

CANADA / JUDGMENT

Gill v. McChesney

2016 BCSC 1416

COURT

Supreme Court of British Columbia

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2016 BCSC 1416 Gill v. McChesney

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. McChesney,

2016 BCSC 1416

Date: 20160729

Docket: M101351

Registry: Vancouver

Between:

Vanessa Gill

Plaintiff

And

Kevin Shelby McChesney and GMAC Leasco

Corporation / La Compagnie GMAC Location

Defendants

Before: The Honourable Mr. Justice J. Sigurdson

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

October 5-9, 13-16, 19-23, 2015, January 25, 26, 28, 29 and

February 3, 2016

Place and Date of Judgment:

Vancouver, B.C.

July 29, 2016

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INTRODUCTION

- [1] The plaintiff was injured in a motor vehicle accident that occurred on December 3, 2008 when her vehicle was struck by a vehicle driven by the defendant Kevin Shelby McChesney.
- [2] The plaintiff is now 46 years old; she was 39 years old at the time of the accident. She is married to Terry Gill, a lawyer, and has four children. The first two children were born in 1998 and 2002, and her twins were born on October 30, 2009, a little less than a year after the accident.
- [3] Liability for the accident is not in issue. This case concerns an assessment of damages suffered by the plaintiff.
- [4] The plaintiff's position is that in addition to various soft tissue injuries, she suffered a mild traumatic brain injury, has ongoing cognitive deficits, and is entitled to substantial damages under a number of heads of relief including past loss of income and loss of future earning capacity.

- [5] The defendants' position is that the plaintiff only suffered relatively minor soft tissue injuries that have now resolved, but if she suffered a mild traumatic brain injury, which they dispute, it was at the minor end of the scale and she has no persisting cognitive deficits or soft tissue injuries that were caused by the accident.
- [6] The issue in general terms that I must decide is, apart from the question of the extent, duration and impact of the soft tissue injuries that have resolved, is the consequences of the head injury that the plaintiff suffered in the accident. Did the plaintiff suffer a mild traumatic brain injury with resulting ongoing cognitive deficits, or did she suffer a mild traumatic brain injury the consequences of which have resolved, or did she not suffer a mild traumatic brain injury but only soft tissue injuries that have now resolved?
- [7] For reasons that I will explain, I have concluded the plaintiff suffered a mild traumatic brain injury at the less serious end of the spectrum and any cognitive and related consequences had resolved prior to trial.

THE ACCIDENT

- [8] On December 3, 2008 in Vancouver, the plaintiff, driving eastbound on Robson Street, proceeded through the intersection at Burrard Street and was struck by the defendant's vehicle which ran a red light.
- [9] The plaintiff was alone, driving a 2007 Toyota FJ Cruiser with her seatbelt on. She had stopped at a red light. When the light turned green she entered the intersection and saw a dark shadow in the corner of her eye on her left side. The defendant's car smashed into her car. Ms. Gill testified that she thought she hit her head because of "liquid or bleeding" she felt, but testified at trial that she did not specifically remember hitting her head. At trial she said that she was not entirely sure what happened. She testified her recollection was very blurred and she was not aware of what had occurred and the first thing she remembered was a voice saying "do not get out of the car".
- [10] She testified that she opened the car door and there was glass and a crunching sound. She said that she had no idea how much time had passed from the impact until she stepped out of the car. She said she remembered a man in "court garb" saying he was a lawyer, that he had seen everything and left his card. She recalled someone saying that she had to get her car out of the intersection and she testified that she must have moved her car. She recalled a couple standing next to her and that they were from Nanaimo. She described the police arriving and asking some questions, but was not sure what they were and she thought they asked her if she was okay. She said her head was hurting on the left side but she did not have to go to the hospital.
- [11] She called her husband who worked at a law firm on Burrard Street a few blocks away and he came to the accident scene very quickly, within four or five minutes.

- [12] A tow truck arrived and Ms. Gill said that her husband drove her home and called her doctor. She lay on the bed and complained of her head being painful.
- [13] She learned that her family physician, Dr. Matsyk, was fully booked that day and her husband drove her to the medical clinic at Park Royal, where she saw Dr. Rubin that afternoon
- [14] It is in issue whether the initial report of the accident was given to the insurance company by her or by her husband.
- [15] Ms. Gill described pain on the left side of her head and said the doctor in the Park Royal clinic looked at it, asked her how she was feeling and saw the red marks and, according to the plaintiff, said she probably had a concussion (a comment the defendants submit, correctly I hold, is not admissible for its truth) and she should go home and rest. The doctor recommended she see her own family physician as soon as possible.
- [16] The plaintiff saw her family physician Dr. Matsyk about nine days after the accident on December 12, 2008.

PLAINTIFF'S BACKGROUND AND DESCRIPTION OF HER INJURIES AND SYMPTOMS OVER TIME

- [17] In this part of the judgment I will review the evidence of Ms. Gill's recollection and reporting of her symptoms following the accident.
- [18] The plaintiff, who in the past has worked outside the home, was, at the time of the accident, working at home caring for her children.
- [19] Ms. Gill is well-educated. She was born in Vancouver but as a young child moved to England where her father was attending Oxford on a fellowship. She was a very good student, attended university in Essex doing a degree in American literature and subsequently obtained a degree in psychology.
- [20] After graduating she worked at various summer jobs as a camp counsellor and a nanny. In the summer of 1994 she started a course at the Justice Institute in British Columbia. By 1995 she was working as a family justice counsellor. She prepared custody and access reports or what were then referred to as Section 15 reports, which involved travelling to interview parents with their children, principally for custody and access disputes. This was difficult work at which she excelled, sometimes working on as many as five to eight reports at any given time. Ms. Gill worked 35 hours a week full-time up to the birth of her first child.
- [21] The plaintiff met Mr. Gill in 1994 when both were at Simon Fraser University studying psychology. They married on August 3, 1996. He graduated from law school in 1998 and in practice has specialized in tax law.

- [22] Their second daughter was born in January 2002. Ms. Gill took a year off for maternity leave at that time. After that she began a Master's program and participated in something called bridging of service that allowed her to take unpaid leave and maintain her seniority level if and when she decided to return to work with the provincial government.
- [23] Ms. Gill returned to work for a year from March 2004 to March 2005 doing custody and access reports, often travelling to Vancouver Island for her work. After March 2005 she decided to finish her Master's while caring for her children and by the end of 2005 she had completed that degree, receiving it in June 2006.
- [24] Mr. Gill, after clerking as a law clerk in the Court of Appeal, was called to the Bar and was an associate from 2000 to 2007. He became a partner at his law firm in 2008. Mr. Gill worked long hours.
- [25] There is an issue whether at the time of the accident in 2008 Ms. Gill was contemplating or planning a return to work outside the home. This is significant to her claim for loss of past wages and loss of future income-earning capacity. Prior to the accident she had enrolled in an HTML-programming class and was considering starting a home-based business, namely a website suitable for young girls of ages 5 to 10. However, the plaintiff says that at the time of the accident she was contemplating a return to her prior work outside the home.
- [26] I have already described the plaintiff's evidence about the accident and the immediate aftermath that day.
- [27] During the evening of the accident the plaintiff said she felt tired and tearful. The following day she found her head was very painful and she woke up with a headache. She saw her regular family doctor Dr. Matsyk a little over a week following the accident on December 12 and told her of the pain on her left side and her headaches. Dr. Matsyk recommended rest, Tylenol and ibuprofen.
- [28] The plaintiff testified that she began to notice memory issues in that period following the accident before she was able to see her family doctor. She described forgetting things such as making the children's lunches. Following the accident and for the period over the next eight months or so, she described short-term memory issues, increased fatigue and feeling fragile. She said that she had shoulder and neck pain, some low back pain, floaters in her left eye, and became nauseous at Christmas. She said her ability to focus and concentrate became different and she found simple things became more complicated. She described foggiess and that she lacked a sharp awareness when reading or looking at things.
- [29] Her sleep pattern she said was affected. Although she could fall asleep, noise woke her up and she could not get back to sleep. She became anxious and described a few panic attacks. She started feeling low or had a blue mood.
- [30] Ms. Gill became pregnant after the accident and her twins were born October 30, 2009.

- [31] Headaches, she said, were constant for the first three or four months then went away and came back. She said that they were always there, sometimes throbbing. They became intermittent in April 2009 and then came back about twice a day. These headaches would last an hour or so, she said. Her headaches started to lessen in the summer and went from twice a day to two to four times a week, lasting an hour or two. By the end of the year they were clearing up. Although she could not say when they disappeared, the headaches were largely gone, she said, by the end of 2009 and she only occasionally had them in 2010.
- [32] The plaintiff said she noticed neck pain shortly after the accident which included stiffness in her neck and shoulders. Until the twins were born in October 2009 her neck pain continued and massage made it more painful. Her neck pain continued into 2010 and was present about a third of the days but was not as regular as it had been. By 2011 it was only a couple of times a month that she had neck problems. By 2012 her neck pain was every three or four months and by 2013 there was nothing that she could recall in terms of neck pain.
- [33] After the accident the plaintiff said she suffered tightness in her upper back which she reported to Dr. Matsyk. She thought it was related to her neck pain. Her upper back pain was fairly regular in 2009 and she said about half the time she was aware that it was there. By the end of 2009 and into 2010 she was still seeing a massage therapist, and the tightness was lessening. By 2011 it was further lessening and not as much as before, and in terms of frequency she said her upper back pain was once a week or every two weeks. Ms. Gill said that there was no upper back pain in 2012 or thereafter.
- [34] In terms of low back pain she said it was there three to four times a week and would last for two hours up to October 30, 2009 and then it lessened to two or three times a week. She said she did not have any pregnancy-related low back pain and by 2010 the low back pain was intermittent or occasional. By 2011 she did not have that problem very frequently, and low back pain was not a problem at all after 2012.
- [35] The plaintiff described anxiety coming on a few weeks after the accident, a strong worrying feeling that would stay with her for about an hour. She said it was brought on by her thinking about her head and the fact that an accident of that sort could happen again. She said simply worrying about her memory made her more anxious. She became worried about the safety of her daughters and that someone would hit them. She described a ski trip where she could not go down the hill because she was afraid of hitting her head.
- [36] She also described a blue feeling after the accident. She found her mood was affected four or five times a week and these spells would last an hour or so. She said that she also suffered periods of feeling blue when she was frustrated at being forgetful and not on top of things. She described panic attacks first coming on after the twins were born sometime in 2010 around Thanksgiving. She described them as feeling as if she was having a heart attack; she could not breathe and had to lie down upstairs. She described having eight or nine of these attacks in total, then they stopped and she has had no attacks in 2014 or 2015. She says they would last less than five minutes and there was no rhyme or reason as to when they would

come. Her doctor advised her to breathe and prescribed Ativan for her. The blue feelings she said were worse around the time of the panic attacks but were more sporadic by 2011, lesser in 2012 and occasional by 2013. The plaintiff described floaters or black spots in her vision a week or two after the accident but those had stopped in May 2009.

