
CANADA / JUDGMENT

White v. Wang

2014 BCSC 2416

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2416 White v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

White v. Wang,

2014 BCSC 2416

Date: 20141222

Docket: M115086

Registry: Vancouver

Between:

Jessica White

Plaintiff

And

Francis Miao Wang, Nissan Canada Inc., Lance Joseph Burley and

Ronald Alonzo Saunders

Defendants

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Plaintiff:

R. A. Holness

Counsel for the Defendants:

D. S. Jarrett

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 9 - 13 and 16 - 17, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2014

- [1] Jessica White was injured in a car accident on October 3, 2009. At the time, she was a passenger in the front seat of a truck driven by Lance Burley, one of the defendants. The defendants have admitted their negligence caused the accident.
- [2] Ms. White was 28 years old and the mother of two young children, ages five and eight, working part-time as a telemarketer when the accident occurred. She stopped working after the accident until December 2009 when she began part-time work at a bottle depot, a job she had previously held. Ms. White says the injuries she suffered in the accident were worsened during a workplace incident in September 2010. She did not work again until March 2013. She has been working full-time in an office position since May 2013. Ms. White says she is no longer capable of performing physical work.
- [3] Ms. White's claim is for damages including non-pecuniary damages, loss of past wages, loss of future earning capacity, loss of homemaking capacity, cost of future care, and special damages. Her position is the accident caused soft tissue injuries to her neck, left shoulder and jaw, chronic pain syndrome involving the left shoulder and neck, pain into her left arm with sensory symptoms that extend into her left hand, a jaw joint disorder again on the left side, headaches and sleep disturbance. The defendants acknowledge Ms. White suffered soft tissue injuries in the accident, but dispute the severity and duration of those injuries, the effect of a subsequent workplace incident if any, and the extent to which her injuries impacted her capacity to earn past income. The defendants deny Ms. White's capacity to earn income in the future has been impaired. The defendants also assert the plaintiff has failed to mitigate her damages.

Background

- [4] Ms. White graduated from high school in 1999. She did not learn to drive because she was involved in a very serious accident as a teenager that left her frightened of travelling by car. Walking became her main means of transportation. Prior to the accident on a typical day she walked for about three hours.

- [5] Her daughter was born in 2001 followed by her son in 2004. Mr. Burley is the children's father. He and Ms. White lived together for several years before separating in 2012. Ms. White has always been primarily responsible for the care of the children as well as the household chores.
- [6] After graduating from high school and up to the time of the accident, Ms. White worked in a series of jobs including working at a coffee shop, a lottery booth, a recycling plant, a garden centre and a company called Westcar where she inspected sheet metal. After the children were born, Ms. White's work outside the home was part-time. Ms. White worked on and off at a bottle depot called Biggar Bottle Depot as a cashier from 2005 to 2008. The job involved sorting bottles, using a palette jack, assisting customers, and garbage and clean up duties. It was a physically demanding job that at times involved some heavy and repetitive lifting. When the accident occurred, Ms. White was working between 12 and 16 hours per week as a telemarketer. The position was expected to end in December 2009 when the business shut down for three months. Ms. White's plan was to return to the bottle depot at that point. She testified that she intended to work full-time at the bottle depot in September 2010 when her son started school.
- [7] Ms. White testified that before the accident the only other injuries she had suffered included hurting her knee when she was a teenager and being "squished" in a forklift at the age of 23. She said the injuries arising from that incident fully resolved. Certainly for two years before the accident she had no symptoms affecting her ability to do any activity. Excepting the issue of headaches, I do not understand the defendants to be alleging the injuries Ms. White suffered in the accident to be complicated by a pre-existing condition.

The Accident

- [8] At the time of the accident Mr. Burley was driving a 2005 Dodge pickup truck at about 60 kph with Ms. White in the front passenger seat wearing her seatbelt. The truck was in the right hand or curb lane on Inlet Drive in Burnaby when a car travelling in the same direction in the left hand lane suddenly swerved in front of them to turn into a gas station. Mr. Burley tried to avoid the collision and slowed somewhat, but the front passenger side of the truck hit the other car. The airbags did not deploy. Ms. White testified that her left arm was on the arm rest and her face was resting in her left hand when the collision occurred. She described the impact of the accident as the most force she has ever felt. She said her arm pushed up into her jaw and her body went forward and back. She was scared and quickly felt pain in her neck and shoulder. Ms. White did not get out of the truck. She said Mr. Burley had to force the door open.
- [9] The photographs in evidence show significant damage to the whole of the front right corner of the truck extending to the front passenger door.

- [10] Ms. White was taken by ambulance to Burnaby Hospital and examined by Dr. Rowell Wong. Dr. Wong's records indicate Ms. White was tender in the c3-c5 vertebrae area. An x-ray of her cervical spine identified no abnormalities. Ms. White testified medication was prescribed and she was told to use heat and ice and see her family doctor. She filled the prescription, but did not find it helpful. Ms. White visited her family physician Dr. Shaw on October 6, 2009. He observed her head was held in about 10% of the left lateral flexion at the neck. The range of motion in her neck was limited in all directions. Her left shoulder had limited movement with diffuse tenderness. Ms. White was also tender in the mid-cervical spine and over the cervical and upper thoracic paravertebral muscles. Dr. Shaw advised her not to work and to start a range of motion exercises for her neck and shoulder.
- [11] Ms. White said that two weeks after the accident her neck and shoulders were really sore. There was a feeling of heaviness down her left arm. Her jaw symptoms came on at that point. She felt popping and clicking when she chewed and her jaw felt tight and sore on the left side. Her sleep was disrupted and she was experiencing nightmares. At around this point Ms. White also began to experience headaches. She said at first they were minor and occurred about once every two weeks. A couple of months later they became "really bad" and included nausea and vomiting. Ms. White described feeling depressed and sad during this time.
- [12] Dr. Shaw referred Ms. White to physiotherapy with Patrick Lo for her neck and back injuries. She attended sessions from October 23, 2009 to December 23, 2009. According to Mr. Lo, Ms. White made steady or reasonable progress in particular with respect to her range of motion. He also found her shoulder strength improved.
- [13] Ms. White said that during this period she did nothing except attend her physiotherapy appointments. Mr. Burley was doing the housework and child care.
- [14] In November 2009 Ms. White and Mr. Burley had a heated argument that led to shoving. She called the police. She said this sort of conflict between them had never happened before. She testified that Mr. Burley had also been injured in the accident and that his mood had changed afterwards. He became much more irritable.
- [15] In December 2009 Ms. White experienced a severe headache. She attended the hospital because she was vomiting blood.
- [16] Ms. White acknowledged that when she saw Dr. Shaw on December 17, 2009 she reported feeling better. She said she told him that because she wanted to get back to work. I note his clinical record for that date also records that Ms. White reported soreness of the left side of her neck, a migraine headache she experienced the week before and intermittent jaw tightness especially when stressed.
- [17] At Christmas 2009, Ms. White was unable to visit her mother in Kelowna because she was in too much pain to sit in the car for the length of the drive. Around this time she said she felt like less of a person and she was losing her confidence.

- [18] Her plan was to return to work at the bottle depot on January 9, 2010, but she started on December 27, 2009. She testified that the manager begged her to start earlier and so she did.
- [19] Ms. White testified that no part of her body felt fully recovered when she went back to work. She experienced symptoms in her shoulder every day which she said were brought on by repetitive motion with her left arm. The pain affected her ability to perform housework. She could not carry the laundry basket or do much cooking. Ms. White testified that her neck did not hurt unless her shoulder hurt. She described the clicking and popping in her left jaw joint as getting worse, apparently triggered by eating, chewing, laughing or talking. The jaw symptoms included pain, which she said lasted for days. Her sleep continued to be disrupted by pain and discomfort a couple of times a week.
- [20] She was referred by her dentist to Dr. Michelle Williams, a specialist in oral medicine, in June 2010. Dr. Williams concluded Ms. White had a temporomandibular joint ("TMJ") condition that was contributing to head and neck pain. She recommended ongoing monitoring and that Ms. White modify her diet and wear a nighttime appliance, which Ms. White did. Ms. White experienced some improvement in her jaw symptoms.
- [21] Because of her injuries the bottle depot modified some of her work duties. She worked three days a week. Each shift was scheduled for eight hours, but sometimes she left early if the depot was not busy and the manager asked someone to volunteer to go home. She found lifting beer cases or using her left arm too much at work aggravated her symptoms. She also found everyday work duties aggravated her neck symptoms.
- [22] While working at the bottle depot Ms. White received no further treatment for her injuries. She said she did home exercises and stretches she learned at physiotherapy every day. She found they gave her brief temporary relief. She continued to experience headaches and still felt like less of a person because she could not do what she used to do in terms of housework, particularly cooking and cleaning.
- [23] Ms. White testified that on September 12, 2010 an incident occurred at work. Ms. White said she was in the process of lifting a garbage can to carry it to others so the garbage could be combined. As soon as she picked up the can she dropped it and then felt instant pain in her neck and shoulder. She estimated the weight of the can to be five pounds. She testified the incident occurred early in her shift, requiring her to leave early. She said she felt the same pain in her shoulder she was already experiencing, but in addition she experienced a pain and numbness that went down her leg. She reported the incident to her employer and to Work Safe BC ("WSBC").
- [24] Kathleen Westhaver who was also working at the bottle depot as a cashier that day testified. She explained that when the depot is not busy, the cashiers clean garbage cans, wipe bins, put bottles away in the back and do whatever needs to be done. She said on September 12, 2010, there was a lull and Ms. White was combining garbage. She was tying up a garbage bag, and she lifted it "although she wasn't supposed to". When asked to describe the weight of the garbage, Ms. Westhaver said it looked pretty heavy and big, but she did not know what

was inside the bag. Ms. White did not complain to her or say that she was injured. It is not clear to me that Ms. Westhaver and Ms. White were describing the same incident.

