
CANADA / JUDGMENT

Woelders v. Gaudette

2016 BCSC 1066

COURT

Supreme Court of British Columbia

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2016 BCSC 1066 Woelders v. Gaudette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Woelders v. Gaudette,

2016 BCSC 1066

Date: 20160610

Docket: M104698

Registry: Vancouver

Between:

Victoria Woelders

Plaintiff

And:

Brad Gaudette

Defendant

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for Plaintiff:

P. Gordon

D. McCormick

Counsel for Defendant:

M. G. Murphy

R. Wijesinghe

Place and Dates of Trial:

Vancouver, B.C.

June 15 - 19, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 10, 2016

INTRODUCTION

- [1] On November 4, 2008, as Victoria Woelders was stopped to merge with oncoming traffic, the defendant's vehicle struck the rear of her car (the "Accident"). Liability for the Accident has been admitted.
- [2] There is no dispute that Ms. Woelders sustained soft tissue injuries from the Accident. The primary issue of contention is whether the Accident is the cause of her cluster of persistent residual symptoms including, headaches, muscular tension, and pain, particularly in her face and jaw and in the region encompassing her neck, upper back and right shoulder. Related issues in dispute include the impact of her injuries on her functional abilities and future work capacity.

BACKGROUND

· Overview

- [3] The following summary reflects evidence that was either not in dispute or, where it was in dispute, the factual findings I have made based on a consideration of the evidence as a whole. I have explained the reasoning underlying my findings where the evidence conflicted in a significant way on material points, or where a party has urged that a particular inference be drawn from the evidence.
- [4] Ms. Woelders is an elementary school teacher of the primary and intermediate grades. She hails from a long line of teachers and as a young girl became passionate about becoming a teacher.
- [5] Ms. Woelders obtained her teaching certificate in 2000 after graduating from university. She worked for a time as a teacher on call locally and in England. When she returned to the Lower Mainland in 2001, full-time teaching positions were scarce and so she continued to work as a teacher on call. She was high-energy and industrious and obtained as many fixed-term contracts of work as she was able and taught summer school. While doing so, she completed a Master of Education degree through the University of Oregon, with emphasis

on the integration of technology in the classroom.

- [6] In 2003, Ms. Woelders married Michael Woelders, who is also a teacher. She was able to secure a six-month contract to teach on a full-time basis in early 2006. Thereafter, she was offered a full-time position teaching intermediate pupils with the Langley School District to start in September 2006. However, her daughter was due to be born the following month and she was not able to accept the position.
- [7] Ms. Woelders and her husband always intended to raise a family and agreed that Ms. Woelders would teach part-time until their youngest child was in school full-time. Their ideal plan was for their children to attend the same school that Mr. Woelders worked at so they could travel with him to and from school.
- [8] In keeping with their mutual plan, Ms. Woelders returned to the classroom on a part-time basis after the arrival of her daughter. When, in September 2008, she discovered she was pregnant again and the baby was due in February 2009, she temporarily increased her workload to a full-time equivalency to be eligible to enjoy a full maternity leave with the second baby.
- [9] Prior to the Accident, Ms. Woelders was an extremely athletic woman who led a very active lifestyle. She took up long distance running as a youngster and before the Accident had participated in triathlons and marathons (including the Vancouver Marathon just six months earlier). In addition to running, Ms. Woelders regularly enjoyed a host of physically intense outdoor activities such as hiking, camping and skiing.
- [10] She was also handy around the house. In 2004, she and her husband purchased a home and together renovated it and installed a basement suite. On that project, she worked hands-on with various power tools, lifted and moved concrete, laid flooring, helped with demolition and dry-walling, and dug drainage ditches.
- [11] In summary, at the time of the Accident, Ms. Woelders was 31 years old, physically fit and in good health, and was nearing the prime working years of her career. She was 27 weeks pregnant with her second child and just three days away from taking a pregnancy-related leave prior to the commencement of her maternity leave from her job as an elementary school teacher.

· The Accident and its Aftermath

- [12] Ms. Woelders was seated forward with her head turned over her left shoulder waiting to merge with the flow of traffic approaching on her left, when she suddenly felt a "strong hit" to the back of her vehicle. She did not sustain any direct blows to her face, neck or jaw. Immediately after the collision, she pulled over to the side of the roadway. She felt generally unwell and was pre-occupied with concern for the well-being of her unborn child. Her neck began to stiffen and bother her slightly on the right side.

- [13] After exchanging information with the defendant, Ms. Woelders drove five blocks to her home. Although she was able to drive her vehicle that short distance, the damage was beyond repair and her car was ultimately written off.
- [14] Shortly after she arrived home, Ms. Woelders felt cramping in her abdomen and pain in her left leg. Her father drove her to the hospital where she was seen by an obstetrician and monitored in the maternity ward for about three hours. Although her primary focus was on the condition of her unborn baby, she was also aware of pain in her neck and a radiating pain down her left leg. Fortunately, no obvious problems with the pregnancy were detected and Ms. Woelders was discharged.
- [15] Ms. Woelders did not feel well enough to return to the classroom to complete the three remaining days of work before the start of her scheduled leave from work.
- [16] Two days after the Accident, Ms. Woelders saw a colleague of her long-standing family physician, Dr. Hester Vivier. She complained of pain in her neck and was recorded as exhibiting tenderness in her right sternocleidomastoid, a muscle that runs across the front of the neck and helps to stabilize and rotate it.
- [17] A few days later on November 10, 2008, she was examined by Dr. Vivier. At that time, she reported a very painful neck, feeling hazy and having difficulty concentrating. Dr. Vivier found tenderness over the right side of Ms. Woelders' neck and into her trapezius and sternocleidomastoid muscle. She assessed soft tissue injuries resulting from the Accident and recommended that Ms. Woelders receive physiotherapy and chiropractic treatment. Ms. Woelders followed Dr. Vivier's advice. In about March 2009, Dr. Vivier added kinesiology to Ms. Woelders' treatment regimen.
- [18] Despite following Dr. Vivier's suggestions for treatment, Ms. Woelders continued to experience neck pain, mainly on her right side that would travel into her upper right shoulder/trapezius area and upper back (the area directly below the base of her neck).
- [19] Although Ms. Woelders was unable to pinpoint an exact date, she recalled that her headaches emerged not long after the Accident. The headache pain manifested above her eyebrows and along the top of her head. She described the feeling as akin to having a vice-clamp around her head or like wearing an excessively tight baseball cap. Related to her headache was, and continues to be, an ever-present, tight muscular tension simmering in the background that can be aggravated by a variety of postures or activities and transform into pain and/or a full-blown headache. She explained that at some later point in time the neck and/or headache pain and/or muscle tension began to migrate to the right side of her face and along her jaw. She was not able to specify when, in relation to the Accident, her jaw symptoms emerged. She also experienced low back pain after the Accident, but was not sure whether it arose as a result of it.

- [20] Within a few months of the Accident, Ms. Woelders experienced a degree of improvement of some of her symptoms. Her left leg pain gradually dissipated and then resolved. Her lower back pain, which she felt was associated with her leg pain, also disappeared about a year or so after the Accident. However, her headaches, the pain at the back of her neck/upper back/right shoulder region, the muscle tension and the constellation of right-sided facial and jaw pain persisted. It is Ms. Woelders' sense that these ongoing residual symptoms are inter-connected and are all part of one injury stemming from the Accident.
- [21] Ms. Woelders has been diligent in attempting to cope with and resolve her symptoms. She has regularly attended physiotherapy, chiropractic and massage therapy sessions. More specifically, from November 8, 2008 until February 21, 2013, she underwent approximately 44 chiropractic treatments. She stopped attending in part because she found the long commute from her home to the chiropractor's office too onerous, and also because she learned to better manage her symptoms and minimize and avoid activities that tended to activate them.
- [22] Starting shortly after the Accident and continuing until December 27, 2013, Ms. Woelders had approximately 61 physiotherapy sessions. Within the same general timeframe but continuing into early 2015, she had roughly 94 massage therapy treatments. All of these modalities have helped her manage her lingering headaches and facial and jaw pain and muscle tension, as well as the pain in her neck/upper back/shoulder area, to one extent or another. Even currently, if she misses a number of her massage appointments, she finds that her symptoms worsen.
- [23] Also on Dr. Vivier's recommendation, starting in about January or February 2010, Ms. Woelders participated in an intensive eight-week active rehabilitation program aimed at enhancing her mobility and strength. She has continued to faithfully follow a rehabilitation program and perform the exercises she learned from her kinesiologist and physiotherapist at her local community centre, where she tries to attend three times per week.
- [24] Being physically inactive is not in Ms. Woelders' nature. While still on maternity leave in June 2009, she tried running once again. That activity tended to aggravate her injuries and in late 2009, on the advice of both her physiotherapist and kinesiologist, she stopped. In January 2010 she began doing hot yoga on the recommendation of one of her healthcare providers.

