

CANADA / JUDGMENT

## K.A.R. v. Dawson

2025 BCSC 973

COURT

Supreme Court of British Columbia

DECIDED

28 May 2025

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2025 BCSC 973 K.A.R. v. Dawson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.A.R. v. Dawson,

2025 BCSC 973

Date: 20250528

Docket: M198375

Registry: New Westminster

Between:

K.A.R.

Plaintiff

And

Cameron Dawson

### Defendant

Restriction on Publication: A publication ban has been imposed by order of this Court on May 13, 2025, restricting the publication, broadcast, or transmission of any information that could identify the plaintiff referred to in these proceedings as "K.A.R." and any related proceedings regarding K.A.R.

This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The Restriction on Publication notice has been added to the cover page on June 11, 2025.

Before: The Honourable Justice Morishita

Reasons for Judgment

Counsel for the Plaintiff:

T. Harding

Counsel for the Defendant:

B.E. McLeod

F. Mohamed

Written Submissions of the Plaintiff:

March 18 and 24, 2025

Written Submissions of the Defendant:

March 21 and 28, 2025

Place and Dates of Trial:

New Westminster, B.C.

February 18-21, 24-28, 2025, &

March 3-7, 2025

Place and Date of Judgment:

New Westminster, B.C.

May 28, 2025

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## INtroduction

- [1] The plaintiff, K.A.R., claims damages for injuries sustained in a motor vehicle accident that occurred on March 18, 2017. At the time of the accident, the plaintiff was 26 years old and worked as a swim program instructor and supervisor at Atlantis Swim programs. At the time of trial, the plaintiff was 34 years old and enrolled in university. At the time of the accident, the plaintiff lived with her husband, S.P., and his parents, B.P. and D.P. in White Rock. The plaintiff and S.P. now live in Nanaimo.
- [2] The accident occurred while the plaintiff and S.P. were on their way home from attending a firearms training course. S.P. was driving. The defendant was driving ahead of their vehicle. As they approached an intersection, the defendant moved his vehicle to the right, as if he was going to make a right turn, but then suddenly executed a U-turn. S.P. steered to the left to try and avoid hitting the defendant's vehicle, but was unable to avoid the collision. The front right of S.P.'s vehicle struck the left front of the defendant's vehicle.
- [3] The defendant has admitted liability for the accident. Therefore, the task before the Court is to determine what damages, if any, the plaintiff is entitled to as a result of the defendant's negligence.

[4] The plaintiff claims significant damages. She alleges that as a result of the accident she suffered the following injuries: mild traumatic brain injury, depression, anxiety, somatic symptom disorder, chronic neck and shoulder pain, and chronic headaches. She alleges that these injuries and related symptoms have left her with a permanent disability and have rendered her unemployable.

[5] The plaintiff seeks the following award:

Non-pecuniary damages

\$170,000.00

Past loss of income earning capacity

\$200,000.00 (gross)

Future loss of income earning capacity

\$1,253,264.00

Special damages

\$3,737.65

Cost of future care

\$122,992.00

Total

\$1,749,993.65

[6] The defendant admits that the plaintiff suffered some injuries as a result of the accident. However, the defendant's position is that the plaintiff did not suffer a traumatic brain injury, and that her ongoing psychiatric and emotional symptoms are not related to the accident. Lastly, the defendant says that the plaintiff is not able to prove any loss of capacity beyond the initial few weeks of missed work.

[7] The defendant submits that the following award is appropriate:

Non-pecuniary damages

\$90,000.00 - \$105,000.00

Past loss of income earning capacity

\$1,463.00 (gross)

Future loss of income earning capacity

Nil - \$50,000.00

Special damages

\$2,748.05

Cost of future care

Nil

Total

\$94,211.05 - \$159,211.05

[8] The plaintiff tendered evidence from the following expert witness:

Name

Expertise

Report Date

Dr. Raymond Ancill

Psychiatrist

Nov. 10, 2022

[9] In addition to testifying herself, the plaintiff called the following lay witnesses as part of her case:

Name

Relationship

Mr. S.P.

Plaintiff's spouse

Ms. B.P.

Plaintiff's mother-in-law

Mr. D.P.

Plaintiff's father-in-law

[10] The defendant tendered evidence from the following expert witnesses:

Name

Expertise

Report Date

Dr. George Medvedev

Neurologist

Jan. 16, 2025

Dr. Gregory Walker

Neurologist

Jan. 24, 2025

Dr. Mitchell Spivak

Psychiatrist

Jan. 9, 2025

[11] The defendant called the following lay witnesses as part of his case:

Name

Relationship

Ms. Lovepreet Gill

Nurse - completed January 30, 2017 mental health initial assessment of the plaintiff.

Dr. Christina Boucher

Emergency medicine doctor at Nanaimo Regional General Hospital - treated the plaintiff on June 3, 2022.

Dr. Benjamin Tyrell

Plaintiff's former family physician.

Ms. Alison Alldritt

Nurse - treated the plaintiff at Peace Arch Hospital on March 18, 2017.

Dr. Anna Green

Psychiatrist - treated the plaintiff at Nanaimo Regional General Hospital on June 4, 2024.

Ms. Deirdre Goudriaan

Manager of Trauma Counselling, Sources Trauma Counselling - testified solely for the purpose of establishing records as business records.

Mr. Bryan Tinlin

Director of Student Services, Vancouver Island University - testified solely for the purpose of establishing records as business records.

Ms. Victoria Pewtress

Clinical Counsellor, Sources Trauma Counselling - conducted intake session of the plaintiff.

Ms. Dianne Middaugh

Nurse Practitioner - treatment provider and assessed the plaintiff for verification of permanent disability in 2019 and 2020.

Dr. Rangappa Balakrishna

Family physician - treated the plaintiff on March 30, 2017.

Ms. Christina Bialik

Counselor - treated the plaintiff on a number of occasions in 2017 (post-accident).

Ms. Angelina Mudry

Human Resources Manager - the plaintiff's human resources manager at the time of the accident.

Ms. Laura Dunkley

Registered Massage Therapist - the plaintiff's treating RMT.

Mr. Al Ezaki

Owner, Morgan Crossing Sports Medicine Clinic - testified solely for the purposes of establishing RMT records as business records.

Dr. Dorothea Bergen

Psychiatrist - treated the plaintiff on February 21, 2017 and drafted a consultation note.

Dr. Attar Khan

Psychiatrist - treated the plaintiff on June 22, 2019 and drafted a consultation note.

[12] This case presented a number of challenging issues for the trier of fact. As will be set out below, much of the case turned on the issue of causation and the plaintiff's original, without-accident position.

[13] Unfortunately, the Court had limited credible and reliable evidence from both expert and lay witnesses on which to make findings of fact and to ultimately reach a decision. As these reasons will set out, the medical evidence was largely unsatisfactory and of limited assistance to the Court. Much of this was due to the plaintiff's conduct.

[14] For the reasons that follow, I find that the plaintiff has proved that the accident caused soft tissue injuries to her neck and back, and associated headaches. I find that the plaintiff did not prove that she sustained a mild traumatic brain injury, nor that the accident caused any psychiatric injuries. The plaintiff proved that she missed three weeks of work as a result of the accident, but has not established any further loss of income earning capacity. The plaintiff is entitled to special damages, but did not prove damages for cost of future care.

## Anonymization

- [15] During closing submissions, I asked counsel for submissions on whether the plaintiff's name should be anonymized in these reasons for judgment. Plaintiff's counsel advised that he did not think anonymization was necessary. Defence counsel did not take a position.
- [16] Despite the position of counsel, I have determined that the plaintiff's name should be anonymized in these reasons for judgment.
- [17] In addition, because of the number of interlocutory applications in this action, one of which I was advised is still under appeal, I have issued a publication ban prohibiting the plaintiff's name from being published in any document or broadcast or transmitted in any way.
- [18] Publication bans limit the principle of court openness. As such, the court should exercise restraint in making such orders.
- [19] At paragraph 38 of *Sherman Estate v. Donovan*, 2021 SCC 25, the Supreme Court of Canada held that to succeed in obtaining such an order, the applicant must establish that:
- a) court openness poses a serious risk to an important public interest;
  - b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent the risk; and,
  - c) as a matter of proportionality, the benefits of the order outweigh its negative effects.
- [20] Writing for the Court in *Sherman Estate*, Justice Kasirer recognized that privacy considerations may constitute an important public interest, but not all privacy interests qualify. What is required is a risk of privacy that imperils the dignity of the person: paras. 68-76.
- [21] There was significant evidence in this case about the plaintiff's traumatic childhood, including testimony relating to sexual abuse. The plaintiff's pre-accident history includes previous suicide attempts, self-harm, and hospitalization for psychiatric reasons. In April 2022, the plaintiff reported the childhood sexual abuse to the RCMP. Two months later, she was hospitalized involuntarily in the psychiatric department of a local hospital under the Mental Health Act, R.S.B.C. 1996, c. 288 [MHA].
- [22] In my view, the facts in this case meet the stringent test out in *Sherman Estate*.
- [23] Given the plaintiff's pre-accident and post-accident psychiatric history, it would be impossible to write these reasons without reference to the evidence about childhood sexual abuse and its impact on the plaintiff's pre-accident and post-accident health and function.
- [24] Sexual violence causes profound harm. It is an important public interest to encourage the reporting of sexual offenses by protecting the security and privacy of complainants.

- [25] Personal injury claimants lose significant privacy rights in bringing a claim, as their pre- and post-accident health becomes a matter at issue. Thus, survivors of sexual violence who are subsequently injured in unrelated incidents are often faced with having to revisit trauma from their past with their counsel, treatment providers, defence counsel, medical experts, and in public during trial.
- [26] Survivors of sexual violence, and childhood sexual abuse in particular, may be reluctant to bring a personal injury claim, knowing that details of the abuse (or the abuse in general) could be revealed publicly in a judgment. Similarly, people who bring a personal injury claim may be reluctant to subsequently report sexual violence because they do not want that information to become public.
- [27] It is an important public interest that survivors of sexual violence should not have to face a choice between maintaining their privacy or seeking compensation for injuries. These choices, or at the very least, the risks and the potential negative implications that flow from such choices should be reduced as much as possible.
- [28] In my view, not protecting the plaintiff's identity poses a risk to the important public interest of encouraging the reporting of sexual violence, and that anonymizing the plaintiff's name is necessary to prevent or mitigate this serious risk to the public interest. Further, I cannot identify any reasonable alternative measures that will prevent the risk and which would infringe the openness principle to a lesser degree than anonymization. Finally, the benefits outweigh the risk. There is little benefit to the public in knowing the identity of the plaintiff. However, there are risks to the plaintiff if her identity is not anonymized. Those risks include causing her additional trauma, which could negatively impact her mental health and personal dignity.

## Issues

[29] This case raises the following issues:

- a) Did the accident cause K.A.R.'s injuries?
- b) Is K.A.R. entitled to any damages?

## Analysis

### Use of Clinical Records

- [30] An inordinate amount of time in this action was spent disputing clinical records.
- [31] This action first proceeded to trial on October 23, 2023. Unfortunately, the parties were unable to agree on a document agreement or agree that clinical records were admissible as business records. This ultimately resulted in a mistrial being declared on day three of that trial.

- [32] For this trial, the parties were again unable to agree on a document agreement, despite the previous mistrial. In addition, there was again no agreement that any clinical records were admissible as business records under s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124 [Evidence Act] or the common law.
- [33] Accordingly, the defendant called 16 witnesses for the purpose of proving that clinical records were business records. Most, though not all, of these witnesses were the treatment providers who made the records at issue.
- [34] The plaintiff took the position that only the record maker could give evidence proving the elements of the business records exception. This position is not supported by the case law. Although elements of the business records exception (under the Evidence Act and at common law) are often proved by the record maker, that is not always necessary: *Oswald v. Start Up SRL*, 2020 BCSC 205 at para. 21; *Mohamed v. Intransit BC Limited Partnership*, 2015 BCSC 1300 at paras. 81-82. I further note that in the seminal case *Ares v. Venner*, [1970] S.C.R. 608, 1970 CanLII 5 (SCC), nurses' notes in the plaintiff's charts were admitted into evidence as part of the defendant doctor's discovery evidence. The nurses who authored the notes at issue were not called to testify.
- [35] All 16 record taker or record holder witnesses called by the defendants were in a position to establish that the records in question were kept in the usual and ordinary course of business, and that it was in the usual and ordinary course of business to record a statement of fact in a contemporaneous manner. Thus, I admitted all the disputed records into evidence as business records under the Evidence Act. Further, some of the disputed records were also admitted as business records under the common law, as the witness proving the record was also able to establish that the record maker was under a duty to make the record.
- [36] The case law on the use of clinical records in personal injury cases is well-established. Nevertheless, because much of my findings on credibility in his case involved the use of clinical records, and, in particular, statements in those records, it is useful to provide an overview of the applicable law that informed my reasons.
- [37] *Edmondson v. Payer*, 2011 BCSC 118 remains the leading case on the use of clinical records.
- [38] At paragraphs 23-39 of *Edmondson*, Justice N. Smith lays out the following key points:
- a) Clinical records are admissible at trial for limited purposes.
  - b) Section 42 of the Evidence Act makes clinical records admissible to prove things such as a treatment provider's direct observations of the patient's medical condition, the results of tests performed or ordered by the treatment provider, and the medical advice given. It eliminates the need for treatment providers to give oral evidence of those facts, of which they are unlikely to have independent recollection. However, this does not make everything in a document admissible just because the document is admissible under the Evidence Act.

- c) Portions of clinical records that report statements made by the plaintiff, including the plaintiff's description of symptoms, are evidence of the fact the plaintiff made the recorded statements on those occasions. Where the recorded statements are inconsistent with the plaintiff's evidence at trial, they may be used in cross-examination to impeach the plaintiff's credibility.
  - d) Unlike prior inconsistent statements of an ordinary witness, which may only be used to impeach credibility, prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content.
  - e) There are important qualifications that apply to statements contained in clinical records. These include the following:
    - (i) Clinical records are not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. Further, there is no record of the questions that elicited the recorded statements.
    - (ii) Statements in clinical records present difficulties because there can be no context. More specifically, a statement in a clinical record is only a brief summary or paraphrase of what the patient purportedly said, and there is no record of anything else that may have been said that might in some way explain, expand upon or qualify a particular treatment provider's notes.
    - (iii) Plaintiffs will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that they must have said what the treatment provider wrote.
    - (iv) Difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time.
  - f) While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. The same applies to a complete absence of a clinical record.
  - g) The introduction of clinical records cannot be used to circumvent the requirements governing expert opinion evidence set out in Rule 11-6 of the Supreme Court Civil Rules.
  - h) Clinical records may provide the assumed facts on which an expert may offer an opinion, including diagnosis; however, the court cannot itself use clinical records to arrive at a medical diagnosis in the absence of expert opinion.
- [39] Edmondson was affirmed by the Court of Appeal: 2012 BCCA 114. I note, however, that the Court of Appeal stated that Justice N. Smith's comments about the absence of a clinical record do not amount to legal principles applicable to every case, but instead reflect a common sense approach to arguments raised in that specific case: para. 30.