[25] A manager of the bottle depot, Ms. Mernickle, also testified. She was aware that Ms. White had been in an accident from knowing her family. Ms. Mernickle became aware that Ms. White was involved in an incident at work on September 12, 2010. Ms. Mernickle said she remembered looking at Ms. White and she did not look right. Ms. White told Ms. Mernickle she had hurt herself lifting garbage the day before. Ms. Mernickle said she sent her home to go to the doctor. Ms. Mernickle testified that Ms. White had no difficulties with her job duties at the bottle depot before the accident. The discrepancy as to the day on which the incident occurred was not put to Ms. White.

[26] On September 13, 2010 Ms. White was seen by Dr. Shaw. When examining her he found her to be tender over the left trapezius muscle and to have restricted rotation and flexion of her neck to the right. He prescribed an anti-inflammatory and advised her to complete range of motion exercises. He recommended she attend physiotherapy again, if she was not better within four days.

[27] Her application to WSBC was completed over the phone that same day. Under incident detail, the WCSB Application for Compensation and Report of Injury form reads:

She has aggravated a condition for a car accident. She lifted up one garbage can (bent over to pick it up from the floor) which had moldy (sic) food in the bottom, and she was dumping it into another garbage can, and as she was hurrying up because a client walked in, she dropped the can in her haste and felt pain in her left shoulder and neck area.

[28] Ms. White returned to Dr. Shaw's office on September 21, 2010 and was seen by his replacement Dr. Andrucson. He completed a physician's report for WSBC that day which includes his clinical observations of Ms. White. Those observations include marked spasm to her left trapezius and interscapular muscles with moderate spasm to the right lateral trapezius muscle. He prescribed a muscle relaxant and recommended starting physiotherapy. Dr. Andrucson also referred Ms. White to a neurologist and requested an MRI Scan. The records indicate she reported to him increased pain associated with numbness in the left arm that was constant and associated with weakness. Ms. White disagreed that she told Dr. Andrucson the numbness was constant. She said it always came and went from the outset.

[29] Ms. White was seen by Dr. Ho, a neurologist on October 12, 2010. An MRI scan was done on October 17, 2010. She was seen by Dr. Shaw for follow-up throughout the month of October, and attended 14 physiotherapy sessions with Mr. Lo between September 22 and October 20, 2010. In his reports to WSBC, Dr. Shaw advised that Ms. White was not ready to return to work.

- [30] A WSBC document titled Phone Memo and dated October 22, 2010 indicates an entitlement officer called Ms. White and advised her that her claim had not been accepted. The decisions appears to be largely based on the opinion of the medical advisor. According to the memo, Ms. White became upset and indicated had she known the outcome she would have kept working. The opinion of the medical advisor to WSBC is not in evidence.
- [31] The focus of the physiotherapy provided by Mr. Lo in 2010 was on Ms. White's left neck area. He noted that among her complaints to him was periodic numbness and tingling in her left arm extending into her left hand. Ms. White testified that she made some progress in physiotherapy, but it was "not huge". She said she still had pain and soreness that came on after prolonged activity such as house work.
- [32] More specifically, Ms. White testified that between September and December 2010 her jaw was still sore and continued to make a popping sound if she ate too much chewy food. She continued to wear her mouth guard at night. Her left shoulder and neck area were sore when she overused her left arm which would go numb or feel heavy if really bad. She was doing some housework, but had to proceed very slowly and take breaks. Her sleep was still disrupted when her shoulder was overused and in pain. She continued to experience headaches after the work incident once in a while when the pain in her shoulder, neck and jaw was really bad.
- [33] Ms. White testified that in 2011 she was able to increase the amount of housework she did a little bit. She was not back to her regular routine. She still needed help with laundry and had to take breaks. She required the help of Mr. Burley and the children. She went grocery shopping with Mr. Burley and he would push the cart and help with carrying the groceries form the car to the house. In 2011 Ms. White also found she was able to take the children to the park more, but was not able to be as active with them as she would have liked.
- [34] In May 2011 Ms. White underwent breast reduction surgery in the hope it would reduce her neck and shoulder pain. She was required to avoid any strenuous activity for six weeks after the operation. Ms. White testified the surgery was not very helpful in reducing her pain symptoms.
- [35] In late 2010, 2011 and into 2012 Ms. White's jaw symptoms continued to be monitored by Dr. Williams.
- [36] In December 2011 Ms. White was seen again by Dr. Ho. He has not prepared a medical legal report in this matter. His consultation report forms part of the records of Dr. Shaw. He notes the MRI scan was essentially normal, demonstrating a number of very minimal disc protrusions at the c3-c4 and c7-t1 levels. At that time Ms. White reported to him tenderness on palpation of her left scapula and upper trapezius and her entire cervical spine and paraspinal muscles. Neck rotation to the right caused pain to the left posterolateral neck. Ms. White testified that she found she was not able to understand what Dr. Ho said to her, describing him as not very clear. She said she showed him the stretches she had received from physiotherapy and he suggested she continue with them which she did.

- [37] In 2011 Ms. White said she obtained her doctor's permission to use Wii Fit to perform yoga exercises. She completed three sessions a week with each lasting about 15 - 30 minutes. She found the exercises helped a little on the day she did them. She also resumed walking as her means of transportation.
- [38] Dr. Shaw's medical legal report dated May 1, 2012, indicates he met with Ms. White on January 20, 2012. She continued to have pain symptoms particularly in the left back and neck, although she was also reporting diffuse pain elsewhere. Ms. White was looking for employment at that point, but not working. Concerned about her weight gain and diffuse muscle symptoms he ordered some laboratory investigations which revealed some abnormal results as did a subsequent ultrasound. Dr. Shaw was of the view that Ms. White remained unable to do physical kinds of work, but there was no reason she could not work at something sedentary.
- [39] Shortly before the date of his first report, however, in April 2012 Ms. White moved with Mr. Burley and the children to live with his mother in Hatsick, a small community outside of Mission, BC. She testified the move was for financial reasons. Ms. White said she looked for work in the area. She searched for jobs on the internet and Mr. Burley's brother would drive her around to hand out her resume. She was looking for work in retail or as a receptionist or in an office; anything that did not involve lifting.
- [40] Ms. White said her goal had been to become a funeral director - she thought it would be rewarding to help people when they were grieving and to show respect for the dead by working on their hair and make-up. She investigated completing a certificate in funeral directing in April 2011 and said at that point she had been looking at the option for about a year. Ms. White testified that when she attended an orientation, she learned the job would involve lifting bodies which she felt unable to do.
- [41] In July 2012 Ms. White separated from Mr. Burley. Their relationship had been difficult since the accident and she decided she simply could not live with him and his mother in a remote community. She packed up her belongings and the children and went to stay with her best friend for three weeks in Surrey. She found a place to live very close by in August 2012 and obtained social assistance to meet expenses. Through social assistance Ms. White attended a women's empowerment class which included some job search training.
- [42] Ms. White testified that her jaw symptoms were not as bad in 2012. Her neck and left shoulder remained painful. She continued to experience numbness down into her left hand. She experienced headaches "here and there". They would always start with shoulder and neck pain which proceeded into her jaw and then her left temple before becoming a full blown headache and causing her to vomit. At those times she had to stay in a quiet, dark room. The longest headache lasted for three days. She says she now gets headaches every couple of months.

