IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Broad v. Clark,*
2018 BCSC 1068

Date: 20180704
Docket: M153576
Registry: Vancouver

Between:

Amanda Rose Broad

Plaintiff

And

William R. Clark

Defendant

Before: The Honourable Madam Justice DeWitt-Van Oosten

Reasons for Judgment

Counsel for the Plaintiff:	Veronica L. Medved Tara Chandler
Counsel for the Defendant:	Tiffaney T.K. Tsang Wendy A.C. Serné
Place and Dates of Trial:	Vancouver, B.C. May 28–31; June 1, 4–8, 11–12, 2018
Place and Date of Judgment:	Vancouver, B.C. July 4, 2018

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I. OVERVIEW

[1] This case involves a personal injury claim arising out of a motor vehicle collision that occurred on October 22, 2013 in Surrey.

[2] The plaintiff was 23 years old at the time. She is now 28, living in a common-law relationship and has two children, ages 10 and two, respectively.

[3] The plaintiff claims she has developed a driving phobia because of the collision. She also sustained injuries to her neck, left shoulder and hip. Most significantly, the plaintiff alleges "catastrophic" soft tissue injury to her lower back that causes chronic pain, severely restricts functionality and renders her permanently unable to work.

II. ISSUES

[4] There are three issues to decide:

a) Liability for the collision;

b) Whether the collision caused the plaintiff's injuries; and,

c) If so, the plaintiff's entitlement to pecuniary and non-pecuniary damages.

III. FACTS

[5] The trial was heard over 12 days.

[6] Both parties called expert opinion witnesses. The qualifications of these witnesses and the admissibility of their reports was not disputed. I was satisfied the expert evidence was admissible under *R. v. Mohan*, [1994] 2 S.C.R. 9.

A. Circumstances Prior to Collision

[7] The plaintiff had a difficult childhood. She was placed in a group home at six years of age because of abuse and neglect. Her parents were drug addicted.

[8] In the group home, the plaintiff felt she was little more than "a number". She moved through foster care, staying in at least three foster homes, dealt with

numerous social workers and had little, if any, contact with her family. She saw herself as an "outcast".

[9] At age 12, she moved to a foster home where her older sister resided. Her sister eventually left the home and the plaintiff joined her. She was 14 or 15 at the time.

[10] The plaintiff began working at a McDonald's restaurant. At age 17, she was in a relationship with a co-worker, Patrick Kennedy, and became pregnant. Their relationship ended about three months into the pregnancy. The plaintiff was living on her own when her child was born (Caleb). She had just turned 18.

[11] At age 19, the plaintiff began dating Kevin Worsley. She met his parents, Linda and Bob Worsley. They bonded and allowed the plaintiff to move into the Worsley home. She lived there for about one year before moving out with Kevin. While residing with the Worsleys, the plaintiff obtained her driver's licence, completed high school and took a course in office skills.

[12] The plaintiff views Linda and Bob Worsley as her "mom and dad". She finally had someone who cared for her as parents. She remains close to them, as well as Linda Worsley's parents, even though her relationship with Kevin Worsley has ended. Caleb views Linda and Bob Worsley as his grandparents. The feeling is mutual. Mr. and Mrs. Worsley are actively involved in Caleb's life and remain closely connected with the plaintiff. Mr. Worsley coaches Caleb's baseball team.

[13] The plaintiff "bloomed" when she moved into the Worsley home. She actively assisted Linda Worsley around the house with cleaning and preparing meals, and was fully engaged in parenting Caleb. She took him to the park, swimming and skating. She would play tag and baseball with him.

[14] The plaintiff's friend, Shae Patterson, spent time with the plaintiff at the Worsley residence. She described the plaintiff as an attentive mother who played a lot with Caleb. She carried him around on her hip; she was up and down on the floor with him; she would join him on the floor to play.

[15] The plaintiff grew increasingly independent with the support and encouragement of the Worsleys and wanted to work. According to her evidence, confirmed by Linda Worsley, the plaintiff had much-needed family support and within this environment, she made significant strides.

[16] The plaintiff was not content to work at McDonald's or in the retail sector. She wanted a "career". After upgrading her office skills, she obtained a position in 2012 with Time Limousine as an office assistant. She was responsible for scheduling, filing, answering the phone and billing. She liked it there. Linda Worsley, who ran a family daycare at the time, looked after Caleb at no cost.

[17] The plaintiff stopped working at Time Limousine for medical reasons. In November 2012, she was diagnosed with colitis and it interfered with her work.

[18] In April 2013, she worked with Starline Windows as a "Receptionist/Office Administrator". The colitis was under control through medication and diet changes. Again, Linda Worsley cared for Caleb.

[19] The plaintiff began with Starline Windows on a part time basis. The position was shared between two employees. She moved to full-time in late September 2013, when the second employee left. The plaintiff ran the front desk, answered emails, phone calls and looked after schedules and filing. Her primary role was to greet customers. She was paid $15 an hour ($31,200 per annum). This was the highest wage she had ever received. According to a company representative, Starline had no issues with the plaintiff's performance. She was punctual and did "okay".

[20] The plaintiff enjoyed working at Starline. It was what she had been striving for. She liked her co-workers and the environment. Her employer provided a benefits package. In light of her childhood struggles, maintaining employment and being self-sufficient carried great meaning to the plaintiff. She intended on staying at Starline for "quite a while". She did not think about retirement. She thought she would work until she was "old".

[21] Persons who interacted with the plaintiff at this time variously described her as ambitious, engaging, funny, bubbly, physically active and an involved mother. When living with her sister at the foster home, the plaintiff danced and swam. While working at McDonald's, she was a hard-working employee who "hustled". Before October 2013, she regularly exercised, including jogging, sports with the Worsley family, and she actively supported her son in his physical activities. Linda Worsley described the plaintiff as an extraordinary young woman who transcended hardship, with good potential and determination.

B. Collision

[22] The collision occurred at the intersection of 96th Avenue and 190th Street in Surrey.

[23] This is an industrial area. There are no traffic lights at the intersection. The plaintiff was driving to work and travelling alone. She said it was approximately 7:30 a.m. She had dropped off Caleb at the Worsley home. The traffic was moderate. The plaintiff acknowledged seeing some fog when she drove to Linda Worsley's home; however, it was not foggy while subsequently heading to work.

[24] The plaintiff was operating a Toyota Tacoma and travelling eastbound on 96th Avenue. This is a four-lane roadway, with two lanes in each direction. She was in the eastbound curb lane as she approached the intersection.

[25] The defendant, William Clark, was travelling westbound on 96th Avenue and turned left on to 190th Street, in front of the plaintiff.

[26] The plaintiff testified she was travelling between 55 and 60 kilometres per hour as she approached the intersection. She thought the posted limit was 50 or 60 kilometres per hour, but could not be definitive. The general location of impact was in the eastbound curb lane. The front of the plaintiff's vehicle hit the back, driver's side of the defendant's vehicle.

[27] Photographs of the Toyota Tacoma post-collision show extensive damage, covering the entire front end. The damage is most pronounced on the right front corner of the Tacoma. The hood is buckled. A section of the right front side of the vehicle is torn from the frame.

[28] The plaintiff testified there was insufficient time for her to brake or swerve to avoid the collision. She said the defendant "suddenly" turned in front of her.

[29] In July 2014, the plaintiff told a physician she was traveling between 60 and 70 kilometres per hour. In May 2015, she told another physician that she was going 65 to 70 kilometres. She explained these discrepancies at trial by saying that she gave the doctors a "range" and "approximates".

[30] In cross-examination, it was put to her that she was driving over the speed limit and not watching for oncoming traffic, or persons making left turns, even though she knew about the intersection and the potential for turns. It was also suggested that if she had been paying attention, she would have had time to stop before hitting Mr. Clark's vehicle.

[31] The plaintiff denied travelling 70 kilometres an hour and said she had no indication the defendant was going to turn left in front of her.

[32] The air bags in the plaintiff's vehicle deployed on impact. She felt as if she was "torn in half", with her bottom half staying in place, but her torso going forward.

[33] A witness at the scene came to her window. He undid her seatbelt, checked on the defendant and then waited with the plaintiff until paramedics arrived. While in the vehicle, the plaintiff felt pain throughout her body. This included severe lower back pain; her chest was badly hurting because the seat belt was so tight; and she felt pain in her shoulder and left hip.

[34] The defendant, William Clark, confirmed that he was travelling westbound on 96th Avenue. He thought it was about 7:00 a.m. when the collision occurred. He was on his way to work and he started at 8:00.

[35] Mr. Clark regularly drove this route to get to work, turning left on to 190th Street from 96th Avenue and heading south. His work place was not far past the turn. He was driving a Dodge Ram pick-up truck. He described the road as flat, traffic was "light" and it was foggy. He had his headlights and fog lights on.

[36] Mr. Clark said he came to a complete stop at the 96th Avenue intersection. Facing him and waiting to turn left on to 190th Street was a five tonne truck. Mr. Clark did not see whether the truck had its signal on. He assumed from the truck's position that a turn would be made. The truck was waiting for the westbound traffic to clear on 96th Avenue before it completed its turn.