- [40] As indicated, much of my findings on credibility turned on statements made by the plaintiff and recorded in clinical records.
- [41] The plaintiff's position is that statements attributed to her in clinical records are not admissible either as prior inconsistent statements nor as admissions unless she specifically admits to making the statement, or the record-taker has an independent recollection of her making the statement. In support of this position, the plaintiff cites *Forget v. MacCarthy*, 2002 BCSC 892 and *Peso v. Hollaway*, 2012 BCSC 1763.
- [42] This specific argument was rejected by the Court of Appeal in *Egan v. Andrychuk*, 2022 BCCA 110. More specifically, the Court of Appeal stated that when a statement made by the plaintiff is admissible as a business record, that itself is evidence that the statement was made, to be weighed by the trier of fact: para. 57. Additional proof that the statement was made beyond its admission as a business record is not required.
- [43] The trier of fact still must be convinced, after weighing all the evidence, that the statement was indeed made, and if so, that it was true. It may very well be that although a statement is admissible as a business record, the court still finds that the statement was not made because the court was not satisfied with the reliability of the clinical records, or due to some of the concerns about clinical records expressed by Justice N. Smith in *Edmondson*.
- [44] With the above in mind, I move to my analysis of credibility and reliability.

#### Credibility and Reliability

- [45] Credibility and reliability are not the same thing.
- [46] Credibility is concerned with a witness's veracity. Reliability, on the other hand, is concerned with the accuracy of a witness's testimony; it involves consideration of a witness's ability to accurately observe, recall, and recount the events in issue: *Ford v. Lin*, 2022 BCCA 179 at para. 104.
- [47] The typical starting point in a credibility assessment is to presume truthfulness: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10, citing *Halteren v. Wilhelm*, 2000 BCCA 2.
- [48] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dillon summarized the key elements of a credibility assessment:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the

demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Faryna v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Faryna]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [49] Additional factors that may be considered when assessing credibility include whether a witness's explanation defies logic or common sense, or if a witness is evasive, longwinded, or argumentative in their responses: Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd., 2019 BCSC 739 at para. 92, aff'd 2020 BCCA 130.
- [50] I have significant concerns about the plaintiff's credibility.
- [51] Dr. Raymond Ancill, psychiatrist, examined the plaintiff in August 2022. Over the course of trial, it became clear that the plaintiff had not been candid and had been untruthful in reporting her pre-accident mental health history to Dr. Ancill.
- [52] The plaintiff described her traumatic childhood to Dr. Ancill, including the physical and sexual abuse she suffered. She also advised that she had suicidal ideation and overdosed when she was 19 or 20, and that she sought psychiatric help for anxiety and depression around that time. However, she did not tell Dr. Ancill about the significant mental health symptoms she was experiencing in the weeks and months leading up to the accident. In addition, the plaintiff did not tell Dr. Ancill that she believed she was diagnosed with Borderline Personality Disorder when she was around 20 and wondered if she had Autism Spectrum Disorder.
- [53] According to Dr. Ancill's report, the plaintiff and her husband reported that the plaintiff "was in good and stable physical and mental health prior to the subject collision and was functioning normally in all domains of her life." When asked about this in cross examination, the plaintiff said she did not recall saying that to Dr. Ancill. I find that the plaintiff did make this statement to Dr. Ancill, and that it was untrue.
- [54] The plaintiff was also not candid with Dr. Ancill about her post-accident medical history.

- [55] As will be set out in greater detail further in these reasons, in April 2022 the plaintiff reported her father to the RCMP for childhood sexual abuse. In May 2022, the plaintiff and her spouse were involved in some type of domestic dispute, which resulted in him being arrested and charged with assault with a weapon. S.P.'s arrest and charges resulted in the plaintiff and S.P. being separated for about two months.
- [56] Less than a month later in June 2022, the plaintiff was involuntarily hospitalized in the psychiatric department of the local hospital.
- [57] The assessment with Dr. Ancill took place in person in August 2022, two months after the plaintiff was hospitalized for psychiatric reasons. Dr. Ancill was not provided with any records from this hospitalization, nor was there any mention of it in his report.
- [58] When asked on cross-examination if she told Dr. Ancill about the June 2022 hospitalization, the plaintiff was very evasive. Defence counsel had to repeat the question multiple times because the plaintiff gave answers that were non-responsive or cagey. After many attempts by defence counsel to ask the question and many non-responsive answers by the plaintiff, the Court intervened and told the plaintiff that her answers were arguably non-responsive, which could impact the Court's assessment of her credibility. After the warning, the plaintiff indicated that she did not know if she or her husband told Dr. Ancill about the June 2022 hospitalization.
- [59] I find as a fact that the plaintiff did not tell Dr. Ancill about the hospitalization, the domestic incident, her husband's subsequent arrest and their separation, nor her report to the RCMP of childhood sexual abuse.
- [60] It is troubling that the plaintiff would not mention these events to the psychiatrist that her own counsel arranged for her to see. I note that the plaintiff testified that she felt comfortable with Dr. Ancill. Further, the hospitalization was approximately two months prior to the assessment.
- [61] Possible explanations for the plaintiff's failure to tell Dr. Ancill about the events in April-June 2022 are that she believed those facts would hurt her case, and thus she did not wish to share them, or she believed they were not relevant. These possible explanations were not put to the plaintiff on cross examination. Thus, out of fairness to the plaintiff, I do not make any findings about the plaintiff's motivations for not being candid about these events. Nevertheless, I find as a fact that the plaintiff consciously and unreasonably chose to keep important information from Dr. Ancill, which negatively impacts her credibility.
- [62] There are other aspects of the plaintiff's conduct which negatively impact her credibility.
- [63] The plaintiff was ordered by Associate Judge Harper on December 16, 2024 to attend defence medical examinations with Dr. George Medvedev, neurologist, scheduled for December 19, 2024 and Dr. Mitchell Spivak, psychiatrist, scheduled for January 8, 2025.

- [64] The plaintiff's husband, S.P., attended the assessment with Dr. Medvedev at the plaintiff's request.
- [65] Unbeknownst to Dr. Medvedev, both the plaintiff and S.P. were audio recording the assessment.
- [66] Early in the assessment, Dr. Medvedev asked the plaintiff what she remembered about the accident. At this point S.P. intervened, asking Dr. Medvedev how a question about the circumstances of the accident was relevant to a neurological examination. Dr. Medvedev understandably took exception to S.P. questioning him of the relevance of his question. Dr. Medvedev warned S.P. that he may ask S.P. to leave if he was going to be raising such questions. There was a further dialogue and Dr. Medvedev opened the door and asked S.P. if he would like to leave. The plaintiff then stated that if S.P. left, she would leave with him. The two ultimately did leave and the assessment did not proceed.
- [67] S.P. interfered with Dr. Medvedev's assessment. Dr. Medvedev was justified in being perturbed at this interference and asking or inviting S.P. to leave. In leaving with S.P. shortly after the assessment started, the plaintiff failed to attend the assessment, in breach of Associate Judge Harper's order.
- [68] Further, it was also improper for the plaintiff and S.P. to be audio recording a court-ordered assessment without court approval: *Cook v. Kang*, 2020 BCSC 575, at paras. 65-70. In my view, surreptitiously recording an independent medical examination can demonstrate a disproportionate interest in the proceedings or their outcome. That, coupled with the fact that a surreptitious recording of a court-ordered assessment is obtained unlawfully, impacts the plaintiff's credibility here.
- [69] The plaintiff's conduct at the January 8, 2025 assessment with Dr. Spivak, psychiatrist, was also problematic.
- [70] The plaintiff essentially refused to answer most of the questions posed by Dr. Spivak. More specifically, Dr. Spivak notes the following:
- a) When asked about the circumstances of the accident, the plaintiff said she did not feel comfortable discussing the accident and would not be complying with that line of questioning.
  - b) The plaintiff declined to answer questions about her past psychiatric history, noting that Dr. Spivak had access to her records and should use those for these purposes. The plaintiff said she felt answering those questions would cause her too much emotional distress.
  - c) When Dr. Spivak asked the plaintiff about her current mental health she provided an ambiguous answer and noted that she was incapable of providing any answer because she was not a medical professional and did not feel that commenting on depression or anxiety would be appropriate.

- d) Dr. Spivak attempted to simplify the question and asked the plaintiff about her current mood and specifically whether she felt happy, sad, or anxious. The plaintiff declined to answer that question noting that it would be too complicated for her to respond.
- e) The plaintiff refused to respond to questions regarding her hospitalization in 2022.
- f) The plaintiff refused to answer questions about her past personal history.
- g) On more than one occasion, the plaintiff expressed reticence to provide responses out of a concern that she did not want to be found to have contradicted prior statements.

[71] I find that the plaintiff made the above statements.

[72] As a result of the plaintiff's conduct, Dr. Spivak was unable to perform a complete mental status examination and was unable to obtain the information he needed to complete a psychiatric evaluation and provide an expert opinion.

[73] Dr. Spivak testified. Although his evidence was very limited for the above reasons, I found him to be a balanced and credible witness.

[74] On cross examination, the plaintiff initially testified that she did not recall the assessment with Dr. Spivak. On further questioning, it became evident that she did recall the assessment, which I note took place less than two months before trial. The plaintiff later testified that she did not recall Dr. Spivak asking her if she had feelings of being happy or not, and that she believes she responded to each of Dr. Spivak's questions.

[75] I find as a fact that the plaintiff refused to answer most of Dr. Spivak's questions, including about the circumstances of the accident, the plaintiff's pre-accident personal and mental health history, the 2022 hospitalization, and her current mental status.

[76] As set out above, I accept that the plaintiff made statements to Dr. Spivak to the effect that she did not want to provide responses out of concern that she would contradict previous statements that she made. I also accept that the content of these statements are true. In other words, the plaintiff did not answer Dr. Spivak's questions because she did not wish to contradict statements she had made to other treatment providers.

[77] If someone is truthful, does their best to be accurate, and approaches appointments and assessments with sincerity, they should not be excessively concerned about contradicting themselves.

[78] I find that in not answering Dr. Spivak's questions about her mental health, past and present, and in not having a reasonable excuse for her failure to do so, the plaintiff did not attend the assessment and thus was in breach of Associate Judge Harper's December 16, 2024 court order mandating her attendance for the examination.

- [79] Because the Dr. Medvedev examination did not proceed due to the plaintiff leaving with her spouse, the parties were in chambers before Associate Judge Bilawich on January 7, 2025. Associate Judge Bilawich ordered the plaintiff to attend a January 10, 2025 independent medical examination with Dr. Walker, neurologist. Associate Judge Bilawich's order stated that at the assessment the plaintiff would be "unaccompanied by a family member or any other person not selected by Dr. Walker "
- [80] In his report, Dr. Walker notes that the plaintiff " within one to two minutes of the questioning and history portion of the encounter, adopted a type of catatonic state, where she sat facing the other direction in her chair, eyes closed, not answering questions." Dr. Walker noted that after three or four minutes of repeat questioning on the details of the accident the plaintiff said she felt discussing the accident was quite triggering that that she was amnesic for most of it and overall has a poor memory and therefore asked if her husband could join them. On further questioning, the plaintiff said she was not going to be able to answer questions unless her husband was in the room with them. I accept that the plaintiff made these statements to Dr. Walker.
- [81] Dr. Walker invited S.P. into the examination room to join them, after which the assessment proceeded without disruption, except that the plaintiff would not agree to be touched by Dr. Walker, thus a physical examination did not occur.
- [82] On cross examination, the plaintiff denied that she at first refused to answer questions posed by Dr. Walker. With respect to the physical examination, the plaintiff said in essence that Dr. Walker suggested that he would like to complete a physical examination but that he wasn't going to insist on it. The plaintiff further said she didn't remember refusing the physical examination.
- [83] There was no medical explanation for her actions at these assessments.
- [84] Overall, I found the plaintiff's conduct at defence medical examinations to be very problematic. In my view, the plaintiff's conduct at the defence-arranged independent medical examinations was consistent with the plaintiff's general lack of candor when it comes to her pre-accident and post-accident mental health history and status.
- [85] As set out above, I find that she was in breach of Associate Judge Harper's order mandating her attendance at the Dr. Medvedev and Dr. Spivak assessments. In my view, the plaintiff's breach of Associate Judge Harper's order negatively impacts her credibility.
- [86] In submissions, plaintiff's counsel asserted that a breach of a court order is not relevant to a credibility assessment. More specifically, he argued that breaching a court order is not about honesty, but rather about arrogance. I disagree. Breaching a court order demonstrates a lack of respect for the court process. When a party shows a lack of respect for the court process it can cast doubt on how sincerely they respect the oath they took in testifying. In other words, someone who breaches a court order without a reasonable explanation or excuse may be more willing to be untruthful or insincere in the witness box.

- [87] Last, there were several examples of prior inconsistent statements and inconsistencies with the evidence of other witnesses, all of which collectively have a negative impact on the plaintiff's credibility and reliability. Most of these inconsistent statements and inconsistencies relate to questions about mental health, the April 2022 domestic incident with her spouse, the June 2022 hospitalization, and medical examinations. There were additional inconsistencies relating to her schooling and work history. I will set out the most significant examples below.
- [88] In 2019, the clinical records suggest that the plaintiff was concerned that she may have high functioning Autism Spectrum Disorder ("ASD"). On cross-examination, the plaintiff was referred to a February 15, 2019 clinical record of her family doctor, Dr. Tyrell. The notes from that visit include the following statement: "concerned about possible high functioning autism she has read accounts of other people with autism and relates herself to this "
- [89] Defence counsel took the plaintiff to this entry on cross examination and asked whether she was of the view she was suffering from autism. The plaintiff replied no.
- [90] The plaintiff was then asked if she was of the view that she perhaps suffered from high functioning autism and wanted to get an opinion or advice on that. The plaintiff gave a very long, difficult to follow answer, which as best I can understand was to the effect that her accident-related symptoms could appear to mimic the symptoms of high functioning autism, and that she thought she could get a neurological assessment of her accident injuries through an investigation of possible autism.
- [91] Defence counsel then rephrased his question, putting it to the plaintiff that she thought she was suffering from or possibly had high functioning autism, which she thought would explain some of the symptoms she had. The plaintiff said she could not agree with that proposition.
- [92] When defence counsel asked the plaintiff about other statements attributed to her in the February 15, 2019 clinical record, she repeatedly said she did not recall.
- [93] The plaintiff was referred to a record of Dr. Attar Khan, psychiatrist, whom she saw on June 22, 2019. Dr. Khan testified at trial. His records were admitted into evidence as business records. The plaintiff testified that she recalled the consultation with Dr. Khan.
- [94] The consultation report of Dr. Khan includes the following notations:
- a) Under "Chief Complaint":
    - i. "Referred for an assessment of high functioning autism. Reports that she meets the criteria."
  - b) Under "History of Present Illness":
    - i. "Comes into the appointment indicating that she feels she has high functioning autism."
    - ii. "She says the only thing she wants to get assessed for is autism"

c) Under "Mental State Examination":

- i. "Indicated she was diagnosed in Newfoundland in the past with borderline personality disorder."

[95] I find that the plaintiff made the statements attributed to her in the paragraph immediately above.

[96] When it was put to the plaintiff that she was referred to Dr. Khan for an assessment of high functioning autism, she responded that she understood she was referred to him for a neurology assessment.