• Events in 2010 - 2011

- [25] Ms. Woelders resumed teaching on a part-time basis when her second maternity leave came to an end in January 2010. At that time, she began teaching every second Monday (10% of full-time hours). Although Ms. Woelders was still suffering from her Accident-induced injuries, the part-time pace of her work was mainly for child-rearing reasons. She was a physical education specialist, but because of her injuries, did not feel physically able to teach that subject area upon her return to work.

- [26] Even in her 10% job-sharing position, Ms. Woelders had difficulty doing commonplace work tasks, such as leaning over desks to interact with pupils and writing on the board above her head. She often experienced exacerbations of her headache and neck/shoulder/upper back pain as a result of partaking in relatively innocuous activities at work and at home.
- [27] In September 2011, Ms. Woelders expanded her work hours to three days a week (equivalent to 60% of full-time). She quickly found that working in a classroom at that pace severely exacerbated her headaches and cluster of other symptoms. Following Dr. Vivier's advice, at the end of September she took an extended medical leave from work. During that period, she concentrated on her rehabilitation. In November 2011, Ms. Woelders returned to the classroom one day per week on a trial basis. Her symptoms persisted.
- [28] Despite Ms. Woelders' commitment to adhere to the recommended treatments and to follow through with the strengthening and stretching exercises that were featured in her active rehabilitation program, her headaches, muscle tension and the neck/upper back/right shoulder pain that travelled to the right-side of her face/jaw area worsened. She was eventually referred to a neurologist for further investigation and to Dr. R. Nairn Stewart, a psychiatrist.
- [29] In 2011, the Woelderses purchased a new home. Mr. Woelders gave persuasive evidence that, in stark contrast to Ms. Woelders' considerable ability to do home updating and renovation tasks before the Accident, her pain and other symptoms significantly hampered her ability to help in the same way that she had before the Accident.
- Events in 2012 - 2013
- [30] In early 2007, before the Accident, Ms. Woelders' dentist had recommended that she wear a night mouth guard. She declined to obtain one due to her financial situation.
- [31] In June 2009, after the Accident, Ms. Woelders underwent a root canal. The treating endodontist referred her back to her dentist for the possible fabrication of a mouth guard and she had subsequent dental appointments where the prospect of her wearing a mouth guard appears to have been raised occasionally.
- [32] In early 2012, Ms. Woelders was fitted with a customized mouth splint to help prevent her from clenching and/or grinding her teeth. Wearing the splint helped reduce the symptoms in her face and jaw.
- [33] Ms. Woelders resumed working one day per week in September 2012. Her father had developed health difficulties that precluded him and his wife from continuing to babysit the Woelderses' children. Ms. Woelders candidly explained that although she was not able to work more than one day per week due to her injuries, given the circumstances she would likely not have worked more than that at that time even if the Accident had not happened.

- [34] In September 2013, Ms. Woelders increased her workload to two non-consecutive days per week. She persuasively explained that she felt able to add the extra classroom day because her mouth splint and the other coping strategies she had learned from her physiotherapist, her kinesiologist and in the active rehabilitation program, together with her physical treatments, were helping her to better cope with her symptoms.
- [35] The preponderance of the evidence establishes that in 2013, especially in the latter half of that year, Ms. Woelders' headaches and cluster of neck- and jaw-related symptoms had continued to improve. That said, her symptoms had by no means resolved. While her energy and tolerance for physical activity was better and she was slowly reintroducing light jogging and cycling on a stationary bike, she continued to be restricted in her function and in most recreational activities. As well, there were certain physical endeavours that she had participated in prior to the Accident that she simply could no longer do.

· Events in 2014 and Beyond

- [36] In consultation with Dr. Vivier, Ms. Woelders began teaching three non-consecutive days a week in January 2014. That September, she added a fourth work day. By then, her daughter was in grade three and her son had started full-time kindergarten. Both children attended the school where their father taught, enabling him to care for them before and after school. This was the stage in their family life where the Woelderses anticipated that Ms. Woelders would return to teaching on a full-time basis. However, that has not come about as yet.
- [37] Ms. Woelders explained that the four-day work week requires her to constantly be on top of her pain and to take all reasonable precautions to avoid or minimize aggravating movements and activities. She believes that it is essential that she have Wednesdays off to give her a mid-week break to rest and attend to her rehabilitation and treatment appointments.
- [38] Activities that continue to trigger and aggravate Ms. Woelders' current symptoms, being neck/upper back and/or right shoulder pain, headaches and facial/jaw area pain include: lifting and carrying her children or heavy items such as car seats; prolonged sitting for upwards of 45 minutes; holding her head in one position for too long; some household chores; most yard work; and tasks that require her to raise her arms above her head, such as placing gym equipment on a high shelf. Many of these exacerbating activities are ordinary tasks from a physical standpoint.
- [39] On the other hand, certain activities help her cope with her symptoms. These include special stretches and exercise and breathing routines together with other components of active rehabilitation; massage, physiotherapy and chiropractic treatments; resting; and napping. She also finds some types of exercises beneficial when they are accompanied by a cool-down period of targeted stretching.

MS. WOELDERS' MEDICAL EXPERTS

[40] Ms. Woelders tendered expert reports from Dr. Vivier, Dr. R. Nairn Stewart, her treating physiatrist and from Dr. Michelle Williams, a dentist and certified specialist in oral medicine. Their respective opinions are summarized below.

· Dr. Hester Vivier, Family Doctor

[41] Dr. Vivier prepared two expert reports in connection with this proceeding.

[42] In her first report dated October 11, 2011, she concluded that Ms. Woelders had suffered a whiplash injury to her neck and upper back as a result of the Accident. She opined that, over time, the injury to Ms. Woelders' neck had caused her significant headaches that also resulted from the Accident. Additionally, she thought it possible that Ms. Woelders may have sustained a minor concussion from the Accident.

[43] When Dr. Vivier wrote her first report, she was of the view that the injuries Ms. Woelders had sustained in the Accident restricted her in terms of her occupation as a teacher. She also noted several limitations with respect to Ms. Woelders' recreational activities, carrying out household chores and commonplace interactions with her children.

[44] Shortly after the birth of Ms. Woelders' son on February 2, 2009, she complained to Dr. Vivier of lower back pain that sometimes radiated down her right buttock and right thigh. It was not clear to Dr. Vivier whether those symptoms were the product of the Accident or were related to Ms. Woelders' delivery by Caesarean section of her son. As mentioned earlier, Ms. Woelders was also not certain of the cause of her low back pain. Ultimately, Dr. Vivier opined that it was more likely than not that Ms. Woelders' lower back pain would have emerged after the birth of her son even if the Accident had not occurred.

[45] The reports of some of the experts in this matter, including those of Dr. Vivier and of the defendant's expert, Dr. Larry M. Goldstein, make reference to clinical records, not in evidence, that suggest Ms. Woelders may suffer from a temporomandibular joint problem of some kind. In her second report, dated March 14, 2015, Dr. Vivier confirmed the opinion she had expressed in her initial report and added that Ms. Woelders also developed a temporomandibular joint disorder in 2011. She described the characteristics of that disorder as acute or chronic musculoskeletal pain triggered by jaw motion, dysfunction of the masticatory system, temporomandibular joint tenderness and neck stiffness and pain. She concurred with the view expressed by Dr. Bo Hogland, an orthodontist who had treated Ms. Woelders in or about January 2013, that the etiology of that disorder is multi-factorial and that whiplash can contribute to its development. Dr. Hogland's records were not before the Court and he did not give evidence. Dr. Vivier opined that it was more likely than not that Ms. Woelders' current symptoms were caused by the Accident.

- [46] Dr. Vivier expects that Ms. Woelders will continue to require massage therapy over the next few years. She anticipates some possibility of a gradual decrease in need that would effectively be offset by periodic increases to address symptom flares. Dr. Vivier believes that Ms. Woelders would benefit from 12 massage treatments per year. She also endorsed her participating in hot yoga twice per week and continuing her exercise program.
- [47] In terms of Ms. Woelders' future work capacity, Dr. Vivier recommended that she continue to teach four days per week for the coming 2015/2016 school year. Ms. Woelders intends to follow her doctor's advice and in September 2015 will move to a new school located closer to her home where she will teach a grade four class.
- [48] Dr. Vivier considered it unlikely, although not impossible, that Ms. Woelders would be able to return to work on a full-time basis at some unknown future date.
- Dr. R. Nairn Stewart, Treating Physiatrist
- [49] Ms. Woelders was first seen by Dr. Stewart on December 1, 2011 and was treated in follow-up on several occasions between March 6, 2012 and February 11, 2015.
- [50] In their initial session, Ms. Woelders complained of several ongoing difficulties, including neck and shoulder pain that was worse on her right side, headaches, pain in her right cheek and jaw area, and back pain. She attributed those injuries to the Accident. She also reported tenderness, which was greater on her right side, over the base of her skull, the paraspinal muscles in her neck, and in her trapezius muscles. On examination, Dr. Stewart found increased muscle tension in both trapezius muscles and a decreased range of motion in turning and tilting Ms. Woelders' head to the right as compared to the left.
- [51] Dr. Stewart testified that Ms. Woelders' neck pain was the predominant symptom early on but that it was eclipsed by her headaches, and by her jaw pain that surfaced later.
- [52] Dr. Stewart described Ms. Woelders as an extremely physically tense person. In fact, Ms. Woelders was the most physically tense patient that Dr. Stewart had encountered in more than 30 years of practice. She explained that individuals who manifest such a high level of muscular tension often respond to neck pain by going on to develop pain in their facial muscles and jaw. Dr. Stewart clarified that such symptoms may not constitute a temporomandibular joint disorder per se.
- [53] Dr. Stewart agreed that as a general rule of thumb, the closer the onset of a symptomatic complaint is to an accident, the greater the likelihood of a causative relationship between the symptom and the accident. She went on to say, however, that such a rule of thumb does not hold up well with people who, like Ms. Woelders, are particularly physically tense, because they tend to develop pain and muscular tension problems in other areas, for example in the jaw, that often manifest after the initial injuries.

