

CANADA / JUDGMENT

## Rabbani-Nejad v. Sharma

2020 BCSC 58

COURT

Supreme Court of British Columbia

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2020 BCSC 58 Rabbani-Nejad v. Sharma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rabbani-Nejad v. Sharma,

2020 BCSC 58

Date: 20200117

Docket: M194200

Registry: New Westminster

Between:

Sarah Rabbani-Nejad

Plaintiff

And:

Sarthak Sharma, Kirastyn Kee and Peter Ingram

### Defendants

Corrected Reasons for Judgment: The first page of the Reasons for Judgment was amended on January 29, 2020 to correct the spelling of the name of the counsel for the Plaintiff.

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

Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Defendants:

G. Thomson

Place and Dates of Trial:

New Westminster, B.C.

January 6-10, 2020

Place and Date of Judgment:

New Westminster, B.C.

January 17, 2020

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## Introduction

- [1] The plaintiff claims damages for personal injuries sustained in two separate motor vehicle accidents. The first ("MVA #1") occurred on September 20, 2015 when the vehicle she was driving was rear-ended while stationary by a vehicle driven by the defendant Sarthank Sharma. The second ("MVA #2") occurred on October 20, 2016 when the vehicle in which she was travelling as a front seat passenger was rear-ended by a vehicle driven by the defendant, Kirastyn Kee, and owned by the defendant, Peter Ingram.
- [2] Liability is admitted in respect of both MVA #1 and MVA #2.
- [3] On July 22, 2019, the plaintiff was involved in a third accident ("MVA #3") during which the vehicle she was occupying was again rear-ended. While there is no pleading in respect of MVA #3, the plaintiff relies on the decision of our Court of Appeal in *Bradley v. Groves*, 2010 BCCA 361 for the proposition that the plaintiff is entitled to claim the entirety of her loss from all three collisions in this proceeding.
- [4] At the outset of the trial, counsel advised the court of the parties' agreement that all of the injuries found to have been caused by MVA #1 and MVA #2 are indivisible and that there are no issues as to coverage limits. Counsel for the defendants further advised that the defendants are content that he continue to act on behalf of all of them.

Evidence Presented at Trial on behalf of the Plaintiff

## The Plaintiff

- [5] The plaintiff is a 39 year old physiotherapist. She obtained her Bachelor of Human Kinetics degree in 2004 from the University of British Columbia ("UBC"). In 2006, she obtained a Masters degree in Physiotherapy, also from UBC. She subsequently obtained a licence in acupuncture as well as certification in manual therapy.
- [6] In 2006, the plaintiff commenced employment as a physiotherapist at both Royal Columbia Hospital and at a private clinic called Village Physiotherapy in North Vancouver.

- [7] By 2014, she was working full-time at Village Physiotherapy, working five days and treating approximately 60 to 75 patients per week. She testified that she did not find the work to be physically draining.
- [8] The plaintiff took maternity leave after the birth of her first son, Quinn, for several months from late 2012 to mid-2013. Thereafter, she returned to full-time work at Village Physiotherapy. Although she became pregnant with her second child in the spring of 2014, she testified that she continued to work full-time and that her pregnancy did not significantly impact her ability to work.
- [9] The plaintiff's second son, Marcus, was born on January 4, 2015. The plaintiff again took maternity leave, planning to return to full-time work at Village Physiotherapy on November 24, 2015. She also planned to increase her levels of physiotherapy certification and training once Marcus started school, which would have increased her income as a physiotherapist.
- [10] The plaintiff testified that, prior to MVA #1, she was in good health and was physically fit and active. She was an athlete who engaged in various sports, including baseball and elite-level soccer, even after Marcus' birth. In addition, she hiked the Grouse Grind several time each week with Marcus on her back and engaged in recreational running while pushing a stroller. She also did the majority of the household cleaning chores at home.
- [11] The plaintiff testified that, although she had been involved in a rear-end collision on November 15, 2014 when she was eight-months pregnant with Marcus, the lumbar back and sacroiliac ("SI") joint pain that she experienced as a result of that collision had fully resolved by the time of MVA #1.

## MVA #1

- [12] On September 20, 2015, MVA #1 occurred as the plaintiff was alone in her car on her way to play in a soccer game. She was stopped on the street in order to allow the vehicle ahead of her to parallel park. She testified that she had no warning of the collision. She felt immediate left-side cervical and lumbar back pain. She felt dizzy and had a "light-headed" and foggy sensation. She was taken to hospital in an ambulance. She was diagnosed as having suffered whiplash. In the hours and days that followed, her neck became very sore and she began having severe headaches. Her lower back continued to be painful.
- [13] The plaintiff began a program of physiotherapy (both manual and needle injections) as well as at-home active rehabilitation exercises which helped manage her symptoms.
- [14] The plaintiff testified that, in the weeks and months following MVA #1, she continued to experience pain, primarily in her neck and mid and lower back. Her headaches continued. Her symptoms increased with activity, more so her neck pain than her back and SI joint pain. She had trouble sleeping. Often, during the night, she experienced nerve pain and cramping in her right arm, hand, and fingers. Sitting for extended periods and attending to Marcus' needs was painful for her as was any attempt to perform household duties. She

continued her physiotherapy sessions as well as her active rehab at home.

- [15] The plaintiff returned to work as a physiotherapist on November 24, 2015, as she had planned to do prior to MVA #1. She testified that her physiotherapy treatments had resulted in her pain symptoms having become manageable and she described herself as "feeling pretty good". She started working four days per week and approximately six hours per day, treating between 30 to 45 patients per week. She soon found that the work exacerbated her pain symptoms. Her headaches, neck and back pain, as well as the cramping and discomfort in her right hand, flared up. She testified that the magnitude of the flare ups depended upon the number of patients she treated each day. She found that she could manage her pain symptoms by modifying and spreading out the activities that exacerbated them. She played less soccer, staggered her housekeeping tasks, and decreased her hiking and running activities. She also slightly reduced the number of physiotherapy patients she saw each day.
- [16] She testified that her return to work resulted in the level of her pain symptom improvement declining from approximately 80% to 50%.

