

CANADA / JUDGMENT

Mascarenhas v. Winter

2021 BCSC 474

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 474 Mascarenhas v. Winter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mascarenhas v. Winter,

2021 BCSC 474

Date: 20210317

Docket: M115918

Registry: Kelowna

Between:

Melinda Luiza Mascarenhas

Plaintiff

And

Allan Fredrick Winter

Defendant

- and -

Docket: M125811

Registry: Kelowna

Between:

Melinda Luiza Mascarenhas

Plaintiff

And

Alicia Pomeroy and Todd Pomeroy

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

D.G. Einfeld

C. Trivitt

Counsel for the Defendant:

M.F. Ruessman

C. Lloyd

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 16 - 19, 22 - 24, 2021

Place and Date of Judgment:

Kelowna, B.C.

March 17, 2021

- [1] The plaintiff was involved in two accidents. The first occurred on September 25, 2015, when she was crossing the street as a pedestrian and was hit in the crosswalk. The second accident occurred on March 6, 2019, when she was a passenger in a vehicle driven by her husband when they were rear-ended.
- [2] Liability has been admitted for both accidents, and consequently the court's only role is to assess the plaintiff's damages. The plaintiff seeks non-pecuniary damages, damages for loss of earning capacity, both past and future, cost of future care and special damages.

Background Facts

Before the accident

- [3] Ms. Mascarenhas is 52 years of age and has been married to her husband Mervin since 1995. They have one child, a daughter, who is now an adult and lives in Toronto.

- [4] The plaintiff was born in Mumbai, India, and obtained a commerce degree from Mumbai University. She worked in the banking industry, initially in Bermuda starting in 1997. She started off in a lower level position but quickly moved up and became a senior business analyst and later a project manager.
- [5] In 2004, the family relocated to Kelowna. She did little work outside the home for the first couple of years, but was then rehired by HSBC Bermuda as a project manager. The first project after she was rehired involved her returning to Bermuda to work, but subsequent projects allowed her some flexibility.
- [6] As her child grew older and moved to eastern Canada to go to university, the plaintiff decided to return to the work force. She wished to return to the banking industry and in August 2015, just a few weeks before the first accident, she was hired by CIBC as a credit analyst in the commercial banking department in Kelowna. Her start date was October 13, 2015, just under three weeks after the accident. Prior to obtaining the position with CIBC, she was employed working on a production line with BC Tree Fruits for a modest wage.
- [7] Prior to the accident, she was responsible for all or ostensibly all of the domestic chores. She did all of the cooking, cleaning and indoor housework. Additionally, she also did the majority of the yard work. Her husband Mervin had previously been in the real estate business. He currently works three days a week at Save-On Foods and has a custom pen making business.
- [8] Prior to the accident, she described herself as quite active. She did hiking, jogging, and walking in addition to entertaining and travelling. They used to be a very social couple and would have people over quite regularly. Prior to Covid, she could only recall them having company over once in the previous year, whereas it had previously been a monthly type of event.

First accident

- [9] The first accident occurred on September 25, 2015, when the plaintiff was a pedestrian crossing Richter Street in Kelowna within a marked crosswalk. She was knocked to the ground and was assisted by a passerby who happened to be a nurse. She has little recall of the specifics of being struck. She was taken to the hospital in an ambulance and was released that night.
- [10] Liability was admitted for the accident, but only in the days prior to the commencement of the trial.

After the accident

- [11] Following the first accident, she recalls being in pain. She had light sensitivity and can remember very little. She was covered with bumps and bruises and had neck ache and headache, joint pain (elbows, knees and shoulders) and her hands were sore. Immediately

following the accident, she went to stay at her sister's home because her husband was away and could not be tracked down to come home to help her. She then arranged for her daughter to fly home from Toronto because someone had to look after her. She was not to be left alone on account of her concussion, and it was not feasible to stay at her sister's home.

- [12] She does not recall a day without pain, headaches or fatigue. For the first little while, she found herself going to bed at 6 or 7 o'clock in the evening and even now, she struggles to stay up past 8 o'clock. She finds the day exhausting, and the only time she has not felt pain and fatigue was on a 15 day vacation to India.
- [13] Since the accident, she has done very few of the household chores. Once in a while she will assist with the cooking and has also done small amounts of yard work, but for the most part, her husband has had to do all the work around the house. Although she has worked from home primarily since the Covid pandemic, her work is generally computer work interspersed with getting up to retrieve and look at files.
- [14] In terms of medications, she has generally been using over-the-counter Voltaren and Isogenex, which are primarily topical creams.
- [15] She has not been able to pursue her exercise regime to the same level. Initially she could not do exercise at all because it would bring on headaches, but she has resumed using her elliptical machine. She has not been hiking, and if she walks too much then she experiences pain.
- [16] Another activity she has not been able to do since the accident is making roti. This involves kneading flour and water and salt, and is a staple part of her regular diet. Although she used to make it all the time, she no longer can and her husband has assumed the role.

Second accident

- [17] The second accident occurred on March 6, 2019.
- [18] The plaintiff was a passenger in a vehicle driven by her husband that was rear-ended. She was going to work. She did not attend at the hospital or at her doctor's office on that day, and proceeded to go to work.
- [19] Liability was admitted more promptly with regard to the second accident.

Medical evidence

Dr. McKee

- [20] Dr. McKee is a physiatrist retained by the plaintiff. He reviewed various records that he had been provided by plaintiff's counsel, interviewed the plaintiff, and physically examined her. He produced two reports, the first one dated June 6, 2018 following an assessment on January 26, 2018; and the second report was dated March 4, 2020 following an assessment of February 13. The second report was following the second accident.

