
CANADA / JUDGMENT

Kallstrom v. Yip

2016 BCSC 829

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 829 Kallstrom v. Yip

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kallstrom v. Yip,

2016 BCSC 829

Date: 20160511

Docket: M030728

Registry: Vancouver

Between:

Susan Kallstrom

Plaintiff

And

Bonnie Yip, Pik Che Peggy Yip, Jenny Lee,

Primus Automotive Financial Services Canada Inc./

Services de Financement Automobile Primus Canada

Defendants

Docket: M042120

Registry: Vancouver

Between:

Susan Kallstrom

Plaintiff

And

Sherwin Sityar Amaba and Marianne De Geroza

Defendants

Docket: M042121

Registry: Vancouver

Between:

Susan Kallstrom

Plaintiff

And

Judy Ming-Chu Lam and Yee Nam Lam

Defendants

Docket: M065021

Registry: Vancouver

Between:

Susan Kallstrom

Plaintiff

And

Frank Sabatino, Leasemaster National Division of

Humberview Motors Incorporated, and

Gunnebo Canada Inc. formerly known as Gunnebo Security Inc.

Defendants

Corrected judgment: The front page of this judgment was corrected on August 30, 2021

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

February 1-5, 9-12,

15-19 and 22-26, 2016

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2016

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INTRODUCTION

- [1] Ms. Kallstrom was involved in no less than six separate motor vehicle accidents ("MVA"s) between March 23, 2001 and December 9, 2004. Four different lawsuits arising out of five of those MVAs are now tried together. One of the MVAs, which occurred on May 8, 2004, is not the subject of any litigation.
- [2] Causation is the controversial issue between the parties. The question to be determined is whether and to what extent each of the MVAs caused or contributed to the chronic pain and depression suffered by Ms. Kallstrom as well as the numerous challenges and difficulties that Ms. Kallstrom has experienced, and will continue to experience, in her daily life.
- [3] Ms. Kallstrom claims that the cumulative effect of the MVAs has resulted in "indivisible injury" which will continue for the balance of her life and for which all defendants should each be jointly and severally liable for the full amount of the damages to be assessed. The defendants, on the other hand, challenge causation and argue that any chronic pain or psychological problems experienced by Ms. Kallstrom were largely caused by incidents and stressors in Ms. Kallstrom's life not related to the MVAs and for which they ought not be held

responsible.

PLAINTIFF'S TESTIMONY

- [4] Ms. Kallstrom is 44 years old. She is presently living in Regina and is employed on a full-time basis by her brother's company, Kalco Construction Ltd. ("Kalco"). She says her brother is extremely patient and very understanding of her medical problems.
- [5] Ms. Kallstrom is not married, although she has a son, Cole, who turned 21 years of age on February 14, 2016. Cole does not live with her at the present time.
- [6] Ms. Kallstrom confirmed that she was involved in six MVAs, all in Vancouver, on the following dates:
- March 23, 2001 (MVA 1);
 - April 12, 2001 (MVA 2);
 - April 17, 2003 (MVA 3);
 - February 4, 2004 (MVA 4);
 - May 8, 2004 (MVA 5); and
 - December 9, 2004 (MVA 6).
- [7] Ms. Kallstrom said that while MVA 3 involved the biggest impact between vehicles, she believes it is an accumulation of all six MVAs which has led to her medical problems. She described those problems, which persist to this day, as including chronic pain, bad headaches, daily depression, suicidal thoughts, chronic fatigue, and nightmares of the MVAs (mostly MVA 3, but also MVA 6).
- [8] Ms. Kallstrom was asked what medications she had taken on the first day of her testimony. She stated she had taken her "daily medication" of Celexa (anti-depressant), Lyrica (fibromyalgia pain control) and Flexeril (muscle relaxant). As well, because of her anxiety about the trial experience, she had also taken some Ativan.
- [9] Ms. Kallstrom described her life as a child in Thunder Bay and Kelowna. She called herself a bit of a tomboy who played lots of sports and who had lots of friends. Her family had converted to the Jehovah's Witness faith when she was quite young and she made many friends with members of the congregation.
- [10] Upon moving to Kelowna, Ms. Kallstrom completed grade 10 at Westbank High School. Thereafter, she completed the last two years of high school by correspondence and graduated from grade 12. She described herself as a "B+ student".

- [11] Ms. Kallstrom first got a job at the age of 15, working as a server at a pizza restaurant in Westbank, and then later in a Chinese restaurant in Vernon. She says her parents instilled both children with a "work before play" ethic and each child was assigned daily chores at a fairly early age.
- [12] Following graduation, Ms. Kallstrom moved to Vancouver with a friend. She worked for eight months at a building supply company as a receptionist and accounts payable clerk, and thereafter full time in the accounting/inventory department of Snap-on Tools on Annacis Island. She left this latter employment after a year to go travelling with her friend, Jodi Sowers, in Hawaii.
- [13] Ms. Kallstrom worked for the BC Lions in Surrey for the 1990-91 season. She was the head coach's secretary and also assisted at various promotional events. During this time she met and became engaged to a young man who was also a Jehovah's Witness. That young man and his mother went back to Germany for several months and while he was gone, Ms. Kallstrom said she had her "eyes opened" by both her new and old friends, skiing, dancing, going to bars and the like. She broke off her engagement shortly thereafter. She, along with Ms. Sowers, also started to seriously question the Jehovah's Witness religion and eventually gave up that faith's commitments. She says her parents were upset but were understanding and that no "shunning" occurred.
- [14] Ms. Kallstrom says that she applied for and was accepted into a nursing program at Douglas College. There was a two-year waiting period and some upgrading (English) was also required. She says she missed the registration deadline for the coursework because her roommate failed to give her the correspondence that had been sent to her from Douglas College.
- [15] During the years 1992 to 1995, Ms. Kallstrom worked full time as a server at a Red Robin restaurant. There, she met and started dating a co-worker, Doug McIlhargey, who was the same age (21). They started living together but were in no rush to get married. Mr. McIlhargey was just starting out in his sales career and Ms. Kallstrom says that she too was intent on pursuing a career, although at that time she also had in mind not only a good job but also "a marriage, four to five kids, and two dogs".
- [16] Ms. Kallstrom took some travel and tourism courses at Nationwide Travel College in Richmond, B.C. She also became pregnant, something that was not planned and which came as a shock. Options were discussed with both Mr. McIlhargey and her parents and a decision was made to keep the child. However, several months later, the relationship with Mr. McIlhargey began to sour. Ms. Kallstrom was resentful, the couple started to argue quite regularly and "drifted apart".

- [17] Cole was born on February 14, 1995. It was an easy delivery. However, Ms. Kallstrom described herself as becoming sleep deprived and irritable. Arguments with Mr. McIlhargey increased and he was less and less at home. She started to feel isolated and experienced post-partum depression. She was prescribed anti-depressant drugs for two to three months.
- [18] Ms. Kallstrom and Mr. McIlhargey separated in the fall 1995 when Cole was 7 to 8 months old. A court order was eventually granted in January 1997 awarding both parents joint custody and equal parenting, and requiring Mr. McIlhargey to pay child support. Ms. Kallstrom described the family court proceedings as a "destructive process".
- [19] In June 1995, Ms. Kallstrom followed up on a newspaper advertisement and interviewed for a position with Air Club International. This was an airline operator offering transatlantic charter flights to Frankfurt, Amsterdam, London and Paris. Ms. Kallstrom worked as a flight attendant, away from home on average three to four days a week. She described it as a "dream job" although exhausting, particularly after Mr. McIlhargey moved out.
- [20] Air Club International became bankrupt in the fall of 1996. Ms. Kallstrom registered with a headhunting/temporary worker agency, G.S. Lerick & Associates, and after working at that firm was then assigned to a position, "Executive Concierge", at the Sheraton Wall Centre Hotel in Vancouver. A full-time position was offered and she worked at the Wall Centre from January 1997 to October 1999. She called it a "good place to work". There was a daycare near her home for Cole, she was paid well (\$47,000-\$48,000 per annum) and had free use of the health and fitness facilities in the hotel. She joined the company's baseball team and had a number of girlfriends with whom she would go rollerblading, play tennis, hike the Grouse Grind and the like.
- [21] Ms. Kallstrom was promoted several times at the Wall Centre and was awarded a "Certificate of Excellence" in August 1998. Eventually she became the personal assistant to the senior executive in the company. The work was very challenging but enjoyable. In addition to scheduling all of the executive's various commitments, she was also called upon to attend functions and meetings as his representative from time to time.
- [22] In later 1999, things became uncomfortable for Ms. Kallstrom at the Wall Centre. The executive started "putting the moves" on her and, as he was a much older man, she eventually chose to leave rather than continue to be subjected to inappropriate behaviour.
- [23] Ms. Kallstrom had a boyfriend while she was employed at the Wall Centre. In December 1997 and again in 1999, she became pregnant by that boyfriend and on both occasions terminated the pregnancy. It was, she says, a mutual decision. Her relationship with that individual terminated in late 1999 when he went to Toronto to pursue a master's degree.

- [24] After leaving the Wall Centre, Ms. Kallstrom very quickly obtained an Executive Administrative Assistant position with an insurance brokerage, Independent Brokerage Group Inc. Shortly thereafter, IBG became part of a larger insurance broker conglomerate, HUB Financial Inc. Ms. Kallstrom remained employed with IBG/HUB for 3½ years until May 2003. Her role was to provide administrative/operations assistance to the President, the Director of Operations (Ms. Noseworthy) and the Executive Vice President (Mr. Di Salle).
- [25] At some point after joining IBG, Ms. Kallstrom restyled herself as a "consultant" using the business name "Glod Productions & Consulting" (an unincorporated entity). In 2001, she signed a "consulting contract" with HUB to work as an "Executive Team Project Manager". Remuneration was payable on the basis of \$25 per hour plus GST, to be invoiced weekly by Glod. The contract also called for "full company benefits" under the group plan, monthly parking and three weeks' vacation. The contract was stated to be terminable by either party on one month's notice. In the calendar year 2002, Ms. Kallstrom (Glod) earned approximately \$43,200 from HUB.
- [26] Ms. Kallstrom says that in the spring of 2000, she developed a condition of excessive sweating. She has no idea what caused it but it resulted in her clothes becoming drenched. She became extremely self-conscious, moody and depressed. She stopped going to the gym and started gaining weight with some resulting back pain.
- [27] Ms. Kallstrom was eventually diagnosed as having a condition called "hyperhidrosis" and on August 31, 2000 she underwent surgery to remove her sweat glands. Recovery from that operation was prolonged by an infection that subsequently developed in the area of the surgery. Her upper body was also immobilized, which resulted in some shoulder pain and a referral to physiotherapy. She said she was feeling better by the end of the year.
- [28] Ms. Kallstrom went on a 10-day vacation to Mexico in February 2001. By that point she says she was feeling good, was experiencing no pain, nor depression, and was not taking any medications. She had resumed working out and she was sleeping okay. She was "back to my normal self", "dating a new guy and enjoying work and still planning on getting married in due course and having more children."
- [29] MVA 1 occurred on March 23, 2001. Ms. Kallstrom was driving north on Hornby Street and was stopped in traffic south of Robson Street. She was driving her 1996 Pontiac Sunfire GT. Her son, Cole, was in the front passenger seat on a booster seat. Her vehicle was suddenly struck from the rear. It was a "severe jerk" and her head "slammed back" into the headrest. Cole started crying.
- [30] Ms. Kallstrom says her primary concern at the time was Cole. She spoke to the other driver and exchanged information. No police, ambulance or fire departments were called. She said that she simply decided to go home, missing Cole's hockey game that evening in the process. She phoned Mr. McIlhargey about missing the game.

- [31] Two to three hours later, Ms. Kallstrom says she started developing a headache. Her neck stiffened up and she started developing pain and soreness in the shoulders, upper back and right hip. The next morning she called her family doctor, Dr. Randi Izen, who was able to fit her in for an appointment that day.
- [32] MVA 2 occurred on April 12, 2001. Ms. Kallstrom says that her injuries from the first collision had not resolved by that time and she was still experiencing pain in her neck. The MVA occurred near the intersection of Oak Street and 7th Avenue in Vancouver. She was stopped on a steep hill heading south, going home after work. A small SUV in front of her started rolling back down the hill toward her. Ms. Kallstrom says it was "almost like someone driving a standard who couldn't get the clutch out properly".
- [33] Ms. Kallstrom says that her car "got bumped". Although she had tensed up in preparation of an impact, her head was jolted back and again hit the headrest.
- [34] After MVA 2, Ms. Kallstrom visited her family doctor on various occasions and also received chiropractic and physiotherapy treatments. She says she continued to experience headaches and pain in the neck and back, which, although it improved over time, continue to persist. Her doctor prescribed medication. She says she "pushed through the pain" and continued working full time, although her neck continued to bother her when she was sitting at her desk for any long period of time.
- [35] Ms. Kallstrom acknowledges that her boyfriend at the time was a heavy cocaine user and that she too was "experimenting" and "using cocaine socially with a group of friends". By that time, she was living with her boyfriend and by late 2001 became worried about the possibility of cocaine addiction. Dr. Izen referred the couple to counselling, however the relationship with her boyfriend ended abruptly in January 2002 and Ms. Kallstrom "kicked him out".
- [36] MVA 3 occurred on April 17, 2003. Ms. Kallstrom says she was "getting back to my old status" by the time the MVA happened. She had a large circle of girlfriends. She was happy and working hard. She frequently would go out for dancing, parties and barbecues. She had "no problem meeting men" and says she still intended to get married in due course and have more kids.
- [37] The MVA happened at the intersection of Smithe and Hornby Streets in Vancouver. Ms. Kallstrom was on her way to work. There were two right turn lanes from Smithe Street onto Hornby at the time. The curb lane was a mandatory right turn lane. Ms. Kallstrom was in the center optional right turn lane. As she was turning right onto Hornby she was struck by the car beside her in the curb lane, which had failed to make its right turn.
- [38] Ms. Kallstrom says the collision was "violent". The other car came "crashing into" the right side of her vehicle causing the latter to swing all the way around and hit the other car again. She said she was in shock, dazed and confused, and that she does not remember the conversations she had with the people who approached her.

- [39] Ms. Kallstrom's car was still working, although it made a "clunking noise". She drove to work and parked her car in the building at West Georgia and Thurlow. After a couple of hours at work, however, she became dizzy and had a pulsating, violent headache. She called a tow truck for her car and a girlfriend at work drove her home.
- [40] The day of MVA 3 was Ms. Kallstrom's birthday. Her girlfriends had arranged a celebration weekend trip to Los Angeles starting the following day. They intended to stay with a friend who lived in Beverly Hills. She told her friends that she could not go because of headache and soreness, but they were insistent.
- [41] Ms. Kallstrom says she spent the entire weekend on her girlfriend's couch with her head throbbing and her ears ringing. She described it as "awful excruciating pain". It "felt like I had been hit in the back of the neck with a 2 x 4."
- [42] Ms. Kallstrom visited Dr. Izen upon her return to Vancouver and was prescribed various medications, including Tylenol 3. She was experiencing a lot of pain, was unable to work, was running out of funds and found herself in a desperate situation, so much so that three weeks following the MVA she wrote the following letter to Dr. Izen:

! URGENT !

DR. IZEN

May 7, 2003

Dr. Randi Izen, GP

810 - 943 West Broadway

Vancouver, BC V5Z 4E1

Subject: Help Please!!!!

Dear Dr. Izen,

I'm at wits end and need help with many everyday activities that cause me great physical pain. At my last visit you advised me not to lift anything and unfortunately many things require doing so and can't be left not done. I can't get my son to school because he has no clean clothes. Making lunches for him can't be done, because I can't go grocery shopping. Dishes are piled up so there is nothing clean to eat off of. My dog is getting into everything because she hasn't been walked regularly in 3 weeks. I frustrated and screaming at everyone and everything. The amount of pain I'm in daily is unbearable unless I'm taking upwards of 6-8 hydromorphine per day. I cannot afford not to work, so working the limited hours I do, leaves me absolutely spent by the time I get home and then there is my son and dog that require my attention. Rather than feeling like I'm improving physically, the pain and frustration is worsening! Both are affecting EVERYTHING; not to mention the mental anguish and stress I'm in beyond that!

I need help PLEASE! I can't walk my dog, my son is angry with me (he's had a new bike for a week now and continually ask me to go out and ride it, but I am unable to do so ... it makes me feel just awful!). My work/company is suffering; my hours/income are less and I'm having to turn away work which I would normally be taking; I have zero funds as the little I did have is being used to now pay for medical bills. My situation is DIRE!

...

My next appointment with you is scheduled for Thursday, May 15th; however, I desperately need this as soon as possible in order to give to ICBC. ...

[43] Dr. Izen obliged Ms. Kallstrom with a letter to ICBC dated May 12, 2003. Things did not improve, however. The pain continued and the income dried up. Neither medical employment insurance benefits nor income assistance ("welfare") was available because of Ms. Kallstrom's status as an unregistered independent contractor. Ms. Kallstrom says that by the end of May she was simply overwhelmed, she needed constant help from her friends who were now starting to turn away, and that she could not cope on her own. She turned to her brother, Chad, in Regina for help. He agreed to fly Ms. Kallstrom, Cole, and the dog out and to put them up for a couple months. That flight occurred on June 10, 2003. Ms. Kallstrom says by that time her son had become aware of all of her difficulties and was "scared".

[44] On June 4, 2003 Ms. Kallstrom had a telephone conversation with Karen Noseworthy at HUB to let her know that she was going to Saskatchewan to stay with her family possibly until the end of August 2003. She followed it up with a letter delivered by email on June 9, 2003.

[45] She enclosed an invoice for services rendered from May 19-30, 2003. She attempted to assure both Ms. Noseworthy and Mr. Brown that she was not permanently moving to Saskatchewan but only taking time off for "health and wellness" and that she "fully intended on making a full return to HUB". She offered to continue doing outstanding projects electronically from Saskatchewan. She apologized for the disruption.

[46] HUB replied with a letter dated June 16, 2003 emailed on the same date. It started with an expression of sympathy respecting the MVA and wishes for a speedy recovery. It then addressed four separate items, namely, (1) employment status change, (2) leave of absence, (3) notice to return to work, and (4) benefits. It essentially provided that:

- Ms. Kallstrom's professional services contract with HUB was terminated effective June 9, 2003 and the sum of \$3,750 would be paid in lieu of notice of termination;

- Ms. Kallstrom's status as an independent contractor would be changed to that of an employee as of that date, although she would be on "unpaid leave of absence" from that point forward, provided documentation verifying illness was supplied no later than June 19, 2003 (three days later);

- the leave would be extended no later than August 30, 2003, although consideration would be given to further extension if proper documentation was provided, however reinstatement of employment could not be guaranteed;
- two weeks' written notice of any intention to return to work would have to be supplied, including medical documentation certifying fitness for such return, whereupon HUB "will determine the exact terms and conditions of your employment";
- coverage under the company's benefits plan would continue during the leave of absence, providing the outstanding amount of \$842.60 (presumably for unpaid premiums) is paid.

- [47] Believing that she had just been fired, Ms. Kallstrom, who was in Saskatchewan at that time, made inquiries of the BC Employment Standards Branch and was referred to various self-help forms. She completed these forms, and on July 3, 2003, sent the same together with a cover demand letter to HUB claiming some \$13,000 for severance pay, vacation pay, overtime pay and statutory holiday pay. HUB did not respond.
- [48] In Saskatchewan, Ms. Kallstrom visited a general practitioner, Dr. Lombard on June 12, 2003. He diagnosed muscular injury as well as post-traumatic stress disorder ("PTSD") and made a referral for both physiotherapy and to the local mental health counselling office.
- [49] Chad suggested to her that she should consider moving to Saskatchewan permanently. If so, he offered to hire her on as a replacement bookkeeper in his business. She researched the school and medicare system and concluded that it would likely make sense for her to move to be closer to her family. She presented the case to Cole's father, Mr. McIlhargey, who resisted the move and then asked for Cole to come back to Vancouver for the rest of the summer.
- [50] In Saskatchewan, Ms. Kallstrom's brother had secured her a job as a server at a local hotel, the Country Squire Inn. She took orders and served drinks. The busboys ran the food and took the plates away. She worked approximately 87 hours between July 7, 2003 and August 9, 2003. She says she "did it with medication" in an effort to get back on her feet.
- [51] In mid-August, Ms. Kallstrom drove back to British Columbia with Cole. Her intention was to terminate her rental arrangements, pack up her belongings and move to Saskatchewan. However, shortly upon her arrival, she was served by a private detective with an ex parte order Mr. McIlhargey had obtained prohibiting the removal of Cole from British Columbia.
- [52] Ms. Kallstrom and Cole then moved into the basement of a friend's house. Cole returned to school and Ms. Kallstrom applied for welfare. She also received total disability payments from ICBC in the amount of \$7,500, representing the maximum amount payable for a period of 25 weeks of disability.

- [53] In late 2003 and early 2004, Ms. Kallstrom also earned modest sums doing "piecework" for Ms. Victoria Langdon. She provided assistance with scheduling and preparation for certain fashion shows that Ms. Langdon was organizing. The amount of time involved was modest, as was the remuneration (not more than \$500 in total).
- [54] On January 14, 2004, Dr. Izen completed a medical report for welfare. The report was to have Ms. Kallstrom designated as a person with "persistent multiple barriers to employment" to allow payment of welfare benefits without the necessity of repeated medical reports. The report identified Ms. Kallstrom's primary medical condition as "soft tissue injuries" and described restrictions on her employability as "neck and back pain".
- [55] MVA 4 occurred on February 4, 2004 at an Esso gas station at West Broadway and Hemlock Street in Vancouver. Ms. Kallstrom had filled up her car and was headed towards the Hemlock exit when a car suddenly reversed out of a parking stall and collided with the front fender of her vehicle. She says she was rocked side to side by the impact and her left shoulder hit the driver's door panel. Ms. Kallstrom says that sometime after MVA 3 she developed "clicking" in her jaw. It became more noticeable to her following MVA 4, particularly when she was chewing food. The day after MVA 4, Ms. Kallstrom visited Dr. Izen. She described the MVA and the development of pain in the neck and back, as well as headache. The diagnosis was soft tissue injury to the cervical spine. Physiotherapy was prescribed.
- [56] Ms. Kallstrom thereafter saw Dr. Izen on six more occasions up to May 1, 2004. Headaches and stiffness/pain in the neck and upper back regions were noted. Prescriptions were refilled.
- [57] For the period April 26 to July 9, 2004 Ms. Kallstrom obtained work with a company called on Ondine Biopharma, a penny stock company that was seeking to go public. She worked in the office preparing written materials and running a variety of errands. Her total employment earnings during that period were approximately \$1,500.
- [58] Even though she was working, Ms. Kallstrom says she was enduring a "vicious circle" of pain which she was masking with medication and which persisted despite rehabilitation. The documentary evidence confirms that Ms. Kallstrom received approximately 60 treatments of massage, physiotherapy and chiropractic during the months April to December 2004.
- [59] MVA 5 occurred on May 8, 2004. Ms. Kallstrom was driving eastbound on South West Marine Drive near Fraser Street when a vehicle exited the Superstore gas bar and merged into Ms. Kallstrom's lane striking the right front fender of her Pontiac Sunfire vehicle.
- [60] At trial, Ms. Kallstrom had difficulty articulating the physical injuries sustained in this MVA, simply saying that it "probably" combined with and exacerbated her pain condition. However, the chiropractic records generated at the time indicate stiffness and soreness in the neck, shoulders and upper body and soft tissue injury was again diagnosed. Continued physiotherapy, massage and chiropractic treatments were prescribed.

