

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hollows v. Wood*,
2013 BCSC 1991

Date: 20131031
Docket: M112924
Registry: Vancouver

Between:

Jennifer Christine Hollows

Plaintiff

And

Lyle Dennis Wood

Defendant

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff:

M.R. Chandler
K. McLaren

Counsel for the Defendant:

W. Chalcraft

Place and Date of Trial/Hearing:

Vancouver, B.C.
September 9-12, 2013

Place and Date of Judgment:

Vancouver, B.C.
October 31, 2013

I

[1] The plaintiff is a 40-year old married mother of two children, a daughter, born in 2007 and a son, born in April 2010. The family lives in North Vancouver.

[2] On December 18, 2009 the plaintiff was injured in a motor vehicle accident at the intersection of Highway 99 and Clarke Drive in Squamish. Liability has been admitted by the defendant. He entered the intersection against the traffic and collided with the vehicle the plaintiff was driving, in circumstances where the plaintiff had no opportunity to avoid or mitigate the impact. Ms. Hollows had three passengers, her two sisters and her daughter Avery, then two years old.

[3] The collision was serious. The vehicles were extensively damaged. The airbags deployed. The plaintiff was shaken up and required assistance to get out of her vehicle.

[4] In the immediate aftermath, the plaintiff was concerned about the safety of her daughter, who was briefly separated from her. She and her passengers were then taken to the hospital in Squamish a few blocks from the accident. There, the plaintiff, who was five months pregnant, went through several hours of acute anxiety over the welfare of the child she was carrying. The hospital staff was unable, for quite some time, to establish a heartbeat, and to confirm that the baby appeared to be unharmed.

[5] Following her release from hospital the plaintiff proceeded up to Whistler with the rest of her family, including her husband Brad, who had come up in another vehicle. The next day she was beginning to show signs of soft tissue injuries and was tearful and anxious, and keeping her daughter close to her. The return trip was hard, and she was particularly upset when she passed the scene of the accident. She saw a massage therapist, and went to a walk-in clinic on her return. She was able to see her regular family doctor on December 30, 2009. This was followed by an extensive series of treatments over the following years.

[6] There is little controversy about the nature of the plaintiff's injuries. The parties differ on the effect the injuries have had on her life to date and what effect they will have in the future.

II

[7] It should be noted as a preface to a consideration of the plaintiff's injuries that there is no significant past medical history, and that the plaintiff was fit and capable of, and active in, sports and other pursuits requiring a high level of strength and endurance. While the court was repeatedly pressed to accept that the plaintiff was truly extraordinary or remarkable in this regard, she was not training at quite the level of elite athletics. I do accept that she placed a high priority on exercise and was at or near an optimal level of fitness for a person in her circumstances, balancing an exercise regime with a busy young family and a responsible job.

III

[8] The medical record includes the following:

(a) Dr. Kathrine C. Sutherland, August 23, 2010:

I first met [the plaintiff] at Pemberton Marine Medical Clinic (Walk-In clinic) on December 30, 2009. She had planned on seeing me in my own office but because of her MVA and holiday hours it was easier to see me at the Pemberton Clinic. I noted that she was the driver and wearing a seat belt when the accident occurred. She reported that an on-coming car made a left turn at an intersection in front of her car and she could not avoid it. She was pregnant (at 25 weeks gestation) expecting her second child. She was attending a Midwife for her obstetric care.

She was admitted to Squamish General Hospital the day of the accident and had attended another Walk-In clinic on December 21, 2009. She had sustained whiplash to the neck, mid-thoracic and low back. She noted daily headache but was only able to take Tylenol for pain because of her pregnancy. She was unable to lift her toddler. There had been no vaginal bleeding and foetal movements continued as before suggesting no adverse effects on her pregnancy.

On examination there was focal tenderness at the posterior cervical and para-vertebral muscles. Rotation to the left at the cervical muscles was reduced. There was marked reduction of forward flexion at the thoraco-lumbar spine. Her symptoms and findings on examination were consistent with whiplash injury to the neck and back caused by a motor vehicle accident.

She was advised to try gentle massage and TENS for symptom control. She already had been given a referral for physiotherapy. She was asked to attend my own office in Deep Cove in 2 weeks. An insurance form was completed since she was unable to work.

...

I last saw her in my office on June 29, 2010 for review. She had her baby on April 27, 2010 by emergency Caesarian Section. Both sets of grandparents had helped her following delivery. As she was weaned off stronger analgesics prescribed after her surgery she was aware of increasing headaches as well as neck and back pain - mainly neck and mid-thoracic. The low back pain was much improved although there was still residual aching in the lumbar spine. She was not able to get to massage because was too busy caring for her new baby. She was seeing her chiropractor for 30 minutes each week. She had enrolled her 3 year old in full time Day Care since she was unable to care for the new baby and her toddler at the same time.

She used Advil or Tylenol for pain but tried to avoid it since she was nursing her baby. She said her sleep was disturbed by headache and neck pain. She was aware of continued anxiety when driving her children fearing another MVA. She still had some nightmares but the tingling in her hands and feet had cleared. On examination, posture and gait were normal. Focal tenderness at the posterior cervical muscles, mid-thoracic spine and para-vertebral muscles persisted. There was some restriction of forward flexion at the thoraco-lumbar spine (finger tips 18 inches from the floor) but otherwise full range of motion all areas. Muscle power and tone were normal with normal plantar reflexes.