- [37] One of the more significant issues the plaintiff described following the accident was memory difficulties. As examples, the plaintiff said that she forgot that she had laundry in the dryer, forgot to take her children to piano lessons, and forgot to take her children to swimming lessons. She said she then started to forget doctor's appointments with her general practitioner and appointments with her massage therapist, and forgot that she had left things on the stove, had run a bath, left the iron on, and things like that.
- [38] She said that beginning in 2009 her husband hired someone to help around the house with the laundry. After the twins were born at the end of October she described the same memory issues. She said someone took over the ironing for her but she still found the children's activities challenging.
- [39] The plaintiff described having on a number of occasions missed or been late for appointments and having difficulty in 2009 finding her car parked at a mall.
- [40] She described going to England in 2010 and in the preparation for travel forgot to pack a lot of things. She described that during the first trip they took with the twins to England she packed inappropriate things for airport travel like scissors. She also described meeting people and having difficulty remembering who they were.
- [41] By 2011 she said that she was finding it difficult to find words, such as the specific words she wanted to use in speaking to a teacher. In 2012 she described trouble organizing activities such as swimming, ballet and gymnastics and found herself running late, not knowing how to plan by looking at the time and working backwards. By 2013 she said she was using a daily planner to remember events.
- [42] She testified finding simple things complicated and had difficulty focusing and concentrating. She described falling asleep in movies, something which had not happened before the accident. She described difficulty in focusing and concentrating on helping her children with their math problems and having difficulty reading a book and trying to remember what happened. She said the children stopped asking her for help with their homework and she now reads much less. She says she becomes more emotional as a day goes along.

The plaintiff's treatment

- [43] The plaintiff has generally been under the care of her family doctor, Dr. Matsyk. Dr. Matsyk testified as to her clinical records but did not provide an expert report. Dr. Matsyk also reported on the plaintiff's complaints of memory problems and headaches early after the accident.

- [44] In December 2008 Ms. Gill received massage therapy but initially found the pain was worse. She received physiotherapy and did Pilates for her shoulder and neck pain.
- [45] The plaintiff was referred by Dr. Matsyk to GF Strong Rehabilitation Centre in January 2009, a time when she was suffering from nausea. The plaintiff continued to complain of memory problems to Dr. Matsyk.
- [46] On January 21, 2009, Dr. Matsyk referred the plaintiff for an MRI of her head.
- [47] The plaintiff was referred by Dr. Matsyk to a neurologist, Dr. Woolfenden. Dr. Woolfenden saw the plaintiff on May 4, 2009 and May 9, 2010. He was called by the defendants to testify but not to give expert opinion evidence.
- [48] The plaintiff said she saw Dr. Hunt, a neurological surgeon, on February 26, 2009 because she was on a waiting list to see Dr. Woolfenden and the MRI showed a meningioma, a small non-malignant tumour. The plaintiff was referred to Dr. Hunt by her counsel. She saw Dr. Hunt on three occasions. Dr. Hunt referred her for an x-ray in October 2011.
- [49] Ms. Gill saw Dr. Wild, a psychologist, in March 2010 upon referral from Dr. Hunt. She was seen by Dr. Wild because of her panic attacks. The plaintiff described learning breathing techniques and said that Dr. Wild tried to help her with time management and organization. Dr. Wild's clinical records were marked but Dr. Wild did not testify and no report from Dr. Wild was filed at trial.
- [50] The plaintiff had done yoga for at least 10 years prior to the accident and said that on the recommendation of Dr. Wild she went back to yoga which she enjoyed and found it calmed her mind. She is now a certified yoga instructor, an accreditation she received since the accident. She described needing Tylenol until sometime in 2010 when she started to get into yoga and found she didn't need it after that.

Impact on activities

- [51] The plaintiff was described by her husband as a "Type A" mother. Since the accident she testified that her involvement in all areas of her children's lives has changed. She said she finds herself snapping at her children and has become less involved in all aspects of their activities and learning. The plaintiff described that she now uses a planner and puts notes on doors to remember things.
- [52] The plaintiff said that one of her hobbies that she enjoyed since she was a pre-teenager was baking which she did fairly regularly. Now she says she does it only if her daughter wants to. Prior to the accident, she had been teaching her daughter how to bake.
- [53] In terms of the accident she says it has had an impact on their marital relations. She said her intimacy with her husband has reduced since the twins were born.

PARTIES' POSITIONS ON THE PLAINTIFF'S INJURIES

Plaintiff's position

- [54] The plaintiff's counsel asserts that since the accident Ms. Gill has gone from being a "Type A overachiever" to a very different person.
- [55] Counsel submits that Ms. Gill's health was good prior to the accident. According to her counsel, she suffered the following injuries from the accident: dizziness and balance difficulties, sleeplessness, headaches, memory issues, focus and concentration difficulty, shoulder and neck pain, low back pain, nausea, anxiety and panic attacks, low mood and floaters in her left eye.
- [56] The plaintiff asserts that most significantly, the accident caused a mild traumatic brain injury with ongoing cognitive deficits. The plaintiff says that she has proven on a balance of probabilities that she has sustained a mild traumatic brain injury which will continue to affect her in all aspects of her life.
- [57] Apart from the soft tissue injuries that on her evidence have generally subsided and resolved over time, the plaintiff says that her memory impairment continues and is manifested through her forgetting the children's activities, forgetting to take them to piano lessons, difficulty finding words, forgetting the kids' shoes, and difficulty remembering things for her trips. She says that she has had to develop coping strategies and has required the older daughter's assistance with daily routines.
- [58] The plaintiff's claim is that she is currently experiencing a multitude of cognitive symptoms, that they are permanent and that she is managing only by using coping aids and adaptive mechanisms.
- [59] The plaintiff asserts that these continuing cognitive difficulties impact her vocational and avocational activities. She says that her continuing cognitive difficulties are corroborated by her husband's evidence and by the plaintiff's experts.
- [60] Apart from her claim for non-pecuniary damages which her counsel says should be substantial and in the range of \$200,000, the plaintiff's counsel says that but for the accident she would have returned to work sometime in 2009 and worked full-time until the trial (seven years post-accident), only taking time off for maternity leave for two years. The plaintiff's counsel argues that an appropriate award for past income loss is in the range of about \$245,000 for gross loss of income up to the date of trial.
- [61] As to diminishment of earning capacity or loss of future earning capacity, the plaintiff says that if the accident had not occurred, she would have returned to her job as a family justice counsellor and likely worked outside the home until she was 65. Her counsel asserts that the earnings approach is the best measure of her impaired capacity and that an award in the sum of \$500,000 is appropriate in all the circumstances.

Defendants' position

- [62] The defendants argue that the evidence does not support that the plaintiff suffered a mild traumatic brain injury. The defendants say that if she did it was on the minor side. A key argument of the defendants is that the essential parts of the plaintiff's history upon which the plaintiff's experts relied to conclude that there was a mild traumatic brain injury were not supported by the plaintiff's evidence at trial.
- [63] The defendants challenge whether some of the plaintiff's symptoms arose as a result of the accident and argue that if they exist, that they must be attributable to some other cause.
- [64] The defendants point out that apart from Dr. Hunt, who they assert offered no diagnosis, none of the specialists called by the plaintiff were treating doctors or saw her within two years of the accident and none have seen her in the past year.
- [65] The defendants say that the plaintiff's damages should be assessed on the basis that her injuries were mild soft tissue injuries that resolved within about six months with an anxiety overlay. The defendants dispute that she suffered a concussion but says that if she did, she has recovered. The defendants say that none of the treating physicians indicated any concern about the plaintiff's cognitive abilities and if there are any continuing cognitive problems, which the defendants dispute, the defendants say that they are not caused by the accident.
- [66] The defendants say the award for non-pecuniary damages should be \$20,000 to compensate for six months of soft tissue injury or between \$40,000 - \$60,000 if I find there was a mild concussion.
- [67] The defendants' position is that the plaintiff has not suffered any loss of capacity, past or future, and that the evidence does not disclose that the plaintiff around the time of the accident intended to return to her employment with the government.

NATURE AND EXTENT OF THE PLAINTIFF'S INJURIES

Has the plaintiff proven that she suffered a minor traumatic brain injury caused by the accident and that there are ongoing consequences?

