

CANADA / JUDGMENT

Sandhu v. Morris

2023 BCSC 35

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 35 Sandhu v. Morris IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Sandhu v. Morris, 2023 BCSC 35 Date: 20230109 Docket: M187109 Registry: Vancouver Between: Karenjit Kaur Sandhu Plaintiff And Michelle Marie Morris, Seflet Burovic, Coast Mountain Bus Company Ltd., and South Coast British Columbia Transportation Authority d.b.a. TransLink Defendants Before: The Honourable Justice Funt Reasons for Judgment Counsel for the Plaintiff: T.F. Dennis F. Balandari, Articled Student Counsel for the Defendants: R. Schubert J. CoKehyeng Place and Dates of Trial: Vancouver, B.C. June 6-10, June 14-15, 2022 Place and Date of Judgment: Vancouver, B.C. January 9, 2023 Table of Contents

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1. introduction

- [1] The plaintiff seeks damages with respect to a June 13, 2016 motor vehicle accident (the "June 13, 2016 MVA") for which the defendants have admitted liability.
- [2] At the time of the June 13, 2016 MVA, the plaintiff was a passenger in a city bus standing at one of the exits waiting to disembark as the bus was approaching its next stop when it stopped suddenly.
- [3] As a result of the sudden stop, the plaintiff suffered injuries.
- [4] The focus of the trial was the nature of the plaintiff's injuries and associated damages.
- [5] The plaintiff seeks the following damages:
 - a) Non-pecuniary: \$127,500
 - b) Past loss of income-earning capacity: \$22,223
 - c) Future loss of income-earning capacity: \$5,000,000
 - d) Loss of housekeeping capacity: \$74,000
 - e) Cost of future care: \$113,483
 - f) Special damages: \$48,495 Total: \$5,385,701
- [6] The defendant says that the appropriate award is: Non-pecuniary: \$30,000 Past loss of income-earning capacity: \$0 Future loss of income-earning capacity: \$0 Loss of housekeeping capacity: \$0 Cost of future care: \$0 Special damages: \$2,669 Total: \$32,669
- [7] For the reasons that follow, the Court will award: Non-pecuniary: \$40,000 Past loss of income-earning capacity: \$0 Future loss of income-earning capacity: \$0 Loss of housekeeping capacity: \$0 Cost of future care: \$0 Special damages: \$2,857 Total: \$42,857

2. proof

- [8] In *F.H. v. McDougall*, 2008 SCC 53, Justice Rothstein, writing for the Supreme Court of Canada, stated that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test": at para. 46.
- [9] Where the alleged injuries are continuing injuries, the Court must be particularly careful in making its findings. In this regard, Chief Justice McEachern (as he then was) in *Butler v. Blaylock Estate*, [1981] B.C.J. No. 31 (S.C.) stated:
 - [18] I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and these complaints of pain persist for long periods extending beyond the normal or usual recovery.

- [19] An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.
- [10] A plaintiff does not need to show objective evidence of continuing injury in order to recover damages: *Butler v. Blaylock Estate*, [1983] B.C.J. No. 1490 (C.A.), at paras. 12-13.
- [11] In *Price v. Kostryba* (1982), 70 B.C.L.R. 397, 1982 CanLII 36 (S.C.), Chief Justice McEachern stated: Perhaps no injury has been the subject of so much judicial consideration as the whiplash. Human experience tells us that these injuries normally resolve themselves within six months to a year or so. Yet every physician knows some patients whose complaint continues for years, and some apparently never recover. For this reason, it is necessary for a court to exercise caution and to examine all the evidence carefully so as to arrive at fair and reasonable compensation. []
- [12] Although a court "should be exceedingly careful when there is little or no objective evidence of continuing injury", the standard of proof is the balance of probabilities test.
3. the June 13, 2016 MVA
- [13] The city bus was being driven by the defendant, Mr. Seflet Burovic, when it rear-ended a car driven by the co-defendant, Ms. Michelle Morris.
- [14] The cost to repair Ms. Morris's car was approximately \$1,400.
- [15] Although Mr. Burovic denies stopping suddenly, I generally found the plaintiff's testimony in this respect more reliable. Mr. Burovic had a poor recollection of the accident generally. A sudden stop of the bus is consistent with the bus colliding with the rear of the car driven by Ms. Morris.
- [16] The plaintiff described her recollection of the June 13, 2016 MVA and its forces as follows: Q I'll take you to the subject accident June 13th, 2016. Do you remember that day? A Yes. Q What happened? A So I was working at Hootsuite at that time and following my normal route catching the UBC 99 from my place on Rupert I think it's East Broadway and jumped on the bus, sat down, it was raining and the bus was going along its way and when we got towards -- we were coming up towards Main on that route and just before that I felt the bus -- I mean I knew my stop was coming up so I hit the button to let the driver know, hey, I'm getting off so he can slow down in due course. And I got up and I was facing this way, facing the two exit doors at the front not right at the front where the driver is but behind because there's a back exit and all of a sudden I heard a crash into the vehicle in front and I grabbed on to the yellow pole with my right hand and it jerked my neck so my neck was jerked off towards the left. I had my rucksack on at the time with my laptop. I just held on to the pole, realized what had happened and the bus driver as soon as the light went green indicated to pull over after Main as well as the vehicle in front and he opened up the doors, jumped out

and then went to see the driver whom he had hit and I looked to see if the driver was to come back to the bus and check on the bus driver, he didn't so I didn't know what to do. I just walked off and walked to work. and further, Q You said your neck got jerked. Any way to describe the intensity of that? How big of a jerk was it? A So when I grabbed on to the pole, I felt my neck pull right. I felt a pull in my neck into my arms and the jerk on my left -- it was almost like -- I would say you're back in school and somebody is pulling your hair really hard. Q Did it take you by surprise? A Yes. Q Were you already holding the pole at the point when you hear this crash happen? A No, I was very close to the pole. and further in cross-examination: Q You don't recall there being a big change in momentum before the sound of the crash? A I felt -- I could feel the brakes being hit hard. That's what I felt.

