IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MacAulay v. Field,*
2014 BCSC 937

Date: 20140529
Docket: M120473
Registry: Vancouver

Between:

Karen MacAulay

Plaintiff

And

Arthur Lewis Field and Rachelle M. Briard

Defendants

Before: The Honourable Mr. Justice Bernard

Reasons for Judgment

Counsel for the Plaintiff:	T.J. Delaney
Counsel for the Defendants:	M.C. Ross
Place and Dates of Trial:	Vancouver, B.C. November 26-28, 2013
Place and Date of Judgment:	Vancouver, B.C. May 29, 2014

A. Overview

[1] On February 16, 2010, the plaintiff Karen MacAulay sustained soft-tissue injuries to her neck and back in a motor vehicle collision with a pick-up truck driven by the defendant Arthur Field. Ms. MacAulay was the driver and sole occupant of a Mazda Miata, which was side-swiped on the driver's side by the fish-tailing pick-up truck. The repair cost for the Miata was $4,647.

[2] Liability is admitted, as is an entitlement to an award in damages. It is the appropriate quantum which is contentious, principally arising from Ms. MacAulay's pre-accident history. At the time of the accident, Ms. MacAulay was a 47-year-old woman with a history of many motor vehicle accidents, back and neck complaints, and frequent chiropractic treatment.

[3] The essence of the defendants' position is that the "crumbling skull" doctrine applies and, therefore, damages must be reduced accordingly. More specifically, the defendants say that they are responsible only for a relatively short-term exacerbation of Ms. MacAulay's pre-existing neck and back pain; not for her claimed long-term debilitation because she would have experienced this in any event.

[4] The plaintiff's position is that her injuries are indivisible and that it is the "thin skull" doctrine that applies; thus, the plaintiff is entitled to an award not reduced because of her pre-accident condition.

[5] The plaintiff seeks the following compensation:

a) $75,000 for non-pecuniary losses;

b) $20,000 for diminished housekeeping capacity, past and future;

c) $7,170 in special damages; and,

d) $20,000 for future care costs.

[6] The plaintiff has not pursued claims for past or future income loss.

B. Evidentiary Synopsis

[7] Karen MacAulay is a 51-year-old wife, mother and executive assistant. At the time of the accident, she was a 47-year-old, physically active woman who worked full-time, tended to her house and garden, and enjoyed various physical, recreational and social pursuits with family and friends. Not long before the accident, she had retained the services of a personal trainer and was using her home treadmill four-to-five times weekly. She said she had a "remnant of pain" in her neck and back which she was attempting to address through fitness training.

[8] The accident in question occurred at 6:40 a.m. when Ms. MacAulay was driving to work. Immediately following the collision Ms. MacAulay felt dizzy, nauseas and upset. She said her back "tensed up" and felt "like a rock". Ms. MacAulay's husband attended to the scene and drove her home. Ms. MacAulay said that after 2.5 days, her dizziness and nausea subsided and she began to differentiate between the pains in her neck, back, shoulders and sides. She said she suffered from an extreme and constant headache for the next three-to-four weeks; thereafter, the headaches were sporadic. By the time of trial, the frequency was down to one or two per month.

[9] On the day following the accident, Ms. MacAulay went to her chiropractor, Chris Gilmore, for treatment. Ms. MacAulay had been seeing Mr. Gilmore frequently for back and neck issues since June 2005. Ms. MacAulay also saw Dr. Hiller, G.P., at a medical clinic because her family physician, Dr. Ipton, was not available.

[10] In the "first several months" following the accident, Ms. MacAulay described the pain in her back and neck as "bad" and her headaches as "excruciating". Shortly after the accident she increased the frequency of her chiropractic appointments and converted nine pre-paid personal fitness training sessions into rehabilitation sessions. She self-medicated with Extra-strength Tylenol, Robaxicet, Aleve and Advil, because her prescription medications (muscle-relaxants and Tylenol 3) upset her stomach.

[11] Ms. MacAulay said she tried to resume various pre-accident activities but could not do so because of her neck and back pain. In relation to leisure activities, she attempted to return to biking, hiking, aerobics, weight-training, treadmill exercise, swimming, golfing, skiing, dancing and other physical activities, but found that she is either unable to engage in them at all or must significantly curtail them because of pain. In relation to work, she says her ability to garden and do household chores has been curtailed, and at the office she can no longer sit for long periods without breaks to stand and stretch.

