IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Van Den Hemel v. Kugathasan,*
2010 BCSC 1264

Date: 20100908
Docket: M081700
Registry: Vancouver

Between:

INGRID VAN DEN HEMEL

PLAINTIFF

And

AKEEBAN KUGATHASAN

DEFENDANT

Docket: M081699
Registry: Vancouver

Between:

INGRID VAN DEN HEMEL

PLAINTIFF

And

JAMES MO

DEFENDANT

Before: The Honourable Mr. Justice Stewart

Reasons for Judgment

Counsel for the Plaintiff:	J.M. Cameron D.W. Kolb
Counsel for the Defendants:	S.P. Grey
Place and Date of Trial:	Vancouver, B.C. August 23-27, 2010
Place and Date of Judgment:	Vancouver, B.C. September 8, 2010

[1] The plaintiff claims damages for negligence. Two actions were tried together. The first action is the plaintiff versus Kugathasan. That action arises out of a motor vehicle accident in Richmond, British Columbia April 21, 2006. Liability is admitted. The second action is the plaintiff versus Mo. That action arises out of a motor vehicle accident in Richmond, British Columbia on July 18, 2006. Liability is admitted. One counsel acts for both defendants. In each action, the defendant pled contributory negligence. In both actions that pleading was abandoned. I must assess the damages. The case proceeded on the assumption that no thought need be given to apportioning (so to speak) the award of damages between defendants. Nor could it be in the circumstances that obtain here for the evidence reveals injuries which are, for the purposes of the law, indivisible: *Bradley v. Groves*, 2010 BCCA 361.

[2] The burden of proof on bottom issues is on the plaintiff to prove her case on a balance of probabilities. The defendants allege a failure by the plaintiff to mitigate her loss. On that issue, the burden of proof is on the defendants to prove their case on a balance of probabilities. I note here that with respect to causation the “but for” test is the applicable test.

[3] In each of the two motor vehicle accidents the plaintiff was a passenger in a car being driven by her common law husband (hereafter simply “her husband”) when the vehicle in which she was sitting was struck by a vehicle driven by a defendant. In the first motor vehicle accident the vehicle in which the plaintiff was seated was stopped at an intersection when it was hit from the rear by a vehicle driven by the defendant Kugathasan. In the second motor vehicle accident the vehicle in which the plaintiff was seated was in motion when it was struck (“T-boned”) towards the front of the driver’s side by a vehicle driven by the defendant Mo.

[4] As to each of the two motor vehicle accidents, the evidence is a jumble as to how much force was applied to the vehicle in which the plaintiff was seated. In each case the defendant testified to the effect that the impact was next to nothing. In each case the plaintiff and her witnesses - her husband and a daughter, both of whom were in the car on both occasions - testified to the effect that the impact was

significant. Exhibits 1 and 2 reveal that the cost of repairing the vehicle driven by the plaintiff's husband was $665.19 in the case of the first motor vehicle accident and $1,421.00 in the case of the second motor vehicle accident. No engineering or other scientific evidence was placed before me in an attempt to give meaning to those bare figures. I note that the defendant Kugathasan was a singularly unimpressive witness. Stating the ridiculous and then, when questioned about that, simply recognizing that it was ridiculous was a feature of his testimony. I find the evidence of the plaintiff and of her witnesses as to both motor vehicle accidents convincing. In the result, I find that in each case there was a significant impact.

[5] I have considered the whole of the defendants' attack on the plaintiff's credibility and I reject it. I will explain. But I will do so in the terminology of testimonial reliability. This is not a mere playing with words. "Credibility" has become a confusing term as its elements are not particularized and whether it encompasses accuracy is in the eye of the beholder. (See *Reddoch v. Yukon Medical Council*, 2001 YKCA 13 para. 29 as opposed to *R. v. Morrisey* (1995), 97 C.C.C. (3d) 193 at 205.) The more precise "testimonial reliability" and its elements - perception, recollection, narration and sincerity - offers up a better analytical tool. (*R. v. Khelawon*, 2006 S.C.C. 57)

[6] I will not replicate the defendants' scattergun attack on the plaintiff's testimonial reliability. I emphasize that I considered the whole of it before rejecting it. I will note here only some of its more important elements.

[7] The defendants' attack on the plaintiff's testimonial reliability focused on her sincerity.

[8] Amongst other things, the defendants point to the fact that at the request of the defendants their witness, Dr. Shojania, examined the plaintiff on June 9, 2010 (Exhibit 13). As will become clear later in these Reasons for Judgment, I find the evidence of the plaintiff's expert Dr. Armstrong convincing on the central medical issues in the case at bar. I find that what Dr. Armstrong had to say when he testified before me in rebuttal at the very least neutralized what might otherwise be the effect

of Dr. Shojania's evidence as to the exaggerating of her pain by the plaintiff when examined on June 9, 2010.

