

CANADA / JUDGMENT

Sahota v. Slupskyy

2019 BCSC 2215

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Supreme Court of British Columbia

DECIDED

24 December 2019

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2019 BCSC 2215 Sahota v. Slupskyy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sahota v. Slupskyy,

2019 BCSC 2215

Date: 20191224

Docket: M191863

Registry: New Westminster

Between:

Sundeep Sahota

Plaintiff

And

Oleksiy Slupskyy and Victor Slupskyy

Defendants

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

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Ryan Kusuhara

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Nicole Langrana

Place and Date of Trial:

New Westminster, B.C.

April 9-12, 2019

July 3, 2019

October 4, 2019

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2019

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I. Introduction and Overview

- [1] The plaintiff claims damages for personal injury and financial loss caused by a motor vehicle accident in Vancouver, BC on March 23, 2016 (the "2016 MVA").
- [2] Liability for the accident is admitted by the defendants, however the nature and extent of the plaintiff's injuries and resulting financial loss is very much in dispute.
- [3] At the time of the accident the plaintiff, Sundeep Sahota, was pregnant with her first child and was actively teaching full time as an elementary school teacher employed by the Vancouver School Board ("VSB"). Her career goal was, and still is, to become a principal in the school system.
- [4] Ms. Sahota now has three children and the primary dispute between the parties is the assessment of damages within the complicated matrix of persistent soft-tissue injury, the demands of an expanding family, and a generous employment benefit regime. The scenario highlights the crucial distinction between the causation of loss on one hand and the principles of damages assessment on the other.

II. The Accident

- [5] The 2016 MVA occurred at the intersection of King Edward Boulevard and Cambie Street in Vancouver. Ms. Sahota was the front seat passenger in a Ford F150 pick up truck driven by her husband which was struck from behind by a Toyota Highlander vehicle driven by the defendant Oleksiy Slupskyy.
- [6] Photographs of the damage sustained by the vehicles were put into evidence. It is evident that Mr. Slupskyy attempted to avoid the collision by turning his vehicle to the right; the impact occurred between the right rear bumper of the Ford truck and the left front fender of the Toyota Highlander. The former is barely damaged and shows only some scratches and a few small dents. The latter sustained a damaged left front bumper, a broken headlight casing, and a partially crumpled fender above the left wheel well.

- [7] Ms. Sahota described the vehicle impact as moderate in force. I accept that was the case. Thereafter, the two vehicles pulled to the side of the roadway and the drivers exchanged information. Ms. Sahota remained in the truck. Emergency personnel did not attend the scene.

III. The Plaintiff's Background and Testimony

- [8] Ms. Sahota was born on December 28, 1982 in Kitimat, BC. She is presently 36 years old. She and her husband, Harminder, were married in 2014 and they now have three children born on September 6, 2016 (son), December 28, 2017 (daughter), and February 7, 2019 (daughter). She says they do not plan on having any more children.
- [9] Ms. Sahota obtained a Bachelor of Arts degree from the University of Victoria in 2004 and a Bachelor of Education degree from UBC in 2006. She also obtained a Master of Education degree from UBC in 2015.
- [10] Ms. Sahota has been employed as a teacher with the Vancouver School Board (VSB) since April 2006. While she is technically qualified to teach all grades, she has chosen to teach elementary school to date i.e. kindergarten through grade 7.
- [11] At the time of the accident, Ms. Sahota and her husband were living in an 800 square foot, one bedroom rental apartment at 16th Avenue and Oak Street in Vancouver. She had lived there for some three years.
- [12] Ms. Sahota was involved in an earlier motor vehicle accident in 2010. She was driving her vehicle at the time and she sustained soft-tissue injuries to her neck, shoulders, hips, and back. She testified that all of the symptoms arising from that accident had resolved within two years. She did, however, acknowledge receiving some physiotherapy and massage therapy treatments in the three to six months before the 2016 MVA. Her employment benefits plan covered these therapies. She also saw the physiotherapist at one point because she had pulled a muscle in her back.
- [13] At the time of the accident, the plaintiff's family doctor was Dr. Izen. The plaintiff says she was unable to make an appointment with Dr. Izen for a couple of weeks, so she attended upon a Dr. Todorovic at a nearby medical clinic on March 24, 2016. On a medical form used by that clinic, she described her symptoms as including headaches, neck pain, anxiety, tender muscles, shoulder pain, low back pain and insomnia. According to the clinical records, the diagnosis was "soft-tissue injuries" and the prescribed treatment was Tylenol, ice, and rest.

- [14] Ms. Sahota finally got an appointment to see Dr. Izen on April 5, 2016. She reported how she had developed tightness in the shoulders, neck, and upper back the day after the accident followed by increasing hip pain three to four days later. She was continuing to experience intermittent pain and headaches and had taken two days off work because of the pain. A decreased range of motion in the cervical spine was noted. Soft-tissue injuries to the neck and upper back were diagnosed and massage therapy treatments were prescribed.
- [15] Three years later, the plaintiff says she continues to experience pain in her neck, arm, right shoulder, and lower back. It is exacerbated by lifting and carrying including many of the activities involving both child care and household maintenance. She feels that the pain in her left leg is a lot better and the periodic pain in the left shoulder has disappeared. However, even though she does stretches every morning and has even started to do some yoga at home, she feels her condition has plateaued and that there has been little improvement overall in the last year. The defendants say the plaintiff is not a credible witness, any ongoing symptomology is exaggerated, and in any event it is not related to the accident.
- [16] Ms. Sahota's parents own a large 6,000 square foot home in Fleetwood, Surrey along with another property in Delta, BC ("Delta Property"). Ms. Sahota's lease on the Oak Street apartment was an annual lease which was set to expire at the end of December 2016. She and her husband had intended to move to the Delta Property because of the new addition to their family of their first son, and also because she wanted to be closer to her parents. Thus, sometime after the accident, they started paying the parents' mortgage on the Delta Property as a form of rent.
- [17] After the birth of their son in September 2016, Ms. Sahota and her husband stayed at the Oak Street property for approximately three weeks during which time her mother and sister-in-law would come over to help with child care and chores around the home. Thereafter, Ms. Sahota increasingly started to stay over at her parents' home so it would be easier for her mother to help with childcare. By the time the lease expired for the apartment on Oak Street, the plan to move to the Delta Property dissolved in favor of staying at the parents' home, a situation which has continued to this day, namely because, as testified to by Ms. Sahota, "taking care of the kids is a challenge for me".
- [18] The defendants say that any move to the parents' home was not caused by the accident.
- [19] The plaintiff's brother and sister-in-law lived in a separate suite in the basement of her parents' house. The plaintiff and her family occupied two bedrooms and two bathrooms and also used common spaces such as the kitchen (which included a second small "spice kitchen"), a family room, and a living room. In the past two and a half years, the plaintiff has hired different people to assist with housework and child care in the parents' home. In that regard, she has produced:

- 5 handwritten receipts signed by Ms. Masumi Wakita each in the amount of \$100 for house cleaning on December 13, 19, 2016 and January 4, 10, and 17, 2017;
- 7 consecutively numbered hand written receipts for aggregate hourly house cleaning services by "Pavan" for the period March through August 2017 (except in July) ranging from a low of \$250 (10 hours at \$25/hr) to a high of \$500 (20 hours at \$25/hr); and
- 11 receipts for the period January to December 2018 (except in August) from Rachel Sandhu "Mothers' Helper" ranging from a low of 42.5 hours to a high of 124.75 hours at \$12/hr.

- [20] There are some curious aspects to these invoices. First, the invoices for Pavan and Rachel were actually prepared by Ms. Sahota and not the service providers. She says the invoices for Pavan were prepared at Pavan's request, although Ms. Sahota did not know why Pavan needed them (the payments were all in cash). Ms. Sahota also drafted the invoices for Rachel, using a template she found on the internet, which involved recording Rachel's hours on the template each day that Rachel attended. This included seven days in the first two weeks of July 2018 when Ms. Sahota and her family were visiting their grandparents in Toronto. On cross-examination, Ms. Sahota testified that Rachel was "deep cleaning", including bleaching and disinfecting toys, and cleaning floorboards during their absence. She also says that the housekeepers she hired only cleaned those areas of her parents' house that she, her husband, and child occupied.
- [21] While the defendants have not expressly accused the plaintiff of fraud, they say she is not telling the truth about these invoices and the claim for housekeeping expenses must be dismissed.
- [22] Ms. Sahota was questioned about the housekeeping and childcare contributions made by her husband. He is a trained commercial diver, however, he has been off work for "three or more years" because of injuries sustained in three different motor vehicle accidents (including the accident that is the subject matter of the present litigation). No details of the other two accidents or of the husband's injuries were solicited or volunteered, although Ms. Sahota says that he "tries to do as much as he can but he is limited in what he can do without being in further pain". She said that her husband could perform tasks that cause her problems i.e. bending, stooping, kneeling, scrubbing, and carrying heavier things, "if he pushed himself but he is not able to do so on a regular basis".
- [23] Ms. Sahota also testified to the chronology of her absence from work as a result of both the accident and maternity/parental leaves.
- [24] The 2016 MVA occurred during the spring break from school. Ms. Sahota completed her teaching duties for the rest of the school year through June 2016 during which time she took only seven days off work for MVA-related symptomology. She continued to receive her salary during these absences pursuant to the Sick Leave Benefits program provided by the Collective Agreement with the VSB.

- [25] Ms. Sahota worked from the end of June to mid August 2016 as a Summer School Administrator for the VSB, for which she earned approximately \$9,400. She then returned to her teaching duties at the school at the beginning of September, taking one sick leave day on September 6, 2016 --the same day on which her first child was later born. She was then on Employment Insurance ("EI") maternity leave (topped up by the VSB) for 17 weeks and EI parental leave (without VSB top-up) thereafter during the period September 7, 2016 to September 6, 2017. Her intention had been to take the full year off for maternity/parental leave even though the parental leave EI benefits were not topped up by the VSB for the entire duration.
- [26] Ms. Sahota's long-term career plan was, and still is, to become a vice principal and eventually a school principal, ultimately working at the district level in a managerial position or perhaps even as a director, all with the VSB. In order to become a vice principal/school principal, a teacher must have a Masters of Education, which she had accomplished in 2015. Her plan was, and still is, to apply for summer school principalships as part of improving her prospects for advancement. She says that notwithstanding her pregnancies, she would have applied for summer school principalships in 2017, 2018, and 2019 because it would have advanced her career goals. Further, the remuneration (\$9,400) was substantially higher than her maternity leave benefits. At one point in her cross-examination, however, Ms. Sahota also stated that her preference in 2017 and 2018 would have been to stay at home with the children rather than doing summer school. The defendants say the latter statement is the correct one.
- [27] As an elementary school teacher, teaching primarily grades four and five (seven to 11 year olds), Ms. Sahota had her classroom set up in stations and she would do a lot of moving around rather than sitting behind the desk and teaching. She was often sitting on the floor or on chairs/stools having conversations or participating in projects with the children.
- [28] Even though she was five months pregnant at the time, Ms. Sahota says she still intended to return to work as an elementary school teacher in September 2017. As was her usual practice, she spent several days in school during the month of August setting up her classroom and preparing her instruction plan for the fall term.
- [29] On September 6, 2017, Ms. Sahota visited a physician at her family doctor's office, Dr. Lochub. She reported ongoing pain in her neck and back aggravated by her pregnancy, the long commute to and from work, and her activities during the day. Dr. Lochub suggested that she reduce her work days to three days a week and he wrote a short report to the effect on the same day along with another letter, presumably for submission to an insurer, confirming her ongoing pain condition as "limiting the patient's ability to perform household chores" and recommending coverage for necessary "maid services/cleaning services for this patient".