## MVA #2

- [17] MVA #2 occurred on October 20, 2016. The plaintiff was in the front seat passenger in a vehicle being driven by her husband. Her children were in the back seat.
- [18] The plaintiff testified that she immediately felt pain in her neck and mid-back both of which seized such that she had difficulty moving. She described the discomfort as "very painful". She testified that, although she returned to work the day after MVA #2, she found it extremely difficult to perform her physiotherapy tasks, had to take several breaks and limit her patients to those with less demanding physiotherapeutic needs. She experienced muscle spasms in her neck and back, had headaches daily, and the fingers on her right hand tended to seize up. She had trouble sleeping and performing housekeeping chores due to the pain.
- [19] The plaintiff continued her physiotherapy treatments and at-home rehabilitation, which included daily stretching and exercises three to four times per week. She took Tylenol and Advil as needed for pain.
- [20] The plaintiff testified that, by 2017, the acuity of her pain symptoms had subsided somewhat. She had fewer flare ups but they intensified if she sat for long periods, moved or twisted the wrong way. Physical activity, including recreation (soccer, running, and hiking) exacerbated her pain symptoms. She found it difficult to sit at a computer to complete patient charting. She began taking additional days off from work because she was finding that four days per week were too much for her.

- [21] The plaintiff testified that she took three weeks off from work in January 2018 to give her body a chance to heal. She felt much better when she returned to work but by May 2018, she again found that working four days straight was too much for her. She reduced her work to three days per week. She found that by doing so she was better able to manage her pain symptoms.
- [22] The plaintiff was diagnosed with pelvic congestion syndrome (during menses and unrelated to the MVAs) and, in April 2019, underwent a surgical day-procedure aimed at decreasing the blood flow to her pelvic area. She testified that the syndrome continues to give her discomfort for three to four days each month and increases the difficulty she has performing physiotherapy on patients. She testified that her recreational activities help her manage this syndrome because they increase blood flow.
- [23] The plaintiff testified that her back pain had essentially resolved by mid-July 2019 and that she was "thinking" about increasing her work schedule from three to four days per week.

### **MVA #3**

- [24] On July 22, 2019, the plaintiff's vehicle was rear-ended by yet another vehicle while she was stopped at an intersection. She testified that, through her rear view mirror, she saw the other vehicle approaching her and was able to brace herself for the impending impact. She testified that she felt an immediate pain spasm in her neck as well as localized left-side low back and left leg pain. She also felt an ache in her left forearm which she attributed to having braced against the steering wheel prior to impact. The plaintiff went to work the following day but did not go to work the day after that because of her pain symptoms.

### **July 29, 2019 Functional Capacity Evaluation**

- [25] On July 29, 2019, seven days after MVA #3, the plaintiff attended a functional capacity evaluation ("FCE") conducted by Andrew Hosking. She testified that, at the time, she was suffering from low back and neck pain but was able to distinguish her MVA #3-caused discomfort from the pain she was still experiencing from MVA #1 and MVA #2, the latter of which symptoms had, since MVA #3, settled back to their pre-MVA #3 levels.
- [26] The plaintiff testified that the pain caused by MVA #3 was localized lower back pain and it did not limit her ability to function during the FCE.

### **Current/Ongoing Pain Symptoms and Other Circumstances**

- [27] The plaintiff testified that, although all of her pain symptoms have subsided since MVA #3, she continues to have daily headaches, neck, lower back pain, and right hand cramping which limit her activities. The pain is exacerbated by physical activity. She also continues to have headaches and cramping in her right fingers. She has reduced her recreational and homemaking activities.

- [28] The plaintiff continues to work three days per week, approximately 6 hours per day. She treats approximately 27 patients per week, earning \$54 per patient (60% of the \$90 fee). She testified that she finds her job stressful because of pain and is exhausted at the end of her work day.
- [29] She testified that, although her husband is supportive of her, their relationship has become strained as a result of her pain-caused irritability, fatigue, and reluctance to socialize.
- [30] The plaintiff testified that, although she would like to upgrade her professional qualifications by taking additional courses, she has not done so because she would find the sitting and studying too painful and because she needs to use the time she would otherwise devote to the courses to recuperate from her current work regime. She also testified that the financial cost of the courses is prohibitive given her reduced work hours. Moreover, she is reluctant to pay for a course only to find that she is physically unable to complete it.

### **Yasha Rabbani-Nejad ("Yasha")**

- [31] Yasha is the plaintiff's husband. They married in 2011. He too is a physiotherapist. He and the plaintiff met at UBC while both were taking their physiotherapy degrees.
- [32] Yasha described the plaintiff before MVA #1 as having been happy, easygoing, fun, adventurous, and driven person who enjoyed her work and her family. Together, they engaged in outdoor activities such as running and hiking and often socialized with friends. He also described the plaintiff as a good athlete who was stoic and rarely complained about pain.
- [33] Yasha testified that, after MVA #1, the plaintiff was not herself. She became anxious, quiet, and was apprehensive when in a vehicle. She complained daily of pain and discomfort which was not her character. She appeared to have difficulty performing day-to-day tasks, such as housework. Their recreation together became less frequent and more curtailed. He testified that, rather than dwell over her pain, the plaintiff worked hard at rehabilitation, staying active, and doing her best to manage her pain.
- [34] Yasha testified that, shortly before MVA #2 occurred, the plaintiff's condition had improved and she was doing much better.
- [35] Yasha testified that the plaintiff showed obvious distress and discomfort immediately after their car was impacted during MVA #2. She complained of a sore neck. The plaintiff regressed and was set back both physically and emotionally as a result of MVA #2. She continued with her rehabilitation and with her work as best she could, but found it difficult both physically and emotionally. He testified that she was in obvious pain.

