

CANADA / JUDGMENT

Pallister v. Seguin

2023 BCSC 2148

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Supreme Court of British Columbia

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2023 BCSC 2148 Pallister v. Seguin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pallister v. Seguin,

2023 BCSC 2148

Date: 20231205

Docket: M55585

Registry: Vernon

Between:

Tracy Pallister

Plaintiff

And

Raven Beaverbones, Angela Seguin,

John Doe and Jane Doe

Defendant

Before: The Honourable Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff:

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K. Watts

M. Ruessmann

Place and Date of Trial:

Vernon, B.C.

February 14-17, 21

23-24, 2023

Place and Date of Judgment:

Vernon, B.C.

December 5, 2023

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I. Introduction

- [1] On August 8, 2017, Tracy Pallister (the plaintiff) and Gordon Zeh were on the Rogers Pass headed east out of Revelstoke, BC. They were in a 2015 Dodge Ram pickup truck pulling a fifth wheel trailer. Mr. Zeh was driving and Ms. Pallister was in the passenger seat, with her feet propped up on the dash. As they were going along the highway, a Honda Civic rear-ended their vehicle (the "Accident").
- [2] Angela Seguin owned the Civic. At the time of the Accident, Raven Beaverbones was driving it. Following the Accident, Mr. Beaverbones fled the scene, continuing east. After examining the damage to their trailer, the plaintiff and Mr. Zeh reported the matter to the police and also continued east. The police pulled Mr. Beaverbones over in Golden.
- [3] There is no evidence suggesting that Mr. Beaverbones possessed the Civic with Ms. Seguin's consent. Counsel agree that an order dismissing the claim as against Ms. Seguin is appropriate.
- [4] While the defendants did not formally concede liability, they called no evidence to explain the rear-end collision and made no allegation of contributory negligence. Accordingly, the Court finds Mr. Beaverbones to be entirely at fault for the Accident.
- [5] The defendants concede that the plaintiff was injured in the Accident. However, they dispute the severity of those injuries and the impact of those injuries on her. The defendants also submit that the plaintiff has failed to mitigate her damages.

II. Before the Accident

- [6] The plaintiff was 29 years old at the time of the Accident, and 34 as of trial. Mr. Zeh is her common law spouse of approximately ten years. They live together in Chestermere, Alberta, a town about ten kilometres east of Calgary, with their three French Mastiffs.

- [7] The plaintiff testified that after high school she took some time off to travel and work, and then enrolled in the Southern Alberta Institute of Technology's journalism diploma program in 2008. She later transferred to the University of Calgary. She graduated in 2013 with both a Bachelor of Arts in Communication and a Diploma in Journalism.
- [8] Post-graduation, the plaintiff took a position as an executive assistant and sales associate with a development company for a period. She then applied to her current employer, Bidell Gas Compression ("Bidell"), a Calgary-based manufacturer of gas compression machinery.
- [9] As a child, the plaintiff was very physically active and has maintained that as an adult, playing multiple sports, including slow pitch softball, beach volleyball and bowling. Her favorite recreational activity is softball, with most of her available recreational time spent playing and regularly attending softball tournaments. About two to three years prior to the Accident, she stopped playing beach volleyball in order to focus on softball. At the time of the Accident, she bowled regularly (in season) with her father and regularly did yoga and various kinds of work outs (year-round).
- [10] Prior to the Accident, the plaintiff attended chiropractic and massage therapy treatments regularly. In the year before the Accident, she was attending massage therapy about once a month and also seeing her chiropractor at that same rate. She testified that she attended these treatments not due to any ongoing issues, but only for "maintenance" and to address minor injuries and transient soreness and strain from her many athletic endeavours.
- [11] The plaintiff testified that at the time of the Accident she was playing on three different softball teams, two that played at the highest level of competitiveness and one in a fun-league. Including tournaments on the weekends, she played five to seven days a week during the softball season. The plaintiff was power hitter and often occupied a clean-up spot in the batting line-up. She prided herself on her skill and ability.
- [12] The plaintiff testified that prior to the Accident, she and Mr. Zeh generally split the household work, with Mr. Zeh doing the majority of the outside yard work and her doing the majority of the inside work, including laundry, cleaning and vacuuming. She was also primarily responsible for bathing and grooming the dogs.

III. Accident

- [13] The Accident occurred on August 8, 2017, as the plaintiff and Mr. Zeh were headed home from a softball tournament. Once the adrenaline and shock of the Accident wore off, the plaintiff realized her neck and shoulders were sore. Over the next few days, she also experienced mid and lower back pain. She testified that about a week later, her hip began feeling aggravated. She described herself as experiencing "throbbing" pain and being "extremely stiff" during the initial period following the Accident.

[14] On August 10, 2017, the plaintiff attended her family clinic. She was diagnosed with a lumbar strain and advised to rest, apply ice, try over-the-counter medications and take chiropractic treatment and massage therapy.

IV. Lay Evidence

A. The Plaintiff

Injuries

[15] The plaintiff submitted a schedule of treatments listing the following treatment appointments after the Accident:

a) Massage therapy:

- 2017: September 5-December 6 (5 times)
- 2018: February 7-December 5 (7 times)
- 2019: February 4 and September 4 (2 times)
- 2020: October 30 and December 30 (2 times)
- 2021: June 11 and June 25 (2 times)
- 2022: February 4, June 17 and August 17 and August 24 (4 times);

b) Physiotherapy:

- 2022: February 3, 8 and 10, August 18 and 25 and September 8;

c) Chiropractic:

- 2017: August 21 - December 4 (18 times)
- 2018: March 29
- 2019: March 4 and November 22 (2 times)
- 2020: May 8 and November 11 (2 times).

[16] The plaintiff also had a series of ten "rolfing" treatments in October and November 2018. She described this as a deep fascia treatment. Rolfing is not a treatment covered by the Alberta Health Services Plan. It was recommended to her by a fellow softball player who was himself a rolfing provider.

[17] The plaintiff said that after the Accident she expected to get back to normal quickly, given her age and level of fitness. She carried on with her usual life and softball activities, expecting that the pain and injuries would eventually go away. She attended treatments and focused her exercises. She testified that her neck and shoulder improved, but her lower back and gluteal/hip issues continued. For simplicity, I will refer to the plaintiff's lower back and gluteal/hip issues collectively as her "lower body issues".

- [18] The plaintiff testified as follows with respect to her condition as of trial. While her neck and shoulder were not 100 percent resolved, they were definitely improved. She described her mid-back issues as "rectified", but said her lower body issues had never improved and had "if anything, gotten worse" no matter what she tried.
- [19] She testified at trial, with respect to her lower body issues, that the "pain is always there" from the moment she wakes up. She expressed concern about having to get shoes with Velcro to make it easier to put on shoes. She indicated that the level of pain varies in that "not every day is a terrible day". She said that notwithstanding the pain, she gets up each day and does what needs to be done because she does not want to appear incapable.
- [20] At trial, notes of the plaintiff's treatment sessions were entered into evidence by agreement of the parties. None of the treatment providers were called as witnesses.
- [21] Particularly notable are the clinical notes made by Dr. Marla Christianson. Dr. Christianson was the plaintiff's treating chiropractor both before and after the Accident. Dr. Christianson's notes in the months following the Accident show the plaintiff complaining about her Accident-related injuries but then gradually reporting improvement, as demonstrated by the following patient report notes:
- a) December 4, 2017: report that fitness classes were going well, that "F45" (a particular workout regime) was helping a lot with the plaintiff's strength and endurance and she was starting to feel back to her old self.
 - b) February 5, 2018: report of continued improvement and getting back to recreational activities.
 - c) March 29, 2018: report of some aggravation of neck symptoms with some activities at the gym. Dr. Christianson's notes indicate she explained the "road to recovery" and that it was left for the plaintiff to determine her next appointment.
 - d) March 4, 2019: report that "previous MVA symptoms have subsided", having had tweaks at the gym, with sports and long days at work, but being able to manage with stretches, heat, ice, etc. Dr. Christianson noted that the plaintiff's next appointment would be "as needed".
 - e) November, 22, 2019: report that "overall has been doing well, [upwards arrow] time exercising/ has worked a lot; just a little tweak in neck (L) and (L) shoulder". Dr. Christianson noted the plaintiff was to return "as needed".
 - f) May 8, 2020: report of "overall doing well/ really busy, lots of work/dogs". Dr. Christianson again noted the plaintiff was to return "as needed".
 - g) November 11, 2020: reported that "right shoulder with lat raise pinches, just some soreness/ pec tightness/ Has been doing exercises continues to do mobility/ stretching and strength training."

