IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lensu v. Victorio,*
2019 BCSC 59

Date: 20190121
Docket: M160185
Registry: Vancouver

Between:

Marina Mikhailovna Lensu

Plaintiff

And

Alex Roque Victorio

Defendant

Before: The Honourable Madam Justice DeWitt-Van Oosten

Corrected Reasons: These Reasons for Judgment were corrected at para. 70 on February 11, 2019.

Reasons for Judgment

Counsel for the Plaintiff:	Pierre R. Bisbicis Robert N. Bisbicis E. Yacout, A/S
Counsel for the Defendant:	Christopher J. Bolan
Place and Dates of Trial:	Vancouver, B.C. December 17–21, 2018 January 2, 2019
Place and Date of Judgment:	Vancouver, B.C. January 21, 2019

INTRODUCTION

[1] This case involves a personal injury claim arising out of a motor vehicle accident that occurred in downtown Vancouver on August 1, 2015.

[2] The plaintiff alleges that the defendant negligently drove his vehicle over the back of her left ankle and foot while she stood outside a parkade, talking with friends.

[3] Liability and damages are in issue.

ISSUES

[4] The pleadings raise the following substantive issues: a) liability of the defendant; b) whether the plaintiff was contributorily negligent; and c) damages.

[5] This is a "fast track" case and subject to Rule 15-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Under Rule 15-1(3), the Court is not precluded from awarding damages in excess of $100,000 if proved.

EVIDENCE

Circumstances Surrounding the Accident

a) Plaintiff's Version

[6] The plaintiff, Marina Lensu, is 62 years old. She is educated as a mathematician; has worked in computer programming; and in 2013, she retired from a position with a ticketing agency. The plaintiff lives part of the year in Vancouver and the rest of the year in Moscow.

[7] On August 1, 2015, she watched a fireworks show in Vancouver with her daughter and granddaughter. Two of the plaintiff's friends were with them (Eduard Ragimov and a woman). Her daughter's car was in a parkade off Beach Avenue. Eduard Ragimov lived in the building associated with the parkade.

[8] After the fireworks, the group walked back to the parkade. The plaintiff's daughter and granddaughter went to retrieve the car. The plaintiff and her two

friends stood outside the parkade in the adjacent alley, waiting for her daughter to arrive.

[9] The plaintiff testified that all of a sudden, she "felt bad pain". She could not understand what happened. She did not hear a vehicle approaching them. She did not see a vehicle or know it was there. She said she felt something very heavy on her left foot and realized it was a tire. She tried to pull her foot out from the tire and jumped to the right. It happened very fast. The tire was heavy and she had to use a lot of strength to pull out her foot. Her left sandal was torn. The plaintiff could see that her foot was injured. She described the tire as moving over the right (inner) side of her left ankle to the left (outer side). Her back was facing the vehicle.

[10] Some "emotional things" were said between herself and the driver of the vehicle. The plaintiff's daughter drove out of the parkade. She took photos of the plaintiff's foot and the licence plate of the vehicle that hit her. She helped the plaintiff get into her car and took her home. They wanted to put ice on the plaintiff's leg as soon as possible.

[11] Referencing a series of photographs that the defendant admits accurately depict the place of the accident, the plaintiff described the unfolding of events in more detail.

[12] An alley runs alongside the parkade. It is on an incline. At the top end of the alley is Beach Avenue (northeast). The bottom end of the alley faces False Creek (southwest) and is blocked by a series of pole barriers. When entering the alley from Beach Avenue, and heading downward, the parkade for Eduard Ragimov's building is on the left. Further down the alley, to the right and before the pole barriers, is a second entrance to another parkade. This parkade belongs to a different building. Vehicles travel in both directions along the alley, entering and leaving the two parkades.

[13] The alley is walled on both sides. When entering from Beach Avenue, the wall on the right runs continuously until the parkade at the bottom right (with an

exception at the top, allowing pedestrians to enter a walkway). The wall on the left runs continuously until the entrance to the parkade on the left. The first break on the left side of the wall consists of an open doorway for pedestrians. This entrance is followed by a small section of parkade wall and then a second, larger break in the wall. This is the entry for vehicles.

[14] Vehicles turn left into the parkade and, using a card reader to the immediate left of the driver side of their vehicle, persons parking there activate an automatic gate, which allows access to multi-levelled parking.

[15] Upon exiting this parkade, a vehicle must turn right and proceed up the alley to access Beach Avenue (the pole barriers are to the left and vehicles cannot leave the alley this way). Across from the exit, on the wall that runs down the right side of the alley when heading in the direction of False Creek, there is a posted sign that reads: "CAUTION – Two Way Traffic – Proceed With Care".

[16] The plaintiff testified that while her daughter was retrieving her vehicle, the plaintiff and her two friends waited in the alley close to the open doorway that pedestrians use to enter the parkade associated with Eduard Ragimov's building. They did not stand inside the doorway, under the overhang. They were on the outside, in the alley. She described the alley as well lit.

[17] She said the plaintiff's two friends stood with their backs against the portion of the wall (or pillar) between the pedestrian entry and the vehicle entry. The plaintiff was talking to them, facing in the direction of Beach Avenue. As a result, the right side of her body would have been facing the pillar. A driver pulling out of the parkade, and looking to the right, would see the plaintiff's back. She testified that she was standing close to the wall and maybe shifting her weight from leg to leg, but not moving.

[18] In cross-examination, the plaintiff said she was standing in that place for about three to five minutes before the accident. She did not turn her mind to whether it was a safe place to stand. She acknowledged she could have gone

through the pedestrian entry into the parkade and waited there, behind the parkade wall, out of the alley and under a cover. She also acknowledged knowing that cars travelled in the alley; however, she believed pedestrians had the right of way. She knew that a vehicle exiting the parkade would have to turn right and come toward her. However, she believed they would proceed with caution. She did not turn her mind to whether she should watch for emerging vehicles. Instead, her friend Eduard Ragimov lived there, he knew the alley and he was standing with her. She relied on him to tell her if something was wrong or she was standing in a place that was not safe.

[19] When they arrived home after the accident, the plaintiff and her daughter put ice on her left ankle. It was swelling. She took a painkiller and stayed in bed. The next morning, she went to St. Paul's Hospital in Vancouver because she did not sleep well and her foot was not getting better. At hospital, an x-ray was taken of her left ankle and foot. She understood nothing was broken and she should rest, take pain medication, ice the ankle and make an appointment to see a doctor.

[20] The plaintiff said she followed this advice and made an appointment to see a physician, going to a clinic a week later. She testified that the day after the accident, she was experiencing pain in her left foot and ankle, low back (starting from the right side, moving over the right hip and into the right leg), and she had pain in her neck and right shoulder and arm.

[21] The plaintiff tendered a series of photographs showing the condition of her ankle and foot post-accident. These photographs range in time from immediately following the accident to just shy of two years out (July 2017). They show various stages of discolouration, bruising and swelling.

[22] A photo taken immediately following the accident (which also displays a broken sandal), shows discolouration on the lower right (or inside) of the left ankle, just above the heel, as well as scraped skin up the back of the left leg. Photos taken the next day show discolouration on the lower left (or outside) of the ankle and

scraped skin that extends to the left side of the leg just above the heel. Swelling to the right side of the ankle is also visible, as well as scraped skin on the heel.

b) Defendant's Version

[23] The defendant, Alex Victorio, has described the accident on three different occasions. Each of these descriptions was before the Court.

[24] On August 5, four days after the accident, the defendant spoke with a representative of the Insurance Corporation of British Columbia (ICBC) by telephone. Notes of this conversation were tendered, by consent, as part of the defendant's case.

[25] The defendant told the representative that he exited the parkade and stopped to wait for the gate to close. He saw three people standing in the "driveway" – two females and a male. They were blocking the driveway. Two of these persons waved at the plaintiff to move, but she did not do so. The defendant said his car was on an incline. He decided to move it so that it would not go backwards; however, as he moved forward "very slowly", one of the women (plaintiff) moved toward his car, rather than away from it. He told the ICBC representative he was not sure if he ran over the plaintiff's foot. He thought she hit the front of his car, but he was barely moving. He described what happened as unintentional. He "[knew] [he] did something wrong because [he] drove slowly forward", but he said "the pedestrian also did something wrong by walking towards [his] car instead of walking to the side with her companions".

[26] The defendant was examined for discovery in May 2017 and December 2018. On those occasions, he described the accident:

> **May 12, 2017**
>
> Q … So how fast do you think you were driving?
>
> A Less than 10.
>
> Q Less than 10. Okay.
>
> Did you hit her with your front wheel well or back? Is it --
>
> A On – it's front wheel.

Q Front, okay. And is it the passenger side front or driver side front?

A The – the passenger side.

Q Okay. Were you able to hit the brakes at all beforehand?

A Yes.

Q Yeah.

A We had to stop right away.

Q You stopped right away. So just – did you stop because you heard her screaming?

A Yes, just – when – yeah, when she start …

Q Yelling?

A Yes.

Q Okay. Was she loud?

A Not – not so loud, but I can – I can – I hear her that she – she's screaming.

Q Okay.

A Because I was – I was looking at the mirror, too.

Q Of course.

A And then sawing [sic] on – on the side of my car, on the passenger side.

Q Right

A Yeah. That's why I stop right away.

Q Now, when you stop right away, where is she in – the lady that – that was hit, where was she –

A She was on the right side, on the – on the passenger side.

December 3, 2018

Q Okay. You see these three people in front of you?

A Yeah.

Q During that time, you're moving the car slowly uphill because you don't want it to roll back, correct? You give the car gas so that –

A Yeah, I can – yeah, I gas, but not too fast.

Q I understand. You give it gas?

A Yeah.

Q And at that time your evidence was you're looking down at the …

…

Q The time that I'm talking about, because it wasn't clear is – according to your counsel, is the time when you're giving the car gas on the

uphill part of the parking lot where you've got three people in front of you; do you understand that? Yes?

…

Q You're looking down at your steering-wheel, and you're looking at the three people in front of you, and you're giving the car gas so that you don't go backwards on the hill that you're coming out of?

A Let me – that was flat first. It's not incline yet.

Q Go ahead.

A It's not incline yet. So when I saw them –

Q Yes.

A Okay. It's from – from the flat, I start my car slowly.

Q Going up?

A Going up.

Q Yes.

A But before I move, she was looking at me, and then she was – she was – she was asked by her friends to move, because I was looking at them.

Q I understand that, but she didn't move?

A Okay. She didn't move. I did not move.

Q So –

A I did not move, because she is not moving.

Q Okay.

A Because when start moving, I see she – after she move.

Q Yes.

