

CANADA / JUDGMENT

VanderVeen v. Amante

2019 BCSC 2079

COURT

Supreme Court of British Columbia

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2019 BCSC 2079 VanderVeen v. Amante

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

VanderVeen v. Amante,

2019 BCSC 2079

Date: 20191204

Docket: M156642

Registry: Vancouver

Between:

Amanda VanderVeen

Plaintiff

And:

Vincenzo Amante, V. Amante Home Supplies Ltd.

Defendants

Subject to Rule 15-1

Before: The Honourable Madam Justice Adair

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

August 12-16 and

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Place and Date of Judgment:

Vancouver, B.C.

December 4, 2019

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1. Introduction

- [1] On February 3, 2014, the plaintiff, Amanda VanderVeen, was involved in a motor vehicle accident. The defendants have admitted liability.
- [2] Ms. VanderVeen says that, as a result of the accident, she sustained soft tissue injuries that have resulted in chronic pain, in particular in her neck, upper back and shoulder area. She says that the prognosis for further improvement is poor, and that her injuries have resulted in functional limitations that (among other things) have affected and will continue to affect her tolerance for and ability to perform all types of work. This includes, in particular, work as a project manager, her chosen career. In addition to non-pecuniary damages, Ms. VanderVeen seeks compensation for loss of earning capacity (both past and future), loss of housekeeping capacity, cost of future care and special damages.
- [3] The defendants accept that Ms. VanderVeen sustained soft tissue injuries to her neck and back in the accident, and they agree that Ms. VanderVeen is entitled to compensation for non-pecuniary damages, past income loss and certain out-of-pocket expenses. However, the defendants say that the effects of the injuries on Ms. VanderVeen's life, her functionality and her future earning capacity are much less than Ms. VanderVeen asserts. The defendants say that her damages must be assessed accordingly.

2. Background

- [4] Ms. VanderVeen (sometimes referred to by her maiden name, Lang) was born in March 1976. As of trial, she had been in a marriage-like relationship with Klaus Wagner for about 12 years. They live in a small home in Bridesville, B.C., which is in the Okanagan.
- [5] Ms. VanderVeen grew up in Williams Lake. She is the oldest of five children, and has three sisters and a brother. Ms. VanderVeen's family (the Langs) lived on a ten-acre property in Williams Lake. As Ms. VanderVeen and her mother, Leona Lang, both recalled at trial, the Lang children spent much of their free time outdoors. Ms. VanderVeen recalled building tree forts, biking, swimming, camping, canoeing and hiking. They would go cross-country skiing in the winters. The Lang children were members of the local 4H club, and, as Mrs. Lang recalled Ms. VanderVeen raised sheep and made it to the Provincials one year. The family enjoyed going on road trips, and did so often. Ms. VanderVeen described how, when she was older, she would get in the car and drive from Williams Lake to Kamloops for the day.
- [6] Ms. VanderVeen's father was a heavy duty mechanic, and worked on vehicles at home. Ms. VanderVeen recalled fetching tools for her father when she was quite young. As she became older, Ms. VanderVeen began working with her father, and she gradually learned a number of "hands-on" skills. By the time she was old enough to drive, Ms. VanderVeen was helping her father with vehicle repairs.

- [7] Ms. VanderVeen was also very interested in music. In elementary school, she learned how to play the recorder, and then started playing the flute when she was in Grade 7. Later, when there was an opening for a saxophone player in the school band (of which she was a member), Ms. VanderVeen took up the saxophone. She played in the orchestra for musical productions in Williams Lake.
- [8] After graduation from high school, Ms. VanderVeen pursued some post-secondary studies, including taking some courses at the University of Northern British Columbia in Prince George. She had some relatively short-term jobs, and then worked for about two years at a Canadian Tire store in Chilliwack. There she was a team leader, and her duties included supervising and training staff.
- [9] By 2001, Ms. VanderVeen was working in a technical support centre at Stream International Inc. in Chilliwack. The company provided customer relationship management services and support services to technology companies and e-businesses. As a technical support person, Ms. VanderVeen was often called on to calm agitated customers and address their problems. While at Stream International, Ms. VanderVeen met Rob VanderVeen, and they married in 2004. Ms. VanderVeen was promoted within the company, and took additional training, giving her the skills to do networking and computer repair. As Ms. VanderVeen recalled, she was on track to be promoted to a management position. However, sadly, Ms. VanderVeen's husband died from cancer-related causes in March 2006. Ms. VanderVeen was her husband's primary care-giver in the final months of his life.
- [10] After her husband's death, Ms. VanderVeen continued to work at Stream International. Her employer had been very accommodating during her husband's illness, and allowed her to work from home. However, as Ms. VanderVeen recalled, she began thinking more seriously about where she wanted to live and what kind of work she wanted to do. She decided to go back to school in Prince George, and in September 2006, she started a course in environmental studies at UNBC. She had decided that she wanted to be outdoors more and be more active. She did not want to be sitting all day at a desk.
- [11] However, as Ms. VanderVeen recalled, she was still recovering from the aftermath of her husband's death. She found school hard and did not finish her course. Instead, she went back to work and essentially put her career goals on hold.
- [12] Ms. VanderVeen and Mr. Wagner met one another in the fall of 2007, and began living together in about November 2007.
- [13] In 2008, Ms. VanderVeen worked briefly at a Home Depot store in Prince George, and then at a dental laboratory. In early 2009, she was hired as an administrative clerk and office assistant at the Forensic Psychiatric Services Commission in Prince George, where she remained for about four years.

- [14] While she was living in Prince George, Ms. VanderVeen learned how to ride a motorcycle. She later purchased her own motorcycle, and used it as her primary mode of transportation. According to Ms. VanderVeen, doing so was much cheaper than using a motor vehicle, and she saved considerable money on gas. Mr. Wagner had ridden motorcycles since he was a teenager, and the two of them would often take motorcycle trips together. In addition to day trips, the two of them would also take longer trips, for example, from Prince George to Kelowna and Vancouver.
- [15] As Ms. VanderVeen recalled, in 2012, she moved to Prince Rupert, where Mr. Wagner was then working. Ms. VanderVeen was hired to work at Ridley Terminals Inc. as a planner and scheduler. Her background in information technology was a significant asset, and (among other things) she assisted in the implementation and commissioning of software for a new workforce management system.
- [16] With the move to Prince Rupert, Ms. VanderVeen also rekindled her interest in music and performing. She explained that for a number of years, she felt she did not have the time to be involved. However, when she was moving to Prince Rupert, she went online and found that the city had a Community Band. She made some inquiries about the skill level required, and, as she recalled, received a very enthusiastic, welcoming response. Then, once Ms. VanderVeen arrived in Prince Rupert, she joined the Band. It was an activity that Ms. VanderVeen thoroughly enjoyed. She also became a member of the "Muskeg Swing Band." She joined the Prince Rupert and Region Music Society, where (among other things) she was actively involved in a fund-raising campaign to build a community music studio. Ms. VanderVeen eventually ended up on the board of the Music Society and became its webmaster. She volunteered at the high school, and played in the pit band for the community musical, which was mounted every other year. With the Community Band and the Swing Band, Ms. VanderVeen generally played alto saxophone. For the community musicals, Ms. VanderVeen played a variety of instruments, including saxophone, flute and recorder. Performing also meant spending time practicing and in rehearsals, which Ms. VanderVeen did. For example, the Community Band held 90 minute practices every Monday, from September through to June.
- [17] Mr. Wagner works as a logistics supply chain and warehouse manager, and had worked in that area since about 1989. He explained that, from 2007 to 2014, he worked as a salaried employee for Canadian Freightways. He had a regular schedule and was home every night. Before the accident, he and Ms. VanderVeen enjoyed a number of activities together, including long walks, canoeing, boating, camping, hiking and road trips (both on motorcycles and in the car). Mr. Wagner explained that, before the accident, he and Ms. VanderVeen used to give regular dinner parties in Prince Rupert. Mr. Wagner would prepare four-to-five course meals, and Ms. VanderVeen would do the dishes and cleaning up. More generally, and for the most part, Ms. VanderVeen and Mr. Wagner shared most of the household chores (indoors and outdoors) equally.

- [18] However, Ms. VanderVeen acknowledged that, prior to the accident and apart from her music-related activities, she had a largely sedentary lifestyle. She weighed about 230 lbs and did not exercise regularly. She had been encouraged to lose weight, but had struggled to do so.
3. The accident and life after the accident
- [19] As Ms. VanderVeen recalled, on the day of the accident, she was driving back to Ridley when her vehicle collided with a vehicle driven by Mr. Amante. As Ms. VanderVeen recalled, after the collision, she was feeling somewhat "shell-shocked." She contacted Mr. Wagner, who came to the scene. As Ms. VanderVeen recalled, her vehicle was not driveable after the collision.
- [20] Ms. VanderVeen and Mr. Wagner then went home. As Mr. Wagner recalled, he suggested that she go to the hospital, but, at first, Ms. VanderVeen said that she was fine. However, as Ms. VanderVeen recalled, later that evening, she began to feel more of the effects of the collision. Her back was tight, and she was having muscle spasms. She also had a headache. She went with Mr. Wagner to the hospital emergency department.
- [21] As Ms. VanderVeen recalled, at the hospital, she was given a muscle relaxant, which helped with her symptoms. The next day, she went into work, but was not feeling well enough to stay and so returned home. She remained off work for the rest of that week. She went back to the hospital emergency department, and got a refill for the prescription for the muscle relaxant. However, the medication made her feel very "loopy" mentally, and so she used as little as possible. In all, Ms. VanderVeen missed work six days in February because of her injuries.
- [22] About two weeks after the accident, Ms. VanderVeen and Mr. Wagner went on a car trip from Prince Rupert to Reno, Nevada and back. The trip had been planned, and mostly paid for, before the accident, otherwise they would not have gone. As both Ms. VanderVeen and Mr. Wagner recalled, Ms. VanderVeen was very uncomfortable during the trip. Before the accident, when the two of them went on road trips, they shared the driving, and they would drive very long distances with very few breaks. However, on the Reno trip, Mr. Wagner did virtually all of the driving, and Ms. VanderVeen required very frequent breaks to move, stretch and manage her pain symptoms. Because Ms. VanderVeen was unable to cope with sitting in the vehicle for long periods, the trip took longer and had to be extended for several days.
- [23] As Ms. VanderVeen recalled, in the months following the accident, her neck, shoulders and lower back were painful. While her lower back pain would wax and wane, the pain between her shoulders and in her upper back and neck was fairly constant. She also had occasional headaches, which seemed to Ms. VanderVeen to be related to her neck symptoms. As Ms. VanderVeen recalled, although her pain symptoms improved with time, they never went away completely. Ms. VanderVeen explained that she tried to manage her symptoms on her own, and she did not think that there was going to be much a doctor could do for her in any

event.

