
CANADA / JUDGMENT

Mollica-Lazzaro v. Leung

2021 BCSC 4

COURT

Supreme Court of British Columbia

DECIDED

6 January 2021

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2021 BCSC 4 Mollica-Lazzaro v. Leung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mollica-Lazzaro v. Leung,

2021 BCSC 4

Date: 20210106

Docket: M119978

Registry: Kelowna

Between:

Gabriella Mollica-Lazzaro also known as

Gabriella Mollica Lazzaro

Plaintiff

And

Chi-Hang Leung

Defendant

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

Reasons for Judgment

Counsel for the Plaintiff:

R.E. McCardell

Counsel for the Defendant:

M. Ruessmann

K. Watts

Place and Date of Trial/Hearing:

Kelowna, B.C.

November 24 - 27, 30;

December 1 - 4, 2020

Place and Date of Judgment:

Kelowna, B.C.

January 6, 2021

Introduction

- [1] The plaintiff seeks damages for personal injuries arising out of a rear-end collision that occurred on December 10, 2016, at the intersection of Spall Road and Hwy 97 in Kelowna, BC ("Collision"). Liability has been admitted on behalf of the defendant.
- [2] The plaintiff claims that the Collision caused a soft-tissue chronic pain condition that continues to have a significant impact on her domestic, vocational, and social life and seeks compensation under all of the usual heads of damage.
- [3] The defendant says the Collision was minor and, at worst, caused a short-term aggravation of the plaintiff's pre-existing chronic pain issues. He says the Collision did not affect her overall long-term function much, if at all. He says that the plaintiff is far more functional than she suggests and is exaggerating her Collision-related symptoms.

Plaintiff's Pre-Collision Health and Lifestyle

- [4] The plaintiff is currently 44 years of age. She obtained a 2-year Diploma of Technology from BCIT in 1996, and has been employed as a neurodiagnostic technician at Kelowna General Hospital since 2007. She is a member of a union that is a constituent of the Health Science Professionals Bargaining Association.
- [5] She is in a long-term relationship with Andrew Meiklejohn ("Mr. Meiklejohn") and the two have a five-year-old daughter who was born in July 2015.
- [6] Health and fitness have been a focus of most of the plaintiff's adult life. Most days prior to the Collision, she was involved in some form of physical activity to varying degrees, be it gym workouts, Pilates, biking, hiking, or other exercise. Some of these activities were intense, fast-paced, and exhausting.

- [7] Within a few months of her daughter being born, the plaintiff resumed her previous physical activities including, from October 2015 to May 2016, training for a bikini contest. Throughout the summer of 2016, she continued training at a high level. She regularly biked and hiked with her family. In September 2016, she participated with Mr. Meiklejohn in "Mudderella", a long obstacle course in mud. She describes herself in the months leading up to the Collision as strong, competitive, and healthy. She was also fully involved with her daughter and had no difficulty engaging in various forms of activity with her.
- [8] In the years leading up to the Collision, she describes suffering from intermittent pain in her neck, shoulder, and lower back. When her symptoms flared, she made regular use of a chiropractor, physiotherapist, and massage therapist for relief. The plaintiff explains that these visits were more for maintenance and flare-ups of her symptoms than anything else and that they helped her continue with her active lifestyle. She would also take over-the-counter pain medicines as needed for pain management.

The Collision and Aftermath

- [9] In the afternoon of December 10, 2016, the plaintiff was driving her 2004 Pontiac Grand Am north-bound at the intersection of Spall Road and Hwy 97 in Kelowna, intending on turning left. The roads were snowy. The left turn light was either about to turn from green to yellow, or was yellow, and the plaintiff decided she should stop. As she was slowing down, her vehicle was rear-ended by the defendant's Honda SUV. The plaintiff initially felt shaken and confused. Without getting out of her car, she followed the directions of others who motioned her to drive to a nearby gas station where she exchanged information with the defendant. After 15 to 20 minutes, she drove home. The damage to both vehicles was minor. The cost of repairs to the plaintiff's and defendant's vehicles was estimated at \$1,266.07 and \$989.03, respectively.
- [10] The plaintiff testified that the rest of that day brought with it headaches from the base of her neck to her forehead, eyestrain, a pulling sensation in her face and jaw. Her neck was sore and hard to move, and was gradually getting worse. She took various pain medications she had handy.
- [11] For the first month or so following the Collision, she testified she was feeling shaky, foggy, stressed, and short tempered. She stated she was also sensitive to bright lights and had difficulty thinking or concentrating.
- [12] She said her headaches intensified to the point of being a daily feature of her life. She had trouble sleeping. She testified feeling tension and pain in her neck, both shoulders, her upper and mid-back. She took Tylenol and Advil regularly. She was prescribed Robaxacet, which she took sparingly because it caused stomach problems.
- [13] She did not notice any change with her pre-Collision lower-back issues until late January 2017, when she noted it was getting progressively worse. She stated that pain flare-ups in her lower back became more frequent and intense, progressing to the point that by the summer

of 2018, the pain was a significant daily issue for her. She could no longer sleep on her back or stomach; she became a "side-sleeper". She purchased various pillows and other sleep aides to help her sleep. She stated that standing or sitting for too long aggravated her lower back.