- [22] As indicated in the full treatment list set out above, the plaintiff had only a few chiropractic and massage therapy treatments in the years 2019 through 2021.
- [23] In 2022, the plaintiff had a series of treatments relating to three injuries: (1) a February shoulder injury sustained doing a "devil's press" exercise during Crossfit; (2) a "ball injury" sustained in early May; and (3) a lower back injury sustained performing a deadlift exercise during Crossfit in August (collectively, the "2022 Injuries").
- [24] Notes from the plaintiff's 2022 treatment appointments read as follows:
- a) February 3, 2022 (physiotherapist): The plaintiff reported doing devil's press exercises as the cause of her shoulder injury. She also reported doing Crossfit and weight training workouts 6 days per week. Under patient history, the notes indicate that the plaintiff reported: "MVA 5 years ago - low back - reasonably good recovery".
 - b) May 14, 2022 (massage therapist): The plaintiff reported she was "in an MVA a few years ago. Still experiences pain/soreness. However she is here do [sic] to a ball injury and general overall soreness".
 - c) June 17, 2022 (massage therapist): The plaintiff reported she was "experiencing the same pain as last visit".
 - d) August 17, 2022 (massage therapist): The plaintiff reported having "hurt her LB deadlifting" and "also had a softball tourney the last weekend".
 - e) August 18, 2022 (physiotherapist): The plaintiff reported "Injured R side lower back after softball tournament followed by heavy deadlifting a few days later."
 - f) August 24, 2022 (massage therapist): The plaintiff reported as follows: "had a popping sensation getting into her in her LB. Felt it lost go and has had great ROM and feeling open since. Is going to a softball tourney this weekend. Will start to heavily focus on gym and weight training come sept. 7. "
 - g) August 25, 2022 (physiotherapist): The plaintiff reported that she was much better, more mobility "packing up her things over the weekend - felt a bit tired in her back but not bad".
 - h) September 8, 2022 (physiotherapist): The plaintiff reported that she had been rear-ended five years ago, "was injured and pursuing law suit" and was having functional testing done in two weeks. The report does not draw a connection made between the deadlifting injury and the Accident. The plaintiff then reported: "back has been sort again lately, played ball again on the weekend, was sore in back and quads following, had a workout that went really well."

- [25] On cross-examination, the plaintiff agreed that she told Gillian Bagg, an occupational therapist who did a functional assessment of the plaintiff on September 26, 2022, that her back seized "this past summer" and described the pain involved in the seizure as excruciating and a "12/10 on the pain scale". At trial, the plaintiff confirmed that she had said that to Ms. Bagg and added that she and Mr. Zeh had been on the brink of calling 911 for help.

Impact on Work

- [26] At the time of the Accident and as of trial, the plaintiff was working full-time at Bidell as the office manager. In this role, she works primarily at a desk. In addition to general office management tasks, she also assists other departments (e.g., human resources) on occasion. As office manager, she also does much of the event planning for Bidell staff parties and activities, including, for example, heading up Bidell's Calgary Stampede participation. She is responsible for maintaining the Bidell social media accounts.
- [27] Following the Accident, the plaintiff did not miss any days of work at Bidell. She also continued to play softball, including planned tournaments, during what remained of the 2017 season.
- [28] The plaintiff has consistently obtained positive reviews and been paid high bonuses at Bidell since the Accident.
- [29] As of trial, she testified as following with respect to her work at Bidell. She needs to avoid sitting or standing for extended periods while she is working. She sometimes does stretches on the floor in her office and sometimes walks a "lap" of the office. On occasion, she needs to walk through the manufacturing work area in the course of her work, and she finds walking on the hard manufacturing floor to be a strain on her lower body. She also found it hard on her lower body to put in the long hours required to organize and attend the Calgary Stampede events wearing cowboy boots. She said that she "cannot fully do the job" at Bidell without pain.
- [30] The plaintiff testified that she loves her job at Bidell and plans to work there until she retires. She said her manager at Bidell knows about the Accident and that he is sympathetic and understanding regarding her injuries. She said she worries, however, that if she had an opportunity to take a better job, her physical limitations might not be as acceptable to a new employer.
- [31] In October/November 2019, the plaintiff took a second job at a Lululemon store, working evening shifts on Monday through Thursday and Sundays (in addition to working full-time at Bidell). She was first offered a temporary position, which later changed into a permanent one. While her job title at Lululemon has changed during her time there, her duties have consistently involved taking in delivered stock, lifting and unpacking boxes (of varying weights) and going around the store restocking items, including sometimes using a ladder.

- [32] The plaintiff testified that she took the position at Lululemon in order to save up money for a planned destination wedding. She said that she was, in her opinion, an ideal employee from Lululemon's perspective as she put much of what she earned back into the company by buying Lululemon products. She discovered that Lululemon employees with ten years service are granted an employee discount for life. She testified that she wanted to get that life-time discount, even if it involved taking a few years off to have children and then returning in order to reach the ten year service mark.
- [33] According to the plaintiff, her Accident injuries affect her ability to perform her work at Lululemon, but she pushes through and tries not to let the pain and effort show. At times, she has delegated more or heavier work to other employees than she would have otherwise. She testified that she had recently asked for a taller table to unpack boxes on (the plaintiff is quite tall). Recently, the store has had boxes delivered at another location in the mall and she finds walking on the concrete floor in that area hard on her lower back.
- [34] In September 2022, she cut back on her hours at Lululemon, eliminating one of her evening shifts (i.e., going down to three evening shifts and Sundays). Under Lululemon's classification system, that reduction moved the plaintiff from being a full-time employee to a part-time employee.
- [35] There has never been any complaint about the plaintiff's work performance at Lululemon. Her reviews have consistently been complimentary. She was given promotions with supervisory responsibility and has earned high performance-based bonuses.
- [36] Beginning January 30, 2023, the plaintiff took some time off from Lululemon. She testified at trial (which began on February 14th) that taking this time off from Lululemon had not improved her pain.
- [37] The plaintiff testified at trial that she missed about ten days of work at Lululemon in 2021 due to her injuries. However, at her September 2022 examination for discovery, the plaintiff testified that she had only missed one day at Lululemon due to her Accident injuries. Notably, she described the particular day and circumstances in some detail. She testified that the number of days missed would rise further to 25 to 30 days if the shifts she gave up in September 2022 are considered days lost due to the Accident.

Activity Levels

- [38] In January 2018, the plaintiff began a minimal strengthening home workout program under the supervision of a friend of hers who is also a personal trainer, Jenna Dawn Grindle. In February 2018, Ms. Grindle suggested a core strength program. The plaintiff built up her pre-existing home gym. She worked with Ms. Grindle primarily by connecting on-line or by making a video of her home work out and giving it to Ms. Grindle to review. For a few months at the end of 2018 or beginning of 2019, the plaintiff also attended "F45" regularly. F45 is a workout system based on 45-minute functional training workouts. When businesses opened after the pandemic, the plaintiff resumed doing gym-based workouts, including

Crossfit, a minimum of four days a week.

- [39] In 2018, the plaintiff reduced the amount of time she spent playing softball. She testified at trial that she no longer plays with one of the competitive teams she played on before the Accident. She said her injuries affect her batting swing and she is no longer a power hitter for the team. Further, due to the "stop and go" movement required, she can no longer run bases as well as she did before the Accident. She testified that she plays perhaps once a week now and goes for occasional tournaments, whereas before the Accident she went to tournaments every weekend during the softball season.
- [40] As of trial, the plaintiff was doing a workout of some kind at least four, and often five, days a week. She continues to do yoga regularly, but testified that she no longer attempts the more challenging poses she used to do as she worries about over-extension or about falling out of the pose. She continues to bowl regularly with her father, but describes her bowling game as "not 100 percent".

Household and Social Life

- [41] With respect to housework, the plaintiff testified that as of trial she was "doing okay" around the house, but does not "do as much as she used to without [Mr. Zeh]". She testified that Mr. Zeh now did the vacuuming, floor cleaning and dog grooming work. She said that whereas before the Accident she used to just clean "hard" for three hours and be done for the week, now she spreads her household chores out over multiple days. She sits on the ground to perform certain bathroom cleaning tasks that require her to bend low (e.g., cleaning the toilet). She describes the pain when her lower body is aggravated by housework as shooting or pulsating.
- [42] The plaintiff testified that, whereas she used to be intensely social, she does "not have much" of a social life now. She said that whenever she does not have to be at work somewhere, she just "shuts down and relaxes". She testified that she does not go out with her friends like she did before the Accident. She also said that her injuries have impacted her relationship with Mr. Zeh. She testified that she is tired all the time and cannot put in the effort to do things with him when they have time to spend together. In terms of their sexual relationship, she said there are days when she does not want to be touched and just wants to be left alone.
- [43] The plaintiff testified that she and Mr. Zeh want to have children and have, in fact, been actively trying to do so. There are some concerns about fertility. She testifies that she expects they will be unable to afford for her to be a stay-at-home parent, but agreed that they do not have firm plans in that respect as of yet.

