

CANADA / JUDGMENT

Fuentes v. Houghton

2025 BCSC 2549

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Supreme Court of British Columbia

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2025 BCSC 2549 Fuentes v. Houghton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fuentes v. Houghton,

2025 BCSC 2549

Date: 20251224

Docket: M220706

Registry: Vancouver

Between:

Ashley Arely Fuentes, an infant by her mother and litigation guardian, Anna Elizabeth Fuentes

Plaintiff

And

Matthew David Houghton, Howard Carter Lease Ltd. and

Lincor Enterprises Ltd.

Defendants

Before: The Honourable Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Defendants:

D. Joyce

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Place and Date of Trial:

Vancouver, B.C.

June 9-12 and 16-20, 2025

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2025

Table of Contents

Introduction.. 3

Before the Accident. 4

The Accident. 6

After the Accident. 7

Expert Opinions. 12

Credibility and Reliability Assessment. 16

Causation.. 17

Non-Pecuniary Damages. 18

Loss of Income Earning Capacity. 23

Past Loss of Income Earning Capacity. 24

Future Loss of Income Earning Capacity. 27

Cost of Future Care. 32

Psychological Treatment 34

Occupational Therapy. 35

Kinesiology/Exercise Training. 36

Cleaning Assistance. 39

Ergonomic Equipment 39

Independent Living Support 40

Medication/Allied Health Treatments for Pain Management 42

Special Damages. 43

In-Trust Claim.. 43

Money Management Fees. 45

Conclusion.. 46

Introduction

- [1] The plaintiff was a pedestrian involved in an accident with a motor vehicle on July 22, 2020, that took place at an intersection in the City of Vancouver. The plaintiff, who was 16 years old at the time, was struck while crossing the street in the crosswalk. She was struck by a motor vehicle owned and leased by the corporate defendants and driven by Mr. Houghton.
- [2] The parties have agreed on liability apportionment. The purpose of the trial was to assess the quantum of damages to be awarded to the plaintiff. In the plaintiff's view, because she was a young person with a pre-existing intellectual disability, the accident destroyed the potential to increase her independence and abilities in the future.
- [3] The defendants do not deny that the accident caused the plaintiff physical and mental injuries. However, the defendants' view is that the plaintiff's future abilities and chance for independence have not been altered by the accident, because she was - and remains - a person with disabilities who is dependant on her family, and the state, for income and care.
- [4] Counsel for the plaintiff submits that the injuries sustained by the plaintiff in the accident are catastrophic, entitling her to maximum non-pecuniary damages. While the award sought for past and future loss of earning capacity is modest in light of her pre-existing disability, the plaintiff's counsel seeks a substantial amount for the cost of future care. In total, the plaintiff's counsel seeks an award for pecuniary and non-pecuniary losses of approximately \$2.5 million.
- [5] The defendants agree that this is likely a permanent chronic pain case with the plaintiff experiencing some lingering permanent pain. However, the defendants submit that the plaintiff has failed to meet the burden of proving that the plaintiff's chronic pain will be disabling into the future.
- [6] The defendants submit that the injuries are not catastrophic, and the plaintiff recovered from her injuries without surgical intervention. Due to the plaintiff's intellectual disability and numerous pre-existing conditions, the defendants submit that a much lower award of damages is appropriate.

Before the Accident

- [7] At the time of trial, the plaintiff was 20 years old. As mentioned, she is a person with disabilities due to an intellectual disability. Since her birth, the plaintiff has had some developmental delays and health issues. The plaintiff had difficulties learning to walk, to acquire language, with toilet training and general challenges with learning.
- [8] In 2010, during kindergarten, the plaintiff was assessed for autism, but never diagnosed with that condition. Instead, she was diagnosed with a moderate mental handicap and described as a child who was young for her age and who would benefit from intervention and support. The plaintiff repeated grade 1 and received specialized learning assistance throughout elementary school and continuing throughout high school.
- [9] The plaintiff explained that during her school years, she experienced bullying but her support workers helped her with that. While the plaintiff described a history of being bullied, she also described her high school program and activities in a very positive light. For example, she described enjoying participating in work experience doing Christmas hampers and going on fieldtrips such as camping.
- [10] The many supports and interventions the plaintiff has received throughout her life were presumably of assistance to her because in 2016, she was reassessed and found to meet the criteria for mild, rather than moderate, intellectual disability. The plaintiff was also identified as having the prospect of meeting the learning-disabled, rather than intellectually disabled, designation if her adaptive skills continued to improve in the future.
- [11] In 2018, the plaintiff started a modified high school program in grade eight. Murray Anderson, a youth support worker, first got to know the plaintiff when she was in elementary school preparing to transition to high school. Mr. Murray worked with the plaintiff throughout high school.
- [12] The plaintiff said Mr. Anderson, was very helpful to her, especially when her mental health was bad. Mr. Anderson signed the plaintiff up for counselling both before and after her involvement in the accident.
- [13] The plaintiff's family background is that she and her siblings were raised by a single immigrant mother in circumstances of economic disadvantage. The plaintiff lives with her family in social housing, and she attended schools with a high proportion of the student body experiencing socio-economic disadvantages.
- [14] The plaintiff received specialized supports to address her special needs throughout elementary and high school. Since completing secondary school, the plaintiff has had ongoing access to a publicly funded multi-year life-skills program for young adults with intellectual disabilities.

- [15] Prior to the accident, the plaintiff said she really enjoyed outdoor activities such as going to the park and walking around. She described herself as "pretty active", and that she really enjoyed making art. The plaintiff's post-secondary skills program has included time working at a pet sanctuary where the plaintiff described really enjoying assisting with cleaning up and socializing with the cats and dogs.
- [16] While in high school, the plaintiff, on her own initiative, signed up for a gardening program that required her to work at the school produce garden. Mr. Anderson noted that this showed the plaintiff's initiative and interest to work in a program that normally attracts older students.
- [17] At the program, the plaintiff would perform gardening activities such as weeding, planting, harvesting and attending the farmer's market where the produce was sold. The plaintiff testified about how much she enjoyed this program and the chance to earn money that came along with it. By all accounts, the plaintiff performed very well in the gardening program.
- [18] In describing her health before the accident, the plaintiff said that she has always had ringing in her ears. She also described getting headaches with "weird", sharp pains everywhere, along with dizziness that would cause her to have to stop walking. However, the plaintiff also said that she could walk and run without problems before the accident and she really enjoyed going to the park.
- [19] The plaintiff had many issues and limitations that pre-dated the accident. One of the experts, Dr. Lisa Callier, reviewed clinical records and summarized the plaintiff's pre-accident condition as including a complex neurodevelopment history such as mild intellectual disability, which was previously, a moderate intellectual disability, bilateral foot deformity, tinnitus, dizziness, dysmenorrhea, gastroesophageal reflux disease, long-standing visual symptoms, a history of right Bell's palsy, various pain complaints and headaches, pre-existing emotional and psychological symptoms in the form of anxiety (generalized and social) and low mood. There is some indication that the plaintiff was referred to a psychiatrist for potential somatization symptoms, but she was not diagnosed with a somatic symptom disorder [SSD] prior to the accident.

The Accident

- [20] As mentioned, on July 22, 2020, in the summer between the plaintiff's 8th and 9th year of high school, she was struck as a pedestrian by the defendant's vehicle. The plaintiff was 16 years old at the time and crossing the street near her school on her way to the summer gardening program.

- [21] In describing what she remembered of the accident, the plaintiff said that she was hit by a truck and she was knocked out. She remembered thinking it was a dream, and she thought she lost consciousness a few times. She had intermittent memories of being lifted into the ambulance, trying to telephone her mother, receiving an X-ray and waking up in the hospital to see that her mother was there.
- [22] In fact, the plaintiff was transported by ambulance from the accident scene to BC Children's Hospital, where she was treated for orthopaedic injuries to her pelvis, knee and ribs, and injuries to her internal organs. She was in the hospital for approximately two weeks and then she spent an additional few days in a rehabilitation facility for children before being discharged to go home.
- [23] While in the hospital, the plaintiff recalled feeling a lot of pain and that the nurses would try to get her to do physiotherapy, but it hurt and her mother told them to stop. She remembered having to use a wheelchair and then using crutches to get around. She said it took her a long time to stop using the crutches. When the plaintiff was transferred from the hospital to the rehabilitation facility, they tried to get her to do physiotherapy, but she was too afraid, so they let her stay in her wheelchair.
- [24] A variety of medical experts diagnosed that as a result of the accident, the plaintiff had a mild traumatic brain injury, headaches, somatic symptom disorder [SSD] with predominant pain, various mental health disorders, orthopaedic injuries including pelvic fractures, SI joint injury, chronic soft tissue injuries, left patellofemoral knee pain syndrome and internal injuries to the vagina, liver, spleen, bladder and lungs. All of the physical injuries healed with surgical intervention.