[12] At present, Ms. MacAulay manages her pain with regular chiropractic appointments, aqua-fit, medication, a back-brace, a muscle-stimulator, and a massage pillow. She eschews any demanding physical activities; thus, she has become a frustrated observer for various multi-family events (e.g.: laser tag, four-wheeling, hiking, water-skiing, kayaking, and water-sliding). Ms. MacAulay also stated she now finds long-distance travel very challenging.

[13] Ms. MacAulay acknowledged that she sustained injuries in two prior motor vehicle accidents. In a 2001 accident, she drove into the passenger side of a car which was doing a U-turn into her path. She said she suffered from some resulting neck and back pain which resolved within six months. In 2007, Ms. MacAulay was rear-ended while stopped at a red light. She described the impact as minor. She said it caused her to miss only a few hours of work and any injury sustained resolved within a period she could no longer specifically recall.

[14] Ms. MacAulay testified that her injuries from past accidents never impeded her activities and that in each instance she recovered to her pre-accident state. She described her experience following the February 2010 accident as quite different. She regards her present condition as unpredictable and unstable. She said it felt as if there were a knife in her lower back as she sat in the witness box.

[15] Ron MacAulay is the plaintiff's husband. Mr. MacAulay testified that since the accident occurred his wife has been unable to function at her pre-accident level in relation to gardening, household chores and recreational activities. He said his wife

now "thinks about everything she does" whereas before she would "just do it"; now, she simply opts out of demanding physical activities. Mr. MacAulay said that since the accident, his wife has been unable to bike, take long walks, and participate in various recreational pursuits with family and friends. In relation to vacation travel, he has noted that his wife is constantly on pain medication to permit her to participate in sightseeing; at home, she uses medication and various aids to cope with her pain. Mr. Macaulay has noted that his wife becomes tired and short-tempered when her back is bothering her.

[16] Janice Pike is a long-time close friend of the plaintiff. After the accident, she noticed that Ms. MacAulay ceased participating in physical activities. Ms. Pike described Ms. MacAulay as being in good physical condition prior to the accident. She was aware that Ms. MacAulay exercised on a treadmill every morning, had a personal trainer, and attended fitness classes.

[17] Ms. Pike noted that since the accident Ms. MacAulay has gained weight and become quite discouraged and frustrated by her inability to exercise and participate in activities. She described Ms. MacAulay's usual upbeat personality as "dimmed" by her pain. Ms. Pike was aware Ms. MacAulay had some previous problems with her back, but in her observation they never seemed to be physically limiting until the February 2010 accident.

[18] Jacqueline Purtzski is a physiatrist who examined and assessed Ms. MacAulay on February 28, 2013. She prepared a comprehensive medical-legal report which the plaintiff tendered into evidence. Her "summary/opinion" was as follows:

> As a result of the MVA, Mrs. MacAulay suffered:
>
> 1. Soft tissue injury of the neck; symptomatic exacerbation of possible pre-existing facet joint pain with secondary chronic soft tissue pain [, and]
> 2. Symptomatic exacerbation of lumbar facet joint pain with soft tissue spasms and pain.

[19] More specifically in relation to Ms. MacAulay's neck injury, Dr. Purtzski said that Ms. MacAulay:

> … likely suffered a symptomatic exacerbation of pain related to degenerative changes of the cervical spine, which were documented by [a] neck x-ray that indicated significant arthritis. ... These degenerative changes likely accumulated over time with repeated whiplash injuries, as well as age and are not the result of one acute injury. The last injury, in particular, seemed to have caused ongoing symptoms without remission. ... It is likely that her joint arthritis has progressed to a point that any additional trauma resulted in ongoing pain related to the neck vertebrae.

[20] In relation to Ms. MacAulay's lower back injury, Dr. Purtzski said that Ms. MacAulay's pain is:

> … likely a combination of pain due to arthritic vertebral joints, reactive muscle spasms, and poor core muscle strength. The arthritis was pre-existing but was symptomatically exacerbated with the MVA.

[21] Dr. Purtzski categorized Ms. MacAulay's prognosis for improvement as "moderate to poor". In this regard, she said:

> I believe a realistic goal for Mrs. MacAulay is to decrease her overall pain level by 50%. Another reasonable goal would be to return to low impact sports and be pain-free during sleep, but, in my opinion, her pain will unlikely disappear completely. If it does, she likely will have flare-ups again even with minor increases in activity or trauma.