- [43] In 2013, Ms. White continued to look for a job. In March 2013 she obtained a job at A&W but she found she could not carry on with it because it required lifting heavy mugs full of root beer. She also trained for a job at a liquor store. She realized part way through she would not be able to do the lifting required for that job either, which involved moving cases of alcohol from the delivery trucks as well as stocking shelves.
- [44] Ms. White started her current job in May 2013. She is a filer and scanner. She works full time. Her wage began at \$11.00 per hour, but increased to \$12.00 in September 2013. She has missed some time from work due to her injuries, including pain in her shoulder and jaw pain leading to a headache. She has also missed some work to attend medical appointments, some of which related to this litigation.
- [45] Ms. White continues to struggle with housework. She said Mr. Burley and the children help her a great deal. She could not manage on her own. Despite their separation, Mr. Burley continues to take her grocery shopping and help with the laundry twice a week. She is able to cook most days, but if Mr. Burley is there, he will take over. She would struggle for example to lift a big pot filled with water.
- [46] Ms. White acknowledged she has been told by Dr. Shaw and others to attend the gym for exercise. She has gone hardly at all. She said she continues to do stretching exercises every day at home and at work, she now does the Wii Fit yoga twice a week and she continues to walk a great deal and play with her children. When she has gone to the gym she has used the treadmill and light weights, but says she needs direction as to how to use the equipment properly.

Expert Evidence

1. Dr. Clifford Shaw

- [47] Dr. Shaw was called by Ms. White as an expert witness in his capacity as her treating family physician. Dr. Shaw prepared two medical legal reports regarding Ms. White. The first I have already referred to above. The second is dated February 4, 2014. In each of his reports Dr. Shaw includes a thorough summary of the appointments he or his colleague Dr. Andruson had with Ms. White. In his first report it was his opinion that Ms. White suffered strain type injuries to her neck and upper back and later symptoms related to temporomandibular joint dysfunction consistent with the accident. He also opined that the work place incident that occurred in September 2010 aggravated Ms. White's accident related injuries. He saw her ongoing symptoms in her neck and upper back or left shoulder area as caused by the accident, but others were not, such as diffuse pain symptoms. In his first report he was of the view that her injuries were still amendable to treatment in the form of an active program of stretching, strengthening and aerobic activity and suggested she may benefit from a gym pass to help with this. He regarded her prognosis at that point as good, but was unable to offer a time frame for her recovery. He saw her then-current inability to work as related in part to the accident. His opinion was that while she remained unsuitable for physical kinds of work, she was capable of doing a sedentary job.

- [48] In his second report, Dr. Shaw provides that Ms. White continues to suffer from symptoms arising from her accident related injuries that involve the left side of her neck and left shoulder area that are most likely muscuotendinous in nature with associated mechanical type pain from the strain type injuries. He notes she continues to report intermittent symptoms suggestive of irritation to the nerves going into her left arm, as well as ongoing symptoms related to temporomandibular joint dysfunction. In his opinion Ms. White remained capable of performing work with light physical duties, but she would have difficulty doing more physical work with heavier lifting and repetitive left arm motion against any significant resistance. His prognosis was much less optimistic than in May 2012. Given that more than four years had passed since the accident and Ms. White's ongoing symptoms, his view is that she will likely have some degree of chronic discomfort in the affected areas.
- [49] In cross-examination Dr. Shaw agreed that he had encouraged Ms. White to use the gym and that attending regularly would have reduced the chances of her experiencing ongoing pain. He was not asked to consider the nature and amount of exercise she testified to doing and whether that was sufficient to assist in her recovery. There was no indication he ever provided Ms. White with specific instructions about what exercises she ought to do at the gym. His evidence was that her explanation for not going was that she was too tired.

2. Dr. Michelle Williams

- [50] Dr. Williams is an experienced specialist in oral medicine who assessed and treated Ms. White's jaw related symptoms. Her medical legal report regarding Ms. White is dated June 25, 2012. At the time of her initial examination of Ms. White in June 2010 Dr. Williams diagnosed her with a TMJ disorder which she considered to be contributing significantly to a more complex pain profile that also included contributions from her neck and shoulder muscles. The jaw-related findings involved myofascial pain of the left side of her neck and the masticatory muscles. In Dr. Williams' opinion the accident was the precipitating event for the development of Ms. White's TMJ disorder. Dr. Williams saw Ms. White several times for re-evaluation and monitoring. Over time her jaw-related symptoms reduced, but did not resolve completely. As of the date of the report, Ms. White continued to experience episodes of jaw-related pain and the clicking in her left jaw joint was ongoing, though she was by then able to eat a normal diet. Dr. Williams did not regard her jaw disorder as disabling although she would be concerned if Ms. White had continued to work as a telemarketer.
- [51] In cross-examination the defendants attempted to make much of the fact that Dr. Williams had not been made aware by Ms. White that she was apparently resting her face on her hand when the accident occurred. Dr. Williams said simply that a direct blow would only increase her risk of TMJ injury. Dr. Williams described Ms. White as compliant with the care she recommended. She modified her diet as suggested and wore her night appliance, etc. She attended appointments reliably.

3. Dr. Ansel Chu

- [52] Dr. Ansel Chu is a specialist in physical medicine and rehabilitation who has been treating patients with chronic pain syndrome since the early 1990's. He estimates that he sees from 100 to 200 new patients with chronic pain syndrome each year. His medical legal report is dated February 24, 2014. Ms. White's presenting complaints to him were left shoulder girdle pain including the upper shoulder and shoulder blade area extending into the neck and the jaw, and the left arm with sensory symptoms and occasional headaches. His diagnostic impressions are that Ms. White has developed chronic pain syndrome with features mainly of soft tissue and myofascial pain syndrome. He concludes she had not suffered any neurological damage or mechanical problems with her left shoulder or neck. Instead he found widespread soft tissue pain in the whole neck and shoulder girdle on the left side with multiple areas of tenderness when he palpated various muscle groups. He was able to reproduce much of her neck and shoulder girdle pain and well as the symptoms in her left arm and hand by palpating trigger points or areas in the muscles rich in nerve endings. Using thoracic outlet impairments tests Dr. Chu was able to produce a lot of pain in Ms. White's left shoulder girdle which started to radiate down the left arm all the way to the hand with sensory symptoms such as tingling and numbness. He also found that Ms. White had a degree of pain from the left jaw joint, but there was also a lot of muscle pain in that area.
- [53] When he examined Ms. White he found her neck range of motion was mildly restricted. Even though she was not experiencing numbness at the time, when he tested for sensation Ms. White had diffuse altered sensation throughout the whole left arm.
- [54] Dr. Chu's report explains that myofascial pain is a complicated chronic pain disorder that appears to involve certain changes within the central nervous system's pain pathways. Various psychosocial factors contribute to the development of myofascial pain syndrome. In general they include the person's perception of the sick role, job satisfaction, interpersonal stressors, monetary stressors, stress caused by the medical system and the litigation, catastrophizing and so on. At p. 3 of his report he writes:

In a small percentage of people, even though the healing takes place, the pain does not resolve and metamorphoses into a chronic soft tissue pain or myofascial pain syndrome. That is why the pain started to spread into the left arm about 6 months after the acute whiplash at the point when the healing had already taken place of the soft tissue injury.

Why one person with a particular whiplash injury goes onto full healing and why another person with the same injury goes onto develop this kind of myofascial pain has little to do with the actual physical injuries suffered or the forces of impact.

- [55] Dr. Chu's report draws a distinction between the notions of impairment and disability. He defines impairment as an alteration or loss in function anatomically, physiologically or psychologically. In his opinion Ms. White's musculoskeletal impairments include the left TMJ dysfunction and pain. In his view her myofascial pain is better categorized as a disability which he defines as much more subjective than impairment. It is the gap between what the person can do and what they are required to do. He found Ms. White had a certain

degree of disability with respect to household chores. She does most of it, but it hurts her and slows her down. She is able to perform her present work duties but was unable to sustain a return to the bottle depot or work at a fast food restaurant or liquor store.

- [56] Dr. Chu's prognosis for complete resolution of the chronic myofascial pain syndrome is guarded. He offers the same view of her TMJ pain and dysfunction.
- [57] He makes a number of recommendations. First he suggests a range of medications to improve Ms. White's sleep. He also recommends an active exercise program. Given Ms. White's uncertainty about what exercise techniques to employ, he recommends involving an exercise therapist or kinesiologist for 15 sessions to instruct her and ensure the exercises are being performed correctly. He further suggests she continue using her bite plate at night. Finally he recommends the use of trigger point anesthetic injections into the muscles of the shoulder girdle and neck to try and relax the muscles that are tight and painful which her family doctor may feel comfortable providing.
- [58] In cross-examination, Dr. Chu testified there were objective findings when he examined Ms. White that included tightness in the muscles and mild tightness during the range of motion exercises. His objective findings also included the mild restriction in Ms. White's neck range of motion.