[17] Later in the afternoon of the day of the accident, the plaintiff started to feel symptoms from the accident and left work around 3 p.m. Her symptoms worsened that evening. The following day, she called in sick to work. No further work days were missed.

4. the plaintiff's background

[18] The plaintiff is 39 years old. She was born and raised in Derby, England.

[19] In 2001, the plaintiff graduated from high school and then attended the University of Derby. In 2005, she graduated with a Bachelor of Science (Hons.) degree in Business Information Systems.

[20] After graduation, the plaintiff was employed in England utilizing her information systems skills.

[21] In 2007, the car the plaintiff was driving on a motorway was rear-ended by another vehicle. She suffered whiplash injuries. She missed approximately three weeks of work. The defendants did not seriously challenge that the plaintiff's injuries from the 2007 accident fully resolved.

[22] I accept the plaintiff's testimony that her injuries from the 2007 accident fully resolved (as "human experience tells us" they usually do "within six months to a year or so").

[23] In March 2007, the plaintiff joined PriceWaterhouseCoopers in the UK as part of its Risk Assurance Services and then in October 2008, moved to Canada as part of PriceWaterhouseCoopers Canada's Risk Assurance Services.

[24] In October 2012, the plaintiff became a Manager of Risk Advisory with Deloitte LLP Canada.

[25] In July 2014, the plaintiff joined Hootsuite Media Inc. ("Hootsuite") as a Security Governance Risk and Compliance Lead. The plaintiff was employed by Hootsuite at the time of the June 13, 2016 MVA.

- [26] In November 2016, the plaintiff left Hootsuite and joined ACL Services Ltd. ("ACL") as a Manager of Governance Risk and Compliance Lead. She remained with ACL until January 29, 2018. The plaintiff testified that her position at ACL was eliminated and she was out of work for a few months.
- [27] In April 2018, the plaintiff joined First West Credit Union as an Information Security and Senior IT Risk Specialist.
- [28] From January 2019 to June 8, 2021, the plaintiff was employed by Absolute Software Corporation ("Absolute") as a Director of Technology Risk Management and Data Privacy.
- [29] In June 2021, the plaintiff joined Kaseya Corp. ("Kaseya") as a Director of Security Operations.
- [30] In January 2022, the plaintiff left Kaseya and joined KPMG as a Manager, Cyber Security Strategy and Transformation. The plaintiff was employed by KPMG at the time of trial.
- [31] The plaintiff's total income for the following years is as follows: 2011 \$72,807 2012 \$73,003 2013 \$81,722 2014 \$87,742 2015 \$102,779 2016 \$105,601 2017 \$125,617 2018 \$107,598 2019 \$161,132 2020 \$189,277 2021 \$210,284
- [32] The foregoing income represents income almost entirely from employment.
5. The April 25, 2018 Motor vehicle accident
- [33] On April 25, 2018, the plaintiff was involved in a further motor vehicle accident (the "April 25, 2018 MVA").
- [34] The plaintiff described the April 25, 2018 MVA as follows: Q I also understand that you were in another motor vehicle accident in April of 2018. Do you remember that? A Yes, that is correct. Q What happened? A Yes, so I was actually coming back from Langley to Vancouver. It was -- I think it was after 6:00 o'clock and the conditions it was sunny and dry. I got off East 1st Avenue and I made - I was making a turn on to East 1st and there were the traffic lights that I was going to go left on to Rupert because it's my -- where I was living was just there and I was on the left-hand lane and there was the right-hand lane and the two vehicles in front of me had stopped when the lights were green. I wasn't sure what was going on so I was stationary too. I looked in my mirror and I even checked my -- over my shoulder to see if there were any oncoming traffic. I didn't see any oncoming traffic and my indicator was on to move and just as I turned to move into the lane a vehicle came by sort of sideswiped and that's how the collision happened. Q How are you at shoulder checking while you're driving? A I'm not very good on my left side. On my right side I feel I can shoulder check better than my left. Q How big of an impact was this April 2018 accident? A I believe it was just -- it wasn't -- it wasn't significant. It was minor. Like I could -- because obviously I was making a turn and when I was making the turn I had felt when the impact happened I felt like my seat belt pulled but nothing really significant. Q So you're trying to change from the left lane to the right lane? A Correct. Q How far did you get to the right lane before you get struck? A I

didn't even get far. I just literally turned my car and that was it. My car wasn't even in the lane. Q What portion of your vehicle was actually struck? A It was the right side on the passenger side so the doors. Q So you got sideswiped as you were just turning into the lane? A That's correct. []

[35] As a result of the April 25, 2018 MVA, the plaintiff missed two days of work.

6. The plaintiff's pre-june 13, 2016 mva neck pain and headaches

[36] Prior to the June 13, 2016 MVA, the plaintiff complained of and sought treatment, in particular, for neck pain and headaches.

[37] After reporting right-sided severe headaches, on February 20, 2015, the plaintiff had a CT scan of her head and cervical spine. The medical imaging report states: Impression: Early degenerative change in mid cervical spine. No obvious acute abnormality.

[38] On July 27, 2015, the plaintiff injured her right neck and shoulder when reaching down to pick up a dumbbell at the gym. She then sought physiotherapy treatment until her benefits coverage were exhausted.