- [21] Dr. McKee opines that Ms. Mascarenhas suffered the following injuries as a result of the First Accident:
- a) Headaches;
 - b) Neck pain;
 - c) Facet joint injury in the upper thoracic spine;
 - d) Muscle pain in her shoulders and neck;
 - e) Limited range of in her back;
 - f) Soft tissue injury in the left shoulder and spine;
 - g) Injury to the cervical facet joints;
 - h) Chronic pain;
 - i) Pain in her left knee; and
 - j) Concussion.
- [22] Dr. McKee agreed that his physical examination, which includes palpation of the areas of concern, coupled with various tests including range of motion tests, involve the patient's self-report with regard to pain symptoms.
- [23] He also agreed that the information in his reports concerning her treatments, and the reasons to either discontinue or not take treatments, were based upon the information she provided to him during her appointments. To this end, it is of note that in his report he states that she was recommended to attend physiotherapy, massage therapy and kinesiology, and started with massage but discontinued it after four appointments because it was not beneficial. She then reported that she resumed massage over another 12 appointments. The records do not indicate this many massage therapy treatments, nor do they indicate an initial period prior to 2016 when the plaintiff did not find them beneficial.
- [24] She also reported to Dr. McKee that physiotherapy and kinesiology were not covered and that she could not afford them, but there was no specific evidence of funding issues during the trial.
- [25] Dr. McKee reviewed the documentary evidence that provides some background and context for some of the findings in his report. The primary source of documentary evidence that he reviewed was the clinical records of Dr. Thomasse. His report provides a chronology of her symptoms and makes note of certain pain reports that correlate with the dates of her appointments with Dr. Thomasse. In particular, he notes and summarizes Dr. Thomasse's notes from March 1, 2016 and June 12, 2017. However, there are two visits to Dr. Thomasse in between these two appointments, both of which indicate improvement. Indeed, the June 12, 2017 appointment was only arranged because Dr. Thomasse had been requested to provide a medical legal report to plaintiff's counsel.

- [26] Dr. McKee testified that Ms. Mascarenhas will have permanent abnormal restriction and ability to perform certain activities that she would have been able to do before the two accidents. Dr. McKee opines that Ms. Mascarenhas had symptoms of facet joint injury in her spine, injury to the supporting ligaments on her spine, and ongoing myofascial trigger points in her neck, shoulders, and shoulder blade. She experiences cervicogenic headaches. She also experiences bilateral shoulder pain with a reduced range of motion and functional weakness.
- [27] In his opinion, her reported symptoms are consistent with facet joint injuries and that these injuries will not resolve. There may be treatment options she could pursue to manage the pain, but at this point in time, resolution of her facet joint injury is unlikely. Possible treatments include radiofrequency ablation treatment, which essentially burns or numbs the nerves that transmit the pain, but those can only be pursued following diagnostic treatments such as medial branch blocks. Medial branch blocks involve injecting local anaesthetic into the affected areas to see if the anaesthetic provides temporary relief. Only if it does would the plaintiff be a candidate for the radiofrequency ablations, which only provide temporary relief.

Dr. Pirolli

- [28] Dr. Pirolli is a neuropsychologist specializing in abnormal and psychiatric disorders that can present as neuropsychological difficulties. In her report, Dr. Pirolli diagnoses the plaintiff as having suffered the following injuries in the first accident:
- a) Mild traumatic brain injury;
 - b) Adjustment disorder; and
 - c) Indications of depression.
- [29] Dr. Pirolli further opines that Ms. Mascarenhas suffers from fluctuating attention and working memory issues, as well as reduced confidence in decision making.
- [30] Dr. Pirolli had the plaintiff undertake a battery of neuropsychological tests which focus on attention, concentration, and problem solving, together with visual and spatial skills. Those results are then measured against standard or normative test results based on age, gender, and education.
- [31] Dr. Pirolli concluded that any mild traumatic brain injury would likely have resolved within weeks to months. The pattern of test results was more consistent with issues with mood, pain and fatigue. She also recommended that the plaintiff attend kinesiology and physiotherapy. She said it may be necessary for the plaintiff to also have psychological treatment at the same time, but she would still encourage an increase in physical activity. Pain management can be physical as well as psychological, hence the need to treat both.

- [32] Dr. Pirolli diagnosed an adjustment disorder. An adjustment disorder is a psychological or behavioural response to an obvious stressor. The responses can be physical or emotional and can include symptoms of depression and anxiety. An adjustment disorder can impact on cognitive function and memory.
- [33] The defendant criticized Dr. Pirolli's report because it was revealed during cross examination that the testing was conducted by Dr. Pirolli's assistant, and certain observations made during testing were not those of Dr. Pirolli but of her assistant. The defendant refers to the decision of *Reid v. Robinson*, 2020 BCSC 574, where the expert relied on his brother's review of clinical records in the preparation of his report. The court in that case was critical, and gave little weight to the report as a result.
- [34] Dr. Pirolli testified that her assistant is trained to conduct the tests and make observations during the testing process, contrary to the facts in *Reid*, where the doctor's brother had no medical training and was not associated with his medical practice. The facts in *Reid* were very different because the expert had relied on a review of the plaintiff's medical history to inform his opinion as to causation, but had relied on his seemingly untrained brother's review of that history.
- [35] I accept that the psychological tests may be administered by someone other than the expert psychologist if that person is trained. However, it would certainly have been preferable if the report had made it clear as to which observations had been made by someone other than the report's author, and the extent to which the observations of Dr. Pirolli's assistant informed the opinions expressed in her report.
- [36] I am satisfied in this case that those observations were not a significant component of the underlying circumstances that led to the conclusions in the report, and therefore I do not consider this to be of sufficient import so as to render her report unreliable or that it should be afforded less weight, but the report should nonetheless have been more accurate as to who had observed what and the significance given to those observations.
- [37] Overall, and subject to my comments above regarding her report, Dr. Pirolli was a good witness and I accept her evidence. Dr. Pirolli included a series of recommendations for the plaintiff including psychological therapy, a referral to a headache specialist, and physiotherapy and kinesiology to re-establish exercise and recreational routines. While the Covid pandemic has necessarily impacted upon the availability of some of these services, there is no evidence that the plaintiff has pursued any of them to any meaningful degree.
- [38] Dr. Pirolli agreed that unless the plaintiff actively took steps to address the underlying stressor that has resulted in the adjustment disorder, the adjustment disorder would remain. However, she agreed that adjustment disorders are treatable, and as such, it cannot be said that the plaintiff cannot recover.