- [14] The plaintiff initially testified that her lower back pain is now worse than it was in 2018. She says it is a constant, intense, and daily issue for her that distracts her from her normal routines at work and home. The pain makes her irritable and it is emotionally frustrating and upsetting for her.
- [15] In addition to her lower back symptoms, the plaintiff continues to complain of ongoing issues with right neck pain radiating into her right shoulder, as well as upper back pain and headaches. She believes the neck and shoulder pain are related. If her neck tightens up, the pain radiates into her shoulder and vice versa. If she is not careful with her arm positioning and activities, especially at work, her symptoms will flare.
- [16] In the last two years, she has noticed the pain in her neck and upper body area easing from constant to more intermittent with decreased intensity. She attributes the decrease in intensity to the use of prescribed topical pain cream. Nevertheless, she says the symptoms flare-up on a regular basis, which she attributes to her work duties.
- [17] She says her headaches have also improved over the last two years. She finds that she is less irritable and short tempered than she was for two years post-Collision. Nevertheless, she complains of headaches a few times per week that she manages with a roller, sleep aids, and non-prescription medications as needed.
- [18] She described ongoing issues with her lower back, neck, and right shoulder that are aggravated by sitting too long (10-15 minutes), standing too long (10-15 minutes), bending over, moving her neck up and down (such as at a desk), moving her arms away from her body from outstretched in front, to the side or above her body. She says that extended durations of these aggravating activities will result in her muscles beginning to tense up and that she must stop the activity for fear of a flare-up. She notices this routinely at work and at home, and during recreational activities.
- [19] The plaintiff admits to some pain-free days and days with only intermittent pain, depending on her activities. She says she has been able to adapt her activities to allow her to manage and continue with her normal routine, albeit she says she is still in pain most days.

Expert Reports

- [20] The plaintiff relies on three expert reports. One from Dr. Laurel Stenger (a chiropractor), one from Dr. Frederik de Villiers (a general practitioner with a specialty in chronic pain management), and one from Carole Kennedy (an occupational therapist).

- [21] The defendant relies on two expert reports. One from Dr. Duncan Laidlow (a physiatrist) and one from Cheryl Black (an occupational therapist).

Dr. Laurel Stenger--Chiropractor

- [22] Dr. Stenger has been the plaintiff's treating chiropractor since May 2014. Her expert report dated October 15, 2018, was filed as an exhibit. She also testified.
- [23] The plaintiff first visited Dr. Stenger in May 2014, complaining of chronic stiffness and pain in her neck, upper back, and lower back. The plaintiff blamed poor ergonomics at her work place for contributing to these issues. Following that initial visit, the plaintiff routinely visited Dr. Stenger for maintenance adjustments. The plaintiff explained that the pre-Collision chiropractic adjustments were to address "ups and downs" and "twinges" of pain. The plaintiff says she occasionally saw Dr. Stenger for adjustments even though she was feeling fine.
- [24] The plaintiff visited Dr. Stenger more frequently after the Collision. During a visit on March 8, 2017, the plaintiff said she had improved to about 70% of her pre-Collision condition. Dr. Stenger felt, however, that the plaintiff's spine was quite different than it was prior to the Collision. Dr. Stenger also noted that the plaintiff presented as a less happy person after the Collision.
- [25] Dr. Stenger's opinion is that the plaintiff suffers from biomechanical dysfunction of the cervical and mid-back vertebral segments, myofascial hypertonicity (spasms) throughout her upper, mid, and lower back, neck, and jaw, as well as neck-related headaches.
- [26] Due to COVID-19, the plaintiff has not seen Dr. Stenger since March 2020.

Dr. Frederik de Villiers--Chronic Pain Specialist

- [27] Dr. de Villiers is a general medical practitioner with a specialty in chronic pain management. He has been working full-time at the Okanagan Interventional Pain Clinic in Kelowna since 2013. He treats in the order of 18 chronic pain patients each day.
- [28] Following Dr. de Villiers' assessment and post-Collision treatment of the plaintiff, he prepared a medical-legal report dated July 30, 2020. He diagnosed her as having chronic myofascial pain of the neck and chronic mechanical low back pain. Relying on the plaintiff's subjective history of increased pain since the Collision, and that her overall pain only improved 5-10% in the past year, his opinion was that the Collision was the cause of her ongoing symptoms. His prognosis was that she would most likely have chronic pain for years to come with no significant improvement.

