

CANADA / JUDGMENT

Sharma v. Bhullar

2020 BCSC 379

COURT

Supreme Court of British Columbia

DECIDED

16 March 2020

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2020 BCSC 379 Sharma v. Bhullar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharma v. Bhullar,

2020 BCSC 379

Date: 20200316

Docket: S-M-192821

Registry: New Westminster

Between:

Pooja Sharma

Plaintiff

And:

Baljinder Bhullar, Manpreet Sekhon and Jatinder Sekhon

Defendants

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

Reasons for Judgment

Counsel for the Plaintiff:

I.C. Ashley

K. Brokop

Counsel for the Defendants:

D.G. Perry

J. Steele

Place and Dates of Trial:

New Westminster, B.C.

February 24-28, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 16, 2020

Introduction

- [1] The plaintiff claims damages for whiplash-related injuries arising out of two motor vehicle collisions (collectively, the "Accidents"). Liability has been admitted in respect of each of the Accidents. Counsel for the defendants confirmed that an apportionment of damages among the defendants is not required.
- [2] The first of the two Accidents ("MVA #1") occurred on January 11, 2016 when the plaintiff, then aged 21, was a passenger in a vehicle driven by her fiancé. The vehicle was slowing for traffic on Highway 1 in Langley, BC when it was rear-ended by a vehicle being driven by the defendant, Baljinder Bhullar. The resulting damage to the respective vehicles was not insignificant and the vehicle occupied by the plaintiff was written off.
- [3] The second Accident ("MVA #2") occurred on November 3, 2016 when a vehicle being driven by the plaintiff near Abbotsford, BC was rear-ended by a vehicle being driven by the defendant, Manpreet Sekhon, and owned by the defendant, Jatinder Sekhon. This collision resulted in minor damage to the plaintiff's vehicle. The total cost of repair was \$880.

Evidence at Trial Tendered by the Plaintiff

The Plaintiff

- [4] The plaintiff is currently 26 years old. At the time of the Accidents, she was living with her parents in Mission, BC and was working as a pharmacy assistant at a Shopper's Drug Mart in Abbotsford, BC, 35 to 40 hours per week, earning \$14 per hour. At the time of MVA #2, her hourly wage had increased to \$15. In addition, after MVA #1, for six weeks commencing in each of April 2016 and January 2017, the plaintiff taught pharmacy assistant courses at Sprott Shaw College for 20 hours per week.

- [5] The plaintiff testified that, prior to MVA #1, she had no health issues, including no headaches. She described herself as having been happy and pleasant. She testified that her then fiancé lived in Calgary and they saw each other approximately one week every two or three months, enjoying hiking, shopping, and watching movies together.
- [6] The plaintiff testified that as a result of MVA #1, she suffered injuries to her neck, right shoulder, back (upper, mid, and lower), headaches, low mood, anxiety, and lack of sleep. She testified that MVA #2 aggravated each of these conditions and also injured her left shoulder.
- [7] The plaintiff testified that her duties at work did not change as a result of the Accidents and that she was able to perform all of them, albeit with pain and with the help of pain medication. She did miss two days of work after MVA #2, losing wages totalling \$249.60.
- [8] On July 1, 2017, the plaintiff quit her employment. She testified that she did so in part to give her Accidents-related injuries time to heal, and in part to plan for her upcoming wedding. The wedding was a large, one-week, six-event affair attended by many friends and relatives from other countries. The marriage took place on August 5, 2017. Thereafter, the plaintiff moved with her husband to Calgary where she currently lives in rented accommodation with him and his mother.
- [9] The plaintiff testified that she did not seek employment in Calgary until November 2017 because she wanted to give her Accidents-related pain symptoms a chance to improve. On November 7, 2017, she started work at a Shoppers Drug Mart in Calgary as a pharmacy assistant, earning \$19 per hour, working 40 hours per week.
- [10] In 2018, the plaintiff began attending a college in Calgary to obtain her pharmacy technician diploma, which she expects to receive in May 2020. In order to attend college, she reduced her work hours to 32 hours per week. She testified that, as a pharmacy technician, she will earn \$21 if she works at Shopper's Drug Mart and \$26 per hour if she works at a hospital. She testified that she is concerned she may not be able to take a position at a hospital because the job will entail sitting for long periods of time and will aggravate her Accidents-related pain symptoms.
- [11] The plaintiff testified that she has not missed any hours of work at her job in Calgary due to her Accidents-related pain symptoms and has been able to perform all of her duties despite her ongoing pain.
- [12] The plaintiff gave the following description of the injuries she says she sustained in the Accidents, using a pain scale of 0 to 10, where 0 was no pain and 10 was the most excruciating pain imaginable:
- a) neck: immediate stiffness after MVA #1 but no real neck pain until approximately one to two months later when pain began to develop over time to an intensity of 6 out of 10, four to five times per week for a couple of hours each time. Just prior to MVA #2, the pain magnitude had reduced to 4-5/10. MVA #2 aggravated her neck pain and it became "excruciating", albeit with less discomfort. Currently her neck pain is sometimes "unbearable" and results in

