

CANADA / JUDGMENT

Lawson v. Xu Xing Enterprises Inc.

2020 BCSC 1156

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1156 Lawson v. Xu Xing Enterprises Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lawson v. Xu Xing Enterprises Inc.,

2020 BCSC 1156

Date: 20200807

Docket: M188217

Registry: New Westminster

Between:

Rebecca Lawson

Plaintiff

And

Xu Xing Enterprises Inc. and Guo Tong Lin

Defendants

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:

J. Jung

C. Wang

Counsel for the Defendants:

B. Quinn

Place and Dates of Trial:

New Westminster, B.C.

July 6 to 10, 2020

Place and Date of Judgment:

New Westminster, B.C.

August 7, 2020

I. Introduction

- [1] Rebecca Lawson was injured in a car accident on June 25, 2016. The accident was a rear-end type of accident. Liability is admitted, so the only issue at the trial of this case was the quantum of damages.
- [2] Ms. Lawson is currently 76 years old. She was 72 at the time of the accident. There is no claim for lost income or loss of income-earning capacity and so the quantification of non-pecuniary damages is the main item to be determined as part of damages generally.
- [3] The contest at trial centred on Ms. Lawson's past problems in her neck, back, right shoulder and left knee, as there is evidence that she suffered injuries in those areas in a 2012 car accident, as well as evidence of degenerative changes that may be a factor in her physical presentation.

II. Plaintiff's Case

A. Rebecca Lawson

- [4] In the courtroom, Ms. Lawson used a cane, and she moved gingerly into the witness box.
- [5] Ms. Lawson has two adult children, born in 1971 and 1974 respectively. She has two grandchildren of elementary school age. She lives alone.
- [6] On the day of the accident, Ms. Lawson was driving on 6th Street in New Westminster, proceeding towards Hamilton Street. She stopped to turn left onto Hamilton, and "two seconds later", she was struck from the rear by a "big black SUV". She said her car had "quite a bit of damage" and there was "some on his", but the other driver seemed "anxious to take off". I will refer to this accident as the "2016 MVA" in order to distinguish it from an earlier accident that took place in 2012.
- [7] She had no pain at the scene, but she started getting pain after a couple of nights. The pain was in her neck, shoulder and back, but mostly her neck. Her thumb was also sore from holding the steering wheel.

- [8] She reported the matter to ICBC, and then visited her family doctor, Dr. Gurpaul Brar. Dr. Bruce Cornish had been her long-time family doctor but he had retired, and Dr. Brar was her new GP. Dr. Brar sent her for x-rays of her "knee and everything".
- [9] In her testimony, the plaintiff addressed each of the areas of complaint, beginning with her neck. She said she has pain in her neck 24 hours a day, every day. Dr. Brar referred her to physiotherapy three times, and she has had massage treatments on and off for four years. Her neck, together with her upper shoulder, are the most painful areas. The therapy she received was mostly to her neck. Her last therapy was prior to the COVID-19 restrictions, although she said she has been doing the recommended exercises on her own.
- [10] She said "the last few years the pain has gone down the spine" into her back. She said the pain is worse now due to stress. She also said it goes down her arm.
- [11] She uses a special pillow and finds it hard to get a comfortable position for sleeping.
- [12] She tries to keep her head vertically straight at all times so as to minimize neck pain, and she finds it hard to read a book or bend her neck forward. She uses ice packs and a heating pad for relief.
- [13] The plaintiff said her back pain is at the waist level. It first arose two or three months after the accident. That pain goes down to her knee and gives her numbness in two of her toes. She said she has "bad circulation" in her leg and so she has to elevate her leg at night, which is an additional matter that makes sleep difficult.
- [14] She said she has had "physio and therapy" for this too ("everywhere"), insofar as she tells the therapist where it hurts and the therapist then works on that area and gives her exercises to address it. She said the therapy helps but she has to keep it up because otherwise the pain comes back after three days.
- [15] She has left knee pain and uses a cane for walking. She finds it hard to go up or down stairs. Going down stairs is harder than going up. She acknowledged that she injured her knee in a 2012 car accident (the "2012 MVA").

The 2012 MVA

- [16] The plaintiff described the 2012 MVA, which was a rear-end or similar type of accident. She had an elaborate explanation of chasing down the other driver and reporting a hit and run to the RCMP. Her friend Ruby Okano was in the back seat, and a 92 year old friend was in the front passenger seat. She said the "bone" of her knee "hit the door", although it seems she may have been referring to the dash.
- [17] She said she did not recall if she went for therapy as a result of the 2012 MVA, but if she did she paid for it herself.
- [18] She said neither her right shoulder nor her back were injured in the 2012 MVA.