- [61] Ms. Kallstrom remained on welfare for the balance of 2004. Total benefits received in that regard during the year were approximately \$19,000.
- [62] MVA 6 occurred in the early evening of December 9, 2004 at the intersection of Granville Street and 16th Avenue in Vancouver. Ms. Kallstrom says she was travelling east in the middle lane on 16th Avenue and was proceeding through the intersection on a green light when a vehicle that had been westbound on 16th Avenue started to make a left turn to go south on Granville and "T-boned" her car, striking the fender and door area on the driver side. Ms. Kallstrom says that this is a busy intersection and she thinks the other driver simply did not see her even though her headlights were turned on.
- [63] Ms. Kallstrom says she was again "jolted" by the impact and that again her "neck took most of the brunt of it". She did not seek medical attention immediately after the MVA, however she developed what she called "excruciating headaches" later that evening and she attended upon the emergency department at UBC Hospital the following day complaining of neck pain, headache and nausea. At UBC, her diagnosis was soft tissue injury and migraine.
- [64] Three days later, on December 13, 2004, Ms. Kallstrom attended upon Dr. Izen. Her subjective complaints included constant headache, and pain in the shoulders and hips. Examination revealed decreased range of movement in both the cervical and lumbar spines. Flexeril and Tylenol 3s were again prescribed. Zomig, a migraine medication, was also prescribed by Dr. Izen in early January 2005 and today, over 11 years later, remains part of Ms. Kallstrom's daily medication regime.
- [65] In December 2004, Ms. Kallstrom got a job with Meridian Pilates Studio operated by Ms. Heather Low. A mutual friend had introduced the two. The job was described by Ms. Low as "office manager & director of sales and marketing". It anticipated that Ms. Kallstrom would manage a variety of office and administrative procedures as well as tasks associated with sales and marketing. The rate of pay was \$24 per hour for a 30-hour week and the hours were said by Ms. Low to be "self-staffed managed and flexible".
- [66] The position at Meridian Pilates was subsidized through a federal government program. Ms. Kallstrom says that Ms. Low was aware of her injuries arising from the MVAs. She says those injuries did affect her ability to work, but that she put on her "game face" for as long as she could, although she eventually came to work from home more and more as her pain became unbearable.
- [67] On April 16, 2005, Ms. Kallstrom completed a claim form with WCB for compensation as a result of injury sustained on the job at Meridian Pilates. She complained of "neck strain, muscle spasms (both sides), right arm tingling and numbness, severe headaches, dizziness and vomiting, lower back/hip pain and severe depression" sustained because of the poor ergonomics both at the studio and at her home. She also disclosed she had previous pain or disability in these areas as a result of MVAs.

- [68] While the WCB form was completed in mid-April 2005, the evidence is vague as to whether it was actually submitted to WCB at any time before August 2005.
- [69] In June 2005, Ms. Low decided to terminate Ms. Kallstrom's employment. She wrote a letter dated June 22, 2005 formally notifying Ms. Kallstrom of such termination and offering a severance payment of \$1,560 in exchange for the execution of a formal release. She encouraged Ms. Kallstrom to obtain legal advice.
- [70] Ms. Kallstrom did consult counsel. She then made a demand of Ms. Low for compensation in the vicinity of \$13,000-\$15,000 (the evidence was rather vague). In August, while she was visiting her brother in Saskatchewan, she also filed (or possibly refiled) the WCB claim earlier completed in April and Ms. Low thereafter exchanged communication with WCB indicating that Ms. Kallstrom's injuries (migraines and neck, shoulder and arm pain) were caused by Ms. Kallstrom's MVAs and not by any work-place injury.
- [71] In November 2005, Ms. Kallstrom and Ms. Low settled the employment termination claim for the sum of \$7,500.
- [72] A family law trial took place in the Provincial Court on January 25-27, 2005 and reasons for judgment were issued in the case on March 10, 2005. The issue to be determined at that time was the terms of joint guardianship that Ms. Kallstrom and Mr. McIlhargey would have in respect of their son, Cole. The court determined that it would be in the best interests of Cole for his father to have the right to make any final decision respecting guardianship matters in the event the parties were unable to agree. The court preferred and accepted the evidence of Mr. McIlhargey over Ms. Kallstrom on various matters and commented unfavourably on the reliability and credibility of Ms. Kallstrom's evidence on several points.
- [73] On April 26, Ms. Kallstrom attended upon Dr. Izen. She complained of migraines, depression, ongoing stress with pain, finances and the family litigation. She voiced passive suicidal ideation and decreased interest, energy and appetite. Dr. Izen diagnosed mood disorder and major depression secondary to chronic neck and back pain and an antidepressant, Celexa, was prescribed. Celexa remains part of Ms. Kallstrom's daily medication regime to this date.
- [74] Ms. Kallstrom described April to May 2005 as "the hardest time of my life". She felt she was "slipping into a black hole". She thought of suicide regularly. Throughout the summer and fall, the depression "just got worse and worse" and she was taking 80 mg of Celexa a day. She says she just was not able to function and that she stopped trying.
- [75] There then followed a 4½-year period during which Ms. Kallstrom was unemployed, surviving on welfare, and constantly moving residences. Throughout that time, Ms. Kallstrom says she endured a constant cycle of pain and depression for which she took medication every day. She no longer took care of her physical appearance because "it didn't matter". She felt she was a disappointment to her parents and to her son, who started spending more time with his father. She had no friends. She says she "just didn't care" and

had given up. At one point in her testimony, sobbing uncontrollably, she declared, "If it wasn't for my son, I wouldn't be here today."

- [76] Ms. Kallstrom attended upon Dr. Izen's office for the last time on February 28, 2007. She saw Dr. Izen's locum, Dr. Kara Jansen. Apparently Dr. Izen's office had sent a letter to Ms. Kallstrom advising her that she could no longer be a patient at their office. The letter was not put into evidence nor was the reason for her rejection as a patient.
- [77] At the suggestion of her friend, Megan Lilley, who was an occupational therapist, Ms. Kallstrom asked Dr. Jansen for a referral to the Thorsen Health Centre for an assessment for chronic pain and depression. The initial consultation at that centre is apparently covered by MSP, although the treatment program itself requires private funding. Dr. Jansen made the referral and she also completed another medical report for the Ministry of Employment and Income Assistance certifying Ms. Kallstrom's inability to work on account of chronic pain and depression.
- [78] Ms. Kallstrom was assessed by Dr. Hrabar at the Thorson Health Center on March 21, 2007. In his consultation report, Dr. Hrabar expressed the opinion that Ms. Kallstrom had sustained muscular-ligamentous injury and was suffering from myofascial pain syndrome and cervicogenic muscle contraction-vascular headaches. He also identified tenderness, clicking and decreased motion in the temporomandibular joints. On examination he found decreased range of motion, tenderness on palpation, spasm and trigger points. He was of the view that Ms. Kallstrom would benefit from a full multi-disciplinary rehabilitation program focusing on physical therapy, trigger point release work, and biofeedback muscle relaxation training.
- [79] The Thorson Health Clinic sent a report to ICBC, dated April 5, 2007, setting out Dr. Hrabar's diagnosis and recommendations as well as the cost for the recommended treatment program. ICBC was asked to advise regarding the availability of funding for the treatment program. ICBC refused to fund the treatment.
- [80] In early 2010, Ms. Kallstrom eventually decided that she had to find a job "to break the cycle". She obtained some serving work with a firm called Culinary Capers who were operating the "Sochi House" during the Winter Olympics in Vancouver, and she also obtained some part-time work at Slocan Restaurant, two blocks away from where she lived. It was minimum-wage work, but Ms. Kallstrom says it was not about making money but more trying to "get out of the darkness". The work helped with her mood, however she lost her job at the Slocan Restaurant after remonstrating with the owner for harassing another server.
- [81] In January 2008, Dr. Robert Menzies became Ms. Kallstrom's general practitioner. From that time through 2010, Ms. Kallstrom saw Dr. Menzies regularly. Chronic pain and depression were both the complaints and the diagnoses throughout this time. Medication was prescribed and regularly refilled for Imovane (sleep), Tylenol 3 (pain), Zomig (migraines), Celexa (anti-depressant) and Flexeril (anti-inflammatories).

- [82] Dr. Menzies testified at trial and was cross-examined on the various entries in his clinical notes. He observed that Ms. Kallstrom had been "living with chronic pain for years" and that he "had no real doubts about the genuineness of her complaints". When asked why no referral was made for treatment at a specialized pain clinic, he noted that all such clinics except at St. Paul's Hospital are private, that Ms. Kallstrom simply could not afford same, and that the waiting list at St. Paul's was extremely long.
- [83] In the fall 2010, Ms. Kallstrom registered with a recruiting agency which was able to find her a temporary job as an executive assistant with a private equity firm in downtown Vancouver. She did not disclose her medical condition to either the recruiting agency or her employer because "they would not have hired me if they had known".
- [84] The job not only entailed working as an executive assistant for regular 9:00 a.m. to 5:00 p.m. office hours, but also a role as a personal assistant to the wealthy family who were the principals of the company. This latter role was particularly demanding since the family comprised four children and a wife/mother who was somewhat dysfunctional and who required Ms. Kallstrom to be "on call 24/7" to assist with a wide variety of needs.
- [85] Ms. Kallstrom described this employment as a "ray of hope" which would allow her to "get out of a constant state of suicide". She was particularly excited when the family informed her that they wished to hire her on a permanent basis, but then suffered a major relapse when, over the Christmas holidays, the recruiting agency called to inform her that the position was no longer available. On that occasion, she attempted suicide by overdosing on drugs and alcohol and was saved only by the intervention of her mother with whom she was staying at the time.
- [86] In January 2011, the permanent position was offered to Ms. Kallstrom and was accepted. It paid \$85,500 per annum and a benefits program was available. Ms. Kallstrom says that, although the work was extremely difficult and challenging, it nonetheless boosted her self-esteem and pride and improved her depression. She remained on medication throughout, often sleeping in her car at lunchtime, and by the end of the day she was exhausted and "barely functioning". Nonetheless, even though she was servicing the family's needs seven days a week, she "pushed through".
- [87] After 9 to 10 months, Ms. Kallstrom says the constant work was "taking its toll". She started to miss days and also tried working from home. She observed that she "thrives at IT and working remotely", however the private equity firm's office manager eventually sat her down and gave a poor performance review for absenteeism. The employer also started deducting the days that she missed work from her pay.
- [88] During this period, Ms. Kallstrom's relationship with her son, Cole, deteriorated. In 2012, Cole told his mother that he wanted to live with his father. He left his mother a note. Ms. Kallstrom left a note of her own directed to Cole, her parents and her brother. She then again attempted suicide by consuming alcohol and sleeping pills.

[89] The suicide notes written by Ms. Kallstrom in both 2010 and 2012 were put into evidence. The distress in these communications is profound and repeating them in this judgment is not necessary. One excerpt suffices to illustrate:

Cole,

I hope one day you will grow to understand that everything I did, I did because I love you You may never truly understand where I am coming from. After six accidents and living with constant pain. What little good I had, I saved/gave it to you. I know that wasn't good enough. I'm sorry I wasn't strong enough...

[90] In February 2012, a traumatic incident occurred involving one of her employer's daughters. At 10:00 p.m., Ms. Kallstrom was called by the mother who was in acute distress. Her daughter had choked on some food and the incident appeared fatal. An ambulance had been summoned and the child was taken to Lions Gate Hospital. The nanny who had performed CPR on the child suffered a heart attack and was also hospitalized. Ms. Kallstrom drove to the North Shore and spent the night with the mother who was hysterical for most of the time and had to be sedated. While driving the mother to the hospital, the latter attempted to grab the steering wheel, almost causing an accident and frightening Ms. Kallstrom. The child survived the incident, but remained hospitalized for a considerable period, part of which was spent in a medically-induced coma.

[91] While working downtown at the private equity firm, Ms. Kallstrom frequently attended the Stein Medical Clinic for her various medical requirements. Ms. Kallstrom says that after working for over a year she was having a "hard time keeping up with it physically" and mentally, notwithstanding heavy medication. A co-worker recommended counselling with Ms. Barb Komar, a women's counselling services provider in North Vancouver. On February 27, 2012 Ms. Kallstrom obtained a referral to Ms. Komar from Dr. Stein and the first counselling session/assessment with Ms. Komar occurred on March 1, 2012.

[92] Ms. Komar was not called as a witness, but her clinical records and reports were put into evidence by consent. They record complaints of chronic pain, stress and inability to cope, including a period in May 2012 when Ms. Kallstrom woke up crying and was unable to stop. Dr. Menzies' clinical records contain similar notations.

[93] Ms. Kallstrom says Ms. Komar recommended that she submit a claim to WCB so that the counselling fees could be funded from that source. Ms. Kallstrom submitted such a claim on March 20, 2012. It was ultimately accepted and WCB funded various counselling sessions with Ms. Komar until November 2012.

[94] In June 2012, Ms. Kallstrom went on stress leave from her employment. Dr. Menzies issued the necessary notes recommending the leave. He also issued prescriptions for anti-depressant and anti-anxiety medication along with anti-inflammatories and sleep medication. His notes record Ms. Kallstrom's complaints of nightmares, flashbacks, anxiety and panic attacks along with his diagnosis of PTSD.

- [95] Ms. Kallstrom's employment at the private equity firm offered a long-term disability plan with Equitable Life Insurance Company. Ms. Kallstrom applied for and received disability benefits under the plan for a period ending May 31, 2013. Dr. Menzies prepared a report dated October 10, 2012 in support of the application in which he described a primary diagnosis of PTSD complicated by insomnia and depression. He stated that Ms. Kallstrom was unable to tolerate stress or focus on complex tasks, and that her disability would prevent Ms. Kallstrom from working for approximately three to six months. He remarked it was a "complex difficult situation".
- [96] Ms. Kallstrom returned to work with the principals of the private equity firm in mid-June 2013. Her position as an executive assistant at the downtown office had been filled by another person. She was assigned an "office" in one of the houses owned by the principals in Lions Bay. The house was under renovation and she was simply given a table in an empty room without any technology. She was assigned only menial tasks such as doing the family laundry and grocery shopping. She quit work altogether a week or so later after her female employer falsely accused her of buying a magazine at their expense at Costco. She then applied for employment insurance benefits and, after a determination was made that she had been constructively dismissed from her previous employment, was paid employment insurance ("EI") benefits for the rest of the year.
- [97] Once the EI benefits expired, Ms. Kallstrom says she lived off money that she borrowed from her parents. She said she was looking for work despite her ongoing pain, but at the same time she stated she was unable to function without anti-depressants.
- [98] Back in June 2014, after Cole had graduated from high school, Ms. Kallstrom decided to move to Kelowna where she lived for several months with her long-time friend, Ms. Sowers and her husband. She had Skype visits with Dr. Menzies, who continued to remotely prescribe her various medications for pain, anxiety, depression and sleeping difficulties.
- [99] Over the course of the next year, Ms. Kallstrom worked for brief periods with different employers. She flipped burgers at the "OKF Grill" in June and July 2013. She worked for six weeks at Lakeview Motors as a receptionist/administrative assistant, although she says she started missing work after three weeks because the sitting/working at a computer proved to be "excruciatingly painful". She then worked for three months at a Tim Hortons outlet, initially on a full-time basis and then on a part-time basis. She tried to start up a false eyelash business out of her home, but was unable to make a go of it. Thereafter she again obtained an administrative position with a construction company in Vernon, the Hoban Group. She was on probation for three months, although it was extended for another two months because of her absences from work. The sitting and typing triggered pain and headaches and she says the "vicious circle" of pain, exhaustion and depression was triggered.

- [100] On April 30, 2015, Ms. Kallstrom attempted suicide once again. Paramedics found her unconscious in her bathtub beside empty containers of alcohol and sleeping pills. She had called her mother beforehand, which is what Ms. Kallstrom believes triggered the attendance by paramedics.
- [101] Ms. Kallstrom says that the month of May was a "blur". Her parents flew in to stay with her. Chad then asked her to come to Saskatchewan to help him with corporate and other documentation related to his divorce litigation. She described this invitation as a "lifeline" as she thereafter became employed by his company as a human resources manager and ultimately made the decision to move full time to Regina.
- [102] Ms. Kallstrom says that her decision to move to Regina has been a good one so far. In addition to human resources, she has taken some courses with a view to becoming the safety officer for Kalco. She says that working is still a "struggle", but with the help of medication, she is better managing the "vicious cycle" of anxiety/depression and physical pain. Fifty per cent of the work is at a computer desk the other 50% involves walking around construction sites to deal with safety issues. She says she is still exhausted at the end of the day but she is taking things "one day at a time".
- [103] Ms. Kallstrom continues to miss work a couple of days a week because of pain or headaches. She says she knows her brother is "keeping track" of her absences, but he is very understanding of her issues. She says she enjoys what she is doing and that she intends to try very hard to continue with her work at Kalco.
- [104] Ms. Kallstrom has found a new family doctor in Regina, (Dr. Shazbah) and has also been receiving regular counselling treatments which she says are proving very helpful. She has been referred to a physiotherapist who specializes in temporomandibular joint disorder ("TMJ") dysfunction and now uses a night guard to prevent teeth grinding while she sleeps.
- [105] Ms. Kallstrom lives in a rented house in Regina. She has a boarder who helps with some of the tasks around the home, particularly clearing snow. For several months, she also had a boyfriend, a worker at Kalco, who moved in and lived with her for a period. She says, however, she is "not ready" for a long-term relationship and she suspects that it is "unrealistic" in any event.
- [106] In November 2015, the plaintiff was involved in another minor MVA. She says that she hit a pothole when stopping for a red light which caused her car to slide on ice and graze another vehicle parked at the side of the road. She left her name and information on the windshield of the vehicle but nothing further was heard. She says she suffered no injury as a result of the incident.

PLAINTIFF'S LAY WITNESSES

Ms. Jody Sowers

- [107] Ms. Sowers is 45 years old and has been a friend of Ms. Kallstrom since high school in Kelowna.
- [108] Although she was supportive of her friend, she was rather a weak historian and unable to recall the precise chronology of various events.
- [109] During high school and in the first few years thereafter, Ms. Sowers spent quite a bit of time with Ms. Kallstrom and, indeed, lived with her on various occasions in the Lower Mainland before Ms. Sowers met her husband and moved to Prince George for nine years. In these early years, she described Ms. Kallstrom as a happy, energetic, and personable individual who was a friendly extrovert. She was active in a number of sports, including skiing, and she and other girlfriends would travel together and socialize.
- [110] Following the MVAs, the precise dates and numbers of which she did not recount, Ms. Sowers says that Ms. Kallstrom's personality changed. She had headaches and was frequently seen to be grimacing from pain. She was on medication. Her personality changed and she was "not the same person". To Ms. Sowers, it seemed Ms. Kallstrom was having a rough time in life and having difficulties coping.
- [111] Ms. Sowers described how Ms. Kallstrom told her that she wished to move back to Kelowna in the early summer of 2014 and asked if she could stay with Ms. Sowers and her husband in their home in lake country. They had a basement suite and Ms. Sowers agreed to accommodate Ms. Kallstrom, who stayed during the period May to September 2014.
- [112] During that summer, Ms. Sowers described Ms. Kallstrom as being stressed out, cranky, "acting weird" and on some occasions being "totally zoned out". When company came to the house, Ms. Kallstrom would not come out of her room. She would often sleep all day and stay up all night, which Ms. Sowers thought was very odd behaviour.
- [113] Ms. Sowers' daughter was still living at home during the summer of 2014. According to Ms. Sowers, her daughter became worried ("freaked out") about the presence of Ms. Kallstrom in the house, often referring to her as "a crackhead". Ms. Sowers had never seen Ms. Kallstrom consuming illegal drugs, but she was pretty sure that "something was going on" and she assumed that it was probably drinking.
- [114] Eventually Ms. Sowers told Ms. Kallstrom that she had to leave in August. She did not do this until September 9, at which time Ms. Sowers helped her pack bags to assist in ushering her out the door.
- [115] Ms. Kallstrom moved up the street to a condominium. She had lost her job at the car dealership by that time and Ms. Sowers believes her mother was paying Ms. Kallstrom's rent.

- [116] Sometime after plaintiff had moved out, Ms. Sowers received a phone call from Ms. Kallstrom's mother asking her to go and check on Ms. Kallstrom. She did so, and discovered Ms. Kallstrom had attempted suicide through overdosing. Ms. Kallstrom was hospitalized on that occasion.
- [117] Ms. Sowers finished her testimony by saying that Ms. Kallstrom "is my friend but I do not want her around" anymore.
- [118] On cross-examination, Ms. Sowers stated she could not recall any time before the MVAs when Ms. Kallstrom had experienced back pain or was receiving medication. However she did confirm that since the 1990s, Ms. Kallstrom has suffered from insomnia and has "always been on sleeping pills as long as I can remember".

Mrs. Marie Kallstrom

- [119] Mrs. Marie Kallstrom is Ms. Kallstrom's 65-year-old mother. She and her husband spend six months of the year in southern California and the other six months at their home in Regina, Saskatchewan. She has been married to her 72-year-old husband, Elvin, for some 45 years and the two of them retired in 2002 when they sold their carpet cleaning equipment company.
- [120] Both Mrs. Kallstrom and her husband are Jehovah's Witnesses. Her daughter, Ms. Kallstrom, was born in Fort Frances, Ontario, in April 1971, thereafter moving to Red Deer for one year, and Thunder Bay until 1986, at which time the family moved to Kelowna, British Columbia.
- [121] Mrs. Kallstrom described her daughter as a bright, happy, outgoing child, active in all school sports. She was an excellent student who is accomplished high grades and had no significant behavioural or health problems during her childhood.
- [122] In Kelowna, Ms. Kallstrom had a large group of friends who were always coming over to the family home.
- [123] Ms. Kallstrom did not really speak about her plans after high school, although she did sometimes refer to the possibility of becoming a nurse. After she left school, she moved to Vancouver and has since worked in a variety of different jobs.
- [124] Mrs. Kallstrom would come into Vancouver every month or so to do custom clearing work at the airport for the parts imported for the family business. She would usually stay with her daughter on those occasions.
- [125] Ms. Kallstrom was engaged to a Jehovah's Witness but that relationship broke up and she drifted away from the church. Her parents were not happy about her choice. They resigned themselves to their daughter being an adult and capable of making her own decisions on such matters.