4. Dr. Bassam Masri

- [59] The defendants called evidence from Dr. Masri, a highly experienced orthopedic surgeon. He treats bone and joint disorders both surgically and nonsurgically with a focus on hips and knees. His medical legal report is dated March 5, 2014. He opines Ms. White suffered a soft tissue injury to her neck and her symptoms gradually improved over a three month period to the point that she was almost asymptomatic until September 2010 when she had another very minor injury at work. This aspect of his opinion was based on his review of many of Ms. White's post-accident medical records, but not the report of Dr. Chu. Dr. Masri states that Ms. White reported to him that her pain was at an 8 - 9 out of 10 before the work place incident and then increased significantly for three months afterwards before returning to an 8 - 9 out of 10 where it has remained unchanged. Elsewhere he writes that she said there had been absolutely no change in her pain since the accident. He says she also reported that although her physiotherapist felt she improved during treatment, she did not.
- [60] Dr. Masri writes that he cannot explain why Ms. White reports that the pain has not improved and persists. He sees no objective reason for the pain. Further he describes his physical examination of her as inconsistent in so far as she reported tenderness over areas where there is no pain.

- [61] He concludes Ms. White suffered a soft tissue strain affecting the neck and left trapezius muscle which should have mostly resolved by now. Dr. Masri does not provide an opinion about whether the work place incident worsened Ms. White's accident symptoms. Instead he writes that assuming she did have a significant exacerbation of her symptoms in September 2010, a further three months off from work would be a reasonable period of recovery.
- [62] In cross-examination, Dr. Masri was queried about the appropriateness of some of the factual assumptions set out in his report. For example, he includes under his list of facts and assumptions the WSBC medical examiner's conclusion that Ms. White's symptoms had for the most part completely resolved by December 2009. This conclusion, along with Dr. Masri's review of the physiotherapy records, appears to provide the basis for his own opinion about the resolution of Ms. White's injuries before the workplace incident. Dr. Masri acknowledged that he did not know what documents the medical advisor reviewed or whether that person was a qualified physician. Dr. Shaw's clinical records which Dr. Masri also reviewed show Ms. White was not asymptomatic after December 2009 and prior to September 2010; she continued to report pain, tenderness and discomfort particularly in relation to the performance of her work duties at the bottle depot.
- [63] Dr. Masri's only recommendation is that Ms. White work hard at losing weight, noting she has gained 30 lbs since the accident and obesity can be a contributor to pain symptoms. There is no suggestion in his report or any of the other medical evidence that Ms. White is obese and so his recommendation is not particularly helpful in terms of how to address the ongoing symptoms Ms. White is experiencing. In addition he states he supports her own plan to start an exercise program at the gym.
- [64] When asked about the issue of chronic pain, Dr. Masri said he does not like the term. He explained that orthopedic pain is defined by duration. He acknowledged a whole other medical speciality deals with pain management and he does not treat patients for chronic pain. When asked if chronic pain syndrome was a genuine medical condition, he responded that it was outside his area of expertise. He also testified that he would defer to Dr. Williams with respect to her opinion about Ms. White's jaw issues.

4. Dr. Ian Turnbull

- [65] Dr. Turnbull is an experienced neurosurgeon. His medical legal report is dated February 26, 2014 and was prepared at the request of the defendants. When he asked Ms. White to describe her ongoing symptoms related to the accident, his report indicates she said her left arm starts to feel heavy and numb if she does too much. At times her left hand goes numb and she drops things. She reported a constant ache in her left shoulder region and soreness in the left side of her neck. The left side of her face "troubles her" if she opens her mouth too widely. Upon examination Dr. Turnbull found she had good range of neck mobility and mild tenderness to palpation of the paraspinal muscles on the left side of her neck and in the upper trapezius on the left side. Dr. Turnbull's opinion is that the problems Ms. White referred to were caused by the accident and possibly exacerbated by the work related injury.

He does not believe that the altered sensation and tingling in her left hand that she feels from time to time is neurological, nor can it be attributed to a physical injury. In his view the length of time Ms. White was off from work was reasonable. He found her capable of performing her present job duties and he found no evidence of permanent disability vis a vis that position.

- [66] During cross-examination Dr. Turnbull acknowledged that tenderness can provide objective evidence for diagnosis but not prognosis.
- [67] Dr. Turnbull has not performed surgery since 1999. He testified that he did see patients with chronic pain arising from degenerative changes. I do not take from his evidence that he actually treated such patients. Instead he would assess their need for surgery or refer them to a pain specialist.
- [68] I note at this stage the evidence of Ms. White with respect to her appointments with Drs. Chu, Masri and Turnbull. She described Dr. Chu as very thorough. She said he spent between 45 minutes to an hour asking her questions. His physical examination of her took the same length of time. She said it was the longest exam she has had. She saw both Drs. Masri and Turnbull on the same day. Each of them spoke to her about her history for 15 minutes at the most and their examinations of her were very brief. She estimated Dr. Turnbull examined her for ten minutes and Dr. Masri for between five and 15 minutes. This aspect of her evidence is consistent with that of the doctors and I accept it.

Causation

- [69] The burden is on a plaintiff to prove causation. She must establish a defendant's negligence caused both her injuries and the resulting losses (e.g. non-pecuniary loss or lost wages). "The former is concerned with establishing the existence of liability; the latter with the extent of that liability": *Blackwater v. Plint*, 2001 BCSC 997 at para. 363.
- [70] The general test used to determine causation is the "but/for" test. Accordingly, Ms. White bears the onus of proving, on a balance of probabilities, that "but for" the defendants' negligence, her injuries would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey]; and *Blackwater v. Plint*, 2005 SCC 58 [Blackwater]; The test for causation is not to be applied too rigidly and is to be contrasted with the more exacting standard that approaches scientific certainty in the medical context: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Midgley v. Nguyen*, 2013 BCSC 693 at para. 172. It is essentially a practical question of fact which can best be answered by ordinary common sense: *Athey* para. 16.
- [71] Nor is Ms. White required to show the defendants' negligence is the sole cause of her injuries. So long as there is substantial connection between the harm she has suffered and the defendants' negligence, beyond the "de minimus" range, the defendants will be liable. In other words, as long as the defendants' negligence is part of the cause of the injury, they are liable, even if their negligence alone was not enough to create her injuries: see *Farrant v. Laktin*, 2011 BCCA 336; *Athey*; *Resurfice Corp. v. Hanke*, 2007 SCC 7. There is no

apportionment between tortious causes and non-tortious causes of an injury. The law does not excuse the defendants from liability merely because causal factors for which they are not responsible also helped to produce the harm.

- [72] If causation for injuries is established, the defendants are liable to Ms. White for all of the losses flowing from her injuries. Such losses are those which Ms. White proves on a balance of probabilities would not have occurred "but-for" the defendants' negligence: see: Blackwater at para. 78; Smith v. Knudsen, 2004 BCCA 613 at para. 26.

Credibility

- [73] I observe at this stage the medical experts who assessed Ms. White relied on her descriptions of her history and symptoms to varying degrees in coming to their opinions.
- [74] As was emphasized by defence counsel, the weight to be given to those experts opinions, to the extent they are based upon her subjective reporting, ultimately turns on the court's assessment of the credibility and reliability of Ms. White's evidence at trial.
- [75] As in any case where there are few objective findings of continuing injury, I must be "exceedingly careful" when I examine Ms. White's evidence.
- [76] The factors to be considered when assessing credibility were summarized in Bradshaw v. Stenner, 2010 BCSC 1398, aff'd 2012 BCCA 296, at para. 186. They include the firmness of the witness's memory, the ability of the witness to resist the influence of interest in modifying her recollection, whether the witness's evidence harmonizes with independent evidence that has been accepted, whether the witness changes her evidence during direct examination and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in her recollections. Other factors are whether the witness's evidence seems generally unreasonable, impossible or unlikely, and the witness's demeanour. At bottom, the question is whether the witness's evidence is consistent with the probabilities affecting the case as a whole.
- [77] The starting point in a credibility assessment is to presume truthfulness: Van Halteren v. Wilhelm, [1997] B.C.J. No. 1959, aff'd 2000 BCCA 2, at para. 207.
- [78] The overarching submission of the defence is that Ms. White has exaggerated the extent and duration of her injuries. They acknowledge she suffered some initial neck, shoulder and TMJ discomfort which were largely resolved within two or three months. They dispute the work place incident to the extent it resulted in any injury at all, or exacerbated her accident related injuries. In the event the court finds differently, they say any worsening of symptoms should have fully resolved within a few months.
- [79] The defendants submit Ms. White is not a credible witness. They argue she is an unreliable and inaccurate historian regarding the circumstances of the accident, her symptoms and their treatment and her capacity to work.