B. Mr. Zeh

- [44] Mr. Zeh agreed that after the plaintiff started at Lululemon, their respective work schedules were such that he only saw her during waking hours two days a week. He agreed that he did not see the plaintiff as often as he wished after she started at Lululemon, that this sometimes made him irritable, that he was almost solely responsible for the house and dogs as a result, and that he had asked her to work less and help out more at home. When she reduced her Lululemon work by one shift in September 2022, he saw her three (or perhaps four) times during waking hours each week. He agreed that he had asked her to reduce her Lululemon work hours further yet, both because he was concerned about the toll it was taking on her and so they could spend time together.
- [45] Mr. Zeh said that before the Accident, he and the plaintiff shared household work, with him doing most outside work and the plaintiff doing most of the inside work. He said that responsibility for the dogs varied with the day of the week and the time of year, but that once the plaintiff started working at Lululemon, he had the vast majority of the responsibility for the dogs and the household work.
- [46] Mr. Zeh testified that he did start doing vacuuming after the Accident. However, he also said that he bought the plaintiff a robot vacuum as a present in late 2018 or early 2019 and that he did so because, with the dog hair, the plaintiff could not do it "all the time".
- [47] Mr. Zeh did recall there having been an incident in the summer of 2022 when the plaintiff's back seized up. His recollection was that he had to help her lay down and that she was crying. He did not recall there being any consideration of calling 911.

C. Margaret Pallister

- [48] Margaret Pallister is the plaintiff's mother. She testified that before the Accident, the plaintiff was healthy, busy and constantly on the go.
- [49] Mrs. Pallister strongly disagreed with the plaintiff's decision to take the Lululemon job. She was concerned about burnout and thought it was simply too much for the plaintiff to work two jobs, play sports and be driving around at night. She said she had asked the plaintiff to quit her Lululemon job "more [times] than I can count on my hands".
- [50] She rarely saw the plaintiff in person during the pandemic, but has seen her in person about twice a month since then. She said that she has seen the plaintiff grimace and grab at her back. She testified that the biggest change she has noticed in the plaintiff is in her personality and that the plaintiff is not as positive as she used to be.
- [51] Mrs. Pallister said she sometimes does "heavy" grocery shopping for the plaintiff and drops it off to her, either at work or at her house. She observed that the Chestermere house used to be spotless, but is not as well kept any longer.

V. Health Experts

A. Tony Giantomaso - Physiatrist

- [52] Dr. Giantomaso assessed the plaintiff on April 14, 2022 and provided her with a report dated April 29, 2022.
- [53] Notably, Dr. Giantomaso was a chiropractor before becoming a physiatrist. He reviewed the plaintiff's pre-Accident treatment notes, including her chiropractic treatment notes. In his opinion, while there was a history of lower back pain, there was no indication of any pre-existing chronic low back pain. He wrote in his report that he did not consider her lower back pain to be "significantly pre-existing" (emphasis added) and managed with exercise and occasional chiropractic therapy.
- [54] The plaintiff reported to Dr. Giantomaso that standing or sitting for more than an hour was difficult and required her to change positions or stretch. She reported sometimes experiencing pain from driving long distances or having her sleep disrupted by pain. She reported being able to perform household chores without much difficulty, unless experiencing a flareup. She told him that she experienced low back pain "about 50% of the time at work", but that she could not recall having missing any work due to pain.
- [55] Dr. Giantomaso found the plaintiff to have a normal range of motion in the cervical and thoracic spine, and a reasonable range of motion in the lumbar spine, but with pain elicited predominantly in extension. Flexion was relatively pain-free. Her range of motion in the hips and shoulders was normal. There was some tightness in the hip flexors. Sacroiliac joint testing produced localized pain only.
- [56] Dr. Giantomaso diagnosed post-traumatic cervical sprain-strain injury and post-traumatic thoracic sprain-strain injury from the Accident, both of which he assessed as resolved. He also diagnosed post-traumatic lumbar sprain-strain injury and post-traumatic sacroiliac joint discomfort, both of which were, in his opinion, chronic and ongoing.
- [57] With respect to impairments, Dr. Giatomaso wrote as follows:

Tracy Pallister notes ongoing activity limitations and participation restrictions in avocational, vocational and recreational realms. Initially, she had significant difficulty at work but over time this has improved to the point where she continues to work in oil and gas and also took an extra job at Lululemon. However, she notes in particular higher-level physical activities such as running, playing slow pitch, volleyball, going to the gym and other more intense activities that she used to be able to tolerate have been negatively impacted. She notes occasional sleep disruption and some limitations in prolonged static positioning whether sitting or standing have persisted post-trauma that have negatively impacted her enjoyment of life, but overall, vocationally she has maintained excellent levels of function.

These self-reported limitations, in my opinion, are reasonable given her post-traumatic injuries and consistent with her history and my physical examination. At this point, there is no limitation in light to sedentary work activities with occasional lifting. However, it is likely that she will continue to experience ongoing limitations in higher-level physical activities permanently in the future.

In my opinion, she does not require a functional capacity evaluation and her self-reported limitations are reasonable. Once again, I strongly recommend active rehabilitation and intermittent management with exercise.

[Emphasis added.]

[58] In his testimony, Dr. Giantomaso described the plaintiff as experiencing mild residual pain and having a degree of functional impairment that is only engaged by high-intensity activities. He also described her as "very functional".

[59] In his opinion, the plaintiff's recovery had plateaued and she will likely experience some degree of long-term chronic pain. He made four recommendations to help to decrease pain and increase function:

- a) a "strong" recommendation for active rehabilitation with a certified personal trainer or kinesiologist;
- b) pain medications, including Lyrica, gabapentin, and Cymbalta;
- c) if pain continues despite conservative measures, sacroiliac joint injections, lower lumbar facet injections (and, if those injections were successful, blocks and ablation);
- d) passive therapies such as physiotherapy, chiropractic therapy, massage therapy and acupuncture "on occasion to decrease the intensity and duration of a flare-up if one occurs".

[60] In response to these recommendations, the plaintiff maintained that she had continued with her home exercises with the help of Ms. Grindle and that she did take Advil occasionally. On the third recommendation, she testified that she had done some research into it on her own and thought it "seemed pretty overwhelming", but was definitely something she would look into in the future.

B. Gillian Bagg - Occupational Therapist

[61] Ms. Bagg assessed the plaintiff on September 26, 2022 and provided a function ability assessment and future care cost analysis report dated October 26, 2022 (the "Bagg Report").

[62] Ms. Bagg assessed the plaintiff as functional, with pain-like symptoms for a number of tasks. However, a central finding of her report is her conclusion that the plaintiff is functionally restricted from static standing for more than 20 minutes.

- [63] Ms. Bagg found the plaintiff to be capable of the physical demands of her office manager position at Bidell, provided she was permitted to change her position and stretch as needed. She concluded, however, that the plaintiff only partially meets the physical demands of her Lululemon position due to her reduced static standing ability and pain symptoms from repetitive reaching. She noted that the plaintiff's work and exercise schedule did not allow her much recovery time and recommended the plaintiff reduce her Lululemon hours. She commented that the plaintiff's stated intention to reduce her hours to 10 to 12 hours a week would be reasonable.
- [64] Ms. Bagg disagreed with Dr. Giantomaso's conclusion that the plaintiff's cervical and thoracic injuries were resolved. Ms. Bagg also disagreed with Dr. Giantomaso's opinion that passive treatments would be appropriate on occasion for flare-ups and made recommendations for extensive ongoing passive treatments (among other future care recommendations).
- [65] On cross-examination, Ms. Bagg testified that she had provided the plaintiff with a non-standard pain reporting scale (based on Ms. Bagg's personal modifications). She conceded that the plaintiff was not asked to try static standing for more than 20 minutes and that the plaintiff had never indicated any need to cease static standing. Ms. Bagg had simply ended the static standing test at the 20-minute mark. The conclusion in her report regarding the plaintiff's static standing restriction was based on Ms. Bagg's impression that the plaintiff was relieved to be advised that she could sit down.
- [66] In the Bagg Report's summary of the plaintiff's reported pre-Accident medical history, "chronic low back symptoms" are noted. Notwithstanding that lower back pain was one of the plaintiff's central complaints, these pre-existing lower back symptoms are not addressed or taken into consideration anywhere in the body of the Bagg Report.
- [67] The Bagg Report also notes that the plaintiff reported that "her low back pain was almost fully relieved for at least six months" following her rolfing treatments, and that the plaintiff did not have further rolfing treatments because they were not covered by her benefit plan. Ms. Bagg confirmed on cross-examination that this was the information Ms. Pallister had provided to her.
- [68] According to the Bagg Report, the plaintiff also reported to Ms. Bagg that she was taking chiropractic and massage therapy treatments at the time of the assessment, and that she had recently had physiotherapy to address "a flare-up of her symptoms associated with a gym-based injury". Ms. Bagg agreed on cross-examination that the back-seizure incident in the summer of 2022 was the only specific example of an Accident-related flare-up that the plaintiff had provided to her. The Bagg Report specifically relies on this treatment and flare-up reporting in recommending ongoing passive therapy treatments.