- [24] According to Ms. VanderVeen (and Mr. Wagner confirmed), activities such as washing dishes would aggravate her symptoms, and she would have to stop and take a break. She was unable to ride her motorcycle, and eventually sold it. As Ms. VanderVeen recalled, on a bad day, her neck would feel very tight and in spasm, and she would have a feeling like a "charley horse" in her spine. Although she would have occasional pain in her lower back, she would more often have pain in her upper back and neck. On a good day, her neck and upper shoulders would feel tight, and there would be a background ache. According to Ms. VanderVeen, to deal with her symptoms, especially at work, she would take microbreaks to (for example) adjust her posture, or step away and do some stretching in a private place. According to Ms. VanderVeen, on a bad day, she would have to take quite a few microbreaks.
- [25] Ms. VanderVeen continued to work at Ridley. However, she had not been happy with her work situation for some time prior to the accident. She saw her family doctor in September 2013 for advice and help dealing with her work-related stress. She found what she described as the "internal politics" both stressful and frustrating to deal with. As Ms. VanderVeen recalled, after the accident, she was tense and uncomfortable while at work. Although she was able to go for walks, stretch and move around while at work, her neck and back were painful and sore. She also had headaches, which she had not had before the accident. According to Ms. VanderVeen, her pain symptoms made her feel distracted and impatient, and she found it hard to focus on her work. She decided that she needed to find a new place to work. She left Ridley in August 2014.
- [26] By this time, Mr. Wagner's job situation had also changed. Instead of being home after work most days, his work was now mostly project-based. It required more travel, and he was away from home for days and sometimes weeks at a time.
- [27] As Ms. VanderVeen recalled, when she left Ridley, she was offered a job in Kitimat, working for a company involved in the Rio Tinto Alcan modernization project, as the materials control clerk. Mr. Wagner was also working in Kitimat on this project. Ms. VanderVeen accepted the new position, and she (along with Mr. Wagner) worked in Kitimat for about nine months, from September 2014 to May 2015. Ms. VanderVeen described her job in Kitimat as mostly desk work, and she was able to manage her day. As Ms. VanderVeen recalled, she worked ten hour shifts, six days a week, with one day off. She then had a full week off every two or three weeks. She and Mr. Wagner still had their home in Prince Rupert, and went back to Prince Rupert during the longer breaks. As Ms. VanderVeen recalled, she missed a few days of work, when her back was bothering her. She recalled that, later on in the project, she felt tense and irritable because of her pain symptoms. The location meant that she was unable to go for any treatment. Moreover, because of the somewhat spartan and close living quarters associated with the Kitimat job, she was not able to carry on with her self-maintenance and stretches.

- [28] As Ms. VanderVeen recalled, when the Kitimat project finished, she had been hoping to take some time off. However, an engineering firm in Prince Rupert was looking for an office assistant and document controller on a temporary, contract basis, and Ms. VanderVeen was hired for that position. Ms. VanderVeen described it as mainly a desk job, which included helping to manage the office. She was there for three months.
- [29] Ms. VanderVeen explained that she left that position to take a permanent position as an executive assistant with the Prince Rupert School District. That position offered both a higher salary (although not as much as she had been earning working at Ridley) and better benefits. She started in the fall of 2015, working a 35-hour week. Ms. VanderVeen explained that this was also essentially a desk job. She had an ergonomic set-up for her work station, including a chair. She was able to move around (including working part of the week at a different building), take breaks and stretch. Her headaches were now infrequent. However, although there had been improvements since the accident, she continued to have painful symptoms in her neck and upper back, and, occasionally, in her lower back.
- [30] Ms. VanderVeen remained very active in Prince Rupert's musical activities.
- [31] Dawn Quast, an oboe player and secretary of the Music Society, played in both the Community Band and the Muskeg Swing Band with Ms. VanderVeen. Both Ms. VanderVeen and Ms. Quast testified that band members were expected to set up chairs and music stands for rehearsals, and then put things away when the rehearsal was finished. Both of them did that. The Community Band also gave a number of performances at various community events, including Christmas concerts. In contrast to the regular rehearsals for the Community Band, the Muskeg Swing Band was more spur of the moment, and got together for a period of quite intense rehearsals shortly before a scheduled performance. In 2017, Ms. VanderVeen was involved in tutoring high school flute players, and also participated in a Middle School Beginner Band Workshop, where middle-schoolers could try out instruments for the first time. Beginning in September 2015, Ms. VanderVeen joined the Rotary Community Choir, which had weekly rehearsals on Wednesdays. In December 2016, Ms. VanderVeen played in the orchestra for the high school production of the musical *The Little Mermaid*. Ms. VanderVeen was actively involved in organizing fundraisers for the Prince Rupert Community Arts Council.
- [32] Ms. VanderVeen became vice-president of the board of the Music Society (which she described as a working board) in November 2013, and remained webmaster for the Society until she left Prince Rupert in 2017. She and Ms. Quast worked together on a major project to organize the Society's music library. Ms. Quast described Ms. VanderVeen as not the type of person to complain, and said that she did not.
- [33] Ms. VanderVeen left her position with the School District in June 2017. Mr. Wagner had been transferred to Kelowna for work. She and Mr. Wagner had decided to sell their home in Prince Rupert and move to the Okanagan, specifically to Bridesville, where they purchased a small (about 600 square feet) house. Ms. VanderVeen explained that, to get the Prince Rupert

house ready for sale, she undertook some renovations, including some painting and tile work. However, because of her pain symptoms, these projects took considerably longer than they otherwise would have.

- [34] At this point, Ms. VanderVeen was interested in taking some time off work to pursue further education, with a view to finding more interesting and fulfilling work. She identified a program, "Sustainable Construction Management Technology," at Okanagan College that led to a diploma in construction management. She applied and was accepted. The program began in September 2017, and was a three-year program condensed into two years.
- [35] Ms. VanderVeen explained that, prior to enrolling in the program at Okanagan College, she had been interested in project management and sustainable construction. She had done some self-study, and taken some on-line courses, including through the University of Waterloo. However, the jobs she was interested in required more education than she had. The program at Okanagan College offered her a path to pursue a career in project management. As she saw it, project management would also challenge her in a way that her prior jobs and work experience had not.
- [36] Ms. VanderVeen had classes five days a week. Three days were in a classroom setting. Two days were done remotely, on-line. For the days when she had to attend class at the College, Ms. VanderVeen had a drive of an hour and 15 minutes each way. Ms. VanderVeen explained that she had no special accommodations during her program. She could take frequent breaks, and there was a gym next door where she could do stretches.
- [37] In January 2019, Ms. VanderVeen attended an independent medical assessment done by Dr. Steven Sylvester. Dr. Sylvester was qualified as an expert in this case, and I will discuss his opinion evidence later in these Reasons. When Ms. VanderVeen saw Dr. Sylvester, she was having neck and upper back pain, which she rated as a 3 out of 10 in baseline severity. According to Ms. VanderVeen, the pain was more or less constant, and the baseline pain had not improved since the accident. It was aggravated by activity and typically worsened during the course of a day. At that time, according to Ms. VanderVeen, at its worse, her neck and upper back pain would increase to a 5 or 6 out of 10. Her pain was improved with stretching, over-the-counter medication, and use of a lacrosse ball for massage and what she described as "myofascial release" in her back. According to Ms. VanderVeen, she had occasional headaches, and occasional low back pain, which seemed to occur when her upper back and neck pain were at their worst.
- [38] Ms. VanderVeen's studies included a 4-month co-op term, during which she worked for Sunco Drywall, one of the contractors involved in the Penticton Regional Hospital expansion project. Ms. VanderVeen worked for Sunco full-time from May to August 2018, and then worked part-time in September and October. Beginning in June, her boss and supervisor was Lyle Lewandowski.

- [39] Mr. Lewandowski has been involved in the construction industry for 44 years. He described himself as essentially growing with the industry, and he has spent a number of years working as a project manager. He was on the point of retiring, when he was "headhunted" to come and work for Sunco. As of trial, Mr. Lewandowski was based out of Calgary, where he is the district manager for Sunco. However, as Mr. Lewandowski explained, his work requires him to travel to wherever Sunco is involved in large construction projects. Since Mr. Lewandowski joined Sunco in 2012, this has included Calgary, Edmonton, Kelowna, Vancouver and Penticton, among other places.
- [40] Mr. Lewandowski described the job of a project manager (based on his experience) as including doing the paperwork to set up the site, co-ordinating materials and personnel on the site, managing personnel on the site, and monitoring budgets and making any necessary adjustments to keep the project within budget. According to Mr. Lewandowski, the nature of the job can vary, depending on whether the person is working mainly in a corporate office, or on a job site. If the person is working in a corporate office, the job is about 80% sitting at a desk working with a computer, with the rest of the time spent on the job site, attending meetings, overseeing work, and resolving issues and conflicts as they arise. On the other hand, if the person is working on a job site, the percentages are more or less reversed. According to Mr. Lewandowski, when he is on a job site, he would be walking the complete site, and looking at all aspects of the work. Some of that can involve climbing scaffolding. Inspection of some of the areas can be challenging and involve awkward body positions. He described every project as having unique challenges.
- [41] Mr. Lewandowski explained that a project manager's hours of work can depend on whether a person is hired on salary or as part of a team with a bonus structure. According to Mr. Lewandowski, if a person is hired on salary, that person generally works an 8-hour day, five days a week. If the person is hired as part of a team with a bonus structure, that person should expect to work more than an 8-hour day and, accordingly, will get paid more. According to Mr. Lewandowski, it can take someone two to three years of project management experience to reach a more senior position as a fully-fledged project manager with compensation that includes a bonus structure.
- [42] Mr. Lewandowski was not asked about his own income.
- [43] Mr. Lewandowski explained that he first got involved with the Penticton Hospital project because it had not been going well, and he was asked to see what the problems were. When he arrived, Ms. VanderVeen was already working there, although it was unclear to Mr. Lewandowski what her job was. Mr. Lewandowski essentially took over project management from the person who had been Ms. VanderVeen's boss, and then hired Ms. VanderVeen to help him with the administrative work. According to Mr. Lewandowski, in that role, Ms. VanderVeen would begin to learn what project management was, and be stepping into a position where she could do project management in the future. Ms. VanderVeen was working a 5-day week, eight hours a day. As Mr. Lewandowski recalled, overtime was available, but Ms. VanderVeen did not work overtime. Mr. Lewandowski explained that he is

an early riser, and occasionally he asked Ms. VanderVeen to come in at 6:00 a.m. or 6:30 a.m. She did that, even though she had a lengthy commute to get to work.