- [126] Ms. Kallstrom met Mr. McIlhargey after she moved to Vancouver. They started living together and in due course the couple became pregnant. Ms. Kallstrom's son, Cole, was born in February 1995.
- [127] Mrs. Kallstrom says that her daughter "started changing" after her involvement in MVA 2. She had not healed from the first and the pain got worse, she got depressed, and she developed migraine headaches. It is a condition that "hasn't quit" and Ms. Kallstrom experiences "black moods" when she is negative and withdraws from company.
- [128] Mrs. Kallstrom says that there is no history of clinical depression in her family. She attributes her daughter's depression to the MVAs and, particularly, the constant pain she believes her daughter has suffered since. She is aware that her daughter has attempted suicide a couple of times, indeed on the occasion in Kelowna she had been on the phone with her daughter just before the incident and, out of concern, had called Ms. Sowers to check in on Ms. Kallstrom.
- [129] According to Mrs. Kallstrom, Ms. Kallstrom is "so depressed she can't see any point going on". It is as a result of the pain and not being able to work or keep jobs when she does find employment. Her daughter is "down in the dumps most of the time".
- [130] Ms. Kallstrom has since moved to Regina where she has been given a bookkeeping job by Chad in his construction business. Even though her brother is accommodating of her condition, she has still missed work. Mrs. Kallstrom believes that unless her daughter learns to manage her chronic pain, she will never be able to do a full-time job and she will always have a problem getting or keeping employment.
- [131] Mrs. Kallstrom does believe that her daughter is happier back at home in Regina. She has more of a support network through her family. Mrs. Kallstrom sees her daughter at least once a week and sometimes more often.
- [132] On cross-examination, Mrs. Kallstrom says she did not know her daughter had any history of trouble sleeping or that she had taken any sleep medication before the MVA (except melatonin while she worked briefly as a flight attendant). She says she was not aware of her daughter being depressed at any time before MVA 1. She was aware that her daughter suffered a severe sweating condition which had appeared to get worse over time before the MVAs and which resulted in an operation to remove her sweat glands. She did not attribute this to any psychological problems such as anxiety, panic attacks or depression and as far as she was concerned, her daughter was not socially withdrawn and "seemed fine to me" before the MVAs.

Mr. Elvin Kallstrom

- [133] Mr. Elvin Kallstrom is 72 years old and while he was undoubtedly honest in his testimony, he proved to be a rather poor historian who testified only to generalities and was often unable to provide specific details of significant events.

- [134] He confirmed that his daughter was a "good child", an excellent student with high marks who was active in most things and who had lots of friends. As far as he was concerned, she had a good relationship with her parents and also with her brother. He is not aware of any medical complaints, other than a broken ankle that Ms. Kallstrom suffered at school when she was pushed by a boy.
- [135] Mr. Kallstrom says that after the MVAs, Ms. Kallstrom was complaining a lot about "aches, pains and things like that". He said that often when he and Mrs. Kallstrom came to visit her, she would simply stay in bed complaining. It "wasn't fun to visit" and it "got boring listening to it all".
- [136] Mr. Kallstrom was not able to offer much evidence as to Ms. Kallstrom's work history, although he seems to recall that she had a number of good jobs. He suggested that his wife and his daughter were much closer in communication than he was.
- [137] Mr. Kallstrom is aware that his daughter has attempted suicide on a couple of occasions. He says, "We try to encourage her but she had her own thoughts."
- [138] Mr. Kallstrom described Ms. Kallstrom as being "always vibrant and going forward" before the MVAs, but she has changed a great deal. He says, "She claims it is because of the so-called accidents".

Mr. Chris Di Salle

- [139] Mr. Chris Di Salle is an Executive Vice President at HUB International in Vancouver. HUB is a wholesale managing general agent for most of the major life insurers in Canada and acts as a "middleman" between the life insurance companies and the "advisors" (licensed insurance salesmen).
- [140] Mr. Di Salle worked with HUB and its predecessor company from 1994 onwards. He was transferred to Toronto in June to 2002.
- [141] Ms. Kallstrom worked directly for Mr. Di Salle, along with two other principals of HUB at the time, Mr. Paul Brown and Ms. Karen Noseworthy in 2001-2002. He says he remembers her well. As an executive assistant, she looked after his calendar and attended to a wide variety of administrative tasks. He described the job as busy, demanding and stressful.
- [142] Mr. Di Salle described Ms. Kallstrom's performance at HUB as excellent, professional, thorough, energetic, polite and punctual. She had a "fairly strong" work ethic and he cannot recall any absenteeism.
- [143] Mr. Di Salle says that at various times he actually wondered why Ms. Kallstrom was working with HUB. In his view, she could easily have been an executive assistant with one of the firm's licensed insurance advisors. Such assistants are fundamental to an advisor's success. Non-licensed assistants can earn in the range of \$50,000 to \$80,000, whereas licensed assistants will usually have a base salary of \$50,000 to \$60,000 and receive a portion of the

advisor's commissions, giving an overall income in the annual range of approximately \$80,000 to \$120,000.

- [144] Mr. Di Salle says that Ms. Kallstrom's former role at HUB has "evolved". He did not elaborate on how the job has changed or what are the current requirements for the position. Currently, an executive assistant is paid approximately \$65,000 to \$70,000 a year.
- [145] Mr. Di Salle had no further contact with Ms. Kallstrom after he moved to Toronto. He only has a very fuzzy recall of her being involved in a couple MVAs, but as far as he was concerned, she exhibited no problems in coping with her work right up until the time he left for Toronto in June 2002.

Ms. Sandra Lynch

- [146] Ms. Sandra Lynch is 47 years old and is the owner of a recruiting business in Colorado. She was formally employed by G.S. Lerick & Associates, a recruiting/temp agency in Vancouver. She met Ms. Kallstrom in 1996 or 1997, when she was recruiting a receptionist for the Wall Centre. She was a good "fit" for the Wall Centre, and she was a good communicator with a friendly personality.
- [147] Ms. Lynch and Ms. Kallstrom also became good personal friends during the years 1997 to 1999. They both hung out with a "core group" of like-minded young single women who usually spent each weekend together skiing, hiking, rollerblading, and going out to clubs.
- [148] In late 1999, Ms. Lynch became engaged, got married in Calgary and then moved to Colorado. After a year or so, she lost touch with Ms. Kallstrom.
- [149] Ms. Lynch described Ms. Kallstrom as a single mother who was always even-keeled, upbeat and positive. All of the young women were "pretty fit" at that time and were fairly active. Ms. Kallstrom displayed no signs of depression or anxiety, but rather had a non-complaining, easy-going personality.

Ms. Lindsay Schooley

- [150] Ms. Lindsay Schooley is a 42-year-old securities lawyer with the Farris law firm in Vancouver. She met Ms. Kallstrom in October 2002 and the two became good friends. They would regularly visit each other's house, hang out socially and go out to bars. Ms. Kallstrom was a fun person to be around.
- [151] Ms. Schooley described Ms. Kallstrom as a "mother first", but that she was also a motivated and professional executive assistant with a company that she seemed to like and where she made "pretty good money". Ms. Kallstrom was not an angry person and, as far as Ms. Schooley knew, had no major struggles in her life other than the challenges of being a single mother.

- [152] At some point, Ms. Schooley became aware that Ms. Kallstrom had been involved in some MVAs. She particularly remembers an accident in March or April 2003, shortly before Ms. Kallstrom and a group of girlfriends went for a trip to California. Ms. Schooley did not accompany them on that trip.
- [153] Throughout April and the summer of 2003, Ms. Schooley knew that Ms. Kallstrom was injured and in pain. She was not feeling well for much of the time and started to change. She started missing work, moving with difficulty and moving in a manner that protected her neck. She tried to work from home, using a heating pad on her shoulder when she was in front of a computer.
- [154] Ms. Schooley says she has a family history of chronic illness and is familiar with pain behaviour. She knew Ms. Kallstrom needed help and, because she lived only a few blocks away, she would go over almost every day to help with things like groceries, laundry and the like. Ms. Kallstrom appeared to be in pain most of the time and she became "more and more dependent" on Ms. Schooley, who felt pressured to show up. Because Ms. Kallstrom was not working, she became very worried about money and, indeed, Ms. Schooley found herself occasionally paying for Ms. Kallstrom's groceries. As time went by, Ms. Kallstrom became more testy and difficult dealing with stress, pain and worry, and seemed to spiral into a decline.
- [155] Ms. Schooley says that Ms. Kallstrom was a friend who needed help and that she did not feel taken advantage of. Nonetheless, their relationship became increasingly awkward and fractured shortly before Ms. Kallstrom moved to Saskatchewan to be with her family.
- [156] Ms. Schooley says she saw Ms. Kallstrom again in the spring of 2004 or 2005, she cannot recall which. Ms. Kallstrom had reached out to her and asked for some assistance with preparing some insurance forms. She also asked Ms. Schooley for some money. Ms. Schooley says she stayed and had dinner with Ms. Kallstrom that night, but it was very awkward and they went their separate ways again thereafter. Ms. Schooley was shocked at Ms. Kallstrom's appearance. The latter had always taken care with her makeup, hair and dress. On the occasion of her last visit, however, Ms. Kallstrom looked haggard, sore, holding her body and looking like someone who did not feel well.
- [157] Ms. Schooley did not see Ms. Kallstrom any more following 2005.

Ms. Megan Lilley

- [158] Ms. Lilley is a 48-year-old occupational therapist from Australia. She came to Vancouver in 1999 and met Ms. Kallstrom the following year. They became good friends very quickly.
- [159] Ms. Lilley described Ms. Kallstrom as being approximately 125 pounds, fit, slim and attractive, who had short blond hair and was always dressed very well. She was working at HUB Financial at the time and seemed to enjoy her work and was very ambitious. She was very knowledgeable about technology.

- [160] Ms. Lilley remembers being told about Ms. Kallstrom being involved in an accident shortly after a girls' trip to Los Angeles. She remembers that "things started to deteriorate" for Ms. Kallstrom after that accident. Ms. Lilley visited Ms. Kallstrom at least once a week after the MVA. She was often dressed in pajamas, and appeared to be in quite a bit of pain. She had difficulty moving and walked with a limp, always grimacing. She needed help with washing and groceries. Things seemed to get worse as time went on. Ms. Lilley helped out with some money for groceries on occasion.
- [161] Ms. Kallstrom went to Saskatchewan during the summer of 2003 and when she returned, Ms. Lilley says "things changed for the worse" such that Ms. Lilley became concerned about Ms. Kallstrom's mental health. Ms. Kallstrom was distressed, seemed to be having difficulties with ICBC, and her finances were becoming more problematic. She recalls Ms. Kallstrom receiving employment insurance and eventually welfare. She described Ms. Kallstrom as being "ashamed but desperate" and eventually she started seeing her less and less, although she would continue to talk with her on the phone from time to time.
- [162] Ms. Lilley's own son was born in February 2005 and she visited Ms. Kallstrom shortly thereafter. It seemed to Ms. Lilley that Ms. Kallstrom was "really going downhill", just getting by, in pain and distress, and reliant on medication. She had put on weight, was dressing in sweats, and had sores on her face. She was no longer the fun-loving, happy, gregarious person that she used to be, but rather someone who was very depressed and dealing with chronic pain.
- [163] Ms. Lilley found herself growing apart from Ms. Kallstrom. Her issues were simply "too big and complex" and Ms. Kallstrom "needed more help than I could offer". Their relationship petered out.

Mr. Chad Kallstrom

- [164] Chad Kallstrom ("Chad") is Ms. Kallstrom's 43-year-old brother. He was very open, frank and honest in his testimony.
- [165] Chad remembers growing up with his sister in Thunder Bay. They were both active and had lots of friends. He described his sister as being "very smart in school" ("way smarter than me") and a person who always excelled at the business end of things.
- [166] The family moved to Kelowna when she was 15 or 16. There were lots of outdoor activities. Ms. Kallstrom lived at the ski hill during the winter and did a lot of boating in the summer.
- [167] Until recently, Chad and his sister always lived in different cities as adults. He did not see her very much, although they would speak on the phone quite often. He knew she became involved in "quite a few accidents over a short period of time" and that afterwards she seemed to develop a lot of pain. She complained regularly about pain in her neck, back and jaw. By the end of the day she was "spent". She "struggled holding jobs because of the pain".

- [168] Chad remembers Ms. Kallstrom coming to live in Regina in the summer 2003. He lived in Fort Qu'Appelle, just outside of Regina, and ran a small construction company, Kalco. Ms. Kallstrom was unable to make ends meet in Vancouver, and so he put her up in his home that summer. Ultimately, she had to go back to Vancouver because of a custody dispute over her son.
- [169] Chad remembers Ms. Kallstrom helping him out with the incorporation of his company in the summer of 2003. She also held a serving job briefly at the Country Squire Hotel in Fort Qu'Appelle. He says she was constantly sleeping during this period and had migraine headaches. Some days she would not get out of bed.
- [170] Chad's construction company has since grown into a substantial enterprise and he has moved into Regina. He now has 40 to 50 employees in the business and some major projects underway, such as the new stadium in Regina.
- [171] Chad knows that his sister went through a "real tough time" when she was very depressed and struggling. He has lent her money over the years.
- [172] In the summer 2015, Chad called up his sister and asked her to come out to Regina to help him with paperwork necessary for his divorce proceedings. He says she has the knack for that sort of thing and excels at it. She started doing human resources work for his company and has since taken safety courses to become the safety officer for the enterprise. She is now a full-time employee earning approximately \$60-\$65,000 per annum with a generous benefits plan.
- [173] Chad says that, as a brother, he is sympathetic to his sister's problems, but as an employer she is putting him in a rough spot. He can see that she has difficulties with pain and cannot sit for very long. She is very tense when driving. He sees her deteriorating during the day. She misses an average of two days a week because of pain and headaches and shortly before coming to Vancouver for the trial, she missed an entire week altogether. He says that her salary reflects her reduced performance (some safety officers make \$80,000 to \$150,000 per annum).
- [174] Mr. Kallstrom says that he and his sister support and look after one another. He knows, however, that she is still struggling with pain and depression. He says that "realistically", if his sister starts missing more days of work, he may not be able to keep her employed long term.

DEFENDANTS' LAY WITNESSES

Ms. Bonnie Yip

- [175] Ms. Bonnie Yip is a 34-year-old elementary school teacher. She was the driver of the other vehicle involved in MVA 1 that occurred on March 23, 2001.

[176] Ms. Yip says that her vehicle was stopped in one way, northbound traffic on Hornby Street just south of the intersection with Robson and close to the Wedgewood Hotel. She says her foot "slipped off the brake", whereupon her vehicle rolled forward and bumped the car in front of her. The only damage she sustained to her vehicle was in the form of a slightly bent licence plate. Ms. Yip is pretty sure that Ms. Kallstrom's vehicle "didn't move very much". Ms. Yip got out of her vehicle and exchanged contact information with Ms. Kallstrom. Later that evening, she called Ms. Kallstrom to let her know that she had reported the matter to ICBC. She asked if she was okay and Ms. Kallstrom responded that she was "fine". Ms. Yip does not remember Ms. Kallstrom saying anything about having a headache or making a doctor's appointment.

Dr. Jenny Lee

[177] Ms. Jenny Lee was the driver of the other vehicle involved in MVA 2 which occurred on April 12, 2001 on the uphill slope of Oak Street shortly before the intersection with Broadway, at approximately 5:30 p.m. She was driving a manual transmission Subaru Forester hatchback vehicle.

[178] Ms. Lee had stopped her vehicle and was waiting for traffic to proceed. She attempted a hill start, without success, whereupon her vehicle rolled back a bit. She again attempted to engage the transmission and again her vehicle rolled back, this time contacting Ms. Kallstrom's vehicle behind her. On cross-examination, she acknowledged that it was a steep hill and that her vehicle may have rolled back 6 to 8 feet before impact.

[179] Ms. Lee says that there was no visible damage to her vehicle. On a questionnaire that she later provided to her insurer, she identified the damage to Ms. Kallstrom's vehicle as a "dented licence plate".

[180] Ms. Lee got out of her vehicle after the impact and exchanged information with Ms. Kallstrom. She asked if Ms. Kallstrom was okay and while she cannot recall the exact words used, she remembers being advised that Ms. Kallstrom had neck problems and was seeing a physiotherapist for treatment.

[181] Ms. Lee acknowledges that she did not observe Ms. Kallstrom at the time of impact and she does not know what sort of body movement Ms. Kallstrom may have been subjected to at the time.

Mr. Richard Chow

[182] Mr. Richard Chow, who is currently 49 years old, was a witness to MVA 3 which occurred on April 17, 2003 at the intersection of Hornby and Smithe Streets in Vancouver. It was approximately 8:45 a.m. with "normal" morning rush hour traffic. He was driving behind Ms. Kallstrom in the second lane from the curb heading west. Vehicles in that lane are able to turn right to head north on Hornby Street. The configuration of the intersection has since changed, but at the time, the curb lane on Smithe Street was a mandatory right-turn

lane onto Hornby Street.

- [183] Mr. Chow saw Ms. Kallstrom start a right turn manoeuvre to go north on Hornby Street when a Honda Civic motor vehicle, which had been in the curb lane, failed to negotiate its right turn striking the right rear quarter panel of Ms. Kallstrom's vehicle. His impression was that the Honda Civic had made a turn that was too wide and that it had crossed into Ms. Kallstrom's lane of traffic. The vehicles were in a process of attempting to turn and he estimates that the speed would have been no more than 20 or 25 km/h.
- [184] As a result of the initial contact, Mr. Chow saw the Pontiac Sunfire spin around approximately 180° ending up right beside the Honda Civic. He is not sure if there was any additional contact between the two vehicles once the Pontiac had spun around, but acknowledged that it was a possibility.
- [185] Mr. Chow parked his vehicle at the side of the road and came over to help Ms. Kallstrom. He asked her if she was okay and, although she seemed okay to him, he cannot specifically remember a response.
- [186] Mr. Chow says that it "seemed like a small accident to me" and there was no major damage to the vehicles. By that, he meant that Ms. Kallstrom was able to get out of her vehicle, i.e. her door was still operating. He admits that he did not inspect the vehicles closely for damage.

Ms. Judy Lam

- [187] Ms. Judy Lam was the driver of the other vehicle that was involved in MVA 4 on February 4, 2004. The collision occurred in the parking lot of an Esso station on the corner of Hemlock Street and Broadway in Vancouver.
- [188] Ms. Lam was 17 years old at the time of the MVA and had her "N" licence.
- [189] Ms. Lam had parked her father's Dodge Neon motor vehicle in the middle of three parking stalls at the gas station and had gone into the store to buy a Coke before intending to head off to Kitsilano Secondary School. She was backing out of the parking stall when she struck the vehicle being driven by Ms. Kallstrom.
- [190] There was a BCAA service vehicle parked in the stall to the left of Ms. Lam, which obscured her view in that direction. As she was backing out of the stall, she expressly recalls that she was looking over her right shoulder at the time of impact and that she simply did not see Ms. Kallstrom's vehicle at any time before that impact occurred.

- [191] Ms. Lam described the impact as "feeling like a bump" and, indeed, she initially thought that she had backed into the curb. When she realized that she had actually struck another vehicle, she got out of her car and spoke to Ms. Kallstrom. She asked if she was okay, but noticed that Ms. Kallstrom was holding her hand to her neck. According to Ms. Lam, Ms. Kallstrom's answer to her inquiry was that she was "fine" and that she stated her neck injury was "from a previous accident".
- [192] Photographs of the damage to Ms. Lam's vehicle show a series of scrapes to the rear left bumper. She acknowledged that her bumper had hit the left front fender of Ms. Kallstrom's car in the vicinity of the front tire.

Mr. Frank Sabatino

- [193] Mr. Frank Sabatino was the driver of the other vehicle involved in MVA 6, which occurred on December 9, 2004 at the intersection of Granville Street and West 16th/Marpole Avenue. At that location, Granville Street is oriented in a north-south configuration with an incline in the same direction. The intersecting road to the west is West 16th Avenue and on the east side of the intersection it becomes Marpole Avenue.
- [194] Mr. Sabatino was driving his vehicle in a westerly direction in the left center of the two westbound lanes on Marpole Avenue. His intention was to make a left turn onto Granville Street and proceed south towards his home. His left turn signal was operating. He waited for the traffic in the eastbound lanes to clear and then proceeded with his turn whereupon he struck the vehicle driven by Ms. Kallstrom which was headed in an easterly direction across the intersection towards Marpole Avenue.
- [195] There are three eastbound lanes on West 16th Avenue, just before Granville Street. The south curb lane is a dedicated right turn lane onto Granville Street heading southbound. The other two lanes both proceed through the intersection and continue east on Marpole Avenue. Traffic in the center lane is capable of turning left to head north on Granville Street.
- [196] Mr. Sabatino admits that at no time did he see Ms. Kallstrom's vehicle before hitting it. He is adamant he had a perfectly clear view of the two eastbound lanes on West 16th Avenue and that there were no vehicles in those lanes when he commenced his turn. The only vehicles on West 16th Avenue at that time were those which were lined up to make the right turn from the curb lane to go south on Granville Street.
- [197] Mr. Sabatino blames Ms. Kallstrom for the MVA. He says, "I think she went straight through the mandatory right turn lanes." He admits he did not see her actually make such a manoeuvre, however he says he has seen many people do it before and "I am sure it is what happened here."

[198] Mr. Sabatino's vehicle hit the front fender of Ms. Kallstrom's vehicle. He did not report the MVA to ICBC because his vehicle was self-insured through his employer's fleet insurance and he did not think there was any damage. He did ask Ms. Kallstrom if she was okay and he testified that her response was that she was "fine". She did not get out of the vehicle and after exchanging information regarding identity and insurance. Mr. Sabatino walked back to his car and continued to drive home.

Ms. Heather Low

[199] Ms. Heather Low has been the owner of Meridian Pilates Studio since January 2000. The premises comprise 800 square feet and Ms. Low taught classes 8 to 10 hours each day. She also had three or four independent contractors who taught part time.

[200] Ms. Low confirmed that Ms. Kallstrom was employed at Meridian Pilates Studio from December 16, 2004 to April 15, 2005. Her job involved administrative assistance, phone calls, payment processing, and help with marketing.

[201] Ms. Kallstrom's employment with Meridian Pilates Studio was partially subsidized by a HRDC work subsidy program. Ms. Low had actually met Ms. Kallstrom through a client who knew that she was looking for an assistant at the time.

[202] Ms. Low was aware that Ms. Kallstrom had been previously injured in some MVAs. Ms. Kallstrom told her that she was in pain from time to time and she recalls Ms. Kallstrom being difficult and "edgy" from time to time.