[37] Mr. Clark had his left signal on and put his head out of the driver's window to look beyond the truck and see if traffic was coming. He had to do this because the truck was blocking his view, at least in part, of oncoming traffic. He saw headlights about a block away at 189th Street. He put his head back inside and made the left turn.

[38] He was about a lane and a half across the intersection when he felt his truck go sideways. He had been hit. He parked on the side of the road and grabbed his licence and insurance papers. He saw someone helping a woman in the other vehicle. He did not approach. Rather, he stayed back while emergency vehicles attended the scene and provided assistance. Police arrived after about 45 minutes. Mr. Clark spoke with them. He was not issued a violation ticket. He said he thought it was about 8:00 a.m. when he left the scene.

[39] The Dodge Ram was badly dented behind the right (passenger side) rear tire and bumper. Mr. Clark repaired the vehicle himself as he did not have collision insurance.

[40] In cross-examination, Mr. Clark acknowledged that the five tonne truck at the intersection was a "relatively large" truck. It "partially obstructed" his view of the eastbound lanes on 96th Avenue. He had to stick his head out the window to check for oncoming traffic. He did this to "see as best as he could".

[41] The defendant acknowledged that he made the left turn without waiting for the five tonne truck to clear the intersection. He also agreed that he made his turn despite the fact that his view was partially obstructed.

[42] He "rough guessed" that 15 to 20 seconds passed between the start of his turn and the time of impact.

[43] No independent or expert evidence was called on the posted speed limit for 96th Avenue; the likely speed of the plaintiff's vehicle at the point of impact; actual point of impact; available line of sight when approaching the intersection, from either direction; or the weather conditions on October 22, 2013.

C. Post-Collision

[44] Immediately following the collision, the plaintiff was transported to hospital. She received pain medication and was sent home. She went to her family physician within a few days. She continued to experience pain in her chest, left shoulder, left hip and back. She had a hard time moving on her own. Her physician recommended pain medication and physiotherapy.

[45] Within a couple of days, the plaintiff was back to see her physician. She had found a "weird lump" on her back. She described it as "parallel to her belly button". It was quite large and pain radiated around it.

[46] For the first few months after the collision, the plaintiff was unable to walk or stand by herself. She lived in a three-floor townhome and did not go up to the third floor because of the stairs. She slept on the couch because she could not lay flat on her bed. The pain would radiate down her legs and getting out of bed was hard. She required rides to attend appointments. Among other things, she experienced "driving anxiety". The plaintiff did not see Caleb very much during this time. Linda Worsley looked after him. It was too painful to engage.

[47] About a week or two after the collision, the plaintiff attended for physiotherapy and acupuncture. She also tried massage therapy and water therapy. The

professionals worked on her neck, shoulder and hip. There was minimal work done to her back. The pain in her back was "excruciating".

[48] In 2014, the plaintiff's chest, neck and shoulder began to improve. She attended for an assessment of her back at the Canadian Back Institute (CBI) in February 2014. She does not recall recommendations emerging at that time. At some point after this visit, her back started to improve and she was able to do more, both around the house and with outside activities. She could vacuum, do laundry, cook meals and take Caleb places. She began driving again in February 2014.

[49] In June 2014, the plaintiff began a new relationship with Ryan Webster. They presently reside together and have a daughter, Layla, who was born in April 2016. Caleb also lives with them. He is now ten.

[50] After the relationship commenced, the plaintiff noticed that the more physically active she became, the more the lump on her back would swell. It became increasingly difficult to take Caleb places. Her neck and shoulder injuries were better, but the lump on her back grew over time. It got to a point where she could not bend. The pain was getting worse. She experienced shooting pains down both legs. If she turned the wrong way, walked for a long period, or sat in the same position for any substantial length, the lump would swell and the pain would increase.

[51] In September or October 2014, the plaintiff heard from the CBI, with a recommendation for physiotherapy and "work hardening". She could not do physiotherapy. It was too painful. Moreover, there were user fees involved and she could not afford them. Based on conversations with her family physician, she also understood that she should not engage in work hardening until an MRI was done on her lower back.

[52] Kristina Sheridan, an occupational therapist employed with the CBI, testified at trial. She confirmed an assessment was done on the plaintiff in February 2014.

[53] A treatment plan was developed in September 2014, starting with physiotherapy. The plaintiff advised she could not afford the user fees. Ms. Sheridan reached out to the Insurance Corporation of British Columbia (ICBC), seeking coverage. She received no response. An alternative plan was developed, focusing on work hardening that involved some physio. The scheduling of this plan could not proceed because of surgery the plaintiff anticipated for November 2014. Ultimately, the CBI file was closed in January 2015 on the instructions of an ICBC adjuster.

[54] Linda Worsley saw the plaintiff shortly following the collision. It was obvious she was in a lot of pain. Ms. Worsley saw bruising and swelling on the plaintiff's chest, left arm and lower back.

[55] The plaintiff was living with Kevin Worsley at the time of the collision. Linda Worsley saw her almost daily. She would help the plaintiff around the house and take care of Caleb. Prior to this, she did not have to assist the plaintiff with general household duties. Ms. Worsley would take Caleb to preschool in the mornings. She would also pick him up after school.

[56] The plaintiff appeared very sore and unable to do much following the collision.

[57] The relationship between the plaintiff and Kevin Worsley broke down. The plaintiff subsequently moved back into Linda and Bob Worsley's home with Caleb. This was in January 2014. Linda Worsley started to notice improvement in the plaintiff. Her arm did not appear to be as sore and her back did not bother her as much. Ms. Worsley described the plaintiff as slowly starting to heal.

[58] The plaintiff remained in the Worsley home for about three months. She then moved into her own place with Caleb. Linda Worsley thought she was well enough to do that. She continued to interact with the plaintiff and assist with childcare.

[59] All of a sudden, the plaintiff's physical condition began to deteriorate. Ms. Worsley believes this was round/about July 2014. The plaintiff stopped doing

things, including walking, going to the gym and riding "quads" with the Worsley family. She "could not do anything".

[60] The plaintiff began to move more slowly. Linda Worsley noticed that something was wrong with her walk. The plaintiff walked "horribly". It drew attention from people. It looked as if she had "terrible posture". She "never used to walk like that".

[61] In January 2015, the plaintiff had an MRI. She had to lay flat on a board for about 45 minutes to an hour. One of her legs went numb and her foot became "lifeless".

[62] She became pregnant with her second child in August 2015. The pain in her back was bad. She went to a pain clinic and was recommended morphine; however, she did not want to take that medication while pregnant. She was put on bed rest and labour was induced early.

[63] Once home with her daughter, the plaintiff had to make numerous modifications. For example, a crib door was built so the plaintiff could access Layla through the door, rather than lift her out of the crib. As confirmed by Linda Worsley, the plaintiff's sister and Ryan Webster, the plaintiff's common-law partner, the only way the plaintiff could bathe her daughter was to first get into the bathtub, have Layla handed to her and then hold her while in the tub. She got a stroller that was much lighter than usual so she could move the child about. She was unable to play and engage with Layla the way she did with Caleb.

[64] Linda Worsley testified there is a not a lot the plaintiff can do with her now two-year old. She cannot chase her, go down the slide with her, or swing her the way she used to play with Caleb. Now, the plaintiff functions primarily as a "bystander", taking pictures rather than engaging with others and her children.

[65] Shae Patterson describes the plaintiff as walking like an elderly person, she seems very stiff and "rigidy". Whereas the plaintiff used to be the "busybody" in the

kitchen, she can no longer do so. She cannot stand for very long and has to sit down.

[66] Ms. Patterson says the plaintiff winces a lot when she gets up. She has to push herself up from a chair with her arms. Caleb assists the plaintiff with his young sister, carrying the child's toys and other things when they go places. He is the one who picks up the toys. Ms. Patterson testified that post-collision and before the plaintiff received housekeeping assistance, the house was messy. There were numerous dishes on the counters, laundry piled up and Layla's toys were strewn everywhere. She described the house as in "disarray".

[67] From her perspective, the plaintiff remains a "kind and gentle soul", but she is different – she has shut down, as if she is depressed.

[68] Patrick Kennedy, Kayleen Morisseau (plaintiff's close friend) and Tammy Broad (her sister) also described limitations on the plaintiff's current physical capacity. They variously testified to decreases in her physical activity post-collision; an inability to housekeep the way she used to; awkwardness in her walk; external manifestations of pain; and a less engaged and/or "survival-mode" demeanour. When asked for a comparison between the speed at which the plaintiff moved pre- and post-collision, Patrick Kennedy said, "It's like The Tortoise and The Hare".

[69] Ryan Webster met the plaintiff in June 2014. They shared common interests, including camping and riding quads. When they first met, the plaintiff seemed fine. Mr. Webster did not notice anything significant about her physical condition until August 2014, when she asked him to feel a lump on her back. He described it as almost the size of a golf ball. He began to realize how uncomfortable the plaintiff was. She would wince when getting out of a chair, put her hand on her lower back to support herself and was constantly shifting weight in an apparent attempt to gain comfort.