- [44] As Mr. Lewandowski recalled, Ms. VanderVeen never complained about pain, and he only learned at the end of her time on this project that she had been involved in a motor vehicle accident. However, as he recalled, when they were working together, he would occasionally notice a change in her demeanor or mood. As Mr. Lewandowski recalled, Ms. VanderVeen never missed work. On one occasion when he needed something for the next day, she took the work home with her so that it could be delivered on time. Mr. Lewandowski rated Ms. VanderVeen's job performance as excellent. He described her as diligent and eager to learn. Based on his experience working with her, he said that she knew how to handle both people and conflicts on the job. She could calm people down and did not get excited.
- [45] According to Mr. Lewandowski, he would hire Ms. VanderVeen, but probably not for a project management position. His reason was primarily because of the need for a project manager to work more than eight hours a day. However, if Ms. VanderVeen was in a position to work more than an 8-hour day, he would hire her as a project manager.
- [46] In April 2019, Ms. VanderVeen completed her program at Okanagan College, with an average of 94%. She received her diploma in June 2019. In May, she registered the business name "ALL Sustainable Build Consulting." She described this step as a way to make herself available to do consulting work.
- [47] Ms. VanderVeen has accepted a job as a project co-ordinator for a construction firm in Kelowna. She described the position as a stepping-stone toward working as a project manager, which is something she has discussed with her new employer. Her starting annual salary in her new job is \$52,000. She will be working out of Kelowna, and living with her sister there during the work-week, thus avoiding a commute from Bridesville. According to Ms. VanderVeen, she expects to work an 8-hour day, beginning at about 7:00 or 7:30 a.m., Monday to Friday, with occasional weekend work. She expects, based on what was discussed in her job interview, that her work station will be set up in a way that is comfortable for her.
- [48] According to Ms. VanderVeen, she feels self-conscious about her physical issues and her need to take microbreaks to deal with her pain symptoms. She expressed concerns about construction being "old school," that it is hard for a woman to be taken seriously, and that perceived weaknesses (such as pain symptoms) can be exaggerated. As Ms. VanderVeen recalled, she did not mention her pain symptoms and limitations to her new employer when she applied for the position. She explained that she did not want those considerations to influence the decision to hire her, and she wanted to show that she was capable of managing the job.

- [49] Ms. VanderVeen explained that, since obtaining her diploma, she is continuing to pursue further accreditations related to sustainable construction management. She created and maintains a profile for herself on "LinkedIn." She described her career goals as either to become a project manager or a sustainable construction management consultant (or both).
- [50] Ms. VanderVeen described a number of difficulties in locating suitable treatment providers, both in Prince Rupert and after she and Mr. Wagner moved to Bridesville. To the extent she has had treatment following the accident, she has not found it very helpful. However, she has never had an extended course of active rehabilitation. When she was living in Prince Rupert, she found that massage therapy was the most helpful in addressing her symptoms. On the other hand, Ms. VanderVeen adopted the suggestion made by a physiotherapist in Prince Rupert to use a lacrosse ball for "myofascial release" and massage. She uses this frequently, and also does stretches recommended by a therapist. Now that she will be working out of Kelowna, and living there during the week, Ms. VanderVeen is hoping it will be easier for her to find a suitable treatment provider for physiotherapy and massage therapy.
- [51] As Ms. VanderVeen recalled, she has done some road trips since the accident, including trips on her own. However, the trips take longer because she needs to take more breaks on account of her pain symptoms. She always has her lacrosse ball and a pillow in the vehicle. According to Ms. VanderVeen, travelling as a passenger in Mr. Wagner's vehicle brings on pain symptoms in her back after about 15 minutes, and the ergonomics of rental cars have also caused problems for her.
- [52] Since the accident, Ms. VanderVeen has been less efficient in completing household chores. Mr. Wagner commented on the tile project at the house in Prince Rupert that, before the accident, Ms. VanderVeen would have been able to complete in a weekend. Instead, it took her a month to finish. According to Ms. VanderVeen, her pain symptoms are aggravated by tasks such as washing the dishes, cleaning the bathroom, folding laundry and vacuuming. Ms. VanderVeen and Mr. Wagner purchased a "Roomba" to do the necessary vacuuming. Although Ms. VanderVeen was accustomed to doing her own vehicle maintenance (including changing tires) before the accident, she says that she now has to hire someone to do that because the awkward positions and the weight of the tires aggravate her neck and upper back pain.
- [53] According to Ms. VanderVeen, she has struggled with snow clearing and removal since she and Mr. Wagner moved to Bridesville, something that would not have been a problem for her before she was injured in the accident. Because of Mr. Wagner's work schedule, he is generally not available to take on this chore when needed. Therefore, Mr. Wagner purchased an ATV to which he attached a winch, which Ms. VanderVeen can operate herself (although not without some difficulty) to clear snow when necessary.

- [54] According to Mrs. Lang, once Ms. VanderVeen moved from Prince Rupert, she saw her more often, because when Mrs. Lang visited her daughter (Ms. VanderVeen's sister) in Kelowna, Ms. VanderVeen would come from Bridesville for a visit. Prior to the accident, when Ms. VanderVeen visited, they would do things such as impromptu car trips. Now, according to Mrs. Lang, during visits, she and Ms. VanderVeen spend most of their time together sitting and talking, and in sedentary activities such as playing board or card games, or doing needlework. Mrs. Lang said that, although Ms. VanderVeen never complains, she can see by the way Ms. VanderVeen moves and stretches her neck that she is uncomfortable and in pain. Indeed, both Mrs. Lang and Mr. Wagner described how they have observed Ms. VanderVeen frequently moving and adjusting her body position to try to get comfortable.
- [55] Mr. Wagner also mentioned the changes he has observed in Ms. VanderVeen's moods and demeanor since the accident. According to Mr. Wagner, Ms. VanderVeen is more short-tempered, and becomes more easily aggravated and annoyed.
- [56] Occasionally, Ms. VanderVeen takes over-the-counter medication to manage her symptoms, although she prefers to avoid medication if possible. Nevertheless, she has found such medications to be effective when her symptoms are more severe. She also uses Tiger Balm, heat, massage with the lacrosse ball and stretching to manage her symptoms and help her to function better. She explained that she has not asked for a referral to pain specialist because so far she has been able to manage her pain.
- [57] According to Ms. VanderVeen, certain activities, for example, spending too much time at the computer without a break, sleeping in a bad position or having to look up, aggravate her pain symptoms. She found that, when she was studying, she needed to move, change position and stretch frequently to manage her symptoms. She noticed some improvement in her symptoms once school was finished. According to Ms. VanderVeen, she has periods when she thinks that she is doing well, but she has to be careful not to do things that can aggravate her symptoms. Ms. VanderVeen explained that she occasionally has headaches, but, unless her neck and back are flaring up (which Ms. VanderVeen tries to avoid), they are now infrequent. According to Ms. VanderVeen, as of trial, the area that bothered her the most was her upper back and neck. She has issues with her lower back much less frequently, and in the five months or so before trial, only two or three times. According to Ms. VanderVeen, since the accident, her sleep is disturbed, and she no longer feels rested in the morning. In contrast, before the accident, after seven and a half hours sleep, she would have felt rested and "ready to go."
- [58] Ms. VanderVeen explained that her pain symptoms make her more irritable and she has less patience. She feels frustrated because there are things that she wants to do, but feels she cannot. She is concerned about others judging her and thinking she is "shirking" responsibilities or activities, and, according to Ms. VanderVeen, she now avoids activities to avoid being judged by others. Ms. VanderVeen described the constant monitoring of her symptoms as exhausting.

4. The Experts

[59] Ms. VanderVeen was assessed by four experts, all of whom prepared reports and testified at trial.

(a) The medical experts

[60] Opinion evidence from two medical doctors was tendered at trial. Ms. VanderVeen tendered evidence from Dr. Raphael Chow. The defendants tendered evidence from Dr. Sylvester.

(i) Dr. Chow

[61] Dr. Chow is a specialist in physical medicine and rehabilitation. He was tendered and qualified to give opinion evidence in those areas in relation to Ms. VanderVeen.

[62] Dr. Chow carried out an independent medical examination of Ms. VanderVeen on December 11, 2017.

[63] In his report, under "Summary and Opinion," Dr. Chow summarized information from various documents provided to him and from the history provided to him by Ms. VanderVeen. He stated that: "Examination today showed that there is pain on range of motion of the cervical spine and lumbar spine with tenderness which could be reproduced when she was distracted." He then stated, without further elaboration, his conclusion:

Based on my assessment today, from a physical perspective, in my opinion, she has impairment of the cervical spine, and to a lesser extent the lumbar spine.

[64] With respect to causation, Dr. Chow stated:

Based on the records and my assessment, from a physical perspective, in my opinion, as a result of the accident of February 3, 2014, Ms. Vanderveen-Lang sustained soft tissue injuries to the cervical and lumbar spine. She had posttraumatic headache which has subsided. Her pre-existing carpal tunnel symptoms have been probably been [sic] aggravated by the accident.

[65] Under the heading "Diagnostic Impression," Dr. Chow stated his diagnoses for Ms. VanderVeen:

Accident-related conditions are as follows:

1. Chronic neck, upper back and shoulder girdle pain.

She has soft tissue injury to the cervical spine. Injury of soft tissue would include muscles, ligaments, tendons, joint capsules, and facet cartilage.

2. Chronic low back pain.

She has a soft tissue injury to the lumbar spine. Injury of soft tissue would include muscles, ligaments, tendons, joint capsules, and facet cartilage.

3. Bilateral hand numbness.

She has a history of carpal tunnel syndrome which probably has been aggravated. An EMG and nerve conduction study is necessary.

4. Weight gain.

She has gained weight since the accident since she has not been as active.

[66] Dr. Chow was asked to state his opinion concerning Ms. VanderVeen's functional status. He said (in part) that "Functionally she has not returned to her pre-accident level."