[9] Another wing of the defendants' attack on the plaintiff's testimonial reliability - more particularly sincerity - focused on what the defendants say is the disparity between the plaintiff's telling me, in effect, that her pain and suffering in the neck, shoulders and back has been present, persistent and continuous since the first motor vehicle accident in April 2006 and what the defendants describe as telling temporal gaps in what the plaintiff complained of when she was seen by her family doctor, Dr. Sun, over the years.

[10] The plaintiff, in effect, told me that on any given occasion when she saw Dr. Sun and had her few minutes in the examining room that she went straight to only what was her most significant problem or complaint that day. I accept that. It makes sense in light of how our medical system functions today. Also I infer from the whole of Dr. Sun's testimony that it was her practice to let the patient take the initiative and that she did not invite the patient to lodge a bill of complaints. Last, I note that - as will become clear later in these Reasons for Judgment - throughout the four years in question in the case at bar the plaintiff has been a woman beset with a myriad of problems for which she sought help or advice from caregivers, only some of which were neck, back and shoulder problems.

[11] Another wing of the defendants' attack on the plaintiff's testimonial reliability - more particularly, sincerity - focused on her statements both in the courtroom and in the presence of doctors that she is in great pain, all the while exhibiting none of the observable indications of pain. Two things in the evidence took the sting out of that submission by the defendants. First, it became clear to me that the plaintiff uses the term "pain" to encompass much more than what is usually thought encompassed by that word. Second, and of much greater importance, as will become clear later in these Reasons for Judgment, I accept that portion of Dr. Armstrong's opinion to the effect that the plaintiff is one who through her chronic pain has been sensitized to pain thus altering her perception or appreciation of pain.

[12] The last bit of the defendants' attack on the plaintiff's testimonial reliability that I choose to deal with in these Reasons for Judgment brings together the attack on the plaintiff's testimonial reliability and the defendants' pleading of a failure by the plaintiff to mitigate her loss.

[13] In a nutshell, counsel for the defendants was candid and admitted that the whole of the pleading of a failure to mitigate is grounded on an assertion that the plaintiff has failed to exercise over the years as her caregivers have advised her to do and that the success of the defendants on that issue rests entirely on my finding that the plaintiff is not to be believed when she tells me that she has in fact conscientiously undertaken exercises directed at strengthening her core. And the defendants submit that I should make just such a finding because Dr. Armstrong (Exhibit 5) found that on May 31, 2010, the plaintiff was in a condition inconsistent with her having so exercised over the last four year. The obverse, says counsel, is that if I accept that she did exercise as she tells me she did, then the de-conditioning and core weakness fundamental to Dr. Armstrong's opinion did not exist and the bottom falls out of his testimony.

[14] In my opinion, the defendants' submission assumes that what the plaintiff says she undertook by way of exercises, including strengthening of her core, is the same as what Dr. Armstrong says is needed. And there is no basis in the record for such a finding by me.

[15] Dr. Armstrong was not asked to detail the exercises he says are essential so that I could compare that description to the description given by the plaintiff of what she says she has in fact been doing. Dr. Armstrong was not confronted with a question drawing to his attention a certain course of exercise (that which happens to be the course of exercise described by the plaintiff) and asked whether his findings are inconsistent with an individual having so exercised or an individual having so exercised means that the basis for his opinion has vanished. And I note here that the fact that the plaintiff testified after Dr. Armstrong had left the box is neither here nor there. In the first place, the plaintiff was examined for discovery on April 12, 2010

and just what exercising she had done over the years was of interest then because of the nature of her claim. If the subject was not touched upon, so be it. A basis for formulating a question for Dr. Armstrong was lost. In addition, it was open to the defendants to ask that Dr. Armstrong be placed back in the witness box for further cross-examination after the plaintiff had testified. That was not done. And I do note that Dr. Armstrong did take the box once again - during the calling of rebuttal evidence - but no attempt was made to explore with him then what is under discussion now.

[16] I find nothing in the alleged conflict between the evidence of the plaintiff and the evidence of Dr. Armstrong that tends to undermine her testimonial reliability. It also follows that the defendants' allegation of a failure by the plaintiff to mitigate her loss has not been established on a balance of probabilities.