2012 to 2016

- [19] When asked if she had any pain in her neck from 2012 to 2016, or neck treatments, she said "not that I'm aware". She received two or three acupuncture treatments for her knee.
- [20] She said her pre-2016 MVA health was "fine". She said she remembered walking every Sunday to New Westminster Quay. She said, "I enjoyed every day". She did gardening, walking, shopping and visiting with neighbours and friends. She said she went on one trip to the Orient (Hong Kong and China), visiting relatives.
- [21] She could not recall any limitations in her activities in this time period. She walked distances of one to one and a half miles prior to the 2016 MVA, and longer on nice days, although not in winter. After the 2016 MVA, she bought special running shoes, and her walks were shorter as there "was no need to go for long walks", a statement that was somewhat confusing. She said, "I just did [the distance] I felt like doing".

Current Status

- [22] The plaintiff said she now cannot go to the driving range or to "pitch and putts", as she formerly did, as she cannot swing a golf club. She said she also used to "bang a tennis ball against a wall" and does not do that any more either because of the pain.
- [23] The plaintiff said she cannot lift anything heavier than five pounds, a limitation she did not have prior to the 2016 MVA. She also said she cannot "bend over", but the motion she demonstrated was bending at the neck rather than bending at the waist.
- [24] Sleep is a problem for her as she cannot sleep on her side due to pain and discomfort in her right shoulder. She sleeps with a pillow under her knee. She wakes up a lot during the night because of her various pains.
- [25] If her pain is bad she nurses it by taking a bath, using a warm pad or ice packs, and using a massage belt.
- [26] Prior to the 2016 MVA she had cleaners come in for heavier tasks such as windows and carpets. Currently, her brother helps her with cleaning. She only does light household tasks, such as loading and unloading the dishwasher.
- [27] She attended regularly on her former family doctor, Dr. Cornish. She said she used to be a diabetic and she also had a lot of stress due to family issues, but she maintained she had no prior physical health problems.
- [28] She reported the 2012 MVA to Dr. Cornish but he did not do anything about it because no care was needed. She said "I might have asked for a treatment referral, but I don't recall". She did not recall getting any treatment as a result of the 2012 MVA.

- [29] The plaintiff said the injuries from the 2016 MVA made her body feel the worst it has ever felt. Every day her pain is about the same. If she does not extend herself she is okay, but even then she is always thinking about it and trying to remember to keep her "head straight", by which she meant her neck.
- [30] The plaintiff walks with a cane. She said she never needed a cane prior to the accident. She has tried to walk without it, but her knee hurts. This is the same knee she injured in the 2012 MVA. She was scheduled for knee replacement surgery, but this was postponed due to the pandemic. She added that her knee problem "is not from the accident; it's from wear and tear".

Cross-Examination

- [31] The plaintiff acknowledged she completed an ICBC claim form in September 2016 and on that form she declared she had no pre-existing injuries. She said the statement was true because she made no claim for her 2012 knee injury.
- [32] When asked about a note by Dr. Cornish that she had suffered from foot pain going back to 1986, the plaintiff said "I saw Dr. Cornish about every pain I had". She acknowledged that she had seen a podiatrist for her foot problems because she has "extremely high arches" and flat shoes give her pain. She has used orthotics for many years as a result. She said that now that she has proper shoes, "it doesn't hurt me".
- [33] The plaintiff had little or no memory of various complaints noted in her physicians' clinical records, including pain in her left knee, right trapezius, arm and elbow in February 2006, left medial-collateral ligament pain in March 2006, resulting physiotherapy in that same time frame, or that in August 2008 she walked with a limp. To the contrary, she said she never limped prior to the 2016 MVA.
- [34] In 2008, 2009 and 2010 her physician completed forms so that she could obtain a disabled parking pass. In the 2008 form the doctor noted that her disability was due to osteoarthritis in her knees. In testimony, the plaintiff said she bought a cane at that time, but it was for balance only. For the 2009 form her disability was noted as being due to a February 2009 bunion operation, which the doctor noted would require a two month recovery. However, the plaintiff testified "I couldn't walk for six months, it was so painful". The 2010 disability parking pass application was for a "permanent" pass (the other two were noted as being "temporary"), and the doctor noted on the form that her disability was due to osteoarthritis in her feet and knees. The plaintiff, however, testified that it was due to her fallen arches, which were fixed by orthotics.