Dr. Thomasse

- [39] Dr. Thomasse is the plaintiff's family doctor. In her report of July 9, 2017, Dr. Thomasse diagnoses the following:
1. Concussion;
 2. Cervical strain; and
 3. Chronic soft tissue pain of arms and left knee.
- [40] Dr. Thomasse was taken through her clinical notes by counsel for both parties. She noted in her initial examination of the plaintiff after the accident, which was approximately one week later, that she was experiencing headaches, nausea, light sensitivity, and pain over most of the left side of her body. She had bruising on her left forehead, upper midline chest, midline upper and mid back.
- [41] The plaintiff saw Dr. Thomasse on two subsequent occasions in 2015, and on five occasions in 2016, the last of those appointments on September 27. Although there were frequent references in the clinical records for those appointments to headaches, pain in her neck, back, shoulders, knees and arms, and blurry vision, there was no mention of issues with cognition, memory, concentration or to problems with self confidence.
- [42] The defendant pursued a theory throughout its cross-examination of Dr. Thomasse that the plaintiff's symptoms were the same as and therefore may be related to menopause or perimenopause. While Dr. Thomasse agreed that some of the symptoms might be consistent, she was very clear that she did not agree the plaintiff's symptoms were caused by anything other than the motor vehicle accidents. She was equally clear that although the plaintiff had reported some similar symptoms to her a year or two before the accident, the current ongoing symptoms were accident related.
- [43] Dr. Thomasse agreed that she would have recorded reports of problems with concentration, cognition, learning difficulties and memory in her clinical notes if those things had been reported to her. The first time she was told about these complaints was at an appointment of June 12, 2017, when she arranged for an appointment to meet with the plaintiff to review her symptoms for the purposes of preparing a medical legal report at the request of plaintiff's counsel.
- [44] Dr. Thomasse confirmed that she had recommended kinesiology and physiotherapy because her opinion was that those treatments would benefit the plaintiff. As at the time of trial, to Dr. Thomasse's knowledge, the plaintiff had still not engaged in any active rehabilitation with a kinesiologist.
- [45] Dr. Thomasse remains of the opinion the plaintiff was likely to encounter persistence of her symptoms in the future, although her only report was written less than two years after the first accident, two years before the second accident and three and a half years before trial.

Credibility and Reliability of Evidence

- [46] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [47] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.

Findings of fact regarding the plaintiff's injuries

- [48] The nature and extent of the plaintiff's injuries are the major point of contention in this case. In particular, whether the plaintiff suffered permanent diminishment of her cognitive skills, her memory, concentration and a reduced ability to learn new things.
- [49] The plaintiff was asked on cross-examination as to why she did not report problems with cognition, memory or learning in any of her consultations with Dr. Thomasse prior to her visit of June 2017, which was for the purpose of preparing the medical legal report requested by the plaintiff's counsel.
- [50] The plaintiff said that she would either have forgotten to mention those issues during her previous seven appointments, or alternatively, that she may have told Dr. Thomasse but that Dr. Thomasse did not make note of it in her records. I do not accept either of these explanations.
- [51] Dr. Thomasse presented as a very thoughtful and careful witness and she was clear in her evidence that she would have made note of those complaints had they been reported to her. It follows that I do not accept the plaintiff's suggestion that she may have reported the symptoms to Dr. Thomasse previously but that Dr. Thomasse may not have recorded them.

- [52] I also do not accept that the plaintiff would have forgotten to report such important symptoms to Dr. Thomasse at any time prior to June 2017. While I understand the plaintiff may have forgotten to mention something when attending at any individual visit, I cannot accept that she would fail to remember a concern as important as issues with cognition and memory on seven separate occasions.
- [53] The plaintiff's reports of her pain to her treating practitioners was also confusing. Using a pain scale of 1 to 10, she described mild pain as a five or six out of 10 whereas severe pain means 10 out of 10. If her pain is 10 out of 10, she goes to physiotherapy or massage and obtains some relief.
- [54] The plaintiff attempted to explain inconsistencies between what she told her doctors and her evidence at the trial by suggesting that the doctors had not recorded things correctly, that she had never been asked certain questions, or that she had simply forgotten to mention a symptom at the time. Even though Dr. Thomasse had noted that the plaintiff had reported that her shoulder, elbow and neck pain was "very mild", she said this was not necessarily the case and that her left arm pain was much worse than recorded.
- [55] During direct evidence, she testified that she could do very little yard work, and was limited mainly to weeding and pruning, but when she did any such work, she had to lie down for the rest of the day due to dizziness, neck pain, headaches and pain in her joints. However, her husband testified that she was unable to do gardening for any more than 15 minutes at a time. However, in her examination for discovery conducted on May 24, 2018, she confirmed that at that time she was able to garden from 7:00 or 8:00 AM to 2:00 PM, spending the majority of that time weeding and that was the only time when her knee hurt.
- [56] At the time of the second accident, she described that her condition was finally beginning to improve although she had not recovered. She testified that following the second accident, her condition has continued to deteriorate progressively to the present day. She felt that her condition was degrading rather than improving, and she described that she feels like it is "on a down slide". She described having pain in her shoulders, arms, hands, back and neck on an almost continuous basis since the second accident.
- [57] The plaintiff also often responded to questions on cross-examination regarding particular events or reports by saying she could not remember much before 2019. The second accident occurred on March 6, 2019, when the plaintiff was a passenger in a vehicle driven by her husband that was rear-ended. She was going to work. She did not attend at the hospital or at her doctor's office on that day, and proceeded to go to work as planned. Dr. Thomasse's clinical notes indicate the plaintiff did not report the second accident to Dr. Thomasse until April 5, some four weeks later.