[22] On May 1, 2013, Ms. MacAulay had a MRI of her spine. Dr. Purtzski reviewed the image and wrote:

> The cervical spine imaging results reportedly show severe degenerative narrowing of the spinal canal at the C5/6 and C6/7 level as well as narrowing of the foramina (nerve exits). This area coincides with the area of clinical discomfort. A neck spinal diameter of less than 10mm is considered stenotic. Her degree of stenosis is severe. (7.8 - 5 mm). I would recommend a quite urgent review/referral to a neurosurgeon. At that time the thoracic/lumbar spine abnormalities can also be addressed.

[23] In her testimony, Dr. Purtzski explained that the foregoing paragraph means that Ms. MacAulay is at greater risk of a spinal injury in the future.

[24] Peter Kokan is an orthopaedic surgeon who wrote a rebuttal to the report of Dr. Purtzski. The defendants tendered Dr. Kokan's report into evidence. Dr. Kokan

did not examine Ms. MacAulay. Dr. Kokan agreed with Dr. Purtzski that the degenerative changes found in Ms. MacAulay's spine likely accumulated over time with multiple injuries and age. He also agreed that Ms. MacAulay's low back pain is most likely a combination of pain due to arthritic vertebral joints, reactive muscle spasms, and poor core muscle strength.

[25] In relation to causation, Dr. Kokan wrote that it was impossible to know that the February 2010 accident alone led to the "worse exacerbation" of which Ms. MacAulay complains. He wrote that "there is nothing in the records that I reviewed that provide direct evidence of a physical injury to her". Dr. Kokan discounted Dr. Purtzski's conclusion that the February 2010 accident exacerbated Ms. MacAulay's pre-existing degenerative changes on the basis that it rests upon Ms. MacAulay's verbal history rather than objective evidence. He questioned the absence of "documented objective findings" of a symptomatic flare-up after the accident; however, he agreed that to diagnose soft tissue injuries, doctors must rely upon what their patients report to them.

[26] In his testimony in relation to causation, Dr. Kokan stated: "[m]y point is that there are so many potential factors which are unknown". In this regard, he said that he did not know anything about the severity of the previous accidents, and noted that there is a range of responses to degenerative conditions; that they can be asymptomatic even when severe. He agreed that degenerative asymptomatic conditions may be exacerbated by acute trauma.

[27] In his report, Dr. Kokan questioned the accuracy of Dr. Purtzski's statement that the frequency of Ms. MacAulay's chiropractic appointments decreased in the months prior to the accident; however, in his testimony he withdrew these comments and agreed that her statement was, indeed, correct.

[28] Under "opinion" in his report, Dr. Kokan speculated that there could be "other stressors in the plaintiff's life that may be exacerbating some of the symptoms" but conceded that "this is purely based on possibilities and assumptions and not based on anything that is in the records that I have reviewed". It was within the context of a

recommendation that Ms. MacAulay should participate in various exercise programs to maintain flexibility and core strength that Dr. Kokan expressed his opinion that the primary cause of Ms. MacAulay's symptoms is chronic degenerative changes in her spine. In this regard, he wrote:

> However, I would suggest that she do it for her own well-being and I would not consider it the responsibility of an insurance company to sponsor her for that when the main cause for her symptoms is chronic degenerative changes.

[29] Christopher Gilmore is the chiropractor who has provided treatment to Ms. MacAulay since June 15, 2005. On this date, Ms. MacAulay sought treatment for lower back pain, and also reported problems with her neck and shoulders. Mr. Gilmore's clinical notes were tendered as an exhibit. They reveal relatively consistent and frequent chiropractic treatments for neck and back complaints, commencing June 15, 2005. They show 37 treatments in the latter half of 2005, 31 in 2006, 25 in 2007, 31 in 2008, 25 in 2009, 39 in 2010, 29 in 2011, 32 in 2012, and 16 in the first half of 2013.

[30] Mr. Gilmore's records note that Ms. MacAulay reported motor vehicle accidents in November 2007 and February 2010. Of some apparent relevance are some "PG" ("pretty good" or no subjective complaint) entries in the 10-month period preceding the February 2010 accident. Specifically, these entries were made on April 8 and 22, July 15 and 29, August 12, and October 14 and 28.