[17] As I said at the outset of this portion of my Reasons for Judgment, I reject the defendants attack on the plaintiff's testimonial reliability focused as it was on the plaintiff's sincerity. However, I must speak to a problem with the plaintiff's powers of narration and recollection. As to the latter, it became clear to me that the plaintiff is good at recalling the order in which things occurred or appeared in her life, but has great difficulty with the "when" of it all. I have kept that in mind. As to the former, and of much greater significance, I say as the finder of fact, that the plaintiff's power of narration is compromised by the fact, as I find it to be, that she is either an actress worthy of an Academy Award or a simple, unintelligent individual lacking in both imagination and guile and manifestly inhibited by feelings of inadequacy, all of which result in her presenting as a witness with respect to whom it must be said that what she is testifying to - and often of more importance, not testifying to - can be gauged by the trier of fact only after what falls from her lips is looked at in the light of her bearing, demeanour and body language as she says it. The record will reveal that at one point during the plaintiff's testimony I, in effect, put what is but an aspect of all of this on the record. I emphasize that assessing just what the plaintiff is testifying to involves much, much more than simply recording the words that fall from her lips. I have kept this overarching fact front and centre in my role as the trier of fact.

[18] I know this is a case in which the plaintiff asserts that she is one of that small percentage of whiplash victims whose pain and suffering continues long after the flesh must have healed and that the law demands that I be slow and cautious before accepting the proposition that she is such a one, (*Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 at paras. 15 and 8). But I find as the trier of fact that she is just such a one, that what began as simple and anticipated-to-be transitory pain and suffering resulting from soft tissue damage to the neck, shoulders and back became chronic pain persisting to this very day. As will become clear later in these reasons when I deal with the import of my accepting, as I do, the heart of the opinion and analysis offered up by the plaintiff's expert as to the diagnosis and management of chronic pain, Dr. Armstrong, the evidence throws up what amounts to an explanation of the mechanics of an aspect of the plaintiff's chronic pain and, in addition, an explanation for the worsening of the plaintiff's perception of her pain and suffering as the years have gone by.

[19] I turn to the evidence of Dr. Armstrong and whether the plaintiff, on whom the onus lies, has proved on a balance of probabilities that "but for" the negligence of the defendants in April and July 2006 she would not now be burdened with a large portion of her chronic pain. She has. The short point is that I accept as accurate the core of what Dr. Armstrong had to tell me. But my referring to a "large portion" of the plaintiff's chronic pain rather than simply her "chronic pain" flows from the fact that:

(1) Dr. Armstrong recognized that the plaintiff is burdened with physical problems that are unrelated to the defendants' negligence; and

(2) having accepted the core of Dr. Armstrong's evidence I am not prepared to accept some of what I view to be the outer reaches of that opinion.

[20] I will now descend to the detail.

[21] The heart of what Dr. Armstrong had to tell me as to causation can be gleaned from this excerpt from his Rule 11 report (Exhibit 5):

CONCLUSIONS BASED ON THE PRECEDING FACTS, ASSUMPTIONS AND OPINIONS

A. Factors present before, at the time of, and after the MVAs

From my review of the Documents and my assessment of Ms. van den Hemel, it appeared to me that, at the time of each MVA, she had significant pre-existing issues related to her physical and mental health that would likely have influenced the impact of each MVA on her body and mind. At the time of MVA- 1, her mental and physical health was clearly compromised following the diagnosis and treatment of her breast cancer as well as by the psychosocial challenges she faced as an unemployed single parent of three children with inadequate financial support and unstable housing.

Following treatment of her breast cancer, her physical difficulties were related primarily to the right shoulder, chest and upper extremity. As well, she likely had previously begun to experience the onset of plantar fasciitis in her left foot, a condition she was prone to develop owing to excessive ankle pronation.

Previous childbirth and a tendency to joint laxity possibly rendered her more susceptible to sacroiliac joint injury.

B. Understanding her condition and diagnoses relative to her injuries

1. Chronic axial (neck and back) myofascial disorder, a soft tissue condition (also involving her TMJs, shoulders and her pelvic girdle) that is (i) associated with shortening of muscles and ligaments (stiffness), increased and unbalanced resting and active muscle tensions, muscle and ligament discomfort and irritability (pain, tenderness, spasm and trigger point activity), and muscular weakness and fatigue; (ii) aggravated by abnormal spinal postures and muscular deconditioning related to the coping tactic of pain avoidance and by increased tension in the muscles of the TMJs, neck, shoulders and back secondary to periods of heightened anxiety that help to sustain an increase in the activity of the sympathetic nervous system (adrenaline drive for “fight or flight”); and (iii) perpetuated by by core weakness and by sacroiliac joint dysfunction, the effects of which conditions

are. felt not only in the low back but are also transmitted up the spine through the continuum created by the axial bony and soft tissues. It is unlikely this condition was present before MVA-1.

The following complications of (1) have arisen:

(i) Myofascial tension headaches likely caused by shortening and residual (but latent) myofascial trigger point activity in her trapezius muscles which are located at the back and base of the neck, across the shoulders and down the back as far as the 12th thoracic vertebra, and in her suboccipital, semispinalis cervicis, and splenius cervicis muscles at the back of her neck. Because of her daily use of short-acting analgesic medication, her headaches are likely complicated and perpetuated, at least in part, by rebound phenomena related to medication use, so-called medication-induced headache.