- [35] The plaintiff said she has had a disability parking pass since 2009 (although I note the documents indicate she has had passes since October 2008) and the reason she obtained them was because she was looking after her elderly mother and it was her mother who needed the pass. The plaintiff testified that because her mother did not speak English the plaintiff obtained the pass or passes in her own name.
- [36] The plaintiff said she experienced hip pain as a result of the 2016 MVA. However, a February 2010 x-ray report concerning her pelvis and hips showed features consistent with "significant degenerative arthritis" in both hips. The plaintiff testified that this was all due to "improper body alignment" caused by her feet.
- [37] A number of further entries in the clinical records were put to the plaintiff, which indicated: (1) complaints of right-side sciatica and a burning feeling down her leg in 2003; (2) a fall while tree trimming in 2005; (3) "clinical signs of fibromyalgia" in 2006; (4) "osteoarthritis and fibromyalgia", preventing her from serving as a juror in 2007; (5) a fall while travelling abroad in 2011, where she injured her hand or hands, which resulted in a three-day hospital stay and x-rays revealing degeneration in her hands; (6) low back pain, right leg pain and using a cane in 2008; and (7) a neck injury from a fall in 2012.
- [38] The plaintiff provided various answers to these records, attributing the afflictions to such things as stress, a "messy divorce" in 1999-2000, diet issues, the burden of looking after her elderly mother, overdoing things during exercise, her bunion surgery, or her fallen arches. Of note, she attributed the 2008 report of low back pain, right leg pain plus use of a cane to her bunion surgery, but the bunion surgery did not take place until the following year.
- [39] The plaintiff was questioned at length about the 2012 MVA and its effects. She agreed she suffered sore shoulders and neck ache and was referred for physiotherapy, but she said "it only hurt for a few days". She said she recovered from everything except her left knee. When asked about a clinical note made August 21, 2012 reporting her complaints of "diffuse weakness and light-headedness" since the March 2012 MVA, she said "I probably did [have those symptoms]". The same note indicated she was returning to physiotherapy to address her persistent neck stiffness, to which the plaintiff said "of course I had neck stiffness". She acknowledged she still had neck pain when further neck x-rays were taken in November 2012. She also agreed she had ongoing shoulder pain through 2013 and 2014, which she attributed to "stress". She emphasized, however, that this was just "muscle pain" and was not like the pain she has now.
- [40] The plaintiff agreed that she had pain in her right shoulder and neck in January 2016, which was prior to the 2016 MVA. Again, although the clinical note describes the cause as "neck sprain", the plaintiff attributed it to stress she was experiencing at the time. She agreed she also reported left knee pain at this time. She acknowledged that in a May 2015 clinical note Dr. Brar linked her right shoulder injury to the 2012 MVA, but she said "the injury had gone away".

- [41] The plaintiff acknowledged that she has had sleep apnea for many years, and she was prescribed a CPAP machine to address that problem. She said she stopped using the CPAP machine after six months. She disagreed that any of her current sleep problems are attributable to her apnea condition or her failure to use her prescribed CPAP machine.
- [42] The plaintiff said that after the 2016 MVA the pain in her neck, upper back and lower back was "quite high". She started physiotherapy in July 2016. She agreed with a physiotherapy chart note of September 8, 2016 that she had not attended physiotherapy for the past month. She returned to physiotherapy for a few sessions that month, but on September 29, 2016 she told the physiotherapist that she would not be coming back for physiotherapy until "into November" because she was "too busy" and thereafter was going on a trip for three weeks. In her testimony, the plaintiff said "I stopped going to [that physiotherapist] because I didn't like his methods", although the records show she did go back to that same physiotherapist in December 2016 and again for a few sessions in March 2017. She later went to a different physiotherapist.
- [43] The plaintiff agreed that in September 2016 she was able to tolerate one hour of walking, as noted in the physiotherapist's chart notes. She said she did not need a cane then.
- [44] Dr. Brar sent the plaintiff for x-rays of her knees, cervical spine and right shoulder in March 2016. When, at trial, it was pointed out to the plaintiff that this was prior to the 2016 MVA, the plaintiff said she believed this was as a result of her continuing complaints with her left knee and Dr. Brar's view that she would need knee replacement surgery at some point. When asked if she was in pain from her knee, neck and right shoulder at that time, the plaintiff said her knee was "irritated", her neck "was hurt but not as bad" and her shoulder pain only hurt "due to sleep" and went away after a few minutes.