[97] When asked if she recalled telling Dr. Khan that she met the criteria for high functioning autism, the plaintiff said she did not recall.

[98] When asked if she told Dr. Khan that she had previously been diagnosed with Borderline Personality Disorder (BPD), the plaintiff said she didn't believe she told Dr. Khan that because she didn't believe she had a diagnosis of BPD.

[99] There are additional examples of the plaintiff's lack of candor, inconsistent statements, or lack of memory about her pre-accident and post-accident mental health history and symptoms. Some of these are set out further in these reasons where I discuss the plaintiff's consultations with Ms. Lovepreet Gill, Dr. Dorothea Bergen, and Dr. Ancill.

[100] Another line of questioning where the plaintiff's evidence was inconsistent with others was in relation to the May 2022 police incident.

[101] S.P. testified that in late May 2022 he perceived from communications with the plaintiff that she did not love him anymore. He testified that hearing that nearly broke him emotionally and he came close to being suicidal. He testified that his emotional status then improved. One morning the plaintiff told him she was going for a walk. S.P. said that some hours passed and then four police officers showed up at the front door. They handcuffed him and said he was being arrested. He subsequently learned that the charge was assault with a weapon. He was ultimately released on a promise to appear, but was not allowed to have any contact with the plaintiff for about two months. The charge was ultimately stayed.

[102] When the plaintiff was asked about the incident on cross examination she denied reporting her husband to the RCMP. Instead, she said she went to the RCMP out of concern for his safety. More specifically, she said she was concerned that her husband may be a risk to himself, and that she wanted to know he would be safe. This, she testified, led to the police officer making an assumption that resulted in S.P.'s arrest.

[103] The full details of the May 2022 police incident did not come out in the evidence at trial. Nevertheless, the plaintiff's inability to make a simple concession, such as admitting that she reported her husband to the RCMP or made a complaint to the RCMP, negatively impacts her credibility. S.P. said he was charged with assault with a weapon and that there was a no contact order in place. The plaintiff's claim that she was concerned about her

husband's safety and that the police charged him with assault with a weapon based on assumptions the police made is difficult to believe.

[104] On August 28, 2017, the plaintiff resigned from her employment with Atlantis Swim via email message to Angela Mudry, Atlantis's human resources manager.

[105] Ms. Mudry testified at trial. The August 28, 2017 email was produced as part of the Atlantis employment file, which I admitted into evidence as business records under the Evidence Act.

[106] The email is sent from the plaintiff's email address, which is also shown in other emails that the plaintiff confirmed she sent. The subject of the email says "Letter of Resignation." It is an addressed to Ms. Mudry. The email contains the following statements:

- a) "I left that meeting with many doubts remaining about the company's understanding of the roles I've been filling, the need for those roles and the value I bring to them, or any real intent to address the issues affecting those roles, including a renegotiated compensation."
- b) "unfortunately, the goodwill I have been extending the company for many months now has been continually abused."
- c) "What I've received in return is broken promises, directives from the office which are out of touch with the program's needs, lack of response on real needs, unrealistic requests, hostility from my direct supervisor, and ultimately a vague indication that things might be looked at in a month, at the earliest, perhaps."
- d) "I hope you can understand why these conditions are no longer tolerable to me."

[107] In cross examination, the plaintiff was asked about her reasons for resigning. The plaintiff denied that she had difficulties with the way Atlantis was treating her. She also disagreed with the statement that she was concerned that her goodwill had been abused and that she was not being supported by the employer.

[108] The plaintiff was taken to portion of the transcript for her examination for discovery where she was asked about the comments in the email that her goodwill had been abused. The plaintiff's answers were long-winded and evasive. However, unlike at trial, she did not deny that she had difficulties in the way her employer was treating her, nor did she deny that she felt her goodwill had been abused.

[109] The August 28, 2017 email was put to the plaintiff and she said she had no recollection of sending the email. I find that the plaintiff did send the email.

[110] More generally, the plaintiff's demeanor while testifying negatively impacted on her credibility. The plaintiff was prone to providing excessively lengthy answers, particularly on cross-examination, that either did not answer the question or were so long and tangential that it was often extremely difficult to distill what her actual answer was.

- [111] I am reminded that a witness that provides long-winded and tangential answers is not necessarily trying to deceive or be non-responsive. Testifying in court is a stressful and nerve-wracking process. Further, some people are naturally direct, articulate and succinct, while others may ramble or speak less directly. Cultural background can sometimes be a factor. There can be medical explanations as well, including neurodivergence or cognitive symptoms related or unrelated to the accident at issue in the litigation.
- [112] In this case there was some indication that the plaintiff may have been diagnosed with BPD in the past. The plaintiff was also investigated for ASD. While there was no admissible expert opinion evidence that the plaintiff was diagnosed with BPD or ASD, or that she lives with either disorder, the evidence does, in my view, establish that the plaintiff currently suffers from significant psychological and emotional difficulties.
- [113] Nevertheless, in my view, the plaintiff's tendency to be non-responsive to questions on cross examination is not explained by psychological difficulties. If they were, I would expect that her approach to responding to questions would be similar in direct examination as in cross examination, particularly given defence counsel's cross examination style was not particularly aggressive in tone or content.
- [114] While the plaintiff did provide lengthy and at times tangential answers on direct examination, she was almost always responsive. Even when her answers were digressive, I was generally able to understand her general narrative, and distill what her answer was. Further, in direct examination, she was able to speak with precision and recount details.
- [115] In contrast, in cross examination, the plaintiff frequently provided paragraph-length answers to simple questions that would appropriately be answered with a "yes," "no," or "I don't recall." As mentioned above, the content of her answers were often non-responsive. The plaintiff refused to concede points and instead tended to provide lengthy, overly detailed answers to cross-examination questions asking her to confirm evidence that likely hurt her case. Alternatively, she often responded to these types of questions by saying she didn't know or didn't recall.
- [116] In my view, this is consistent with the plaintiff's behaviour at the independent medical examinations (both plaintiff-arranged and defence-arranged), where the plaintiff was evasive about her pre-accident and post-accident mental health history or flat-out refused to answer questions.
- [117] For the reasons above, I find the plaintiff is generally not credible.
- [118] It follows that a witness who is not credible on an issue cannot give reliable evidence on that same point: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 1995 CanLII 3498 (ON CA).
- [119] Because I find the plaintiff to be generally not credible and not reliable, I can give little to no weight to her evidence unless her evidence is corroborated by objective evidence or the evidence of other witnesses who I find to be credible and reliable.

- [120] Further, I am mindful that a court may accept all, some, or none of a witness's evidence: R. v. R.E.M., 2008 SCC 51 at para. 65. As will be set out later in these reasons, while I generally give little to no weight to the plaintiff's evidence, I do accept her evidence in some isolated areas.
- [121] I will now discuss my credibility and reliability findings of the other lay witnesses.
- [122] S.P. was an important witness. The plaintiff had a very small social circle both before and after the accident. In addition, S.P. was in the vehicle with the plaintiff at the time of the accident and with her in the minutes, hours, and days afterwards. Because there is an allegation of a traumatic brain injury, his observations of the plaintiff post-accident are of critical importance. In addition, because causation of the plaintiff's psychological injuries is one of the key issues in this matter, his observations about her mental health status both pre-accident and post-accident are also critically important.
- [123] While I found S.P. to be fairly forthright in the witness box, some of his conduct pre-trial was also troubling and ultimately impacts his credibility.
- [124] As set out above, S.P. interfered with Dr. Medvedev's independent medical examination, which ultimately resulted in the plaintiff ending the assessment, which I found was a breach of a court order.
- [125] Also set out above, S.P. and the plaintiff each surreptitiously audio-recorded the Dr. Medvedev assessment. The recording was unlawfully obtained. As with the plaintiff, I find that this action negatively impacts S.P.'s credibility.
- [126] S.P. had a very cynical view of the independent mental examination process. When asked why they recorded the Dr. Medvedev assessment, S.P. said that they didn't know who Dr. Medvedev was and didn't know whether he was competent or honest. He said that regardless of Dr. Medvedev's credentials, he was hired by the defence and his "employer" was not out for the plaintiff's best interests. I infer that by "employer" S.P. was referring to ICBC.
- [127] S.P. attended the Dr. Ancill assessment with the plaintiff and was interviewed by Dr. Ancill. As indicated above, Dr. Ancill's report states that both the plaintiff and S.P. said the plaintiff was neither depressed nor anxious at the time of the accident. The report further states that according to the plaintiff and S.P., the plaintiff was in "good and stable physical and mental health prior to the subject collision and was functioning normally in all domains of her life." The plaintiff and S.P.'s reports to Dr. Ancill about the plaintiff's mental state prior to the accident were untrue.

- [128] As set out above, a number of important events took place in the spring of 2022. S.P. was asked on cross examination whether he told Dr. Ancill about the May 2022 police incident and the plaintiff's June 2022 hospitalization. S.P. responded that he and the plaintiff spoke to Dr. Ancill about the police incident. In addition, he said he assumes they spoke about the hospitalization, but he doesn't have a specific memory.
- [129] I have found as a fact that the plaintiff and S.P. did not tell Dr. Ancill about these two events. S.P.'s failure to tell Dr. Ancill about these events and his inconsistent evidence at trial significantly impacts his credibility and reliability. Accordingly, I must approach his evidence with caution.
- [130] Counsel raised no concerns about credibility or reliability of any of the remaining lay witnesses. I find all the remaining witnesses, including B.P. and D.P., to be credible and reliable.

Did the Accident Cause K.A.R.'s Injuries?

### **K.A.R.'s Health and Abilities Pre-Accident**

- [131] The plaintiff grew up in Newfoundland. She has two younger siblings. The plaintiff describes her home life growing up as abusive. She testified that she was subjected to physical and childhood sexual abuse by her father, and emotional abuse from her mother.
- [132] The plaintiff started swimming at a young age and swam competitively growing up. Swimming would feature quite prominently in the plaintiff's life until after the accident.
- [133] The plaintiff also showed artistic and musical talent growing up, two endeavors that she would continue until the accident.
- [134] In 2006, the plaintiff's family moved from Newfoundland to Alberta.
- [135] As a teenager in Alberta, the plaintiff worked while attending high school. Her work during this period included jobs at Superstore and as a lifeguard.
- [136] In 2008, after finishing her high school studies, the plaintiff returned to Newfoundland to attend Memorial University. The plaintiff did not declare a major, but was largely taking science courses.
- [137] While a university student, the plaintiff worked in a variety of jobs, including as a swim instructor, lifeguard, aquafit instructor, counsellor and acting instructor with the Boys and Girls Club, and as a kayak tour guide.
- [138] The plaintiff did not complete a degree at Memorial University. She stopped her studies there in 2011. In direct examination, the plaintiff said she had to work full-time to pay for school and was struggling to balance school with work, which caused her to ultimately leave her studies.

- [139] After leaving her studies, the plaintiff continued working as a kayaking tour guide.
- [140] In June 2012, the plaintiff met S.P. in Edmonton. The two quickly moved in together at an Edmonton house owned and occupied by S.P.'s parents B.P. and D.P.
- [141] From 2012 to the date of the accident, the plaintiff and S.P. lived in a house with B.P. and D.P. The family moved around, and at the time of the accident lived in a house in White Rock. The plaintiff and S.P. always lived in the downstairs of the house, while B.P. and D.P. always lived in the upstairs. The plaintiff and S.P. would typically have meals with her in-laws, and the four of them would often spend time together cooking and socializing.
- [142] In 2013, the plaintiff starting working as a self-employed swim coach.
- [143] In March 2013, the plaintiff and S.P. got married in Las Vegas.
- [144] In September 2013, the plaintiff started working as a coach at Making Waves Swim Club.
- [145] In November 2016, the plaintiff started working as a swim instructor for Atlantis Swim programs, the job she held at the time of the accident. She also continued working as a self-employed swim coach.
- [146] Just prior to the accident, the plaintiff was also working as a lesson supervisor and was taking on some of the staffing coordinator responsibilities.
- [147] There was no indication that the plaintiff had any difficulties with her work duties in the lead up to the accident.
- [148] The plaintiff struggled with her mental health as an adolescent and young adult, which is quite understandable given the childhood trauma she described.
- [149] The plaintiff testified that when she was 18 or 19 she started being more vocal about the abuse she experienced during childhood. She said she attempted to speak with a lawyer, the police, teachers, nurses, and doctors about the abuse, but was continually referred back to her parents. She sought and obtained some counselling and/or psychological treatment around this time.
- [150] When she was about 20 years old, the plaintiff attempted suicide. Around that time, she had started taking antidepressants and believed the suicide attempt was due to experiencing suicidal thoughts as a side effect of taking the antidepressant.
- [151] The plaintiff testified that she experienced head trauma in her childhood, including hitting her head on a reinforced wall when she was between three and five years old (resulting in a scar on her forehead), hitting her head on a metal bar while doing push-ups when she was between five and seven years hold, being punched repeatedly on the top of her head by her father and losing consciousness, being struck on the head with a steel bat by her father when she was six or seven, and losing consciousness, and hitting her head while swimming at age 12 or 13.

- [152] The plaintiff testified that she was in a car accident in 2013 where she suffered some minor stiffness which resolved completely within two weeks.
- [153] The plaintiff experienced migraines about once or twice a year in the time leading up to the 2017 accident.
- [154] In late January 2017, about six weeks before the accident, the plaintiff started seeking treatment for mental health concerns.
- [155] On January 30, 2017, the plaintiff participated in an initial mental health assessment with the rapid access clinic at Peace Arch Hospital.
- [156] Ms. Lovepreet Gill was the nurse who did the initial assessment with the plaintiff. The assessment took place over the phone. Based on Ms. Gill's testimony, I was satisfied that her clinical records were admissible as business records under the Evidence Act and under the common law.
- [157] Ms. Gill did not have an independent recollection of the intake assessment with the plaintiff; however, she gave evidence about her practice in conducting such assessments and in particular, her notetaking practice. Ms. Gill testified that her practice was to take very detailed notes. She said she would write down most of what the client would say, but not every word. She would not write down irrelevant matters, such as details of what the client's interests are.
- [158] Ms. Gill struck me as a diligent nurse and note-taker. She testified by videoconference very late at night while on holiday in India. Her notes are thorough. Given her testimony and the quality of her notes, I do not have any concerns about the accuracy of Ms. Gill's records.
- [159] There are a number of statements in Ms. Gill's notes attributed to the plaintiff. These include the following:
- a) She was diagnosed with BPD in 2011 by a psychiatrist in Newfoundland.
  - b) She had recently been doing more research on BPD and wanted a second opinion.
  - c) She had one suicide attempt in 2010 when she overdosed on a number of antidepressants. Subsequently, she tried to cut herself when the suicide attempt was unsuccessful. This led to an involuntary admission to the hospital.
  - d) She never completed university because of mental health issues.
  - e) She is always anxious and worrying about things.
  - f) She has trouble falling asleep and staying asleep and feels tired all the time.
  - g) She has little interest in doing things and has poor concentration.
  - h) She was functioning at work but finding it difficult.

