair her ability to perform her duties as a police officer and that she was able to work through her lower back pain. He agreed that, "from a functional point of view, the plaintiff is able to do everything."
- [81] Dr. Claire agreed on cross-examination that he was not asked to provide an opinion on whether the plaintiff was limited in her ability to work overtime until receipt of a letter dated September 11, 2020 from plaintiff's counsel. His opinion in that regard is set out in his third report dated October 12, 2020. Although he opined that the plaintiff is unable to work overtime at the VPD, he agreed that his opinion was based entirely on what the plaintiff had told him during "tele-visits" on June 4, 2020 and September 24, 2020 rather than on an examination or objective assessment of her condition.
- [82] Dr. Claire recommends that the plaintiff follow up with a Rehab Medicine specialist, engage in training with a personal trainer, and attend a chronic pain centre, trigger point injections, and cognitive behaviour therapy to assist her in living with chronic pain.

Dr. Steven Helper

- [83] Dr. Helper is a physiatrist who was qualified without objection as an expert in the field of physical medicine and rehabilitation. He interviewed and conducted a physical examination of the plaintiff on March 20, 2018 (six days prior to MVA #2) and prepared a report of the same date setting out his recommendations regarding the plaintiff's recovery. He assessed the plaintiff again on September 18, 2020 and prepared a medical/legal report dated September 20, 2020, setting out his opinions regarding the plaintiff's diagnosis, the cause of her injuries, his prognosis for recovery, and his additional recommendations for her recovery.
- [84] Based upon the plaintiff's self-reports to him, together with the imaging he had access to and his own physical examination of her, Dr. Helper opined that the plaintiff's neck, shoulder, upper back and low back/gluteus pain was soft tissue (musculotendinous) in nature. He found that her neck, shoulder, and lower back range of motion was within normal limits. He noted only mild limitations in the quality and functionality of the plaintiff's lumbopelvic region.

- [85] Given the similarity between the plaintiff's two clinical presentations on March 20, 2018 and September 18, 2020, Dr. Helper opined that MVA #1 is the primary cause of her present-day musculoskeletal pain, that the aggravation of her symptoms after MVA #2 was temporary and that her pre-MVA #2 symptoms have not worsened. He opined that the plaintiff's subjective impression that her symptoms worsened after MVA #2 is suggestive of her pain coping mechanisms fatiguing.
- [86] In March 2018, Dr. Helper recommended that the plaintiff improve her alignment and core activation through guided training and possibly clinical Pilates together with home exercises. Those recommendations were repeated in his September 2020 report, with increased frequency. He also recommended that the plaintiff undergo a pelvic therapy assessment, as was recommended by another physiatrist (Dr. Kim Waspe) in 2019. If those treatments are unsuccessful, Dr. Helper recommends that the plaintiff be referred to Mr. Dean Kotopski, a massage therapist who focuses on the treatment of misaligned pelvis' and pelvic imbalance.
- [87] In Dr. Helper's opinion, given the length of time that the plaintiff has complained of pain, her prognosis for a complete recovery is poor, but there is a more than 50% probability of her achieving greater than 50% improvement in her current pain symptoms through the continued pursuit of guided physical fitness. Dr. Helper opined that the plaintiff will likely require medical support in order to achieve this additional recovery.
- [88] On cross-examination, Dr. Helper readily agreed that his assessments of and opinions related to the plaintiff were based, in large part, on the plaintiff's self-reports, although supplemented by his own physical examinations and observations. He also agreed that the plaintiff's subjective reports of her pain having worsened between March 2018 and September 2020 were in conflict with his objective findings.
- [89] Dr. Helper agreed that the plaintiff having passed the POPAT was a positive indicator of her strength, agility, and functional ability to perform the difficult physical tasks required. He agreed that the shoulder injuries sustained by the plaintiff in April 2020 while on the job could be the source of her right shoulder pain complaints. He also opined that those pain complaints may simply be the natural result of her being right-handed.
- [90] Dr. Helper agreed that the plaintiff has the ability to work full-time as a police officer, albeit with pain. He agreed that, provided the plaintiff follows his recommendations with guidance, he expects that she will improve.