- [58] I do not accept that the plaintiff's memory or recall was impacted by the second accident. There is no updated medical legal report from Dr. Thomasse following the second accident, and no evidence that would be suggestive of injury other than of an aggravation of her pre-existing orthopedic injuries that resulted from the first accident and had not fully resolved.
- [59] In all of the circumstances, I accept that the plaintiff was injured in the first accident and that she suffered a concussion. She also suffered soft tissue injuries to her neck, back, shoulder, elbows and left knee. I accept that her headaches are the most pervasive of her symptoms, and that the headaches continue to today.
- [60] However, I do not find on the evidence that the plaintiff suffered any diminishment of her cognition, memory, concentration or ability to learn new things, nor do I find that the second accident caused anything more than an aggravation of her ongoing symptoms from the first accident. The plaintiff suffered no new injury from the second accident.
- [61] I accept that her social and recreational activities have been somewhat curtailed by her injuries, and that her injuries, in particular the injury to her neck and the consequential headaches, persist to the present day.

Adverse inferences

- [62] Both parties ask the Court to draw adverse inferences from the failure on the part of the other to call a witness.
- [63] The defendant sent the plaintiff for medical examination with a physiatrist, Dr. Berger; however, no report was ever served and Dr. Berger was not called to give evidence at the trial. The plaintiff says the Court should draw an adverse inference from the failure to obtain evidence from Dr. Berger and says the Court should assume that Dr. Berger's evidence would have been favourable to the plaintiff.
- [64] The defendant argues that an adverse inference should be drawn from the plaintiff's failure to produce any evidence from its first neuropsychologist, Dr. Dominelli. The plaintiff was seen by Dr. Dominelli sometime prior to when she saw Dr. Pirolli. Although Dr. Pirolli had requested copies of any prior neuropsychological reports or test results, none were ever provided.
- [65] Although Dr. Pirolli did not agree that prior neuropsychological testing results would be significant as it related to her own findings, she said that one of the consequences of prior testing as it relates to one or two of the tests that she has patients undertake is what she referred to as "practice effect". Practice effect, as the name suggests, is when a person remembers a test and therefore is able to respond to a question differently than if they had never seen the question before. It does not affect the reliability of her reports but could change performance on a couple of her tests.

- [66] Plaintiff's counsel advised the Court, and I accept what he said, that although the plaintiff saw Dr. Dominelli, the plaintiff's visit seemingly "slipped through the cracks" at Dr. Dominelli's office such that nothing was generated, and the plaintiff's counsel was also dilatory to the extent that they had failed to realize that they had not heard from Dr. Dominelli. By the time they had realized what had happened, it was too late to get a report and the plaintiff was sent to Dr. Pirolli instead.
- [67] The law related to adverse inferences was summarized by Justice Voith in *Zawadzki v. Calimoso*, 2011 BCSC 45 at paragraph 149:
- [149] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a prima facie case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.) at 287.
- [68] It does not always follow that because a party has access to further evidence, that an adverse inference should be drawn if that evidence is not tendered.
- [69] First, I accept plaintiff's counsel's explanation about the events surrounding the plaintiff's attendance with Dr. Dominelli. I also accept the plaintiff's counsel's statement that they requested but did not receive Dr. Dominelli's test results and file contents. While I suppose it is possible that plaintiff's counsel could have applied for an order to compel their production, the defendant could presumably have done the same thing which would have put the plaintiff to the test of deciding whether to maintain a claim for privilege or not. In any event, I conclude that having accepted Mr. Einfeld's explanation, no adverse inference would be appropriate.
- [70] I now turn to the failure on the part of the defendant to obtain a report from Dr. Berger. It does not necessarily follow that an adverse inference should be drawn each time a defendant has a plaintiff attend for a medical examination but obtains no report. As Justice Forth said in *Slater v. Gorden*, 2017 BCSC 2265 at paras. 97 and 98, it does not automatically follow that such an inference should be drawn:
- [97] I find that there should be no adverse inference drawn against the defendants for their decision not to request a report from Dr. Masri. To draw an adverse inference every time a defendant does not order a report arising from a medical examination of the plaintiff is not appropriate. It may well be that Dr. Masri's opinion was not helpful to the defendants or perhaps his opinion added nothing to the opinions already expressed.