After the Accident

- [25] The plaintiff testified that since the accident, she has not been able to engage in social or physical activities like she used to. The plaintiff missed a great deal of school following the accident and when she returned to school, she experienced fatigue and pain. Overall, she described a diminishment in her ability to engage in normal day-to-day activities and to enjoy social time with her friends and family.
- [26] The plaintiff's mother described that after the accident, she had to pressure the plaintiff a lot more to persuade her to attend school and her post-secondary programming. The mother explained that she finds it difficult to get the plaintiff to get out of bed. The mother described the plaintiff has trouble sleeping, but she agreed this might be because the plaintiff stays up late at night on her phone. The mother has noticed that the plaintiff tends to isolate in her bedroom and to complain and focus on her pain.

- [27] The mother also said that after the accident, the plaintiff was reluctant to accompany her to do the shopping or to leave the house. When they go shopping, the mother described the plaintiff complaining of pain and nausea and saying that she needs to take frequent breaks to sit down. Shopping is something that the plaintiff used to enjoy doing but the mother says the plaintiff now finds shopping physically challenging and tiring.
- [28] After the accident, the plaintiff did not return to school for four months. When she did return to school, the plaintiff described having a lot of trouble with her pain, bullying and she often missed class due to her pain symptoms. The plaintiff estimated that it took about two years after the accident before she was able to regularly attend school.
- [29] Approximately one year after the accident, the plaintiff was able to return to the summer gardening program. The summer gardening program lasted somewhere from a couple of weeks to a month. The plaintiff said that returning to the gardening program and working at the farmer's market made her feel happy, even though she did miss some of the days due to her pain symptoms.
- [30] The plaintiff went to the gardening program by herself using the bus and she started at 8:00 a.m. and she would get there early. During this part of her testimony, the plaintiff was proud and confident, stating that she had learned to be on time and that she was independent in getting to the program on her own because she knew the bus route to take.
- [31] The plaintiff said that even before the accident, she has a tendency to get lost. She and her mother practice taking the bus to new places so that she learns the route. With practice she explained that she can learn how to get places.
- [32] The plaintiff testified that she always had trouble sleeping but it got worse after the accident due to pain, feeling "useless", and not being the way she was before the accident. The plaintiff said that her mother helps her a lot when she cannot sleep by applying a balm that helps with her pain symptoms.
- [33] After the accident, the plaintiff was very afraid of cars. She would need to hold her mother's hand when they were near traffic. When the plaintiff is planning to cross the street, she looks back and forth many times before starting to cross.
- [34] The plaintiff says she has constant pain in her knee, especially when she walks too long. Eventually, she will start limping from the pain. She also has pain in both sides of her pelvic area and she applies balms or takes over the counter medicine, like Tylenol, for the pain. The plaintiff also has ongoing nausea symptoms from her acid reflux or from the pain.
- [35] The plaintiff states that she has anxiety that "skyrocketed" after the accident. and she has low moods. She tries to get out of her low moods by doing art, attending programming twice per week at the youth centre and seeing her counsellor. The plaintiff said her counsellors have been very helpful for her low mood and anxiety.

- [36] The plaintiff described how she enjoyed being involved in the recent planning and hosting of a youth centre party and getting paid to work at that event. However, she felt a lot of pain during the party, and she had to switch from sitting to standing often because of pain. The plaintiff said after the event, she was in so much pain that she felt nauseous but she thought the experience was worth it.
- [37] The plaintiff said that after the accident, she noticed that her memory has become worse. She often cannot remember things that she is told and she forgets how to navigate around unfamiliar spaces.
- [38] The plaintiff explained that she feels a lot of pain after sitting for more than 1.5 hours and she experiences difficulties with bladder control which is very embarrassing for her. She goes to the toilet frequently to avoid having her bladder leak. The plaintiff has seen a specialist for this, but she said it has not helped.
- [39] In June 2023, the plaintiff completed her modified high school program and received an Evergreen certificate. This is different from the Dogwood diploma that students receive in the non-modified high school program. Effectively, this means that the plaintiff does not have a traditional high school diploma.
- [40] As mentioned, after completing high school, the plaintiff started at a skills development program for young adults with disabilities and she reports enjoying this program. This program runs three days per week. She is expected to graduate from this program in August 2025.
- [41] The plaintiff said that her attendance at the program has been affected by the number of medical appointments that she has, but the program officials are very understanding and supportive. The plaintiff also attends the youth centre twice per week. The plaintiff takes the bus independently to these programs and locations. The plaintiff also volunteers at a soup kitchen for a couple of hours each week, where she helps with set up tasks.
- [42] In 2023, the plaintiff began to receive a Persons with Disability Pension from the provincial government due to her intellectual disability. After completing the program for young adults, the plaintiff plans to begin another program that will assist her to identify her interests and potential jobs. The plaintiff said she knows that she will need to work part-time because of her pain and problems sitting or standing for long periods.
- [43] On one field trip at the youth program, the plaintiff walked as much as she could, but she had to take a taxi home during the walk back from the field trip and she found it hard to move afterwards. Typically, the plaintiff takes a day off after exerting herself to allow her pain to decrease.
- [44] The plaintiff testified that she has been pushing herself to walk longer and get more activity. The plaintiff said that her weight increased a lot after the accident, which made her feel depressed because she wasn't able to be as active as before.

- [45] The plaintiff agrees that she had headaches and pain before her accident, but she said after the accident, she would get a weird throbbing pain in her head. The plaintiff sustained a cut on her head during the accident and this is the same area where the plaintiff describes feeling sharp pain during headaches.
- [46] In cross-examination, the plaintiff agreed that she has always had problems with sleep. She also agreed that some of her problems with sleep are due to living in a noisy house with her siblings. She said earplugs help her sleep but her pain and stress since the accident has made sleeping more difficult.
- [47] The plaintiff said that after the accident, she considered moving out of the family home. However, she decided that due to her special needs and her pain flare ups, she decided that living alone is not a good idea.
- [48] The plaintiff receives a lot of help from her mother. The plaintiff relies on her mother for care, for example, her mother will administer over the counter pain medications. The plaintiff said that because her mother has been having health problems, she has been trying to help out at home, for example, by doing the dishes and vacuuming. She has been cooking basic things by herself, just as she did before the accident.
- [49] The plaintiff also agreed that she has been able to participate in some special occasion sporting events at her program. These sporting events have involved kicking a ball and running, but she would have to take breaks and lie down to rest during these events.
- [50] The plaintiff also stated she would have to take the next day off to recover after a sporting event. When she is taking the day off after exerting herself, the pain starts out as very bad but it becomes tolerable again after the day off.
- [51] The plaintiff agrees that over time her ability to sit and stand for extended periods has gradually increased despite feeling pain. She summarized it by saying that she has learned to try not to think about and ignore her pain. The plaintiff also agreed that her mental health has improved over time and that her counsellors have been very helpful.
- [52] Initially, the plaintiff participated in physiotherapy appointments after the accident. However, the plaintiff said the activity caused her pain, so she and her mother decided that she should stop attending physiotherapy. She has not attended physiotherapy for a few years.

Expert Opinions

- [53] Numerous experts provided opinions respecting the plaintiff's injuries. As well, Mr. Curtis Peever, an economist, provides a report with estimates and calculations of past and future losses, costs and present values.

- [54] Dr. Callier, who is a physiatrist, evaluated the plaintiff on February 18, 2025. Respecting injuries unrelated to the accident, Dr. Callier opined that the plaintiff's vocational capabilities or capacity was likely significantly diminished due to her pre-existing intellectual disability. Dr. Callier also opined that the accident had impacted the plaintiff physically, emotionally and cognitively. Dr. Callier's opinion was that the injuries the plaintiff suffered in the accident means that the plaintiff is unable to engage in part-time employment that is heavier-based or requiring sedentary or repetitive-type activities.
- [55] However, Dr. Callier's opinion is that the plaintiff is likely capable, from a "physical" standpoint, to work "within a very part-time or volunteer positions" with a supportive employer allowing for the plaintiff's symptoms and limitations, "but she would still likely be on Persons with Disability ("PWD") in the absence of this accident" and be approved for Community Living British Columbia assistance secondary to her pre-existing cognitive and neurobehavioral issues.
- [56] Dr. Callier opined that the plaintiff's history of somatization for vague physical symptoms prior to the accident increases her risk of worsening pain complaints, especially when she is under stress or when her emotional and psychological health deteriorates. Dr. Callier said that in the absence of the accident, the plaintiff would not have her current and ongoing level of pain complaints in her pelvis, lower extremities and lower back.
- [57] Dr. Callier concluded the plaintiff's ongoing complaints of visual symptoms, tinnitus and dizziness were unrelated to the accident injuries. However, her pre-existing and ongoing headache and sleep difficulties are "in part" related to the accident.
- [58] Respecting the plaintiff's many injuries related to the accident, Dr. Callier concludes that the plaintiff suffered an MTBI that she had recovered well from, with current complaints about things like dizziness and fatigue more likely related to pre-existing intellectual disability and accident-related pain. The plaintiff's chronic pain in her right rib region, lower right extremity, pelvis, hip and gluteal regions are likely mechanical due to fractures and soft tissue in nature.
- [59] Dr. Callier diagnoses the plaintiff with mental health conditions, sleep disturbance, physical deconditioning, cognitive dysfunction and chronic pain, although she defers to other specialists in many areas. On the prognosis, Dr. Callier opines that the plaintiff's likelihood of becoming completely symptom free is poor and the plaintiff will likely experience pain daily especially when engaged in sustained, repetitive, heavy or impact activities.
- [60] Dr. Lazar, a medical doctor and psychiatrist, performed an independent medical examination of the plaintiff. Dr. Lazar provided a report that includes a diagnosis, prognosis and treatment recommendations for the plaintiff. Additional aspects of Dr. Lazar's opinion will be discussed later in these reasons.