Danae Rau

- [91] Ms. Rau is an occupational therapist. She conducted a functional capacity evaluation ("FCE") of the plaintiff on September 25, 2020. Her report is dated October 19, 2020. She was qualified without objection to give opinion evidence regarding the plaintiff's functional capacity.

[92] Ms. Rau found that the plaintiff had reduced range of motion in her neck, shoulders and lower back and that she was only able to safely lift a maximum of 15 pounds between ground and shoulder level.

[93] Ms. Rau noted a 60% decline in the plaintiff's functioning during her 6 ½ hour assessment. The plaintiff reported neck pain of 7 on a scale of 1 to 10 and shoulder and lower back pain of 7.5/10. The scale she used provided the following subjective descriptor:

7

Severely disabling pain. You cannot move or use the painful area. You have difficulty speaking/engaging in conversation. You have difficulty concentrating on anything but the pain. Needing to lie down, and pain related tearfulness are also common at this level of pain.

8

Pain that causes disability between levels 7 and 10. Nearing need for hospitalization.

[94] Based upon the plaintiff's history and her observations of the plaintiff during the evaluation, Ms. Rau opined that the plaintiff has not returned to her pre-accident level of functional capacity, has limitations that impact her current functional capacity, and does not meet the strength demands of a police officer.

[95] Ms. Rau opined that the job accommodations the plaintiff has received at the VPD are insufficient, that she is at risk of further re-injury and that her durability to maintain her current work schedule is poor. Ms. Rau recommends that the plaintiff's work shifts be reduced to part-time.

[96] Ms. Rau recommended an ergonomic assessment of the plaintiff's workplace to determine if there are equipment needs or strategies that will be of benefit to her. Ms. Rau opined that the plaintiff will require continued massage therapy for symptoms management and active rehabilitation to assist her to re-engage in a physical conditioning program, with education on body mechanics.

[97] On cross-examination, Ms. Rau agreed that the plaintiff would have exhibited significantly greater muscular strength and functional capacity when she performed the POPAT in January 2017 than was observed during the FCE. Ms. Rau also agreed that VPD police officers are expected to maintain a high standard of fitness and that the plaintiff would obviously have had to have demonstrated much higher physical strength than she observed in order to pass the VPD's training academy.

[98] Ms. Rau agreed that deconditioning as a result of the plaintiff's MTBI in early 2018 and inability to work out and maintain her physical fitness during the period of April to July 2019 due to her ankle/foot injury could have affected her performance during the FCE.

[99] On cross-examination, Ms. Rau acknowledged that she was unaware of the VPD's performance reviews of the plaintiff.

Evidence at Trial Tendered by the Defendants

Sukhwinder Bhullar

- [100] Bhullar, the defendant in MVA #1, is a 72 year old former taxi driver. He testified that, at the time of MVA #1, he was driving eastbound on 88th Avenue in Surrey approaching the intersection of King George Boulevard. The traffic light was red in his direction.
- [101] He testified that he came to a full stop behind the plaintiff's vehicle. As he was stopped, he reached behind to the rear seat to retrieve a bottle of water. His vehicle was on a slight downhill grade and he did not notice that it began to roll forward until it slowly "touched" the plaintiff's vehicle. He denied that there was a "bang" or any kind of forceful impact.
- [102] He testified that there was no sign of damage to either vehicle. He did not make a claim or make any repairs to his vehicle.

Jacob Carvery

- [103] Carvery, the defendant in MVA #2, described a somewhat different version of this accident than was described by the plaintiff and Prince. He testified that he was driving an older Honda Accord that was quite "banged up", with lots of body damage, peeling paint, and rust on the exterior.
- [104] He testified that it was raining at the time of MVA #2. There were two vehicles ahead of him as he approached a four-way intersection stop. The lead vehicle pulled to the right side of the street and stopped 30 to 40 feet before the intersection. The plaintiff's vehicle which was immediately ahead of him came to a full stop behind the first vehicle, as did Carvery. The plaintiff's vehicle then began to slowly move around the stopped vehicle and Carvery slowly followed, however the plaintiff's vehicle quickly stopped because there was another vehicle approaching from the opposite direction. Carvery's vehicle had moved only one to two feet before it struck the rear of the plaintiff's vehicle.
- [105] Carvery testified that his vehicle was moving very slowly at the time of the impact. He described the impact as "very light" when he "ran into" the plaintiff's vehicle.
- [106] Carvery testified that only Prince got out of his vehicle. The female passenger did not. He described the damage to the plaintiff's vehicle as "minor scratches". He was unable to discern any new damage to his vehicle.

