
CANADA / JUDGMENT

Lane v. Pedersen

2014 BCSC 1302

COURT

Supreme Court of British Columbia

DECIDED

14 July 2014

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2014 BCSC 1302 Lane v. Pedersen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lane v. Pedersen,

2014 BCSC 1302

Date: 20140714

Docket: M101918

Registry: Vancouver

Between:

Julie Vera Lane

Plaintiff

And

Megan Kendall Pedersen

Defendant

Before: The Honourable Madam Justice Russell

Reasons for Judgment

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Place and Dates of Trial/Hearing:

Vancouver, B.C.

October 21-24, 28, 30,

November 4-8, 18-21, 2013; and

January 16-17, 2014

Place and Date of Judgment:

Vancouver, B.C.

July 14, 2014

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Introduction

- [1] The plaintiff, Ms. Julie Lane, was injured in a rear-end accident (the "MVA") on January 14, 2009.
- [2] That day, the plaintiff was driving to work in her Nissan Pathfinder at 7:38 a.m., proceeding northbound on 240th street in Maple Ridge. She looked to her left as she prepared to merge to her right onto westbound Lougheed Highway from the designated merge lane. As she did so, she was hit at speed from behind by the vehicle of the defendant, Ms. Megan Pedersen. The plaintiff's car was stopped at the time of impact.
- [3] Upon impact, the plaintiff hit her head on the side frame of her car. She was left with a visible contusion on her left forehead. After Ms. Lane exited her car following the MVA, Ms. Pedersen took a picture of her. That photograph shows a large bump on the left side of the plaintiff's forehead. The defendant admits the authenticity of that picture.
- [4] The plaintiff and the defendant went to a parking lot and exchanged information. The plaintiff was shaken and confused, but after unsuccessfully trying to remove her dragging bumper, she managed to navigate to a local ICBC office where she was told to seek medical attention.
- [5] Over the next few months, it became apparent that in addition to injuries to her neck, shoulder and back, the plaintiff had sustained what used to be called a concussion, but what is now known as a mild traumatic brain injury.
- [6] At the time of the MVA, the plaintiff was employed as a school psychologist for the Maple Ridge-Pitt Meadows school district, while pursuing a doctorate of Education ("Ed.D."). She also had a very active social and home life. The Court heard substantial evidence about the impact the MVA had on these activities.
- [7] The defendant admits liability. As a result, the lengthy trial, and the evidence of a number of experts, focused on the damages suffered by the plaintiff. These included: damages arising from the pain she suffered in her head, neck, back and leg that interrupted her life style; her

past loss of wages and sick leave benefits; interruption and delay to her pursuit of an Ed.D.; loss of opportunity to apply for positions superior or supplemental to her employment; loss of capacity; loss of future earnings; loss of housekeeping ability; and compensation for the supportive work of her husband. In addition, the plaintiff claims a substantial sum for special damages.

The Lay Witness Evidence

- [8] The Court heard from a number of lay witnesses, who provided details with respect to the plaintiff's condition before and after the MVA.
- [9] Chief among them, the plaintiff provided evidence with respect to her condition and capabilities before and after the MVA. Evidence from her husband, Mr. James (Sandy) Lane ("Mr. Lane"), and one of her two sons, Mr. Douglas Lane, tended to corroborate that evidence.
- [10] The Court also heard from a number of the plaintiff's friends, colleagues and acquaintances: Mr. and Mrs. Goodman, friends of the plaintiff; Larissa Predy, a colleague; Joy Priestly, an acquaintance of the plaintiff from her Toastmasters Club.
- [11] The Court also heard from witnesses who provided evidence related to the damages the plaintiff claimed arose out of the MVA. Margaret Teyema, a witness from the Maple Ridge school district, provided evidence relating to the plaintiff's absence from work and graduated return to work. Karen Dean, a member of the Support Staff Union at Simon Fraser University, testified about the stipends earned by sessional lecturers and limited term instructors. Deborah Stewart, from the British Columbia Provincial School Employers' Association (known colloquially as BCPC), gave evidence about the salary ranges of senior administrative positions in special education in some local school districts.
- [12] In addition, Mr. Stuart Ladysmith, a now retired but experienced former superintendent of schools, gave evidence of his observations made as a superintendent in particular school districts related to the duties of senior special education specialists. I did not permit him to opine on whether Dr. Lane's qualifications would have persuaded him to hire her as there had not been an expert report served.
- [13] The defendant gave evidence concerning events immediately following the MVA.
- [14] The defendant also called some former and current school administrators. The Court heard from Dr. Dave Carter, a member of the plaintiff's dissertation committee, who has hired candidates for the types of positions the plaintiff planned to apply for before the MVA. The defense also provided evidence from two Simon Fraser University officials: Dr. Steward Richmond, the Director of Undergraduate Programs; and Dr. Robin Brayne, the Director of Graduate Programs. They described the process for hiring sessional instructors to teach undergraduate and post-graduate programs, respectively.

- [15] The defendant also provided the evidence of Mr. Sean McStay, a member of the plaintiff's Toastmasters club.

A. The plaintiff pre-MVA

- [16] The plaintiff is now 59 years old. It appears that before the MVA, the plaintiff was an extremely high-energy person who filled the hours of every day to the maximum.
- [17] Before the accident, the plaintiff worked full time for School District 42, Maple Ridge-Pitt Meadows, first as a support teacher and then as a school psychologist. She continues to occupy the position of school psychologist.
- [18] As a school psychologist, the plaintiff assesses students, which includes administering tests to identify problems, meeting with teachers and parents, writing reports on her findings, and developing teaching strategies for students with behavioural and learning issues. She also works to find and create resources that teachers, parents and students can use to assist with issues that interfere with students' ability to participate fully in the school system.
- [19] Before the accident, the plaintiff took an active role teaching her colleagues. She led workshops for them both within working hours and on evenings and weekends.
- [20] She has been married to Mr. Lane for many years. They have two adult sons. The plaintiff and Mr. Lane occupy a five-acre property with fruit trees and gardens in Maple Ridge. Their house is 5,000 square feet.
- [21] The plaintiff and her husband renovated the house after moving into it in 2000. She did many of the initial drawings for the house plans, put in her own flooring and did all the interior painting. She assisted with the application of siding to the exterior of the building, and with the exterior painting of the house by doing all the ladder work.
- [22] In addition to working full-time, the plaintiff says that she did 90% of the housework and cooking. She also claims that she did a substantial part of the gardening, including keeping up flower beds, a vegetable plot and a rose garden, maintaining a large greenhouse, and pruning and spraying numerous fruit trees, all without outside help.
- [23] In season, the plaintiff harvested the fruit and vegetables she grew and canned for her pantry. She kept goats and chickens and did part of the animal care on the farm.
- [24] In addition, the plaintiff attended church regularly and took part in a regular prayer group and bible study.
- [25] She was also a member of the Mission Toastmasters Club, where she enjoyed public speaking, won awards and was sufficiently successful to move up in responsibility in the club. The plaintiff had been Vice President of education and President of her local chapter. She also organized the programmes for meetings.

- [26] The plaintiff also enjoyed some success with her Toastmasters club, placing third in British Columbia in impromptu speaking. Impromptu speaking, known as Table Topics, requires the speaker to respond to a topic chosen by panel members, and immediately deliver a properly structured speech which is between one minute thirty seconds and two minutes thirty seconds.
- [27] To come third in British Columbia, the plaintiff won at the local and district levels, then competed with the successful candidates from other districts.
- [28] On Friday evenings, the plaintiff would often host or attend dinner parties with friends. She and her husband went to concerts in Vancouver, and attended plays and the opera from time to time.
- [29] For fitness, the plaintiff attended Aquafit twice a week and hiked around their property and in the local research forest.
- [30] Both her educational and vocational histories show the plaintiff is able to focus on her goals and to work to attain them. She has steadily progressed in all the fields of work in which she has been involved.
- [31] The plaintiff's curriculum vitae shows the vast range of courses, degrees and diplomas the plaintiff has earned over the years, as well as the many volunteer positions and charitable endeavours she has undertaken. She has not included all of her endeavours in her C.V., but to do so would require an even longer document than the 21 pages provided.
- [32] There is no doubt the plaintiff is an ambitious person. She obtained a Master's degree in Education in 2006, then immediately began a doctoral programme focused on the same area of study as her Master's programme. The plaintiff decided to pursue her Ed.D. as part of her plan to teach at the university level and to apply for more senior positions in her school district or others.
- [33] The plaintiff took her studies very seriously. By rising early and working in the evening, she was able to study about three hours every week day. She states that she studied six to nine hours on Sunday and slightly less on Saturday so she could go to church in the evening.
- [34] While the plaintiff was working on her dissertation, she received a fellowship. This fellowship was awarded to her for her contributions to the field of special education.
- [35] The plaintiff also received a grant from the community since the work she was doing provided some benefit to services for children in the community.
- [36] The plaintiff testified that she hoped to finish her dissertation and defend it by the end of the 2008/2009 school year, in the spring of 2009. At the time of the MVA, she was in the midst of writing her doctoral dissertation and claims to have substantially finished her dissertation. However, her dissertation committee had not yet been formed. Dr. Carter roughly estimates that she had about 20% left to complete, and I accept that this was the case.

- [37] The plaintiff says that she was contacted by Fraser Valley University, Simon Fraser University and by Athabasca University and encouraged to make application for positions with them once her dissertation was completed and she had succeeded in her defense.
- [38] No one was called from these institutions and there was no documentation to substantiate this claim. The plaintiff also has not made application to any of the institutions she named.

B. The plaintiff post-MVA

- [39] The plaintiff recalls very little about the MVA. She says that she does not remember exiting her car and exchanging information with the defendant. She recalls having a pink object in her hands, which she later determined to be the defendant's cell phone number.
- [40] She also does not recall trying to remove the half-dragging bumper from her Nissan Pathfinder before she drove off.
- [41] She has learned from others that she went to an ICBC office near her husband's former place of work.
- [42] At some point, the plaintiff called her friend Donna Goodman, who accompanied her to the office of her family doctor, Dr. Robert Grist. Ms. Goodman did not go into the office with the plaintiff.
- [43] The plaintiff does not now recall how she got to Dr. Grist's office, but she remembers he asked her to do a balance test.
- [44] The plaintiff initially suffered from pain in her neck, shoulders and back. She also had severe headaches, pain down her entire left side to her ankle, stomach pain from seatbelt bruising, difficulties with her sight and her balance as well as interference with her cognitive abilities. She was forgetful and occasionally confused.
- [45] For the first few days following the accident, Mr. Lane stayed home from work to provide care for the plaintiff.
- [46] The plaintiff spent a good deal of time on the sofa at first, since she found her bed uncomfortable. She recalls listening to daytime television, although she could not watch it due to her visual disturbances. She felt exhausted and to this day, the fatigue she suffers means she requires a nap on her return from work in the afternoon. If she intends to go out in the evening on a weekend, she must prepare by napping.
- [47] The plaintiff recalls having difficulty finding words and struggling with ordinary conversation.
- [48] The plaintiff's sight was interrupted and blurry at first. Her visual disturbances resolved, although she is not certain when this happened. She did continue to suffer from light sensitivity for a period of time, although this condition also appears to have resolved.

- [49] The plaintiff's balance remains occasionally problematic, and she still has pain through her left buttock and into her knee and down to her ankle. Her headaches have decreased in frequency but still occur. If she has one, she leaves work early.
- [50] The plaintiff continues to use a low dose of nortriptyline to help reduce her pain.
- [51] Despite receiving more than 100 physiotherapy sessions, the plaintiff continues to have pain in her back and neck, but according to the history she provided to Dr. Derryck Smith, a psychiatrist who assessed her in 2010 and 2012 and provided an expert report, her low-back pain seems to have improved.
- [52] The plaintiff still finds relief from physiotherapy, which she attends once every two weeks. She finds she becomes stiff without it. She says the physiotherapy "keeps her moving".
- [53] The plaintiff's physiotherapist also offers the services of a kinesiologist. The plaintiff has attended with the kinesiologist to develop an exercise routine that she knows is both helpful and safe for her sensitized back and neck. She has followed the exercises at home.
- [54] The kinesiologist allows drop-ins for those using physiotherapy services at the same clinic. She charges \$5 for the use of the gym and while her services in that situation are not one-on-one, she supervises the user. In the months before trial, the plaintiff dropped in to exercise when she was attending for physiotherapy.
- [55] At the same facility where the plaintiff attends physiotherapy, the plaintiff also received acupuncture and massage therapy. She obtained relief from both modes of therapy. The plaintiff continues to receive acupuncture occasionally.
- [56] The plaintiff uses a Wii home video game console for balance and yoga exercises. She also uses Thera-Band resistance bands to build arm and shoulder strength.
- [57] She has also purchased a treadmill that she uses fairly regularly.
- [58] The irritability the plaintiff exhibited early post-injury has improved, but she becomes irritable when she feels fatigued. Both Mr. Lane and Douglas Lane say this is different from how the plaintiff behaved before the MVA.
- [59] One major loss the plaintiff continues to suffer is the loss of smell and taste.
- [60] While the plaintiff has recovered some ability to smell, she remains unable to identify what she smells. In other words, she knows when an odour is present, but is unable to identify whether the scent is that of compost or a rose. The plaintiff has burned food items while cooking because she cannot smell when they become overcooked.
- [61] The plaintiff's loss of smell means that food does not have much flavour. Even coffee is just a hot liquid to her.
- [62] The plaintiff and Mr. Lane do not go to restaurants as often as they did before the MVA because all food tastes the same to her, and gourmet dishes have no special appeal.