- [61] Dr. Cohen, a neuropsychologist, opines that the plaintiff suffered a traumatic brain injury in the accident based on reports that the plaintiff lost consciousness at the scene of the accident and her confused mental state along with other symptoms. The plaintiff also sustained a laceration to her head. Dr. Cohen notes that the plaintiff continues to present with a pre-existing intellectual development disorder which rendered her more vulnerable to the impacts of a brain injury, persistent pain and emotional disruption.
- [62] Dr. Cohen notes that the plaintiff presents with symptoms consistent with SSD, with predominant pain, and anxiety post-accident that is consistent with a generalized anxiety disorder ("GAD") which is an aggravation of pre-existing anxiety. Following the accident, the plaintiff had symptoms of major depressive disorder ("MDD"), moderate. However, she was not reporting symptoms of low mood so the MDD is likely in partial remission currently. She had some symptoms of post-traumatic stress disorder but did not meet the criteria.
- [63] Mr. Cheesman conducted a functional capacity evaluation of the plaintiff and he provided a cost of future care analysis. Mr. Cheesman's report was prepared in circumstances where he did not have access to Dr. Cohen's opinion and recommendations.
- [64] Dr. Colleen Quee-Newell, a registered clinical counsellor and approved clinical supervisor and vocational rehabilitation consultant, performed a vocational assessment of the plaintiff on February 24, 2025, and she provided a report dated March 14, 2025. As a result of the functional capacity assessment, Dr. Quee-Newell concludes that the plaintiff does not possess the functional endurance to engage in gainful employment and at best she can manage 1-2 hours of continuous functions.
- [65] During the vocational assessment, the plaintiff required unscheduled breaks to rest and manage her pain symptoms including by resting in lying postures. Dr. Quee-Newell opined that the plaintiff could engage in "sheltered volunteer opportunities" with durations of 1-2 hours and limited expectations for productivity. Vocational testing of the plaintiff placed her overall cognitive ability in the below average range similar to persons working in unskilled, direct-entry occupations. She had below average scores for reading, exceptionally low spelling and math computation abilities and she could comprehend basic written materials.
- [66] Dr. Quee-Newell opined that absent the accident, the plaintiff was likely to have achieved the greatest success in supported, structured work settings such as food preparation, cleaning tasks, basic shelf stocking, and gardening or landscaping. However, as a result of the accident, her opinion is that these types of part-time supported employment opportunities are no longer realistic for the plaintiff because of her pain symptoms and significantly reduced endurance for functional activity.
- [67] The defendants also provided expert evidence consisting of the reports of Dr. Trevor Stone and Dr. Alina Webber. Dr. Stone is an orthopedic surgeon who performed an independent medical evaluation of the plaintiff, and he examined her on January 6, 2025.

- [68] Dr. Stone notes that the plaintiff's pelvis injuries had healed but there is a mild deformity of the superior and inferior pubic rami fracture with some minor abnormalities of the left SI joint and increased risk of degenerative change. Despite the healing, the plaintiff has ongoing pain and he notes that no surgical intervention that is effective in improving these symptoms, although muscle strengthening can potentially provided benefits. Given the lack of surgical interventions that are possible, Dr. Stone opines the plaintiff could benefit from treatment by rehabilitation specialist or physiatrist to address her multiple pain complaints following a complex injury.
- [69] Dr. Alina Webber, a neurologist, conducted an independent medical examination of the plaintiff on November 27, 2024 and provided a report dated January 15, 2025. Dr. Webber diagnoses the plaintiff with the following injuries from the accident: a probable MTBI, possible but not probable post-concussion syndrome, headache attributable to trauma to head or neck, soft tissue injuries, internal injuries, anxiety and depression, although she deferred to other experts in those areas. Dr. Webber acknowledges that the plaintiff had a five year history of migraines prior to the accident and that it was difficult to quantify the amount of headaches prior to the accident. Dr. Webber thought it was possible the headaches could be improved with treatment interventions.
- [70] Dr. Webber notes that the plaintiff's cognitive deterioration reported in 2022 would not be consistent with post-concussion syndrome and she queried whether it was secondary to anxiety. Dr. Webber recommends a variety of preventative strategies and prescription medications for treatment of the plaintiff's headaches but notes the plaintiff has not tried any of them and she is reluctant to take medications.

Credibility and Reliability Assessment

- [71] The plaintiff testified at the trial. Her testimony revealed that she has a friendly and open demeanour. The plaintiff appears to be young for her age and she is unsophisticated. She was able to understand and answer the questions put to her and she could express herself effectively. However, I did observe, consistent with some of the expert evidence, that she appeared somewhat disinhibited during her testimony, for example, seeming to find some of the process of being asked questions amusing and laughing or joking about them.
- [72] I do not recount these observations to suggest that the plaintiff behaved inappropriately during her testimony, because she never did. Rather, I observed that at some points, the plaintiff came across as playful and light-hearted, while she also was saying that she felt nervous and in pain. In short, I noted that the plaintiff exhibited some of the disinhibited behaviour that the experts referred to.

- [73] I also note that there is no suggestion by the defendants that the plaintiff embellished her evidence nor a submission that she generally lacks credibility and reliability. Overall, I find the plaintiff to be a credible witness and while she has a pre-existing intellectual disability, I found her testimony about her injuries and how she has felt since the accident to be credible.
- [74] Counsel for the defendants did submit that the plaintiffs' mother lacks credibility and reliability and that little weight should be placed on her evidence. I disagree that the mother lacks credibility and reliability. I observed the mother to answer questions willingly and to the best of her ability. She was not evasive nor argumentative.
- [75] I have considered that the mother is clearly interested in protecting her daughter and very concerned about her care and future well being. However, I found that during the mother's evidence, she readily agreed with many details about the plaintiff's pre-existing conditions without attempting to minimize or avoid potentially unhelpful facts. I find that overall, the mother is a credible and reliable witness.
- [76] There is no suggestion that any of the other witnesses were lacking in credibility or reliability. I have carefully considered the evidence of all of the witnesses, whether lay or expert.

Causation

- [77] The plaintiff submits that her chronic pain and mild traumatic brain injury is caused by the accident. The defendants submit that the plaintiff's physical injuries, such as her many orthopedic injuries, healed without surgical intervention. The defendants also submit that her MTBI has resolved and the symptoms the plaintiff reports, such as dizziness and memory problems, are caused by her pre-existing intellectual disability and mental health problems.
- [78] It is well established that the test for causation is the "but for" test. The defendant does not need to put the plaintiff in a better position than she originally would have been in and the need not compensate the plaintiff for damages she would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [79] The plaintiff has the onus to demonstrate on a balance of probabilities that the defendant's negligence caused or materially contributed to her injury, but the defendant's negligence needn't be the sole cause of the injury. As long as the defendant is part of the injury's cause, the defendant will be liable even if his act alone was insufficient to create the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 466-467.

- [80] In my view, there is ample evidence to establish that the injuries the plaintiff sustained in the accident worsened the plaintiff's pre-existing conditions and vulnerabilities. For example, while the plaintiff had pre-existing symptoms of SSD, the accident and the injuries she sustained in it, have worsened those symptoms such that she is now diagnosed with SSD, with predominant pain. Likewise, the accident has caused the plaintiff to experience chronic pain in her hip and pelvic area.
- [81] While the many fractures and internal injuries to her spleen, liver, bladder, lungs and vagina healed on their own, expert evidence confirms that chronic pelvic pain is extremely difficult to treat. The experts agree that the plaintiff is likely facing life-long chronic pain impairing the plaintiff's ability to sit, stand or engage in repetitive movements for sustained periods.
- [82] I find that the plaintiff has established on the whole of the evidence that she sustained numerous injuries in the accident, some of which have resolved, but many of her symptoms of pain and discomfort continue. Her ongoing injuries include psychiatric disorders, headaches, and, chronic pain including from a permanently widened sacroiliac joint and left patellofemoral knee pain syndrome.

Non-Pecuniary Damages

- [83] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews], is the seminal decision respecting the assessment of non-pecuniary damages, particularly where there are catastrophic injuries. In *Andrews*, at p. 261-262, the court sets out the purpose of non-pecuniary damages, being to provide reasonable solace for misfortune not subject to monetary valuation, and establishes the functional approach to assessing such damages.