- [68] The central issue in this case is whether the plaintiff suffered a mild traumatic brain injury in the accident and if so whether there are ongoing consequences of that injury at the time of the trial.
- [69] In this case, there is no scan or MRI that shows injury to the plaintiff's brain. However, it is well-accepted that even without that type of evidence, there can be a mild traumatic brain injury with significant consequences.

- [70] As to the requirements for a diagnosis of a mild traumatic brain injury, there does not appear to be any dispute among the experts who testified at trial. According to the American Congress of Rehabilitation Medicine ("ACRM") definition, a mild traumatic brain injury is suffered by a person who has had a traumatically-induced physiological disruption of brain function as manifested by at least one of the following:
1. any period of loss of consciousness;
 2. any loss of memory for events immediately before or after the accident;
 3. any alteration in mental state at the time of the accident (e.g. feeling dazed, disoriented or confused).
- [71] A number of experts were called by the plaintiff - Dr. Donald Cameron, a neurologist; Dr. Michael Vondette, a physiatrist; Dr. Hunt, a neurosurgeon; and Dr. Shaohua Lu, a psychiatrist - and they, including Dr. Alister Prout, the defendants' neurological expert, all accepted and adopted the ACRM definition as the medical criteria for diagnosing a minor traumatic brain injury.
- [72] Each of the plaintiff's four experts was engaged to provide opinions to the plaintiff's counsel for this litigation. Their opinions, which I will discuss, were all to the effect that the plaintiff suffered a mild traumatic brain injury in the accident.
- [73] Dr. Brian Hunt, a neurological surgeon, saw Ms. Gill on February 26, 2009, March 1, 2010 and May 25, 2012. In his first report, he opined that "she was diagnosed with and advised that she suffered a cerebral concussion or mild traumatic brain injury" as well as muscle and ligamentous injuries to her neck and lower back. He reassured her that a small abnormality identified on an MRI was a benign lesion called a meningioma. In his second and third reports Dr. Hunt confirmed his opinion that Ms. Gill had suffered a mild traumatic brain injury at the time of the accident. Dr. Hunt referred the plaintiff to Dr. Wild, a psychologist, apparently because of anxiety that she was suffering. Dr. Wild's clinical records were produced but she did not testify at trial.
- [74] Dr. Lu, a psychiatrist, saw Ms. Gill on June 14, 2012. Dr. Lu recorded that Ms. Gill reported a loss of consciousness in the motor vehicle accident and that she believes she struck her head on the window. She noted that "brief alteration in level of consciousness following physical trauma to the head is generally known as a concussion or a mild traumatic brain injury".
- [75] Dr. Vondette, a physiatrist, saw the plaintiff about three years after the accident on June 18, 2012. Dr. Vondette noted that there was a duration of post-traumatic amnesia, appearing to have been brief although he said that this possibly could have lasted as long as several hours or even longer since the plaintiff was not sure whether she went home first or was taken directly to a walk-in clinic which occurred nearly five hours after the accident. He said that her continuous memory for events occurring immediately after regaining awareness may have been patchy. Dr. Vondette explained the reference to no loss of consciousness in the initial reports to Dr. Rubin (at the drop-in clinic) and Dr. Matsyk (a week later) and said at p.

9:

In respect to "loss of consciousness" (i.e., "LOC") it was concluded by Dr. Rubin on December 3, 2008 and subsequently by Dr. Joanna Matsyk (Ms. Gill's regular family physician) that there had been "no LOC". However, in light of what I was able to learn from Ms. Gill from detailed questioning, and also from reviewing the accounts set out by Ms. Rose, Dr. Woolfenden and Dr. Brian Hunt (neurosurgeon) concerning this matter, it is my opinion that Ms. Gill indeed did sustain LOC or, alternatively, "lowered level of arousal". In support of this conclusion, one notes that Ms. Rose (the occupational therapist) wrote that Ms. Gill's "last memory before the MVC" (i.e., motor vehicle collision) was "starting through the intersection", her "next memory" having been "shocked and overwhelmed" (this indicating that there was "missing memory" involving the collision between her head and her vehicle). Additionally Dr. Woolfenden wrote that Ms. Gill "did not recall specifically hitting her head on the windshield", it otherwise being indicated that she had struck her head and that her left temple region had been "sore", there also being "a mark on it". Dr. Hunt wrote that just prior to the collision Ms. Gill recalled "a big thing coming at" her out of the corner of her eye, it being said that what she "next remembers" was "alighting from the car", feeling "in a daze", feeling "shocked" and "clutching" her "left frontal head", where there was a "red mark". Ms. Gill specifically had told me "I don't remember actually hitting my head", which she "grabbed" immediately following the collision, Ms. Gill explaining also "It felt like it was bleeding". It accordingly is my opinion that Ms. Gill did experience a brief period of loss of consciousness.

[76] Dr. Cameron, a neurologist, saw the plaintiff more than three years after the accident on June 11, 2012 and then again on August 13, 2014. Dr. Cameron said:

Following my neurological assessment of Ms. Vanessa Gill and following my review of the medical records and clinical documents, it is my opinion that Ms. Gill probably did suffer an altered state of consciousness or brief loss of consciousness at the time of the motor vehicle accident of December 3, 2008. She does recall the initial noise of the impact but then she does not recall striking her head on the side window or side window sill at the time of the impact. Her first recall after the accident is realizing that there were voices at the door at the scene of the accident.

[77] Dr. Cameron continued:

Based on this clinical history is my opinion that Ms. Gill probably suffered a mild traumatic brain injury or concussion at the time of this motor vehicle accident. Almost immediately following the accident Ms. Gill has complained of headaches, dizziness, nausea, vomiting and a foggy feeling in her head. She subsequently over the next couple of weeks noticed problems with short-term memory, decreased concentration, decreased attention span, recurrent dizziness, headaches, sleep disturbance pattern, decreased libido, anxiety, irritability, mood swings and anger outbursts.

[78] The experts called by the plaintiff discussed her complaints of headaches, dizziness, nausea, vomiting and cognitive difficulties. These symptoms, the evidence suggests, can occur as a result of a brain injury. However, the defendants say that if she has suffered these difficulties they are not the product of the injury from the accident, or if they are, that they have long since resolved.

[79] Let me turn to the expert evidence called by the defendants.

[80] Dr. Prout, a neurologist, saw the plaintiff on May 8, 2012. He opined that "there is not sufficient evidence to diagnose Ms. Gill has suffered from a concussion or mild traumatic brain injury as a result of the December 3, 2008 accident." He was the only expert to opine that she did not suffer a brain injury. He said this despite the fact that he said she did likely strike the left side of her head against the window in the accident. He said that this does not appear to have resulted in a loss of recollection of the events surrounding the accident and in his opinion has not resulted in any degree of brain injury. He explained that in his opinion her post-accident cognitive difficulties were explained by her anxiety and depressed mood. He did not consider her description of having "blacked out" in the accident to be sufficient to support any degree of brain injury particularly as he said she did not appear to have any loss of recollection for events surrounding the accident.

[81] Dr. Kevin Solomons, a psychiatrist called by the defendants, testified that the plaintiff probably had a concussion that resolved itself within a few months after the accident. He saw the plaintiff on June 4, 2012. He noted that the plaintiff told him that she struck her head in the accident and lost consciousness although she was not sure for how long. He opined that:

She sustained soft tissue injuries. The relevant physical medicine experts are best placed to comment on the nature of the injuries that she suffered in this accident as well as any symptoms that arose from these injuries, the course of these symptoms, her treatment, prognosis and any question of disability arising from these injuries.

She struck her head in the accident. She did not lose consciousness and had no retrograde amnesia. She described a brief period of discontinuous memory immediately after the accident that was probably due largely to the shock of the accident and the bustle that followed it. The doctor who saw her soon after the accident diagnosed her with a head injury and concussion. She experienced post-concussive symptoms, which as indicated by both her history and the medical records, resolved a few months after the accident, except for her cognitive complaints, which have persisted until the present.

Neurocognitive screening tests have shown normal cognitive function. She has recently undergone more detailed neurocognitive testing, but the results of these tests are not yet available. The normal course of post-concussive symptoms is to resolve spontaneously over time, and it is unusual for cognitive symptoms to persist unchanged, particularly when the other post-concussive symptoms remit.

In my opinion, she likely suffered a closed-head injury with a mild traumatic brain injury, or concussion, in the accident. Her post-concussive symptoms remitted spontaneously within a few months of the accident, as is typical of the course of concussion.

Her subjective experience of persisting cognitive complaints is, in my view, not attributable to the concussion. It is more likely a function of the stresses of being a mother to four young children, including a set of twins. In my opinion, she has not been left with lasting neurocognitive impairments or disabilities as a result of the injuries that she sustained in the accident.

She experienced anxiety after the accident that was likely attributable to a combination of the post-concussive syndrome and a reaction to the accident. The nature of these anxieties did not conform to any particular Anxiety Disorder in the DSM-1V-TR (Diagnostic and Statistical Manual 4th Edition Text Revision). These anxieties settled, especially after a short course of counselling with the psychologist Dr. Wild.

[82] Dr. Solomons also agreed that the widely accepted criteria for a mild traumatic brain injury includes any loss of memory for events immediately before or after the accident and any alteration in mental state at the time of the accident (e.g., feeling dazed, disoriented, or confused).

Discussion

[83] Apart from her soft tissue injuries which I will summarize below and from which the plaintiff has now recovered, the key question is whether the plaintiff suffered a mild traumatic brain injury, and if so, what symptoms she suffers from as a result and whether they persist.