[39] Excerpts from the physiotherapy notes include:

- a) July 29, 2015 - "Then radiated pain/tingling into entire right arm and head. Unable to move shoulders. Slightly better next day. Currently difficult to lift arm. Really bad headache. Sharp pain behind right eye, decreased range of motion";
- b) July 31, 2015 - "Yesterday felt really good" [] "so decided to use her arm again" [] "pain returned";
- c) August 4, 2015 - "Neck has been really sore with bad headache on weekend";
- d) August 6, 2015 - "Seems to have shifted to left side more";
- e) August 11, 2015 - "Neck feels good - better range of motion";
- f) August 18, 2015 - "burning pain into left shoulder";
- g) August 25, 2015 - "Five days ago complained of pain/stiffness in neck. Yesterday numbness down right arm to elbow.? Stress from work. Also had headache in occipital";
- h) August 27, 2015 - "Better. Mild headache in left occipital. Had nausea yesterday with headache. Does get migraines with nausea and blurry vision. Currently feels numb in right arm";
- i) September 3, 2015 - "Better working from home which helps. Currently right headache with numbness in right arm";
- j) September 10, 2015 - "Not bad over weekend. More stressed so feeling increased tension across shoulders. Saw GP - will do x-ray next week".

- [40] The plaintiff accepted the physiotherapy's notes as accurate. She stated "If it's written in the documentation and there's clearly a time there it must be".
- [41] On September 4, 2015, the plaintiff saw Dr. Riskalla, her family doctor. Dr. Riskalla's clinical notes record (in part): Observation: "right sided paraspinal tenderness and pain in lateral flexion to the left more than the right due to shortening of the right side". Diagnosis: "severe cervicalgia".
- [42] Dr. Riskalla recommended an ergonomic assessment. In cross-examination, the plaintiff confirmed an ergonomic assessment but described her neck pain as of September 2015 to be "medium scale".
- [43] Between February 2016 and the June 13, 2016 MVA, the plaintiff reported continuing symptoms to her treaters.
- [44] In cross-examination, the plaintiff confirmed that she told Dr. Wilson, a neurologist, on June 30, 2016 (shortly after the June 13, 2016 MVA) that in February 2016, she thought "her head would fall off". The plaintiff further agreed that the reference was to her neck pain and that it was "quite severe". In other words, approximately four months before the June 13, 2016 MVA, the plaintiff was suffering from quite severe neck pain.
- [45] On April 8, 2016, the plaintiff again saw Dr. Riskalla. Dr. Riskalla ordered an X-Ray of the plaintiff's cervical spine. Dr. Riskalla's notes read (in part): Observation: "point tenderness on the trapezius and cc 5-6 limited range of motion in all direction[s]".
- [46] An X-Ray of the plaintiff's cervical spine was taken on April 11, 2016. The X-Ray report reads (in part): CERVICAL SPINE Straightening of the normal cervical lordotic curve is present. Mild disc space narrowing is noted at C3-4 and C4-5. Moderate to marked disc narrowing is present at C5-6. Osteophytes encroach on the intervertebral foramina bilaterally at C4-5 and C5-6. IMPRESSION: Straightening of the normal cervical lordotic curve. Degenerative disc disease and foraminal encroachment.
- [47] On May 11, 2016, the plaintiff had a further physiotherapy session. Excerpts from the physiotherapy notes read: Has been having headaches and ringing in head constantly Pain: constant ache, sharp
- [48] On May 27, 2016, the plaintiff had a CT scan of her head. The radiological consultation report describes the history as follows: Left-sided headache and neck pain with left facial numbness and progressive worsening of symptoms for three weeks. Post chiropractor neck manipulation.
- [49] Under "Impression", the May 27, 2016 consultation report reads:
1. No acute intracranial pathology air or definite vascular injury.

2. Degenerative changes of the cervical spine, worst at C4-C5 and C5-C6 with central and left paracentral disc bulge causing moderate and mild to moderate spinal canal narrowing at these levels respectively.
- [50] On June 1, 2016, the plaintiff had another physiotherapy session. Excerpts from the physiotherapy notes read: Still in quite a lot of pain. Didn't seem to feel much relief after last session either.
- [51] On June 8, 2016, the plaintiff had a physiotherapy session (five days before the June 13, 2016 MVA). Excerpts from the physiotherapy notes read: Over the last week had a lot of pain and tension in the neck and cheek bones. Incidents of numbness in left digits. [] Has MRI scheduled for June 18th.
- [52] With respect to the weeks before the June 13, 2016 MVA, in cross-examination, the plaintiff testified: Q I'm going to go forward a little bit. May 27th, 2016. So this is a couple weeks before the subject accident. You have a CT scan to your head done. Do you recall why you're having that CT scan done at that time? A Yes, I felt -- I felt more pain and the symptoms of headaches and I know the x-ray that Dr. Riskalla had ordered in April of that year I wanted to get a better picture of what was going on because x-rays don't really give you the fuller picture than the other scan would have. Q You said earlier if there was a significant concern with your neck, you would want to take in additional treatment or find out what was wrong so this is that additional finding out what is wrong doing these scans? A I would say that I had concerns with - further with my neck and that's why I had additional scans performed. Q And I think it was your sister Charlene that had kind of convinced you to go to the hospital around this time to get it checked out? A Yes. Q At this time, so this is May 22nd again about two weeks prior to the subject MVA, you agree you had worsening symptoms of left-sided headache? A That's correct. Q Also worsening symptoms of neck pain? A Correct. Q And also worsening symptoms of left facial numbness? A Correct. Q And shortly prior to this you had a chiropractic manipulation to your neck. Do you recall that? A Yes. Q You had some concern at that time that that might have been linked to these increasing symptoms? A I did not have any concerns that the chiropractor caused any increasing symptoms. As I mentioned yesterday, I went to Vancouver General Hospital and told them everything, what was going on with me. I told them that I saw a chiropractor. They told me not to see a chiropractor to set my neck again. Q But the symptoms occurred shortly after the chiropractic manipulation? That's when they started to increase? A No. I did not feel any increase in -- when the chiropractor had performed his procedure on me. In fact, I felt a little bit of relief then. Q Okay. How long after the chiropractic manipulations does increasing symptoms we just talked about start? A I don't recall. Q By the time you went to Vancouver General Hospital, May 27th, or thereabouts, your symptoms had been increasing for about three weeks by that point? A Correct. Q So why were you attending a chiropractor at that time? A Dr. Riskalla suggested it. Q Okay. And were you having some treatment specifically done? Was it to your neck, other parts of your body? What was the chiropractic treatment focused on? A The chiropractor was focused on my headaches that I was getting