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

- [84] The plaintiff seeks an award for non-pecuniary damages at or near upper limit because it is alleged that her injuries were catastrophic, even though she was not paralyzed nor did she sustain a serious brain injury.
- [85] The plaintiff's submission as to why her award ought to be one that reflects catastrophic injury is summarized as follows:

For a person with a disability such as Ashley, the non-pecuniary losses are catastrophic. This is the reason why her award should be at the rough upper limit. Not because she will have to walk and talk unlike those more severely injured, but because she will have to walk and talk through life never knowing what she could have been and always being entirely reliant on the state for funding rather than being able to contribute to her well-being herself.

- [86] The defendant submits that this not a case of catastrophic injury. Instead, the defendant emphasizes that the medical evidence establishes that the plaintiff's orthopedic injuries all healed without surgical intervention, the MTBI resolved without ongoing symptomology, and her pre-existing psychological issues were aggravated by the accident. The defendant emphasizes that the plaintiff was already disabled at the time of the accident by her intellectual disability and there is no dispute that, but for the accident, the plaintiff would still have qualified for PWD benefits when she became an adult.
- [87] I was provided with extensive medical evidence during the trial which I have considered. In addition to listening to the plaintiff's testimony, I also heard from the plaintiff's relatives, Anna Fuentes, Maria Fuentes, who described the plaintiff before and after the accident. I also received evidence from two youth support workers, Murray Anderson and Phillip Tanafranco, who worked with the plaintiff both before and after the accident.
- [88] There is no dispute that the injuries that the plaintiff sustained in the accident have negatively impacted her and her family. Dr. Cohen opined that the gains the plaintiff was making before the accident are now less likely as a result of the accident. The impact of the plaintiff's injuries, when overlaid onto her pre-existing conditions, had worsened her pain.
- [89] Dr. Callier testified that the plaintiff suffers from chronic pain in the pubic synthesis area that result from the fractures in her pelvic region. While those fractures healed, the plaintiff is left with abnormalities in her pelvis. Sitting, bringing the legs up, and repetitive movements contribute to pain in this region. It is very difficult to treat, and Dr. Callier did not know of any treatment that would take the pain away.
- [90] Mr. Anderson described that he continued working with the plaintiff after the accident at her school. Mr. Anderson's role as a youth worker was to work with younger students at the school. However, he developed a relationship with the plaintiff when she was younger and he continued to work with her throughout high school because he concluded she needed his ongoing support, especially after the accident. The plaintiff and her mother described Mr. Anderson as someone who had helped and supported her a great deal while she was at high school.
- [91] Mr. Anderson observed that the plaintiff was spending much of her time talking about what had happened to her in the accident. He thought she was missing out on her high school experience because of this. Mr. Anderson said this behaviour was very different from what the plaintiff was like before the accident.

- [92] Mr. Anderson would have to redirect the plaintiff from discussing the accident to encourage her to talk about other things. He worked on referring the plaintiff to services and professionals who could address her issues, including by referring her to Dr. Moore, a primary care physician who worked in the school.
- [93] As previously described, since the accident, the plaintiff has had difficulty doing housework, participating in activities, anxiety around traffic and fatigue and pain around standing/walking/sitting requiring her to take lengthy breaks, including to lie down. Sometimes the plaintiff needs to take several days off following an activity to recover from her pain. The plaintiff has also become withdrawn and reluctant to leave her bedroom and home, which has diminished her participation in and enjoyment of activities and programs designed for young persons with intellectual disabilities. She is suffering from mental health conditions, including anxiety and SSD with a predominant focus on pain.
- [94] The plaintiff's counsel referred me to *Van v. Howlett*, 2014 BCSC 1404 [Van] and *Uy v. Dhillon*, 2020 BCSC 1302 as authority for awarding non-pecuniary damages at the rough upper limit. In *Van*, the 54-year-old plaintiff suffered significant injuries in a motor vehicle accident and the most serious ongoing injury included permanent traumatic brain injury leading to increased risk of progressive cognitive decline and seizures. The brain injury left Ms. Van with significant problems in executive functioning and while she could enjoy activities, damage to her front lobe, among other things, left her with lack of judgment and inhibition that caused her to experience emotional outbursts and to be unable to control her behaviour. The result was a negative, persistent change in personality and daily life functioning that treatment would do little to assist.
- [95] The parties in *Van* agreed that Ms. Van was competitively unemployable and her prognosis was of deterioration and not improvement. In *Van*, Justice Grauer found the accident had a profound effect on Ms. Van, including by completely changing her personality, making her abusive and difficult, which had forced her husband to become her primary caregiver.
- [96] At para. 49 of *Van*, Justice Grauer described the assessment of non-pecuniary damages in the following way:
- [49] Assessing non-pecuniary damages is not, of course, a matter of simply comparing injuries on a scale that ends at the upper limit. A trial judge is obliged to balance the need to arrive at an award that is specific to the plaintiff and reasonable to both parties, with achieving a result that is consistent with the fundamental principle that like cases be decided alike.
- [97] Due to the severity of the brain injury to Ms. Van, which involved the "loss of one's very self" and the ability to have control over one's own life, Justice Grauer found catastrophic injury, awarding her the upper limit of non-pecuniary damages at \$351,000.

- [98] Mr. Uy, who was a father of one child and a 39 year-old commercial painter at the time of the accident, suffered a significant brain injury in the accident. Justice Skolrood found that because of the accident, Mr. Uy had lost the ability to function as an independent adult again notwithstanding the evidence that Mr. Uy still derived enjoyment from certain activities such as signing and dancing.
- [99] Justice Skolrood relied on Van to conclude that Mr. Uy's significant injuries and his total inability to live independently entitled him to an award of non-pecuniary damages at the rough upper limit which in that case was \$388,177. I find that the injuries sustained by Mr. Uy are distinguishable from the injuries that the plaintiff sustained in the sense that they were more life-altering and serious.
- [100] The defendants referred me to many cases as examples of authorities awarding non-pecuniary damages to a person in similar circumstances to those of the plaintiff. For example, in *Rickards v. Turre*, 2023 BCSC 436, the plaintiff, who was 12 years old pedestrian at the time of the accident, had pre-existing attention deficit disorder for which he took medication although he testified that this had resolved prior to the accident. He was regularly bullied at school, he was significantly overweight, and he had some pre-existing symptoms of intermittent depressive and anxiety feelings prior to the accident.
- [101] In the accident, Mr. Rickards suffered a leg injury including a fracture and was left with chronic knee pain and depression caused by the accident. The plaintiff sought non-pecuniary damages of \$160,000 while the defendant submitted that an award of \$75,000 to \$90,000 was warranted. Ultimately, Justice Norell awarded him \$110,000 for non-pecuniary damages.
- [102] In *Ackley v. Audette*, 2015 BCSC 1272, the court considered a 19-year-old plaintiff who was involved as a pedestrian in an accident where he, like the plaintiff here, suffered multiple pelvic fractures with continuing pain in his low back, pelvis and hips after the accident and he had a history of anxiety and panic attacks prior to the accident. The plaintiff had attended a youth employment skills program prior to the accident and he had not graduated from high school. The plaintiff in *Ackley* was assessed non-pecuniary damages of \$100,000.
- [103] None of the cases that the defendant referred me to were factually similar in a significant way to the present circumstances. Importantly, none of these cases discusses addressing a plaintiff's circumstances where prior to the accident, the plaintiff was a young person who would not graduate from a typical high-school program but was participating in programming to increase their skills and independence due to an intellectual disability.

- [104] The plaintiff's counsel submits that because of the accident injuries, the plaintiff has entirely lost the ability to work, to be a contributing member of society and to possess a sense of self worth. Instead of possessing these things, the plaintiff's counsel submits that the plaintiff will need daily supervision and home care, and she will rely on her family and the state for that.
- [105] I agree that the plaintiff has suffered a significant non-pecuniary loss including because she now deals with daily pain which diminishes her desire to participate in, and enjoy, day-to-day activities. However, I am not satisfied that the plaintiff's injuries fall within the category of catastrophic because, unlike the situations in *Uy and Van*, they have not resulted in the fundamental loss of "self" or the ability to have control over her own life.
- [106] When I consider the factors described in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, such as the plaintiff's young age as a 16-year-old at the time of the accident, the severity of the physical and psychological injuries and the resulting pain, which I note Dr. Callier opines will include lifelong pain in her pelvic area, as well as the plaintiff's emotional suffering and loss of lifestyle, I conclude that the injuries are very serious, but not catastrophic.
- [107] When I balance the need to arrive at an award that is specific to the plaintiff and reasonable to the parties, along with achieving a result that is consistent with similar cases, and keeping in mind the purpose of an award under this head, I conclude that the plaintiff is entitled to an award of \$270,000 for non-pecuniary damages.

Loss of Income Earning Capacity

- [108] The purpose of tort damages is to compensate a plaintiff for pecuniary loss of income earning capacity, regardless of whether the loss happens before or after the trial: *Charters v. Jordan*, 2024 BCCA 351 at para. 121.
- [109] In *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19, Justice Garson described the legal principles that apply to valuing a claim for loss of earning capacity:
- [19] While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11, 84 B.C.L.R. (3d) 158, the overall fairness and reasonableness of the award must be considered taking into account all the evidence. An award for loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.