A Otherwise if – if I start moving and then – and then she's not moving, I'm going to hit her on my – my front.

Q Okay.

A So I wait for her to move before I start moving.

Q Okay. And then what?

A And then what happen, so when I turn, when I turn, slowly, slowly, and then was – because I'm looking at my – my – because I'm turning, right, so I look my – my wheels – I mean my – my, what we call that?

Q Mirror?

A No, no, no, no, my – what's – and then –

Q Hold on, just take your time. What were you looking at –

A I look my, what is that, steering-wheel.

Q Steering-wheel, yeah.

A And then after that when – after I look my steering-wheel, I look – I look at her, and then look in the mirror.

Q Right. And that's when the accident happened?

A Yeah, but I thought when I was moving, she was moving closer to the wall but …

Q That's not what happened?

A Yeah.

Q Okay. You thought she was going to move closer to the wall?

A Yes.

Q And she didn't?

A She didn't.

…

Q Right. And you're looking at your mirror, you're looking at her, and you're going slowly?

A Yes.

Q Okay. And when you're looking at her through the window, she is facing the wall?

A Yeah, she's facing the wall.

[27] At trial, the defendant testified that he was driving a 2005 Chevrolet Equinox at the time of the accident. He described this vehicle as a mid-sized SUV, with a capacity for five passengers.

[28] After watching the fireworks with his wife, daughter and niece, the defendant returned to the vehicle on the second level of the parkade (his wife worked in the related building and was allowed to park there). He drove over the cable that triggers the gate to exit the parkade and waited for the gate to open. He then drove through the gate and stopped again, waiting for it to close.

[29] The defendant testified that he saw three people standing in the alley. A man and woman were standing next to the parkade wall to his right. They were leaning on the outside of the wall. A third person (plaintiff) was standing in front of them, facing the wall.

[30] He said the man and the woman leaning against the wall looked at his car. The man motioned to the plaintiff that she should move, because the defendant was waiting for them to do so. The defendant said the plaintiff looked at his car and continued talking with her friends. The man gestured again and she began to move.

[31] When the plaintiff began to move, the defendant started to move forward. He was going "slowly". He looked through the side mirror on the right of the vehicle because he did not want to hit the plaintiff when going by. He saw that she was "bumped" by the vehicle. After he passed her with his front wheel, he heard her screaming. He stopped right away and put his foot on the brake. He thought he was going two, maybe three kilometres an hour.

[32] The defendant said when he stopped, the plaintiff was on the passenger side of the vehicle, near the back seat area. He got out of the vehicle with his wife. The plaintiff was walking around the vehicle. She appeared to be walking "normally". She took a picture of his licence plate and kept saying that she was a "pedestrian". He tried to explain that she had been standing in an alley where vehicles travelled. The conversation was not going well. He decided he should call 9-1-1, but a car came out of the parkade. The plaintiff was urged to get in that car and he was told the people travelling with her were going to take the plaintiff to the hospital. They were screaming at him to move his vehicle. He felt he had no choice and let them pass.

[33] In cross-examination, the defendant was challenged on whether he was looking ahead when he made his right turn out of the parkade, toward the plaintiff, or looking at his steering wheel. He said he was looking ahead, but acknowledged that at his examination for discovery, he said he was looking at his steering wheel. He testified that he was "nervous" when he said that, and "confused".

[34] He acknowledged that before pulling out of the parkade, he did not roll down a window and ask the plaintiff to move. He did not honk his horn. He could see that the plaintiff was facing her friends when he began to move by her.

c) Independent Witnesses

[35] In addition to the parties, three witnesses testified about observations made at the scene of the accident: the defendant's wife and niece, and the plaintiff's daughter.

[36] Nida Victorio, the defendant's wife, confirmed that they were travelling in a 2005 Chevrolet Equinox. She was in the front passenger seat. Her daughter and niece were in the back seat.

[37] Ms. Victorio said the defendant drove from inside the parkade to the automatic gate, waited for it to open and then drove through. Once on the other side, he stopped again, waiting for the gate to close. Ms. Victorio could see three people on the other side of the parkade wall, having a conversation. Two of them had their backs to the wall. The third person (plaintiff) was facing Beach Avenue. The defendant drove forward a "little bit". The three people were blocking the way. The defendant stopped. He moved forward again. Ms. Victorio made eye contact with the male standing by the wall and mouthed to him, "Move please". He motioned to the plaintiff to move, but she moved "very little", only about half a step. The defendant moved the car again. Ms. Victorio was watching through the right-side mirror and thought the plaintiff may have been hit. She told the defendant to stop, but by then, the plaintiff was already "screaming". She was by the back tire of the defendant's vehicle.

[38] The defendant and his wife exited the vehicle to figure out what had happened. The plaintiff was moving around the vehicle, taking photos. She seemed to be walking "perfectly fine". She kept saying she was a "pedestrian". The car she was waiting for came out of the parkade and the plaintiff got inside. The people in that car yelled at the defendant to get out of the way. He moved his vehicle and let them go by.

[39] The defendant's niece, Athiela Magtoto, was in the back seat, sitting behind the front passenger seat. Her young cousin (the defendant's daughter) was seated to her left, behind the defendant.

[40] Ms. Magtoto testified that the defendant headed out of the parkade and once through the automatic gate, he stopped to wait for the gate to close. He then drove forward. The niece saw two women and one man standing to the right side of the defendant's vehicle. The defendant stopped because "the woman [plaintiff] was too close". She saw the man motion to the plaintiff to move so that the defendant could go through. The plaintiff moved toward the male and she was about a metre away from the vehicle. From the niece's perspective, it was "far enough away so that they could go through". The plaintiff was looking toward Beach Avenue.

[41] The defendant turned right out of the parade. Suddenly, the niece heard a scream. The defendant stopped the vehicle. He and his wife exited. The plaintiff was walking around the car taking pictures. She was speaking with the defendant and his wife. The niece stayed in the car.

[42] Elena Lensu, the plaintiff's daughter, was with her mother the evening of the accident. They were watching the fireworks. They walked back to the parkade. It was not yet dark. She went in to the parkade to retrieve the vehicle. Her mother and two friends waited in the alley, close to the pedestrian entry. There was nothing preventing them from moving through the entry and standing beneath the parkade's overhang, away from the travelled portion of the alley. She recalls her mother standing with her back toward False Creek, facing Beach Avenue. However, Ms. Lensu acknowledged that this memory may consist of what she was told by others, after the fact, rather than an independent recollection.

[43] While Ms. Lensu was in the parkade, she heard her mother scream. She exited the parkade. She cannot recall if this was by foot or with her vehicle. She cannot recall if she had her daughter with her. She saw a van leaving the parkade. She remembers that it was positioned "diagonally" to where her mother and two friends were standing. Her mother was leaning forward and holding on to one of her friends.

[44] Ms. Lensu did not see the accident as it unfolded. She took a picture of the licence plate of the van. She recalls trying to talk to the driver of the van. They

wanted him to stop and exchange information. She described him as angry. She got her mother into her car and took her home. Her mother's sandal was broken. She was in pain and crying.

Admissibility Ruling on Demonstrative Evidence

[45] As part of his case, the defendant sought to tender a re-enactment of the accident, with experimental components. Rather than retain an accident re-constructionist to provide expert opinion evidence on the mechanics of the accident, with reference to the plaintiff's injuries, counsel for the defendant attended the scene after-the-fact with the defendant and Marcus Dyck, an independent adjuster/investigator, and conducted his own analysis.

[46] A 24-page report setting out various observations made at the scene was disclosed to the plaintiff. Plaintiff's counsel was first told of the material on November 14, 2018 (one month before trial). The report was delivered on November 29. Plaintiff's counsel objected to its admissibility.

[47] On December 15, two days before the start of trial, counsel for the defendant provided the plaintiff with a diagram of the scene prepared by Mr. Dyck and said it would form part of Mr. Dyck's evidence at trial.

[48] The report, which I reviewed, contained:

- aerial views of the alley obtained from Apple Maps;
- photographs of the alley facing northeast toward Beach Avenue, and southwest toward False Creek;
- measurements of the slope of the alley, including its "gradient", "percentage" and the "slope in degrees"; and,
- information arising from a "number of scenarios [that were] conducted and documented through photographs and video".

[49] The "scenarios" were generated using a 2018 Nissan Rogue rented by counsel for the defendant.

[50] "Scenario 1" shows the vehicle with straight front wheels and counsel for the defendant standing beside the vehicle.

[51] "Scenario 2" show the vehicle's front wheels turned fully to the right and its impact on counsel's right leg when placed in various positions.

[52] "Scenario 3" shows counsel for the defendant standing by the right wheel of the vehicle and its angle *vis-à-vis* counsel's legs when standing in various positions.

[53] "Scenario 4" re-enacts the defendant's exit out of the parkade, based on his indication of "where he believed [the plaintiff] was standing" in the alley. For the purpose of this scenario, the defendant was "asked to operate the Nissan Rogue and drive in the same path as he did on August 1, 2015". The demonstration was captured through photographs and video. Photos included in the report include a "View from driver's seat inside the vehicle".

[54] During the re-enactment, counsel for the defendant stood in the places where the defendant said the plaintiff was standing before he exited the parkade and after he put his vehicle in motion. The purpose of the re-enactment, which included additional experimental components, was presumably to determine whether the plaintiff's version of events was physically possible, as well as test the defendant's theory of the case.

[55] At trial, the plaintiff objected to the admissibility of this evidence. Among other things, her counsel argued that through this evidence, the defendant was attempting to put expert opinion before the Court without complying with the requirements of *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.), or the notice provisions of the *Supreme Court Civil Rules*.

[56] Moreover, because of the defendant's direct involvement in the analysis, and the degree to which his version of events informed the re-enactment in "Scenario 4", it was argued that the evidence violates the rule against prior consistent statements.

[57] After hearing submissions on admissibility, I declined to admit the report, any associated photographs or videos, the evidence of Mr. Dyck relating to the scene-analysis, and the diagram provided to plaintiff's counsel on December 15. I indicated that my reasons for doing so would form part of these *Reasons for Judgment*.

[58] In my view, the admissibility of this evidence is appropriately determined with reference to the principles set out in *R. v. MacDonald*, [2000] O.J. No. 2606 (O.N.C.A.) and *R. v. Collins*, [2001] O.J. No. 3894 (O.N.C.A.).