These findings are consistent with a Grade 2 Whiplash soft tissue injury caused by forcible flexion/extension during the motor vehicle accident. She was encouraged to mobilise as tolerated starting with daily walks with her baby. Massage and chiropractor treatment could help with symptom management. She remained unable to do heavy housework and needed help with household chores. As her symptoms decreased she should follow a more active rehab program.

She was reassured that eventual recovery would be expected but it might take time.

In summary, she sustained a soft tissue injury to the neck, mid and low back. She was pregnant at the time and was noted to have a small subchorionic bleed on obstetrical ultrasound following the accident - presumed to be caused by the accident. She was naturally concerned that her unborn baby might be harmed but fortunately her pregnancy continued without significant complication and she delivered a healthy baby boy by Caesarian Section. However; she experienced considerable pain and stiffness in the neck, mid and low back which made it difficult to dress herself, look after her home, care for her toddler and also prevented her from working.

Her symptoms have improved since her new baby was born but she continues to have headaches and neck and back pain which interfere with her ability to care for her children and home by herself.

She experienced considerable anxiety at the time of the accident regarding the safety of her family and unborn baby. This likely contributed to her feelings of tingling in the hands and feet which have now resolved. The anxiety has persisted to some extent so that she remains anxious about driving her children - fearing another MVA.

[Emphasis added.]

(b) Dr. Kathrine C. Sutherland, August 9, 2011:

She was last seen by me on April 26, 2011. She reported that she had returned to work on April 04, 2011 and initially had noted increased back pain. She had started attending the gym in January with some initial flare of symptoms which then improved. She had to attend a training week in Toronto and found sitting in the plane there and back was associated with increase in pain. This was low back pain with some transient numbness in the feet but no radiation of pain to the legs. She had been seeing the chiropractor 3x/week since the increase in pain. She had been trying a traction table 4x/week for symptom relief and found it helpful although she had just got it.

Her diagnosis remains Grade 2 Soft Tissue Whiplash injury to the cervical, thoracic and lumbar spine. She experienced anxiety over possible harm to her unborn baby but fortunately her pregnancy progressed normally. She continued to have anxiety around driving her children and potential accidents. She also noted depression and fatigue after her new baby was born although she did not have a history of mood disorder or post-partum depression with her first child. This was associated with chronic pain, headaches and fatigue and the resulting difficulties of caring for her family and home. She had to enroll her toddler in full-time Daycare since she could not cope with her new baby as well as her first child. She was referred to a Post- Partum Support Group through Community Mental Health.

She has always been motivated to recover and return to work and started to attend the gym in January, 2011 with return to work April 04, 2011 after a year of Maternity Leave. She had not been able to work between the MVA and the birth of her second baby. She had avoided medication as much as possible because she was pregnant or nursing her new baby. Following her return to work and training course in Toronto she experienced a flare-up of pain and had resumed chiropractor treatments. She had purchased a traction table and was hopeful this would be useful for symptom management. She did not report any residual mood problems and was no longer nursing her baby.

She continued to have lingering symptoms from her Grade 2 Whiplash Injury over a year after the MVA. Unfortunately this can happen although symptoms should subside completely in time. It is helpful to maintain general fitness with a regular exercise program and pay attention to posture and ergonomics in the workplace and at home. Physical therapy such as chiropractor may be helpful for specific flare-ups but would not be expected to be necessary on a long term basis. There is no reason to expect a recurrence of Mood Disorder but some degree of anxiety related to driving her children may persist. She would be more likely to have prolonged symptoms if involved in another MVA.

[Emphasis added.]

(c) Dr. Hannah Surgenor, June 12, 2013:

When I first met Jennifer [October 11, 2011] she stated that she was suffering with regular headaches since the aforementioned MVA. She stated that she was unable to do as much at home than she could previously and thinks she may have "over done" things over the Thanksgiving weekend. Her neurological exam was normal but was tender over the cervical spine. Continued massage therapy and acupuncture was recommended.

She was next assessed regarding the MVA in May 2012. She stated that she continues to have daily headaches, these did not always need medication and she has learned to function with a low grade headache. She had been going to massage therapy regularly and had started acupuncture.

The headaches were occipital in position and on examination she was tender over her cervical spine and between her shoulder blades. She was doing regular exercise - yoga, cardio, lifting weights and she was advised to continue this.

She was next seen in September 2012 with regards to the MVA. She stated that she was going to chiropractic treatments, acupuncture, and massage therapy as regularly as she possible could. The headaches continued on a daily basis but she is leaning to live with this. The headaches were still occipital in region although sometimes radiating across her entire head. She noted that 2-3 days every 5 weeks she has to spend a large chunk of the day in bed with a headache. This is very disruptive as she cannot predict when these headaches are going to occur. She also described some recent panic attacks associated with driving - especially around her daughters safety in the car. I have not seen Ms Hollows since this time.

Ms Hollows had not reported any mid or lower back pain to me during these visits but on review of her previous chart notes, these were areas that she had consistently complained about after the MVA.

I can confirm that prior to December 2009, Ms Hollows had not been seen or complained of regularly occurring problems with headaches, neck or back pain.