- [110] There is no fixed rule that "only loss of actual income is compensable" or that actual income loss is the only reliable measure of loss of earning capacity: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 30.

Past Loss of Income Earning Capacity

- [111] The parties agree that from July 22, 2020 up to October 31, 2022, the plaintiff did not suffer any gross past wage loss from the motor vehicle accident. Therefore, the claim for past loss of income earning capacity excludes that period.
- [112] In *Roberts v. Colbourne*, 2024 BCSC 1720 at para. 106, Justice Ramsay explains that damages for past loss of earning capacity are based on what the plaintiff would have earned but for the injuries sustained in the accident with different burdens applicable depending on the events at issue:
- a) for actual past events, the burden of proof is a balance of probabilities; and
 - b) for hypothetical past and future events, they are taken into account as long as the events are a real and substantial possibility, not mere speculation.
- [113] The plaintiff submits that there was a real and substantial possibility that she would have worked in the pre-trial period but for the injuries she sustained in the accident. The plaintiff had successfully worked in the summer gardening program between grades 8 and 9. Mr. Anderson described that the plaintiff enthusiastically pursued work experience and earnings in the gardening program and she did very well in it.
- [114] I am aware that even before the accident, the plaintiff often missed school and activities, including due to problems with her health. Her attendance was sometimes irregular, and she testified that even before the accident, she sometimes needed to stay home because she was not feeling well.
- [115] On the day of the accident, the plaintiff was on her way to the gardening program on a summer morning before her 10th year of high school began. The plaintiff testified that she enjoyed the gardening program even though it was tiring and hard work. The plaintiff was eventually able to return to the gardening program after the accident. She was also able to attend a post-high school program designed to assist special needs young adults gain experience and skills. This was the plaintiff's plan before the accident, and she has carried through with that plan despite being injured in the accident.
- [116] The plaintiff's counsel submits that but for the injuries she sustained in the accident, the plaintiff would have been able to work at a similar statistical rate of a person her age with no certificate or diploma.

- [117] The plaintiff also submits that there are some positive contingencies that must be considered, including that the plaintiff was motivated to work at the gardening program and to earn money and that over time she could have improved her skills and abilities to be assessed as learning disabled rather than intellectually disabled.
- [118] I agree that there are positive contingencies applicable to assessing the plaintiff's past loss of earning capacity including that she enjoyed the work involved in the gardening program and she expressed pleasure and pride in being able to earn money. She continued to enjoy the gardening program even after the accident. I also agree that there are some negative contingencies to consider such as that the plaintiff has a long-standing pattern, even without the accident, of missing attendance due to physical and mental health issues.
- [119] Dr. Quee-Newell opined that the plaintiff had earning capacity, although it was limited to non-competitive employment. On the other hand, Dr. Cohen's neuropsychological assessment was that the plaintiff was capable of competitive employment in jobs that fit within the categories identified by Dr. Quee-Newell.
- [120] Due to the accident, many of the experts, such as Dr. Caillier and Mr. Cheesman, opined that the plaintiff's physical limitations resulting from the accident injuries will prevent the plaintiff from doing sustained, repeated and heavy activities. In short, the plaintiff finds it extremely challenging to sit or stand for long periods, and she requires extensive breaks, including to lie down. After she engages in a sustained period of sitting, standing or activity, she requires a day or two afterwards to recover.
- [121] Mr. Peever calculated the plaintiff's past loss of income in the last two years at \$19,437. The plaintiff's counsel seeks an award of \$10,000 to \$15,000 for net past wage loss. Because the amount sought is relatively low, the plaintiff submits that a net-of-tax amount is appropriate since it is close to the personal exemption amount for income tax purposes.
- [122] The defendants submit that the plaintiff has failed to show any actual past loss of income. The defendants emphasize that the plaintiff always intended to, and did, attend and complete the post-high school program intended to assist special needs young adults with gaining skills and experience.
- [123] However, the authorities are clear that evidence of actual past loss of income is not the only way to establish a claim. Despite the injuries that the plaintiff sustained in the accident, she was able to participate in some paid work through her young-adult program. The plaintiff was enthusiastic about working and earning income and she it was apparent she genuinely enjoyed her work in the gardening program and in the post-secondary skills program.
- [124] I am satisfied the plaintiff's capacity to work in such opportunities was damaged by the injuries sustained in the accident. I am satisfied on the whole of the evidence, and after considering all hypothetical possibilities, that the plaintiff has established a loss of capacity.

[125] Taking all evidence into account, I find that a fair and reasonable award for past loss of earning capacity, is \$15,550 on a net-of-tax basis pursuant to ss. 95 and 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. In his report, Mr. Peever, states that given the low amount of "without accident" earnings there would be no income deducted; however, a 1.65% adjustment for EI premiums that would have been deducted from her earnings might apply. Therefore, the total net award for past loss of earnings is \$15,293.

Future Loss of Income Earning Capacity

[126] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the court describes a three-step process for assessing claims for future loss of earning capacity:

- i. Step 1 - does the evidence disclose a potential future event that could lead to a loss of capacity?
- ii. Step 2 - on the evidence, is there a real and substantial possibility that the future event will cause pecuniary loss?
- iii. Step 3 - assess the value of the possible future loss as well as the relative likelihood of the possibility occurring.

[127] The final step in the assessment process is to determine if the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[128] Dr. Cohen and Dr. Quee-Newell, both provided opinions indicating that but for the accident, and even with the plaintiff's pre-existing intellectual disability, she would have been capable of some amount of appropriate paid employment, albeit with appropriate supports. Dr. Cohen assessed the plaintiff's potential for paid employment absent the accident most favourably.

[129] Dr. Cohen concluded absent the accident, that the plaintiff likely had a higher capacity for paid employment than others with more typical intellectual deficits. However, due to the injuries from the accident, Dr. Cohen concludes that the plaintiff is likely "permanently and fully disabled from an employment perspective".

[130] Dr. Quee-Newell's assessment of the plaintiff's pre-injury vocational prospects were less favourable. She concludes that the plaintiff's pre-existing intellectual disability and her need for ongoing educational and social supports mean that absent the accident, the plaintiff was limited to non-competitive employment with the requirement for coaching and support to meet the requirements. Dr. Quee-Newell opined that the plaintiff would not have been suited for work that required "cognitive flexibility, numerical calculations, written output, and/or creating problem solving" but the occupational strengths that does possess would have made suitable for work with a supportive employer doing food preparation, cleaning tasks, basic shelf stocking and gardening.

- [131] Dr. Quee-Newell notes that given the plaintiff's eligibility for Persons with a Disability Benefits, the plaintiff is allowed to earn employment income of up to \$16,200 per year while receiving Benefits. Assuming the plaintiff could have earned the current minimum wage of \$17.40 per hour, it would take approximately 930 hours, or 17 hours of work for every week of the year, to earn a gross amount of \$16,200 per annum.
- [132] Mr. Cheesman, who conducted functional testing of the plaintiff, concluded that post-accident, the plaintiff lacked the functional endurance to engage in gainful employment and at best, she could engage in sedentary activity but her reaching and handling productivity would be unlikely to meet standards needed for paid employment. Mr. Cheesman opined that the plaintiff would not be reliable in her engagement in paid work.
- [133] The defendants submit that Dr. Cohen's opinion respecting the plaintiff was overly pessimistic and that it failed to recognize that the plaintiff was able to participate in a two-day assessment without showing any objective signs of decreased performance on testing over time and without making any complaints of pain. The defendants note that many experts described the plaintiff as a unique patient and that some of the testing results showed average or even above average results, such as with her processing speed or attention to detail. However, even when the plaintiff's strengths in certain aspects of the testing were pointed out to an expert, no expert significantly revised their overall opinion of the plaintiff's prognosis, current condition or capacity.
- [134] The defendants emphasize that during her testimony, the plaintiff displayed no pain behaviours or deterioration in performance. The defendants counsel describe the plaintiff as follows: "She was articulate in expressing herself, had no difficulty with word finding, took no inappropriate delays, was able to manipulate exhibits to the requested tab and page number, asked for no unscheduled breaks and conducted herself with grace and decorum". In short, the defendants point out that the plaintiff showed none of the impediments described by Mr. Cheesman.
- [135] The defendants submit that the court must, at the end of the analysis, take into account the overall fairness and reasonableness of the award in light of all the evidence. They submit that the evidence does not establish a lifelong loss of future earning capacity on the facts because the evidence is based on the erroneous assumption that before the accident, the plaintiff's likely trajectory involved her doing physical labour - an ability she has lost because of the accident. The defendants say that the evidence actually shows that the plaintiff can still do sedentary work.
- [136] The defendants also say that the plaintiff's evidence is also premised on the erroneous assumption that but for the accident, her lifelong working memory deficit would have somehow still allowed her to succeed in the workforce to the same degree as others with mild intellectual disabilities.