[70] Mr. Webster and the plaintiff moved in together in November 2014. The plaintiff was not working. She was living on her own with Caleb. Mr. Webster

noticed there was minimal food in her fridge. When he asked her to do outside activities, the plaintiff would shut down. He would bring food for her and Caleb. The plaintiff seemed to be under a lot of stress. He suggested that she and Caleb move into the basement suite he was renting. It was a small space and not ideal, but would assist the plaintiff financially.

[71] Mr. Webster recalls the plaintiff attending for physiotherapy in January 2015. He noticed that when she returned from the visits, she would be in pain, hunched over and holding her back. She would need pain medication. She would go on to the couch and stay there for a couple of days to relieve the pain.

[72] Over time, he has witnessed the plaintiff deteriorate. When they started living together, there were more "good days" than "bad days". Now, the bad days are more frequent and her mobility has deteriorated even further. She has limited ability to get up from the couch, get into a vehicle or pick anything up that has some weight. There is a lot they cannot do as a family because the plaintiff tries to avoid aggravating her injury. If she extends herself and tries something unusual, it can result in hospital attendance.

[73] As an example, he described an incident where he returned home after work and the plaintiff was leaning on the fireplace mantel. She was holding her back. A vacuum cleaner was nearby and running. She was short of breath, hunched over and in obvious pain. She was not able to move herself away from the mantel, "almost as if something had locked up". She ended up in hospital for several hours to try to address her pain.

[74] Mr. Webster recounted a trip to Las Vegas that he took with the plaintiff after he graduated from his electrician's program. A friend provided them with free flights and a hotel room. He was excited to go and wanted to "explore everything". However, they could only go across the street and, after walking to a casino next door, the plaintiff had to go back to their hotel by vehicle. They spent a lot of time in their room.

[75] He described another trip to the United States, which he arranged for the plaintiff's birthday in November 2017. The plan was to travel to a nearby casino and stay for two nights in a travel trailer. They were able to spend an hour or so at the casino on the first night. The next day, they went to obtain groceries. As the plaintiff got out of the vehicle, she appeared to "tweak" something in her back. She was holding her back, leaning over and short of breath. Nothing Mr. Webster did to assist provided relief. He got a mobilized buggy for her to complete the shopping. The plaintiff's demeanour completely changed. She kept her head down, was obviously embarrassed, the conversation became short and she disengaged. When they returned home, Mr. Webster took her to the hospital.

[76] The plaintiff's physical limitations have had a significant impact on the plaintiff and her family unit. Although they do things together, Ryan Webster says the plaintiff "stands on the sidelines".

[77] Mr. Webster works long hours as an apprentice electrician. During the day, the plaintiff does what she can in the home and for the kids. When he gets home, Mr. Webster "tags her out" and takes over. He brings the plaintiff her medication so she can find relief. He then takes care of the kids, entertains them and cleans the house. They order a "ton of take out". The plaintiff cooks on occasion, but usually quick meals that require limited preparation time. Bathing Layla is a bit easier now because she is older, but the plaintiff's sister often assists with this.

[78] The house is not in the "most presentable form". They are behind in laundry; the bathrooms are not cleaned until Molly Maid is available; any form of extensive cleaning has to await assistance; and, Caleb is required to help out with household chores and assist with Layla. The plaintiff sits on the floor to put things away in the kitchen. They store their pots and food items in bottom cupboards so she can access them.

[79] On "good days", the plaintiff does what she can. On "bad days", she waits for Mr. Webster to get home and it is an obvious relief to her when he arrives. Both of

them sleep on the couch. The plaintiff because it is more comfortable for her. Mr. Webster sleeps on the couch with her so that she is not alone.

[80] He testified that he does most of the driving. The plaintiff will panic when they go through intersections.

[81] Finances are very tight. Mr. Webster believes that once he completes his apprenticeship, they will be able to afford more. Ideally, he would like to purchase a detached home that consists of only one floor, so he can eliminate the need for stairs. They presently live on the second floor of a rental four-plex. The plaintiff can shop for groceries, but not carry them up the stairs.

[82] They have tried to brainstorm home business ideas for the plaintiff. Two attempts have been made to establish a business (making items for sale); however, the plaintiff cannot manage the physical tasks and both projects have fallen by the wayside.

[83] In cross-examination, Facebook photos were put to Mr. Webster showing happy times with the plaintiff post-collision. He acknowledged their existence and explained the context. He does not deny the family has positive experiences, notwithstanding the plaintiff's injuries. In fact, he describes them as a "happy" family. The plaintiff is an excellent mother. However, these happy moments occur within a larger context of limited mobility and ongoing pain. He is prepared to do whatever he can to support the plaintiff in getting to a better place, physically. He is also supportive of her returning to work if she can. He believes this would be a positive development for the plaintiff. In his view, she has always been passionate about working.

[84] The plaintiff testified that over time, the lump on her back has grown. She has shooting pain down her legs. She can only bend to a certain degree. She cannot walk or sit for very long. On bad days, it is "paralyzing" and she has to take morphine. Ryan Webster will stay home to assist with the children. She frequents the hospital when it gets too much to bear. Nothing will relieve the symptoms in her

back. At hospital, she receives morphine intravenously, as well as anti-inflammatory medication. This process lasts for about 10 hours. They then send her home with morphine tablets. Over the last two to three years, this has occurred about six times.

[85] The plaintiff lives in rental accommodation with Mr. Webster and the children. Expenses are shared 50/50. She pays all expenses related to Caleb. His father, Patrick Kennedy, pays child support, but not consistently. The plaintiff has a bank account; a credit card with a $500 limit; has never written a cheque; and has never had a bank loan or line of credit. She has no investments and her credit card is "maxed out" from time to time. She is currently receiving disability benefits (just over $490 every two weeks).

[86] The plaintiff confirmed she does not do much physically. She is not working because of her physical condition. She has tried various things to assist with her condition and the pain, including yoga and meditation. It has not worked. The yoga aggravated the lump on her back and she had to stop.

[87] Someone comes to her home every Friday to assist with house cleaning. She can do small things around the house and cook meals. The plaintiff can get groceries, but someone else has to carry them in to the house. She makes meals and does what she can around the house. She has purchased a lighter vacuum to assist with this endeavour. Caleb and Ryan Webster assist with the house. This includes Caleb doing his own laundry. The plaintiff can drive, although she continues to find it anxiety provoking. She has to take morphine for her pain about once a month.

[88] The plaintiff does not plan on more children. She wants to return to work. Linda Worsley is prepared to care for her daughter. Ms. Worsley continues to provide care where necessary and is available to the plaintiff. Government monies that the plaintiff receives for childcare go to Ms. Worsley to subsidize the costs of caring for Caleb. However, no additional monies are required of the plaintiff.

[89] The plaintiff says she feels "horrible" about not working. She is frustrated and angry. She always wanted to be independent. She promised herself that unlike her parents, she would work and her children would have her work ethic as a form of role modelling. Now, she cannot do so. She describes her back as perpetually "on fire". When she bends to one side, it "takes her breath away". Although she has been told the lump on her back can be removed surgically, she has also been told it should not be touched. Until someone tells her that surgical intervention will make her better, she is reluctant to take the risk. She is willing to do what it takes to make her feel better, but she wants "strong evidence" of removal actually improving her condition before she undergoes the procedure.

[90] In cross-examination, the plaintiff acknowledged the existence of other medical issues since October 2013 that are unrelated to the collision.

[91] These include pelvic pain in April 2014 that required hospitalization, connected with her endometriosis. She underwent a tonsillectomy in November 2014; experienced kidney pain and/or bladder infection in July 2015 that was treated at hospital (although she has no personal recollection of this); right ear pain in December 2016 that required seeing an ear, nose and throat specialist; and, in August 2017, the plaintiff suffered severe sinusitis.

[92] In cross-examination, the plaintiff was also shown surveillance footage from May 31 and June 1, 2014, in which she is captured at a White Rock beach with her son and attending one of his baseball games. Among other things, she is physically active in both videos: standing; sitting on a towel for a prolonged period with legs outstretched; doing a cartwheel; demonstrating push ups; flying a kite; walking; carrying several items at once; and jumping down from bleachers. She bends forward from a standing position and picks things up from the ground. The videos show no outward sign of physical limitations and/or pain.

[93] Various still photos were also put before the plaintiff. Some of these capture her post-collision carrying laundry out of her vehicle, or moments with friends and family taken from Facebook or Instagram in which she looks happy and engaged.

Evidence was tendered of a trip to a beach with a friend, attendance at BC Lions games and two trips to the United States with Ryan Webster. The plaintiff acknowledged these events, as well as taking her daughter in a stroller to visit her sister at a local mall once a week, and going out for coffee and/or lunch with Linda Worsley and friends.

[94] She reiterated, in cross-examination, that she wants to go back to work. However, she has seen many doctors since the collision and no one has told her that if she undertakes a particular treatment or form of medical intervention, she will be 100% better and can return to work. The plaintiff said she has been trying to get better for four years, but her symptoms are only getting worse.