- [29] He first assessed the plaintiff in December 2018. He understood that the plaintiff was experiencing constant, daily pain in her neck and upper back. His diagnosis, prognosis, and recommendations were based on that assumption. He also assumed that any pre-Collision symptoms with her neck, upper back, and shoulders were episodic, not chronic. He agreed that if, contrary to his understanding, the plaintiff was having pain free days post-Collision, then his opinion on causation and his prognosis would likely change.
- [30] At some point, the timing of which is unclear, Dr. de Villiers administered facet joint nerve blocks at the L5/S1 level on the left and right sides, temporarily numbing the nerves. The plaintiff experienced instant relief lasting one hour or so on the left side and two to three months on the right side.
- [31] Given her response to the facet joint nerve blocks, Dr. de Villiers believes the plaintiff may be a candidate for a rhizotomy of the L5/S1 joint--a procedure where the sensory nerve to the area is burned providing pain relief for between 6 and 18 months, depending on how long it takes for the affected nerve to regenerate. There is no known restriction on the number of rhizotomies that a person can receive.
- [32] Going forward, Dr. de Villiers suggested it would be reasonable for the plaintiff to have 20 passive therapy treatments per year. However, he did not recommend such therapies over the long term. He recommended sparing use of these therapies and only when her symptoms flare. He also felt she might benefit from medications such as duloxetine, amitriptyline, and gabapentin, which, if tolerable, could reduce her pain levels by approximately 30%.
- [33] Dr. de Villiers did not feel that the plaintiff required any homemaking assistance around the house.
- [34] Dr. de Villiers did not foresee any difficulties with the plaintiff being able to perform her current full-time work duties, or indeed any other work involving similar duties, into the future as long as she remains accommodated. If she was not accommodated, however, he felt she would probably not be able to perform all of her duties on a full-time basis.
- [35] Dr. de Villiers' opinion is that the Collision caused the plaintiff's neck pain. His conclusion is based on the assumption that the plaintiff's "episodic" neck pain prior to the Collision "always resolved spontaneously" and only became a daily issue after the Collision.
- [36] Based on the assumption that the plaintiff suffered from intermittent back pain prior to the Collision, Dr. de Villiers opines that the Collision aggravated her previous lower back pain, as the pain has worsened and is now constant.

Carole Kennedy--Occupational Therapist

- [37] Ms. Kennedy is an occupational therapist. She deals with chronic pain patients on a regular basis with a goal of returning them to their previous level of functioning.

- [38] Ms. Kennedy conducted a functional capacity evaluation ("FCE") of the plaintiff on May 25, 2020. While Ms. Kennedy observed the plaintiff during the FCE, her opinion relies extensively on the plaintiff's subjective self-reporting of pain and discomfort. The job simulation tasks performed during the FCE indicate that the plaintiff is able to function as a neurodiagnostic technician without difficulty, albeit with periodic shifting and stretching. Due to COVID-19 precautions, Ms. Kennedy was unable to observe the plaintiff in the workplace. Nevertheless, based on assessments of other clients in the past and from attending the plaintiff's Neurodiagnostic Unit on a personal matter, Ms. Kennedy is familiar with the plaintiff's work duties.
- [39] On August 12, 2020, Ms. Kennedy performed an in-home assessment of the plaintiff. Ms. Kennedy asked the plaintiff not to clean her house so that she could observe how the plaintiff functioned during homemaking activities. Notwithstanding this request, the plaintiff tidied her home in advance of the assessment. The in-home assessment, therefore, involved the plaintiff demonstrating only some of her homemaking activities.
- [40] Ms. Kennedy prepared a report dated August 26, 2020, containing both her FCE results and Cost of Future Care recommendations ("CFC"). Her qualifications to conduct a FCE and prepare CFC recommendations were admitted without debate, as was her report.
- [41] Ms. Kennedy's CFC recommendations were based to a large degree on Dr. de Villiers' opinion that the plaintiff was suffering from chronic pain and that her symptoms were not expected to improve significantly. She assumed the plaintiff's functional status had plateaued.

Dr. Duncan Laidlow--Physiatrist

- [42] The defendant retained a physiatrist, Dr. Laidlow. He assessed the plaintiff on August 10, 2020. He issued his findings in a report dated August 18, 2020. Dr. Laidlow's report and qualifications were admitted without debate.
- [43] Dr. Laidlow opines that the plaintiff had chronic discomfort in her neck, back, knees, legs, and shoulder pre-Collision and would have been prone to have chronic discomfort in those areas even if the Collision had not occurred. He believes that the Collision resulted in additional strain, especially to the neck and upper shoulder region, that made her more prone to myofascial pain in that area. He does not believe the plaintiff suffered a permanent structural change to the skeleton or any neurological injury as a result of the Collision.
- [44] Dr. Laidlow believes that the plaintiff has myofascial pain involving the right side of the neck. His opinion is that, while she probably suffered a musculoligamentous strain of her neck in the Collision, it is difficult to get a good sense of how much the Collision caused her current symptoms given her pre-existing issues. He also believes her ongoing headaches are triggered by her neck issues.

- [45] Dr. Laidlow believes the plaintiff has had long-standing, albeit mild, myofascial pain in her lower back that could have been aggravated by the Collision. However, he feels that the majority of her ongoing low-back issues are related to her pre-existing conditions.
- [46] The plaintiff told Dr. Laidlow during the interview that she had general improvement in her overall symptoms since the Collision. At that time, her chief complaints were pains in her right shoulder, neck, upper and lower back, as well as headaches.
- [47] Dr. Laidlow summed up his prognosis as follows:

The most likely situation is that she will continue to have some discomfort in the areas that she has had pain in for many years. She is likely to have good and bad days but the bad days will become less frequent and less severe if she's involved in a regular exercise program.

- [48] Should the plaintiff's headaches and neck and shoulder pain become more frequent and troublesome, Dr. Laidlow suggests that she could be a candidate for nerve blocks. If successful, further nerve block treatment would give her a 60-80% chance of significant pain relief in one to two years.
- [49] Given the large number of treatments--physiotherapy, massage therapy, chiropractic, and other modalities--the plaintiff has had since the Collision and that, at best, she has had only transient relief from them, Dr. Laidlow does not believe that ongoing passive therapy treatments are going to help solve her symptoms. His view is that simple stretching and core strengthening will be the most beneficial activities she can do.