- [160] In cross examination the plaintiff said she did not recall the telephone intake interview with Ms. Gill.
- [161] I find that the plaintiff made these statements to Ms. Gill. As such, they constitute admissions which may be admissible for the truth of their contents. I accept all of the above for the truth of their contents with one exception: I accept that the plaintiff believed that she was diagnosed with BPD in 2011; however, I do not accept that the plaintiff was, in fact, diagnosed with BPD or that she had/has BPD. Making such a finding would, in my view, require expert opinion evidence.
- [162] Following the initial assessment with Ms. Gill, the plaintiff was assessed by Dr. Dorothea Bergen, psychiatrist, on February 21, 2017, roughly one month before the accident.
- [163] Dr. Bergen testified at trial regarding her clinical records/consultation notes. She had no independent recollection of the consultation, but provided evidence of her practice in conducting psychiatric consultations and her note-taking practice. She testified that she would typically dictate her notes at the time of the consultation or later the same day. Dr. Bergen's evidence is that her practice was to base her consultation report on the information she receives from the patient, but that on occasion she would include some information obtained from the intake worker.
- [164] There are some statements in Dr. Bergen's notes attributed to the plaintiff. These include the following:
- a) The plaintiff had previously been given a tentative diagnosis of BPD and was seeking some possible confirmation of that and possibly some help with obtaining services for therapy.
  - b) The plaintiff had childhood trauma namely at the hands of her mother.
  - c) The plaintiff had some crises in her early adulthood, including an overdose and cutting episode, two hospitalizations, and ongoing difficulties in her emotionally intimate interpersonal relationships, which has caused her to question peoples' motives and led to difficulties in her work place, with her family, and with other people.
  - d) The plaintiff has some problems with mood and with depression and feeling blackness, but they are often situationally driven.
- [165] I am satisfied that the plaintiff made these statements to Dr. Bergen. As such, they constitute admissions which may be admissible for the truth of their contents. I accept all of the above for the truth of their contents with one exception: for the reasons set out above, I do not accept as true that the plaintiff had a diagnosis of BPD, as that would require expert opinion evidence to establish.
- [166] Dr. Bergen referred the plaintiff to a behavioural therapy group.

- [167] Following the consultation, the plaintiff attended at Sources Women's Place for counselling. On February 23, 2017, she had an intake session with Victoria Pewtress, a clinical counsellor.
- [168] Ms. Pewtress testified at trial regarding her clinical records/intake notes. She had no independent recollection of the consultation, but provided evidence of her practice in conducting intake consultations and her note taking practice.
- [169] Ms. Pewtress initially stated that all of the information recorded in her clinical notes/intake form were provided by the plaintiff. Some of the portions of the notes were whited out. It wasn't clear from Ms. Pewtress's evidence what was whited out, although it appeared to be references to third parties. Ms. Pewtress also gave evidence that she sometimes tidies up her handwritten notes afterwards, but never removes anything important.
- [170] While Ms. Pewtress's records were admitted into evidence generally as business records, I am not satisfied that portions of the records attributed to the plaintiff are admissible as statements, as it is not clear to me from the clinical records and the evidence how much of the purported statements are words spoken by the plaintiff and how much are heavily-edited summaries of what the plaintiff told Ms. Pewtress.
- [171] The plaintiff's first counselling session at Sources Women's Place took place on March 22, 2017, four days after the accident.
- [172] The plaintiff was asked about her pre-accident psychiatric history in direct examination. She gave evidence about the physical and sexual abuse she experienced as a child. She also testified about the suicide attempt and a hospitalization when she was about 20 years old.
- [173] When asked on cross examination about the intake with Ms. Gill and the consultation with Dr. Bergen, the plaintiff refused to clearly concede that she was suffering from mental health issues at the time. In response to questioning on this matter, the plaintiff's answers were often long and evasive. While she seemed to concede that her mental health was not perfect in the weeks leading up to the accident, her evidence was that she sought out these assessments/treatments in anticipation of making the report to the RCMP about the historical abuse, because she knew that she had previously struggled with her mental health when she tried to report sexual abuse in the past.
- [174] I do not accept this explanation. As discussed above, the plaintiff has not been candid with medical professionals about her pre-accident mental health history. Although she disclosed to Dr. Ancill her childhood trauma and the mental health struggles she experienced at around age 20, she did not disclose to Dr. Ancill that she was seeking psychological treatment in the weeks leading up to the accident. In fact, she and her husband told Dr. Ancill that she was neither depressed nor anxious at the time of the accident. In addition, as set out above, the plaintiff refused to answer Dr. Spivak's questions about her pre-accident mental health history. In light of this, I cannot accept the plaintiff's evidence when it comes to her mental health history; she is not credible or reliable in this regard.

[175] Regarding the plaintiff's pre-accident recreational and avocational activities, the key evidence from the plaintiff, S.P., B.P., and D.P. is as follows:

- Prior to the accident the plaintiff did not have any limitations on her recreational and avocational activities;
- The plaintiff was fairly active and enjoyed physical activities such as swimming, hiking, jogging, going to the gym, rock-climbing, and kayaking.
- The plaintiff and her spouse were board game enthusiasts and enjoyed getting together with friends to play complex board games.
- The plaintiff is musically talented. She can play a number of instruments, including the guitar, trumpet, and keyboard, and liked to sing.
- The plaintiff is artistically talented and liked to paint and sketch.

[176] Although I've found the plaintiff to be generally not credible and I have credibility concerns about S.P., there is sufficient objective evidence (e.g. photographs) and corroborative evidence from B.P. and D.P. to accept this evidence.

[177] In summary, I make the following factual findings about the plaintiff's pre-accident health and abilities:

- The plaintiff had a traumatic childhood where she was subjected to abuse;
- The plaintiff struggled with her mental health as an adolescent and young adult.
- In her late teens to early 20s, the plaintiff's mental health deteriorated significantly as she started to grapple with the ramifications of her traumatic childhood, including efforts to report her childhood abuse.
- The plaintiff was investigated for BPD around this time and believes that she received a diagnosis for BPD.
- The evidence does not establish that the plaintiff actually had BPD pre-accident.
- When the plaintiff was about 20, or in or around 2010, the plaintiff had severe mental health issues, which led to one suicide attempt, other self-harm, and one or two hospitalizations, at least one of which was an involuntary admission.
- The plaintiff did not complete her undergraduate degree at Memorial University due to mental health issues.
- The plaintiff's mental health improved and was stable by the time she met her now husband S.P., and remained stable until early 2017.
- From 2012-2016 the plaintiff did not experience any limitations, vocational or avocational, due to mental health issues.

- The plaintiff had very occasional migraines prior to the accident which did not cause any functional limitations.
- The plaintiff was in a motor vehicle accident in 2013, where she sustained very minor injuries that resolved completely within a couple of weeks. Prior to the 2017 accident, the plaintiff had no musculoskeletal issues and no physical limitations.
- By early 2017, the plaintiff started experiencing significant mental health symptoms. More specifically, she was experiencing symptoms of anxiety and depression. She was frequently anxious and worrying about things. She was having trouble sleeping and was feeling tired all the time. She was experiencing poor concentration and had little interest in doing things. She was also having ongoing difficulties in her relationships and although she was functioning at work, she was finding it difficult. She was also concerned about the negative impact that reporting her father to the RCMP would have on her mental health.
- Prior to the accident, the plaintiff was a fairly active person who enjoyed many physical, artistic, musical, and board-game related activities without any physical, psychological, or cognitive limitations.

### **K.A.R.'s Health and Abilities Post-Accident**

- [178] The plaintiff testified to having a patchy and inconsistent memory about the accident and the period following the accident. She recalls seeing the defendant's vehicle pointed directly at them and coming at them. She next recalls their vehicle being at rest and seeing S.P. and the defendant standing in front of the vehicles having a conversation. She testified that she was confused as to how the vehicles were oriented and believes she did get out of the vehicle to ask if everyone was okay. She testified that after some period of time had passed, she and S.P. proceeded home.
- [179] There was very little evidence from the plaintiff about her symptoms in the minutes, hours, and days after the accident. It could be because she does not remember, or because she experienced an altered state of consciousness, or both. However, she was not asked many questions on direct examination about this timeframe, so it is difficult for the Court to determine her symptoms during this period.
- [180] The plaintiff's evidence is that shortly after the accident she remembers seeing black spots in her vision, having trouble coordinating her movements, and having difficulty communicating with her husband. She felt she was suffering from a lowered level of consciousness in the time after the accident, but provided no other details, other than testifying that she was having difficulty speaking in a concise manner.
- [181] S.P. provided evidence about his observations of the plaintiff in the hours and days after the accident.

- [182] He testified that in the moments after the accident he observed that the plaintiff was slumped forward. S.P. asked the plaintiff if she was okay and describes her slowly turning her head towards him and looking like a deer caught in headlights. S.P. then proceeded through the intersection and pulled to the side of the road, after which he got out of his vehicle and spoke with the defendant. S.P. recalls the plaintiff appearing dazed at the scene and having a blank expression on her face. After some period, they left the scene of the accident to head home. The drive home was about five minutes. At their home, S.P. noticed the plaintiff moving slowly down the stairs, holding on to the railing for balance. S.P. and the plaintiff discussed the accident. S.P. said the plaintiff seemed absent and pre-occupied, and was not looking at him while speaking, which was atypical. He said she was speaking slowly and slurring some of her words. Some of her responses did not make sense. He testified that after about an hour the plaintiff told him she was seeing black spots, which concerned him enough that he decided to take her to the hospital. The plaintiff attended at Peace Arch Hospital, where she remained for about an hour before being discharged.
- [183] For the week after the accident, S.P. testified that the plaintiff complained of pain, still seemed confused, and was having trouble sleeping.
- [184] About ten days or so after the accident, S.P. took the plaintiff back to the hospital due to concerns that she was still in pain, was nauseated, and didn't seem to be improving.
- [185] The plaintiff testified about having the following issues and symptoms in the weeks and months after the accident:
- a) Persistent headaches that were debilitating and associated with almost persistent nausea;
  - b) ringing in her ears;
  - c) persistent neck pain;
  - d) difficulty sleeping; and
  - e) reduced energy and motivation.
- [186] Following the accident, the plaintiff took approximately three weeks off from work on the recommendation of her family doctor. In retrospect, she stated that she feels she returned to work too early. She testified that when she returned to work she was still experiencing stiffness and pain, along with headaches, ringing in her ears, and balance issues. She found it painful to complete her work duties and the pool environment aggravated her symptoms. She testified that she also had difficulty driving, as it would increase her anxiety, which was problematic because she had to drive to different work locations.
- [187] The plaintiff testified that from the date of the accident up until she moved to Nanaimo in the late summer of 2019, she continued to suffer from neck pain and headaches, albeit with some improvement. In addition, although she experienced improvement, she continued to have some difficulties with moving, sleeping, and reading.

- [188] The plaintiff ultimately left her employment at Atlantis and worked for a different swim instruction company for a relatively short period. She then took a position at Indigo Books. She testified that she had some difficulties carrying out her duties as a result of symptom aggravation. She recalls having some difficulty with tasks requiring memory. The plaintiff left her employment at Indigo Books in the spring of 2019, shortly after starting school at Kwantlen Polytechnic University.
- [189] The plaintiff was then asked to describe her symptoms from the time she moved to Nanaimo in the summer of 2019 to the time of trial. Physically, she said she experienced pain in her head, neck, back, right shoulder, and right leg. She has continued to experience persistent headaches, although the headaches have improved as she has learned how to avoid aggravating them. She continues to experience tinnitus (with some improvement), nausea, reduced energy (with some improvement), nightmares (with some improvement), energy problems (with some improvement), memory and concentrations issues, noise sensitivity, and reduced ability to handle stress (with some improvement). In addition, she continues to experience difficulty with multitasking and with conversations.
- [190] In terms of her activities post-accident, the plaintiff testified that she did not hike as much as before the accident, and when she did hike it would be on well-established trails. More strenuous hikes cause her to get dizzy and aggravates other symptoms. She stopped doing art, as she found she no longer had the necessary fine motor skills. She also had difficulty playing the guitar, due to difficulties keeping her hands on the frets, and problems playing the trumpet due to difficulties with her shoulders. She stopped playing the keyboard for a long time due to difficulty reading sheet music, and she did not sing because it was hard to feel in the mood due to being in pain. She has difficulty reading, as her eyes have difficulty focusing and she gets very fatigued. The plaintiff testified that she also stopped playing complex board games, as she struggles with the cognitive demands. Being physically intimate with her husband was also very difficult due to her physical pain.
- [191] Regarding treatment, the plaintiff attended physiotherapy, chiropractic, kinesiology, registered massage therapy, counseling, and vision therapy. She was prescribed topiramate for her headaches. She found this helpful, but discontinued it because she was concerned about some of the potential negative side effects.
- [192] In September 2019, the Plaintiff enrolled in the Bachelor of Arts program at Vancouver Island University (VIU). She receives accommodations at VIU, including being permitted to record lectures and getting extra time to complete assignments and write exams. She also has a reduced course load while being able to keep full-time status. The plaintiff has met the requirements to graduate with a major and a minor, but is planning on graduating in April 2025 with a double major.

- [193] There was little reliable corroborative evidence about the plaintiff's condition after the accident. S.P. testified that the plaintiff's mood was down in the weeks after the accident. He said that she seemed flat and downcast emotionally. According to S.P., after the plaintiff returned to work she would be exhausted and have a low mood. He testified that she was more sensitive than usual and had a short temper. He also noted she had issues with driving anxiety and was emotionally withdrawn.
- [194] As set out above, I have concerns with S.P.'s credibility and thus approach his evidence with caution. In addition, I do not find S.P. to be a reliable witness when it comes to the plaintiff's mental health both pre- and post-accident.
- [195] In cross examination, S.P. was asked about the plaintiff's mental health in the weeks leading up to the accident. He conceded that his memory about her mental health during this period was not particularly good. Although he did acknowledge that the plaintiff was dealing with some mental health issues during that time, he significantly downplayed the severity of those symptoms.
- [196] Accordingly, I do not accept S.P.'s evidence about the plaintiff's emotional and mental state in the weeks after the accident unless it is corroborated by other reliable evidence.
- [197] Other than questions about how the plaintiff was doing in the initial weeks after the accident, S.P. was mainly asked to comment about how the plaintiff's symptoms were "after the crash". S.P. gave a lot of evidence about significant changes in the plaintiff's personality and cognition, but generally it was not clear whether these changes occurred before or after the spring of 2022. This approach was not helpful to the Court, because of the significance of the events in the spring of 2022.
- [198] B.P. and D.P. were also mainly asked about changes they observed "after the crash." B.P. and D.P. did give evidence about the plaintiff being more withdrawn and less active from the date of the accident to the summer of 2019. After this period, the plaintiff and S.P. no longer lived with B.P. and D.P. Outside of that, B.P. and D.P.'s descriptions of more severe symptoms and personality changes corresponded either to Post-Spring 2022 or the timeframe was not clear.