blurred vision, headaches akin to migraines and an inability to tolerate loud noise. She has seen no improvement in her pain symptoms despite pain medications and her having followed the stretching exercises recommended by her doctors and therapists. Cortisone injections in December 2019 provided some temporary relief. Household chores and lifting heavy objects at work aggravate her pain;

- b) headaches: mostly at the back of her head, 2 to 3 times per week for a duration of approximately two hours. The initial intensity was 5/10 but her symptoms improved prior to MVA #2 to 3/10. MVA #2 resulted in her headaches becoming more frequent and severe. She attributes her headaches to her neck pain. They are aggravated by household chores and work. There has been no improvement since MVA #2.
- c) mid-back: pain with an intensity of 7/10 lasting between a couple of hours and most of the day "almost every day". Prior to MVA #2 the pain intensity had improved slightly to 5-6/10. MVA #2 aggravated her symptoms such that the intensity is now 8/10. Although her mid-back pain is not constant, it is aggravated by prolonged periods of sitting. Her symptoms are alleviated with pain medications, heating pads and stretching.
- d) upper back: pain surrounding her shoulder blades. Within one month of MVA #1, the intensity was 7/10 but was reduced to 6/10 shortly before MVA #2 which aggravated the pain. Currently, the intensity is 5/10 and waxes and wanes depending on activity. Long periods of sitting and household chores are a major cause of aggravation. Her pain symptoms are alleviated with medication, heating pads and stretching. She received further temporary pain relief after cortisone injections in 2017.
- e) lower back: throbbing pain on both sides, with an intensity of 7/10, making it difficult to stand or sit. The symptoms improved to 6/10, but were then aggravated by MVA #2. Currently the intensity is 3-4/10. Stretching and massage therapy provide some relief, but the pain is aggravated to an intensity of 6-7/10 by housework, heavy lifting or prolonged sitting. She experiences the pain once every week or two for a couple of hours.
- f) right shoulder: constant, localized, sharp, "pins and needles"-like pain in both the front and back of the shoulder with an intensity of 10/10. Prior to MVA #2 the intensity had reduced to 9/10. Currently the pain intensity is 7/10. The symptoms are aggravated by household chores and some of her work duties.
- g) mood: MVA #1 caused her mood to change. She is no longer the pleasant, social person she once was. She attributes her change in mood to her intolerable pain. She feels depressed and suffers from anxiety whenever she is the occupant of a vehicle. She described her mood level as 4/10. Her depressed and anxious mood worsened after MVA #2. Her mood has not improved and, indeed, worsened after her move to Calgary due to her added responsibilities in the home. She did not mention her anxiety to any of her treating physicians.
- h) sleep issues: she often awakens during the night due primarily to neck pain.

- i) left shoulder: a sharp, throbbing pain after MVA #2, but not as severe as her right shoulder pain, the intensity being 6/10. The pain resolved completely within 2 months.
- [13] The plaintiff testified that she has followed all of the medication and therapy recommendations of her various family doctors (Dr. Saurabh Vaish, Dr. Darren Presley, and Dr. Sadaf Siddique).
- [14] In April 2018, the plaintiff fell down some stairs at home. She testified that the fall resulted in her bruising her lower back, and aggravating her right shoulder and upper back pain. She testified that the increased pain and bruising resolved within two to three months, and that none of her current pain complaints are attributable to that fall.
- [15] The plaintiff testified that, although she is able to perform housekeeping tasks, she has to take her time doing them, stretching them throughout the day. In June 2019, the plaintiff's mother-in-law moved in with her and her husband and since then has been assisting with the housekeeping.
- [16] The plaintiff testified that her relationship with her husband has suffered because her chronic pain has made her a less pleasant person than she was prior to the Accidents and that he is "forced" to do some of the housework when she is in pain. She testified that she now does not enjoy the activities she engaged in before the Accidents, such as hiking, shopping, and "road trips".
- [17] When asked on cross-examination about the pain intensity ratings she had used during her direct examination and to explain why she had not gone to the hospital if her right shoulder pain was a constant 10/10, she responded that she has a "high pain tolerance", is able to function, and does not find it necessary to go to a hospital for such pain. Rather, she is able to manage with over-the-counter medications. Although her direct evidence was that there had been no improvement in her right shoulder pain symptoms, she relented somewhat during her cross-examination, conceding that there has been improvement because she manages her pain with medication.
- [18] She maintained during her cross-examination that her right shoulder strength has been reduced as a result of her pain. When asked by the defendants about orthopedic surgeon, Dr. Slade Shantz's assessment tests that rated her strength as 5 out of 5 on their measurement scale, she replied that his testing was inaccurate. She acknowledged, however, that Dr. Slade Shantz's testing which showed she had normal range of motion in both shoulders was accurate.
- [19] The plaintiff also had a difficult time explaining the absence from the various clinical records of any mention of Accidents-related sleep and mood problems. She conceded during cross-examination that her low mood was the result of the added responsibilities of marriage and having to look after her own home. She also conceded that she refused counselling that had been recommended by her Calgary general practitioner, Dr. Sadaf Siddique. She admitted that her driving anxiety does not limit her travel by car.