D. Medical Diagnoses and Physical Capacity

Observations of Family Physician

[95] Dr. Pascaline Mahungu has been treating the plaintiff for approximately ten years. This includes providing care during both pregnancies.

[96] She confirmed the plaintiff was diagnosed with colitis in 2012 and has a history of endometriosis. The plaintiff has not required medical intervention or assessment for colitis since 2013. No issues have arisen in relation to endometriosis since the birth of Layla in 2016.

[97] Dr. Mahungu testified that on October 25, 2013, the plaintiff attended her office in relation to the collision. She was in pain. This was apparent from the way she was holding herself and positioning her body when sitting. Dr. Mahungu observed bruising on the plaintiff's lower back and knees. She recommended pain medication and physiotherapy.

[98] The plaintiff returned on November 8, 2013. Dr. Mahungu examined her back. It was still bruised. She also saw a "lump" on the back. Palpating the lump caused the plaintiff pain. Dr. Mahungu did not see this lump on the October 25 visit or in her prior care. She recommended an MRI. She advised the plaintiff to not

undertake physical intervention or treatment with her back until the MRI was done and they had better information on the nature of the lump.

[99] Dr. Mahungu cared for the plaintiff during her pregnancy in 2015. This was a difficult pregnancy compared to the first because of back pain.

[100] The plaintiff has not been cleared for return to work by Dr. Mahungu.

MRI Results

[101] Dr. Jason Clement is a radiologist. He reviewed two MRIs completed on the plaintiff's thoracic and lumbar spine, dated January 28, 2015 and December 28, 2017 respectively.

[102] The January 28, 2015 MRI showed the plaintiff's five lumbar-type vertebrae in normal alignment. However, small diffuse disc bulges were apparent in the L4/5 and L5/S1 regions.

[103] The MRI also revealed an "Abnormality [directly beneath the skin] centred at the L3 level … there [was] even larger surrounding edema". This "abnormality" corresponded with the area (or site) that the plaintiff identified as one of clinical concern. Dr. Clement described it as a "complex looking lesion".

[104] Finally, the January 28, 2015 MRI showed an annular tear in the lower lumbar.

[105] The December 28, 2017 MRI revealed that the central portion of the "complex looking lesion" was now at the mid-L3 level. It had grown larger.

[106] The disc bulge at the L4/5 had increased slightly in size and had gone from "small" to "moderate". The bulge at the L5/S1 remained small and the annular tear (in the same location) was still present.

[107] The injury to the L5/S1 area was "only slightly more pronounced than on the previous exam".

Orthopaedic Assessments

[108] Dr. John Street is an orthopaedic surgeon. Based on his review of the plaintiff's clinical records, and a three-hour in-person assessment on December 15, 2017, Dr. Street opines that as a result of the collision, the plaintiff has suffered neck pain, left shoulder pain, low back pain, left buttock and lower extremity pain, lower extremity weakness, pain from the lump in her low back, and right leg pain.

[109] In his view, the plaintiff experienced whiplash that resulted in a soft tissue injury to her neck. The symptoms lasted less than six months and have not recurred.

[110] The plaintiff also experienced whiplash to her lower back, resulting in soft tissue injury. There was significant bruising to the back and approximately two weeks post-collision, she developed a "lump which is in keeping with scar tissue from torn subcutaneous tissue". The lump has not resolved itself and the associated pain has not significantly improved.

[111] Dr. Street typically reviews five to ten MRIs per day, four or five days a week. He has been doing this for 15 years. He cannot recall seeing the kind of lump that has developed in the plaintiff's lower back and its growth over time. This indicates that the soft tissue injury to the back was severe.

[112] The plaintiff also experienced left buttock and left lower extremity symptoms following the collision. However, these symptoms have dissipated and she currently has minimal radiating pain in this area. These symptoms are not likely to get progressively worse.

[113] Dr. Street opines that the plaintiff is suffering from the equivalent of disc-mediated pain at the L5/S1 portion of her lower back (likely secondary to the annular tear), as well as radicular pain into her right lower extremity. Her clinical examination was in keeping with lumbar nerve root compression. In his view, the plaintiff's history was "textbook classic for nerve pain and her clinical exam … for

someone who has examined thousands of people with nerve pain … was very, very convincing".

[114] The MRIs from January 2015 and December 2017, as well as one taken in 2016, do not show disc herniation or nerve compression. Dr. Street acknowledged this fact in cross-examination. However, from his perspective, it does not take away from the likelihood of nerve-related pain.

[115] At trial, Dr. Street explained the difficulties that can arise from an annular tear. An annular tear is akin to a crack in the outer layer surrounding the disc. If gelatin from inside the disc escapes through the crack, it can push on nerves outside of the disc. This results in compression.

[116] However, another possibility is that "waste" produced within the disc emerges through the crack and irritates tissue and nerves that are not ordinarily exposed to these chemicals. The chemicals "burn [the] nerve or cause a chemical irritation of the nerve" and it causes leg pain.

[117] In the latter scenario, there is no compression of the nerve:

> … compression is only one possible cause of nerve pain … the alternate cause of pain is – well, there's multiple. But if you've pain in the nerve, you can be pressing on it from the outside [and that] can cause pain. You can be stretching it [and that] can cause pain … Or … it can be exposed to chemicals that it shouldn't be. And that can cause pain.
>
> So that's the basis around nerve pain without compression …
>
> … there was no compression in those nerves, but that doesn't tell us – that doesn't tell us that the nerve is not experiencing pain. All it tells us is that the clinically most common cause of that type of leg pain is not the cause in that situation. But it's not telling you what the cause is …
>
> … it can be traction, local irritation, chemical irritation. It can be something growing in the nerve. There are many causes for nerve pain other than compression …
>
> … we have compression on the top of our list because it's the one we see most commonly.
>
> … in someone who has had two MRIs with an annular tear which we know is rarely asymptomatic [at the plaintiff's age], if that annular tear persisted, then that to me would provide a – an explanation for her leg pain absent any compression …

> … if the annular tear may have been more pronounced than a prior report … that's very important, because annular tears normally heal within two years. But if you have an individual who has had an annular tear on three subsequent MRIs and it's still present … and, in fact may be more pronounced … that provides … an alternate explanation for [the plaintiff's] leg pain outside of compression.

[118] In cross-examination, Dr. Street acknowledged that in his December 2017 written report, he made no mention of the theory that the plaintiff's pain in her lower extremities could be the product of waste that has leaked through the annular tear.

[119] He agreed that the plaintiff's right leg pain appears not to have manifested itself until two years after the collision. However, in his view, this fact does not preclude a finding of nerve-related pain when it results from something other than compression:

> … if you expose the nerve to some irritants, the – how soon or how quickly it takes for that pain to develop is not at all as predictable as pain developing as a result of compression.

[120] Dr. Street opines that the plaintiff may have also experienced a "significant soft tissue ligament injury to major stabilizing ligaments of her spine" because of the collision, which has not yet been completely diagnosed or clarified. He explains:

> Her current clinical examination shows that she has forward positive sagittal imbalance of about 7-8 cm. She has a flat lumbar spine and stands with flexed knees. She is unable to forward bend her lumbar spine and is unable to extend to normal. She has a mild mid-lumbar scoliosis … the subcutaneous lump, thought to be scar tissue as a result of the accident, may be an indication of the degree of soft tissue injury that occurred. This soft tissue injury, if it does involve the stabilizing ligaments around the spine … could have rendered the spine potentially unstable and that would explain the type of symptoms that she reported early on after the accident. This could also explain many of the findings of her current clinical examination …
>
> … If Ms. Broad indeed does have this instability, then the prognosis for any improvement in her symptoms related to that injury is poor. She has had back pain now for more than four years. Her back pain has not improved to any degree over that time. Typically, back pain after trauma, if it is not resolved within18 months, is not likely to improve further.

[121] In Dr. Street's view, the plaintiff is "incapable of working given her current level of disability". If there is no anticipated improvement in the future, she is "likely

to remain at her current level of disability and likely not to return to gainful employment in the foreseeable future".

[122] Dr. Bassam Masri testified as a defence expert. He has been an orthopaedic surgeon since 1989. His clinical practice is predominantly focused on hip and knee surgery.

[123] In July 2014, Dr. Masri conducted an independent medical examination of the plaintiff. The purpose of the examination was to "identify the orthopaedic injuries suffered" in the collision.

[124] Dr. Masri examined the plaintiff's lumbar spine and noted that it:

> Revealed a severely restricted range of motion … [The plaintiff] was unable to stand upright beyond neutral. Lateral [side] flexion was diminished by at least 60%. There was marked muscle spasm in the left paraspinal muscles with tenderness. There was no paraspinal muscle spasm on the right side and there was much less tenderness. She [had] a 2 cm mass in the subcutaneous tissues in the mid-central back. This was markedly tender. This was mobile as well. Straight leg raising tests were negative [did not produce pain]. Neurovascular examination was unremarkable [no indication of nerve injury].