Cheryl Black--Occupational Therapist

- [50] Ms. Black, an occupational therapist whose credentials were not disputed, prepared a report dated October 6, 2020, at the defendant's behest, critiquing Ms. Kennedy's FCE and CFC recommendations. She did not meet with the plaintiff.

Discussion

- [51] At issue is the nature and extent of the plaintiff's injuries caused by the Collision and the effect they have had and will have on her function. The plaintiff has the burden of proving not only the injuries, but their causation. It is a "but for" test: *Clements v. Clements*, 2012 SCC 32 at paras. 7-13. The defendant's negligence need not be the sole cause of the injury, so long as it is part of the cause beyond the de minimus range: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 466-467; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9. Once causation has been established, the role of damages is, so far as money is able, to place the plaintiff in the same position he or she would have been in had the injury not occurred--no better, no worse: *Blackwater v. Plint*, 2005 SCC 58 at para. 78. The defendant need not compensate the plaintiff for the effects of a pre-existing condition, which the plaintiff would have experienced anyway: *Athey*, at 472-473.

- [52] Similar to all cases involving soft-tissue injuries with subjective complaints and symptoms, determining the nature and extent of the plaintiff's injuries requires confidence that her evidence is reliable and trustworthy. This means that the plaintiff must be open and frank about her pre-existing conditions, the effects they had on her, and any changes in her condition post-Collision.
- [53] The plaintiff was subjected to a methodical, thorough, and effective cross-examination, which highlighted major inconsistencies in her earlier evidence about her pre-existing conditions, the Collision itself, and the effects and duration of the injuries she suffered in it. Her direct testimony that she has been having significant and continuous Collision-related difficulties with her neck, upper back, and lower back was inconsistent with her discovery evidence, her personal notes, and what was documented as told to her various treating practitioners. When these inconsistencies were put to her, she struggled to provide a persuasive response. When pressed, she was reluctant to agree to the inconsistencies, changed her evidence, was evasive and/or gave vague responses.
- [54] Ultimately, she conceded that her neck and upper back symptoms fluctuated and were not constant, contrary to what she told Dr. de Villiers. She also confirmed that she has had chronic low back pain for 20 years and that those symptoms waxed and waned depending on her activities. As an example, shortly before the Collision, she admitted slipping and jarring her lower back while carrying her daughter causing her low back symptoms to flare. Also, contrary to what she told Dr. de Villiers, she admitted that her current low back pain is generally the same as it was pre-Collision, just more consistent.
- [55] Regrettably, the plaintiff's testimony in many respects came up short in the trustworthiness department. My impression was that she understated her pre-Collision symptoms and exaggerated her Collision-related symptoms and the impact on her functionality. Instead of being open and frank, she tailored her evidence in a way she thought was favourable to her case. While it serves no purpose to outline every example where the plaintiff's evidence fell apart, some of the most germane instances are:
- a) Her evidence was inconsistent respecting whether her vehicle was stopped at the time of the impact, or whether it was in motion as she was slowing down and had not yet stopped. Contemporaneous notes by the plaintiff, her examination for discovery evidence, and what she told the various practitioners that she saw tell different versions. In the scheme of things it mattered not because liability was eventually admitted. This begs the question as to why she would change her version of the Collision. Some of these inconsistencies are perhaps explainable by the passage of time since the Collision, or perhaps by how the various practitioners she spoke to recorded her history. More likely, however, the changes in her story were more to do with her concern, early on, that she might be found partially to blame for the Collision.

- b) In a chiropractic consultation with Dr. Stenger in March 2017, she estimated that she had recovered to about 70% of her pre-Collision status. At trial she maintained that, not only had she not improved, but her symptoms were worse.
 - c) She testified on discovery in July 2019, that she had pain free days (6-7 pain free days out of 14) and that the severity of her pain in her neck, upper, and lower back had reduced over time. However, at trial she maintained that her pain was constant.
 - d) At the same discovery, she testified that she was 85-90% improved from the effects of the Collision and that her symptoms were still improving. At trial, her evidence was that her injuries were not improving and that her low back symptoms had degenerated.
 - e) During her direct evidence, she stated that she has had problems with sleep since the Collision. Yet, at her July 2019 discovery, she testified that her sleep was not affected by her symptoms.
 - f) She stated on direct that, after the Collision, she purchased a "new spine" device to help with her sleep issues and that she had no sleep issues prior to the Collision. On cross-examination it was pointed out that she purchased a "new spine" in 2013 to help with her sleep. In response, she changed her evidence to say that she had purchased other sleep aids after the Collision, but not the "new spine" aid.
 - g) Her evidence about how often she went for a "whole body massage" (which is unrelated to the Collision) before and after the Collision was inconsistent.
 - h) During her direct evidence, she was unable to say how often her neck, upper back, and shoulder were pain free post-Collision, suggesting that the pain she was experiencing in those areas was quite regular. But she testified at her discovery that she was pain free in those areas three to five days per week unless she had a flare-up. If she did have a flare-up, the symptoms could last a week or two. She stated that flare-ups occur once or twice a month.
- [56] Additionally, she testified that sitting for "too long" (which she defined to be 30 minutes) is difficult for her and she needs to stand and stretch. Contrary to this evidence, I observed her sit in the witness box for long stretches of time, well over 30 minutes without moving, fidgeting, or showing any signs of discomfort.
- i. The Lay Witnesses
- [57] The plaintiff called three lay witnesses: Mr. Meiklejohn (her husband); Ms. Tammy Cranston (her clinical supervisor at the Neurodiagnostic Unit); and Ms. Kristine Bene (her ex-Pilates instructor and friend).
- [58] The lay witness' evidence was generally quite consistent. They all supported the plaintiff's claim that her function has decreased since the Collision. All three agreed that the plaintiff was extremely physically active and health conscious pre-Collision, and that there have been significant changes since the Collision. They confirmed that her pre-Collision activities

