

CANADA / JUDGMENT

Purewal v. Uriarte

2020 BCSC 1798

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2020 BCSC 1798 Purewal v. Uriarte

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Purewal v. Uriarte,

2020 BCSC 1798

Date: 20201123

Docket: M181474

Registry: Victoria

Between:

Davinder Kaur Purewal

Plaintiff

And

Martin Lorenzo Chavarria Uriarte

Defendant

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

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Place and Date of Trial:

Victoria, B.C.

June 15-19 and June 22-24, 2020

Place and Date of Judgment:

Victoria, B.C.

November 23, 2020

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I. Introduction

- [1] In 2016, Ms. Purewal was 32 years old, married with two children, and was working at the Tim Hortons restaurant located in the Victoria General Hospital. On May 16, 2016 she was driving her car on Peatt Road in Langford, BC when she was hit from behind by the defendant while she was stopped at a red light. Ms. Purewal suffered a number of myofascial injuries in the accident. Liability for the accident is not contested. In this action Ms. Purewal seeks compensation for her injuries sustained as a result of the accident, and the impact those injuries have had on her life.

II. Issues

- [2] This case raises the following issues:
- a) Did the accidents cause or exacerbate Ms. Purewal's injuries?
 - b) What is Ms. Purewal's prognosis?
 - c) Is Ms. Purewal entitled to any damages?

III. Analysis

A. Did the accidents cause or exacerbate Ms. Purewal's injuries?

- 1. Ms. Purewal's abilities and health pre-accident
 - a) Work and social life

- [3] Ms. Purewal was born in India, into a traditional Sikh family. Ms. Purewal attended one and a half years of a post-secondary arts degree in India. Her family suggested she move to Canada on a work permit allowing her to work as a nanny. To qualify for this program, she stopped her undergraduate program and began a nanny training program. In 2006 she moved to Canada, originally living in Surrey. She met her future husband Prabjeet Purewal in Surrey. She married him in April 2007, and moved to Victoria the same year.
- [4] Ms. Purewal was a nanny when she first moved to Victoria, but then moved on to a job at a Subway restaurant. In 2008 she began working at the Tim Hortons restaurant in the Victoria General Hospital. She continued to work at Tim Hortons through two pregnancies, and right up until the accident in 2016.
- [5] Ms. Purewal was a member of the Hospital Employees Union, and received wages in accordance with the collective agreement for that union. She also received benefits, including extended health benefits.
- [6] Her job was quite physical, and involved bending, carrying stock up from a lower floor, deep cleaning, reaching up to stock shelves, working the cash machine, and covering for other staff members. She was able to lift a case of 24 - 330ml drink bottles. Ms. Purewal was generally healthy and energetic. Her physical and emotional health was good. She loved her job, which provided her with good benefits, including dental care, vision care, sick days and vacation days. At the time of the accident, she was a full time employee, working Monday to Friday, 6 am to 2 pm.
- [7] In the home, Ms. Purewal was responsible for 90 percent of the household chores, including cleaning, dusting, cooking, vacuuming, washing cars, changing beds, and gardening. Her husband worked the afternoon/evening shift, so she was also responsible for the children after school and in the evenings.
- [8] Ms. Purewal has two children. At the time of the accident they were six and five years old. Before the accident, Ms. Purewal was the primary caregiver for the children. Because she worked the early shift, she was home for the children after school. She helped them with school work, played with them, did sports with them, took them swimming and to the park, and was physically affectionate with them, including hugging and cuddling them. She enjoyed reading to them at bedtime.
- [9] Ms. Purewal had a warm and loving relationship with her husband. She described being "really connected emotionally" to her husband, and they loved to be in each other's company all the time.
- [10] Ms. Purewal's friend Shirin Purewal testified that before the accident Ms. Purewal was engaged, present, and involved in everything. She would host large parties of up to 50 people, and would constantly move around helping people, serving them food, dancing, and enjoying herself. Ms. Shirin Purewal testified that Ms. Purewal was bubbly, creative, loved to share things on Pinterest, and was the life of the party. Ms. Shirin Purewal used to see Ms.

Purewal at least once a month before the accident, and sometimes every weekend. She described the physical relationship Ms. Purewal had with her children: always hugging them, grabbing them, and loving them.

- [11] In October of 2015, Ms. Purewal twisted and injured her back at work, which resulted in pain in her buttock and left leg. She had to take three and a half weeks off work, but then gradually returned to work. She received trigger point injection therapy, and one physiotherapy treatment. By November 2015 she had no residual impairment from this injury, although at times her back was achy if she overworked it.
- [12] She also had a one-time incident where she experienced some left chest pain in March 2015. This resolved quickly, and had no recurrence.
- [13] At the time of the accident at issue, she had no problems with her neck, shoulder or upper back. She had no migraines, and no problems with her vision, her sleep, her ears, anxiety or depression.

2. Ms. Purewal's abilities and health post-accident

- [14] The accident at issue occurred at approximately 4 pm on May 16, 2016. Ms. Purewal was stopped at a red light, on her way to pick her son up from preschool. She was rear-ended, her head moved forward and backward, and she blacked out for a second. She and the defendant pulled off to the side of the road. After determining that the car was still driveable, she continued on to the preschool. When she got to the preschool, she was shaken up and the teacher asked her sit down, gave her some water, and recommended she go to the doctor.
- [15] Ms. Purewal went to a walk-in clinic. She was lightheaded, in shock and her left neck and upper shoulder felt hot and achy. Over the next few days, she continued experiencing pain in the left side of her neck and shoulder, and began getting headaches. About a week after the accident she went to her regular family doctor, as her neck, shoulder and head pain were getting worse. Her mood and sleep were affected, and she was experiencing tingling and numbness in her left arm down into her fingers.
- [16] Her family doctors recommended that she take time off work, prescribed medications and physiotherapy, and suggested she may need trigger point injections. Ms. Purewal followed her doctor's recommendations. She continued to see him up to two times a month, but the pain and headaches worsened.
- [17] Ms. Purewal has undergone physiotherapy, chiropractic treatments, massage therapy, acupuncture treatments, trigger point injections, dry needling, and painful Botox treatments. She has seen specialists, including an inner ear and eye specialist, a psychiatrist, doctors at the CBI pain clinic, and a kinesiologist. She has been prescribed, and has taken, more than 20 different pain medications, and medications related to her psychological injuries.

- [18] I am satisfied that Ms. Purewal has done all she could to recover from her injuries. She complied fully with all recommendations, and has approached all therapies with a good faith attempt to recover from her injuries. Ms. Purewal did not fail to mitigate her damages. Notwithstanding Ms. Purewal's efforts, she continues to suffer from her injuries.
- [19] Ms. Purewal obtained independent medical assessments from Dr. Donald Cameron, an expert in neurology, Dr. Aindrias O'Breasail, an expert in psychiatry, and Dr. John Armstrong, an expert in chronic pain with a neurologic foundation.
- a) Admissibility of the opinion of Dr. Armstrong
- [20] The plaintiff sought to call opinion evidence from Dr. Armstrong. This evidence was the subject of a voir dire. During the trial, I ruled that the expert opinion evidence of Dr. Armstrong was admissible, with my reasons to follow. These are those reasons.
- [21] Dr. Armstrong was examined and cross-examined on the voir dire. He is a medical doctor with a degree from McGill University. He completed full graduate clinical training in neurology, and earned a Ph.D. in neuroscience in the department of neurology and neurosurgery at McGill. He also did post-graduate work in the area of clinical pharmacology. He held a clinical research fellowship in muscle disease at Sick Kids in Toronto, where he was also the chief resident in neurology. For the past 25 years, he has focussed his medical practice on the interdisciplinary diagnosis and management of complex chronic pain. Dr. Armstrong has clear expertise in the area of diagnosis and treatment of chronic pain. This was admitted by the defendant.
- [22] Dr. Armstrong prepared an opinion in which he states that the plaintiff is suffering from spinal pelvic ring dysfunction ("SPRD") and malalignment syndrome, which has caused or contributed to ongoing chronic pain in her neck and shoulders, as well as in her hips and pelvic girdle.
- [23] Dr. Armstrong summarizes SPRD and malalignment syndrome as follows:

In an MVA, soft tissue injuries of the SPR [spinal pelvic ring] are common and are caused by the abrupt application of flexion, extension, rotational, translational and blunt forces to the spinal axis and SPR.