- [80] They identify internal and external inconsistencies in Ms. White's evidence to support their position. Several of the inconsistencies identified by the defendants were minor and more than adequately explained by Ms. White. The defendants focused on Ms. White's inconsistent reporting of her head resting on her hand or fist at the time of the accident. As noted above she reported this circumstance to Drs. Chu, Masri and Turnbull, but not Dr. Williams who assessed and treated pain in her left jaw. Dr. Williams was not bothered by this omission. Given Ms. White's consistent reporting of left jaw symptoms, and the defendants' acceptance that she suffered some TMJ injury, I am also not concerned by this issue, meaning it does not cause me to doubt her evidence as to the circumstances of the accident.
- [81] The defendants also ask the court not to believe aspects of Ms. White's testimony because they are uncorroborated. In doing so on at least one occasion they inaccurately describe her evidence. For example, the defendants allege the plaintiff testified she experienced really bad headaches and being sick every two weeks in the first few months after the accident. They say the only medical record that supports her claim to severe headaches is from Eagle Ridge Hospital dated December 8, 2009. They complain further she failed to advise the hospital of the accident. Firstly, Ms. White's evidence was that the headaches she experienced after the accident were minor at first occurring once every two weeks. It was after a couple of months she said they became really bad and involved vomiting. She identified the December 2009 headache as the most severe up to that point. Given her state at the time which included vomiting and nausea, it is entirely understandable that she would not have mentioned the accident to hospital staff. There is no suggestion the treatment provided for her headache would have been different had she informed staff of the accident.
- [82] I wish to note at this stage the challenges involved for Ms. White in giving evidence at this trial. Several times, in both direct and cross-examination she was stood down to allow other witnesses to testify. While she was not giving evidence, Ms. White waited outside the courtroom for reasons that were not explained to me. As a result she spent the whole of the trial on and off the witness stand, testifying or waiting to continue testifying. Testifying in and of itself is a stressful experience. Testifying as Ms. White did was considerably more difficult. I note that on the first day she gave evidence Ms. White appeared frightened. She relaxed somewhat but continued to seem uncomfortable, although she listened carefully and gave clear, direct answers to the questions she was asked. By the last day of the trial she was visibly distressed and increasingly so over the course of the day. When it appeared her evidence would not complete that day she became almost distraught, advising the court that she feared losing her job if she missed any further time from work. Ms. White's understandable fear appeared to affect some of her answers to questions put to her in cross examination that day. I was not however left with the impression that she became less truthful as a result or that the reliability of material points in her evidence were impacted.

- [83] The defendants focused with some intensity on Ms. White's admission that she told the physiotherapist Mr. Ho she was feeling better toward the end of her physiotherapy in December 2009 when she says she was not. In her evidence she stated forthrightly she had lied to him about feeling better, explaining she did so because she wanted her life back and to return to work. She said she pushed herself back to work to pay the bills. She also said she felt she did not deserve to be in pain because she had been a passenger in a car. While it is troubling that Ms. White was untruthful with her physiotherapist on this occasion, it does not cause me to disbelieve her evidence. I note she also told Dr. Shaw that she was feeling better in December 2009 but at the same time she reported ongoing symptoms consistent with her evidence.
- [84] Ms. White denied lying to other medical professionals, including exaggerating her symptoms, which I accept. Her evidence made it obvious that she was very distressed by her inability to care for her children and run the household successfully, and if anything she pushed herself to do more than she could because she did not want to be constrained by the limitations of being injured. While testifying, rather than overstate her symptoms she was rather reserved and brief in her descriptions of what those symptoms were and remain. It was clear to me she does not enjoy talking about her injuries or being the focus of attention and very much wanted to get better and return to the life that she had.
- [85] I have considered Ms. White's at times quirky or unusual responses to circumstances in assessing her credibility. I have in mind an example which involved Ms. White giving an inaccurate answer to a question at discovery. After the discovery, quite properly, the error was identified and corrected in a letter to counsel. At trial Ms. White explained she gave the incorrect answer because she was distracted by the fact that defence counsel's tie did not match the rest of what he was wearing. As strange as this explanation may be, I am satisfied it was truthful.
- [86] A range of clinical records were put to Ms. White in an attempt to demonstrate inconsistencies, including one made by Dr. Andrucson in September 2010 where his notes indicate she described her left arm numbness as constant. Ms. White testified it has never been constant. It has always been intermittent and she would have said so. Similarly, she denied telling Dr. Masri that her pain had remained at an 8 - 9 out of 10 since a few months after the work place incident or, as it also states in his report that her pain had not changed since the accident. I accept her answers on these points
- [87] Insofar as the defence seeks to impugn Ms. White's credibility through alleged inconsistencies in the information she previously provided to various medical professionals and her evidence at trial, the court's observations in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, are instructive:

- [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
- [35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time.
- [88] I note also that the absence of a record is not in itself evidence of anything. This is particularly important when considering the plaintiff's complaint that she experienced more serious and more frequent headaches after the accident which I will discuss in more detail below.
- [89] I conclude that on the whole I found Ms. White provided credible, reliable evidence. Most of the internal and external inconsistencies in her evidence were minor and or satisfactorily explained by her. I accept her testimony as to why she told Mr. Ho she felt better when she did not. Most importantly, I did not find her testimony involved any attempt to exaggerate her injuries and symptoms.

Conclusions on Causation

Headaches

- [90] The defendants argue there is no expert evidence to support a finding that Ms. White's post-accident migraine headaches were caused by the accident. They ask the court to place significant weight on Ms. White's failure to mention the accident when she attended the Eagle Ridge Hospital in December 2009 for treatment of a severe headache and vomiting and the absence of further medical records regarding ongoing headaches. Dr. Shaw's clinical records indicate that on December 17, 2009 Ms. White reported to him the same migraine-like headaches from the week before as well as a past history of migraines once or twice a year. She described the most recent headache as worse and different than those she had experienced in the past, reporting it began at the neck before radiating into the front of her head. Dr. Shaw prescribed her Tylenol No. 3 to use as needed and provided instructions about how to deal with migraines. Similarly on February 3, 2010, Ms. White reported that she suffered a migraine the day before with a headache around the temporal area of the head associated with jaw pain, worse on the left side.
- [91] In his medical legal report, Dr. Shaw does not state expressly that the frequency and severity of Ms. White's headaches have been worsened by the accident nor does he exclude the exacerbation of headaches in giving his opinion that her injuries and symptoms are consistent with the accident. The injuries and symptoms she described to him included

worsening headaches. I note that Dr. Chu's report includes occasional headaches among Ms. White's presenting complaints. It seems very likely none of the medical experts focused on Ms. White's headaches symptoms because they have interfered far less with her everyday life than her shoulder and neck symptoms. None the less she testified that she continues to experience them far more often than she did before the accident - now approximately every two months - and at times they are far more severe than anything she experienced before the accident. When she experiences a severe headache she is incapacitated until it passes. Her evidence on this issue was not diminished by cross examination. I am satisfied that she has proven the accident caused the more frequent and severe headaches she continues to experience.

Other Injuries and Symptoms

- [92] Turning to Ms. White's other injuries and symptoms, based on the evidence of Ms. White, and that of Dr. Shaw, Dr. William and Dr. Chu, I find that the accident caused soft tissue injuries to Ms. White's left shoulder area, neck and jaw area that resolved to some degree by the time she returned to work in December 2009, but not to the extent she reported to Mr. Ho. I find that although her range of motion had improved and her strength had increased through physiotherapy, she continued to experience significant pain in her left shoulder, neck and jaw, along with regular sleep disturbance when the pain was particularly acute and periodic severe headaches. I accept that she experienced pain while working at the bottle depot, but she pressed on.
- [93] The level of pain and discomfort Ms. White experienced as a result of the accident was significant enough that she could do virtually no housework for three months after the accident and then far less that she did before the accident for a significant period of time. I also find that Ms. White's symptoms were ongoing at the time of the work place accident which then exacerbated those symptoms. Around the same time and perhaps because of the exacerbation Ms. White also began to experience the intermittent feeling of numbness and tingling in her left arm extending into her hand. This was either caused by the exacerbation of her injuries or, as Dr. Chu opined about, the onset of chronic pain. In his view the pain started to spread into the left arm at the point when the healing had already taken place, as is typical with chronic pain. The bottom line is the accident caused the symptoms Ms. White experiences in her left arm and hand. Based on the evidence of Drs. Chu and Turnbull I accept that the nature of Ms. White's injuries is not neurological despite the sensory symptoms that continue to occur.
- [94] I also accept that Ms. White's ongoing symptoms are as she described in her evidence and so over time there has been some improvement. She resumed walking for about an hour a day. She gradually returned to many of her housekeeping activities although she continues to experience pain while doing so and finds sweeping and doing laundry particularly difficult. Her shoulder and neck pain remain her most significant symptoms. The pain in those areas fluctuates with use of the left arm, but they have not resolved.