## Medical Evidence

### The Plaintiff's Medical Evidence

- [199] The plaintiff relied on one expert; Dr. Raymond Ancill. Dr. Ancill is a psychiatrist with considerable experience in geriatric psychiatry, chronic pain, and the assessment, diagnosis, and treatment of individuals who have suffered a brain injury. He assessed the plaintiff in person on August 29, 2022. His report is dated November 10, 2022.
- [200] Dr. Ancill diagnosed the plaintiff with the following injuries and symptoms caused by the accident:

- a) Persistent physical, functional, cognitive and emotional symptoms;
- b) A significant concussion;
- c) Major Depressive episode, moderate, chronic;
- d) Somatic Symptom Disorder - predominantly pain, chronic;
- e) Adjustment Disorder with anxiety - chronic;
- f) Mild Neurocognitive Disorder due to Traumatic Brain Injury;
- g) Concussion;
- h) Diffuse Injury of Cerebrum;
- i) Mild Traumatic Brain Injury with diffuse axonal injury;
- j) Post-concussion syndrome;
- k) Diffuse traumatic brain injury;
- l) Chronic tension-type headaches;
- m) Chronic primary musculoskeletal pain;
- n) Fatigue;
- o) Primary Fatigue; and
- p) Kinesiophobia.

[201] Dr. Ancill's report, approach, and opinion are problematic for a number of reasons.

[202] First, the report contains an inordinate amount of references to literature, research, and textbooks. Some of the quotations from these references are lengthy. Moreover, there are a number of improper or incomplete citations. For example, at page 19 of the report, the report includes a seven line quote about traumatic brain injury, but the reference merely states "[a]ccording to the CDC (February 2019) ". On page 21 of the report, there a reference to the Textbook of Traumatic Brain Injury - 3rd Edition, with no specific page or section citation. These are only two of numerous similar examples. Dr. Ancill testified that his reports are citation heavy as a result of his academic training. Nevertheless, his excessive citations were often superfluous or unnecessary, and at times made it difficult to ascertain whether his conclusions were based on research, clinical experience, or both.

[203] Second, Dr. Ancill conducted his assessment of the plaintiff with the plaintiff's spouse present. Dr. Ancill testified that it is best practice to interview a collateral witness, particularly where the patient may have a lack of insight due to a brain injury. Dr. Ancill said that he allows the patient to make the decision of whether a collateral witness will be present during the assessment, unless there is a strong reason not to do so. He explained that allowing patients to make the decision helps set the patient up for the most

comfortable therapeutic situation. Dr. Ancill asserted that S.P.'s presence did not interfere with the assessment, and that in fact it was helpful.

- [204] I agree that it could be helpful for psychiatrists to conduct collateral interviews with the examinee present, particularly in situations where an individual may lack insight or may be unreliable due to injuries or health conditions. This approach may very well be the standard and/or recommended in a therapeutic situation, as Dr. Ancill states. Nevertheless, this approach is generally not appropriate when conducting an independent medical evaluation for the purposes of drafting an expert opinion for the court.
- [205] Interviewing witnesses together makes the fact-finding role of the trier of fact more difficult, as witnesses can intentionally or unintentionally adopt some of the others' evidence. It is one reason why, for example, witnesses are not permitted to attend the Examinations for Discovery of other witnesses, nor to listen to other witnesses' testimony in court prior to their own. In this case, interviewing the plaintiff and her husband together taints the reliability of each of their evidence. It also taints the reliability of Dr. Ancill's opinion.
- [206] I'm mindful that there are some cases where it may be necessary to have a family member present during an assessment - for example cases involving infants or a plaintiff with a severe disability. However, I can see very few situations where it would be appropriate for that family member to also be interviewed in the presence of the plaintiff.
- [207] There was no evidence adduced at trial which showed any reasonable medical basis for S.P. to be present during Dr. Ancill's assessment.
- [208] Third, Dr. Ancill's approach to arriving at his opinion was troublesome. Dr. Ancill testified that he does not review clinical records prior to an assessment. In his view, doing so potentially invites bias. His approach is to conduct the assessment and then review the clinical records. If he has any questions or concerns after reviewing the clinical records, he will follow up later.
- [209] I see nothing wrong with this approach; however, Dr. Ancill's method of implementing this approach in this case was problematic.
- [210] As set out in his report, and confirmed in his testimony, Dr. Ancill was provided with the following clinical records:
- a) Clinical records from Peace Arch Hospital (March 18, 2017 to March 30, 2017);
  - b) Clinical records from Hilltop Medical Clinic (July 29, 2015 to January 11, 2017 and June 28, 2018 to September 11, 2019);
  - c) Clinical records from Dr. Khan (June 27, 2019); and
  - d) Clinical records from Dr. Bergen (February 21, 2017 to May 8, 2019).

[211] In his report, Dr. Ancill sets out the pre-accident medical history that he obtained from the plaintiff at the August 29, 2022 assessment. He reports that the plaintiff described the following pre-accident mental health history:

- a) The plaintiff had a traumatic childhood, due to a physically abusive mother and a sexually abusive father;
- b) The plaintiff left home when she was 18 and sought psychiatric health for anxiety and depression;
- c) The plaintiff had suicidal ideation and overdosed at age 19 or 20;
- d) The plaintiff thought she may have suffered previous concussions from the physical abuse.

[212] Consistent with this approach, after the assessment, Dr. Ancill reviewed the clinical records he was provided with by plaintiff's counsel. He summarized the relevant parts of those records in the "Review of Documents" section of his report. In this section, Dr. Ancill notes that Dr. Bergen is a psychiatrist who drafted a consult report dated February 21, 2017. Dr. Ancill noted in his report that the plaintiff saw Dr. Bergen through the Rapid Access Clinic and was seeking confirmation of whether she suffered from BPD, as well as some help with therapy. Dr. Ancill further notes in his report that the plaintiff reported to Dr. Bergen a history of childhood trauma, overdoses, self-harm, hospitalizations, some situational depression, and ongoing difficulties in her intimate interpersonal relationships.

[213] Dr. Ancill also summarized the relevant portions of a June 22, 2019 consultation report of Dr. Khan. Dr. Ancill notes that according to Dr. Khan's records, the plaintiff wanted to be assessed for ASD. Dr. Ancill notes that the plaintiff reported to Dr. Khan that she had been diagnosed with BPD in her 20s. Dr. Ancill indicated that Dr. Khan was unable to form a diagnosis.

[214] I pause to note that I am not relying on any of the opinion evidence contained in the consult reports of Dr. Bergen and Dr. Khan for their truth. Rather, in assessing the credibility and reliability of Dr. Ancill's expert opinion, I consider Dr. Ancill's treatment of these reports.

[215] There is no indication in Dr. Ancill's report that the plaintiff advised him at the assessment that she had seen Dr. Bergen five weeks before the accident, or the reasons why she was referred to Dr. Bergen. In addition, there is no indication in Dr. Ancill's report that the plaintiff advised Dr. Ancill that she had seen Dr. Khan after the accident and the reasons why. As set out above, the records of each of those psychiatrists refer to a pre-accident diagnosis of BPD.

- [216] Thus, the first time Dr. Ancill would have learned of these consultations is after his assessment with the plaintiff, when he turned to reviewing the clinical records. In my view, after reviewing the clinical records, Dr. Ancill should have followed up with the plaintiff to ask her about the visits to Dr. Bergen and Dr. Khan and ask her further questions about her pre-accident mental health history.
- [217] Dr. Ancill does address, to a limited degree, some of the issues flagged in Dr. Bergen and Dr. Khan's consultation reports. At page 33 of his report, Dr. Ancill notes that the "clinical records indicate that [the plaintiff] has sought psychiatric assessment as to whether or not she has borderline personality disorder (BPD) or autism." He then opines that the plaintiff does not meet the necessary criteria for BPD, noting that one of the indicators of this would be an inability to sustain relationships. The plaintiff, he noted, has been married for 10 years. Dr. Ancill also said he saw little indication to entertain a diagnosis of any form of autism.
- [218] In my view, it is concerning that Dr. Ancill would learn about a potential pre-accident diagnosis of BPD and the plaintiff's concern of a potential autism diagnosis from reading clinical records after the assessment, and then rule out those disorders without conducting a further assessment or interview of the plaintiff.
- [219] Instead, Dr. Ancill appears to have simply accepted the plaintiff (and her husband's) evidence that the plaintiff's mental health was good and stable prior to the accident and then concluded that the accident was the sole explanation for the plaintiff's ongoing symptoms and impairments. In the section "Causation & Prognosis" Dr. Ancill writes, at page 44 of his report:
- But for the motor vehicle collision of March, [sic] 18, 2017, I can find no other reasonable explanation for the emergence and persistence of [K.A.R.'s] symptoms and functional impairments.
- According to [K.A.R.] and her husband, [K.A.R.] was in good and stable physical and mental health prior to the subject collision and was functioning normally in all domains of her life.
- [220] On cross examination, Dr. Ancill was taken to the clinical notes of Ms. Gill, which were included in Dr. Bergen's clinical records. Dr. Ancill confirmed on cross examination that he had these records at the time he drafted his report. Defence counsel then took Dr. Ancill to the line in the intake assessment where Ms. Gill writes, " she scored severe on both the depression and anxiety scale." Defence counsel asked Dr. Ancill if he read that line before formulating his opinion. Dr. Ancill responded that he assumed that he did.
- [221] However, when questioned about these records, Dr. Ancill wavered. Dr. Ancill initially took the position that Ms. Gill's notes did not change his opinion as it merely spoke to the plaintiff's "vulnerability". When pressed further, Dr. Ancill confirmed that the notes did suggest that the plaintiff was not as mentally stable as she and her husband reported, but that he would nevertheless expect her condition to get worse following the collision. Dr.

Ancill later conceded that he didn't fully think about the impact of Ms. Gill's January 30, 2017 intake assessment at the time he drafted his report and ultimately conceded that the intake assessment may modify his opinion.

- [222] It is concerning that Dr. Ancill did not mention in his report a clinical note from about six weeks pre-accident where the plaintiff is said to have scored in the severe range for both anxiety and depression. Dr. Ancill said he assumed he read that entry. Certainly, Dr. Ancill was under no obligation to accept Ms. Gill's notes as determinative. However, the report gives no reason for Dr. Ancill's rejection or disregard of the intake assessment. Instead, he simply accepted the plaintiff and her husband's statements to him that the plaintiff was in a good state of mental health at the time of the accident.
- [223] I note again that I am not considering Ms. Gill's note in her intake assessment that the plaintiff scored "severe on both depression and anxiety" for the truth of its contents - i.e. that the plaintiff was severely depressed and anxious at the time of the assessment. Rather, I am considering this evidence for the purpose of assessing the foundation of Dr. Ancill's opinion and his credibility and reliability as an expert.
- [224] In my view, Dr. Ancill's failure to address Ms. Gill's, Dr. Khan's, and Dr. Bergen's clinical records in his report, and to instead rely solely on the incongruent statements of the plaintiff and her husband significantly reduce the reliability of his report and evidence.
- [225] Fourth, as set out above, on June 3, 2022, approximately three months before Dr. Ancill's assessment, the plaintiff was involuntarily hospitalized at Nanaimo Regional General Hospital (NRGH) for mental health reasons. Neither the plaintiff nor S.P. advised Dr. Ancill of this hospitalization. Further, Dr. Ancill did not have these records. These records are significantly relevant to a psychiatric opinion. If an expert does not have all the relevant information and records, the reliability and veracity of their opinion can be significantly undermined. That is the case here.
- [226] Dr. Ancill agreed on cross examination that information about the hospitalization would be important information to have. After he was taken through some of the NRGH records, Dr. Ancill said that his opinion may be amended, but that the thrust of his opinion wouldn't be altered. It was very difficult to discern from Dr. Ancill's testimony exactly how his opinion may be amended. He said that if what was documented in the NRGH records was a change in behaviour post-accident that was not present pre-accident, or if it was a significant worsening of a pre-accident problem, then his opinion would be that the accident was the cause of the plaintiff's symptoms. In my view, Dr. Ancill's opinion of the impact of the June 3, 2022 hospitalization on causation amounted to advocacy.
- [227] For the above reasons I give little to no weight to Dr. Ancill's opinion, except where his opinion is congruent with that of other experts whose opinion I accept. I give no weight to any parts of his opinion dealing with diagnosis and causation of injuries.

## The Defendant's Medical Evidence

- [228] The defendant relies on reports of three experts: Dr. George Medvedev, neurologist; Dr. Gregory Walker, neurologist, and Dr. Mitchell Spivak, psychiatrist.
- [229] Unfortunately, all of the defendant's medical experts were limited in their ability to provide a fulsome opinion, largely due to the plaintiff's conduct during the assessments, which I've set out above.
- [230] The plaintiff's court-ordered assessment with Dr. Medvedev took place on December 19, 2024. As set out above, this assessment essentially did not proceed, as the plaintiff left the assessment early on.
- [231] On January 8, 2025, the plaintiff attended a court-ordered assessment with Dr. Spivak. As set out above, the plaintiff did not cooperate at the assessment, refusing to answer most of Dr. Spivak's questions.
- [232] The defendant served the reports of Dr. Medvedev and Dr. Spivak dated January 16, 2025 and January 9, 2025, respectively.
- [233] At trial, the plaintiff objected to the admissibility of both reports.
- [234] With respect to Dr. Spivak, the plaintiff's position was that his report had "nothing to offer" that was relevant to the issues that the court must determine. The plaintiff noted that Dr. Spivak indicated in his report that he was not able to provide an opinion regarding psychiatric diagnosis, impairment, or causation due to an invalid exam. In short, the plaintiff's position was that Dr. Spivak's report offered no opinion and is thus not admissible pursuant to *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC).
- [235] The plaintiff advanced similar arguments regarding Dr. Medvedev's report. More specifically, the plaintiff argued that Dr. Medvedev also had "nothing to offer" on any issue, and that his report is "largely an assertion that all the [p]laintiff's problems are, or are related to, psychiatric conditions." The plaintiff's position was that Dr. Medvedev is "incompetent to conduct" a psychiatric examination.
- [236] At trial I held that both reports would be admitted, with reasons to be included in my trial reasons. These are my reasons for that ruling.
- [237] Dr. Spivak's report did not contain substantial medical opinion; however, it does contain some opinion evidence. For example, his report sets out the required components of a psychiatric evaluation, including the necessity of exploring mental health symptoms, past psychiatric history, and one's emotional experience. He also states that a review of documents for the formulation of an opinion is recognized to be inadequate review. The appropriate methodology for a psychiatric evaluation is specialized knowledge which is likely outside of the court's experience or knowledge.