[59] In *R. v. MacDonald*, the Court held that the "preferable approach" to this type of evidence:

> 42 … recognizes the dangers of video re-enactments but adopts a case-by-case analysis. As with the admissibility of other kinds of evidence, the overriding principle should be whether the prejudicial effect of the video re-enactment outweighs its probative value. If it does, the video re-enactment should not be admitted. In balancing the prejudicial and probative value of a video re-enactment, trial judges should at least consider the video's relevance, its accuracy, its fairness, and whether what it portrays can be verified under oath … Other considerations may be material depending on the case. And as with rulings on the admissibility of other kinds of evidence, the trial judge's decision to admit or exclude a video re-enactment is entitled to deference on appeal.
>
> [Emphasis added. Internal references omitted.]

[60] See also: *R. v. Sipes*, 2011 BCSC 917 at paras. 106–108; *R. v. Violette*, 2009 BCSC 421 at paras. 50–52; *R. v. Ellard*, 2005 BCSC 219; and *Luckett v. Chahal*, 2017 BCSC 1031.

[61] In *R. v. Collins*, Charron J.A. summarized the principles governing the admissibility of "experiment evidence":

> 21 In a nutshell, experiment evidence, if it is relevant to an issue in the case, should generally be admitted, subject to the trial judge's residuary discretion to exclude the evidence where the prejudice that would flow from its admission clearly outweighs its value. Beyond this, when the evidence requires the making of inferences from observed facts that require special knowledge, the test in *Mohan* will have to be met before the evidence can be admitted as expert opinion evidence.
>
> 22 In most cases, the relevance of the experiment evidence will depend on the degree of similarity between the replication and the original event. Consider the

> example given earlier where the experiment consists of the driving along a particular stretch of road to determine at what point a stop sign becomes visible. If the distance at which the stop sign becomes visible is in issue at trial, the experiment evidence will be material, but will only be relevant if the replication bears some similarity to the original event. For example, if the original event occurred in the summer when vegetation partly obstructed the driver's view but the experiment was conducted in winter after all the leaves had fallen, the relevance of the evidence will be greatly diminished. Depending on all the circumstances, it may not be worth receiving. Similarly, if the experiment evidence includes expert opinion evidence, variances between the replication and the original event, depending on their degree and importance, will affect the weight that can be given to the expert opinion evidence.
>
> [Emphasis added.]

[62] Applying these principles to the defendant's proposed evidence, I am satisfied that the prejudice that would flow from the admission of this evidence would clearly outweigh its value.

[63] The report from Mr. Dyck captures observations made at the accident scene more than three years after the fact.

[64] The photographs and videos are not generic in nature. Instead, they seek to examine the mechanics of the accident, through the testing of specific scenarios that depict interaction between a vehicle exiting the parkade and a pedestrian in the alley.

[65] Measurements were taken during the analysis, and conclusions reached, on issues such as the slope of the alley, without any demonstration of technical expertise. The vehicle used during Scenarios 1–4 is not the vehicle driven by the defendant at the material time, or even a vehicle of the same year, make and model. The report contains no information on size and shape similarities between the vehicle used in the accident and the Nissan Rogue.

[66] The scenarios depicting contact between the vehicle and counsel for the defendant, at least in part, focus on the back of counsel's right leg. It was the plaintiff's left ankle and foot that was at issue on August 1. It is apparent from the report that the scene analysis was completed in daylight. The accident occurred

after 10:00 p.m. and although the witnesses testified it was not yet dark, there would still be differences in the lighting.

[67] Scenario 4 includes a re-enactment of the defendant's exit from the parkade, predicated on the defendant's version of events, including his perspective on where the plaintiff was standing before he exited and after he put his vehicle in motion. This is a biased account of factual matters that are in significant dispute at trial. Furthermore, although this may not have been the intent, the re-enactment functionally puts the defendant's version of the accident before the Court in a manner that he would not otherwise be entitled to lead. It is akin to a prior consistent statement, particularly with his direct involvement in the scenarios.

[68] Finally, counsel for the defendant participated in the re-enactment. To cross-examine on the accuracy and/or reliability of the angles and positioning depicted in the photographs and video, he would potentially be subject to cross-examination.

[69] In the whole of these circumstances, I was of the view that admitting this evidence was highly problematic and declined to do so. With reference to the factors discussed in both *R. v. MacDonald* and *R. v. Collins*, the prejudice that would flow from the admission of the evidence clearly outweighs its value.

[70] Specific to the diagram presented to plaintiff's counsel on December 15, this evidence failed to meet the notice requirements established under Rule 12-5(10), which provides that no plan or photograph may be received in evidence unless at least seven days before the start of trial, the parties of record have been given an opportunity to inspect it. This timeline was not met.

[71] I note that as part of the plaintiff's case, 25 photographs were admitted into evidence, by consent, depicting the accident scene, the alley, the areas of the parkade in which the events unfolded, and the alley's slope. These photographs were clear enough that the witnesses for both sides were able to use them as a reference point in describing what occurred. Declining to admit the evidence of Mr. Dyck did not deprive either party, or the Court, of a basis to work from in

understanding the scene, including the configuration of the alley, and drawing inferences about how the accident likely unfolded.

Plaintiff's Health, Pre- and Post-Accident

[72] The plaintiff described her physical health before the accident as "pretty good". She acknowledged experiencing symptoms in her lower back once or twice a year. She would go to a chiropractor about once per year to prevent problems arising in her lower back. When she did experience symptoms there, they lasted for two to three days and then she recovered. This situation did not limit her activities in any way.

[73] Before the accident, the plaintiff played tennis and ping-pong. She could play ping-pong for two to three hours straight. She was an avid skier who could manage challenging runs, went camping, took dance classes, rode horses, was learning how to sail, and loved hiking, including demanding trails. She could hike from between two to five hours. She travelled internationally and walked extensively. She enjoyed these activities and did not experience any negative effects.

[74] Since the accident, the plaintiff can no longer ski, sail or play tennis or ping-pong. She has tried horse riding once and had to stop because it hurt too much. She has continued with international travel, but experiences difficulty on the plane because she cannot sit for a long time. She cannot walk as far and as quickly as she used to. Instead, she needs to rest and sit after every 20 to 30 minutes. Pre-accident, she spent a considerable amount of time walking with her friends in Vancouver and abroad. Now, she spends most of her time waiting for them, sitting in the car and watching the sights from there. It makes her unhappy.

[75] Post-accident, the plaintiff had to sell her car because it was too low to the ground. Now, she uses her daughter's car. This has affected her independence and mobility.

[76] The plaintiff lives in a three-story Yaletown condominium. She has owned this home for 10 years and loves it. The condominium is ideally located, within

walking distance of what she needs and the things she most enjoys. There are two flights of stairs in the condominium. The plaintiff has decided she needs to sell her home because of difficulties she experiences with the stairs. This makes her feel helpless.

[77] She used to clean the condominium herself and do all of her own cooking. After the accident, she has had to hire someone to help clean. Her daughter also helps her out. The plaintiff can do some things, such as dusting and using the microwave. However, she has difficulty accessing any lower cabinets.

[78] Since the accident, the plaintiff has tried various rehabilitative treatments, including physiotherapy, massage, acupuncture and specialized exercise. She has followed through on most of what has been recommended. In the past few months, her condition appears to be getting worse.

[79] The plaintiff testified that her neck, right shoulder and arm have recovered from the accident. She only experiences pain in these areas a few times per year. Pain in her lower back and right leg is getting worse. It starts on the right side, moves over the hip and extends down the right leg. She said she experiences this pain every day.

[80] Her left foot and ankle were injured in the accident and continue to bother her. Her ankle will swell with increased activity.

[81] In cross-examination, the plaintiff acknowledged that she began experiencing back pain as early as 2001. She lifted something the wrong way and her back hurt. It took three or four visits to a chiropractor to remedy the situation. The pain was gone within a few days. After that, the plaintiff would experience symptoms in her back once per year, or once every two years. She would see a chiropractor, but mainly to prevent problems from occurring, rather than to fix them. The plaintiff said she managed her back this way up to 2014, the year before the accident.

[82] In July 2014, she was descending stairs in her Yaletown condominium and fell over the lowest step. She felt pain in her right shoulder, right arm, neck and low

back. The right shoulder pain radiated down the right arm. The symptoms associated with the fall stayed with her for three to five days. She went to a chiropractor and took pain medication. She testified that within a week, she was back to normal and able to travel to Hornby Island with friends.

[83] Between the fall in July 2014 and the accident in August 2015, the plaintiff said she experienced one further incident of low back and right shoulder pain. It lasted about three to five days. She believes this was in spring 2015. The plaintiff attended for physiotherapy in Moscow to address this issue.

[84] The plaintiff's daughter confirmed that prior to the accident, her mother lived an active lifestyle.

[85] She was athletic, social and, post-retirement, the plaintiff was trying to experience activities she had not been able to undertake when working (such as dancing). Ms. Lensu knew her mother as an avid skier. They skied together locally, in other British Columbia locations, and internationally. The plaintiff played tennis; ping-pong; enjoyed swimming and horse riding with her granddaughter; had taken up sailing; and she participated in various other outdoor activities, including hiking and camping.

[86] Elena Lensu described her mother as someone with considerable physical stamina pre-accident. However, after August 2015, things changed. They have not been skiing since then. They have tried to do simple hikes in flat locales. The plaintiff experiences pain and, as a result, this is no longer something they pursue together. From Ms. Lensu's perspective, her mother's physical condition appears to be getting worse. She gets tired much faster. When teaching piano to her granddaughter, it is now done intermittently, so that the plaintiff can rest. She cannot stay in one position for very long. She complains about pain in her left ankle, legs and one of her hips.

[87] Ms. Lensu describes her mother as limping. From her observations, the plaintiff is in a lot of pain. It is difficult for her to lean forward. She squats to lift

anything that is heavy. She had to stop using her car because it was too low to the ground and the plaintiff experienced considerable difficulty getting out of the vehicle. She now uses her daughter's vehicle, which is higher.

[88] Ms. Lensu lived with her mother between 2014 and 2016. Prior to the accident, the plaintiff was able to maintain the home, manage most of the related chores and do the cooking. Since the accident, Ms. Lensu has had to provide her mother with assistance. She no longer lives with her mother. She is married and lives in separate accommodation with her husband and daughter. She works in Victoria but regularly assists with obtaining groceries for her mother on weekends, cleans and helps with other chores, including cooking. Her mother now requires a housekeeper.

[89] Ms. Lensu describes her mother as feeling "down". She is "emotionally distressed". Her demeanour is different than before the accident. She noticed this change about three to four months after the accident.

[90] In cross-examination, Ms. Lensu confirmed that prior to the accident, her mother would complain of occasional back pain. However, this was a "rare" occasion. It was not chronic. She described it as the pain one might experience "as a matter of everyday life".

[91] She also confirmed that in 2014, her mother fell on the stairs in her condominium. However, she recovered quickly. Ms. Lensu remembers that her mother impacted her right arm in the fall.