- [95] I accept the opinion of Dr. Chu that Ms. White suffers from myofascial pain syndrome. I find her chronic pain condition is a result of the accident. The defendants spent a great deal of time in cross-examination pointing to the various other stressors in Ms. White's life since the accident, including other unrelated health issues, relationship problems, Mr. Burley's failure to pay child support etc. While they may very well be contributing to her experience of pain, I am more than satisfied that but for the accident she would not now be suffering from myofascial pain syndrome.
- [96] Based on the evidence of Ms. White and Dr. Williams, I find that Ms. White also suffered a TMJ disorder and that it in turn was contributing to what Dr. Williams described as a complex pain profile involving the neck and shoulder muscles. I accept that her painful jaw symptoms were at first intermittent, became constant and quite intense, and then by June 2012 were episodic. Her jaw symptoms although still painful at times are not disabling.
- [97] Ms. White's evidence along with that of Drs. Shaw and Chu also establish that Ms. White is not capable of working at jobs that are physically demanding including those that involve repetitive or heavy lifting. She is not disabled however from lighter duties including those she performs at her current position. I also accept Dr. Chu's opinion that the prognosis for complete resolution of Ms. White's myofascial pain syndrome is guarded, although he thinks she can make some improvements based on his recommendations. I also accept his view that she will continue to experience some pain in her jaw.
- [98] In coming to these findings, I was not assisted by Dr. Masri's assessment given his conclusion that he could offer no explanation for Ms. White's ongoing pain absent objective findings. His perspective on the question of chronic pain contributed to undermining the value of his opinion here. He said both that he does not like the term and that it is beyond his expertise to comment on whether chronic pain syndrome is a real medical condition. He acknowledged that a whole other medical speciality is devoted to management of chronic pain. Part of Ms. White's claim is that she suffers from chronic pain. Dr. Masri is an expert is in the field of orthopedic surgery. While he therefore has expertise in the realm of soft tissue injuries, with respect to ongoing pain issues, he does not have nearly the same level of training, expertise and experience as Dr. Chu who, as a physical medicine and rehabilitation specialist, is immersed in a practice that assesses and treats patients with pain issues many of whom have chronic pain.
- [99] For the above noted reasons, I place little weight on Dr. Masri's opinions and prefer those of Dr. Chu and Dr. Shaw who, as her treating physician, has the benefit of knowing and seeing Ms. White over time.
- [100] Liability for the accident is admitted in this case and there was no evidence elicited at trial or submissions made to suggest that Ms. White was contributorily negligent with respect to the subsequent work place incident or there was some other tortious cause. Nor have the defendants argued any injury arising from the work place incident was divisible from those Ms. White suffered in the accident.

[101] Accordingly, I find the injuries Ms. White sustained in the workplace incident not only aggravated some of the injuries caused by the accident but also are indivisible from those injuries. Ms. White is therefore entitled to recover all of her damages from the defendants.

Damages

[102] The rules of damages require the defendant to restore, as best as possible, the injured plaintiff to her original position; that is, the position she would have occupied had the defendant's negligence not occurred. The defendant need not put the plaintiff in any better position, but must take the plaintiff as he finds her: *Athey* at para. 32.

Duty to Mitigate

[103] The defendants argue Ms. White failed to mitigate her losses, by not complying with the recommendation of treating professionals that she obtain and use a gym pass.

[104] It is well settled that a plaintiff in a personal injury action has a positive duty to act reasonably in mitigating her losses: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. However once the plaintiff has proved the defendant's liability for her injuries, in order to succeed in a mitigation defence, the defendant has to show the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. In *Chiu*, the Court articulated the governing principles regarding mitigation where a plaintiff has not pursued recommended medical treatment as follows:

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

[105] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, the Court outlined a subjective/objective mitigation test at para. 56:

whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment .

[Emphasis in original.]

[106] The defendants' primary complaint is Ms. White did not obtain a gym pass until January 24, 2013, and then she failed to use it, despite Dr. Shaw first recommending that she do so on December 17, 2009. Ms. White testified that she did not obtain a pass because she was unable to afford the initial expense, although she knew she would be reimbursed. She also testified that she was uncertain about what to do at the gym. She acknowledges that Mr. Ho

has shown her how to use weights during physiotherapy sessions, but she found she forgot when away from physiotherapy which she said was embarrassing. She agreed that Dr. Shaw told her to get a gym pass, but he did not tell her how it would be beneficial. She said she advised Dr. Shaw numerous times she was unable to pay for the pass. Ms. White also testified that she thought walking every day, stretching and doing home exercises was staying active.

[107] Dr. Shaw's report dated May 1, 2012 indicates that he provided Ms. White with a note for a gym pass, recommended not by him but by the physiotherapist, on December 17, 2009. Mr. Ho's clinical records provide that Ms. White completed gym exercises with weights during her December 2009 appointments, but they do not contain a recommendation that she obtain a gym pass. Nor do his records or progress reports set out what if any exercises she ought to continue with after treatment, except "home exercises" which he advised her about on her last appointment. Ms. White testified that she did those exercises.

[108] On February 23, 2010 Dr. Shaw suggested to Ms. White that she target using the gym pass three days a week. There is no indication in his report that Dr. Shaw ever recommended specific exercises for Ms. White to do at the gym. In his first report he writes as follows at page 9:

In my opinion, her injuries are still amenable to treatment, although I believe that should take the form of an active program of stretching, strengthening and aerobic activity. She may benefit from a pass to a gym or fitness facility to help with this.

[109] Although Dr. Shaw testified in cross-examination that going to the gym would reduce Ms. White's chances of experiencing ongoing pain, he offered this opinion without it ever being established what precisely he or others recommended she ought to be doing at the gym. Urging an injured person to obtain and use a gym pass is not helpful advice in the absence of specific recommendations about the form of exercise to be undertaken and perhaps modified overtime.

[110] In his subsequent report dated February 4, 2014, Dr. Shaw indicates he met with Ms. White on February 1, 2014. She advised him she was doing stretches twice a day in accordance with the physiotherapist's instructions and walking for at least an hour per day. She reported that she was too tired to attend the gym. His report indicates he advised her to continue with her regular exercises. He offers the opinion that she will benefit from continued stretching exercises and from doing light aerobic activity. In other words, he was no longer recommending she obtain and use a gym pass or prescribing a particular form of exercise she was not already doing.

[111] In his report dated February 24, 2014, Dr. Chu recommended that Ms. White start an active exercise program. She told him she did not know what to do at the gym and that she hadn't really had any guidance. He suggested she see an exercise therapist or kinesiologist for 15 sessions to assist her in learning appropriate exercises and performing them correctly.

- [112] Based on the evidence I am not satisfied that Ms. White has acted unreasonably by "eschewing" recommended treatment nor have the defendants' established the extent to which her injuries and therefore her damages would have been reduced had she followed the advice to obtain and use a gym pass. I conclude the defence has not established Ms. White failed to mitigate her losses.

Non-pecuniary Damages

- [113] Ms. White seeks non-pecuniary damages of \$85,000. Given my finding about the workplace incident, the defendants suggest \$40,000 is appropriate. Non-pecuniary damages are awarded to compensate a plaintiff for her pain, suffering, loss of enjoyment of life and loss of amenities caused by the defendant's negligence. The award should be fair and reasonable to both parties. Fairness is measured against awards made in comparable cases which may provide a rough guide because each case calls for individualized assessment and must be decided on its own unique facts.
- [114] In *Stapley v. Hejslet*, 2006 BCCA 34, Justice Kirkpatrick outlined a non-exhaustive list of factors to be considered when assessing non-pecuniary damages at paragraph 46. They include: the plaintiff's age, the nature of the injury, the severity and duration of the pain, disability, emotional suffering; loss or impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities, loss of lifestyle and the plaintiff's stoicism which generally speaking should not be penalized.
- [115] All of these factors are at play here in determining an appropriate award of non-pecuniary damages to Ms. White. Ms. White was a young woman of 28 when the accident occurred. The pain and discomfort she has suffered particularly in her left shoulder area, neck and jaw area have been significant and enduring, along with the intermittent numbness and feeling of heaviness in her left arm. Although somewhat better than her symptoms once were, particularly her left jaw area, the prognosis for complete recovery is guarded. Her injuries have affected all aspects of her life. Most importantly perhaps, they interfered with caring for her children at a time when her youngest child remained at home in her full time care. Ms. White's daily routine involved walking the children to and from school and to the playground or park where she actively played with them. For quite some time she was unable to do this. Her injuries also prevented her from running the household - doing laundry, cleaning, and cooking - important responsibilities she performed to a high standard before the accident. Over time she has resumed most aspects of housekeeping but she remains unable to manage without help, and performing housework causes her pain. She is also unable to sustain the high standard she once did.
- [116] In addition, her injuries prevented her from carrying on with part time work without pain and restrictions. For some time after the accident, Ms. White also suffered emotionally. She felt less of a person, like she had lost confidence, and sad. She was no doubt frustrated by the level of pain she was experiencing and the impact on her sleep and her ability to do the things she had always done. While there is some evidence Mr. Burley's behaviour changed

after the accident, causing their relationship to deteriorate, the increased burden of working full time, caring for the children and the household because of her injuries no doubt also had a negative impact.