[20] The plaintiff agreed on cross-examination that she has not attended a physiotherapy appointment since July 2017 and has only attended massage therapy appointments on an irregular basis. She also agreed that she has struggled with her weight since she was a teen and admitted it was due primarily to her poor diet and lack of exercise as a result of her busy schedule. Finally, she admitted that she stopped attending a gym because of time and the increased responsibilities of being married.

Gagandeep Sharma ("Gagandeep")

[21] Gagandeep is the plaintiff's husband.

[22] He testified that he and the plaintiff met in 2012 and began dating in 2014. He described the plaintiff at that time as being "happy, outgoing and jolly". He testified that, although he lived in Calgary, he and the plaintiff saw each other "quite often" and on "a regular basis". When together they were "super active" and were always out hiking, on road trips and going to movies. He testified that he did not observe that the plaintiff had any health-related problems or physical limitations prior to the Accidents.

[23] Gagandeep testified that, since the Accidents, the plaintiff always seems depressed and prone to mood swings. She and Gagandeep rarely talk as she buries herself in her cell phone. She is also afraid when riding in a car.

[24] During his cross-examination, Gagandeep confirmed that his and the plaintiff's wedding was a large affair with many events and he had suggested to the plaintiff that she quit work in order to make the arrangements for it. He also confirmed that his mother is responsible for the housekeeping in their home.

Ajay Sharma ("Ajay")

[25] Ajay is the plaintiff's younger brother by one year. He testified that he and the plaintiff grew up having a close relationship with the same circle of friends. He testified that, prior to the Accidents, the plaintiff was "calm, patient, responsible, helpful, and fun". She had no physical injuries, limitations or mood disorders that he was aware of, other than that she was a little over weight and used an inhaler. They engaged in various activities together including playing badminton, watching movies, "a few hikes", and enjoyed occasionally cooking together.

[26] Ajay described the plaintiff after the Accidents as impatient, moody, seemingly depressed, and reluctant to engage in activities. He testified that the plaintiff seldom danced at her wedding, but did acknowledge on cross-examination that the week-long wedding festivities were tiring for her but that she appeared to enjoy her wedding.

Plaintiff's expert evidence

Dr. Saurabh Vaish

- [27] Dr. Vaish is the plaintiff's former general practitioner, he treated her from November 2007 until she moved to Calgary in August 2017. The plaintiff consulted Dr. Vaish on 22 occasions during the period January 14, 2016 to February 10, 2017 in connection with her Accidents-related injuries. Dr. Vaish prepared a medical-legal report dated February 26, 2017. He was qualified without debate to give opinion evidence in the field of family medicine.
- [28] Dr. Vaish's opinion as of the date of his expert report was that the plaintiff's prognosis was "quite good", that she had made good progress since December 2016, and was pain free for the most part but needed medications consistently at that time. He expected continued improvements in her pain symptoms and a slow weaning of her medications over the ensuing six to 12 months. He opined that occasional exacerbation of her pain symptoms, once or twice per year, was possible especially with heavy work or activities in which event she would likely require medications such as anti-inflammatories or muscle relaxants.
- [29] On cross-examination, Dr. Vaish confirmed that he did not record any complaints by the plaintiff of sleep disturbances. He also confirmed that he had discussed with the plaintiff maximizing her attendances at a gym because such attendances can play a significant role in the rehabilitation of back injuries.
- [30] Dr. Vaish also confirmed that, prior to the Accidents, the plaintiff had complained of neck pain during various consultations with her.