[84] There is no dispute that the plaintiff struck her head in the accident. The question is whether there was loss of consciousness, loss of memory, or any alteration in mental state at the time of the accident sufficient to support a diagnosis of a mild traumatic brain injury. The diagnosis of a mild traumatic brain injury, the evidence shows, depends in large part in this case on an assessment of the plaintiff's mental state in and following the accident. The evidence of that mental state in this case appears in the plaintiff's recollection and description and her reporting of whether there was any loss of consciousness or any alteration in mental state at the time of the accident (e.g. feeling dazed, disoriented or confused).

[85] The plaintiff's counsel argues that the medical evidence supports the fact that symptoms that the plaintiff suffered following the accident such as nausea, headaches, confusion, anxiety and memory problems are consistent with a concussion or a mild traumatic brain injury.

- [86] The plaintiff's counsel argues that Ms. Gill sustained a mild traumatic brain injury with ongoing cognitive difficulties. He refers to the totality of the evidence, not just the reporting of the level of disorientation in the immediate aftermath of the accident. He refers to the evidence of real-life functional challenges corroborated by her husband, her family doctor, and a care-worker, Ms. Shahabi, arguing that these are a better indicator of her functional limitations from her head injury than neuropsychological testing.
- [87] Symptoms of memory loss and anxiety can, the evidence shows, be caused by a mild traumatic brain injury, but the evidence also shows that the subjective experience of cognitive difficulties can be the function of stresses from being a parent to four children.
- [88] Because the plaintiff's medical expert evidence relies significantly on the reporting by the plaintiff, it is important to review that evidence. This is particularly so as the defendants challenge the fact that there was sufficient interruption or alteration in mental state such as feeling dazed, disoriented or confused to support a diagnosis of a mild traumatic brain injury.
- [89] Notwithstanding some inconsistencies regarding her reporting, the plaintiff's counsel says that at a minimum the plaintiff has established an alteration in her mental state at the time of the accident which is the factual foundation on which the diagnosis of mild traumatic brain injury is properly based. The defendants' expert who opined that there was a mild traumatic brain injury or concussion that remitted spontaneously described a period of discontinuous memory that he attributed to the shock of the accident and the bustle that followed it.
- [90] The experts in providing their opinions must rely on evidence about the plaintiff's mental state in and around the time of the accident, including the description provided by the plaintiff and the evidence of her husband as to her state of mind. The weight to be attached to the opinion evidence of an expert witness that the plaintiff suffered a mild traumatic brain injury depends on the proof of the underlying facts and assumptions upon which those opinions were based. Without a factual foundation, an expert opinion may be given little or no weight: *R. v. Abbey*, [1982] 2 S.C.R. 24.
- [91] Expert witnesses regularly testify based on reports to them from other persons. An expert opinion may contain hearsay evidence; however the weight to be attached to the expert's opinion depends on the proof of the underlying facts and assumptions upon which that opinion was based. In *Mazur v. Lucas*, 2010 BCCA 472, the Court of Appeal summarized some principles governing the admissibility of expert reports containing hearsay evidence which included these points:

- The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.
- The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

[Emphasis added.]

[92] In this part of the judgment, I will review the evidence of the plaintiff as to her mental state at the time of the accident and the evidence of her husband who attended shortly after, the early report to the insurance corporation, her early reports to doctors, and her reports over time to various expert witnesses.

The plaintiff's evidence

- [93] Mr. Gill took his wife shortly after the accident to a walk-in clinic at Park Royal where she was seen by Dr. Mitchell Rubin, a family physician. Ms. Gill saw him about three hours after the accident. It was recorded in the clinical records of Dr. Rubin that she had "zero LOC". Dr. Rubin's clinical records indicate that she hit (her) head on window and has a headache since the accident.
- [94] Ms. Gill testified at trial that she had no reason to think that Dr. Rubin was wrong in his observation that she was at 1:48 p.m. the day of accident, "o/e alert" during the visit.
- [95] However the evidence of Ms. Gill and her husband Mr. Gill on their visit to Dr. Rubin that day was to this effect: her recollection of the meeting with Dr. Rubin she said was unclear, but she agreed he did examine her head. Ms. Gill does not recall saying to Dr. Rubin that she had no loss of consciousness as noted in his clinical records but agreed on cross-examination that she or her husband probably said that. She said that if Dr. Rubin had asked her if she suffered a loss of consciousness, she would have answered no because she does not recall anyone waking her up.

The call reporting the accident to ICBC

- [96] Prior to her visit to Dr. Rubin, the plaintiff caused the accident to be reported to ICBC. I use the phrase caused to be reported because it is in issue whether the plaintiff reported the accident, or her husband did on her behalf, and who spoke to the insurance corporation when the report was made.

- [97] The telephone statement to ICBC recorded "at the time of the impact I hit the left side of my head to the driver window". There is no doubt that the plaintiff struck her head on the side of the car in the accident. One aspect of the issue of whether she suffered a mild traumatic brain injury is her memory of the accident. The significance of this is that the plaintiff did not recall striking her head when she testified and she reported not remembering striking her head at least to Dr. Cameron and Dr. Woolfenden. The report to ICBC when she states that she struck her head purports to be a statement of Ms. Gill taken over the phone but it is not signed; it goes on to say "A witness asked me if I needed an ambulance but I said no because I was not bleeding .I have a quite bad headache right now and it has not gone away."
- [98] The plaintiff testified she did not now recall the telephone call and suggested that her husband may have provided the information on the call to ICBC that she had hit her head.
- [99] Although at trial Ms. Gill said she could not recall whether she or her husband had called ICBC shortly after the accident, she appeared to remember the call during her examination for discovery in 2011, about two and a half years after the accident, and at that time did not indicate needing any assistance from her husband.
- [100] Tracy Lee, the ICBC adjuster, testified that she did not specifically recall the call but testified that in accordance with her normal practice, she would not have accepted any information from Mr. Gill to form the basis of the statement. She testified that if Ms. Gill had been incapable of providing the statement she would have advised Ms. Gill to call her back later. I find on a balance of probabilities that Ms. Gill probably spoke directly to Ms. Lee by phone and gave the statement, although I expect the plaintiff's husband placed the call.
- [101] Although the question of diagnosing a mild traumatic brain injury is whether the plaintiff's mental state was disrupted at the time of the collision, one aspect of that mental state issue is whether the plaintiff did or did not remember striking her head on the side panel or side window. Clearly she struck her head. At trial she testified that she could not remember striking her head on the window but thinks she did, but on discovery she answered "I remember hearing this incredible noise and hitting my head on the side of the car" and agreed that answer was true. She added on her discovery that she thinks she blacked out for a few seconds.

The plaintiff's husband at the scene

- [102] At trial the plaintiff indicated that she was not sure what happened immediately after impact and the first thing she remembered was someone saying "don't get out of the car" or "don't touch the door" and she testified she was thinking "where am I?" She said that she could not account for how much time passed and she heard someone say get the cars out of the intersection and that she must have moved the car out of the intersection.

- [103] On cross-examination at trial she indicated that she felt dazed and confused after the accident and was not aware of what was going on after the accident.
- [104] The plaintiff's husband described her at the scene as distressed and teary. She had trouble giving him the location. He testified that she seemed disoriented and distraught, and had trouble putting a string of events or sentences together. He got his car, drove her to their home on the North Shore and told her she had to be seen by the family doctor. He said he dialed the ICBC claim line and that she was in the background for that call.
- [105] Although Mr. Gill described his wife as disoriented at the scene, the evidence is that he attended with her at the doctor's a few hours later and Dr. Rubin recorded no loss of consciousness and reported that the patient was alert, even though Mr. Gill in his evidence indicated her disorientation continued. The defendants' counsel points out that when the plaintiff was seen by Dr. Hunt in February 2009 Mr. Gill did not provide this additional information that she was disoriented at the site. Mr. Gill said he was not sure if he was asked or if it was brought up by Dr. Hunt.

The plaintiff's evidence about her mental condition following the day of the accident

- [106] Ms. Gill reported that the next day her head was very painful and she woke up with a throbbing, pulsing headache. She went to see Dr. Matsyk on December 12, 2008. She reported that she had a pain on the left side of her head and headaches, and may have had a cut on the left side. Her doctor recommended that she take Tylenol and ibuprofen and rest, and to come back and see her.
- [107] Dr. Matsyk's clinical record indicated that the plaintiff suffered no loss of consciousness in the accident; that she had pain in her head and headaches. Dr. Matsyk was not called to give opinion evidence but testified and explained her clinical records. She said that her practice is that when a patient suffers a head injury she will ask if there was a loss of consciousness, even transient. She said that her typical approach at the first visit after an accident is to ask her patients what their immediate symptoms were right at the time of the accident and then go on to ask them what the symptoms have been since the time of the accident.
- [108] The plaintiff at trial described being unaware of what occurred in the car and has used the phrase "blackout" to describe her condition. However, a week following the accident, on their first meeting, the plaintiff did not tell Dr. Matsyk that she had blacked out or had a period of missing recollection.
- [109] The plaintiff did describe to Dr. Matsyk memory issues starting shortly after the accident, and complained of decreased concentration and memory.
- [110] On her next visit to Dr. Matsyk on December 17, 2008 the plaintiff complained of mood concerns such as irritability, anger, sadness, anxiety, tearfulness and frequent daily headaches, but no nausea.

- [111] Ms. Gill, in addition to not recalling the statement to ICBC, said that she did not recall the appointment with Dr. Matsyk. She testified she did not recall telling Dr. Matsyk that she had no immediate loss of consciousness.