[117] Ms. White cites the following cases in support of her proposed award:

Murphy v. Jagerhofer, 2009 BCSC 335 (\$100,000); and

Ashmore v. Banicevic, 2009 BCSC 211 (\$80,000).

[118] The defendants rely on the following authorities:

Fifi v. Robinson, 2012 BCSC 1378 (\$42,000);

Zajackowski v. Grauer, 2014 BCSC 711 (\$40,000);

Maltese v. Pratap, 2014 BCSC 18 (\$40,000);

Sooch v. Snell, 2012 BCSC 696 (\$45,000);

Loeppky v. Insurance Corporation of British Columbia, 2012 BCSC 7 (\$45,000); and

Rozendaal v. Landingin, 2013 BCSC 24 (\$40,000).

[119] In reviewing the authorities provided by the parties I note the plaintiff in Ashmore suffered very similar injuries to Ms. White, but his headaches were far more frequent and his injuries had a far more significant impact on his involvement in sports and other activities. None of the defendants' authorities include injuries or personal circumstances that are sufficiently comparable to Ms. White's to make them of much assistance here.

[120] In any event, the awards in other cases serve as a guideline only. Taking into account my review of the provided authorities, the injuries Ms. White suffered in the accident and their impact over time on her various aspects of her life, and the application of the factors identified in Stapley, I find that an award of \$65,000 is appropriate in this case.

Loss of Income Earning Capacity

Past Wage Loss

[121] Ms. White seeks a total award of \$41,925.50. The defendants suggest an award of \$1,200 for wages lost from her employment as a telemarketer prior to her return to work in December 2009 and \$925 to compensate her for a loss of earnings from the bottle depot following the aggravation of her injuries in September 2010. The defendants take the position the plaintiff was entirely capable of returning to work five weeks after the workplace incident occurred when her second round of physiotherapy completed.

[122] Claims for past loss of income are subject to the same legal test as those for loss of future earning capacity. The plaintiff must prove that her injuries impaired her ability to earn income. While the burden of proof relating to actual past events is a balance of probabilities, hypothetical events including those that are past will be considered as long as

there was or is a real and substantial possibility they would occur, and not mere speculation: Athey at para. 27. The Court of Appeal in *Smith v. Knudsen* put the matter this way at para. 29:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[123] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for her net past income loss only. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62.

[124] At the time of the accident Ms. White was working as a telemarketer between 12 and 16 hours a week earning \$10 per hour. Her shifts were typically in the evening when Mr. Burley was available to care for the children. After the accident she did not work at all until she began to work part time on December 27, 2009 at the bottle depot. She claims \$1,800 for her inability to work up to this time. The defendants' dispute this amount arguing her gross wage loss should be limited to \$1,200 based on \$10 per hour, a 12 hour week, and an eight (sic) week disability period. I assume they meant to submit ten weeks. The evidence was that Ms. White and Dr. Shaw discussed her returning to work on January 10, 2010 but she went back earlier at the manager's request. Ms. White testified that no part of her body felt recovered at that time. Her last session with the physiotherapist was on December 23, 2009. I am satisfied that Ms. White returned to work as soon as she was able, if not prematurely, and is entitled to her wages for that period. Given the variability in the hours she worked prior to the accident, I find she is entitled to be compensated for 14 hours per week up to December 27, 2009 which results in the amount of \$1,680.

[125] Between December 27, 2009 and September 12, 2010 Ms. White worked three shifts a week at the bottle depot. Each of her shifts was scheduled for eight hours. Ms. White's employment records for 2010 indicate she only twice worked 48 hours or more during a two week pay period. On one occasion she worked 47 hours. The evidence of Ms. Mernickle the bottle depot manager was she would sometimes send staff home early when the depot was not busy. She said Ms. White at times would volunteer to go home. When she did she was not paid for the balance of her shift. Ms. White testified that she was the first one sent home most of the time because they knew she was injured. She was not asked during her evidence if in fact she volunteered to leave early because of pain and discomfort although I accept her evidence that between January and September 2010 her left shoulder was always in pain and was aggravated by lifting beer cases or anything heavy or using her left arm too much. Her jaw was also still very painful. Dr. Shaw provided her with a medical note in June 2010 that she should avoid loading the truck and using the hand jack in response to Ms. White's report of increased discomfort in her left shoulder girdle when doing either of these tasks at work. Given the state of the evidence I conclude that half of the reduced

hours and therefore half of amount claimed by Ms. White for past wage loss during this time were caused by her leaving early due to her injuries. That amount is \$691.40 (\$6,525.88 (780.25 hours) - \$7,217.30 (705.5 hours)).

- [126] I have already concluded that Ms. White aggravated her injuries while lifting and dropping some garbage at work in September 2010. She did not work again until March 2013. The plaintiff argues that but for the accident she would have started working full time in September 2010 when her youngest child began school full time. She testified to her intention was to work full time in 2010 and 2011 to save money so she could return to school for further training. She says she is entitled to net past wage loss between then and May 2013 of \$39,004.75. That amount includes a deduction for social assistance payments she received in 2012 and 2013 and wages earned at A&W.
- [127] The defendants dispute Ms. White's claim that she planned to work full-time in September 2010. They point to the evidence of Ms. Mernickle who said she was not aware Ms. White planned to seek a full time job at the bottle depot. She also testified that there were few full time employees. The defendants also argue Ms. White's employment history was not one that included full time work. Employment history is of course important in predicting a plaintiff's future plans, but I must also consider whether that work history has been impacted by the person's role in caring for young children. I have no trouble accepting Ms. White's evidence that she planned to work full-time after her son was enrolled in school full time. Her testimony is entirely plausible. Ms. White was primarily responsible for the children's care and the household. Mr. Burley worked full time. The job she had at the time of the accident allowed her to work in the evening when Mr. Burley could be home with the children. Once their youngest child entered school full time, Ms. White was free to pursue employment during the day without the expense of full time child care. Given Ms. Mernickle's evidence, it may not be that Ms. White would have worked full-time at the bottle depot. I have no reason to believe she would not have found a full-time job elsewhere.
- [128] The next issue to consider is whether Ms. White has established the injuries she suffered in the accident caused her to be unable work until May 2013. Dr. Shaw's report dated May 1, 2012 indicates that on January 20, 2012 Ms. White advised him she was looking for work but she felt her symptoms were a barrier to both physical work and more sedentary jobs, even though she herself felt she could do the later. The opinion set out in his report is that he could see no reason why she could not do sedentary work.
- [129] Ms. White provided very little evidence about her efforts to find work prior to the family's move to Hatsick in or about April 2012. She testified to applying for retail positions in 2011, but receiving no responses which she attributed to her lack of experience.
- [130] Ms. White testified that the move to Hatsick was for financial reasons. Its remote location made it difficult for her to find employment, although she continued her search with the help of Mr. Burley's brother. She believes the move to Hatsick was precipitated by the injuries she suffered in the accident.

[131] I am satisfied however that Ms. White was capable of performing sedentary work by the end of 2011 and she has not established that her failure to find a job prior to the family's move to Hatsick was caused by the accident. I conclude she has not proven that her claim to past wage loss should include lost wages after February 1, 2012 to allow for a reasonable period of time in which to find full-time sedentary employment. Based on an hourly wage of \$10.00 between September 1, 2010 and February 1, 2012, or 78 weeks x 40 hours, Ms. White would have earned \$31,200 but for the accident. From that amount I deduct \$740.88 earned at A&W, \$7,192.98 in social assistance benefits for 2012 and \$4,327.62 for 2013. This results in a gross wage loss from September 1, 2010 to February 1, 2012 of \$18,938.52.

Future Loss of Income Earning Capacity

[132] Ms. White seeks \$100,000 as compensation for loss of future earning capacity based on a predicted loss of income for one-and-a-half months a year over 25 years. The defendants argue she has not demonstrated an impairment of her future earning capacity or a real and substantial possibility that any diminution in her earning capacity will result in a pecuniary loss.

[133] In *Morgan v. Galbraith*, 2013 BCCA 305, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge when assessing a claim for loss of future earning capacity. Madam Justice Garson stated at para. 53:

... in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach ... or the capital asset approach ...