- [30] When Ms. Sahota presented the first letter to the VSB, she was informed that it would be necessary for her doctor to complete the VSB's required "medical certificate/teacher request for partial medical leave" form. Dr. Lochub filled out and signed this form on September 20, 2017. Among other things, Dr. Lochub certified that Ms. Sahota required a partial medical leave because of "worsening lower back and hip pain" compounded by her pregnancy and "standing, sitting, and driving". He recommended that she be permitted to work three days a week and he estimated that she would be able to return to full-time teaching assignments after any maternity leave subsequent to the delivery of her second child.
- [31] Ms. Sahota's changed work status took effect at the beginning of October 2017. She took three sick days during the month of September and during the period October 4 to December 14, 2017, she took some 27 days of additional sick leave all of which she ascribes to her musculoskeletal pain condition. The defendants say none of these sick days were caused by any MVA injuries.
- [32] Ms. Sahota's second child was born on December 28, 2017 during the Christmas break. She took maternity/parental leave and received benefits for all of 2018. However, in late July or early August, she found out that she was pregnant again and, realizing that she had not worked enough hours to qualify for EI maternity/parental leave benefits after the birth of the third child, decided to return to work "early". Because the school had already hired a replacement for her grade two class starting in September, she obtained an appointment as a resource teacher assigned to a caseload of students across multiple grades who required additional support in partnership with each student's teacher.
- [33] Ms. Sahota said she returned to work hopeful she would be able to endure five days a week. However, she says that she immediately experienced the same sort of pain exacerbation that had occurred one year previously, which was significantly contributed to by the 1-1.5 hour one way commute from Surrey to the school in Vancouver. She took four days sick leave in the first two weeks of September 2018 and then, following consultation with her physician, went on an extended medical leave starting on September 17, 2018 which was thereafter extended multiple times up until February 15, 2019. Beginning February 15, 2019, following the recent birth of her third child on February 7, 2019, her status with VSB was converted into unpaid maternity/parental leave. The defendants again say none of these absences from work were caused by any 2016 MVA injuries.
- [34] The extended medical leave during the fall/winter of 2018 was granted by the VSB based on various medical certificates issued by Ms. Sahota's family doctor, Dr. Uppal. In those reports, he certifies that Ms. Sahota has injuries related to the 2016 MVA which include persistent, severe lower back and neck pain which prevents her from working because of her inability to sit/stand for prolonged periods of time and to bend, reach, and lift. He says the plaintiff requires "physical rehabilitation" and that he is unable to determine when she will be able to return to work, whether on a full-time or part-time basis. The defendants dispute the diagnosis and any connection to the 2016 MVA.

- [35] Ms. Sahota's accumulated/banked paid sick day entitlement with the VSB was exhausted on October 1, 2018. Both her extended medical leave following that date and the maternity/parental leave following the birth of her third child in February 2019 have been on an unpaid basis given the exhaustion of paid sick day entitlement and the inability to qualify for paid EI maternity/parental benefits.
- [36] On the last day of her testimony at trial (April 12, 2019) Ms. Sahota stated that she still has a goal of becoming a vice principal, principal and manager within the VSB system, although the 2016 MVA has delayed that goal. She said that she was planning to apply to return back to work in September 2019 even though the unpaid maternity/parental leave is for a full year. She says she will plan this return to work in consultation with her doctor to see if she can go back on a full-time basis, failing which she will go back on a part-time basis. Ms. Sahota says that her son will be three years old in September and she intends to put him into full-day preschool. This will leave only two children who are not in preschool and she hopes that her mother will be her childcare provider when she returns to work. Her husband will be able to drive her son to preschool and her other family members will also be available for drop-off and pick-up.
- [37] With respect to the impact of the 2016 MVA on her recreational activities, Ms. Sahota says it has "definitely limited [her] ability to do activities" that she used to engage in such as road biking, hiking, and going to the gym. She acknowledges that her growing family has also limited her ability to engage in such activities.

IV. Medical Witnesses and Documentation

Dr. Navdeep Uppal

- [38] Dr. Uppal is a family physician with a practice in Surrey, British Columbia. He says that in any given week he attends upon approximately 40 patients who have been involved in a motor vehicle accident and as a consequence he has considerable experience addressing neck, back, and other pain disorders arising from such accidents.
- [39] Dr. Uppal first saw Ms. Sahota as a patient on January 17, 2017 (about nine months from the date of the accident) and he has authored two reports which were admitted into evidence in this case dated March 25, 2018 (primary report) and March 1, 2019 (reply report), respectively.
- [40] At the time of Ms. Sahota's first attendance upon Dr. Uppal, she was complaining of pain in the neck, shoulders, lower back, both hips, and the right knee. As well she complained of headaches and insomnia. Examination revealed tenderness on palpation in all of these areas as well as on flexion and extension. Dr. Uppal notes that these symptoms have continued to persist to the time of his report.

- [41] Dr. Uppal was informed by Ms. Sahota's counsel of her involvement in an earlier motor vehicle accident caused in 2010 and understood that from December 2015 to March 2016, she received physio and massage therapy treatments for pain in her neck, shoulder, hips, lower back and legs. He opines that "the accident of March 23, 2016 has exacerbated these symptoms".
- [42] Dr. Uppal's opinion is that as a result of the 2016 MVA, Ms. Sahota has sustained "tears, pulls, and bruising of ligaments, tendons, and muscle". i.e. symptomology collectively known as "soft-tissue injuries". Because her pain has persisted beyond six months it is properly characterized as chronic. He also diagnoses "cervicogenic headaches", cervical radiculopathy (numbness, tingling originating in the neck), and sciatica in the legs (originating in the lumbar spine and radiating down the legs).
- [43] Dr. Uppal recommends a treatment program consisting of massage, chiropractic and physiotherapy to "manage occasional exacerbation", as well as "active rehabilitation" and gym exercise to promote increased activity. He also recommends prescription pain medication as needed for pain management.
- [44] Dr. Uppal's prognosis is that Ms. Sahota "will continue to have chronic pain for the imaginable future". In his experience, patients with similar symptoms remaining after two years following a motor vehicle accident are unlikely to make further significant gains in recovery. He says that "on a balance of probabilities, it is more likely than not that Ms. Sahota will not make a full recovery to her pre-accident status and she will continue to suffer chronic pain."
- [45] In his reply report, dated March 1, 2019, Dr. Uppal respectfully disagrees with the opinions expressed by orthopedic surgeon, Dr. Erik Calvert, who was retained by the defendants to perform an "independent" medical examination of the plaintiff. Dr. Calvert's opinion is reviewed in detail below, but his conclusion is that active participation in a physical rehabilitation program would probably improve Ms. Sahota's condition, reduce the symptomology, and see her get back to full-time work. Dr. Uppal notes that Dr. Calvert's opinion "is based on one single encounter with Ms. Sahota" whereas his own assessment was prepared after being involved in Ms. Sahota's care for an extended period of time involving multiple visits. He says he has a better understanding of the factors contributing to her symptomology and that his assessment is "more accurate as a result of being the primary care provider for her injuries".
- [46] Dr. Uppal notes that Ms. Sahota's symptomology persists notwithstanding rehabilitative massage, physio, and chiropractic therapy, and he maintains his opinion that "Ms. Sahota's pre-existing symptoms have been significantly exacerbated as a result of the MVA" and that she "will not be able to make a return to full time work duties".
- [47] While in his report Dr. Uppal purported to acknowledge his duty to assist the court and not be an advocate for any party, it is clear that he is indeed advocating on Ms. Sahota's behalf. Some parts of his primary report read like a lawyer's mediation brief. He expresses opinions

based on "the balance of probabilities" which is, of course, a legal standard of proof. He argues why his opinion should be preferred over that of Dr. Calvert's. On cross-examination he acknowledged that between the period January 2017 and March 18, 2018, he saw Ms. Sahota 15 times in total, only four of which related to MVA complaints. He acknowledged his clinical notes respecting the first visit with Ms. Sahota made no reference to MVA complaints and identified "no acute concerns". He admitted he wrote a doctor's note in support of "maid services-cleaning services" based solely on the plaintiff's request without any knowledge of or inquiry about her actual household living arrangements.

- [48] It is not uncommon for family physicians to be supportive of their patients when they are involved in MVA litigation. I accept Dr. Uppal's opinion that the MVA has exacerbated pre-existing injury and also that the symptomology has persisted. I do not, however, accept his opinion that Ms. Sahota will never be able to return to full time work duties. This, in my opinion, is an overstatement likely based on well intentioned advocacy in support of his patient.

Dr. Brenton Cheng

- [49] Dr. Cheng is a chiropractic physician who treated the plaintiff on 11 occasions between January 18 and April 26, 2017. He prepared a medical legal report dated January 13, 2018 which was admitted into evidence without objection.
- [50] Dr. Cheng received a Bachelor of Science degree in kinesiology from Simon Fraser University in 2004. He obtained his doctor of chiropractic degree from Western States Chiropractic College in Portland, Oregon in September 2009 and he has been a practicing chiropractic physician since that time. Since July 2014, he has been practicing with a group known as TeamWell Health Fleetwood in Surrey, BC.
- [51] When Dr. Cheng saw Ms. Sahota for the first time, she was on maternity leave from her job as an elementary school teacher with the VSB, after having given birth to her first child on September 6, 2016. Dr. Cheng's initial visit with Ms. Sahota consisted of Dr. Cheng taking a history from Ms. Sahota, listening to her subjective complaints, and undertaking a physical examination. The subsequent visits each lasted approximately 20-25 minutes, including treatment.
- [52] During the initial visit, the plaintiff complained of neck pain, lower back pain, headaches, and some burning/numbness in her right arm and hand. On examination, he noted certain objective signs of injury including painful restriction by approximately 40 percent in both cervical and lumbar ranges of motion. Palpation and compression revealed significant pain and spasm. While he was able to reproduce pain and paresthesia in her right hand, Dr. Cheng's neurological examination concluded it was unlikely that she had any nerve impingement. He diagnosed the following injuries, all of which he ascribed to the 2016 MVA based on the history provided by the plaintiff:

- Grade 2 strain of the muscles in the neck and upper back as well as a grade 2 sprain of various cervical and thoracic facet articulations;
- Grade 2 strain of muscles in the lower back as well as grade 2 strain of lower thoracic and lumbar facet articulations;
- Cervicogenic headache; and
- Mild right thoracic outlet syndrome (a condition he sees in approximately 1 out of 15 to 20 patients).