C. Cheryl Black--Occupational Therapist

- [69] Ms. Black did not assess the plaintiff. Her report is a critique of the methodology used in the Bagg Report. The plaintiff did not ask to have Ms. Black produced for cross-examination.
- [70] Ms. Black states that it is unclear from the Bagg Report what pain scale definitions the plaintiff was using for her subjective reporting. She also observed that the Bagg Report fails to identify the tests or assessment activities that the plaintiff was unable to complete due to her pain levels. Finally, Ms. Black notes that while the Bagg Report purports to recommend assistive devices for household tasks, the report does not identify any objective clinical findings related to the plaintiff's ability to perform household tasks.

D. Kaila Holtz - Physiatrist

- [71] Dr. Holtz assessed the plaintiff on November 22, 2022 and provided the defendants with a report dated December 12, 2022.
- [72] Dr. Holtz diagnosed the plaintiff with the following injuries causally related to the Accident:
- a) cervicothoracic strain (probably resolved); and
 - b) lumbar strain (possibly resolved).
- [73] Dr. Holtz noted that at the assessment the plaintiff reported only activity-dependent neck, upper back and mid-back pain ranging from a 0/10 to 2/10 in severity. She notes the absence of any post-2017 medical records supporting a complaint of ongoing neck, upper back or mid-back pain related to the Accident.
- [74] In Dr. Holtz's opinion, the plaintiff had pre-existing activity-dependent back pain prior to the Accident and likely suffered a lumbar strain injury in the Accident that aggravated that pre-existing issue. In her view, while the plaintiff's ongoing lower back pain might be due to the strain injury she suffered at the time of the Accident, it might also be due to overactivity given her work schedules and recreational activities. In Dr. Holtz's opinion, "it is unclear to what degree [the plaintiff's] current complaints are related to the [Accident] vs. her occupational and recreational demands."
- [75] Dr. Holtz agreed that it was reasonable for the plaintiff to have reduced higher intensity household maintenance activities for a period after the Accident. However, in her view, overactivity is a possible reason for the plaintiff's ongoing symptoms at present.
- [76] Dr. Holtz considered the plaintiff's prognosis for recovery from her soft tissue injuries to be favorable. In her opinion, Ms. Pallister did not demonstrate any evidence of permanent disability from her soft tissue injuries.
- [77] Dr. Holtz notes that the plaintiff advised Dr. Holtz at the assessment that she intended to stop working at Lululemon at the end of January 2023 as she was "finding it hard both schedule-wise and physically to continue". In Dr. Holtz's view, if the plaintiff stops working at Lululemon, her symptoms will probably improve and her level of activity restriction will

possibly be reduced. She makes a similar observation with respect to the plaintiff's ongoing symptoms in relation to beach volleyball and softball. Dr. Holtz's report does not give any indication of how long after ceasing to work at Lululemon the improvement would be expected to be seen.

- [78] Dr. Holtz did not offer any opinion on the plaintiff's ability to perform her Lululemon job, presumably due to the plaintiff's report that she was stepping down from it in any event.
- [79] In Dr. Holtz's view, the plaintiff meets the criteria for hyper-mobility. In her view, absent the Accident, the plaintiff would probably have continued with her pre-Accident schedule of monthly chiropractic and massage therapy treatments for the foreseeable future given her physical activities and her hyper-mobility.
- [80] In terms of recommendations, Dr. Holtz opined that the plaintiff would benefit from "ongoing strength training" under her established exercise routine. She also found it would be appropriate for the plaintiff to return to her "pre-accident frequency of chiropractic and massage therapy treatment of one session per month for symptoms of overactivity" (emphasis added). Finally, Dr. Holtz stated it would be reasonable to have the plaintiff's Bidell workstation assessed by an occupational therapist and to have any suggested ergonomic equipment provided in order to reduce symptoms.

VI. Injury Findings

A. Credibility

- [81] The guiding principles regarding assessing injuries were summarized by Justice Veenstra in *Lindemann v Pabbi*, 2021 BCSC 703:
- [153] The defendants rely on the comments of McEachern C.J. (as he then was) in *Price v. Kostryba* (1982), 1982 CanLII 36 (BC SC), 70 B.C.L.R. 397 (S.C.). As noted recently by Justice Sharma in *Rabiee v. Rendleman*, 2015 BCSC 595 at paras. 64-66:
- [64] The defendants emphasize that Ms. Rabiee's injuries were very mild and that there is little "objective" evidence of her injuries. They rely on *Price v. Kostryba* where McEachern C.J. quoted his own words in *Butler v. Blaylock*, [1981] B.C.J. No. 31 (B.C.S.C.) that "the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery" and that no one can expect citizens to be responsible for compensating a plaintiff "in the absence of convincing evidence."
- [65] I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff's subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is "objective" or "subjective". In fact, after considering the above quotation, the Court of Appeal in *Butler v. Blaylock*, [1983] B.C.J. No. 1490 (B.C.C.A.) clarified: "It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the

pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages."

- [66] The key consideration is whether the evidence, as a whole, establishes that the plaintiff's injuries were caused by the defendant's negligence on a balance of probabilities
- [82] This assessment examines the trustworthiness of a witness' testimony based upon both the veracity or sincerity of a witness (credibility) and the accuracy of the evidence they provide (reliability). Factors that are relevant to this assessment include: the ability and opportunity to observe events, the firmness of the witness' memory, their ability to resist the influence of interest to modify their recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes their 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: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.
- [83] The defendants contend that neither the plaintiff's testimony nor her reporting to experts is reliable. They point to inconsistencies in her testimony (both internally and as compared to that of other witnesses) and between her discovery and trial testimony. They also submit that she was frequently argumentative or evasive on the stand, and gave some evidence that was unlikely, unreasonable or clearly exaggerated.
- [84] Plaintiff's counsel acknowledged in their closing argument that the plaintiff had, at times, her timelines wrong and was defensive on the stand. He contended that she was, nonetheless, firm in her testimony about how her injuries continue to affect her and that her testimony in that regard was supported by the evidence of Mr. Zeh and Mrs. Pallister.
- [85] I do not agree with all of the criticisms advanced by the defendants. As a starting point, I place no reliance on the plaintiff's social media postings: *Singh v. De Santis*, 2022 BCSC 35 at para.18. That said, in my view a significant number of the defendants' other points are well-founded.
- [86] The plaintiff was generally a poor witness. Her version of the facts was often vague and varied. Her time frames often failed to align with other evidence, and this was with respect to matters both significant and not.
- [87] I find the inconsistencies between her September 2022 discovery and her trial testimony quite troubling. Notable among these are the inconsistent descriptions of her lower body pain. At discovery, the plaintiff specifically declined to say that she had lower body pain every single day. She described pain starting to "seep in" by mid-week and said that, by Friday, she would need to rest after work as "then it does start to get painful". At discovery, she described the everyday impact as follows:

Like a minor -- like it's kind of like a minor -- you just know there's something there and you just can't -- it's just bugging you or it's tolerable and you're able to continue on with your things.

- [88] In comparison, at trial she described herself as being in considerable pain from the moment she wakes and at pretty much every moment of every day thereafter and that the pain made simple things, like putting on her shoes in the morning or walking up stairs at work, exhausting for her.
- [89] Her counsel submitted that her trial and discovery testimony regarding her pain levels was not significantly inconsistent. I disagree. The fact that both versions describe that some pain is constant does not make the versions consistent. The tenor of the two descriptions is entirely at odds, and the key issue in dispute here is the severity of any ongoing symptoms and their impact. I note that the plaintiff's discovery took place in September 2022, and thus after the August 2022 deadlift injury and 2022 back seizure. In other words, the 2022 Events are not an explanation for this fundamental inconsistency.
- [90] I also agree that, at times, the plaintiff provided testimony that strained credulity. This was particularly so when she attempted to reconcile her own statements (e.g., that "playing" softball did not necessarily mean playing "on the diamond"). I also agree that the plaintiff exaggerated at times on the stand. For example, in direct examination she testified that she had had more than one job at a time for "pretty much [her] whole life" - which was readily disproven on cross. I also do not accept her evidence that she and Mr. Zeh almost called an ambulance when her back seized, as I am confident that Mr. Zeh would have a specific recollection of that and also that he would have a better recollection of the event in general if were as dramatic as the plaintiff described.
- [91] I am satisfied that the plaintiff, on multiple occasions, denied having any recollection as a means to shut down questioning on cross-examination. This was particularly so when questioned as to what she had reported to or discussed with experts. The plaintiff denied having any meaningful recollection of matters that were important to her personally and relatively recent. This was at least at times an evasive tactic.
- [92] In the circumstances, I am satisfied that little weight should be attached to the plaintiff's trial testimony except where it is consistent with other evidence.
- [93] I agree with plaintiff's counsel that Mr. Zeh and Mrs. Pallister were both credible witnesses. They provided tempered testimony that provides at least some support for parts of the plaintiff's own. However, both of their evidence had certain limitations.
- [94] Mr. Zeh confirmed that his household chores and responsibility for the dogs increased after the Accident, but also candidly agreed that at present, and for at least some time, this was due to the plaintiff rarely being at home. His version of events is consistent with the plaintiff being improved by mid-2019 and thereafter simply being too busy to contribute.