- [238] I also disagree that Dr. Medvedev's report had "nothing to offer." His opinion was limited because he was not able to complete an assessment of the plaintiff, as she refused. Nevertheless, Dr. Medvedev did provide an opinion on the plaintiff's injuries based on a review of records.
- [239] The plaintiff is correct in asserting that Dr. Medvedev's opinion is largely that the plaintiff's ongoing complaints are mostly psychiatry-related. That opinion, however, does not render Dr. Medvedev's report inadmissible in its entirety. A neurologist is qualified to opine on psychiatric issues. The plaintiff's complaints about Dr. Medvedev's report are relevant to the weight to be given to the report, not its admissibility.
- [240] Last, it would be unfair to not admit these reports into evidence on the basis that they provided limited opinion (although I found that not to be the case). Through no fault of their own, Dr. Spivak and Dr. Medvedev were extremely hamstrung in their ability to provide opinion evidence. The defendant should not be further prejudiced by the plaintiff's conduct.
- [241] Dr. Medvedev has been a neurologist for almost 20 years. He was head of neurology at Royal Columbian Hospital from 2014-2024. He is a general neurologist with significant experience in all neurological conditions.
- [242] Dr. Medvedev's opinion is that the plaintiff may have suffered a concussion/mild traumatic brain injury in the accident, but the effects of any such injury were likely resolved by the time she returned to work three weeks later.
- [243] Dr. Medvedev's opined that as a result of the accident, the plaintiff suffered whiplash, causing neck muscle and soft tissue strain and sprain injury. In addition, according to Dr. Medvedev, the plaintiff developed posttraumatic headaches.
- [244] Dr. Medvedev's opinion is that the plaintiff's documented physical complaints are probably related to the accident, but have largely recovered. He bases this opinion on his review of the records, which documented a return to work and physical activities, and that accommodations at VIU were due to psychiatric conditions and not accident related conditions.
- [245] Dr. Medvedev stated that the plaintiff's ongoing complaints and challenges are more likely psychiatry-related. At the end of his report, Dr. Medvedev addresses a consultation report of a Dr. Chaudhary, which suggested that the plaintiff at that time (i.e. in December 2023) was still experiencing symptoms of a brain injury. Dr. Medvedev was of a different view than Dr. Chaudhary and believed that the plaintiff's symptoms at that time were more likely than not explained by the effects of psychiatric conditions, posttraumatic headaches, and stress, rather than the effects of the brain injury.
- [246] I found Dr. Medvedev to be a balanced and fair witness. He made appropriate concessions and was helpful to the Court. I accept most, but not all of his opinion.

[247] Dr. Walker assessed the plaintiff on January 10, 2025 and drafted a report dated January 24, 2025. Dr. Walker has been a neurologist since 2016.

[248] Dr. Walker's opinion is that the plaintiff has "no neurologic diagnosis." He describes the plaintiff's headaches, muscle spasticity, and blurred vision as "inorganic," which he said means the symptom does not have a cause related to physical damage to the nervous system.

[249] In his view, the plaintiff's psychiatric history constitutes a much more relevant explanation for her symptoms following the accident than any neurologic diagnosis such as a concussion or migraine.

[250] Overall, I found Dr. Walker's report and testimony unhelpful. The language of his report is not neutral and crosses into advocacy on a number of instances. Dr. Walker's approach suggests a high level of rigidity or a very "black and white" approach, which does not assist the court in cases like this, which often involve a lot of nuance and shades of grey. Examples include the following:

- "it is quite clear to me that there is no neurologic diagnosis "
- "the history, that she and her husband give, are completely out of keeping with a concussion "
- "her explanation of are completely inorganic."
- "the spells of muscle spasticity are completely inorganic "

[251] The following passage is the most concerning:

Certainly, given the objective details surrounding the motor vehicle accident in question, such [as the fact that] she did not hit her head, lose consciousness, suffer severe neck trauma, the accident occurred at a lower to mid-range speed, and the absence of any physical injury, all speak to a low risk motor vehicle accident that has afterwards been followed by a complete physical and mental decompensation by [the plaintiff].

Certainly, the objective details of the accident are out of keeping with any mechanism that would cause such a decompensation

[252] In his testimony, Dr. Walker did clarify that one does not need to hit their head to suffer a brain injury and noted that acceleration-deceleration forces (without a direct impact to the head) can cause a brain injury. In addition, he also conceded that no generally accepted medical definition of mild traumatic brain injury requires an actual loss of consciousness.

- [253] Dr. Walker's comments about a lower to mid-range speed accident and "low risk" motor vehicle accident are also concerning. In the history portion of his report, he notes that the triage nurse at the hospital indicates that the plaintiff's car was t-boned at 40 kph. Dr. Walker subsequently states that "the speed at 40 kilometres per hour of a car collision is not a dangerously high speed where one would feel that whiplash or concussive injuries would certainly occur."
- [254] There is no indication that Dr. Walker has any engineering or bio-medical engineering expertise. It is widely-accepted that people can suffer significant injuries and symptoms in motor vehicle accidents where the vehicle speeds are not significant or where there is limited vehicle damage.
- [255] Dr. Walker makes several comments about Dr. Ancill which also impact his credibility. He states that Dr. Ancill is not a concussion expert. While I do not accept Dr. Ancill's opinion in this case, there is no dispute that he has considerable experience assessing and treating patients suffering from the effects of a concussion. Dr. Walker also questions Dr. Ancill's experience, noting among other things that Dr. Ancill does not run a concussion practice and works in a "low volume center in Shuswap." It is not clear to me what, if any, evidence Dr. Walker had about Dr. Ancill's experience and background, but it is apparent that he did not review Dr. Ancill's CV before making these comments. The opinion of an expert that is willing to make such bold assertions of another expert's qualifications based largely or completely on assumptions should be approached with significant caution.
- [256] Argument in the guise of opinion runs afoul of the necessity criterion for expert reports: *Murray v. Galuska*, 2002 BCSC 1532 at para. 15; *Sengbusch v. Priest*, 14 B.C.L.R. (2d) 26, 1987 CanLII 2796 (BC SC). In my view, Dr. Walker strayed too far into advocacy for his opinion and evidence to be necessary and reliable. Accordingly, I give no weight to his opinion.

## Causation & Injuries Sustained in the Accident

- [257] Madam Justice Stromberg-Stein, writing for the Court, recently provided a helpful summary of the applicable law in *Zenone v. Knight*, 2024 BCCA 200. She writes:
- [54] The test for showing causation is the "but for" test. It requires the plaintiff to demonstrate on a balance of probabilities that their injury would not have occurred "but for" the negligence of the defendant: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14; *Clements v. Clements*, 2012 SCC 32 at para. 8.
- [55] The "but for" test is to be applied in a "pragmatic" and "robust common sense fashion" and does not require "scientific evidence of the precise contribution the defendant's negligence made to the injury": *Clements* at paras. 9, 11, 46. Nor does it require the plaintiff to establish that the defendant's tortious act was the sole cause of the injury: *Athey* at paras. 17-19; see also *Blackwater v. Plint*, 2005 SCC 58 at paras. 78-81. In every case, there may be a myriad of other non-tortious factors which were necessary preconditions to the injury occurring. What is required is a "substantial connection" between the injury and the defendant's

tortious conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at para. 23, citing *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327.

[56] In *Clements*, Chief Justice McLachlin explained:

[10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell and Athey v. Leonati*, [1996] 3 S.C.R. 458.

[11] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the . . . facts" (p. 569).

[Emphasis in original.]

[57] The "crumbling skull" doctrine, as adverted to by the judge, is not a doctrine of causation. Rather, as Justice Major explained in *Athey*, the "crumbling skull" is a shorthand for the broader principles that apply in determining the effect of a plaintiff's pre-existing condition on their ability to recover damages:

[34] The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

[35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. This is consistent with the general rule that the

plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis by underlining added; citations omitted.]

[58] In *Murphy v. Snippa*, 2024 BCCA 30, Justice MacKenzie further explained the implications of a plaintiff's pre-existing condition:

[54] A pre-existing condition can have important legal implications, including the contingency analysis discussed in *Dornan v. Silva*, 2021 BCCA 228, at paras. 62-64.

[55] A pre-existing condition may affect the plaintiff's entitlement to damages. The damages owed to the plaintiff consist of the difference between the plaintiff's "original position"--namely the position they would have been in had the accident never occurred--and their actual position after the negligently-caused injury (*Blackwater v. Plint*, 2005 SCC 58, at para. 78). A plaintiff who would have suffered some or all of the injuries resulting from the defendant's negligence, even absent that negligence, is sometimes referred to as a "crumbling skull" plaintiff. In such a case, the court determines what debilitating effects the plaintiff would have suffered in any event, and ensures the defendant is not held liable for those (*Athey*, at para. 35).

[56] In the case of a plaintiff who suffers from a pre-existing condition that may get progressively worse, the question is whether there is a "measurable risk" that the pre-existing condition would have affected the plaintiff in the future, regardless of the defendant's negligence (see *Dornan*, at para. 45; and *Athey*, at paras. 35-36). If such a measurable risk is demonstrated, the overall damage award can be adjusted accordingly.

[Emphasis in original.]

[59] Unlike the test for causation, which the plaintiff must establish on a balance of probabilities, the crumbling skull doctrine is predicated on hypothetical events; that is, the plaintiff would have experienced medical deterioration or injury absent the defendant's tortious act. Such hypothetical events will be taken into consideration as long as they are a real and substantial possibility, as opposed to mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; see also *Murphy* at para. 59; *Athey* at para. 27. Therefore, the prospect of a crumbling skull simply results from an accumulation of evidence, rather than an explicit onus that must be met in every case: see *Rezaei v. Piedade*, 2012 BCSC 1782 at para. 45. Practically speaking, however, the burden of establishing a real and substantial possibility falls on the party who seeks to rely on it: *Lo v. Vos*, 2021 BCCA 421 at para. 39.

[258] Determining what injuries the plaintiff suffered as a result of the accident is challenging due to the number and nature of the injuries and symptoms alleged, the plaintiff's pre-accident personal and mental health history, and the events of the spring of 2022 (i.e. the reporting of her father to the RCMP for childhood sexual abuse, the domestic incident where S.P. was arrested, and the involuntary hospitalization under the MHA).

- [259] The Court's task is made even more difficult by the limited evidence that is before it. Specifically, the plaintiff served only one expert report, which I give little to no weight to. The plaintiff called no treatment providers as part of her case. The only lay witnesses called by the plaintiff were her spouse and parents-in-law. Her parents-in-law had very limited interaction with the plaintiff after the fall of 2019 (i.e. before the events of the spring of 2022).
- [260] The defendant concedes that the plaintiff has proven that she sustained neck and back injuries consistent with a whiplash injury, including headaches and related symptoms. They do not accept that she sustained a mild traumatic brain injury, or that her current psychological conditions and symptoms are caused by the accident.
- [261] For the reasons that follow, I agree with the defendant's position.

### **Mild Traumatic Brain Injury**

- [262] I find that the plaintiff has not proven, on a balance of probabilities, that she suffered a mild traumatic brain injury in the accident.
- [263] Dr. Ancill's opinion is that the plaintiff sustained a mild traumatic brain injury in the accident. However, as set out above, I give no weight to Dr. Ancill's opinion on diagnosis and causation, unless it is congruent with another expert opinion that I accept.
- [264] Dr. Medvedev's opinion is that the plaintiff may have suffered a traumatic brain injury. In my view, may is not sufficient to establish a fact on a balance of probabilities.
- [265] Dr. Medvedev testified that diagnosing mild traumatic brain injury is challenging because the diagnostic criteria is non-specific. More specifically, he noted that many conditions, when severe enough, will produce symptoms that are similar to those associated with mild traumatic brain injury. He stated that because of this, doctors must consider whether other diagnoses better explain the symptoms. For example, he testified that a shock emotional response can produce symptoms that are similar to mild traumatic brain injury.
- [266] In any event, the experts all agree that in order to meet the diagnostic criteria for mild traumatic brain injury, one must experience an altered state of consciousness.
- [267] The plaintiff testified to having patchy and inconsistent memory in the period following the accident. She said she felt confused at the accident scene, and when she returned home she had difficulty coordinating her movements and communicating with her husband. She started seeing black spots, which caused them to go to Peace Arch Hospital for assessment.
- [268] S.P. described the plaintiff as appearing dazed at the scene and having a blank "deer in the headlights" expression on her face. He said the plaintiff had difficulty moving and with balance when they returned home, and was speaking slowly and slurring. He testified that some of the plaintiff's words didn't make sense.

- [269] As set out above, I have found the plaintiff to be generally not credible. I also have concerns with S.P.'s credibility and reliability. Accordingly, I must exercise significant caution when assessing their evidence.
- [270] Ms. Allison Alldritt is a Registered Nurse at Peace Arch Hospital who treated the plaintiff on the day of the accident. She was called by the defence in order to establish the hospital clinical records as business records. I was satisfied that the conditions of section 42 of the Evidence Act were met and admitted the Peace Arch Hospital clinical records into evidence as business records.
- [271] Ms. Alldritt's notes document complaints of disorientation, mild dizziness, seeing flecks in both eyes, and generalized headaches. The notes also indicate that the plaintiff denied hitting her head and denied a loss of consciousness. Other notes in that set of clinical records document a complaint of difficulty getting words out. These prior consistent statements are admitted not for the truth of the contents, but rather as part of the narrative in order to assist me in my assessment of the truthfulness and reliability of the plaintiff's in-court testimony, and more specifically to provide the surrounding circumstances and context to evaluate the credibility and reliability of the witness's in-court testimony that she was disoriented shortly after the accident, notwithstanding that the clinical records report that she denied a loss of consciousness: *R. v. Gill*, 2018 BCCA 275 at paras. 76-78; *Kaler v. Lee*, 2016 BCSC 1125 at para. 74.
- [272] I accept the plaintiff's and S.P.'s evidence that she was disoriented immediately following the accident and for some period that day. I also accept that she was having some difficulty with her speech and was experiencing some issues with balance and dizziness.
- [273] Nevertheless, I do not find that the plaintiff has established, on a balance of probabilities, that she suffered an altered state of consciousness as a result of the accident. I accept Dr. Medvedev's opinion that the symptoms the plaintiff was experiencing immediately after the accident could also be explained by other conditions, such as emotional shock. While it is possible that the plaintiff an altered state of consciousness, the evidence is not convincing enough to find that she more likely than not suffered an altered state of consciousness.
- [274] Moreover, there was minimal evidence at trial about brain injury-type symptoms in the days and weeks following the accident. The plaintiff and S.P.'s evidence was limited. The plaintiff did not call any treatment providers to testify. Further, and more significantly, the plaintiff's in-laws did not provide any evidence of their observations and interactions with the plaintiff in the days immediately following the accident. The plaintiff and S.P. lived with B.P. and D.P. at the time of the accident. The evidence was that the plaintiff and S.P. usually took meals together with B.P. and D.P., and were quite close at the time. If the plaintiff was suffering from significant memory, cognitive, and speech difficulties in the days and weeks after the accident, I would have expected to hear evidence of that from B.P. and D.P.