[53] Dr. Cheng's report reflects certain facts and assumptions provided to him in an instruction letter he received from plaintiff's counsel. These include information to the effect that the plaintiff had been involved in a previous motor vehicle accident in 2008 for which she received massage and physiotherapy treatments, including further such treatments in the period December 2015 to March 2016 for "tension in her neck and shoulders, as well as tightness, pain and tingling in her hips, lower back, and legs". As well, he understood that the plaintiff has reported having headaches since becoming pregnant (December 2015). He concludes, however, that "the vast majority of the patient's condition is due to the [March 26, 2016] accident" and that he does not believe that any symptomology associated with Ms. Sahota's pregnancy contributed significantly to her pain and suffering after that accident.

[54] Dr. Cheng discharged Ms. Sahota from further chiropractic treatment at the end of April 2017 because she had achieved "maximum improvement from chiropractic" treatment by that point in time. He says he did not consider there to have been much improvement in her condition by the time of the last visit. Even though he did not see her again, Dr. Cheng expressed the opinion in his report written nine months later that,

- she will continue to experience symptomology for the foreseeable future and her recreational and non-work related activities will continue to be compromised;
- it is reasonable to accept that this patient may have some long term impediments that will affect her performance in some forms of employment and some types of recreational activities;
- the patient will likely continue to require assistance occasionally with the more physical aspects of household upkeep; and
- it is unlikely that the patient will be able to tolerate the physical demands associated with heavier/seasonal household and/or yard work.

[55] In terms of future treatment, Dr. Cheng recommends that,

- the patient should continue both with chiropractic treatment and registered massage therapy to address periodic exacerbations in symptomology;
- the patient will also benefit from either physiotherapy and/or active rehabilitation; and

- the patient should be as active as possible and attempt to return to as many of her pre-accident activities as her level of pain and/or discomfort allows.

[56] In his report, Dr. Cheng purports to identify the "anticipated costs" for the further treatments and support services he recommends, all of which (except chiropractic) he learned by way of "personal research" by online searches and asking his own parents. This latter evidence is no doubt triggered by a genuine motivation on the part of Dr. Cheng to be helpful. However, this is inadmissible advocacy on behalf of his patient and is not expert opinion evidence which he is qualified to provide.

Dr. Erik Calvert

[57] Dr. Calvert is an orthopedic surgeon whose scope of practice includes reconstruction of the foot, knee, ankle as well as arthroplasty to the hip and knee. He lists another area of practice as "Medical Legal Assessments" and his Medical Legal report dated December 21, 2018 was generated at the instruction of in-house legal counsel at ICBC's litigation department. The report was written under the letterhead of an entity known as Rapid Interactive Disability Management Ltd., which appears to be some sort of private supplier of independent medical evaluations for the insurance industry.

[58] Dr. Calvert has provided no medical treatment to Ms. Sahota. His report is based on an interview and physical examination of Ms. Sahota performed on December 10, 2018 as well as a review of medical records provided by the instructing solicitor.

[59] Based on Ms. Sahota's self reported subjective symptoms as well as his medical examination, Dr. Calvert expresses the following opinions:

- the plaintiff suffers myofascial pain as a result of a soft-tissue injury to the neck and upper back caused by the motor vehicle accident;
- she also suffered soft-tissue injury involving the lower back, although the continuation of such symptomology is "multifactorial" in origin i.e. a combination of the accident, her pre-accident incidents of low back and hip pain ("lumbar disk syndrome"), and the multiple pregnancies;
- the low back pain and radiating symptomology might possibly have occurred "at some level" without the contribution of the 2016 MVA however "the causation of the low back pain is probably in part due to the [2016 MVA]";
- it is probable that Ms. Sahota's cervicogenic headaches following the accident were triggered by her soft-tissue injury to the neck, however any such headaches at this time are "likely multifactorial";
- involvement of the shoulder and hip joints in the patient's condition is not likely; and

· numbness radiating from the shoulder to the right hand are vague symptoms without clear diagnosis but are possibly reflective of carpal tunnel syndrome (which can be associated secondarily to pregnancy) or are discogenic (nerve impingement).

[60] Dr. Calvert recommends that the plaintiff undergo an active/physical rehabilitation program. He notes that she has had challenges preventing her from being fully engaged in such a program, namely three pregnancies, but he insists engagement in such a program over a period of six months or more would likely diminish her symptoms as her general conditioning improves.

[61] Dr. Calvert expresses the opinion that Ms. Sahota was likely limited to an ability to work three days a week given her condition at the time of assessment but that if the physical rehabilitation program succeeds, she should be able to get back to tolerate full-time work, "albeit with a level of symptoms". Occasional over the counter pain medication would likely be helpful with aggravations along with an ergonomic assessment for the workplace.

[62] On cross-examination, Dr. Calvert agreed that it was "difficult to tell" if the plaintiff will ever be completely symptom free in the future. He noted that the absence of objective symptoms was an "entirely normal" occurrence in soft-tissue cases and he noted no "pain amplification" behaviour on the plaintiff's part during examination. He acknowledged that sitting on the floor and interacting with children might well be "problematic" for the plaintiff given the symptomology the plaintiff was displaying at the time of his assessment.

Pre-MVA Physio Clinical Records

[63] In the three months before the 2016 MVA, Ms. Sahota attended for several treatments at a physio therapy/massage therapy clinic located at Oak Street in Vancouver called "Physio Room". None of the medical professionals who treated Ms. Sahota at the Physio Room were called as witnesses at trial. However, their clinical records were in evidence and, indeed, were reviewed by the three physicians who prepared medical-legal reports and who also testified at trial.

[64] In personal injury litigation such as the present case, clinical records are usually treated as "business records", the admissibility of which is governed by section 42 of the Evidence Act, RSBC, 1996, c. 124 [Evidence Act] and the common law as articulated in *Ares v. Venner*, [1970] S.C.R. 608. Some of the governing principles developed in the case law respecting such clinical records include:

- clinical records are admissible evidence of the fact that the plaintiff attended upon the medical professional on the date indicated and received the treatment recorded;
- any recorded observations, diagnosis and administered treatment are admissible to prove the fact of their occurrence;

- any opinions, including diagnoses, recorded in the clinical records by the health professional are admissible for the fact that they were made at the time but not for their truth or correctness in the absence of any other properly admissible opinion evidence to that effect;
- any statements of the plaintiff recorded in the clinical records are admissible to prove the fact that such statements were made but not for the truth of their contents, unless the statements constitute an admission against the plaintiff's interests or the plaintiff otherwise adopts at trial the statements as being true; and
- the plaintiff's statements recorded in clinical records may also be used as evidence of a prior inconsistent statement on the part of a plaintiff provided the cross examiner complies with the impeachment requirements of the Evidence Act.

See *Olynyk v. Yao*, (1988) 33 B.C.L.R (2d) 247 (BCCA); *Seaman v. Crook*, 2003 BCSC 464; *Edmondson v. Payer*, 2011 BCSC 118; *Firman v. Asadi*, 2018 BCSC 2437.

[65] At the physio room, Ms. Sahota received massage therapy treatments from Ms. Sarah Wu, RMT, and physiotherapy treatments from both Ms. Dianna Bicego, MPT, and Ms. Dara Storey, MPT. She received massage therapy on December 18, 2015 (45 minutes), January 20 and 25, 2016 (60 minutes each), and February 17, 2016 (60 minutes). She received 30 minute sessions of physiotherapy treatments on December 23 and 29, 2015; January 4 and 18, 2016; February 1, 2016, and March 2, 2016.

[66] On her initial visit with Ms. Wu on December 18, 2015, Ms. Sahota, as recorded in Ms. Wu's notes, complained of "shooting pain around hip down front of quads, around knee, down back of legs. Sometimes just R, sometimes either side, tension neck/shoulders" [sic].

[67] On her first physiotherapy treatment on December 23, 2015, physiotherapist Ms. Bicego made note of Ms. Sahota's self reported medical history and symptomology:

Chief complaint

MVA 5-6 years ago had sciatic issues previously. R hip is really tight, sometimes left, but R right now is ++

Subjective

Would like to try acu-IMS- sees Sarah Wu RMT here as well

Used to also get tight shlds and neck, so physio for this

AGGR: pain to fall asleep right now and pain after walking always

Ease: Feels better after massage

MOI: two summers ago in 2014, hips got bad and low back pain+. Since then has had tingling down outer hip, front of quad and outside of shin down to ankle.

- [68] Ms. Bicego records objective symptomology to include stiffness and tenderness on palpation and she notes "appears that sacrum is tilted left/R rotated." Treatment on that occasion included moist heat, soft-tissue release, medical acupuncture and intramuscular stimulation.
- [69] Subsequent recorded clinical notes reflect ongoing stiffness and aching in the hip and pelvis area as well as in the neck and shoulder. Exercising and stretching seemed to have been helpful, however Ms. Sahota discovered herself to be eight weeks pregnant at the beginning of February 2016 and pregnancy-related nausea was preventing ongoing exercise.

V. The Lay Witnesses

Lorelei Russell

- [70] Ms. Russell is the human resources director for the VSB. She testified with respect to the compensation and various benefit programs available to VSB employees such as Ms. Sahota pursuant the collective agreement between the BC Public School Employers Association and the BC-Vancouver Teachers Federation covering the period July 1, 2013 to June 30, 2019. I accept all of her evidence on these matters.
- [71] Ms. Sahota has been employed as a teacher with the VSB since April 2006. The Collective Agreement provides for a "Teachers Salary Grid" which sets the annual salary of a teacher according to certain specified categories which include levels of post secondary education. The Collective Agreement also provides for annual salary increases in specified amounts. Given her Master's degree and her length of tenure, Ms. Sahota's annual salary has been in the following amounts for the time periods subsequent to the following dates:
- January 1, 2015- \$84,158
 - May 1, 2016- \$84, 536
 - July 1, 2016- \$85,382
 - May 1, 2017- \$85,681
 - July 1, 2017- \$86,109
 - May 1, 2018- \$87,315
 - July 1, 2018- \$87,751
 - May 1, 2019- \$89,287
- [72] In addition to the Annual Base Salary, as determined by the "grid", the teacher employee is entitled to a number of "allowances" should he/she so qualify. All such employees receive an allowance equal to 2% of salary to offset the payroll deduction for the BCTF Salary Indemnity Plan (short-term disability benefits program). There are additional sums paid to teachers appointed to positions of "special responsibility" (consultants, counsellors, department heads, etc.). According to Ms. Russell, Ms. Sahota was not being paid any

"special responsibility" allowances.

[73] The Collective Agreement also provides for sick leave entitlements. Sick leave is earned at the rate of 1.5 days for each month the teacher has worked and received salary from the VSB. There is no maximum to the number of sick leave days that an employee may accumulate. 15 days of sick leave is immediately available to each employee at the beginning of each school year. Any days during which the employee is absent for a full day for reasons of illness are charged against the sick leave accumulated by the employee. The absences beyond accumulated sick leave time are treated as Personal Leave. Absences exceeding 10 consecutive teaching days require the presentation of a certificate signed by a physician indicating the necessity for the absence.