- [54] Dr. Stewart characterized Ms. Woelders as a driven perfectionist who pushes herself. She noted that it is harder for that personality type to deal with injuries of the kind sustained by Ms. Woelders, and that an injured "couch potato" personality typically has an easier time of it.
- [55] Dr. Stewart recommended that, in addition to Ms. Woelders maintaining her gym exercise program and daily stretches for her neck, she ought to take up yoga for the stretching and muscle relaxation benefits. She taught Ms. Woelders a breathing exercise to promote muscle relaxation as a means of addressing her muscle tension, and discussed the pacing of her tasks and activities in a manner that would avoid aggravating her symptoms.
- [56] In terms of Ms. Woelders' return to work, in December 2011, Dr. Stewart suggested that she begin with two half-days per week (with a day between to recover) and then gradually increase her hours on non-consecutive work days. In early 2012, she recommended 12 psychological counselling sessions to address Ms. Woelders' residual post-traumatic stress symptoms related to the Accident, and that such counselling include relaxation exercises.
- [57] In follow-up on March 6, 2012, Ms. Woelders said that she was feeling somewhat better. Her sleep and energy level had improved and her mouth guard had "been amazing" in reducing her facial muscle spasms and her facial/jaw pain.
- [58] At her third visit on July 11, 2012, Ms. Woelders reported that although her headaches still occurred several times a day, they were no longer constant and had tapered off in frequency and intensity and seemed more related to activities. She reported being able to do the majority of her housekeeping tasks, but stated that those activities aggravated her pain.
- [59] As at the date of her first report of September 28, 2012, Dr. Stewart opined that Ms. Woelders sustained soft tissue injuries to her neck and back as a result of the Accident. She elaborated that the symptoms had been aggravated by increased secondary muscle tension and that it was likely that Ms. Woelders' right facial/jaw pain was also related to such increased muscle tension in her face.
- [60] Dr. Stewart also opined that the Accident caused Ms. Woelders some post-traumatic stress symptoms, including anxiety when driving, which contributed to an increase in her physical muscle tension. That increased muscular tension, in turn, caused her increased pain.
- [61] Dr. Stewart pointed out that due to hormonal changes in pregnancy that make the body's ligaments more pliable, Ms. Woelders' recovery has been somewhat delayed. She also considered it possible that the hormonal changes made Ms. Woelders' injuries more severe than they would have otherwise been. She convincingly disagreed with Dr. Vivier's opinion to the effect that Ms. Woelders' low back pain was likely related to the delivery of her child. Dr. Stewart testified that it would be unusual for a delivery by Caesarean section to cause lower back pain and that, had that happened to Ms. Woelders, the pain would have been transient. In holding to her opinion that Ms. Woelders' low back pain was caused by the Accident, Dr. Stewart was not bothered by the fact that the first entry of such a complaint in

Dr. Vivier's medical records was in approximately mid-March 2009. This is because, as Dr. Stewart repeatedly noted in her testimony, it is not unusual for an injured person with Ms. Woelders' degree of muscular tension to experience a delay in the onset of certain symptoms and medical problems.

- [62] It was suggested to Dr. Stewart in cross-examination that Ms. Woelders' jaw problem did not emerge until the fall of 2011. Dr. Stewart said she would not dispute that timing. However, the timeline she accepted did not prompt Dr. Stewart to modify her opinion as to the cause of Ms. Woelders' jaw symptoms. Her testimony on this matter was in keeping with her evidence to the effect that it is not uncommon for individuals with muscular tension like Ms. Woelders, to go on and develop symptoms in areas other than the site of an initial soft tissue injury.
- [63] When she composed her first report on September 28, 2012, Dr. Stewart considered it appropriate that Ms. Woelders limit herself to working only one day a week and continue concentrating on gaining better control of her symptoms and becoming more functional at home. Although Dr. Stewart believed it likely that Ms. Woelders would be able to increase her workload in the future, she expected that ultimately she would not be able to work more than two to three days a week, with days off in between to recover. She opined further that although Ms. Woelders was capable of doing some physically intense tasks (e.g., lifting a mattress) on a "sometimes" basis, her injuries prevented her from engaging in physically demanding labour of any kind of an ongoing or repetitive basis.
- [64] Dr. Stewart's second report dated March 16, 2015, was based on five further sessions with Ms. Woelders - she did not review additional medical records when preparing it. She confirmed her initial opinion that the Accident caused soft tissue injuries to Ms. Woelders' neck and back and that her symptoms had been aggravated by increased muscle tension that worsened her pain and reflected a well-known cycle of chronic pain.
- [65] When seen in January 2013, Ms. Woelders told Dr. Stewart that, although she continued to battle ongoing neck pain, clamp-like headaches and tension and discomfort in her right jaw and face, her symptoms had substantially improved over the preceding year. That being said, everyday activities such as driving, some household tasks, and job activities, including moving desks and holding up a book to read to the class, continued to trigger neck pain and headaches. Dr. Stewart recommended that Ms. Woelders maintain her approach to treatment and rehabilitation and gave her a prescription for an ObusForme back support for use in her car.
- [66] In follow-up on August 20, 2013 Ms. Woelders reported that in the preceding six months she had experienced more symptomatic improvement but still faced chronic problems with pain and tension in her neck/right shoulder area migrating to the right side of her face and into her jaw. Ms. Woelders had experienced some symptomatic relief by no longer wearing a bra. Dr. Stewart explained that the bra straps aggravated her symptoms by pulling and placing additional pressure on Ms. Woelders' shoulders and the muscles at the base of her

skull and neck.

- [67] Ms. Woelders' father died in July 2013, after a period of hospitalization. Ms. Woelders described that event to Dr. Stewart as a "big stress" in her life. Dr. Stewart confirmed that situational stressors of that kind could contribute to Ms. Woelders' existing muscle tension and pain and in that way play into her chronic cycle of pain.
- [68] Ms. Woelders cited continued improvements at her appointments with Dr. Stewart throughout 2014. She said she still experienced headaches, although with declining frequency. She told Dr. Stewart that her facial pain had resolved, as had her neck and shoulder pain, although some tension remained. At the same time, however, she mentioned that she had broken her mouth guard two weeks earlier and afterward had experienced some "pretty big flare-ups" of pain with increased headaches and tension in her neck and shoulder area. At trial, Dr. Stewart stated that, despite what Ms. Woelders may have thought about her progress at that time, the episodic flares she endured indicated that her symptoms had not actually resolved. Ms. Woelders expressed the hope to start teaching full-time in September 2014. Dr. Stewart considered that to be an overly optimistic goal.
- [69] In August 2014, Ms. Woelders reported she was suffering from headaches every two to three weeks depending on her activities and that they were very predictable. She had progressed to running for a 30-minute stretch without triggering a headache and was doing stretching, strength-training and cardiovascular exercises five to six times a week. Her tolerance for activities had gotten better.
- [70] Dr. Stewart last saw Ms. Woelders on February 11, 2015. At that time, she was teaching four days a week and seemed able to manage the pace. Dr. Stewart agreed that Ms. Woelders had exceeded Dr. Stewart's initial expectations for recovery. However, in her opinion, Ms. Woelders has now reached her maximum medical recovery and Dr. Stewart did not foresee any further recovery of significance. She anticipated that Ms. Woelders would be plagued indefinitely by her current symptoms and limitations attributable to her Accident-induced injuries. It is her view that Ms. Woelders could not work full-time and still be a functional individual outside of the workplace. Her reasoning is that Ms. Woelders needs to spend her mid-week day off resting and maintaining her exercise routine and treatments to prevent her from reaching a "burn-out" stage, and to allow her to have enough energy to participate in her children's lives and her life outside of work.
- [71] If Ms. Woelders were to sustain another significant injury, Dr. Stewart believes she would likely have increased symptoms, less success in her recovery and a greater degree of disability than would otherwise have been the case had she not been injured in the Accident.
- [72] In Dr. Stewart's view, Ms. Woelders' efforts to recover and manage her residual symptoms were reasonable and compliant with medical advice. She recommended that Ms. Woelders be provided with more sessions with a kinesiologist to review and, if necessary, modify her exercise program. She also thought it reasonable to continue massage therapy once a month

in the future to address Ms. Woelders' residual symptoms. As a further recommendation, she endorsed Ms. Woelders receiving ergonomic advice with regard to her home computer station and use of a computer at her school because her education, interests and some of her job responsibilities were in the area of teaching others to use information technology.