S/Sgt. Sandra Glendinning

- [107] S/Sgt. Glendinning was the plaintiff's sergeant and direct supervisor from June 2019 until December 2020 when she was promoted to Staff Sergeant.

- [108] S/Sgt. Glendinning described the POPAT as a physically demanding series of exercise and obstacle tests that most prospective officers train for as it must be completed in four-and-a-quarter minutes.
- [109] S/Sgt. Glendinning described the plaintiff as a good officer, a self-motivated hard worker, a team fit, and an officer who is always trying to improve herself. She testified that the plaintiff has progressed very well as a VPD officer and that she has no concerns about her abilities.
- [110] S/Sgt. Glendinning testified that the plaintiff and Cst. Waterfield work well together and are a "very good match" as regular partners.
- [111] S/Sgt. Glendinning testified that, other than the injury the plaintiff sustained to her foot while on the job, she was unaware of any injury to the plaintiff that impacted or limited her ability to carry out her duties as a police officer. S/Sgt. Glendinning acknowledged that on at least one occasion the plaintiff complained of a sore back due to the weight of her service belt, but such complaints are common among officers given the belt's weight of approximately 25 pounds.
- [112] S/Sgt. Glendinning testified that the VPD has processes in place for accommodations for officers, if needed, but that the plaintiff has never requested any accommodations, nor has she ever observed the plaintiff having any difficulties that might indicate accommodations were required.
- [113] S/Sgt. Glendinning testified that overtime at the VPD is strictly voluntary and that it has decreased overall due to the COVID-19 pandemic.

Dr. Alister Prout

- [114] Dr. Prout is a neurologist who was qualified without objection to give opinion evidence in that specialty.
- [115] Dr. Prout met with and conducted an independent medical examination of the plaintiff on February 26, 2020. His medical/legal report is dated March 5, 2020.
- [116] During his examination of the plaintiff, Dr. Prout found that the range of motion in her neck and shoulders was normal. The internal rotation of her hips was mildly restricted. The plaintiff reported mild discomfort with full flexion of the lumbar spine, although excursion of the lumbar spine was normal. She reported pain with the extension of her lumbar spine.
- [117] Based upon the plaintiff's self-report, his review of the medical records that were provided to him and his examination of the plaintiff, Dr. Prout opined that:
- the plaintiff exhibited no neurological issues;
 - mild muscle spasm was noted in the right more than the left trapezius muscles but no muscle spasm was noted in the cervical, thoracic or lumbar paraspinal muscles;

- the plaintiff suffered a lingering musculoskeletal soft tissue strain/sprain to her neck and lower back;
- the plaintiff's ongoing complaints of pain are likely due to the atypical lingering effects of these injuries, which may be due to her physical work as a police officer;
- it is likely that the plaintiff's recovery has plateaued, although further improvement is possible with Pilates and other core strengthening exercises and conditioning; and
- a conditioning and weight loss program would likely help alleviate some of the lower back pain symptoms she describes.

[118] Dr. Prout opined that, assuming the plaintiff had no pre-existing musculoskeletal neck/back symptoms, her ongoing complaints are likely caused by MVA #1.

[119] Dr. Prout opined that the plaintiff will likely have some lasting and possibly permanent susceptibility to low back pain and to a lesser degree neck discomfort in certain situations, although further improvement is possible. He opined that the plaintiff is not disabled from performing her usual recreational and work activities with the possible exception of lifting heavy weights.

[120] Dr. Prout agreed on cross-examination that he would defer to a physiatrist regarding specific therapies the plaintiff should undertake, and to a FCE regarding how the plaintiff is able to function vocationally.

Credibility and Reliability

[121] As is generally the case in personal injury actions, the most important witness is the plaintiff herself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.