- [63] After the MVA, the plaintiff was unable to recommence her work on the dissertation at first because she could not concentrate or understand what she was reading. This prevented her from returning to her work for a period of time.
- [64] Although the plaintiff had serious difficulty resuming her writing, reading and analysis, she found some adaptive strategies that allowed her to read carefully and edit vigilantly so as not to affect the quality of the end product. However, this had an effect on the speed with which she completed her work.
- [65] The plaintiff claims that as a result of this, she paid tuition in 2010 and 2011 while she worked to complete her doctorate.
- [66] The work the plaintiff had left to do on her dissertation at the time of the MVA was not simple. She had to generate conclusions and recommendations that were synthesized from the findings in her research. She also had to check her bibliography.
- [67] However, she persevered, completed the outstanding work on her dissertation, incorporated the changes suggested by her committee, and successfully defended it in April 2011. She was granted her Ed.D. at that time.
- [68] For part of the time she was working on her dissertation, the plaintiff was also working, first part-time and then full-time.
- [69] She says that, but for the MVA, she would have achieved her goals of either teaching at the university level or attaining a more senior position with a school district, and thus would have increased her income over time.
- [70] Currently, the plaintiff earns \$86,000 per annum.
- [71] The plaintiff currently believes that she is unable to apply for the kinds of positions that some of her colleagues in her doctoral group of 12 (5 of whom have finished their Ed.D.) have been able to obtain. For example, one member of her cohort, Dr. Julie Parker, now holds the senior position in special education in North Vancouver.
- [72] Of her colleagues in school psychology, many hold down full-time positions in a school district and teach part-time at university, and do private assessments.
- [73] The plaintiff says that her fatigue makes it impossible for her to drive any distance for employment, and reduces her ability to put in the long hours that would be required.
- [74] The plaintiff applied for a more senior position in her own school district after she had completed her Ed.D. The position she sought was the district vice-principal for student support services in Maple Ridge.
- [75] However, the plaintiff was not granted an interview and another employee in her school district, Laura Brandon, a support teacher, obtained the position. The plaintiff did not call evidence to explain why she was not interviewed for this position.

- [76] One of the plaintiff's colleagues, Ms. Larissa Predy, testified that the plaintiff would be a "great" district vice-principal for special education.
- [77] The plaintiff says she did not intend to retire at 65 but would keep working as long as she is able. Currently, she is uncertain how long she will be able to continue working.
- [78] The plaintiff no longer gives 25 workshops a year to her colleagues due to the fatigue she feels at the end of the day. She now holds only three or four workshops per year.
- [79] The plaintiff's ability to socialize has been curtailed because she does not have the energy to participate in social events.
- [80] At work, the plaintiff finds that her memory is not as reliable as it was, and she occasionally forgets meetings. Fortunately, her colleagues are aware of this and call her to remind her if she does not attend.
- [81] After the MVA, the plaintiff has not been able to maintain her former level of success in Table Topics at her Toastmasters club. The plaintiff has noticed that her ability to spontaneously respond to the topics has been compromised. She is no longer able to organize topics in her head, and must use notes.
- [82] Since the MVA, the plaintiff has gone on to become an Area Governor and a District Governor for Toastmasters, but these positions relate more to administrative and ceremonial tasks than to talent in public speaking. However, when she visits clubs in her district, she gives a short speech of encouragement.
- [83] Also since the MVA, the plaintiff has undertaken to organize a new Toastmasters club. That process is underway, but she does not yet have the requisite number of members to be chartered as a new club. She has undertaken this task to complete a step towards obtaining the top qualification in Toastmasters: that of Distinguished Toastmaster.
- [84] The plaintiff began to discuss a graduated return to work with her doctor and as of March 1, 2009, the plaintiff had completed her first part-time week at work, attending one-half day twice a week (35% of a week). She worked at this level for two weeks, then increased her time at work to 40% of a full-time week. This continued until April 16, 2009, at which time she began working 50% of the time. This amount of work increased as of June 1, 2009, when she began working 70% of a full time position.
- [85] The plaintiff continued working at 70% of a full time position until she resumed working full-time hours commencing April 16, 2010. She has continued to work full-time since April 2010 and has not taken any sick time since her return to work.
- [86] The plaintiff is a member of the British Columbia Teachers' Federation ("BCTF"). An occupational therapist employed by the BCTF saw the plaintiff and recommended ergonomic adjustments to the plaintiff's work station, including obtaining a made-to-fit chair for her main office, raising her desk level and obtaining an under tray, and arranging for comfortable chairs at each of her work sites and rolling carts to place her materials in.

The occupational therapist also suggested that identical rolling tables be placed in an enclosed space at each of the plaintiff's work sites to create consistent locations for her materials and a consistent environment for her work.

- [87] These measures have helped the plaintiff to minimize distraction and discomfort during her day. The plaintiff also has some flexibility to work from home or rest and make up lost time later if her symptoms are severe.
- [88] As a school psychologist, the plaintiff is required to maintain her qualifications. Because she was unable to write a timed examination to update her qualifications before 2011, she is now required to take some additional course work to qualify. Until she re-qualifies, she must have a second signature on her reports.
- [89] The plaintiff is taking about one course each year for her qualifications since that is all she feels she can manage.
- [90] Since the MVA, the plaintiff no longer performs housework. She was not able to vacuum after the MVA and has still not resumed this task. From doing 90% of the housework before the MVA, she now puts laundry into the washing machine, but Mr. Lane puts it in the dryer. She says she is "comfortable" with allowing others to take up the housework she no longer does.
- [91] Mr. Lane tried to take over with the housework, but was not able to keep up with all the work. When Mr. Lane indicated he could not carry on with the housework, the plaintiff hired a cleaner who comes to clean every two weeks. There is no evidence of how long Mr. Lane managed the housework before the Lanes made other arrangements.
- [92] Between cleaning sessions, Mr. Lane might vacuum a little. The plaintiff leaves the house as it is until the cleaners come.
- [93] The plaintiff no longer cooks because her lack of skill makes her a danger in the kitchen. Douglas Lane, who lives with the Lanes while attending university, is a trained chef and has taken over the cooking.
- [94] The gardening the plaintiff did to maintain their substantial property included pruning fruit trees and growing roses and dahlias. She cannot do these tasks and the trees have been left to grow without pruning. This affects their productivity. Mr. Lane is acrophobic so cannot take over duties that involve the use of a ladder.
- [95] The flower gardens added to the beauty of the property but take time and physical effort to maintain. Mr. Lane assists with some smaller gardens but the majority of them have been abandoned.
- [96] Mr. Lane has taken over the care of their farm animals with some assistance from Douglas Lane.

- [97] Mr. Lane and Douglas Lane do most of the grocery shopping. Douglas Lane stated that if he asks his mother to pick up a grocery item as she is on her way to shop, she will forget to buy it unless she writes it down.
- [98] Driving was not possible for the plaintiff at first. The plaintiff began driving again in early April 2009, and gradually increased the distance she could tolerate. Now she and Mr. Lane drive together, and she is capable of driving by herself to local communities.
- [99] The plaintiff continues to be fearful of driving, and relies on Mr. Lane to do a large portion of the driving. Since unfamiliar road are confusing for the plaintiff, if she and Mr. Lane travel to the US, the plaintiff drives to the border and Mr. Lane takes over once they cross the border.
- [100] When travelling to Edmonton to see their older son, the plaintiff takes a neck pillow and ice packs to help with her neck pain. She is able to assist Mr. Lane with some of the driving.
- [101] The plaintiff testified that after the MVA, she started to lose weight and went from a size 16 to a size 6 over the course of about a year.
- [102] She was forced to acquire a new wardrobe to accommodate her change in size. She has regained most of the weight she lost, and the wardrobe is no longer useful to her.
- [103] The fate of the useless wardrobe was not revealed.
- [104] The plaintiff has claimed for the cost of the clothing that she required but can no longer use.
- [105] The plaintiff believes her weight loss occurred because her loss of ability to smell and taste resulted in a loss of appetite. There was no medical evidence to explain why the plaintiff endured a rapid weight loss. Nor is there any evidence of the plaintiff's weight before the accident, of her weight after the weight loss, or her weight after she regained sufficient weight that her new clothes no longer fit.
- [106] The plaintiff testified that the intimate relationship she has with her husband has been affected by the MVA.
- [107] The plaintiff can no longer sleep in the marital bed, and sleeps on the couch. Because of her residual pain, she cannot tolerate being touched.
- [108] For several months following the MVA, the plaintiff saw her family doctor, Dr. Grist. Dr. Grist retired in June 2009, and the plaintiff began seeing Dr. Virindir S. Bhatti, who took over treatment of the injuries from the MVA. Dr. Bhatti remains the plaintiff's family doctor today.
- [109] The plaintiff says she does not recall much about her visits to Dr. Grist or her description of symptoms to him. She says that her short term memory is "patchy" and even today she must write things down lest she forget them.

C. Assessment of the Evidence

- [110] While I found the plaintiff's evidence to be reasonably credible during the course of the direct examination, I was of the view that she tended to exaggerate her pre-MVA capacity for work.
- [111] There are simply not enough hours in the day to maintain a 5,000 square foot house, substantial gardens, a small farm operation, make meals, do minor renovations, keep up an active social life, go to church two nights a week (Saturday and Wednesday), go to Toastmasters one night a week and Aqua fit two nights a week while studying three hours daily (a "mean" of three hours a day on weekdays), seven hours on Saturday and nine hours on Sunday, all while working full time.
- [112] Nevertheless, I accept that before the MVA, the plaintiff was able to accomplish a substantial number of tasks in the ordinary day.
- [113] I was also somewhat taken aback by the plaintiff's attitude to her cross-examination. While I have no doubt she was advised by her counsel not to volunteer any answers to cross-examining counsel, her refusal to respond to counsel's questions was an obvious attempt to block any question that would somehow moderate her claim. She was, quite simply, not the candid and open witness she had been on direct.
- [114] I note that at no time during what must have been a frustrating cross-examination did the defendant's counsel lose his patience with the plaintiff or treat her with disrespect.
- [115] It also seemed very strange that in cross-examination, the plaintiff could remember very little about her treatment post-MVA, and indicated that she could not remember the sequence of her recovery when she was able to give a medical history to her own medical-legal experts.
- [116] I understand that the plaintiff has had some interruptions in memory caused by the MVA but it is my view that she tends to exaggerate them. I do not accept that her ability to give her medical history is only based on what others have told her.
- [117] Her memory is somewhat affected by the MVA but this problem has not interfered with her successful dissertation completion and defense, and I believe her memory is only mildly affected.
- [118] Cognitively, the plaintiff has substantially recovered, although she has lost some of her ability to synthesize ideas quickly.
- [119] I accept that the plaintiff continues to suffer from cognitive fatigue caused by her post-concussion syndrome, and that she continues to suffer from a reduced sense of smell and taste. She has some residual pain in her neck, shoulder and back, and occasional sciatic and sacroiliac pain and occasional headaches that have been proved to my satisfaction.

[120] However, I have been left with the impression that I must consider with caution the extent of the plaintiff's claims.

[121] The evidence provided by Mr. Lane and Douglas Lane was of some minor assistance, but was not particularly remarkable.

The Medical Expert Evidence

[122] There were a number of expert medical witnesses for the plaintiff: Dr. James Schmidt, a neuropsychologist; Dr. Smith, a psychiatrist; Dr. John Fuller, an orthopedist; Dr. Brenda Lau, a pain specialist; and Dr. Dean Foti, a neurologist. Dr. Foti was originally a defense witness, but the defendant chose not to call him and the plaintiff did.