- [95] Mr. Zeh did indicate that he took over the vacuuming and floor cleaning for a period following the Accident, but then testified that he bought the robot vacuum for the plaintiff in late 2018 or early 2019, which is consistent with her having returned to regularly performing vacuuming by then. (This timeline is also supported by the plaintiff's reporting to Dr. Giantomaso and her discovery testimony.)
- [96] Further, while he clearly wanted the plaintiff to stop or at least cut back on working at Lululemon, I am satisfied that his central concern was, cumulatively, the toll her schedule was taking on her, the fact that he was effectively shouldering the household work alone, and that they barely saw one another awake.
- [97] However, Mr. Zeh did confirm that the plaintiff continues to complain of lower body pain when she plays softball and that she no longer plays as often or as well as she used to.
- [98] Mrs. Pallister was a credible witness, but her testimony was of limited value in that little of it was based on observation. She did testify to having seen the plaintiff grimace and grab at her back, but that testimony is of little assistance without a factual context and a specific timeframe. She testified that she helps the plaintiff out, but she did not meaningfully explain why she felt it was appropriate (and she agreed that she also tries to be of assistance to her son).
- [99] Mrs. Pallister did also testify that the Chestermere house was no longer "spotless", but there was no indication that this was due to the plaintiff's Accident injury symptoms as opposed to the plaintiff having little time or energy for cleaning as a result of her demanding schedule. She emphatically described the biggest change in the plaintiff as her being less positive, but again that was not tied to Accident injury symptoms and could easily be a consequence of an exhausting schedule. Notably, Mrs. Pallister's own evidence was that she believed that the plaintiff had over-committed herself and she was concerned about the plaintiff being "burnt out".

B. Injuries

- [100] In order to get an award for damages, the plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [101] In *Beardwood v. Sheppard*, 2016 BCSC 100, the Supreme Court set out the established principles for assessing liability once causation is found:
- [76] Once factual causation is found, liability may still be limited in the assessment of damages: *Blackwater v. Plint*, 2005 SCC 58 at paras. 78 - 81. I note the well-established principle of tort law that the defendant need not place the plaintiff in a better position than his original

position and should not compensate the plaintiff for damage he would have suffered in any event, otherwise known as the crumbling skull rule, which was set out by the Supreme Court in *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 34-35, as follows:

It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway.

Pre-Accident Status

[102] I accept Dr. Giantomaso's assessment that the plaintiff did have a pre-existing history of lower back pain and a pattern of seeking related treatment, but had no chronic lower body pain before the Accident. I find his opinion particularly persuasive given that he was previously a chiropractor. Dr. Holtz also reached the conclusion that the plaintiff had pre-existing activity-dependent lower back pain, but had then suffered a lumbar strain in the Accident and that the lumbar stain had aggravated the pre-existing issue.

[103] The defendants note that the Bagg Report indicates that the plaintiff reported having "chronic" lower back pain before the Accident. Even if the plaintiff reported that, I find she was using the term "chronic" in a colloquial sense.

[104] Overall, I find that the plaintiff did have activity-dependent lower back pain before the Accident and did take chiropractic and massage treatments for it, but that she did not have chronic lower body pain prior to the Accident. As Dr. Giantomaso put it, the plaintiff's present lower back pain should not be considered to be "significantly pre-existing" (emphasis added).

Recovery Trajectory: Accident to Mid-2019

[105] I accept that in the period immediately following the Accident, the plaintiff suffered pain and impairment as a result of neck, shoulder, mid-back and lower body injuries sustained in the Accident. There is ample evidence supporting the plaintiff's testimony in that respect and the defendants do not assert otherwise.

- [106] I find, based on the evidence of Dr. Giantomaso and Dr. Holtz, that the plaintiff's upper body symptoms did resolve. The treatment records indicate that these injuries were very significantly resolved by at least the end of 2018.
- [107] I accept Dr. Giantomaso's report and testimony, based on his April 2022 assessment, as to the state of the plaintiff's recovery from her Accident-related injuries as of April 2022.
- [108] The evidence of Mr. Zeh, Dr. Giantomaso and Dr. Holtz is consistent with the plaintiff's evidence that the plaintiff continued to have some significant Accident-related lower body symptoms at the close of 2018. This is also consistent with the plaintiff's reporting to treatment providers and the frequency of treatment up to that date. I find, however, that the plaintiff was substantially recovered from her lower body symptoms and that she had most likely reached the degree of recovery she was in as of April 2022 (the time of Dr. Giantomaso's assessment) by mid-2019. This is consistent with the trend of her reporting improvement to treatment providers, with Mr. Zeh's testimony indicating she was performing vacuuming by then, the plaintiff's degree of athletic and recreational activities and her taking of the position at Lululemon in the fall of 2019.
- [109] Plaintiff's counsel urges me not to put weight on the treatment notes and the plaintiff testified that she did not say or did not recall saying things reported in the notes. It is not surprising that the plaintiff would not have any independent recollection of what she said at her various appointments. I agree with plaintiff's counsel that clinical notes should not be treated as a transcript and that treatment providers make mistakes. Here, however, there are a significant number of treatment notes (made by different providers), a treatment pattern, and the plaintiff's return to activities to consider together. I find Dr. Christianson's notes particularly persuasive given her longstanding, pre-Accident treatment relationship with the plaintiff. Dr. Christianson's notes also suggest an attempt to record the plaintiff's subjective reporting using the plaintiff's own words and phrases. I find the subjective reporting set out in the notes persuasive in the circumstances.
- [110] Over time, the plaintiff's reporting in the clinical notes returns to reflecting discrete reasons for seeking treatment (e.g., sports injuries) without any reference to her Accident-related injuries or symptoms. Significantly, her post mid-2019 reporting in the notes is very much in line with that found in the pre-Accident treatment notes in evidence.
- [111] Although the plaintiff said that the expense of her dogs made having extra income from Lululemon welcome, she testified that she took the Lululemon job to save up money for a destination wedding. She also testified that she spent a significant part of her Lululemon earnings on Lululemon products (which was why the employee discount was such a bonus to her). I am satisfied that she did not start working a Lululemon job out of financial need. Rather, she took the job because she was capable of performing the work without anything more than mild residual pain and wanted the earnings she could spend on non-essentials.

The 2022 Injuries

- [112] Having established that the plaintiff had substantially recovered from the Accident by mid-2019, the more challenging factual issues are: (1) the trajectory of the plaintiff's recovery with respect to her lower body issues from 2019 through to April 2022 (the date of Dr. Giantomaso's assessment); and (2) whether the 2022 Injuries are, as characterized by the plaintiff, flare-ups of symptoms from her Accident-related injuries.
- [113] At trial, the plaintiff categorized the 2022 Injuries as flare-ups of her Accident-related symptoms and the treatments taken in respect of the 2022 Injuries as treatments for those flare-ups. She also described them in this manner in her reporting at expert assessments (only the February 2022 injury occurred prior to Dr. Giantomaso's assessment).
- [114] The defendants contend that the 2022 Injuries are not flare-ups of Accident-related symptoms. They submit that the 2022 Injuries are all discrete minor sports strains and injuries of the same sort routinely suffered by the plaintiff pre-Accident.
- [115] Dr. Giantomaso accepted the plaintiff's characterization. As he testified, it is not his job to cross-examine patients. His assumption is that their reporting is accurate. As I read her report, Dr. Holtz's opinion was somewhat more skeptical, at least to the extent that she considered overactivity to be a possible alternative explanation for what the plaintiff described to as "ongoing" Accident symptoms. Ms. Bagg squarely relied on the 2022 Injuries and what she understood to be related treatments as Accident-related symptom flare-ups in making her recommendations, especially with regard to future ongoing passive treatments.
- [116] I am not satisfied on the evidence that the 2022 Injuries were Accident-related "flare-ups" or that any of the treatment after mid-2019 should be considered treatment for Accident injury-related symptoms. As of mid-2019, the plaintiff had returned to regular workouts, including participating in various Crossfit challenges, as well as recreational activities. She was playing softball less frequently, but was working an extra job. The plaintiff also had pre-existing lower back pain prior to the Accident. She had also injured herself performing deadlifts prior to the Accident. She had a pre-Accident record of routinely sustaining sports-related injuries and suffering sports-related strains. There is thus nothing in the evidence that satisfies me that the 2022 Injuries were not simply incidents consistent with her pre-Accident pattern of activity-dependent injuries and strains.
- [117] I note was well that the cause and timing of the plaintiff's back seizure was vague on her evidence. As noted, I do not accept her more dramatic description, but do accept Mr. Zeh's more moderate evidence that it occurred. The seizure was described as having occurred "in the summer of 2022". As there are no separate treatment notes regarding the seizure, and given the time, the seizure appears to be connected to the plaintiff's August 2022 deadlifting injury. I have already found the evidence insufficient to connect the August 2022 deadlifting injury to the Accident.