included frequent biking (biking was her main mode of transportation), regular hiking, skiing, gym workouts, Pilates, pole dancing, family swimming, and bowling, all without restrictions or difficulties. Her pre-Collision activities were described as intense and fast moving and she was portrayed as being accomplished in them all.

- [59] These witnesses confirmed that, if the plaintiff overdid an activity or pushed herself too hard, she tended to develop episodes of short-lasting general aches and pain that went away without too much trouble.
- [60] Mr. Meiklejohn stated that before the Collision the plaintiff was a good, sound sleeper. He testified that she was fully involved in activities with her daughter, including rough-housing, playing at the park, swimming, and water park activities. He described her as a "hands-on" parent.
- [61] Regrettably, these witnesses made the same folly as the plaintiff. While I find it was not intentional, I conclude that all three did what they thought best to help the plaintiff's case and in the process lost some of their objectivity. In particular, they downplayed the plaintiff's level of function compared to pre-Collision and made it sound far worse than, as I have concluded from the plaintiff's evidence, it is.

ii. The Expert Witnesses

- [62] The expert medical evidence was based to a significant degree on the plaintiff's self-reporting. In forming their opinions, all experts assumed the history that the plaintiff gave them fairly represented her health status. I have already stated the concerns I have with the plaintiff's evidence. Having heard the experts testify and having reviewed their reports, I conclude that the history she gave them--upon which they based their opinions--did not paint an accurate picture of either her pain levels or her functionality pre and post-Collision.
- [63] Dr. de Villiers diagnosed the plaintiff with chronic myofascial pain of the neck and mechanical low back pain, both of which are likely going to be present for years to come. He does not expect to see any significant improvement and believes that she will struggle with pain in these areas going forward. At the same time, he found that her "disability index" was relatively low. This means she is capable of performing all normal activities, but with a reduced duration and not without pain.
- [64] Dr. de Villiers assumed that the plaintiff suffered from episodic neck pain prior to the Collision. The plaintiff told him that it always resolved spontaneously. Assuming that she began suffering from daily neck pain soon after the Collision and to the extent she continues to suffer daily neck pain, he opined that the Collision was the cause. Respecting her ongoing low back pain and relying on the plaintiff's report that it was worse after the Collision, he opined that the Collision aggravated her pre-existing low back pain.

[65] Of the two medical opinions in evidence, I prefer Dr. Laidlow's. Given my conclusions about the plaintiff's pre and post-Collision health, his opinions are the most persuasive and I found his evidence and opinions of the most assistance.

iii. Conclusions re: Injuries

[66] The plaintiff has the burden of proving the nature and extent of her Collision-related injuries and how they have affected her. I have already mentioned that pre-Collision, the plaintiff was suffering from intermittent symptoms of tightness, discomfort and pain in her neck, shoulders, upper and mechanical low back pain. These symptoms waxed, waned, and flared-up from time-to-time depending on her activity level. Some days and months were better than others but regardless she was able to function at work, domestically, and recreationally.

[67] I conclude that the Collision caused an aggravation of these symptoms and brought on headaches that gradually dissipated over a few months. For the most part, the plaintiff recovered to her pre-collision baseline by approximately July 2019, the date of her examination for discovery. Nevertheless, she will probably be susceptible to ongoing flare-ups with less strenuous activity and with more frequency but for the Collision. Despite these additional flare-ups and increased discomfort and tension, she will be able to perform her normal vocational and domestic duties and recreational activities in the same manner as she did pre-Collision. However, she may have increased discomfort on occasion.

[68] I accept she struggles with some of her work duties that can cause a "tightening" in her neck, shoulders, and low back especially towards the end of the work-week. However, these "flare-ups" are more of a discomfort than anything else. They are not disabling and do not prevent her from performing her duties. She simply has to adapt her positioning from time-to-time or adjust how she is performing the aggravating task.

[69] I find that the plaintiff's symptoms from the Collision initially got worse, plateaued, and then gradually improved. She is able to function in her day-to-day domestic, vocational, and recreational activities, but she experiences flare-ups from time-to-time depending on the activity. She tends to be careful with what she does so as not to aggravate the symptoms.