and I informed him of the symptoms and pain that I had with my neck and he was trying to give me some relief. Q Okay. So this is to do with the headaches and your neck, trying to address those issues? A Yes. Q With respect to your left-sided facial numbness, as of May 27th, 2016, you had that problem for more than a year at that point, some issues with facial numbness? A Sorry, can you repeat which year. Q Right. So as of May 27th, 2016, just a couple of weeks before the collision, you had some issue with facial numbness for at least a year by that point? A I wouldn't say that I had like a full one-year issue with my neck. Like it was early onset. Nothing that was progressing significantly. Q Right. But specifically to do with facial numbness? A Correct.

- [53] In sum, the Court finds that in the weeks before the June 13, 2016 MVA, the plaintiff was experiencing significant ongoing neck pain, headaches, numbness and tingling on a frequent basis. The plaintiff's symptoms may have waned from "quite severe" neck pain in February 2016 but not dramatically so or with any apparent trend of continuing improvement or resolution over time.
- [54] I have considered that the plaintiff in March 2016 completed the St. Patrick's Day five kilometre run and in April 2016 hiked Burnaby Mountain with her older sister. The plaintiff is a determined individual who faces adversity despite challenges. At Kaseya in July 2021, in her second week of employment, as a result of a ransomware attack, she worked 20-hour-days consecutively for three-and-one-half weeks until the ransomware attack abated (while enduring worsening neck pain and headaches).
- [55] The medical records with the plaintiff's descriptions of her neck pain, headaches, and other conditions are not such that they would prohibit a determined individual who wishes to try to enjoy life or to try to succeed at work (as the plaintiff attempted to do so at Kaseya in 2021) from running or hiking a distance.
7. the plaintiff's post-june 13, 2016 mva neck pain and headaches
- [56] The post-June 13, 2016 MVA imaging results (the June 15, 2016 CT scan and the June 18, 2016 MRI) showed no objective changes to the plaintiff's cervical spine from the pre-June 13, 2016 MVA (the May 27, 2016 CT scan).
- [57] As noted, the plaintiff has the burden of proving her injuries on a balance of probabilities.
- [58] The plaintiff called Dr. H. Sangha, a physiatrist, to give opinion evidence.
- [59] With respect to the plaintiff's description of her cervical spine pain, Dr. Sangha stated in his August 7, 2018 report (in part): Cervical Spine - Ms. Sandhu describes difficulties with sharp, aching, burning pain that has been ongoing since the time of the first motor vehicle accident. She again notes that she had difficulties prior to the motor vehicle accident. Her neck pain was originally 3/10 in intensity rising up to as much as 9/10 following the collision before settling back down to 5-6/10 where she remained prior to the time of the second motor vehicle accident. Since the time of the second motor vehicle accident she rates her pain as 9/10. Ms. Sandhu also describes intermittent referral of pain into the left arm as far

as the elbow with a burning sensation. She also has intermittent tingling into the left hand generally 2-3 times per month. She noted that she had this difficulty of hand tingling prior to the original indexed accident but it became worse following the 2016 collision as it has become much more frequent.

[60] In cross-examination, the plaintiff balked at the defendants' wish to have her describe her condition at a point in time using a pain scale. In this regard, the transcript reads: Q In your testimony on Monday when we started the day you were asked to describe your pain levels, and you can correct me if I'm wrong, but I believe you talked about a scale you said your pain at that time was about an 8 out of 10 and later in the day you talked about it being about an 8.5 out of 10. Does that seem accurate for what your pain levels were on Monday? A Yes. Q You also talked about how your pain was the worst after the accident. You felt like your head would fall off or you wanted to chop your head off. That was how you described the worst pain that you had? A Yes. Q So compared backwards when you felt like the pain in your neck was so bad that you felt like your head was going to fall off, what is the pain scale at that point out of 10; what was the pain like? A In what year? Q When it was its worst. A I don't like to use numerical scales because I just -- it doesn't give a real full picture of what pain really is. It's hard just to pick a random number and say oh this is it because pain can't actually truly be measured and I just feel like, you know, being questioned to say just pick a number, it's not really giving an accurate picture of how the pain is. I talked about yesterday, you know, think about picking navel oranges, putting in the bag and then you want to check to see, you know, how the weight is, either you're going to weigh it or go by feel. You feel how the weight of those oranges, that's how I feel the weight of my neck. Like even now it is hurting and I'm trying my best to get through this process but it's hard to describe and it's hard to put a number on it. Q Okay. So when you feel -- when your pain was at its worst and you felt like your head was going to fall off, and you wanted to chop off your head, that's worse than your descriptor with a bag with navel oranges? It's worse? A Yes. Q Okay.