Expert evidence

- [112] The plaintiff's counsel says that the evidence of the experts called by the plaintiff should be accepted and that it establishes that she suffered a mild traumatic brain injury with permanent consequences.
- [113] The defendants on the other hand say that the assumptions and facts upon which the plaintiff's experts have relied in diagnosing a mild traumatic brain injury have not been proven.
- [114] The defendants say that Ms. Gill's reports to her expert witnesses are inconsistent with the evidence that she gave immediately after the accident to her physician and to ICBC.
- [115] The defendants say that the information provided to Dr. Rubin at the walk-in clinic the day of the accident accords with the information provided to Dr. Matsyk one week later, as Dr. Matsyk testified that she always asks her patients further questions including whether there was even a "transient" loss of consciousness. The defendants say that this contradicts the evidence of the plaintiff and her husband as to her mental state at the time of the accident and their evidence in that respect should not be accepted. The defendants say that the evidence of the plaintiff and her husband about their recollection of the reports on the day of the accident is not reliable and I should find that, consistent with the text of the report to ICBC, the statement was made by the plaintiff, not her husband.
- [116] The evidence that appears to be important to the experts is the evidence of at least mental disturbance or memory difficulty concerning the circumstances at the time of the accident. If the plaintiff lost consciousness, blacked out or had a memory disturbance or incomplete memory, such evidence would appear to support the opinions of the plaintiff's experts. If the plaintiff was dazed or confused at the time of the accident, that as well might satisfy the definition of a mild traumatic brain injury.
- [117] Although the evidence of the plaintiff at trial would appear to support the experts' conclusions, the evidence of her initial reports, her apparent immediate report to ICBC, and her report to her doctor the day of the accident and within that week, put that evidence in issue.
- [118] This issue is significant to the weight I attach to the evidence of the experts.
- [119] The following important assumptions, or reports from the plaintiff, appear in the expert reports:
- The assumption of Dr. Hunt that "there was a transient loss of awareness of an undetermined length of time immediately following the collision";

- The facts and assumptions in Dr. Lu's report that "Ms. Gill reported loss of consciousness in the December 3, 2008 motor vehicle accident (MVA). She believes that her head struck the window of the car";
- The plaintiff's statement to Dr. Vondette that "there was this big smashing sound. I don't remember actually hitting my head. I grabbed my head. It felt like it was bleeding. It was a strange feeling. I'm not sure how long I was unconscious. Probably about five seconds, then I realized I'd hit my head"
- The opinion of Dr. Cameron that "Ms. Gill probably did suffer an altered state of consciousness or brief loss of consciousness at the time of the motor vehicle accident. ... Her first recall after the accident is realizing that there were voices at the door at the scene of the accident."

[120] Those assumptions are important to the opinions of the plaintiff's experts but they are not consistent with the plaintiff's reporting after the accident that she did not suffer a loss of consciousness and there was not an immediate reporting of a memory gap during the accident. The defendants also say that the report the plaintiff gave to her experts is also different from her report to others such as Dr. Woolfenden. The defendants say that this was a more detailed report than any taken by the plaintiff's experts and indicates that she had a good memory of the accident. Dr. Woolfenden, the plaintiff's treating neurologist, reported to Dr. Matsyk on May 10, 2009, several months after the accident:

She recalled her body jolting back and forth, although did not recall specifically hitting her head on the windshield. She remembered glass breaking during the accident. She remembers that she decided she had to move from the intersection so she drove forward about a foot or so to get out of the way. Some bystanders told her that there was a problem with one of her wheels. She next was able to get out of the car on her own.

Dr. Woolfenden agreed on cross-examination that there were some errors in the letter, one example being that his notes said jostled rather than jolted. I however did not find the errors to be of particular significance to the history he took and described.

[121] Is there an explanation why the plaintiff, as I find, apparently reported no loss of consciousness initially to Dr. Rubin and Dr. Matsyk and at least did not mention a loss of consciousness in the telephone report, but later by the time of the discovery had a belief that she blacked out during the accident? I think that if the plaintiff had felt she was unconscious or had blacked out for a period of time, even briefly, she would have likely reported that to Dr. Rubin, to the insurance company or to Dr. Matsyk on her first visit.

[122] Based on a consideration of all of the evidence, I find that at the time of the accident, the plaintiff was aware that she struck her head; she felt that she had suffered no loss of consciousness nor did she black out. I find that as time has gone on the plaintiff is consciously or unconsciously reconstructing events at the time of the collision in a way that supports a brain injury being the cause of some of her continuing difficulties, as it appears she appreciates the significance of being unconscious or blacking out to the determination

of whether and the extent to which she suffered a mild traumatic brain injury.

[123] I think that her initial reports to her doctors about whether she suffered a loss of consciousness, even a transient one, are a more accurate recollection than her description much after the event. As a result I accord less weight to the plaintiff's experts' opinions that she suffered a mild traumatic brain injury with ongoing problems.

[124] However, the diagnosis of a mild traumatic brain injury does not rest on a finding of a period of unconsciousness or that the plaintiff blacked out after suffering a head injury. A person may suffer a mild traumatic brain injury as a result of a head injury if the collision causes an alteration of her mental state such as being dazed, disoriented or confused.

Are there ongoing cognitive issues and the significance of any testing?

[125] The soft tissue injuries suffered by the plaintiff have now resolved. The evidence suggests that although the large majority of patients suffering from mild traumatic brain injuries recover, there is a group of about 10-15% who have ongoing memory and cognitive problems. If the plaintiff suffered a mild traumatic brain injury, as her counsel suggests, he says the evidence shows that she is in that group where her symptoms, in her case, cognitive difficulties, will essentially be permanent.

[126] The plaintiff claims that as a result of her injuries in the accident she has ongoing cognitive difficulties. The defendants say that there are other explanations such as the stress in managing a hectic home, but an initial question is whether the plaintiff has demonstrated that she suffers ongoing cognitive difficulties.

What is the evidence in support of ongoing cognitive difficulties?

[127] The plaintiff relies on her description of ongoing cognitive difficulties and the observations of her husband.

[128] The plaintiff reported memory issues and concentration issues to Dr. Matsyk during her first visit on December 12, 2008. Over time the plaintiff described forgetting children's activities and lunches. She described a foggy state when reading or looking at things. She says she missed or was late with her appointments a couple of times. She described cooking and household management issues. She said she had to pull her daughter out of ballet because she was not making the appointments due to her memory. She said that her memory problems made packing difficult and where she was organized before she now has to make lists. She described difficulty recognizing faces and, in 2011, described difficulty finding words. She described her memory issues as creating problems of organization of her children and family and her schedule. Examples were forgetting to register her children in activities, forgetting birthdays and other special occasions, forgetting where she parked her car, forgetting why she was doing things, and falling asleep in movies. She also described these as problems with focus and concentration. She described not recalling what she had read and becoming fatigued.

- [129] Her husband testified that his wife was a planner, an achiever and a systematic "Type A" person who brought those skills to her parenting and to her work as a family counsellor. As to managing the house, he described her as "completely competent" and stated that she did all the cooking, cleaning, pickups and planning. She was largely responsible for the domestic side of their busy family and undertook these tasks without housekeeper assistance.
- [130] He testified that shortly after the accident she indicated that she did not feel her memory was the same. He described her as not being on top of things and recounted such things as her disorganization, forgetting tasks and where she left her car, and said that she was now weaker at card and scrabble games and her scores in these games dropped off significantly. He said she became frustrated more easily and had developed a shortened temper. She began to call him frequently at work. He found her ability to multi-task diminished. He said that with his need to devote more time at home to the household his billable hours decreased. He then left his firm and worked out of his home as well as a downtown office where he now works most of the time.

What is the expert evidence that supports the plaintiff's claim of any ongoing cognitive difficulties, and whether they were caused by the car accident?

- [131] According to his records, when the plaintiff first saw Dr. Woolfenden in May 2009, her cognitive problems had improved and were quite a bit better, something I understood her to disagree with, but in May 2010 he reported that she felt that her cognitive problems had worsened from when she saw him a year earlier in May 2009.
- [132] Dr. Cameron, a neurologist, noted that patients improve up to approximately two years following a physical injury with traumatic brain injury. He also indicated that any residual cognitive complaints due to the original mild traumatic brain injury would have maximized with respect to the degree of improvement approximately two years following the date of the motor vehicle accident and after that he did not anticipate the ongoing cognitive problems would improve to any further degree. He noted that:

Ms. Gill continues to suffer from ongoing cognitive problems. It is my opinion that these kinds of problems are predominantly resultant from the original mild traumatic brain injury that she sustained at the time of this accident, and that these cognitive problems are probably permanent in nature.

- [133] As to medical or psychological evidence, the evidence suggests that some testing is available to demonstrate the level of any cognitive deficits. However, the evidence of testing in this case was very limited.
- [134] Dr. Hunt and Dr. Lu did not do any cognitive testing. Dr. Woolfenden did some in 2009 and 2010, and Dr. Vondette and Dr. Cameron did some. The defendants' experts did not do cognitive testing.

- [135] One test that was used by a number of the doctors is called the Montreal Cognitive Assessment "MoCA" test. It is a simple screening test marked out of 30. The evidence suggests that the "normal range" is about 26-30. However it is not a particularly sophisticated or precise test. Dr. Woolfenden, the plaintiff's treating neurologist, saw her in May 2009 and May 2010 and when he administered the MoCA test she scored 29 out of 30 in May 2009, and 30 out of 30 in May 2010.
- [136] In 2012 Dr. Cameron's neurological exam and testing of the plaintiff was normal except that on testing of delayed recall she correctly identified only 1/3 items after five minutes and with reinforcement was able to recall the second and third items. He agreed that in 2010 Dr. Woolfenden had administered the Montreal Cognitive Assessment and scored 30/30 but said that the MoCA test is for dementia and is not sensitive to assessing mild traumatic brain damage.
- [137] Although the defendants argue that the testing that has been done and introduced in evidence in the trial shows normal cognitive function, the plaintiff disagrees. The plaintiff's counsel refers to the evidence of Dr. Vondette who said:

It is my opinion, in keeping with all the earlier results obtained on the mental status examinations conducted by Drs. Matsyk and Woolfenden and also by Ms. Rose, that Ms. Gill currently still is not able to obtain a 30/30 score on mental status examination, the key area of deficiency being demonstrated currently in keeping with what was demonstrated on earlier mental status examinations, namely short term memory.