The soft tissue injuries to the SPR can include an acute overloading with strain and/or tearing (sprain) of the posterior spinopelvic ligaments, the lumbar ligaments and facet joint capsules, and the anterior capsule of the sacroiliac joints that support and stabilize the SPR. The injured soft tissues of the SPR can heal but, if not, as the woman continues her daily activities, the SPR becomes increasingly deformed and misaligned over time, owing to progressive reduction in muscular tension.

These effects lead to the malalignment syndrome in which the ligaments become unduly strained. The supporting spinopelvic musculature becomes progressively and continuously under-recruited, leading to its deconditioning, weakening, shortening, imbalance, and incoordination with further aggravation of SPR misalignment. The loss of form and force closure under the influence of malalignment further weakens and distorts the SPR.

Thus, the natural forces of form and force closure normally operating at the sacroiliac joints and lower lumbar segments and controlling the stability and alignment of the SPR are diminished which, in turn, interferes with the sensory-motor feedback loop governing neuromuscular fine tuning of motion control at the SPR. this is a complex neuromuscular control system that is critical in maintaining skeletal alignment for normal function throughout the spinal axis and in the TMJ, shoulders, hips, pelvic girdle and extremities.

- [24] His report goes into more detail about SPRD and the malalignment syndrome, and how, in his opinion, these explain and contribute to the other problems suffered by Ms. Purewal.
- [25] The defence objected to Dr. Armstrong's report on the basis that the diagnoses of SPRD and malalignment syndrome are not scientifically valid or accepted. Defence counsel argued that these diagnoses represent novel science and should not be admitted by the court. Further, he argued that these diagnoses are the foundation for all the other diagnoses in the report such that, if I determined the diagnoses in issue could not be admitted, the whole of the report must be excluded. He argued the other aspects of Dr. Armstrong's report are not sufficiently independent and must fall with the diagnoses argued to be novel and inadmissible.
- [26] Dr. Armstrong was unshaken under cross-examination. I found him to be a credible and reliable witness. No contrary opinion evidence was tendered by the defence as to validity of SPRD or malalignment syndrome as a diagnosis known within the clinical community.
- [27] The issue on the voir dire was not whether Dr. Armstrong's opinion should prevail or be relied on by the court in final judgment. Rather, the sole issue was whether Dr. Armstrong's opinion should be put before the court for consideration.
- [28] In *R. v. Mohan*, [1994] 2 S.C.R. 9, the Supreme Court of Canada confirmed the four criteria which must be met before expert evidence can be received by the court:
- a) relevance,
 - b) necessity in assisting the trier of fact,
 - c) the absence of any exclusionary rule, and
 - d) a properly qualified expert.

[29] There is no question that Dr. Armstrong is a qualified expert. Dr. Armstrong's opinion provides information which is outside the experience of the court, and is necessary to allow the court to understand the technical nature of the medical evidence. As such, the criterion of necessity is met. There is no exclusionary rule, apart from the opinion rule itself, which would prevent the admission of Dr. Armstrong's opinion.

[30] The defendant's argument primarily focussed on the relevance criterion. The defendant says, in essence, that while the evidence may be logically relevant, its probative value is overborne by its prejudicial effect (Mohan at 21). The defendant relies on the following passage from Mohan at 21-22:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves . The application of this principle can be seen in cases such as *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348, in which Moldaver J. applied a threshold test of reliability to what he described, at p. 353, as "a new scientific technique or body of scientific knowledge" .

[31] The Supreme Court concluded its review of the criteria to be considered in the admission of expert evidence with the following statement at 25:

In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

[32] In *R. v. J.-L.J.*, 2000 SCC 51, the Supreme Court of Canada again tackled the issue of expert scientific evidence. In particular, the Court commented on the debate around "junk science" and the need to preserve and protect the role of the trier of fact (para. 25). The Court referred to the "reliable foundation" test described by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *R. v. J.-L.J.* at para. 33, the Court identified the following factors which may be helpful to a court in assessing the soundness of novel science:

- a) whether the theory or technique can be and has been tested,
- b) whether the theory or technique has been subjected to peer review and publication,
- c) the known or potential rate of error or the existence of standards, and
- d) whether the theory or technique used has been generally accepted.

- [33] The risks in admitting scientific opinion evidence were further discussed in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. Adopting the approach in *R. v. Abbey*, 2009 ONCA 624, the Supreme Court of Canada agreed with a two-step approach. First, an opinion must meet the threshold requirements from *Mohan* (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Next, the court must undertake a second discretionary gatekeeping step:
- [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J., Binnie J.* spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. *Doherty J.A.* summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.
- [34] Finally, the Court concluded its analysis of the gatekeeping exclusionary discretion with the statement: "At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence." (para. 54).
- [35] The evidence of Dr. Armstrong included the following relevant points:
- a) SPRD describes a problem which has been the subject of careful clinical observations by Dr. Armstrong and many physicians, including most psychiatrists, in the lower mainland of British Columbia.
 - b) Malalignment syndrome, and SPRD, are described in a text written by Dr. Wolfgang Schamberger that has been published internationally by the medical publisher, Churchill Livingstone, first in 2002, with a second edition published in 2013.
 - c) Dr. Schamberger's text is peer accepted, and widely heralded as a milestone text in this area.
 - d) Dr. Schamberger is located in Vancouver.
 - e) In 2016 Dr. Schamberger published his work in a prestigious peer-reviewed medical journal, *Physical Medicine and Rehabilitation Clinics of North America*. Dr. Armstrong brought copies of this article with him, although neither counsel asked to see a copy. I have no reason to disbelieve Dr. Armstrong's statement that Dr. Schamberger's work was published in this peer-reviewed journal.
 - f) Chronic, complex low back pain and spinal pain is a very difficult subject, and Dr. Schamberger's work makes a strong contribution to this field.