(ii) A myofascial tension myalgia with pain, tenderness, tightness and spasm in the muscles of the TMJs, neck, upper chest, shoulders, and upper, mid- and low back. This complication has likely had an aggravating effect on the pain and stiffness in her right shoulder, chest and upper extremity that was caused previously by the treatment of her breast cancer.

Her chronic axial myofascial disorder has improved somewhat over time but she has yet to return to her condition as it was before MVA-1. Her residual complaints and findings related to the chronic axial myofascial disorder were worse after MVA-2 and have been sustained overall by (a) inadequately restored core strength which has likely been diminished for several years now since MVA-1 and (b) by previously undiagnosed and untreated sacroiliac joint dysfunction.

Following the MVAs, she has been plateaued in her recovery for a lengthy time because, as far as I could tell, her rehabilitation has been inadequate in the absence of a full and comprehensive diagnosis including sacroiliac joint dysfunction. In my opinion, absent targeted active therapy, she has yet to reach maximum medical improvement.

When I examined her, I found no active myofascial trigger points but this does not rule out that her muscles are harboring latent ones that likely

become active only under certain conditions, for example, when she is more active, fatigued or stressed.

2. Sacroiliac joint dysfunction, causing spinopelvic instability and misalignment that have retarded the recovery of core strength. It is unlikely this condition was present before MVA-1.

3. Patellofemoral pain syndrome (PFPS) affecting both knees, owing to weakness in the quadriceps muscles from deconditioning related to pain avoidance, for example use of a cane.. This condition was likely not present before MVA-1.

4. Bilateral plantar fasciitis likely present to a mild degree before the MVAs, especially in the left foot, but likely worse thereafter owing to further overall deconditioning.

5. Pain in the wrists, hands and fingers likely secondary to the early onset of osteoarthropathy unrelated to the MVAs.

6. Pain at the back of both elbows, likely caused by shortening of the triceps tendons as part of (1).

7. Status post-partial right-sided masrectomy, axillary lymph node dissection and radiation for breast cancer with somatic and neuropathic pain resrticting movement in the right shoulder present before the MVAs, the restriction of movement shifting to the left shoulder as well as being aggaravated overall by the further development of chronic myofascial pain after the MVAs.

8. Chronic pain and its complications including a possible increase in sensitivity to pain (peripheral and/or central nervous system sensitization) and a likely increase in emotional distress (depression and anxiety) and further interference with sleep, the latter likely resulting in increased daytime fatigue and some cognitive difficulties. The overall pain experience and the speed of recovery are often adversely affected by these complications but this should not be misconstrued in a way that suggests the pain is somehow psychological or the patient is malingering. Currently, it would appear that she is coping better and likely no longer meets the criteria for an Adjustment

Disorder although she continues to exhibit cognitive disotortions that are likely geting in the way of her recovery.

An increased sensitivity to pain occurs in susceptible individuals who are exposed to persistent pain and likely results from functional and structural neuroplastic changes that alter the way pain signals are initiated and processed in the nervous system. In many patients these neuroplastic changes appear to be maintained and to be irreversible so that pain actually becomes a neurological disease, meaning the prospects for the individual ever becoming pain-free are very guarded.

An extreme example of such neuroplastic change is FMS which, although it has been suggested by others as a diagnosis, Ms. van den Hemel, in my opinion, appears fortunately not to have developed. Except when clinical features of neuropathic pain are present, it is difficult, in the current state of our knowledge, to know for certain if a person suffering from chronic pain is or will be suscetible to neuroplastic change and the development of an increased neurological sensitivity to pain. In my opinion, the pain she experienced following treatment for her breast cancer had a neuropathic component so I would say that she likely is susceptible to developing neuroplastic change. It is hoped that, in futrue, fMRI may help to determine this suceptibility and demonstrate such changes.

C. Causation in respect to the MVAs

In my opinion, the forces applied in MVA-1 to her neck, back, shoulders and pelvic girdle were likely sufficiently severe to overload her axial soft tissues and her sacroiliac joints (her injuries) and to establish an acute axial myofascial disorder that became chronic owing largely to the aggravating effect of MVA-2 and the perpetuating effects of sacroiliac joint dysfunction, the development of increased muscle tension secondary to the increased emotional distress related to the MVAs, and the abnormal posturing and physical deconditioning consequent to pain avoidance. Her pain that was occasioned by her injuries sustained in the MVAs has become persistent and has been added to her pre-existing burden of chronic pain that followed her

> treatment for breast cancer. Owing to the MVAs there has been a material aggravation of the complications of chronic pain I have described.
>
> In my opinion, it is likely that sacroiliac joint dysfunction was (a) initiated by the MVA-1 and was materially aggravated by the MVA-2.
>
> Absent the MVAs or other similar trauma, it is my opinion that, on a balance of probabilities, Ms. van den Hemel, would not have developed a chronic axial myofascial disorder, sacroiliac joint dysfunction, an increase in her pre-existing chronic pain or an augmentation of its complications I have described. Nor would she have been likely to develop elbow pain or PFPS.