[125] Dr. Masri concluded that the plaintiff "suffered from a number of injuries related to [the] motor vehicle accident". This included bruising from the seat belt affecting the chest wall and abdomen, accompanied by pain that resolved in approximately a month. The plaintiff also had pain affecting her left shoulder and back.

[126] Dr. Masri was of the opinion that the plaintiff's left shoulder symptoms were "minimal" when he saw her. There was no evidence of "significant rotator cuff weakness".

[127] With respect to her back:

> I believe [the plaintiff] suffered from a soft tissue injury to her low back as evidenced by significant bruising that I saw in the photographs. Subsequently she developed a small mass in the subcutaneous tissues of the low back. It is unclear to me whether this mass pre-dated the motor vehicle

> accident or not. It is quite conceivable that someone might not have noticed the small mass such as the one that [the plaintiff] has. The differential diagnosis would include a benign lipoma [common, abnormal collection of normal fat cells], a tiny hemangioma [collection of blood vessels], or, if the lesion occurred after the motor vehicle accident, it would be a residual effect from the hematoma with some scarring or fat necrosis. The lesion itself is very painful and fat necrosis can, on occasion, be quite painful. In that case, it would be related to the motor vehicle accident, and excision would be recommended in order to alleviate the symptoms. This is a minor procedure that can be performed under local anaesthesia.

[128] Dr. Masri recommended that the plaintiff undergo an MRI. As an interim measure, he believed the plaintiff required assessment by a physiotherapist for the purpose of, among other things, improving her posture. He also suggested enrolment in an exercise program. He described the prognosis as "excellent", with a return to gainful employment over the next six to 12 months (assuming the plaintiff participated in the recommended therapy program, for approximately one year to 18 months).

[129] In cross-examination, Dr. Masri acknowledged that when he saw the plaintiff in July 2014, she was not able to lean back without pain and, instead, leaned forward. Nor could she fully lean to her right side. He found evidence of muscle spasm, consistent with an injury, to the left of the mid-line of the plaintiff's spine and "severely restricted range of motion" in her lumbar. This was a "significant" finding. He also observed a marked limp, which he agreed was attributable to back injury. Finally, based on medical records post-2014, Dr. Masri agreed that the lump in the plaintiff's back was likely traumatic and developed post-collision.

[130] Dr. Masri was asked to review Dr. Street's December 2017 report on the plaintiff. He took issue with Dr. Street's opinion that the plaintiff is likely experiencing nerve pain in her lower extremities. In his view, this hypothesis was predicated on the suggestion that the annular tear in the plaintiff's L5/S1 area was causing a disc herniation that, in turn, would result in nerve compression. The MRIs from both January 2015 and December 2017 showed no evidence of nerve compression through herniation.

Neurosurgical Assessments

[131] Dr. Shahid Gul is a neurosurgeon whose practice consists primarily of the surgical treatment of spinal and cranial disorders. He assessed the plaintiff in May 2015, June 2016 and in early 2018.

[132] He determined that as at May 13, 2015, the plaintiff's symptoms associated with soft tissue injury to her neck had resolved.

[133] However, Dr. Gul diagnosed the plaintiff with continuing lower back pain secondary to a soft tissue musculoskeletal injury to the lumbar spine:

> This injury typically involves the muscles, tendons and/or ligaments that function to move and/or support the torso while supporting the weight of the body. Such injuries can be slow to heal due to the relatively constant biomechanical demands placed on this region of the spine. As a result, such injuries can be associated with persistent lower back pain. In this context, mechanical lower back pain can be worsened by activities that include but are not limited to heavy or awkward lifting; impact or jarring; strenuous or repetitive lower back flexion or extension; and/or prolonged sitting or standing.

[134] Dr. Gul attributed the lower back injury to the collision. Prior to the collision, the plaintiff had no history of lower back associated pain. She began experiencing this pain shortly after the collision occurred. Based on his review of the medical history, Dr. Gul saw no signs of pre-existing spine injuries that would have influenced the injury sustained in the collision.

[135] In Dr. Gul's experience:

> Most spine associated pain that arises as a result of trauma from a motor vehicle accident resolves within about 12 to 18 months following the trauma … any pain beyond this period of time is likely to persist as chronic pain …

[136] In May 2015, Dr. Gul considered it "unlikely that [the plaintiff would] be able to return to her previous work for the foreseeable future given that the physical demands of her job would likely aggravate her lower back pain".

[137] Dr. Gul was aware of the lesion that developed beneath the skin on the plaintiff's lower back. He recommended that the plaintiff see a plastic surgeon to determine whether it might be removed to avoid further, potential progression. He noted, however, that removal is "no guarantee of significant overall major improvement, particularly given that [the] procedure would not address [the plaintiff's] mechanical lower back pain secondary to the lumbar spine associated soft tissue injury".

[138] The plaintiff was assessed a second time by Dr. Gul on June 8, 2016. On this assessment, he noted a "firm tender grape-size mass" in the plaintiff's lumbar region, just to the right of the midline. There was also a second, smaller lump in the lumbar region beneath the first lesion. It was less than 1 cm in diameter. It was non-tender and more mobile.

[139] Dr. Gul opined in June 2016 "it is most likely that [the plaintiff's] lumbar spine associated lower back pain will persist as chronic pain". Moreover, "she [will] likely be susceptible to problematic flare-ups of lumbar spine lower back pain with more strenuous physical activities associated with increased mechanical strain to the lower back".

[140] Dr. Gul again recommended consideration of surgically removing the lesion on the lower back, although recognizing there is no guarantee removal would lead to "significant overall pain improvement".

[141] On February 19, 2018, Dr. Gul produced a third report after reviewing developments in the plaintiff's circumstances since June 2016.

[142] This included a comparative review of the January 28, 2015 and December 28, 2017 MRIs. The second MRI revealed a "significant progressive enlargement" of the lesion in her lower back. "Inflammatory features" overlay the abnormality. The pathological basis for the progression was unclear. "The lesion does not appear to be related to lumbar spine associated bone, ligaments, tendons, or nerve roots."

[143] Dr. Gul estimated that he has reviewed over 20,000 MRIs in his clinical practice. The plaintiff's MRIs are the only ones in which he has seen a lower back lesion of the sort displayed here.

[144] In cross-examination, Dr. Gul acknowledged that in his May 2015 assessment, the plaintiff showed no signs of numbness or tingling in her lower extremities. Moreover, she demonstrated full motor power in both her upper and lower extremities. Dr. Gul saw no signs of nerve root compression at any level of the lower lumbar spine in the January 2015 MRI.

[145] A second neurosurgeon testified at trial. Dr. Scott Paquette was called by the defendant. He specializes in complex spine surgery.

[146] Dr. Paquette examined the plaintiff on January 16, 2018 and reviewed her medical history, including records produced post-collision. He did not see a copy of the December 2017 MRI, or have access to functional capacity assessments completed by Gary Worthington-White, a consultant occupational therapist (referenced below).

[147] Dr. Paquette concluded that the plaintiff:

> … likely incurred a soft tissue injury to her lower back at the time of the accident. By [the plaintiff's] history and from a review of the records, it appears a painful lump appeared in her lower lumbar spine within days of the motor vehicle accident. Photo evidence provided within the records suggests this is bruising. This lump has persisted to this day and is likely traumatic in origin. I suspect this represents a haematoma from the time of the accident; however, it is also possible that she suffered a traumatic tear to the fascia or covering of the muscles in the lumbar spine. This lump could represent the residual of a haematoma but also a small muscle hernia …

[148] In the absence of diagnosing the lump, Dr. Paquette opined it is "difficult to offer a likely return to physical activity or a likely return to work".

[149] However, even if the lump is removed, or repairs are made, thereby reducing the plaintiff's "ongoing pain triggers", this would not mean she would be pain free:

> the chronicity of her pain at this stage would suggest that she has permanent mechanical low back pain … her back pain appears to be musculoskeletal or mechanical in nature …
>
> [The plaintiff] continues to report pain in her lower back made worse with physical activity. The prognosis for recovery for this injury is poor. Her pain is likely a result of soft tissue injury, but also this lump in her lower back has yet to be truly diagnosed or treated. Her prognosis for improvement would depend on the underlying diagnosis and whatever potential treatments could be offered …

Occupational Therapy

[150] Mr. Worthington-White is a consultant occupational therapist who conducted two "Work Capacity Evaluations" on the plaintiff: September 15, 2016 and December 21, 2017. He also prepared a report on the plaintiff's "Cost of Future Care".

[151] In physical tests during the September 2016 assessment, the plaintiff's ability to "provide higher levels of physical effort on a number of tests was limited by notable chronic pain behaviours, pain limited function, and requesting to stop or avoid tests due to pain and/or apparent guarding/fear [of] further symptom aggravation". She appeared to be in "physical distress" throughout the evaluation.

[152] Mr. Worthington-White opined that the plaintiff's overall functional capacity presented as "best suited for limited/sedentary strength activity".

[153] Among other things, activities or postures that increased the stress on her spine or low back resulted in increased pain and reduced fluidity of movement. She was seen to "assume a slight hunched posture … and would avoid spinal extension due to reported pain with such movements/positions":

> As the testing day progressed and exposure to activity and postures increased, general signs of fatigue became more apparent (i.e. slow lethargic movements, increased request for breaks, leaning on supports, etc.), as well, reports and observations of pain impacting [the plaintiff's] function became more prevalent.