Dr. Darren Presley

- [31] Dr. Presley is the plaintiff's current general practitioner. He also practices in the area of primary care sports medicine.
- [32] The plaintiff consulted with Dr. Presley on eight occasions between November 7, 2017 and November 4, 2019. Dr. Presley prepared a medical-legal report dated November 14, 2019. He was qualified without debate to give opinion evidence in the field of family medicine.
- [33] During the plaintiff's second visit to Dr. Presley on November 22, 2017, he administered trigger point injections (short term anesthetic) into her trapezius muscles.
- [34] Dr. Presley's diagnosis is that the plaintiff suffered chronic soft tissue injury to her trapezius muscles as a result of the Accidents. On cross-examination, he confirmed that, in his opinion, the injury was "mild".
- [35] Dr. Presley reported that, as of November 4, 2019, the plaintiff's mid-back pain symptoms were much improved and were tolerable with medication and massage therapy. He also reported that her neck pain, localized to her trapezius muscles, had increased and was consistent for more than two weeks.

- [36] Dr. Presley opined that the plaintiff's disability from the Accidents was "partial and temporary". He suggested that, although the plaintiff was still symptomatic, her prognosis was good. Dr. Presley's opinion is that the best way for the plaintiff to treat her injury is for her to be as active as possible. Although such activity may increase her pain, it will not make her injury worse, and the pain can be managed with Cymbalta and possibly Botox injections.
- [37] Dr. Presley does not support the plaintiff having time off from work based upon the nature of her ongoing pain and her job duties.

Dr. Jesse Slade Shantz

- [38] Dr. Slade Shantz is an orthopedic surgeon. He assessed the plaintiff on November 26, 2019. His qualifications in that field as well as his expert report of that same date were introduced in evidence without debate.
- [39] Dr. Slade Shantz's physical examination of the plaintiff did not disclose anything abnormal. She showed no acute distress throughout its duration.
- [40] Based upon the plaintiff's narrative to him of her medical history, as well as his review of the medical records supplied to him, Dr. Slade Shantz opined that the plaintiff suffered the following Accidents-related injuries:
- a) MVA #1:
 - i. whiplash-associated disorder, type II with scapulothoracic myofascial pain and cervicogenic headaches;
 - ii. mechanical lumbar low back pain (intermittent).
 - b) MVA #2:
 - i. aggravation of type II whiplash-associated disorder and lumbar mechanical low back pain; and
 - ii. left acromioclavicular joint sprain (resolved).
- [41] Dr. Slade Shantz opined that the plaintiff can fully function, albeit with pain symptoms that will likely continue long-term and may limit lifting at work and other strenuous activities such as gym attendance. He opined that she will likely experience flare ups from time to time but that he does not expect any future disability related to her current symptoms.
- [42] Dr. Slade Shantz opined that additional rehabilitation may be required on an intermittent basis, three to four times per year, one hour per session when the plaintiff's symptoms flare up.

Dr. Tony Giantomaso

- [43] 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 November 21, 2019. He also reviewed various clinical records and other documents relating to the plaintiff's medical history. His expert report is dated November 27, 2019 and was put in evidence without the need for Dr. Giantomaso to attend court.
- [44] Based upon his review of the plaintiff's medical history as well as his interview and physical examination of her, Dr. Giantomaso opined that the plaintiff suffered the following soft tissue injuries as a result of the Accidents:
- a) MVA #1
 - i. cervical sprain-strain consistent with a WAD-II injury;
 - ii. thoracic sprain-strain (grade 1-2);
 - iii. cervicogenic headaches with occasional migrainous features.
 - b) MVA #2
 - i. exacerbation and aggravation of her cervical sprain-strain;
 - ii. exacerbation and aggravation of her thoracic sprain-strain injury;
 - iii. cervicogenic headaches with occasional migrainous features.
- [45] Dr. Giantomaso opined that all of the above injuries are chronic. He noted that the plaintiff's complaints of low back pain have resolved. He also noted the plaintiff's pre-existing history of chronic sinusitis and obesity.
- [46] Dr. Giantomaso opined that the plaintiff would benefit from 16 to 24 supervised active rehabilitation program sessions and strongly recommended that she engage in them. He also opined that the plaintiff's future activity tolerance and endurance would be substantially increased by a combination of exercise and weight loss, recommending that she work with a dietician in this regard.
- [47] Dr. Giantomaso also recommended a referral to a psychiatrist or psychologist to assist the plaintiff in coping with chronic pain. He also recommended that cognitive behaviour therapy be considered.
- [48] Dr. Giantomaso agreed that the plaintiff's current use of Cymbalta is reasonable and that, in addition, the use of topical lidocaine, diclofenac, and Flexeril Transdermal cream could be helpful for localized pain control.