[22] The defendants had the plaintiff examined by an expert of their choosing, a rheumatologist, Dr. Shojania, on June 9, 2010. The essentials of what he had to say on the point under discussion now is revealed by the following excerpt from his Rule 11 report, Exhibit 13:

> **Opinion**
>
> Ms. Van Den Hemel was involved in two motor vehicle accidents (April 21, 2006 and July 18, 2006). Prior to the motor vehicle accidents she had right-sided breast cancer a year prior treated with lumpectomy, lymph node dissection and radiation. She had pain in the right shoulder and was unable to work due to right arm and shoulder dysfunction. Subsequent to the first motor vehicle accident she complains of pain approximately 8/10 in severity and subsequent to the second motor vehicle accident she complains of pain 9/10 in severity. On my assessment I find a few objective findings:
>
> 1. There seems to be osteoarthritis possibly of the knees and of the 1st MTP joints (bunions).
>
> 2. She has some subjective (self-reported) symptoms of soft tissue aches and pains. This is difficult to assess because I also detected an element of exaggeration in that her pain is described as 9/10 in severity while she is sitting and talking with me without typical objective features of severe pain (diaphoresis, tachycardia, hypertension). Also she has demonstrated some of the findings of

> pain exaggeration such as general pain with light stroking or touching with a tissue paper, inconsistent straight leg raising, inconsistent back range of movement and non-organic signs of axial compression and block turning.

Having said the above I did find some features of joint inflammation in some of the MTP joints (ball of the foot) on the right side, her history of plantar fasciitis, her history of right 2 MCP (index finger knuckle) inflammation, her history of a rash in the gluteal cleft (possible psoriasis) and a family history of psoriasis in her mother. Along with her elevated erythrocyte sedimentation rate (ESR) of 35 noted previously this brings to mind a diagnosis of psoriatic arthritis.

Psoriatic arthritis would be unrelated to her motor vehicle accident. Psoriatic arthritis is an inflammatory arthritis associated with psoriasis. It is a distinct clinical entity that occurs in approximately 10 to 15% of people with psoriasis. There is often a family history of psoriasis. Typical age of onset can vary from childhood to elderly onset. Typically there is a symmetric distribution of joints but there is also inflammation at tendon insertions typically at the Achilles (it sounds like she has had this in the past). She has had plantar fasciitis diagnosed in the past. Plantar fasciitis is a common feature of psoriatic arthritis. Psoriasis can often be present in the gluteal cleft (she describes a rash in her gluteal cleft previously though she did not have one at the time of my examination. A bone scan showed inflammation that could be in keeping with psoriatic arthritis.

To answer the questions noted earlier:

1. History and complaints have been noted.
2. Diagnosis has been noted above - Osteoarthritis, subjective symptoms of soft tissue aches and pains and possibly psoriatic arthritis. The prognosis of her osteoarthritis is good. This may result in very slow progression of deformity in her toes, possibly some increasing knee pain but the majority of people with osteoarthritis continue to function at a relatively high level. With regards to her psoriatic arthritis, this is a tentative diagnosis and I have

recommended that she see her primary care physician and follow-up with Dr. Kherani to review the possibility of psoriatic arthritis. If this is indeed present then she needs to be on anti-inflammatory medications and possibly disease modifying anti-rheumatic drug (DMARDS) to prevent damage and reduce inflammation.

3. Her prior/existing problem was her right breast cancer with subsequent right arm and shoulder pain resulting in work disability. A previous diagnosis of depression may contribute to her work disability however this is out of my area of expertise.
4. With regards to time off work due to the motor vehicle accidents, it may be that she would need weeks to a maximum of two months off work subsequent to each motor vehicle accident due to possible soft tissue pain and injury. I do not find at the time of my examination that she had features of any soft tissue injuries related to the motor vehicle accident.
5. There is no permanent disability with relation to the motor vehicle accident and the length of temporary disability would be approximately a maximum of two months after each motor vehicle accident.
6. Future investigations should be for psoriatic arthritis. A review by a rheumatologist would be appropriate. I have sent a separate note to her family physician recommending a review for the possibility of psoriatic arthritis.
7. There will be no need for surgery with relation to the motor vehicle accident.