B. Dr. Gurpaul Brar

- [45] Dr. Brar is the plaintiff's current family physician. He wrote a report dated March 27, 2020. He was found qualified to give opinion evidence in the field of family medicine.

Report of March 27, 2020

- [46] In his report, Dr. Brar said Ms. Lawson has been a regular patient of his since March 2015. He did not have the prior physician's records available for his review, although he was aware she had been involved in a prior car accident at some point and was aware of her general medical history. He summarized her pre-accident medical history as follows:

Rebecca Lawson had a pre-existing condition of osteoarthritis in her knees, degenerative disease in her cervical spine, and injury to her right shoulder without any bony changes. She also had pre-existing hypertension, diabetes and general anxiety.

- [47] Dr. Brar summarized the plaintiff's various visits from the time of the 2016 accident until January 2020. In the first post-accident visit of June 27, 2016 he noted:

She reported pain in her neck, right shoulder and back, she was feeling stiff. She had pain going into her left leg, and pain in both knees. On exam she had neck pain and limitation with right rotation, extension, flexion, right lateral flexion. She had right shoulder pain with arm overhead movement. Low back pain with hip flexion and rightward rotation of her trunk. She had tense and tender tissue in her neck and back. She was diagnosed with a soft tissue injury to her neck, shoulders, back, left leg and bilateral knees. She was advised to start physiotherapy (PT) and use NSAIDs (Ibuprofen or Advil OTC), heat and stretching to help with recovery.

[48] Dr. Brar's report indicates that the plaintiff's symptoms continued through mid-2017, with some improvement in symptoms noted in August 2017. He also noted the plaintiff had taken breaks from physiotherapy for various reasons, although she reported she still did exercises on her own.

[49] Dr. Brar provided his opinion as follows:

Rebecca Lawson sustained injuries from the MVA on June 25, 2016. The injuries are headaches, neck pain, shoulder pain, upper back pain, lower back pain, right hip pain, knee pain, leg pain and anxiety. Her symptoms are still persistent and have not resolved. These injuries resulted in limitations to Rebecca Lawson's personal life, activities of daily living, and sleep. She is troubled on a daily basis due to her injuries.

[50] Dr. Brar's prognosis was as follows:

Given the degree of recovery over the length of period since the injury, I do not anticipate Rebecca to recover from these injuries. I feel her ability to recover from these injuries is nil. She makes mild to modest progress, which is easily reversed with simple daily activities or lack of therapy. Unfortunately, this cycle likely will not be broken. She will need to continue therapy indefinitely to cope with her symptoms. I recommend regular PT and RMT indefinitely. She can alternate therapies weekly. In addition to hands on therapy in a clinic [s]he will need to continue with home based therapy at the direction of her therapists, but on her own. She would also benefit from counselling to help cope with this reality. She will need more frequent session[s] for the first few months, but will be able to space out sessions to monthly after the first 6 months of more regular sessions. She may require medication to cope with this anxiety, however I would like to avoid this option due to adverse effects of the medications.

Direct Testimony

[51] Dr. Brar said that in the year prior to the 2016 MVA he had treated her for a couple of different complaints, in particular the osteoarthritis in her knee. In January 2016 (five months prior to the 2016 MVA) he treated her for pain in her neck and right shoulder.

Cross-Examination

- [52] In cross-examination, Dr. Brar clarified that he was not saying the 2016 MVA injuries were "brand-new injuries", but instead "I think you could say there was some aggravation of pre-existing injuries", particularly in her right shoulder and neck. He then commented that it was hard to determine whether these were aggravations of injuries or new injuries as the plaintiff was "not complaining too much leading up to [the 2016 MVA]". He agreed, however, that if the plaintiff was complaining of similar symptoms in the one to two years prior to the 2016 MVA then the post-accident symptoms would be an aggravation of the earlier condition.
- [53] Dr. Brar also agreed that symptoms lasting longer than six to 12 months would be considered "chronic" and if those symptoms were significant then he would not expect a person in their 70s to recover from them.
- [54] Dr. Brar agreed it is likely the plaintiff was still experiencing "myofascial neck pain" in January 2016, given that Dr. Cornish diagnosed "myofascial neck pain" in October 2014 and Dr. Brar himself noted "pain in right shoulder and neck" and "neck sprain" on January 28, 2016. He said the terms "myofascial neck pain" and "neck strain" are similar.
- [55] Dr. Brar was aware that the plaintiff had stopped physiotherapy for a time. When asked if this would have affected her recovery, he said "she would likely have deteriorated some".
- [56] When questioned about his prognosis, Dr. Brar reiterated that the plaintiff will not recover, but he said "she will continue in a waxing and waning course", needing therapy at times. As to his opinion that the plaintiff will need physiotherapy and massage therapy indefinitely, he said "she can taper these off, but she will need these indefinitely".