- [138] Dr. Vondette overlooked a test by Dr. Woolfenden in 2010 where the plaintiff scored 30/30 on the MoCA test, a result that Dr. Vondette apparently had in his possession. Overall, I found Dr. Vondette to act as an advocate for the plaintiff's position. I allowed Dr. Vondette's report in evidence, over an objection before he testified that it was advocacy. I ruled that it was admissible but the objection went to the question of weight. Nevertheless, after hearing his evidence I found a strong element of advocacy in his evidence (as well as his report) that affects the weight to be given to his opinion. I do not place weight on the opinion of Dr. Vondette on the significance of the cognitive testing that was done.
- [139] An interesting issue in argument was whether neuropsychological testing as opposed to the specific real-life circumstances and functional challenges of the plaintiff is the better measure of whether there are persisting effects of a minor traumatic brain injury. The plaintiff points to the evidence of Dr. Hunt and Dr. Lu about the limits of neuropsychological testing and cognitive testing in what are described as high-functioning individuals such as the plaintiff because as Dr. Lu pointed out, neuropsychological testing for most measures does not evaluate personality change, irritability and so forth. Dr. Hunt indicated that neuro-psychological testing does not match the day to day stresses in the home or workplace.

[140] I appreciate that a diagnosis of cognitive problems associated with mild traumatic brain injury is a clinical diagnosis based on a number of factors and cognitive testing is only one of them. The evidence of cognitive testing in this case does not support continuing cognitive difficulties.

Possible adverse inference

[141] The defendants say the failure to call evidence from Dr. Schmidt, a neuropsychologist, who saw the plaintiff and administered testing, should lead to an adverse inference that his evidence would not support the plaintiff's case.

[142] The defendants also argue that I should draw an adverse inference from the failure of the plaintiff to call Dr. Matsyk, the treating general practitioner, and Dr. Wild, a psychologist, as experts.

[143] I will deal with the issue of Dr. Schmidt first.

[144] According to the evidence, the plaintiff was sent to Dr. Schmidt, a neuropsychologist, for testing and testing was done but no report was produced by the plaintiff and Dr. Schmidt was not called.

[145] The defendants say that the evidence is that neuropsychological testing while not diagnostic provides evidence of whether a person is suffering from cognitive deficits. The defendants' argument is that an inference should be drawn that the plaintiff was not suffering from any cognitive deficits at the time she was tested by Dr. Schmidt over an afternoon in his office in Langley.

[146] The leading authority on drawing adverse inferences from the failure to call a witness is *Buksh v. Miles*, 2008 BCCA 318.

[31] The general proposition long applied in British Columbia, stated by Mr. Justice Davey in *Barker v. McQuahe* (1964), 49 W.W.R. 685 (B.C.C.A.), is that an inference adverse to a litigant may be drawn if, without sufficient explanation, that litigant fails to call a witness who might be expected to give supporting evidence. Further, said Mr. Justice Davey at 689, a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so".

[32] It seems to me that the tactic of asking for an adverse inference is much over-used in today's legal environment, and requires, at the least, a threshold examination by the trial judge before such an instruction is given to the jury.

...

[35] [the] threshold question that must be addressed before the instruction on adverse inferences is given to the jury: whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the

circumstances of the trial (e.g., an initial agreement to introduce clinical records that work contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side) a juror could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case. Where, as here, the trial started on the basis that all records should be before the jury, and ended with a request for an instruction on adverse inferences, and when both counsel have explained the failure to call the witness or witnesses by referring to their own assessment of the utility or need for the evidence, the answer to the threshold question I have stated is not self-evidently affirmative. In this case, in my view, the judge herself should have heard the explanations, considered the degree of disclosure of that witness's files and the extent of contact between the party and the physician, received submissions and determined whether a reasonable juror could draw the inference sought before giving the instruction to the jury for its consideration in its fact finding role. If not, the instruction had no place in her charge to the jury.

- [147] Adverse inferences have not been drawn where the family doctor's clinical records were fully disclosed and admitted into evidence at the trial and the witness was interviewed by counsel for both parties prior to the trial: *Sidhu v. Johal*, 2012 BCSC 587. In the case at bar, a report on the results of Dr. Schmidt's testing was not produced and was not available to the defendants to tender in evidence.
- [148] The plaintiff's counsel says this case is distinguishable from a decision of Justice Kelleher called *Roussin v. Bouzenad*, 2005 BCSC 1719, where an adverse inference was drawn that the plaintiff would likely have been shown from the tests that were not presented to the court to have some employment capacity. The difference the plaintiff's counsel points to is that in the case at bar the plaintiff's partial capacity to earn income is conceded.
- [149] Here the question of whether the plaintiff has any ongoing cognitive deficits is an important issue in this trial. The testing in evidence does not itself support the plaintiff's case.
- [150] The plaintiff argues that neuropsychological testing is of limited value in this case compared to real life functional challenges. The plaintiff points to the evidence of Dr. Hunt and Dr. Lu that neuropsychological tests and cognitive testing can be normal in high-functioning individuals with cognitive deficits. I have taken that into consideration.
- [151] The plaintiff's counsel says that an adverse inference is not appropriate because the results of neuropsychological tests must be weighed with caution. He argues that the Court should examine how the plaintiff has performed since the injuries, and how she has marshalled her resources to overcome deficits, because those things are more valid, particularly with high-functioning individuals, than neuropsychological testing might be.

- [152] I appreciate that neuropsychological testing may only be one factor and in some cases may not be a significant or a determining factor in ascertaining whether there are ongoing consequences of a mild traumatic brain injury.
- [153] Nevertheless, I have concluded that it is appropriate in all of the circumstances to draw an adverse inference that Dr. Schmidt's testing would not have supported her case that she had cognitive difficulties at the time she was tested.
- [154] On the other hand I have concluded that it is not appropriate to draw an adverse inference from the failure to call Dr. Wild as I think that there was a reasonable explanation for her not being called due to her availability. I also do not draw an adverse inference from the plaintiff not calling Dr. Matsyk as an expert given that her clinical records were produced and the defendants could have requested a report from her if they wanted to tender her evidence.

Significance of lay as opposed to expert evidence

- [155] The evidence in support of the plaintiff's case that she suffered a mild traumatic brain injury that has had and continues to have an impact on her cognitively and emotionally comes from the evidence of the plaintiff and her husband.
- [156] As noted in the report of Dr. Cameron, the plaintiff's complaints of dizziness, headaches, foggy, short-term memory problems, decreased concentration, anxiety, irritability, anger outbursts and decreased libido can be symptoms that are part of mild traumatic brain injury. Dr. Cameron was of the view that the above mentioned symptoms are diagnostic of post-concussion syndrome.
- [157] In terms of non-pecuniary damages, the evidence of the plaintiff and her husband is relevant to the nature and extent of the plaintiff's injuries, particularly the immediate effect of the collision on her mental state and the impact of the soft tissue injuries over time as well as the alleged ongoing cognitive, organizational, emotional and memory impacts.
- [158] In assessing the credibility and reliability of the evidence, the question often asked is whether it is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the circumstances: O'Halloran JA in *Faryna v. Chorny* [1951] B.C.J. No. 152, [1952] 4 W.W.R. 171 at 174 (B.C.C.A.).
- [159] The plaintiff does not need to call witnesses to corroborate her case but in this case the only other witness who testified as to the effect of the injuries on the plaintiff was her husband. Although most of her observations and her husband's were not contradicted, or successfully cross-examined about, I find that in the circumstances of this case I must approach their evidence with some caution. I conclude that as time has passed the Gills have tailored or allowed their recollection to become tailored particularly with respect to the nature of the plaintiff's mental state during and immediately after the accident. They are not independent witnesses without an interest in the outcome of the case.

- [160] The discrepancy between Ms. Gill's description of her mental state at the time of the accident to the various experts and at trial and in her early reports is a factor that significantly affects her credibility and the reliability of her evidence. As I have pointed out, the plaintiff indicated on discovery that she had blacked out but I find that her immediate report to her doctors was that she did not suffer any loss of consciousness. The fact that she struck her head supports her evidence that she was dazed or confused but her reports to the experts goes beyond that.
- [161] The plaintiff's evidence that she does not remember hitting her head is inconsistent with her earlier reports. I find that she knew that she hit her head at the time and I find that she, not her husband, reported that to the insurance company within a few hours of the accident. From the usual practice of the ICBC representative, and the language of the report to the insurer, I think that it was Ms. Gill who spoke to the representative.
- [162] Although the plaintiff indicated at trial that if she was asked if she had suffered a loss of consciousness (at the time), she would have said that she was dazed, confused, bleeding and not aware of what was going on, I find that she did not indicate that when asked by Dr. Matsyk.
- [163] Reporting the accident and hitting her head are things that from discovery the plaintiff appeared to remember but now she purports not to. The plaintiff also does not agree that she told Dr. Woolfenden that she was getting a little better in 2009 and telling Dr. Matsyk in February 2010 that her memory is better. I think that she made those statements and find that they were probably true at the time.
- [164] I do not reject Mr. Gill's evidence that he thought his wife was disoriented when he arrived at the accident scene, but I would have expected if he thought that to be a significant matter he probably would have mentioned it to the initial doctor or brought it up with Dr. Hunt when he accompanied her on her first visit to see that expert witness.
- [165] Although the plaintiff testified about ongoing cognitive difficulties, she was able to give detailed evidence on how the various soft tissue injuries that she suffered from were bothering her and with what frequency over the last seven years. That evidence appeared to be inconsistent with ongoing memory difficulties as she was able to give that evidence with some acuity.
- [166] I find that the plaintiff has allowed herself to point to things being caused by the accident that may well not be, and at least in part to blame on the accident, things such as organizational difficulties and memory difficulties that may occur in a busy household with four children.