[74] The Collective Agreement contains a subrogation-clawback provision as follows:

Where an employee is paid his/her wages by the Board while he/she is absent from his/her employment by reason of any disability other than one for which he/she would be entitled to receive workers compensation benefits, and the employee subsequently recovers such wages or any part thereof from any source, than the employee shall pay the amounts recovered to the Board. Upon the Board receiving such amount it shall credit the employee paying the same with the number of days of such leave proportional to the amounts recovered.

[75] Once an employee has exhausted his/her accumulated sick leave days, that employee can continue to be absent on an "unpaid health leave" basis. There is, however, both a short-term and long-term disability benefits program available through the BC Teacher's Federation which can be accessed as a form of income replacement insurance. These programs are funded by way of employee payroll deductions. The short-term disability program is paid by the Teacher's Federation itself for the first six months in any single school year. Thereafter, the long-term disability payments are funded by way of a policy with Great West Life Insurance.

[76] Should a pregnant employee on sick leave (either paid or unpaid) become eligible for Maternity Leave, then any available maternity benefits would apply in priority to any sick leave entitlement (whether sick leave paid by the employer or disability benefits payable by the Teacher's Federation/Great West Life). If the pregnant employee does not qualify for EI maternity benefits (for example, because of an insufficient number of days worked by that employee in the preceding 12 month period), there is no other source of income available to the employee while he/she remains absent from work.

[77] In Ms. Sahota's case, her sick leave benefits were exhausted by the beginning of October 2018, following which she was on an unpaid health leave from the VSB. She started a Maternity Leave under the collective agreement on February 18, 2019. Ms. Russell does not know whether the plaintiff received any short-term disability benefits for the period October 2, 2018 -February 15, 2019, but following that latter date, the commencement of Maternity Leave meant she would no longer have been eligible to continue receiving any such short-term benefits. As well, because Ms. Sahota had not worked the required number of days in

the preceding period, she also did not qualify for EI maternity benefits and, as at the date of the trial, she would have received no income from either the VSB or the short-term disability benefits program in the intervening period. Eligibility for EI Maternity Leave is 600 hours in the preceding year (65 full time teaching days).

- [78] The Collective Agreement also provides for Maternity Leave as well as Parental Leave Without Pay ("PLWP"). A pregnant employee is entitled to apply for Maternity Leave for a period of up to 18 weeks. The employee must provide four weeks' notice before starting any maternity leave. At the expiration of Maternity Leave, the employee has the option of returning to her previous position or to an alternative suitable position provided one is available. She is also entitled to apply for parental leave without pay and without earning seniority. Parental Leave was available for 35 further weeks, although since December 2018, Parental Leave is now available for up to 61 weeks (all unpaid).
- [79] The Collective Agreement requires the VSB to provide a "top-up" Supplemental Unemployment Benefit for employees receiving EI maternity benefits. The employee must first qualify for, apply for, and be granted EI maternity benefits, following which the VSB pays the employee 1) 95% of her current salary for the first two weeks of leave, followed by 2) the difference between the amount of EI benefits received by the employee and 95% of her current salary for a further 15 week period. While the EI waiting period has been reduced to one week since the Collective Agreement was signed, the VSB is still, technically speaking, obliged to pay the first two weeks benefit and currently does so on a "without prejudice/without precedent" basis.
- [80] Ms. Sahota's first child, Himmet, was born on September 6, 2016. She was then on maternity/parental leave until September 2017. She returned to work at the beginning of September 2017 but for health reasons, she applied for and was granted job sharing and a temporary reduction of her full-time employment for the period October 2, 2017 to December 29, 2017. Supported by medical notes written by another physician at Dr. Uppal's office ("low back and hip pain made worse by pregnancy, commuting and work related duties"), her position was reduced to a "0.5852 FTE" category. During October, November, and December 2017, she took some 27 days of sick leave.
- [81] Ms. Sahota's second child, Sunaiya, was born December 28, 2017, whereupon Ms. Sahota went on Maternity Leave until May 4, 2018 and thereafter, further parental leave from May 7, 2018 to August 31, 2018.
- [82] In September 2018, Ms. Sahota again returned to work, however during September 2018, she took 14 days sick leave. By this time, she was pregnant with her third child and, supported by medical notes from her physician, Dr. Uppal, she applied for and was granted extended medical leave which commenced on September 17, 2018 and was extended multiple times ultimately to February 15, 2019. Her third child was then born and Ms. Sahota commenced Maternity Leave on February 18, 2019 which was ongoing at the time this trial got underway.

- [83] Ms. Russell also explained the current requirements and qualifications for vice principal and principal positions. When positions become available, they are posted on the VSB Career website which makes a "call for a vice-principal pool". The last such posting was two years ago in November 2017. Teachers can then apply and a joint committee of stakeholders will interview the applicants and ultimately select the successful candidate(s). Ms. Russell explained that a Master's degree was a requirement and that other criteria were also taken into account (not identified in the evidence).
- [84] It is also possible for teachers to become "Summer School Principals" (technically known as Summer School Administrators). The VSB Summer School Program is held between the first Tuesday in July and the first Friday after the August long weekend. It requires 750 employees (500 teachers and 250 support staff). Approximately 20-30 teachers are also required to be the "Summer School Principals/Administrators" for the program at any given school. The positions are posted in the previous summer, hiring decisions are made in November or December, orientation occurs in February, and training sessions are held in June. The Principals are paid an additional amount over and above their regular annual salary under the Collective Agreement.
- [85] Ms. Sahota applied for the position of Elementary Summer School Principal for the summer of 2016. Her application was made in the late summer/early fall of 2015 (when she was not pregnant), and she was advised of her appointment by way of a letter dated December 7, 2015. She performed the job following the conclusion of the 2015/2016 school year notwithstanding her intervening pregnancy and the injuries sustained in the 2016 MVA.
- [86] Finally, Ms. Russell described the VSB practices/policies with respect to accommodating employees with medical disabilities. When a teacher has been absent 10 consecutive days, they are required to provide the employer with an "extended medical leave form" completed by the physician which will indicate any possibility of modified duties or a gradual return to work.
- [87] The VSB has a "Manager of Employee Wellness" who regularly works with teachers with impairments or disabilities to provide temporary or permanent accommodations or assistance. Equipment or other aids recommended by the physician will be purchased and the services of an occupational therapist are made available. If the employee has been on long-term health leave, the VSB generally initiates a "work hardening" program for up to a month and thereafter a gradual return to work process with the assistance of a substitute teacher. Ms. Russell did note, however, that where a "person is prevented from working because they cannot sit, stand, bend, lift, or reach, the employer is left with very little to accommodate or modify".
- [88] Ms. Russell was an impressive witness. I accept her testimony in its entirety and find as a fact the matters to which she testified.

Amandeep Kang

- [89] Ms. Kang is a 32 year old teacher employed by the VSB. She first met Ms. Sahota during a 13 week practicum program at John Henderson Elementary School in 2011/2012. After completing her education, Ms. Kang started working at John Henderson as a resource teacher for the academic year September 2015 to June 2016. During that year, she was the resource teacher for Ms. Sahota's classroom and would see her at work daily. Before the 2016 MVA, Ms. Kang stated that Ms. Sahota did not appear to have any difficulty working as a teacher, however, this changed following the accident. From that point forward, Ms. Sahota took more breaks during teaching time, was no longer able to circulate around the room as much to support students, spent less time in the building before and after classes, and became less active in school committees.
- [90] Ms. Kang and Ms. Sahota used to go for long walks at lunch time on an almost daily basis unless it was raining hard. Ms. Sahota stopped participating in the walks after the accident.
- [91] Ms. Sahota appeared to be very frequently in pain after the accident. She would touch her back and neck, stretch a lot more, and had difficulty picking up heavy items or packing boxes. This continued into summer school preparation in 2016 when Ms. Kang helped Ms. Sahota with the set-up because the latter appeared to be in pain.
- [92] Ms. Kang and Ms. Sahota also used to socialize outside of work, going out for dinners a couple times a month. After the accident, these dinners would take place at Ms. Sahota's apartment and not at restaurants so she could spend time on the couch alleviating her back pain. She described the environment as "more subdued" after the accident.
- [93] Ms. Kang's interaction with Ms. Sahota became much less frequent after Ms. Sahota moved to Ms. Sahota's parents' home in Surrey residence later in 2016.

Shashi Sahota

- [94] 33 year old Shashi Sahota, née Dhaliwal is the plaintiff's sister-in-law. She married the plaintiff's brother four years ago but has known the plaintiff for 10 years. She works in an opioid treatment clinic.
- [95] Shashi Sahota and her husband lived in the downstairs suite at the home of the latter's parents in Surrey. This is the same residence into which the plaintiff, her husband and their first child moved in late 2016 and their respective stays at that residence overlapped for two years before Shashi Sahota and her husband bought their own house and moved away.
- [96] Shashi Sahota and the plaintiff frequently socialized before the latter's accident in March 2016. Indeed, they and their respective husbands-to-be used to double date and do various activities together including hiking, biking, dining out, going to movies, and going to the lake. She described the plaintiff's demeanor and personality before the accident as "very bubbly" and "very active", enjoying "outdoor activities a lot".

- [97] Shashi Sahota saw Ms. Sahota in her Oak Street apartment within the first week following the 2016 MVA. Shashi Sahota recalls the plaintiff lying on the couch with a heat pad on her lower back. Thereafter, Shashi Sahota frequently visited the plaintiff and would from time to time help her with household chores that the plaintiff was unable to do such as vacuuming, doing dishes, grocery shopping with the plaintiff's husband, and after the baby was born, changing and bathing the child, getting milk bottles ready, and taking the laundry back with her to the plaintiff's parents' house.
- [98] Shashi Sahota says she also helped the plaintiff set up her class rooms for summer school in 2016 and pack up her personal belongings at school before the new school year started in September 2016. She did so because the plaintiff was having trouble packing, bending over, and picking up/carrying items such as boxes.
- [99] Shashi Sahota described the family residence in Surrey. It is a two storey house with five bedrooms and three bathrooms upstairs, and an additional bedroom in the basement suite downstairs. The suite has a separate entrance. After the plaintiff moved in, she, her husband and the baby lived upstairs along with the plaintiff's parents. The plaintiff, her husband and the baby occupied two bedrooms upstairs each of which had an adjoining bathroom. The family otherwise shared the common areas, including the kitchen.
- [100] Shashi Sahota remembers that the plaintiff hired an assistant to help with the housekeeping. She cannot remember the name of the person who was hired but she did from time to time see this person vacuuming, mopping, dusting, cleaning up, taking out the garbage and performing other household chores. She says "from what I can remember" the chores were performed "mainly" in the plaintiff's bedrooms/bathrooms, but also in the living room which was part of the common area frequented by the child. When asked if the assistant cleaned other parts of the house, Shashi Sahota responded "not that I can remember".
- [101] Shashi Sahota says the plaintiff was a bubbly "very fun" person to be around before the accident but after that accident, she became "very irritable", agitated by the smallest things, wanting to stay in her room pretty much the whole time, not wanting to talk, and prone to crying "because she didn't have her independence anymore, moving back into her parents' house".