[92] Vira Pryhkhodko is a long-time friend of the plaintiff. She lives in Vancouver. They have travelled together internationally. They have a history of getting together on weekends to participate in physical activity. This included a lot of walking. They used to regularly meet at the Burrard Bridge and walk around the Vancouver seawall.

[93] Prior to the accident, Ms. Pryhkhodko travelled with the plaintiff to Europe and other places a few times. They would go for as long as two weeks. They would also

travel locally to Squamish, Whistler and Vancouver Island. The plaintiff skied with Ms. Prhykhodko's husband. As a group, they hiked and swam together. They tried to stay as fit as possible.

[94] From Ms. Prhykhodko's perspective, the plaintiff was energetic and strong prior to the accident. She could manage long and challenging hikes. She could swim for a considerable period. At times, Ms. Prhykhodko could not keep up with her. She does not recall the plaintiff complaining about health issues.

[95] This changed post-accident. They have travelled to Colombia and Europe since the accident. Ms. Prhykhodko and her husband have decided they can no longer travel with the plaintiff as she is not able to keep up with them. She cannot engage in the physical activities the three of them use to do. The plaintiff cannot walk as much; she needs to rest every half an hour or so; and the plaintiff ends up waiting for them in the car and/or at a cafe while they sightsee. The walks around the seawall now consist of the plaintiff taking the car and meeting them somewhere.

[96] Ms. Prhykhodko is familiar with the plaintiff's condominium. Since the accident, she has seen the plaintiff having difficulty managing the stairs. The plaintiff limps (since at least 2016). She complains about her back and legs. She needs assistance to get out of a vehicle. When travelling, Ms. Prhykhodko and her husband have had to carry the plaintiff's luggage.

Medical Evidence

a) Attendance at Medical Clinic Post-Accident

[97] The plaintiff attended a medical clinic twice within a month of the accident.

[98] Dr. Carlie Germain, the attending physician, testified at trial. She has no independent recollection of the plaintiff's visits. However, her clinical notes were entered as an exhibit. She types out her notes while a patient is with her.

[99] On August 5, 2015, Dr. Germain's notes recorded the plaintiff's presenting "problem" as a "Backache, unspecified". The plaintiff complained of:

> Having low back pain for about 1-2 weeks
>
> Worse on Rt side, but both hips. Radiating down RT leg, no numbness or tingling, no weakness
>
> Has had "bad back for many years".
>
> Usually physically active and had injury to Lt ankle/foot Aug 2nd and was in bed for a few days afterward. Car ran over foot?
>
> Was in ER to assess ankle, did xrays but no fracture. Still mild bruising laterally
>
> Pain with walking or sitting too long. No concerns with bowel/bladder.
>
> Using Tylenol pm for pain

[100] Dr. Germain examined the plaintiff. The plaintiff appeared "stiff with mobilizing". Dr. Germain noted "mild lumbar tenderness" in the low vertebrae and sacral area. The tenderness appeared "worse" over the plaintiff's paravertebral muscles and "Sl joints", and on the right side. Dr. Germain encouraged the plaintiff to stay active, stretch, avoid bed rest and seek out physiotherapy.

[101] The plaintiff returned to Dr. Germain on August 21. This time, the clinical record shows the presenting "problem" as "Sprains and strain of ankle and foot". The plaintiff complained of:

> Here for f/u Lt foot injury.
>
> August 1st car apparently ran over foot. Was seen in ER, did xrays but no fracture then visible.
>
> Still painful posteriority at night, swelling at night. Pain with walking, no instability.
>
> Tried hiking, and says was more painful walking up hill.
>
> Using OTC analgesia pm, topical voltaren.

[102] Dr. German observed the plaintiff appeared to be "Ambulating ok" and was "Full able to weight bear on both ankles". She noted "Mildly tender lower/posterior medial malleclus". The plaintiff was tender over her Achilles tendon. There was "No obvious deformity or bulge, minimal swelling". The "Ligaments seem[ed] stable".

[103] Among other things, it was recommended that the plaintiff use ice and heat to treat her injury, wear a brace for support, and avoid high-impact activities, but remain active with stretching.

b) Musculoskeletal Injury

[104] Dr. John Fuller is a physician with a specialization in orthopaedic surgery. He was qualified as an expert witness to provide opinion evidence in the area of musculoskeletal injuries, their diagnoses, causes and prognosis.

[105] Dr. Fuller reviewed the plaintiff's clinical history, related medical information and conducted a "straightforward" physical examination of the plaintiff on August 23, 2017.

[106] At the time of the examination, the plaintiff was complaining of: (1) residual pain and swelling in her left foot and ankle, with limitations to movement; (2) a "significant exacerbation" of low back pain that had pre-existed the accident; and (3) pain in her right shoulder girdle and arm.

[107] Based on his review, Dr. Fuller diagnosed:

> a) … residual evidence of marginal compromise to the stabilizing ligaments of the left ankle with associated residual swelling and reported pain;
>
> b) Low back pain with evidence of sacroiliac dysfunction; the sacroiliac complex being the complex of ligaments and joints between the tailbone and pelvis; and,
>
> c) No clear clinical evidence of significant compromise to the right shoulder.

[108] During his examination, Dr. Fuller asked the plaintiff to walk. He did not see what he would describe as "limping"; however, he did notice subtle changes to the plaintiff's gait consistent with pain-avoidant behaviour.

[109] Assuming that the accident occurred as the plaintiff alleges, Dr. Fuller concluded that the defendant driving over the plaintiff's left ankle and foot was the "initiating factor" for the residual symptoms experienced in the left ankle and foot.

[110] He understood from the plaintiff's account, and the material provided to him, that the tire impacted the outside of the left ankle and foot. Medical imaging conducted post-accident shows evidence of compromise to the ligaments and bony structure of the ankle. The plaintiff reported that she did not experience symptoms in this area prior to the accident. The observations Dr. Fuller made of the left ankle and foot were consistent with the notion of a foot that was pinned and then pulled out. In all of the circumstances, he concluded in favour of a direct causal nexus between the accident on August 1 and the injuries to the left ankle and foot.

[111] Dr. Fuller also concluded that the exacerbation of the plaintiff's previously existing low back symptoms is likely the result of "additional loading being placed through the [plaintiff's] left lower extremity" because of the significant force used by her in pulling her foot out from under the vehicle's tire. The force would have gone through the right hip and right pelvis, and influenced the plaintiff's lower back. Although the mechanism by which the plaintiff's lower back was additionally compromised is unusual, in Dr. Fuller's experience, low back problems arising from force applied to the lower extremities are not uncommon.

[112] The plaintiff has a history of intermittent low back pain for which she received chiropractic treatment. Dr. Fuller was aware of this history, which he understood to consist of intermittent pain that manifested itself once or twice a year. The plaintiff claims that since the accident, the pain in her lower back has substantially worsened. Dr. Fuller had clinical records available to him that showed displacement at the joints between the tailbone and pelvis. From his perspective, displacement is a common and "significant" contribution to low back problems.

[113] Given the manner in which the plaintiff described the accident (including a left ankle and foot that was "pinned" and pulled out from a tire), and the temporal connection between the accident and increased low back symptoms, Dr. Fuller found it reasonable to conclude that the displacement of the joints in the plaintiff's lower back occurred at the time of the accident, and was caused by the additional loading.

[114] In cross-examination, he acknowledged he cannot be "definitive" about the causal nexus. He also acknowledged that his conclusion on what has caused the plaintiff's lower back issues relies heavily on the accuracy of the plaintiff's reporting, the degree to which her lower back symptoms have increased since the accident, and the extent of pre-existing injury to this area. In particular, he accepted that if the plaintiff's lower back problems before the accident were more pronounced than she has described, and more prolonged in their manifestation, this would likely change his conclusion on the nexus between the current symptoms and the accident. His opinion on causation assumed that the pre-existing symptoms were episodic and effectively treated through chiropractic intervention.

[115] In respect of the plaintiff's right shoulder girdle and arm, Dr. Fuller opined that the relationship between the accident and symptoms experienced in this area is "more debatable" than the other two. Since the accident, the plaintiff has been treated for cancer in her right breast. It is conceivable that the symptoms experienced in the right shoulder area are attributable to that issue, rather than the accident.

[116] He concluded there is no medical-based treatment (such as surgery) that is likely to "significantly improve or alleviate" the plaintiff's symptoms in her left ankle and foot or low back.

[117] Moreover:

> The prognosis for a significant improvement in this patient's residual symptoms would be considered poor. It would in fact be my opinion that symptoms will persist and for practical purposes she has reached maximum medical recovery.

[118] Generally, the symptoms associated with the type of injuries sustained by the plaintiff are expected to improve over two years. If they have not improved by then, the possibility of further improvement "drops off" considerably.

[119] The defendant did not call expert opinion evidence in response to Dr. Fuller's diagnoses or the prognosis for improvement.

c) Occupational Therapy

[120] Claudia Walker, a registered occupational therapist, conducted a 2.5-hour functional assessment of the plaintiff in March 2018.

[121] The plaintiff's physical concerns, as presented to Ms. Walker, consisted of:

a) Constant right sided buttock and leg pain exacerbated by forward leaning, leg abduction and walking on stairs; and,

b) Frequent left ankle pain and swelling exacerbated by walking, climbing stairs and moderate manual handling.

[122] Ms. Walker also noted the presence of emotional/cognitive concerns, including: intense disappointment over the plaintiff's loss of capacity; periodic feelings of depression and sadness; and disappointment with having to sell her Yaletown condominium because of restrictions on her mobility.

[123] During the physical component of the functional assessment, the plaintiff was observed to:

a) Stand asymmetrically and bear more weight through her right leg;

b) Move with caution and hold onto adjacent surfaces while performing more challenging movements;

c) While sitting, she adjusted her posture periodically before electing to rise and stand;

d) She walked with a slight limp;

e) When walking down stairs, she held onto both handrails and her left foot was seen to be externally rotated;

f) She used a range of strategies for reaching down to low levels, including leaning forward, half kneeling and crouching. She appeared to be fatigued and with increased pain symptoms after completing these movements; and,

g) When demonstrating how she uses a toilet, the plaintiff was noted to brace herself on both adjacent walls when lowering and rising.

[124] As a result of her findings, Ms. Walker recommends that the plaintiff participate in a 12-month intensive rehabilitation program with psychological services; physical therapy; targeted exercise to rebuild her physical condition; gym access; remedial massage; and, meditation and yoga.