- [137] The defendants point out that Dr. Cohen asserted that the plaintiff was currently capable of doing sedentary clerical work based on some of her atypical test results. The defendants also point out that Dr. Quee-Newell was unaware of Dr. Cohen's opinion, including his opinion that the plaintiff had capacity to perform sedentary clerical work and Dr. Callier agreed if the plaintiff followed recommended treatment, her functional abilities would increase.
- [138] In the alternative, the defendants submit that any loss of future earning capacity should be limited to no more than five years, or in the further alternative to extend no longer than ten years, to ensure overall fairness and reasonableness because the plaintiff failed to obtain psychotherapy for her mental health symptoms and physical rehabilitation for her pre-existing somatization symptoms and chronic pain from the orthopedic injuries sustained in the accident. The defendants noted that Dr. Callier indicated that treatment could be expected to improve the plaintiff's function.
- [139] The defendants acknowledge that the plaintiff may not earn more than the allowable \$16,200 per year while maintaining her PWD benefits. The defendants, therefore, submit that any quantification of loss of future earning capacity should be based on minimum wage up to \$16,200 per year.
- [140] In considering the whole of the evidence, I agree with Ms. Quee-Newell's opinion respecting the plaintiff's pre-injury vocational prospects. The evidence demonstrates that even before the accident, the plaintiff's ability to consistently attend programming, whether at school or otherwise, was impacted by issues such as her intellectual disability, and health-related challenges including symptoms of fatigue and physical discomfort. In other words, the plaintiff's range of employment options was already restricted prior to the accident.
- [141] However, on my review of the evidence, I find that had the accident not occurred, the plaintiff would likely have achieved some level of suitable part-time employment at a minimum wage, for example, stocking shelves, bagging groceries or gardening. I also find that the evidence amply discloses a potential future event, namely, that the chronic pain the plaintiff experiences from the many injuries she sustained in the accident, will more likely than not lead to a loss of capacity. I further find that there a real and substantial possibility that this future event, which is likely to involve chronic pain impairing the plaintiff's capacity to reliably attend even a part-time job, will cause pecuniary loss.
- [142] I must also assess the value of the possible future loss as well as the relative likelihood of the possibility occurring. In assessing the value of the possible future loss, I am assisted by Mr. Peever's report and the useful tables he provides for determining the present value of the plaintiff's future loss of earnings. Mr. Peever provides a variety of calculations for scenarios that might apply to the plaintiff's future earnings.

- [143] I assess the value of the possible future loss, taking into account all of the evidence and the most likely scenario, to assume that without the accident, the plaintiff had the potential to earn income from the trial date to age 70, working as a part-time shelf stocker, after deductions for "risk and choice" contingencies, plus an additional contingency of 25% due to the plaintiff's pre-existing challenges (which I have already discussed) in the amount of \$14,212 per year, for a total present value of \$482,454.
- [144] Overall, I find it is more likely than not that the possible future loss facing the plaintiff will occur, namely, she will experience impaired capacity due to chronic pain that will prevent her from taking part in paid work in the future. This finding also reflects that the plaintiff was likely particularly impacted by the loss of capacity because her range of available employment was already restricted by her intellectual disability.
- [145] As mentioned, the final step is to determine if the damage award is fair and reasonable. In my view, an award of damages that reflects the amount, after factoring in realistic additional negative contingencies for the plaintiff's pre-existing conditions and disabilities, the plaintiff was likely to earn each year from part-time work at a minimum wage job, fairly and reasonably reflects her potential future income loss resulting from her impaired capacity.
- [146] Having made these findings, I find that a fair and reasonable assessment of the plaintiff's future loss of earnings is the sum of \$482,454.

Cost of Future Care

- [147] An award for cost of future care is intended to compensate a plaintiff for costs that may reasonably be expected to be incurred to preserve and promote the plaintiff's physical and mental health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30.
- [148] To assess future costs, the test is well established and it involves asking: (1) whether the costs are reasonable; and (2) if the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62.
- [149] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Justice Adair summarized the principles for a cost of future care award as follows:
- [107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55.

Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

- [108] In addition, while health and happiness are intertwined, the award is not intended to account for the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable: *Warick v. Diwell*, 2018 BCCA 53, at para. 24.
- [150] In *Gill v. Borutski*, 2021 BCSC 554, at 107, Justice Gomery reiterates the goal underlying an award for cost of future care:
- [107] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff
- [151] To determine the quantum of an award for cost of future care, it is done by way of assessment not a precise accounting and the court must make adjustments for the contingency that the future may unfold differently from what the evidence at trial indicated the future would be: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 108.
- [152] The plaintiff seeks a substantial award for cost of future care in the amount of \$910,000 for the costs recommended by the many experts with the costs as calculated by Mr. Cheesman and Mr. Peever.
- [153] The defendants' counsel submits that many of the costs making up the plaintiff's claim for cost of future care would have been required by the plaintiff's circumstances even without the accident. That is because the plaintiff and her family testified that they always planned for the plaintiff to live with family, but it that became impossible, the public services provided by Community Living BC would be required to assist the plaintiff with living arrangements.
- [154] Dr. Lazar discusses the plaintiff's future care needs at length in the report and some of Dr. Lazar's recommendations overlap with the recommendations of others. For example, Dr. Lazar recommends cognitive behavioural therapy treatment of the plaintiff's SSD, with predominant pain, by a psychologist of 16-20 sessions; occupational therapy, recreational therapy; 12 sessions of psychological treatment for anxiety and PTSD symptoms plus 6 booster sessions for 2-4 years.

- [155] Dr. Cohen also makes recommendations for the plaintiff's future care including assistance developing and sustaining avocational activities, home care, psychotherapy support from a clinical psychologist to treat the plaintiff's SSD and a multi-disciplinary program of treatment cycles (3 x 12-15 sessions] with a clinical psychologist plus 6 hours of community consultation; ongoing counselling 4-6 sessions yearly; occupational therapy, active rehabilitation and attendance at a sleep clinic.
- [156] Dr. Callier recommends that the plaintiff work with a psychologist or counsellor to provide her with strategies to address her pain and emotional issues. Dr. Callier also recommends the plaintiff engage in a regular-based exercise program to manage her pain in the future. Dr. Callier further recommends that the plaintiff have kinesiology sessions and that she has a rehabilitation assistant go to the gym with her at least once-to-twice per week in the future. Dr. Callier notes that the plaintiff has the capacity to engage in housekeeping activities and self-care, while noting that she is "someone who would have required some support with living with family or shared housing" even absent the accident.
- [157] A main point of disagreement between the parties concerns whether the plaintiff's cost of future care includes lifetime one-to-one gym assistance from a rehabilitation assistant as well as a kinesiologist. The defendants point to evidence of the plaintiff learning to independently attend school and other programming by public transit.
- [158] In the years following the accident, the plaintiff has developed routines that assist her with attending activities. The plaintiff expressed pride in her achievement of learning transit routes to get to her activities. The plaintiff clearly values developing some sense of autonomy and independence.

Psychological Treatment

- [159] Many experts recommend that the plaintiff receive psychological treatment for psychological conditions, such as SSD. The plaintiff was exhibiting symptoms of SSD prior to the accident but she was not diagnosed with that condition. I find that the plaintiff's current mental health conditions are due to the accident.
- [160] Dr. Cohen recommends three individual treatment cycles of 12-15 hours each to address the plaintiff's mental health conditions, plus six hours of community and consultation time with a psychologist at \$225 per hour. After that, Dr. Cohen recommends supporting counselling or psychotherapy of 4-6 sessions per year. Dr. Lazar recommends cognitive behavioural therapy for the plaintiff's SSD of 16-20 sessions with a psychologist and sessions to treat post-traumatic stress and mood and anxiety symptoms of 12 sessions initially, followed by six booster sessions per year for two to four years. Based on Mr. Cheesman's report, Mr. Peever has determined a present value of the psychological costs of the initial treatment in year one to be \$6,979 and the booster sessions in subsequent years to be \$4,022.

[161] I find that there is a clear medical recommendation for the psychological treatment and I prefer Dr. Lazar's recommended course of treatment of 28 sessions to treatment SSD and mood disorder issues followed by six booster sessions per year for two years. I find that \$11,500 is a reasonable assessment of the present cost of future psychological care that will provide the number of sessions recommend by Dr. Lazar at an approximate cost of \$235 per hour.

Occupational Therapy

[162] Mr. Cheesman recommends that the plaintiff receive 10 hours of annual service from an occupational therapist consisting of quarterly reviews of her situation at an annual cost of \$1,400. Dr. Cohen also recommends the plaintiff receives occupational therapy for activities of daily living because he anticipates the plaintiff will have difficulties in those areas due to her chronic pain symptoms.

[163] The defendants submit that the occupational therapy services recommended for the plaintiff in Mr. Cheesman's report should be limited to five years from the trial date to recognize that while the accident aggravated the plaintiff's condition, she had many pre-existing conditions and needs that are unrelated to the accident. While it is true that the plaintiff did have pre-existing conditions unrelated to the accident, I find that her capacity has been reduced and her needs have increased due to the injuries she sustained in the accident. Therefore, I agree with Dr. Cohen's recommendation that lifelong occupational therapy assistance will be required to assist the plaintiff with, for example, carrying out activities of daily living when she is likely to be experiencing chronic pain symptoms.