[70] In sum, while I am satisfied that the Collision aggravated her pre-existing symptoms to some degree, I am not persuaded that the Collision resulted in the degree of difficulty and reduced function that she suggests.

iv. Non-Pecuniary Damages

[71] The plaintiff is currently 44 years old. She is a full-time neurodiagnostic technician and mother of a five-year-old. Despite the relatively minor damage to the vehicles involved, the Collision caused an aggravation of pre-existing issues she had with her neck, shoulders, and upper and lower back.

- [72] Her pre-existing issues did not prevent her from leading an active lifestyle. She was physically fit and regularly participated in bike riding, hiking, high-level Pilates, and exercising. She enjoyed her family and was fully involved.
- [73] As active as she was, she was not without pain from time-to-time. She had episodic flare-ups of pain and other difficulties. Activities, including those related to her work duties, tended to aggravate her symptoms. To compensate, she routinely took advantage of the multitude of therapy modalities available to her through her work benefits, including massage therapy (both relaxation and rehabilitation), physical therapy, and chiropractic treatments.
- [74] Save for a moderate aggravation of these symptoms for a period of about two years with the possibility of ongoing minor flare-ups down the road, the Collision has not changed her original position. She will continue to be able to lead the same active and busy lifestyle as she did pre-Collision.
- [75] The plaintiff seeks a general damages award of \$90,000. In support, she relies on: *Williams v. Dolhan*, 2020 BCSC 136; *Afework v. Correa*, 2019 BCSC 1672; *Konnert v. Buonassisi*, 2019 BCSC 1648; and *Grimm v. Young*, 2019 BCSC 1549. In each of these cases, general damages of \$90,000 was awarded for what the plaintiff says were similar injuries in similar circumstances.
- [76] The defendant argues that a proper general damages award should be in the \$40,000 to \$50,000 range. The defendant relies on: *Rozendaal v. Landingin*, 2013 BCSC 24; *Sandher v. Hogg*, 2010 BCSC 1152; *Rogalsky v. Harrett*, 2014 BCSC 1255; *Kostecki v. Li*, 2014 BCSC 1056; *Brass v. Von Chudentiz*, 2020 BCSC 343; and *Duffy v. Dutt*, 2020 BCSC 995. In these cases, general damages ranged from \$35,000 to \$55,000 in circumstances that the defendant says were similar.
- [77] Any non-pecuniary damage award should be fair and reasonable for both parties. Ultimately, each case must be decided on its own facts and comparable cases only provide a rough guide: *Trites v. Penner*, 2010 BCSC 882 at para. 189.
- [78] I have set out my concerns about the reliability of the plaintiff's evidence and accordingly, I must approach what she said, when assessing her non-pecuniary damage award, with caution.
- [79] The plaintiff has always been dedicated to her fitness and health. It was a focus of her lifestyle. I find that in the years leading up to the Collision she had frequent flare-ups with pain and stiffness in her neck, shoulders, lower back, and knees. She was able to plow through these issues maintaining a high level of function.
- [80] I accept that the Collision aggravated these symptoms. Because of her make-up, she was vulnerable to having increased symptoms if she was jolted, as I accept she was in the Collision. The fact that her symptoms would flare with minor events (such as slipping while carrying her daughter shortly before the Collision) speaks to her vulnerability to flare-ups.

- [81] She has returned to her active lifestyle including hiking, biking, exercising at a gym, and Pilates, albeit, according to the lay witnesses, at levels that are less intense. With ongoing exercise and occasional physiotherapy, massage therapy, and other modalities, I find that she will continue to improve and her pre-Collision high-level function will return in time. To the extent it does not, I find that it will be related to her pre-Collision condition and not the Collision.
- [82] Considering the evidence, the cases upon which the parties rely, the well-known factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, and the circumstances of this case, I assess general damages at \$75,000. In arriving at this sum, I have applied a negative contingency to account for the plaintiff's pre-existing conditions and the pain she would have likely suffered from those conditions in the future: *T.W.N.A. v. Canada*, 2003 BCCA 670.
- v. Special Damages
- [83] The plaintiff initially claimed reimbursement of \$70,912.81 for expenses incurred since the Collision. The vast majority were for the extensive number of treatment modalities she has undertaken (mainly physiotherapy, massage therapy, Pilates, and chiropractic treatments). She asserts that, but for the Collision, she would not have incurred these expenses, which were detailed in an eighteen-page spread sheet ("Spread Sheet") setting out each expense, the date it was incurred, to whom she paid and for what.
- [84] My earlier comments about the reliability of the plaintiff's evidence also apply to her claim for special damages. After testifying during direct that she had cross-referenced the details of her special damage claim with dates and invoices to ensure that they were properly claimable Collision-related expenses, it turns out some were not. Some massage therapy expenses were for non-Collision related treatments that she had submitted to her employer's health care plan for reimbursement. Despite the relatively small number of improperly claimed expenses, her explanations for why she claimed those expenses were unsatisfactory and did not inspire confidence in the validity of other such expenses. It is evident that, contrary to her testimony, she sought to claim all post-Collision expenses she incurred, whether related or not and she did not cross-reference the Spread Sheet with Collision-related expenses before testifying as to the Spread Sheet's correctness.
- [85] I conclude that the plaintiff would have incurred many of the expenses claimed in the Spread Sheet in any event of the Collision. The defendant suggests, and I agree, that after deducting the amount that was wrongfully claimed for treatments that were non-Collision related, a negative contingency of 40% ought to be deducted to take into account the portion of the expenses the plaintiff would have incurred in any event of the Collision. This leaves the sum of \$41,772.91 (\$69,621.51 x 60%).
- [86] Special damages of \$41,772.91 are awarded.