- [36] Yasha testified that the plaintiff's reduction of her work days from four to three days per week had a significant financial impact on their family. He began to work longer hours in order to subsidize the family's income but they, nevertheless, had to forego vacations and social outings they otherwise would have enjoyed. He confirmed that the additional day off from work resulted in the plaintiff's overall health improving.
- [37] Yasha testified that MVA #3 resulted in a significant negative impact on the plaintiff emotionally. It also resulted in her previous injuries flaring up.
- [38] Yasha testified that, currently, the plaintiff has some days that are better than others but she remains less active, recreationally and socially, and less involved than she was prior to MVA #1. He testified that, while their recreational activities together are fulfilling, they are not without the plaintiff experiencing pain.
- [39] On cross-examination, Yasha agreed that the plaintiff is slowly getting better and, through continued rehabilitation, is working her way towards trying to become the person she was before MVA #1. He also confirmed that Markus will be starting kindergarten full-time in September 2020 and that the plaintiff will then have more time to devote to herself and, hopefully, additional days at work.

#### Cheryl McNeight

- [40] Ms. McNeight has been a physiotherapist since 1994. She described physiotherapy as a physically demanding job.
- [41] She has worked with the plaintiff at Village Physiotherapy since late 2015. She described the plaintiff as a highly competent, caring, and conscientious physiotherapist who works hard during her shifts.
- [42] After MVA #1, Ms. McNeight provided 24 physiotherapy treatments to the plaintiff during the period May 2016 to June 2019.
- [43] Ms. McNeight testified that her general observations of the plaintiff while at work after MVA #1 were that the plaintiff's demeanour "ebbed and flowed"--she had good days and bad days and appeared to be struggling at times. From a review of her clinical notes of her treatments with the plaintiff, Ms. McNeight testified that her objective observations were confirmatory of the plaintiff's subjective complaints of pain and discomfort in her neck, shoulder, cervical, and thoracic facet joints.

#### Andrew Hosking

- [44] Mr. Hosking is a physiotherapist who conducted FCE of the plaintiff on July 29, 2019. His report is dated August 15, 2019. The defendants raised no issue regarding his qualifications.

[45] Mr. Hosking's evaluation of the plaintiff was, by any measure, thorough and exhaustive. He found that the plaintiff provided her full physical effort throughout the assessment. He opined that the plaintiff's subjective reports of pain and her perceived level of disability were generally consistent with his objective findings and considered them reliable.

[46] In Mr. Hosking's opinion, the plaintiff:

- a) has a need for workplace accommodations in order to meet the physical demands of her pre-MVA #1 occupation as a physiotherapist;
- b) exhibits clear signs of limited capacity for sustained postures of neck flexion, neck extension and forward bending. She also exhibits signs of specific weakness of her left shoulder girdle musculature as well as grip of her right hand (although Mr. Hosking conceded on cross-examination that there is no comparative measure of the plaintiff's grip strength pre-MVA #1);
- c) has a definite mismatch between the strength capacity of her upper body and lower body. While Mr. Hosking acknowledged on cross-examination that this was consistent with the plaintiff's history of having played soccer at a high level, he pointed out that the differential was also consistent with her having sustained an upper body injury;
- d) is limited for reaching to chest level or higher due to pain. Her outer range of reaching is also limited with her right hand;
- e) is limited for prolonged periods of sitting due to pain aggravation and neck stiffness, necessitating regular postural and mobility breaks.
- f) faces reduced competitive employability due to her MVA-related physical limitations and likely remains limited in the patient population she is able to assist and manage as a result of her upper body strength and static posture limitations and reduced capacity for right hand grip functioning. These limitations present a barrier to her completing the full range of manual therapy techniques available to physiotherapists. She will be limited to jobs that allow for frequent changes of position and that have limited need for repeated or frequent bending or prolonged postures of neck flexion; and
- g) is likely to remain durably employable three days per week for six hours per day but is not likely to have the endurance capacity to expand her hours of work.

[47] Mr. Hosking's opinions were not impugned during cross-examination.

### **Dr. Tony Giantomaso**

[48] Dr. Giantomaso is a physiatrist who was qualified without objection as an expert in the field of physical medicine. He interviewed and conducted a physical examination of the plaintiff on September 9, 2019. He also reviewed various clinical records and other documents relating to the plaintiff's medical history. His expert report is dated September 22, 2019.