[123] The plaintiff also called her family physician at the time of the MVA, Dr. Grist, who retired at the end of 2009. He did not prepare an expert report and was limited to his direct observations. As he did not recall much, his direct observations from the time of the evidence are of very limited assistance.

[124] The plaintiff is now cared for by a Dr. Bhatti who did not give evidence but whose clinical records formed part of an exhibit at trial.

[125] Dr. Grist's records were entered as business records and in the course of the trial I ruled that certain of the statements contained in Dr. Grist's records made by the plaintiff to Dr. Grist were contemporaneous utterances of bodily sensation and thus could be accepted in evidence for proof of the truth as exceptions to the rule against hearsay.

[126] While these utterances supported the plaintiff's evidence respecting the pain, confusion and interruption in memory she suffered following the MVA, I did not find them to deviate from the evidence she had given in direct or to the experts she called.

[127] Her memory issues resulted in somewhat patchy evidence about her recollection of the timing of symptoms most specifically within the first six months of the MVA, and on that particular issue, these utterances were of assistance.

[128] The plaintiff's injuries are well-documented; this case rather turns on the duration and effect of her injuries.

[129] I therefore do not find it necessary to consider the plaintiff's submissions requesting that I admit Dr. Grist's clinical records in their entirety as proof of the truth of the plaintiff's conditions. Dr. Grist only treated the patient for several months following the accident, and did not provide an expert report. His records are of little assistance with respect to the duration and long-term consequences of the plaintiff's injuries.

[130] The defendant intended to call a neurologist, Dr. Morton Knazan, but sadly, he died suddenly well before the trial.

- [131] The defendant applied to admit Dr. Knazan's expert report in any event, but due to the fact that Dr. Knazan's notes could not be produced and no cross-examination was possible, I declined to admit the report.
- [132] I did permit the defendant to put certain of the statements from Dr. Knazan's report to the plaintiff in cross-examination despite the complaints of plaintiff's counsel. However, I ruled that if the plaintiff did not adopt the statements, no further use could be made of them.
- [133] The plaintiff did not agree with or remember many of the statements Dr. Knazan recorded in his report and therefore, they could not be relied upon as evidence.
- [134] The defendant called Dr. Stephen Wiseman, a psychiatrist, but did not call any other medical evidence in response to the plaintiff's case.

A. Dr. James P. Schmidt

- [135] Dr. Schmidt provided two reports on which he was cross-examined. The first is dated April 13, 2010, and the second June 21, 2012.
- [136] Dr. Schmidt is an expert in neuropsychology, clinical psychology, the interpretation of neuropsychological and psychological test results and the effect of injury on function.
- [137] The defendant did not challenge his qualifications.
- [138] In his second report, Dr. Schmidt found the plaintiff had improved significantly with respect to many of the difficulties she was experiencing when he examined her in September and October of 2009 in connection with his April 2010 report.
- [139] However, after interviewing the plaintiff and performing tests on her to analyze her cognitive function and her emotional issues, he concluded that she was still suffering from a number of problems.
- [140] His conclusions in his second report synthesize his assessment test results, his interview findings and his records review, including his review of certain of the other expert reports. Chief among his conclusions are the following (at 7):
1. . . . some of her problems have improved [but] she does continue to have significant problems with pain, fatigue, reduced cognitive functioning and loss of sense of smell. The problems with cognitive functioning appear to be at least in part related to her problems with fatigue and pain . . .
 2. . . . improvements in simple focused and sustained attention . . . No improvement was seen in processing speed. . . scores were even more notably weak in tests of learning and memory. . . . weaknesses were most likely associated with fatigue. some improvement in cognitive functioning but it has not yet returned to normal . . . [and] significantly impacted by pain and fatigue. . . . profound loss of sense of smell. . .

3. . . . some improvement in her overall emotional functioning over time. . . . I would agree with the diagnosis of Dr. Smith that she is suffering an Adjustment Disorder with features of anxiety.
 4. . . . although there has been improvement it has by no means led to a full recovery with respect to cognitive, emotional and behavioral functioning. It is very difficult to determine the exact cause of these problems. On the one hand, the traumatic brain injury she suffered in the accident in question was fairly mild, and . . . one would expect to see her recover fully from it. On the other hand, her age at the time of the accident is a negative prognostic indicator, as is the loss of her sense of smell. . . . she does continue to show cognitive difficulties that are most likely a result of the combined impact of her fatigue, her pain, her somewhat reduced frustration tolerance, her increased anxiety, and, possibly, the effects of the traumatic brain injury. Differentiating the relative contribution of these factors is impossible.
 5. . . . it might be appropriate for Dr. Lane to receive psychological intervention aimed at reducing her general levels of frustration and anxiety, as well as helping her to learn adaptive strategies for dealing with her pain and fatigue. . . . this treatment would not be to eliminate her pain and fatigue, but rather to help her deal with it more effectively. . . . Dr. Lane is obviously motivated to continue on with her career and I believe she will be able to do that, barring the occurrence of further injuries or complications to her recovery.
 6. . . . Dr. Lane's condition . . . [is] most likely . . . plateaued.
- [141] Dr. Schmidt adds that if the plaintiff's pain problems persist, it is likely that her other problems will persist as well and would likely do so in any event if they are neuropsychological in origin.
- [142] There is also the possibility that if treatment for her pain and fatigue assist her, the accompanying problems might also improve.
- [143] Dr. Schmidt explained cognitive fatigue in a way that I found helpful. He stated that this kind of fatigue means that the subject has a more difficult time maintaining brain arousal at a maximal level, resulting in the brain operating less efficiently.
- [144] Dr. Schmidt also pointed out that fatigue has a disproportionate effect on neuropsychological performance.
- [145] It is this kind of fatigue from which the plaintiff suffers and which likely affects her test results.
- [146] The source of this fatigue is, as his report states, impossible to determine. But he is clear that the plaintiff indeed suffered a mild traumatic brain injury as a result of the MVA.

- [147] I found Dr. Schmidt to be a very credible expert witness. He was helpful and responsive to cross-examination without any hint of defensiveness. His report was readable and comprehensible with the minor exception that he found some of the plaintiff's test results on the second battery he administered to be significantly improved and well within "expected ranges", but not up to "expected ranges given her level of intellectual functioning".
- [148] This confusing conclusion indicated to me that Dr. Schmidt was conducting tests of Dr. Lane with certain assumptions in mind related to her academic achievements.
- [149] I point this minor inconsistency out not to detract from Dr. Schmidt's overall findings but to indicate the difficulty in assessing the plaintiff objectively in the face of her many accomplishments, and in particular, the completion of her doctoral degree post-MVA.
- [150] With that cavil in mind, I accept the conclusions in Dr. Schmidt's report.

B. Dr. John A. Fuller

- [151] Dr. Fuller is an expert in orthopedic surgery and medicine, with an interest in chronic pain. He estimates he has seen several thousand patients with problems similar to those suffered by the plaintiff.
- [152] The defendant did not challenge Dr. Fuller's qualifications.
- [153] Dr. Fuller examined the plaintiff on November 9, 2011. His report is dated November 16, 2011.
- [154] Dr. Fuller was forthright in acknowledging that he had not seen the plaintiff prior to the MVA and saw her for the first time two years and ten months after the MVA.
- [155] Dr. Fuller observed that on physical examination, the plaintiff demonstrated balance instability when standing with her eyes closed, trigger points in the musculature between the shoulder blade and the mid-spine, tenderness at the base of the skull, restricted range of motion of the cervical spine, and marked asymmetry in the sacroiliac system with right anterior rotation.
- [156] In his report, Dr. Fuller considered the circumstances of the MVA and potential causation of the plaintiff's physical symptoms.
- [157] In Dr. Fuller's opinion, the impact of the defendant's car placed an overload on her musculoskeletal system in extension (backward bending) and then into flexion (forward bending), which the seatbelt cannot protect against. The fact that the plaintiff's head was turned to the left would exacerbate these strains because the cervical spine was positioned to reduce the degree of movement available to it.
- [158] As a result, Dr. Fuller concludes that there was musculoligamentous trauma to the cervical spine.

- [159] Dr. Fuller opines that the way in which the seatbelt holds the pelvis in place can cause an additional load to the pelvis affecting the sacroiliac system and causing its inherent instability to shift slightly.
- [160] In Dr. Fuller's view, the impact of the MVA caused the movement of the plaintiff's body and resulted in the complex of symptoms she now has in her cervical spine and neck and the lumbosacral spine and low back.
- [161] The particular diagnoses Dr. Fuller made were: headache and neck pain following from the residual musculoligamentous trauma to structures supporting the cervical spine; and low back pain located in the sacroiliac complex and buttock resulting from a very slight dislocation of the sacroiliac joint.
- [162] Dr. Fuller's opinion of the plaintiff's prognosis for further improvement is poor.
- [163] Dr. Fuller's view is that in most cases, symptoms generally improve naturally over a two-year period. He has seen further improvement occur over as long as four years. Dr. Fuller notes that two years and ten months had passed since the MVA, and a number of conservative interventions had been employed without resolution of the plaintiff's neck symptoms. Dr. Fuller therefore opines that the plaintiff had reached the endpoint in her clinical status.
- [164] With respect to her sacroiliac complex, Dr. Fuller is of the view that there is little that can be done, as the area is resistant to treatment.
- [165] In Dr. Fuller's opinion, the plaintiff will likely continue to suffer limitations on her ability to function at home, and will not be able to maintain her home or yard. He also concludes that she will only be able to continue to function at work with the assistance of her adaptive techniques, such as curtailing her activities, ergonomic chairs and office arrangements. Even with these adaptations, he observes that the plaintiff often has occasional bouts where her symptoms are exacerbated.
- [166] Dr. Fuller does not recommend the use of prolotherapy (the injection of an irritant solution into a joint space, weakened ligament, or tendon insertion to relieve pain) to assist with the plaintiff's symptoms. He has tried this technique in the past without success and no longer regards it as having any efficacy in the relief of pain.
- [167] Dr. Fuller also commented in passing on the plaintiff's post-concussion syndrome, but since he acknowledges this is beyond his expertise, I have not considered those brief remarks.

- [168] On cross-examination, it was put to Dr. Fuller that the plaintiff had not had the benefit of physiotherapy, and experienced increasing pain between May 2010 and January 2012, and then resumed physiotherapy and found that her pain and headaches had largely resolved as reported to Dr. Smith in July 2012. Dr. Fuller agreed that if this was the case, then it was possible that physiotherapy had resulted in a significant improvement that he had not predicted was likely to occur.
- [169] Dr. Fuller stated that if Dr. Smith had recorded that the plaintiff had reported this later improvement, he had no basis to disagree.
- [170] Dr. Fuller also agreed that if the plaintiff had reported in 2009 that her back pain had "mostly resolved" and that her headaches were better, then in view of the results of his clinical examination, the differences between reports demonstrate a highly variable pain picture.
- [171] Dr. Fuller was also unable to say whether a 1998 accident in which the plaintiff was hospitalized and suffered injury to her right hip/pyriformis could have been the precipitating factor to cause the shift in her sacroiliac complex with the resulting current low back pain.
- [172] I have no doubt that as the plaintiff stated, she has good days and bad days but I find Dr. Fuller's report to be substantially more pessimistic than the more recent report by Dr. Smith and the earlier report (April 2010) and later report (June 2012) of Dr. Schmidt.
- [173] Since Dr. Fuller acknowledges he has no basis to disagree with Dr. Smith's findings, I have concluded that the more recent report of Dr. Smith in July 2012 is a more accurate picture of the degree of improvement enjoyed by the plaintiff.
- [174] I do not mean in any way to suggest that Dr. Fuller did not accurately record his findings. He did say that he has observed limited improvement in patients like the plaintiff to continue for up to four years post-accident.
- [175] At the same time, his comments on causation of injury are informative and helpful.

C. Dr. Brenda Lau

- [176] Dr. Lau is a doctor qualified to practice in British Columbia, and a specialist anesthesiologist with extensive training and a Master's Degree in pain management. She is a fellow of the Faculty of Pain Medicine of the Australia and New Zealand College of Anesthetists.
- [177] Since 2005, Dr. Lau has run a practice focused on pain management.
- [178] Pain management has only as recently as August 2013 been recognized as a subspecialty in British Columbia. That it has been recognized is largely due to Dr. Lau's efforts.
- [179] Dr. Lau's qualifications were not challenged.