C. Discussion

[31] The defendants' trial position narrows the issues for judicial resolution. The defendants concede: (a) responsibility for the accident; (b) the plaintiff's entitlement to compensation for injuries caused by the accident; and (c) that the plaintiff is not obliged to prove that the accident is the sole cause of her current condition.

[32] The defendants' principal position is that by April 2011 the plaintiff had recovered to her already compromised pre-accident state, and that her damages must be assessed accordingly. Alternatively, the defendants argue that "even if [the plaintiff] has not returned to her pre-accident baseline, she would be at her current

level of symptomology as a result of the natural progression of her arthritis and her age", and, thus, her injuries are divisible and damages must be assessed accordingly. The defendants rely on one of the fundamental principles of tort law: that a negligent defendant's legal responsibility is to return the plaintiff to her original (pre-negligent act) position from her injured one, and not to a better one.

[33] The defendants submit that Ms. MacAulay's testimony regarding her successful recoveries from prior motor vehicle accident injuries should not be believed. In this regard, the defendants point to the evidence of a long history of chiropractic care and to Ms. MacAulay's acknowledgement that she had some neck and back issues at the time of the accident in question. The defendants submit, specifically, that this case turns on the latter.

[34] The defendants argue that Dr. Purtzski's evidence is of limited value because Dr. Purtzski was personally unfamiliar with the plaintiff's "pre-subject MVA baseline" and, therefore, was neither in a position to assess the extent to which the accident exacerbated the plaintiff's pre-accident symptoms, nor to say that the plaintiff would not be at "her current level of symptoms had the 2010 accident not happened".

[35] The defendants rely on Dr. Kokan's evidence that the plaintiff has severe osteoarthritis of her cervical spine, developing osteoarthritis in her thoracic spine, and some osteoarthritis in her lumbar spine. In relation to causation, they note that Dr. Kokan said he could find nothing that showed the cause of the arthritis to be a permanent injury as opposed to age-related degeneration of the spine.

[36] In relation to the plaintiff's alleged recovery to her pre-accident (or "baseline") state, the defendants rely on chiropractic records which show a return to her pre-accident frequency of appointments following a spike in treatments from February 2010 to April 2011. In this spike the appointments are as frequent as three-to-five times per month; thereafter, the appointments return to a pre-accident average of approximately twice per month.

[37] The plaintiff's case rests principally on the testimony of Ms. MacAulay and the supportive and unchallenged testimony of persons well-acquainted with the plaintiff and her lifestyle both before and after the accident.

[38] Ms. MacAulay readily acknowledged her history of soft-tissue back problems due to previous motor vehicle accidents, and of related chiropractic treatments. The essence of her testimony is that she always "bounced back" from the consequences of these prior events, and that any injuries she sustained were neither enduring nor debilitating to the degree that they had a discernibly negative impact upon her lifestyle. To the extent there was discomfort it was manageable, and she remained active in sports and recreation, without hesitation or compromise. She asserts that her experience since the accident in question has been dramatically different, and this was fully supported by the testimonies of Mr. MacAulay and Ms. Pike.

[39] Ms. MacAulay also freely admitted having some residual neck and back pain at the time of the accident; however, she said that this pain was not unmanageable or limiting. In this regard, it is not in question that in the months leading to the accident in question, Ms. MacAulay was working with a fitness trainer, running on a treadmill regularly, and seeing her chiropractor with decreasing frequency. It is also notable that there is no evidence that in the pre-accident period Ms. MacAulay had ever declined to participate in physical activities due to back or neck complaints.

[40] Ms. MacAulay described her experience in the aftermath of the accident in question as distinctly different and more severe than anything she had experienced in the past; in particular, her back seized up and she suffered from dizziness, nausea and extreme headaches. She sought medical attention almost immediately; a step she did not take after two of the more recent prior collisions which resulted in some physical consequences to her. Her efforts to resume her exercise regimen and to participate in any activities requiring physical exertion and stamina have failed; for the first time in her life she has been unable to "bounce back".

[41] Notwithstanding the defendants' urgings to the contrary, I found Ms. MacAulay to be frank and forthright in her testimony and I believe her when she

says that her experience in the aftermath of the accident in question has been dramatically different than any past experience; that it has been significantly more negative and debilitating, and has endured without much abatement. In this regard, the evidence from the plaintiff's husband and close friend supports Ms. MacAulay's assertion of a significantly altered post-accident state; one in sharp contrast to a lengthy history of activity apparently uncompromised by back and neck pain.