Ms Hollows has chronic mechanical neck and back pain. Her headaches are secondary to the mechanical neck pain. At the time I last saw her it had been close to three years following the MVA. It is well documented that the majority of healing is done in the first twelve months after an injury of this nature. Some healing takes place up to twelve months after that. Recovery after that time is unlikely.

Ms Hollows will need to avoid certain activities in the future. She will find it difficult to do activities that put stresses on the spine. She will likely have difficulty with any employment or household activities that require heavy lifting; prolonged sitting, standing or walking; and carrying.

Manual therapies such as massage therapy and acupuncture may continue to offer symptomatic relief. She is also advised to maintain a regular fitness program.

[Emphasis added.]

(d) Dr. Mark D. Adrian, a physiatrist, March 27, 2013:

Current Status:

Ms. Hollows experiences daily pain affecting her neck. The intensity of her pain symptoms fluctuates. The symptoms are triggered by activities that involve prolonged static or awkward positioning involving her neck; repetitive neck motion; lifting; and prolonged reaching.

Ms. Hollows experiences daily pain affecting her upper mid back. The symptoms are triggered by standing; stooping; bending; lifting; carrying; and prolonged sitting.

Ms. Hollows experiences daily pain affecting her lower back. The intensity fluctuates. The symptoms are triggered by bending; stooping; lifting; prolonged sitting; and prolonged walking.

Ms. Hollows denies pain symptoms that spread from her spine to her extremities. She experiences temporary improvement of her spinal symptoms when she alters her position and posture. She experiences intermittent numbness involving her hands and feet. The hand symptoms occur more often than the symptoms in her feet. The symptoms do not occur regularly.

Ms. Hollows' spinal symptoms do not change with coughing or sneezing. She has urgency of bladder function and a degree of incontinence with straining.

Ms. Hollows experiences psychological and cognitive symptoms. She experiences nightmares since the accident and nervousness when travelling in vehicles. She is easily irritable since the accident. She notices that her energy levels are lower than usual. At times she has difficulty focusing her thoughts during pain symptoms.

Current Functional Status:

Ms. Hollows is independent with performing activities of daily living. She has difficulty performing activities that require prolonged sitting, standing or walking due to her spinal pain symptoms. Since the accident, she avoids heavier housework activities and delegates the heavier housework activities such as lifting laundry, vacuuming and floor cleaning, to others. She is able to perform light housework activities.

Since the accident, Ms. Hollows avoids yard work and pet care and delegates these activities to her husband. She experiences difficulty shoulder checking while driving due to neck pain symptoms associated with neck motion.

Ms. Hollows' symptoms affect her physical interaction with her children. She experiences difficulty with the stooping, bending and lifting required of bathing her children.

Ms. Hollows' symptoms affect her recreational activities. Since the accident, she avoids running, golfing and skiing.

...

Prognosis:

As indicated in my original report of July 2011, in general, individuals suffering from mechanical, spinal pain following an injury experience

improvement over time. Some individuals, however, do not fully recover. In my experience, individuals experiencing symptoms beyond two years from the injury date are unlikely to experience further significant improvement.

In Ms. Hollows' situation, over two years have elapsed since the accident date. The prognosis for further recovery of the injuries suffered in the motor vehicle accident over time is poor. It is unlikely the injuries suffered in the motor vehicle accident will undergo progressive deterioration over time.

Functional Capacity:

Ms. Hollows will probably experience difficulty performing activities that place physical forces onto the painful and injured structures involving her spinal column. Specifically, she will probably continue to experience difficulty performing employment, recreational, or household activities that involve prolonged sitting; prolonged standing; prolonged walking; prolonged reaching; prolonged static positioning involving her spinal column; heavy or repetitive lifting; or impact activities. The prognosis for further recovery of these functional limitations over time is poor. Ms. Hollows is probably permanently partially disabled as a result of injuries suffered in the motor vehicle accident.

...

Therapeutic:

Ms. Hollows participates with massage and chiropractic treatments. These treatments assist her with pain management. She will probably continue to experience short-term improvement with passive modalities. It is unlikely, that the passive treatments will lead to long-term improvement of her symptoms or function.

Ms. Hollows participates with a gymnasium-based exercise program focusing on low impact cardiovascular exercise, yoga, and weights. Her ability to exercise is affected by her symptoms. She indicates that she had two informal sessions with a personal trainer. She may benefit with a more formal assessment by an experienced personal trainer to review her current exercise program to ensure that she is performing the exercises in a manner that does not place unnecessary physical forces onto the painful and injured structures involving her spinal column.

Ms. Hollows has self-modified her workstation. She has obtained a specialized chair and uses a computer monitor. She may benefit with the involvement of an occupational therapist to perform a formal workstation evaluation. It is possible that further ergonomic modifications are available that could make certain work activities less uncomfortable for Ms. Hollows.

Ms. Hollows has participated with psychological treatments. I will defer to the specialists in psychology to provide further comment on the potential requirement for treatments into the future.

[Emphasis added.]