- g) A diagnosis of malalignment syndrome is based on clinical observation, and can explain neck pain in the absence of low back pain.
 - h) Dr. Armstrong presented a paper to the Trial Lawyers Association of BC in 2013 in which he described SPRD as being dismissed by many clinicians as a non-entity, and the methods of assessment as being controversial. However, in 2020, seven years since that paper was presented, these statements are no longer true.
 - i) In 2020, SPRD assessment is not controversial to people practicing in the field, although it may not be known to people unfamiliar with this area. The method for assessing the alignment of the pelvis is well documented in a number of places and widely used by clinicians in the field, like physiatrists.
 - j) Many orthopedic surgeons may not be familiar with the problem as it is a soft tissue problem and not a surgical problem.
 - k) Dr. Armstrong has personal knowledge that practitioners in the area of the lower mainland are aware of SPRD and malalignment syndrome and diagnose it. Dr. Armstrong does not have personal knowledge of what physiatrists in other regions know about SPRD or malalignment syndrome.
- [36] The plaintiff referred me to two cases in which the BC Supreme Court has recognized SPRD and malalignment syndrome. In *Saopaseuth v. Phavongkham*, 2014 BCSC 887 Mr. Justice Bernard received opinion evidence from Dr. Armstrong regarding SPRD and sacroiliac joint misalignment. Mr. Justice Bernard noted that Dr. Armstrong was cross-examined extensively. He also referred to an opinion from an orthopaedic surgeon, Dr. Sovio, who asserted that Dr. Armstrong's finding of SPRD was without scientific basis and made no anatomical sense. Ultimately, Mr. Justice Bernard accepted the opinion of Dr. Armstrong over that of Dr. Sovio, and found the plaintiff's injuries resulted from a misalignment of his pelvis.
- [37] In *Gill v. Huber*, 2020 BCSC 519, Madam Justice Shergill received Dr. Armstrong's opinion that the plaintiff suffered from SPRD and malalignment syndrome. Dr. Armstrong was cross-examined extensively, and his opinion was countered by an opinion from an orthopaedic surgeon, Dr. Horlick, who did not know what SPRD or pelvic malalignment disorders were. Madam Justice Shergill placed significant weight on Dr. Armstrong's opinion in relation to the cause of the plaintiff's physical injuries, and preferred Dr. Armstrong's opinion to that of Dr. Horlick on the diagnosis, causation and prognosis of the plaintiff's physical and pain conditions. She found Dr. Armstrong's opinion to be medically sound, comprehensive, and consistent with the documentary and other evidence in the case.

- [38] The defendant referred to *Bialkowski v. Banfield*, 2011 BCSC 1045, where the court determined that a clinical diagnostic tool described as QEEG (quantitative electroencephalograph analysis) was novel science deserving of special scrutiny. Ultimately, the court determined that QEEG evidence could only be accepted as part of an opinion of a neurologist trained and qualified in EEG testing and analysis. The court rejected the evidence of QEEG analysis because it was not offered by a qualified expert.
- [39] In *Italy v. Seifert*, 2003 BCSC 501, the court also rejected the use of QEEG analysis on the basis that it did not satisfy the requirements needed to allow for its admission as a novel scientific theory. In *Italy*, the court rejected the use of QEEG analysis for a number of reasons, including that the expert offering the opinion did not have expertise in EEG data and was unable to verify a critical data set which had the potential of rendering any opinion meaningless, two separate QEEP analyses of the same data collected by the expert resulted in different outcomes, the expert admitted that QEEG analysis was controversial, a report of the American Psychiatric Association Task Force concluded that the ability of the QEEG procedure to make various psychiatric determinations was not well established, and the American Academy of Neurology and the American Clinical Neurological Society concluded that QEEG was not recommended for use in court proceedings.
- [40] I find that the cases which reviewed the use of QEEG techniques do not provide a foundation to refuse the admission of Dr. Armstrong's opinion and diagnoses based on SPRD and malalignment syndrome.
- [41] Based on the evidence before me, and as discussed above, I am satisfied that SPRD and malalignment syndrome are recognized in the field of physiatry, and are known to clinicians practicing in British Columbia. These are clinical observations which explain the occurrence of neck pain in the absence of lower back pain.
- [42] I am satisfied that SPRD and malalignment syndrome have been recognized since 2002, have been the subject of an international medical publication, and have been the subject of a peer-reviewed article.
- [43] I am also satisfied that Dr. Armstrong is a properly qualified expert, and his opinion, which includes SPRD and malalignment syndrome as applied to Ms. Purewal, is reliable and will assist me in assessing the relevant facts in this case.
- [44] In the result, Dr. Armstrong's opinion is admissible in this trial.
- b) Injuries and review of medical evidence
- [45] Dr. Cameron was qualified to give his expert opinion in relation to thoracic outlet syndrome ("TOS"), musculoskeletal injuries, headaches, and traumatic brain injuries. He examined Ms. Purewal in December 2018.

- [46] In his opinion, Ms. Purewal developed chronic pain in her neck, head, shoulders and upper back area, particularly on her left side, as a result of the musculoskeletal injuries she suffered in the accident. Further, he found that Ms. Purewal acquired a mild case of TOS as a result of the injuries she suffered to the left side of her neck and to her left shoulder. He stated that TOS can be acquired as a result of muscle spasm in the scalene muscle and upper fibres of the trapezius muscle and alternate lateral cervical paraspinal muscles. Dr. Cameron was of the opinion that Ms. Purewal suffers from cervicogenic headaches and post-traumatic common migraine headaches.
- [47] Under cross-examination, Dr. Cameron testified that psychological injuries often occur later in the recovery process, when the patient realizes that progress is not happening in the way they hoped. This can lead to depression, anxiety, frustration, and can develop into serious psychological issues. These psychological issues make the patient experience the pain more severely.
- [48] Dr. Cameron was rigorously cross-examined, but his opinions did not change. I accept Dr. Cameron's opinion.
- [49] Dr. Aindrias O'Breasil is a psychiatrist qualified to give expert opinion evidence on the diagnosis, treatment, prognosis and vocational impact of psychiatric disorders, traumatic brain injuries, and chronic pain. Dr. O'Breasil examined Ms. Purewal in December 2018, and one week before the trial.
- [50] Dr. O'Breasil was of the opinion that Ms. Purewal experienced anxiety and post-traumatic stress following the accident, which developed into a major depressive disorder. He noted that Ms. Purewal's anxiety increases in certain situations, such as going into crowded areas, or meeting other people. She experiences sleep disturbances, low energy and fatigue. She avoids talking about the accident, and experiences stress from driving. She has become detached from her children and her husband, and has feelings of hopelessness. Dr. O'Breasil characterized Ms. Purewal's anxiety as severe.
- [51] These psychological injuries are secondary to the physical injuries Ms. Purewal suffered in the accident. In addition, Dr. O'Breasil opined that she suffers from chronic physical pain, headaches, and intermittent migraines as a result of the injuries she sustained in the accident.
- [52] Dr. Armstrong was accepted as a neurologist qualified to give expert opinion evidence in the diagnosis and treatment of chronic pain with a neurological foundation. Dr. Armstrong examined Ms. Purewal in January 2020.
- [53] Dr. Armstrong diagnosed Ms. Purewal with a chronic left-sided, upper axial and para-axial myofascial disorder, which resulted in pain in the left side of her neck, chest, upper back and shoulder girdle, a condition known as persistent postural-perceptual dizziness, and a post-traumatic headache disorder.