[23] Without ignoring anything in the evidence that bears on the question of causation and keeping firmly in hand that the law abhors simple “after this therefore because of this” reasoning, I note that:

(1) Dr. Armstrong made a positive finding of sacroiliac joint dysfunction on May 31, 2010;

(2) nowhere in the record is there evidence that another doctor ever looked for but did not find sacroiliac joint dysfunction;

(3) Dr. Shojania made no diagnosis of psoriatic arthritis;

(4) it is common ground on the *viva voce* testimony of Dr. Armstrong and of Dr. Shojania that both sacroiliac joint dysfunction - its existence, significance and investigation (the Faber test, the Gillet test) - and chronic pain's sensitizing of the patient to pain are topics about which knowledgeable and reasonable medical experts differ;

(5) Dr. Armstrong was an impressive and convincing witness and the fact is that he is one who has come down firmly on one side on each issue;

(6) the defendants' assertion that the absence of immediate, persistent and consistent complaints of low back pain is fatal to Dr. Armstrong's opinion was met and set at nought by Dr. Armstrong's evidence to the effect that the absence of immediate, persistent and consistent low back pain is not inconsistent with what eventually became sacroiliac joint dysfunction having been set in train by the forces applied to the plaintiff's body during the two motor vehicle accidents in question in the case at bar; and

(7) other than the two motor vehicle accidents that bottom the litigation in the case at bar the record is devoid of any mention of a source of trauma that could result in significant force being applied to the plaintiff's sacroiliac joint.

[24] Accepting, as I do, the heart of Dr. Armstrong's opinion and analysis, but not being prepared to adopt what I view as the outer reaches of his opinion, the net result for present purposes is that I find that but for the negligence of the defendants the plaintiff would not have suffered from soft tissue damage to the neck, shoulders and back resulting in chronic pain which continues to this day.

[25] I turn to the assessment of damages.

[26] The guiding principal is this: "... the essential purpose of tort law ... is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant." (*Athey v. Leonati*, [1996] 3 S.C.R. 458, para. 20).

[27] The need is great in this particular case to keep firmly in hand that each assessment of damages is peculiar to a particular plaintiff and that it is the difference between what that particular individual was and what he or she became as a result of the defendants' negligence that matters.

[28] The plaintiff is 49 years of age. She was 45 years of age when the two motor vehicle accidents in question in the case at bar occurred.

[29] The plaintiff was born in Holland. She came to Canada at the age of 12. Her schooling ended at Grade 9. Attempts thereafter to add to her education came to nothing.

[30] From 1989 to 1994, the plaintiff worked as a salesperson at a Sears store. Before that she had had various jobs. Those jobs included working in restaurants as a bus person or a server and as a telemarketer.

[31] In May 2004, the plaintiff began working as a sales clerk at Home Depot. She was employed there until August 2005 when she had to quit because of the onset of cancer. What both the plaintiff and her Home Depot witnesses told me makes it clear that the plaintiff enjoyed her job in the Seasonal department, was good at her job, got along well with both the customers and her fellow workers and was a real asset to her employer.

[32] The plaintiff and her future husband met in 1992. They began living together in 1994. They have three daughters. Shaslin was born in 1995 and is now 15; Kasja was born in 1997 and is now 13; Tehnica was born in 1999 and is now 11 years of age.

[33] The plaintiff and her husband have had a rocky relationship. That they have separated for long periods of time over the years is obvious. His evidence as to just when they were separated clouded the picture. I have decided to look to the plaintiff's evidence for something of a chronology. I took it that they were living separate and apart from call it 2000 until August 2005. There is precision about the fact that they lived separate and apart from August 2006 until February 2009. As of the date of the trial they were still living together. Their periods of separation threw up a strange blend of court orders directed at keeping the husband away from the plaintiff, her living in shelters, and his being helpful both with the children (who had remained with the plaintiff) and household chores.

[34] The plaintiff was diagnosed with breast cancer in June 2005, quit her job at the end of August, underwent surgery in September and radiation treatment in (as best I can tell) December and January 2006. She emerged from this experience with what was referred to as "frozen shoulder", i.e., a permanent defect which prevents her from making full use of her right arm. And I note that she is right-handed.

[35] As stated elsewhere, the plaintiff was involved in motor vehicle accident #1 on April 26, 2006 and motor vehicle #2 on July 18, 2006.

[36] The plaintiff has not been gainfully employed outside the home since August 2005. She began receiving some form of disability payment in March 2010. Clarity exists only as to her receiving $1,449 per month and the present term of the payments being two years from March 2010. The source of the disability payments was referred to as the Provincial government. That her family doctor, Dr. Sun, endorsed the proposition that she was sufficiently disabled from working to receive the payment is clear on the evidence. Precision about exactly what level of disability was necessary to receive the payments is lacking. That something less than total disability would suffice seems to be all that one can say.