- [98] Ultimately, there must be something more before an adverse inference is drawn. As has been the case on several occasions in which this court has declined to draw an adverse inference against the plaintiff for the failure to call a physician, there is an insufficient basis here to draw an adverse inference against the defendants: see *Djukic v. Hahn*, 2006 BCSC 154 at para. 60; *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762 at paras. 118-122; *Love v. Lowden*, 2007 BCSC 1007 at paras. 57-58.
- [71] These comments are apposite here. The defendants chose to proceed to trial without any medical evidence, and therefore were content to proceed with the medical evidence obtained on behalf of the plaintiff, and subject to cross-examination.
- [72] While the defendants would undoubtedly have met with some resistance if they sought to have the plaintiff seen by another expert, I conclude that no adverse inference should be drawn simply because the defendants here chose not to obtain a report.

Past and Future Loss of Income

Facts

- [73] The plaintiff worked in the banking industry in Bermuda before the parties moved to Canada. She progressed quite quickly and earned in the range of \$118,000 in her most remunerative position in Bermuda. She currently works on the support side of the commercial banking department of CIBC in Kelowna as a credit analyst. She had been hired for the position just prior to the first accident, but her start date was not until two weeks after the accident.
- [74] The plaintiff was keen to advance quickly at CIBC. Her current position is referred to as level 5, which is same the level as when she was initially hired. Her work involves doing support work on the midmarket area, which involves credits of \$10 million and above. She presently earns \$57,000 per year. She remains in the position of a credit analyst. Her belief is that but for the accident, she would have progressed rapidly and would now be a level 6 or level 7.
- [75] Commercial banking positions, at least in terms of the positions available in Kelowna, follow one of two paths. A person can either work on the sales side or on the support side. The position of credit analyst is on the support side. Her intended path was to move into a commercial banking sales department position, which starts at level 6. People on this track can progress up to level 7, and ultimately can advance to level 8.
- [76] The plaintiff blames the accidents for her failure to secure promotions within the bank, and points to short-term memory problems, constant pain and headaches as the reason for her lack of self-confidence that she says has precluded advancement.
- [77] Mr. Thomas Tobias is a director and team lead at CIBC, and is the plaintiff's immediate supervisor. He was called to testify by the defendants. Mr. Tobias was involved in hiring the plaintiff, a process that involved a number of people.

- [78] She took the bank's Commercial Banking Associate Program ("CBAP") at her suggestion but with the encouragement of Mr. Tobias, starting in the middle of 2016. He was not in a position to approve it by himself, but she was nonetheless approved for it. The course is expected to take 12 to 18 months, and the plaintiff successfully completed it well within the expected time frame.
- [79] Following her completion of the program, the plaintiff had a discussion with Mr. Tobias about the possibility of promotion, and specifically the possibility of a move on to the sales track. His opinion was that she was not suited for the position of a sales associate because she did not have what it took to succeed in that role, which, from his perspective, requires a more aggressive or assertive personality.
- [80] The plaintiff testified that Mr. Tobias told her that she did not have the confidence to succeed in a sales role. Although Mr. Tobias denied telling Ms. Mascarenhas that she did not have the confidence, because he said that was not something he would say to someone, I am satisfied that he did so. The plaintiff was very clear in her recollection, and since she would undoubtedly have been very disappointed to find that she would not be considered for the role she sought, the conversation is one that she would remember. Mr. Tobias could not recall precisely what it was that he had told Ms. Mascarenhas about why she was not considered suitable for promotion; however, he undoubtedly would have told her something and I accept the plaintiff's evidence regarding the conversation.
- [81] Mr. Tobias said that the plaintiff has performed well in her role as a credit analyst. She is meticulous and careful and her work demonstrates attention to detail. He confirmed that her formal annual job reviews have all been very positive, he has no negative comments, there are no issues with her job performance, and her job is not in jeopardy. He agreed that she is a private person and their discussions do not generally go beyond work matters. Overall, her work has been excellent and there have been no issues.
- [82] Mr. Tobias is not in a position to comment with regard to her cognition, memory or ability to learn, and he was not aware that she had had a motor vehicle accident until some six months afterwards. He did not know her before she started work at CIBC, and therefore is not in a position to comment on any changes to her that would have flowed from the accident.
- [83] She continues to apply for positions that would provide her with advancement, most of which positions are in Toronto as the only possibility within Kelowna would be to advance through the commercial banking side. She would also prefer a transfer to Toronto as her daughter resides there.

Law

- [84] In *Grewal v. Naumann*, 2017 BCCA 158, Justice Goepel summarised the approach when assessing loss of both past and future earnings capacity:

- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [85] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss.

Positions of the parties

- [86] The plaintiff argues that if it were not for the accidents, she would have advanced within CIBC. She points to her headaches and issues with cognition, memory, concentration and diminished ability to learn new things, all of which have contributed to a lack of self-confidence and a corresponding failure to advance within CIBC.
- [87] The salary ranges within the various levels of CIBC are as follows:
- a) Level 5: \$46,500 to \$67,900;
 - b) Level 6: \$55,500 to \$81,500; and
 - c) Level 7: \$67,000 to \$97,800.
- [88] The plaintiff argues that \$10,000 per year for each of the last two years, would be appropriate to compensate her for her past loss of earning capacity.
- [89] As for loss of future income earning capacity, she argues that the capital asset approach is more appropriate in these circumstances and seeks two years of salary, or \$115,000, to compensate her for her loss.
- [90] The defendants deny that the plaintiff has established a loss, other than for the two week period following the first accident and before her start date with CIBC when she may have worked for BC Tree Fruits.