VI. Causation, Pre-existing and Indivisible Injury, and the Assessment of Damages in a Negligence Case

- [102] In *Kallstrom v. Yip*, 2016 BCSC 829 [Kallstrom] I spilled much judicial ink describing in detail the legal principles related to causation of damage (injury/loss) and the assessment of damages (compensation) in a negligence case. Analagous to the case at bar, Kallstrom addressed these legal principles in the context of a personal injury claim arising out of a MVA.. A copy of the case was provided to the parties and I will not repeat here what can be found in paragraphs 316-341 of that decision. The major point for the purposes of the present case is made in *Blackwater v. Plint*, 2005 SCC 58:

- [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway. ...
- [103] Part of the discussion in *Kallstrom* centered around the scepticism, or perhaps cynicism, that can accompany claims arising from relatively minor MVAs where there is little objective evidence of physical injury and where complaints of pain persist far beyond what some observers might consider to be "normal". Again, I will not repeat here the analysis set out in *Kallstrom* save to emphasize that whether a plaintiff has been injured in a minor motor vehicle accident is not determined by the extent of motor vehicle damage but rather must be determined on the whole of the evidence before the Court. This point has also recently been reinforced by our Court of Appeal in *Greenway-Brown v. MacKenzie*, 2019 BCCA 137, leave to appeal ref'd [2019] S.C.C.A. No. 231, where the Court stated:
- [26] In *Gordon v. Palmer*, Thackray J. (as he then was) held that the view that if there is no vehicle damage there is no injury has no application in court:
- [4] It is not a legal principle of which I am aware and I have never heard it endorsed as a medical principle.
- [5] Significant injuries can be caused by the most casual of slips and falls. Conversely, accidents causing extensive property damage may leave those involved unscathed. The presence and extent of injuries are to be determined on the basis of evidence given in court. Objectivity is thus preserved and the public does not have to concern itself with extraneous philosophies that some would impose on the judicial process.
- [33] "[I]t is not the law that if a plaintiff cannot show objective evidence of continuing injury he/she cannot recover." [citations omitted].
- [104] I have emphasized the above points in this case for two reasons. First, the defendant driver testified to the minor nature of the collision and the absence of damage to the plaintiff's vehicle presumably for the purpose of invoking a presumption of little or no injury to the plaintiff. Second, as is discussed below, the parties' submissions respecting injury and loss in this case sometimes appear to muddle the important distinction between causation as a source of the loss on the one hand and the rules governing assessment of damages on the other.

VII. Findings as to Injury, Causation, and Loss

- [105] The defendants submit that while the MVA aggravated pre-existing soft-tissue injury to Ms. Sahota's neck, shoulders, back, and hip, the injuries gradually improved and Ms. Sahota had returned to her pre-accident condition sometime between October 2017 and April 2018 -- i.e. 1 to 1.5 years before trial. Therefore, the 2016 MVA was not causative of any financial loss which occurred after Ms. Sahota returned to her pre-accident condition sometime between October 2017 and April 2018. As well, and in any event, the defendants also submit that Ms. Sahota was an unreliable witness of questionable credibility whose evidence regarding "crucial matters" (i.e. motivation to move to parents' house, existence/extent of housekeeping assistance, intent to be a Summer School Principal during pregnancies, and claimed inability to work in the Fall 2018) should be disbelieved.
- [106] In essence, the defendants submit that Ms. Sahota simply preferred and continues to prefer to stay at home with her children, that she has made no serious attempt to go back to work, and thus has sustained little or no loss for which the defendants are liable. The implication of these submissions, of course, is that the plaintiff is exaggerating her disabilities for secondary gain and that she is being dishonest with her physicians, her employer, and the Court.
- [107] There is no question that the Court's task in this case would have been facilitated by evidence either corroborating or contradicting the plaintiff's version of various matters. Such evidence might have been forthcoming from her parents, her husband, housekeeper(s), recent work colleagues, and additional treatment providers both before and after the accident. Expert evidence from functional/work capacity evaluators, occupational therapists, and actuaries/economists would also have been helpful. However, the absence of such evidence does not lead to any adverse inferences against the plaintiff. Such witnesses were equally available to the defendants and, indeed, I understand that the defendants actually subpoenaed the husband to give evidence and ultimately elected not to call him as a witness.
- [108] In soft-tissue "whiplash" cases, where medical diagnosis and treatment is at least partially if not wholly based on a plaintiff's "subjective" pain complaints, the Court will examine the available evidence critically and carefully to ensure justice is done between the parties. In this particular case, however, the defendants have themselves adduced evidence from their own expert medical witness which substantiates the existence in December 2018 of myofascial pain resulting from soft-tissue injury to the plaintiff's neck and back caused at least in part by the 2016 MVA. The same expert opined that the pain would limit her ability to work, although it might be remediated by an active/physical rehabilitation program. Even without the evidence of Dr. Uppal and Dr. Chang, the evidence of Dr. Calvert refutes the defendants' following submissions:
- that any MVA injuries ceased to have effect (beyond any pre-accident condition) as of April 2018; and

· that the MVA injuries did not cause or even contribute to the plaintiff's reduced work capacity and her medical leave of absence from September 2018 onwards.

[109] While I do not accept all of the plaintiff's claims in this case, I also do not find her to be a dishonest or an unreliable witness. To the contrary, I generally found her testimony to be frank, direct, and responsive.

[110] In any event, having considered all of the evidence referred to above, I make the following findings of fact on the balance of probabilities:

- The plaintiff sustained soft-tissue injuries in the 2010 MVA which were not fully resolved by March 23, 2016 and which resulted in periodic pain in the neck, shoulders, back, hips, and legs, for which she received occasional physiotherapy and massage therapy treatments;
- These periodic symptoms did not prevent the plaintiff from working full-time as an elementary school teacher;
- The 2016 MVA combined with her pre-existing vulnerability to exacerbate and cause further soft-tissue injury to the plaintiff's neck and back, which has proved to be stubbornly persistent in nature, albeit waxing and waning depending on activity. This is classic "indivisible" injury;
- Various non-tortious events have also contributed to the persistence and severity of the plaintiff's symptomology, including multiple pregnancies, physical deconditioning, and lengthy commutes to work;
- The plaintiff's absences from work as an elementary school teacher, whether characterized as sick days or extended medical leave, and all resulting financial loss, were caused at least in part by the soft-tissue injuries sustained in the 2016 MVA. However, the plaintiff is not permanently disabled from working as an elementary school teacher, but she will likely require active physical rehabilitation over a period of six-12 months to improve her general conditioning, massage therapy treatment for recurrent symptomology, and a graduated return to work program.

[111] As a matter of law, these findings of fact respecting the 2016 MVA as a cause of the plaintiff's injuries and loss mean that the defendants are 100 percent liable for all such injury or loss even though non-tortious causes may also have contributed to same. Having found the defendants liable, I will now turn to the assessment of loss and appropriate compensation.

VIII. Non-Pecuniary General Damages

[112] In a personal injury lawsuit, the Court may make an award for non-pecuniary damages to compensate a plaintiff's pain and suffering, loss of amenities, and loss of enjoyment of life. The Supreme Court of Canada has articulated a "functional approach" to the assessment of such damages. Following this approach, because non-pecuniary losses are intangible and not readily susceptible to evaluation, any such award should be designed to provide reasonable "solace" for a plaintiff's loss, where "solace" is viewed in the sense of funding things that might make life more bearable or enjoyable.

[113] In 1978 the Supreme Court of Canada also limited these types of general awards to a limit of \$100,000, a limit which is subject to upward adjustment to account for the effects of inflation. At the present time, the upper limit is in the vicinity of \$400,000, which is only awarded in cases involving extremely severe injury and disability and where maximum solace must be recognized.

[114] A non-exhaustive list of factors taken into account in assessing any award for non-pecuniary general damages include the plaintiff's age, the nature of the injury, the severity and duration of the pain, disability, emotional suffering, impairment of life, family, marital and social relationships, impairment of physical and mental abilities, and loss of lifestyle. While there is no "tariff" on such awards, their fairness and reasonableness are measured with reference to awards made in other cases involving similar injuries and circumstances. In each case an appreciation of the plaintiff's specific circumstances is required as the need for solace does not necessarily correlate with the seriousness of the injury.

See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. School Dist. No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Lindal v. Lindal*, [1981] 2 S.C.R. 629, at 638-648; *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46, leave to appeal ref'd [2006] S.C.C.A No. 100.

[115] The plaintiff submits that the appropriate award of non-pecuniary damages in this case is in the range of \$85,000-\$130,000, citing *Clayton v. Barefoot*, 2018 BCSC 239 (\$130,000, recognized as "the very high end of the range"); *Woelders v. Gaudette*, 2016 BCSC 1066 (\$85,000, 31 year old pregnant woman in previous good health, chronic soft-tissue pain with some degree of improvement but persistent residual symptomology and restrictions); *Harry v. Powar*, 2018 BCSC 845 (\$85,000, soft-tissue injuries and headaches persisting for five years to trial and beyond); and *Kasidoulis v. Russo*, 2010 BCSC 978 (\$90,000, 38 year old teacher with chronic back pain, exhaustion, inability to do housework, and symptomology aggravated during pregnancy).

[116] For their part, the defendants emphasised that the plaintiff's injuries have gradually improved since the accident and they submit that the plaintiff returned to her "pre-accident state" at some point in time between October 2017 and April 2018. They submit the appropriate award for non-pecuniary general damages in this case is in the range of \$45,000-\$55,000, citing *Tugnait v. Li*, 2005 BCSC 226 (\$30,000, 35 year old flight attendant, three months pregnant, soft-tissue injuries becoming intermittent symptomology, deconditioned status because of pregnancy, full recovery likely); *Runghen v. Elkhail*, 2009 BCSC 467 (\$40,000, four months pregnant, continued symptomology from soft-tissue injuries to cervical and lumbar spines, expected to markedly improve with correct rehabilitation treatment -\$48,000 2019 value); and *Salvatierra v. Vancouver (City)*, 2008 BCSC 537 (\$45,000, 41 year old plaintiff with soft-tissue injuries persisting four years to trial -\$55,000 2019 value).