[61] The plaintiff's reluctance to answer a straightforward question does not redound to the reliability the Court expects of a forthright witness, especially having regard to the plaintiff's willingness to use the 1 to 10 pain scale with her counsel and Dr. Sangha.

[62] A pain scale does not involve the picking of a "random number". A 1 to 10 pain scale is a common tool to compare the degree of pain one may feel.

8. expert evidence

a) Generally

[63] In a case like the one at bar, as in *Blaylock*, at trial, there is "little or no objective evidence of continuing injury" relating to the June 13, 2016 MVA.

[64] Since the *Blaylock* and *Price* decisions, there have been significant developments in medical imaging, especially computer tomography and magnetic resonance imaging.

- [65] In the case at bar, the medical imaging of the plaintiff's cervical spine and neck area before and not long after the June 13, 2016 MVA do not reflect any significant changes. The degenerative aspects of the plaintiff's spine shown in the pre-June 13, 2016 MVA images may explain the plaintiff's pre-June 13, 2016 MVA symptoms. The post-June 13, 2016 MVA imaging results were similar. The comparison of pre- and post-June 13, 2016 MVA imaging (the May 27, 2016 and the June 15, 2016 CT scan reports of the cervical spine) serve to establish that the June 13, 2016 MVA did not cause objective evidence of injury. (e.g., an altered disc).
- [66] In sum, there is "little or no objective evidence of continuing injury" caused by the June 13, 2016 MVA.
- [67] With "little or no objective evidence of continuing injury" from the June 13, 2016 MVA, the medical experts were forced to rely on the plaintiff's descriptions of her injuries. Where a person is not reliable in describing their injuries, then the usefulness of a medical expert's opinion may be affected.
- [68] In whiplash or other primary soft tissue injury cases, a trier of fact, with the benefit of all of the evidence at trial, is in the better position to determine a plaintiff's reliability in the description of his or her injuries than a medical expert who may have met with the plaintiff once or twice and without the benefit of cross-examination.
- b) Dr. H. Sangha
- [69] Dr. H. Sangha is a medical doctor with a specialty in physiatry who was qualified to give opinion evidence with respect to physiatry, including the diagnosis, prognosis, and management of injuries following trauma.
- c) Dr. N. Heran
- [70] Dr. N. Heran is a medical doctor with a specialty in neurosurgery who was qualified to give opinion evidence on neurosurgery, particularly in medical and surgical management of the spinal, cranial, nervous, and vascular structures of the nervous system, and supporting systems in soft tissues, along with the rehabilitation and assessment of a patient's pain and functionality.
- d) The medical expert reports
- [71] Dr. Sangha prepared a medical-legal report dated August 7, 2018 and an addendum report dated March 10, 2022. Dr. Sangha saw the plaintiff on June 19, 2018 (which is after the April 25, 2018 MVA).

- [72] In his report, Dr. Sangha states that the plaintiff described her neck pain as "mild, about 3/10" shortly before the June 13, 2016 MVA. Dr. Sangha also understood that prior to the June 13, 2016 MVA, the plaintiff undertook housekeeping chores without assistance from others. He also understood that the plaintiff's February 2016 reference to her "head would fall off" was the plaintiff's description of a heaviness and not neck pain.
- [73] With respect to undertaking housekeeping chores prior to the June 13, 2016 MVA, the plaintiff, in cross-examination, testified: Q Prior to the collision you had your siblings help out with some of your chores as well? A Yes. Q So for instance, there was instances before the collision when you needed someone to help you with reaching with the vacuum and they helped you? A I would say it was -- it was generally not all the time. Sometimes I could manage it on my own. But sometimes I couldn't if the symptoms were more intense. But generally it was a balance of where I was -- I could do things on my own but on occasions I would need assistance to help. Q So it's simply an instance after the collision of needing more times of assistance from your siblings for these tasks? A Yes.
- [74] In cross-examination, as noted above, the plaintiff also testified that in late May 2016, she was feeling more pain: Q I'm going to go forward a little bit. May 27th, 2016. So this is a couple weeks before the subject accident. You have a CT scan to your head done. Do you recall why you're having that CT scan done at that time? A Yes, I felt -- I felt more pain and the symptoms of headaches and I know the x-ray that Dr. Riskalla had ordered in April of that year. I wanted to get a better picture of what was going on because x-rays don't really give you the fuller picture than the other scan would have. and further, Q At this time, so this is May 22nd again about two weeks prior to the subject MVA, you agree you had worsening symptoms of left-sided headache? A That's correct. Q Also worsening symptoms of neck pain? A Correct. Q And also worsening symptoms of left facial numbness? A Correct.
- [75] The plaintiff's description that she felt her "head would fall off" was a reference to pain. In cross-examination, she testified: Q So when you're talking to Dr. Wilson about how you felt that your head would fall off in February 2016, you're referring to your neck pain? A That is correct. Q And you were characterizing your neck pain at that time as being -- sorry, just give me a second. Quite severe? A Yes.
- [76] In his August 7, 2018 report, Dr. Sangha relies in some considerable measure on his understanding that the plaintiff's pain was "mild, about 3/10" shortly before the June 13, 2016 MVA.
- [77] Upon receiving further medical records, Dr. Sangha prepared an addendum report dated March 10, 2022. He did not change his opinion.