## Psychiatric/Psychological Injuries

- [275] I find that the plaintiff has not proven, on a balance of probabilities, that she sustained psychiatric/psychological injuries as a result of the accident.
- [276] The plaintiff had a difficult and traumatic childhood. Around the age of 20, or approximately seven years prior to the accident, the plaintiff's mental health deteriorated significantly as she tried to deal with the terrible consequences of the trauma she experienced. As indicated, the plaintiff attempted to report her father for childhood sexual abuse around that time. Unfortunately, she was suicidal and made one attempt. She was hospitalized once or twice. Fortunately, the plaintiff was resilient and her mental health ultimately stabilized.
- [277] Although her mental health stabilized, the evidence establishes that in the weeks and months leading up to the accident her mental health status was deteriorating.
- [278] The evidence does not establish that the plaintiff experienced any noticeable increase in her mental health symptoms in the days and weeks after the accident.
- [279] Equally significant are the events of the spring of 2022. As set out above, there was unfortunately little direct evidence in the plaintiff's case about these events and the plaintiff's mental health status just prior to these events, during these events, and shortly afterwards.
- [280] There was very little evidence from the plaintiff about her reporting her father to the RCMP in the spring of 2022. The plaintiff was not asked any questions on direct examination about whether there were any negative psychological implications of doing so. On cross examination, she agreed that she was becoming more sensitive and anxious after making the report.
- [281] S.P. testified that the plaintiff reported her father to the RCMP on April 25, 2022. He went with her to the RCMP station. On cross examination, he agreed that the plaintiff went through some serious emotional turmoil both before and after making this report. However, when asked if the plaintiff became more sensitive and anxious after reporting her father, S.P. said that if anything she was less anxious and that she was relieved.
- [282] I find that the while reporting her father to the plaintiff did provide some relief to the plaintiff, it also caused her significant emotional and psychological turmoil, which contributed to the significant and very unfortunate events in the weeks and months that followed.
- [283] As set out above, on May 22, 2022, about a month after the plaintiff reported her father to the RCMP, S.P. was arrested and charged with assault with a weapon. The arrest flowed from a domestic incident between the plaintiff and S.P. The details of this incident and the arrest are not entirely clear. The plaintiff and S.P. both provided some evidence about the incident; however, their evidence was rather vague and irreconcilable. What is clear,

however, is that the plaintiff and S.P. were having some relationships issues. S.P. became distraught because he believed that the plaintiff was no longer in love with him. The plaintiff left the family home and made a report to the RCMP. The RCMP arrested S.P. and charged him with assault with a weapon, and S.P. was not allowed to have contact with the plaintiff for about two months.

- [284] S.P. called his mother B.P. after he was arrested. B.P. got on a plane to Nanaimo the next morning to provide support to both S.P. and the plaintiff. B.P. testified that she and S.P. stayed in an Airbnb. Over the course of three weeks, she also stayed with the plaintiff a few times at the plaintiff and S.P.'s home. She describes the plaintiff during this period as being agitated and withdrawn. At one point the plaintiff kicked B.P. out.
- [285] On June 3, 2022, the plaintiff attended at Nanaimo Regional General Hospital ("NRGH"). She was held involuntarily overnight under the Mental Health Act.
- [286] There was little oral evidence at trial about the plaintiff's attendance at NRGH. The plaintiff was not asked any questions about it on direct examination.
- [287] The plaintiff was asked about the hospitalization in cross examination. Her memory was spotty. The plaintiff said she sought treatment at NRGH on June 3, 2022 because she was suffering due to being separated from SP. She stated that she was under a significant amount of stress because of that situation, and was not eating and was not sleeping well.
- [288] The plaintiff was seen by two physicians at NRGH: Dr. Christina Boucher, emergency medicine doctor, on June 3, 2022, and Dr. Anna Green, psychiatrist, on June 4, 2022. Both doctors testified at trial and their respective clinical records were admitted into evidence as business records.
- [289] Dr. Boucher's clinical records are thorough and comprise two pages of small font typewritten notes. They are drafted as a consultation-type report. From those records I note the following direct observations of the plaintiff's medical condition, statements attributed to the plaintiff, and/or medical advice given:
- "She was very anxious and afraid in the interview and stated that she did not feel safe and also endorsed some fear for her safety."
  - "It was difficult to determine if this was a paranoid delusion or if she was legitimately afraid of her husband who had recently attacked her, but she was unable to display to me rational thinking of how she would handle difficult situations."
  - "She presented today to the emergency department today with a chief concern of fearing for her safety."
  - "Apparently, there was an additional stressor last night when there were probably sirens heard by the patient on her street and she was worried that her husband was trying to break into the home to harm her."

- "She tells me that she has been hearing voices in her head. She cannot tell me who is the voices how many there are or if it is male or female and thinks it might be her own voice and the voices saying to her that her life is in danger. She tells me that she fears that people are out to get her and harm her and kills her [ ] she feels very anxious and low mood. She denies any suicidal ideations or homicidal ideations."
- "She also does not have any supports in the community and lives at home and because she was unable to demonstrate any problem-solving to be in the [sic] seems to be a new presentation with a difficult social situation [sic] have admitted her for her safety for reassessment by the psychiatrist and she is agreeable to this plan."

[290] Dr. Green assessed the plaintiff and wrote a 3.5 page consultation note. From her records I note the following direct observations of the plaintiff's medical condition, statements attributed to the plaintiff, and/or medical advice given:

- "She separated from her husband 3 weeks ago and had an additional stressor of reporting childhood sexual abuse to the police 1 month ago."
- "[the plaintiff] called an ambulance, as she felt anxious and unsafe at home. She initially left hospital after speaking to the nurse, but then returned requesting to speak to the emergency room doctor, to whom she disclosed that she felt unsafe and was worried that people were out to harm and kill her."
- "She was held under Form 4 of the Mental Health Act overnight until psychiatric review this morning."
- "When she was initially seen for interview, she reported that she had come into hospital because 'I experienced a psychotic break,' clarifying this by 'experiencing mental distress.' She now agrees that her symptoms were most likely due to hypervigilance and anxiety. She became preoccupied with the fact that the emergency doctor detained her under the Mental Health Act "
- "In 2017, she was involved in a motor vehicle accident and was seen in the emergency room for a mild head injury. There is an ongoing court case with ICBC. Following the head injury, she was a little slower and more tired "

[291] Dr. Boucher and Dr. Green's clinical records are thorough. They both presented at trial as professional, thorough, and detail-oriented. I am satisfied that the plaintiff made the statements above that were recorded by Dr. Boucher and Dr. Green. I find that the plaintiff's statements about being in mental distress, feeling unsafe, and hearing voices were admissions and were true.

[292] Dr. Green's impression was that while the plaintiff was still presenting as mildly thought disordered, anxious with freezing and dissociative episodes, she was less acutely paranoid and was not responding to internal stimuli. She noted that the plaintiff was now eating normally and had a reasonable sleep the night before and was not presenting with a risk of

self-harm or harm to others. Dr. Green noted the trusting relationship with B.P., who agreed to stay with the plaintiff. Dr. Green discharged the plaintiff and made a referral for psychiatric follow up.

- [293] In direct examination, B.P. described an incident that occurred in late June to early July, when she was caring for the plaintiff. B.P. was in the living room and the plaintiff came out of the bedroom and went to the refrigerator in the kitchen. B.P. observed the plaintiff take some butter out of the fridge. Suddenly, the plaintiff dropped to the floor and was eating the butter with her fingers and kept saying over and over again: "they are here, can't you hear them?"
- [294] The plaintiff's position is that causation for her psychological injuries and conditions is established. More specifically, plaintiff's counsel argues that the plaintiff had a pre-existing vulnerability and that the accident caused a sudden and significant increase in the severity of her pre-existing psychological symptoms. In addition, the plaintiff submits that she suffered emotional trauma as a result of the new injuries she sustained in the accident. The plaintiff further argues that accident made the plaintiff was made vulnerable to injury flowing from reporting her father, S.P.'s arrest, and the 2022 hospitalization.
- [295] The plaintiff argues in their written submissions that Dr. Ancill reported and testified that the plaintiff's childhood trauma made her more susceptible to injury from the accident. This is a mischaracterization of Dr. Ancill's evidence. In his report, Dr. Ancill does not state that the plaintiff's childhood trauma made her more susceptible to injury. As set out above, in the causation section of his report, Dr. Ancill states that but for the accident he "can find no other reasonable explanation for the emergence and persistence of [the plaintiff's] symptoms and functional impairments." There is no mention of the plaintiff's childhood trauma or any pre-existing conditions contributing to injury or symptoms.
- [296] In cross examination, when presented with clinical records that called into question his assumption that the plaintiff's mental health was good and stable at the time of the accident, Dr. Ancill conceded that the plaintiff might not have been as mentally healthy as she and S.P. represented to him. While he said that didn't change his opinion he also said that he was prepared to accept that her pre-existing condition "speaks to her vulnerability" and he would expect that to get worse following the accident.
- [297] On cross examination Dr. Ancill said if there was no mention of the June 2022 NRGH hospitalization in his report then he was not aware of it. There was no mention of the hospitalization in Dr. Ancill's report, thus I find he was not aware of it when he wrote his report.
- [298] Dr. Ancill agreed on cross examination that information about the hospitalization would be important information to have. After he was taken through some of the NRGH records, Dr. Ancill said that his opinion may be amended, but that the thrust of his opinion wouldn't be altered. It was very difficult to discern from Dr. Ancill's testimony exactly how his opinion may be amended. He said that if what was documented in the NRGH records was a change

in behaviour post-accident that was not present pre-accident, or if it was a significant worsening of a pre-accident problem, which is significantly worse after the accident, then his opinion would be that the accident was the cause of the plaintiff's symptoms.

- [299] As set out above, I have given no weight on Dr. Ancill's opinion on diagnosis and causation of injuries. In addition, I give no weight to Dr. Ancill's answers on cross examination on the impact of the plaintiff's pre-existing mental health status and the June 2022 hospitalization on causation. Dr. Ancill had Ms. Gill and Dr. Bergen's records when he wrote his report, yet he accepted that the plaintiff's mental health was good and stable at the time of the accident and concluded that the accident was the sole cause of her symptoms. He is too unreliable a witness in this case for the court to accept any of his opinion on causation, whether in his report or in his evidence on cross examination.
- [300] A finding of causation in this case requires the plaintiff to prove on a balance of probabilities that "but for" the accident, she would not have suffered a deterioration in her pre-existing condition: *McGlue v. Girvan*, 2024 BCCA 208 (*McGlue*) at para. 75.
- [301] Failing to provide medical experts with an accurate picture of one's pre-existing medical history can be fatal to proving that an accident has caused an exacerbation of psychological injuries: *McGlue* at para. 75.
- [302] It follows that failing to provide medical experts with an accurate picture of one's post-accident medical history can also be fatal to proving that an accident left someone more vulnerable to increased psychological symptoms when going through subsequent challenging and/or traumatic events post-accident.
- [303] In my view, the plaintiff has not proven causation for her psychiatric/psychological injuries.
- [304] First, she failed to provide medical experts with an accurate picture of her pre-existing mental health, in particular her mental health in the weeks and months leading up to accident.
- [305] Second, she was not credible and accurate about her reporting of her mental health history and symptoms following the accident.
- [306] The causation opinion of Dr. Ancill was completely undermined for a variety of reasons, including the failure of the plaintiff to provide relevant information about her pre-accident and post-accident mental health history.
- [307] The plaintiff refused to cooperate with the assessment with Dr. Spivak.
- [308] Accordingly, there was no expert evidence before the court distinguishing the psychological impact of the accident from the other incidents and factors which affected and likely caused pre-accident psychiatric issues as well as post-accident psychiatric issues. In other words, there was no accepted expert evidence supporting a finding of causation.

- [309] Nevertheless, causation can be established without expert evidence. In some cases, it may be inferred from a temporal sequence of events: *Midgley v. Nguyen*, 2013 BCSC 693 at para. 171.
- [310] When causation is asserted primarily on a temporal relationship between the negligent conduct and injury in question, "a close scrutiny of the evidence is required because the inference from a temporal sequence to a causal connection is not always reliable": *Hardychuk v. Johnstone*, 2012 BCSC 1359, at para. 130.
- [311] In the circumstances of this case, such an inference cannot be made.
- [312] As indicated, there is no reliable evidence about the extent and likely trajectory of the plaintiff's pre-accident psychological issues. The evidence establishes that the plaintiff had considerable pre-existing psychiatric issues at about age 20. Although her mental health stabilized, in the weeks and months leading up to the accident her mental health status was deteriorating.
- [313] However, because the plaintiff has not been candid about this, we do not have an accurate baseline and etiology for the plaintiff's pre-accident psychiatric condition. Without this, it is not possible for the court to conclude that her mental health status has in fact changed, or that any changes were related to the accident.
- [314] In addition, the court was not able to determine if there was any increase in the plaintiff's psychological symptoms following the accident. As set out above, the plaintiff and S.P. provided little evidence about the plaintiff's mental condition in the days and weeks immediately following the accident. While the plaintiff and S.P. did give evidence of decreased mood and fatigue issues post-accident, the evidence did not establish that her mood and fatigue was any worse than it was when she met with Ms. Gill or Dr. Bergen in the weeks prior to the accident. In short, the evidence does not establish that the plaintiff's already deteriorating mental health status was made worse as a result of the accident.
- [315] Similarly, there was not much evidence about the plaintiff's mood from the time she returned to work to early 2022, just before the significant events that spring. While B.P. and D.P. provided examples of the change in the plaintiff's mood post-accident, for the most part it was not clear whether they were referring to observations from before spring 2022 or after spring 2022.
- [316] Further, because the plaintiff has not been candid about the events of 2022, we do not have an accurate etiology for the plaintiff's post-accident psychiatric condition.
- [317] Simply put, based on the evidence before it, the Court cannot find on a balance of probabilities that the accident was necessary to bring about the psychiatric symptoms the plaintiff reported post-accident.

## Whiplash Injury

- [318] I find that the plaintiff has established causation with respect to the whiplash injury. More specifically, she has proven that she sustained soft tissue injuries to the neck and back, and associated headaches, as a result of the accident.
- [319] As indicated, the defendant admits that the plaintiff suffered these injuries due to the accident.
- [320] Dr. Medvedev's opinion is that the plaintiff suffered whiplash in the accident, causing a neck muscle and soft tissue strain and sprain injury, and the development of posttraumatic headaches. In addition, Dr. Medvedev's opinion is that the documented physical complaints are probably related to the accident. I accept Dr. Medvedev's opinion in this regard.
- [321] Dr. Medvedev had the clinical records of Hilltop Medical Clinic when he drafted his report. Following the accident, the plaintiff attended at Hilltop on March 21, 2017, where she saw her family doctor, Dr. Tyrell, and on March 30, 2017, when she saw another doctor at the clinic, Dr. Balakrisna. She then saw Dr. Tyrell again on April 4, 2017, June 12, 2017, August 11, 2017, August 15, 2017, June 12, 2017, May 8, 2018, and August 16, 2018. Both Dr. Tyrell and Dr. Balakrisna testified at trial and their clinical records were admitted into evidence as business records.
- [322] At the March 21, 2017 visit, Dr. Tyrell performed an examination and observed tender muscles of the neck, limited extension, and pain on palpation to the left (presumably referring to the neck).
- [323] At the March 30, 2017 visit, Dr. Balakrisna found that the plaintiff had grade 2 range of motion in the neck and the back. On cross-examination, he clarified this note to mean that the plaintiff had pain at the extreme range of motion in the neck and back. He stated that these were objective findings, although I'm not sure that is correct.
- [324] At the April 4, 2017 visit, Dr. Tyrell's examination finding was that there was some stiffness in the neck and back bilaterally on flexion.
- [325] Dr. Tyrell's June 12, 2017 record noted tender muscles in the neck, and reduced flexion and rotation of the neck.
- [326] I accept the plaintiff's evidence that while her neck, back and headache symptoms have improved, they have not gone away.
- [327] Although I found the plaintiff generally not credible and not reliable, there was no evidence that she had any pre-existing issues with her neck and back. While she had very occasional migraines prior to the accident, there was no indication that she had post-traumatic headaches or any significant issues with headaches and migraines.