[42] While it is apparent that the pre-accident state of Ms. MacAulay's neck and back is not readily discernable from medical records, diagnostic tests, or medical assessments within the pre-accident period, I am satisfied that the absence of such information is, in and of itself, informative. The clinical notes of Ms. MacAulay's appointment history with her family physician show a complete absence of musculoskeletal complaints from October 2003 until her visit immediately following the February 2010 accident. Notably, within this lengthy period, Ms. MacAulay was in two other motor vehicle accidents which had some physical consequences to her. It is also noteworthy that the records show that Ms. MacAulay saw her physician within this period and that she was not resistant to medical attention for her neck and back, both historically and in the aftermath of the February 2010 accident.

[43] On the other hand, I am not inclined to infer much about Ms. MacAulay's pre-accident state from her relatively frequent and regular visits to a chiropractor. In this regard, it is not contested that Ms. MacAulay has a history of back and neck complaints. Such is relatively common among mature adults, none of whom apparently escape age-related degeneration of the spine, whether symptomatic or not. It is clear Ms. MacAulay was symptomatic; however, I am satisfied that it is not reasonable to infer solely from Ms. MacAulay's chiropractic history that she was doing anything more than effectively managing her health so as to permit her to lead the active and fulfilling life she enjoyed. I am satisfied that Ms. MacAulay's chiropractic history is not inconsistent with her testimony. The evidence establishes that throughout Ms. MacAulay's chiropractic treatment history she remained active in sport and recreation; moreover, her chiropractic history shows a pattern generally

more suggestive of preventative maintenance than of treatment for chronic and debilitating pain.

[44] I am also satisfied that Ms. MacAulay did not return to her pre-accident "baseline" by April 2011. I accept her evidence that: (a) she has remained continuously symptomatic and disabled since the February 2010 accident; and, (b) this state is neither the same nor similar to her pre-accident, or "baseline", state. I am not persuaded that the only reasonable inference from the April 2011 cessation of the post-accident spike in the frequency of chiropractic appointments, is that Ms. MacAulay had returned to her pre-accident state.

[45] On the question of which of the two doctrines, "thin skull" or "crumbling skull", is applicable on the facts of the instant case, Mr. Justice Major's oft-quoted passages in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 473, are apposite:

> 34 The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> 35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position <u>better</u> than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[46] Also, in *Zacharias v. Leys*, 2005 BCCA 560, the Court made these helpful observations in relation to the "crumbling skull" analysis:

> 18 *Pryor v. Bains* (1986), 69 B.C.L.R. 395 (C.A.), was, of course, decided long before Athey, but is of interest as a case which involved a careful "crumbling skull" analysis. The plaintiff was being treated for a neck injury as well as certain emotional and psychological problems when she was involved in a car collision. There was extensive evidence at trial of the relative significance of her pre-existing condition and the accident as causes of the harm she suffered. Carrothers J.A., for the Court, said, at 399-400, that:
>
> > The present case, where there was a pre-existing condition, as found by the trial judge, already manifest and presently disabling, must be distinguished from the "thin skull" cases where the weakness or latent susceptibility of the victim is quiescent but is activated into being as a result of the tortious conduct of another.
>
> The Court upheld the trial judge's 75% reduction of general damages. It should be noted that this passage should not be taken as requiring that a pre-existing condition be "already manifest and presently disabling" for the "crumbling skull" rule to apply. As noted by Smith J.A., for the Court, in *T.W.N.A. v. Clarke* (2003), 22 B.C.L.R. (4th) 1 (C.A.) paragraphs 54, 62, the passage simply means that manifest and disabling conditions should be taken into account.

[47] Applying the foregoing principles to the instant case, I am satisfied that the "thin skull" doctrine is applicable; thus, there can be no apportionment of damages. In this regard, the preponderant evidence establishes that the plaintiff had a pre-existing condition, or susceptibility, that was quiescent but activated as a result of the defendants' tortious conduct. The evidence does not permit a reasoned conclusion that Ms. MacAulay's pre-existing condition was, in the words of Carrothers J.A., "already manifest and disabling", or that there was a measurable risk that it would become manifest and disabling without the defendants' tortious conduct.