[122] A plaintiff who accurately describes her symptoms and circumstances before and after the collision without minimizing or embellishing them can reasonably anticipate that the court will find her evidence to have been credible and reliable.

[123] The plaintiff's testimony was often unnecessarily prolix and repetitive. She took every opportunity to bolster her claim of pain caused by the Accidents and its effect on her ability to function. Similarly, she rarely if ever missed an opportunity to downplay the frequency and extent of pain from her several non-accident-related injuries, several of which she testified that she "forgot about", including the MTBI diagnosis by Dr. Claire in February 2018 and her shoulder injuries in April 2020.

- [124] The plaintiff's evidence regarding what she had told her various treating professionals and the treatments that were recommended to her was often confused and speculative. Her evidence regarding her inability to perform house cleaning was contrary to her statement to Dr. Helper in September 2020 that she had full function with housework activities. She often attempted to support the veracity of her evidence on cross-examination by volunteering that she had given the same evidence during her examination for discovery.
- [125] The plaintiff was not forthcoming about her pre-MVA #1 health nor her post-MVA #1 injuries. She led the court to believe that her work as a corrections officer was physically draining. However, Prince testified that she worked most of her time at the Surrey Pre-Trial facility in the programs department which did not involve any rigorous physical activity.
- [126] Despite having just completed her training as a police officer in March 2018, the plaintiff had difficulty on cross-examination identifying the obvious from the photographs that were taken of the vehicles on March 26, 2018 after MVA #2.
- [127] It is difficult to comprehend how any person, let alone one about to submit her application as a police officer, to have been "in shock" after what can only be described as a minor tap to the rear bumper of her vehicle during MVA #1. The photographic evidence demonstrates that the plaintiff's vehicle was not pushed forward during MVA #1 and is consistent only with Bhullar's evidence that his vehicle slowly rolled and touched the rear of the plaintiff's vehicle. The photographic evidence of MVA #2 is equally inconsistent with anything other than a minor mishap. The plaintiff attempted to suggest to the court that the impact of the collisions was much greater than it obviously was.
- [128] It is equally difficult to comprehend how a person who purports to have been in the extraordinary physical condition the plaintiff claims to have been in at the time of MVA #1 would have been injured by a minor contact between vehicles, to the extent of being completely incapacitated from working for over four months and, after more than five years, still claims to be the victim of chronic unyielding pain. It is even more difficult to comprehend how a person such as the plaintiff would be able to pass the gruelling POPAT on her first attempt and yet claim to continue to be suffering from debilitating pain. Although the plaintiff had no difficulty reporting to the VPD pain associated with her work-related injuries, she rationalized the complete absence of any reported pain she claims was caused by the Accidents by a fear of her career becoming limited.
- [129] In September, 2020, over five years after MVA #1, while working full-time as a patrol officer and one week after Dr. Helper assessed her as having only mild limitations in the quality and functionality of the lumbopelvic region, the plaintiff assessed her low back pain during the FCE as severely disabling and nearing the need for hospitalization.
- [130] Despite a requirement that the VPD be informed of any injuries, she never reported any of the Accident-related injuries she claims to have suffered to her superiors.