[164] I find that there is clear medical recommendation for occupational therapy services for the plaintiff. I find Mr. Cheesman's recommendation for 10 hours of annual OT services at an annual cost of \$1,400 for life is appropriate for the difficulties the plaintiff is more likely than not to experience with performing day-to-day activities. Mr. Peever calculates the present value of quarterly occupational therapy reviews at an annual cost of \$1,400 to be \$49,982.

[165] I find that \$49,982 is a reasonable assessment of the present cost of future occupational therapy care that will provide the plaintiff with 10 hours of annual OT services for life that is recommended.

Kinesiology/Exercise Training

[166] Many of the experts recommended that the plaintiff receive kinesiology and exercise training to improve her physical condition and to assist with pain and mood management issues.

- [167] With respect to kinesiology services and community support worker, or recreational assistant, to attend the gym, the defendants submit that these services are duplicative and not supported by the evidence.
- [168] For kinesiology, Dr. Callier recommends the plaintiff engage in 24-26 sessions with a kinesiologist in a pool, followed by 24 - 26, one-to-one, gym sessions and then six to eight kinesiology sessions yearly thereafter. Dr. Callier also recommends the plaintiff be accompanied to the gym by a community support worker, or a recreational assistant, to be safe in the gym environment.
- [169] I find there is ample and clear medical recommendations for kinesiology services for the plaintiff who is significantly deconditioned. However, I must also consider whether the recommendations are reasonable and decide whether the plaintiff is actually likely to use the kinesiology services. The plaintiff testified that when she experienced pain from physiotherapy treatments she and her mother decided to terminate them. I find there is a high likelihood that when the plaintiff experiences physical discomfort from attending kinesiology and exercising, she might discontinue the program.
- [170] In the plaintiff's testimony, she did not express a determination to follow the recommendations made to her to engage with a kinesiologist and a program of exercise. I appreciate that the plaintiff has an intellectual disability which may impact her ability to understand the benefit of these recommendations, but I must consider the possibility that when discomfort arises, she will not engage in a program of exercise and strength building for any significant period.
- [171] Ideally, the plaintiff would follow Dr. Callier's recommendations for kinesiology sessions in the pool and in the gym are reasonable and appropriate because the plaintiff is likely to require substantial one-to-one time to learn routines and checklists to establish and maintain exercise.
- [172] Mr. Cheesman and Mr. Peever calculate the cost of the initial recommended sessions with the kinesiologist at \$7,500, along with annual review sessions at \$1,050. The annual cost of attending a community exercise facility is between \$277 and \$194 per year depending on age calculated up to age 75 with a present value of \$7,997 and \$650.
- [173] I find that there is a substantial possibility that the plaintiff will engage in services with a kinesiologist and a program of exercise only for a short period of time. In the past, she attended physiotherapy for approximately 6 months before she decided to terminate due to her pain symptoms.
- [174] Therefore, I find that \$7,500 for the initial recommended sessions, plus \$3,000 for the future cost of gym or recreation centre membership, is an appropriate and fair award to provide the plaintiff with the recommended kinesiology services and gym membership. In my view, this award appropriately weighs the substantial risk that the plaintiff's pain will increase as she engages in increased exercise and that she will terminate the activity. However, this

award also provides the plaintiff with a reasonable opportunity to learn safe exercise techniques and an appropriate place to exercise.

- [175] The plaintiff also seeks a large amount for the future cost of a recreational assistant. In cross-examination, Dr. Callier explained that there are two main reasons for the recommendation for a recreational assistant. First, the plaintiff's intellectual disability presents challenges for her to behave appropriately in the gym environment. Second, the plaintiff requires motivation and accountability to promote attending at the gym to exercise.
- [176] In my view, the recommendation for a recreation assistant is not adequately justified nor reasonable because it mainly addresses the plaintiff's preexisting intellectual issues. There was ample evidence that the plaintiff, both before and after the accident, was able to establish routines to get herself to programming and to maintain a routine respecting programming, despite her intellectual issues. The plaintiff travels alone by public transit in a city environment and there is no suggestion that her intellectual issues make it unsafe for her to interact with the public. Dr. Callier's concern that the plaintiff would be unsafe at the gym appeared to be based on unexplained assumptions about her characteristics.
- [177] The plaintiff will receive the cost of future care for considerable kinesiology treatment and exercise training. I find it likely that the extensive kinesiology treatment included in the award of future costs, which could easily include routines and checklists for exercising independently, will provide the plaintiff with the level of practice and structure that helped her as she practiced and learned to commute independently to programming.
- [178] The evidence shows that the plaintiff faced lack of attendance and pain management issues well before the accident occurred. Nevertheless, she has managed to establish and maintain routines that have increased her independence, even without having a support worker or recreational assistant at her side. I have already discussed my assessment of the substantial risk that the plaintiff will terminate the kinesiology and exercise training due to increased pain. For all of these reasons, I decline to include an amount for the future cost of a recreation assistant to attend the gym with the plaintiff.

Cleaning Assistance

- [179] Mr. Cheeman recommends cleaning assistance services at an annual rate of \$1,200 to age 80. This is based on a budget of two hours of cleaning assistance per month at an approximate cost of \$50 per hour. Some of the experts recommended that the plaintiff use adaptive tools for housekeeping, such as extender poles and a robotic vacuum. I find that there are medical recommendations for the plaintiff to receive cleaning assistance, which I find are reasonable and appropriate.

- [180] The evidence is that after the accident, the plaintiff has been able to continue performing light housekeeping tasks such as vacuuming, dusting and sweeping. However, she experiences pain when doing these tasks. There is no evidence the plaintiff ever engaged in heavy duty housekeeping tasks, either before or after the accident.
- [181] I find that it is likely that the plaintiff will require assistance with housekeeping in the future and that two hours per month is a modest and reasonable assessment of the housekeeping assistance the plaintiff will require. I find this assessment is in keeping with the evidence that the plaintiff is only able to do light housekeeping tasks. As the plaintiff ages, I find it unlikely that performing housekeeping duties will be easier.
- [182] I find that two hours of cleaning assistance services at an estimated cost of \$50 per hour each month for an annual total of \$1,200 is a reasonable estimate of the future cost. Mr. Peever calculates the present value of the \$1,200 annual cleaning cost to age 80 to be \$40,194 and I find that \$40,194 is an appropriate and reasonable assessment of the present value of the cost of future cleaning assistance care for the plaintiff.

Ergonomic Equipment

- [183] Dr. Callier recommends the plaintiff be provided with ergonomic equipment for her home to assist with pain management in performing daily living activities, such as long-handled implements and Mr. Cheesman's functional capacity assessment supports that recommendation. Mr. Cheesman and Mr. Peever determine the every-five year cost of ergonomic equipment at \$200, with a present value of \$1,509.
- [184] I find that ergonomic equipment costing \$200 every five years with a total present value cost of \$1,509, is appropriate and reasonable to provide the plaintiff with assistance to manage her pain and to safely carry out activities of daily living into the future.

Independent Living Support

- [185] If the plaintiff chooses to live independently, Mr. Cheesman and Dr. Cohen recommend daily supervision services, but Dr. Cohen does not recommend that the supervision be for every activity since she can do some simple tasks independently.
- [186] The evidence is that while the plaintiff considered moving out on her own, she and her family always intended her to live with family. Dr. Cohen notes that the plaintiff now has separation anxiety and believes that she is unable to cope with life on her own.
- [187] Dr. Cohen observed that recommendations for the plaintiff were difficult to establish because her profile is complex. He agrees that the plaintiff "would have been likely to have met requirements for CLBC and PWD supports independent of any impacts from the 2020 MVA". He also notes that the plaintiff's frailty and level of disability will likely exceed what her family can provide within the family home.

- [188] I find that the evidence establishes that the plaintiff is very unlikely to decide to live independently. However, I must also consider the hypothetical possibility that circumstances may develop such that the plaintiff's family is unable to provide care for her. Her mother's health is poor and her older sister, Maria, is willing to provide assistance, but she does not plan to stop working as part of caring for the plaintiff. In my view, there is a real and substantial possibility, that the plaintiff will continue living with family members. Overall, the plaintiff and her family have had a long-standing plan for the plaintiff to always live with family.
- [189] However, I must also consider the possible contingency that the plaintiff is eligible for disability benefits including because she meets the requirements for CLBC as a person with disabilities. Mr. Cheesman recognizes that CLBC funding and supports will be available given the plaintiff's existing intellectual disability, but she may require some additional support not covered by the funding to manage her pain reactivity and accident-related symptoms. Mr. Cheesman recommends funding for an additional six hours of community support per week to assist her with attending social events and exercise opportunities with an annual cost of \$12,480.00.
- [190] While it is likely that the plaintiff will receive supports and services through the funding available to her as a PWD and through CLBC, I think it is more likely than not that there will be gaps in that funding and in what the plaintiff's family will provide for the plaintiff as part of the normal give and take of family life. I find that the public funding will be insufficient to provide the plaintiff with sufficient support to offset the deficits she has experienced from the injuries in the accident.
- [191] As I mentioned, Dr. Cohen and Mr. Cheesman recommend funding for additional independent living support for an additional six hours per week to facilitate the plaintiff in engaging in the community and managing her persistent pain and psychological issues. In addition to the other requirements, the cost must be reasonable.
- [192] The parties recognize that the plaintiff will receive publicly funded benefits in the future to assist her with independent living support. Therefore, I find that funding for an additional 15 hours per month, or 180 hours per year, until age 80 is medically justified, fair and reasonable and that it will assist the plaintiff to manage her significant chronic pain symptoms and mental health.
- [193] Mr. Cheesman calculated the cost of the additional independent living support at \$40 per hour in his report. Therefore, the plaintiff is awarded \$7,200 annually until age 80 for the future cost of independent living support assuming a rate of \$40 per hour for 180 hours per year. I will leave it to the parties to calculate the present value of this aspect of the award for future costs of care.