[125] Ms. Walker further recommends ongoing maintenance that includes physiotherapy, year-round exercise, and registered massage therapy as a form of pain management. "Adaptive equipment" is necessary, including pressure stockings; walking poles; cane; back support; long-handled "reacher"; raised toilet seat; "handybar" for use with a vehicle; and a light-weight vacuum cleaner.

[126] Finally, Ms. Walker recommends that the plaintiff receive assistance with housecleaning three hours every two weeks.

[127] The defendant did not call evidence in response to the conclusions reached by Ms. Walker, or the recommendations made.

Future Cost of Care

[128] Expert opinion evidence on the plaintiff's future cost of care was admitted by consent, without cross-examination. The report was prepared by Darren Benning with PETA Consultants Ltd.

[129] Based on the recommendations flowing out of Claudia Walker's functional assessment, Mr. Benning estimated the lump sum present value of the plaintiff's future cost of care at $107,375.

Special Damages

[130] The plaintiff claims $3,366.06 in special damages. At trial, she provided receipts substantiating $1,257.30 of expenses associated with her injuries, including expenses for: chiropractic treatment; medication; physiotherapy; exercise; cab rides, and, new shoes. Expenses not substantiated by receipts include cab rides, parking, take-out food in for the weeks immediately following the accident, and housecleaning services.

PARTIES' POSITIONS

[131] The following is a brief overview of the parties' positions. Further discussion of the arguments made on specific issues will be included in the body of the Court's analysis.

Liability

[132] The plaintiff argues that the defendant is 100% liable for the accident. She says he drove without due care in an area intended for vehicles and pedestrians, and hit her at a time when she was clearly visible to him.

[133] The defendant was aware of the plaintiff's presence and alive to the risk associated with driving too closely. Notwithstanding the risk, he proceeded out of the parkade without adequate precautions to avoid an accident, travelled up the alley and hit the plaintiff, driving over the back of her left ankle and foot. She argues that she did nothing to contribute to the accident and, consistent with the manner in which the courts have addressed collisions between vehicles and pedestrians in parking lots, the defendant should be held exclusively responsible.

[134] It is the defendant's position that a determination of liability requires an analysis of who had the right of way in the alley. Relying on the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, the defendant argues that in emerging from the parkade, he had the right of way. He stopped his vehicle before entering the alley and satisfied himself that the plaintiff was aware of his presence and able to distance herself. He then proceeded slowly and with care.

[135] It is the defendant's theory that when he emerged into the alley, there was sufficient room for him to pass the plaintiff without making contact with her. However, rather than remaining stationary or moving away from the vehicle, she must have suddenly stepped back with her left leg, placing the back of her left ankle and foot in a position where the vehicle would make contact. From the defendant's perspective, this is the only way the accident could have happened and the plaintiff's sudden movement was not something the defendant could reasonably foresee, or avoid.

[136] The defendant argues the plaintiff should be held 100% liable for the accident. At the very least, given his right of way and the care exercised by him, the starting point should be a 50/50 liability split.

Damages

[137] The plaintiff argues that because of the accident, she has sustained significant and long-term injuries to her left ankle and foot and lower back. She acknowledges that she had pre-existing challenges with her back. However, it is her position that the condition she now faces in her back, which manifests itself in the form of daily pain in her right hip and leg, is a result of the accident having exacerbated the previous condition. From the plaintiff's perspective, the accident has materially contributed to her present debilitation.

[138] She argues that the injuries sustained in the accident have profoundly altered her life. She has gone from being physically active to someone on the sidelines. The injuries have impaired her ability to participate in leisure activities that require physical output; they have rendered her dependent on the assistance of others to manage simple tasks, such as cooking, housekeeping and driving; and the loss of independence and mobility have left her feeling depressed. The "golden years" she envisioned for herself post-retirement are no longer possible. She cannot do the things she looked forward to.

[139] The plaintiff claims:

- $160,000–$180,000 for non-pecuniary damages;
- $35,000 for past and future loss of housekeeping capacity;
- $107,375 in present-day value for her future cost of care;
- a minimum $23,400 as an in-trust claim to compensate her family for the assistance they have provided to her; and,
- special damages in the amount of $3,366.06.

[140] The defendant accepts that the injuries to the plaintiff's left ankle and foot were caused by the accident. However, it is his position that causation has not been proved in respect of the lower back. From his perspective, this is the plaintiff's primary complaint and, if the Court finds no causal relationship, it substantially reduces the amount of damages to which the plaintiff may be entitled.

[141] The defendant argues that if causation is established for both sets of injuries, non-pecuniary damages in the range of $60,000 to $65,000 would be appropriate, subject to any apportionment of liability. He furthermore says that this range would sufficiently take into account loss of housekeeping capacity, and the Court should not make a separate award under this heading.

[142] The defendant argues that future care costs should only be granted to the extent they have been medically justified, and the justification is lacking in this case. The evidence in support of the in-trust claim is also said to be insufficient. On the issue of special damages, the defendant argues there should be no coverage for expenses associated with the plaintiff's participation in her daughter's wedding following the accident (in 2015), or monies spent for attending at her lawyers' office.

ANALYSIS

Credibility and Reliability

[143] The parties challenge each other's credibility, as well as the reliability of their evidence. Both testimonial veracity and the accuracy of their version of events is at issue.

[144] The plaintiff says the defendant's testimony is not credible in light of previous statements he made about the accident. Moreover, even if the inconsistencies between his testimony and those statements are reconcilable, his testimony was materially inconsistent with the evidence of his wife and niece, who were in the vehicle with him on the night in question.

[145] As one example, the defendant testified that the plaintiff's right side was facing him when he began his turn out of the parkade and that before he moved up the alley, he made eye contact with her. Both his wife and niece testified that the plaintiff was facing Beach Avenue when they exited the parkade, which means only the back of her body would have been visible. Eye contact would have been impossible.

[146] From the defendant's perspective, it is the plaintiff's evidence that has significant weaknesses, particularly her assertion that she was not aware of the defendant's vehicle approaching from behind. He says this makes no sense given the close proximity of the plaintiff to the vehicle, and, more importantly, the evidence of Ms. Victorio and Ms. Magtoto that the plaintiff's friend gestured for her to move.

[147] He also challenges the plaintiff's evidence on the extent of the injuries she says she sustained in the accident and their continuing nature.

[148] In written submissions, counsel have set out various bases for the cross-challenge on credibility and reliability. I have reviewed those submissions. Ultimately, in considering the evidence, I have informed myself of the factors for assessing credibility set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

> …The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally … Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time …
>
> [Internal references omitted.]

[149] Applying these factors, I am not persuaded that either party was untruthful at trial. I found both to be straightforward witnesses who sincerely endeavoured to put their versions of the accident before me. However, more than three years have passed since the event. Memories fade over time. Moreover, the accident occurred very quickly; it is apparent there was considerable confusion among the participants about what happened; and, both parties were upset and emotionally impacted by the event. As a matter of common sense, this contextual reality will have affected their ability to recall and lay out the details with particularity.

[150] In respect of the defendant, it is also apparent from his examination for discovery excerpts, and testimony at trial, that English is a second language for him. He struggled with understanding some of the questions put to him and in articulating his response. Within this context, a certain level of inconsistency between his descriptions of the event, and/or gaps in the defendant's narrative, is to be expected. In my view, when language barriers are at play, the Court should be cautious about finding a lack of veracity based on these frailties alone.

[151] The real issue in this case is not one of credibility, but reliability.

[152] On this point, I am satisfied that the plaintiff's evidence about how the accident occurred, and the injuries she sustained, is the more reliable of the two, although it too has frailties.

[153] Her evidence about the mechanics surrounding the accident finds general support in other evidence, including the testimony of Ms. Victorio and Ms. Magtoto (both of whom I find reliable); photographs of the scene; the witnesses' depiction on these photographs of where people were standing; and photographs of the plaintiff's left ankle and foot in the immediate aftermath and months following the accident.

[154] The plaintiff's evidence about her physical well-being before and after the accident is consistent with observations made by her daughter and Ms. Pryhkhodko, during the relevant timeframes, as well as the evidence of Dr. Fuller and Ms. Walker.

[155] The defendant did not call expert evidence to contest the findings of Dr. Fuller or Ms. Walker, or lay an evidentiary foundation to undermine the probative value and/or weight of conclusions drawn by them.

[156] With respect to the accident itself, there are material inconsistencies between the defendant's description of the accident to the ICBC representative, at his examination for discovery, and his evidence at trial.

[157] For example, he told the ICBC representative that the plaintiff moved toward his vehicle as he exited the parkade. At his discovery and trial, he said he thought

she was moving toward the wall of the parkade (and therefore away from his vehicle) as he exited.

[158] As further examples, at discovery, the defendant said he was looking down at his steering wheel when he pulled out of the parkade. He denied this at trial. At discovery, he said he hit the plaintiff with his front tire. At trial, he testified that she was "bumped" by his vehicle and started "screaming" after the front tire had already passed.

[159] These are significant differences. Although I did not find the defendant to be untruthful, he is overall a less reliable historian than the plaintiff, Ms. Victorio and Ms. Magtoto on the particulars of the accident.

Liability

[160] The parties accept that in determining liability, I must apply common law duties of care, supplemented by relevant provisions under the provincial *Motor Vehicle Act*. See *British Columbia Electric Railway v. Farrer*, [1955] S.C.R. 757 at p. 763.

[161] Various provisions of the *Motor Vehicle Act* were referenced in submissions. In my view, ss. 180–182 are the most germane:

> **Crossing at other than crosswalk**
>
> 180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.
>
> **Duty of driver**
>
> 181 Despite sections 178, 179 and 180, a driver of a vehicle must
>
> (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
>
> (b) give warning by sounding the horn of the vehicle when necessary, and
>
> (c) observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.
>
> **Pedestrian walking along highway**
>
> 182(1) If there is a sidewalk that is reasonably passable on either or both sides of a highway, a pedestrian must not walk on a roadway.

> (2) If there is no sidewalk, a pedestrian walking along or on a highway must walk only on the extreme left side of the roadway or the shoulder of the highway, facing traffic approaching from the opposite direction …
>
> [Emphasis added.]

[162] Under s. 1 the *Motor Vehicle Act*, a "highway" is defined to include:

> …
>
> (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and
>
> (c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited,
>
> but does not include an industrial road.
>
> [Emphasis added.]

[163] The accident occurred in an alley running alongside and between two parkades. The alley functions as a lane, right of way or passageway for both vehicles and pedestrians. It is accessible to members of the public. Vehicles travel along the alley to enter and exit the parkades. Pedestrians also use the alley to access the parkades and retrieve their vehicles. In my view, the alley meets the definition of a "highway" for purposes of ss. 180–182 of the *Motor Vehicle Act*.