- [131] I did not find the plaintiff to be a credible or reliable witness regarding the extent and longevity of her accident-related pain. Nor did I find her a credible witness regarding significant aspects of her evidence. Indeed, I do not believe the plaintiff's evidence that she continues to experience pain symptoms that are attributable to the Accidents.
- [132] Although it is not surprising that a boyfriend would want to support his girlfriend's case, I found Prince's evidence to be overly rehearsed and partisan. He played down the plaintiff's non-Accidents related injuries as well as the physical strength and endurance needed to pass the POPAT. He plainly embellished the impact that occurred during MVA #2. Other than accepting his evidence regarding the plaintiff working in "programs" as a corrections officer, I give his evidence little weight.
- [133] I found each of S/Sgt Glendinning, Cst. Waterfield, and Cst. Wu to have been an honest, forthright, and genuine witness who testified in a sincere and reliable manner. I have no hesitation accepting their respective evidence in its entirety.
- [134] I found Bhullar to be an honest and genuine witness whose evidence regarding MVA #1 was credible and consistent with the objective photographic evidence. I have no hesitation accepting it in its entirety.
- [135] Carvery was an articulate, sincere, and credible witness who had very good recall of MVA #2. I accept his evidence regarding MVA #2 over that of the plaintiff and Prince.
- [136] Dr. Claire testified in a helpful, candid, and objective manner. He readily conceded that his assessments of and opinions related to the plaintiff were based almost entirely on the plaintiff's self-reports to him. I accept Dr. Claire's evidence to the extent it is factual or based upon facts I have otherwise accepted. However, I do not accept Dr. Claire's opinion expressed in his October 12, 2020 report, which was based upon what the plaintiff told him in a June 4, 2020 and September 24, 2020 "tele-visit" that she has "regressed" and that there is a 50% chance of regression in the future. The factual foundation of that opinion has not been established.
- [137] Drs. Helper and Prout were both impressive witnesses. Their evidence was helpful, candid, and objective. Each was prepared and articulate. It was clear that each of them understood his role was to provide assistance to the court rather than to advocate for one party or the other. To the extent their evidence is factual or is comprised of opinion based upon facts I have otherwise accepted, I accept their evidence unreservedly.
- [138] I found Ms. Rau to be overly assertive and excessively defensive of her opinion that the plaintiff is unable to work as a police officer on a full-time basis. Her findings of the plaintiff having reduced range of motion were in marked contrast with those of Dr. Helper one week earlier. Her opinion that the plaintiff has a maximum safe lifting capacity of 15 pounds is also in marked contrast with the plaintiff having successfully completed the POPAT in January 2017 which included a requirement that the plaintiff lift and carry at least 80 pounds. Ms. Rau emphatically disagreed with Dr. Helper's opinion that the plaintiff is

able to continue to work full-time. Although she agreed that her opinion is based solely on a "snapshot" of the plaintiff's functioning on the day of her assessment, Ms. Rau, nevertheless, opined that the plaintiff "has not returned to previous level of functional capacity" and has limitations that pose a risk for re-injury in the field. Ms. Rau opined that a reduction of the plaintiff's work schedule to half time "is required". I find that I am unable to give Ms. Rau's opinion more than little weight.

Causation

- [139] The legal test for causation is the "but-for" test--the plaintiff must prove on a balance of probabilities that, but-for the defendant's negligence, she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32 at paras. 8-10; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28-29; and *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [140] The classic statement of the law of causation was stated by Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: " causation need not be determined by scientific precision ". It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff need only establish a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
- [141] Although there is no necessary connection between the force of impact and the severity of injury, each case must be determined on its own facts: *Newman v. Johal*, 2021 BCSC 65 at paras. 22 and 23. Where there is little or no objective evidence of injury or continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery, a plaintiff is not entitled to compensation absent convincing evidence. The evidence can be from the plaintiff herself if the surrounding circumstances are consistent with the complaints of pain and are true reflections of a continuing injury: *Price v. Kostryba*, (1982), 70 B.C.L.R. 397 (S.C.).
- [142] In this case, the damage to each of the four vehicles involved in the Accidents was, at most, insignificant and the impact in each case was minimal. There is little or no objective evidence supporting the plaintiff's claims. Her complaints of persistent debilitating pain do not ring true when assessed against the surrounding circumstances as a whole.
- [143] Based upon the evidence as a whole, I find that MVA #1 caused the plaintiff to suffer, at most, mild soft tissue injury to her neck, shoulder, and lower back areas. Those symptoms fully resolved by no later than January 2017 when she passed the POPAT. I find that it is more likely than not that the plaintiff was excused from a further POPAT in March 2018 at the end of her police training because she had been diagnosed by Dr. Claire with a MTBI. I also find that the plaintiff's current complaints of lower back pain are more likely attributable to her heavy duty belt and work duties than to the Accidents.

[144] I am not persuaded, on the balance of probabilities, that any of the other conditions or complaints the plaintiff claims to have suffered were caused by the Accidents. My conclusion in this regard is despite having accepted the opinions of Drs. Claire, Helper, and Prout. Those opinions were based almost entirely on the plaintiff's subjective complaints of pain after January 2017 which I do not accept as credible or reliable.