[67] On cross-examination, Dr. Chow acknowledged that he was not aware of the extent of Ms. VanderVeen's post-accident music-related activities when she was still living in Prince Rupert. He agreed that it would have been relevant to his assessment of Ms. VanderVeen's level of functioning after the accident. Although Ms. VanderVeen told Dr. Chow that she was spending 30 to 40 hours a week in class in relation to her program at Okanagan College, he was not aware that she had a lengthy commute to and from school.

[68] I have a number of concerns about Dr. Chow's opinion evidence.

[69] Some of his opinions are simply conclusory. For example, Dr. Chow expresses the opinion that Ms. VanderVeen has "impairment of the cervical spine, and to a lesser extent the lumbar spine." Although Dr. Chow has told me that he has reached this conclusion based on his assessment, he does not explain to me what his conclusion means. In the absence of some explanation, his bald conclusion is not helpful.

[70] Another example is found under the heading "Functional Status," and is in the nature of a prognosis. Dr. Chow says:

She is 41 years old. It is likely that she will experience worsening of her symptoms and deterioration of her functional ability with time and the aging process (APPENDIX I). Over time, it is unlikely that she will be able to maintain her functional ability at the current level.

Appendix I is a listing of four "Scientific References."

[71] Dr. Chow makes treatment recommendations premised on a worsening of Ms. VanderVeen's symptoms and deterioration of her functional ability.

[72] However, Dr. Chow does not provide any other explanation for why he predicts this grim future for Ms. VanderVeen in relation to the injuries she sustained in the accident. In fact, based on Ms. VanderVeen's evidence concerning her functioning and symptoms since she was assessed by Dr. Chow, it has not been borne out. Ms. VanderVeen's low back symptoms, which (based on her own report to Dr. Chow) were relatively infrequent and were continuing to improve, have not worsened. Indeed, based on Ms. VanderVeen's evidence, her symptoms generally have not worsened. Based on Ms. VanderVeen's report to Mark Jaschke during her functional capacity evaluation, her lower back symptoms did improve.

- [73] Moreover, many of Dr. Chow's conclusions under "Functional Status" are not based on any testing or assessment of Ms. VanderVeen herself. Rather, they are simply generalizations.
- [74] Dr. Chow's prognosis (under the heading "Prognosis") that Ms. VanderVeen "may be predisposed to degenerative changes in the cervical spine as a result of the accident" is, in my view, no more than speculation on Dr. Chow's part. He does not identify anything related to Ms. VanderVeen specifically that might predispose her to degenerative changes as a result of the accident, or explain why or how the accident might result in any predisposition in Ms. VanderVeen's case. He agreed in his oral evidence that degenerative changes would best be seen by medical imaging, none of which has been done for Ms. VanderVeen. At best, there might be a statistical or theoretical possibility of degenerative changes in the future, and they may or may not be related to the injuries Ms. VanderVeen sustained in the accident. However, based on this initial prognosis, Dr. Chow then goes on to forecast a risk Ms. VanderVeen may develop "radiculopathy or myelopathy." Again, Dr. Chow's opinions are conclusory rather than explanatory, and based on a premise that, in my view, is speculation.
- [75] In the "Diagnostic Impression" section of his report, Dr. Chow appears to imply that, in Ms. VanderVeen's case, she sustained injury to "soft tissues, including muscles, ligaments, tendons, joints capsules, and facet cartilage." It only became clear from Dr. Chow's oral evidence that he did not know, and could not express any opinion concerning, which soft tissues had been injured in Ms. VanderVeen's case. Thus, these statements in Dr. Chow's report go beyond the opinion Dr. Chow is able to express respecting Ms. VanderVeen. Rather, the statements are confusing and (at worst) misleading. They are certainly not helpful.
- [76] Dr. Chow described "carpal tunnel syndrome" as a pre-existing condition, and he expresses an opinion that "Static and dynamic hand and wrist activities and movements beyond the occasional-mid frequent rate would likely create excessive load thereby aggravating her carpal tunnel syndrome." However, Dr. Chow did not make a diagnosis of carpal tunnel syndrome, and there was nothing in the material provided to Dr. Chow (such as a clinical record) that confirmed such a medical diagnosis had ever been made by anyone. Rather, Ms. VanderVeen reported to Dr. Chow that she had developed carpal tunnel syndrome in 2007. A diagnosis of carpal tunnel syndrome could not be made without an EMG and nerve conduction study, the steps identified by Dr. Chow as "necessary." In that light, Dr. Chow's opinion evidence with respect to "carpal tunnel syndrome" goes beyond what can be justified. I place little weight on Dr. Chow's acceptance of carpal tunnel syndrome as a pre-existing condition that had "probably" been aggravated as a result of the accident.
- [77] Dr. Chow expressed the opinions that "Functionally [Ms. VanderVeen] had not returned to her pre-accident level," and that "Her quality of life and lifestyle have been affected since she has not returned to her pre-accident functional level." His diagnosis respecting weight gain is based only on Ms. VanderVeen's report. These are not opinions where I require the expertise of a specialist in physical medicine and rehabilitation to draw appropriate inferences from the facts, based on the evidence. They are unnecessary. I give these and

similar such opinions in Dr. Chow's report no weight.

(ii) Dr. Sylvester

[78] Dr. Sylvester is an orthopaedic surgeon. He was tendered and qualified to give opinion evidence concerning the causation, diagnosis, prognosis and treatment of soft tissue and musculoskeletal disease and injury, in relation to the issues in this case.

[79] Dr. Sylvester carried out an independent medical examination of Ms. VanderVeen on January 15, 2019.

[80] As set out in his report, Dr. Sylvester diagnosed a "grade 2 Whiplash Associated Disorder (subjective and objective findings of neck and upper back pain without associated neurological findings)," caused as a result of the accident. With respect to prognosis, Dr. Sylvester said that Ms. VanderVeen:

... has developed chronic neck and upper back pain as a result of her motor vehicle crash in 2014. She has received suboptimal treatment thus far with minimal active rehabilitation, a long delay since initial injury and no assessment by a chronic pain physician. As such, her prognosis is guarded.

Although some improvement can be expected with more aggressive treatment, long-term pain is to be expected in this scenario. As such, I believe that [Ms. VanderVeen] will continue to experience some degree of baseline neck and upper back pain with positional and activity related exacerbations. Nevertheless, it is my opinion that [Ms. VanderVeen] will be able to continue with most activities of daily living, provided a combination of adequate rehabilitation and pain management are undertaken. Likewise, [Ms. VanderVeen] has demonstrated an ability to undertake a demanding professional degree, combined with a long daily commute of 1.5 hours in either direction. As such, I do not believe that her ability to participate in the workforce in her chosen profession [will] be significantly compromised by her medical condition.

[81] Dr. Sylvester had a number of treatment "suggestions," including: assessment by a physiotherapist to provide an active rehabilitation program and home program; provision of a gym membership to assist Ms. VanderVeen's rehabilitation; assessment by a kinesiologist and occupational therapist for provision of assistive devices and postural training to mitigate symptom onset and severity; assessment by a physician specializing in the diagnosis and treatment of chronic pain; enrollment in mindfulness and meditation class to assist in coping strategies for pain management.

(b) The non-medical experts

[82] Ms. VanderVeen also tendered opinion evidence from Mark Jaschke and Dr. Pieter van den Berg.

- [83] Mr. Jaschke is an occupational therapist and a certified functional capacity evaluator. He was tendered and qualified as an expert in occupational therapy, work capacity evaluation and cost of future care, qualified to give opinion evidence in those areas in relation to Ms. VanderVeen.
- [84] Mr. Jaschke carried out a full-day functional capacity evaluation of Ms. VanderVeen on July 11, 2018. His report dated September 25, 2018 provides his opinion concerning Ms. VanderVeen's functional and work capacity, and also his cost of future care recommendations. I note that Mr. Jaschke relied on Dr. Chow's report for medical diagnoses and prognoses.
- [85] In Mr. Jaschke's opinion, Ms. VanderVeen was functional for activities requiring basic balance, stair climbing and occasional step-ladder climbing. She was capable of occasional short periods of mild degree stooping, provided she could limit prolonged looking downwards and was able to periodically stretch or adjust her body position (or both) as needed. In his opinion, Ms. VanderVeen required attention to ergonomic positioning and workstation set-up to limit the degree and duration of activity requiring repetitive or prolonged non-neutral (i.e., not upright) neck and trunk postures. In Mr. Jaschke's opinion, Ms. VanderVeen was functional for occasional short periods of low level or low height work while kneeling or crouching, but would not be able to tolerate frequent or repetitive low level work demands. In his opinion, Ms. VanderVeen did not meet full medium-strength work demands.
- [86] Further, in Mr. Jaschke's opinion, although Ms. VanderVeen was able to sit in a "relaxed" position for almost three hours, a more durable sitting tolerance for Ms. VanderVeen was in the range of between 90 minutes to 2 hours at a time. In his opinion, she was limited to occasional moderate periods of work-intensive sitting (that is, sitting with mild bending or looking downward) throughout the day. In his opinion, Ms. VanderVeen's work activity tolerance and productivity would be maximized with "ongoing attention to self-directed postural breaks and ergonomic positioning and workstation set-up."
- [87] In Mr. Jaschke's opinion, the results of the functional capacity evaluation showed that Ms. VanderVeen met the essential physical demands of her job at Ridley and meets the essential physical demands of her proposed career in either project management or construction consulting (or both). However, he noted that:

[S]he will require work style modifications for limiting prolonged sitting and work intensive postures involving bending with her back and/or neck as well as attention to postural and stretch breaks throughout the day. She will also require access to ergonomic equipment and attention to the set-up of her workstation. She will need to monitor her symptoms in order to promote durability and productivity in her work. Given these limitations I anticipate Ms. VanderVeen will have difficulty tolerating high-demand work projects or significant extra work demands. . . .