- [328] Dr. Medvedev's opinion is that she sustained these injuries as a result of the accident. His opinion is also that the plaintiff's physical injuries largely recovered by August 2017, when it is documented that she had returned to some amount of running and was able to lift a canoe on at least one occasion. I don't accept Dr. Medvedev's opinion that the plaintiff's physical injuries were largely resolved by August 2017. I found that the plaintiff was candid about her physical injuries. She acknowledged that they have improved and that she has learned to manage them.
- [329] I also accept B.P. and S.P.'s evidence that they observed a noticeable decline in the plaintiff pursuing physical activities post-accident.
- [330] Unfortunately, there was little evidence about the severity and frequency of the plaintiff's neck pain, back pain, and headaches at the time of trial. Nevertheless, based on the limited evidence I have, I find that the plaintiff suffers from ongoing mild to moderate neck pain, back pain, and headaches.
- [331] Dr. Ancill's opinion is that, given the passage of time, the plaintiff's pain and headaches are unlikely to resolve completely, however, it is possible that treatments may be of some help. Although I have generally given Dr. Ancill's opinion no weight, this is one aspect of his opinion that I will give weight to, as it is not in relation to causation or diagnosis. Accordingly, I find that the plaintiff is likely to experience these symptoms for the foreseeable future.
- [332] I find that the plaintiff's other complaints, namely right shoulder pain, right leg pain, anxiety with driving, sleeplessness, and fatigue, have not been proven to be caused by the accident.

Is K.A.R. Entitled to Damages?

### Non-Pecuniary Damages

- [333] In *Langford (City) v. Matthews*, 2024 BCCA 214, Madam Justice Horsman (writing for the Court), helpfully summarizes the applicable law as follows:
- [44] Non-pecuniary damages are intended to compensate the plaintiff for pain and suffering caused by their injuries and the consequences of those injuries, including the loss of amenities and enjoyment of life: *McCliggot* at para. 43. The amount of an award for non-pecuniary damages is determined by a functional approach that does not depend solely on the gravity of the injury, but also on the circumstances of the particular plaintiff: *McCliggot* at para. 44. While an assessment of comparator awards is important, damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26. In British Columbia, the assessment of non-pecuniary damages is generally guided by the non-exhaustive list of factors set out by this Court in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. They include the plaintiff's age, the nature of the injury, the severity and duration of pain, level of disability, emotional suffering, loss or impairment of life,

impairment of family, marital and social relationships, impairment of physical and mental abilities, and loss of lifestyle.

[334] None of the authorities provided by the parties are applicable given my findings on causation.

[335] I have found that as a result of the accident, the plaintiff has suffered soft tissue injuries to her neck and back. In addition, she also suffers from post-traumatic headaches. The plaintiff had no pre-existing history of neck or back pain. She experienced occasional migraines prior to the accident. The plaintiff's accident-caused injuries caused her some discomfort in her work as a swimming instructor, and did cause her to reduce and/or modify some of her physical activities, such as hiking, running, and rock climbing. The plaintiff has experienced some improvement in these symptoms but they are unlikely to go away completely in the future.

[336] The plaintiff is only 35 years old. Given her youth and lack of pre-existing physical health issues, I find that an award of \$80,000.00 for non-pecuniary damages is appropriate.

#### Loss of Income Earning Capacity

##### Past Loss of Income Earning Capacity

[337] In *Lamarque v. Rouse*, 2023 BCCA 392, Madam Justice Horsman (writing for the Court), summarizes the applicable law as follows:

[29] An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have, not could have, performed, but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The standard of proof for past hypothetical events is: whether there is a "real and substantial possibility" that the events would occur: *Grewal v. Naumann*, 2017 BCCA 158, at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. If the claimant establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48.

[30] In many cases, a claimant's actual lost income will be the most reliable measure of a loss of earning capacity. However, there is no hard and fast rule that only loss of actual income is compensable. It must be remembered that it is not the actual lost income that is compensable, but the loss of capacity: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. An award of damages for past loss of earning capacity compensates a claimant for any pecuniary loss resulting in an inability to work, and evidence supporting such loss can take different forms. In *Ibbitson*, for example, the plaintiff, who worked in the forest industry, maintained his pre-accident level of income by working longer hours. Thus, he was found to have suffered a pecuniary disadvantage that was compensable through an award of damages for loss of earning capacity: *Ibbitson* at paras. 20-21.

- [338] At the time of the accident, the plaintiff was employed part-time by Atlantis Swim as a swim instructor and lesson supervisor. She also had her own business as a swim coach.
- [339] The plaintiff's evidence was that she missed approximately three weeks from her job at Atlantis immediately following the accident.
- [340] The plaintiff filled out an Insurance Claim Application for ICBC, which she signed on April 18, 2017. The plaintiff confirmed on cross examination that it was her signature on the completed form, and that her husband's signature is on the form as a witness to her signing it. On the form, the plaintiff indicates that she missed 77 hours of work at a wage of \$19.00 per hour. This amounts to \$1,463.00 in lost wages.
- [341] The defendant's position is that this is the amount the plaintiff is entitled to under this head of damage. I agree.
- [342] The plaintiff returned to work at Atlantis Swim about three weeks after the accident. Starting with the pay period commencing April 24, 2017, the plaintiff's average weekly hours increased significantly compared to what her average weekly hours were before the accident. Within about two months of the accident, the plaintiff was promoted to staffing coordinator, earning an annual salary of \$39,520.00, working full time hours. On June 15, 2017, the plaintiff applied for a manager position.
- [343] The plaintiff resigned from her position on August 28, 2017 via email. As discussed above, in the email the plaintiff outlined a number of concerns with Atlantis, including feeling that the goodwill she extended the company had been continually abused for many months. In addition, she complained about "broken promises", "directives from the office which are out of touch with the program's needs", "lack of response on real needs", "unrealistic requests", and "hostility from [her] direct supervisor". She indicated that the conditions were no longer tolerable to her and resigned effective immediately.
- [344] I pause to note that the plaintiff called no witnesses that worked with her, nor did she call any of her swim coaching clients.
- [345] The plaintiff testified that she found the work at Atlantis to be physically challenging. In addition, she said that the pool environment aggravated her concussion symptoms. Further, she testified that some responsibilities were taken away from her after she asked for accommodation due to her concussion symptoms. She also said that driving to work locations was difficult due to her driving anxiety.
- [346] While I accept that the plaintiff's work likely aggravated her physical injuries, I find as a fact that the plaintiff's accident-caused injuries did not cause or contribute to her leaving her job at Atlantis. I find that the plaintiff left her job at Atlantis due to her general dissatisfaction with the company, the details of which were outlined in the August 28, 2017 email.

- [347] After leaving Atlantis, the plaintiff obtained a similar position with another swim program provider called Catalyst Kinetics. She worked at Catalyst starting in mid-September 2017, but by September 2018 she was doing very little work with them. In October 2018, she joined Indigo Books in an operations role, where she was mainly involved in merchandising. The plaintiff left Indigo Books in the spring of 2019, when she started school at Kwantlen Polytechnic University. Since then, the plaintiff has not returned to the workforce and has focused on being a student.
- [348] The plaintiff claims \$200,000.00 for past loss of income earning capacity.
- [349] The plaintiff argues that but for the accident, she would have continued to work as a swimming coordinator at Atlantis or another similar company, earning approximately \$39,500 per year. She says that because of her accident injuries she was unable to maintain even part-time employment.
- [350] I do not accept the plaintiff's position. First, the plaintiff's position assumes that she has proven that the accident caused all the injuries she claims, which she has not. I find that while the plaintiff's neck, back and associated headaches have likely caused her some discomfort while working, beyond the first three weeks post-accident those injuries did not cause her to miss any work and did not contribute to her decisions to leave her positions at Atlantis, Catalyst, or Indigo. I find that the plaintiff left Indigo in order to be a student. I also find that the plaintiff's accident-caused injuries did not impact her swim coach business in any way.
- [351] The plaintiff and S.P. moved to Nanaimo in the summer of 2019 so that they could pursue studies at VIU.
- [352] In December 2019 and March 2020, Nurse Practitioner Diane Middaugh filled out forms verifying that the plaintiff had a permanent disability and a mental health disorder. Ms. Middaugh testified as part of the defendant's case to prove her records, which I admitted into evidence as business records.
- [353] Ms. Middaugh testified that the forms were required in order for the plaintiff to obtain accommodations at the university. There is no mention of the accident in any of these forms.
- [354] I find that the plaintiff has not proven any past loss of income earning capacity other than the first three weeks of missed work at Atlantis.
- [355] I award her \$1,463.00 in gross past loss of income earning capacity.

#### Future Loss of Income Earning Capacity

- [356] In Lamarque, Madam Justice Horsman again provides a helpful summary of the applicable law. She writes (for the Court):

- [37] The central task for the court in assessing a claim for loss of future earning capacity is to compare the claimant's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156-157. As with past hypothetical events, future hypothetical events need not be proven on a balance of probabilities. A hypothetical future possibility will be accounted for as long as it is a real and substantial possibility. If a claimant establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event: *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [Rab], citing *Goepel J.A.*, dissenting on other grounds, in *Grewal* at para. 48.
- [38] A diminishment in earning capacity does not justify an award of damages for future loss of earning capacity in the absence of evidence that the impairment will result in a pecuniary loss. A claimant must always prove there is a real and substantial possibility of a future event leading to an income loss. If the claimant discharges that burden, then the loss must be quantified based on either an earnings approach or a capital asset approach. The earnings approach is more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at paras. 4 and 32.
- [39] In *Rab*, this Court set out a three-step process for considering claims for loss of future earning capacity: (1) does the evidence disclose a potential future event that could give rise to a loss of capacity?; (2) is there a real and substantial possibility that the future event will cause a loss of capacity; and (3) what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?: *Rab* at para. 47.
- [40] The process of quantifying damages for loss of capacity at the third step of the *Rab* test is often challenging. Courts have adopted various approaches to assigning a dollar figure to the loss of capacity to earn income, including, where appropriate, awarding a claimant's entire income for one or more years: *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), 1995 CanLII 2871 at para. 43. Any approach that is adopted must be supported by the evidence: *Rab* at para. 75.
- [357] As set out above, the plaintiff has not proven on a balance of probabilities that she suffered a traumatic brain injury as a result of the accident. Further, she has not proven, on a balance of probabilities, that the accident caused or contributed to any psychiatric or mental health conditions or symptoms. She has proven that she suffered mild to moderate soft tissue injuries to her neck and shoulder as a result of the accident, along with headaches. As indicated above, I find that the plaintiff's mild to moderate soft tissue symptoms are chronic and will continue into the future, and could give rise to a loss of capacity. As such, the first step in the *Rab* test is established.
- [358] However, I am not satisfied that the second step in the *Rab* test is met. In other words, there is no real and substantial possibility of a future event that will cause a loss of capacity. While the plaintiff's soft tissue injuries may have caused her some discomfort and pain at times when carrying out her work as a swim instructor, as set out above, I find that they did not continue to impair her ability to do work duties. In addition, while her soft-

tissue pain may cause some discomfort and pain while studying for prolonged periods, she has not established a real and substantial possibility of a future event leading to a pecuniary loss.

[359] I find that any ongoing impairment that the plaintiff may have in her capacity to earn income is a result of psychological conditions not caused or contributed to by the accident.

[360] The plaintiff is not entitled to an award for loss of future income earning capacity.

#### Special Damages

[361] Claims for special damages are subject to the standard of reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[362] Evidence of medical justification is a factor in determining whether an expense aimed at promoting the plaintiff's physical or mental wellbeing is reasonable: *Redl* at para. 55.

[363] Subjective factors can also be considered in determining whether an expense is reasonable, including whether the plaintiff believes an expense was reasonably necessary: *Redl* at para. 55; *MacIntosh v. Davison*, 2013 BCSC 2264 at para. 128.

[364] The plaintiff claims \$3,737.65 for special damages. The defendant has agreed to special damages of \$2,748.05. The defendant takes issue with amount the plaintiff incurred for cannabis, which is \$989.60.

[365] The plaintiff testified that she used cannabis in the form of cannabidiol. She asserted that cannabidiol was helpful for her pain symptoms, as well as with reading. The plaintiff stopped using cannabidiol because she felt judged for using it. Moreover, her therapist recommended that she reduce her dose or stop using it altogether.

[366] Although there was no evidence before the court of any medical practitioner recommending cannabidiol, as set out above, subjective factors can be considered in determining whether an expense is reasonable as a special damage.

[367] I am satisfied that the cost of the cannabidiol was reasonable as a special damage, and award the plaintiff \$3,737.65 in total for special damages.

#### Cost of Future Care

[368] In *Pang v. Nowakowski*, 2021 BCCA 478, Mr. Justice Voith (for the Court), helpfully summarizes the applicable law as follows:

[56] The legal framework that is relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:

[43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary

on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable: *Aberdeen* at para. 42; *Gao* at para. 69.

[57] Several additional principles are relevant:

i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40 and 54; *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 at paras. 86-87.

ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred: *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 54-55;

iii) The court must be satisfied that there is no significant overlap in the various care items being sought: *Johal v. Meyede*, 2015 BCSC 1070 at para. 9(f); *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968 at para. 356; *Myers v. Gallo*, 2017 BCSC 2291 at para. 231.

[58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *O'Connell v. Yung*, 2012 BCCA 57 at para. 55. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties: *Shapiro* at para. 51; *Krangle* at paras. 21-22. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss: *Perren* at para. 32; *Rizzolo v. Brett*, 2010 BCCA 398 at para. 49. See also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 245-248, 1978 CanLII 1.

[369] Dr. Ancill recommends the following medication and treatments:

- a) Psychostimulants (e.g. Modafinal or methylphenidate) for fatigue;
- b) Duloxetine for depression;
- c) SSRI anti-depressants (e.g. escitalopram or sertraline) for anxiety;
- d) Psychological intervention (e.g. cognitive behavioral therapy); and
- e) Psychiatrist intervention - for chronic pain.

[370] Dr. Medvedev could not make any recommendations without obtaining all up to date medical information.

- [371] Dr. Spivak could not provide any recommendations due to an invalid exam.
- [372] Dr. Walker recommended that the plaintiff be assessed by a psychiatrist and neuropsychiatrist. He further stated that the plaintiff "well may need" intensive cognitive behavioral therapy.
- [373] With the exception of the psychiatrist intervention, all of the recommendations made by the medical experts are for treatment of psychiatric injuries and/or symptoms.
- [374] Because I have found that the plaintiff has not established that her psychiatric conditions and symptoms were caused by the accident, she is not entitled to cost of future care for treatments aimed at addressing these conditions or symptoms.
- [375] The plaintiff has not established an entitlement to any of the cost of future items claimed, and the court makes no award under this head of damage.

## Conclusion

[376] The plaintiff is awarded the following damages against the defendant:

a) Non-pecuniary damages

\$80,000.00

b) Past loss of income earning capacity

\$1,463.00

c) Future loss of income earning capacity

0

d) Special damages

\$3,737.65

e) Cost of future care

0

Total

\$85,200.65

[377] Total damages are awarded in the amount of \$85,200.65, less statutory deductions.

[378] If the parties cannot agree to costs, they may schedule a one-hour 9:00 am hearing, to be set no later than 45 days from the release of these reasons. The parties must file written submissions and briefs of authorities no later than seven days before the hearing. The written submissions must not exceed 3,000 words and the brief of authorities must not exceed five authorities.

"Morishita J."

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