- [49] Dr. Giantomaso opined that, given the time lapse from the dates of the Accidents, the plaintiff's recovery has likely plateaued and she will probably continue to experience chronic pain to some degree long-term in the future. However, if the plaintiff follows his recommendations, she may experience decreased pain and increased function.
- [50] Dr. Giantomaso opined that, although passive therapies such as physiotherapy, massage therapy, chiropractic and/or acupuncture may provide temporary symptom relief for flare ups, interventional procedures such as trigger point injections, Botox or cortisone could be considered for more lasting relief. He also opined that C2-C3 facet injections would be the best interventional course of action.

Evidence at Trial Tendered by the Defendants

Dr. David Flaschner

- [51] Dr. Flaschner is a Calgary-based physiatrist who assessed the plaintiff on November 12, 2019. He also reviewed the plaintiff's medical records. His medical-legal report is dated that same day. He was qualified without objection as an expert in the field of physical medicine.
- [52] Dr. Flaschner noted the plaintiff's history of bruxism, chronic sinusitis and commented that these issues, as well as her cervicothoracic injury, could all be contributors to her headache complaints. He also noted during his evidence in chief that the plaintiff reported to him her mood had been depressed after her move to Calgary because she was "homesick" but that it has since resolved.
- [53] Dr. Flaschner opined that the plaintiff's subjective pain symptom complaints are consistent with a cervicothoracic sprain/strain that have become chronic. He opined that these symptoms were caused by a combination of MVA #1, MVA #2, and the fall down her stairs in April 2018. Dr. Flaschner was asked on cross-examination whether his opinion regarding the ongoing impact of the April 2018 fall would change if the plaintiff's testimony was that the pain aggravation from the fall resolved entirely within two to three months. Dr. Flaschner responded that the natural history of the types of injuries sustained by the plaintiff during the Accidents tend to wax and wane over time and that if another injury occurred while she was still symptomatic, it is very difficult to determine which injury influences the ongoing pain.
- [54] Given the nature of the plaintiff's whiplash-type injury, Dr. Flaschner opined that the plaintiff's description of pain severity as 10 out of 10 suggested either that she was exaggerating or that there was a psychological component to her assessment. In other words, he believed it was unlikely that her self-assessment of pain severity was objectively accurate, and that there may be a non-physical explanation for her subjective description.

- [55] Dr. Flaschner recommends the plaintiff undergo an active rehabilitation program for postural exercises, core stability, and hip flexibility as well as regular cardiovascular fitness. He opined that manual therapies would be unlikely to provide a cure but might provide temporary symptomatic relief. He also recommended various medications could be used for temporary pain relief.

Credibility and Reliability

- [56] In *Bradley v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave ref'd [2012] SCCA No. 392, Madam Justice Dillon made the following observations regarding the credibility of witnesses, at para. 186:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para.128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [57] As is the case in most personal injury actions, the most important witness in a determination of the outcome is the plaintiff herself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation and damages, usually with the assistance of opinion evidence from qualified medical experts.
- [58] A plaintiff who accurately describes his or her symptoms and circumstances before and after the collision without embellishment can reasonably anticipate that the court will find his or her evidence to have been credible and reliable.
- [59] Regrettably, that did not occur in this case. I find the plaintiff's evidence regarding the severity and frequency of her injuries and pain symptoms, as well as their effect on her ability to function, were exaggerated. During her examination-in-chief, she appeared to be reciting rehearsed and memorized verbiage, which came across as an attempt to derive as much financial benefit from her case as possible. A significant aspect of her claim is that prolonged sitting exacerbates her pain symptoms, yet she spent most of her first day as a witness sitting in the witness box without any overt indication of pain. She spent the entirety

of her second day as a witness standing, which appeared to be an attempt to aggrandize her case, rather than a sincere reflection of her discomfort.