· Dr. Michelle Williams, Dentist and Certified Specialist in Oral Medicine

- [73] Dr. Williams performed an independent assessment of Ms. Woelders' facial and jaw symptoms on January 29, 2013 and prepared an opinion dated October 25, 2013. She subsequently died in January 2015. Ms. Woelders did not learn of Dr. Williams' death until April 9, 2015, after the deadline to file her expert reports had passed. Dr. Williams was Ms. Woelders' only dental expert specifically retained to opine with respect to her temporomandibular disorder. Ms. Woelders sought to tender Dr. Williams' expert report into evidence; the defendant opposed its admission.
- [74] The case authorities establish that it is open to the Court to receive into evidence the report of an expert, who has subsequently died or is otherwise unavailable for cross-examination, where the twin requirements of necessity and reliability under the principled approach to the exception to the hearsay rule have been satisfied. Where that evidentiary threshold is met, the unavailability of the expert for cross-examination by the other party has generally been regarded as a deficiency that goes to the weight to be given to the report and not to its admission: *Andrews v. Mainster*, 2013 BCSC 501; *Scime v. Guardian Insurance Co. of Canada*, [1988] O.J. No. 2878 (Dist. Ct.); *Tulshi v. Ioannou*, [1994] O.J. No. 1472 (Ct. J. (Gen. Div.)).
- [75] There was no suggestion by the defendant that Dr. Williams was not qualified to give the opinions contained in her expert report. Nor were there objections raised to the effect that her report did not comply with the requirements under Rule 11-6 of the Supreme Court Civil Rules or that it otherwise offended any of the principles governing the appropriate content of an expert's report.
- [76] As required by Rule 11-2(2), Dr. Williams certified that she was aware of her duty to assist the Court and not be an advocate for any party, had made her report in conformity with her duty and would give testimony in accordance with her duty if called upon to do so. There is no indication on the face of her report of any bias, advocacy, or partiality.
- [77] There is a degree of prejudice to the defendant in not having an opportunity to cross-examine Dr. Williams. However, that prejudice is counterbalanced to a considerable extent by the fact that the defendant retained his own oral surgeon, Dr. Larry M. Goldstein, to examine Ms. Woelders and provide his opinion concerning her temporomandibular joints and facial/jaw pain complaints. In formulating his opinion, Dr. Goldstein was able to review and comment upon Dr. Williams' opinion.

- [78] During the course of trial, I concluded that the necessity criterion was amply established and that there were sufficient circumstantial guarantees of trustworthiness of Dr. Williams' evidence to satisfy the reliability requirement. Accordingly, I ruled that Dr. Williams' report was admissible.
- [79] I turn now to Dr. Williams' opinion.
- [80] On examination of Ms. Woelders, Dr. Williams identified a temporomandibular disorder which she considered significant as a contributor to a more complex profile of pain in Ms. Woelders' head and neck region. She determined that Ms. Woelders' occlusal wear pattern was suggestive of a parafunctional habit, namely the clenching and/or grinding of her teeth, which she considered significant as a contributing variable in the ongoing nature of Ms. Woelders' chronic jaw-related pain.
- [81] Dr. Williams formed the opinion that the Accident was the precipitating event for the development of the temporomandibular component of Ms. Woelders' chronic pain in her head/neck region, and that her temporomandibular disorder is a contributor to a more complex condition that compromises her level of daily function and quality of life.
- [82] Dr. Williams described Ms. Woelders' prognosis as it relates to her temporomandibular condition as somewhat guarded, but did not elaborate further. She recommended monitoring Ms. Woelders' temporomandibular condition every 12 to 16 weeks for one to two additional years and that she continue to wear her mouth splint (replaced every five years or so) for as long as her jaw-related symptoms persist.

THE DEFENDANT'S MEDICAL EXPERTS

- [83] The defendant tendered expert reports from Dr. Wayne Pisesky, an orthopaedic surgeon, Dr. Larry M. Goldstein, an oral and maxillofacial surgeon, and Dr. Auby Axler, a psychiatrist. Their respective opinions are summarized below.
- Dr. Wayne Pisesky, Orthopaedic Surgeon
- [84] Dr. Pisesky carried out an independent medical assessment of Ms. Woelders on October 17, 2012. Ms. Woelders did not require his attendance at trial for cross-examination.
- [85] Dr. Pisesky opined that the Accident caused soft tissue injuries to Ms. Woelders' shoulder and neck and is a direct cause of her current symptomology. Those symptoms, as set out in his report under the heading "Current Symptomology" encompassed the following:
- ongoing headaches and accompanying neck tension;
 - a dull aching pain in her shoulder and neck/upper back, also accompanied by the tension; and
 - tension that is worsened by activities like straining, pulling, and writing overhead on the board.

- [86] Dr. Pisesky was aware that Ms. Woelders had been involved in two prior motor vehicle collisions: one in 1994, and a second and more severe one in 2001. As a result of the second accident, she had sustained a whiplash injury, and for approximately 18 months, had endured headaches that were intermittently bothersome. Ms. Woelders told Dr. Pisesky that within two years following the 2001 accident, she was fully recovered. In Dr. Pisesky's opinion, Ms. Woelders had no pre-existing injuries or conditions, from these prior accidents or otherwise, that impacted her injury or recovery from the Accident. There is no cogent evidence to suggest otherwise.
- [87] Dr. Pisesky found no basis for surgical intervention to address Ms. Woelders' symptoms. He considered her management of her injuries to be appropriate. However, he did not think Ms. Woelders was deriving any significant, long-lasting benefit from her massage or chiropractic treatments, and recommended they be discontinued. Dr. Pisesky favoured ongoing symptomatic management of Ms. Woelders' injuries with modification of her activities, and regular and daily exercises, and suggested that she participate in an increased strengthening program targeting her right upper extremity.
- [88] Among the documents reviewed by Dr. Pisesky in formulating his opinion was an initial report dated June 7, 2012 of a psychologist, Dr. Tara Learn, who had seen Ms. Woelders in the spring of 2012. Dr. Learn's report was not in evidence and she did not testify.
- [89] In his report, Dr. Pisesky remarked that Dr. Learn indicated that Ms. Woelders had significant psychological difficulties referable to the Accident. He summarized Dr. Learn's report this way:

Dr. Learn has described the injuries to [Ms. Woelders] and how this has impacted her psychologically. Dr. Learn indicated that Ms. Woelders currently met the criteria for "an adjustment disorder with mixed anxiety and depressed mood, a Specific Phobia, situational-type, and a Pain Disorder, associated with both psychological factors and a general medical condition".

- [90] Dr. Pisesky opined that Ms. Woelders' ongoing symptomology in relation to her musculoskeletal injuries may be a consequence of the psychological issues identified by Dr. Learn, which he believed were significantly impacting Ms. Woelders' recovery. In that context and on that footing, he supported the management of her psychological issues. It was by no means clear as to whether the defendant was relying on this aspect of Dr. Pisesky's opinion to support the proposition that the psychological conditions highlighted by Dr. Learn were unrelated to the Accident and independently responsible for Ms. Woelders' unresolved Accident-induced symptoms. If so, I reject this proposition as Dr. Pisesky's summation of Dr. Learn's opinion is readily capable of supporting an interpretation that she found that the physical injuries sustained by Ms. Woelders in the Accident lay at the root of her psychological problems. Accordingly, the mental health issues purportedly identified by Dr. Learn would have been caused by the Accident. On the other hand, it may be that the defendant is relying on this part of Dr. Pisesky's opinion to ground an argument to the effect that once Ms. Woelders successfully addresses her psychological issues, her lingering

headaches and chronic symptoms and pain attributable to the Accident will resolve, which would militate against a large award of damages. Again, it was not made clear during the evidence portion at trial or in submissions whether this was the defendant's position.

- [91] Moreover and in any case, Dr. Pisesky himself acknowledged that Ms. Woelders' psychological issues were beyond his expertise. In all of the circumstances and given the opinion of Dr. Axler, summarized below, it would be unsafe for this Court to give any weight to Dr. Pisesky's commentary relative to Ms. Woelders' psychological issues or their impact.

· Dr. Auby Axler, Psychiatrist

- [92] The only medical expert qualified to provide an opinion relative to Ms. Woelders' psychological condition and/or injuries was Dr. Axler. Ms. Woelders did not require his attendance at trial for cross-examination.