- [78] With the plaintiff's testimony at trial of worsening symptoms as of May 22, 2016, her stated difficulty in using a 1 to 10 pain scale, Dr. Sangha's understanding from the plaintiff that her pain was "mild, about 3/10" shortly before the June 13, 2016 MVA, and the ongoing imaging and related medical history prior to the June 13, 2016 MVA, I do not accept Dr. Sangha's opinion that "on the balance of medical probabilities that Ms. Sandhu's current presentation is directly and causally related to the [June 13, 2016 MVA]".
- [79] Dr. Heran assessed the plaintiff on March 4, 2022 (also after the April 25, 2018 MVA) and prepared a medical-legal report the same day (based on a February 14, 2022 instruction letter).
- [80] In his report, Dr. Heran, under the heading Physical Examination, states (in part): She has tendency to minimize neck movements. Range of motion in her neck is full though.
- [81] Under the heading Opinion, Dr. Heran states: Diagnoses as a consequence of subject motor vehicle accident
- 1) Exacerbation or aggravation of pre-existing mechanical neck pain with associated right-sided possible radiculopathy versus referred myofascial symptoms.
 - 2) Cervicogenic headaches. Causation The above areas of diagnosis are attributable to the subject motor vehicle accident as outlined above.
- [82] Dr. Heran also states: There are significant pre-accident factors that influence her presentation with the neck pain and associated headaches starting in 2015. These were significant enough that they warranted further imaging for evaluation as well as multiple physician visits. The findings at that time as well as findings thereafter have been fairly similar on imaging supporting that no objective worsening phenomena was encountered following the subject accident. This supports the exacerbation or aggravation at this site. An additional factor has been the non-subject motor vehicle accident of 2018 where worsening of symptoms also arose. The involvement was the same location as well, with right-sided predominance. This is also either an exacerbation or aggravation with persistence thereafter from this site or from just the natural history. This is not well defined as her symptoms likely would have continued anyway had these events not transpired.
- [83] At trial, there was significant controversy over the description (or existence) of symptoms of right-sided predominance.
- [84] I found Dr. Heran's report and testimony to be of assistance in that it served to confirm my understanding of what the medical imaging showed (based on my reading of the reports), that there was no objective signs that the plaintiff's cervical spine was damaged as a result of the June 13, 2016 MVA.
- [85] Dr. Heran's report also served to confirm that there were observable degenerative changes in the plaintiff's cervical spine before the June 13, 2016 MVA.

- [86] With respect to Dr. Heran's opinion that cervicogenic headaches were caused by the June 13, 2016 MVA, it is clear, and I find, that the June 13, 2016 MVA caused further cervicogenic headaches such as those the plaintiff had suffered from time to time before the June 13, 2016 MVA.
- [87] As may be seen, Dr. Heran also opined as to "right-sided possible radiculopathy" versus "referred myofascial symptoms".
- [88] The defendants in their written submission concede that "the plaintiff has sustained a temporary worsening of pre-existing mechanical neck pain with associated right-sided radiculopathy and/or myofascial pain, and cervicogenic headaches, all as described by Dr. Heran in his report of March 4, 2022".
- [89] The defendants further say that the plaintiff's current cervicogenic headaches or other difficulties result from the plaintiff's pre-existing degenerative changes to her cervical spine or subsequent events, such as the April 25, 2018 MVA. In other words, the plaintiff's injuries caused by the June 13, 2016 MVA had fully resolved before the April 25, 2018 MVA.
- [90] Dr. Heran also opined that the effects of the June 13, 2016 MVA lasted probably up until the April 25, 2018 MVA. Dr. Heran does not provide supporting analysis. However, it does assist me in my finding described below that the plaintiff's injuries caused by the June 13, 2016 MVA did resolve, albeit earlier than the April 25, 2018 MVA.
9. findings on injuries caused by the June 13, 2016 MVA
- [91] I find that the plaintiff suffered a divisible injury as a result of the June 13, 2016 MVA. I accept that the plaintiff "sustained a temporary worsening of pre-existing mechanical neck pain with associated right-sided radiculopathy and/or myofascial pain and cervicogenic headaches". I find that these injuries resolved, within the usual period of resolution of human experience, of "six months to a year or so".
- [92] The onus rested with the plaintiff to show a longer period. She has not done so. She was not a consistently reliable witness in order to help base her claim. She has not shown, on a balance of probabilities, that her injuries persisted beyond the usual recovery period of six months to a year or so.
- [93] My finding is based on several key aspects. First, prior to the June 13, 2016 MVA, the plaintiff had degenerative changes to her cervical spine. Second, the June 13, 2016 MVA did not worsen the then degenerative changes to the plaintiff's cervical spine. There was no objective evidence of injury to her cervical spine caused by the June 13, 2016 MVA.
- [94] Further, for many months before the June 13, 2016 MVA, the plaintiff had suffered neck pain and headaches. In February 2016, she felt like her "head would fall off". In the months before the June 13, 2016 MVA, various medical images had been taken of the plaintiff's cervical spine with a MRI scheduled before the June 13, 2016 MVA, which was taken after the June 13, 2016 MVA.