Re-Examination

- [57] When asked to compare the plaintiff's condition between the year prior to the 2016 MVA and the time afterward, Dr. Brar said there was "quite a big difference" in intensity, and the frequency of her complaints was much greater.

III. Defendants' Case

A. Dr. Bruce Cornish

- [58] Dr. Cornish is a retired family physician. His records of the plaintiff's care go back to at least 2002 and his last note was in November 2015.
- [59] Dr. Cornish acknowledged that he completed an accident form following the 2012 MVA. In that form he noted the plaintiff's complaints of pain in her right neck, both shoulders, her interscapular area, arms, left wrist, both temples and left knee.

- [60] Dr. Cornish also confirmed a clinical note he made on November 5, 2012, indicating the plaintiff complained of "a lot of pain in her left knee" since the March 2012 MVA. He noted this was due to "known" degenerative joint disease and osteoarthritis "with loose body" in her left knee, the latter probably being a piece of cartilage.
- [61] Dr. Cornish also confirmed the various complaints by the plaintiff of neck pain in August 2012, November 2012, December 2012, January 2013 and April 2015.
- [62] In September 2007, Dr. Cornish wrote a note for the plaintiff in order for her to be excused from jury duty due to her osteoarthritis, fibromyalgia and obstructive sleep apnea. At trial, he testified that sleep apnea is a condition that does not "go away".
- [63] In July 2010, Dr. Cornish completed a SPARC BC form for the plaintiff in order for her to acquire a parking permit for disabled persons on a permanent basis. The plaintiff's mobility was limited due to osteoarthritis in her feet and knees. The application was for a "permanent" parking permit because her condition was not going to be cured.

B. Ruby Okano

- [64] Ms. Okano is a friend of the plaintiff's. They first met in the 1990s. She is 82 years old.
- [65] In past years, Ms. Okano and the plaintiff did various activities together, including walking, pitch and putt golf, "small" golf courses (which I took to be par-3s) and restaurant meals. They had a group of friends who did these activities together.
- [66] Ms. Okano was with the plaintiff at the time of the 2012 MVA. Both of them were injured in the accident, and both of them went to physiotherapy. Ms. Okano returned to her aerobics classes, but they did not golf much after that, merely going to pitch and putt courses a few times.
- [67] When asked if the plaintiff recovered from her 2012 injuries, Ms. Okano said "I wouldn't say so". She said the plaintiff's injuries lasted longer and the plaintiff was not going for walks. She said they still did some things together, but the plaintiff was "always tired". Ms. Okano said the plaintiff was not fully recovered by the time of the 2016 MVA.
- [68] Ms. Okano acknowledged she has some difficulties with her memory, noting she only has "short-term memory now".
- [69] In cross-examination, Ms. Okano said that although the plaintiff took longer to recover from the 2012 MVA, they still went walking and played pitch and putt golf. They did not golf after the 2016 MVA, and during their walks the plaintiff was much slower and needed breaks.

C. Dr. Mark Gatha

- [70] Dr. Gatha is an orthopedic surgeon who conducted an independent medical assessment at the request of the defendants. He prepared a report dated April 8, 2020 and a supplementary report dated July 6, 2020. He was not required by the plaintiff to attend for the purposes of cross-examination.
- [71] In his first report, Dr. Gatha noted a brief mention in the clinical records that the plaintiff had been in a car accident prior to the 2016 MVA, but since he only learned this after seeing the plaintiff he had not had the opportunity to ask her about the earlier accident. He also noted there was no other mention of that earlier accident in the records provided to him.
- [72] In his report, Dr. Gatha summarized the plaintiff's complaints, her more recent medical history, the available imaging and the results of his physical examination of the plaintiff. In the course of summarizing her recent medical history, he noted that the plaintiff was on a surgical waitlist for a total knee replacement.
- [73] Dr. Gatha provided the following diagnoses and comments:
- a) moderate myofascial neck pain: Dr. Gatha concluded this was related to the 2016 MVA, but he noted there was evidence of pre-existing neck pain and neck osteoarthritis, which he said might relate to her previous car accident "although I do not have enough information to definitely corroborate this". Given that there had been x-rays taken of the plaintiff's neck three months prior to the accident, indicating she had prior symptoms, he concluded the 2016 MVA aggravated a pre-existing condition.
 - b) moderate rotator cuff tendinopathy both shoulders, right greater than left: Again, Dr. Gatha attributed this to the 2016 MVA. Although he noted there may have been pre-existing issues because x-rays had been taken of her right shoulder just three months prior to the 2016 MVA, he concluded the plaintiff's shoulder issues were likely caused by the 2016 MVA.
 - c) moderate mechanical low back pain: For similar reasons, Dr. Gatha concluded the 2016 MVA aggravated a pre-existing condition in the plaintiff's lower back.
 - d) osteoarthritis in both knees: Dr. Gatha concluded that the plaintiff's osteoarthritis in both knees was unrelated to the 2016 MVA.
- [74] Dr. Gatha said some of the plaintiff's current restrictions were related to her knees, but he also said "she has enough symptoms in her back, shoulders and neck to limit her day-to-day activities".
- [75] As for prognosis, Dr. Gatha said the plaintiff has likely reached maximum medical improvement for her myofascial neck pain and lower back pain, but her shoulder symptoms might improve with certain treatment he recommended.