- [117] In the present case, the plaintiff was 33 years old at the time of the accident. Her pre-existing vulnerability for periodic musculoskeletal pain was exacerbated and further soft-tissue injury was caused by the 2016 MVA which has proved to be stubbornly persistent in nature, albeit waxing and waning depending on activity. It is anticipated that with an applied program of active rehabilitation and improved physical conditioning, she will see improvement in her ongoing symptomology that will ultimately enable her to return to work full-time. It is likely however, that Ms. Sahota will continue to experience occasional flare-ups in severity of symptoms.
- [118] Whilst I find on the evidence before me that there was a real and substantial possibility that Ms. Sahota's pre-existing vulnerability and other non-tortious contributors (e.g. pregnancies, commutes, etc.) would have triggered some future episodes of soft-tissue pain and disability in the absence of the 2016 MVA, I also find a real and substantial possibility that as a result of the 2016 MVA she may be left with lingering symptomology and disability for a considerable period of time.
- [119] The plaintiff's pain has been present for over three years and will likely continue to some degree. While her family has grown and appears to be thriving, I find that the 2016 MVA and the resulting injuries and pain symptomology have undoubtedly caused some impairment in terms of life style, recreational activities, family and social relationships, and homemaking capacity. This too may also continue to some degree in the future.
- [120] In all of these circumstances, and having regard to the ranges referred to in the case law provided by the parties, I award Ms. Sahota \$75,000 for non-pecuniary general damages.

IX. Loss of Past and Future Income Earning Capacity

- [121] In *Kallstrom v. Yip*, I discussed in detail the principles governing awards for loss of past and future income earning capacity at paras. 388-402. I will not repeat those principles here but would point out that in the years since *Kallstrom*, our Court of Appeal has repeatedly emphasised:

- What would have happened in the past but for the plaintiff's injury is no more "knowable" than what will happen in the future and, rather than applying the balance of probabilities standard of proof that is usually applied with respect to past events, hypothetical past or future events will simply be given weight according to their relative likelihood (usually by ascribing a percentage and adjusting the damages accordingly);
- The plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss. However an inability to perform an occupation that was or is not a realistic alternative will not meet even the lower standard of proof;
- Assessment of quantum may be based on earnings or some other method of capital asset impairment evaluation but in any event, the Court should take a disciplined approach using factual, mathematical, and economic anchors as a foundation for the analysis;

- The assessment must be grounded in the evidence which would ideally include the plaintiff's pre-accident employment history, training, and capabilities as well as intangibles such as his/her personality, work ethic, and attitude; and,
- While quantification of the loss is an assessment and not just an arithmetical exercise, mathematical aids and economic analysis can facilitate a "bracketing" which will indicate the high and low extremities of possible awards in any given case.

See *Grewal v. Naumann*, 2017 BCCA 158; *Knapp v. O'Neill*, 2017 YKCA 10, paras. 17-19; *Rousta v. MacKay*, 2018 BCCA 29; *Gao v. Dietrich*, 2018 BCCA 372.

Past Loss of Earning Capacity

[122] At the time of the accident, the plaintiff was fully established in a teaching career with the VSB and had achieved the highest possible level of remuneration available to such a teacher. The claim for both past and future loss of income earning capacity is grounded on a continuation of that career both between the date of the accident and the trial, and thereafter into the future.

[123] The plaintiff posits her past loss of income earning capacity claim on three different bases, namely:

- exhaustion of accumulated sick days when salary payment continued;
- loss of Summer School Principal income in 2017 and 2018;
- loss of salary during her unpaid medical leave from October 2, 2018 to February 6, 2019; and
- loss of maternity/parental benefits following the birth of the plaintiff's third child.

[124] I will deal with each claim separately.

Wage Loss Benefits/Sick Days

[125] The availability to an injured employee of "sick days" or wage loss/continuation benefits raises complicated questions as to whether any amounts paid must be brought into account in any related personal injury litigation and, if so, how. The issue is complicated because:

- wage loss benefits can be treated in law as a "non-deductible collateral benefit", and particularly so where the payor has a right of subrogation respecting any amounts paid (see analysis below);
- section 83 of the Insurance (Vehicle) Act, RSBC 1996, ch. 231 [IVA] provides for a "deemed release" by a plaintiff claiming a personal injury damages "to the extent of [certain defined] benefits" received or receivable by that plaintiff (see analysis below); and
- "loss of sick day accumulation/entitlement" is itself a form of financial loss for which compensation is available in personal injury litigation (on a gross-of-tax basis): *Gormick v. Amenta*, 2013 BCSC 1998.

- [126] Neither of the parties in this case provided any analysis of the law applicable to such matters. The plaintiff simply pointed to (i) the subrogation provision in the "Collective Agreement", and (ii) the "Absence Report" prepared by the VSB listing the plaintiff's sick days taken since the 2016 MVA and the "daily rate" paid in that regard (totaling approximately \$25,000 which, with a small discount, is the amount claimed). For their part, the defendants simply presented their argument (now rejected) that the plaintiff's absence from work was not caused by the 2016 MVA.
- [127] In the present case, the plaintiff has not expressly pleaded any claim for the value of past or future "lost" sick bank credits. Rather, she simply alleges "loss of earnings" and "loss of income earning capacity" as a result of the injuries and claims unspecified damages on that account. In their Response, the defendants expressly plead the "deemed release" and "net past income loss only" provisions of the IVA, albeit referencing the incorrect title and sections of the legislation.
- [128] In *Provost v. Bolton*, 2018 BCSC 1090, Justice Butler analyzed the law surrounding the recoverability and deductibility from loss of income damages awards of employer-paid salary continuation "benefits" paid to an employee while absent from work because of injury. In summary, such benefits constitute an indemnity against the loss of income that would otherwise be incurred, and if the employer has a non-waived right of subrogation in respect of the payments (whether pursuant to contract or in equity), then the payment will be treated as a "non-deductible collateral benefit" which does not impair the plaintiff's right to recover the same monies as damages in the personal injury action: *Provost*, paras. 50-62).
- [129] While I acknowledge the existence of some contradictory case law in this area, I agree with and adopt Butler J.'s analysis of this issue in *Provost*. However, the analysis does not end there; it remains to be considered whether this sort of wage loss "benefit" is subject to the "deemed release" provisions found in section 83 of the IVA.
- [130] Section 83 of the IVA is a provision that has existed in auto insurance legislation across the country for many years. In addition to providing liability coverage for the persons insured by the auto insurance policy, such policies also provide limited "no fault" benefits to insureds injured in a motor vehicle accident for such things as wage loss, medical expenses, and the like. The purpose of the "deemed release" provision in the legislation was to ensure that an injured plaintiff would not receive "double recovery" for losses already paid by the same or another auto policy.
- [131] Section 83 of the IVA, as that provision existed at the time of the 2016 MVA in this case, legislated a deemed release from any MVA personal injury damages claim of the "no fault" benefits received by the plaintiff under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83, or for similar benefits provided "under vehicle insurance wherever issued or in effect". The wage loss continuation benefits received by the plaintiff in this case were not paid pursuant to any auto policy, whether issued by ICBC or any other auto insurer, and hence the deemed release provision in section 83 of the IVA (as it existed at the relevant

time) does not apply.

- [132] The situation may well have been different if the plaintiff's accident had occurred on or after May 17, 2018. This is because section 83 of the IVA has been significantly amended to, among other things, 1) expressly capture benefits payable under any type of insurance or any terms or conditions of employment (whether under a collective agreement or otherwise), and 2) expressly render unenforceable any right of subrogation such a payor "may have under an agreement, the common law or an enactment". These provisions have yet to be fully judicially considered but they may radically change the previous common law respecting non-deductibility of certain collateral benefits such as the benefits received by the plaintiff in this case.
- [133] In any event, the bottom line in the present case is that the plaintiff is entitled to claim as loss of income the amounts paid to her by the VSB pursuant to accumulated sick bank credits for absences from work caused by her MVA injuries. Any award in this regard will presumably be paid by the plaintiff to the VSB to restore the accumulated sick bank credits in question but it is not the role of the Court in this case to supervise or enforce any such obligation.
- [134] As noted above, the total sum paid by the VSB to the plaintiff on account of absences from work covered by sick bank credits during the period March 30, 2016 to October 1, 2018 was approximately \$25,000 (slightly rounded up). Ms. Sahota concedes that not every absence from work was caused by her MVA injuries. However, she only identifies five such days (representing \$2,275) as absences related to her pregnancies.
- [135] It must be remembered that the defendants are not liable for losses (including absences from work) that the plaintiff would have incurred regardless of the accident. Ms. Sahota would not have been impervious to colds, flus, or other ailments that might trigger an absence from work let alone taking an occasional "sick day" for reasons other than actual sickness. There is little or no evidence before the Court respecting the plaintiff's "pre-accident" history in this regard but I am satisfied that there is a real and substantial possibility such events would have occurred and that a further discount is warranted albeit in a modest amount. I therefore determine that the plaintiff's claim for loss of income because of MVA-injury-caused absences from work covered by accumulated sick bank credits is in the gross amount of \$20,000.
- [136] The parties have agreed that this claim qualifies as "lost past income" which is subject to a "netting" deduction pursuant to section 98 of the IVA and that the appropriate reduction on that account would be 25 percent. The "net" award under this heading is therefore \$15,000.

Summer School Principalship

- [137] The plaintiff argues that, if the 2016 MVA had not occurred, she would have applied for and obtained Summer School Principal positions in 2017, 2018 and 2019, despite her pregnancies and related available paid maternity/parental leave. She says she would have done this because the income as a Summer School Principal was significantly higher than maternity/parental benefits and such positions would help keep her on track to become a vice-principal and principal in due course.
- [138] Ms. Sahota's claim in this regard does not accord with the facts and I reject it for that reason.
- [139] First, on more than one occasion during her testimony, Ms. Sahota acknowledged without qualification that she intended to take full advantage of all available maternity/parental leave for a full year following the birth of her children. I acknowledge she persevered with the Summer School Principalship in 2018 but this was because she had already applied for and accepted the position before she knew she was pregnant and she was determined to be seen as a person who lived up to her commitments.
- [140] Second, Ms. Sahota also knew that she would be giving birth in September 2016 and would be on maternity/parental leave for the one year period thereafter. There was no basis for her to assume she would be physically unable to perform duties as a Summer School Principal in July 2017 and yet she made no application for such position in the late summer or early fall of 2016. This is a strong indicator of her intentions.
- [141] I am not persuaded that Ms. Sahota intended to apply for and obtain Summer School Principalships available during any maternity/parental leave periods following the birth of her children and, indeed, I find as a fact that no such intention existed. The requisite threshold causation not having been established, any assessment of damages reflecting real and substantial possibilities does not arise and the claim for this aspect of past loss of income earning capacity must be dismissed.

Unpaid Medical Leave and Loss of Maternity/Parental Benefits

- [142] While I have found as a fact that Ms. Sahota intended to take full advantage of all available maternal/parental leave during any pregnancy, such a finding is not fatal to her claim for loss of income in the 2018-2019 school year. To the contrary, I find as a fact that Ms. Sahota is shrewd and intelligent and that she realized immediately upon discovery of her third pregnancy that an "early" return to work would be necessary in order to qualify for any EI Maternity/Parental Leave benefits following the anticipated birth of her third child in February 2019.
- [143] Ms. Russell testified, and I accept, that while the VSB/Collective Agreement definition of a full teaching day comprised only five hours, this was equivalent of 9.1 hours for EI entitlement accrual purposes. This meant that in order to qualify for EI Maternity/Parental

Benefits (and any VSB "top-up") following the birth of her third child, Ms. Sahota had to accumulate approximately 66 full teaching days in the period of September 2018 to early February 2019, something that could only be accomplished if she returned to work "early" from her (previously planned) full year of maternity/parental leave in 2018. It was for this reason that Ms. Sahota decided to return to work in September 2018 on a full-time basis.