- [49] Although the plaintiff advised Dr. Giantomaso that she felt that she was 80% better before she returned to work after MVA #1 and only 50% better after returning to work prior to MVA #2, and 80% better more than two-and-a-half years later just prior to MVA #3, he considered those figures to have been "completely arbitrary" and nothing more than an indication of the sense the plaintiff had of her improvement relative to how she was prior to MVA #1. Indeed, it was the plaintiff's evidence that she has little understanding of the use of percentage in such contexts because they are not qualitative and that she was uncomfortable with assigning such values to her recovery. Dr. Giantomaso pointed out that myofascial pain such as that suffered by the plaintiff "waxes and wains" over time.
- [50] Dr. Giantomaso opined that the plaintiff suffered the following injuries as a result of the MVAs:
- a) MVA #1
    - i. cervical sprain/strain (AD-II);
    - ii. thoracic sprain/strain (grade 1-2);
    - iii. lumbar sprain/strain (grade 1-2);
    - iv. cervicogenic headaches with occasional migrainous features
  - b) MVA #2
    - i. exacerbation and aggravation of her thoracic sprain/strain;
  - c) MVA #3
    - i. exacerbation and aggravation of low back pain on the left side.
- [51] Dr. Giantomaso was unable to opine that the plaintiff's right-hand numbness and cramping was caused by any of the MVAs. As to the plaintiff's headaches, Dr. Giantomaso stated his belief that they exhibit some features of, but not all criteria of, migraines.
- [52] In Dr. Giantomaso's opinion, the plaintiff's MVA-related myofascial (soft-tissue) injuries are chronic. He opined that she will likely continue to experience chronic pain to some degree long term in the future.
- [53] Finally, Dr. Giantomaso observed that the plaintiff's reported physical limitations are reasonable given her injuries.
- [54] Dr. Giantomaso's opinions were not impugned during cross-examination. While Dr. Giantomaso stated that the timing of Mr. Hosking's FCE, having been conducted only seven days after MVA #3, was less than ideal. He qualified this in stating the FCE evaluator would be in a better position to assess the validity of the plaintiff's functional capacity than he is.

Evidence Presented at trial on behalf of the Defendants

**Dr. Amarjit Arneja**

[55] Dr. Arneja is a physiatrist who, like Dr. Giantomaso, was qualified without objection as an expert in the field of physical medicine. He too interviewed and conducted a physical examination of the plaintiff, in his case on September 25, 2019. He too reviewed the plaintiff's clinical records. His expert report is dated October 11, 2019.

[56] Dr. Arneja opined that MVA #1, MVA #2, and MVA #3 caused the plaintiff to sustain "acceleration-deceleration injuries to her spine leading to injuries and conditions including neck pain, right hand and forearm pain with tingling/cramping of right fourth and fifth fingers, cervical occipital headaches, reduced energy level, and reduced functional capabilities".

[57] Specifically, Dr. Arneja's diagnoses and objective assessments of the plaintiff's condition, as set out in his report, are as follows:

- a) neck - whiplash-associated disorder 2 (WAD2) due to interspinous ligament strain and myofascial pain. Her neck pain has reduced as a result of treatments received;
- b) right hand/fingers - myofascial pain with trigger points of hypothenar and forearm muscles, including flexor digiti minimi, abductor digiti minimi, palmaris brevis, flexor carpi space ulnaris, flexor digitorum, superficialis. There is no evidence of ulnar nerve compression or radiculopathy or thoracic outlet syndrome. Dr. Arneja opined that repetitive strain from pushing a stroller and work-related and recreational activities, painting at home are contributing factors;
- c) cervical occipital headaches - (tension muscular headaches) triggered by neck pain. Dr. Arneja opined that family stressors, demanding work and recreational activities are aggravating factors; and
- d) thoracolumbar pain - due to myofascial pain of quadratus lumborum muscles and left iliolumbar ligament strain.

[58] Dr. Arneja indicated in his report that it is probable the plaintiff's symptoms will improve with the use of the following recommended treatments:

- a) blood work to rule out systemic perpetuating factors;
- b) an MRI of the brain and cervical spine to rule out intracranial pathology and cervical disc herniation/annular tear;
- c) a goal-oriented interdisciplinary intervention, including a team of physiatrists, kinesiologists/physiotherapists, occupational therapist and psychologists to assist in pain management, strengthening of weak muscles to enhance functional capabilities;
- d) cognitive behaviour therapy; and
- e) counseling to control and reduce stressors.

- [59] Dr. Arneja was steadfast in his opinion that the plaintiff's injuries will likely resolve if she undergoes the treatment modalities he has recommended. He suggested that the reason she still has symptoms is likely because the treatments she has received since MVA #1 were not appropriate. He eventually, but reluctantly, agreed on cross-examination that the plaintiff may be one of the 20% of injured people who do not respond to treatment. He also reluctantly agreed that the plaintiff's condition may be chronic but, again, maintained that with "proper treatment", her condition is likely to improve.
- [60] Dr. Arneja suggested that the plaintiff's symptoms may be attributable, at least in part, to financial, family, lifestyle, and other stressors in her life which are negatively affecting her recovery. For example, he stated that the plaintiff may be reinjuring her neck when she "heads" a ball during soccer.
- [61] Dr. Arneja stated the following in his report under the heading "pre-existing injuries, which are not stated by Ms. Sarah Rabbani-Nejad":

There is documentation of a motor vehicle accident in the notes of Dr. E. Henry dating October 7 (sic), 2016, in the section of "Past Medical History," December 18, 2014, rear-ended. Neck pain daily, 3-4

- [62] It was plain on cross examination that Dr. Arneja misinterpreted Dr. Henry's (the plaintiff's G.P.) clinical note of a visit on October 17, 2016, three days prior to MVA #2. The reference to neck pain was to the ongoing pain from injuries the plaintiff sustained in MVA #1, not the December 2014 accident.

### Credibility and Reliability

- [63] The plaintiff was an honest, forthright, and reliable witness (counsel for the defendants conceded as much in his closing submissions). She readily conceded points that were potentially detrimental to her case. She tended to downplay her symptoms and was not prone to exaggeration. She struck me as a stoic person who is not easily sidelined and is determined to do her best to get on with her life. She was a credible and reliable witness and I accept her evidence in its entirety.
- [64] I also found Ms. McNeight to have been a sincere and objective witness who, despite her working relationship with the plaintiff, properly refrained from any attempt to be partisan towards the plaintiff and her case. She stuck to the facts as she understood them. I accept her evidence in its entirety.
- [65] I recognize that it is naturally for a husband to be supportive of his wife's personal injury claim. Generally, I found Yasha to have been an honest witness who tried to do his best to give his evidence objectively. However, I found that, at times, Yasha tended to downplay the plaintiff's physical capabilities and over-emphasize a sense of anguish and despair regarding what the plaintiff and their family have been through as a result of her pain symptoms. As noted above, I observed the plaintiff to be a stoic individual who has done her best to

recover from her injuries. Although I find that Yasha was a credible witness, I rely on the plaintiff's evidence regarding her level of physical and emotional distress as well as her capabilities over that of her husband.