- [88] Mr. Jaschke explained that by "high-demand work projects" and "significant extra work demands," he meant working more than 40 hours per week, sustained periods of extra work and tight deadlines.
- [89] Mr. Jaschke was not qualified to express an opinion concerning the possible effect of her functional capacity on her vocational opportunities. I give the opinion he expresses in that respect no weight.
- [90] With respect to housekeeping, in Mr. Jaschke's opinion, Ms. VanderVeen was capable of tasks that do not exceed the "Light to entry Medium strength" category or require sustained static or back flexion while applying force and prolonged above-shoulder height work. As examples of tasks for which Ms. VanderVeen would not be functionally suited, Mr. Jaschke noted cleaning low level surfaces, bathtubs and showers, and cleaning blinds and curtains. In his opinion, she is not suited for household tasks classified in the medium strength category. Changing tires would be an example.
- [91] I will discuss Mr. Jaschke's cost of future care recommendations later in these Reasons.
- [92] Dr. van den Berg has a Doctorate of Psychology in Clinical Psychology from California Southern University in Irvine, California and is a registered psychologist. Dr. van den Berg is also a certified vocational rehabilitation professional registered with the College of Vocational Rehabilitation Professionals.
- [93] Dr. van den Berg was tendered and qualified as an expert in vocational rehabilitation, qualified to give opinion evidence in that area in relation to Ms. VanderVeen.
- [94] Dr. van den Berg assessed Ms. VanderVeen on January 4, 2019. The assessment consisted of a one hour interview, and approximately three hours of psychometric testing. Dr. van den Berg relied on Dr. Chow's report respecting the medical prognosis for Ms. VanderVeen.
- [95] In Dr. van den Berg's opinion, results from cognitive ability, academic achievement and aptitude testing suggested that Ms. VanderVeen possessed very strong intellectual abilities, and she likely has the educational potential for a graduate degree. Based on the test results, Ms. VanderVeen would likely do well in jobs that require more complex problem-solving, analysis and decision-making. According to Dr. van den Berg, in Ms. VanderVeen's case:

Aptitude testing suggests very high general learning ability, very high verbal aptitude for new learning and verbally demanding work, high numerical aptitude for mathematically demanding work, very high spatial aptitude for design-type work or roles requiring reading blue prints and industrial drawings, very high perceptual aptitude for clerical and detailed work, and high manual dexterity for quickly and accurately coordinating hand and eye movements.

- [96] In Dr. van den Berg's opinion, Ms. VanderVeen has likely sustained a "mild to moderate reduction" in her vocational capacity and range of job options. He noted (consistent with Mr. Jaschke's evidence) that Ms. VanderVeen would likely require an occupation with sufficient positional and task variety that would allow Ms. VanderVeen to take "micro-breaks" and stretch, that provided ergonomic support, and that did not require working additional hours.
- [97] With respect to Ms. VanderVeen's planned career as a project manager, Dr. van den Berg noted that:
6. In terms of Ms. VanderVeen's planned occupation as a project manager (\$36.25/hour with a range of \$20.00 to \$57.69/hour) this occupation typically does allow for positional variety between office work and field work and is likely within Ms. VanderVeen's functional range. In addition, Ms. VanderVeen has the vocational aptitudes for [a] project manager and her strong intellect lends itself well to this occupation. Upon completion of her studies she would likely have an advantage over other job applicants without post-secondary education, her vocational interests support her vocational choice, and the employment outlook is favourable. Considering Ms. VanderVeen's vocational profile she likely has the cognitive potential for a more senior or managerial position in the project management field with increased income.
 7. To support Ms. VanderVeen's durability she would likely require a position that allowed her to take micro breaks to stretch, change position and provide ergonomic support . . . Ergonomic support is very common in the modern workplace and should not be a hiring deterrent. Project managers face frequent deadlines and times of increased workload that would likely require occasional prolonged sitting and additional hours. The position also requires strong logical and critical thinking, problem solving and decision making, analysis, conflict resolution, and stress management.
 8. While taking regular micro-breaks would likely support Ms. VanderVeen's durability I expect the interruptions to likely impact her efficiency and productivity especially during busier times and with tight deadlines. This would likely negatively impact her ability to be considered for more senior or managerial positions in the future. In addition, should her medical condition deteriorate as medically predicted, she would likely face reduced hours to support her durability. This would likely further reduce her advancement opportunities considering that project manager and most management positions do not lend themselves well to part-time hours due to operational requirements. I expect Ms. VanderVeen to face similar challenges in other occupations and considering income differentials a career change to a new position or any of her previous occupations is not recommended.
 9. To summarize, Ms. VanderVeen has likely sustained a mild to moderate reduction in her overall vocational capacity and range of job options as a result of her symptoms and functional limitations from the February 3, 2014 MVA. Ms. VanderVeen likely has the vocational capacity for full-time gainful employment in a select range of occupations both

previously occupied and in terms of her planned occupation as a project manager. To support her durability, she would likely require compensatory strategies and ergonomic adaptations. The most significant vocational impact is likely in terms of Ms. VanderVeen's vocational trajectory into more senior project management positions and I expect her to be at a competitive disadvantage with a likely loss in earnings potential.

5. Findings and conclusions concerning Ms. VanderVeen's injuries

[98] I will begin with some observations concerning the evidence and the witnesses.

[99] Ms. VanderVeen's credibility and reliability are, of course, important, since, as of trial, there was little in the way of objective evidence of injury.

[100] The defendants accept that Ms. VanderVeen is generally a credible witness. They say, however, that there are some inconsistencies in her evidence. For example, the defendants say that on direct examination, Ms. VanderVeen testified that she did not have a family doctor prior to the accident, but admitted on cross-examination that she did, and that she had made a number of visits to the doctor's clinic prior to the accident. The defendants note that Ms. VanderVeen could not recall speaking to her family doctor prior to the accident about her workplace stress, but when records were put to her on cross-examination, she agreed that she did. Although she agreed that her family doctor recommended she seek counselling for stress, she said that she could not recall the specific resources he gave her respecting treatment. The defendants say that there are inconsistencies in Ms. VanderVeen's evidence concerning her neck pain, pointing to a hospital emergency department record from July 2018.

[101] I agree that there were some inconsistencies in Ms. VanderVeen's evidence. However, in my view, the inconsistencies were, in general, inconsequential. Ms. VanderVeen provided what I consider to be a reasonable explanation in relation to what was recorded on the emergency department record in July 2018. Although I would describe Ms. VanderVeen as very detail-oriented and precise (no doubt some of the reasons why she has been successful in the various administrative positions she has held, and in her college courses), lapses of memory are not unheard of even for someone with such a personality style. With respect to having a family doctor, for example, Ms. VanderVeen did not stubbornly persist with a position that she did not have one prior to the accident. Rather, when records were put to her and her memory refreshed, she agreed that she did. There were occasions during Ms. VanderVeen's cross-examination when her memory appeared to fail her at convenient times, and she appeared to be defensive in her responses. However, the occasions were few and they were generally not with respect to significant or material matters.

- [102] On cross-examination, Ms. VanderVeen was asked whether information she had given to the experts doing independent assessments concerning her symptoms was "true and correct." Her response was always that it was. She was not further challenged on the point. Moreover, her evidence at trial concerning her symptoms was generally consistent with what the experts reported she had told them.
- [103] I have discussed above some of my concerns with Dr. Chow's opinion evidence. I have some additional concerns.
- [104] In my view, Dr. Chow's opinion and diagnosis that, as a result of the accident, Ms. VanderVeen suffers from chronic low back pain and that she has permanent impairment of the lumbar spine are not supported by Ms. VanderVeen's evidence concerning her symptoms since the accident and as of trial. It is also not supported by the opinion evidence of Dr. Sylvester, which I accept. I note that, based on Ms. VanderVeen's own report of her symptoms at the time of Dr. Chow's assessment, she had "aching and pinching in the lumbar area . . . occurring every few months," and that overall her lower back symptoms "have improved and continue to improve." In my view, without some convincing explanation (which Dr. Chow does not provide), neither Ms. VanderVeen's report nor Dr. Chow's examination findings support Dr. Chow's diagnosis and gloomy prognosis.
- [105] Moreover, when Ms. VanderVeen saw Mr. Jaschke in July 2018 (about seven months after Dr. Chow's assessment), her report of pain in her lower back pre-test, post-test and next day was, respectively "N/A" (or nothing), 1 out of 10, and 2 out of 10. Ms. VanderVeen testified that the information she gave to Mr. Jaschke was "true and correct." In my view, it is inconsistent with Dr. Chow's diagnosis and prognosis concerning Ms. VanderVeen's lower back.
- [106] When Dr. Sylvester assessed Ms. VanderVeen in January 2019 (a little over a year after Dr. Chow), she reported (as "true and correct") that she had "occasional low back pain which seems to occur when her upper back and neck pain is at its worst." This symptom report is also inconsistent with Dr. Chow's diagnosis and prognosis.
- [107] In addition, when Ms. VanderVeen was assessed by Dr. Sylvester, she did not complain of hand pain or symptoms when describing her then-current symptoms.
- [108] I have discussed above my concerns about Dr. Chow's opinions that Ms. VanderVeen would experience a worsening of her symptoms and deterioration of her functional ability and that she might be predisposed to degenerative changes in her cervical spine. In my view, for the reasons I expressed above, these opinions are entitled to very little (if any) weight. Unfortunately, they were given weight by Dr. van den Berg in reaching some of his opinions concerning Ms. VanderVeen's vocational prospects. As a result, I must discount the weight I can give Dr. van den Berg's opinions in these areas, as the opinions are based (at least in part) on evidence I do not accept.