[144] As noted above, the injuries sustained in the 2016 MVA were at least a significant contributory cause to Ms. Sahota's failure to accomplish her goal and thus was also a significant contributory cause of her lost salary and her inability to obtain EI Maternity/Parental Leave Benefits (and any related VSB "top-up") following the birth of her third child on February 7, 2019. Ms. Sahota is thus entitled to an award of damages representing both her lost salary in the period September 2018 to February 6, 2019 and also for lost maternity/parental benefits that would otherwise have been received from February 6, 2019 to the date of trial. Any such award of damages must of course reflect an assessment of any real and substantial possibilities/contingencies that might reduce the amount recoverable as well as any further reductions required by the IVA (for such things as income tax, deemed releases, etc.).

[145] In final submissions, the plaintiff presented a claim only for loss of earnings during the unpaid medical leave from October 2, 2018 to February 6, 2019 as follows:

If she had been working for the VSB in 2018-2019 school year, Ms. Sahota would have been earning an annual gross salary of \$87,751. Over a 38-week school year, this equals \$2,040.72 gross per week. From October 2, 2018 February 6, 2019, calculating her missed time on her expected salary of \$2, 40.72 gross per week, Ms. Sahota had lost past income earning capacity of \$54,232.10 gross.

[146] The arithmetic is perplexing. \$87,750 divided by 38 equals \$2,310 per school week (i.e. while the school is in session). The period October 2, 2018 to February 6, 2019 comprised of 16 weeks when the school would have been in session resulting in lost income of \$37,000 gross (rounding the numbers). After a "netting" deduction of the agreed 25%, this equals \$28,000 net (again, rounded).

[147] Plaintiff's counsel also provided calculations for lost income that Ms. Sahota would have received as EI Maternity/Parental benefits (topped up by VSB) for the period February 7, 2019 to the first day of trial, and thereafter to the beginning of September 2019, the date Ms. Sahota testified she planned on returning to work. The amount for the first period is \$16,500 (slightly rounded) and for the second period is \$24,000 (slightly rounded). Applying the agreed 25% "netting" rate, the total loss to the beginning of September 2019 is \$30,000 net (slightly rounded).

- [148] The defendants did not challenge the arithmetic presented by the plaintiff to the Court. Instead, they claim that any damages awarded by the Court in that regard should be reduced by 80% because of the plaintiff's failure to mitigate her loss during this period of time. The failure to mitigate is said to be the plaintiff's failure to access the 6 month short-term disability plan funded by the BC Teacher's Federation and more specifically referred to in the evidence of Ms. Russell.
- [149] Alternatively, and perhaps illogically, the defendants argue that the plaintiff could have mitigated her loss by requesting accommodations from her employer that would have enabled her to work at least part-time or, in a similar vein, by accessing the VSB's "work hardening" program which might have allowed a substitute teacher in Ms. Sahota's classroom to assist while Ms. Sahota was "gradually building up capacity".
- [150] In my opinion, there is no merit in these submissions respecting a failure by the plaintiff to mitigate her loss.
- [151] I acknowledge, of course, that a plaintiff in a personal injury action has a duty to take all steps reasonably available in the circumstances to limit their loss, including for example taking prescribed medical treatment, seeking alternative sources of income that might reasonably be available, and the like. In order for a "mitigation defense" to succeed, it is the defendant who has the burden of establishing on the balance of probabilities 1) that there were steps that the plaintiff could have taken to mitigate her loss, 2) that such steps were reasonable for her to take in the circumstances, and 3) the extent to which the loss would have been avoided or reduced by taking those steps.
- [152] In the present case, and indeed more generally, resort to available disability insurance does not mitigate the loss because the disability benefit payor is invariably subrogated to the payee's right of recovery from a third party. Even if the plaintiff could have applied for and received disability benefits during the period of her extended unpaid medical leave (which has not actually been proved by the defendants but is only speculation), the plaintiff would be entitled to recover her indemnified wage loss in any event, precisely as she has done with respect to her salary continuation and related sick bank credit depletion. In other words, the receipt of such disability benefits would not actually mitigate the loss but would simply substitute another beneficiary (the "insurer") for the same claim.
- [153] It is true that, generally speaking, the VSB can provide accommodation and assistance to teachers whose ability to work is impaired by temporary or permanent disability. Ms. Russell confirmed this to be the case. However, the defendants have not met their burden of leading evidence to establish on a balance of probabilities that such resources were actually available for the plaintiff's particular injuries and, more importantly, that it would have made any meaningful difference to the outcome.

- [154] Insofar as a part-time return to work is concerned, the plaintiff was confronting an economic imperative (accumulation of EI-qualifying work hours), and I cannot fault her for attempting to return to work on a full-time basis. It was not unreasonable for her to try, and the claim that the plaintiff unreasonably failed to mitigate in this regard has no merit.
- [155] The claim for past loss of earning capacity in this case totals \$75,000 net (\$15,000, \$28,000, and \$30,000), and I award the plaintiff damages in that amount together with all appropriate pre-judgment interest.

Future Loss of Earning Capacity

- [156] The plaintiff's submissions respecting her future loss of income earning capacity are confusing and contradictory. On the one hand, counsel argues that "chronic pain prevents Ms. Sahota from working full time, though [she] acknowledges there is prospect that she will work part time, on a more limited basis". Counsel also argues that the plaintiff's future prospects are "less certain" because she has been unable to take advantage of intervening Summer School Principal opportunities and she will be "less competitive" when she applies for promotion to vice-principal or full-time principal.
- [157] Based on these submissions (and also Dr. Uppal's rather dire prognoses) one would have expected expert reports from an actuary or an economist "illustrating" the present value of future economic loss based on a variety of scenarios. For example, part-time vs. full-time employment over various periods of time, comparison of income streams based on salary as a teacher, and as a vice principal or principal. Such evidence might have provided a "bracketing" of possible future loss which might inform the Court's assessment of damages. At the upper end of the spectrum, the amounts involved could well be in the many hundreds of thousands of dollars.
- [158] As well, while suggesting that "at a minimum" the plaintiff's "track to be a principal" has been delayed, no evidence was tendered regarding the number of past or anticipated vacancies, the number of qualified candidates who usually apply for such positions, or other factual or employment related anchors that might assist the Court in assessing the plaintiff's realistic prospects for promotion, whether in the past four years or in the next decade.
- [159] It must also be borne in mind that, very likely for perfectly sensible economic imperatives (i.e. no present income), the plaintiff testified that she intended to return to work as a teacher in September 2019 on a full-time, or, at the very least, on a part-time basis.
- [160] In his submissions on this part of the claim, the plaintiff's counsel referred only to *Pallos v. ICBC*, [1995] 3 WWR 728 (BCCA), where the Court noted that one, admittedly arbitrary method of assigning a dollar value to the loss of future income earning capacity was to "award the plaintiff's entire annual income for one or more years:" at para. 43. In that case, the Court awarded an amount that appears to have been one or two years income to a plaintiff who suffered chronic pain but was still employed by his pre-accident employer and

would continue to be so employed indefinitely.

- [161] In the result, the plaintiff in this case simply quantified her loss of future income earning by positing "3 times the difference of annual gross income between a teacher with the plaintiff's salary and a principal" i.e. an aggregate sum of \$107,561.97.
- [162] For their part, the defendants provide no analysis of the relevant case law nor any submissions on quantum methodology, even if only as an alternative. Instead, they simply say "the plaintiff has not established that she suffered a loss of earning capacity, past or future" and that "she has not been delayed by the accident in her goals to become an administrator". They thus urge this Court to make no award whatsoever for loss of future income earning capacity in this case.
- [163] As noted above, I have found as a fact that the soft-tissue injuries sustained by the plaintiff in the 2016 MVA have proved to be stubbornly persistent, albeit waxing and waning depending on activity, and that they did indeed cause her absences from work during the period September 2018 to February 2019. However, I have also found as a fact that the plaintiff is not permanently disabled from working as an elementary school teacher. Instead, I have found that a graduated return to work should be able to occur, albeit with some degree of recurrent symptomology.
- [164] In my opinion, the evidence does indeed support a finding that the plaintiff has sustained a loss of future earning capacity and that her injuries trigger real and substantial possibilities of future events leading to an income loss. These include the possibility that the plaintiff may not be able to endure full-time work even with active rehabilitation, that part-time work may become a reality for much longer than anticipated, and that her pre-accident prospects for promotion may well be prejudiced to some degree.
- [165] Given the absence of alternative approaches, whether simply as submissions or actually anchored in expert evidence, I will adopt the Pallos approach in this case and award Ms. Sahota \$115,000.00 as the present value of her future loss of income earning capacity. It is a little more than one year's salary or two years' lost salary on a part-time basis. It is an amount that reflects a graduated return to full-time work, negative contingencies arising from pre-existing medical conditions, but also the more substantial possibility that a return to full-time work may take much longer than anticipated. It includes an allowance for delayed promotion or prejudiced prospects. It is also an amount that I consider to be fair to both parties in the circumstances of the case.

X. special damages

[166] The plaintiff claims special damages as follows for a total of \$15,412:

- Myodetox (Physio Room Clinic) - \$180;
- Innovate Guilford - \$820 + \$23.40;

- PainPro - \$71.70 + \$7.90 (Mileage)= \$79.60;
- Masumi Nakita - \$500;
- Pavan - \$2,950;
- Rachel Sandhu (Mother's Helper) - \$10,759; and
- Dr. Navdeep Uppal - \$100.

[167] The defendants accept all of the plaintiff's claims for special damages listed above except those related to Pavan and Rachel Sandhu. The amount that they therefore agree to pay is \$1,703.

[168] With respect to the disputed items, the defendants say;

- The main reason the plaintiff and her husband moved to her parents' house was to obtain assistance with childcare and housekeeping the claim for these items are therefore unreasonable;
- "The truth of the contents of these invoices is questionable" and has not been "reasonable verified" (see below);
- The plaintiff is the author of the invoices;
- The plaintiff could not reasonably explain the inconsistency with her evidence at discovery that she was considering hiring a mother's helper but then at trial submitted invoices for a period of seven months before that point;
- The plaintiff could not reasonably explain the hours and amounts claimed for the first two weeks of July 2018 when she and her family were on vacation in Toronto.

[169] When expressly confronted by the Court on this point, the defendants declined to accuse the plaintiff of fraud i.e. making a claim for amounts she did not actually pay. Instead, the defendants simply maintained that the services were not reasonably necessary and are not reasonably attributed to the 2016 MVA.

[170] Both parties accept that expenses claimed as special damages in a personal injury action are recoverable if they were incurred for services that were reasonably necessary in the circumstances and were reasonable in amount. However, neither party provided any analyses of the law respecting past or future loss of domestic capacity.