[9] The plaintiff was assessed by Dr. Andrew Miki, a psychologist. He prepared a report dated February 13, 2012:

Psychodiagnostic Assessment (July 18, 2011):

1. Ms. Hollows Diagnosis:

Axis I: Posttraumatic Stress Disorder (309.89)

Presentations secondary to PTSD:

1. Generalized Anxiety

2. Depression

Pain Disorder Associated with both Psychological Factors and a General Medical Condition (307.89)

Axis II: Deferred

Axis III: Pain (neck, mid and lower back, head)

Axis IV: Occupational stress

GAF: 53 (current)

2. Ms. Hollows Psychological Symptoms:

Post Traumatic Stress Disorder (PTSD):

Ms. Hollows reported that she was the driver in an MVA on December 18, 2009. She was driving to Whistler with 3 passengers including her daughter and 2 sisters. She estimated that her vehicle was travelling approximately 60 to 70 km/hr when an oncoming vehicle unexpectedly turned in front of her. The front of her vehicle collided with the side of the other vehicle. The airbags in Ms. Hollows' vehicle were deployed. Initially, she felt disoriented, as she could not comprehend how she could open the door. She denied any loss of consciousness. Ms. Hollows was transported to Squamish Hospital and was discharged several hours later.

The MVA on December 18, 2009 was an extreme traumatic stressor involving the threat to Ms. Hollows' physical integrity and that of her daughter, sisters, and unborn child (Criteria A1). Ms. Hollows reportedly experienced intense fear following the accident (Criteria A2). This emotional state was exacerbated at Squamish Hospital because she was pregnant and could not feel her baby move following the MVA. Further, the hospital staff could not identify a heartbeat for approximately 1.5 to 2 hours. Ms. Hollows reported that she felt "beside herself" as she had recently experienced a miscarriage in April 2009. [emphasis added.]

Following the MVA, Ms. Hollows reported that she experienced recurrent and intrusive distressing thoughts and recollections of it. Specifically, she "replayed it all of the time and I don't know why." She also experienced nightmares of family members being hurt in a car accident approximately 5 to 7 times a month (Criteria B). Ms. Hollows reported that she avoided driving unless necessary and she had avoided returning to the site of the accident. She experienced a diminished interest and participation in social activities. Ms. Hollows reported a restricted range of affect as she had difficulties experiencing positive emotions and primarily felt angry, sad, and irritable (Criteria C). Since the MVA, Ms. Hollows had increased difficulty falling asleep and she often felt angry as "a lot has been taken away" (Criteria D). Finally, she had these symptoms since the MVA (Criteria E) and her symptoms caused a significant decline in her emotional, occupation, interpersonal, and household functioning (Criteria F).

[10] Dr. Miki also noted symptoms of generalized anxiety:

Generalized Anxiety Symptoms:
Specifically, her [Ms. Hollows] worry had increased since her MVA as she worried about her health, how her compromised functioning affected her parenting, her finances, and friendships. Ms. Hollows reported that she had significant difficulties controlling her worry. Also, she acknowledged that her physical pain and excessive worry contributed to her difficulties falling asleep.

[11] Dr. Miki noted symptoms of depression:

Depression Symptoms:
Ms. Hollows reported significant symptoms of depression. She felt guilty over her inability to maintain her relationships (i.e. children, husband, friends), occupational functioning, and household. Also, she endorsed decreased confidence and significant fatigue.

[12] He noted a pain disorder:

There was evidence of psychological factors that maintained and exacerbated Ms. Hollows' physical pain (Criteria C). She presented as a highly motivated individual with a strong work ethic. This was consistent with evidence in her medical records. For example, Dr. Trester (January 7, 2010) and Dr. Sutherland (August 23, 2010) noted that Ms. Hollows was "well motivated to make a full recovery." However, Ms. Hollows reported that she had a tendency to overextend herself physically when she felt low levels of pain and when her mood had improved. She admitted that she "pushes [herself] beyond what is possible." Consequently, Ms. Hollows' tendency to overextend herself to function as close to her premorbid level as possible significantly increased her pain and adversely affected her mood and functioning.

[13] Dr. Miki noted the plaintiff's report of the impact of her symptoms on her life:

3. The Impact of Her Symptoms on her Current Level of Functioning:

At the time of her intake assessment, Ms. Hollows had experienced a decline in multiple areas of functioning. First, her PTSD, GAD, and depression symptoms contributed to her decline in emotional functioning. Ms. Hollows reportedly experienced these symptoms daily since her MVA. Second, her interpersonal functioning declined as Ms. Hollows reported that her condition had strained her relationships with her husband, children, family, and friends. Third, Ms. Hollows reported that she was not able to maintain her occupational functioning due to her psychological symptoms and chronic pain. She noted that it was difficult to keep up with her work and business travel demands. Fourth, her chronic pain limited her physical functioning such that her ability to care for her children and household were compromised. Finally, Ms. Hollows reported that her decline in interpersonal, occupational, childcare, and household functioning exacerbated her psychological symptoms as she felt significant anxiety, guilt, sadness, and anger.

[14] Dr. Miki noted improvement with treatment:

5. Ms. Hollows' Response to Cognitive Behavioural Therapy (CBT):

Ms. Hollows was seen for 7 sessions of CBT from July 18, 2011 to October 31, 2011. Overall, she presented as a highly motivated individual and appeared to complete the assigned homework to the best of her ability. Early intervention exercises included psychoeducation, behavioural monitoring, and cognitive restructuring. Ms. Hollows reported in the fourth session that her anxiety and mood symptoms had significantly improved. Specifically, she had identified periods of time that she felt better, she was becoming more adept at identifying and managing her negative/anxious thoughts, and her communication with her husband had increased. Also, she was learning to better manage her behaviours based on her level of physical pain. For example, Ms. Hollows' ability to monitor and quantify her pain improved such that she was able to strategically determine whether to engage in physical activities and when to disengage from them to prevent subsequent pain.