[164] On the plain wording of these provisions, I am satisfied that the defendant's vehicle had the right of way in the alley (s. 180). The plaintiff was not on a crosswalk when the accident occurred; in fact, there is no crosswalk.

[165] In this sense, I agree with counsel for the plaintiff that functionally, the alley is akin to a mixed-use parking lot. It serves vehicular and pedestrian purposes. Consistent with para. 16 of *Russell v. Parks*, 2014 BCCA 104, s. 180 of the *Motor Vehicle Act* applies and the defendant had the right of way.

[166] However, he was obliged to exercise that right of way in accordance with s. 181.

[167] As explained in *Funk v. Carter*, 2004 BCSC 866 at para. 22, even where a vehicle has the right of way, s. 181 imposes a duty on drivers to operate their

vehicles in a manner that allows them to avoid pedestrians who are visible to them, and not unreasonably crossing their path of travel (such as "darting from between parked cars, or running, or possibly clothed so as to reduce visibility").

[168] In *Russell*, the Court held that in places where drivers can reasonably be expected to anticipate the presence of pedestrians, the "standard of "due care" [under s. 181] will obviously be higher …": at para. 16.

[169] In my view, this principle is applicable to the case before me. Drivers who traverse the alley can be expected to anticipate the presence of pedestrians. Two parkades are accessible by pedestrians directly from the alley. The pedestrian entryways are visible to anyone driving in or out of that location.

[170] As indicated, I do not find the defendant to be a reliable historian in describing the particulars of the accident from the vantage point of his vehicle. Instead, I prefer the evidence of Ms. Victorio, who was seated beside him and, as a matter of common sense, would have had the same line of sight. On her evidence, considered within the context of the evidence as a whole, I am satisfied that the defendant did not meet the standard of care required of him, as informed by s. 181 of the *Motor Vehicle Act*.

[171] Ms. Victorio said the defendant drove from inside the parkade to the automatic gate, waited for it to open and then drove through. Once on the other side, he stopped again, waiting for the gate to close. From that vantage point, Ms. Victorio could see three people near the parkade wall, having a conversation. She could see that two of them had their backs to the wall of the parkade. The third person (plaintiff) was facing Beach Avenue, which means her back was facing the vehicle. The fact that the plaintiff had her back to the vehicle was corroborated by Ms. Magtoto.

[172] If Ms. Victorio could see the positioning of the plaintiff and her friends, so could the defendant. Indeed, in his evidence he acknowledged that he saw the

plaintiff and her friends standing by the wall. Although it was likely after 10:00 p.m., all witnesses agree that visibility was not impaired.

[173] Ms. Victorio said the defendant drove forward a "little bit". The three people were blocking the way. In other words, one or more of them was in the path of travel. Ms. Victorio testified that she made eye contact with the male standing by the wall and mouthed to him, "Move please". This would not have been necessary if there was sufficient room for the vehicle to pass. Mr. Ragimov is said to have motioned to the plaintiff that she move. I accept this evidence. However, according to Ms. Victorio's evidence, the plaintiff moved "very little", only about half a step. Notwithstanding this fact, the defendant advanced his vehicle, turned out of the parkade and began to move up the alley.

[174] Ms. Victorio testified that as they moved forward, she was watching through the right-side mirror. She did so because she was concerned that the plaintiff could be hit. In his testimony, the defendant also said he was watching through the right-side mirror. He did not explain why, but the obvious inference to draw is that the plaintiff was so close to the vehicle that it necessitated monitoring. Otherwise, there would have been no need to take this action. Ms. Magtoto said the plaintiff was about a metre away when the defendant turned out of the parkade; however, she was seated in the rear seat and I find that Ms. Victorio would have had a better view of the plaintiff's actual proximity.

[175] At his discovery, the defendant said he was looking down at the steering wheel when he pulled out of the parkade. Whether such was the case, or he simply underestimated the distance between the vehicle and the plaintiff before advancing, I find as a fact that when the defendant pulled out of the parkade and turned right, he did so in the face of a reasonably foreseeable risk that the plaintiff's proximity to the vehicle presented a realistic hazard. He nonetheless carried on, without honking his horn or taking other measures to ensure that the plaintiff was not only aware of his presence, but had sufficient warning and time to get far enough away that there was no opportunity to be hit. Instead, I find as a fact that the defendant tried to squeeze

by the plaintiff without taking appropriate precautionary measures, assumed she would move away, and ended up running over the back of her left ankle and foot, likely with the rear tire on the passenger side.

[176] According to Ms. Victorio's evidence, when she heard the plaintiff "scream", the defendant immediately stopped the vehicle. The plaintiff was standing beside the back tire. The defendant said he heard the screaming after he passed her with his front wheel and stopped right away. On the evidence, I find the most plausible explanation for what occurred is that when the defendant turned right out of the parkade, he cut the corner too closely while the plaintiff had her back toward him, and his rear right tire came into contact with the back of the plaintiff's left ankle and foot as he tried to pull past. She screamed, he immediately stopped, and the plaintiff extricated her left ankle and foot from the tire. On the evidence, these events happened instantaneously.

[177] It is the defendant's position that for the accident to have occurred this way, the plaintiff must have stepped back with her left leg, placing her left ankle and foot in the immediate path of the rear tire. He argues that if the plaintiff was standing straight, as she described, the body of the defendant's vehicle would have bumped the plaintiff in the mid-body area before she was impacted by the rear tire.

[178] I agree with counsel for the plaintiff that this is a speculative theory and not borne out on the evidence.

[179] I accept that the plaintiff had her back to the defendant as he turned out of the parkade. The defendant's theory of how the accident occurred is predicated on a belief that the plaintiff was facing the parkade wall with her right side facing the defendant. There is furthermore no evidence that the plaintiff stepped back. She was seen to move by Ms. Victorio and Ms. Magtoto, but it was toward Mr. Ragimov, not away from him and closer to the vehicle. Ms. Victorio testified that she was watching the plaintiff through the right-side mirror. She said nothing about the plaintiff stepping back. Third, the defendant's proposition that it would not be "possible for the rear tire of a right turning vehicle that had normal sized tires to

impact the ankle area of a leg unless that leg was extended out on an angle behind the person", is simply that, a proposition. I have no expert opinion evidence substantiating its accuracy. Moreover, this proposition underestimates the physical possibilities associated with a vehicle travelling diagonally to the plaintiff (trying to get out and around her), rather than parallel to her left leg.

[180] I am satisfied, on a balance of probabilities, that the defendant owed a duty of care to the plaintiff as a pedestrian when he emerged from the parkade, entered the alley and began the incline to Beach Avenue. I am further satisfied that he breached that duty by failing to exercise the standard of care expected of a reasonably prudent motorist in all the circumstances.

[181] The plaintiff was clearly visible. She was in the defendant's intended path of travel. Her presence presented a foreseeable hazard if she did not move away at a sufficient distance to allow the defendant to pass. There was a sufficiently close relationship between the defendant and the positioning of the plaintiff such that, in the reasonable contemplation of the defendant, carelessness on his part could have caused harm to the plaintiff: *Simpson v. Baechler*, 2009 BCCA 13 at para. 28. In fact, at his discovery, he said he knew that if the plaintiff did not move, he would hit her.

[182] The defendant proceeded without taking sufficient precautionary measures, including honking his horn, to ensure the plaintiff was aware of his presence, his need to get by her, and able to take the steps necessary to get herself out of harm's way. As plaintiff's counsel has termed it, the defendant knew he was "dangerously close" to the plaintiff when he tried to go by her. Ms. Victorio recognized this as well. They both considered it necessary to watch through the side-view mirror, alive to the risk. The vehicle was not far enough away and, ultimately, the plaintiff was struck.

[183] The defendant may have had the right of way, but he did not exercise the due and reasonable care required of him.

[184] At the same time, as a pedestrian in the alley, the plaintiff also bore certain obligations. These are set out in s. 182 of the *Motor Vehicle Act*. When walking down the alley and waiting for her daughter to emerge from the parkade, the plaintiff was obliged to stay on "the extreme left side" of the alley, "facing traffic" approaching from the opposite direction.

[185] On the evidence, I find that she did not meet these obligations. Although the plaintiff waited to the side of the alley, she did not face traffic or make any efforts to keep a lookout for approaching vehicles. Instead, she stood with her back to the exits from both parkades.

[186] At trial, she testified that she did not turn her mind to whether she had chosen a safe place to stand, even though she knew vehicles travelled in the alley. She also knew that a vehicle exiting the parkade immediately behind her would have to turn right and come toward her. Notwithstanding this reality, she did not consider whether she should watch for emerging vehicles. Instead, she simply assumed that she had the right of way and if there was a problem with where she was standing, Mr. Ragimov would let her know.

[187] As indicated, I accept the evidence of Ms. Victorio (corroborated by Ms. Magtoto), that before the defendant exited the parkade, Eduard Ragimov gestured to the plaintiff that she should move out of the way. The evidence is that the plaintiff moved toward Mr. Ragimov, but not by very much and clearly not enough to be at a safe distance from the vehicle. I find as a fact that Mr. Ragimov's efforts were ultimately ineffective because the plaintiff was not paying attention to the circumstances around her. I accept her evidence that she was not aware of the defendant's vehicle. I do not accept her evidence that she remained stationary throughout. I accept that she moved toward Mr. Ragimov; however, it was at best by half a step and I am not surprised, within this context, that the plaintiff considers herself to have remained in the same place. On the evidence, the movement was slight.

[188] Although the plaintiff moved forward, she made no effort to turn around, see whether something required her to move, acquaint herself with the circumstances, or assess her distance from any oncoming vehicle. Had the plaintiff been paying attention and "facing traffic", as mandated by s. 182, I find that she would have seen the defendant and had greater opportunity to ensure she was safely out of the way. There is "a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards": *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 23. [Internal references omitted.]

[189] I am satisfied the plaintiff did not exercise due and reasonable care when standing in the alley waiting for her daughter, whether measured against s. 182 of the *Motor Vehicle Act* or common law standards. In so doing, she contributed to the accident.

[190] On the facts of this case, it is appropriate to find the defendant 75% liable for the accident and the plaintiff 25% liable.

[191] The gravity of risk created by the defendant in exiting the parkade without taking precautionary measures, and while the plaintiff had her back toward him, puts his moral blameworthiness for the accident higher up the scale than the plaintiff. The defendant was in control of the vehicle; had the capacity to stop before impacting the plaintiff; and, most importantly, there were easily accessible means by which to ensure that she was aware of and understood the danger he presented if she did not move far enough away – such as honking the horn. By his own discovery admission, he knew that if the plaintiff did not move far enough away, he would hit her.