[171] In her Notice of Civil Claim, the plaintiff expressly pleads:

8. As a result of the injuries, the Plaintiff has incurred and continues to incur "in trust" personal services provided by others, particulars of which will be provided by the Plaintiff in this action.

9. As a result of the injuries, the Plaintiff has been rendered disabled from performing household duties and yard work, and has thereby suffered a loss of domestic capacity and will continue to suffer such losses in the future.

[172] Apart from the claim for "homemaker" services referred to above, (whether as a cleaner or a "mother's helper"), the plaintiff is also pressing a claim for future loss as follows:

The plaintiff further requires ongoing homecare services, as evidenced by the ongoing receipts and referral from Dr. Uppal. Based on the amount the plaintiff spent to date, the plaintiff submits an award of \$4,000 per year is appropriate. The plaintiff therefore claims \$20,000 in relation to her ongoing homecare.

[173] In Kallstrom, I noted at para 455 - 456:

[455] Our Court of Appeal instructs us that, properly considered, homemaking costs are awarded for loss of capacity, are distinct from future cost of care claims, and thus require separate assessment: *Westbroek v. Brizuela*, 2014 BCCA 48 (CanLII). In that case the court stated:

[74] An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff. [Emphasis in original.]

[456] *Westbroek* and other appellate decisions regarding this head of damages have instructed trial courts to adopt a "cautionary approach" to assessment "lest it unleash a flood of excessive claims" (at para. 77) but (conservative) awards can, and should, be made where the evidence at trial substantiates the loss in a meaningful way.

[174] More recently, in *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal stated:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [175] The Court is hampered in its assessment of the plaintiff's claims for special damages by the absence of reliable evidence corroborating both the extent of any incapacity on the part of the plaintiff and the necessity for paid replacement services.
- [176] As noted earlier, no expert evidence was rendered from a functional/work capacity evaluator or from an occupational therapist. Dr. Uppal is an unreliable advocate for the plaintiff. None of the housekeepers, plaintiff's mother or plaintiff's husband testified as to the extent of services provided and their necessity. The husband and father of the plaintiff's children is apparently not working because of injury, but no medical evidence was led to prove the existence and extent of any resulting disability. The plaintiff says she intends to rely on her mother and her husband for the necessary assistance when she returns to work this fall, which implies that substitute "mother's helper" services from a third party were and are unnecessary.
- [177] Nonetheless, the nature of the plaintiff's injuries (persistent albeit periodic musculo - skeletal, myofascial pain) logically suggests the plaintiff would have periods of time when she would be unable to perform usual and necessary housekeeping or child care services. However, the extent of the services provided in this case seems excessive. As well, multiple pregnancies resulting in three very young children at home at also undoubtedly contributed to a need, at least occasional, for child care and home assistance services regardless of any MVA related injury.
- [178] In the end, all I can do is "rough justice" to the claim for past and future loss of domestic capacity. In that regard, I award \$3,000 as special damages for past housekeeping/homemaking services and I have included an allowance for the plaintiff's ongoing loss of amenities in that regard as part of the non-pecuniary damage award in this case.

XI. Cost of Future Care

- [179] I summarized the legal principles applicable to cost of future care claims in paragraph 429 of Kallstrom and I will not repeat that listing here. Essentially, as with any claim for special damages, the services must be reasonably necessary in the circumstances and the costs must be reasonable in amount.
- [180] As noted above, the plaintiff claims under this heading \$20,000 in respect of "ongoing homecare services". For the reasons stated above I make no separate award in this regard.

[181] The plaintiff also claims the cost of future medical treatments on the grounds that they are "necessary in order to manage occasional exacerbations of the plaintiff's condition":

- massage therapy - \$1,440 per annum
- chiropractic therapy - \$900 per annum
- physiotherapy - \$1350 per annum
- active rehabilitation - \$945 per annum
- prescription pain medication - \$137 per annum (cost of Tylenol 3 - 100 tablets)
- exercise program - \$600 per annum (cost of annual gym membership)

Total: \$5,372 per annum.

[182] Plaintiff's counsel submits as an estimate that the plaintiff "will require the above-noted care for the next five years of her life, taking the optimistic view that there may be some room for the plaintiff's condition to require less care" and on these grounds argues that "\$26,860 is the appropriate award".

[183] The defendants say that the recommendations by Dr. Chang and Dr. Uppal are too vague and too broad. If some on-going medical treatment is required, the defendants submit that "there is no [admissible] evidence regarding what those services will cost and which treatments the plaintiff will prefer and as such there is simply not enough evidence to make an award under this head of damage". The defendants do note, however, that the cost of an active rehabilitation program of the sort recommended by Dr. Calvert would cost approximately \$1,000.

[184] Once again, there is a certain lack of analytical rigour by the parties with respect to this claim and the evidence is weak. As a result, I will apply some "rough justice" to ensure that both parties are treated fairly.

[185] Neither Dr. Uppal nor Dr. Cheng provided any rationale for four different and not necessarily complementary therapies. Dr. Cheng said any such therapies would be "largely palliative in nature". Dr. Uppal does not appear to have been aware that Dr. Cheng discharged Ms. Sahota from further chiropractic treatment because there had not been much improvement in her condition. Dr. Cheng suggested a 12 month regime for continued treatment, whereas Dr. Uppal's recommendation appears to be perpetual.

[186] In the end, I conclude it would be reasonable for the plaintiff to be provided funds sufficient to cover multiple sessions of active rehabilitation, combined with registered massage therapy or physiotherapy, and the costs of attending a gym or yoga centre for a period of one to two years following the date of trial. This should assist with any graduated return to work, should such a graduated approach be required, and will help to address any occasional flare-ups of symptomology resulting from work or otherwise. On a global basis, I assess the award in the amount of \$4,000.

XII. Summary and Conclusion

[187] I find both defendants jointly and severally liable for the injuries inflicted upon the plaintiff as a result of the 2016 MVA and I assess damages as follows:

- Non-pecuniary damages - \$75,000
- Past Loss of Earning Capacity - \$73,000

(plus pre-judgment interest to be calculated)

- Loss of Future Earning Capacity - \$115,000
- Special Damages - \$4,703

(plus pre-judgment interest to be calculated)

- Cost of Future Care - \$4,000

Total: \$271,703

[188] If the parties are unable to agree on the amount of pre-judgment interest or any other adjustments mandated by the IVA, they are at liberty to apply for further directions within 30 days of the date of this judgment.

[189] Should anything have occurred between the parties that might affect any award of costs in this case, the parties may make submissions in writing within 30 days of the date of this judgment. Otherwise, costs will follow the event and are awarded to the plaintiff to be assessed under Scale B of Appendix B to the Supreme Court Civil Rules.

XIII. post script: some comments about trial organization

[190] I cannot leave this case without some comment about the organization and presentation of this trial which will hopefully be of benefit to counsel, and the bar generally, in future personal injury cases.

[191] This action was filed subject to Rule 15-1 which applies to "fast track" litigation. Rule 15-1 only applies to actions where, among other things, the amount claimed is \$100,000 or less, or the trial can be completed within three days.

[192] At the Trial Management Conference held April 9, 2019, the Court noted that the time estimates set out in the parties' respective trial briefs totalled 12.95 hours which was longer than the 12 hours of court time presumed for a three day trial. At that time, counsel indicated they were having discussions on how to trim their time estimates and assured the court that the trial would be completed in three days. The plaintiff's trial brief indicated three named witnesses would be called along with two further unidentified lay witnesses. The defendants' trial brief indicated two witnesses would be called. By the time the trial date arrived, each party had added one witness to their respective witness list (including, in the case of the defendants, the plaintiff's husband).

- [193] In the result, the parties' estimates and assurances to the court turned out to fall woefully short of the mark. The trial took six days. While the Court was able to tack on a fourth day at the start of the trial, a fifth day had to be scheduled for the closing submissions (three months after the closing of evidence) and when this too turned out to be an inadequate time estimate, a further day was required for closing submissions to be completed (again scheduled for another three months later). Poor planning and inadequate time estimates thus resulted in a six-month delay before the case could be completed. By that time a great deal of water had flowed under the judicial bridge which, combined with other competing scheduling priorities, resulted in a further delay in providing the parties a fulsome judgment on the merits. All of this is completely unsatisfactory.
- [194] Much to the dismay of the Court, the parties did not provide at the outset of the trial, an Agreed Statement of Facts nor even an Agreed Chronology of Events. This should be possible in every case. The Court finds it extremely helpful.
- [195] There also appears to have been a lack of cooperation with respect to any Common Book of Documents. Each party presented the Court at the outset of the trial with their respective binders of documents bearing labels such as "Plaintiff's Book of Documents - General", "Plaintiff's Book of Documents - Wage Loss", "Trial Binder of the Defendants (Liability & Medical)" and "Trial Binder of the Defendants (Wage Loss & Specials - 1 of 2)" and the like. These binders (five in total) were marked as "exhibits for identification", presumably so they would be available to the court in the event their contents were actually used and some relevant document might be entered as a full exhibit. These hundreds of pages of material included such things as the plaintiff's entire employment records file from the VSB, MSP printouts, PharmaNet printouts, clinical records from a variety of service providers, ICBC documents, and the like, some duplicated more than once. Approximately 95% of this material was not actually referred to or used in the trial. The whole exercise was a confused and confusing waste of time and paper.
- [196] When the parties convened three months following the close of evidence for their first attempt at final submissions, they presented the court with a revised Document Agreement executed by both counsel and a further "Common Book of Documents" (33 in number and comprising another couple hundred pages of material). This was marked as a full exhibit by the consent of both parties (and under considerable exasperation on the part of the Court) as was a further, albeit slimmer, binder entitled "Defendants Book of Documents". All of this should have been done before the trial started.
- [197] This case clearly was not a candidate for "fast track litigation" and the lack of cooperation between the parties with respect to trial preparation resulted in undisciplined scheduling and poor organization and presentation of the evidence. All in all, this was a most unsatisfactory trial experience from a judicial point of view.

[198] Similar problems occurred in the case of *Firman v. Asadi*, 2019 BCSC 270, which resulted in my colleague, Justice Verhoeven, delivering some sage advice respecting organization and preparation of a personal injury trial. I commend paragraphs 261-270 of his judgment to the parties here and to the personal injury bar generally.

[199] I also commend the recent comments of my colleague Justice Power in *Cummings v. Tellier*, 2019 BCSC 2067 at paras. 70-71. In *Cummings*, Justice Power suggests it would be "constructive advocacy" (i.e. helpful for the Court) if counsel would include in their final argument "submissions in the alternative" on matters of substance just in case a party's primary submission does not prevail. For example, instead of submitting only that "the plaintiff's claim for loss of future earning capacity has not been proved on the evidence", it would be helpful for counsel to also make submissions in the alternative concerning quantification in the event the Court holds otherwise. In this fashion, the Court will have the benefit of the alternative argument in assessing appropriate damages.

[200] I hope these observations will be of assistance in future cases.

" Kent J"

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Prepared on 29 October 2026 · Esheria