- [54] Dr. Armstrong also diagnosed Ms. Purewal with sacroiliac joint dysfunction, SPR instability and misalignment, SPRD and malalignment syndrome, which I reviewed above. This constellation of disorders are key factors in the symptoms and physical findings affecting the soft tissues of the spinal axis/para-axis, shoulders, hips and pelvic girdle. These disorders impede Ms. Purewal's recovery. Dr. Armstrong was of the opinion that Ms. Purewal had not been properly diagnosed to date, and therefore had not received treatments which would address these sacroiliac disorders. Appropriate treatments of these disorders would, in his view, assist with Ms. Purewal's further recovery, although his prognosis for a full recovery was guarded, as will be discussed below.
- [55] Dr. Armstrong noted that Ms. Purewal experienced some depression, but he linked this to her physical impairments and chronic pain. He did not diagnose her with an independent major depressive disorder.
- [56] Dr. Armstrong was of the opinion that Ms. Purewal suffered from a complex chronic pain disorder with complications of emotional, cognitive, mental and social distress, non-restorative sleep, fatigue, and diminished energy and physical capacity.
- [57] The defendant called Dr. Atkins, Ms. Purewal's treating neuro-ophthalmologist, as a non-expert, fact witness. The defendant referred to a consultation note prepared by Dr. Atkins. In particular, he focussed on Dr. Atkins' opinion, as set out in the note, that Ms. Purewal did not have a concussion or post-concussive symptoms; that while she may have had a mild cervical strain injury with associated cervicogenic headaches, her ongoing symptoms are atypical in not resolving after three years; and that Ms. Purewal has a high degree of learned (self-perceived) and iatrogenic disability (disability induced inadvertently by medical treatment or diagnosis).
- [58] The defendant agrees that the diagnosis in the clinical note is admissible solely for the fact that the diagnosis was made, and it is not admissible for the truth of the diagnosis: *Seaman v. Crook*, 2003 BCSC 464 at para. 14.
- [59] The defendant argues that the relevance of Dr. Atkins' evidence is that Ms. Purewal failed to call him as a witness. No expert opinion was sought from Dr. Atkins by either party. The defendant argues that an adverse inference should be found against Ms. Purewal for her failure to call Dr. Atkins. Further, the defendant argues that I should find that Dr. Atkins' opinion would be adverse to Ms. Purewal.
- [60] There is no obligation on plaintiffs to call each treating physician as a witness at trial. There was no evidence to establish that Ms. Purewal impeded Dr. Atkins in providing an opinion to the defendant. It is not unheard of for one party to rely on and call as a witness an expert retained by the opposite party.
- [61] In *Kallstrom v. Yip*, 2016 BCSC 829, the court addressed adverse inferences in the context of treating physicians in a motor vehicle case:

- [344] The defendants submit that an adverse inference should be drawn from the failure of Ms. Kallstrom to call as witnesses her treating family doctor, Dr. Izen, and one of her former employers at HUB, Ms. Karen Noseworthy.
- [345] Regarding Dr. Izen, the defendants argued that this was the only physician who treated Ms. Kallstrom extensively both before and after the MVAs and hence was uniquely positioned to explain Ms. Kallstrom's medical conditions and the reasons for medications being prescribed and dispensed right up until the eve of MVA 1. The defendants also argue that Dr. Izen could have provided valuable insight into the extent and duration of Ms. Kallstrom's cocaine use, whether Depo-Provera could indeed have caused the symptoms alleged by Ms. Kallstrom, and also the reason for the termination of Ms. Kallstrom as a patient.
- [346] Regarding Ms. Noseworthy, the defendants argue that this witness could have validated Ms. Kallstrom's allegation that no resumption of employment with HUB was available or feasible upon her return to Vancouver from Saskatchewan in August 2003.
- [347] *Thomasson v. Moeller*, 2016 BCCA 14, is a recent example of the Court of Appeal dealing with the question of an adverse inference being drawn for failing to call a medical witness at the trial of an MVA personal injury claim. The Court stated:
- [34] I first observe that "[w]hether an adverse inference is drawn from failure to call a witness is a question for the trier of fact": *Buksh v. Miles*, 2008 BCCA 318 at para. 33. Nor is a judge bound to draw an adverse inference from the failure of a witness or party to testify: *Weeks v. Baloniak*, 2005 BCCA 193 at para. 12.
- [35] The law relevant to adverse inferences was helpfully summarized in *Zawadski v. Calimoso*, 2011 BCSC 45, where Mr. Justice Voith stated:
- [149] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.) at 287.
- [348] The Court of Appeal held, among other things, that the ability to call the medical witness in question was available to both parties. In *Zawadski v. Calimoso*, 2011 BCSC 45, Voith J. refused the adverse inference because there was "no evidence that the defendants were unable to or, in fact, so much as tried to speak to any of the physicians in question" (at para. 150).
- [349] The same is true in the present case. Furthermore, as in *Zawadski*, the physicians' clinical records were put into evidence pursuant to a document agreement very similar to the one used by the parties in the present case.

- [350] While it likely would have been helpful for the Court to have heard oral evidence from both Dr. Izen and Ms. Noseworthy, it is not appropriate to draw an adverse inference against Ms. Kallstrom for failure to call them as witnesses. The defendants were well aware before trial of the witnesses that Ms. Kallstrom intended to call and there is no reason why they themselves could not have called these individuals as witnesses if they thought they might present evidence helpful to the defence.
- [62] The facts before me are very similar to those described in Kallstrom. I find that Dr. Atkins was equally available to both parties, as demonstrated by his attendance as a witness for the defendant. I decline to draw an adverse inference against Ms. Purewal because she did not call Dr. Atkins as a witness. Consistent with the law set out in Seaman, I cannot receive Dr. Atkin's opinion as set out in the clinical notes as expert evidence.
- [63] I am not satisfied that Dr. Atkins' evidence outweighs the expert opinion evidence of the experts called by Ms. Purewal in this case.
- [64] Ms. Purewal was assessed by Ms. Walker, an occupational therapist who was qualified to provide her opinion in the areas of occupational therapy, cognitive functional capacity, and future care. Ms. Walker assessed Ms. Purewal on three separate occasions in 2019 and 2020.
- [65] Ms. Walker observed that Ms. Purewal was fatigued and irritable in the first two assessments, and while her condition was improved initially during the third assessment, Ms. Purewal's condition deteriorated after one and a half hours to the point she was on the floor holding her head. In her home evaluation, Ms. Walker observed that Ms. Purewal had impaired movement of her neck and shoulder which impaired her function in her daily tasks. She described a "catastrophic" impairment of Ms. Purewal's domestic and parenting responsibilities. As will be clear in my discussion of Ms. Purewal's prognosis for recovery, I do not agree with the descriptor "catastrophic". However, I am satisfied that Ms. Purewal currently experiences a substantial impairment of her domestic and parenting responsibilities.
- [66] Ms. Walker administered a number of standardized tests, but Ms. Purewal was unable to complete them all due to headaches and pain. Each session with Ms. Purewal only lasted approximately 80 minutes, as Ms. Purewal was unable to continue. Ms. Walker noted that Ms. Purewal's visual, vestibular and pain symptoms were easily triggered and did not resolve during the sessions.
- [67] The defendant mounted a significant challenge to the evidence provided by Ms. Walker. He was critical of the fact that Ms. Walker did not conduct a functional capacity assessment or validity testing, and that Ms. Walker was unable to obtain much data. Much time was spent cross-examining Ms. Walker on these issues. However, I am satisfied with the responses provided by Ms. Walker, namely that she did as much as she could, but that Ms. Purewal's injuries prevented a more detailed examination. Ms. Walker was able to provide a professional assessment with the information she had, including Ms. Purewal's inability to complete the testing.