[192] The defendant cites a number of cases that he says are "factually relevant" to this one and support a finding of primary responsibility against the plaintiff. I have reviewed these cases. They are distinguishable.

[193] For instance, in *Kreutziger v. Kreutziger*, [1991] B.C.J. 667 (S.C), the defendant ran over the plaintiff's foot. The injury occurred while the defendant was

trying to extricate herself from an "emotional and potentially dangerous" situation created by the plaintiff, who was "aggressively pursuing" her: at pp. 5–7. The defendant retreated to her vehicle, locked the doors and tried to leave "as cautiously as she could given the situation she was confronted with": at p. 6. The judge found that she met the standard of care required of her. The plaintiff's behaviour in this case is in no way comparable to *Kreutziger*.

[194] In *Garcia-Schwartz v. Spruce City*, [1997] B.C.J. 1522 (C.A.), another example, the child plaintiff was found 75% liable for a collision with a truck on a roadway. The trial judge found "there was some sudden movement from the infant plaintiff toward the centre of the road just prior to the impact": at para. 3. I have made no such finding.

[195] In *Kennedy et al. v. Coquitlam (City)*, 2002 BCSC 1057, the plaintiff ran after the defendant's car in a parking lot. She fell beside the car and one of its wheels ran over her foot: at para. 1. The trial judge found that the plaintiff "suddenly ran from her position of safety near [a] building toward [the defendant's car], jumped onto the side of it, and then fell off before [the defendant] had an opportunity to bring the car to a stop": at para. 25. He found, as a fact, that the plaintiff's injuries "resulted from her own actions": at para. 25. This is a very different factual matrix than the one before me.

[196] In *Ilet v. Buckley*, 2017 BCCA 257, a cyclist was held 50% liable for the collision. The cause of the accident was "primarily" that neither party saw each other before the collision: at para. 33. In this case, I have found that the defendant saw the plaintiff when emerging from the parkade, was alive to the risk she presented in light of her proximity to the vehicle, and chose to proceed in any event. In my view, this is a significant distinction.

Damages

[197] To recover damages, the plaintiff must show causation between the accident and her injuries. The test applied is the "but for" test. The plaintiff must prove that

but for the defendant's negligent acts, her injuries would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 466–468.

[198] The evidence is clear that because of the accident, the plaintiff has suffered injuries to her left ankle and foot. There are photographs and medical evidence substantiating those injuries. The defendant does not take issue with this fact. Instead, it is the alleged link between the accident and injury to the lower back that is in issue.

[199] I accept that prior to the accident, the plaintiff experienced challenges with her lower back, as recent as the spring 2015. However, I also accept that the pain and physical limitations in those instances was transitory, generally lasting no more than a week. I also find, as a fact, that these symptoms typically resolved themselves through rest and chiropractic intervention. The plaintiff's active lifestyle, pre-accident, is consistent with her narrative of episodic and transitory symptoms. The pre-accident activity, including diverse and challenging athletic endeavours, was confirmed by Elena Lensu and Vira Pryhkhodko. I accept their descriptions of the plaintiff's energy before August 1, 2015. There is no evidence to the contrary and I found both witnesses to be sincere and careful in their testimony.

[200] Post-accident, the situation changed dramatically. I accept Dr. Fuller's conclusion that the force required of the plaintiff to pull her left foot out from the defendant's back tire likely resulted in "additional loading" that caused the displacement of the joints in the plaintiff's lower back. He testified that although the specific mechanics relayed by the plaintiff may be unusual, injury to the lower back arising out of pressure applied in the lower extremities is not uncommon. He has seen it many times in his practice.

[201] In assessing causation, Dr. Fuller relied on the plaintiff's version of being pinned beneath the tire. I accept this version. There is no evidence to the contrary. It is also consistent with Ms. Victorio's description of what she saw and heard. There is evidence of a broken sandal and visible markings, including skin scrapings, to both sides of the plaintiff's left ankle. Dr. Fuller also relied on medical imaging

records put before him, showing joint displacement in the lower back. I accept that evidence as independently reliable and capable of supporting the opinion he has provided.

[202] Dr. Fuller relied on the temporal connection between the accident and the reported exacerbation of lower back symptoms. The plaintiff's evidence of increased pain, significantly reduced mobility and the chronic nature of her lower back symptoms, post-accident, was corroborated by Elena Lensu and Ms. Pryhkhodko.

[203] Finally, counsel for the defence made much of information the plaintiff provided to Dr. Germain at her first visit following the accident. The clinical records indicate that the plaintiff reported having had back pain for one to two weeks. The accident occurred four days before she saw Dr. Germain. In my view, this statement does not carry the weight the defendant suggests that it does. Dr. Germain has no independent recollection of the visit with the plaintiff; the statement provides no real detail about the nature or level of the back pain spoken of; and, in any event, I am satisfied that the evidence at trial, considered in its entirety, shows a material increase in the plaintiff's lower back symptoms post-accident.

[204] The plaintiff does not deny the pre-existence of back pain. Indeed, she accepts that in April 2015, she was experiencing symptoms there. The issue here is whether those symptoms worsened after August 1 and the accident either caused the worsening, or played a contributing role. I accept the plaintiff's evidence that her symptoms did worsen and, in fact, in the days, weeks and months following the accident, her lower back problems manifested themselves in ways that she had never experienced. The logical triggering event, in my view, was the accident. Counsel for the defendant elicited from the plaintiff conversations she had with physicians in the fall of 2015 about possible problems with her discs. This evidence was hearsay, not supported in any way by medical records and/or other evidence, and I give it no weight.

[205] In cross-examination, Dr. Fuller acknowledged that he is unable to be "definitive" about the nexus between the accident, displacement of the joints in the

plaintiff's lower back and her increased struggles. However, the evidence does not have to rule out all other possibilities prior to meeting the "but for" test. As held in *Athey*, as long as the defendant's negligence forms "part" of the cause of an injury, a sufficient nexus will have been established. Defendants "remain liable for all injuries caused or contributed to by their negligence": at para. 17. [Emphasis added.] A finding in favour of causation does not require a determination on the *extent* of the contribution in relation to other possible contributing factors (such as a pre-existing condition). That determination is relevant to damages, not the causation analysis: *Khudabux v. McClary*, 2018 BCCA 234 at para. 34. Instead, as noted in *Gabert v. Krist*, 2018 BCSC 2109 at para. 56, a "defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimis* …". [Internal references omitted.]

[206] On the facts of this case, I am satisfied on a balance of probabilities that the injury to the plaintiff's lower back, and the condition she now finds herself in, was contributed to by the defendant's negligence beyond *de minimis.*

a) Non-pecuniary Damages

[207] The legal framework for non-pecuniary damages was addressed by Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34:

> [46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris* (2004), 237 D.L.R. (4th) 193 (B.C.C.A.)] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (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 (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[208] Applying these factors, the plaintiff is 62 and was only in the second year of retirement when the accident occurred. She led a physically active and independent life, including numerous outdoor and sports-related activities, as well as international travel. These activities formed an integral part of her personal fitness regime, family life and social relationships. She took pleasure in them. She was an avid skier; could play ping-pong for long periods; she hiked challenging trails; rode horses; and could sit through the entirety of her granddaughter's piano practice. Others found it difficult to keep up with her.

[209] The plaintiff looked forward to a retirement of high-energy output. From her perspective, these years also presented an ideal opportunity to learn and try new things (such as sailing). She was excited about the prospect.

[210] There is no question that the injuries to her left ankle, foot and lower back have profoundly affected the plaintiff's life. She experiences daily pain; is unable to do many of the things she previously did; her mobility and endurance have been reduced; and she has decided she must sell her condominium, a place she has lived in for ten years and enjoys. Overall, the situation has led to feelings of dependency, helplessness and decreased enjoyment in life. There are still things she can do, including travel. She does them and tries to persevere. However, it is not the same. The plaintiff's frustration with her current situation was obvious from her testimony. She presents as proud and stoic. However, her physical discomfort was readily apparent from the way in which she held and moved her body while testifying. Moreover, it was obvious to me that she genuinely misses, and longs for, her prior independence and strength.

[211] No medical intervention is likely to alleviate the plaintiff's condition. The prognosis for improvement is poor. The lifestyle the plaintiff planned for herself post-retirement is forever diminished.

[212] Taking into account the pre-existing condition of the plaintiff's back, which manifested itself in the form of episodic, but treatable pain, I am satisfied that a non-pecuniary damages award of well over $100,000 is appropriate. Not only is the plaintiff still dealing with left ankle and foot issues three years after the fact, she experiences significant, ongoing pain in her lower back and right leg. Together, these injuries have led to a substantial loss of physical function: *Rizzolo v. Brett*, 2010 BCCA 398 at paras. 32–37.

[213] The plaintiff offers *Gabert* as instructive on *quantum*.

[214] In that case, the trial judge awarded $160,000 in non-pecuniary damages to a 71-year old retiree whose life, including her relationship with her spouse of 49 years, had been seriously affected by her injuries. These injuries included soft tissue injuries that cause chronic pain in her neck; headaches; tinnitus; vertigo; poor sleep; altered mood; and restricted function. Ms. Gabert was diagnosed with chronic fatigue syndrome or fibromyalgia. The judgment details the plaintiff's limitations post-accident, including an example of the detailed planning that must go into facilitating her participation in family-oriented outings. In my view, the plaintiff in this case is not as limited as Ms. Gabert and has retained the capacity to do some things on her own, including international travel, socializing with friends and (albeit much reduced) outdoor activities.

[215] A second case referenced by the plaintiff is *Lynn v. Pearson*, 1997 CanLII 3976 (BC SC). There, a present-day equivalent of $177,000 in non-pecuniary damages was awarded to an 81-year old male who sustained multiple injuries. At the time of the accident, the plaintiff was the primary caregiver for his spouse, who was legally blind. He was her companion and guide outside of the home. The injuries prevented him from fulfilling this role and, in fact, required that his spouse provide him with assistance. He went from an active and social retiree, to a shut-in. Both the plaintiff and his spouse found themselves "isolated" with "minimal outside assistance": at para. 15. Again, in my view, the plaintiff in this case is not as limited.

[216] Having regard to these decisions, as well as the cases referenced in *Rizzolo* at paras. 32–37, I consider a non-pecuniary award of $140,000 to be appropriate in the circumstances of this case.

[217] The defendant argues that the non-pecuniary award should not exceed $65,000. However, the cases he relies upon in support of that position, *Zhang v. Ghebreanenya*, 2015 BCSC 938 and *Johal v. Radek*, 2016 BCSC 454, involve less serious circumstances.