- [180] Dr. Lau conducted an independent medical examination of the plaintiff on November 6, 2012. She prepared a report dated March 6, 2013, and an addendum dated July 15, 2013, after receiving information from the plaintiff's counsel concerning the plaintiff's attendance at physiotherapy and marked improvement in her symptoms of pain and headaches.
- [181] Dr. Lau sets out a number of pain symptoms that she found the plaintiff suffered from. She opines that those symptoms are typical of Whiplash Associated Disorder ("WAD").
- [182] WAD often causes myofascial contractures resulting in the development of painful trigger points, which in turn cause the plaintiff pain in her neck, upper and lower back.
- [183] According to Dr. Lau, the headaches from which the plaintiff suffers are generated by the pain in her upper back and are classified as cervicogenic headaches.
- [184] In turn, the persistent pain from which the plaintiff suffers causes fatigue and interferes with her ability to function and concentrate.
- [185] While Dr. Lau does find that the plaintiff had some restrictions on range of motion in the neck and spine, and the plaintiff continued to experience a reduced sense of smell, Dr. Lau notes the plaintiff's view that her post-MVA symptoms such as photosensitivity and dizziness had improved. The plaintiff's low back pain had improved to the point that the plaintiff rated it at one to three on a scale of ten.
- [186] It is Dr. Lau's view that the plaintiff's headaches, low-back pain, fatigue and cognitive issues are likely permanent.
- [187] Notwithstanding all of the above, Dr. Lau finds the plaintiff has continued to improve since the MVA and has not yet reached maximum recovery. She also reports that the moderate impairment from which Dr. Lane suffers may be temporary.
- [188] Dr. Lau recommends a number of interventions that she believes will afford the plaintiff relief, including Intra Muscular Stimulation ("IMS"), or dry needling, which is somewhat similar to acupuncture but aimed at the muscles and sensitized cutaneous nerves. To assist with the use of the dry needling process, Dr. Lau recommends use of cannabinoids rather than opioids to reduce pain.
- [189] Dr. Lau also recommends neural prolotherapy, which involves the injection of a dextrose solution as an irritant to cause the ligaments and tendons to lay down new tissue in response. I have already observed that Dr. Fuller disagreed with this recommendation.
- [190] In the addendum to her report, Dr. Lau was asked to respond to six points raised by counsel for the plaintiff related to the plaintiff's successful results from her return to regular physiotherapy (30 sessions) and the significant improvement she had in the range of motion in her neck, frequency of headaches and fatigue.

[191] Dr. Lau comments that her opinion remains unchanged, and that the interpretation of the six points was better left to the physiotherapist. She closes the addendum by repeating the conclusions she had reached in her first report.

[192] There are several factual inaccuracies contained in Dr. Lau's reports. For example, Dr. Lau indicates that the plaintiff did not report any variation in her weight since the MVA other than a 10 lb. gain. She also refers to a "graded return to work at 2.5 days a week" but does not report the plaintiff's return to full-time work in April 2010.

[193] Along with those inaccuracies, Dr. Lau's failure to reconsider her conclusions given the improvement noted by the physiotherapist, Mr. Moffitt, somewhat undermines my confidence in her report.

[194] I note as well that under "Prognosis", Dr. Lau states that:

At the time of our interview [November 6, 2012], Ms. Lane regained her ability to drive, to work. . .

[195] I find this recital of the evidence somewhat disingenuous since the plaintiff was only restricted from driving for approximately two weeks following the MVA. Well before November 2012, the plaintiff had been driving without difficulty at minimum in her own community, and had helped her husband drive to Edmonton.

[196] I also note that the plaintiff returned to full-time work in April 2010 while Dr. Lau's report makes it sound as if her return to work was not full time and she had just returned to work as of the time of the interview.

[197] I found Dr. Lau's report helpful in a general way but cannot give it substantial weight.

D. Dr. Derryck Smith

[198] Dr. Smith is a long-time psychiatrist in British Columbia who has assessed well over 1,000 patients over the course of his career.

[199] He has testified as an expert witness in psychiatry in the Supreme Court of British Columbia many times.

[200] His qualifications were not contested.

[201] Dr. Smith's first report was based on an independent medical examination that took place on June 20, 2010. That report is dated June 20, 2010.

[202] Dr. Smith's first report details a number of concerns, including the diagnosis of an adjustment disorder with features of anxiety for which he recommends treatment.

[203] Based on his re-examination of the plaintiff on June 26, 2012, Dr. Smith opines in his second report dated July 16, 2012, that these issues had resolved.

- [204] In his second report, Dr. Smith lists the problems with which the plaintiff had presented at the first independent medical examination, and reassessed them as he saw them at the second independent medical examination.
- [205] Dr. Smith states that the plaintiff's sleeping difficulties had resolved and she was sleeping well at this point.
- [206] While the plaintiff's appetite was reduced due to her lack of smell and taste, Dr. Smith observes that she had gained 10 lbs. due to lack of exercise.
- [207] The plaintiff reported that her balance problems continued and she could not ride a bicycle or use the treadmill without holding on the siderails. However, I note that she told Dr. Fuller she could ride a bicycle but only on a quiet street. She also told her physiotherapist that she could use a treadmill without holding on and regarded this as a major victory.
- [208] I accept that any medical examination considers the plaintiff's condition on the day she is examined. It may be that the plaintiff was failing to recall the minor steps forward that she had reported to others.
- [209] Dr. Smith relates that the problems the plaintiff had experienced with speech had become "fine", but the plaintiff had not returned to her pre-MVA capacity at Toastmasters.
- [210] He also recounts that the plaintiff has been able to return to reading, and calls her ability "fine" without qualification.
- [211] Dr. Smith notes that the plaintiff's earlier emotional ability had improved so that she had no problems except when she grew fatigued.
- [212] The plaintiff also reported to Dr. Smith that her pain had mostly resolved.
- [213] The plaintiff told Dr. Smith that she believed her earlier problems with executive functioning were due to pain and did not trouble her when she had had a good night's sleep and awoke feeling refreshed.
- [214] Her photosensitivity was also reportedly no longer a problem.
- [215] Dr. Smith relates that the plaintiff's cognition had improved, with the qualification that she continued to have trouble during meetings where a number of different people spoke. Dr. Smith also comments that the plaintiff occasionally had problems keeping track of the topics they were discussing during the examination.
- [216] The plaintiff reported that she had begun driving more widely, and drove herself from Maple Ridge to her appointment with Dr. Smith on West Broadway in Vancouver. The plaintiff also reported that she helped with the driving to Edmonton when she and her husband visited their son.

- [217] Dr. Smith notes that the plaintiff's stamina for socializing remained decreased because of fatigue. I take this to mean the plaintiff no longer meets friends for dinner or hosts dinners because the plaintiff's own evidence is that she is still attending church and Toastmasters during the week.
- [218] The plaintiff told Dr. Smith that she could no longer manage Aquafit because of dizziness.
- [219] The plaintiff reported to Dr. Smith that she was continuing to perform shopping and cooking but could not do heavy chores around the house, and was using a hired housecleaner for those tasks.
- [220] Other than those heavy chores, the plaintiff did not report any limitations on other activities of daily living.
- [221] The plaintiff reported that she was uncertain if she had experienced changes in her personality. But her husband says she is more perseverative, which relates to the tendency to repeat a word or phrase after the original stimulus has ceased. I take this expression to mean that the plaintiff tends to repeat herself unnecessarily.
- [222] The plaintiff reported a significant loss of marital intimacy.
- [223] The plaintiff's loss of smell and therefore of taste remained a major loss that interfered with her enjoyment of eating.
- [224] The plaintiff characterized her main problem as chronic low-grade pain from sitting too long with resulting pain in her neck that caused headaches. These problems were caused by too many meetings and writing long reports, but the plaintiff was working with her physiotherapist and acupuncturist to assist with those issues.
- [225] Dr. Smith opines that recovery from brain injury occurs within the first two years following the injury. At the same time, Dr. Smith observes that if the plaintiff suffers from fatigue and pain, her cognitive abilities may be only temporarily impaired.
- [226] Referring to the Diagnostic and Statistical Manual of Mental Disorders ("DSM") axes, Dr. Smith observes that on Axis I, sub. 2, the plaintiff suffers from Cognitive Disorder NOS (Not Otherwise Specified, meaning her symptoms do not fall within any single diagnostic category) secondary to brain injury. Dr. Smith defers to Dr. Schmidt and presumably to the results of his neuropsychological test results in this regard.
- [227] With respect to Axis III, Dr. Smith diagnoses mild traumatic brain injury, whiplash type injuries to her neck and back, and cervicogenic headaches.
- [228] In connection with Axis IV, Dr. Smith indicates the plaintiff has psychosocial stressors in her life, which have meant she is no longer as socially active, no longer as able at Toastmasters and her libido is flat.

- [229] Turning to Axis V, Dr. Smith states that the plaintiff's Global Assessment of Functioning has risen to 65 from 60, two years earlier.
- [230] Dr. Smith recommends treatment with a neurostimulant, modafinil, to address her fatigue and energy issues, resumption of an exercise programme and treatment of her pain.
- [231] It is Dr. Smith's opinion that all of the plaintiff's problems are related to the MVA.
- [232] Dr. Smith notes that the plaintiff had "been assessed by a physiatrist". No physiatrist testified at trial and no such report appeared in evidence.
- [233] I found Dr. Smith's report to note a mixture of continuing problems and significant improvement in many of the formerly problematic symptoms suffered by the plaintiff. He also indicates that the brain injury's cognitive sequelae may be primarily related to pain and fatigue and thus temporary, a finding that somewhat echoes that of Dr. Schmidt.
- [234] It may be just an example of a doctor "hedging his bets", but I read in Dr. Smith's report some optimism that if the plaintiff's pain and fatigue can be resolved, her cognitive symptoms may also substantially resolve.
- [235] I could not help but notice Dr. Smith's somewhat argumentative and condescending tone on cross-examination.
- [236] Despite the obvious contradictions in his report, Dr. Smith refused to acknowledge that certain "truisms", such as an absolute two-year rule for improvement of brain injury symptoms after which deficits become permanent, is not universally reliable and depends certainly on such matters as the accuracy of the initial diagnosis.
- [237] Dr. Smith would not accept Dr. Schmidt's comment that the two-year rule is overly simplistic and can be misleading.
- [238] This seemed odd when Dr. Smith had already agreed that a course of neurostimulant might effect an improvement to the plaintiff's cognitive symptoms, which by his own definition had become permanent due to the lapse of time of more than two years since the MVA.

E. Dr. Dean Foti

- [239] Dr. Foti is a neurologist who was initially consulted by the defendant. He became the plaintiff's expert and was called for cross-examination on his report by the defendant.
- [240] Dr. Foti's expertise is in behavioural neurology, and neuropsychiatry, a subspecialty recognized in the U.S. and U.K., but not in Canada.
- [241] Dr. Foti has studied the cognitive and neurological aspects of psychiatric disease and their syndromes and management. His practice is largely focused on the diagnosis and management of dementias.

- [242] Dr. Foti was tendered as a medical doctor with a specialty in neurology and a subspecialty in behavioural neurology capable of giving opinion evidence on whether the plaintiff presents with any neurological injury and the causes and impacts of that injury.
- [243] His qualifications as a neurologist were, of course, not contested by the defendant, since Dr. Foti had been an expert for her and his report is addressed to the defendant.
- [244] Dr. Foti examined the plaintiff on July 5, 2013. His report is dated August 11, 2013.
- [245] Dr. Foti's report is perhaps the least optimistic of any of the doctors who examined the plaintiff.
- [246] Dr. Foti finds that the plaintiff suffers from prolonged cognitive symptoms that interfere with her simple attention, focus and concentration, and which are mediated by the pain and fatigue she suffers.
- [247] It is his view that as a result of the impact of the MVA, the plaintiff may have suffered a Diffuse Axonal Injury ("DAI").
- [248] Since such an injury often does not cause a brain bleed, imaging may not reveal objective signs of a DAI. Thus, Dr. Foti explains that injuries of this nature are diagnosed based on the kind of impact suffered and the symptoms presented.
- [249] The plaintiff did not suffer any loss of consciousness at the time of the MVA, but Dr. Foti points out that he has seen patients who have not lost consciousness demonstrate DAI on imaging, detected by the evidence of bleeding.
- [250] The plaintiff did not show any evidence of bleeding (hemosiderin) in her brain imaging.
- [251] Dr. Foti bases his finding of DAI (a unique finding among the experts) on the plaintiff's loss of smell, and on her difficulties with simple attention.
- [252] The loss of smell, Dr. Foti opines, results from the shearing of olfactory nerves connecting through the cribriform plate between the eyes to the olfactory bulb in the brain located in the frontal lobe. Essentially, the impact of the plaintiff's head on the inside frame of her car sheared the nerves in the cribriform plates at the top of the plaintiff's sinuses. These nerves communicate smell and taste to the brain. When such nerves are sheared, there may also be more diffuse damage at the level of the axons, with resulting interference with executive functions like attention.
- [253] Dr. Foti notes that the plaintiff's only symptomatic neurological signs were the loss of her sense of smell and a slight balance issue. With those exceptions, her neurological examination was normal.
- [254] I accept Dr. Foti's explanation for how the plaintiff came to lose her sense of smell. However, because of the lack of medical evidence to support the existence of a DAI, it is my view that Dr. Foti's DAI diagnosis is somewhat speculative.