- [68] Ms. Walker also provided her clinical observations on clinical issues such as the presentation of anxiety, depression and trauma-related symptomology. Further, Ms. Walker made certain assumptions as to Ms. Purewal's prognosis. With respect to these observations and assumptions, I prefer the evidence of Drs. Cameron, O'Breasil, and Armstrong who I find are more qualified than Ms. Walker in these areas. With respect to Ms. Purewal's injuries, my reliance on Ms. Walker's evidence is limited to her observations and opinion of Ms. Purewal's level of function at the time of her assessments.
- c) Work and social life
- [69] Ms. Purewal attempted a graduated return to work in March 2017. She worked at Tim Hortons for four hours per day, for four days. The return to work was unsuccessful because Ms. Purewal's injuries prevented her from meeting her job duties, and resulted in increased pain. Ms. Purewal did not return to Tim Hortons, and has held no job since then. Her pain and psychological injuries have increased over time. While she may improve in the future, as of the date of trial she was functionally incapable of working.
- [70] Ms. Purewal underwent a vocational assessment in January 2019, in hopes of becoming an office assistant. However, her pain and headaches have prevented her from fulfilling this ambition.
- [71] Her personal life has been severely affected by her injuries. She no longer has the energy to be the mother and wife she was before. She cannot help her children with their homework. She does not hug and kiss her children, and no longer enjoys any physical touch with her family members. She feels like she is failing her children. She is afraid her husband will divorce her because she no longer wants a physical relationship with him.
- [72] Ms. Purewal no longer sleeps well. She wakes up throughout the night, and suffers from neck pain and discomfort when she tries to sleep. She is always exhausted. Her constant fatigue is a contrast to her energetic personality before the accident. She testified that she is never pain-free.
- [73] Ms. Purewal's husband confirmed the impact the accident has had on his wife. He confirmed that they had a very physical relationship before the accident, and that this is no longer the case. Ms. Purewal does not like him to touch her and recoils from him when he tries to kiss her. Ms. Purewal is now irritable, angry and in pain. He confirmed that Ms. Purewal had no sleep problems before the accident, but that he now has difficulty sleeping in the same bed with her because her sleep is so disturbed.
- [74] Mr. Purewal recounted the change in Ms. Purewal's relationship with their children. Ms. Purewal yells at the children when they come to her for help with their schoolwork. Mr. Purewal recalled one instance in which Ms. Purewal called her daughter stupid and walked away from her. Mr. Purewal testified that he is now responsible for the majority of the homemaking tasks. While before the accident Ms. Purewal would prepare elaborate traditional meals and cook for parties of up to 50 people, she is now only able to prepare

simple foods like snacks and sandwiches. All traditional cooking is now done by Mr. Purewal.

[75] Ms. Shirin Purewal testified that since the accident Ms. Purewal is a totally different person. She shies away from large gatherings, no longer engages with other people at parties, does not dance, and is no longer herself. Ms. Shirin Purewal described Ms. Purewal as a person whose light has gone out. Ms. Purewal no longer meets up with Ms. Shirin Purewal as she did before the accident. If the families plan to get together, it is common now for Ms. Purewal to send her husband and children without her.

3. Causation

[76] In Kallstrom the court summarized the law of causation:

[318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, [1996] 3 S.C.R. 458, repeated many times since, and which include:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[77] The defendant argued that Ms. Purewal's chronic pain could be explained by circumstances other than the accident. For example, the defence argued that Ms. Purewal may seek attention, care, sympathy, relaxation or compensation, and those desires have created either her subjective experience of chronic pain, or a dishonest reporting of her chronic pain. The defence relies on two very old cases, *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 (C.A.) and *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.) in support of his proposition that the onus is on the plaintiff to establish that:

- a) their pain and discomfort is real and does not arise from the plaintiff's desire for such things as care, sympathy, relaxation or compensation,
- b) the plaintiff could not be expected to overcome their pain by their own internal resources or will power, and

- c) they have overcome the improbability that pain will continue beyond the expected recovery period, in the absence of objective symptoms.
- [78] The conception of chronic pain outlined in those earlier decisions has been superseded by a contemporary medical understanding and knowledge of chronic pain now recognized in our courts. Numerous more recent cases have acknowledged the complexity of chronic pain, and have recognized chronic pain as compensable even in the absence of objective findings. These cases include *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, *Park v. Targonski*, 2017 BCCA 134, *Deol v. Sheikh*, 2016 BCSC 2404, and *Moreira v. Crichton*, 2018 BCSC 1281.
- [79] In *Deol*, Madam Justice Griffin addressed the tenor of the argument advanced by the defence herein:
- [109] In the legal system the argument was typically advanced that patients complaining of this kind of disorder [chronic pain] were exaggerating for the sake of an ongoing legal claim, given that medical science could not understand why someone would have pain in the absence of an objective ongoing injury.
- [112] Medical science has come to accept that some people can suffer an increased and prolonged sensitivity to pain from what to others appears to be a minor injury.
- [80] In arguing that Ms. Purewal's reported pain results from her desire for gain, or other such reasons, the defendant put into issue Ms. Purewal's credibility. In considering the credibility of a witness, the court must examine all of the evidence and determine whether the witness' evidence is consistent with the preponderance of the probabilities recognizable as reasonable: *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357 (B.C.C.A.). In cases where there is little objective medical evidence, the court must be cautious in accepting the plaintiff's evidence and must consider the evidence in the case as a whole: *Thompson v. Helgeson*, 2017 BCSC 927.
- [81] In addition to Dr. Atkins' evidence, which I have already discussed, the defendant relied on a variety of evidence including reports Ms. Purewal made to an occupational therapist following the accident, video surveillance of Ms. Purewal in the years following the accident, and Ms. Purewal's pain diary.
- [82] Dealing first with the video surveillance evidence, the defendant characterized Ms. Purewal as walking freely for extended periods of time, moving freely and easily, moving her neck from side to side, stooping and squatting to look at items in a store, carrying items in her arms, and hugging her husband. The defendant hired an investigator to conduct surveillance on Ms. Purewal from October 2017 to virtually the date of trial. More than 70 days of surveillance were conducted. Three reports were prepared, and one and a half hours of surveillance video was played at the trial, and entered into evidence.

- [83] Notwithstanding the extensive surveillance conducted on Ms. Purewal, I saw no "smoking guns" which contradicted Ms. Purewal's position at trial. I did not find the surveillance footage to be inconsistent with Ms. Purewal's testimony. Ms. Purewal does not allege that she is incapable of walking or moving, that she is incapable of driving, or is incapable of carrying light items. She says that she cannot carry heavy loads, cannot walk as long as she did before, and cannot move as freely as she did before the accident.
- [84] The video I saw confirmed that she walks at a slow to moderate pace, that she only carries very light items, and that she does not hug or put her arms around her children or husband. While the defendant pointed out that she hugged her husband on the video, what I noted was that in the one and a half hours of video surveillance played in evidence, only once did Ms. Purewal put her arm around her husband for a brief moment, and not once did she hug, touch, or put her arm around her children. I saw Ms. Purewal often holding her arm, and rubbing her neck. I saw Ms. Purewal sitting down to take breaks.
- [85] I find that Ms. Purewal's credibility is unaffected by the video surveillance evidence. If anything, I find that the extensive video surveillance confirms the testimony of Ms. Purewal.
- [86] In 2016 Ms. Purewal was assessed twice by Thomas Watson, an occupational therapist retained by ICBC. Mr. Watson was not called as a witness at trial. He prepared two reports, one in July 2016 and one in October 2016.
- [87] Ms. Purewal agreed under cross-examination that in July 2016, two months after the accident, she told Mr. Watson that she walked two to three kilometers each day, and rated her neck pain as ranging from four to five out of ten, and her shoulder pain as ranging from two to three out of ten. She further relayed to Mr. Watson impaired function in her grooming, bathing, sleep, meal preparation, shopping, laundry, cleaning, child care, and home maintenance.
- [88] Ms. Purewal also agreed that a few months later in October 2016 she told Mr. Watson that she walked four to five kilometers each day, that her neck pain ranged from two to three out of ten, and that she rated her left shoulder pain as one out of ten. She continued to experience limited range of motion, numbness in her left arm, and irritability, but reported improving mood, and improving sleep except when suffering from a headache. While she was beginning to re-engage with her children, she still could not engage in physical activities with them. The report of Mr. Watson appears to indicate that he assessed her emotional state, and found the likelihood that Ms. Purewal suffered from PTSD to be low. When presented with this aspect of the report, Ms. Purewal responded that her emotional issues came on later, and continue to worsen. This is consistent with the opinion given by Dr. O'Breasil and the evidence of Dr. Cameron under cross-examination.
- [89] The defendant argued that the statements made by Ms. Purewal to Mr. Watson in 2016 were inconsistent with her direct evidence where she explained how her pain had worsened since the accident. I disagree. The visits of Mr. Watson all took place in the first 6 months after the accident. In her direct evidence Ms. Purewal described her pain from the date of the

accident to the date of trial. In the four years between the accident and the trial, Ms. Purewal's pain has worsened. This was noted by the medical experts. Dr. O'Breasil expressed the opinion that her depression, anxiety and PTSD all interact with her ongoing pain. He also noted that pain scales can be misleading, as people have good days and bad days. If a person reports a low pain scale one day, they could report high pain another day. To be meaningful, these pain scales must be repeated on a consistent basis over a long time.