- [66] Mr. Hosking was an impressive witness who I found to be forthright, objective, and non-partisan in giving his testimony. I accept his opinions and assessments in their entirety.
- [67] Drs. Giantomaso and Arneja both have impressive credentials and provided the court with helpful insight into the plaintiff's MVA-related injuries and prognosis. I found Dr. Giantomaso's assessment of the plaintiff's condition to be objective and he gave his evidence in an articulate and forthright manner. I have no difficulty accepting his opinions.
- [68] Dr. Arneja was cross examined at some length. Although it was apparent that he was desirous of giving the court the benefit of his extensive expertise and experience, he became overly anxious to do so. He was argumentative, evasive and, at times, judgmental. Occasionally, he strayed beyond his area of expertise. Many of his answers were unnecessarily lengthy and prolix, even when asked simple "yes" or "no" questions. He provided complex answers to uncomplicated questions.
- [69] As mentioned, Dr. Arneja repeatedly asserted that the plaintiff's injuries will likely resolve if she undergoes the treatment modalities he has recommended. However, it is noteworthy that the plaintiff has undergone the first two of Dr. Arneja's recommended treatments, namely, myofascial pain management and active rehabilitation therapies, for over four years in the past but to no avail. It is also noteworthy that not one of the plaintiff's treating physicians, or any of the other practitioners she consulted after MVA #1, has recommended the cognitive behaviour therapy or counselling recommended by Dr. Arneja.
- [70] I accept Dr. Giantomaso's opinion evidence over that of Dr. Arneja to the extent that it differs.

## Causation

- [71] The legal test for causation is the "but for" test--the plaintiff must prove on a balance of probabilities that, but for the defendant's negligence, she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32 at paras. 8-10; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28-29; and *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [72] The classic statement of the law of causation was stated by Mr. Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: "causation need not be determined by scientific precision". It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff need only establish a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.

- [73] I do not accept Dr. Arneja's opinion that the plaintiff's complaints of pain after MVA #1 are the result of physio-social stressors in her life resulting from family and other responsibilities. His opinion in that regard was based entirely upon speculation and conjecture and his general view that, if the plaintiff received appropriate treatment modalities, there is no other reasonable explanation for her chronic condition. The evidence is overwhelming that the plaintiff's pain symptoms were and continue to be the result of the MVA #1 and MVA #2 which were exacerbated by MVA #3 despite the treatments and other steps she has taken towards resolving her pain.
- [74] I am satisfied on the whole of the evidence that the plaintiff sustained the following physical injuries as a result of MVA #1:
- a) a sprain/strain to her cervical, thoracic and lumbar back muscles;
  - b) myofascial whiplash injury to her neck (WAD 2);
  - c) cervicogenic headaches.
- [75] Although Dr. Giantomaso was unable to opine that the plaintiff's right-hand numbness and cramping were caused by MVA #1, Dr. Arneja was of that opinion. I accept the plaintiff's evidence that she never had those symptoms prior to MVA #1 and find that they were caused by that collision.
- [76] The plaintiff's evidence, which I accept, is that her symptoms improved after each of the MVAs but that MVA #2 set back her recovery from her MVA #1 injuries significantly. I find that MVA #2 exacerbated and aggravated the plaintiff's myofascial neck and back injuries.
- [77] In this case, the defendants have conceded that the injuries suffered by the plaintiff in MVA #1 and MVA #2 are indivisible. Accordingly, the defendants are jointly and severally liable to her for the damages arising from the injuries she suffered as a result of those accidents: Bradley, at para. 32.
- [78] With respect to the injuries sustained by the plaintiff as a result of MVA #3, I accept the plaintiff's evidence that the left-side lower back pain and pain in her left arm were caused by MVA #3 and are divisible from the injuries she sustained as a result of MVA #1 and MVA #2. Her evidence in this regard is corroborated by an ICBC Physiotherapy Initial Report prepared two days after MVA #3 indicating she was treated only for pain in her lower left hip and back region. There is no indication that she received any treatment for her neck on that occasion. I accept the plaintiff's evidence that her divisible MVA #3-related injuries, including the aggravation of her neck pain, resolved within two months.
- [79] I find that MVA #3 also aggravated the plaintiff's injuries from MVA #1 and MVA #2. In other words, MVA #3 made worse what MVA #1 and MVA #2 created in a manner that cannot be distinguished from the injuries suffered in those earlier MVAs. Accordingly, MVA #1 and MVA #2 remain the cause of the entirely indivisible injuries suffered by the plaintiff under the "but for" test: Bradley, at para. 37; Scoates v. Dermott, 2012 BCSC 485 at paras. 164-165.