[48] The evidence establishes that prior to the accident Ms. MacAulay suffered from spinal degeneration due to age and injury. This condition caused some very manageable and non-disabling symptomology. To the extent that this case turns on Ms. MacAulay's neck and back symptomology at the time of the accident, as was submitted by the defendants, I am satisfied it turns in favour of the plaintiff.

[49] I find that Ms. MacAulay's pre-accident symptoms were entirely manageable aches and pains that were neither disabling nor limiting. At the time of the accident, Ms. MacAulay was working with a trainer, running regularly on a treadmill, and participating in various sports and activities without compromise or hesitation. It would be unusual to find a physically active middle-aged person such as Ms. MacAulay who did not suffer from some age-related or injury-caused aches or pains; such is not enough to establish the existence of a pre-existing condition with a measurable risk of detrimental effects in the future. In this context, a measurable risk must be taken to mean something more than a prospect of eventual symptomology due to degeneration of the spine. If this were not so then the crumbling skull doctrine might reasonably apply to virtually all mature adults.

[50] It is also evident that the issue is more nuanced than whether a degenerative spine is symptomatic or not. Relatively few physically active middle-aged people are completely symptom-free; however, through exercise, treatments, therapies, and medicine, many people effectively manage their symptomology in a manner which allows them to be physically active and to expect to remain so well into their senior years.

D. Damages

Non-Pecuniary

[51] It is well-established that a plaintiff is entitled to compensation for pain, suffering, and loss of enjoyment of life and amenities caused by a defendant's negligence. An individualized assessment of damages is required, with due regard for awards made in other similar cases. Factors to consider in the assessment include: (a) the age of the plaintiff; (b) the nature of the injury; (c) the severity and duration of the pain; (d) disability; (e) emotional suffering; (f) loss or impairment of life; (g) impairment of family, marital, and social relationships; (h) impairment of physical and mental abilities; (i) loss of lifestyle; and (j) the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[52] Ms. MacAulay was 47 years of age when she was injured by the defendants. She was a physically active woman who enjoyed various athletic and recreational pursuits as a dominant aspect of her social life with family and friends. This enjoyment has been taken from her by the negligent act of the defendants.

[53] Ms. MacAulay's medical prognosis is couched in terms of "improvement" rather than "recovery". Dr. Purtzski said, "I believe a realistic goal for Mrs. MacAulay is to decrease her overall pain level by 50%... her pain will unlikely disappear completely... she likely will have flare-ups again even with minor increases in activity or trauma". The injuries to Ms. MacAulay thus represent a significant loss of lifestyle, an impairment of relationships, daily discomfort, sleepless nights and painful flare-ups.

[54] Ms. MacAulay is a healthy woman who, but for her injuries caused by the defendants, had a reasonable expectation of enjoying an active lifestyle for many years to come. She had a well-established history of engaging in the sort of physical activities (e.g.: skiing, swimming, biking, hiking, camping, dancing, gardening and exercising) that she could reasonably expect to have continued to enjoy well into her senior years.

[55] In support of an award of $75,000 the plaintiff cites the following cases: *Gold v. Joe*, 2008 BCSC 865 ($80,000); *Testa v. Mallison*, 2009 BCSC 957 ($75,000); and *Ghataurah v. Fike*, 2008 BCSC 533 ($70,000).

[56] The defendants cited cases consistent with their position that the plaintiff's injury should be assessed as no more than "a one-year acute exacerbation soft tissue injury with lingering symptoms at roughly 3 ¾ years ago"; however, this is not in accord with the Court's findings.

[57] The plaintiff submits that the circumstances in *Testa* are the most similar to the case at bar, and I agree. In *Testa*, the plaintiff was a physically active 58-year-old woman who sustained debilitating neck, shoulder and back pain in a motor vehicle accident. In awarding $75,000 for her non-pecuniary losses, the Court said:

> 59 The plaintiff's life has been severely impacted by the result of her injuries sustained in the March 23, 2004 accident. She has constant pain and headaches and suffers from sleep disturbance and altered mood. She has experienced a substantial quality decline in her ability to work and in both her leisure and social life activities.
>
> 60 The plaintiff is a motivated lady who will persist in using her long standing fitness and running activity to assist in controlling her chronic pain condition. Unfortunately at most she may only be able to reduce her pain levels to more tolerable or manageable levels and is unlikely to enjoy a full recovery.