- [90] I do not find the statements in Mr. Watson's reports, which Ms. Purewal readily admitted she said, in any way undermine her credibility.
- [91] The defendant also referred to Ms. Purewal's pain diary, arguing that it was incomprehensible that she could not remember when she made the entries, and questioning the purpose of the document. The tenor of the argument was that Ms. Purewal was attempting to mislead the court with her pain diary. However, Ms. Purewal did not rely on her pain diary in her case. Its very existence was only revealed when she was under cross-examination. It had not been produced to her counsel, and at no point did she assert that it was a contemporaneously made document. Her explanation for its creation was that someone recommended she write things down to help her deal with her stress, and she did not think it was relevant or something that she needed to produce. The defendant's attempt to raise a credibility issue in relation to this document utterly fails.
- [92] The defendant raised a number of additional credibility challenges, none of which I found persuasive. The defendant has not persuaded me that Ms. Purewal was anything other than forthright and honest in her testimony. I am satisfied that Ms. Purewal's pain asserted in this action does not arise from a desire for secondary gain, such as care, sympathy, or compensation.
- [93] Drs. Cameron, O'Breasil and Armstrong all opined that the accident was the cause of the injuries they diagnosed. Under cross-examination Dr. O'Breasil acknowledged that Ms. Purewal's condition may have improved somewhat initially; however, he confirmed that Ms. Purewal's psychological injuries arose in response to her failure to fully recover from her physical injuries and her resulting chronic physical pain, headaches and intermittent migraines. The psychological disorders suffered by Ms. Purewal are caused by the physical injuries she suffered in the accident.
- [94] Dr. Armstrong opined that the accident resulted in the injuries to her upper spinal axis/para-axis and SPR, which then resulted in her myofascial pain and sacroiliac joint dysfunction, SPRD and malalignment syndrome. The accident further caused the complex headache and chronic pain disorders suffered by Ms. Purewal. Dr. Armstrong determined that Ms. Purewal was unlikely to have suffered a concussion in the accident, and so was unlikely to have suffered a central vestibular or ocular disorder.

[95] Dr. Cameron opined that Ms. Purewal probably did suffer a mild traumatic brain injury in the accident. He also opined that Ms. Purewal developed acquired thoracic outlet syndrome and chronic pain in her neck, head, shoulders, and upper back as a result of the accident. He further opined that Ms. Purewal's headaches were post-traumatic musculoskeletal or cervicogenic headaches which resulted from the injuries she suffered in the accident, and that she has developed anxiety and depression from her accident-related injuries.

a) Conclusion on causation

[96] I find that Ms. Purewal suffers from chronic pain in her neck, head, shoulders, upper back, particularly focussed on her left side. She has mild TOS in the left side of her neck and shoulder. She suffers from cervicogenic headaches, post-traumatic headaches, and migraines. Secondary to her physical injuries, she suffers from anxiety and post-traumatic stress, which have developed into a major depressive disorder. She suffers from sacroiliac joint dysfunction, SPR instability and misalignment, and SPRD and malalignment syndrome.

[97] I am satisfied that all of Ms. Purewal's injuries, as set out above, arose as a result of the accident at issue. Further, I am satisfied that Ms. Purewal had no pre-existing psychological make-up which is the origin of her current psychological injuries. In other words, the defendant's negligence which resulted in the accident is the proximate cause of her injuries.

B. What is Ms. Purewal's prognosis?

[98] Dr. Cameron opined that Ms. Purewal's chronic pain will probably result in a permanent partial disability. She continues to suffer from TOS, which might be alleviated with Botox treatments. She has ongoing intermittent headaches, which arise from her soft tissue injuries. He was of the view that her ongoing psychological problems are prolonging her recovery from her chronic pain, and are significantly contributing to her inability to return to competitive work.

[99] While Dr. Cameron found that Ms. Purewal suffered a mild traumatic brain injury in the accident, she did not have any residual adverse effect from that injury.

[100] Dr. O'Breasil noted that many of Ms. Purewal's symptoms had become chronic since the accident. However, he also was of the view that she may experience some improvement with further treatment, including cognitive behavioral therapy. He noted that she is still young, and expected that she will be capable of returning to work in the future. He recommended that Ms. Purewal be reassessed after one year of significant cognitive behavioral therapy, and after further psychiatric consultations and treatments.

[101] Dr. O'Breasil opined that Ms. Purewal had received appropriate treatment for her conditions. He noted that Ms. Purewal had been attending a psychiatrist, and supported the choice of medications Ms. Purewal had been prescribed.

[102] Dr. Armstrong opined that Ms. Purewal's physical problems had not resolved as of the time he examined her, but he was also of the view that she possibly had not reached her maximum physical improvement. He was of the opinion that resolution of her myofascial pain was key to her overall recovery. He felt she had the potential to return closer to her pre-accident health following further rehabilitation specific to her SPRD and malalignment syndrome. However, he was also of the view that if her rehabilitation goals could be achieved, she may see improvement but the extent of the improvement was unknown given the fact that she has now been suffering from her injuries for four years.

[103] Without further treatment, Dr. Armstrong opined that Ms. Purewal would continue to experience a complex headache disorder, complex chronic pain disorder, and chronic disorders flowing from her underlying chronic sacroiliac joint dysfunction. While Dr. Armstrong was of the view that further rehabilitation efforts should be made, particularly given the fact Ms. Purewal is only 36 years old, he considered it unlikely that her chronic pain will fully resolve. Dr. Armstrong concluded:

Presently, her prognosis is very guarded in respect to her achieving a reduction in her pain and fatigue and further recovery of function as to her sleep disorder, mental health, and physical capacity sufficient to resume and sustain her full-time employment, to return to and sustain her former quality of life, and to regain the level of function in her housekeeping, homemaking, marriage, parenting, and emotional and mental status and in her social and family recreational activities that she enjoyed before the MVA.

[104] I find that Ms. Purewal will continue to suffer chronic pain, TOS, and headaches throughout her life. Although with further treatment these conditions will improve from where Ms. Purewal is today, a complete recovery is unlikely. I accept Dr. Armstrong's opinion that she will likely have some improvement with appropriate treatment of the issues involving her sacroiliac joint, but that the extent of that improvement is unknown at present. With respect to her psychological injuries, I find that there is a significant likelihood that Ms. Purewal will see improvement with appropriate treatment, including cognitive behavioural therapy.

C. Is Ms. Purewal entitled to damages?

[105] The plaintiff claims non-pecuniary damages, and the following pecuniary damages: loss of income earning capacity (past and future), cost of future care, loss of housekeeping capacity, and special damages.

1. Non-pecuniary damages;

[106] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

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

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[107] Ms. Purewal seeks \$185,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is \$50,000 to \$120,000.