Assessment of Damages

Non-pecuniary Damages

[145] The assessment of non-pecuniary damages takes into account the well-established factors from *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An award under this head is intended to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Factors commonly taken into account include the age of the plaintiff, nature of the injury, severity and duration of pain, extent of any disability, extent of emotional suffering, and impairments to the plaintiff's life, including impairments to family, marital, and social relationships, physical and mental abilities, and loss of lifestyle.

[146] Each plaintiff must be assessed individually, although reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at para. 56.

[147] Counsel for the plaintiff seeks a non-pecuniary award of \$120,000, relying on the following decisions of this court:

- *Hastings v. Mathew*, 2020 BCSC 1418 (\$95,000): the plaintiff's neck and back stiffened shortly after the accident and he felt some numbness in his right thigh. His low back pain was his most serious injury notwithstanding he had intermittent pre-existing issues. The court found that, absent the accident, he would have continued to have intermittent non-disabling back pain due to longstanding spinal defects, but that the accident caused chronic pain which is likely to persist indefinitely. The plaintiff's relationship with his wife and sons was affected, as he is more irritable and less active. He modified or abandoned altogether some of his recreational activities;

- *Sekihara v. Gill*, 2013 BCSC 1387 (\$130,000): the accident caused the plaintiff significant chronic back pain. There was evidence of a pre-existing degenerative issue and mild depression that was resolving. Professional snowboarding had defined her life and had been negatively impacted by her injury; and

- *Kam v. Van Keith*, 2015 BCSC 1519 (\$125,000): the 36-year-old plaintiff injured her back, upper and lower back and shoulders. She suffered from depression, sleep disturbance, fatigue, headaches and had chronic pain. She was incapable of practically all of the sporting activities that had been vital to her pre-accident life.

[148] Counsel for the defendants submits that a non-pecuniary damages award of \$25,000 to \$30,000 is appropriate in this case (subject to a reduction for failure to mitigate), relying on the following decisions of this court:

- *Sharma v. Bhullar*, 2020 BCSC 379 (\$38,000): the plaintiff suffered mild to moderate soft tissue injuries and associated headaches as a result of two accidents. She lost only a modest number of hours of work after the second accident;
- *Cegielka v. Grace*, 2020 BCSC 115 (\$40,000): the plaintiff sustained neck, upper back, left shoulder and lower back injuries. He was off work for over three months and thereafter continued to experience pain while at work;
- *Bagri v. Heran*, 2020 BCSC 2002 (\$50,000): the plaintiff suffered soft tissue injury after three separate accidents. Her pain symptoms continued to linger at the time of trial. Her sleep was disturbed but she was not prevented from working as a hairstylist;
- *Harle v. Williams*, 2020 BCSC 1684 (\$50,000): the plaintiff sustained injuries to his neck, right shoulder and back that persisted for almost three years and were aggravated by his work as a concrete layer. Prior to the accident he was in good health both physically and emotionally;
- *Ludwiczak v. Nguyen*, 2020 BCSC 1202 (\$50,000): the 35-year-old plaintiff suffered mild to moderate soft tissue injuries leading to headaches and neck pain that resolved within 18 months and persistent chronic low back pain that flared up with prolonged physical exertion. He was limited in his recreational activities and ability to sit for long periods of time;
- *Findlay v. Sun*, 2020 BCSC 1330 (\$55,000): the plaintiff suffered bruising to both knees, her chest and right wrist as well as soft tissue injuries to her neck and upper back. She also suffered driving anxiety. Her condition was considered chronic, it affected her work as a laser technician and her prognosis for a full recovery was poor.

[149] I find that, prior to MVA #1, the plaintiff was a healthy, active and physically fit young woman who enjoyed various activities such as hiking and dancing. She was committed to a career as a police officer with the VPD.

[150] It has been over five years since MVA #1. The thrust of the plaintiff's submissions is that she is facing a life mired in chronic pain and that she continues to suffer from unrelenting and excruciating pain despite having persisted through numerous treatments/therapies. She maintains that she no longer has the motivation she had before MVA #1 to pursue physical training and has limited her recreational endeavours because she is physically exhausted from having to endure pain during the work days. She says that her pain and resulting fatigue make all walks of her life less enjoyable and more challenging--vocationally, socially, and recreationally.