Ms. Hollows' symptoms continued to improve in the latter stages of treatment. She consistently reported that her confidence was increasing and she experienced significantly fewer mood swings. In the last two treatment sessions, Ms. Hollows reported that she was managing her mood/anxiety despite a significant increase in stressors. For example, prior to her last session, Ms. Hollows reported that she had an unexpected major house expense (i.e. \$15000), problems with her daycare provider, she had her family over for Thanksgiving, she learned her house was infested with mice, and she had considerable travel for work. Nevertheless, she was able to maintain her mood and level of functioning. This was significant because Ms. Hollows experienced little change in her overall level of pain during her CBT treatment. Accordingly, she reported that she learned to better manage her pain and her psychological reaction to pain and stressors. At the end of treatment, Ms. Hollows reported that she was "feeling more confident and back to [her] old self." Consequently, treatment was discontinued indefinitely.

6. Ms. Hollows' Prognosis:

Ms. Hollows responded very favorably to CBT in a relatively limited number of treatment sessions. This was largely due to her strong work ethic and motivation to learn to manage her symptoms independently. Indeed, a typical course of CBT for this presentation is 15-20 sessions. Nevertheless, Ms. Hollows demonstrated consistent improvements and a greater resiliency to stress over the four months of treatment. Therefore, her ability to manage her PTSD, GAD, and depression symptoms in the future is positive with continued to practice of the CBT strategies she learned. I will defer to medical opinion regarding the prognosis of her physical pain.

[15] The observations of the medical and psychological examiners and treaters reflect the evidence the plaintiff gave in the witness box. This is not to suggest any virtue in consistency but only to observe that the written reports significantly parallel the evidence the plaintiff gave and are representative of the tenor of her evidence.

IV

[16] Before the accident, the plaintiff was employed as a sales representative for a pharmaceutical company, Abbott Laboratories. The work required extensive travel to meet with hospital representatives and doctors to discuss the product lines she represented. There were quotas and bonuses and the plaintiff did very well at meeting and exceeding the company's expectations. The plaintiff's earnings in 2009 were \$105,852. The accident put her out of work from December 18, 2009 until she went on maternity leave in April of 2010 due to the birth of her son. As matters turned out, the plaintiff never did return to her employment at Abbott, but, while still on maternity leave, heard about an opportunity with Baxter Corporation, another pharmaceutical company. It had less onerous driving requirements and appeared to be otherwise comparable to the work she did for Abbott. The plaintiff did not seek this opportunity out, as was suggested in submission. The plaintiff had a good friend, Sophy Olafson, who had worked with her at Abbott and had moved on to Baxter. She brought the opportunity to the plaintiff's attention. The plaintiff went to work for Baxter a month before her maternity leave expired. It was a term of the plaintiff's arrangement with Abbott that she would have to reimburse Abbott for a maternity leave supplement it paid to employees. This amounted to \$13,503.51.

[17] The plaintiff's income for 2010 was \$75,658. It was \$77,808 in 2011, and \$109,813 in 2012. The evidence is that in 2012, and this year, the plaintiff is achieving the highest standard, and all the bonuses available to her.

[18] The plaintiff has pursued a number of therapeutic options including massage, chiropractic treatments, physiotherapy and acupuncture. The medical consensus is that these treatments are unlikely to assist the plaintiff in improving the chronicity of her complaints. She may get some short term relief from her symptoms by taking such treatments.

[19] The plaintiff's husband testified to the change he sees in the plaintiff since the accident. He said he was initially attracted to her because she seemed to be the "life of the party." He said she was fun and energetic. Since the accident he finds her

frequently irritable. He has had to take on more of the household chores. He said their social life has changed.

[20] These observations are echoed by the two friends who testified on behalf of the plaintiff, Ms. Olafson and Ms. Devlin. Ms. Olafson noted that the plaintiff has good days and bad days and is more withdrawn on bad days. She said this is “frowned upon” within Baxter Corporation, where participation at meetings and conferences (which is now when she and the plaintiff see each other) is expected.

[21] Ms. Devlin is a friend who got to know the plaintiff when they were young mothers with their first children. She is also aware of the plaintiff’s dedication to exercise, which she shares, perhaps even to a greater degree. She described the plaintiff as determined, but not yet back to the level of fitness she once achieved. She has noticed that the plaintiff is sometimes less patient, and less outgoing – to the extent that she sometimes avoids social engagements – and that she is anxious about having her children drive with anyone else.

[22] To a degree unusual, even in matters of this kind, the witnesses have attempted to put across a picture of someone who was an exemplary mother, companion, friend, employee, and a person in remarkable physical condition. Her progress since the accident is described in terms that are not unusual in similar kinds of cases. The plaintiff sustained soft tissue injuries that were initially expected to resolve; she complains that her symptoms have persisted and that the pain and suffering interfere with significant aspects of her life, including her activities and her relationships; the complaints have persisted for over two years and the doctors suggest that where pain persists for that length of time it is unlikely to improve.