- [60] Moreover, she was not forthcoming during her evidence-in-chief, as significant aspects of her story were not revealed until cross-examination at which point she was evasive and minimized the history of her non-Accidents-related physical and emotional issues.
- [61] Any doubt about the plaintiff's lack of veracity was eliminated almost immediately after her cross-examination began and was only reinforced as the cross-examination continued. It became evident that she had not been forthcoming about her pre-Accident health or the lasting effect of her Accidents-related injuries. Consequently, the attribution of all of her post-Accidents pain symptoms to the Accidents was also put in doubt.
- [62] Additionally, the plaintiff's clinical records disclosed that, on January 26, 2015, she had complained to her family doctor, Dr. Vaish about neck and hip pain. Despite her inability to recall the complaint, she discounted the document, surmising it related to a pulled muscle during sleep and was "definitely" not due to an injury. Other clinical notes, including one dated December 20, 2016 from the Abbotsford Regional Hospital Emergency Ward recording the plaintiff having had complaints of headaches before MVA #1, made no mention of the Accidents and variously attributed her headaches to grinding her teeth (bruxism), ear pain, and a chronic sinusitis condition. Her attempts during cross-examination to explain these clinical notes and lack of any reference to the Accidents, as well as her attempts to describe how her documented headaches differed from those she claims were caused by the Accidents, further undermined her credibility. The plaintiff ultimately acknowledged that headaches caused by the Accidents had not been medically documented as a concern until after MVA #2.
- [63] The plaintiff was reluctant to concede anything that she considered might be detrimental to her case. As noted, she had difficulty explaining the discrepancies between the evidence she gave during her direct examination and the many clinical records and other documents indicating her having reported improvement in, or full resolution of, all her pain symptoms since the Accidents. When faced with those documents, she backed away from the assertions she made during her evidence-in-chief that her pain symptoms are and had been as intolerable as she had suggested. At one point during her cross-examination she stated that her pain symptoms now are "mostly my neck - nothing else".
- [64] I give the plaintiff's evidence as to her pain symptoms very limited weight, and only to the extent it has been corroborated by the medical experts.
- [65] Generally, I found Gagandeep to be an honest witness. However, at times he was, perhaps naturally, overly supportive of his wife's case. Nevertheless, I found him to be mostly credible.
- [66] I found Ajay's evidence to have been overly rehearsed and partisan. I give it little weight.

- [67] Drs. Presley, Slade Shantz, Vaish, and Flaschner were impressive witnesses. Each gave evidence in an objective, forthright, and helpful manner. I accept their respective opinion evidence, as supplemented by their oral testimony, without reservation.
- [68] I was given no reason not to accept Dr. Giantomaso's opinions. Accordingly, I also accept his evidence in its entirety.

Causation

- [69] 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.
- [70] 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.
- [71] Based upon the evidence as a whole, I find that MVA #1 caused the plaintiff to suffer a mild to moderate myofascial (soft tissue) injury to her neck, right shoulder, and upper and mid-back. Those symptoms were exacerbated by MVA #2. I also find that MVA #1 caused the plaintiff to suffer occasional headaches as a result of her upper back pain. Her pain symptoms have continued intermittently but are not debilitating.
- [72] I am not persuaded on the balance of probabilities that any of the other conditions or complaints the plaintiff claims to have suffered were caused by the Accidents.

Assessment of Damages

- [73] The overarching purpose of awarding damages is to put the plaintiff back to the position she would have been in had the Accidents not occurred, and not a better position: *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), at paras. 32-35.

Non-pecuniary Damages

- [74] The assessment of non-pecuniary damages takes into 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.

- [75] Each plaintiff must be assessed individually, although reference to previous similar cases can be helpful: *Boyd v. Harris*, 2004 BCCA 146, at paras. 29-30; *Zamora v. Lapointe*, 2019 BCSC 1053, at para. 56.
- [76] Despite the plaintiff not being a credible or reliable witness regarding the severity and duration of her pain symptoms, I have found on the basis of the expert medical evidence that the plaintiff did suffer a mild to moderate whiplash type injury with associated intermittent headaches. Given the plaintiff's unreliability, the best way to assess her non-pecuniary loss is to consider her ability to function. She did not lose any hours of work after MVA #1 and only modest hours after MVA #2. She has never lost her ability to perform all of her job functions. Shortly after MVA #1, she took on additional work.
- [77] Dr. Vaish opined in February 2017, slightly more than one year after MVA #1, that the plaintiff's improvement had been good and he expected a full recovery over the course of the next year. All of the medical experts were in agreement that the plaintiff's symptoms have mostly resolved. To the extent that she may continue to experience some discomfort, I accept the experts' unanimous opinions that the intensity of that discomfort neither has not impaired her ability to function, nor will it in the future. All of the medical experts agreed that the plaintiff's prognosis for a full recovery is very good.
- [78] Counsel for the plaintiff seeks a non-pecuniary award of \$90,000, relying on the decisions of this court in *Dhillon v. Singer*, 2017 BCSC 414 (\$85,000); *Kodelja v. Johal*, 2017 BCSC 164 (\$80,000); and *Lu v. Huang*, 2016 BCSC 1146 (\$90,000), each involving a similarly employed plaintiff with similar injuries.
- [79] Counsel for the defendants submits that an award of \$30,000 is appropriate in this case, relying on the decisions of this court in *Bains v. Park*, 2014 BCSC 1818 (\$15,000, reduced to \$13,500 due to a pre-existing condition), *Erwin v. Buhler*, 2017 BCSC 362 (\$40,000); and *Kostecki v. Li*, 2014 BCSC 1056 (\$42,000).
- [80] Having considered the Stapley factors, I find that an award of \$40,000 is appropriate in this case for non-pecuniary damages, subject to a reduction for her failure to mitigate.