[154] Ultimately, the plaintiff did not present as capable:

> of durable full-time work. Even her durability for regular part-time work would likely be compromised at this time due to her demonstrated pain and emotional presentation and participation in even part-time work would likely have a notable impact on her participation in avocational activities (i.e. looking after her children, household activities, etc.).

[155] Mr. Worthington-White recommended a comprehensive treatment program for pain management, including physiotherapy, exercise, working with a psychologist to address the emotional component of pain management, increased participation in daily living activities and possible attempts at return to work. He also recommended an active exercise program to focus on improvement to the plaintiff's general conditioning and core stability:

> With appropriate interventions and related improved symptom management, it will likely be reasonable for [the plaintiff] to first explore physically suitable part-time work options. With improved ability to cope with her pain and learn strategies and techniques for independent symptom management, and emotional control, durable part-time and possibly physically suitable full-time work involvement is reasonable in the future.

[156] A second "Work Capacity Evaluation" was completed on December 21, 2017. Once again, the plaintiff presented with chronic pain behaviours and "acute" physical distress:

> She presented with pain limited function, specifically related to low back pain and right lower extremity nerve symptoms, as well as subsequent activity postural and activity tolerance limitations. Additionally, [the plaintiff] presented with general activity tolerance limitations, fatigue and increased disabling pain and functional decline as the day progressed.
>
> Again, activities or postures placing increased mechanical strain on her spine/low back consistently resulted in increased pain, guarding, reduced fluidity of movement, as well as postural and activity tolerance limitations. As during the September 15, 2016 WCE, [the plaintiff] was observed to consistently assume a slightly hunched posture (mild spinal flexion) and would avoid spinal extension.
>
> In addition to the noted physical limitations, there remains a notable psycho-emotional component to her presentation. [The plaintiff] was often tearful during periods of increased symptoms and when discussing the impact that her ongoing symptoms have had on her life and her hands were often shaking …
>
> At this time, [the plaintiff] does not present as gainfully employable. Functional testing results strongly indicate that [her] ability to even look after basic day-to-day household tasks is limited and typical day-to-day tasks and

> childcare likely result in aggravation of her symptoms, impacting her tolerance and durability for such activity.
>
> Overall, considering [the plaintiff's] current pain presentation, emotional status, pain limited function, specifically related to her back and right lower extremity, her overall function and employability is notably limited from a physical/functional point of view and also likely from a psycho-emotional standpoint.

[157] Mr. Worthington-White has done between 1,200 to 1,500 medical/legal assessments and another 1,000 functional capacity assessments. He can recognize physical distress when he sees it. The plaintiff experienced sudden, intense pain during his assessments of her. She was in tears, asking for breaks and needed to stop.

[158] During the two assessments, the plaintiff was asked to describe her pain levels before and after the sessions. These descriptions were recorded on diagrams tendered at trial.

[159] At the start of the September 2016 assessment, the plaintiff recorded her lower back pain as a three (moderate) out of 10+ (maximum pain). On completion of the assessment, she described the pain in her "lower spine" as 8.5/10.

[160] At the start of the December 2017 assessment, the plaintiff recorded her lower back pain as a four (somewhat strong pain) out of 10+. On completion of the assessment, it was rated at between 7.5 (very strong pain) and 9/10.
Mr. Worthington observed "notable swelling" on the plaintiff's low back at the end of the assessment and a palpable hard lump.

[161] Although the plaintiff's overall level of function and activity tolerance was similar to that displayed in September 2016, "with some increases in strength ability", Mr. Worthington-White concluded "her self-perception of abilities [had] reduced since the initial assessment".

[162] Once again, a "more comprehensive treatment would likely be beneficial to promote pain management, emotional coping skills, etc. … [The plaintiff] would be best served in an interdisciplinary pain program to assist her to better control her

symptoms". If notable improvements are made, "it may be possible" for her to explore part-time employment options involving administrative positions.

[163] In cross-examination, Mr. Worthington-White acknowledged that the plaintiff did not provide full physiological effort on the physical tests he conducted. However, he attributed this to observable limitations resulting from pain.

[164] Mr. Worthington-White prepared "Cost of Future Care" recommendations specific to the plaintiff. These recommendations take into account the results of the functional capacity assessments and a review of the plaintiff's medical reports, including the prognostic information.

[165] Mr. Worthington-White's recommendations are set out in the chart attached as Appendix A to these *Reasons for Judgment*. He acknowledged in cross-examination that his recommendations contemplate the possibility of an eventual return to work, with ergonomic accommodation.

[166] The defence called Theresa Wong as a rebuttal witness to Mr. Worthington-White. She is also an occupational therapist and has been so-employed for over 20 years. Ms. Wong reviewed the cost of future care analysis completed by Mr. Worthington-White.

[167] In her view, the capacity findings made by him should be viewed as "functional minimums", rather than representative of the plaintiff's maximum capacity. This is because on both "Work Capacity Evaluations", Mr. Worthington-White found that the plaintiff made reasonable, but not "high" levels of effort during the physical testing. She also reported high levels of pain and it was unclear, to Ms. Wong, whether these reports were consistent with observations made of her during the testing process.

[168] From Ms. Wong's perspective, these factors detract from the objective reliability of the conclusions reached by Mr. Worthington-White. They also raise a question about whether some of the specifics recommended by Mr. Worthington-

White are justified, including weekly household cleaning and seasonal household upkeep, as well as ergonomic equipment.

Psychiatric Assessment

[169] The plaintiff attended for an independent medical examination with Dr. Spivak on February 17, 2018. The purpose of the examination was to assess her for psychiatric/psychological injuries arising from the collision. Dr. Spivak is licensed to practise psychiatry in Alberta and British Columbia.

[170] Dr. Spivak concluded that the plaintiff has "ongoing difficulties with a specific phobia (vehicular type). The main manifestation of her symptom has been while driving … [and] represents an ongoing source of impairment for her".

[171] Apart from a driving phobia, which he described as "mild", Dr. Spivak found "no evidence of any anxiety disorders". He recommended that the phobia be treated through 10 to 20 sessions of psychotherapy. The plaintiff's prognosis from recovery with intervention is "good".

[172] After reviewing the plaintiff's history and interviewing her in-person, Dr. Spivak found the plaintiff to be:

> An extraordinarily resilient individual from an emotional perspective who is open to any treatment suggested and despite her past, as well as the nature of her injuries, has tried to remain positive …

[173] He described the plaintiff as "unusual" given her background and the context surrounding her present circumstances. She is doing her best to not allow her pain to affect her psychologically.

E. Earning Capacity, Future Care

[174] Each party called an economist at trial. Curtis Peever testified for the plaintiff and assessed her past and future loss of earning capacity, as well as her cost of future care.

[175] For past loss, he assumed that from the date of the collision to the first day of trial, the plaintiff would have worked on a full-time, full-year basis as an "Administrative officer" (as defined in Canada's 2006 National Occupational Classification for Statistics (NOC)), except from April 9, 2016 to April 9, 2017, when she would have been on maternity leave.

[176] He put her total "gross" past loss of probable earnings and EI benefits at $161,630. Once reduced to take into account provincial and federal income taxes, as well as EI premiums, the total "net" past loss of earnings and EI benefits is $150,083. This amount does not take into consideration any potential impact of negative labour market contingencies.

[177] For future loss of earning capacity, Mr. Peever assumed that because of her injuries, the plaintiff "has no residual employability". Moreover, but for the collision, she would have continued working full time post-trial as an "Administrative officer" until retirement at age 70.

[178] Using actuarial multipliers, Mr. Peever produced estimates for three potential future earning streams based on Statistics Canada data for British Columbia females in the plaintiff's age-range, with a high school education. These streams, representing probable earnings, capture:

1) full-time, full year earnings in the occupational classification of ["Administrative officer"] until age 70 with no negative labour market contingencies;

2) full-time, full-year earnings reduced for the impacts of average labour market contingencies, including "risk" contingencies (*i.e.* illness or injury, lay offs or involuntary termination or retirement) and "choice" contingencies (*i.e.* voluntary withdrawal from the workforce for part-time options to facilitate child care, travel or retirement); and,

3) full-time, full-year earnings reduced for the impacts of involuntary, "risk-only" labour market contingencies.

[179] Expressed in lump-sum present values, Mr. Peever estimated the plaintiff's cumulative probable earnings in the three streams at $1,619,815, $898,137 and $1,420,742, respectively.

[180] In cross-examination, Mr. Peever was asked whether the plaintiff's earnings would be lower if employed within the NOC category for "Receptionist" or "General office support worker". He acknowledged that about 70% of persons within the "Administrative officer" classification typically have university degrees. The plaintiff has a high school education. Applying the "General office support worker" classification would result in a 17% reduction in cumulative projected earnings. For example, the second of Mr. Peever's three income streams, the "risk and choice" stream, would be reduced to a cumulative $745,454 by age 70.