[23] The plaintiff has taken many different kinds of passive treatments, which give only temporary relief but do not appear to be offering any improvement. It is not uncommon for doctors to suggest that passive treatments should be discontinued in favour of a more active exercise regimen. It is an unusual feature of this case that the plaintiff has pursued a vigorous schedule of attendances at a gym for much of

the time since the acute phase of her injuries, *in addition to* all the passive therapies she has taken.

V

[24] The court has had the advantage of a DVD recording of an exercise class and some other activity the plaintiff engaged in, particularly a scene in a parking lot at a shopping venue. It is very difficult to regard the person depicted in the DVD as in any significant sense, disabled, or to accept the distinctions offered by those who treated the plaintiff as convincing. Dr. Adrian's suggestion that, for instance, a person with the ability to twist and move vigorously through a very large number of aerobic exercises, executed rapidly and repetitively, could find it hard to vacuum or to lift light loads is difficult to credit. He explained that the difference between the strenuous exercises the plaintiff is able to perform and ordinary household tasks was that when the plaintiff exercises she uses "biomechanically correct posture", while the activities of ordinary life are unpredictable. He also noted that a gym environment does not involve prolonged standing or sitting. The evidence shows, however, that the plaintiff's daily routine does not require either. She works from home and is quite free to move about.

[25] Dr. Surgenor, the plaintiff's family physician, testified to similar effect, distinguishing between the exercises in the video and household where the positions required to do household tasks could cause discomfort.

[26] Again, the distinction seems rather forced. The plaintiff's exercise program was clearly designed to address many different muscles and movements and it is difficult to imagine any ordinary activity that did not have a correlative exercise in the varied routines shown to the court. It must be said, as well, that the plaintiff is clearly a highly capable member of the class. She does not lag the instructor and she gives the full measure of effort the instructor demonstrates.

[27] The evidence of Dr. Miki is, I think, central to the assessment of the plaintiff's condition. I largely accept what he had to say about the plaintiff's reaction to the

accident, which had the twin features of immediate anxiety about the whereabouts and safety of her daughter initially, and a more prolonged period of anxiety when it was not clear whether or not her unborn son had survived or suffered serious harm. I accept that the event was traumatic and that the plaintiff has had a prolonged reaction. It has manifested in a sense of vulnerability and in a lack of trust in others, exemplified in her refusal to allow others to drive her children anywhere.

[28] The plaintiff is hyper-vigilant and hyper-aware. I think this extends to her own assessment of her condition and leads to a belief in a pre-accident world of perfect health and fitness that effectively amplifies her present experience of muscle pain and fatigue. I fully accept the plaintiff's evidence, and that of her husband, that she is less cheerful and easygoing than she was in the past, but, given her obvious physical capacity, I am of the view that this is largely a product of anxiety and does not reflect anything that could be called a disabling condition, or one that significantly interferes with her activities.

[29] The evidence that the pain is likely chronic is a prognostication based on medical experience that where complaints of pain persist for over two years, they tend to go on. Such observations must be considered carefully in context. If complaints of ongoing pain are reasonably congruent with the surrounding evidence there may be no reason to question such medical opinions.

[30] As the plaintiff points out in submission, as far back as *Butler v. Blaylock*, 1983 CarswellBC 2066, [1983] B.C.W.L.D. 609 the Court of Appeal recognized that "subjective" complaints do not *require* objective evidence in order to found recovery:

12 With the greatest respect, I am of the opinion that there is no evidence upon which one could reasonably conclude that the appellant did not continue to suffer pain as of the date of the trial. After careful consideration of the expert testimony and the evidence of the appellant and his wife, I have reached the conclusion that the only finding open to the learned trial judge was that as of the date of trial the appellant continued to suffer moderate pain and in the words of Dr. Lehmann, his symptoms "will gradually subside with further time. Having been present for approximately two and a half years, *it is doubtful that they will disappear completely.*" (italics emphasis in original).

13 There are three basic reasons which, in my view, support the conclusion that the plaintiff continued to suffer pain as of the date of trial. Firstly, the plaintiff testified that he continued to suffer pain. His wife corroborated this evidence. The learned trial judge accepted this evidence but held that there was no objective evidence of continuing injury. It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the Plaintiff is entitled to recover damages. There is no suggestion in this case that the pain suffered by the plaintiff did not result from the accident. I would add that a plaintiff is entitled to be compensated for pain, even though the pain results in part from the plaintiff's emotional or psychological makeup and does not result directly from objective symptoms.

14 Secondly, all of the medical reports support the view that the plaintiff continued to suffer pain and that it was not likely that his symptoms would disappear completely.

[31] In the present case the court has similar evidence: complaints of pain from the plaintiff; observations of pain behaviour from her husband and others, and medical support for the continuation of that pain. It also has "objective" observational evidence of the plaintiff working through vigorous exercises apparently pain free.

[32] In assessing subjective complaints of pain *at odds* with other aspects of the evidence, a court must bear in mind the observations of McEachern C.J.S.C. (as he then was) in *Price v. Kostyba* (1982), 70 B.C.L.R. 397:

1. The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.
2. In this endeavour, we attempt to apply legal principles; otherwise every damage award would stand alone in isolation from other cases, depending largely upon how each individual plaintiff reacts and responds to his injuries and how he or she describes them. This question was discussed in *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 at 243-44, where Dickson J., speaking for the court, said:

The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable.