- [118] I find that as of mid-2019 the plaintiff had returned to her pre-Accident recreational activities and her associated practice of routinely taking maintenance and minor sports-strain treatment. I am therefore not satisfied that the 2002 Injuries were flare-ups of Accident-injury symptoms and thus also not satisfied that the treatments sought for them were treatments for flare-ups.
- [119] As already noted, Ms. Bagg accepted that the 2022 Injuries were flare-ups and that all treatments related to them were treatments for Accident-related injuries. That is significant problem for the Bagg Report. What's more, I am satisfied that Ms. Black's criticisms of the Bagg Report's methodology, including the use of a modified pain scale and the lack of objective criteria, have merit. Further, Ms. Bagg conceded on cross-examination that a finding of central importance to her assessment - the conclusion that the plaintiff has a static standing restriction - was not based on any meaningful testing. I am satisfied that no weight should be placed on Ms. Bagg's evaluation or recommendations.
- [120] In summary, I find that:
- a) The plaintiff's upper body symptoms resolved by the end of 2018.
 - b) As of mid-2019, the plaintiff's lower body symptoms had resolved to the degree noted by Dr. Giantomaso at his April 2022 assessment.
 - c) The plaintiff's lower body symptoms continue to cause mild residual pain when she stands or sits continuously in excess of an hour and she needs to change positions, stretch or move about in order to avoid discomfort. Pain from her lower body symptoms also occasionally disrupts her sleep.
 - d) The plaintiff has no limitations in performing light to sedentary work with occasional lifting. She is able to perform her work as an office manager with the above-noted limitations on static standing and sitting.
 - e) The plaintiff is able to perform her work as an expeditor at Lululemon without functional impairment, but with some mild residual pain.
 - f) The plaintiff's lower body injuries have left her with reduced tolerance in particular for high-level physical activities and can no longer do these at the same high level that she could prior to the Accident or without mild pain. These high-level physical activities include intense recreational activities (competitive softball, beach volleyball) and particular household tasks (e.g., vacuuming, floor cleaning, dog bathing).
 - g) The above symptoms are chronic and permanent. However, I accept Dr. Holtz's opinion that these symptoms may improve further if the plaintiff ceases to be overactive.

- [121] With respect to the last finding above, the plaintiff testified at trial that although she had not worked at Lululemon since January 30, 2023, her pain had not improved any as of trial. First, I have already expressed my issues with the plaintiff's testimony regarding her pain levels. Further, Dr. Holtz did not indicate that any improvement to be had could be expected to be realized in a matter of weeks. I find that there is a real and substantial possibility that a less demanding schedule of activity will result in some improvement.
- [122] Finally, I am not persuaded that being generally fatigued and not feeling up to spending time with Mr. Zeh and her friends are Accident-injury related developments. I am satisfied that the plaintiff's schedule of activities is not only an equal, but in fact the more likely, cause of these.

C. Failure to Mitigate

- [123] The defendants assert that the plaintiff failed to mitigate her damages by failing to take up Dr. Giantomaso's recommendations for active rehabilitation, long-lasting pain medication or injections, blocks or ablation.
- [124] The two-step test that a defendant must meet to obtain a reduction in damages due to a plaintiff's failure to mitigate their losses is set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. Per Chiu, a defendant must prove:
- a) that the plaintiff acted unreasonably in eschewing the recommended treatment; and
 - b) the extent, if any, to which the damages would have been reduced had the plaintiff acted reasonably.
- [125] The defendants point to Dr. Giantomaso's recommendation for active rehabilitation program with a certified professional. (There is no evidence that Ms. Grindle is certified.) In my view, the defendants have failed to establish that the exercise program overseen by Ms. Grindle is deficient. I note in particular that the defendants' expert, Dr. Holtz, recommended the plaintiff continue her existing exercise program (and did so after specifically referencing Ms. Grindle.)
- [126] With regard to Dr. Giantomaso's recommendations for long-acting medications and injections and blocks for pain management, I consider the plaintiff's decision not to take up these recommendations to be evidence confirming my finding that her residual pain is, in fact, mild and that she remains highly functional. Entertaining a mitigation argument based on the same non-action would be unfair to the plaintiff. (Further, even if mitigation were to be considered, it is notable that Dr. Holtz did not make parallel recommendations.)

VII. Non-Pecuniary Damages

- [127] Non-pecuniary damages are meant to compensate a party for the pain and suffering experienced by an individual. The awards given in other cases provide a useful, albeit rough, guide. However, the specific circumstances of the plaintiff must be considered, and the compensation awarded must be fair and reasonable to both parties: *Marriott v Peterson*, 2021 BCSC 1066 at para. 47.
- [128] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors for consideration in assessing non-pecuniary damages. These include: a plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and/or social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism. A plaintiff should not be penalized for being stoic.
- [129] As observed in *Moskaleva v. Laurie*, 2009 BCCA 260 at para. 95, the objective of non-pecuniary damages is to "make life more endurable" and not merely compensation for direct injuries. In *Lindal v. Lindal*, 1981 CanLII 35 (SCC), [1981] 2 SCR 629, at 637, Justice Dickson emphasized that the quantum of an award is determined through a functional approach and should not depend alone upon the gravity of the injury.
- [130] The plaintiff submits that an award of \$100,00 to 120,000 is appropriate, and that the award should be on the higher end to account for the absence of a separate house-keeping award. The defendant submits that an award of \$30,000 to 40,000 is appropriate.
- [131] The plaintiff submitted the following cases for consideration as comparators:
- a) *Dhanda v. Thind*, 2022 BCSC 1003 (\$100,000);
 - b) *Fatla v. McCarthy*, 2022 BCSC 577 (\$110,000);
 - c) *Morlan v. Barrett*, 2012 BCCA 66 (\$159,000, as adjusted for inflation);
 - d) *Roemer v. Shafi*, 2020 BCSC 1 (\$80,000); and
 - e) *Singh v. De Santis*, 2022 BCSC 35 (\$115,000).

However, all of these decisions involve plaintiffs who had more significant injuries that had more significant impacts on their lives than is the case here.

[132] The defendants provided the following cases for consideration:

- a) *Campbell v. Makela*, 2003 BCSC 634 (\$30,176, adjusted for inflation);
- b) *Hussain v. Cho*, 2012 BCSC 194 (\$31,876, adjusted for inflation);
- c) *Dogra v. Thakore*, 2001 BCSC 834 (\$31,962, adjusted for inflation);
- d) *Robinson v. Anderson*, 2009 BCSC 1450 (\$34,048, adjusted for inflation);

- e) *Vela v. MacKenzie*, 2012 BCSC 438 (\$34,426, adjusted for inflation); and
- f) *Hyndman v. Singh*, 1998 CanLII 5773 (BC SC), [1998] B.C.J. No. 612 (S.C.) (\$42,326, as adjusted for inflation).

[133] The facts in the defendants' cases are more comparable. However, the age of the defendants' cases is notable. Cases of this age may provide inappropriate non-pecuniary comparators, even as adjusted for inflation. The Court of Appeal has said that it is not appropriate to take an older case (in that case, a case that was 12 years old) and simply adjust it for inflation as that would fail to take in account the fact that awards for non-pecuniary damages have increased over the years (aside from the inflationary component): *Valdez v. Neron*, 2022 BCCA 301 at para. 58, leave to appeal to SCC ref'd, 40442 (30 March 2023). In *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 at paras. 17-18, the Court of Appeal declined to consider a case that was more than a decade old. The cases provided by the defendants here are all at least a decade old. I find it would inappropriate to rely on the awards made in defendants' cases as comparators.