Discussion

- [91] In order to succeed in her claim under this head of damage, the plaintiff must establish that her failure to advance within the bank was as a result of her injuries suffered in the two accidents. She does not need to prove on a balance of probabilities that she would in fact have been promoted, but she must nonetheless show that it was a realistic possibility.
- [92] I conclude that the plaintiff has not established that there was a substantial possibility of her obtaining a promotion if it were not for the accidents.
- [93] The plaintiff applied for and was hired as a credit analyst, a position that is in keeping with, even if not identical to, her previous experience in the banking industry. The plaintiff's claim hinges on her assertion that she would have been promoted into a position on the sales' side of commercial banking. However, the evidence does not establish that the plaintiff has any history in the sales' side of banking.
- [94] The plaintiff approached Mr. Tobias at CIBC with regard to taking the CBAP course. The plaintiff gave differing reasons for doing so. She testified that she wanted to take the course to support her advancement onto the sales' side of the business, but also said that she wanted to learn more about commercial banking and felt that she was not learning it quickly enough by way of her on-the-job training. I accept that the latter of these two justifications was the one she provided to Mr. Tobias when seeking his approval to take the course.
- [95] Mr. Tobias approved and supported the plaintiff in taking the CBAP course, but needed the approval of others within the bank before her enrolment was confirmed, as the course constitutes an investment in an employee on the part of CIBC. I infer from his support of her taking the course that Mr. Tobias considered the plaintiff to be a valuable employee, and one who was worthy of the bank's investment. However, successful completion of the course is no guarantee of promotion or advancement, particularly to an entirely new area of the business in which the person has no experience.
- [96] Mr. Tobias' evidence was that in order to succeed on the sales' side of the commercial banking industry, a person must be aggressive because the position is akin to running one's own business. His opinion was that the plaintiff did not have the personality required in order to succeed on the sales side.
- [97] The evidence does not support the inference that the plaintiff's personality underwent a shift as a result of the accidents, other than the plaintiff's self-perception.
- [98] It is apparent that the plaintiff was very disappointed that she would not be considered for promotion into a sales position. However, the evidence does not establish that there was a substantial likelihood that she would have obtained such a promotion had the accidents not occurred. In *Kim v. Morier*, 2014 BCCA 63, our Court of Appeal reiterated that a plaintiff must establish a "real and substantial" possibility of a future loss, and self-perception is insufficient:

- [8] In my view, the trial judge here did err in equating the loss of capital asset here with the plaintiff's own perception. As the cases demonstrate, that is not enough. The plaintiff must show that it is a realistic possibility she will be less able to compete in the marketplace - with economic consequences, not merely psychological ones.
- [99] I am satisfied that the plaintiff remains a valued employee within CIBC.
- [100] Mr. Tobias's evidence was that he will continue to try to assist the plaintiff in obtaining a transfer to Toronto. The plaintiff has submitted close to 40 applications within the bank for transfers, but has not yet succeeded and has only had one interview, which was by telephone, to date. The positions for which she has applied may be more suited to her technical skill set; however, the fact that she has not succeeded with any of her applications to this point cannot be visited on the accident since the screening of applications in the absence of an interview must be based solely on her resume and experience.
- [101] In summary, I am satisfied that the plaintiff has significant skills on the technical or support side of the banking industry, but that her personality, which was described by her friend Sandy McKay as quiet and reserved, is not one that is considered by her current employers, CIBC, to be suited for the sales and business development side of their commercial banking operations.
- [102] It follows that I do not accept the plaintiff's argument that she has established a loss of past and future earning capacity on account of failure to advance within CIBC.
- [103] The plaintiff is entitled to some compensation for past loss of income between the date of the accident and October 13, 2015, when she started at CIBC on account of lost shifts at BC Tree Fruits. The record of employment from BC Tree Fruits shows that shifts were sporadic; however, I am satisfied that this was due to the timing of the harvesting of the various crops as opposed to any unwillingness on the part of the plaintiff to accept work.
- [104] I do not accept the plaintiff's estimate of a loss of \$2,000, however. I consider that 40 hours per week at \$15 per hour for two weeks, or \$1,200 gross, represents fair compensation. I trust that the parties will be able to adjust the gross amount for taxes.

Costs of Future Care

- [105] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30.

- [106] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care, and (2) the claims must be reasonable: *Milina v. Bartsch* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [107] Future care costs are considered to be justified if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will likely be used in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60 & 68-70.
- [108] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

Positions of the parties

- [109] The plaintiff argues that the medical evidence justifies future treatments. Dr. McKee recommended physiotherapy, including intramuscular stimulation, and also outlined the possibility of radiofrequency ablation subject to suitability and potentially prolotherapy. Dr. Pirolli recommended psychological therapy and a referral to a headache specialist. All three of the practitioners who testified had recommended kinesiology. The plaintiff also seeks some compensation for the Voltaren and Isogenex relief creams that she has used, and says \$100 per year is a reasonable sum.
- [110] The plaintiff has referred to the tables in Schedule 3.1 of the Insurance Vehicle Regulation for the cost of various treatments, and while she provides no precise method or calculation, submits that \$20,000 on account of costs of future care is appropriate.
- [111] The defendants argue that the plaintiff has not demonstrated any particular interest in pursuing treatments, and therefore any award for future care ought to be modest. To this point, the plaintiff has attended approximately a dozen massage treatments and less than ten physiotherapy treatments.
- [112] The defendant says that \$5,000 represents appropriate compensation for the plaintiff's costs of future care.