Medication/Allied Health Treatments for Pain Management

- [194] Both before and after the accident, the plaintiff has avoided prescribed medications. Recently, she was prescribed a topical treatment for pain management, and she reports finding the topical treatment helpful. While some experts suggest medication to treat headaches and mood disorders, the experts indicated that prescription medications could raise complications for the plaintiff's pre-existing intellectual profile. There is also evidence that the plaintiff is reluctant to take medications.
- [195] The evidence satisfies me that the plaintiff is not likely to utilize prescription medications to treat her mental health conditions, given her pre-existing intellectual disability. Based on the plaintiff's recent modest prescription medication costs that are included in her claim for special damages, I find that an award of \$200 per year for a period of 5 years, i.e. \$1,000 in total, to cover the future cost of prescription medication is a fair and reasonable amount for future medication costs. I will leave it to the parties to determine the present value of these medication costs.
- [196] The plaintiff did not attend massage therapy after the accident, but she did attend physiotherapy treatments in 2021. The plaintiff reports that her mother sometimes rubs her back when it is sore and she finds that helpful to relieve pain. I find that the plaintiff is likely to utilize physiotherapy and massage therapy treatment to manage her pain and to assist with movement and functionality. She did terminate physiotherapy in the past when she found the treatment caused her increased pain, but I find it likely, given that many experts recommend that she increase her physical activity and that she do so safely, that the plaintiff will utilize either physiotherapy or massage therapy in the future to manage her pain symptoms.
- [197] I find that an award for the future cost of ten sessions annually for a period of five years to cover massage therapy or physiotherapy at a cost of \$105 per session. This amounts to \$1,050 annually for five years for a total of \$5,250. I will leave it to the parties to determine the present value of these massage or physiotherapy costs.

Special Damages

- [198] The defendants take no issue with the special damages sought by the plaintiff in the amount of \$67. Therefore, special damages are awarded to the plaintiff in the sum of \$67.

In-Trust Claim

- [199] The plaintiff seeks an in-trust claim for the mother who has cared for her since the Accident, in the amount of \$50,000, and an addition in-trust award for the mother and/or the older sister, in the amount of \$250,000 to \$400,000, respecting care that they are expected to provide to the plaintiff in the future.

- [200] The mother is presently 54 years old. The mother has a history of significant health problems including, cancer. The mother is currently being screened for cancer, and she is awaiting diagnosis and potential treatment. The mother testified that if, in the future, she is unable to care for the plaintiff, then Maria, who is currently in her 30s, is willing to take over that responsibility.
- [201] Maria testified that if their mother is unwell or unable to do so in the future, she is willing to care for the plaintiff and her youngest sibling, who is also a special-needs individual. However, Maria said that she would not give up her job or become a stay-at-home carer.
- [202] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Justice Adair considered an in-trust claim for assistance by the plaintiff's son and spouse. Justice Adair notes, at para. 103, that in-trust claims require scrutiny on two fronts:
- [S]uch claims must be carefully scrutinized, both with respect to the nature of the services (were they simply part of the usual "give and take" between family members, or did they go "above and beyond" that level), and with respect to causation (were the services necessitated by the plaintiff's injuries or would they have been provided in any event?): see *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735 at para. 180, *aff'd* 2004 BCCA 124; and *Dykeman v. Porohowski*, 2010 BCCA 36, at para. 29.
- [203] The mother and the plaintiff testified that after the accident, the mother stayed with the plaintiff in the hospital, and she was directly involved in caring for her. They described being unhappy with the nursing care in the hospital, so the plaintiff's mother would manage the plaintiff's day-to-day care. It was apparent that the mother devoted a great deal of attention to the plaintiff's care after the accident, especially when the plaintiff was using a wheelchair and crutches in the immediate aftermath of the accident.
- [204] However, there was also evidence indicating that even before the accident, the plaintiff's mother provided a high level of care for the plaintiff due to the plaintiff's pre-existing health and intellectual disability issues. In other words, even without the accident, the mother is very likely to have provided a high level of services and care to the plaintiff.
- [205] When I consider the nature of the services, and whether those services provided by the mother went above and beyond the usual give and take, I conclude that they are part of the usual, long-standing pattern of mothering care in the particular relationship that pre-dated the accident.
- [206] Further, when I consider whether the nature of the mother's services were necessitated by the plaintiff's injuries from the accident, I conclude that they would have been provided in any event. I therefore decline to make an in-trust award respecting the plaintiff's mother.

[207] Respecting the in-trust claim related to Maria, there is evidence she has agreed to provide care if the mother is no longer able to. However, as mentioned, Maria testified that she would not give up her employment to provide care. I was provided with no details of the nature of the care that Maria expected she would provide to the plaintiff in the future.

[208] As a result, I am unable to determine whether the nature of the care that Maria might provide in the future to the plaintiff rises to the level to justify an in-trust claim for Maria's services. I therefore decline to make an in-trust award respecting the plaintiff's sister, Maria.

Money Management Fees

[209] The plaintiff seeks an award for money management fees equal to 28% of the award for pecuniary damages. Mr. Peever estimates the cost of money management based on fees charged by the Public Guardian and Trustee of assets of between \$400,000 to \$500,000, which equals about 28% of the value of the assets to be managed.

[210] The defendants accept that money management fees, or investment counselling, are necessary in the circumstances and should be awarded. However, the defendants submit that the cost of these services should be adjourned until after judgment to allow the parties to agree on the cost of such services after the amount of the award is known. If the parties cannot agree, then the defendants submit that the parties could reappear, on additional evidence respecting the cost of services, to seek further direction.

[211] The defendants are concerned that the plaintiff's request for committee fees equal to 28% of the award for pecuniary damages is premised on the assumption that the Public Guardian and Trustee ("PGT") would accept a management role. However, there is no evidence of that and no evidence that the plaintiff has complied with the requirements of the Adult Guardianship Act, the Statutory Property Guardianship Regulation or that a Certificate of Incapability has been obtained to access the PGT's services.

[212] I agree that the issue of the cost of money management should await the release of these reasons for judgment. The parties agree that money management is required in the circumstances; however, if the parties cannot agree on an amount for the cost, the parties are directed to seek a video appearance before me through SC Scheduling at 9:15 am to discuss exchanging and filing materials respecting an award for the cost of money management.

Conclusion

[213] In summary, I award damages to the plaintiff as follows:

- a) Non-pecuniary damages in the sum of \$270,000;
- b) For past loss of income earning capacity, the sum of \$15,293;

- c) For future loss of income earning capacity, the sum of \$482,454;
- d) For cost of future care, the following amounts:
 - i. \$11,500 for psychological treatments;
 - ii. \$49,982 for occupational therapy;
 - iii. \$7,500 for kinesiology and exercise training and \$3,000 for gym or recreation centre membership;
 - iv. \$40,194 for cleaning assistance;
 - v. \$1,509 for ergonomic equipment;
 - vi. \$7,200 annually until age 80 for independent living support services;
 - vii. \$5,250 for 10 sessions annually of physiotherapy or massage therapy for five years; and,
 - viii. \$1,000 for prescription medication.
- e) Special damages in the sum of \$67.

[214] I have determined the plaintiff has not established an entitlement to an in-trust award.

[215] There will be pre-judgment interest as provided by the Court Order Interest Act, R.S.B.C. 1996, c. 79 [COIA].

[216] The parties have liberty to apply if any issues arise as to the application of the COIA to any of the heads of damage, if there are any disagreements over tax gross-ups or if there are calculation errors in these reasons.

[217] Subject to any submissions that the parties wish to make, the plaintiff is entitled to costs at Scale B. If the parties wish to make submissions concerning costs, they may do so in writing, providing that any submissions must be filed within 30 days of the date of these reasons. Written submissions must be no more than 10 pages double-spaced (except for quotations) using a font size not smaller than 12 point (except for quotations). The counsel shall agree between themselves on a suitable schedule for the exchange of submissions respecting costs.

"E. McDonald J."

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