- [76] As for treatment recommendations, Dr. Gatha said the plaintiff would benefit from massage therapy (10 sessions and if necessary, repeated) for her neck pain or, alternatively, massage therapy on an as-needed basis. For her shoulder pain, Dr. Gatha recommended shoulder-specific physiotherapy and, if her symptoms did not settle, a cortisone injection.
- [77] Dr. Gatha prepared a second report, dated July 6, 2020, as a result of receiving late-delivered clinical records of Dr. Cornish. The admissibility of that report was challenged. In a mid-trial ruling, I held that Dr. Gatha's opinion was admissible only in part and only to the extent he had changed his opinion in a material way. Essentially, this confined his new report to just the plaintiff's shoulder problems. This report was entered as an exhibit in redacted form.
- [78] In that further report Dr. Gatha reviewed clinical notes of the plaintiff's shoulder complaints from 2006, Dr. Cornish's report of the 2012 MVA, clinical records indicating ongoing shoulder pain in 2013 and 2015, and a right shoulder x-ray from April 2015. He then concluded (as redacted):

In my previous report I diagnosed Ms. Lawson with (b) moderate rotator cuff tendinopathy, both shoulders, right greater than left and felt that these injuries were related to the accident of June 25, 2016. At the time, I felt that her shoulder pain was new. This new documentation confirms that these diagnoses were pre-existing conditions that were exacerbated by the accident in question. Given the history, and the symptoms noted in Dr. Cornish's notes, it is my opinion that the accident in question aggravated previously symptoms in Ms. Lawson's shoulders.

IV. Positions of the Parties

A. Plaintiff

- [79] The plaintiff submits the evidence establishes that she suffered injuries to her neck, right shoulder, back and left knee in the 2016 MVA. Although she injured these same areas in the 2012 MVA, there is no evidence that she had ongoing symptoms and no evidence she had treatments for symptoms in those areas in the 12 to 18 months prior to the 2016 MVA.
- [80] The plaintiff acknowledges that she saw Dr. Brar in January 2016 because of neck and shoulder pain, but given the absence of any evidence showing she attended the physiotherapy recommended by Dr. Brar, it must be concluded that these symptoms resolved or were otherwise not problematic for her. In any event, Dr. Brar testified that the intensity and frequency of the plaintiff's complaints were much greater after the 2016 MVA than they were before it.
- [81] As a result of her injuries the plaintiff has neck and shoulder pain 24 hours a day, as well as symptoms in her back and limbs. These symptoms cause her significant difficulties with sleep and have prevented her from such former activities as pitch and putt golf and long walks, and they impair her ordinary daily activities as well. The medical evidence is that her prospects of recovery are nil.

- [82] The plaintiff says the injuries she suffered in the 2016 MVA materially aggravated any existing or earlier conditions. She is not obliged to show that these are the sole cause of her current symptoms and limitations, only that they are a contributing cause.
- [83] The plaintiff says this is a "golden years" case in that the injuries from the 2016 accident have deprived her of many of the small pleasures in life that she would have otherwise enjoyed at her age. The plaintiff submits that non-pecuniary damages ought to be assessed in the range of \$75,000 to \$100,000, citing *Lewis v. Worth*, 2020 BCSC 57 and *Javan Parast v. Curry*, 2020 BCSC 877 in support.
- [84] The plaintiff also submits an award of \$10,000 ought to be made for future treatments. Special damages have been agreed at \$2,500.