- [167] I was surprised that the plaintiff, if she felt that her memory problems were caused by the accident, was not curious about the results of cognitive testing by Dr. Schmidt especially if she was suffering memory problems of the type she described. She had said that her memory problems were to the degree that she would be unable to do the interviews with children required by her previous employment, because her memory did not allow her to interview children and a short time later record what they said.
- [168] The plaintiff indicated that her need for her husband to leave his firm was because she required the additional help in the household and she was unable to provide the direction to the child support workers that were hired. On the whole of the evidence, although I accept that the plaintiff's husband had to devote more time to household and childcare because of her injuries, I was not persuaded that the plaintiff's husband left his law firm to practice on his own at home entirely for the support that she needed with childcare. I note that the since the late fall of 2011 the plaintiff has not had additional childcare support for her family. I recognize that her older children can now help but I think it is some indication that the organizational problems of which the plaintiff complains were diminishing and were not as significant as the plaintiff asserts.
- [169] The plaintiff is not presently under any care for cognitive problems as she only sees her general practitioner with respect to this claim because it is ongoing.
- [170] While I do not reject the evidence of either of the plaintiff or her husband, the concerns that I mention affect the weight that I give their evidence. They are not independent witnesses and to the extent there were ongoing cognitive or emotional consequences from the accident, there were no other lay witnesses called to support the plaintiff's case.

Conclusion

- [171] On the whole of the evidence I find that the plaintiff suffered a head injury and soft tissue injuries that have now resolved.
- [172] While the evidence persuades me that the plaintiff was injured in the accident and suffered a head injury, I am not persuaded that I can give much weight to the opinions of the experts retained and called by the plaintiff's counsel to the effect that the plaintiff suffered a mild traumatic brain injury. The difficulty is that in the case of each of the reports I find that the experts to some significant degree relied on an inaccurate history of whether the plaintiff suffered a loss of consciousness or a disruption of mental awareness in and following the accident. Dr. Hunt considered the fact that Ms. Gill had a transient loss of awareness for an undetermined length of time was the most important piece of information upon which he relied. Dr. Cameron, the neurologist, who saw her three and three-quarter years post-accident, said that Ms. Gill reported that her first recall after the impact is hearing voices at the door of the vehicle which I find is not an accurate statement of the plaintiff's actual recollection. The psychiatrist Dr. Lu's opinion was based on her reporting a loss of consciousness in the accident which I find did not occur. As to Dr. Vondette, I find that

notwithstanding his evidence that he determined from his questioning that the plaintiff had a patchy memory of the accident, I cannot place any significant weight on his opinion. The plaintiff's counsel said that Dr. Vondette emphasized the importance of the questions to ask when eliciting a history from the patient and explained in detail how he came to the conclusion that "altered level of consciousness" had been established. He explained on cross-examination that the plaintiff had a "patchy memory." I did not accept his opinion of the plaintiff's altered state of consciousness and found his conclusion more argument than opinion.

CONCLUSION: NON-PECUNIARY DAMAGES

[173] Based on all of the evidence my conclusion is as follows.

[174] I find that the plaintiff suffered a head injury and soft tissue injuries in the accident. Those were injuries to her neck, low back and upper back. The plaintiff suffered headaches and anxiety as a result of the accident and her injuries. The progress of the injuries and their improvement was described by the plaintiff and I find that the soft tissue injuries to her neck, lower and upper back have resolved over time, and within 18 months to two years, I find that they essentially were no longer troubling to her.

[175] I find that the plaintiff struck her head against the car window and based on all of the evidence I conclude that she was likely dazed or confused to some degree although she did not suffer any period of unconsciousness or loss of memory in the accident.

[176] I find, given all of the evidence including the evidence of the plaintiff and her husband, the circumstances of the accident, the fact of a head injury with immediate headaches and the early reports of memory problems, that the plaintiff had sufficient alteration in her mental state at the time of the accident to amount to a mild traumatic brain injury or a concussion. However, given all of the evidence, I conclude that the brain injury was on the lesser end of the scale and although the plaintiff suffered some cognitive difficulties, particularly with her short term memory for a period of time, they steadily improved over time and the evidence does not establish that there have been any ongoing cognitive or other deficits as a result of the accident beyond at the most 18 months to two years following the accident.

[177] Any symptoms of which the plaintiff complains of such as memory difficulties and organizational problems that related to the head injury, including anxiety, I find have resolved. To the extent that the plaintiff has any ongoing cognitive difficulties such as short term memory or concentration issues, I find that they are related no longer to the accident but probably to the stresses relating to running a busy household with four young children in which the plaintiff and her husband live.

[178] The plaintiff has not established that she has suffered any permanent or ongoing cognitive or other deficits from the accident.

[179] While the plaintiff's injuries were resolving they impacted her enjoyment of her family and the pleasure she experienced from organizing and caring for her children and her home, and they affected her relationship with her husband.

[180] Non-pecuniary damages must compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities and the compensation must be fair to all parties.

[181] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

[182] The plaintiff's counsel referred me to *Wallman v. Doe*, 2014 BCSC 79, *Gabor v. Boilard*, 2015 BCSC 1724, *Burdett v. Eidse*, 2010 BCSC 219, *Afonina v. Jansson*, 2015 BCSC 10, *Watkins v. Dormuth*, 2014 BCSC 543, *Mastromonaco v. Moraal*, 2015 BCSC 228, and *Cikojevic v. Timm*, 2010 BCSC 800, but those cases all concern plaintiffs with much more serious and persisting consequences from brain injury than I find were suffered by the plaintiff.

[183] Given all the evidence, I award general damages of \$80,000.

PAST LOSS OF INCOME

[184] The plaintiff claims damages for lost income from the date of the accident to trial.

[185] The plaintiff says that but for the accident in 2008 she would have returned to work sometime in 2009 and worked full-time until the trial in 2015 and would only have taken time off for maternity leave for two years for the twins. The plaintiff claims that her past wage loss for the years 2009, 2010, 2011, 2012, 2013, 2014 and 2015 (a total of seven years)

(with mitigated earnings and taking into account what her counsel describes as her residual earning capacity) totals \$245,000. The calculation advanced by the plaintiff is that if she had returned to work in 2009 she would have worked at paygrade 5 as a family justice counsellor earning about \$67,000 per annum. The plaintiff argues that as she recovered from her soft tissue injuries she had some earning capacity which the plaintiff's counsel refers to as residual earning capacity. The plaintiff's argument about her residual earning capacity in the pre-trial period is summarized in this chart her counsel submitted:

Post-MVA (year)

Year

Residual Earning Capacity

1

2009

\$0 (MVA)

2

2010

\$0 (due to birth of twins)

3

2011

\$0 (due to birth of twins)

4

2012

\$10,000

5

2013

\$20,000

6

2014

\$30,000

7

2015

\$30,000

- [186] Accordingly the plaintiff's counsel says the earnings she would have made had she returned to work after two years, less her residual earning capacity, is about \$245,000 for the pre-trial period.
- [187] The defendants argue that the plaintiff has not suffered a loss of capacity, either past or future, because: she is capable of working; she does not have any limitations; there is no acceptable evidence that she is less employable than prior to the accident; she has not taken any steps to obtain employment apart from becoming a yoga instructor (which is her chosen occupation); the evidence establishes that she did not intend to return to her former employment; before the motor vehicle accident the plaintiff was working on a concept for a website but the idea was in the nascent stages, not a monetary project and has been replaced with her idea to pursue yoga instruction.
- [188] The defendants say that there is no "real and substantial possibility of a future event leading to an income loss".
- [189] My conclusion is that outside a period of 24 months after the accident, there were no physical or cognitive issues from the accident impairing the plaintiff's ability to earn income. Although the period of time prior to trial was greater than 24 months, I have concluded that she was not in any way disabled from working beyond that period of time.
- [190] The question is whether there is a proven loss for the period from the date of the accident to the end of the 24 months following the accident.
- [191] Let me briefly review the evidence in support of the plaintiff's claim.
- [192] The plaintiff was a highly regarded and competent employee when she worked as a family justice counsellor and report writer from 1995 to 2005 and she only took breaks for maternity leave.
- [193] From February 2001 to 2005, while juggling her family obligations and work, Ms. Gill completed her Master's in public policy through the University of London.
- [194] Between January and December 3, 2008, Ms. Gill and Mr. Gill say that they discussed their future plans. The plaintiff testified that she had her husband's support to have a third child and then re-enter the workforce. She testified that she would need to work if they were going to send their children to private school which was their intention with at least one of their children. She said the plan was if she did not become pregnant she would work to build up insurable hours for employment insurance and she said that in 2008 she started to put her resume together for management roles in government.
- [195] She testified that she was doing approximately 10 hours per week of legal research for her husband before September 2008 when she enrolled in the computer web design courses to acquire the skills for the website she wished to develop for young girls.