[151] I do not believe the plaintiff's evidence in this regard.

[152] Despite her complaints of unrelenting and excruciating pain since MVA #1, the plaintiff has worked full-time as a corrections officer from April 2016 and full-time as a police recruit/police officer since May 2017. It defies credulity that she is able to not only carry out but exceed her required duties as a full-time police patrol officer but is otherwise virtually unable to function day-to-day. Although the plaintiff is clearly a motivated and driven

individual, she struck me as being far from stoic and a person who will not risk any significant movement or activity "if something doesn't feel right".

[153] It was telling that Prince was unable to provide the court with anything other than mere generalities regarding the plaintiff's limitations, with two exceptions:

- she did not want to dance at a wedding in the summer of 2019.

I find it more likely than not that her reason was her recent ankle/foot injury; and

- not wanting to go swimming during a trip to the Dominican Republic.

I am not persuaded that this trip did not take place in April/May of 2019 when the plaintiff was off work due to her ankle/foot injury.

[154] I accept the submissions of counsel for the defendants that, at most, the plaintiff suffered a mild soft tissue injury to her lower back and to a lesser extent to her upper back, shoulders, and neck. Regardless, I find that the plaintiff is able to fully function. To the extent she has had ongoing lingering pain symptoms after January 2017, they are unrelated to the Accidents. Moreover, I find that, to the extent the plaintiff has and continues to limit her work duties, it is not because of pain but rather because she is concerned that she might experience pain.

[155] Having assessed the Stapley factors in the context of the overall evidence in this case, I award non-pecuniary damages in the amount of \$25,000.

Mitigation of Damages

[156] As I stated in Sharma at paras. 81-82, in assessing whether the damage award ought to be mitigated, the onus is on the defendant to prove that the plaintiff would, on the balance of probabilities, have avoided all or a portion of her loss. In this regard, the defendant must prove:

- 1) the plaintiff acted unreasonably, on a subjective/objective standard, in eschewing the recommended treatment, and
- 2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably. In determining the first prong of the test, the plaintiff's personal circumstances can be taken into account in terms of (a) whether the plaintiff understood, appreciated, and was capable of following the advice given and (b) whether a reasonable person in the plaintiff's circumstances would have done so.

[157] In this case, the evidence is clear that the plaintiff understood, appreciated, and was capable of following the advice of Drs. Claire, Helper and Waspe regarding the importance of rehabilitation, including clinical Pilates. However, given my findings that the plaintiff's Accident-related injuries had resolved by January 2017, there is no need to consider the defendants' submissions regarding mitigation.

Loss of Income Earning Capacity

[158] The value of a plaintiff's capacity to earn is equivalent to the value of the earnings that she would have received over time, had the tort not been committed. The loss of income earning capacity is the difference between the value of what the earnings would have been and what they are, or will be, as a result of the tort: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 29-30. The assessment is based upon either the earnings approach or the capital asset approach and must be based upon the evidence. The plaintiff must demonstrate that there is a real and substantial possibility, beyond mere speculation, that the loss has occurred or will occur in the future. It is a matter of judgment, not calculation: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Arletto v. Kin*, 2016 BCSC 77 at para. 61.

Past Loss of Income Earning Capacity

[159] The plaintiff's employment income in the relevant years was:

2012 \$14,809

2013 \$16,943

2014 \$35,850

2015 \$46,334

2016 \$53,305

2017 \$61,611

2018 \$73,488

2019 \$77,645

2020 \$94,376 (YTD on December 26, 2020 pay stub)

[160] The plaintiff did not work as a correctional officer from September 5, 2015 to April 9, 2016. The defendants concede that she is entitled to an award of \$13,451 as compensation for this missed employment as set out at p. 13 of the expert report of an economist, Darren Benning, dated October 9, 2020 that was tendered in evidence by the plaintiff without objection.