- [255] While I agree there is evidence upon which the other medical experts found that the plaintiff suffered a mild traumatic brain injury in the MVA, I do not accept this unique opinion that the injury can definitively be stated to be a DAI.
- [256] Dr. Foti performed a limited physical examination and noted that the results were substantially normal, with the exception of a slight limitation to the range of motion in the plaintiff's neck as measured by left flexion (putting her ear to her shoulder). The plaintiff also had some tenderness over her left paraspinals and trapezius, but moved easily and did not display any pain behaviours.
- [257] Dr. Foti bases his report on his history and examination of the plaintiff, including the administration of what he calls his "bedside battery".
- [258] In addition to his own results and analysis, Dr. Foti relies on medical records of the plaintiff and other expert opinions.
- [259] In particular, Dr. Foti refers to Dr. Schmidt's neuropsychological test results, and observes that they are similar to his own. But I note that he relies only on the April 2010 report of Dr. Schmidt and not his June 2012 report. The latter report would have been available, but was not provided.
- [260] Neither was the later report of Dr. Smith reviewed by Dr. Foti. That report was dated June 2012 and should have been available to Dr. Foti.
- [261] As a result, Dr. Foti's survey of medical opinions concerning the plaintiff was incomplete. He was denied the opportunity to see that both Dr. Schmidt and Dr. Smith observed considerable improvements in the plaintiff's symptoms.
- [262] I also have some concern with respect to Dr. Foti's willingness to comment on the plaintiff's ability to take on more responsibility due to her ongoing problems with fatigue and pain.
- [263] Dr. Foti did qualify his views somewhat in cross-examination by agreeing he had only spent 2.5 hours with the plaintiff on one occasion, and he would in a sense defer to her thesis committee members. However, he also stated that the plaintiff could likely cope with more senior positions, but at the cost of her social and recreational time and perhaps the return of more serious symptoms.
- [264] The plaintiff is clearly a person who has sacrificed social and recreational time to satisfy her professional and academic goals for years. It seems somewhat presumptuous for a doctor with Dr. Foti's limited acquaintance with the plaintiff to suggest that a more senior position would possibly carry with it the loss of her social and recreational time. From her own evidence, the ability to juggle the pressure of work, family, friends and study is normal for this plaintiff (even after the MVA), and this ability seems to be a normal requirement for anyone who takes on a complex, senior position.

- [265] Whether taking such a position would result in the return of more severe symptoms for the plaintiff is an unknown. It is this issue which is within Dr. Foti's province.
- [266] Dr. Foti is not able to say with certainty whether more severe symptoms would return, but says it is a possibility.

F. Dr. Stephen Wiseman

- [267] Dr. Stephen Wiseman is a psychiatrist attached to the Complex Pain Centre at St. Paul's Hospital, where he is the physician lead and medical director.
- [268] Dr. Wiseman was presented by the defendant as an expert in psychiatry with the expertise to comment on the psychiatric and potential brain injury factors that may apply to the plaintiff in this case.
- [269] There was no issue with Dr. Wiseman's qualifications to give this opinion.
- [270] Dr. Wiseman saw the plaintiff on June 25, 2013. His report is dated July 2, 2013.
- [271] The opinion expressed by Dr. Wiseman in his report is comprehensive and clear.
- [272] It is Dr. Wiseman's view that the plaintiff suffered a mild traumatic brain injury and post-concussive symptoms. In his view, her brain injury is likely resolved but the remaining sequelae are more likely mediated by her ongoing pain and fatigue rather than being symptoms of a permanent and serious brain injury.
- [273] If the plaintiff were to have suffered from a serious brain injury, it is Dr. Wiseman's opinion that she would not have been able to resume functioning as soon as she did following her injury, and could not have gone on to finish and defend her dissertation.
- [274] Dr. Wiseman does not agree with Dr. Smith that the plaintiff suffered an adjustment disorder. Rather, he views the indicia of her difficulties at work and home as stressors resulting from her physical impairments and concussion rather than as symptoms of a psychiatric disorder as outlined in DSM. In his view, her initial functional impairments were caused by these stressors, not emotional symptoms.
- [275] It is Dr. Wiseman's view, similar to that of Dr. Schmidt, that the plaintiff's initial symptoms were more related to chronic musculo-skeletal pain than to a diagnosable psychiatric illness, which is what an adjustment disorder is.
- [276] Dr. Wiseman's opinion respecting the plaintiff's current condition is that she continues to suffer from ongoing pain that "mediates" her symptoms. I take this to mean that it forms the background and context for her ongoing difficulties with fatigue, cognitive fuzziness and headaches.

- [277] Counsel for the plaintiff pursued Dr. Wiseman aggressively in an attempt to demonstrate that his opinion that the plaintiff had learned something from her injury experience following the MVA was not appropriately included in an expert report. Counsel also tried to show that Dr. Wiseman had failed to clearly delineate between facts and assumptions.
- [278] In my view, Dr. Wiseman was at all times reasonable in his responses, and was honest about the very difficult distinction between facts and assumptions. As I see it, Dr. Wiseman's comment on the plaintiff having learned that she had overburdened herself before the accident was insightful, and reflected his ability to listen carefully to what the plaintiff had to say to him and to understand her.
- [279] I accept his report and his evidence.
- [280] Quite frankly, I am not satisfied that Dr. Wiseman's report diminishes the plaintiff's claim in any way. The plaintiff did suffer a mild traumatic brain injury that resolved. Resolved or not, she continues to suffer serious symptoms which have impacted her lifestyle and her plans for the future, whether overambitious or not, and whether caused by chronic pain and fatigue or mild traumatic brain injury.

The Issues

- [281] Because there is no liability issue in this case, I will organize the remainder of my reasons around causation and damages.

A. Causation

- [282] The plaintiff must satisfy the Court, on a balance of probabilities that, but for the defendant's negligent act, she would not have sustained her injury. The "but-for" test is the general test for factual causation. The negligent conduct must be substantially connected to the injury.
- [283] This test was recently affirmed and set out in *Clements v. Clements*, 2012 SCC 32 (at paras. 8-10):
- [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
- [9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.), at p. 1090, per Lord Bridge; *Snell v. Farrell*, [1990] 2 S.C.R. 311.

[101] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell and Athey v. Leonati*, [1996] 3 S.C.R. 458. See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe* (1945), 71 C.L.R. 637 (H.C.), at p. 649; *Bennett v. Minister of Community Welfare* (1992), 176 C.L.R. 408 (H.C.), at pp. 415-16; *Flounders v. Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.

[Emphasis in original.]

[284] The trial judge is to adopt a "robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss": *Clements* at para. 46. At the same time, causation need not be established with scientific precision: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328. Where causation is established by inference only, it is open to the defendant to argue or call evidence that the injury was inevitable: *Clements* at para. 11.

[285] The plaintiff must also establish legal causation, which arises once factual causation is proved. Legal causation is examined at the damages stage of the analysis. The plaintiff's injury must be a reasonably foreseeable consequence of the defendant's negligence. Reasonableness is assessed by examining whether it was foreseeable that a person of ordinary fortitude would suffer the injury at issue: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paras. 11, 18.

[286] It is a basic principle of damages in tort law that the defendant need not put the plaintiff in a better position than her original position and should not compensate the plaintiff for any damages she would have suffered anyway. This principle is referred to as the crumbling skull rule. At the same time, the defendant must take her victim as she finds her, known as the thin skull rule: *Blackwater v. Plint*, 2005 SCC 58 at paras. 78 - 80.

[287] I conclude that the way in which the plaintiff was hit from behind at speed while her head was turned to the left to watch for oncoming traffic contributed to the extent of her injuries.

[288] There is no doubt among the medical experts that the plaintiff suffered a mild traumatic brain injury (a concussion) as a result of the impact. The impact would not have taken place had the defendant not failed to stop in time. The defendant admits liability for that impact.

[289] In this case, as a result of reviewing the extensive medical reports which I have summarized above, the plaintiff's evidence, and the evidence of the other lay witnesses including Mr. Lane and Douglas Lane, I find the following:

- [290] I am satisfied that the plaintiff has proved that the defendant's negligence caused her to suffer the following injuries: mild interference with her memory and attention; a reduced ability to synthesize ideas quickly; cognitive fatigue related to her post-concussion syndrome; a reduced sense of smell and taste; residual pain in her neck, shoulder and back with resulting occasional headaches; and occasional sciatic and sacroiliac pain.
- [291] I find that these symptoms continued to the date of trial. While Dr. Lau opined that the plaintiff had yet to reach maximal recovery, the fact remains that the plaintiff suffers off and on with many of these symptoms. Her evidence, which I accept, was that she has good days and bad days.
- [292] The plaintiff was in generally good health before the MVA. Of course she was ageing as we are all, but she was able to accomplish a substantial number of tasks in the ordinary day. Post-MVA, she is not the same person she was.
- [293] There is no explanation for the changes the plaintiff has suffered except the MVA.
- [294] The blow to the plaintiff's head was not sufficient to fracture her skull. Nevertheless, to this day she has a noticeable bump where the impact of the defendant's car caused her to strike the frame around the window.

B. Damages

1. Non-pecuniary damages

- [295] Non-pecuniary damages compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. This type of compensation must be fair to all parties. This is done in part by comparing the circumstances at issue with other cases of similar circumstances. A non-exhaustive list of relevant factors for the court to consider when determining an appropriate award for non-pecuniary loss was developed by Madam Justice Kirkpatrick in *Stapley v. Hejslet*, 2006 BCCA 34 (at para. 46):
- [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris* (2004), 237 D.L.R. (4th) 193] that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[296] However, a non-pecuniary damages award will ultimately turn on the particular circumstances of the case.

[297] The plaintiff was 54 at the time of the MVA, a factor which means that it was likely she was more vulnerable to injury than a younger person would be.

[298] The injury itself was serious, and caused the plaintiff to face a future that is different from what she had planned. She suffered badly for the first six months and has had ongoing pain and fatigue, which she lives with to the present. Whether it will improve substantially is difficult to say. It has impacted her lifestyle since she lacks the energy to participate in the number of activities she took part in before the MVA.

[299] Following the MVA, the plaintiff was fearful of driving. Even driving with her husband past the location of the MVA initially caused her some upset. Fortunately, this is no longer a problem. She persevered and began to drive again once her doctor had cleared her to do so.

[300] The plaintiff is not disabled, but she has changed. She is no longer able to work in her garden and she cannot even smell her flowers as a result of her loss of the sense of smell. This of course impacts on her ability to enjoy food.

[301] The plaintiff has seen a diminution of her success at Toastmasters. Josephine Priestley's evidence was that the plaintiff was a less effective speaker after the MVA. While the plaintiff has moved up in the administration of her Toastmasters group and division, her success as a speaker is not what it was, and this is a source of disappointment to her. To her credit, she continues to strive to complete her qualifications in the club, but now she must use notes to make her speeches and she has lost some of the spontaneity and wit that made her talks so notable in the past.

[302] Certainly in the time period immediately following the MVA, for approximately a three-month period, she had vision disturbances, interrupted sleep, continuous headaches, confusion and word-finding difficulties. All of these symptoms must have been worrisome to her.

[303] Mr. Lane and Douglas Lane point to her increased irritability and ongoing memory issues as having changed their lives with her.

[304] She is not able to sleep in the marital bed because movement causes her pain. Her ability to be intimate with her husband is reduced.