[33] I accept that the plaintiff and her supportive husband are genuine, decent people who have tried to convey their appreciation of the facts accurately. As the

plaintiff's submission pressed more than once, however, she asks the court to accept a standard of extraordinary health and fitness against which to weigh the plaintiff's perception of significant loss of function, amounting to a partial form of disability. As McEachern C.J.S.C. indicated, however, it is not a straight line from the plaintiff's perception of his or her injuries to compensation for damages. The court cannot reward a description.

[34] In this case, fairness to the defendant dictates that the court take account of the plaintiff's manifest *abilities*, her active life, her evident physical strength and energy, and the degree to which she meets the demands of her work, in assessing the proper measure of damages. In assessing *loss*, it is incumbent on the court to measure the difference pre- and post-accident against a reasonable standard of health and fitness, that takes account of the plaintiff's actual pre-accident circumstances but that does not idealize them.

[35] As I have said, I accept Dr. Miki's analysis as descriptive of the plaintiff's psychological condition, and think it may account, in part, for the plaintiff's heightened awareness and descriptiveness of her pain and suffering. I accept that she suffered significant soft tissue injuries that have left her with some residual, nagging pain from time to time, but pain that is clearly not seriously inhibiting.

[36] The plaintiff suggests that the proper measure of damages for pain and suffering and loss of enjoyment of life is in the range of \$100,000. The defence, properly, in my view, concedes that significant damages should be assessed, and suggests that the range is \$65,000 to \$70,000. Inasmuch as I think the bulk of the plaintiff's damages are properly categorized under this heading, I set general damages at \$90,000.

[37] The defendant concedes past income loss of \$36,636 gross. She arrives at this figure by taking the plaintiff's 2009 income of \$105,852, and assuming that the plaintiff would have worked the 18 or so weeks between the accident (December 18, 2009) and the birth of her son (April 2010) when she went on maternity leave. The calculation is 18 weeks / 52 weeks x \$105,852. The defence also agrees that the

plaintiff is entitled a maternity leave top up of \$13,503.51 net which relates to a benefit that was contingent upon the plaintiff's returning to Abbott Laboratories.

[38] The plaintiff claims that had she worked in the period of time she was off work due to the accident (and before her maternity leave) she would have earned bonuses and awards over and above into the \$105,852 she earned the year before, which she estimates might have been about \$14,500. There is simply no adequate foundation for the court to speculate that this might have happened. I prefer the figures given by the defendant, which I allow. There shall be liberty to apply if the parties cannot agree on the appropriate calculation for the effect of tax. The past income loss is fixed at \$36,636, together with the net maternity leave top-up conceded by the defendant.

[39] Notwithstanding the defendant's concession in relation to the maternity top-up, the evidence does not support the inference that the Baxter opportunity was taken because of the injuries suffered in the motor vehicle accident. To the contrary, the opportunity came to the plaintiff and she found it more attractive. The evidence simply does not establish that this was "mitigation." The plaintiff considered it a better opportunity than the Abbott position and involved less travelling, and particularly less driving. There were family-related and personal reasons why this was better and the evidence does not support the notion that the plaintiff was obliged to take this opportunity to accommodate her disabilities from the accident. Nor is there any basis for a sort of "parallel work" claim where she is allowed damages as if she had stayed at Abbott while working for Baxter. There is no loss attributable to the change of employment.

[40] The plaintiff claims loss of incoming earning capacity. She cites *Rossvold v. Dunlop*, 2001 BCCA 1. There, the Court of Appeal observed:

[8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently

impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

[9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

[10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, aff'd [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.); and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:

[1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;

[2] whether the plaintiff is less marketable or attractive as an employee to potential employers;

[3] whether 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] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[41] The plaintiff also cited *Perren v. Lalari*, 2010 BCCA 140:

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

[31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos* [*Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260]. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward* [*Steward v. Berezan*, 2007 BCCA 150], by Bauman J. in *Chang* [*Chang v. Feng*, 2008 BCSC 49], and by Tysoe J.A. in *Romanchych* [*Romanchych v. Vallianatos*, 2010 BCCA 20] that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok* [*Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.)], or a capital asset approach, as in *Brown* [*Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353]. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa* [*Parypa v. Wickware*, 1999 BCCA 88]. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[42] The basis for this claim was outlined in the plaintiff's submission, as follows:

201. A home office allows Mrs. Hollows to take breaks when needed and gives her the opportunity to work in non-traditional positions. For example, Mrs. Hollows gave evidence that she sometimes takes conference calls lying down because of neck or back pain. Working from home also provides a more flexible work schedule to allow for recommended exercise classes and therapy appointments which often have to be booked during working hours.
202. Even with these allowances, Mrs. Hollows continues to experience daily headaches upon waking and before bed, and has a relatively constant baseline level of neck and upper back pain that are also subject to "flare ups".