- [93] In preparing his report dated February 2, 2015, Dr. Axler interviewed Ms. Woelders the same day and reviewed numerous of her medical records, as well as Dr. Stewart's first expert report and Dr. Learn's initial report of June 7, 2012. Dr. Axler understood that Ms. Woelders had seen Dr. Learn for psychotherapy "because of her stress and feelings related to the [Accident]".

- [94] Dr. Axler remarked that Ms. Woelders had no psychiatric history prior to the Accident and had some anxiety and short-lived depressed mood afterwards. He concluded that her bout of depression may well have been due to the significant hypothyroid disease she suffered in the same timeframe.

- [95] Dr. Axler opined that Ms. Woelders' injuries which "included pain and some small amount of anxiety" were probably related to the Accident. In his assessment, Ms. Woelders had no ongoing psychological disability related to the Accident and nor did he think that she had any significant vulnerability to psychological symptoms before the Accident. In contrast to Dr. Pisesky, Dr. Axler found that Ms. Woelders' pain was not significantly impacted at this point by any psychological factors. In sum, he concluded that she was currently doing well from a psychological standpoint.

· Dr. Larry M. Goldstein, Oral and Maxillofacial Surgeon

- [96] Dr. Goldstein examined Ms. Woelders on March 26, 2015 and prepared an expert report dated March 29, 2015.

- [97] At the time of the assessment, Ms. Woelders relayed that after the Accident, she developed muscle tension running down the right side of her face and the back of her neck on the right side, radiating into her shoulders and her right upper back. She reported that the muscle tension she experienced changed in intensity and frequency over the years depending on factors such as her exercise regimen, the use of her mouth guard and other treatment modalities. Ms. Woelders also told Dr. Goldstein about her vice-like tension headaches.

- [98] Dr. Goldstein noted that Ms. Woelders' dental records indicated that in January 2007, her dentist had recommended she obtain a night mouth guard and that she had declined to do so for financial reasons. Dr. Goldstein considered the dentist's records to be incomplete, and concluded that their significance was unclear. In cross-examination, he further agreed that they did not permit him to quantify the extent of the dental problem that the mouth guard was meant to address. Dr. Goldstein acknowledged that the symptoms Ms. Woelders described having experienced after the Accident were more severe than what is suggested by the contents of the dentist's notes.
- [99] Dr. Goldstein observed that Ms. Woelders had very active facial musculature, and was periodically tightening several of her facial muscle groups during his interview. He noted that the high muscular tensions and abnormal excessive time periods her movements entailed could lead to muscular fatigue and tenderness. He continued that a person under stress may grind or clench their teeth either when awake or asleep or both. That type of activity is referred to as parafunctional and is the most common cause of facial pain and temporomandibular joint dysfunction.
- [100] Dr. Goldstein elaborated that patients who grind their teeth often end up with sore teeth, wear on the teeth, and muscular pain, which is sometimes quite severe. This can, in turn, lead to headaches, and in some cases, pain in or around the temporomandibular region for the simple reason that the muscles are in the same area. Sometimes the temporomandibular joints themselves get stressed from all of the overuse.
- [101] Dr. Goldstein noted the multiple entries in Ms. Woelders' dental chart that refer to tooth sensitivity and possible clenching and grinding. Almost all of those entries record complaints Ms. Woelders made after the Accident. He then referred to Dr. Learn's diagnosis of certain psychological conditions experienced by Ms. Woelders after the Accident. Using that as a springboard, Dr. Goldstein commented that the relationship between facial pain and anxiety, depression and stress is complex but the result is often stress-induced grinding and clenching, similar to what Ms. Woelders' history shows and which would, in turn, lead to the symptoms that she is demonstrating. To Dr. Goldstein's mind, Ms. Woelders had a long and well-documented history of all of the typical findings of someone who grinds and clenches, and he concluded that the most likely central causes and unifying diagnoses to account for her current complaints "are the mental health and stress issues". As a side note, I observe that the post-Accident medical charts he surveyed record the presence of complaints of jaw and/or temporomandibular symptoms by Ms. Woelders reaching back to June 2009, if not earlier.
- [102] In the end, Dr. Goldstein opined that more likely than not, Ms. Woelders' current problems are the result of her stress-induced grinding and clenching and facial muscle posturing. As he had determined there was nothing structurally wrong with her face, jaw or temporomandibular joints (which I accept), he was optimistic that Ms. Woelders could return to "normal" if her other "stress problems" were resolved. Dr. Goldstein added that her prognosis is contingent on her becoming "less stressed", stopping the clenching and

grinding as well as facial muscle posturing, and on the resolution of "any of the psychiatric diagnoses made by Dr. Learn".

- [103] Although he does not say so explicitly, it appears to be inherent in Dr. Goldstein's opinion that Ms. Woelders' underlying stress and mental health issues that are responsible for her facial/jaw pain are unrelated to the Accident. To the extent that his opinion is that Ms. Woelders' jaw symptoms are, therefore, not connected to the Accident in a causative way, it causes me significant pause. In the first place, Dr. Goldstein fails to pinpoint precisely what "stress issues" he is referring to, leaving me to wonder whether he meant specific stressful events or general stress in Ms. Woelders' life, or perhaps something else entirely. In this regard, I have not overlooked Ms. Woelders' testimony that she felt considerable stress surrounding the illness and death of her father. However, Dr. Goldstein does not single out that situation as a particular stressor relative to her parafunction and, in any case, that unhappy event occurred years after the pain pattern implicating her jaw and face had taken hold, and there was no evidence that her father's death has caused her significant ongoing stress. To this I would add that feeling stress and upset around the death of one's parent is a common human experience across the population.
- [104] Also troubling is that with respect to Ms. Woelders so-called mental health issues, Dr. Goldstein elected to rely heavily on Dr. Learn's report authored nearly three years earlier while, at the same time, effectively ignoring Dr. Axler's opinion, which he had before him and was the most current opinion about Ms. Woelders' psychological functioning. As mentioned, Dr. Axler's opinion was that Ms. Woelders had no significant psychiatric condition at the present time and, indeed, was doing well from a psychological perspective. Finally, the summaries and extracts from Dr. Learn's report that are referred to in the reports of the experts suggest that she tied Ms. Woelders' psychological difficulties to the Accident in any case.
- [105] The foregoing deficiencies related to the factual underpinnings and reasoning of Dr. Goldstein's opinion are material and significantly undermine its cogency and persuasiveness.

MS. WOELDERS' CREDIBILITY

- [106] Ms. Woelders' credibility and the reliability of her evidence are key in determining the causation of her injuries, their nature and severity as well as her damages. They also have bearing on the weight to be given to the medical opinions to the extent that they are fastened upon her subjective reporting and perception of her symptoms and her recitation of her activities and condition before and after the Accident.
- [107] Determining the credibility and reliability of a witness is fundamental to the judicial task, and yet can be notoriously difficult. The process is recognized as more an art than a science, and is not a purely intellectual exercise. The informing factors can be challenging to verbalize: R. v. R.E.M., 2008 SCC 51 at para. 49.

- [108] A clarifying passage summarizing the factors to be considered in the art of the assessment of credibility is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time [citations omitted]

- [109] Truthfulness and reliability are not always one and the same. A witness may sincerely believe that she is telling the truth, but lack sufficient memory, perspective, cognitive ability or narrative capacity to give reliable testimony. As well, it is not uncommon for a plaintiff in a personal injury case to become deeply focused on his or her injuries and unconsciously exaggerate the deleterious aspects of their effect: *Noyes v. Stoffregen*, [1995] B.C.J. No. 73 (S.C.); *Dinyer-Fraser v. Laurentian Bank et al*, 2005 BCSC 1432 at para 18. Alternatively, a witness "may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome": *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. And there is always the possibility that a witness may simply choose to outright lie for whatever reason.
- [110] The defendant characterized Ms. Woelders as a poor historian "who has taken a bundle of complaints and laid them at the foot of the defendant", and criticized her testimony as being unhelpful in understanding the progression of her symptoms or her recovery. He is particularly critical of the quality of her evidence about the nature of the simmering muscle tension she attributes to the Accident and what he asserts as her reluctance to acknowledge the improvement of her symptoms.
- [111] I found that Ms. Woelders did display a noticeably poor recall when being cross-examined on a small handful of discrete topics, largely in connection with aspects of Dr. Stewart's expert report that recorded her subjective reports of improvements of her symptoms. In my view, that and other testimonial shortcomings were counterbalanced by several instances in her evidence where she credibly discussed the onset and nature of her injuries and the intensity and frequency of her symptoms over time and emphasized their connection to her activities and the techniques she learned to better cope with them. Ms. Woelders also repeatedly clarified the important point that her personal threshold for pain has heightened substantially since the Accident as her new "normal self" has come to better withstand and live with her ongoing headaches and other residual symptoms and pain. She elaborated that the dynamic nature of her symptoms has made it difficult to pin down with exactitude, their

nature, intensity and frequency at select segments in the timeline.