[58] Taking into account all the foregoing, I am satisfied that a fair award for Ms. MacAulay's non-pecuniary losses is $75,000. Included in this figure is an allowance for her diminished enjoyment and abilities in relation to household and gardening activities.

Diminished Housekeeping Capacity

[59] At the time of the accident, Ms. MacAulay employed a housecleaner who attended bi-weekly to clean the family home. She intended to continue with this service into the foreseeable future. Between cleanings, Ms. MacAulay washed dishes and occasionally swept and vacuumed. Since the accident, Ms. MacAulay has continued to perform these chores, albeit with greater difficulty. An aspect of her household duties included washing her car and helping her husband maintain a large garden. These chores are now particularly challenging for her due to the bending required; thus, her husband has essentially taken over these tasks.

[60] The plaintiff cites the case of *Knight v. Belton*, 2010 BCSC 1305, in support of assessed damages of $20,000 for diminished housekeeping capacity. Notably, in *Knight* there was evidence recommending three hours per week of housekeeping services and professional help with the demands of the garden. The length of the period in question was 40 years. The trial judge calculated the present value of the future costs at $50,000, reduced this figure to $20,000 for contingencies, and then assessed the loss at $20,000.

[61] The defendants' position is that the evidence tendered does not support a separate award for diminished housekeeping capacity; however, if there is, indeed,

some loss, then they say it should be assessed as a nominal amount in the range of $1,500 to $2,500. In support of this position the defendants cite *Ward v. Zhu*, 2012 BCSC 782, and *Eaton v. Regan*, 2005 BCSC 3.

[62] *Ward* has similarities to the case at bar. The evidence established that a consequence of Ms. Ward's injuries was that she would, in the future, perform her usual household tasks with less efficiency and comfort. The trial judge found that this evidence did not support a separate award; instead, he took the diminishment into account in assessing non-pecuniary losses, citing *Helgason v. Bosa*, 2010 BCSC 1756 at para. 160 in support:

> 160 Damages for the difficulty the plaintiff has or will have in performing her usual household tasks with less efficiency and comfort than she did before the accident, or where the tasks have never been and will never be done, or for the loss of the amenity of an orderly and functioning home, should be assessed as non-pecuniary or general damages for a loss of amenity: *Fobel v. Dean*, *supra*, at p. 25-26; *McTavish v. MacGillivray*, *supra*, at para. 69; and McIntyre v. Docherty (2009), 308 D.L.R. (4th) 213 (Ont. C.A.), 2009 ONCA 448, at paras. 63, 73.

[63] Having regard to the foregoing, I am not persuaded that the evidence supports a separate award for diminished housekeeping capacity. On the evidence presented, the diminishment is only nominal and more appropriately factored into the assessment of an award for non-pecuniary losses.

Special Damages

[64] The plaintiff seeks compensation for the following out-of-pocket expenses incurred between the date of the accident and the trial:

(a)	Chiropractic treatment @ $35 x 125 (est.)	$4,401.40
(b)	Massage x 2	$123.20
(c)	Pillow	$167.99
(d)	Back brace	$67.19

(e)	Personal trainer/rehab	$1,134.00
(f)	YMCA aquafit	$51.60
(g)	Dr. Ho muscle therapy system (est.)	$120.00
(h)	Massage pillow (est.)	$125.00
(i)	Tylenol, Advil, Robaxicet and Aleve (est.)	$845.00
(j)	Mileage	$2,000.44

[65] The plaintiff has been reimbursed $1,848.80 by SunLife Insurance.

[66] It is well settled that special damages are awarded for all reasonable out-of-pocket expenses a plaintiff has incurred, as a result of his or her injuries, from the date of the accident to the date of trial. The principal expenses in issue in the instant case are for chiropractic treatments. The defendants' position is that the plaintiff would have incurred most of these expenses even if the accident had not occurred. In this regard, the defendants rely upon the plaintiff's 5-year history of routine and frequent chiropractic appointments preceding the accident and submit that it is reasonable to infer from this history and the plaintiff's testimony that she would have continued with such treatments with similar frequency at least up to the date of trial.