- [305] Both Donna and Scott Goodman noticed the difficulties she was dealing with when they visited her during the first year following the MVA. In their views, she was greatly changed from the person they had known before the MVA, but this was during the acute phase of her injuries.
- [306] All of the medical experts state that the plaintiff tends to underreport her difficulties because she wants to get on with her life and minimizing her problems makes her able to better control them. That does not mean she does not suffer.
- [307] The plaintiff remains functionally impaired to some degree as a result of her injuries, and while she has developed adaptive strategies like talking to herself when trying to solve a problem or remember a sequence, she must still confront the losses she has incurred as a result of the MVA on a daily basis.
- [308] Both counsel provided a number of authorities on the appropriate range of non-pecuniary damages.
- [309] The plaintiff's books of authorities contain 48 cases, some of which deal with evidentiary issues but the bulk of which deal with non-pecuniary damages.
- [310] I accept that no two cases are alike when considering an amount of non-pecuniary damages, but that looking at the facts and amounts awarded can provide general guidance.
- [311] I have read the cases on non-pecuniary damages referred to in the plaintiff's closing argument. I will provide a brief summary of those cases here since I assume from the fact that counsel raised them in her final argument that she considers them the most helpful and pertinent.
- [312] The plaintiff begins with the case of *Sirna v. Smolinski*, 2007 BCSC 967, a decision of Mr. Justice Macaulay. The case provides a helpful discussion of the consequences of traumatic brain injury.
- [313] Mr. Justice Macaulay awarded \$200,000 in non-pecuniary damages to the plaintiff, who had suffered serious injuries when she was hit in a crosswalk. The impact threw Ms. Sirna up onto the hood of the oncoming car, where she hit her head on the windshield, and then fell onto the road where she hit her head again.
- [314] The trial judge found Ms. Sirna had lost consciousness.
- [315] Ms. Sirna suffered more severe injuries than the plaintiff in this case, including what one expert defined as traumatic brain injury in the "complicated mild" category, with damage to her pre-frontal cortex and continuing cognitive difficulties, depression and extensive soft tissue injuries.
- [316] Ms. Sirna was much younger than the plaintiff in this case and thus would suffer loss for a longer time.

- [317] Ms. Sirna was not able to continue with her planned career as a teacher or as a dental hygienist. She also lost her long-term relationship as a consequence of her injuries.
- [318] Here, the plaintiff has been able to maintain her career. I accept that she had ambitions to apply for more senior positions in special education or to teach university, and she feels she is no longer able to act on that ambition. No doubt she is disappointed by that prospect.
- [319] However, I do not find Sirna to be helpful in looking for a comparable case on which to base an award of non-pecuniary damages.
- [320] Next, the plaintiff cites *Young v. Anderson*, 2008 BCSC 1306. In that case, Madam Justice Boyd awarded \$200,000 non-pecuniary damages. But Boyd J. makes it clear throughout her judgment, that although she found the plaintiff had suffered a mild traumatic brain injury as a result of being rear-ended, he also had an asymptomatic underlying brain pathology that contributed to the serious, ongoing cognitive symptoms he had suffered and continued to suffer. In addition to those progressive cognitive difficulties, Mr. Young had a severe depression leading to suicidal ideation and personality changes. He also suffered from extreme and intrusive tinnitus resulting in an inability to participate in social conversations, chronic pain and headaches.
- [321] The initial injuries suffered by Mr. Young may well have been somewhat akin to those suffered by the plaintiff in this case, but the trial judge found that the accident had triggered the onset of symptoms of a deterioration of his brain.
- [322] Mr. Young and his wife were no longer able to maintain their sexual or marital relationship. He had had great difficulty in finding and maintaining employment, and would be unlikely to be able to work again in his creative industry. His group of friends had dwindled.
- [323] In the circumstances of that case, an award of non-pecuniary damages of \$200,000 seems very appropriate.
- [324] Once again, I do not find this case to be of particular assistance in determining the non-pecuniary damages appropriate to this case. The plaintiff here does not find herself in such dire straits as the plaintiff in *Young*.
- [325] *Roussin v. Bouzenad*, 2005 BCSC 1719, (Mr. Justice Kelleher) is the next case cited by the plaintiff. Again, Ms. Roussin was more seriously injured than the plaintiff in this case. Ms. Roussin suffered a fractured skull, brain injury, facial lacerations resulting in scarring, a fractured left wrist that necessitated surgery, and soft tissue injuries to her hip, back and neck.
- [326] As a result of the accident, Ms. Roussin lost the ability to continue as a television journalist, her chosen profession. The accident and its consequences strained Ms. Roussin's relationship with her common-law husband.

- [327] Ms. Roussin had ongoing headaches, cognitive difficulties, sleeplessness and fatigue. But her biggest single loss concerned her employability at the level she had previously held in a field she enjoyed.
- [328] She, too, was awarded non-pecuniary damages of \$200,000. Because Ms. Roussin's situation was more severe than that of the plaintiff in this case, I do not find this case particularly instructive.
- [329] In *Scoates v. Dermott*, 2012 BCSC 485, the plaintiff was involved in four accidents. The first, in which he was hit by a left-turning car while riding his motorcycle, was the most serious. Sometime after the accident, the plaintiff's continuing headaches and cognitive problems led to the diagnosis of a mild traumatic brain injury.
- [330] In a 2009 assessment following the other three accidents, a specialist in physical medicine and rehabilitation summarized Mr. Scoates's condition in this way (at para. 79):
- [Mr.] Scoates sustained multiple orthopaedic injuries to his neck, back, pelvis and right wrist as well as severe soft tissue injuries to his neck, back and both knees, and probably a mild traumatic brain injury in the motor vehicle accident of April 26, 2004. He required surgical treatment of his pelvic and wrist injuries, and has subsequently required two discectomies at L4-5 because of a recurrent disc protrusion, undoubtedly related to his injury in the April 2004 accident. He has continued to experience neck and back pain, headaches, and pelvic pain as a result of his injuries. He also has ongoing cognitive, emotional, and behavioural difficulties and a change in his personality, resulting from a combination of brain injury and his emotional response to chronic pain and the loss of his usual physical abilities and activities. He has had appropriate rehabilitation for his injuries. ... [I]t is likely that Mr. Scoates will continue to experience all of his current symptoms and limitations over the long term. His injuries have interfered with his work, home and leisure activities.
- [331] The Scoates case involved both more serious injuries and the permanent loss of a career the plaintiff lived for.
- [332] Mr. Justice N. Smith awarded the plaintiff \$250,000 for non-pecuniary damages for the four accidents.
- [333] In *Courdin v. Meyers*, 2005 BCCA 91, the Court of Appeal reversed a jury's award of \$1,000,000 for non-pecuniary damages. I note that the parties had substituted that amount with an award of \$292,823, reflecting the rough upper limit of such awards. The Court of Appeal awarded of \$200,000 in non-pecuniary damages.
- [334] In that case, Ms. Courdin's vehicle was struck from the rear in a three-car collision. After showing some improvement, her symptoms worsened, resulting in a diagnosis of fibromyalgia secondary to the trauma the plaintiff suffered in the accident.

- [335] Ms. Courdin and her husband separated two months after the accident. The plaintiff related the separation to her inability to contribute to the running of their lawn maintenance business. She said she had intended to work to at least the age 65, but was only able to work three to four hours per day as a landscaper after the accident.
- [336] The plaintiff in that case was no longer able to participate in the tennis, racquetball, cross-country skiing, baseball, skating, badminton, camping, hiking and canoeing that she actively participated in prior to the accident.
- [337] Like the other cases cited by the plaintiff, Ms. Courdin's situation was much more severe than that of the plaintiff in this case. In addition to losing the substantial part of her livelihood and her husband, she suffered fibromyalgia rather than a mild traumatic brain injury. I also note that the plaintiff is able to continue with some of her pre-accident activities, including Toastmasters and church groups, although she is less able than she once was at Toastmasters.
- [338] I find the cases cited by the defendant deal with circumstances more analogous to those of the plaintiff in this case.
- [339] In *Drodge v. Kozak*, 2011 BCSC 1316, the plaintiff was found to have some degree of cognitive impairment since the accident, including problems with concentration, memory, and difficulties with directions and simple arithmetic. He also had a pre-existing condition of low back pain that was aggravated by the accident, which resulted in his occasional use of prescribed narcotic medications. Mr. Drodge also suffered from severe headaches and cognitive difficulties, although they fell short of a diagnosis of a concussion or post-concussive syndrome. Mr. Drodge found it difficult to drive, and his intimate relationship with his wife was adversely affected. Mr. Drodge had lost the ability to seize upon all job opportunities that might otherwise have been available to him. He was awarded \$85,000 in non-pecuniary damages.
- [340] In that case, it appears to me that the finding of the pre-existing back condition led Dardi J. to award the amount of non-pecuniary damages she did. I also note that Mr. Drodge did not suffer from a mild traumatic brain injury or post-concussive syndrome. These factors distinguish the case from this one. The plaintiff in this case did not exhibit any pre-existing condition or "crumbling skull".
- [341] The other case cited by the defendant is *Moukhine v. Collins*, 2012 BCSC 118, a decision of Madam Justice Watchuk.
- [342] Madam Justice Watchuk awarded \$90,000 in non-pecuniary damages to a plaintiff with balance, nausea, headaches and dizziness that reduced his capacity to work as a computer programmer, a job he loved, to 2.25 to 3.25 hours per day. He also exhibited personality changes. His issues were caused by a condition that was likely to be permanent.

- [343] While these latter two cases are instructive, each case is to be assessed on its particular facts.
- [344] I understand the ways in which the plaintiff's injuries in this case have interfered with her enjoyment of life. Notably, she must almost constantly deal with low-grade pain and resulting fatigue that degrades her cognitive abilities and quality of life.
- [345] However, I also find that condition may improve slightly over time, either on its own or with treatment such as a neurostimulant, as suggested by Dr. Smith. Dr. Wiseman likewise agreed that this treatment could be beneficial to the plaintiff. This could open some activities to the plaintiff that she previously did not believe she could perform because of fatigue and lack of energy.
- [346] Even so, I find that it is highly unlikely her condition will ever completely resolve.
- [347] The loss of her sense of smell and taste is another serious loss that has removed an important aspect of pleasure in the plaintiff's life. She has recovered a consciousness of smell but not to the extent she is able to identify the smell.
- [348] In the circumstances of this case, I award non-pecuniary damages of \$110,000.

2. Pecuniary losses

- [349] With respect to pecuniary losses, the defendant supported its position with the evidence of Dr. Carter, Dr. Richmond and Dr. Brayne. That evidence primarily relates to the plaintiff's claim for loss of future earning capacity.
- [350] In addition to the lay witness evidence of Ms. Teyema, Ms. Dean, and Ms. Stewart, the plaintiff relies on the evidence of two expert witnesses with respect to pecuniary losses.
- [351] Ms. Michelle Hodson is an occupational therapist and certified functional capacity evaluator who has been conducting functional capacity evaluations since 2005. She conducted a functional capacity evaluation of the plaintiff, and prepared a report dated July 22, 2013 addressing the plaintiff's functional abilities and her future care needs.
- [352] The plaintiff also relied on the evidence of Mr. Robert Carson, a labour economist. Mr. Carson provided two reports. His first report dated July 25, 2013 relates to the cost of future care. His second report dated July 29, 2013 sets out his opinion with respect to wage loss.

a. Past wage loss

- [353] The parties are close to agreeing on past income loss, with the exception that the plaintiff's claim for past wage loss does not take into account income tax liability.
- [354] I agree with the defendant that the plaintiff is only entitled to recover her net past wage loss. The defendant suggests a nominal deduction of 10% for a net amount of \$18,901.14. I award that amount.