- [112] Ms. Woelders' overall presentation in the courtroom left the impression that she was making a sincere effort to answer questions helpfully and truthfully. Evaluating her testimony against the whole of the evidence, including the convincing force of the supportive testimony of her husband, sister and mother, I conclude that the deficiencies emphasized by the defendants are insubstantial at the end of the day. Ms. Woelders' credibility was not successfully impeached on central issues.

CAUSATION

· Basic Principles

- [113] The primary test to determine causation in negligence is the "but for" test. The plaintiff bears the onus of proving, on a balance of probabilities, that "but for" the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey]; *Blackwater v. Plint*, 2005 SCC 58; *Clements v. Clements*, 2012 SCC 32 [Clements]; *Ediger v. Johnston*, 2013 SCC 18 [Ediger]. Inherent in the test is the requirement that the injury would not have happened without the defendant's negligence: *Clements* at para. 8; *Ediger* at para. 28.
- [114] It is not necessary for a plaintiff to establish that a defendant's wrongful conduct is the sole cause of her or his injury. So long as a substantial connection beyond the de minimus range between the harm and the defendant's negligence is established, the defendant will be fully liable for the harm suffered by a plaintiff, even if other causal factors, which the defendant is not responsible for, were at play in producing that harm: *Farrant v. Laktin*, 2011 BCCA 336; *Athey*; *Resurfice Corp. v. Hanke*, 2007 SCC 7.
- [115] Causation is a practical question of fact which can best be answered through the application of ordinary common sense: *Snell v. Farrell*, [1990] 2 S.C.R. 311.
- [116] The concepts of etiology in the medical sphere and causation at law are not synonymous. This is because the causation test in the tort context need only be proved on a balance of probabilities, does not demand scientific precision and is not to be applied too rigidly. In contrast, of necessity, the medical field endeavours to apply a far more rigorous causation standard that approximates the threshold of scientific certainty: *Tsalamandris v. MacDonald*, 2011 BCSC 1138 at paras. 144-146, var'd on other grounds, *Tsalamandris v. McLeod*, 2012 BCCA 239; *Midgley v. Nguyen*, 2013 BCSC 693 [Midgley] at para. 172; *Munoz v. Singh*, 2014 BCSC 567 at para. 136. It follows that the "but for" test does not require the Court to accept or find a particular medical diagnosis.

· Analysis of Causation

- [117] The preponderance of the evidence establishes that as a result of the Accident, Ms. Woelders sustained the following injuries:

- i. soft tissue injuries to her neck, right shoulder and back, and pain radiating down her left leg. Her left leg pain was relatively short-lived and the pain in her low part of her back resolved a number of years ago;
- ii. pain in her face and jaw;
- iii. ongoing headaches; and
- iv. a simmering muscle tension that typically accompanies her neck/upper back/right shoulder symptoms and her face and jaw pain, and is prone to graduate to pain depending on her activities.

[118] As the causal connection between the Accident and Ms. Woelders' jaw and face pain was especially controversial at trial, I will elaborate further. As her treating physiatrist, Dr. Stewart had the benefit of providing care to Ms. Woelders over the span of more than three years and had more interactions with her than any other specialist. Her repeated exposure to Ms. Woelders in the relevant period provided her with a unique vantage and insight into the nature and progression of Ms. Woelders' injuries, the role played by her intense physical tension in relation to those injuries, the functional limitations they impose, and her path of improvement. I accept Dr. Stewart's opinion that, despite the delayed onset of Ms. Woelders' face and jaw symptoms, they are linked to her headaches and neck/upper back/right shoulder injuries and the accompanying muscle tension. I further conclude that after the Accident and because of it, Ms. Woelders began to grind and clench her teeth to such a degree and in such a way as to significantly contribute to her face and jaw pain and her other residual symptoms. The probabilities of the evidence prove that the pain experienced by Ms. Woelders in her face and jaw, predominantly on her right side, was causatively connected to the Accident.

[119] It is not necessary for Ms. Woelders to establish the precise medical condition or physiological mechanism that triggers her facial/jaw symptoms, beyond establishing that they probably result from the Accident. Accordingly, for my purposes, nothing turns on whether Ms. Woelders' facial/jaw symptoms and pain fall within the medical diagnosis of temporomandibular dysfunction or not. To the extent that Dr. Goldstein's opinion is that such parafunction (i.e. clenching and grinding) is unrelated to the Accident or will resolve once she reduces her stress or overcomes her "mental health" issues, I have rejected it .

[120] In sum, the evidence satisfies me that "but for" the Accident, Ms. Woelders would not have suffered the facial and jaw pain and other cluster of symptoms that emerged (although, admittedly, not uniformly in time) after the Accident. Put differently, although to the same effect, Ms. Woelders would not have experienced any such symptoms just the same had the Accident not happened.

DAMAGES

• Basic Principles

- [121] The essential purpose of damages is to restore an injured plaintiff to the same position he or she would have been in had the negligence not occurred, to the extent that such an outcome can be achieved by way of a monetary award.
- [122] People have different physical and psychological susceptibility to injuries. A core principle in the assessment of damages is that the defendant must take the plaintiff as she is. A plaintiff whose unique psychological makeup or pre-existing physical condition makes her more vulnerable to sustaining injury is to be compensated for the entire extent of her injury, both physical and/or psychological, caused by the defendant's negligence. This is so even where, due to some unique feature of the plaintiff, the injury was greater, or different or of a more dramatic or severe type than one would expect an average person to sustain. It is no answer for a defendant to say that the plaintiff would have suffered less injury or a different kind of injury or no injury at all if he or she had been less susceptible or vulnerable. It is the impact of the defendant's negligence on the actual plaintiff, and not on a fictional or average one, that is relevant for compensatory purposes: *Athey*.
- [123] An equally fundamental tenet is that a defendant is not expected to put the plaintiff in a better position than she was in the moment before the negligence happened. It is the difference between the plaintiff's original position, with all the attendant risks and shortcomings (e.g. a pre-existing condition) just before the accident, and the plaintiff's injured position after and as a result of the accident, that comprises the plaintiff's loss: *Athey* at paras. 34-35.
- [124] There is a suggestion in the evidence that in 2007 Ms. Woelders' dentist recommended the use of a night guard for her with the implication that she needed it due to clenching and grinding. There is no principled basis to reduce Ms. Woelders' damages to reflect a measurable risk of loss in that connection: See generally, *Athey* at para. 35; *Sangha v. Chen*, 2013 BCCA 267; *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2012 BCCA 331; *Moore v. Kyba*, 2012 BCCA 361, at para. 43.

· Loss of Income-Earning Capacity

- [125] The legal framework that informs an award for loss of earning capacity was instructively summarized by Dardi J. in *Midgley* at paras. 236-240:
- [236] The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19; *X. v. Y* at para. 183.

[237] As enumerated by the court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45, the principles which inform the assessment of loss of earning capacity include the following:

- (i) The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
- (ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).
- (iii) The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[238] Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *X. v. Y* at para. 185.

[239] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

[240] This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

[40]... the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,

"What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

[126] In advancing a claim for the loss of income-earning capacity, the plaintiff must prove a real and substantial possibility of such loss, as opposed to a theoretical one. In other words, the award cannot be based on speculation: *Rosvold v. Dunlop*, 2001 BCCA 1 [Rosvold]; *Perren v. Lalari*, 2010 BCCA 140. Where a real and substantial possibility of loss has been established,

compensation is awarded based on an estimation of the chance that the event leading to such loss will occur: *Steward v. Berezan*, 2007 BCCA 150. As recently observed by the Court of Appeal in *Kim v. Morier*, 2014 BCCA 63 at para. 7, the onus on the plaintiff is not a heavy one but must nonetheless be met in order to justify a pecuniary award.

[127] Quantification of loss is an assessment meant to reflect the non-speculative positive and negative contingencies at play in the particular case. As quantification is not a strict mathematical calculation, there is no particular formula or methodology to be employed: *Rosvold* at para. 11; *Jurczak v. Mauro*, 2013 BCCA 507 at para. 36.

[128] Evidence of ongoing pain may be sufficient to ground a substantial possibility that a plaintiff's pain will adversely affect his or her future ability to work. This may hold true even where, at the time of trial, the plaintiff has not missed work due to the injury: *Clark v. Kouba*, 2014 BCCA 50 at para. 33; see generally, *Williamson v. Suna*, 2009 BCSC 576 at paras. 52, 55 and 62.

· Ms. Woelders' Past Loss

[129] The parties agree that Ms. Woelders sustained a loss of employment earnings prior to trial and have agreed to quantify it as \$38,343, net of income taxes and employment insurance premiums saved. The quantum is based upon the calculation contained in the report of Darren Benning, the consulting economist retained as an expert by Ms. Woelders, whose report was in evidence.

· Ms. Woelders' Future Loss

[130] In a nutshell, my task is to compare the likely future of Ms. Woelders' working life if the Accident had not happened, to her likely future working life in light of its occurrence: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 [Gregory] at para. 32.