[181] Mr. Peever also completed a cost of future care estimate for the plaintiff. This estimate is based on the items and services recommended by Mr. Worthington-White (Appendix A). Mr. Peever put the total present value of the plaintiff's cost of future care at a low of $233,759 and a high of $278,879, assuming all of the recommendations were given effect.

[182] Douglas Hildebrand was retained by the defendant to respond to Mr. Peever's report on past and future loss of earning capacity. He reviewed Mr. Peever's estimates on past loss of earnings and had "no technical concerns" with the estimate.

[183] On future earnings, Mr. Hildebrand used economic multipliers rather than actuarial to assess lost capacity. Ultimately, the cumulative total he reached on Mr. Peever's "risk" and "choice" stream came in at $907,050. He opined that if this Court were to find the plaintiff capable of part-time work on a 50% basis in the "Administrative officer" classification, this amount would need to be reduced to $364,708.

[184] Mr. Hildebrand made various observations about the assumptions underlying Mr. Peever's calculations. These included the fact that the first income stream,

which assumes full-time, full-year employment as an "Administrative officer" until the age of 70, with no negative labour market contingencies, reflects a "labour market attachment significantly stronger than for other similarly-educated females". According to Mr. Hildebrand, Statistics Canada data from 2011 shows that:

> Only 40.1% of British Columbia female high school graduates age 60 to 65 remain in the labour market, and only about 40.5% of those who reported earnings in this age group are full-time full-year workers.

[185] Also, the assumed retirement age of 70 exceeds the average retirement age of other Canadians in the first and third of Mr. Peever's income streams. Data from Statistics Canada shows that the average age of Canadian female retirees in 2017 was 62.6 years.

[186] Finally, Mr. Hildebrand opined that projected future loss that makes only a partial adjustment for labour market contingencies (for example, the "risk only" stream), "assumes below-average labour market contingencies faced by a particular individual relative to his/her peers". Typically, this scenario is "reserved for individuals who have exhibited strong labour market attachment through years of employment". The plaintiff does not have this background.

F. Vocational Prospects

[187] Samantha Gallagher is a vocational consultant who testified as a defence expert witness. She was retained to provide an opinion on present and future employment potential. Ms. Gallagher met with the plaintiff for 3 1/2 hours on February 13, 2018. Among other things, she conducted vocational tests.

[188] During the testing, the plaintiff:

> Alternated between sitting and standing, using a sit/stand desk. Pain behaviours such as sighing, rubbing her back and grimacing increased as the day went on. At the conclusion of the testing [the plaintiff] reported an increase in her low back pain …

[189] Based on these "pain behaviours", Ms. Gallagher concluded that if the plaintiff "presents on a day-to-day basis as she did at [the] assessment, most employers

would have significant concerns about her ability to meet job demands and show up to work on a consistent basis". From her perspective, "with her current level of symptoms, [the plaintiff] is likely not ready to return to paid employment".

[190] Should the plaintiff's physical condition improve, enabling her to return to work, either full or part time, Ms. Gallagher concluded that the plaintiff is likely best suited for positions such as receptionist, customer service agent, administrative assistant and/or office clerk. The median wage for these positions, based on data maintained by Statistics Canada, is $17, $20, $22 and $21 respectively.

IV. LEGAL PRINCIPLES AND ANALYSIS

A. Liability

[191] The plaintiff says the defendant is 100% liable for the collision. He turned left in front of her without a clear view of the eastbound lanes when it was patently unsafe to do so. The plaintiff argues she was the dominant driver and had the right of way; the presence and proximity of her vehicle *vis-à-vis* the defendant presented an obvious and immediate hazard; and in these circumstances, the defendant to yield was obliged under s. 174 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. The failure to do so renders him negligent.

[192] The defendant disputes liability. He says he exercised reasonable care in making his turn. He signalled that he was turning left and, once stopped at the intersection, he put his head out his window to look beyond the five tonne truck and make sure it was safe to turn. The only approaching vehicle that he could see was about a block away. The plaintiff hit his vehicle toward the rear, consistent with the defendant having travelled through most of the intersection before the collision. From this, he says it is clear the plaintiff did not present an immediate hazard when he entered the intersection (otherwise, she would have hit him in the front), and, consequently, the defendant was the one who had the right of way. From his perspective, the plaintiff was obliged to yield.

[193] Alternatively, the defendant argues the plaintiff is ten to 15% contributorily negligent. She was familiar with 96th Avenue and knew vehicles make left turns on to 190th Street. She approached an intersection with no traffic control at a speed too fast for the weather conditions and without paying attention to the fact that a large truck had stopped at the intersection in the left, eastbound lane. She passed by this vehicle without ensuring it was safe to do so and she entered the intersection without braking or slowing. From the defendant's perspective, the plaintiff's conduct violated both sections 144 and 158 of the *Motor Vehicle Act* (driving without due care and attention and unsafely overtaking and passing on the right).

[194] Section 174 of the *Motor Vehicle Act* stipulates that:

> 174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[195] The relevant portions of sections 144 and 158 of the *Act*, invoked by the defendant, provide:

> 144(1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions …
>
> 158(1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except
>
> (a) when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
>
> (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or …
>
> (2) Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right

(a) when the movement cannot be made safely, or

(b) by driving the vehicle off the roadway.

[196] On the evidence, I am satisfied the defendant is 100% liable for the collision.

[197] On his own testimony, the defendant turned left at an intersection facing two eastbound traffic lanes, knowing that his view of those lanes was "partially obstructed" by a five tonne truck posed to turn left. The defendant had to put his head out of the driver's window to see around the truck. Even then, he acknowledges he did not have a clear view of what lay in front of him, which logically included the potential for oncoming traffic. Seeing "as best [that] he could", he made the decision to turn without waiting for the five tonne truck to clear the intersection. More importantly, he turned despite the fact that his view of the eastbound lanes was partially obstructed in what he described as "foggy" driving conditions.

[198] I find as a fact that the defendant made a left turn without a clear view of eastbound traffic, in conditions that reasonably required a greater exercise of care on his part. He entered the intersection and crossed oncoming lanes of traffic knowing that he had an obscured view of eastbound traffic. The risk associated with this manoeuver was reasonably foreseeable; that is, one or more vehicles might come up beside the five tonne truck in the curb lane to proceed through the intersection, unaware of the defendant's presence. The defendant took a chance and proceeded to turn left on the assumption that there was only one set of oncoming headlights, and it was a block away. The assumption was erroneous.

[199] In *Pacheco (Guardian ad litem of) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (C.A.), at para. 15, the Court held that:

> … a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. Where the defendant … has totally failed to determine whether a turn can be made

> safely, the defendant should be held 100 percent at fault for a collision which occurs. [Emphasis added.]
>
> As cited in *Walker v. Leung*, 2014 BCSC 1623 at para. 45.

[200] In this case, I am satisfied that the defendant "totally failed to determine whether [his left turn could] be made safely". Had he waited for the five tonne truck to clear the intersection, he would have been able to see whether there was more than one eastbound vehicle approaching the intersection and, more importantly, how close those vehicles were.

[201] The defendant testified that he saw only one set of headlights and it was about a block away when he commenced his turn. However, I do not know the actual length of a "block" in the area of the collision. Moreover, and in any event, the defendant's observation was made within the context of an admittedly obstructed line of sight. Even if accepted at face value, it does not foreclose the possibility that there was more than one eastbound vehicle approaching the intersection, and/or they were closer to the intersection than the defendant thought. Clearly, such was the case.

[202] The plaintiff testified that the defendant turned suddenly in front of her and she had no time to avoid the collision. I accept her evidence. Her vehicle could not have been a "block away" from the intersection when the defendant began his turn. It is unlikely the collision would have occurred in those circumstances. Instead, I find as a fact that the plaintiff's vehicle was close enough to the intersection that she presented an immediate hazard and, as the servient driver, the defendant was obliged to yield and let her go through. He said he was only half way across the plaintiff's lane when hit. The defendant either grossly underestimated the distance of the oncoming headlights, or, he did not see the plaintiff's vehicle and the headlights were associated with some other driver.

[203] To mitigate his burden under s. 174 of the *Motor Vehicle Act*, the defendant bears the onus of showing that the plaintiff was not in the intersection when he

turned, or did not constitute an immediate hazard. As noted at *Nerval v. Khehra*, 2012 BCCA 436:

> [35] The effect of s. 174 is to cast the burden of proving the absence of an immediate hazard at the moment the left turn begins onto the left turning driver. This result flows inevitably from the wording of the section itself, given the nature of the absolute obligation the section creates. If a left turning driver, in the face of this statutory obligation, asserts that he or she started to turn left when it was safe to do so, then the burden of proving that fact rests with them.

[204] The defendant has failed to discharge this burden.

[205] I also reject the defendant's suggestion that the plaintiff was contributorily negligent as the dominant driver on grounds that she was travelling too fast, passed by the five tonne truck when it was unsafe to do so and entered the intersection without sufficient measures to allow for braking. On the facts of this case, neither s. 144 nor s. 178 of the *Motor Vehicle Act* is appropriately engaged.