203. Without these allowances, Mrs. Hollows would not be able to work in a full time position. She would suffer from too much pain and fatigue. Her ability to concentrate would be severely compromised. She is thereby precluded from working in any type of employment that requires a more “traditional” work space and schedule, or any employment that requires significant car or long distance flight travel.
204. As it is, when Mrs. Hollows is required to travel to meetings back east, we heard from Ms. Olafson that she is often disengaged, quiet and skips all or parts of meetings due to increased symptoms.
205. Mrs. Hollows is only 40 years old. Circumstances could (and likely will) change over the course of the next 25 years. Obviously, it is difficult to predict the future. However, there is no question that Mrs. Hollows' injuries have limited her options in a competitive labour market.
206. If Mrs. Hollows has to find new employment, she has fewer opportunities available to her. She is at a particular disadvantage within her chosen expertise of pharmaceutical sales; where it can be presumed (based on her prior job with Abbott) that many positions would require significant travel in a car and/or airplane.
207. If Mrs. Hollows has to look for work outside sales, she is even more limited due to both inexperience and the more likely requirement she would have to work in a more traditional office setting. The Plaintiff submits the Court should take judicial notice that the overwhelming majority of employers still require employees to work in a traditional office space environment without the flexibility Mrs. Hollows' injuries demand.
208. Mrs. Hollows' injuries also potentially limit her opportunity for advancement within Baxter or any other organization. As noted by her treating Psychologist, Dr. Miki, Mrs. Hollows is an extremely high achieving individual. As her seniority grows within Baxter, given her work performance to date, it is reasonable to expect that, but for her injuries, promotions to more senior, higher paying positions would be forthcoming.
209. However, because of her injuries and resulting restrictions on her ability to work in a traditional environment and/or travel, she may be passed over for other candidates without these restrictions, or have to turn down these opportunities if offered to her.
210. Mrs. Hollows' future earning capacity is also limited by her tolerance for discomfort. It is uncontroverted that Mrs. Hollows has a permanent partial disability. This continues to result in daily headaches and neck pain. Her husband and friends all describe Mrs. Hollows as having “good and bad days”. Her husband's evidence was that his wife's “good days” would cause him to go back to bed.
211. Mrs. Hollows continues to make remarkable efforts to maintain a full time job and care for a young family while experiencing daily pain and discomfort. Her condition is permanent and it is uncertain how Mrs. Hollows will continue to cope with her condition.

- 212. It would be artificial for Mrs. Hollows to comment on her retirement plans at such an early age. However, it is both entirely possible and completely understandable that Mrs. Hollows may be less inclined to work to the same age as she would have without her injuries. It is almost trite to say that a person's ability to cope with pain diminishes with age.
- 213. Her injuries have introduced a very real risk that Mrs. Hollows will retire earlier than she would have without her injuries and/or reduce her employment from a full time to part time position.
- 214. In light of the above noted circumstances, and taking into account Mrs. Hollows' high income earning potential, the Plaintiff submits an award of \$200,000 is appropriate for loss of earning capacity.

[43] The evidence of the plaintiff's actual experience at Baxter is that she is earning at the highest rate and achieving all her targets. The plaintiff's husband testified that she is of interest to "headhunters" for other positions with other firms.

[44] The evidence that pain has an actual effect on the plaintiff's work is scant. It more or less amounts to suggestions that the plaintiff is not as enthusiastic a performer at company meetings and seminars, and that this might hurt her in the future.

[45] The difficulty for the court is that despite vivid description of ongoing pain the plaintiff has demonstrated a level of physical capacity well beyond anything required of a person in a home office or even in a corporate office setting. There is no credible case that the plaintiff's accident-related injuries will prevent her from doing anything she chooses to do. At most there is a suggestion that she may suffer some residual pain, but I view that as properly subsumed in the damages for pain and suffering and loss of enjoyment of life. There is no reasonable possibility that the effects of the plaintiff's injuries will cause her future loss. I regard the plaintiff's submission as entirely speculative and remote. I make no allowance for future loss of income.

[46] The plaintiff claims for both cost of future care and loss of housekeeping capacity. These claims are not well-founded. The extraordinary edifice of future care costs contained in Ms. Chambers' PETA report, which included extravagant amounts for massage, chiropractic treatments and physiotherapy and for house

cleaning services totalling \$172,567.54, is not justified. Such expenses could only be justified on a theory of disability seriously at odds with the plaintiff's minimal functional interference, which at its worst is related to residual pain that may occasionally contribute to a feeling that she could use assistance. For the possibility of occasional assistance for housekeeping or therapeutic care that may be contributed to by the accident, I allow \$10,000 *all in* for future care.

[47] The plaintiff seeks special damages of \$23,235.02. The defendant submits that \$3,333 should be subtracted for daycare of Avery that was unnecessary, while the plaintiff says the proper deduction is \$1,300. I will not attempt to reconcile these figures on the information I have. I do not think all the therapy the plaintiff has taken has been necessary, although it appears to have been recommended or encouraged by doctors and other therapists. I simply allow \$20,000 for special damages on the basis that on the recommendation of those who have treated the plaintiff, the money has been spent. The defence did not dispute most of it or obtain medical evidence to cogently suggest that the treatments may not have been necessary.

[48] In summary, damages are assessed as follows:

(a)	General Damages	\$90,000.00
(b)	Past Income Loss	\$50,139.51
		\$36,636.00
		\$13,503.51
(c)	Future Income Loss	0
(d)	Cost of Future Care/Housekeeping	\$10,000.00
(e)	Special Damages	\$20,000.00

[49] Costs may be spoken to if necessary.

“McEwan J.”

The Honourable Mr. Justice McEwan