- [109] On the other hand, there is agreement between Dr. Chow and Dr. Sylvester that, as a result of the accident, Ms. VanderVeen sustained soft tissue injuries to her neck and upper back, and that she has been left with chronic pain in those areas in particular as a result. The medical diagnosis is consistent with Ms. VanderVeen's description of her symptoms as of trial. The prognosis concerning Ms. VanderVeen's chronic pain is "poor" (in Dr. Chow's opinion) or "guarded" (in Dr. Sylvester's opinion). Ms. VanderVeen should expect to experience, and have to manage, pain over the long-term.
- [110] I find that, as a result of the accident, Ms. VanderVeen sustained soft tissue injuries to her neck and upper back, and, to a lesser extent, to her lower back. She also developed headaches associated with her neck injuries. The soft tissue injuries to Ms. VanderVeen's lower back have resolved to the point where Ms. VanderVeen has only occasional symptoms in that area, usually when her neck and upper back pain are at their worst. On the other hand, the soft tissue injuries to Ms. VanderVeen's neck and upper back have resulted in chronic pain in those areas. Although the level of pain can intensify depending on Ms. VanderVeen's body position and activity, Ms. VanderVeen has a constant baseline (albeit low) level of pain, and she is rarely (if ever) pain free. Ms. VanderVeen's evidence in this respect is confirmed by the evidence of Mrs. Lang and Mr. Wagner, both of whom have been close observers of how Ms. VanderVeen deals with her pain.
- [111] I find that the prognosis for improvement, in the sense of Ms. VanderVeen's pain symptoms being resolved so that she is pain free or her baseline level is reduced, is poor. Ms. VanderVeen will therefore have to deal with and manage chronic pain in her neck and upper back on a daily basis. On the other hand, as Dr. Sylvester stated in his report, there are steps Ms. VanderVeen can take to manage her symptoms and improve her function. Indeed, Ms. VanderVeen has already adopted some of these, such as making time for and taking microbreaks and stretching, and taking steps to have an ergonomic set-up for working. Taking such steps allowed her to complete a demanding college program.
- [112] I find that Ms. VanderVeen has taken a stoic approach in the face of her pain symptoms, and has looked for ways and strategies in which her symptoms can be managed and made more tolerable. However, she has found - and finds - that process exhausting. In the workplace, she is self-conscious about her pain-management strategies and fears being judged as someone who is shirking responsibilities. Managing her pain symptoms affects her focus and concentration. Moreover, I find that her pain symptoms and management of those symptoms affect her mood, and she becomes impatient and short-tempered, including occasionally in the workplace. She takes over-the-counter pain medication, but infrequently, and (essentially) only as a last resort, if she is unable to manage her symptoms through other means. She has found self-massage (what she calls "myofascial release") using a lacrosse ball effective.
- [113] I find that, prior to the accident, Ms. VanderVeen led what was primarily a sedentary lifestyle, although, in Prince Rupert, she was an active participant and volunteer in music-related activities. Moreover, she and Mr. Wagner enjoyed taking road trips together, either

on their motorcycles or in a motor vehicle, where they would share the driving. Some of these road trips covered substantial distances. I find that, after the accident, and as a result of the injuries she sustained in the accident, Ms. VanderVeen was no longer able to ride her motorcycle, which she eventually sold. A road trip in a motor vehicle was rare. Ms. VanderVeen's pain symptoms made it too uncomfortable for her to endure such a trip without frequent stops, and she was no longer in a position to share the driving with Mr. Wagner.

- [114] I find that Ms. VanderVeen's pain symptoms have made her feel less independent than prior to the accident. She is no longer fully capable of doing her own motor vehicle maintenance or household maintenance. With respect to the latter, as a result of her pain symptoms, she now must pace herself in performing chores, which take longer to complete.
- [115] Since the accident, Ms. VanderVeen has, however, continued to be active as a musician, consistent with her love of music, and as a volunteer. While she was living in Prince Rupert, and after the accident, she remained a very engaged member of the community music scene and the Music Society. I find that she did so despite her pain symptoms. I reject the proposition that her participation meant that she no longer had pain symptoms. Rather, she was willing to tolerate and manage her pain symptoms to participate in activities that were highly enjoyable to her and gave her life meaning.
- [116] Ms. VanderVeen was also able to complete her diploma program at Okanagan College, with great success. She has put herself in a position where she can now pursue her career goal of project management. However, I find that, as a result of her chronic pain, Ms. VanderVeen will have difficulty tolerating high-demand work projects or significant extra work demands on a sustained basis. I draw a distinction between Ms. VanderVeen's ability to work longer hours during her work on the Rio Tinto project, and her ability to sustain that over the long-term as a project manager, a more demanding job with greater responsibility. Her difficulty tolerating high-demand work projects and significant extra work demands on a sustained basis will affect her ability, over the long term, to move into more senior project management positions. On the other hand, in my view, she has shown that she will be able to tolerate extra work demands and longer hours on an occasional, or shorter term, basis. However, I find that, as a result of her chronic pain symptoms, it is unlikely she will be able to pursue her long-held ambition to become actively involved in straw-bale construction, and to help build a house where she and Mr. Wagner would live.

6. Damages

(a) Non-pecuniary damages

- [117] It is well-established that the purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism

(a factor that should not, generally speaking, penalize the plaintiff). See *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46. An award of non-pecuniary damages must be fair and reasonable to both parties.

- [118] It is also well established that each case must be decided on its own facts, and prior cases are useful as a guide - but only a guide - in the assessment of non-pecuniary damages.
- [119] On behalf of Ms. VanderVeen, Ms. MacWilliam submits that an award for non-pecuniary damages in the range of \$90,000 to \$100,000 is appropriate.
- [120] In support of an award in this range, Ms. MacWilliam cites: *Sunner v. Rana*, 2014 BCSC 1379; *Layes v. Stevens*, 2017 BCSC 895; *Dhaul v. Meahan*, 2019 BCSC 990; *Merko v. Plummer*, 2016 BCSC 1403; *Lauriente v. Schoonhoven*, 2017 BCSC 2246; and *Bain v. Goodridge*, 2019 BCSC 1450.
- [121] In *Dhaul*, for example, the plaintiff was a university-educated 40-year-old male plaintiff who was working as a dispatcher at the time of the accident. The Court found that he suffered from significant neck pain with limited range of motion; lower back pain; ongoing numbness in his arms and left leg; headaches; and shoulder pain that had improved since the accident. The plaintiff was noted to be stoic, and rarely complained of his injuries, even though it was apparent to his friends and family that he had been in various stages of pain and depression since the accident. The court awarded the plaintiff \$90,000 in non-pecuniary damages.
- [122] In *Lauriente*, the plaintiff was 43 years old at the time of trial and living in Nelson. She had previously enjoyed a variety of outdoor activities. As a result of the accident, she suffered primarily from neck pain and headaches, which she had on a daily basis. Her work as an emergency room nurse was physically demanding but she continued to work full-time, although with less enjoyment. She curtailed her recreational activities but nevertheless remained a relatively active and social person. The Court awarded her \$100,000 in non-pecuniary damages.
- [123] On the other hand, on behalf of the defendants, Ms. Singh submits that an appropriate range for non-pecuniary damages is between \$50,000 and \$60,000.
- [124] In support, Ms. Singh cites: *Dennison v. Jensen*, 2019 BCSC 725; *Hay v. Benzer*, 2014 BCSC 1522; *Young v. Shao*, 2018 BCSC 2017; *Bove v. Wilson*, 2016 BCSC 1620; and *Lowe v. Johnson*, 2019 BCSC 1283.
- [125] In *Dennison*, the plaintiff (age 40 as of trial) was injured in an accident four years before. Prior to the accident, she worked as a catering sales manager at hotel and did not miss any time from work relating to the accident. Pre-accident, she was active in hiking, golfing and dance, and she shared housekeeping duties with her husband. As a result of the accident, she suffered headaches, neck, low back and right shoulder injuries, as well as sleep and weight issues. Her headaches were resolved as of trial. However, she continued to suffer shoulder, neck and back pain. The court awarded her \$50,000 in non-pecuniary damages.

- [126] In *Lowe*, the Plaintiff (age 33 as of trial) suffered soft tissue injuries to her neck, low back, right shoulder and right elbow in an accident seven years earlier. Her low back pain, headaches and right elbow pain had resolved completely within a year of the accident. However, she continued to have pain in her shoulder, which radiated into her neck. As of 2015, her shoulder pain symptoms had plateaued. Prior to the accident, she was heavily involved in sports, soccer in particular. Post accident, her physical activity level had decreased, and she had had to give up playing soccer. When her daughter was born in early 2016, the plaintiff had difficulty nursing and holding her because of right shoulder pain. She experienced similar problems when her son was born in 2018. She was no longer working out and had difficulty with household chores. Her shoulder pain limited her ability to interact with her children. The court accepted medical opinion evidence that the plaintiff's condition as of trial was likely to improve, and accepted the prognosis that she would likely experience a full or near full recovery to the soft tissue injury to her shoulder. Plaintiff's counsel sought non-pecuniary damages of \$75,000, while counsel for the defendant argued damages should be assessed at between \$50,000 and \$55,000. The plaintiff was awarded \$60,000 in non-pecuniary damages.
- [127] In my view, the evidence here, and my findings, do not support an award in the range proposed by Ms. MacWilliam. I note that, before the accident, Ms. VanderVeen's main social and recreational activities were centred on music and volunteering. She continued to be an active participant in those areas following the accident, although the effects of the injuries she sustained made (and will make) the activities less enjoyable than before the accident. On the other hand, in my view, the range of non-pecuniary damages proposed by Ms. Singh fails fully to reflect my findings concerning how Ms. VanderVeen's life has been affected by her injuries. I note that in *Lowe*, the plaintiff was expected to experience a full or near-full recovery in respect of her main injury. That is not the prognosis for Ms. VanderVeen.
- [128] Taking into account the factors mentioned in *Stapley* (including Ms. VanderVeen's stoicism), the cases cited to me, and my findings above, I conclude that a fair and reasonable award of non-pecuniary damages for Ms. VanderVeen is \$75,000.
- (b) Loss of earning capacity
- [129] The parties agree that Ms. VanderVeen suffered a loss of earnings up to trial in the sum of \$801.76.
- [130] With respect to loss of future earning capacity, Ms. MacWilliam submits that Ms. VanderVeen has shown a loss of future earning capacity, and that her damages in this respect should be assessed at between \$200,000 and \$250,000.
- [131] Ms. MacWilliam submits that Ms. VanderVeen's situation is not unique, in that she has continued to work despite her pain symptoms and has completed the diploma course at Okanagan College, which will allow her to pursue a new career. In Ms. MacWilliam's submission, Ms. VanderVeen has chosen a career in which she will likely be able to succeed. However, Ms. MacWilliam argues that Ms. VanderVeen will face barriers as a result

of her injuries, and her opportunities to advance will be diminished because of her inability to put in the long hours required to move into many of the higher-paying senior positions.