- [355] The defendant also agrees that there should be no deduction from the short term disability benefits, known as Salary Indemnity Plan Benefits ("SIP") received by the plaintiff while she worked on a graduated return to work from June 2009 to April 2010 because this benefit is funded by deductions from the plaintiff's salary. (See *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359.)
- [356] I do not have clear evidence on the actual amount the plaintiff received in SIP benefits even after considering Ms. Teyema's evidence. Ms. Teyema is the Manager of Payroll and Benefits for the plaintiff's employer. As best I understand Ms. Teyema's evidence, it appears the plaintiff is entitled to the return of \$19,144.53.
- [357] I also understand that the plaintiff is likewise entitled to recover the loss of her stipend over the period of her absence from work in the amount of \$1,444.84, and her two percent premium of \$411.90. Together, the SIP, stipend and lost premium amount to \$21,001.27.
- [358] In the circumstances of this case, the plaintiff's loss of sick pay is best understood as the loss of a contingent future benefit: *Bjarnason v. Parks*, 2009 BCSC 48. To obtain value from those sick days, the plaintiff must actually use them. She cannot bank them and collect them on her retirement, and they do not vest in the plaintiff.
- [359] As the defendant describes it, there are two contingencies at issue: The first contingency is that the lost benefits may never be used or not all used. The second is that if the lost benefits are to be compensated for, there must be an accounting for the fact that those benefits will be paid for now but if used, will be used in the future.
- [360] Since her return to work, the plaintiff has continued to generate sick leave credit on the basis of 1.5 days per month to a total of 15 days per year. At the time of trial, she had accumulated 63 days. She has not used any of the sick leave that has accumulated since her return to work.
- [361] As well, and as we hope, the plaintiff may never need or use the sick leave entitlement for which the defendant must compensate her.
- [362] Ms. Teyema's evidence shows that the plaintiff took a total of 68.5 sick days as a result of the MVA. These days have a gross value of \$28,467.92 (68.5 x \$415.59).
- [363] I accept the defendant's argument on the logic of taking a deduction from this unique benefit. I agree that the loss of sick leave must be subject to a deduction.
- [364] In valuing the loss of these sick days, their value as a contingent future benefit must result in some nominal deduction to recognize that they may never or only partially be used.
- [365] In my view, the fair way of calculating that deduction is to look to the newly proclaimed discount rate of 2% per annum for each year the plaintiff continues to work. If she works to age 65, the total discount would be 14%. As a rough approximation of the appropriate deduction, valuing the lost sick leave as suggested by the defendant leaves a total of \$25,000.

b. Special damages

- [366] The plaintiff underwent a number of treatments which she paid for herself. These included treatments for physiotherapy, kinesiology, massage, acupuncture and IMS.
- [367] I was unable to locate where the plaintiff specified the amount she claims for these services. Based on the total amount of special damages claimed less the amounts claimed for other heads of special damage, I infer that the plaintiff claims \$7,630.45 for therapy sessions.
- [368] The defendant claims that the gap in physiotherapy ("physio") treatment between May 2010 and January 2012 is indicative of the plaintiff's recovery from her injuries, and claims that there should therefore be no payment for physiotherapy after May 2010.
- [369] I cannot agree with that argument and do not accept it.
- [370] The period during which the plaintiff did not attend for physio corresponds to the time she was working intensively on her dissertation and returning to full time work. It would have been difficult to fit in physio appointments.
- [371] The defendant benefited from both the plaintiff's completion of her dissertation and her return to full time work.
- [372] I accept that the plaintiff was also finding money a bit short. Since her funding for physio had ended, she decided she would try to do without physio to see if she could manage on her own.
- [373] The plaintiff had benefited in the past from the ministrations of her physiotherapist, Mr. Moffitt, and after her symptoms and pain had recurred, she went back to him after the gap in treatment. The treatments she received from him included physio, kinesiology, massage, acupuncture and IMS.
- [374] It is my view that these treatments were both reasonable and necessary, and helped to keep the plaintiff working full-time at her job. All of the physio charges she incurred to the date of trial will be reimbursed to the plaintiff.
- [375] It is worthy of note that her attending physicians recommended continuing physical therapy.
- [376] I therefore allow the full amount of \$7,630.45 for the plaintiff's therapy sessions.
- [377] The use of orthotics at \$400.00 (recommended by Mr. Moffitt) does not appear to have any medical justification. Had there been evidence that their use assisted the plaintiff with her balance issues, I would have awarded them. Unfortunately, I do not have such evidence.

- [378] In my view, the housekeeping expenses incurred by the plaintiff were associated with her pain and injury, but also related to her lack of ability to complete her dissertation while keeping house. It is also clear that there was also a benefit to Mr. Lane and Douglas Lane. It seems to me to be reasonable that the plaintiff would have needed some help with her 5,000 square foot house in any event so that she was freed up to work on her dissertation and study for her defense.
- [379] I am aware that Ms. Hodson has stated that cleaning help is available at \$15 per hour. I find that figure to be unreasonably low, and accept the figure of \$25 per hour as reasonable.
- [380] I would deduct 5% of the \$4,275 housekeeping amount claimed to recognize that the plaintiff would have needed some help with housework in any event of the MVA. This would result in an award of \$4,061.00 (rounded off).
- [381] The plaintiff claims tuition costs of \$12,294.86 [sic] for 6 semesters at \$1,891.60 per semester (which should be \$11,349.60). These fees cover tuition for all of 2010 and 2011.
- [382] There can be no doubt that the plaintiff was delayed in the completion of her dissertation. Only the duration of the delay is at issue.
- [383] When the plaintiff was involved in the MVA, (January 2009), she had approximately 20% of her thesis left to do, and I accept that some of this remaining work involved time and effort to complete.
- [384] I also note that at that point, her committee had not yet been selected. The plaintiff's dissertation was not sufficiently advanced to take to a committee for review and feedback.
- [385] In my view, it would have been unlikely that the plaintiff could have assembled the committee, completed her draft dissertation to the stage necessary for comment by the committee, met with the committee, and prepared for and completed her defense in spring 2009 but for the MVA.
- [386] As I see it, the plaintiff would have been required to pay tuition for two semesters of 2009 in any event of the MVA. This would have allowed her to complete her work by December 2009, which I accept to be the most plausible scenario. The plaintiff is therefore entitled to be reimbursed for the tuition she paid for the remaining four semesters to compensate her for the additional tuition she paid due to the delay caused by her injuries from the MVA. This amounts to \$7,566.40.
- [387] The plaintiff also claims for a new bed and mattress. These items may have been purchased in an effort to help with the plaintiff's discomfort. However, the items were not medically recommended and the evidence was that the Lanes had a satisfactory older bed. I do not allow the expense for the bed of \$1,351.84.
- [388] The plaintiff claims for the cost of a wardrobe she bought when she lost a substantial amount of weight following the MVA. The amount claimed is \$6,302.00.

[389] There was no medical evidence of the plaintiff's weight before the MVA, although the plaintiff agreed she had gained weight during the time she was studying and preparing her dissertation. Neither was there any evidence of her weight following the weight loss or of her weight after she had regained weight. I am also lacking evidence of the duration of the weight loss or of the medical reason for it and its connection to the injuries the plaintiff sustained in the MVA.

[390] I must also assume the plaintiff could have realized some money from the resale of this wardrobe.

[391] Given the paucity of evidence on this item of special damages, I cannot allow it.

[392] The plaintiff also claims for a Wii console (to assist with exercise) and iPod touch for its GPS. Both of these items were recommended by Ms. Hodson. However, while their cost is negligible, their medical justification is questionable. The rationale for needing the iPod touch is that it has a GPS, but as pointed out by the defendant, the plaintiff has a GPS in her car.

[393] I do not allow the \$400 the plaintiff claims for the Wii console and iPod touch.

[394] Special costs will be allowed except as I have indicated above. The total to which the plaintiff is entitled is \$19,257.81.

c. Cost of future care

[395] The plaintiff claims \$200,000 for cost of future care.

[396] I appreciate that the cost of future care award is not a precise accounting exercise to determine the strict minimum required by the plaintiff: *Strachan v. Reynolds et al*, 2006 BCSC 362 at para. 83.

[397] According to *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, an award for the cost of future care must be medically justified and reasonable, using an objective test: what is reasonably necessary to preserve the plaintiff's health. While there must be a medical justification for the claims, medical necessity is too stringent a test.

[398] I am also guided by the Court of Appeal's judgment in *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135, in which Madam Justice Newbury states for the court that "common sense should inform claims under this head, however much they [assistive items] may be recommended by experts in the field" (at para. 13).

[399] Ms. Hodson's extensive report sets out her analysis of the plaintiff's future needs for care. I found Ms. Hodson's report to overreach on many of the items claimed under this head. To include the value of "one long-handled mop at \$3.95 to be replaced every five years to age 70" seems to me to misconceive the nature of damages appropriate under this head.

- [400] In Penner, the Court of Appeal for British Columbia quoted with approval (at para. 13) from Travis v. Kwon, 2009 BCSC 63, where Mr. Justice Johnston stated as follows (at paras. 109-111):
- [109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under Andrews v. Grand & Toy, Alberta, Ltd. [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577.
- [110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.
- [111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-[handled] duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.
- [401] In Penner, Newbury J. disallowed any award for "cold packs, heating pads, bath mats or safety bars, as I expect these are part of most households in any event" (at para. 14).
- [402] On the basis of the authority in Penner, adjuring me to exercise my common sense, I will not allow the plaintiff's claim for assistive devices when she shows no interest in taking up housework any time soon. I will also not consider the claim for ice packs, heating pads and safety bars.
- [403] The defendant disputes a number of the items listed by Ms. Hodson. For the most part, I agree with her position.
- [404] I will first set out the items I will not allow:
- i. With respect to the claim for "memory/cognitive aids", I agree with the defendant that the iPod Touch, case, task timer and separate GPS are not reasonable or necessary to promote the plaintiff's recovery or preserve her health.
 - ii. I will not allow an amount for "painting the outside of the house". The last time the plaintiff participated in this exercise was some time before the MVA. I do not accept that she would have stained or painted the exterior at this point in her life.
 - iii. The same is true for "painting the interior of the house". I will not allow an amount for this cost.
 - iv. The plaintiff also claims for "household /environment /management", which relates to caring for garden plots and upkeep of greenhouses. I do not allow these items as being medically necessary to preserve the plaintiff's health. It may be a service required that she can no longer perform, and as such will be awarded under "Outdoor Seasonal Services".

- v. Under "positional aids", the power adjustable bed is not reasonable, necessary or medically justifiable. There is no medical recommendation for it and no indication from any caregiver that it would ease the plaintiff's pain.
- vi. The "occupational therapy service - PGAP" is clearly inapplicable to this plaintiff and is an example of Ms. Hodson's overreaching. This programme is designed to assist a plaintiff to return to work. The plaintiff has been back at work full time since April 2010.
- vii. "Occupational therapy services - prolotherapy" was suggested by Dr. Lau if other efforts to assist the plaintiff were unsuccessful. Dr. Fuller was unequivocal that he had tried prolotherapy on patients in the past without success, and would not recommend it for this plaintiff. There will be no award for this item.
- viii. The plaintiff's claim for "household/environment/management - care of fruit trees" is duplicative. The plaintiff is awarded an amount for outdoor seasonal services, which would subsume any pruning services that the plaintiff can no longer perform.

[405] The remaining claims are reasonable, necessary and medically justified.

[406] Therefore, the plaintiff will be awarded the amount claimed for "rehabilitation equipment". The plaintiff benefits from walking regularly, and in our rainy winter climate, she will be able to use her treadmill when she cannot walk outside. The overall amount for treadmills should be reduced as I see this item as being amenable to repair rather than requiring such frequent replacement.

[407] Since the plaintiff has given evidence she finds pain relief from the use of the ObusForme neck support in the car, she will receive the amount claimed for it.

[408] The amount the plaintiff claims for kinesiology is comparable to the cost of a personal trainer (which she does not claim), but has the advantage of providing the plaintiff with continuing advice with respect to the kind and form of exercises the plaintiff can and should be performing. It is my view this cost is reasonable and justified and will help to keep the plaintiff mobile and working full time. However, as the plaintiff ages, it is likely she will use this service on a declining basis. Therefore, she will be entitled to attend kinesiology sessions once a month for five years (to age 62) and once every two months thereafter (to age 70).

[409] The same is true of physiotherapy. The plaintiff gave evidence that physio keeps her mobile and helps to control her symptoms. She will be entitled to attend physio twice a month for five years and once a month thereafter to age 70.

[410] The amount the plaintiff claims for medications seems to me to be reasonable and necessary to control the plaintiff's symptoms. It is a cost which will likely be incurred for some years to come as a result of the plaintiff's chronic pain.

[411] I am foreclosed from making an award for homemaking under this head, although it appears to me to be a reasonable item to claim. However, as indicated by the Court of Appeal in *Westbroek v. Brizuela*, 2014 BCCA 48, homemaking costs are awarded for loss of capacity and are distinct from possible future cost of care claims.

[412] Madam Justice Garson (for the Court) stated in that case that (at para. 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 other 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 reasonable expected to be rendered to the plaintiff rather than by the plaintiff. [Emphasis in original.]

[413] In the result, I have substantially discounted the amount claimed for the cost of future care.

[414] In recognition of the fact that this exercise is not a precise accounting but is rather an attempt to provide an amount which will assist the plaintiff to live the life she would have lived but for the MVA (insofar as damages can compensate for her losses), I will award a global amount.