[108] Ms. Purewal relies on *Kim v. Lin*, 2016 BCSC 2405, *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, *Redmile v. Beaulieu*, 2019 BCSC 1571, and *Broad v. Clark*, 2018 BCSC 1068, where awards ranged from \$175,000 to \$185,000 for plaintiffs suffering from soft tissue injuries and chronic pain with resulting psychological or psychiatric injuries. However, in some of these cases the plaintiff had additional serious injuries, such as in the *Kim* case where the plaintiff had L-spine disc prolapse, compression of the S1 nerve, SI joint osteoarthritis, and L5 - S1 disc calcification and compression and her disability was found to be permanent.

[109] The defence relies on *McColl v. Sullivan*, 2020 BCSC 137, where the plaintiff was awarded \$120,000 in non-pecuniary damages for her severe TOS, myofascial pain, cervicogenic headaches, and psychological symptoms resulting from her injuries, all of which were expected to continue throughout her life. The defence argues that the plaintiff in *McColl* had much more severe and permanent injuries than Ms. Purewal, and so \$50,000 would be a more appropriate award for Ms. Purewal.

[110] Ms. Purewal argues that the impact on her of the extensive surveillance conducted by ICBC ought to be taken into account in a non-pecuniary award. Ms. Purewal says the extensive surveillance over several years, and at times up to six hours in duration, was unwarranted and extremely distressing to her. She testified that she was made to feel like a criminal.

- [111] I agree that the surveillance conducted by ICBC was excessive and unwarranted. For all the effort expended by ICBC on surveilling Ms. Purewal, nothing contradictory to her evidence was recorded. However, I am not satisfied that it would be appropriate to award Ms. Purewal non-pecuniary damages in relation to this surveillance. Non-pecuniary damages are awarded to compensate plaintiffs for damages suffered as a result of the negligence of the defendant. The impact on Ms. Purewal from the surveillance in this case is not the proper basis for an award of non-pecuniary damages.
- [112] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in the case at bar.
- [113] Ms. Purewal was 32 years old at the time of the accident. As a result of the accident, she suffers from chronic pain in her shoulders, back, neck and head, and suffers from serious and ongoing headaches. In addition, the persistence of her injuries over the past four years has created her anxiety, stress, and depression. Her relationships with her husband and children have been seriously affected. She cannot be physically affectionate with them, she is short tempered with her children, and she is restricted in what she can do. Her sleep is seriously impacted. She used to gain considerable pleasure from her work, and that is now lost to her. She used to enjoy social gatherings and entertaining people; these activities are also severely impacted by her injuries.
- [114] However, the medical opinions suggest that there is room for optimism. With appropriate treatment, her pain may become more manageable and her psychological problems may improve. She may be able to work again.
- [115] I find that an award of \$80,000 for non-pecuniary damages is appropriate in this case.

2. Loss of earning capacity

- [116] The purpose of an award for loss of earning capacity is to restore the plaintiff, as best as possible, to the position she would have been in had the accident not occurred. The plaintiff must establish an impairment in her earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [117] The Court in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 set out the factors to consider in assessing a loss of earning capacity:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;

3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[118] Both past and future loss of earning capacity address the same loss. However, there are differences in how this loss is assessed before and after trial. To the extent past loss of capacity relies on facts which are capable of proof, those facts must be proven on the balance of probabilities. To the extent past loss of capacity relies on hypothetical facts, the court must be satisfied that there is a real and substantial possibility of such facts occurring. The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies. Future losses are almost always based on hypothetical facts, and are assessed on the standard of real and substantial possibility with consideration of relevant contingencies.

a) Pre-trial loss of earning capacity

[119] Dr. Cameron opined that Ms. Purewal has developed significant psychological problems, including anxiety, anxiety attacks and depression following the accident. He found that her psychological problems caused irritability, mood swings, anger outbursts, difficulty making decisions, and decreased self confidence. He was of the opinion that these problems, coupled with her ongoing chronic pain and secondary sleep disorder due to the chronic pain, have rendered Ms. Purewal incapable of returning to work in a competitive fashion at a job similar to the one she held at the time of the accident.

[120] Dr. O'Breasil was of the view that Ms. Purewal was totally vocationally disabled, and has been so since the accident. Dr. O'Breasil noted that the symptoms contributing to her disability included her depressed mood, anxiety, low energy, fatigue, and cognitive difficulties.

[121] Ms. Walker opined that Ms. Purewal was non-employable at the time of her assessment. She was of the view that Ms. Purewal would not be able to work in a time-pressured environment, such as her previous employment, and was not able to manage her emotions or symptoms. She also found that Ms. Purewal's impairment in her left arm would preclude her from engaging in manual work, such as that required to work as a fast food server.

[122] I am satisfied that Ms. Purewal has proven that she lost her employment as a result of her injuries. I am also satisfied that the worsening of her injuries since the accident have prevented her from returning to work before trial.

- [123] Ms. Purewal retained Mr. Coleman, an economist, to calculate her pre-trial loss of income. Mr. Coleman calculated this loss to be \$117,800, based on her anticipated earnings to the date of trial as set in the collective agreement of the Hospital Employees Union. The defendant does not dispute this calculation. I award Ms. Purewal past loss of earning capacity in the amount of \$117,800.
- b) Future loss of earning capacity
- [124] While Ms. Purewal has proven on a balance of probabilities that she is presently totally vocationally disabled, the future may not be so bleak. Ms. Purewal has established that there is a real and substantial possibility that her disability will continue into the future. There is no question that this disability represents a substantial impairment of her future earning capacity. She is less capable overall of earning income from all types of employment, cannot take advantage of all job opportunities which might otherwise be available to her, and is less valuable to herself as a person capable of earning an income in a competitive market.
- [125] In her testimony, Ms. Purewal suggested that before the accident she planned to work until she was 65 years old. I agree that Ms. Purewal's future loss of earning capacity claim should be determined on the basis that she planned to work until she reaches age 65 on January 9, 2049.
- [126] Mr. Coleman prepared an economic loss report calculating Ms. Purewal's future loss from the date of trial, assuming a yearly income of \$35,776, which includes non-wage benefits. The defendant does not dispute this yearly income figure, although he does dispute the period of time over which it should be calculated.
- [127] The present value of Ms. Purewal's loss of future earnings to age 65, using the multiplier and yearly income presented by Mr. Coleman, is \$529,628.
- [128] However, the medical evidence in this case suggests that Ms. Purewal will recover some of her function, and may be able to learn to manage her psychological conditions, improving her ability to return to the work force.
- [129] I have found that Ms. Purewal will continue to suffer from chronic pain, TOS and headaches throughout her life, although she is likely to improve from where she is today. She may also see improvement in the issues involving her sacroiliac joint. There is a significant likelihood that Ms. Purewal will see improvement her psychological injuries with appropriate treatment, including cognitive behavioural therapy.
- [130] As such, while Ms. Purewal will suffer some ongoing future loss, there is a real and substantial possibility that her symptoms will improve to the point that she can re-enter the workforce in the future. I find that it is appropriate to apply a contingency to Ms. Purewal's future loss of earning capacity claim to reflect my finding that some further recovery is likely. I discount Ms. Purewal's future loss of earning capacity by approximately one third to reflect the likelihood that she will re- enter the workforce in the future. I award Ms.

Purewal \$350,000 for loss of future earning capacity.