- [132] In addition, in Ms. MacWilliam's submission, although Ms. VanderVeen is employable, she requires accommodations throughout her workday and she is limited in terms of the hours she can work. Therefore, and based on the opinion evidence from Dr. van den Berg, Ms. VanderVeen is by definition not competitively employable, in Ms. MacWilliam's submission. Ms. MacWilliam argues that, while Ms. VanderVeen is capable of working full-time hours with accommodations, the evidence shows that she is distracted by her pain and forced as a result of her pain to take breaks throughout the day. She becomes easily irritated and frustrated when in pain, and her tolerance for stress and conflict is reduced.
- [133] The result, in Ms. MacWilliam's submission, is that Ms. VanderVeen has demonstrated a real and substantial possibility of a loss of future income. Ms. MacWilliam says that, given Ms. VanderVeen's ambition and her passion for the type of work she is about to take on, it is extremely unlikely that Ms. VanderVeen, but for the accident, would have been content to work at the bottom of her industry and not advance her career.
- [134] Ms. MacWilliam submits that an award of two years' salary would be appropriate compensation for Ms. VanderVeen's loss of earning capacity. At the top end of the earnings range described by Dr. van den Berg (\$57.69 per hour), this amounts to about \$120,000 annually. In Ms. MacWilliam's submission, this is a reasonable estimate of Ms. VanderVeen's likely without-accident annual earnings. Alternatively, assuming Ms. VanderVeen has another 20 to 25 working years ahead of her, and estimating her annual loss over those years at \$10,000, her loss would be between \$200,000 and \$250,000. The present value of such a loss would be between about \$170,000 and \$207,000.
- [135] The defendants' principal position is that Ms. VanderVeen has not demonstrated any loss of earning capacity, and, therefore, she has not demonstrated an entitlement to any compensation under this heading.
- [136] The defendants say that Ms. VanderVeen has demonstrated the capacity to work full-time, if not more. For example, her position at Kitimat required her to work a 60-hour week. When working with Sunco, she had a long commute before arriving at the job-site for an early morning start, and then put in a full day. Her decision to embark on a new career as a project manager was not related to the accident. The defendants say that Ms. VanderVeen's exceptional performance in her program at Okanagan College shows that she did not allow pain symptoms to interfere. According to Dr. van den Berg, a project manager position allows for positional variety between office and field work, and, therefore, the defendants say, Ms. VanderVeen will have the flexibility she desires and says she requires. The defendants say that Dr. van den Berg's opinion that Ms. VanderVeen's need for microbreaks and the associated interruptions would adversely affect her efficiency, productivity and her opportunities for career advancement, is purely speculative.

- [137] In the alternative, the defendants say that if the court finds that Ms. VanderVeen has demonstrated a loss of future earning capacity, then the loss should be assessed using the capital asset approach, and the loss is minimal. The defendants submit that the appropriate award would be between \$25,000 and \$35,000, or about half of Ms. VanderVeen's salary at the time of the accident.
- [138] I turn then to the applicable legal principles.
- [139] There are two stages in assessing a claim for damages for loss of earning capacity (in this case, loss of future earning capacity): *Gillespie v. Yellow Cab Company Ltd.*, 2015 BCCA 450, at para. 34. The first stage is entitlement. A plaintiff must prove that the injuries suffered in the accident and the resulting symptoms impaired her ability to earn income and that there is a real and substantial possibility that her diminished earning capacity will result in a pecuniary loss. A plaintiff may be able to prove that there is a substantial possibility of a future loss despite having returned to his or her usual employment. If the plaintiff satisfies that burden, and therefore establishes an entitlement to compensation, then the second stage requires an assessment of the loss. A plaintiff may prove the quantification of that loss either on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured. See generally *Perren v. Lalari*, 2010 BCCA 140, at paras. 21 and 32. Either way, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of her working career, taking into account relevant and realistic negative and positive contingencies.
- [140] A plaintiff's loss is assessed on the basis of the difference between the plaintiff's original position just before the occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission: see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 34-35. The assessment is an exercise of judgment, not a mathematical calculation. Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable.
- [141] In my opinion, Ms. VanderVeen has demonstrated a real and substantial possibility of a future event that she can no longer realize as a result of the injuries she sustained in the accident, which will, in turn result in a loss of income. Specifically, I find that, as a result of the injuries she sustained in the accident, she is no longer able to take on, on a sustained basis, the high-demand work projects with tight deadlines and significant extra work that are a feature of senior level project management positions.
- [142] There is no dispute, and I have found, that Ms. VanderVeen has been left with chronic neck and upper back pain as a result of the injuries she sustained in the accident. Her symptoms can be managed but not eliminated. Dr. Sylvester said he did not believe that Ms. VanderVeen's ability to participate in her chosen profession "will be significantly compromised" by her medical condition. However, in my view "significantly" is an

important qualifier. The inference I draw from Dr. Sylvester's opinion is that Ms. VanderVeen's ability to participate in her chosen profession will be compromised by her medical condition. That conclusion is supported by the opinion evidence of Mr. Jaschke and Dr. van den Berg, as well as Ms. VanderVeen's own evidence. There can be little doubt that management of chronic pain symptoms, day in and day out, over the course of a working life, takes its toll: see *Morlan v. Barrett*, 2012 BCCA 66, at para. 41.

- [143] Mr. Lewandowski's evidence, together with the opinion evidence of Dr. van den Berg, supports the conclusion that to advance in a career as a project manager, and to earn the higher income that comes with being part of a bonus structure, an individual must be prepared to and capable of working regular overtime hours (more than a 40 hour week) and meeting what can be tight project deadlines. In the short term, Ms. VanderVeen was able to manage longer work hours when she was working on the Rio Tinto project, although not without pain. However, in my view, being able to commit to long hours and extra work for the balance of her working life is not something that Ms. VanderVeen is now in a position to do as a result of the injuries she sustained in the accident. Moreover, attempting to do so would, in my view, come at too great a sacrifice to other parts of Ms. VanderVeen's life and would not be sustainable.
- [144] Ms. VanderVeen has demonstrated that she is ambitious, especially now that she has found a suitable career, and she has demonstrated in the past that she prepared to work hard. She is highly intelligent, creative, a very good problem-solver and skilled in "calming the waters" when dealing with people, and she has the cognitive potential for more senior positions in the project management field. These are all qualities she had in the "without-accident" scenario and that she retains in the "with-accident" scenario. In my view, in the without-accident scenario, Ms. VanderVeen would have looked for and pursued opportunities to advance her career by being available to work overtime and do what was required to be part of a bonus structure, and she possessed the skills to be successful. Now, as a result of the injuries she sustained in the accident, her ability to do that is diminished, with the consequent loss of income.
- [145] Accordingly, I find that Ms. VanderVeen has established an entitlement to compensation for loss of future earning capacity.
- [146] I turn then to the assessment of Ms. VanderVeen's loss. In my view, the capital asset approach is the more appropriate in Ms. VanderVeen's case, particularly since she is starting out on a new career.
- [147] Using the capital asset approach does not mean that the assessment is unstructured or that the assessment is entirely at large without the necessity to explain the factual basis of the award. In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), at para. 8, form the basis of the assessment. The questions are whether:

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

[148] Of the Brown factors, I consider the second and third to be the most significant in Ms. VanderVeen's case.

[149] There was little time spent at trial exploring how long Ms. VanderVeen plans to work, and when she is likely to retire. She is now 43. In my view, the assumption that, but for the accident, she would work for another 25 years (to age 68) as a project manager with steadily increasing income over that period, and that her loss should be assessed on that basis, is not one that can bear much weight. A more reasonable assumption is that she will work until age 65.

[150] In addition, the evidence shows that, although she is ambitious, Ms. VanderVeen is not exclusively (or even primarily) motivated by money. Rather, the quality and nature of the work are also important to her, and, at this stage of her life, she has finally acted on a long-held desire to do work that is more fulfilling. Although Ms. VanderVeen was more than capable of continuing to earn a reasonable salary as an administrative assistant (with the possibility of moving into more senior, better paying management positions, which she was also more than capable of doing), she decided instead to take time off to enrol in the program at Okanagan College. Thus, she traded income for education. Her education provided her with the tools to pursue a career that interests her and that she expects she will find more fulfilling personally and professionally, so, for Ms. VanderVeen, the monetary sacrifice is worth it. In addition to her interest in sustainable construction, Ms. VanderVeen has a long-standing interest in straw-bale construction. Whether that is likely to be financially rewarding is unknown. Her relationship with Mr. Wagner is also important to her, and was the reason for the move from Prince Rupert. I see Mr. Wagner's work situation and location as a contingency in assessing Ms. VanderVeen's loss of earning capacity, since Ms. VanderVeen has, in the past, moved to where Mr. Wagner was working. However, it was something else that was not explored to any degree in the evidence at trial.

[151] I also note that Ms. VanderVeen is just starting out in a new career. While she has excellent and very well-developed skills as an administrator (including skills related to the use of technology), she does not have the years of hands-on background in construction that Mr. Lewandowski (for example) has. Even in the without-accident scenario, Ms. VanderVeen could not expect immediately to be earning the income of an experienced project manager, at least not for some time.

[152] In my view, a reasonable assessment of Ms. VanderVeen's loss of earning capacity is \$140,000. This is roughly two years' annual salary at the hourly rate of \$36.25 set out in Dr. van den Berg's report. It is also roughly equivalent to the present value of an annual loss of \$10,000 to age 65, taking into account that there will be a period at the beginning of her career as a project manager when Ms. VanderVeen must expect to earn a lower income. In other words, her income-earning capacity as a project manager is diminished at the beginning of her career because she lacks experience, not because of her injuries.

(c) Loss of housekeeping capacity

[153] Ms. VanderVeen seeks an award of \$20,000 for loss of housekeeping capacity.

[154] Ms. MacWilliam submits that such an award is justified on the evidence. She notes for example the evidence of Ms. VanderVeen and Mr. Wagner that household projects and chores that, prior to the accident, Ms. VanderVeen would have completed efficiently, are now either not done at all or take Ms. VanderVeen much longer to complete. Ms. MacWilliam submits that Ms. VanderVeen's functional limitations with prolonged stooping and bending, and activities requiring low-level positions, support the conclusion that, as a result of the injuries she sustained in the accident, Ms. VanderVeen had suffered a loss of her housekeeping capacity. In addition, Ms. MacWilliam notes that Mr. Wagner spends much of his time working away from home, and Ms. VanderVeen must shoulder almost all of the responsibility for household tasks on her own. In Ms. MacWilliam's submission, this is not a case where routine domestic chores can be reorganized between Ms. VanderVeen and Mr. Wagner.

[155] The defendants oppose any award for loss of housekeeping capacity, which they say is not supported by the evidence. They say that, for example, Ms. VanderVeen is required to show that she will be forced to hire someone to perform housekeeping services or have someone perform such services gratuitously. The defendants say further that any issue concerning Ms. VanderVeen's housekeeping capacity can and should be addressed by way of a nominal amount to be included in the award for non-pecuniary damages, citing *Liu v. Bains*, 2016 BCCA 374, at paras. 25-26.

[156] Compensation for loss of homemaking capacity is distinct from compensation for cost of future care. Both can be awarded when supported by the evidence. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred or are likely to be incurred, and therefore a plaintiff is not required to show that she is likely to hire someone or have someone else perform services gratuitously. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss. See *Westbroek v. Brizuela*, 2014 BCCA 48, at paras. 72-78.