vi. Past Wage Loss

[87] The plaintiff's gross past wage loss related to the Collision has been agreed at \$8,200. During submissions, counsel agreed that a deduction for income tax of 25% would be appropriate, translating into a net past wage loss of \$6,150.

vii. Loss of Future Earning Capacity

[88] The questions to be addressed in considering the plaintiff's loss of future earning capacity claim are whether her earning capacity has been impaired by the Collision and if so, what compensation should be awarded: *Hoy v. Williams*, 2014 BCSC 234. In answering the first of these questions, the task is to compare the likely future of the plaintiff's work life had the Collision not occurred with her likely future work life after the Collision: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.

[89] The plaintiff has the onus of showing "a real and substantial possibility" that the Collision may have an impact in her ability to earn income in the future: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. A future or hypothetical possibility will be considered as long as it meets this threshold and is not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. A claim for loss of earning capacity cannot be based on subjective theoretical speculation that employment may change without a factual background that rises to the level of a realistic and substantial possibility: *Erwin v. Buhler*, 2017 BCSC 362 at para. 131-136; *Kim v. Morier*, 2014 BCCA 63 at para. 8.

[90] The plaintiff testified that she is passionate about her work and loves her job. She agreed that she is tenacious at work and at home. She agreed that she is a "go-getter". She gets along well with her supervisor and her co-workers. No one has suggested to her that her job is in jeopardy. Indeed, the evidence is to the contrary. The only issue that has arisen is that her manager feels she has taken excessive time off work for various treatments. During cross-examination, it became evident that appointments made during work hours were made in part, if not entirely, for convenience to accommodate pick-up from the plaintiff's daughter's day care. The plaintiff's managers have told her that these appointments should be arranged outside of work hours. In cross-examination, the plaintiff agreed with, and planned to follow, Dr. de Villiers recommendation that she restrict her therapy sessions to 20 per year. This should eliminate her manager's concerns because the plaintiff will be able to schedule any needed appointments outside her work hours.

[91] I accept that the plaintiff's job can be physically demanding and challenging, and, at times, it can take a toll on her physically. However, the same was true pre-Collision. There are also potential safety issues, for example, in assessing patients who might have epileptic seizures without warning, or patients who are aggressive or immobilized. I conclude that, while the plaintiff's duties at work cause her symptoms to flare-up from time-to-time, these flare-ups are not much different than what she experienced before the Collision and what she would have experienced in any event of the Collision. In other words, the Collision is not the cause of these flare-ups.

- [92] Accommodations have been made at work and she is able to manage her job duties on a full-time basis by making adaptations and adjustments, such as shifting and stretching as needed. She has been performing the job for 13 years and clearly loves being a neurodiagnostic technician. She is a member of a union that is a constituent of the Health Science Professionals Bargaining Association with rights to participate in an enhanced disability management plan if necessary, the purpose of which is to keep her working in her current role.
- [93] Both Dr. de Villiers and Dr. Laidlow agree that the plaintiff should be able to carry on with her work duties into the future. I accept that this will be the case.
- [94] My assessment of the plaintiff is that she is capable of managing her duties. She has a good working relationship with her current team. She has over 13 years experience at the Neurodiagnostic Unit and is clearly a valuable employee there.
- [95] In short, although the plaintiff may have ongoing issues, I am not persuaded that she has shown a real and substantial possibility of a future loss of earnings related to the Collision.
- [96] I decline to make an award under this head.

viii. Future Care Costs

- [97] The plaintiff seeks an award of \$100,000 under this head. The defendant says that no costs of future care should be awarded.
- [98] The plaintiff's claim is based on a combination of Dr. de Villiers and Ms. Kennedy's recommendations. Dr. de Villiers recommended that the plaintiff should have access to 20 treatments--physical therapy, massage therapy, or chiropractic-- per year on an on-going basis in addition to a supervised active rehabilitation program involving a kinesiologist and Pilates instructor. He also suggested she try medications such as amitriptyline, duloxetine, and gabapentin. Ms. Kennedy recommended a cervical neck pillow and body pillow (for sleep), an anti-fatigue kitchen mat and wheeled step-stool (for homemaking), a roller and trigger-point ball (for stretching and self-massage), and seasonal house cleaning assistance to age 79.
- [99] As mentioned, Ms. Kennedy conducted a FCE and prepared a CFC report. The upshot of the FCE was that the plaintiff could perform her vocational, domestic, and recreational activities, but not always pain free, especially after performing the heavier tasks for a period of time.
- [100] The plaintiff says that massage, chiropractic, and other therapies help relieve her lower back, right shoulder and neck and that the relief they provide can last for a few days. In particular, they help with flare-ups.
- [101] On the recommendation of her physiotherapist, she sought the assistance of a kinesiologist in December 2019, to help ensure the exercises she was performing were done properly.