B. Defendants

- [85] The defendants emphasize that the plaintiff has had, for many years, injuries and symptoms in the very same areas for which now seeks damages. She was also diagnosed with fibromyalgia in 2007 and, as Dr. Cornish confirmed, this is a condition that does not resolve.
- [86] The defendants went through various records and testimony showing complaints in the same areas pre-dating the accident, noting in particular Dr. Brar's evidence that the neck and shoulder pain experienced by the plaintiff after the 2012 MVA was chronic in nature and had not healed at the time of the 2016 MVA. The defendants also noted that since July 2009 the plaintiff had a permanent disability parking pass because of mobility issues caused by osteoarthritis in her knees and feet.
- [87] The defendants submit that the opinion of Dr. Brar is of limited utility because he was not asked to consider the plaintiff's pre-existing condition, which is a critical factor in this case. They add that there was a "recurring theme" from the plaintiff of understating her prior medical history and overstating her current limitations and symptoms, such that she attributes nearly all of her current limitations to the 2016 MVA.
- [88] The defendants allege that the plaintiff failed to mitigate her damages because she did not attend treatment diligently. In this regard, they rely on: (1) a physiotherapist's note of April 6, 2017, indicating the plaintiff was discharged from treatment due to her "brutal record of attendance, and for someone in the amount of pain she describes, it frankly should be better"; and (2) the plaintiff's weak excuses for not attending treatment. The defendants submit that the damages awarded to the plaintiff ought to be reduced by 50 percent as a result.
- [89] The defendants argue for an assessment of non-pecuniary damages in the range of \$25,000 to \$35,000, based on the following cases: *Duifhuis v. Bloom*, 2013 BCSC 1180; *Williams v. Nicholson*, 2005 BCSC 922; *Manering v. Imanian*, 2006 BCSC 323; and *Weinmuller v. Tait*, 2006 BCSC 416.

[90] The defendants submit that given the ongoing nature of the plaintiff's pre-existing problems, there should be no awards for cost of future care or loss of housekeeping capacity.

V. Discussion

A. Credibility

- [91] The nature of this case requires that I comment on the credibility and reliability of the plaintiff's testimony. In brief, while I am satisfied that the plaintiff told the truth to the best of her ability, her evidence was highly unreliable. She was vague, tangential and discursive in her testimony and she had such little command of dates, or even of general chronology of things, that I am unable to have much, if any, confidence in the timing of events she described.
- [92] The plaintiff often avoided direct or specific questions and she spoke in vague generalities. I suspect she simply did not remember such things as past health complaints and this was her way of answering as best she could. In answering questions about how she was prior to the subject accident, she described her activities (golf and tennis) in a way that seemed quite out of step with the medical and other documents, which caused me to query whether her view of "before the accident" really meant a period from many years prior. One example will illustrate the point: the disabled parking pass she obtained on a permanent basis in 2010. She obtained this pass due to mobility issues arising out of osteoarthritis in her knees and feet. I found it very difficult to accept that at this point or thereafter she was playing any material amount of tennis or golf, even if the golfing was just on small golf courses or pitch and putt courses.
- [93] I appreciate the plaintiff testified that the parking pass was really for her elderly mother, who did not speak English, but I found this very difficult to accept in light of her documented knee problems, and Dr. Cornish - who provided the physician's certification on the SPARC BC application form - testified to the contrary.
- [94] In addition, the plaintiff greatly minimized various pre-accident health difficulties (her prior knee problems in particular), attributing them to other issues (stress, divorce, diet, fallen arches) that the clinical records did not support. I agree with the submission of the defendants that the plaintiff substantially understated her prior medical history and inaccurately attributes nearly all of her current limitations to the 2016 MVA.
- [95] In summary, the plaintiff's testimony was very unreliable. I conclude that the clinical records are a far more reliable source of evidence of the plaintiff's medical and other history. In particular, the plaintiff's assertion that she had few, if any, physical problems prior to the 2016 MVA is simply not accurate.

- [96] There were reliability problems with Ms. Okano as well. It took quite a bit of effort to get her to attend the trial as she was most reluctant to attend but, as it turned out, her ability to recall general dates or the timing of events was worse than the plaintiff's. Inconsistently, she testified that: (1) she and the plaintiff did not golf much after the 2012 MVA; and (2) they still went walking and played pitch and putt golf after the 2012 MVA. While Ms. Okano did her best to be truthful, she acknowledged she has difficulties with her memory, saying she only has "short-term memory now".
- [97] For those reasons, I conclude I cannot rely on any of Ms. Okano's testimony that dealt with the dates or timing of events.