[134] The plaintiff is therefore required to prove a real and substantial possibility that the diminishment in her earning capacity will result in a pecuniary loss. Evidence of ongoing pain may be sufficient to ground a substantial possibility that a plaintiff's pain will adversely affect the future ability to work, even where, at the time of trial, the plaintiff has not missed work due to the injury: *Clark v. Kouba*, 2014 BCCA 50 and *Munoz v. Singh* 2014 BCSC 568 at 170. Although the onus of the plaintiff is not heavy, it must be met to justify a pecuniary award: *Kim v. Morier*, 2014 BCCA 63 at para. 7. The essential task of the court is to compare what the plaintiff would have probably earned if the accident never occurred and what she probably will earn having suffered the injuries in the accident. The overall fairness and reasonableness of the award must be considered, taking into account all the evidence: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

- [135] Here I have already found that Ms. White's future earning capacity has been impaired by the injuries she suffered in the accident and her ongoing pain including myofascial pain syndrome based on the medical opinions of Dr. Chu and Dr. Shaw and Ms. White's evidence. I also find based on the same evidence there is a real and substantial possibility that this impairment will result in a pecuniary loss.
- [136] The court may assess the amount of a future loss of earning capacity using either an earnings approach or a capital asset approach. Both are correct. The appropriate approach will depend on the circumstances of the case. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12. On either approach the court must assess the loss taking into account both negative and positive contingencies. However, the assessment is an exercise of judgment based on all relevant evidence, not a mathematical calculation.
- [137] With respect to the quantification of her loss of future earning capacity, Ms. White simply submits she will likely lose one-and-a-half months in wages each year on account of the accident. She has not explained how she came to this estimate.
- [138] Given Ms. White's current employment and her pre and post-accident employment history, along with my acceptance of her evidence that but for the accident she would have begun full time work in September 2010, in my view the capital asset approach should be used to assess Ms. White's loss of future earning capacity.
- [139] The capital asset approach involves considering factors such as those set out in *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8:
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. the plaintiff is less marketable or attractive as an employee to potential employers;
 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [140] The fact that Ms. White now earns more than she did at the time of the accident does not preclude her from an award for loss of future earning capacity. It is not a loss of earnings, but rather a loss of earning capacity, a capital asset for which compensation is being made: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. Accordingly even a plaintiff who is able to earn as much or more after her injuries as before may be entitled to compensation because some occupations or jobs will be closed to her. In *Pallos v. Insurance Corp. of British Columbia*, [1995] B.C.J. No. 2 (C.A.) the plaintiff suffered a leg fracture in the accident resulting in permanent pain which limited his capacity to perform certain activities. At the

time of trial he was performing lighter duties and earning more income from the same employer than he did before the accident despite being disabled from his previous duties. Mr. Justice Finch, as he then was, concluded his earning capacity had nonetheless been reduced.

- [141] Although she is capable of fulfilling the more sedentary duties at her present job, Ms. White's testified she has missed some time from work due to her injuries and symptoms. For example, she was away from work for three days due to prolonged and severe headache. She has also left work early owing to pain from time to time. Thus far she has made up the missed time upon her return but there is a real and substantial possibility she will not be able to continue do so. I have considered that Ms. White's work history has also included missing work time because of her responsibilities as a parent.
- [142] Ms. White's current position offers no job security. In the event she loses this job, all of the Brown factors are at play. Given the guarded prognosis for complete recovery and the likelihood she will continue to suffer chronic myofascial pain, Ms. White has clearly been rendered less capable overall from earning income from employment that involves any significant physical duties. Her work history is one that focused on such employment. Given her lack of post-secondary training and her history of physical work, the impact of her injuries is greater for her than in might be for another person with a more developed history of sedentary work. The scope of employment available to Ms. White is clearly significantly reduced, leaving her less capable overall from earning income from all types of employment. On the other hand, I am also of the view that a steady and uninterrupted or undiminished income to age 65 would overstate the likely earnings that Ms. White would have achieved, but for the accident.
- [143] In the circumstances, I think a reasonable award is the equivalent of somewhat more than one years' income at her current rate of pay in the amount of \$30,000. As noted by Mr. Justice Finch, as he then was, in Brown at para. 6, this approach reflects the diminished capacity, but also acknowledges the uncertainty about how much work will be missed and when that will occur.

Loss of Homemaking Capacity

- [144] Ms. White seeks damages for loss of homemaking capacity in the amount of \$28,225. Homemaking costs are awarded for loss of capacity and are distinct from future care and cost of care claims: O'Connell v. Yung, 2012 BCCA 57 at paras. 59 - 68. An award for homemaking capacity provides compensation for the value of the work that would have been done by the plaintiff that she is incapable of performing because of the injuries she suffered in the accident. Loss of housekeeping capacity reflects the loss of personal capacity, which is an asset. Consequently damages for such a loss are not dependent upon the issue of whether replacement costs are actually incurred. Similarly, whether or not the plaintiff is likely to hire such assistance in the future does not inform the analysis, contrary to the defendants' submissions: Munoz at para. 195.

- [145] However, a cautionary approach is also required in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss: see *Westbroek v. Brizuela*, 2014 BCCA 48, at paras. 72 - 78.
- [146] In this case, the evidence establishes that before the accident, Ms. White was a meticulous housekeeper. Her friend Amber Fernley described Ms. White as a "neat freak". Although the family always had dogs, there was no smell of animals or hair present in the home. The children were tidy and the kitchen was clean. Since Ms. White's surgery in 2011, Ms. Fernley has visited Ms. White many times and observed the home is not kept to the same high standard of cleanliness. There are lots of dishes to be done, clumps of dog hair everywhere and food items all over the stove top.
- [147] After the accident, it is clear Ms. White struggled to perform any housework which then fell to Mr. Burley. Ms. White's evidence is she really was not doing anything for the first three months except attending physiotherapy. After the work place accident in September 2010 she did some housework but very slowly and with breaks she continued to require help. The evidence is that Ms. White has pushed herself to resume her housekeeping role and over time assumed responsibility for most of it. However, Mr. Burley continues to assist her. She testified that despite their separation, he comes to the home to perform housework and cooking when he can tell she is in pain. He routinely helps with laundry. Her children also help with various tasks. She manages to cook for the most part but still cannot do some things such as lifting a large pot full of water. She sweeps and vacuums very slowly and with difficulty.
- [148] I conclude that \$10,000 is a reasonable and cautious amount that compensates her loss of homemaking capacity both before trial and afterward.
- [149] To be clear, I have not included any part of this award in the assessment of Ms. White's non-pecuniary damages which took into account the pain and discomfort Ms. White experienced and continues to experience when performing housework due to her injuries.

Cost of Future Care

- [150] Ms. White claims \$8,640 for the cost of future care. She seeks \$4,320 to cover the cost of physical therapy, including sessions with a kinesiologist which she estimates at \$45 twice per month for 48 months and \$4,320 for massage therapy again on \$45 per session for 48 months. The defendants submit that Ms. White is entitled to \$500 for the cost of a gym pass. Their view is that her future care requirements are limited to exercise and ongoing strengthening "at most".
- [151] Ms. White is entitled to compensation for the cost of future care based on what is reasonably necessary to restore to her pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate care. The award is based on what is reasonably necessary, based on the medical evidence, to preserve and promote the plaintiff's mental

and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at para. 172; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29 - 30.

[152] The test for determining the appropriate award under this heading is an objective one.

[153] Dr. Chu recommends Ms. White engage in an active exercise program with the assistance of an exercise therapist or kinesiologist for 15 sessions. He suggests the exercise program could include a pool exercise program as well, as there are certain things she could do in the pool that will not aggravate her myofascial pain.

[154] In his second report Dr. Shaw opines that Ms. White is likely more susceptible to exacerbations related to heavier physical activity which could make episodic massage or physiotherapy necessary.

[155] In my view, Ms. White's estimates for the cost of each session of massage therapy are very low, but given the medical evidence she has significantly overestimated the number of sessions for both physical therapy and massage that will be reasonable necessary.

[156] I regard a total award of \$3,100 as appropriate which includes \$720 for the cost of 15 physical therapy sessions; \$2,000 for periodic massage therapy for symptoms flare ups or exacerbations and \$500 for the cost of a gym pass.

Special Damages

[157] Ms. White claims special damages of \$1,668.85 which includes \$700 physiotherapy treatments she received in 2010. Ms. White's evidence is she signed an agreement to pay the cost of the treatment upon resolution of her claim and so that amount remains outstanding. The defendants dispute Ms. White's entitlement to the \$700 based on their position that the workplace accident did not aggravate injuries suffered in the accident. Given my findings in that regard, I award Ms. White \$1,668.85 with interest.

Conclusion

[158] In summary, I award Ms. White damages as follows:

Non-pecuniary Damages:

\$65,000

Loss of Past Earning Capacity:

\$21,309.92 (gross)

Loss of Future Earning Capacity:

\$30,000

Cost of Future Care:

\$3,100

Loss of Housekeeping Capacity:

\$10,000

Special Damages:

\$1,668.85

[159] I trust the parties can agree on the net amount for past loss of earning capacity and any interest calculations that are required to be made.

[160] If the parties are unable to agree on costs they may make arrangements to appear before me to speak to the issue.

"Fleming J."

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