[37] As of May 2005, the plaintiff was a relatively happy and upbeat woman, happy in her job and good at it. She was the mother of three children and caring for them while separated from her husband. The plaintiff was very active. She swam,

road a bike, took long walks and played Frisbee, badminton and tennis. In addition, the keeping of her house, the cooking and the cleaning largely fell to her. There was nothing of interest in her medical history. Any suggestion that while being interviewed by one Dr. Kherani the plaintiff admitted that beginning in 2004 she began to have pain over large portions of her body is rejected. The combined effect of what appears on the face of an examination for discovery conducted on April 12, 2010 (Questions 341-343) and what I took from what flowed from her cross-examination on this episode when she testified before me is that this doctor – who neither testified before me nor appeared before me by way of a Rule 11 report – simply got it wrong. The plaintiff had said no such thing. And the fact is, I find, that nothing had occurred in connection with her health that is relevant to this case prior to June 2005. And as to that what is relevant is simply that she was diagnosed with cancer and that the aftermath of her experience and treatment was with her on April 21, 2006 when the first of the two motor vehicle accidents that bottom the litigation in the case at bar occurred.

[38] The downward spiral of the plaintiff's health began with the diagnosis of cancer in June 2005. A frozen right shoulder was one of the results of the surgery in September 2005. Depression entered the picture. In April and July 2006, the plaintiff suffered soft tissue damage which resulted in pain and suffering which pain and suffering became chronic as dealt with earlier in these Reasons.

[39] But the plague did not stop there. She developed plantar-fasciitis, pain behind both kneecaps, pain in the wrist, hand and fingers, and pain at the back of the elbows. And as to none of this do I say that "but for" the negligence of the defendants it would not have been her lot. As to some of this it is common ground that her problems cannot be driven home to the defendants' negligence and as to others I am simply not convinced by Dr. Armstrong's evidence that causation has been made out. In connection with the latter, I note both simple failure by the trier of fact to find the proposition in the evidence convincing on a balance of probabilities and the lurking presence of a relevant alternative cause - Osteoarthritis - in the testimony of Dr. Shojania.

[40] The results for the plaintiff of the defendants' negligence have included, but are not limited to: pain and suffering, the ingestion of pain killers and anti-inflammatories, multiple sessions of physiotherapy in 2006, 2007 and 2010, multiple visits to her family doctor and an assessment by two treating physiatrists, and a treating rheumatologist.

[41] The results for the plaintiff of the defendants' negligence have been a cause of the worsening of her pre-existing depression, a cause of her subsequently developed, growing and debilitating chronic pain, a cause of her loss of mobility, sleep disturbance, fatigue, emotional and cognitive distress, loss of capacity for lifting, sitting or standing and a cause of her having developed, in all likelihood I find, a lowered pain threshold. As to the last, what is somewhat tentative in Dr. Armstrong's evidence is found to be fact by me after considering not just Dr. Armstrong's evidence in isolation, but the whole of the evidence together.

[42] I turn to the assessment of damages for non-pecuniary loss. I have outlined some of the past from April 2006 until now. What about the future? In a nutshell, in so far as recovery from the effects of the defendants' negligence is concerned the thrust of Dr. Armstrong's report is that until what he says must be done – "targeted active therapy" including active not passive therapy, supervised stretching and posture improvement, aligning and stabilizing exercise, the use of a sacral belt and bio feedback – is done, and done for at least a year, improvement remains (for the purposes of the law) but a real and substantial possibility. It is my opinion that for this determined woman who has, in Dr. Armstrong, found someone who believes he knows what may well improve her lot substantially, the prognosis is not bleak but guarded.

[43] I have considered the case law placed before me by counsel. I have kept front and center the fact that the plaintiff is entitled to no more than to be placed in the position she would have been in absent the defendants' negligence. I have kept front and center both the state of the plaintiff's physical and mental health before the advent of the motor vehicle accidents and the onset after the date of the first motor

vehicle accident of problems with her health that are unrelated to the motor vehicle accident. The diverse sources of the downward spiral of the plaintiff's health since the summer of 2005 means that there is a measurable risk approaching certainty that even absent the defendants' negligence a significant degree of pain, suffering, discomfort, loss of mobility and all the rest of it would have been, and would continue to be, the plaintiff's lot.

[44] Having considered the whole of what was placed before me during the trial, and applying the applicable law, I award the plaintiff $75,000 by way of non-pecuniary damages. And I note that in arriving at that figure I did not forget that apart from all else the plaintiff hurt her hand during one of the motor vehicle accidents.

[45] I turn to the assessment of damages for loss of the value of the work that the plaintiff would have performed but was unable to perform because of the plaintiff's injuries (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, para. 30).

[46] Because the plaintiff was not employed after August 2005, had restricted mobility of the right arm resulting from her breast cancer surgery in September 2005, suffered the onset of depression by early 2006, was at least partially disabled from working by January 2006 in the opinion of her family physician, Dr. Sun, had debilitating setbacks which are unrelated to the motor vehicle accident, was found to be sufficiently disabled from working in Dr. Sun's opinion that by March 2010 she was receiving time-restricted disability payments and was, as of August 2005, a person whose lack of education and training restricted her to entry-level jobs in which the ability to stand on one's feet for hours on end (or sit at a desk with telephone in hand for hours on end) and be pleasant and helpful with customers is essential, the fact that proof on a balance of probabilities of the plaintiff's claim is not in issue looms large.