B. Findings

- [98] From the evidence as a whole I conclude that, in the time immediately preceding the 2016 MVA, the plaintiff had active issues in her neck, shoulder and at least one of her knees, which were causing her pain, discomfort and mobility problems. I conclude that she was probably not engaging in any tennis or golf by that point. The 2016 MVA aggravated these pre-existing conditions, particularly those in her neck and shoulder. I am satisfied that her neck and shoulder conditions became much more painful and problematic, as reflected in Dr. Brar's testimony that there was "quite a big difference" in intensity and the frequency of her complaints was much greater.
- [99] The exacerbation of problems with the plaintiff's left knee or both knees is less clear. She did not actually say that either knee was injured in the accident (as she did when describing the 2012 MVA), although Dr. Brar documented "left knee pain" and "left leg pain" in his first post-accident clinical note. While the plaintiff described various difficulties with her knee or knees after the accident, she conceded her knee problem "is not from the accident; it's from wear and tear".
- [100] I conclude it is most likely she had some additional knee and leg pain due to the 2016 MVA accident, but that her ongoing symptoms in her knee or knees (and, importantly, her associated mobility issues) were and are due to the significant issues she has with osteoarthritis. She would have had these issues even if the 2016 MVA had not occurred. Indeed, she has had significant knee and mobility issues since at least 2010, when she was issued a permanent disability parking pass due to osteoarthritis in her feet and knees. These have now deteriorated to the point that she is in need of knee replacement surgery.
- [101] I agree with the defendants that the plaintiff was less than diligent with her attendance at physiotherapy which, according to Dr. Brar, likely resulted in some deterioration of her condition. The plaintiff did say, however, that she did the exercises on her own, which may have made up for the missed therapy appointments in whole or in part. In these circumstances it is very difficult to draw any firm conclusions on failure to mitigate and, given that the defendants have the burden of proof on this issue, I find that a failure to mitigate has not been made out.

[102] While the evidence about missed therapy sessions is not conclusive on the failure to mitigate issue, that same evidence gives some insight on the severity of the plaintiff's symptoms. The plaintiff twice told her physiotherapist that she was "too busy" to attend physiotherapy for significant periods of time, which I conclude is at least somewhat revealing in terms of symptom severity.

C. Assessment of Damages

Non-Pecuniary Damages

[103] My assessment of non-pecuniary damages is based on my findings as well as the report of Dr. Brar (as further explained or modified in his cross-examination). I found Dr. Brar to be very balanced and fair, and I accept his findings and opinions.

[104] Perhaps unsurprisingly, I found the cases cited by the plaintiff to involve injuries, symptoms and overall effects that were more serious than those in the present case, and those cases cited by the defendants to be less serious. In addition, most of the defendants' cases were somewhat dated.

[105] Having considered the various factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, I assess non-pecuniary damages at \$55,000.

Cost of Future Care

[106] The plaintiff noted that both Dr. Brar and Dr. Gatha recommended at least some massage therapy for her neck and back, and physiotherapy for her shoulder. The defendants noted that Dr. Brar had referred the plaintiff for physiotherapy a few months prior to the 2016 MVA and thus required physiotherapy even without the 2016 MVA having occurred. In submissions, however, the defendants conceded that a modest award might be appropriate for massage therapy.

[107] Treatment recommendations were made by both Dr. Brar and Dr. Gatha. Dr. Brar said the plaintiff "will continue in a waxing and waning course" and will need physiotherapy and massage therapy at times. He said "she can taper these off, but she will need these indefinitely".

[108] Dr. Gatha said the plaintiff would benefit from massage therapy (10 sessions and if necessary, repeated) for her neck pain or, alternatively, massage therapy on an as-needed basis. Dr. Gatha recommended shoulder-specific physiotherapy for the plaintiff's shoulder pain and, possibly, a cortisone injection if her symptoms did not settle.

[109] I conclude that there should be an award for cost of future care, though I bear in mind that the plaintiff has not always been diligent about attending therapy. I conclude that \$5,000 is an appropriate award here.

Special Damages

[110] Special damages are allowed in the agreed amount of \$2,500.

VI. Conclusion

[111] I award the following damages to the plaintiff:

Non-pecuniary damages

\$55,000

Cost of future care

5,000

Special damages

2,500

Total

\$62,500

[112] Unless there are issues on costs which the parties wish to draw to my attention, the plaintiff will have her costs on the ordinary scale.

"Blok J."

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