- [95] I accept Dr. Heran's observation: A []. She had imaging requested for her neck very shortly prior to the first subject accident. So nobody orders those tests for trivial or minor pain. They would be ordered for significant life affecting pain syndromes.
- [96] I reject that the plaintiff's pain level was "mild, about 3/10" shortly before the June 13, 2016 MVA. A longitudinal view of the evidence, including the plaintiff's descriptions to various treaters, does not support such a finding.
- [97] Having regard to the plaintiff's condition in February 2016 (felt like her "head would fall off"), various reports to her treaters after February 2016 and before the June 13, 2016 MVA, and the need for investigations using imaging techniques, I do not find that the plaintiff's neck pain and headaches were "mild, about 3/10", as Dr. Sangha understood from the plaintiff shortly before the June 13, 2016 MVA.
- [98] Her neck pain and headaches may have lessened to a degree after February 2016 and before the June 13, 2016 MVA but not to the degree she claims ("mild, about 3/10"). As noted above, as of May 22, 2016, the plaintiff had worsening symptoms of neck pain.
- [99] The reasonable and most probable explanation for the plaintiff's current neck pain, headaches, numbness, and tingling are the degenerative changes to her cervical spine and possibly other events, such as the April 25, 2018 MVA.
- [100] If the June 13, 2016 MVA had not occurred, there is not a basis to conclude that the neck pain, headaches, numbness, and tingling would have diminished or stopped.
- [101] As of February 2016, the plaintiff was experiencing "quite severe" neck pain. In the months after February 2016 and before the June 13, 2016 MVA, I find that the plaintiff's neck pain decreased but was still significantly intense (the reports of the treaters and the need for various imaging tests support the finding). I find that as a rough and reliable measure, 6 out of 10 on a 1 to 10 pain scale (as also used by Dr. Sangha) would capture matters shortly before the June 13, 2016 MVA.
- [102] I accept that the June 13, 2016 MVA exacerbated the plaintiff's neck pain "up to as much as 9/10" in intensity as Dr. Sangha sets forth in his August 7, 2018 report "before settling back down to 5-6/10 where she remained prior to the [April 25, 2018 MVA]".
- [103] With the shortly before June 13, 2016 MVA baseline of 6 out of 10 on a 1 to 10 pain scale established, the Court is in the position described by Chief Justice McEachern in *Price*. Human experience is that whiplash type injuries "normally resolve themselves within a month or a year or so". The plaintiff has failed to provide "sufficiently clear, convincing and cogent evidence" to prove otherwise.
- [104] I find that, as a result of the June 13, 2016 MVA, there was a temporary worsening of the plaintiff's pre-existing mechanical neck pain, associated cervicogenic headaches (including frequency), numbness, and tingling. Further, the plaintiff suffered soft tissue injuries.

[105] In sum, I find that the exacerbation of the plaintiff's neck pain, headaches, numbness, and tingling lasted no longer than a year or so. I also find that any soft tissue injuries also resolved within the normal human experience of one year or so.

10. contributory negligence

[106] The defendants submit that the plaintiff was 25% at fault for the injuries she suffered as a result of the June 13, 2016 MVA.

[107] The defendants say that the plaintiff should have remained seated until the bus came to a stop. In the alternative, the defendants say that the plaintiff should have held onto a bus rail or pole as the bus was slowing and should not have had her rucksack on at that time.

[108] Prior to the plaintiff pressing the button to indicate to the bus driver that she wished to disembark at the next stop, there is no evidence of the bus driver driving the bus erratically or otherwise operating the bus in an unprofessional manner.

[109] The defendant, TransLink, is a common carrier. It is reasonable for a bus passenger to expect that any of TransLink's bus drivers are trained professionals and will drive in a professional manner having regard to the fact that the passengers on a bus may include the elderly, the frail, and those whom may otherwise be physically vulnerable.

[110] I find that the plaintiff took "reasonable care for her own safety" in not leaving her seat until after pressing the button to notify the bus driver that she wished to disembark at the next stop: *Erickson v. Sibble*, 2012 BCSC 1880 at para. 70. It would be reasonable for a bus rider to expect that the bus driver would proceed to decelerate the bus in a controlled manner as the bus came to the next stop. It is also not unreasonable for a bus passenger to have his or her hand on or near a railing or pole in a ready position to grab or to be wearing a rucksack.

[111] In sum, the Court does not find the plaintiff to have been contributorily negligent.

11. non-pecuniary damages

[112] In *Karim v. Li*, 2015 BCSC 498, Justice Abrioux (then sitting in this Court) summarized the applicable law:

[120] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[121] The framework for the assessment of non-pecuniary damages was outlined by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34:

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

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life; I would add the following factors, although they may arguably be subsumed in the above list:
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff): *Giang v. Clayton*, 2005 BCCA 54.

[122] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences and ability to articulate that: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[113] In *Trites v. Penner*, 2010 BCSC 882, Justice Ker states:

[188] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews]; *Jackson v. Lai*, 2007 BCSC 1023 at para. 134 [Jackson]; *Kuskis v. Hon Tin*, 2008 BCSC 862 at para. 135 [Kuskis].

[189] For the purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Andrews*; *Jackson*; *Jenkins v. Bourcier*, 2003 BCSC 388 at para. 87; *Radford v. Drobot et al.*, 2005 BCSC 293 at para. 62; *Kuskis* at para 136.

[114] In *Riley v. Ristro*, 2018 BCCA 366, Justice Groberman, in writing for the Court of Appeal, stated:

[102] I acknowledge what was said in [*Kroecker v. Jansen* (1995), 123 D.L.R. (4th) 652 (B.C.S.C.)] about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary

damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

- [115] In my assessment of non-pecuniary damages, I have included the consideration of the loss of housekeeping capacity. There is an absence of special circumstances to justify a separate housekeeping capacity award.
- [116] The plaintiff says that \$127,500 is the appropriate award for non-pecuniary damages (excluding \$74,000 for loss of housekeeping capacity). The defendants say that the appropriate award is \$40,000 (before a 25% reduction for the plaintiff's contributory negligence).
- [117] An award of \$40,000 for non-pecuniary damages is consistent with the Court's finding that the plaintiff suffered a divisible injury.
- [118] The defendants say that the plaintiff's divisible injuries had resolved no later than just before the April 25, 2018 MVA (approximately 22 months after the June 13, 2016 MVA).
- [119] As noted, the plaintiff has not proven, on a balance of probabilities, that her injuries from the June 13, 2016 MVA did not resolve within "six months to a year or so".
- [120] The defendants say the following authorities, where the injuries were more impactful than the case at bar, to ground their submission that \$40,000 would be the appropriate award:
- a) Dhugga v. Poirier, 2020 BCSC 914 - \$65,000
 - b) Johnson v. Heer, 2020 BCSC 1168 - \$75,000
 - c) Chow v. Kandola, 2021 BCSC 297 - \$75,000
 - d) Grewal v. Chandi, 2021 BCSC 120 - \$56,000
- [121] The Court will award \$40,000 as non-pecuniary damages for the transient exacerbation of the plaintiff's pre-existing neck pain, headaches, tingling or numbness, and any soft tissue injuries caused by the June 13, 2016 MVA.
- [122] As noted, without the plaintiff proving otherwise, the Court has found that the foregoing injuries caused by the June 13, 2013 MVA resolved within "six months to a year or so".
- [123] With the defendants submitting \$40,000 as to the appropriate award, I will not consider whether a somewhat lesser award may be more appropriate having regard to the fact that the plaintiff's injuries resolved some months before April 25, 2018.
- [124] A person with a crumbling skull may suffer a blow or a jolt to the head without affecting the degenerative decline of the skull itself. There is no reason that say, a resulting bruise, a soft tissue injury, or additional neck pain, may not fully resolve over six months to a year or so. The blow or jolt does not necessarily cause an indivisible injury.

12. Past loss of income-earning capacity

[125] I find that there was no past loss of income-earning capacity. As noted, the plaintiff's injuries caused by the June 13, 2016 MVA had resolved before the April 25, 2018 MVA.

[126] At the time of the June 13, 2016 MVA, the plaintiff was working at Hootsuite and continued to do so until she joined ACL in November 2016.

[127] The plaintiff continued to work at ACL until January 29, 2018 when her position was eliminated. She was then out of work for about two months until she joined First West Credit Union. As a general trend, the plaintiff's monthly income continued to increase over the years.

[128] In sum, the Court finds that the plaintiff did not suffer a past loss of income-earning capacity.

13. future loss of income-earning capacity

[129] There is no need to consider the future loss of income-earning capacity because the plaintiff's injuries caused by the June 13, 2016 MVA have been found to have been divisible and to have resolved before trial.

14. Cost of future care

[130] As with the future loss of income-earning capacity, there is no need to consider the cost of future care because the plaintiff's injuries caused by the June 13, 2016 MVA have been found to have been divisible and to have resolved before trial.

15. Special damages

[131] In *MacIntosh v. Davison*, 2013 BCSC 2264, Justice Davies succinctly summarizes the guiding principles for an award of special damages as follows:

[128] In summary, I am satisfied that when assessing special damages the standard is the reasonableness of the expense claimed in the context of the injuries suffered. Medical justification for any expense is a factor to be considered, but not the only one. Subjective factors can also be considered including whether the plaintiff believed the treatments were reasonably necessary.

[132] The total of the plaintiff's claim for special damages is premised upon her injuries as being indivisible.

[133] As noted, I have found that the plaintiff suffered divisible injuries as a result of the June 13, 2016 MVA. A defendant should be "liable only for the injury he or she has caused, according to the usual rule": *Athey v. Leonati* (1996), 3 S.C.R. 458, para. 24.

- [134] The defendants are willing to pay claim for special damages that otherwise meet the requirements for special damages up to immediately before the April 25, 2018 MVA. With this concession, I will follow the same approach although it may be that the plaintiff's injuries caused by the June 13, 2016 MVA fully resolved earlier, a year or so after the June 13, 2016 MVA.
- [135] With respect to the plaintiff's claim for special damages incurred before April 25, 2018, I accept the claims for acupuncture, massage treatments, physiotherapy, a doctor's note, an ergonomic assessment, and mileage. These claims total \$2,857.
- [136] I have not allowed the claims for naturopathic treatment and related medicines. In context, I do not find that such expenses were reasonable.
- [137] I have also not included \$373.99 for a curved monitor, \$223.94 for an ergonomic chair, and \$103.16 for contour pillows. These items were included in the defendants' calculations but, I believe, by mistake. Each of these claims relate to expenditures incurred after the April 25, 2018 MVA.
- [138] I have also rejected a Steve Nash Fitness membership fee of \$114.36.
- [139] Although I am not awarding any amount for the cost of future care because the plaintiff's injuries were divisible and resolved before trial, I note that the plaintiff claimed an annual gym pass fee of \$513.45 as a cost of future care. When such an annual fee is present valued to age 75, the plaintiff's claim was $\$513.45 \times 25.4888 = \$13,087$ (before a 25% deduction for contingencies).
- [140] The plaintiff's claim for the cost of an annual gym pass is unfounded and extravagant. A plaintiff cannot claim for expenditures, past or future, that he or she would have, in all likelihood, incurred or would have incurred. As noted, on July 27, 2015, the plaintiff injured her right neck and shoulder when she reached down to pick up a dumbbell at the gym ("She's Fit" in Surrey).

16. Conclusion

- [141] The Court awards the plaintiff the following damages: Non-pecuniary: \$40,000 Past loss of income-earning capacity: \$0 Future loss of income-earning capacity: \$0 Loss of housekeeping capacity: \$0 Cost of future care: \$0 Special damages: \$2,857 Total: \$42,857

17. costs

- [142] If the parties wish to speak to costs, I ask that they, within 90 days of this judgment, arrange through Supreme Court Scheduling a 9 a.m. 55-minute hearing before me. "Funt J."

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