[203] Ms. Low confirms that Ms. Kallstrom started working from home at some point, although she cannot remember the precise date. Certainly by April, Ms. Kallstrom was working mostly from home and Ms. Low acknowledges that she agreed to this.

[204] On April 16, 2005 Ms. Kallstrom completed an "Application for Compensation and Report of Injury" form for WorkSafe BC. In it she described having sustained injuries to her neck, lower back, right arm, as well as muscle spasm, headaches, and severe depression. She claimed that the office area set up at the Meridian Pilates Studio was "extremely poor" and that she was "forced to work from my home with a poor setup as well". She identified that she had previous injuries in the same areas resulting from MVAs.

[205] On June 22, 2005 Ms. Low sent to Ms. Kallstrom a formal letter terminating her employment. In that letter she stated:

The reception position that we need to have filled is one that demands someone who can work evenings and I know this is something you are unable to do, given your life situation. The studio cannot handle another office person working day times, and the "work at home" model has proven itself to be an inefficient model for our needs as a small business.

[206] She made an offer of \$1,560 in exchange for execution of a formal release document which was enclosed in the letter.

[207] Ms. Kallstrom did not accept Ms. Low's offer. Instead, she replied with a demand for an amount in excess of \$13,000 for wrongful dismissal. In due course the two of them settled the claim in exchange for a payment of \$7,500, in October or November 2005.

[208] In August 2005, before the wrongful dismissal claim was settled, WCB informed Ms. Low of Ms. Kallstrom's WCB claim for injuries sustained on the job. She completed a form entitled "Employer's Report of Injury" in which she stated that no injuries had been reported to her and that she was unaware of same. In her cover letter to WCB dated November 17, 2005, Ms. Low stated:

I am aware that when she began her employment here, she was coming back from being off work due to injury from several motor vehicle accidents prior to her association with my business. As far as I was aware, the difficulties, such as migraines and neck, shoulder and arm pain, from which she was suffering while she was working here, were directly related to those previously sustained injuries.

MEDICAL/EXPERT WITNESSES

Dr. George Aitken

[209] Dr. George Aitken is an orthopedic surgeon and a diplomat of the American Academy of Pain Management. He prepared a report for plaintiff's counsel dated May 5, 2003, less than a month following MVA 3.

[210] Dr. Aitken noted that Ms. Kallstrom was being evaluated regarding three MVAs, "but in reality she was in acute distress following the most recent accident and requires urgent attention". His physical examination revealed "an acutely distressed woman, sitting guarding the right buttock, and walking with a trunk shift to the left, with diminished stance phase and stride on the right side." He noted "she has virtually no range of motion of the lumbar spine at all".

[211] Dr. Aitken was particularly concerned that Ms. Kallstrom has "an acute right L5 radiculopathy" and believed that "she is so acutely disabled that the diagnosis of an L4/5 disc herniation needs to be excluded in order to determine further management." He recommended "urgent CT scanning".

Dr. Stephen Anderson

[212] Dr. Stephen Anderson is a psychiatrist who was qualified to provide expert opinion evidence respecting the diagnosis and treatment of chronic pain and depression. He assessed Ms. Kallstrom on June 11, 2012 for a little over two hours, and again on June 14, 2014 for approximately 1½ hours. He prepared two reports, dated June 20, 2012 and July 21, 2014 respectively.

- [213] Dr. Anderson expresses the opinion that Ms. Kallstrom suffers from chronic pain and chronic fatigue as well as anxiety and depression. He believes Ms. Kallstrom "has likely been caught up in a vicious cycle of chronic pain disorder whereby physical and emotional factors are interacting to create her clinical picture."
- [214] Dr. Anderson's first formal diagnosis was that Ms. Kallstrom "likely has a chronic pain disorder associated with both psychological factors (PTSD and major depression) and a general medical condition (etiology deferred to physical medicine specialists)". He opines that the injuries resulted from the MVAs in which Ms. Kallstrom was involved and that, while he was "not able to determine the precise contribution of any specific MVA, the April 17, 2003 MVA likely caused the most significant psychiatric difficulties."
- [215] Dr. Anderson is of the view that Ms. Kallstrom "would likely not have developed her present constellation of physical, cognitive and emotional difficulties if she had not been injured in the MVAs". He acknowledged that she had a prior history of post-partum depression and of some neck and back pain in the year 2000; however, he noted that she did not have any "significant physical or emotional symptoms" before the MVAs.
- [216] In Dr. Anderson's opinion, Ms. Kallstrom likely developed PTSD and a major depressive disorder following MVA 3. The PTSD symptoms reduced over time, although they were exacerbated following work-related stress in February 2012. He believed the chronic PTSD was in partial remission at the time of his examination, but that Ms. Kallstrom continued to have significant depressive symptoms consistent with a diagnosis of chronic major depressive disorder of moderate severity.
- [217] Dr. Anderson noted that the most appropriate treatment for patients with chronic pain disorder is at a comprehensive multi-disciplinary pain clinic where both physical and emotional factors can be addressed in one setting by experienced therapists. He notes, however, that patients with chronic pain disorder lasting more than two years "usually continue to be symptomatic despite appropriate treatment". He strongly encouraged treatment of Ms. Kallstrom by a registered psychologist who has experience in treating patients with chronic pain, anxiety and depression. He also recommended enrolment in a supervised exercise program, provided it does not cause exacerbation of pain.
- [218] From a psychiatric point of view, Dr. Anderson opines that Ms. Kallstrom's long-term prognosis is "guarded". This is because "the longer psychiatric disorders last the less likely they are to respond to treatment". He notes Ms. Kallstrom will "likely continue to have significant depressive symptoms, despite treatment of psychotherapy and pharmacotherapy". She remains at increased risk of developing PTSD in the future if she is exposed to further trauma. He expects that she will "not likely return to her pre-MVA level of emotional functioning" and "will likely remain emotionally vulnerable on a long-term basis".

[219] In his second report of July 21, 2014, Dr. Anderson reaffirms his original diagnosis and prognosis. He notes that in the intervening period, the formal medical terminology for chronic pain disorder had been changed in the new fifth edition of The Diagnostic and Statistical Manual of Mental Disorders ("DSM"). The new term is now "persistent somatic symptom disorder with predominant pain" and, in Ms. Kallstrom's case, is a disorder of "moderate severity". He continues:

Ms. Kallstrom's life largely revolves around her pain. When she is under increased emotional stress or pain and insomnia worsens. Work activities, including sitting at a computer, exacerbate her symptoms. Ms. Kallstrom worries excessively about her pain. She tends to catastrophize her symptoms and worry excessively about the risk of reinjuring herself. When Ms. Kallstrom's pain increases her mood deteriorates. She has a persistently high level of anxiety regarding her own health.

[220] In his second report, Dr. Anderson also responded to a diagnosis made by the defendants' expert psychologist, Dr. Koch, that Ms. Kallstrom had borderline personality traits and/or a borderline personality disorder. He disagrees with that diagnosis. He says he has treated many patients with borderline personality disorder and that, indeed, they are "the most difficult patients to deal with in psychiatry". He notes, however, that patients who have borderline personality disorder/traits have developed this condition by late adolescence and certainly before the age of 30.

[221] On cross-examination, Dr. Anderson stated it was "possible but unlikely" that Ms. Kallstrom had borderline personality traits before the MVAs. He noted that such persons can, in any event, have a relatively normal life by managing the traits. He commented that the "hallmark" of borderline personality is severe interpersonal difficulties, which was not something Ms. Kallstrom experienced before her MVAs. As well, he noted there was no evidence of any vocational functioning by Ms. Kallstrom being affected by emotional factors before the MVAs. To the contrary, Ms. Kallstrom had a "strong work ethic". He is insistent that Ms. Kallstrom's "major impediment" is chronic pain which has been triggered by the MVAs.

Dr. Marguerite Stolar

[222] Dr. Marguerite Stolar specializes in rheumatology. At the request of plaintiff's counsel, she prepared a report, dated April 28, 2014, following an extensive interview of Ms. Kallstrom, and a full physical examination. She also reviewed various documents, including Ms. Kallstrom's Pharmanet records, medical records from various physicians, and the medical-legal reports of Drs. Aitken and Anderson.

[223] Dr. Stolar diagnoses Ms. Kallstrom's medical condition as:

- chronic cervical, thoracic and lumbar spinal pain;
- degenerative arthritis of the cervical and thoracic spine;

- fibromyalgia; and
- depression.

- [224] In Dr. Stolar's opinion, Ms. Kallstrom sustained soft tissue injuries to the neck, mid and low back, and pelvis as a result of the MVAs, which has subsequently developed into chronic pain. On assessment, Ms. Kallstrom was found to have 18 out of 18 fibromyalgia pain points as well as diffuse pain in other areas of her body. Dr. Stolar expresses the view that there is no reason to think Ms. Kallstrom was overreacting in the course of her examination, and that Ms. Kallstrom's responses were consistent with fibromyalgia.
- [225] Fibromyalgia is a chronic, unrelenting, pain syndrome which can wax and wane in severity over time. Dr. Stolar says the development of fibromyalgia can be directly triggered by both physical and emotional trauma, although other potential triggers include thyroid disease and sleep disorders. The prognosis for recovery from fibromyalgia is "guarded" and Ms. Kallstrom's condition is more likely than not to remain chronic.
- [226] Dr. Stolar notes that severe depression is a common feature in patients with chronic pain, although she defers the ultimate discussion of the relationship to Dr. Anderson.
- [227] Dr. Stolar notes that fibromyalgia has the capacity to interfere with a person's ability to work full time, as well as to work at jobs which are physically demanding and stressful. However, the condition can also be aggravated by additional emotional stressors in Ms. Kallstrom's life. She believes Ms. Kallstrom might benefit from participation in a multi-disciplinary pain program to address both the physical and emotional issues associated with continued participation in the workforce. However, she is of the opinion that with appropriate physical rehabilitation and support, Ms. Kallstrom should be able to continue working in her previous capacity as a personal assistant, although she may have to set some boundaries in that regard.
- [228] Dr. Stolar says there is no "cure" for fibromyalgia, but that physical activity is often the most beneficial treatment. She recommends that Ms. Kallstrom participate in an active physical exercise program as a way of coping with her chronic pain. She acknowledges, however, that Ms. Kallstrom will likely find it difficult to engage in home, domestic and recreational activities because of the chronic pain.
- [229] In Dr. Stolar's opinion, the cumulative trauma from the MVAs aggravated the physical and emotional stress impacts on Ms. Kallstrom and there is "no question" that Ms. Kallstrom's fibromyalgia is "directly attributable to the motor vehicle accidents", particularly MVA 3 which appears to have been the most significant.

Dr. Joel Epstein

- [230] Dr. Joel Epstein is a fellow of the Royal College of Dentistry and a specialist in oral medicine. He is associated with an oral and maxillofacial surgery practice, but he himself does not perform such surgery. His curriculum vitae is 86 pages long, more than four times the length of his actual report dated April 7, 2015.
- [231] Dr. Epstein's report is based on an interview and examination of Ms. Kallstrom conducted on March 18, 2015, the completion by Ms. Kallstrom of a pain questionnaire, and a review of certain x-ray imaging. He also reviewed two volumes of documents provided by plaintiff's counsel comprising some 69 statements, reports, insurance forms, prescriptions and other medical records from various sources. On cross-examination, he acknowledged that the clinical diagnoses set out in his report was based "in large degree" upon the history provided by Ms. Kallstrom.
- [232] Dr. Epstein's clinical examination determined the existence of various degrees of tenderness in Ms. Kallstrom's masticatory and cervical muscles as well as clicking and grinding sounds (crepitus) in the temporomandibular joint and a restriction (50% less than normal), of Ms. Kallstrom's jaw opening ability. No significant wear was seen on Ms. Kallstrom's posterior teeth and the bite relationship appeared to be non-contributory to Ms. Kallstrom's problems.
- [233] Dr. Epstein's clinical diagnosis is that Ms. Kallstrom suffers from temporomandibular disorder ("TMD") associated with jaw dysfunction and headaches triggered by the neck and jaw symptomology. He expresses the opinion that the TMD is primarily related to MVA 3 based on Ms. Kallstrom's report of a direct blow to the left temple during that impact. He also observes that the condition was likely aggravated by the subsequent MVAs.
- [234] Dr. Epstein suggests the TMD symptomology requires treatment, in addition to the multi-disciplinary management suggested in the other medical reports. He particularly recommends that an oral orthotic appliance be used and that some physiotherapy specifically directed to the jaw symptomology and functions be carried out. He opines that the significant and chronic nature of Ms. Kallstrom's pain rules out any surgical intervention with the temporomandibular joints.
- [235] Dr. Epstein was cross-examined on the absence of early reference in the clinical records to symptomology involving Ms. Kallstrom's jaw. It was suggested to him that no such symptomology was identified until some considerable time after Ms. Kallstrom's various accidents. Dr. Epstein suggested that a May 21, 2003 entry in the clinical records of Ms. Kallstrom's family doctor seem to refer to TMJ, but otherwise he acknowledged there appears to be no notation respecting any jaw involvement until a medical report to ICBC dated January 19, 2005. That report refers to MVA 5 and includes specific reference to jaw pain and headache.

[236] Dr. Epstein acknowledged that the association between temporomandibular symptoms and whiplash injury sustained in MVAs has been controversial in the past. He stated, however, that the evidence is much stronger today that a small subset of people can and do develop a disorder following soft tissue/whiplash injuries and he believes Ms. Kallstrom is such an example.

Mr. Niall Trainor

[237] Mr. Niall Trainor is a vocational rehabilitation consultant with more than 30 years' work experience in the field of vocational rehabilitation. Over the years, he has provided vocational rehabilitation assessments and assistance to a broad cross-section of individuals who have been injured as a result of MVAs or other trauma. He has been qualified on numerous occasions as an expert witness in this Court to provide opinion evidence in matters relating to vocational rehabilitation.

[238] At the request of plaintiff's counsel, Mr. Trainor undertook a comprehensive assessment of Ms. Kallstrom's employability in light of the MVAs and related medical conditions. He conducted a four-hour interview in June 2014 and administered a variety of vocational interest and academic achievement tests. Thereafter he prepared a detailed report dated July 14, 2014, which was tendered in evidence at trial.

[239] Mr. Trainor observes that while individual employers have their own unique set of requirements, generally speaking, employability is a function of factors such as education, specific skills training and work experience, physical capacity, values and interests, temperaments, and intellectual skills. Employability is also a function of labour market factors, i.e. the supply and demand for various types of employment and the individual's own resourcefulness for developing job leads and promoting herself to prospective employers.

[240] Based on the testing performed, Mr. Trainor states that Ms. Kallstrom has a keen vocational interest in occupations consistent with the social, enterprising and/or conventional interest themes. She has functional reading comprehension and math skills at the post-secondary school level, serviceable oral communication skills, and well-developed computer literacy. Based on a review of Ms. Kallstrom's upbringing, education and work experience, Mr. Trainor notes Ms. Kallstrom has a positive work ethic and achievement motivation.

[241] Mr. Trainor opines that, based on Ms. Kallstrom's education, training and work experience before the MVAs, she likely had good potential to continue working in her chosen field (administration) and that she probably had good potential to advance on-the-job into increased levels of responsibility. While she aspired to managerial levels of employment, pursuit of such goals would likely have required her to obtain a diploma or degree in business administration and possibly a professional designation, such as licensing within the insurance, real estate or other financial fields. He is of the opinion that Ms. Kallstrom likely had (and continues to have) adequate literacy and numeracy for pursuit of such skills

training at the post-secondary school level. He notes it was possible, though not probable, that she could have advanced to certain managerial positions on the basis of work experience alone, as this has in fact occurred for sales and office managers in various fields.

- [242] Mr. Trainor observes that Ms. Kallstrom has ongoing chronic pain, functional limitations and emotional problems which impact her employability. He defers to the medical experts to assess the contribution of Ms. Kallstrom's MVAs to her ongoing symptomology. However, he offers balanced, sensible and practical observations as to the impact of certain medical conditions on an individual's employability.
- [243] Persons with Ms. Kallstrom's pain and functional limitations are less feasible for physically demanding work as well as occupations involving prolonged keyboarding, standing and occasional demand for moderate lifting and carrying.
- [244] Based on Mr. Trainor's experience, he observes that workers with chronic pain often experience disruption in their employment due to (1) difficulty performing physically demanding work, (2) difficulty attending work on a regular and reliable basis, (3) difficulty working full-time, (4) limited availability of accommodation (light duties), and (5) trouble handling exigent circumstances such as working overtime, helping co-workers, or working in areas outside of their normal responsibility. The disruption to employment for such individuals often leads to the necessity to change current occupation/careers, loss of job satisfaction, and less remunerative employment.
- [245] Mr. Trainor notes that Ms. Kallstrom has been diagnosed with depression. He says the majority of depressed persons are able to work. However, depression is often linked to problems with (1) slowness and mistakes in work, (2) poor concentration and forgetfulness, (3) poor timekeeping, (4) increase in unexplained absences or sick leave, and (5) disputes and arguments with colleagues. Persons with both physical ailments and depression are more likely to be disabled than patients with physical problems alone, such as high blood pressure, coronary heart disease, arthritis, and back problems.
- [246] Mr. Trainor notes that Ms. Kallstrom has been diagnosed with PTSD. Workers with such a disorder may seek to avoid circumstances leading to an increase in symptoms and this can affect attendance at work. Other common vocational issues for workers with PTSD include (1) difficulty meeting performance expectations, (2) increased number of mistakes in work, (3) low energy and lack of stamina, (4) reduced tolerance for stress, (5) detachment from teammates, and (6) loss of interest in previously enjoyed work activities.

- [247] There are also negative employability implications for persons who have a history of accident and disability. Such individuals may be more likely to apply for WCB or private disability insurance benefits during the course of their employment. In the contemporary budget-conscious economy, employers often seek to minimize labour costs by implementing strategies to contain insurance and illness costs. This typically begins with the hiring process, i.e. by hiring low-risk workers.
- [248] There are also negative employability factors associated with the concept of "presenteeism" applicable to individuals who show up for work sick, injured, stressed or burned out. These factors impact productivity in the workplace. Such "presenteeism" can result in (a) taking longer to start working after arriving at work, (b) lack of concentration on work, (c) making mistakes and needing to repeat tasks, (d) performing work at a slower pace than usual, (e) feeling fatigued at work, and (f) attending work but not actually doing work. Workers with presenteeism are less likely to be promoted and they have an increased risk of job loss due to their inefficiency. They can also experience a catastrophic reaction to job stress, characterized by complete cessation of employment for indefinite periods.
- [249] Mr. Trainor expresses the opinion that Ms. Kallstrom's medical condition renders her less competitively employable than she was before the MVAs. All of the factors referred to above, which have a negative impact upon employability, apply to Ms. Kallstrom. Before the MVAs, Ms. Kallstrom was competitively employable in a number of occupations, including administrative assistant, in both the sales and service sectors. Pursuit of a career in administrative management would have been consistent with Ms. Kallstrom's interests and aptitudes. Prognosis for achievement at that level was perhaps guarded for lack of a diploma or degree in business administration, but such qualifications would likely have been achievable if Ms. Kallstrom had set out to pursue them. At present, however, Ms. Kallstrom's ongoing pain, functional limitations and emotional problems will likely diminish her attendance, productivity and versatility as a worker. In addition to fewer feasible occupations being open to her, she is a less attractive candidate for the occupations that remain within her grasp. As well, she has lost valuable time toward building her career.
- [250] Mr. Trainor notes that Ms. Kallstrom is capable of employment, however she will likely require sympathetic employers, i.e., employers who are willing to hire her in spite of her problems and notwithstanding the general availability of other, equally qualified workers who lack her infirmities. He notes the disabled worker is often forced to make certain concessions in order to secure employment, i.e., accepting a lower wage, temporary work, shorter hours, fewer benefits, less job security and the like.
- [251] Mr. Trainor believes Ms. Kallstrom could feasibly be employed in a number of business occupations such as receptionist, administrative assistant, banking or insurance clerk, accounting clerk, customer service clerk, et cetera. She has adequate job search skills and, in the past, has used temporary agencies to find short-term assignments that have led to permanent jobs. He notes that the pursuit of professional qualifications, such as in real

estate sales, mutual fund sales or mortgage brokerage, would also allow Ms. Kallstrom to take her career in specific directions.

- [252] Mr. Trainor opines that, if left to her own resources, Ms. Kallstrom will likely continue with a succession of jobs, most probably in the fields of administration and retail. She will likely start such employment with enthusiasm, but as time passes she will "burn out". She will likely start with good attendance, but this will wane as she starts flagging and she will become subject to "attendance management" by her employer. Her pain will eventually become obvious to employers, her depression will flare, eventually resulting in a loss of employment. The succession of relatively short-lived jobs is also subject to the risk that she may simply stop employment altogether.
- [253] Mr. Trainor stresses that help and support for Ms. Kallstrom is very important. He believes she would benefit from long-term psychological assistance to help re-frame her stressors and also help cope in the workplace.

Dr. J.F. Schweigel

- [254] Dr. J.F. Schweigel is a specialist in orthopedics and, at the request of defence counsel, carried out an independent medical examination of Ms. Kallstrom on January 26, 2004. His report is dated the same day.
- [255] Dr. Schweigel reviewed a variety of documents for the purposes of his assessment, interviewed Ms. Kallstrom, and also carried out a clinical examination.
- [256] The records he reviewed included some of Dr. Izen's records/notes, physiotherapy, chiropractic and massage notes, and x-ray reports. He noted certain extracts from some of these records as indicating that Ms. Kallstrom may have had a pre-MVA history of back and neck pain.
- [257] Dr. Schweigel says that the physical examination of Ms. Kallstrom was essentially normal, with perhaps a slightly decreased motion in both the neck and cervical spine.
- [258] Dr. Schweigel then expressed the following opinions:
- I am amazed that this lady had neck pain after the first MVA as the MVA appeared, from my reading of the documents, very minor
 - the second MVA appears to have aggravated the pre-existing neck problem and to have caused some shoulder pain and low back pain;
 - these soft tissue injuries would have healed within one to two months, although she may have had some slight discomfort thereafter lasting for six months to a year which would not have restricted most of her activities;

- the third MVA resulted in minor soft tissue injury to the neck and lumbar spine (a stretching of muscles and ligaments). This is because Dr. Izen's notes record a normal range of motion of the lumbar spine 10 days after the accident and there was no observation of loss of motion, spasm or deformity;
- Ms. Kallstrom has had a propensity to have neck and back pain for whatever reason prior to the accidents, therefore the third MVA aggravated a pre-existing tendency;
- Ms. Kallstrom's prognosis is good and she does not require any further physiotherapy or massage treatment and/or chiropractic treatment. She should not be more prone to injury because of these soft tissue injuries;
- this young lady would probably not have been disabled after the first two MVAs more than a few days at a time. After the second MVA, she may have been disabled for anywhere from three to six months. She is not disabled now, and she is capable of full-time work. She may have some discomfort if she returns to work, but this will not cause any future problems and she has to work through that discomfort. I suspect, when she returns to work, her pain will slightly intensify, but within three to six months post-working, the pain should disappear.