- [102] The plaintiff is no stranger to exercise or to the gym. She prided herself in keeping strong and fit in the years leading up to the Collision. Indeed, she got right back into a strict exercise regime within a few months of giving birth.
- [103] It is evident that the number and type of treatment modalities have significantly increased since the Collision. She says she needs to continue to receive the physiotherapy, massage therapy, and chiropractic treatments, as well as Pilates and more recently kinesiology to assist her, albeit at a frequency recommended by Dr. de Villiers.
- [104] Dr. Laidlow does not recommend that the plaintiff continue with physical therapy, kinesiology, massage therapy, or chiropractic treatments on a long-term continuous basis. His view is that such treatments on a periodic basis to deal with flare-ups in her symptoms may be appropriate.
- [105] I agree with Dr. Laidlow's opinion on this point. As Dr. Laidlow stated, the plaintiff has had a long-term belief in the value of physiotherapy, massage therapy, and other passive treatments. She is also a firm believer in the benefits of Pilates and exercise. Dr. Laidlow explained that passive therapies are not beneficial in the long run. He says the only thing that has been shown to be of value to change the outcome of chronic pain long term is exercise. His opinion, which I accept, is that the plaintiff needs to spend less time on passive treatments and should be encouraged towards an active approach. Dr. Laidlow's view is that simple stretches and core strengthening will be the most beneficial treatment for her.
- [106] In my view, the plaintiff does not need continuous Pilates or kinesiology instruction to assist her. I agree with Dr. Laidlow that, once shown how to perform the exercises correctly, she should be able to perform them on her own without someone watching over her.
- [107] I am persuaded that the plaintiff should receive access to active rehabilitation sessions (in addition to the sessions she would have gone to without the Collision), as well as some passive therapies going forward, but only for a limited time. As Dr. Laidlow points out, she has taken advantage of every passive therapy available to her since the Collision and it does not seem to be helping.
- [108] I am also persuaded that she should have access to the medications recommended by Dr. de Villiers. However, the cost of these should be discounted to reflect the measurable risk that she would have required these medications in the future regardless of the Collision: *Athey*, at 472-474. I assess that risk at 50%.
- [109] Based on the home assessment and the subjective and objective difficulties the plaintiff was apparently having, Ms. Kennedy recommends ongoing home support services of two hours every two weeks to help with the heavier homemaking chores, and ongoing seasonal help. Dr. Laidlow's opinion is that the plaintiff would be capable of performing her home activities into the future and did not require home assistance.

- [110] I am not persuaded that any of the homemaking or sleep accessories recommended by Ms. Kennedy are related to her Collision-related injuries. She is capable of performing the same housekeeping tasks she did prior to the Collision and her evidence regarding the necessity for sleep accessories was unsatisfactory.
- [111] Taking everything into account, with applicable contingencies, I assess the plaintiff's cost of future care claim at \$10,000. This amount will allow her approximately three years of additional active rehabilitation sessions, passive therapies, Pilates, including \$500 for medications.

ix. Loss of Housekeeping Capacity

- [112] The plaintiff seeks an award of \$10,000 for loss of housekeeping, not so much for the day-to-day tasks such as bathroom cleaning, vacuuming and mopping, but for seasonal house cleaning assistance which she says goes beyond the day-to-day division of labour between her and Mr. Meiklejohn. The plaintiff bases her claim on Ms. Kennedy's recommendations for seasonal house cleaning assistance of 16 hours per year well into her seventy's.
- [113] The plaintiff and her family live in a 1,000 square foot main floor of a 2,000 square foot home in Kelowna. The basement is rented out.
- [114] Pre-Collision, the plaintiff and her spouse essentially shared the homemaking duties, with each having separate duties. The plaintiff would clean the bathrooms once per week, dust once or twice a month, clean windows as needed, keep the kitchen tidy and vacuum, and mop floors as required, often multiple times per day. She also did all the grocery shopping once per week and made all meals except breakfasts. She claims she had no issues with any of these activities with the exception of the occasional low back pain during vacuuming. I conclude, however, that, during flare-ups of her pre-Collision symptoms, she experienced difficulties.
- [115] Dr. de Villiers opinion is that the plaintiff does not need additional assistance around the house or with personal care. Dr. Laidlow believes the plaintiff is capable of performing her domestic homemaking tasks and activities into the future and does not need home assistance. I accept their opinions on this point.
- [116] Given my earlier conclusions about the plaintiff's pre-Collision physical issues and that the plaintiff is far more functional than she lets on, I am not persuaded that she has proven a loss under this head of damage.
- [117] To the extent the plaintiff has suffered or will suffer any loss of ability to perform her housekeeping chores as a result of her Collision-related injuries, I have included that loss as part of the award I am making for general damages.

Summary

- [118] In sum, the plaintiff is awarded the following damages:

- a) General Damages: \$75,000;
- b) Special Damages: \$41,772.91;
- c) Net Past Wage Loss: \$6,150;
- d) Loss of future earning capacity: nil;
- e) Cost of Future Care: \$10,000;
- f) Loss of Housekeeping Capacity: nil.

[119] The total damage award is \$132,922.91.

[120] The plaintiff is entitled to court order interest on her special damages and past wage loss. If there is a claim for a tax gross-up and/or management fees, the plaintiff may make written submissions within 30 days of today's date.

Costs

[121] Subject to matters to which I am unaware, the plaintiff is entitled to Scale B costs.

"G.P. Weatherill J."

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