Mitigation of Damages

- [81] In assessing whether the damage award ought to be mitigated, the onus is on the defendant to prove that the plaintiff would, on the balance of probabilities, have avoided all or a portion of her loss. In this regard, the defendant must prove (1) the plaintiff acted unreasonably, on a subjective/objective standard, in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably: *Gill v. Lai*, 2019 BCCA 103 at para. 26; *Gregory v. ICBC*, 2011 BCCA 144.

- [82] In determining the first prong of the test, the plaintiff's personal circumstances can be taken into account in terms of (a) whether the plaintiff understood, appreciated, and was capable of following the advice given and (b) whether a reasonable person in the plaintiff's circumstances would have done so (Gill, at para. 26).
- [83] The evidence in this case is clear that the plaintiff understood, appreciated, and was capable of following Dr. Vaish's advice regarding the importance of exercise. She was aware of that advice as early as August 2016 but chose instead to limit her rehabilitation to some physiotherapy and massage therapy sessions as well as two chiropractic treatments. Although she maintained that she also did yoga at home, I do not believe that was any more than minimal.
- [84] In my view, a reasonable person in the plaintiff's position would have been more aggressive in her rehabilitation efforts. The uncontroverted medical opinion evidence is that, had she done so, there would have been at least some improvement in her pain symptoms.
- [85] Based upon this conclusion, I find there ought to be a modest reduction of 5% in the award for non-pecuniary damages: *Saunders v. Rempel*, 2019 BCSC 2177. Accordingly, the plaintiff is entitled to an award of \$38,000 for non-pecuniary damages.

Past Loss of Earning Capacity

- [86] Compensation for past loss of earning capacity 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.
- [87] An assessment of past wage loss requires that the plaintiff demonstrate a real and substantial possibility that the income would have been earned: *Athey* at para. 27; *Mills* at para. 82.
- [88] The overall fairness and reasonableness of the award must be considered taking into account all the evidence. It requires an assessment of the plaintiff's past loss of earning capacity, not a calculation according to some mathematical formula: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19.
- [89] The plaintiff testified that she chose to work after MVA #1 and did not lose any wages. In fact, she worked an additional 20 hours per week at Sprott Shaw College, increasing her hours from 35-40 to 55-60 per week. She did, however, lose wages totaling \$249.50 on November 3 and 4, 2017 after MVA #2. That evidence was corroborated by records from Shopper's Drug Mart, her employer. I accept that she lost income in that amount as a result of the Accidents.

- [90] I do not believe the plaintiff's evidence that she quit work on July 1, 2017 in order give her pain symptoms a chance to heal. Rather, I find that she quit work to plan her wedding. The plaintiff ultimately admitted as much during her cross-examination and it was later confirmed by Gagandeep in his evidence.
- [91] I do not believe the plaintiff's evidence that she did not seek employment in Calgary after her wedding in order to heal and find no evidence to indicate that she was not able to work full-time after MVA #1 and MVA #2. I find that she could have worked after her wedding as well, and that she used the time between her wedding and return to work on November 7, 2017 to visit with wedding attendees from out of the country and to relocate to Calgary.
- [92] The plaintiff is entitled to an award of \$249.60 for past loss of earning capacity.

Future Loss of Earning Capacity

- [93] 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.
- [94] 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.

[95] Where, as here, the plaintiff seeks an award of damages based upon the permanency of an injury or functional incapacity, it is incumbent upon her to demonstrate the permanency of her injuries with cogent evidence. The court is entitled to rely on common sense to determine if there is a real and substantial possibility of future loss of income: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.

[96] The plaintiff bears the burden of proving that:

- a) her Accidents-related injuries have impaired her capacity to earn income;
- b) those injuries are likely to persist into the future; and
- c) there is a real and substantial possibility she will suffer a loss of income as a result.

[97] In my view, the plaintiff has failed to meet that burden. Indeed, she disclosed for the first time during her cross-examination that she has accepted a position as a pharmacy technician with her current employer once she obtains her diploma in May 2020. She also admitted that her current pain complaints will not have any impact on her ability to perform that job.