Dr. Simon Horlick

- [259] Dr. Simon Horlick is an orthopedic surgeon who, at the request of defence counsel, conducted an independent medical examination of Ms. Kallstrom on November 3, 2015. Approximately 30% of Dr. Horlick's practice is devoted to medical-legal work, 65% of which is on behalf of defendants.
- [260] In his report, Dr. Horlick recites the history of the six MVAs occurring between March 23, 2001 and December 9, 2004. He notes that it is now 11 years since the last MVA and that Ms. Kallstrom continues to have ongoing complaints referable to these MVAs including: neck pain, thoracic spine pain, low back and right buttock discomfort, headache, PTSD, anxiety and depression. He notes that he was limiting his opinion to his area of clinical expertise, namely, disorders of the musculoskeletal system.
- [261] At the time of the his physical examination, Dr. Horlick says Ms. Kallstrom was 5'8" tall and weighed 190 pounds, representing approximately 40 pounds of weight gain in the previous three years. He says the physical examination of Ms. Kallstrom's entire musculoskeletal system including her cervical, thoracic and lumbar spine, her shoulders, elbows, hands and wrists, her knees, hips, ankles and feet was "entirely normal with no measurable impairment present". He also notes that Ms. Kallstrom's imaging studies to date, including CT scans and multiple x-rays of these areas "have also failed to reveal any objective pathology".

- [262] Dr. Horlick concludes that the diagnosis with respect to Ms. Kallstrom's ongoing subjective complaints referable to the musculoskeletal areas referred to above would be myofascial in origin, i.e. soft tissue. Given the absence of impairment on physical examination, Dr. Horlick says that because there is no measurable loss of range of motion, weakness or instability present on physical examination, there is no orthopedic basis for Ms. Kallstrom to undergo any physiotherapy, massage therapy or chiropractic treatments.
- [263] He concludes there is no orthopedic basis for any restrictions in Ms. Kallstrom's occupational or vocational duties. He notes that notwithstanding ongoing subjective complaints in her musculoskeletal areas, Ms. Kallstrom has been able to work in a variety of different occupations and he expects that she will continue to do so in the future.
- [264] Dr. Horlick confirmed that pain medicine has, in recent years, become a new subspecialty of the Canadian Royal College of Physicians and Surgeons. He says there are three elements to the subjective experience of pain including bio-physical, psychological and social factors. His is a "myofascial diagnosis", which is a diagnosis of exclusion after having ruled out any structural problems on the part of Ms. Kallstrom. He suggests that psychological and social factors play a significant role in Ms. Kallstrom's symptoms.

Dr. William Koch

- [265] Dr. William Koch has been a registered psychologist in BC since 1982. He is a clinical full professor in the Department of Psychiatry, Faculty of Medicine, at the University of British Columbia ("UBC"), as well as an adjunct professor in the Departments of Psychology at both UBC and Simon Fraser University.
- [266] At the request of the defendants, Dr. Koch undertook two separate psychological assessments of Ms. Kallstrom in 2014 and 2015 and issued two 48-page reports dated April 19, 2014 and November 6, 2015, respectively. Regrettably, neither report is scientifically reliable and I am unable to give much weight to Dr. Koch's opinions in this case.
- [267] Psychologists, unlike psychiatrists, are not medical doctors and they are not allowed to prescribe medications. Dr. Koch acknowledges that psychiatrists have better training in medicine and acute mental health disorders as well as psycho-pharmacology. They are much more likely to prescribe medications for mental disorders whereas psychologists prefer psychometric tools and structured behavioural therapy.
- [268] In his second report, Dr. Koch says, "There are a number of reasons to be uncertain about Ms. Kallstrom's ultimate diagnoses and extent of her disability". He nonetheless purports to diagnose various mental health conditions on her part, which he claims existed before any of the MVAs, including:
- borderline personality disorder or traits of same;
 - panic disorder without agoraphobia;

- somatic symptoms disorder (predominantly pain);
- depression; and
- generalized anxiety disorder.

- [269] Dr. Koch disagrees with Dr. Anderson's opinion that Ms. Kallstrom did not have significant physical or emotional difficulties before the MVAs. He also disagrees with Dr. Anderson's opinion that Ms. Kallstrom's mental health problems were primarily caused by the MVAs.
- [270] Dr. Koch conducted a lengthy interview of Ms. Kallstrom for both of his assessments, as well as a wide battery of psychological testing. He noted that in the first interview, Ms. Kallstrom was in obvious distress with significant mood variation, swinging from friendly jocularity to tearful anger. In the second interview, she was a "changed person", brighter and without anger. He described the difference as "night and day".
- [271] Most significantly, there was a very substantial change in some of the testing performed on Ms. Kallstrom on each occasion. These variations indicate that the data is invalid and unreliable.
- [272] The Personality Assessment Inventory usually has very high test - re-test reliability because they are designed to reflect long-standing traits. Her score on Borderline Features fell from the 98th percentile to the 36th percentile of the general population. Her Anxiety Related Disorders score fell from the 98th percentile of normal population to the 70th percentile. These major declines in the testing cannot be explained, and Dr. Koch acknowledges he simply does not know which of the data is valid and reliable.
- [273] Without valid and reliable psychometric data, Dr. Koch acknowledges that his opinion was based in large measure upon a record review and the history related by Ms. Kallstrom during her interviews. At the end of the day, Dr. Koch stated he was "not very confident in my report generally" and that he was "often guessing" in some of his conclusions without supporting data.
- [274] Dr. Koch was also thoroughly discredited during cross-examination. He acknowledged that, based on test data alone, borderline personality disorder was not a likely pre-MVA diagnosis. He also acknowledged there was nothing in the pre-accident clinical records that supported any diagnosis of borderline personality disorder.
- [275] Dr. Koch acknowledged that his analysis would have been assisted by "collateral evidence" obtained by interviewing family members, employers and friends of Ms. Kallstrom. He says such information was not realistically available to him in a "defence assignment". When confronted with some of the testimony given in the trial by such collateral witnesses, Dr. Koch acknowledged that it would "diminish my certainty" of diagnosis.

- [276] Insofar as his diagnosis of pre-MVA panic disorder is concerned, Dr. Koch acknowledged that it was based on a single note in the clinical records. He acknowledged that panic attacks can be triggered by a variety of things, including possibly the contraception medication that Ms. Kallstrom was consuming. At the end of his cross-examination on this subject, he said he was now "not confident in my diagnosis", but then observed "where there is smoke, there is fire", which is hardly the most scientific of analyses.
- [277] Much of Dr. Koch's reports comprise advocacy on behalf of the defendants. For example, he seizes on the existence of an emergency room note respecting "chest wall pain" experienced by Ms. Kallstrom between MVA 2 and MVA 3 as supportive of pre-existing panic disorder. Even though the note makes no reference whatsoever to any panic episode, he argues that chest pain is a "common symptom of anxiety attack" and hence the incident "could be" an instance of panic disorder.
- [278] It should be noted that after a long career in clinical practice, more than 90% of Dr. Koch's current practice is limited to medical-legal work, a significant portion of which is for ICBC. He said he thought his 2014 billings to ICBC were within the range of \$189,000, but acknowledged on cross-examination that they might have been as high as \$240,000.
- [279] Dr. Koch did acknowledge that the test data produced "reliable findings" of (1) depression and (2) clinically significant pain and somatic preoccupation. He acknowledged that depression is a feature of chronic pain and, indeed, that the two are "mutually maintaining conditions".

CLINICAL NOTES OF TREATING MEDICAL PRACTITIONERS

- [280] At the commencement of the trial, the Court was presented with seven binders of documents that were entered into evidence by consent pursuant to a formal "Documents Agreement" executed between the parties. Among other things, that agreement provided that the documents in the binders were admissible as business records.
- [281] Included in the material were clinical records, notes and reports of various medical professionals who have provided treatment to Ms. Kallstrom over the years, including family doctors, physiotherapists, and chiropractors. Ms. Kallstrom's Pharmanet records, evidencing the various prescribed medications obtained by Ms. Kallstrom through the years 1999 to 2015, were also subject to the Documents Agreement.
- [282] With respect to the medical records, the Documents Agreement provided the same were admissible to prove:
- Ms. Kallstrom was seen by and examined by the medical professional on the day in question;
 - treatments and medication were prescribed as recorded;
 - any medical procedures occurred as stated in the records; and

- opinions set out in the records were held as recorded.

[283] None of Ms. Kallstrom's treating medical professionals were called as expert witnesses or provided any reports of expert opinion. One of Ms. Kallstrom's family physicians, Dr. Menzies, was presented to confirm, and to some degree elaborate upon, his medical file on Ms. Kallstrom spanning the years January 2008 to May 2015.

Dr. Randi Izen

[284] The earliest clinical records put into evidence were those of Dr. Randi Izen. Those clinical records start on October 21, 1999 with a notation that Ms. Kallstrom was a new patient at that time. Ms. Kallstrom was well on that occasion.

[285] The first MVA occurred March 23, 2001. Apart from Ms. Kallstrom's own testimony, the only evidence respecting the plaintiff's medical history before MVA 1 comes from Dr. Izen's medical records as well as the Pharmanet records. These records show:

- a diagnosis of axillary hyperhidrosis (excessive sweating) on March 15, 2000 followed by a sweat gland removal operation performed at UBC Hospital on August 31, 2000;
- a diagnosis of insomnia, depression, anxiety symptoms and panic attacks on July 4, 2000, albeit "no recognized stimulus". Mood was noted as being "decreased for past two months" and a reference was made "on anti-depressant in past". A prescription was given for Paxil (anti-depressant) and 15 tablets of Tylenol 3;
- on August 4, 2000 Dr. Izen provided a refill of Tylenol 3 (60 tabs) for back pain along with a continuation of Paxil for depression and Imovane (sleeping medication);
- in September 2000, Ms. Kallstrom received physiotherapy for "lower back pain";
- Ms. Kallstrom was again dispensed Tylenol 3 on September 2 (15 tabs), September 14 (40 tabs), 2001 and a further 20 tabs on March 16, 2001 (one week before MVA 1);
- Zopiclone (Imovane, sleeping pill) was dispensed August 31 (30 tabs), November 3 (30 tabs), November 20 (60 tabs) 2000, and again January 30, 2001 (90 tabs);
- Paxil (anti-depressant) was dispensed November 3 (30 tabs), November 20, (60 tabs), and December 29 (60 tabs) 2000;
- Cyclobenzaprine (Flexeril, anti-inflammatory/muscle relaxant) was dispensed September 2, 2000 (15 tabs) and Novo-cycloprine (muscle relaxant) on March 16, 2001.

[286] Following MVA 1, Ms. Kallstrom saw Dr. Izen three times (March 24, March 29 and April 6) and also attended physiotherapy. The clinical records refer to headaches, dizziness, neck and shoulder pain, muscle spasm and "soft tissue injuries". Prescription medication included Imovane, Tylenol 3, Robaxisol (muscle relaxant) and Flexeril.

[287] MVA 2 occurred April 12, 2001. Thereafter, Ms. Kallstrom saw Dr. Izen 12 times throughout the balance of 2001 and five times in 2002. Physiotherapy and chiropractic treatments were also received. The related clinical records refer to back pain, decreased cervical range of motion, headaches, neck and shoulder pain, insomnia (include one note by Dr. Izen "long history of insomnia - relates back to adolescence") and mood swings. Repeated prescriptions were given for Tylenol 3, Flexeril and Imovane, among others.

[288] Dr. Izen's note of December 27, 2001 refers to a "cocaine habit" on Ms. Kallstrom's part, repeated on January 14, 2002:

Referral for couples counselling. Both have cocaine habit. Patient concerned about becoming addicted. Use seems to be increasing lately. Appropriate behaviour today. Discussion re substance abuse and therapy.

[289] MVA 3 on April 17, 2003, and the fourth on February 4, 2004. During that period, Ms. Kallstrom saw Dr. Izen 16 times, as well as various physiotherapists. She also saw other medical professionals in Regina in the period mid-June to mid-August 2003. Throughout these visits, Dr. Izen again records subjective complaints of pain in the neck, shoulders and lower back, headaches and emotional difficulties, including one occasion when Ms. Kallstrom was crying on account of the pain. Soft tissue injury was, again, the diagnosis. The same medication (Tylenol 3, Flexeril, Imovane) was repeatedly prescribed as well as anti-depressants in December 2002 (Elavil) and November 5, 2003 (Wellbutrin) and again on November 27, 2003 (Trazodone).

[290] In Saskatchewan, the plaintiff saw a Dr. Lombard on June 12, 2003 complaining of pain in the back, increased anxiety bordering on panic attacks and repeated flashbacks to MVA 3. He diagnosed "muscular injuries" arising from the MVA as well as PTSD and he referred her for counselling. She received various physiotherapy treatments and the physiotherapist diagnosed "right sacroiliac/shoulder dysfunction". The mental health counsellor "reviewed coping strategies" with Ms. Kallstrom, but considered that further follow-up was not necessary at the time.

[291] In the three-month period between MVA 4 and MVA 5, which occurred on May 8, 2004, Ms. Kallstrom attended upon Dr. Izen on seven occasions. Again, Ms. Kallstrom was complaining of headaches and ongoing pain in the right neck, shoulder and upper back areas. Soft tissue injuries were again diagnosed and the same medication was again repeatedly prescribed. Massage therapy and physiotherapy were also undertaken.

[292] Following MVA 5, which occurred on May 8, 2004, Ms. Kallstrom attended Dr. Izen's office on May 10, 2004 and while she informed Dr. Izen of the accident, she declined an examination for lack of time and simply wanted some forms completed for employment insurance purposes. She did, however, undergo a variety of massage therapy, physiotherapy and chiropractic treatments in the ensuing four months and gave Dr. Izen a more detailed description of the MVA and its aftermath during her visit on September 2, 2004. Ms. Kallstrom described having no pain at the time of the impact, but a severe

headache a couple hours later, followed by neck and upper back pain, which had since persisted. There was decreased flexion, rotation and range of motion along with paraspinal muscle tenderness detected. Soft tissue injuries to the cervical spine in the upper back were again diagnosed.

- [293] The MVA 6 occurred on December 9, 2004. The plaintiff attended at UBC Hospital the following day complaining of diffuse neck discomfort, headache and nausea. Soft tissue injuries were diagnosed along with a possible migraine.
- [294] Ms. Kallstrom visited Dr. Izen on December 13, 2004. Decreased flexion in the cervical and lumbar spine was detected on examination. Tylenol 3, Flexeril and Zopiclone were again prescribed.
- [295] In early January 2005 the plaintiff complained to Dr. Izen of migraine headaches. The complaint was repeated during office visits in both February and March 2005. A migraine medication, Zomig, was then added to the list of medications prescribed for Ms. Kallstrom (sleep, anti-inflammatory and pain) along with an anti-depressant (Trazodone). A referral was made to a neurologist at VGH, Dr. Gillian Gibson. The findings on neurological and neurophysiological examinations were normal and Dr. Gibson expressed the opinion that Ms. Kallstrom's pain was soft tissue in origin, accompanied by frequently disabling migraine headaches.
- [296] On the April 26, 2005 visit, Dr. Izen noted the continuation of migraines, nausea and depressed mood. She noted "ongoing stress with pain" (as well as financial issues and family litigation), and suicidal ideation. Dr. Izen diagnosed "major depression" and prescribed an anti-depressant (Celexa). She also issued a medical certificate for Employment Insurance Sickness Benefits stating that Ms. Kallstrom was "suffering from major depression and is unable to work due to poor memory, concentration and injuries".
- [297] A clinical record from Pinnacle Sports Physiotherapy dated May 20, 2005 notes "TMJ problems" as part of Ms. Kallstrom's complaints. Ms. Kallstrom had previously reported injury to the jaw area (as well as neck, shoulders, back and headaches) on a January 19, 2005 Insurance Claim Application provided to ICBC and had also listed jaw pain as one of the symptoms that developed following the sixth MVA in a questionnaire completed for the Kitsilano Chiropractic Clinic on February 3, 2005. The first note of TMJ pain in Dr. Izen's clinical records is not until January 30, 2006, at which time reference is made to constant clicking and pain in the joint (along with daily neck pain and dysfunction with speech and eating).
- [298] A June 1, 2005 examination by a chiropractor, Dr. Chan, reported Ms. Kallstrom's complaints of neck pain, thoracic pain, low back pain and headaches as a result of the MVA. The examination findings were listed as follows:

Range of motion of cervical spine and lumbar spine produced pain at the cervical spine and at the lumbo-sacral region on all ranges. Static palpation revealed hypertonic cervical paraspinal, trapezius, suboccipital and lumbo-sacral paraspinal muscles. Motion palpation showed joint restrictions in the cervical lumbar, thoracic and SI joints.

[299] Ms. Kallstrom's final appointment with Dr. Izen occurred on February 28, 2007. The clinical records refer to a letter that had been issued by the doctor's office advising her that she could no longer be a patient. No reason is cited in the clinical records and a copy of the letter was not put into evidence. However, from the summer 2005 through to February 2007, Dr. Izen's notes and clinical records repeatedly contain references to and diagnoses of ongoing chronic pain in Ms. Kallstrom's neck and back, migraine headaches, and depression. Notes and reports were prepared for the Ministry of Employment and Income Assistance confirming the diagnosis and prescriptions of Tylenol 3, Imovane, Flexeril, Zomig and antidepressants were regularly made.

Dr. Robert Menzies

[300] Dr. Robert Menzies became Ms. Kallstrom's family physician in January 2008. She had consulted with an associate in his office at the end of November 2007. The notes on that visit recorded multiple MVAs, chronic pain and medication that included Tylenol 3, Imovane, Zomig Flexeril and Celexa. Prescriptions were refilled on that occasion.

[301] Ms. Kallstrom attended Dr. Menzies' office nine times in 2008, four times in 2009, once in 2010, three times in 2011, 25 times in 2012, 12 times in 2013, and 16 times in 2014 (many of the latter by Skype). Substantial quantities of medications are repeatedly prescribed.

[302] Dr. Menzies was cross-examined on some of the entries in his clinical records, particularly a note in March 2010 about possible "malingering", and in August 2014 "borderline personality disorder". He acknowledged he was questioning some of Ms. Kallstrom's presentation and that these entries were speculation on his part. However, he also stated that he had "no real doubts" about the genuineness of Ms. Kallstrom's complaints of chronic pain, that she had been living with such chronic pain for years, and that at various times over the years, he was completing the necessary forms certifying Ms. Kallstrom's inability to work to the Ministry of Employment and Income Assistance.

LIABILITY

[303] This judgment arises from the joint trial of four separate actions involving five separate MVAs. In addition, Ms. Kallstrom has been involved in two other MVAs (May 8, 2004 in Vancouver and November 2015 in Regina) and several other incidents which caused or aggravated personal injury, whether physical or psychological.

[304] One of the challenges in this case is determining the nature and extent of the personal injury and the related losses or damages sustained by Ms. Kallstrom as a result of each MVA and, having regard to common law tort principles and the apportionment of liability for damages under the Negligence Act, R.S.B.C. 1996, c. 333, how (if at all) allocation of fault and loss is to be made. The (largely boilerplate) pleadings filed by the defendants in these actions:

- admit that MVA 1 and MVA 2 were caused by the negligence of the respective defendant drivers, but deny the existence of any injury caused by the MVAs and allege contributory fault on the part of Ms. Kallstrom for failing to properly use a seat belt/headrest;
- deny liability for MVAs 3, 4 and 6, and allege that both the MVAs and any injuries were entirely caused or contributed to by the negligence of Ms. Kallstrom; and
- each of the defences also alleges, in the alternative, that if Ms. Kallstrom has suffered any injury loss or damage, then it was not caused by the MVA in question, but rather was "attributable to previous or subsequent traumas or to congenital defects".

[305] In their final arguments, the defendants seek allocation of fault against both Ms. Kallstrom and other third parties, and claim consequential severance of joint liability and apportionment of damages between the various defendants and others. No proceedings for contribution or indemnity have been issued as between the various defendants or, indeed, against any other persons.

[306] At the commencement of trial the defendants admitted liability for MVA 1 and MVA 2 and withdrew any contributory fault offenses. I therefore find that these defendants are liable for the damages assessed and allocated later in this judgment.

[307] Insofar as MVA 3 is concerned, the uncontroverted evidence is that the MVA was caused solely by the defendants' vehicle failing to properly negotiate a right turn and entering into the lane of traffic in which Ms. Kallstrom was travelling. There was no evidence supporting any allocation of contributory fault to Ms. Kallstrom and, accordingly, I find that these defendants are liable for the damages assessed and allocated later in this judgment.

[308] Although liability for MVA 4 was technically in issue by virtue of the pleadings, the defendant did not seriously contest same at the conclusion of the trial, nor was any contributory fault on the part of Ms. Kallstrom pursued. I have no hesitation in holding, in any event, that the MVA was caused solely by the defendant Lam backing out of a parking spot without sufficiently checking her surroundings for other vehicles in the vicinity. I find that she is 100% liable for MVA 4 and for the damages assessed and allocated later in this judgment. There was no contributory fault on the part of Ms. Kallstrom in respect of that collision.

[309] Liability for MVA 6 was seriously contested, however I find that the defendant Sabatino was solely at fault for that collision. Ms. Kallstrom's testimony was uncontroverted that she was travelling in the middle lane through the intersection on a green light when Mr. Sabatino's

vehicle turned left and collided with the left front fender of her vehicle. Mr. Sabatino admitted that he did not see Ms. Kallstrom's car at any time before the collision and his belief that Ms. Kallstrom must have made an illegal lane change manoeuvre (proceeding straight through a mandatory right turn lane) is nothing but unsubstantiated speculation vehemently denied by Ms. Kallstrom.