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Assessment of Damages**Non-pecuniary Damages**

- [80] The assessment of non-pecuniary damages takes into the account the well-established factors from *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An award under this head is intended to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Factors commonly taken into account include the age of the plaintiff, nature of the injury, severity and duration of pain, extent of any disability, extent of emotional suffering and impairments to the plaintiff's life, including impairments to family, marital, and social relationships, physical and mental abilities, and loss of lifestyle.
- [81] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Boyd v. Harris*, 2004 BCCA 146; *Zamora v. Lapointe*, 2019 BCSC 1053, at paras. 54-56.
- [82] Counsel for the plaintiff seeks a non-pecuniary award of \$100,000, relying on the decisions of this court in *Patterson v. Gauthier*, 2019 BCSC 633; *Cummings v. Tellier*, 2019 BCSC 2067; and *Cottrell v. Bates*, 2019 BCSC 1992.
- [83] The decision in *Patterson* involved a 32-year-old physiotherapist who was diagnosed as suffering from chronic cervical, thoracic and lumbar pain, ongoing left-sided SI joint dysfunction and chronic cervicogenic headaches (at para. 45). Her injuries were found to be serious but not debilitating, and many of her limitations closely match those described by the plaintiff. Ms. Patterson was awarded \$80,000 in non-pecuniary damages.
- [84] In *Cummings*, a 27-year-old plaintiff suffered a WAD2, with myofascial injury to her cervical spine, right upper back, and right scapular areas. She was barely able to function beyond working and caring for her family. She was a stoic individual who demonstrated an ability to work through her pain symptoms. She was awarded non-pecuniary damages of \$95,000 net of a 10% deduction for a pre-existing lower back injury.
- [85] In *Cottrell*, a 56-year-old plaintiff suffered neck pain that extended through her shoulder and into her right arm that never went away. She ultimately took an early retirement and scaled back her gym attendance, housekeeping routines, and interactions with her family. She was awarded \$100,000 in non-pecuniary damages.
- [86] Counsel for the defendants submits that the evidence warrants an award of non-pecuniary damages in the amount \$65,000, relying on the decisions of this court in *Poulin v. Armstrong*, 2019 BCSC 926; *Mills v. Graham*, 2019 BCSC 641; and *Owen v. Peljhan*, 2017 BCSC 423.
- [87] In *Poulin*, a 14-year-old plaintiff sustained chronic upper back, neck pain, and associated headaches that were likely to affect her indefinitely. At the time of trial, she was 20 years old, in her third year of Kinesiology, and planning to obtain a Master's degree in Physiotherapy and thereafter pursue a career in that field. She was regarded as a high-level athlete whose

abilities had been diminished. She gave up swimming and was no longer able to perform any of her previous athletic activities at the level she had prior to her injuries. She was awarded \$65,000 in non-pecuniary damages.

- [88] In *Mills*, a 55-year-old massage therapist sustained chronic neck, upper back and shoulder pain, along with associated headaches, as a result of a WAD 2 injury in a motor vehicle accident. She had good days and bad days with flare ups. She reduced her work hours. She could no longer bicycle ride as avidly as she did before her injuries, ultimately, stopping altogether. The medical evidence indicated that there was little or no potential for improvement in her symptoms. She was awarded \$70,000 in non-pecuniary damages.
- [89] In *Owen*, a financial planner who was an avid runner, hiker, and boxer was injured in a motor vehicle accident in 2011 at the age of 37. She was off work for two-and-a-half months. Her injuries, principally to her neck and shoulder muscles, were determined to be chronic. She continued to enjoy an avid lifestyle. There was some evidence of pre-existing depression. The court found that, although her injuries had a detrimental impact on her enjoyment of life, they were not debilitating and had not caused any significant emotional trauma or serious marital discord. She was awarded \$75,000 in non-pecuniary damages.
- [90] In the case at bar, prior to MVA #1, the plaintiff was a healthy, physically active, and competitive individual who enjoyed playing soccer, hiking, and running at an elite level. Her life was relatively pain and stress-free, other than what is typical given the everyday exigencies and contingencies of family and working life. There is no evidence that she suffered from any significant pre-existing health or pain issues that impacted her daily life or any of the activities she enjoyed. Her pelvic congestion syndrome caused her discomfort for approximately three days per month but not to the extent that it affected her enjoyment of life.
- [91] In this case, the experts are largely in agreement that the culmination of the MVAs led the plaintiff to suffer from ongoing chronic soft tissue injuries to the cervical, thoracic, and lumbar spine as well as posttraumatic cervicogenic headaches. The plaintiff gave cogent evidence about her ongoing symptoms, how they wax and wane day-to-day, and factors that cause them to flare up. However, I find that, overall, the plaintiff's condition is slowly improving, but are unlikely to resolve completely.
- [92] I find that, from and after MVA #1 to the present, the plaintiff engaged in a reasonable and proper active rehabilitation regime in an attempt to return to her pre-MVA physical condition and, as a result, she was generally able to function on a day-to-day basis--albeit with pain, discomfort, and flare-ups. I accept her evidence that she has suffered an impairment of her marital and social relationships as a result of her MVA-related injuries. I also accept that she has had to give up and/or reduce her housekeeping, social, and sporting activities as a result of these injuries.

- [93] Although the plaintiff continues to be an active and competitive person, her performance and enjoyment of her athletic endeavours has been significantly diminished by her MVA-related injuries. She no longer plays soccer at the elite level that she did prior to MVA #1. Rather, she plays at two levels below the elite level and, even at that, does not enjoy the game as much because she finds it painful and physically draining. Her enjoyment of running has also been diminished. Although she continues to run and participate in races, she does so at the "open" level rather than the "elite" level.
- [94] I accept Dr. Giantomaso's opinion that the plaintiff will likely continue to experience chronic pain at least to some degree long term in the future.
- [95] After considering all of the evidence and the submissions of counsel, as well as the case authorities they rely upon, I conclude that an appropriate award of non-pecuniary damages in this case is \$85,000.