[47] Real and substantial possibilities – both pro and con – must be taken into consideration and given weight according to their relative likelihood (*Smith v. Knudsen*, 2004 BCCA 613, paras. 23-38). That is so because albeit I am dealing

with the past I must consider what might have occurred absent the defendants' negligence.

[48] The plaintiff's capacity to earn income as of August 2005 may be got at by beginning with her income while working for Home Depot in 2004-2005. The plaintiff told me she worked at Home Depot from May 2004 until the end of August 2005. Exhibit 8 reveals 2004 income of $11,965. Exhibit 9 reveals 2005 income of $12,238. On a 12-month basis her income was call it $18,000 ($1,512 x 12).

[49] Were the negligence of the defendants' responsible for all of the plaintiff's problems the plaintiff would be entitled to an award of damages for past lost opportunity to earn income of $78,000 ($1,512 x 52).

[50] But the law demands that I ignore none of the factors that bear on lost capacity to earn income because of the over-arching need to restrict the award of damages to only what was lost to the plaintiff as a result of the defendants' negligence.

[51] What is afoot is an assessment based on judgment after the weighing of all that bears on the issue. In my opinion an award of $40,000 is fair to both the plaintiff and the defendants. That is the award for past, lost opportunity to earn income, i.e., $40,000.

[52] If counsel cannot agree on the result, for this case, of *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, and the need for notional income tax to be deducted from the gross award for past lost income, they will have to get back before me.

[53] I turn to the assessment of damages for loss of or diminishing of the capacity to earn income in the future. I note at the outset that no vocational or work capacity assessment has been placed before me.

[54] I will not repeat here what I have said elsewhere. I will simply add to it.

[55] As noted above, the prognosis may be summarized as not hopeless but guarded. In addition, I am satisfied from all I saw of the plaintiff that her desire to do whatever she can by way of making a contribution to her family's well being is great.

[56] The plaintiff is 49. Assuming that absent all of her problems the plaintiff would have worked until age 65, 16 years are of interest.

[57] I have considered the familiar case law that has application to the assessing of damages for loss of or diminution of the capacity to earn income in the future. More particularly, I have considered the cases cited by counsel: *Rosvold v. Dunlop*, 2001 BCCA 1 and *Pallos v. ICBC* (1995), 100 B.C.L.R. (2d) 260.

[58] All approaches to arriving at an award are arbitrary. Pure calculation is eschewed by the law. An economist’s multiplier (Exhibit 11) is only an aid, a place to perhaps begin.

[59] If the whole of the plaintiff's problem with her capacity to earn income in the future would not be hers "but for" the negligence of the defendants an award in the area of $200,000 would be in order. In my opinion, in the case at bar an award of $100,000 would be fair to the plaintiff and to the defendants. In the result, that is the award for loss of or diminution of the capacity to earn income in the future i.e. $100,000.

[60] I turn to the assessment of damages for the cost of future care.

[61] I must focus on what is medically necessary and likely to be incurred.

[62] The evidence of Dr. Armstrong supports a conclusion that an award that encompasses the cost of a sacral belt, physiotherapy, counselling and a pedometer is – as the plaintiff submits – in order. A figure that emerges from the evidence is call it $8,000. That is the award, $8,000.

[63] I turn to the assessment of damages for loss of the capacity to undertake housekeeping. The case at bar falls into that basket of cases in which members of the family fill in for the plaintiff and there is no hiring of help.

[64] That the plaintiff's capacity has been severely undermined is clear from the evidence of herself, her husband and, very usefully, her daughter Shaslin.

[65] There is a paucity of evidence on which to base the quantum of an award. On the other hand, in *Campbell v. Banman*, 2009 BCCA 484, the Court of Appeal makes plain that what really matters is not arithmetic based on figures thrown up by the evidence but an assessment of the loss keeping in mind both the need for judgment and the fact that there has not been any actual expenditure.

[66] Having considered the whole of it it is my opinion that an award of $10,000 given under this discrete head of damages would be reasonable.

[67] That is the amount of damages for loss of housekeeping capacity, $10,000.

[68] I turn to the plaintiff's claim for special damages.

[69] The evidence in this area is sparse. The plaintiff's claim is correspondingly modest, i.e., $820.

[70] I award $820 by way of special damages.

[71] As demanded by the case law I "step away" and look at the overall award for reasonableness in the circumstances. In my opinion it is reasonable.

[72] If counsel are not able to agree on any ancillary matters they will have to get back before me.

“Stewart J.”