[98] I am not persuaded that, to the extent the plaintiff's Accidents-related injuries persist into the future, there is a real and substantial possibility that they will affect her capacity to earn income in the future. As was stated by this court in *Kostecki*, at para 109:

[109] While it is a mistake to reason directly from a plaintiff's ability to maintain employment to the absence of impairment of her future earning ability, in this case [the plaintiff's] post-accident employment record shows how readily her situation can be managed to avoid any employment consequences.

[99] Those words are equally applicable in this case.

[100] I decline to award the plaintiff any damages under this head.

Cost of Future Care

[101] The purpose of an award for cost of future care is to restore, as best as possible with a monetary award, the plaintiff to the position she would have been in had the Accidents not occurred: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. Any award should reflect the reasonable or normal expectations of what the plaintiff will require: *Spehar v. Beazley*, 2004 BCCA 290 at para. 19; *Peters v. Ortner*, 2013 BCSC 1861 at paras. 141-144.

[102] The plaintiff must demonstrate an evidentiary link between her pain symptoms and the recommended treatment and care. The level of care should reflect the reasonable expectations of what the plaintiff will require: Spehar at para. 19.

[103] The plaintiff testified that she is prepared to take the medications and participate in each of the various modalities of treatment that have been recommended by the expert witnesses if money is made available to her to fund them. She submits that the following categories of future care costs are justified in this case:

- a) active rehabilitation program for core strengthening, scapular stabilization and cervical stabilization exercises, as well as for slowly progressed aerobic and resistance training (16 to 24 sessions);
- b) cognitive behaviour therapy with either a psychiatrist or a psychologist to improve her ability to cope with chronic pain;
- c) Cymbalta, 60 mgs. twice per day, together with a topical lidocaine, diclofenac, and Flexeril Transdermal cream for localize pain control;

failing which,

- d) interventional procedures such as trigger point injections, Botox or cortisone, or C2-C3 facet injections combined with greater occipital nerve blocks.

[104] The plaintiff seeks an award of \$25,000 for the cost of future care but did not lead any evidence as to the likely cost of these medications or ongoing programs in the future. That is unfortunate because the medical evidence is uncontroverted that the plaintiff will require and likely benefit from ongoing prescription medications as well as an active rehabilitation program.

[105] On the basis of the evidence as a whole, I am persuaded that the plaintiff is entitled to a modest sum under this head of damages. I assess that amount at \$5,000, which must be reduced by 5% as a result of the plaintiff's failure to mitigate her damages.

[106] The plaintiff is entitled to an award of \$4,750 under this head of damages.

Loss of Housekeeping Capacity

[107] Where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work--i.e., where the plaintiff has suffered a true loss of capacity--that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. It lies in the trial judge's discretion whether to address the claim as a part of the non-pecuniary loss or as a segregated pecuniary head of damages: Kim v. Lin, 2018 BCCA 77 at para. 33.

[108] Whichever option is chosen, when valuing the different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by the plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place: Kim at para. 34.

[109] I am not persuaded that an award under this head of damages is justified in this case. Rather, I find that the plaintiff's loss is more in keeping with her loss of amenities and her pain and suffering, in respect of which, in my discretion, I have addressed as part of her non-pecuniary damages award.

Special Damages

[110] The plaintiff claims the following special damages totaling \$6,196.99, comprised of:

a) mileage to attend medical/therapy appointments (3106.6 km @ \$.30/km):

\$931.98

b) prescription costs:

\$2,696.74

c) therapy/chiropractor user fees:

\$3,271.21

d) recommended pillow

\$201.59

e) doctor's note:

\$20.00

Subtotal:

\$7,121.52

Less: Amount advanced by the Insurance Corporation of BC

<\$924.53>

Total:

\$6,196.99

[111] The defendants accept all of these amount with the exception of \$201.59 for the pillow. I am persuaded that the pillow was beneficial to the plaintiff's neck pain symptoms and that its cost should be included in the award.

[112] The plaintiff is entitled to recover \$6,196.99 for special damages. However, the defendants are at liberty to claim the appropriate deductions from this award pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.

Conclusion

[113] The plaintiff is entitled to judgment against each of the defendants, jointly and severally, in the total amount of \$49,196.59, calculated as follows:

a) Non-pecuniary damages:

\$38,000.00

b) Past loss of earning capacity:

\$249.60

c) Future loss of earning capacity:

\$0.00

d) Cost of future care:

\$4,750.00

e) Loss of housekeeping capacity:

\$0.00

f) Special damages:

\$6,196.99

Total:

\$49,196.59

[114] The defendants are at liberty to apply under s. 83 of the Insurance (Vehicle) Act for appropriate reductions to the special damages award.

costs

[115] Subject to any submissions the parties wish to make, the plaintiff is entitled to her costs of the action at Scale B.

"G.C. Weatherill J."

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