### **Past Loss of Earning Capacity**

- [96] Compensation for past wage loss is based on the value of the work that the plaintiff would have, not merely could have, earned, but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Mills v. Graham*, 2019 BCSC 641, at para. 82.
- [97] An assessment of past wage loss requires that the plaintiff demonstrate a real and substantial possibility that the income would have been earned: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Mills v. Graham*, at para. 82.
- [98] I do not accept Dr. Arneja's speculation or the defendants' submission that the plaintiff reduced her work days from four to three days per week, even in part, to facilitate her lifestyle, the balancing of her career with that of her husband, family challenges outside of work or medical issues unrelated to the MVAs. I accept the plaintiff's evidence that she did so solely because of the MVA-related pain she was enduring in her physically-demanding profession. I find that it is unlikely she would have reduced her working hours had the MVAs not occurred.
- [99] Although the plaintiff gave evidence that, shortly before MVA #3 she was "thinking about" slowly increasing her work days, and that after MVA #3 she stopped thinking about it, I find that the reason she did so was likely the exacerbation of her pre-MVA #3 injuries caused by MVA #3. I also find that, although the exacerbation of the plaintiff's neck pain caused by MVA #3 resolved within a relatively short time such that the pain was back to its pre-MVA #3 level, the plaintiff's decision to continue working three days per week rather than slowly increasing her workdays, as she had thought about doing prior to MVA #3 taking place, was reasonable in the circumstances and given her ongoing pre-MVA #3 pain symptoms.
- [100] I find that the plaintiff has demonstrated a real and substantial possibility that she would have continued to work four days per week but for the MVAs.

[101] The plaintiff's income for the relevant periods was as follows:

Year

Employment

Maternity

Total

2013

\$18,726

\$17,945

\$36,671

2014

\$55,558

\$55,558

2015

\$6,938

\$25,700

\$32,638

2016

\$71,224

\$71,224

2017

\$70,398

\$70,398

2018

\$58,742

\$58,742

[102] There is significant evidence in this case regarding the plaintiff's struggles at work after her return in November 2016. She found the newly installed electronic charting system very difficult due to increased neck pain, headaches, and cramping in her right hand. She found the physical demands of the job, particularly with larger and heavier patients, to be challenging due to her pain symptoms. She testified that there were days when she barely

made it through her shift. She used hot packs and breaks during her shift to attempt to find relief. She avoided as best she could treating patients with difficult injuries requiring onerous manual manipulations. In 2017, the plaintiff began to decline work on the occasional Friday. In January 2018, she took three weeks off work to attend treatment and attempt to recuperate from her pain symptoms. Commencing May 4, 2018, the plaintiff began working only three days per week because she found that working four days was too physically exhausting and painful for her. As Mr. Hosking pointed out, and I find, the plaintiff's limitations were caused primarily by neck pain, left shoulder musculature, and weakness of grip in her right hand.

- [103] The plaintiff's evidence is that, following MVA #2, she missed four days of work in 2017 as a result of her MVA-related injuries, April 14, May 12, June 9 and August 25. In January 2018, she took three weeks off work due to her injuries. Commencing May 4, 2018, the plaintiff reduced her work from four to three days per week. The evidence is that, between MVA #1 and the date of trial, the plaintiff lost income from 832 appointments. Her gross income per appointment would have been \$54. Accordingly, the plaintiff's gross loss is \$44,928. Counsel for the defendants is largely in agreement with this amount but submits there should be a reduction of 30% in consideration of negative contingencies. As set out above, I have rejected the defendants' submission that such contingencies are present in this case.
- [104] The parties are in agreement that a 20% reduction of the plaintiff's gross past loss of income-earning capacity is appropriate as an allowance for income tax that would otherwise have been payable by her on income of \$44,928.
- [105] I award the plaintiff \$36,000 for past loss of earning capacity.

### **Future Loss of Earning Capacity**

- [106] An award for future loss of earning capacity recognizes that a plaintiff's capacity to earn income is an asset that has been taken away. If a plaintiff's permanent injury limits her capacity to perform certain activities and consequently impairs her income-earning capacity, she is entitled to compensation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8. The plaintiff must demonstrate both impairment to her earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss. The standard of proof is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.
- [107] Once that threshold is met, the plaintiff may prove the amount of loss by one of two calculation approaches, as set out by the British Columbia Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140 at para. 32:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward v. Berezan*, 2007 BCCA 150, by Bauman J. in *Chang v. Feng*, 2008 BCSC 49, and by Tysoe J.A. in *Romanchych v. Vallianatos*, 2010 BCCA 20, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending

upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), or a capital asset approach, as in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa v. Wickware*, 1999 BCCA 88. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

See also *Mills v. Graham* 2019 BCSC 641 at para. 87.

[108] The task of the court is to assess the future loss of income-earning capacity, not attempt to calculate it mathematically. Since the course of the future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong. The proper deduction (usually a percentage) will depend on the facts of each case, including the plaintiff's occupation, but generally it will be small: *Brewster v. Li*, 2013 BCSC 774 at para. 142, quoting *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Raikou v. Spencer*, 2014 BCSC 1 at para. 83.

[109] Where an award of damages based upon the permanency of an injury or functional incapacity is sought, it is incumbent upon the plaintiff to demonstrate the permanency of her injuries with cogent evidence. Such evidence is present in this case. Dr. Giantomaso opined that the plaintiff is likely to experience chronic pain "to some degree long term in the future".

[110] Generally, this is not a case involving a plaintiff who has no clear earnings history or involves consideration of factors such as her being rendered less capable overall of earning income from all types of employment, being less marketable or attractive as a potential employee, having lost the ability to take advantage of all job opportunities that might otherwise have been open, or being less valuable to herself as a person capable of earning income in a competitive labour market. Here, the plaintiff was well established as a registered physiotherapist. She had worked for the same employer for almost nine years prior to MVA #1. Her employment and rate of pay was steady. The basis upon which she earned her income allows for an easy measurement and, thus, her loss is easily measured. In my view, the quantification of any future loss of income-earning capacity should be assessed using the earnings approach as opposed to the capital asset approach.