[131] The defendant asserts that Ms. Woelders has failed to prove a real and substantial possibility of a future event leading to an income loss and that consequently, she is not entitled to an award under this head.

[132] My observation is that in recent years defendants in personal injury actions before this Court have increasingly adopted this submission, namely that the plaintiff's future loss of earning capacity claim falters on the failure to meet the threshold of a real and substantial possibility that the injury will result in a future pecuniary loss. In my experience, this tends to be the position taken by the defence even in cases where that is plainly not so or where there is a reasonable prospect that the Court will find the evidence goes the other way. This practice is of concern, given that such a blanket assertion ordinarily comprises the full extent of the defendant's argument on this factually nuanced and conceptually difficult issue. Where the Court determines that the plaintiff has indeed made out a future loss claim, it is left with no argument of substance from the defendant as to the negative or positive contingencies at play or the quantum of damages to be assessed under this head.

- [133] I would suggest that a more constructive approach would be for defence counsel who contend that the plaintiff has not satisfied the requisite evidentiary test, to make submissions in the alternative about the relative contingencies and the quantum of the plaintiff's future loss of earning capacity. Adherence to that advocacy practice will ensure that the Court has the benefit of considered submissions on the issue from all parties.
- [134] On the evidence, the defendant's position that Ms. Woelders has fallen short of establishing a real and substantial possibility that her injuries will result in a future pecuniary loss is untenable. It is also puzzling, given the basis upon which the defendant appears to have agreed to the calculation of Ms. Woelders' pre-trial loss as set out in Mr. Benning's report. Is it the defendant's expectation that after the trial Ms. Woelders' condition will immediately and sufficiently improve such that she will be able to forever resume teaching on a full-time basis?
- [135] Ms. Woelders was approaching the prime working years of her teaching career when she was injured in the Accident. Many of her compulsory work tasks and everyday activities continue to trigger and aggravate her symptoms. Those setbacks cause her pain that can become intense and functionally limiting. She tries to push through as best she can.
- [136] I find that on account of the hormonal changes that Ms. Woelders was experiencing when the Accident occurred, her injuries were more severe than what would have otherwise been the case. Dr. Stewart believes that she has reached her maximum medical recovery and does not foresee any further recovery of significance. Drs. Vivier and Stewart concur that teaching four days per week is likely the maximum pace at which Ms. Woelders will be able to work into the future. I do not accept Dr. Goldstein's prognostication of Ms. Woelders' recovery. The balance of the defendant's medical evidence digested in the context of the whole of the evidence does not weaken the opinions espoused by Drs. Vivier and Stewart on this central issue.
- [137] I conclude that there is a high chance of a real and substantial possibility that Ms. Woelders will be burdened throughout her tenure as a teacher, and in all likelihood indefinitely, with battling her symptoms and coping with the functional restrictions they impose in the major facets of her life.
- [138] The lingering after-effects of the Accident will likely continue to pose a barrier to Ms. Woelders' capacity to work more than four days per week indefinitely into the future. There is a strong likelihood of a real and substantial possibility that she will not be able to manage an additional day of work per week, except perhaps in infrequent short spurts of several weeks or a few months at a time. On the other hand, the episodic flares that Ms. Woelders will likely experience while working a four day week may, at times, require her to decrease her workload, at least on a temporary basis. The prospect that her injuries will ever improve to a point where she can continuously teach on a full-time basis is a faint one.

- [139] It is a matter of common experience that, over time, ongoing pain can have a detrimental effect on a person's capacity to work. This holds true even in circumstances where the employer is prepared to make accommodations that may help to ameliorate the pain: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41. As I noted in *Suthakar v. Humble*, 2016 BCSC 155, the logical extension of that common experience is that the detrimental effect may be accelerated or more profound where an employer is not prepared to make workplace accommodations, or where the accommodations do not provide the beneficial effects to the extent expected or, I would add, where the nature of the employment tasks can only be accommodated so far.
- [140] The Accident is plainly responsible for an impairment of Ms. Woelders' future earning capacity, with a high chance of a real and substantial possibility that her diminished capacity will continue to manifest into the future indefinitely. The evidence also amply demonstrates a real and substantial possibility that Ms. Woelders' impaired earning capacity caused by the Accident will generate a pecuniary loss to her long into the future. How then to fairly quantify her loss?
- [141] One of Mr. Benning's calculations quantified Ms. Woelders' future loss as a public school teacher on the premise that she could only work four days a week rather than five, yielding an estimated loss of \$251,635 (including her loss of pension benefits). He made explicit allowance for the usual negative contingencies such as labour force participation, unemployment, part-time work and survival. As I understand it and for reasons that were not explained, the labour force data that Mr. Benning applied pertained to males who hold a master's degree. I am mindful of that fact.
- [142] Mr. Benning's estimation presumes that, without the Accident, Ms. Woelders would have taught full-time until her retirement at age 65. However, she testified that both she and her husband intended to retire at age 57. There is no indication that her retirement plan had changed in the aftermath of the Accident. The difference between the present value of Ms. Woelders' without-Accident full-time earnings to age 57, and her with-Accident earnings working only four days a week to the same age, is \$206,093. That amount would need to be adjusted upward somewhat to reflect her net loss in her pension plan benefits. Ms. Woelders' loss would be significantly greater were she to be compelled to reduce her work commitment to three days per week because of her injuries.
- [143] Ms. Woelders' career ambitions went beyond the classroom. She testified of her intention to work at the school board office or in an administrative role working with technology, which would have dovetailed nicely with the focus of her master's degree. Another of her goals was to become a principal or vice-principal, however, she explained that those positions were not available to a teacher who could not work full-time. No evidence was adduced as to the qualifications and work experience necessary to be a likely candidate to obtain any of those positions (beyond working full-time), the availability of such positions or the degree of competition in respect of securing one. While I find that these were Ms. Woelders' genuine pre-Accident career aspirations, there is no cogent evidence to assess how realistic

a prospect one or the other of them might be. I share the defendant's view that this possibility is too speculative to raise a real and substantial possibility for the purpose of assessing Ms. Woelders' future loss.

[144] I agree with Ms. Woelders' submission that the assessment of her future loss of earning capacity ought to be based on the earnings approach.

[145] Bearing in mind the applicable legal principles in light of the evidence and weighing the pertinent contingencies, I conclude that the sum of \$175,000 is the present value of a fair and reasonable measure of Ms. Woelders' future loss.

· Non-Pecuniary Damages and Loss of Housekeeping Capacity

[146] Ms. Woelders seeks non-pecuniary damages in the amount of \$100,000. The defendant counters that an award of \$50,000 would be fair in the circumstances. She also seeks a separate award in the amount of \$30,000 in respect of her loss of housekeeping capacity, which is disputed by the defendant.

[147] Non-pecuniary damages are intended to compensate a plaintiff for the pain, suffering, and loss of enjoyment of life and amenities experienced as a result of the defendant's negligence. They are meant to encompass such damages suffered up to the date of trial and those that the plaintiff will suffer into the future.

[148] The award should be fair and reasonable for both parties, as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff: *Hunt v. Ugre*, 2012 BCSC 1704 at para. 176. While fairness is assessed by reference to awards made in comparable cases, because each case is decided on its own unique facts and calls for an individualized assessment, it is neither possible nor desirable to develop a "tariff": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 39-43. The process is one of assessment and is not amenable to mathematical precision: *Miller v. Brian Ross Motorsports Corp.*, 2015 BCSC 1381.

[149] In *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] at para. 46, Kirkpatrick J.A. enumerated a non-exhaustive list of factors to be considered in awarding damages under this head. They include: the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.

[150] Ms. Woelders was 31 years old when the Accident happened. For more than six years, she has been plagued by headaches and pain in her neck/upper back/right shoulder region and in her face and jaw, together with a simmering muscle tension that can transform into pain. The intensity and frequency of Ms. Woelders' chronic symptoms have declined over the years and her overall condition has improved in large measure due to her sheer grit and determination (to her credit) coupled with her diligent rehabilitation efforts and implementation of pain management strategies. Even so, and while there is a slim chance

she may enjoy some marginal improvement going forward, her symptoms are enduring and continue to be problematic and remain susceptible to exacerbation by commonplace tasks and maneuvers at work, at home and recreationally.