[157] In my view, a modest award, consistent with the cautionary approach and my findings above, can be justified in this case. I award \$5,000.

(d) Cost of future care

[158] Mr. Jaschke's opinion and recommendations on cost of future care are based in part on Dr. Chow's opinion evidence and in part on Mr. Jaschke's recommendations in his capacity as an occupational therapist. To the extent Mr. Jaschke's recommendations rely solely on the opinion evidence of Dr. Chow, they are problematic, given my concerns about Dr. Chow's evidence. On the other hand, Dr. Sylvester, in his report, also made a number of future care recommendations, and he and Dr. Chow agreed on some items. Mr. Jaschke did not have the benefit of Dr. Sylvester's report when he prepared his report.

[159] In general, Ms. VanderVeen is asking for compensation for cost of future care in the sum of \$50,000. On the other hand, the defendants say that an appropriate and reasonable award would be between approximately \$15,370 and (at the high end) \$23,500.

[160] I turn then to the specific items, beginning with one-time only costs.

[161] Occupational therapy was recommended by both Dr. Chow and Dr. Sylvester to address pain management, pain control and ergonomics at home and at work. Mr. Jaschke recommends ten 1-hour sessions with an average cost of \$112 per hour, for a total of \$2,240. The defendants agree that this recommendation is reasonable and medically supported. The cost is therefore allowed at \$2,240.

[162] Weight reduction was recommended by Dr. Chow, and Ms. VanderVeen claims between \$330 and \$390. However, Ms. VanderVeen's issues with weight clearly pre-dated the accident. To her credit, and using an App-based program, since the beginning of 2019, Ms. VanderVeen has lost weight and is now substantially below her pre-accident weight. She plans to continue using the App. I award nothing for this item.

[163] A supervised exercise program with a kinesiologist was recommended by both Dr. Chow and Dr. Sylvester. Mr. Jaschke recommended 16-20 sessions, typically at \$75 per session, for a total cost of between \$1,200 and \$1,500. The defendants agree that this recommendation is reasonable and medically supported. The cost is allowed at \$1,500.

[164] Dr. Chow recommended cognitive behavioural therapy to assist Ms. VanderVeen with pain control and mindfulness. Dr. Sylvester recommended that Ms. VanderVeen enrol in a mindfulness and meditation class to assist with coping strategies for pain management, and also that she be assessed by a physician specializing in the diagnosis and treatment of chronic pain for "multimodal" pain management. There is, therefore, medical justification for this item of future care. Mr. Jaschke recommended 14 sessions of cognitive behavioural therapy at a cost of \$200 per session, for a total of \$2,800.

[165] However, Ms. VanderVeen has, in the past, been reluctant to see a counsellor concerning pain management. In my view, there should be some deduction to reflect the possibility that Ms. VanderVeen will not incur the costs.

[166] I award \$2,000.

[167] Ms. VanderVeen seeks \$875 for a spine specialist consultation and \$700 to \$2,600 for nerve block treatment. These are claimed as "contingent" items. Both are based on opinions expressed by Dr. Chow. However, as I set out above, I have rejected these opinions as speculative. I award nothing for these items.

[168] I turn then to ongoing costs, where Ms. VanderVeen is seeking compensation as follows (in rounded numbers):

Item

Cost

Frequency

Present value

Gym pass

\$398.00

annual to age 59

\$5,403.00

Gym pass

\$293.00

annual from age 60 to 74

\$3,764.00

Physiotherapy and supportive treatments

\$300.00 to \$800.00

annual to age 75

\$7,040.00 to \$18,770.00

Ergonomic equipment

\$1,500.00 to \$2,000.00

every 10 years to age 65

\$3,000.00 to \$4,000.00

Snow removal

\$416.00 to \$520.00

annual to age 75

\$9,760.00 to \$12,200.00

Vehicle maintenance

\$160.00 to \$190.00

annual to age 75

\$3,755.00 to \$4,460.00

Medications

\$43.68

annual to age 75

\$1,025.00

Trigger point (lacrosse) ball

\$15.00

every 10 to 12 years

\$30.00

Warming salve/A535 cream

\$30.50 to \$61.00

annually to age 75

\$715.00 to \$1,430.00

[169] A gym pass was recommended by both Dr. Sylvester and by Mr. Jaschke, and therefore it is medically justified. However, on the question of whether Ms. VanderVeen would be likely to incur this cost, in my view, the answer is, at best, a qualified "maybe," and there is virtually no support in the evidence for the possibility that she would continue to incur the cost to age 75. I award \$1,500 in total for these two items.

[170] Physiotherapy and supportive treatments (including massage therapy and chiropractic treatment) were recommended by Dr. Chow. Since the move to Bridesville, Ms. VanderVeen has been an infrequent user. However, as she explained, it has been difficult to locate a suitable treatment provider in a convenient location. That is likely to change now that Ms. VanderVeen will be in Kelowna during the week, and she and Mr. Wagner may be moving from Bridesville to a larger centre, with better services, in any event. The defendants accept Ms. VanderVeen's need for such treatment and submit that an appropriate award would be

between \$4,800 to \$14,080, to cover treatments until age 60. I consider \$10,000 for this item to be reasonable.

- [171] Ergonomic equipment is recommended by Mr. Jaschke. The recommendation was primarily in relation to Ms. VanderVeen's future workplace station. However, this is not an expense that Ms. VanderVeen will be incurring herself. I award nothing for this item.
- [172] Snow removal assistance was also recommended by Mr. Jaschke. Of course, the assistance required depends very much on where Ms. VanderVeen and Mr. Wagner will be living. Moreover, in my view, this is an area where Mr. Wagner must expect to share some of the responsibility (when necessary) for snow removal as part of the give and take between individuals sharing a household, either by doing it himself (assuming he is not out of town) or by hiring someone to do it. I award nothing for this item.
- [173] Vehicle maintenance (specifically oil and tire changes) was again recommended by Mr. Jaschke, based on the results of his functional capacity assessment. The defendants submit that some amount for this item can be justified and is reasonable. However, they say that it should be to age 60, rather than age 75. I agree with the defendants on this point. I do not think that, in the without-accident scenario, Ms. VanderVeen would still have been carrying out this kind of vehicle maintenance herself at age 75. I award \$2,500, which is approximately the present value of an annual cost of \$190 to age 60.
- [174] The defendants accept that the amounts claimed for medications and the trigger point ball are medically justified and reasonable. They are allowed at \$1,025 and \$30, respectively. The defendants also accept that an amount for salve or cream is also reasonable. I award \$1,000 for this item.

[175] In summary, I award costs of future care as follows:

Item

Award

Occupational therapy

\$2,240.00

Supervised exercise program

\$1,500.00

Cognitive behavioural therapy

\$2,000.00

Gym pass

\$1,500.00

Physiotherapy and supportive treatments

\$10,000.00

Vehicle maintenance

\$2,500.00

Medications, trigger point ball and warming salve

\$2,055.00

Total

\$21,795.00

(e) Special damages

[176] In Exhibit 1, the parties agreed that Ms. VanderVeen is entitled to special damages in the sum of \$3,678.58.

[177] However, in addition to the agreed amount, Ms. VanderVeen seeks compensation for what she claims are further special damages. The amount involved is about \$6,300. Specifically, Ms. VanderVeen seeks: the cost of the ATV purchased by Mr. Wagner to deal with snow removal at the Bridesville property, which Ms. VanderVeen estimates was about \$3,500; the cost of the Roomba vacuum cleaner; and the extra money she says that she had to spend on fuel after selling her motorcycle. No receipts have been produced.

[178] Ms. MacWilliam cites *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968, at para. 368, for the proposition that it is open to the court to award special damages in the absence of receipts so long as the claim is particularized. She cites *Crossman v. Boiley*, 2016 BCSC 1437, at para. 27, for the proposition that the court may estimate the amount of special damages based on information provided and should do so.

[179] The defendants are opposed, and say the additional amounts claimed are not recoverable as special damages, at least in part because of the absence of any receipts.

[180] I agree with the defendants.

[181] There was no attempt to quantify the "extra money" Ms. VanderVeen claims she had to spend on fuel after she sold her motorcycle and was driving a vehicle. No evidence was tendered concerning the price of gas at any location at any particular time. No evidence was tendered of the amount of Ms. VanderVeen's travel. The claim is completely unparticularized.

[182] In my view, with respect to the other items, neither *Brodeur* nor *Crossman* assists Ms. VanderVeen.

[183] Unlike, Brodeur, here the claims are unparticularized. I note that in Brodeur, Sharma J. did not award special damages in the amount claimed by the plaintiff, but awarded an amount that the defendants did not oppose and said was reasonable.

[184] Crossman was an application for approval of an infant settlement, which included an amount for special damages. Church J. observed (at para. 20) that while there were no receipts to support the amounts in issue, they were documented "with some particularity" in one of the affidavits filed in support of the application. That is not the case here. Nothing has been provided. Moreover, in Crossman, while counsel for the Public Guardian and Trustee noted that the onus of proof was on the plaintiff to produce evidence in support of the claim for special damages and pointed to the lack of receipts and supporting documentation for many of the expenses claimed, he suggested that, in the "interests of proportionality and judicial economy," it may be acceptable for the court to assess the claim for special damages based on the documentation provided. It was counsel for the Public Guardian and Trustee who advanced the suggestion (at para. 24) that the court may estimate the amounts of these special damages claims on the basis of the information provided, given the need for the application to be addressed in a timely manner given the child's circumstances. That was the context for Madam Justice Church's comments at para. 27 of her Reasons, where she said:

I agree with the submission of counsel for the PGT that this is a case where the Court may estimate the amount of special damages based on the information provided and indeed, should do so.

[185] Accordingly, Ms. VanderVeen is entitled to special damages in the sum of \$3,678.58.

7. Summary and disposition

[186] In summary, I award damages to Ms. VanderVeen as follows:

- (a) non-pecuniary damages in the sum of \$75,000;
- (b) for loss of earning capacity to trial \$801.76;
- (c) for loss of future earning capacity \$140,000;
- (d) for loss of housekeeping capacity \$5,000;
- (e) for cost of future care \$21,795; and
- (f) special damages in the sum of \$3,678.58.

[187] There will be pre-judgment interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[188] Subject to any submissions the parties may wish to make concerning costs, Ms. VanderVeen is entitled to her costs on Scale B. If the parties wish to make further submissions concerning costs, I direct that appropriate steps be taken within 30 days of the date of these Reasons to obtain a convenient hearing date from Scheduling.

"ADAIR J."

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