[196] The question for me is whether but for the accident there was a real and substantial possibility that the plaintiff would earn income pending trial and what is the proper measure of that loss. In *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, Saunders J.A. stated:

[45] ... In *Smith v. Knudsen* Madam Justice Rowles discussed at length the correct approach that should be brought to a hypothetical past wage loss claim. She said, noting the distinction between proof of actual events and proof of hypothetical events, and having referred to the significant cases of the Supreme Court of Canada and this Court on the subject at para. 29:

... What would have happened in the past but for the injury is not more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[197] Has the plaintiff demonstrated that there was a real and substantial possibility that she would have worked outside the home in remunerative work had she not been involved in the accident? The plaintiff had not worked for about four years prior to the accident and to some degree her husband had been splitting income with her from his practice. The defendants point out that if she returned to work she would have to incur childcare costs and forgo the income splitting that she had been doing.

[198] As to her plans at the time of the accident, the plaintiff mentioned to Norah Chambers, the person preparing the cost of care report, that her plan was to start a computer business, a reference to a child-friendly educational website she was planning; she made no reference in that interview to going back to work as a family counsellor.

[199] It appears on the evidence that the plaintiff had been trying to conceive a child at the time of the accident according to her report to her family physician in early 2009. What she pursued after the accident may not indicate what she would have done but for the accident. However, since then the plaintiff has worked to become a certified yoga instructor, which she has accomplished.

[200] I find that the accident impacted the plaintiff's ability to secure employment in the two years following the accident. The plaintiff was very talented at preparing custody and access reports and she enjoyed the job. The job was attractive as it provided financial security, a top-up of maternity benefits and flexible working hours. The plaintiff testified that her plan was to return to work if she did not become pregnant early in 2008 and that her plan, subject to maternity leave, was to work until she was 65 years old. Accordingly, had the accident not occurred the plaintiff suggests that she would have returned to work, taken maternity leave when her children were born and returned to work after the maternity leave. The plaintiff said that as her bridging of service benefits ended in 2009, she wanted to collect enough hours to qualify for employment insurance maternity benefits.

- [201] The defendants argue that there is no evidence that the plaintiff would have or intended to return to her job as a family court counsellor or as a custody and access report writer. The defendants point to the records of Dr. Matsyk in the consultation with the plaintiff shortly after the accident referring to her occupation as starting a computer business and not referring to her returning to her work with the provincial government. The defendants say that in interviews by Dr. Prout and Dr. Solomons, and with Ms. Chambers, there was mention of a vocational plan to start a website but no mention of a return to her previous employment. The defendants say that the fact the plaintiff did not apply or inquire about work with her previous employer prior to the accident is strong evidence that she had no plan to return to her previous line of work. Since the accident the plaintiff's efforts have been toward developing her website for programs for children and teaching yoga. As to the latter there was really no evidence produced about any significant income that was generated from that business.
- [202] Although the plaintiff was restricted from returning fully to her former employment during her recovery from her soft tissue and related injuries, the evidence indicates, I find, that she would not have returned to her former employment but would have in the two-year period expended her efforts outside the home in an area of work that was unlikely to be remunerative such as yoga instruction.
- [203] In *Perren v. Lalari*, 2010 BCCA 140, the Court of Appeal dealt with the question of loss of earning capacity:
- [30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:
1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].
- [31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the

loss is not as easily measurable, as in Pallos and Romanchych. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both Pallos and Parypa. But, as Donald J.A. said in Steward, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

- [33] On the facts of this case, the trial judge found that there was no substantial possibility of a future event leading to an income loss. That should have been the end of the enquiry. That was a reasonable conclusion on the evidence because there was no evidence that she was limited in performing any realistic alternative occupation.
- [204] Had the accident not occurred was there a substantial possibility of a future event leading to an income loss? Had her return to work been a real and substantial possibility I would expect some preparatory steps would have been taken such as updating her resume or inquiring if positions were available. Although the plaintiff and her husband said that they had such discussions the weight of the evidence is against it being a plan.
- [205] On the evidence I find that there was not a substantial possibility of her earning other income had she not been injured. I think that the opportunity to have gone back to her past work in the government was speculative.
- [206] In all the circumstances I have concluded that the plaintiff has not demonstrated an income loss or a loss of capacity for the period pending the trial.

Diminishment of Earning Capacity - Future

- [207] It has not been established that the plaintiff suffers physical or cognitive injuries or deficits that have persisted more than 24 months following her accident. There is no basis for finding that her capacity to earn future income has in any way been impacted by the accident.
- [208] As her earning capacity post-trial has not been diminished in any way, I find that there is no provable loss in this respect.

LOSS OF HOUSEKEEPING CAPACITY / IN-TRUST CLAIM

- [209] The plaintiff says that as a result of the accident and her injuries she has and will require childcare assistance and housekeeping assistance. She says that her husband has and will be required to provide these services as will her older children over time. Collectively this claim is advanced for damages in the amount of \$75,000. The claim as I understand it is advanced collectively as a loss of housekeeping capacity claim and an in-trust claim for the services provided by the plaintiff's husband.
- [210] Homemaking costs are awarded for loss of capacity and are distinct from future care and cost of care claims: O'Connell v. Yung, 2012 BCCA 57 at paras. 59-68.

- [211] In *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.) the majority held that the loss of a housekeeping capacity was compensable as damages in a manner that was distinct from non-pecuniary damages for "pain and suffering". Where appropriate, the award should be made irrespective of whether help was acquired as it is the loss of capacity that is to be compensated.
- [212] The plaintiff also advances an in-trust claim for the services performed by her husband for work that he would not otherwise have performed. *D. Smith J. as she then was in Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735, set out the relevant criteria to establish an in-trust claim:
- [180] ... a summary of the factors to be considered in the assessment of "in trust" claims:
- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
 - (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
 - (c) the maximum value of such services is the cost of obtaining the services outside the family;
 - (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
 - (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
 - (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.
- [213] The plaintiff asserts, correctly, that prior to the accident she was managing her home without any difficulty while her husband was involved actively in his law practice and he largely left child and household responsibilities to her.
- [214] The plaintiff submits that after the accident Mr. Gill's role dramatically changed. He was required to take on extra roles in the household and perform tasks that he did not do prior to the accident and that included driving, cooking, cleaning, pre-school attendance, feeding duties and diaper changes.
- [215] The plaintiff asserts that she should be awarded, for past and future loss of housekeeping capacity and the in-trust claim, the sum of \$75,000 to reflect her loss of capacity, and the services provided and that will be provided by the plaintiff's husband that he would not otherwise have provided. In the plaintiff's submission, her husband started doing additional household work after the accident. Initially from January 2009 to October 30, 2009, he started to help to transport the children (to and from school/activities), take them

where they needed to go, go to doctors' appointments and those sorts of tasks. Mr. Gill estimated that he was spending approximately seven hours additionally a week on his home chores than he had done prior to the accident.

- [216] Mr. Gill testified that after the twins were born in October 2009, his involvement and his home responsibilities dramatically increased. He was also assisting with feeding duties and diaper changes.
- [217] Mr. Gill testified that after the accident his billable hours declined at the office. Mr. Gill gave evidence that the reason for this was that he was spending more time with home matters and dealing with phone calls from his wife. In October 2010, Mr. Gill advised the partnership that he was leaving the partnership for family reasons. Following his departure, Mr. Gill set up his own law practice in his own home in 2010. He also rented office space to meet clients. Mr. Gill testified that he spent the majority of his time in the home office.
- [218] The defendants dispute this claim and argue that no amount should be awarded. They say that the plaintiff had childcare costs before the accident, that the childcare incurred was not out of the ordinary for a family of this size, and that the childcare that was hired in 2009 following the accident was modest until the twins were born.
- [219] I make the following findings with respect to this claim.
- [220] As I noted earlier, by 24 months following the accident I find that there were no soft tissue or cognitive issues that persisted. After two years there were no household and childcare responsibilities beyond what the plaintiff could handle.
- [221] I find that the hiring of nannies in 2010 was largely caused by the introduction of twins into a busy household.
- [222] Although I am not persuaded that the plaintiff's husband left his law firm because of the need to commit more time to house and childcare responsibilities, the evidence on balance indicates that after the accident the plaintiff's husband, who continued to have a busy law practice, undertook housekeeping and childcare duties increased beyond his usual level due to the injuries that the plaintiff suffered. I find that while the plaintiff was recovering from her injuries, particularly in the early stages, the plaintiff's husband had to assist with housekeeping and childcare beyond what he usually did because for a time the plaintiff lacked the capacity to perform the work and childcare that she had in the past.
- [223] I think that the evidence in support of this claim is very imprecise but it has been proven to a degree that it is a compensable claim.
- [224] Keeping in mind the hourly rate suggested by Ms. Chambers as a reference point, I award the sum of \$5,000 for the claims under this heading.

SPECIAL DAMAGES

- [225] The plaintiff claims special damages of \$27,500 which she says is about half of her total childcare and medical expenses of \$54,031.78, some of which she says would be incurred in any event.
- [226] While I was satisfied that some award should be made under the prior head, I am not satisfied that the plaintiff made a greater out-of-pocket expenditure for childcare than she would have but for the accident and this claim is not proven.
- [227] Other than the claim for part of the childcare expenses, the special damages claim as best I can tell is made up of massage and psychological treatments which total the sum of \$2,550 and I allow that amount for special damages.

COST OF FUTURE CARE

- [228] The plaintiff advances a claim for cost of future care for vocational services of \$3,000. I find that the plaintiff has not proven any need for future care for vocational services and that claim is denied.

SUMMARY

- [229] The plaintiff is awarded general damages of \$80,000, the sum of \$5,000 for the claim for the in-trust, housekeeping and childcare capacity claim, and special damages in the sum of \$2,550. The other claims are dismissed.
- [230] The parties may speak to the issue of costs if they are unable to resolve that issue.

"The Honourable Mr. Justice J. Sigurdson"

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