- [310] Mr. Sabatino was obliged to yield the right-of-way to Ms. Kallstrom's car which was closely approaching from the opposite direction and which was clearly there to be seen. His failure to do so renders him 100% liable for the ensuing collision and I find no contributory fault on the part of Ms. Kallstrom in that regard.
- [311] While technically not an issue of "liability" per se, the evidence revealed incidents other than the five MVAs referred to above which may have aggravated or caused additional injury to Ms. Kallstrom and for which the defendants argue some fault should be attributed to Ms. Kallstrom. These include MVA 5, for which no action was brought, the November 2015 MVA in Regina, and at least two incidents where Ms. Kallstrom slipped and fell.
- [312] Insofar as it is the defendants who are seeking minimization or allocation of damages based on alleged fault on the part of Ms. Kallstrom for these incidents, it is the defendants who have the onus of proving such fault on the balance of probabilities. The evidence with respect to each of these incidents is very scant and falls far short of establishing fault on Ms. Kallstrom's part. The only evidence is Ms. Kallstrom's own testimony on these matters, as well as certain references in medical reports and clinical records. The latter merely record the occurrences but, quite understandably, do not recite the details necessary to make any meaningful determination of fault.
- [313] Ms. Kallstrom's evidence respecting MVA 5 establishes that she was driving eastbound on South West Marine Drive with the right-of-way when another vehicle merged into her lane and caused a collision. The evidence was vague as to the precise timing and distances involved as well as the nature and extent of other traffic. Any suggestion that Ms. Kallstrom could perhaps have avoided the impact by making a lane change or taking any other evasive manoeuvre is simply speculation and I am not prepared to ascribe fault to her based on such meagre evidence.
- [314] The November 2015 Regina accident involved a pothole and an icy road surface. The defendants did not lead any evidence as to the visibility of a pothole or the nature and extent of the slippery surface. Absent such evidence, the allocation of fault to Ms. Kallstrom is again an exercise in speculation.
- [315] Similarly, the slip and fall incidents were not explored in sufficient detail, whether in cross-examination or otherwise, to establish the precise circumstances and the cause of the fall. The onus of proof to establish fault on Ms. Kallstrom's part for these incidents lay with the defendants and has not been met.

CAUSATION, PRE-EXISTING AND INDIVISIBLE INJURY, AND THE ASSESSMENT/ALLOCATION OF DAMAGES IN A NEGLIGENCE CASE

[316] A claim for personal injury damages arising out of an MVA is, of course, a claim in tort (negligence). As with any negligence claim, in order to succeed, the plaintiff must prove on a balance of probabilities the following constituent elements of the tort:

1. the defendant owed the plaintiff a duty of care (to avoid acts or omissions which might be reasonably foreseeable to cause injury to the latter);
2. the defendant's acts or omissions breached the standard of care applicable to that duty;
3. the plaintiff suffered damage of a sort that is recognized and compensable in law; and
4. the defendant's breach was causative, in both fact and law, of the plaintiff's damage.

(See *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 96; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3; *Ediger v. Johnston*, 2013 SCC 18 at para. 24.)

[317] Where the plaintiff's damage is caused by the negligence of two or more persons (possibly including the plaintiff herself), the court must determine the degree to which each person is at fault. The apportionment of liability as between such at-fault persons is governed by the Negligence Act. The apportionment is determined on the basis of the degree to which each person was at fault, not on the extent to which each person's fault caused the plaintiff's damage: *Bradley v. Bath*, 2010 BCCA 10 at para. 24; *Chambers v. Goertz*, 2009 BCCA 358 at para. 55. By virtue of the Negligence Act:

- the amount of damage or loss and the existence or degree of fault are questions of fact (s. 6);
- except where the plaintiff is contributorily at fault, persons whose fault has caused the plaintiff's loss or damage are jointly and severally to the plaintiff for same (s. 4);
- however, no person is liable for damage or loss to which their fault did not contribute (s. 1).

[318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, [1996] 3 S.C.R. 458, repeated many times since, and which include:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;

3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
 4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.
- [319] The above paradigm addresses principles of liability. It does not address principles related to the assessment of damages in tort. The latter requires consideration of conditions or events unrelated to the tort(s) which occurred either before or after the plaintiff's injury and which impact the nature or extent of the compensation that should be awarded for the tort. In such situations, *Athey* reminds us to consider first principles:
- [32] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence ("the original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position" which is the plaintiff's loss. [Emphasis in original.]
- [320] In *Blackwater v. Plint*, 2005 SCC 58, the Court put it this way:
- [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway. ...
- [321] It is in the above context that the so-called doctrines of "thin skull" and "crumbling skull" come into play. In that regard *Athey* held:
- [34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

- [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position 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: *Cooper-Stephenson*, supra, at pp. 779-780 and *John Munkman, Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, supra; *Malec v. J. C. Hutton Proprietary Ltd.*, supra; *Cooper-Stephenson*, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position. [Emphasis in original.]
- [322] In *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, a unanimous decision from a five-member panel of the Court of Appeal reviewed the principles outlined in *Athey*, and addressed pre-existing medical conditions and how they affect the assessment of damages. The *Athey* case articulated the notion of a "measurable risk" or "realistic chance" of a subsequent medical problem occurring at some point in the future, even without the accident that is the subject matter of the lawsuit, noting on that account
- [48] a reduction of the overall damage award may [be] considered. This is because the plaintiff is to be returned to his "original position", which might have included a risk of spontaneous disc herniation in the future [in any event].
- (See also: *T.W.N.A.* at para. 34-35)
- [323] The court in *T.W.N.A.* held that a defendant need not prove on the balance of probabilities that the pre-existing condition would have actually caused the subsequent loss regardless of the accident. It noted:
- [48] a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood. [Emphasis added.]
- [324] If the said "measurable risk" or "realistic chance" can be demonstrated on the evidence, then "the net loss attributable to the tort will not be as great and damages will be reduced proportionately" (*T.W.N.A.* at para. 36 citing *Athey* paras. 31-32).
- [325] Similar principles are articulated in *Moore v. Kyba*, 2012 BCCA 361 at paras. 32-37, and where the court also described the operation of the "crumbling skull" rule as follows:

[43] if the plaintiff had a pre-existing condition and there was a measurable risk that that condition would have resulted in a loss anyway, then that pre-existing risk of loss is taken into account in assessing the damages flowing from the defendant's negligence.

[326] Athey also addressed the concepts of "divisible" and "indivisible" injury:

[24] The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

25 In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

[327] This concept of "indivisible" injury and the apportionment of damages between multiple accidents was reviewed in detail by our Court of Appeal in the seminal decision of Bradley v. Groves, 2010 BCCA 361. In that case, it was argued that aggravation of a pre-existing tortiously-caused injury is not the same as indivisible injury and that trial judges must identify and disentangle discrete injury so as to assess damages separately. That contention was bluntly rebuffed by the Court of Appeal which held:

- "[d]ivisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes." (para. 20);
- "...indivisible injuries, whether occasioned by a combination of non-tortious and tortious causes or solely by tortious causes, result in joint liability for tortfeasors." (para. 24);
- "There can be no question that Athey requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them." (para. 32);

· "If an [indivisible] injury cannot be divided into distinct parts, then joint liability to the plaintiff [for that indivisible injury] cannot be apportioned either. ...[T]ortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant." (para. 34).

[328] The Court of Appeal also addressed the interplay between "indivisibility" and aggravation of a pre-existing injury:

[37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach ... if the injuries cannot be distinguished from one another on the facts ... It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

LOW VELOCITY ACCIDENTS, CHRONIC PAIN, SUBJECTIVE COMPLAINTS AND CREDIBILITY

[329] Much scepticism, some might say cynicism, can accompany claims that significant injury has been sustained as a result of a minor MVA, and particularly so where there is little objective evidence of physical injury and where complaints of pain persist far beyond what most observers might consider to be "normal". It must be remembered, however, that not everybody has the mental or physical constitution of a rugby prop forward.

[330] In *Boag v. Berna*, 2003 BCSC 779, Williamson J. noted somewhat sardonically:

[12] I am aware that it is often inappropriate to equate the damages to a motor vehicle to injuries that may be sustained by occupants of that vehicle. That a piece of steel is not dented does not mean that the human occupant is not injured.

[331] And in *Gordon v. Palmer* (1993), 78 B.C.L.R. (2d) 236 (S.C.), Thackeray J. stated:

[4] I do not subscribe to the view that if there is no motor vehicle damage then there is no injury. This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has no application in court. It is not a legal principle of which I am aware and I have never heard it endorsed as a medical principle.

- [5] Significant injuries can be caused by the most casual of slips and falls. Conversely, accidents causing extensive property damage may leave those involved unscathed. The presence and extent of injuries are to be determined on the basis of evidence given in court. Objectivity is thus preserved and the public does not have to concern itself with extraneous philosophies that some would impose on the judicial process.
- [6] In the case at bar the limited amount of motor vehicle damage is not, in my opinion, the yardstick by which to measure the extent of the injuries suffered by the plaintiff. ... The extent will be decided on the evidence.
- [332] I agree with these points of view. Whether the plaintiff has been injured and to what degree is something that must be determined on the evidence in every case.
- [333] The absence of objectively measurable physical injury does not necessarily mean that a plaintiff's subjective complaints must be disregarded
- [334] Defendants often invoke *Price v. Kostyba* (1982), [1986] 70 B.C.L.R. 397 (S.C.), in urging utmost caution, some might say scepticism, with respect to such subjective complaints. In *Price* at 397-399, McEachern C.J.S.C. cites his own earlier comments to that effect in *Butler v. Blaylock*:

The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.

Perhaps no injury has been the subject of so much judicial consideration as the whiplash. Human experience tells us that these injuries normally resolve themselves within six months to a year or so. Yet every physician knows some patients whose complaint continues for years, and some apparently never recover. For this reason, it is necessary for a court to exercise caution and to examine all the evidence carefully so as to arrive at fair and reasonable compensation.

In *Butler v. Blaylock*, decided 7th October 1981, Vancouver No. B781505 (unreported), I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

- [335] Few observers note that McEachern C.J.S.C.'s decision in *Butler* was actually overturned by the Court of Appeal after *Price v. Kostryba* had been decided. In the appeal, *Butler v. Blaylock Estate*, [1983] B.C.J. No. 1490 (C.A.), Anderson J.A., with Seaton and Lambert JJ.A. concurring, stated:
- [12] With the greatest respect, I am of the opinion that there is no evidence upon which one could reasonably conclude that the appellant did not continue to suffer pain as of the date of the trial. After careful consideration of the expert testimony and the evidence of that appellant and his wife, I have reached the conclusion that the only finding open to the learned trial judge was that as of the date of trial the appellant continued to suffer moderate pain and in the words of Dr. Lehmann, his symptoms 'will gradually subside with further time. Having been present for approximately two and a half years, it is doubtful that they will disappear completely'.
- [13] It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages. There is no suggestion in this case that the pain suffered by the plaintiff did not result from the accident. I would add that a plaintiff is entitled to be compensated for pain, even though the pain results in part from the plaintiff's emotional or psychological makeup and does not result directly from objective symptoms. [Emphasis added.]
- [336] In the present case, Ms. Kallstrom has been diagnosed by some of the medical experts as suffering from both depression and a chronic pain disorder, both of which are listed as a "mental disorder" in the DSM published by the American Psychiatric Association, and which is the standard classification of mental disorders used by mental health professionals in North America. Quite apart from scepticism arising from minor accidents, the courts have also articulated various principles to be applied in assessing claims of psychological injury. These principles were usefully summarized by Abrioux J. in the recent case of *Karim v. Li*, 2015 BCSC 498, as follows:
- [102] The principles to be applied in assessing claims of psychological injury are set out in *Maslen* at 133-135 and summarized in *Yoshikawa v. Yu*, [1996] 21 B.C.L.R. (3d) 318 at 325-326 (C.A.). They are:
- the pain, discomfort, or weakness must be genuine;
 - the psychological problems must have their cause in the defendant's wrongful act and not be rooted in desires for sympathy or compensation or be such that the plaintiff could be expected to overcome them through his or her inherent resources;
 - the psychological problems will be found to be subjective or internal if their existence or continuation stems from the plaintiff's desire for their existence or continuation;

- causation is not established unless the court can say whether the plaintiff really desired to be free of the psychological problems;
- identification of the symptoms as "chronic benign pain syndrome" does not resolve the questions of legal liability or the question of assessment of damages;
- it is unlikely expert opinion can resolve the ultimate questions on which these cases turn;
- psychological problems will attract damages where the psychological mechanism is beyond the plaintiff's power to control and was set in motion by the defendant's wrongful act; and
- evidence of psychological problems must be of a "convincing nature" but the plaintiff's own evidence, if consistent with the surrounding circumstances, may suffice for the purpose.

This list is not intended to be exhaustive: *Yoshikawa* at 326.

- [103] When determining whether or not a psychological injury has occurred, some expert medical evidence is necessary. The trier of fact should not rely only on a plaintiff's own perception of disability: *D.E. v. Unum Life Insurance Co. of America*, 1999 BCCA 507 at para. 86.
- [104] Consideration should also be given to whether the plaintiff's pre-existing condition was caused by significant tortious, as opposed to non-tortious, factors. If the plaintiff's original position consisted of anxiety, depression, and stress related to a prior tortious cause then that must be taken into account.
- [337] To these principles I would also add the observations of Bennett J.A. in *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258, where she stated:
- [74] [W]here the psychiatric injury is consequential to the physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury even if this injury was unforeseeable.
- [338] Whether because of the minimal damage-low velocity collisions or the absence of significant objective evidence substantiating Ms. Kallstrom's subjective complaints of ongoing pain and disability, the credibility and reliability of Ms. Kallstrom's evidence must be scrutinized with care.
- [339] Ms. Kallstrom's case relies substantially upon the medical opinions of various experts retained by counsel to provide "independent" assessments of Ms. Kallstrom, in most cases, many years after the MVAs. Ms. Kallstrom did not call as expert witnesses most of the general practitioners, psychologists, psychiatrists or other health professionals involved in her treatment and care either before or after the MVAs. While extensive clinical records for most of these health professionals were put into evidence, more detailed opinion evidence from Ms. Kallstrom's treating general practitioners and psychologists would likely have assisted the Court in better understanding the plaintiff's pre-accident mental and medical conditions, and the involvement of factors unrelated to the MVAs in the development of her

chronic pain and depression.

- [340] Assessing the credibility and reliability of Ms. Kallstrom's evidence is also complicated because she clearly has a tendency to, as Dr. Anderson puts it, "catastrophize" her symptoms and to focus on the MVAs as the source of all her physical and psychic psychological complaints. In doing so she tends to minimize, if not dismiss, other physical and psycho-social events such as pre-existing medical conditions, family court litigation, abusive employers and even other injury incidents (e.g. falling down stairs and fracturing her arm).
- [341] The factors and approach to be considered when assessing credibility were usefully summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, as follows:
- [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), 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.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [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 (*Farnya* 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), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [342] The defendants cast various aspersions on Ms. Kallstrom's credibility. Among other things, they argue:

- she has "lied on her resume" in the past;

- she falsely stated she was in fine health when she went on her vacation to Mexico shortly before the first MVA, when, in fact, the Pharmanet records evidence the dispensing of anti-depressants, anti-inflammatories, muscle relaxants, Tylenol 3 and Imovane in the three months before the MVA;
- she exaggerates and characterizes very minor accidents as involving "violent impact";
- she minimizes the "devastating" role of the family law litigation over Cole and the 2012 workplace incident when they were clearly major psychological stressors; and
- she shrewdly pursued secondary gain by improperly filing claims for WCB compensation and, in one instance, used such a report to increase her bargaining position with a former employer.

[343] I am inclined to agree that Ms. Kallstrom is intelligent and shrewd, and that in her testimony, she has maximized the effect of events favouring a positive outcome in this litigation while minimizing events that might have a negative impact on the same. I am also inclined to agree that Ms. Kallstrom's perception of events is, to some degree, coloured by her medical and emotional difficulties. However, while I approach Ms. Kallstrom's evidence with caution, I do not believe she is complaining of pain and medical disability which does not exist, nor do I believe Ms. Kallstrom is deliberately or falsely exaggerating matters for purposes of secondary gain. I will address these issues further in my findings respecting Ms. Kallstrom's injury and disability.

ADVERSE INFERENCE

- [344] The defendants submit that an adverse inference should be drawn from the failure of Ms. Kallstrom to call as witnesses her treating family doctor, Dr. Izen, and one of her former employers at HUB, Ms. Karen Noseworthy.
- [345] Regarding Dr. Izen, the defendants argued that this was the only physician who treated Ms. Kallstrom extensively both before and after the MVAs and hence was uniquely positioned to explain Ms. Kallstrom's medical conditions and the reasons for medications being prescribed and dispensed right up until the eve of MVA 1. The defendants also argue that Dr. Izen could have provided valuable insight into the extent and duration of Ms. Kallstrom's cocaine use, whether Depo-Provera could indeed have caused the symptoms alleged by Ms. Kallstrom, and also the reason for the termination of Ms. Kallstrom as a patient.
- [346] Regarding Ms. Noseworthy, the defendants argue that this witness could have validated Ms. Kallstrom's allegation that no resumption of employment with HUB was available or feasible upon her return to Vancouver from Saskatchewan in August 2003.
- [347] *Thomasson v. Moeller*, 2016 BCCA 14, is a recent example of the Court of Appeal dealing with the question of an adverse inference being drawn for failing to call a medical witness at the trial of an MVA personal injury claim. The Court stated:

- [34] I first observe that "[w]hether an adverse inference is drawn from failure to call a witness is a question for the trier of fact": *Buksh v. Miles*, 2008 BCCA 318 at para. 33. Nor is a judge bound to draw an adverse inference from the failure of a witness or party to testify: *Weeks v. Baloniak*, 2005 BCCA 193 at para. 12.
- [35] The law relevant to adverse inferences was helpfully summarized in *Zawadski v. Calimoso*, 2011 BCSC 45, where Mr. Justice Voith stated:
- [149] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.) at 287.
- [348] The Court of Appeal held, among other things, that the ability to call the medical witness in question was available to both parties. In *Zawadski v. Calimoso*, 2011 BCSC 45, Voith J. refused the adverse inference because there was "no evidence that the defendants were unable to or, in fact, so much as tried to speak to any of the physicians in question" (at para. 150).
- [349] The same is true in the present case. Furthermore, as in *Zawadski*, the physicians' clinical records were put into evidence pursuant to a document agreement very similar to the one used by the parties in the present case.
- [350] While it likely would have been helpful for the Court to have heard oral evidence from both Dr. Izen and Ms. Noseworthy, it is not appropriate to draw an adverse inference against Ms. Kallstrom for failure to call them as witnesses. The defendants were well aware before trial of the witnesses that Ms. Kallstrom intended to call and there is no reason why they themselves could not have called these individuals as witnesses if they thought they might present evidence helpful to the defence.

FINDINGS AS TO MS. KALLSTROM'S INJURY AND DISABILITY

- [351] I fully appreciate that whether in the legal arena or as a matter of medical diagnostics, the credibility and reliability of Ms. Kallstrom's description and presentation of her complaints plays a critical role. Nonetheless, the evidence is simply overwhelming, and I find as a fact that for many years Ms. Kallstrom has suffered from chronic pain and depression which has waxed and waned from time to time, but which has proved to be persistent and unrelenting and will likely continue to be so in the future.
- [352] It is not important from a legal perspective whether, absent objective evidence of permanent musculoskeletal physical injury, one labels the condition as myofascial pain, "chronic pain syndrome", fibromyalgia, or "persistent somatic symptom disorder with predominant pain". There is simply no doubt that Ms. Kallstrom has suffered, and will

continue to suffer, from a complex constellation of disabling neck and back pain, headaches and depression. I am entirely satisfied, and I find as a fact, that these conditions are "real" in the sense that Ms. Kallstrom genuinely experiences them.

- [353] It must also be observed that, in any event, there exists some objective evidence of physical musculoskeletal injury. This evidence is found in the clinical notes of Dr. Izen and various physiotherapists and chiropractors who noted limited range of movement in the cervical and lumbar spines on various occasions following one or more of the MVAs. Clicking and grinding (crepitus) was also detected in the temporomandibular joint, along with restriction in jaw opening. I accept this evidence and find as a fact that these physical limitations existed at the time of their observation. In the case of the temporomandibular dysfunction, I find it continues to exist.
- [354] The defendants do not seriously challenge the existence of Ms. Kallstrom's medical problems. They are sceptical about the genuineness of some of Ms. Kallstrom's complaints at various times and believe Ms. Kallstrom is significantly motivated by secondary gain. They do not deny, however, that Ms. Kallstrom has, for almost a decade now, been repeatedly and continuously prescribed a host of medications for pain, depression, anxiety and headaches. I find as a fact that such medications were indeed prescribed for and dispensed to Ms. Kallstrom on the dates set out in the clinical and Pharmanet records entered into evidence.
- [355] The real debate between the parties concerns etiology, i.e. whether or not, and to what extent, any of the five MVAs which are the subject matter of this litigation caused or contributed to Ms. Kallstrom's medical problems.
- [356] In my opinion, the defendants have, to some degree, misapprehended the causation principles in tort law expounded in *Athey and Bradley v. Groves*, as discussed earlier in this judgment. Ms. Kallstrom's medical problems constitute an indivisible injury occasioned by a combination of both non-tortious and tortious causes. It is not necessary for Ms. Kallstrom to establish that the MVAs were the sole cause of her injuries and related losses. It is sufficient, for the defendants to be liable, that each of the MVAs is just part of the cause of Ms. Kallstrom's injuries and, if so, the defendants are all jointly liable for the entire amount of Ms. Kallstrom's loss, excepting only those items that can be specifically allocated to any one MVA.
- [357] The expert medical evidence adduced by the defendants does not in any way disprove any connection between the MVAs and Ms. Kallstrom's injuries.
- [358] I give no weight whatsoever to Dr. Schweigel's report. It is an "old school", paternalistic report from an orthoped who clings to the view that a minor collision will not likely cause injury and who proclaims "amazement" at Ms. Kallstrom's assertions of neck pain. I simply do not accept his purported diagnosis of "a few days" disability following the first two MVAs nor his assessment that MVA 3 "may have" disabled Ms. Kallstrom for anywhere from three to six months. I acknowledge, of course, that his examination was relatively early in these

proceedings (January 26, 2004) and he did not have the benefit of seeing the chronicity of Ms. Kallstrom's pain and depression develop.