Discussion

- [113] The parties do not disagree with regard to the recommendations that the plaintiff has received. Neither has undertaken any sort of precise calculations with regard to the costs of the recommended services if pursued, which is to counsels' credit given the relatively modest sums involved. The real area of disagreement between the parties is the extent to which the plaintiff might actually utilize the services.
- [114] Even though a referral to a kinesiologist has been a recurrent theme through the plaintiff's consultations with each of her doctors, she has yet to see a kinesiologist.
- [115] She initially declined to pursue the recommendation because she was fearful of aggravating her headache symptoms. It was only at the beginning of 2020 when she started to take any steps in this regard, but even then her efforts were minimal. She obtained a referral from Dr. Thomasse but found out that the kinesiologist was not registered and therefore the treatment would not be covered. Subsequently, the plaintiff assumed that in-person services would not be available as a result of the pandemic. However, she did not take steps to determine whether her assumption was accurate.
- [116] The amount claimed by the plaintiff assumes a level of uptake that has not yet proven to be the case. However, I am satisfied that the plaintiff is perhaps more likely to at least pursue a more active rehabilitation program, and I conclude that \$10,000 represents fair compensation for the plaintiff's costs of future care.

Loss of housekeeping capacity

- [117] The plaintiff's evidence was that prior to the accident, she performed all or substantially all of the home care work. This included the cooking, cleaning, laundry and yard work. Since the accident, the plaintiff's husband has been required to play a greater role. The plaintiff is unable to carry the laundry, make roti or do much of the cleaning work.
- [118] However, having heard the evidence of both the plaintiff and her husband, the evidence does not satisfy me that the plaintiff is largely dependent on her husband. Rather, the evidence satisfies me that there is more of a division of labour than was previously the case, with the plaintiff's husband assuming the lion's share of the more physical or heavier work. While this represents a change from the arrangement between the plaintiff and her husband prior to the accident, it is also important to keep in mind that the plaintiff had not worked full-time for some years prior to obtaining the position at CIBC that started only two weeks after the first accident. As such, some adjustment in the division of the household chores was inevitable.
- [119] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal revisited the issue of valuing loss of housekeeping capacity and, more particularly, whether and in what circumstances it ought to be compensated by way of a pecuniary or nonpecuniary award (paras. 27 to 32). The Court summarized the principles to be applied at paras. 33 and 34:

- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [120] The plaintiff's evidence with regard to her claim for loss of housekeeping capacity and for seasonal yard work is nothing more than a couple of estimates for quotes she obtained in the week before the trial. This does not provide an evidentiary foundation for a claim.
- [121] I also reject the suggestion that the plaintiff would require housekeeping services in the future because her husband's business requires him to travel. The evidence regarding Mervin Mascarenhas' requirement for travel is insufficient. He has his own pen making business, and intends to pursue it. Currently, he works three days per week at Save-On Foods and approximately three days per week on his business. However, his history of travel with regard to his business to this point has been limited to going to Toronto where his daughter lives and to Bermuda where the family used to live. There is also insufficient evidence of how long he would need to be away or of the tasks that the plaintiff would not be able to do but would need to be done during whatever period of time he may be travelling.
- [122] The plaintiff has not established that she is unable to perform her share of the housework. Rather, the evidence satisfies me that she is able to do so but with pain, discomfort and some restriction. As such, this claim falls within the category of cases whereby the appropriate method of compensating the plaintiff is to take it into account in the assessment of her award of nonpecuniary damages, as part of the loss of amenities and functions of daily life that result from her injuries.
- [123] In the circumstances, I accept that the plaintiff is less capable of doing all of the housework as she may have done before the accident and before she obtained full-time employment, but I am satisfied that the appropriate approach is to consider these facts when assessing her nonpecuniary damages.

Non-Pecuniary Damages

Law

[124] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities.

[125] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

[126] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases, recognizing that no two cases are alike.

Positions of the parties

[127] The plaintiff submits the appropriate range for an award of nonpecuniary damages is from \$150,000-\$214,000, and is informed by the Court's recent decisions in *Gauthier v. Dubois*, 2018 BCSC 229; *Megaro v. Vanstone*, 2017 BCSC 2256; *Kim v. Lin*, 2016 BCSC 2405; *Hawkins v. Kumar*, 2019 BCSC 1896; *Jones v. Rossner*, 2020 BCSC 2056; and *St. Denis v. Turner*, 2020 BCSC 603.

[128] The defendants rely on the decisions in *Abraha v. Suri*, 2019 BCSC 1855; *Bossio v. Li*, 2012 BCSC 1544; *Liu v. Zhang*, 2019 BCSC 778; and *Pan v. Lau*, 2020 BCSC 288, to support an appropriate range for nonpecuniary damages between \$65,000-\$75,000.

Discussion

[129] The majority of the cases cited by the plaintiff would provide for a range of awards for general damages if I were to have concluded that the plaintiff suffered injuries that resulted in an ongoing and permanent diminishment of her cognition, memory, and concentration.

[130] In *Gauthier v. Dubois*, the Court found that the plaintiff had ongoing cognitive impairments resulting from an injury to her brain (at para. 128); however, I did not reach the same conclusion with regard to the plaintiff.

[131] Similarly, in *Hawkins v. Kumar*, the Court concluded, based upon third-party witnesses and medical witnesses, the plaintiff suffered a permanent brain injury, resulting in cognitive difficulties, a change in personality, coupled with forgetfulness, dizziness and poor recall. The third-party evidence included evidence of an employer who confirmed diminished work performance.

[132] Some of the cases cited would be distinguishable even if I had found that the plaintiff had suffered a brain injury with permanent ongoing cognitive symptoms. In *Kim v. Lin*, for example, the plaintiff was found to be permanently unemployable, while in *Megaro v. Vanstone*, the plaintiff suffered a traumatic brain injury and was no longer able to be the family's primary breadwinner.