[111] I do not accept that Mr. Hosking's FCE of the plaintiff is invalid merely because it was conducted seven days after MVA #3. Although the timing of the FCE was less than ideal, its results do not stand alone. The evidence corroborates its findings. Although the divisible

MVA #3-related injuries (left side of low back and left arm pain) were present at the time of the FCE, the plaintiff's evidence, which I accept, was that she was able to distinguish the pain symptoms after MVA #1 and MVA #2 from those caused by MVA #3 and that her functional capacity limitations were unrelated to her MVA #3-related pain. Mr. Hosking's findings demonstrated that the plaintiff's functional limitations were due primarily to neck, upper cervical, and shoulder girdle musculature, as well as weakness in her right hand. None of those injuries was related to MVA #3.

- [112] The plaintiff's evidence was that, prior to MVA #1, she intended to return to working five days per week once Marcus entered kindergarten in September 2020, at which time she would be 40 years old. The evidence regarding the patient load at Village Physiotherapy is such that she would have had no difficulty filling her extra days with treatments.
- [113] Counsel for the defendants submits that the plaintiff has not demonstrated a real and substantial possibility that her WAD 2 injury, that waxes and wanes with good days and bad days, reaches the level of a lifetime impact that would justify an award for loss of future earning capacity to age 65, as is sought by the plaintiff. I agree.
- [114] The plaintiff's evidence was that her pain symptoms have improved after each of the MVAs and that she continues to improve. I recognize that Dr. Giantomaso's opinion is that the plaintiff will likely continue to experience chronic pain to some degree for the long term, but I am not persuaded that her pain will debilitate her to the extent that she will be unable to work full time for the rest of her career to age 65.
- [115] Rather, I find there is a real and substantial possibility that the plaintiff will experience some ongoing functional incapacity but her symptoms will likely improve such that she will be able to increase her work days from three to four days per week within a reasonable period of time after Marcus begins kindergarten in September 2020. I also find there is a real and substantial possibility that the plaintiff will be able to increase her work days to five days per week at some point in time thereafter.
- [116] I find that there is a real and substantial possibility that, but for MVA # 1 and MVA #2, the plaintiff would have worked four days per week until the end of August 2020 and, commencing September 2020, five days per week for at least several years before retirement. I am not persuaded that the plaintiff has demonstrated a real and substantial possibility that she would have worked full-time to age 65 (February 27, 2040).
- [117] I am also not persuaded that the plaintiff would have taken only two weeks off per year for vacation. I find that, based upon the plaintiff's evidence as a whole, there is a real and substantial possibility she would have taken an average of four weeks off per year.
- [118] In addition, I find that there is a real and substantial possibility that the plaintiff's current pay of \$54 per patient hour will increase over the remaining course of her career.

- [119] There is ample evidence in this case supporting a real and substantial possibility that, but for MVA #1 and MVA #2, the plaintiff would have furthered her training and been able to increase her income as a result. Prior to MVA #1, the plaintiff was a driven and competitive individual who had obtained a number of additional certifications and licenses. She was motivated to excel in her profession and obtain additional qualifications. She was not one to "rest on her laurels". The MVAs thwarted her aspirations in that regard. She attempted one needling course but found that her neck was too sore and uncomfortable. She gave up pursuing further training. As the evidence of both Ms. McNeight and Yasha made clear, these advanced courses are demanding and exhausting, requiring long days on weekends. I am satisfied that there is a real and substantial possibility that the plaintiff's MVA-related injuries will preclude her from successfully completing those courses.
- [120] The evidence discloses that there are significant financial benefits associated with taking this advanced training for physiotherapists. Yasha has parlayed his further training into a lucrative practice that includes elite athletes. In 2018, he earned approximately \$133,000 working full-time. In 2019, he earned approximately \$140,000. Ms. McNeight charges her patients \$100 per half-hour treatment, verses the \$90 that the plaintiff charges. As noted, each receives 60% of that amount.
- [121] Taking into account of all of the foregoing, including positive and negative contingencies and vicissitudes of life and the real world, I find that a fair and reasonable assessment of the plaintiff's future loss of earning capacity is \$200,000.

#### Loss of Housekeeping Capacity

- [122] The plaintiff has abandoned her claim for loss of housekeeping capacity.

#### Cost of Future Care

- [123] The plaintiff claims under this head for seven physiotherapy sessions per year at \$90 per session (\$630 annually) for the remainder of her working career. Both Dr. Giantomaso and Mr. Hosking recommend continuing physiotherapy.
- [124] In my view, there is a real and substantial possibility that the plaintiff will require ongoing physiotherapy for several years. Drs. Giantomaso and Arneja opined that, in addition, the plaintiff may benefit from other treatment modalities including a kinesiology program, clinical counselling, a further FCE, as well as an occupational therapy assessment.
- [125] The plaintiff seeks an award of \$12,495 under this head, based upon her having ongoing future case needs to age 65. The defendants submit that an award of \$5,600 is reasonable.
- [126] I assess the plaintiff's entitlement under this head of damages at \$9,000.

**Special Damages**

[127] The parties are in agreement that the plaintiff is entitled to judgment for special damages in the amount of \$5,341 less \$371 that has already been advanced, for a total of \$4,970.

**Conclusion**

[128] The plaintiff is entitled to judgment against the defendants, jointly and severally, in the following amounts:

a) Non-pecuniary damages:

\$85,000

b) Past Loss of Earning Capacity:

\$36,000

c) Future Loss of Earning Capacity:

\$200,000

d) Cost of Future Care:

\$9,000

e) Special Damages:

\$4,970

TOTAL:

\$334,970

[129] The plaintiff is entitled to court ordered interest on the awards for past wage loss and special damages.

**Costs**

[130] Subject to any submissions counsel wishes to make, the plaintiff is entitled to costs at Scale B.

"G.C. Weatherill J."

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