- [359] Dr. Horlick is more sophisticated in his approach. He limits his opinion to an assessment of physical impairment to Ms. Kallstrom's musculoskeletal system. He finds no "objective pathology" in any musculoskeletal area and he thus concludes that Ms. Kallstrom's complaints of pain are myofascial in origin. He did not in any way challenge the diagnoses of Dr. Anderson (psychiatrist) or Dr. Stolar (rheumatologist).
- [360] The primary challenge to the etiology of Ms. Kallstrom's complaints came from the defendants' expert in psychology, Dr. Koch. However, Dr. Koch's opinion was completely discredited during cross-examination and I am unable to give any weight to his suggestion that Ms. Kallstrom's problems stem from a borderline personality disorder and not from the MVAs. Dr. Koch did acknowledge that his testing of Ms. Kallstrom produced reliable findings of clinically significant pain and depression.
- [361] The defendants did not undertake any independent examinations of Ms. Kallstrom by a psychiatrist or a rheumatologist. They did not retain any oral medicine specialist to assess or challenge Dr. Epstein's findings of TMJ or its etiology. Nor did they commission any assessments by independent vocational or occupational therapy experts to rebut or address the opinions of Ms. Haley Tencha and Mr. Trainor.
- [362] It is certainly true, and I find as a fact, that Ms. Kallstrom had various medical problems before MVA 1. These are outlined to some degree in the clinical notes of Dr. Izen. In paragraph 285 of this judgment, I have set out the various medications prescribed and dispensed to Ms. Kallstrom in the months before MVA 1 and this evidence clearly demonstrates that, notwithstanding her testimony to the contrary, Ms. Kallstrom had pre-MVA issues with depression, muscular pain and sleep. There is no evidence before me respecting the precise nature of these problems, but they were not sufficient to prevent her from socializing with friends (as described by the lay witnesses), or working full time at IBG/HUB from fall 1999 to May 2003. Nonetheless, these pre-existing conditions, to the extent that they may constitute the proverbial "thin skull" or even a "crumbling skull", represent a negative contingency that must be taken into account in the assessment of damages in this case.
- [363] I accept the opinions of Drs. Anderson, Stolar and Epstein. I accept Ms. Kallstrom's testimony as to the physical impact of the MVAs upon her body and the development of soft tissue pain and headaches that she describes. I find as a fact that the headaches, dizziness, neck and shoulder pain described in the clinical records following each of the five MVAs that are the subject matter of this litigation did occur. I find that the persistent pain arising from the MVAs was a significant contributing cause to Ms. Kallstrom's emotional difficulties and to the depression developed during 2003, and which was formally diagnosed as major depression by Dr. Izen in April 2005. There were undoubtedly other events contributing to Ms. Kallstrom's emotional disorders and depression such as interrupted employment,

family litigation and financial stress, but I find that these conditions and their development into a syndrome of chronic pain and depression which has persisted to this day were caused in large part by, and are the cumulative result of, all of the MVAs.

[364] I recognize there were periods in the years following the MVAs when Ms. Kallstrom appeared to function, to the extent that she was able to work full time. This occurred briefly with Meridian Pilates in the period December 2004 to April 2005 and again, more significantly, in late 2010 to June 2012 for the principals of the private equity firm in Vancouver.

[365] In oral argument, the defendants pushed for a conclusion that any medical disabilities arising from the MVAs had resolved by the end of 2010 and that all of Ms. Kallstrom's subsequent medical problems are attributable to the "abusive" and stressful circumstances of the private equity firm employment including, in particular, the traumatic event of February 2012. I find as a fact that the circumstances of that employment were stressful for Ms. Kallstrom and were very likely a factor in perpetuating the cycle of her chronic pain and depression. However, I also accept Ms. Kallstrom's evidence respecting the physical difficulties she experienced during these periods of employment (neck, back, headaches, et cetera) which were caused by the MVAs, and, in any event, to the extent that the cycle of chronic pain and depression is a "mental disorder", I find that such disorder was and remains a cumulative effect of both the occurrence of multiple MVAs and the soft tissue injuries resulting from same.

MUST A WCB ALLOCATION/DEDUCTION BE MADE?

[366] As stated earlier, the defendants' position on factual causation of injury in this case was essentially as follows:

- MVA 1 and MVA 2 caused very minor soft tissue injury which had completely resolved before MVA 3;
- MVAs 4, 5 and 6 each caused a relatively minor and discreet aggravation of the injuries sustained in MVA 3, which aggravation did not contribute to indivisible injury but rather were "blips of exacerbation, each of which dissipated" and hence were separately and discreetly compensable as "divisible effects" (Derksen v. Nicholson, 2015 BCSC 1268 at para. 52); and
- any contributory impact of MVA 3 upon Ms. Kallstrom's medical condition ceased to be effective by 2008 and certainly 2010 at the latest.

[367] I have rejected this approach to and characterization of the nature and extent of each MVA's contribution to Ms. Kallstrom's medical condition. I have held that Ms. Kallstrom's past, present and future medical condition is one of indivisible injury caused or contributed to by each of the MVAs, and that separate assessment and allocation of damages for each MVA is not appropriate.

[368] Even so, the defendants say I am nonetheless legally bound to determine the extent to which Ms. Kallstrom sustained injury as a result of her employment in 2011-2012 for which she applied for and received WCB benefits, and that any loss caused by or attributable to such injuries must be deducted from any award of damages in this case. Such an outcome, the defendants argue, is mandated by s. 10 of the Workers Compensation Act, R.S.B.C. 1996, c. 492, as interpreted and applied by this Court in *Pinch v. Hofstee*, 2015 BCSC 1888.

[369] In *Pinch*, the plaintiff was injured in two MVAs 2½ years apart. The injuries caused by the two accidents were found to be indivisible. However, because the second accident occurred "on the job" of all concerned, the Workers Compensation Act precluded any civil proceedings to collect damages. The question then arose whether s. 10 of the Act prevented application of the common law, which would otherwise have permitted Mr. Pinch to collect from the at-fault driver in the first accident 100% of the losses subsequently determined to be attributable to the indivisible injury caused by both accidents. The court held that s. 10 of the Act, properly interpreted, negated the common law and precluded such recovery.

[370] The defendants argue:

- Ms. Kallstrom's employers at the private equity firm were dysfunctional and abusive and the stress of the employment relationship caused considerable harm to her;
- this stress combined with the traumatic incident in February 2012 caused PTSD and not only resulted in WCB funding for several months of counselling but also qualified for long-term disability benefits under the employer's insurance plan right up to the end of May 2013; and
- the employer's conduct was tortious and, while s. 10 of the Act precluded any lawsuit on that account, it nonetheless mandates a reduction of damages in this case.

[371] I do not agree that any reduction in damages is required. There are several reasons for this.

[372] First, this is not a defence that has been formally pleaded in any of the actions. The facts relating to, and the legal basis for, such a technical and unique defence are required to be pleaded and this has not been done.

[373] In any event, *Pinch* neither applies to nor governs the present claim. It was the subject matter of an appeal and cross-appeal, but the case was settled and thus no definitive ruling on this interesting (and highly debatable) point of law has yet been made by the Court of Appeal. It must be noted that other decisions of this Court have treated a subsequent workplace accident aggravating a pre-existing injury as a situation of indivisible injury for which the defendant in the first accident remains 100% liable: see e.g., *Kaletka v. MacDougall*, 2011 BCSC 1259.

[374] Further, I do not agree that the employer's conduct is properly labelled as tortious in this case. It is not necessarily a tort for an employer to be difficult and demanding. Similarly, the distraught actions of a mother witnessing a near-death incident involving her child may also not amount to an actionable tort, particularly where the result is mental distress

without accompanying physical injury. Pinch involved negligence on the part of the Workers Compensation Act-immunized worker. Further, Kaleta involved an on-the-job injury while lifting heavy product, i.e. no third-party negligence.

[375] In the result, I hold that the "WCB defence" does not apply and no reduction in damages is required on that account.

NON-PECUNIARY GENERAL DAMAGES

[376] Ms. Kallstrom's counsel argues the appropriate arrange for non-pecuniary damages in this case is \$200,000-\$240,000. He refers to the following cases for guidance:

1. Bruno v. Diamzon, 2014 BCSC 1270 - \$120,000 (psychological injuries);
2. Scoates v. Dermott, 2012 BCSC 485 - \$250,000 (multiple injuries, chronic pain);
3. Chowdhry v. Burnaby (City of), 2008 BCSC 1337 - \$200,000 (PTSD, major depression);
4. Morena v. Dhillon, 2014 BCSC 141 - \$130,000 (major depressive disorder, PTSD, chronic pain).

[377] Defence counsel took the position that general damages should be separately assessed for each one of the five MVAs. It is argued that the injuries sustained in MVAs 1, 2, 4 and 6 were so minor that the appropriate range would be zero to \$10,000 for all four MVAs in the aggregate. No case law was referred to in that regard.

[378] With respect to MVA 3, counsel for the defendants argues that an appropriate award of non-pecuniary damages would be \$65-\$100,000 depending on the court's findings respecting original position, causation and crumbling skull. In that regard he cites:

1. Van Den Hemel v. Kugathasan, 2010 BCSC 1264 - \$75,000 (aggravation of pre-existing depression, chronic pain);
2. Yeung v. Dowbiggin, 2012 BCSC 206 - \$85,000 (multiple accidents, mild depression, persistent soft tissue symptoms);
3. Rajan v. Hudon, 2014 BCSC 1678 - \$90,000 (three accidents, soft tissue injuries, chronic pain, depression);
4. Tsalamandris v. MacDonald, 2011 BCSC 1138 - \$100,000 (multiple accidents, chronic pain and depression).

[379] In Stapley v. Hejslet, 2006 BCCA 34, the Court of Appeal noted that:

[45] ... I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from Lindal v. Lindal, supra, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.). [Emphasis in original.]

- [380] This is a case where the need for "solace" is significant. Ms. Kallstrom has been converted from a happy, successful, active young single mother with a wide circle of friends into someone who suffers relentless pain and depression, is physically inactive, and has gained considerable weight, has experienced a profound loss of self-esteem, has few friends beyond family, has been rejected by her son and who, as a result of all these things at least in part, has attempted suicide on at least three occasions. Ms. Kallstrom's dream of developing in her thirties a long term successful career, getting married and having several more children will never be realized. Her ability to form a long-term relationship, whether formally married or otherwise, remains significantly impaired ("I have so much baggage, who in their right mind would want to be with me?", she says rather forlornly). Her prospects for long-term happiness are poor.
- [381] Plaintiff's counsel suggests Ms. Kallstrom has lost the "critical and irretrievable youthful years in her life, when her son was growing up and when she could have pursued and established a successful long time career". This is probably a correct observation.
- [382] The severity and duration of Ms. Kallstrom's pain and disability has been significant and will likely continue most of her life. She has endured a great deal of emotional suffering to the point that that she has, in the past, attempted to end her life. There has been substantial impairment of family and social relationships and a significant loss of lifestyle.
- [383] It is true that Ms. Kallstrom had some pre-existing issues with pain, depression and sleep, but not to the extent that her lifestyle was significantly impaired. It is also true that her brother has recently "thrown her a lifeline" and that her recent move to Saskatchewan might well be the start of a more positive period in her life, but she will nonetheless remain subject to pain and depression and, indeed, at risk of major reversal.
- [384] In all these circumstances, I award Ms. Kallstrom non-pecuniary damages for past and future pain, suffering, loss of enjoyment of life and loss of amenities in the amount of \$180,000.
- [385] Although I have found that the cumulative effect of the five MVAs in this case has resulted in long-term indivisible injury for which all the defendants are jointly and severally liable, there must nevertheless be certain adjustments to some aspects of the damages awarded in each action in recognition of the approximately 3½ years separating MVA 1 from MVA 6.

For example, the MVA 6 defendants cannot be held liable for pecuniary or non-pecuniary loss which occurred in the 3½-year-period before December 9, 2004; they had nothing to do with the causation of such loss, and at law, they cannot be held responsible for same.

[386] The adjustments involved are small, all the more so since it must be remembered that the general damages award is not only for loss that has been incurred to date, but also for loss that will be incurred in the future.

[387] Since all of the defendants are insured by the same liability insurer and I have been assured by counsel that the plaintiff will be paid 100% of the award made in favour of the plaintiff regardless of any outcome respecting several allocation, it might have been preferable for the defendants to have dispensed with the requirement for these minor adjustments. Nevertheless, I am technically obliged to make the adjustments and so the individual judgments for non-pecuniary general damages in each of the four actions before me will be \$180,000 less the following amounts for the following MVAs:

MVA 1 - \$0

MVA 2 - \$2,000

MVA 3 - \$4,000

MVA 4 - \$8,000

MVA 6 - \$10,000

LOSS OF PAST AND FUTURE INCOME EARNING CAPACITY

[388] Each of the four actions includes a claim for damages for loss of past and future income that the plaintiff would have earned, had the defendants' negligence and the resulting injuries not occurred. Since *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, it has been acknowledged that, technically speaking, it is not loss of earnings for which compensation is being made, but rather it is for loss or impairment of a capital asset, namely, the plaintiff's capacity to earn income.

[389] Valuation of the loss may be measured in different ways depending on the circumstances of each particular case. Generally speaking, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that he or she would have received, whether in the past or in the future, had the tort not been committed. The essential task of the court is to compare what would have been the plaintiff's past and future working life if the accident(s) had not happened with the plaintiff's actual past and likely future working life after the accident(s). The difference between the two scenarios represents the plaintiff's loss and the resulting monetary award is thus consistent with the basic principle of tort law compensation, which is to restore the injured plaintiff to the position he or she would have been in but for the defendant's negligence, at least insofar as a monetary award is capable of doing so.

- [390] Determining how a plaintiff's life would have proceeded had the accident(s) not occurred is an exercise in the hypothetical. So too, of course, is any determination of how the plaintiff's post-accident(s) future life will unfold following the trial.
- [391] In the 1978 trilogy of cases of which the Andrews decision was part, the Supreme Court of Canada itself referred to this exercise as "crystal ball gazing" inasmuch as it involves an inquiry into future events. However, it involves more than mere speculation; rather, it must be informed speculation firmly grounded in the evidence and the particular facts of each case.
- [392] The standard of proof for such future events is not the traditional "balance of probabilities" applicable to most civil cases; rather, future or hypothetical possibilities are taken into consideration, so long as they are real and substantial and will be given weight according to their relative likelihood: *Athey*, supra, para. 27.
- [393] There is a discrete, two-step process that is required with respect to these past and future loss of earning capacity claims:
1. the court must first determine whether, as a result of the injuries sustained in the accident(s), the plaintiff's past or future earning capacity has been or will likely be impaired, such that there has been an actual loss of income in the past and/or a real and substantial possibility of a loss of income in the future; and
 2. if so, then the court must then determine the amount of past loss that has been incurred to the date of trial and, on a present value basis, assess the amount to be awarded for any possible future financial loss.
- [394] The first question deals with entitlement and the second with quantum.
- [395] Some cases are relatively simple. For example, where a plaintiff is engaged in steady, long-term, likely permanent employment, and sustains injury which makes her unable to work both before and after the trial, a past and future loss of capacity to earn income is clearly established and a relatively simple arithmetical approach to valuation may be appropriate, e.g. doing the obvious calculation on past loss, albeit adjusting for contingencies, and for future loss, present valuing the stream of income that would have been received from that employment from trial to the date of retirement, taking into account appropriate discount rates and contingencies affecting the plaintiff's personal circumstances.
- [396] Most cases are not as simple as the scenario described above. Young persons who have not settled into a career, those with an irregular or no history of employment income, self-employed entrepreneurs, and those involved in unconventional income-earning enterprises are all examples where any past or future loss of earning capacity can be very difficult to both establish and measure. So too where an injured plaintiff has returned to work (usually with a sympathetic employer), but whose future remains uncertain.

[397] In these difficult cases, step one in the analysis, entitlement, is often informed by the factors listed in *Brown v. Golaiy* (1985), [1997] 26 B.C.L.R. (3d) 353 (S.C.) at para. 8, namely whether,

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market,

bearing in mind that mere inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss: *Perren v. Lalari*, 2010 BCCA 140.

[398] Evidence from experts in the fields of work capacity testing, occupational assessment and vocational rehabilitation is often helpful, as is expert evidence from economists respecting valuation of employee benefit programs, discount rates and present value of future income streams, labour force and marketplace contingencies, and the like.

[399] In some of these difficult cases, valuation is challenging and the result can appear somewhat arbitrary. For example, in the frequently cited case of *Pallos v. Insurance Corp. of British Columbia*, [1995] 3 W.W.R. 728, the court concluded the plaintiff had permanent pain resulting from his injuries that limited his activities and his income earning capacity. The loss of income earning capacity was found to exist even though the plaintiff was still employed by his pre-accident employer and would continue to be so employed indefinitely. The question was what award ought to have been made under such circumstances and how it should be assessed. The court stated:

[43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. In all the circumstances, I would regard a fair award under this head to be the sum of \$40,000.

[400] There is nothing in the judgment to expressly indicate how the amount of \$40,000 was determined. It was an arbitrary figure, likely reflecting one or two years income, but one the court felt was fair in the circumstances of the particular case.

- [401] Even where mathematical calculation is involved, our Court of Appeal has repeatedly reminded us that the assessment of damages is a matter of judgment, not calculation. The court must still use careful judgment in weighing all substantial possibilities and the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.
- [402] At the end of the day, instead of simply adverting to general principles and "plucking a number from the air", the court is obliged to make a "reasoned analysis to explain and justify the award" and in doing so expressly relate the findings of fact in the case to the actual assessment of damages: *Schenker v. Scott*, 2014 BCCA 2003. See also *Morgan v. Galbraith*, 2013 BCCA 305; *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 105; *Gillespie v. Yellow Cab Company Ltd.*, 2015 BCCA 450; *Tsalamandris v. McLeod*, 2012 BCCA 239.
- [403] I turn now to applying these legal principles to the facts of this case.

Past Loss of Income Earning Capacity

- [404] The plaintiff testified that but for the MVAs, she would have stayed in Vancouver permanently. From an employment perspective, she envisaged herself eventually taking on a management-type role, most probably continuing in the insurance industry.
- [405] Before MVA 3, Ms. Kallstrom had settled into a career as an executive assistant, first with the Wall Centre Hotel and secondly with HUB Insurance. While she did not have any college or university degree, she had considerable computer skills and had proven to be quite adept at organization, scheduling and information management projects. She had a pleasant personality, good "people skills", and a strong work ethic. She had good performance reviews and excellent prospects for long-term employment in the insurance brokerage sector.
- [406] Expert evidence of a consulting economist, Mr. Darren Benning, was adduced at trial to "illustrate" and estimate past and future income loss on the part of Ms. Kallstrom. Mr. Benning was instructed to provide calculations of annual loss based on two alternative scenarios, namely, the average annual earnings of a B.C. female executive assistant and also those of a financial brokerage firm manager. The former reflected an average salary of approximately \$53,000 in 2004 increasing to approximately \$75,000 in 2015. The salary used for the (eventually promoted) female financial brokerage manager model ranged from \$53,000 in 2004 to \$87,000 in 2015. These figures were then adjusted for negative "labour market" and other standard contingencies with a cumulative discount value of approximately 23% generating a "without accident past income" in the cumulative amount of approximately \$570,000 to the date of trial for a female executive assistant and \$654,000 for a financial brokerage manager. From these numbers, Mr. Benning then deducted the actual income received by Ms. Kallstrom over the years in question as well as income taxes to postulate past income loss to date of trial in the net amount of approximately \$244,000 as

an executive assistant and \$302,000 as a manager.

- [407] Ms. Kallstrom's actual income in the years from 2003 to the present was set out in a chart prepared by counsel and largely reflects the same numbers employed by Mr. Benning. The amounts were agreed by counsel, except whether the amount for 2005 included or excluded the \$7,500 settlement monies received from Meridian Pilates. In the bigger picture of things, the dispute is so small as to be immaterial. The evidence was insufficient to establish one way or the other whether it was included in the numbers set out in the chart. In the result, absent sufficient proof to the contrary, I accept the amounts set out in the chart were in fact received by Ms. Kallstrom in the years in question and, to the extent it matters, her stated income for 2005 included the said \$7,500.
- [408] In cross-examination, Mr. Benning confirmed that the occupation of brokerage manager usually requires a university degree or college diploma in business administration, economics or other related fields and, in some circumstances, appropriate licensure. He also acknowledged that the position of senior executive assistant also usually requires a bachelor's degree as well as related experience. He further confirmed that the only contingencies taken into account in his calculations were "labour market" and other standard contingencies, but did not include additional contingencies particular to Ms. Kallstrom's personal circumstances.
- [409] While Ms. Kallstrom had displayed skill and ability as an assistant/project administrator at both Wall Centre and HUB, I find it unlikely she would have been promoted to any managerial position. She was a very busy single mother of a young child who had displayed no inclination towards further formal education, whether a college diploma or a university degree. While it is not impossible that she may have graduated into management by dint of effort and experience, that possibility is better addressed as a contingency rather than an assumption for arithmetic illustration.
- [410] I also consider the salary increases posited in Mr. Benning's executive assistant illustration to be unrealistically aggressive. Ms. Kallstrom earned \$46,000 in a full year's employment at HUB in 2002. Positing a 60% salary increase of \$29,000 within 13 years is overly optimistic, particularly without further formal education, which is no doubt a significant factor in elevating the "average" salary sourced by Mr. Benning for his calculations. More likely and realistic, in my view, would be the scenario where increasing seniority and experience would have seen Ms. Kallstrom's salary as an assistant gradually increase to the range of \$60,000 to \$65,000 by the date of trial. Using the same contingencies, tax rates and deductions identified by Mr. Benning posits a net income loss to date of trial in the vicinity of \$215,000.
- [411] Any such arithmetical approach to assessment also necessitates consideration and application of other positive and negative contingencies particular to Ms. Kallstrom's personal circumstances.

- [412] Positive contingencies include the possibility that, given her personality, skills and work ethic, Ms. Kallstrom would indeed have graduated to a more lucrative position, whether as management, a licensed assistant to an insurance/financial advisor, or a senior executive assistant of the sort Mr. Di Salle now employs. Such events might well have resulted in salaries 20-30% higher than the \$65,000 suggested above.
- [413] There are some significant negative contingencies at play as well. Ms. Kallstrom clearly had pre-existing health issues involving long term insomnia and some episodes of pain and depression requiring medication. While she was still high functioning at work as well as socially at least until 2003 and hence was not a demonstrated "crumbling skull" plaintiff, she nonetheless had a medical history (largely unexplained) warranting some "thin skull" status. This represented a real and measurable future risk of absence from work and disruption of employment advances.
- [414] Another negative contingency arises from Ms. Kallstrom's expressed ambition of getting married and having several more children. No evidence was lead respecting any maternity benefit program at HUB or labor market withdrawal statistics for females in the insurance industry who have multiple children in their thirties. One cannot simply ignore, however, that had things gone as Ms. Kallstrom hoped, it is distinctly possible an expanded family may have resulted in extended absences from work beyond "standard" maternity leave, and perhaps even total withdrawal from the workforce depending on family dynamics and the complexities and costs of any necessary child care.
- [415] All in all, I consider it reasonable and fair to both parties to treat the negative and positive personal contingencies as equally offsetting. In the result, I assess the Ms. Kallstrom's past loss of earning capacity in the after-tax, net amount of \$220,000 along with pre-judgment interest thereon pursuant to the Court Order Interest Act. Should counsel not be able to agree on the interest calculation they are at liberty to apply for further directions in that regard.
- [416] Some minor adjustment is warranted as between judgments to account for the factors identified in para. 385 above. There was no meaningful loss of income before MVA 3, but some such loss occurred before MVAs 4 and 6 for which the latter defendants are not responsible at law. The \$220,000 award under this heading for MVA 4 is thus reduced by \$13,000 and for MVA 6 by \$25,000 being the approximate difference between actual annual income and \$45,000 for the relevant periods of time.

Future Loss of Earning Capacity

- [417] There can be no doubt that Ms. Kallstrom's injuries have impaired and will continue to impair her future earning capacity. Mr. Trainor's testimony respecting employability demonstrates, and I find as a fact, that Ms. Kallstrom meets every one of the *Brown v. Gola* criteria referred to above. The difficulty again lies in putting a value to the loss.