[134] As no two cases are like, assessing non-pecuniary damages requires the Court to have a sense of the spectrum of cases dealing with facts comparable to those the court had found on the evidence before it. Where the comparator cases identified by parties are not sufficient to provide a sense of the spectrum, the Court may consider additional cases: see, for example, *Carter v. Zhan*, 2012 BCSC 595 at paras. 118-123; *Healey v. Chung*, 2019 BCSC 1429 at paras. 223-224; *Martin v. Frederickson*, 2021 BCSC 1424 at para. 54.

[135] I find the following more recent cases to be of assistance here:

[136] In *Grimm v. Young*, 2019 BCSC 1549, Ms. Grimm was 37 at time of trial, had been a fitness industry employee when an accident took place four years prior to trial. She suffered myofascial neck, upper back and shoulder pain and chronic headaches of six to eight hours duration that occurred four to six times a week. As of trial she had improved about 30 percent and appeared to have plateaued, with her prognosis for future improvement being guarded. She could continue work as a yoga teacher, but was unable to do certain poses. Her chronic pain and recurrent headaches rendered her unable to instruct high intensity fitness programs even with modifications to her personal performance. Child care was more difficult for her and she was unable to do certain housework. She was less inclined to engage in her former recreational pursuits such as biking, softball, and dancing. She was awarded \$90,000 for non-pecuniary damages (\$98,470, as adjusted for inflation). That amount specifically included consideration of loss of housekeeping capacity (para. 73).

[137] In *Travelbea v. Henrie*, 2012 BCSC 1532, Ms. Travelbea was 49 at the time of injury and 53 as of trial. Following the accident, she did not miss any work time as a retail cashier. She had a particular interest in physical exercise and endurance sports and trained up to six days a week before the accident. She suffered a mild to moderate soft tissue injury to her neck and upper back, resulting in a reduced range of motion. She initially returned to training and doing endurance events (e.g., triathlons, duathlons and half marathons), but experienced

significant pain. The discomfort led her to reduce and then almost eliminate her endurance training. Most of the endurance events she participated in had a road bicycling component and the Court found it was unlikely that she would ever be able to road cycle any appreciable distance again. She had also become irritable and withdrawn. Her injuries had caused her distress by impairing her ability to look after her sick mother. She was initially able to complete housework but over time her capacity had diminished, particularly in relation to floors, vacuuming, laundry, and semi-annual heavy cleaning tasks. Her condition would continue to improve, but she would still continue to be restricted from participating in certain events she had previously done. She was awarded \$50,000 for non-pecuniary damages (\$63,600 as adjusted for inflation). That amount specifically included consideration of loss of housekeeping capacity (para. 80).

[138] In *Gorval v. Quan*, 2023 BCSC 1757, Ms. Gorval was 43 at the time of accident and 48 at trial, was a professional fitness instructor and a recreational body builder. She suffered a mild mid-back soft tissue injury that resolved within a year. She also sustained a soft tissue injury to her neck, upper back and left shoulder which as of trial continued to affect her as follows: some general stiffness; mild pain when required to maintain the same position for a prolonged period of time; and some mild to moderate pain when actively engaged in high impact, very intense physical activity. The plaintiff had returned to successfully instructing high-level, high-impact fitness classes. She had also returned to running, but found herself unable to match her pre-accident times. She could lift weights, and although she had not returned to bodybuilding at her previous level to date, it was possible that she could. The evidence indicated that her symptoms would improve further yet. The accident had significantly aggravated her pre-existing anxiety and depression, but the aggravation abated within a year or so. She was awarded non-pecuniary damages of \$50,000. Again, the amount awarded included the impact on housekeeping capacity (para. 155).

[139] Here, the plaintiff has ongoing symptoms that are greater than those suffered in *Gorval*, but Ms. Gorval also had significant mood-related issues. I have not found that the plaintiff in this case suffered any significant mood-related issues as a result of the Accident. Additionally, the plaintiff is considerably better off than Ms. Grimm, who suffered severe headaches on an ongoing basis and could not return to high intensity physical activities. The plaintiff, like Ms. Travelbea, remains capable of activity notwithstanding her ongoing symptoms, but has lost the ability to fully participate as she did before in a recreational activity that was of considerable importance to her. Ms. Travelbea was older than the plaintiff, but her capacity to perform housework was more seriously impacted. That being said, I accept that there was some impact on the plaintiff's ability to perform housework, as supported by Mr. Zeh's testimony.

[140] In the circumstances, the Court awards \$50,000 in non-pecuniary damages. That award specifically includes an amount in relation to house-keeping matters.

VIII. Loss of Earning Capacity

A. Future Loss of Earning Capacity

- [141] The burden of proof of actual past events is a balance of probabilities, whereas assessing future loss of earning capacity involves a consideration of hypothetical events. Hypothetical events are not required to be established on a balance of probabilities. Instead, they are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility, and not mere speculation: *Athey* at para. 27; *Morlan* at para. 38.
- [142] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the Court of Appeal set out a three-step analysis to be applied in assessing damages for future loss of earning capacity:
- (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?
 - (2) Is there a real and substantial possibility that the future event will cause a pecuniary loss to the plaintiff?
 - (3) What is the value of that possible future loss, given the relative likelihood of it occurring?
- [143] If the analysis proceeds to the third step in *Rab*, a decision must be made as to the appropriate means for assessing the value of the future loss in the circumstances: *Sendher v. Wong*, 2014 BCSC 140. However, as explained below, the analysis in this case fails at step two of the *Rab* analysis.
- [144] With respect to future loss of earning capacity, the plaintiff posits that her chronic pain will "wear her down" and adversely impact her ability to earn at Bidell (over the long term) and at Lululemon (so as to prevent her from gaining ten years' service).
- [145] The plaintiff seeks damages equivalent to twice her 2022 income for a total award of \$180,000. In reaching this number, she relies on the valuation approach set out by the Court of Appeal in *Pallos v. Insurance Co. of British Columbia*, 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260.
- [146] The defendants submit that no loss of earning capacity has been established.
- [147] The plaintiff's position on earning capacity is heavily reliant on the functional evaluation findings in the Bagg Report (which I have found to unreliable). Further, I have generally accepted the evidence Dr. Giantomaso (the plaintiff's expert). Dr. Giantomaso strongly expressed the view that functional testing would be useless as the plaintiff's abilities would far exceed the demands of the levels used for assessment. He also described her as having maintained "excellent levels" of vocational functioning. He expressed no concern about her ongoing symptoms having an impact upon her capacity to work - at Bidell, Lululemon or elsewhere.

- [148] The plaintiff's argument relies heavily on the Court of Appeal's decision in *Morlan*. The facts in *Morlan* greatly differed from those here. Ms. *Morlan* had fibromyalgia and the trial judge found there was a real and substantial possibility that the condition, which was persistently draining and could worsen over time, would shorten her working life (paras. 34 and 39-42).
- [149] The evidence here does not establish that the plaintiff suffers chronic pain of a nature or to a degree that would be expected to have a detrimental effect on her ability to work.
- [150] When working in a sedentary position, such as hers at Bidell, the plaintiff needs to switch between sitting and standing every hour or so or stretch in order to avoid discomfort. She also testified that she planned to work at Bidell until she retired and that Bidell is pleased with her work. Even if she did take a comparable position elsewhere, to the extent that allowing an employee in such a position to stretch or change their posture occasionally is an "accommodation", it is one that could be reasonably expected of any employer.
- [151] With regard to Lululemon, the plaintiff initially took the position as a temporary job in order to save up money for her wedding. Her assertion that throughout her life she has generally had two or more jobs at once did not withstand cross-examination. Mr. Zeh and Mrs. Pallister both gave evidence that working at both Bidell and Lululemon resulted in an unsustainable schedule/lifestyle. The plaintiff testified that she and Mr. Zeh are actively trying to have a family. I am not satisfied that the plaintiff would work at both Bidell and at Lululemon on a long-term basis in any event.
- [152] Furthermore, notwithstanding that neither Mr. Zeh nor Mrs. Pallister were supportive of her having a second job at Lululemon, and notwithstanding that there was no financial need compelling her, the plaintiff worked there for almost three years. During that period, she was given promotions and awarded high bonuses. The plaintiff has established that she is, in fact, exceedingly employable.
- [153] Finally, as I have already set out above, there is a real and substantial possibility that she may improve further yet.
- [154] On balance, I find that the plaintiff has not satisfied the evidentiary burden to show a real and substantial possibility of any pecuniary loss. Based on my findings, step three of the Rab analysis is not needed as there is no loss to quantify.
- [155] There is no award made for loss of future earning capacity.