[67] I agree with the defendant's position; accordingly, I am satisfied that the defendants are responsible only for the plaintiff's additional chiropractic sessions in the spike shown in the chiropractic records between February 2010 and April 2011. After this period, the treatments resumed their pre-accident frequency as an aspect of Ms. MacAulay's on-going and firmly entrenched health maintenance program. While it may be that the focus and nature of the treatments after the aforementioned period may have slightly changed as a result of the February 2010 accident, their frequency and duration have not. The plaintiff should not be reimbursed for the cost of sessions she would have taken in any event.

[68] A similar claim was rejected in *Redl v. Sellin*, 2013 BCSC 581. In limiting recovery to 12 of 97 chiropractic sessions, Saunders J. said:

> 57. … Beyond that, I find that had the accident not occurred, the pre-accident pattern of these treatments likely would have continued up to the present date, even if the accident had not occurred, and no greater frequency of treatment has been demonstrated to have been reasonable.

[69] In the spike between February 2010 to April 2011, there were 15 extra appointments; accordingly, I find the plaintiff's entitlement is limited to $525 in chiropractic expenses. The claimed mileage expense is correspondingly reduced to $400 to reflect the reduced number of chiropractic sessions.

[70] I am satisfied that all other expenses are reasonable and attributable to the defendants' negligence. In relation to the costs of those expenses for which no receipt was tendered, I accept Ms. MacAulay's testimony as accurate or, alternatively, as a conservative estimate of the actual amount she spent; accordingly, the plaintiff's special damages are calculated as follows:

Special Expenses:	$3,558.98
SunLife reimbursement:	($1,848.30)
Total:	$1,710.68

Future Care Costs

[71] The legal principles applicable to an award for future care costs were helpfully summarized by Fitzpatrick J. in *Langille v. Nguyen*, 2013 BCSC 1460:

> 231. The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104.

> 232. The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* at 84.
>
> 233. Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
>
> 234. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required: *Tsalamandris* at paras. 64-72. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.
>
> 235. An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[72] In addition to the foregoing, the following legal principles are also apposite:

(a) The medical evidence supporting a future care cost need not be from a physician; it may come from a health care professional so long as an evidentiary link exists between a physician's diagnosis and the treatment recommended by a qualified health care professional: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 39.

(b) Where there is no evidence of either the cost of a claimed future expense or that the plaintiff intends to pursue it, the plaintiff will have failed to establish an award of damages*: Eaton v. Reagan*, 2005 BCSC 3 at para. 48.

(c) The standard of proof is simple probability, but the less likely it is that an expense will actually be incurred, the more the damage award

should be reduced for contingencies: *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 at 12-13 (Ont C.A.).

[73] The plaintiff seeks $20,000 in future care costs, based upon her submission that she will incur expenses similar to those incurred prior to trial, for the next 30 years. These include: (a) pain medication; (b) unspecified periodic replacement of equipment such as her massage pillow, Dr. Ho's machine, and a back brace; (c) chiropractic treatments; and, (d) aquafit classes.

[74] Dr. Purtzski's prognosis speaks of chronic pain management rather than injury resolution. In this regard, she has recommended: (a) facet and medial joint blocks; (b) 10-to-12 physiotherapy sessions; (c) 12 sessions with a personal trainer; (d) gym membership for at least one year; (e) pain medications; (f) aquatic therapy; and, (g) an ergonomic assessment of her work station. This is the extent of future care supported by medical evidence. There is, however, no evidence of the costs of treatments for (a), (b) and (g). In relation to the others, the costs of such may be inferred from similar expenses incurred by the plaintiff in the 4-year pre-trial period. In this regard, the plaintiff spent $51.60 on aquafit classes, $60 per session for a fitness trainer, and $845 for pain medications.

[75] Applying the foregoing principles to the instant case, I am satisfied that the evidence establishes the foundation for an award for future care costs as follows: (a) $210 annually for pain medication for 30 years; (b) $720 for 12 personal trainer sessions; (c) $300 for a gym membership for one year; and, (d) $250 for aquafit classes for 30 years, for a total of $14,820. Taking into account future contingencies, this amount is reduced to $10,000.

E. Disposition

[76] The plaintiff's claim is allowed. Damages are awarded, as follows:

Non-pecuniary losses:	$75,000
Diminished housekeeping capacity:	Ø

Special:	$1,710.68
Future care:	$10,000
TOTAL:	**$86,710.68**

F. Costs

[77] If the parties are unable to agree on costs, they may make written submissions.

"The Honourable Mr. Justice Bernard"