- [418] The same "without accident" income scenario referred to above applies to inform the pre-accident assessment of Ms. Kallstrom's earning capacity from trial to the date of retirement (her "original position"), i.e. \$60-\$65,000 per annum at trial date with incremental increases in the future.
- [419] What must now be determined is her "with accident" likely future employment picture from date of trial to retirement age. It is the present value of the difference between the two earning streams, again adjusted for appropriate contingencies, that is one measure of the future loss of earning capacity caused by the MVAs.
- [420] At present Ms. Kallstrom is employed full time by her brother's business, earning approximately the same amount as posited by the "without accident" scenario. In other words, at the present time there is no current loss of income to be compensated. The real question, however, is how long will that continue?
- [421] Ms. Kallstrom's brother is an accommodating employer. His company has work for the next two to three years. His best guess is that there is a 50-60% chance he will be able to employ his sister for the next 20 years, but that assumes her already weak attendance record does not deteriorate to the point he has no choice but to terminate her employment. Plaintiff's counsel observes, quite correctly, that Ms. Kallstrom has a "demonstrated pattern of working and crashing" and implies this is likely to continue notwithstanding everyone's fervent hope otherwise.
- [422] Drs. Anderson and Stolar expect Ms. Kallstrom's chronic pain symptoms to continue and I have found as a fact that this will likely occur.
- [423] Ms. Kallstrom said that if she loses her job at Kalco, she will "try and look for another job". I accept that such would be the case, though it is clear she would face significant challenges.
- [424] Mr. Trainor paints a somewhat gloomy picture for Ms. Kallstrom's prospects should she lose her current job. He expects her ongoing pain, functional limitations and emotional problems will likely diminish her attendance, productivity and versatility as a worker. While he thinks Ms. Kallstrom is capable of employment, he believes she will likely require sympathetic employers, i.e. employers who are willing to hire her in spite of her problems and notwithstanding the general availability of other, equally qualified workers who lack her infirmities. He suggests repeated employment failures, such as has occurred in the past and which he expects would occur again, may even cause Ms. Kallstrom to simply give up. These are all real and substantial possibilities that must be taken into account.
- [425] Plaintiff's counsel suggests that Ms. Kallstrom's loss should be valued as 40% of the present value of her projected "without accident" income stream to retirement. The percentage reflects her brother's best guess of a 40% chance his sister will lose her employment with him for one reason or another. The "economic" (as opposed to "actuarial") multiplier applicable to such a valuation is, according to Mr. Benning, 13.204. As an illustration, 40% of [\$65,000 x 13.204] equals approximately \$345,000. The number would of course be higher

if one does a calculation reflecting increases in salary over the next 20 years (counsel actually posits scenarios resulting in losses ranging from a "low" of \$486,000 to a "high" of \$1.1 million).

[426] Defence counsel submitted there is no loss at all. This was based on the causation approach that I have since rejected. During argument, however, when pressed to suggest an amount that should be awarded if the plaintiff prevailed on causation, counsel argued in favor of a Pallos approach, i.e. an arbitrary figure of two years' salary or \$130,000.

[427] In my opinion, it is unlikely that Ms. Kallstrom will continue to be employed by her brother until retirement. I expect he will remain an accommodating employer for as long as he can afford to do so, but his business will be subject to the same periodic downturns of a resource-based provincial economy that Saskatchewan has experienced in the past. It is also likely Ms. Kallstrom's employment by Kalco will be occasionally interrupted by her health issues, and termination in the future is a real and substantial possibility. In such latter event, she will mostly likely experience periods of intermittent employment thereafter and a reduction of income similar to what has happened in the recent past few years.

[428] In all the circumstances, an award of \$245,000 for loss of future income earning capacity would be reasonable. On a Pallos approach it amounts to roughly four years' salary at present levels and approximately 25% of anticipated "without accident" earnings to retirement. On a more arithmetical present value basis, it reflects a likelihood that Ms. Kallstrom can stay employed with Kalco for at least the next several years, followed by a reduction, but not total elimination, of annual income from periodic employment thereafter. In my opinion, it is an amount that is fair to both parties.

COST OF FUTURE CARE

[429] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same, or as narrow as, "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;

- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis, despite however much particular items might be recommended by experts in the field; the court should have regard for whether any particular expense will actually be incurred and an allowance can be made for any contingency, any real and substantial possibility, that the cost may not in fact be incurred;
- in motor vehicle cases, given the distinction between mandatory and discretionary benefits under s. 88 of Part 7 of the Insurance (Vehicle) Regulation, BC Reg. 447/83 and the requirement of mandatory deductions under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, it is desirable for the trial court, where possible, to assign specific amounts for each future care item claimed;
- properly considered, homemaking costs are awarded for loss of capacity and are distinct from future cost of care claims; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd.*; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), [1990] 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), [1990] 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128; *Sunner v. Rana*, 2015 BCCA 406.

[430] Section 88 of Part 7 of the Insurance Vehicle Regulation provides for mandatory medical benefits coverage for "all reasonable expenses incurred ... as a result of [an injury arising out of a motor vehicle accident] for necessary medical, surgical, or dental ... services, or for necessary physical therapy, chiropractic treatment, occupation therapy". While s. 83 of the Insurance (Vehicle) Act contemplates a reduction of any award to reflect a "deemed release" to the extent of Part 7 benefits paid or payable to a plaintiff, the deduction process does not occur until after judgment is granted in the tort case and the plaintiff is only entitled to enter formal judgment for the balance owing after any such deduction has been made. Key to the process is, of course, a determination by the court that the expenses in question are reasonable and that the services to which they relate are necessary as a result of the injury sustained. In order to assist the parties in any future dealings on this point, I wish to make it clear that any awards made for cost of future care in this case are in amounts and are for treatments that are both necessary and reasonable.

[431] Section 88(6) of the Regulation excludes coverage for any expenses paid or payable under medical plan, law or insurance available to the plaintiff.

- [432] In this case, although the implications were seemingly unrecognized by the parties until pointed out by the Court, Ms. Kallstrom lives and intends to continuing living in Saskatchewan. Some testimony was provided respecting the existence of what was described as a "Cadillac" medical insurance plan available to Ms. Kallstrom as an employee of Kalco, but details of that plan's coverage were not produced. Similarly, the nature and extent of available government-funded health care services and prescription drugs was also not in evidence. The occupational therapist, Ms. Tencha, who testified as to the cost of drugs and services in Saskatchewan, acknowledged that it was beyond her expertise to opine on the nature and extent of coverage afforded by the Saskatchewan government for any of the future health care items claimed by Ms. Kallstrom.
- [433] Medical costs covered by a private insurance policy, whether issued to an individual or a group, and whether personally purchased or employer sponsored, are as a matter of law, considered to be collateral benefits that are not deductible from an award of damages in a personal injury case: *Cunningham v. Wheeler*; *Cooper v. Miller*; *Shanks v. McNee*, [1994] 1 S.C.R. 359. Benefits (treatments, services, medication, et cetera) available to a plaintiff through government-funded plans or programs can be deductible depending on such things as universality, discretionary availability, subrogation obligations, et cetera, but it is clear that if the defence seeks a reduction of a personal injury damage award for the cost of such items, then the onus is on the defence to prove both entitlement and deductibility: *Morlan v. Barrett*, 2012 BCCA 66. No evidence was produced by any of the parties on this point and the defendants must live with the consequences.
- [434] Plaintiff's counsel constructed Ms. Kallstrom's cost of future care claim as follows:
- an occupational therapist, Ms. Tencha, was retained to scour the medical reports and compile a list of the items of future care recommended by the medical professionals in question;
 - in addition, Ms. Tencha carried out some basic "functional testing" as well as a "clinical interview" at Ms. Kallstrom's home in Vancouver on May 8, 2014 and then prepared a list of her own recommended "supports" (pillows, memory foam mattress, et cetera);
 - Ms. Tencha then ascertained (primarily through calling suppliers) the cost of the various items recommended by her or the other medical professionals (personal care, rehabilitation/exercise, medication, et cetera) as well as the necessity for replacement/continuation into the future;
 - the occupational therapist reports were then provided to the expert economist, Mr. Benning, who then calculated the future cost of all the care items based on an assumption of normal life expectancy and the application of the statutorily-mandated discount rates.
- [435] Some last minute, mid-trial adjustments to their respective reports were made by both Ms. Tencha and Mr. Benning to hastily "Saskatchewanize" their opinions, costing and calculations. The bottom line resulted in a cost of future care claim with a present value of approximately \$460,000 before any gross-up for income tax.

[436] The defendants rely on the same factual causation positions referred to above to assert no liability on their part for any future care costs. Assuming causation is proven, however, they argue in the alternative:

- psychological counselling is medically necessary but only on a monthly basis for three years at a cost of \$4,800;
- there is nothing "structurally" wrong with Ms. Kallstrom and hence no physiotherapy or kinesiology treatments are required;
- the TMJ complains were not caused by the MVAs and so no TMJ-related future costs are compensable;
- Ms. Kallstrom's pre-accident consumption of sleeping medication, painkillers and muscle relaxants should be a "baseline" and any liability the defendants have for those medications should be limited to the amount that consumption has and will "increase from this baseline"; and
- the amount of Zomig medication claimed to be required in the future is excessive, and is not based on doctor-recommendations and may have been required regardless of the MVAs.

[437] The Morlan case referred to above is one example where our Court of Appeal has instructed that negative contingencies can and should be taken into account in reducing any award for cost of future case.

[438] The plaintiff claims the future costs of various items for personal care and pain management including a support pillow, a digital moist heating pad, "Dr. Ho's "massager", a memory foam mattress topper, a sacroiliac belt, a supportive back rest and supportive footwear. None of these things have been expressly recommended by any physician. I recognize Ms. Tencha holds the view that these items "likely benefit" Ms. Kallstrom, but many of them are items which are necessary to day-to-day living in any event and the medical necessity has not been sufficiently proved.

[439] I agree with the defendants that, given the absence of objective musculo-skeletal injury, there seems to be no medical necessity for any physiotherapy, chiropractic or kinesiology services. I decline to make any award on that account.

[440] Similarly, I decline to make any award in connection with "ergonomics", whether it be an assessment, keyboards, wireless headsets, chairs or a foot rest. These too, except perhaps for the assessment, are ordinary day-to-day items of a sort that would be purchased in any event.

[441] I agree with Ms. Kallstrom, however, that some of the items claimed are both reasonable and necessary for the ongoing treatment of the plaintiff's injuries sustained as a result of these MVAs. These include:

- participation in a multi-disciplinary pain management clinic program;

- psychological counselling beyond any such program;
- a regular exercise regime;
- TMJ orthotic appliance; and
- medication.

[442] Support for the necessity of all these items can be found in the reports of Drs. Stolar, Anderson, and Epstein.

[443] The only evidence before me is that there is no multi-disciplinary pain program available in Saskatchewan. The only alternative suggested (by Ms. Tencha) was that perhaps an occupational therapist could coordinate the rehabilitation services required and monitor progress, including the necessary communications with psychologists, physiotherapist, kinesiologist and the like. It seems highly unlikely to me that any occupational therapist would be sufficiently well-qualified to direct and coordinate such a sophisticated and specialized program of treatment. It would be, in my view, much better for it to be performed by persons expressly qualified in chronic pain treatment of this sort.

[444] The cost of participation in a private multi-disciplinary pain program in Vancouver is approximately \$11,000. There would be other costs associated with an attendance at such a program (transportation, accommodation) fairly estimated in the vicinity of \$2,500. I therefore award \$13,500 in total under this heading.

[445] There is clearly a need for ongoing psychological counselling on Ms. Kallstrom's part. It would be "double counting" to award an amount for all the initial sessions recommended by Dr. Anderson as much of the initial intensive work would be carried out by the private pain clinic. However, long-term follow-up counselling is clearly necessary; however, the frequency each year and the number of years over which it might be required following such a pain clinic is simply not addressed in the evidence. Mr. Penner calculated a lump sum present value of approximately \$34,000 for this claim based on 12 hours per annum at \$120 per hour to age 80 starting two years from the present. That seems an excessive amount. A more appropriate value reflecting 10 years' duration of decreasing frequency would be \$10,000, which is the amount I award under this heading.

[446] Fitness activity is strongly recommended by all the medical professionals for the treatment of chronic pain. Mr. Benning calculates a lump sum present value of \$12-13,000 based on an annual yearly membership at a City of Regina recreational centre, both up to and following age 65 (at which age a discount is triggered). The difficulty I have with this claim is that, although exercise is medically necessary for Ms. Kallstrom, she was a regular gym attendee before the MVAs and, like many in her generation, would likely have remained so had the MVAs not occurred. In the circumstances, I award Ms. Kallstrom \$4,500 under this heading.

- [447] In his report, Dr. Epstein stated that an oral orthotic appliance "was indicated". I had understood the evidence at trial to be that Ms. Kallstrom was currently using such an appliance, but there was no evidence as to its source or its cost. Ms. Tencha has determined that the average cost for an oral orthotic for TMD syndrome in Regina is approximately \$2,500 and that such items typically require a replacement once every three years. However, there is no evidence before me as to the length of time such an orthotic is required. Nor is there any evidence before me as to the number of TMD physiotherapy sessions required, even though some such physiotherapy was also recommended by Dr. Epstein. Given the paucity of evidence on these points, I will award a fairly nominal amount of \$1,500 for future TMJ treatment.
- [448] The claim for the future cost of medication is very substantial: the lump sum present value is calculated by Mr. Benning to be some \$197,000, the most significant portion of which relates to the drug Zomig (migraines) in the amount of \$127,000. Zomig is the drug that is the subject of a special damages claim in the amount of approximately \$13,000, and which is challenged by the defence on the basis that the actual costs incurred by the plaintiff were only approximately \$800 (see *infra* at para. 466).
- [449] The Court has grave concerns about the toxic cocktail of medications which have been prescribed to Ms. Kallstrom, seemingly upon request, by general practitioners over many years. These have included, and evidently continue to include, Celexa (anti-depressants), Cyclobenzaprin (muscle relaxants), Zopiclone (sleep), Lyrica (fibromyalgia), Zomig (migraines) and Lorazepam (anxiety). One cannot help but wonder whether any physician who has seen Ms. Kallstrom, whether a treating physician or a consultant retained for medical legal purposes, has inquired into Ms. Kallstrom's medication consumption and considered the overall cumulative effect upon Ms. Kallstrom's health, both physical and mental. It is this Court's sincere hope that the multi-disciplinary pain clinic for which funding is being awarded will directly address that issue and put in place any remedial measures that may be considered necessary.
- [450] There is no doubt Dr. Anderson recommends that Ms. Kallstrom take Celexa on a daily basis to counter depression. This will likely be a life-long medication and Ms. Kallstrom testified that she simply cannot function or get through the day without it. Similarly, the Lyrica has been prescribed for the fibromyalgia and it is also consumed every day. It also appears that Ms. Kallstrom needs a muscle relaxant on a daily basis as all three of these drugs were consumed throughout the one-month trial. The lump sum present value of the cost of this medication for the balance of Ms. Kallstrom's life is calculated to be \$35,000 (round numbers) and I am prepared to award that amount for those medications.
- [451] I make no award for the future cost of Zopiclone. It is clear that Ms. Kallstrom was using Zopiclone on a daily basis long before the MVAs and, indeed, her good friend testified that she cannot remember a time when Ms. Kallstrom was not using a sleeping pill. To use the defendants' terminology, the "baseline" for this particular prescription drug was well-established and I note that various physicians, including Dr. Anderson, have recommended

against continued use. Given the absence of the necessary evidentiary linkage between the MVAs and any continuation of Zopiclone as a medication, I make no award for this product.

- [452] Anti-anxiety medication has been prescribed only on an "as needed" basis. There is no medical evidence before me as to the necessity of its consumption in the future and so I make a modest award of \$600 representing two years' worth of this medication over the balance of Ms. Kallstrom's lifetime.
- [453] Dr. Epstein recommended Zomig for the management of Ms. Kallstrom's vascular (migraine) headaches, however even Dr. Menzies, who seems to have prescribed at Ms. Kallstrom's will, stated that Zomig should be consumed only occasionally. Absent compelling medical evidence that this (currently very expensive) medication is required on a daily basis and as part of Ms. Kallstrom's overall health regime, I am inclined to make only a modest award in recognition of occasional and necessary consumption. I fix that figure, admittedly on a somewhat arbitrary basis, in the amount of \$5,000.
- [454] The total award for cost of future care is therefore \$70,100, which I round down to \$70,000, and all of the defendants are jointly and severally liable for the full amount. In the event the parties are unable to agree on the amount by which this award is to be reduced pursuant to s. 83 of the Insurance (Vehicle) Act, they are at liberty to apply for directions and a determination in that regard.

LOSS OF DOMESTIC CAPACITY

- [455] Our Court of Appeal instructs us that, properly considered, homemaking costs are awarded for loss of capacity, are distinct from future cost of care claims, and thus require separate assessment: *Westbroek v. Brizuela*, 2014 BCCA 48. In that case the court stated:
- [74] An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff. [Emphasis in original.]
- [456] *Westbroek* and other appellate decisions regarding this head of damages have instructed trial courts to adopt a "cautionary approach" to assessment "lest it unleash a flood of excessive claims" (at para. 77) but (conservative) awards can, and should, be made where the evidence at trial substantiates the loss in a meaningful way.
- [457] In this case plaintiff's counsel merged the "loss of domestic capacity" claim with the claim for cost of future care and the same arithmetical approach to assessment was taken i.e., Ms. Tencha suggested assistance that would "will likely" be required along with the annual cost of same, and Mr. Benning then calculated the present value of those amounts to age 80.

[458] Ms. Tencha identified four categories of domestic assistance likely to be required:

- (1) inside, regular housecleaning services (approximately \$2,300 per annum);
- (2) seasonal cleaning services (approximately \$320 per annum);
- (3) lawn maintenance tasks (approximately \$650 per annum); and
- (4) snow removal (approximately \$420 per annum).

[459] Mr. Benning calculated the present value of the claim in the amount of approximately \$86,000.

[460] Neither "expert" specifically addressed in their calculation the fact that Ms. Kallstrom's sub-tenant in Regina is performing many of the more physical tasks and that she is generally coping with interior housekeeping albeit with pain, medication and pacing. Nor do the experts address other contingencies of life such as, for example, the fact that most women will not likely be shoveling snow in their 70s.

[461] For their part, the defendants take the position that no loss of housekeeping capacity has been proven on the evidence.

[462] I accept that the plaintiff's future medical condition will likely impair Ms. Kallstrom's housekeeping capacity to some degree. I therefore reject the defendants' position that no such loss has been proven. However, I also reject the plaintiff's arithmetical approach to assessment as being non-compliant with the cautionary conservatism urged in Westbroek and other appellate decisions.

[463] In the end, I make no award for any loss of housekeeping capacity on the part of Ms. Kallstrom. I do so because I have already factored that loss of capacity into the assessment of general damages, a factor that served to increase that particular award beyond what I might otherwise have been inclined to favour.

SPECIAL DAMAGES

[464] The book of documents entered as evidence at trial pursuant to the Documents Agreement between the parties included a binder of materials purporting to represent and substantiate the claim for special damages in this case. A multi-page spreadsheet was included listing each item of expense allegedly incurred together with over 300 photocopied receipts said to support the claim.

[465] In argument, counsel for Ms. Kallstrom claimed \$55,000 of special damages had been "proved" in this fashion, along with some \$2,800 on account of "transportation costs" and a further \$6,200 for pre-judgment interest on the various items claimed.

[466] In reply, counsel for the defendants provided the Court with a list of all entries claimed by Ms. Kallstrom for the drug Zomig/Zolmitriptan (for migraines). The total cost claimed by Ms. Kallstrom for this medication was \$12,861.80, yet several items were not accompanied

by a corroborating receipt and other receipts reflected the amount claimed, but also indicated that the portion paid by Ms. Kallstrom was substantially less. Defence counsel pointed out while the amount claimed was \$12,861, the costs that appeared on corroborating receipts totalled only \$9,574, and the portion actually paid by Ms. Kallstrom was a mere \$834.78. In other words, counsel argued, this "example" demonstrated that the entire claim for special damages was grossly overstated, much of it was "not proven", and in any event many of the damages sought were not causally related to the MVAs.

[467] The Court expressed its dissatisfaction at the manner in which the parties were attempting to prove/disprove the items of expense claimed as special damages. It directed the parties to revisit the issue outside the courtroom and, if possible, present to the Court a number representing the amount of expenses agreed to be appropriate special damages. The parties subsequently advised the Court in writing that the "agreed net special damages" in this case were in the amount of \$27,000. That figure was said to include "\$3,394.39 paid by ICBC pursuant to Part 7 of the Regulation which the parties agree should not be deducted at this time, but may be subsequently deducted pursuant to s. 83 of the Insurance (Vehicle) Act".

[468] I am not exactly sure what "netting" process has been employed and I am not inclined to inquire. I will simply award the agreed sum of \$27,000 as special damages in this case.

[469] Ms. Kallstrom is also entitled to pre-judgment interest on these special damages. Since neither the particulars nor the date of the expenses comprising the special damages have been identified, the Court cannot determine the amount of interest that should be awarded and will leave that calculation to the parties. Should disagreement arise with respect to such calculation, the parties are at liberty to apply to the Court for further direction.

[470] As with the awards for general damages and past loss of earning capacity, some minor adjustments to the special damage award must be made in each action to deduct expenses incurred before any respective course of action accrued. Again, I will leave that adjustment to counsel for the purposes of finalizing the formal judgment to be entered in each action.

SUMMARY AND CONCLUSIONS

[471] In conclusion, I find all defendants liable, jointly and severally, for the following "principal" amount of damages, which principal amount is to be adjusted downwards in their respective actions for certain categories, in accordance with the directions and figures set out earlier in this judgment:

Non-pecuniary general damages

\$

180,000.00

Past loss of earning capacity:

(plus pre-judgment interest to be calculated)

\$

220,000.00

Loss of future earning capacity

\$

245,000.00

Cost of future care

\$

70,000.00

Loss of domestic capacity

\$

0.00

Special damages

(plus pre-judgment interest to be calculated)

\$

27,000.00

TOTAL

\$

742,000.00

[472] Should anything have occurred between the parties that might affect any award of costs in this case, the parties may make submissions in writing within 30 days of the date of this judgment. Otherwise, costs will follow the event and are awarded to the plaintiff to be assessed under Scale B of Appendix B to the Supreme Court Civil Rules. While I make no express apportionment of the sort suggested in Article 7 of Appendix B, I direct that the plaintiff is entitled to all tariff items and disbursements incurred which are unique to any one of the four separate actions, however there is to be no double recovery for costs incurred in respect of steps common to all proceedings, whether before or after the September 2, 2014 order directing all actions be tried together.

"KENT J."

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