[133] Because my findings with regard to the plaintiff's injuries are more in keeping with the defendants' theory of the case, the authorities cited by the defendants are therefore closer to the facts in this case as I have found them.

[134] I accept that the plaintiff chose to persevere with her new job at CIBC notwithstanding the first accident, and this would undoubtedly have been very difficult for her, especially in the initial few months. As such, the plaintiff's compensation for her pecuniary claims is lower than it may otherwise have been in a less resilient or determined person.

[135] As a result, I am satisfied that her compensation for non-pecuniary damages should reflect her willingness to continue to work in the face of her injuries which would undoubtedly have resulted in a greater level of pain and suffering than if she had not done so.

[136] I conclude that an appropriate award for nonpecuniary damages in this case is \$85,000.

Duty to Mitigate

Law

- [137] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.
- [138] Once the plaintiff has proved the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert*, at para. 202.
- [139] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, sets out the test for failure to mitigate by not pursuing recommended treatment:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
- [140] In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment; and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

Discussion

- [141] The defendants argue that the plaintiff has failed to follow the recommendations of her medical practitioners, and therefore has failed to mitigate her losses. In particular, the defendants say that the plaintiff failed to:
- follow the recommendations of Dr. Thomasse and Dr. Rajasekaran, her treating physiatrist, that she attend massage therapy until April 25, 2016, and ceased treatments after only six sessions;
 - follow Dr. Thomasse's recommendation that she attend for physiotherapy until January 8, 2019, followed by only sporadic attendance up to the date of trial; and
 - follow the recommendations of Dr. Thomasse and Dr. Rajasekaran that she attend for kinesiology treatment and active therapy to the date of trial.

- [142] I do not accept that the plaintiff's relatively infrequent attendances at massage therapy and physiotherapy are significant in the overall picture. She testified that the massage therapy provided some temporary relief when her symptoms were at their worst, but the evidence does not satisfy me that the plaintiff's overall recovery would have been different had she attended more often.
- [143] More concerning is the plaintiff's failure to pursue an active rehabilitation program with the aid of a kinesiologist. The plaintiff has been recommended to do so by Dr. Thomasse since approximately seven months' post-accident. She received the same recommendation from Dr. Rajasekaran, and Dr. McKee was also of the view that it would provide some value so long as the services were provided concurrently with the assistance of a trained physiotherapist. Indeed, Dr. Pirolli also concluded that the plaintiff would benefit from physiotherapy or kinesiology in order to re-establish her exercise and recreational routines because it would be important for her mood, pain and sleep management. In short, every medical professional consulted by the plaintiff has provided her with the same advice in this regard.
- [144] The plaintiff's reason for not pursuing it is that any increase in her level of exercise brings on headaches. She felt she was not ready for an increased exercise regime when she first received the recommendation from Dr. Thomasse.
- [145] However, there is no evidence that she ever attempted to explain the reasons for her reluctance to those making the recommendations. It may be that a more gradual return to an active rehabilitation program could have been provided, but the plaintiff has simply not explored the possibility.
- [146] Even though the plaintiff has indicated a willingness to pursue some sessions with a kinesiologist over the past year, her efforts amount to no more than a single phone call to a kinesiologist who was not "registered" and therefore would not be approved under her benefits program. Other than the one call, she has simply assumed that services could not be provided during the pandemic without ever finding out whether it was the case.
- [147] A plaintiff will not be found to have failed to mitigate simply because they decline potential treatment options. Some options may be prohibitively expensive, and others medically risky. In some cases, a person has a particular aversion to a form of treatment, such as a fear of injections or needles, that would render a treatment inadvisable for that particular plaintiff. However, an increase in physical activity under the supervision of a trained professional kinesiologist is not a risky, dangerous or otherwise unsuitable alternative for the plaintiff as a potential source of medical improvement.

[148] I conclude that the plaintiff, having received what amounts to the same recommendation from each of her treating practitioners, ought to have pursued a rehabilitation program with the assistance of a kinesiologist and that it constituted a genuine possibility for improved symptoms at minimal or no risk. I therefore conclude that the plaintiff's damages ought to be reduced because she failed to mitigate her losses by failing to follow her medical practitioners' advice.

[149] Because all of her practitioners provided the same advice, I can only assume that there would have been some improvement in the plaintiff's function. It is impossible to quantify the chances of improvement or degree of improvement, and in the circumstances, I conclude that a deduction of ten percent is appropriate in these circumstances. The deduction only applies to the award for non-pecuniary damages because the other awards would not be affected by the plaintiff's failure to pursue the treatments as recommended.

Special Damages

[150] The plaintiff claims special damages in the amount of \$1,469.11, comprised of user fees for massage and physiotherapy, mileage, and the cost for the plaintiff's daughter to fly home to care for the plaintiff immediately following the first accident. The defendant does not consent but does not contest these amounts. Damages are awarded as claimed.

Summary

[151] The plaintiff is entitled to the following:

a)

Non-pecuniary damages:

\$85,000.00

b)

Costs of Future Care:

\$10,000.00

c)

Past Wage loss:

\$1,200.00

d)

Special damages:

\$1,469.11

[152] The past wage loss claim is subject to adjustment for the income tax that would have been payable, and the award for non-pecuniary damages is subject to a 10% deduction for the plaintiff's failure to mitigate.

Costs

[153] Subject to anything of which I am unaware, the plaintiff is entitled to her costs at Scale B. If either party wishes to address the issue of costs, arrangements should be made with Supreme Court Scheduling within 21 days of these reasons.

"Wilson J."

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