3. Cost of future care

- [131] Ms. Purewal submits that in any claim for cost of future care, the test to be applied is whether a reasonably-minded person of ample means would incur the expense: *Bystedt v. Hay*, 2001 BCSC 1735 at paras. 162-163, aff'd 2004 BCCA 124. I agree with this statement of the law. In addition, the plaintiff is entitled to services, medications and other items of care that are reasonably necessary to preserve and promote her mental and physical health, and which she is likely to access in the future: *Sendher v. Wong*, 2014 BCSC 140 at paras. 192-195.
- [132] Dr. O'Breasil recommended that Ms. Purewal continue using sertraline, and Wellbutrin or bupropion. He also recommended Ms. Purewal be referred to a psychologist trained in cognitive behavioural therapy to treat her anxiety, PTS symptoms, and chronic pain, for 24 weekly sessions, followed by 18 to 36 more treatments for another 18 months.
- [133] Dr. Armstrong recommended that Ms. Purewal work with a physiotherapist to develop a gentle progressive exercise program to align and stabilize her SPR, and the use of a sacral belt to assist in maintaining her alignment. He also recommended 18 initial sessions with a senior physiotherapist with experience in sacroiliac dysfunction, SPRD and malalignment syndrome, followed by up to one year of treatments twice a month. Dr. Armstrong recommended Ms. Purewal participate in supervised exercise at a gym, and maintain a regular walking program using a pedometer. He recommended cervical medial branch blocks to determine if joint irritability is contributing to her neck and shoulder pain. He recommended the purchase of a sacral belt, which Ms. Purewal had already purchased at about the time of trial. To address her psychological injuries, Dr. Armstrong recommended Ms. Purewal participate in approximately 15 sessions with a clinical psychologist. Additional therapies which Dr. Armstrong indicated may be appropriate, depending on the outcome of her additional care, included injections in her sacroiliac joints, and prolotherapy.
- [134] Dr. Cameron recommended that Ms. Purewal be assessed by a physiatrist or neurologist regarding Botox injection therapy for her TOS, and also that she continue Botox injections to treat her headaches. He recommended physical therapy to address her chronic pain, and Rizatriptan for management of her headaches.
- [135] Ms. Walker prepared a report setting out the cost of various future care items. As I have noted above, some of the items were recommended by physicians. Other items were based on Ms. Walker's own assessment. Mr. Coleman has prepared a present value for the cost of future care items.
- a) Botox
- [136] Botox was recommended for Ms. Purewal's headaches and her TOS. Ms. Walker presented a yearly cost of \$2,700 for Botox treatments. It was not clear in the evidence as to how long such treatments should continue. Ms. Purewal argues that she should be awarded costs for

10 years of Botox treatments. The defendant argues that Botox treatments should be limited to two years. I am satisfied that some award should be made for Botox treatments. However, I am not satisfied that Ms. Purewal has proven a need for 10 years of treatments. I award a total amount of \$7,000 for Botox treatments.

b) Medications

[137] Ms. Walker provided an annual cost of \$2,203 for five medications currently taken by Ms. Purewal: Rexulti, Mirtazapine, Duloxetine, Tylenol, and Advil. Mr. Coleman provided a present value of \$67,961 for the cost of these medications over Ms. Purewal's lifetime. The defendant argued that medications should be restricted to the two years following trial, given the optimistic prognosis of Dr. O'Breasil.

[138] I find that Ms. Purewal will continue to use medications to address her pain needs over her lifetime, but that her medication needs will reduce over time. I award Ms. Purewal \$30,000 for medications.

c) Psychological interventions

[139] Both Ms. Purewal and the defendant agree that the costs of psychological interventions are reasonable, and I award \$15,000 for such costs.

d) Occupational therapy

[140] Mr. Coleman provided a present value of \$4,684 for the occupational and rehabilitation assistance recommended by Ms. Walker for one year (56 sessions over one year). The defendant objects to this cost, arguing that Ms. Purewal is at risk of being over-medicalized during the same years she will be receiving ongoing psychological interventions. I agree that the number of sessions recommended by Ms. Walker is excessive. I allow \$1,000 for occupational and rehabilitation sessions.

e) Visual therapy

[141] Ms. Purewal claims expenses related to visual therapy, including sessions, glasses, and taxis. I am not satisfied that Ms. Purewal has met the burden of proving that such therapy is required or necessary. No medical professional provided an opinion in relation to such therapy. I decline to make an award for visual therapy.

f) Yoga

[142] Ms. Walker recommended private yoga therapy to address Ms. Purewal's chronic pain. As Ms. Purewal's chronic pain is likely to continue throughout her life, I agree that Ms. Walker's recommendation of 24 sessions of private yoga is reasonable and that these sessions will assist Ms. Purewal in developing additional skills to manage her pain. I award \$2,400 in relation to these expenses.

g) Physical rehabilitation

[143] Physical rehabilitation was recommended by both Dr. Armstrong and Dr. Cameron. Ms. Walker provided costing for physical rehabilitation and vestibular rehabilitation. The need for vestibular rehabilitation was not proven, and I make no allowance in this respect. I award \$10,000 for physical rehabilitation.

h) Domestic services

[144] I am not satisfied that Ms. Purewal will use cleaning services, as recommended by Ms. Walker. While Ms. Purewal has suffered a loss of homemaking capacity, I am not satisfied that recovery of future care costs for domestic services is appropriate.

4. Loss of homemaking capacity

[145] Damages for loss or impairment of homemaking capacity may be awarded where the plaintiff has established she has lost the ability to perform household tasks as she did previously, even where such services are replaced gratuitously by family members: *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28.

[146] Ms. Purewal relies on *Fatin v. Watson*, 2018 BCSC 306 in which a 78-year-old retired physician claimed loss of homemaking capacity as his wrist injury prevented him from carrying out home maintenance, renovations, landscaping, gardening, and other activities around the house. The court awarded \$55,000 for loss of homemaking capacity, recognizing that such an award "is intended to compensate the plaintiff for the lost value of work that the plaintiff would have undertaken, but is now incapable of performing. It recognizes the value of the loss of an asset." (para. 47).

[147] Before the accident, Ms. Purewal was primarily responsible for housekeeping and cooking. These chores have now fallen to her husband. She is no longer able to assist with housework to any great degree, and is no longer able to host parties, or cook for her family.

[148] If Ms. Purewal's condition improves, it is likely that she will be able to assist with some of the chores again in the future. In addition, as she reaches a more advanced age, it is reasonable to assume that she would engage additional help around the home even if she had not been injured. Therefore, under this head of damage I am primarily focussed on the loss of capacity she has experienced to date, and will experience until she reaches the age of 70 - a date where I find she would most likely require additional help with household tasks.

[149] While I have declined to award domestic services as a cost of future care, I do note that Ms. Purewal advanced a claim with a present value of \$37,714, representing house cleaning charges of \$35/hour for three hours per week for one year, three hours every two weeks for seven years, and three hours every four weeks until Ms. Purewal is 85 years old. Damages under the head of loss of homemaking capacity are assessed, not calculated. Nevertheless, it is useful to understand what the market-based claim is valued at.

[150] I award Ms. Purewal \$20,000 for loss of housekeeping capacity. This reflects the likelihood that her condition will improve somewhat following the treatments anticipated in this judgment, and the likelihood that she would have required additional household assistance after the age of 70 even if she had not been injured.

5. Special damages.

[151] In the event I found that Ms. Purewal's injuries were caused by the accident, the defendant did not dispute the total of \$12,883.52 claimed by Ms. Purewal as special damages. As I have found that Ms. Purewal has met the burden to establish causation, I am satisfied that Ms. Purewal is entitled to the special damages she has claimed. I award Ms. Purewal \$12,884 in special damages.

IV. Conclusion

[152] Ms. Purewal is awarded the following damages against the defendants, jointly:

a) Non-pecuniary damages

\$80,000

b) Past loss of earning capacity

\$117,800

c) Loss of future earning capacity

\$350,000

d) Cost of future care

\$65,400

e) Loss of housekeeping capacity

\$20,000

f) Special damages

\$12,884

[153] Total damages are awarded in the amount of \$646,084.

[154] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Ms. Purewal at Scale B.

"Baker J."

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