[415] I award the plaintiff \$70,000 for the cost of future care calculated to age 70.

d. In-trust claims

[416] Immediately following the MVA, Mr. Lane stayed home with the plaintiff for three days to assist her.

[417] I do not have evidence of the value of the loss of these days, nor do I have any indication of whether or not his lost salary was covered by his employer.

[418] In principle, I would be inclined to award some amount to him for that loss but I have no evidence on which to base it. I have no idea if he is out-of-pocket as a result of staying home with the plaintiff.

[419] However, it is fair to say that had he been unable to stay at home with the plaintiff, it is likely she would have needed an attendant of some kind to be certain she was coping.

[420] I will award an amount for this service, which does rise above the ordinary care and devotion he would offer to his wife, the plaintiff.

[421] Mr. Lane also gave evidence that he took over many of the tasks the plaintiff did in the house and the yard after the MVA. The housework he did until he was no longer able to carry on with it was to replace what the plaintiff said was 90% of the house and garden work she had formerly been doing.

- [422] The bulk of Mr. Lane's claim appears to relate to future costs associated with the fact that the plaintiff prefers that he drive whenever it is possible for him to do so.
- [423] However, the plaintiff is able to drive and has been ever since her doctor cleared her to drive two weeks after the MVA.
- [424] I have no doubt that even after she returned to driving, the plaintiff preferred to have her husband accompany her to doctors' appointments, and take over the task of driving when he could. But I have some doubt that in the absence of Mr. Lane's help with driving, it would have been necessary for the plaintiff to hire help.
- [425] I am prepared to award a small amount to compensate for the driving Mr. Lane did to assist the plaintiff for a short time after the MVA. However, there is no basis in law to award continuing damages as part of an in-trust claim for a service the plaintiff is able to perform for herself.
- [426] It is somewhat difficult to put a monetary value on the time and work Mr. Lane gave to the plaintiff. I am limited by the notion of what would be reasonable in the circumstances. Further, the maximum value of the services rendered is the cost of obtaining the services outside the family. These should be services over and above what would be expected: *Farand v. Seidel*, 2013 BCSC 323 at paras. 99-100, citing *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, (aff'd, 2004 BCCA 124). I have used this general value in coming to my conclusion.
- [427] I find the evidence to support Mr. Lane's continuing claim somewhat vague and I cannot find that it would go beyond what would be expected of a spouse as the case law requires: *Brennan v. Singh*, [1999] B.C.J. No. 520, 1999 CarswellBC 484 (S.C.).
- [428] Once again, the process of determining an in-trust award is not a mathematical exercise, it is an assessment.
- [429] I award the sum of \$5,000 for the services Mr. Lane has rendered to the plaintiff, of which \$1,000 represents a fair estimate for his ongoing help since the plaintiff is now reasonably self-sufficient.
- e. Loss of housekeeping capacity
- [430] It is clear that the plaintiff's ability to perform housekeeping to the same extent that she did before the MVA has been reduced.
- [431] However, the evidence is not clear on what she is truly able to do in the way of housework.
- [432] The plaintiff is not catastrophically injured. She has indicated that she is "comfortable" with giving up housework. She has also claimed both for assistive devices such as the maligned long-handled mop while saying she will not do housework in the future (although she "might" wipe out the tub from time to time).

- [433] In her report on cost of future care, Ms. Hodson listed a number of assistive devices to allow the plaintiff to do some housework, and stated that the plaintiff was able to do housework.
- [434] The plaintiff's physical issues would not keep her from being able to do at least some light housekeeping tasks, although it appears that she would suffer a degree of fatigue that could interfere with her ability to carry on working.
- [435] I do not see the plaintiff's loss of housekeeping ability as one that should result in a substantial award. However, I also note that the plaintiff has lost her former apparently boundless ability to work day and night and look after her household as well.
- [436] It is reasonable for the plaintiff to claim for the loss of a capital asset as measured by an amount for homemaking. However, the amount should be provided for a limited number of years.
- [437] This is so because the plaintiff is now 58-years-old, and would likely have required more assistance to manage her housework as she aged and carried on with her full-time job and other activities. I would award an amount for lost housekeeping capacity of \$3,000 per year for the next seven years and reduce it thereafter from age 65 to 70 at a reduction of 20% a year to acknowledge the increasing likelihood that at age 70 the plaintiff would require assistance to maintain her large home in any event of her injuries.
- [438] The amount claimed for seasonal homemaking of \$177.30 per year (to age 70) is agreed and for convenience, I have removed it and the following item from cost of future care and have considered it under this head.
- [439] The amount claimed for outdoor seasonal services is agreed at \$1,085.00 per year.
- [440] I assess the value of the plaintiff's reduced housekeeping capacity, which I am required to treat conservatively, at \$45,000.
- f. Loss of capacity
- [441] There is general agreement on the principles that govern awards made under this head. Mr. Justice Walker made a useful summary in *Ruscheinski v. Biln*, 2011 BCSC 1263 (at paras. 114-116):
- [114] For an award under this head of damages to be made, Ms. Ruscheinski must demonstrate a "substantial possibility that lost capacity will result in pecuniary loss": *Perren v. Lalari*, 2010 BCCA 140 . . . *Steward v. Berezan*, 2007 BCCA 150 . . . A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Perren* at para. 30.
- [115] If the plaintiff discharges the burden of proof, then he or she may prove quantification of that loss by an earnings approach or by a capital asset approach: *Perren* at para. 32; . . .

[116] Garson J.A. wrote in *Perren* at para. 11 that where the loss cannot be measured in a pecuniary way, "the correct approach [is] to consider the factors described by Finch J., as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. In *Brown*, he said at para. 8:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include 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.

[442] In *Perren*, Madam Justice Garson distinguishes between the two approaches to the assessment of future loss of earning capacity. She states that where there is a demonstrated pecuniary loss which can be quantified, although it is still a loss of capacity which is being quantified, it is a measure of the real possibility of loss (at para. 12).

[443] She goes on to say that where a loss of future capacity is proven, but it is not measurable in a pecuniary way, then the second approach, the loss of a capital asset, is an appropriate way to quantify such a loss (at para. 12).

[444] Madam Justice Garson goes on to set out the principles governing the determination and measure of an entitlement of an award for loss of income earning capacity at para. 32:

[32] A plaintiff must always prove . . . that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach . . . or a capital asset approach The former approach will be more useful when the loss is more easily measurable The latter approach will be more useful when the loss is not as easily measurable A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her employment. . . . [Emphasis in original.]

[445] Once causation is proven on the balance of probabilities, future or hypothetical events can be factored into the calculation of damages according to degrees of probability: *Atthey v. Leonati*, [1996] 3 S.C.R. 458 at 475.

[446] The plaintiff's injuries are enduring. She remains afflicted with pain and fatigue and cognitive issues. It is my view she has proved she would have been able to perform at a more senior level from the position she holds now but for the injuries suffered in the MVA.

- [447] There are of course negative contingencies which must be considered: the fact is that her age somewhat affects her marketability.
- [448] The plaintiff seeks an award based on the earnings approach as she says that, but for the MVA, she would have completed her doctorate by 2009 and have obtained a more senior position in special education as her colleague in the Ed.D. programme, Dr. Julie Parker, did when she became the director of special education for the School District of North Vancouver.
- [449] But Dr. Parker did not give evidence and I do not know what her career path was. As well, her age is not known to me. I cannot give any weight to the general comparison of Dr. Parker offered by the plaintiff.
- [450] The plaintiff points out that during her programme, she was awarded a fellowship that recognized her particular talents, suggesting that she would have been highly marketable once she completed her doctorate.
- [451] Had she obtained a position in North Vancouver, she would have earned \$40,000 more per year, with substantial additional benefits worth up to 16%.
- [452] As set out in the report of Mr. Carson, had the plaintiff completed her doctorate in 2009, based on statistical averages, she could have been earning \$13,000 more per year from 2009 forward.
- [453] The plaintiff argues that had she finished her Ed.D. in 2009, she would have been undertaking her search for higher level positions at age 55. Nevertheless, the plaintiff is not like Dr. Carter, who obtained his qualifications much earlier in his life, and retired at the age the plaintiff was when she finished her doctorate.
- [454] Counsel for the plaintiff advised that if I were to find there was a real and substantial possibility that the plaintiff suffered the loss of such a position as the North Vancouver job as a result of the injuries she suffered in the MVA, I must also consider that the plaintiff's pension benefits would also have increased over her years of work, and award an amount for that loss.
- [455] Plaintiff's counsel also argued that I should consider the possibility that the plaintiff's high energy, but for the MVA, could also have led to her being able to not only take on a senior position in special education, but also teach at a university in the evenings.
- [456] I reject this argument for the simple reason that the evidence of the former senior school administrators (Dr. Brayne and Dr. Carter, and Mr. Stewart Ladyman) indicated that a director of special education position or its equivalent requires long hours and substantial stress. The plaintiff would not have been entering such a position as a young woman. As I have noted, she was 54 years old at the time of the MVA, a reality which impacts a person even with her former level of energy.

- [457] It is my view that the plaintiff could not have performed in both positions.
- [458] I am also not convinced that the plaintiff is unable to perform such additional income-earning jobs such as doing educational assessments during the summer, as Ms. Predy does.
- [459] I also note that the plaintiff returned to full time work in her capacity as a school psychologist on April 16, 2010, and despite some continuing difficulties with her fatigue, she has not missed one day of work even while working on her dissertation and its defense.
- [460] I do not accept that the plaintiff's failure to obtain the job as District Vice-Principal for Student Support Services in her own School District is related to the injuries she suffered in the MVA. I do not have any evidence to suggest that there is a connection between the two events, notwithstanding the fact that the plaintiff knew who was responsible for the decision not to grant her an interview and chose not to call that person as a witness.
- [461] In the result, I am left with an admission from the plaintiff that she feels she is capable of performing the job she was not awarded and this is corroborated by her colleague, Ms. Predy.
- [462] However, the plaintiff has not applied for other positions as she feels she is unable to travel long distances from her home in Maple Ridge due to her fatigue and she is concerned she will not be able to perform at the level required due to her cognitive issues.
- [463] Before the MVA, the plaintiff did not have experience in administration in her school district and she had only entered the position as School Psychologist in 2005.
- [464] It is likely she would have spent some time in an entry level administrative position before being able to move on should a suitable position have become available.
- [465] In summary, I do not share the view that the plaintiff's loss is as substantial as that claimed by her counsel. I find that it is entirely speculative to say that the plaintiff would have obtained the most senior position in special education in a school district.
- [466] Nonetheless, I remain of the view that there was a substantial possibility she would have moved up had she not suffered the MVA.
- [467] It seems reasonable to me that she would have had to work her way up.
- [468] It is my view she would likely have found an entry level administrative position by 2010, resulting in an increase in salary.
- [469] If I consider that her earnings would have been comparable to those of Ms. Shearer, the District Principal, from 2010 forward, then her loss can be assessed over time at about \$7,000 - \$10,000 per year to age 65 with a corresponding increase in benefits and pension which I will leave to counsel to calculate.

[470] With the passage of time, it is my view that the plaintiff may also be able to undertake some assessment work or move into administration should a suitable position become available, and I have deducted a contingent amount of 20% for that possibility.

[471] I accept her evidence that she would work until age 70, and assess her loss of capacity at \$90,000 based on working to that age.

Conclusion

[472] The plaintiff will be awarded damages as follows:

- i. Non-pecuniary damages of \$110,000;
- ii. Past loss of wages of \$64,902.41;
- iii. Special damages of \$19,257.81;
- iv. Cost of future care of \$70,000;
- v. Loss of housekeeping capacity of \$45,000;
- vi. In-trust award to Mr. Lane \$5,000;
- vii. Loss of capacity \$90,000 (plus an additional amount for pension and benefits).

[473] Counsel for the plaintiff assured me that she and counsel for the defendant could deal with the calculation of pension and benefits on the loss of capacity award. I will also leave it to counsel to calculate any required deductions or discounts.

[474] I have already mentioned that I inferred the amount for which the plaintiff is out of pocket for therapy sessions due to the absence of a figure. I have tried to be as accurate as possible. However, if I am in error due to the gap in the evidence, counsel should first attempt to agree on the correct figure based on my decision to allow all of the plaintiff's therapy sessions. They may come back before me if they are unable to agree on the proper amount.

[475] I am advised by counsel that they wish the matter of costs to be reserved and to make submissions before me. If necessary, the parties may also make submissions with respect to a tax gross-up.

[476] They may request a time to appear before me from the Registry.

"Russell J."

The Honourable Madam Justice Russell

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Prepared on 29 October 2026 · Esheria