[218] In *Zhang*, the plaintiff experienced ongoing weakness in his right shoulder and arm that affected his ability to drive, prepare food, perform some aspects of household cleaning, and lift heavy objects. His social activities were reduced: at para. 30. At the same time, he was already experiencing restrictions in his right elbow from a pre-existing injury, as well as a degenerative condition in his shoulder: at para. 53. In my view, the factual matrix of that case does not demonstrate the severity of impact on lifestyle and mental well-being established here.

[219] In *Johal*, the 70-year old plaintiff complained of ongoing pain in her neck, thoracic and lumbar spine, shoulders, and head: at para. 1. The trial judge found the pain inhibited the plaintiff in her ability to maintain her home, including cooking and baking. She was also more withdrawn and irritable than in the past. At the same time, she maintained a "high level of ongoing functionality": at para. 43. He awarded $60,000 in non-pecuniary loss. Again, as with the result in *Zhang*, I see the case before me as more serious in the plaintiff's debilitation.

b) Loss of Housekeeping Capacity

[220] The plaintiff seeks $35,000 for past and future loss of housekeeping capacity. The defendant says compensation on this issue is not necessary. Instead, the non-pecuniary damages award will have adequately accounted for this loss.

[221] The principles governing a loss of housekeeping award were discussed by the Court of Appeal in *Riley v. Ritsco*, 2018 BCCA 366:

> [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
>
> [Emphasis added.]

[222] The plaintiff has established that prior to the accident, she cleaned her own home and took care of the vast majority of her household needs. She might retain someone to assist with larger, seasonal endeavours, but for the most part, she considered herself self-sufficient. She took pride in this fact. It was important to her that she be responsible for her own home. She is someone who believes she should take care of things herself.

[223] Her capacity to do so changed post-accident. Not only did Elena Lensu have to provide assistance to her mother, the plaintiff required the services of a housekeeper. For example, she retained someone to clean for her on August 4, August 11, August 18 and August 25, 2015, paying $100 each time. She eventually retained someone at a lower rate. Although three years have passed since the accident, and the plaintiff can manage household tasks that do not require her to bend or engage in heavy lifting, she continues to require assistance. She has clearly lost the personal capacity to maintain her own home to the standard she was accustomed.

[224] In these circumstances, I consider it appropriate to exercise my discretion in favour of a pecuniary award for past and future loss of housekeeping.

[225] However, I consider the $35,000 requested by the plaintiff to be too high. Photographs of the plaintiff's Yaletown condominium are before me. It is sparsely furnished and minimalist in its approach. Although there is a rooftop deck, there is no yard to maintain. The plaintiff also plans to sell this home. Finally, she does not spend the whole of the year in Vancouver. She spends part of her time in Moscow. I have no sense of what she did, pre-accident, to care for a residence there. Those circumstances were not canvassed.

[226] On the whole, I consider $20,000 in loss of housekeeping capacity to be a fair amount.

c) Future Cost of Care

[227] The test for assessing the future cost of care was explained in *Tsalamandris v. McLeod*, 2012 BCCA 239:

> [62] The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):
>
> > 3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.
>
> [63] McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:
>
> > The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

[228] It is not imperative that the "medical evidence" in support of future care costs include expert opinion from a physician. As noted by Garson J.A. in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144:

> [38] Courts do accept testimony from a variety of health care professionals as to necessary and reasonable costs of future care …
>
> [39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. <u>But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional</u> …
>
> [Emphasis added. Internal references omitted.]

[229] The plaintiff tendered evidence from an experienced occupational therapist who conducted a 2.5-hour functional assessment of the plaintiff in March 2018. I find that the observations made of the plaintiff, including limitations to her strength

and mobility, were consistent with (and responsive to) the conclusions reached by Dr. Fuller on injuries sustained in the accident and their impact.

[230] The defendant did not call evidence to challenge the recommendations made by Ms. Walker. I saw nothing in her report that appeared unreasonable. There is no evidence of malingering or embellishment of the plaintiff's symptoms. It is also clear that to effectively manage the pain associated with her injuries, and her limitations, the plaintiff will need to remain as active as she can in future years, supported by multi-faceted rehabilitative therapies.

[231] Ms. Walker recommends that the plaintiff participate in a 12-month intensive rehabilitation program with psychological services; physical therapy; targeted exercise to rebuild her physical condition; gym access; remedial massage; and, meditation and yoga. In my view, these recommendations are reasonably responsive to the nature of the injuries sustained and their impact on the plaintiff, as described in the plaintiff's evidence.

[232] The plaintiff testified that she would follow through on Ms. Walker's recommendations and use the equipment recommended for her. I accept her evidence on this point. Her only hesitation was the use of a cane. This would prove embarrassing for her. I respect the plaintiff's perspective; however, I also find that with increased age, in light of Dr. Fuller's prognosis, a cane may well be necessary.

[233] The present value of the estimated future cost of care is justified on the evidence.

d) In-trust Claim

[234] Factors relevant to assessing an in-trust claim are set out in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124:

> …
>
> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;

> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[235] The plaintiff advances an in-trust claim of a minimum $23,400 for services provided by her family post-accident. The plaintiff estimates the value of her daughter's assistance at $50 per hour, which she says is the current "market rate" for a housekeeper. Her daughter is said to have provided assistance for five to six hours per week in the first year following the accident (5 hrs x 52 weeks = 260 hours x $50/hour = $13,000 minimum). For the next two years, Elena Lensu is said to have spent two to three hours per week providing assistance (2 hrs x 104 weeks = 208 hours x $50/hour = $10,400 minimum).[1]

[236] I am not satisfied the plaintiff has proved the in-trust claim on a balance of probabilities. In particular, the evidentiary basis for the claim does not establish that the assistance has been to the extent claimed, and, more importantly, over and above what would reasonably be expected within the context of the plaintiff's family relationships.

[237] Elena Lensu testified that she lived with her mother until 2016 (approximately five months post-accident). She said that between the accident and leaving the

[1] In her written submissions, the plaintiff quantified her in-trust claim at $20,800. However, upon a review of the calculations included in the submissions, the quantification actually ranged from a minimum of $23,400 to a maximum of $31,200 (5-6 hours per week from August 2015 to August 2016, and 2-3 hours per week for a two-year period, from September 2016 to September 2018). A half-way point between these two figures would be $27,300.

residence, she did the "main shopping and cleaning". However, she offered scant detail on what this entailed; the effort or length of time required; the extent to which providing this assistance interfered with, or pulled Ms. Lensu away from other commitments; and, at the material time, she was sharing the residence with her mother, daughter and possibly her husband. Presumably, all four individuals benefitted from the work. Assisting with the cooking and cleaning between the accident and 2016 was something, at least in part, that Ms. Lensu would have had to do in any event as a contributor to her own family unit.

[238] Ms. Lensu testified that since moving from her mother's residence, she has assisted on the weekends, approximately two to three hours per weekend. General reference was made to picking up groceries, cooking and cleaning, but I have no real sense of the extent to which this is actually necessary to meet needs that the plaintiff cannot otherwise manage. The plaintiff's evidence did not flesh this out in any substantive way. As noted, she also receives assistance from a paid housekeeper, and, it is clear that the plaintiff has the capacity to do some things herself (although limited).

[239] The plaintiff and her daughter are closely bonded and they spend considerable time together. On the evidence, there is every reason to believe that the plaintiff's daughter would assist her mother even without the presence of one or more injuries, at least in some way.

[240] I am not able to find, factually, that the efforts spoken of at trial extend beyond that which family would ordinarily provide, or by how much. I also note that the in-trust claim appears predicated on an assertion of three full years of assistance post-accident. Yet, the plaintiff does not reside in Vancouver full time. Since the accident, she has also travelled internationally with friends and has spent a number of months in Moscow. During those periods, the plaintiff's daughter is presumably not providing weekly care.

[241] In my view, the plaintiff has not discharged her evidentiary burden on this aspect of her damages claim.

e) Special Damages

[242] The defendant does not dispute the fact of the expenses claimed under this heading. Rather, he takes issue with their reasonableness, particularly expenses associated with cab rides to facilitate the plaintiff's participation in her daughter's wedding in August 2015; parking associated with attending at her lawyers' office; and alternative footwear purchased by the plaintiff post-accident.

[243] I accept the plaintiff's explanation for these expenses, including her testimony that the cab rides and parking expenses were necessitated by her inability to drive long distances, or to walk short distances. Whereas she might otherwise have driven herself to events, or walked to her lawyers' office, the pain in the months following the accident and limitations on the plaintiff's mobility required that she adopt a different approach.

[244] Whereas she might have otherwise have worn footwear that was purchased pre-accident, the swelling in her left ankle and foot, and the need for increased support in that area, rendered her existing footwear unusable.

[245] An injured person is entitled to recover the reasonable out-of-pocket expenses incurred as a result of an accident, and be restored to the position she would have been in had the accident not occurred: *Carillo v. Deschutter*, 2018 BCSC 2134 at para. 165. [Internal references omitted.]

[246] I cannot say that the expenses claimed are unreasonable in light of the time at which the accident occurred; the significance of her daughter's wedding to the plaintiff; and the nature of her injuries. I understand the rationale underlying the choices that she made (including attending at her lawyers' office); the necessity of those choices in light of what was happening in her life at the time; and I do not consider the expenses to have been extravagant or unnecessary.

[247] I am satisfied that the plaintiff's out-of-pocket expenses meet the test for reimbursement as special damages.

DISPOSITION

[248] For the reasons provided, I have made the following determinations:

a) The defendant is 75% liable for the accident.

b) The plaintiff is 25% liable for the accident.

c) Non-pecuniary damages are set at $140,000.

d) Damages for loss of housekeeping capacity are set at $20,000.

e) Damages for future cost of care are set at $107,375.

f) The plaintiff's "intrust" claim is dismissed.

g) Special damages are set at $3,366.06.

Court-ordered Interest

[249] Pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, the defendant shall pay interest on his share of the plaintiff's pecuniary damages for loss of housekeeping, as well as her special damages.

Costs

[250] The parties requested an opportunity to address costs after judgment on the merits.

[251] My preliminary view on costs is that the plaintiff has been substantially successful in this action and is entitled to her costs, assessed in accordance with Rule 15-1(15) of the *Supreme Court Civil Rules*.

[252] However, the parties may file written submissions on costs if there are matters they consider the Court should be made aware of.

[253] Submissions from the plaintiff must be filed no later than 30 days from the date of these *Reasons* and are limited to five pages. The defendant's submissions are due within 15 days of receipt of the plaintiff's submissions, and similarly limited to

five pages. The plaintiff is entitled to file a two-page reply, within seven days of receiving the defendant's submissions.

"DeWitt-Van Oosten J."