B. Past Lost of Earning Capacity

- [156] In *Hobbs v. Rozon*, 2022 BCSC 2178, Justice Edelmann commented on how the Rab analysis applies to past lost earning capacity:

- [20] The principles applicable to a claim of past lost earning capacity are the same as the principles applicable to a claim of future lost earning capacity: *Grewal v. Naumann*, 2017 BCCA 158 [Grewal] at para. 46, citing *Smith v. Knudsen*, 2004 BCCA 613 at para. 29. The plaintiff must establish (i) impairment of earning capacity, and (ii) a real and substantial possibility of an event resulting in a loss: *Grewal* at para. 48.
- [21] While in many cases the actual lost income will be the most reliable measure of the loss, it is not the actual lost income but the lost capacity which is compensable (see *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19). That being said, compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [157] The plaintiff claims for damages for past loss of income. She lost no time at Bidell. She submits that she lost 25 evening shifts at Lululemon as a consequence of her September 2022 decision to reduce her shifts. She calculates the corresponding loss on an hourly wage basis as totalling \$2,281.25.
- [158] The plaintiff has not established that the September 2022 reduction in hours was due to her Accident-related injuries. To the contrary, the evidence indicates that Mr. Zeh (supported by Mrs. Pallister) asked the plaintiff to cut back on her hours because her multifold commitments were taking a toll on her and because she was spending no time at home or with Mr. Zeh. While it is possible that the August 2022 deadlifting injury was a contributing factor in the decision to cut back on hours, the evidence does not establish that that the deadlifting injury was related to the Accident.
- [159] I therefore award the plaintiff no damages for loss of earning capacity.

IX. Cost of Future Care

- [160] 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, insofar as is possible, and to preserve and promote her mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (B.C.S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [161] The test of an award for future care is an objective one, based on medical evidence. To satisfy this test, a claim must be reasonable and medically justified. Generally, there must also be evidence that the plaintiff is likely to incur these costs in the future, with the onus being on the plaintiff to show that there is a reasonable likelihood that they will use the suggested services: *Montazamipoor v. Park*, 2022 BCSC 140 at para. 112; *Golkar-Karimabadi v. Bush*, 2021 BCSC 990 at para. 107.
- [162] As noted by Justice Butler, writing for the Court of Appeal, in *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 44:

44. It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable: *Aberdeen* [v. *Zanatta*, 2008 BCCA 420] at para. 42; *Gao* [v. *Dietrich*, 2018 BCCA 372], at para. 69.
- [163] No award is appropriate for expenses that the plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55; *Golkar-Karimabadi* at para. 107.
- [164] The plaintiff seeks \$59,900 on a present value basis as an award for the recommended future cost of care under five headings: (1) symptom management devices; (2) projected therapeutic treatments; (3) aids for independent function/ household management; (4) vocational costs; and (5) transportation for therapies.
- [165] I do not accept the Bagg Report evaluation or recommendations, however, an award of some of the items costed out in the Bagg Report are supported on the evidence of Dr. Giantomaso and/or Dr. Holtz.

Symptom Management Devices

- [166] The plaintiff seeks the present value amount of \$6,257 for "symptom management devices" including a mattress, pillow and massager replacement, as well as gym equipment replacement.
- [167] With respect to the gym equipment, Dr. Holtz indicated that the plaintiff would benefit from "ongoing strength training" under her established exercise routine. I take that recommendation to include the plaintiff's continued home workouts (as developed with Ms. Grindle). On that basis, I award the plaintiff the amount sought for replacing her home gym equipment.
- [168] Dr. Giantomaso accepted that the plaintiff's ongoing lower body symptoms occasionally caused her disrupted sleep. I find that an award for sleep-related symptom management devices is appropriate in the circumstances.
- [169] For these reasons, I award the plaintiff the present value amount of \$6,257 to manage her disrupted sleep and to replace her gym equipment.

Therapeutic treatments/ Transportation Costs for Treatments

- [170] Dr. Giantomaso recommended passive treatments on occasion for flare-ups, "if any". Dr. Holtz recommended the plaintiff resume her pre-Accident treatment regime, but notably recommended it for addressing symptoms due to "overactivity" (i.e., not as treatment for ongoing Accident-related symptoms).

- [171] The defendants contend that, regardless of any recommendations there should be no award for future passive treatments given the plaintiff's intensive pattern of pre-Accident treatment. (Again, it is undisputed that over the year prior to the Accident, the plaintiff had both massage therapy and chiropractic treatment effectively monthly.)
- [172] My finding above is that the plaintiff resumed her practice of taking passive treatments for general maintenance and minor sports injuries and strains effective mid-2019. While she did not return to her pre-Accident treatment rate in mid-2019, it is notable that she took the Lululemon job that fall and thereafter her time was in short supply.
- [173] Given that the plaintiff routinely had treatment prior to the Accident and the absence of any satisfactory evidence of Accident-related flare-ups in recent years, I find that no award is warranted.

Occupational Therapy/ Vocational Aids

- [174] Dr. Holtz stated that an ergonomic assessment and related vocational equipment would be appropriate to reduce symptoms while working as an Office Manager.
- [175] The amount \$1,620 is awarded for occupational therapy for the plaintiff. The plaintiff seeks an additional amount for vocational aids in the form of an ergonomic chair, file holder and footstool. The further amount of \$2,384 is awarded as sought for those vocational aids.

Aids for independent function/ household management

- [176] The Bagg Report includes costing for a sit-stand stool, a long-handled cleaning aid, iRobot Vacuum, iRobot Mop, laundry machine pedestals and various baby items. These have been listed at a combined present value at \$5,556.
- [177] There is no evidentiary basis for an award with respect to laundry machine pedestals. I found that the plaintiff is capable of doing tasks such as vacuuming, floor cleaning, but that these high intensity chores aggravate her residual pain. Mr. Zeh testified that the robot vacuum cleaner was of assistance by reducing the number of times manual vacuuming was required. I accept that lifting a baby or toddler can amount to a high intensity household task, if the plaintiff and Mr. Zeh do, in fact, have children.
- [178] In the circumstances, I would award 66 percent of the amount sought in order to eliminate the laundry pedestals and account for the possibility that the plaintiff might not have children. The amount of \$3,667 is awarded under this heading.
- [179] In total, the amount awarded for the plaintiff's cost of future care (\$6,257 + \$1,620 + \$2,384 + \$3,667) is \$13,928.

X. Special Damages

- [180] The plaintiff claims \$7,080.51 in special damages.

[181] The defendant submits that the following treatments (and related mileage) should be excluded from that amount:

- a) March 4, 2019 (chiropractor) - this is the visit where it was noted that the plaintiff had reported that her MVA symptoms had subsided;
- b) September 4, 2019 (massage therapy), November 22, 2019 (chiropractor), May 8, 2020 (chiropractor), October 7, 2020 (massage therapy) and November 11, 2022 (chiropractor) - the plaintiff did not provide any evidence of an Accident-related reason for the treatment sought;
- c) February 3, 8 and 10 (physiotherapy) and February 4, 2022 (massage therapy) - these related to the devil's press Crossfit injury;
- d) August 17, 2022 (massage therapy), August 18, 2022 (physiotherapy), August 24, 2022 (massage therapy) and August 25, 2022 (physiotherapy) - these related to the deadlift Crossfit injury.

[182] Payment for the March 4, 2019 treatment is warranted as the notes indicate the plaintiff and Dr. Christianson discussed the plaintiff's long-term recovery from the Accident as a part of that appointment.

[183] I agree with the defendant that the treatments set out in subparagraphs (b), (c) and (d) are appropriately excluded. The evidence did not establish an Accident-related basis for those treatments. The transportation costs related to these appointments should also be excluded. The parties are directed to recalculate the submitted special damages calculations accordingly.

[184] The defendant also seeks a discount from the special damages claimed on the basis that the plaintiff would have had some treatments between the date of the Accident and mid-2019 in any event of the Accident. The plaintiff testified that she generally had at least one chiropractic and massage therapy session at the outset of each softball season and again at the season's conclusion. On a ballpark basis, I find that the plaintiff would most likely have had at least eight treatments (4 chiropractic and 4 massage therapy) between August 2017 and mid-2019 regardless of the Accident (i.e., fall 2017, spring 2018, fall 2018 and spring 2019). Again, the parties are directed to recalculate the submitted special damages calculations accordingly.

XI. Conclusion

[185] The claim is dismissed as against Ms. Seguin. The defendant Mr. Beaverbones was negligent and is liable for the plaintiff's injuries.

[186] In summary, I award the following:

Non-Pecuniary Damages \$50,000

Loss of Earning Capacity Nil

Cost of Future Care \$13,928

Special Damages As directed above

[187] I leave it to the parties to address the recalculation of the special damages and to consider any costs, tax, statutory deductions, or interest implications of this judgment. If they are unable to agree on these matters, the parties are at liberty to make further submissions, with the plaintiff providing written submissions to the Court within 30 days of this judgment, and the defendant responding 30 days thereafter.

"Tucker J."

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