[161] The plaintiff says that, but for MVA #1, she would have successfully obtained employment as an officer with the VPD one year earlier than she did. I do not accept that evidence. At her examination for discovery conducted on September 8, 2020 she testified that she was, "not sure exactly when I planned on applying, but I knew I was Like - yeah, I was able to." I find that it is more likely than not that, after obtaining her degree in criminology, the plaintiff decided to continue working as a corrections officer to further strengthen and bolster her application credentials.

- [162] The plaintiff also maintains that she would have worked overtime an average of two shifts per four-day-on/four-day-off work cycle. Taking various contingencies into account, she says that she would have earned \$170,000 more than she did earn prior to trial, but for the Accidents.
- [163] There is no question that the plaintiff is a goal-oriented, determined individual who is fulfilling her life-long career goal of working as a police officer with the VPD. She clearly loves the work and strives at every turn to impress her superiors with the objective of climbing the ranks within the VPD. It defies credulity that the plaintiff never sought to work any overtime as a police officer, even for the many benign event assignments that were available such as security at hockey games, movie shoots, and fireworks displays, solely because of the Accidents. Given the plaintiff's obvious drive and determination, I have little doubt that she would have worked a significant amount of overtime had her personal circumstances been such that she was able to. I find that she has not worked overtime because of her commitment to care for her aged grandmother and not as a result of the Accidents. This level of commitment existed prior to MVA #1 and will likely continue until her grandmother is no longer living in the plaintiff's home, at which point I find that the plaintiff is likely to work overtime absent other personal reasons such as becoming a mother.
- [164] I assess the plaintiff's past loss of income earning capacity at \$13,451.

Loss of Future Income Earning Capacity

- [165] The plaintiff submits that her loss of future income earning capacity should be assessed at \$1,200,000 on the basis of delayed advances in her career trajectory as well as her ongoing inability to work overtime due to her accident-related injuries.
- [166] The facts, as I have determined them based upon the evidence as a whole, including my findings as to credibility and reliability, do not support any claim for loss of future income earning capacity. Even plaintiff's counsel, when asked by the court, was unable to sustain Ms. Rau's assertion that the plaintiff is unable to work full-time as a police officer.
- [167] The plaintiff has failed to satisfy me that there is a real and substantial possibility that she will suffer future loss of income earning capacity as a result of the Accidents, or either of them.

Loss of Housekeeping Capacity

[168] In order to justify a separate award for loss of housekeeping capacity, the plaintiff must establish a real and substantial possibility that she will be unable to perform usual and necessary household work as a result of her Accident-related injuries: *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37. If the plaintiff is able to carry out such chores albeit with pain and discomfort, her compensation will be part of the award for non-pecuniary damages: *Beaudry v. Kishigweb*, 2010 BCSC 915; *Co v. Watson*, 2010 BCSC 950.

[169] I am not persuaded that the plaintiff has been, is or will be impaired from carrying out her usual and necessary household work.

Cost of Future Care

[170] I am not persuaded that the plaintiff is entitled to any award under this head of damages.

Special Damages

[171] The plaintiff claims an award of \$10,732.41 for special damages.

[172] The defendants accept that \$7,686.40 of that amount is compensable but contest the balance of \$3,046.01.

[173] The expenses that are in dispute relate to personal trainers and fitness sessions that the plaintiff testified were incurred by her in an effort to maintain her decreased strength and conditioning as well as to help her pass the police officer physical ability testing requirements for becoming a police officer. I find that either these expenses would have been incurred by the plaintiff regardless of the Accidents or that the plaintiff's injuries were not such that they were reasonably required for her rehabilitation.

Conclusion

[174] The plaintiff is entitled to judgment against each of the defendants, jointly and severally, in the total amount of \$46,137.40, calculated as follows:

Non-pecuniary damages:

\$25,000.00

Past loss of income earning capacity:

\$13,451.00

Future loss of income earning capacity:

\$0.00

Cost of future care:

\$0.00

Loss of housekeeping capacity:

\$0.00

Special damages:

\$7,686.40

Total:

\$46,137.40

[175] The defendants are at liberty to apply under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 for appropriate reductions to the special damages award.

Costs

[176] Subject to any submissions the parties may wish to make, the plaintiff is entitled to her costs of these actions at Scale B.

"G.C. Weatherill J."

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