- [151] The ill-effects of the Accident have negatively impacted the quality and enjoyment of Ms. Woelders' interactions with her children. She experienced pain and difficulty nursing her youngest and lifting and carrying both her children. She is reluctant to pick them up for fear she will trigger her symptoms. She goes through much of her life on-guard, evaluating whether certain movements will activate her symptoms and trying to make the modifications that may be required.
- [152] Ms. Woelders is from a close-knit family. Since the Accident, she has curtailed her participation in family gatherings, has all but ceased organizing them, and feels the need to leave get-togethers early when her symptoms flare.
- [153] I accept the evidence of Ms. Woelders' twin sister, Ann Pimentel, to the effect that Ms. Woelders was in peak physical condition before the Accident. Ms. Pimentel spoke with emotion about how her sister's injuries have visibly aged her and that she had lost her "spark" after the Accident. Ms. Woelders' husband and mother gave similar testimony, which I also accept.
- [154] Ms. Woelders' formerly high-energy and optimistic personality has been overshadowed by a less positive, more serious self with less energy and spark. I accept her mother's evidence that she has recently made a point of taking the children after school on Fridays primarily because her daughter is drained at the end of the work week and needs time to rest and rejuvenate.
- [155] The medical evidence indicates that Ms. Woelders will be prone to headaches and periods of aggravation of her unresolved symptoms for years to come, and likely indefinitely to one degree or another. In prior cases, I have observed that enduring pain, even when it is intermittent, can compel unfavourable adjustments to one's work life and lifestyle and cloud the pleasures of life, as it clearly has in Ms. Woelders' case. Taking care to not aggravate her residual symptoms and trying to manage her pain, even during the times that things seem to be under control, has become part of Ms. Woelders' everyday life or, as she aptly put it, her "new normal". This is an unwelcome new reality for Ms. Woelders and her family.
- [156] Ms. Woelders finds certain kinds of housework difficult. Although she continues to perform most of her pre-Accident share of the housekeeping, it is not done to her pre-Accident standards. The evidence concerning her compromised housekeeping capacity was under-developed at trial. I accept that she has impairments in this regard but am not persuaded that they justify a stand-alone award of damages as Ms. Woelders has urged. Instead, I have considered it as a factor in the assessment of her non-pecuniary damages.

[157] I have reviewed the authorities placed before me by counsel. The cases submitted by the defendant are, for the most part, factually distinguishable in material ways and are less instructive than those relied by Ms. Woelders. In any event, the case law only provides rough guidelines for what is, at its core, a highly individualized assessment: *Karim v. Li*, 2015 BCSC 498 at para. 120. Having regard to the Stapley factors and to the other case authorities in the context of the evidence in the case at hand, in my opinion, a fair and reasonable award for Ms. Woelders' non-pecuniary damages is \$85,000.

· Cost of Future Care

[158] The approach to be taken in assessing future care costs was settled by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22:

[21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

[22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

[159] Damages for the cost of future care are meant to compensate for the financial loss to be reasonably incurred by an injured plaintiff to sustain or promote his or her mental and physical health: *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30 [Gignac]. The claimed services and items must be medically justified. Being medically justified is not synonymous with the more stringent requirement of being medically necessary: *Aberdeen v. Township of Langley*, *Zanatta*, *Cassels*, 2007 BCSC 993 at para. 198, rev'd on other grounds *Aberdeen v. Zanatta*, 2008 BCCA 420; *Chow v. Nolan*, 2013 BCSC 1383 at para. 71; *Lane v. Pedersen*, 2014 BCSC 1302 at para. 397.

- [160] Recommendations made by physicians and other health care professionals such as an occupational therapist, are relevant in determining whether an item or service is medically justified: Gregory at para. 38; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.), quoted with approval in Gregory at para. 38. However, to successfully advance a future cost of care claim it is not necessary that the health care provider testify to the medical justification of each and every item of care being claimed. What is required is some evidentiary link between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: Gregory at para. 39; Gignac at paras. 31-32. General contingencies and those specific to the plaintiff are to be taken into account where and as appropriate: Gignac at para. 52. The amount of the award is necessarily affected by the nature of the future care and its anticipated duration.
- [161] The standard of proof for an award for future care is the determination of the real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209.
- [162] Whether a plaintiff is prepared to accept care that is in his or her best interests is a relevant factor. Where the plaintiff testifies that he or she will not submit to the recommended treatment, even though it is medically justified on the evidence, the Court may decide that an award ought not to be made or may discount the quantum of it: *Coulter (Guardian ad litem) v. Leduc*, 2005 BCCA 199 [Coulter]; *O'Connell v. Yung*, 2012 BCCA 57 [O'Connell]. Additional material considerations would include: (i) whether the plaintiff's judgment on the question of whether he or she will adhere to the recommendation has been impaired by the injuries inflicted by the tortfeasor; and, (ii) whether the evidence establishes that the plaintiff may ultimately be forced by circumstances to participate in treatment that he or she has expressed a desire to avoid, especially if the injuries are grave: O'Connell at paras. 61-62; *Van v. Howlett*, 2014 BCSC 1404 at paras. 78-79.
- [163] There is a distinction between a case where there is evidence that the plaintiff will not follow the recommended treatment (as in O'Connell and Coulter) and a case where no evidence has been led one way or the other: *Lo v. Matsumoto*, 2015 BCCA 84 at paras. 20-21.
- [164] The trier-of-fact is to be cautious about reducing or eliminating altogether an award for the cost of future care simply on the basis that the injured plaintiff has not confirmed a willingness to participate in a medically justified course of care, or currently says that he or she will not follow the recommended treatment. Similar circumspection is required where the plaintiff has not previously used the recommended type of treatment. This is because fairness requires that the trier-of-fact be alive to the prospect that an injured person's disposition may change, or that he or she may not have had the means or ability to follow certain courses of treatment in the past.
- [165] Ms. Woelders seeks an award under this head for the cost of future massage therapy treatments and for an annual gym pass to facilitate her rehabilitative stretching and exercise routine.

- [166] As mentioned, the defendant's expert, Dr. Pisesky, expressed the view that Ms. Woelders should discontinue massage therapy and other passive treatment modalities because he did not consider that she was getting significant or long-lasting benefit from them at the time.
- [167] After Dr. Pisesky assessed Ms. Woelders on October 17, 2012, she continued to participate in such treatments as she considered necessary. The evidence establishes that those sessions helped Ms. Woelders manage her pain and that her symptoms indeed improved during that timeframe. Having the benefit of regular follow-up appointments with Ms. Woelders, Dr. Stewart has recommended that, as a future pain management tool, she have 12 massage therapy treatments annually.
- [168] Dr. Pisesky's recommendation on this matter seemed short-sighted and, in any case, is outdated. I give far greater credence to Dr. Stewart's recommendation and Ms. Woelders' own credible testimony that massage therapy continues to provide her with symptomatic relief. Accordingly, I conclude that it is reasonable and justifiable to make an award for the costs of her future massage therapy as part of her overall future pain management strategy and to help her settle her episodic flares. An award for such treatments also aligns with Dr. Vivier's recommendations.
- [169] The annual cost of Ms. Woelders' gym pass is \$342 (rounded down). While it is true to say that she could carry out her stretching and exercise routine at home, her pattern has been to faithfully attend her community centre gym to address her physical rehabilitation. It is essential that she maintain her regimen and is entirely reasonable that she continue to do so at the gym.
- [170] All things considered, Ms. Woelders' request for the cost of massage and gym membership spanning the next 30 to 40 years is excessive on the evidence.
- [171] Applying the applicable principles in light of my findings of fact pertinent to the issue, I conclude that it is fair and reasonable to award Ms. Woelders the sum or \$15,000 for her future massage therapy treatments and \$4,000 for her future gym passes.

· Special Damages

- [172] Ms. Woelders is permitted recovery of the out-of-pocket expenses she reasonably incurred as a result of her injuries. Her entitlement is derived from the fundamental principle that an injured person is to be restored to the position she would have been in had the negligence not happened: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [173] Ms. Woelders seeks an award of \$20,929.77 in special damages to cover the expenses incurred for medications, physiotherapy, chiropractic treatments, massage therapy, kinesiology, active rehabilitation, gym passes, counselling and transportation expenses (limited to bridge tolls) to certain appointments.

[174] The entirety of the defendant's argument relative to special damages was set out in this one sentence in final submissions: "The defendant says that the passive treatments such as massage should be cut off as of the date of her visit to Dr. Pisesky in October of 2012." For the reasons already articulated concerning my misgivings towards Dr. Pisesky's view that Ms. Woelders should discontinue massage and other passive treatments, I reject the defendant's position.

[175] Ms. Woelders was not directly challenged in cross-examination about any of her expenses. There is no evidence to suggest that she did not incur them in respect of the injuries she sustained in the Accident, or to support the inference that any of them are unreasonable in the circumstances. I conclude that the total amount claimed, which was incurred over several years, is reasonable and that Ms. Woelders is entitled to reimbursement of the full amount of \$20,929.77.

SUMMARY

[176] In summary, I find that Ms. Woelders is entitled to the following damages:

- \$38,343 for her past loss of income-earning capacity;
- \$175,000 for her future loss of income-earning capacity;
- \$85,000 in non-pecuniary damages;
- \$19,000 for the cost of her future care; and
- \$20,929.77 in special damages.

Total: \$338,272.77

COSTS

[177] If the parties are unable to reach agreement about costs, they may file written submissions implementing a timetable of their choosing that incorporates a final deadline of August 12, 2016.

"Ballance J."

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