[206] In her testimony, the plaintiff put her speed at 55 to 60 kilometres per hour. There is evidence that she told others it was higher, up to 70. The defendant asks me to infer, from this, that the plaintiff was driving too fast.

[207] The difficulty with this argument is two-fold. The plaintiff also told at least one other person, Dr. Paquette, that she was travelling 60 km/hour at the time of impact. As such, her pre-trial, upper speed estimates carry little probative value, overall. More importantly, I have no independent evidence of the actual posted limit for the relevant portion of 96th Avenue. Even if I accepted that the plaintiff was travelling 70 kilometres per hour, based on what she told others after the fact, I do not know if that exceeds the posted limit.

[208] The defendant points to the fact that his vehicle was hit in the rear as evidence of speed. However, it would be speculative to draw any such inference. This evidence is equally consistent with proceeding across the plaintiff's lane of travel without sufficient time to clear it while oncoming traffic was travelling at the posted limit.

[209] I do not find that the plaintiff was travelling too fast as she approached the intersection. She testified she was driving toward the intersection uneventfully, had no indication of someone making a left turn, and, that the defendant was suddenly in front of her. Her evidence was not undermined. I accept this version of events.

[210] I find as a fact that the suddenness of the defendant's appearance left the plaintiff with no time to avoid the collision. It is likely that her view of the defendant was at least partially blocked by the eastbound, five tonne truck. However, as noted in *Pacheco v. Robinson*, at para. 15:

> … the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care …

[211] The evidentiary foundation before me is fundamentally different than *Nerval v. Khehra*, a left-turn case relied upon by the defendant in support of contributory negligence.

[212] There, the trial judge found that the dominant driver travelled toward the intersection "at a high rate of speed": *Nerval v. Khehra*, 2011 BCSC 1245 at para. 86. He also found that as the dominant driver approached the intersection, she was aware of a white van stopped ahead of her, intending to make a left turn: at para. 86. In other words, there was evidence of advertence to risk.

[213] The dominant driver's path in *Nerval v. Khehra* consisted of a single lane and she was travelling behind the white van: at para. 92. The trial judge found that she "swerved to pass the white van on the right" while visibility was obscured: at para. 88. Within that context, she made no effort to slow down or ascertain that her movement around the van could be made safely: at para. 89.

[214] From the trial judge's perspective, "[t]he combination of speed and direction change constituted a breach of her duty of care … contributing to the collision": *Nerval v. Khehra* at para. 91. [Emphasis added.] The dominant driver's conduct was

a "substantial contributing factor" to the collision and she was found 40% liable: at para. 96.

[215] The evidence in this case does not establish a high rate of speed on the part of the plaintiff; that she adverted to a risk presented by the five tonne truck, but proceeded in any event; or that she swerved around the truck to pass it by, or otherwise changed her direction while close to the intersection and in an unsafe manner.

B. Causation

[216] The plaintiff argues that as a result of the collision, she has suffered a "constellation of physical and emotional injuries", including: a vehicular-specific (driving) phobia; mild whiplash of the neck; soft tissue injury to her left shoulder; soft tissue injury to her left hip; permanent mechanical back pain; instability to her spine; an annular tear and protrusion at the L5/S1 of her lower back, with intermittent nerve irritation impacting the right leg; and, a traumatic lesion on the lower back.

[217] She acknowledges that as at the date of trial, the injuries to her neck, left shoulder and left hip have "experienced significant resolution".

[218] However, she remains afraid of driving and continues to suffer from a soft tissue injury to her lumbar spine, including: "permanent" mechanical back pain; a lesion on the lower back; and an annular tear, which causes "L5 nerve root irritation resulting in intermittent pain with numbness and tingling into [the plaintiff's] right leg".

[219] The defendant does not dispute that the collision caused a "soft tissue injury to [the plaintiff's] neck and left shoulder, and bruising to her sternum and hips".

[220] It is also not disputed that the plaintiff has developed a driving phobia; experienced "left leg symptoms" post-collision; and, that she "suffered a soft tissue injury to her low back", which manifests itself in the form of "mechanical back pain".

[221] However, the defendant's concessions end there. He disagrees that the evidence shows nerve compression or nerve irritation affecting the plaintiff's lower extremities, or instability of her spine.

[222] Moreover, although the defendant acknowledges the presence of an annular tear at the L5/S1 area of the lower back, and a subcutaneous lesion that developed post-collision, he says the plaintiff has not proved that these conditions were caused by the collision. It is equally plausible that they existed prior to October 22, 2013.

[223] To claim damages for injuries arising out of the collision, the plaintiff must establish that "but for" the collision, she would not have sustained her injuries: *Clements v. Clements*, 2012 SCC 32. This test recognizes that compensation should only be made where a substantial connection exists between the injury and the defendant's conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.

[224] Taking the entirety of the evidence into account, including the expert opinions tendered by both parties, I am satisfied that the plaintiff has suffered the injuries put forward by her counsel, delineated in para. [216] above, with one exception.

[225] Instability of the plaintiff's spine has only been shown as a "potential", rather than an established fact. In his evidence, Dr. Street did not suggest it was anything more than this.

[226] The medical evidence does not establish a disc protrusion or herniation compressing the L5 and/or S1 nerves. However, as discussed below, I accept Dr. Street's alternative explanation of nerve irritation likely resulting from a chemical leak through the annular tear. The evidence establishes, on a balance of probabilities, that in addition to mechanical back pain, the plaintiff experiences intermittent shooting pain down her legs, predominantly the right leg, and that this pain is functionally akin to the pain associated with nerve compression.

[227] I am also satisfied that the injuries referenced in para. [216], to the extent I have found them to exist, were caused by the collision within the meaning of *Clements v. Clements*.

[228] The credibility of the plaintiff, her friends and family members was not seriously challenged. I accept their descriptions of the plaintiff's physical incapacity and pain from the collision forward, its chronic nature and the extent to which the plaintiff's combined dysfunctionality interferes with her life. Dr. Spivak, the psychiatrist, described the plaintiff as someone who tries not to let her pain get the better of her. I take this to mean that she has not given in to the pain, psychologically, and her self-reports can be taken as accurate and reliable. The evidence does not suggest malingering or symptom-embellishment. Nor is any such claim made by the defendant.

[229] Indeed, when the plaintiff testified, the manner in which she walked into the courtroom, held her body while giving evidence and her obvious discomfort at sitting for a prolonged time, was consistent with her descriptions of pain and limited mobility over time, as well as the observations made by others.

[230] All of the lay witnesses who knew and interacted with the plaintiff pre-collision described a profound difference in her physical condition after October 2013; severe restrictions on her capacity for physical movement; obvious and outward manifestations of pain with movement in respect of her lower back; and, they have testified to a worsening over time. The comparisons made between the plaintiff's physical capacity pre- and post-collision reveal a stark and enduring difference.

[231] I have no reason to disbelieve the evidence put forward by the lay and non-opinion witnesses. A consistent picture emerges from their testimony. In the first three or four months following the collision, the plaintiff was unable to do very much because of injuries sustained to her neck, shoulder, hip and lower back. She went from independent and self-sufficient, to someone requiring assistance with most day-to-day tasks. Bruising in the impacted areas of her body was visible; as well as a lump on her lower back. Dr. Mahungu saw the lump in November 2013, within a month of the collision, and palpating it caused pain. Dr. Mahungu had not seen this lump before and she cared for the plaintiff long before the collision.

[232] Linda Worsley, who I found credible and forthright, testified that in January or February 2014, the plaintiff seemed to be getting better. So much so, that she was able to move out of Ms. Worsley's home with Caleb. Then, consistent with the plaintiff's own testimony, in July or August 2014, the condition with her back began to deteriorate. Physically, the plaintiff became someone Ms. Worsley had not seen before. The determined, active young woman who was fully engaged with the people around her, including her young son, and making significant strides in life, transitioned into someone who required substantial assistance in caring for her child, maintaining a home and doing the simplest of tasks. She became a "bystander" – living on the sidelines because of her limitations. The catalyst for this change was the collision. The evidence points to nothing else.

[233] In my view, the medical evidence, from both sides, also supports a finding that the plaintiff's current physical limitations, and her pain, are all attributable to the collision.

[234] There is agreement on the existence of a driving phobia that has yet to be treated, as well as resolved injuries to the neck, left shoulder and left hip that are attributable to the collision.

[235] All four surgeons accept that as a result of the collision, the plaintiff sustained a serious soft tissue injury to her lower back that is debilitating and causing her chronic pain. Dr. Paquette, called by the defendant, describes it as "permanent mechanical low back pain". [Emphasis added.] The plaintiff has no medical history of recurring or chronic back pain predating the collision.

[236] On balance, I am satisfied the four surgeons also agree that the lesion on the lower back is likely traumatic in nature and attributable to the collision. Further, they accept that it causes pain, and, although supportive of further exploration, including possible removal, none of them can say definitively whether removal will improve the plaintiff's condition. Dr. Paquette opined that the lesion may be associated with a muscle hernia, which can be repaired. However, even this step is "unlikely to remove all of the reports of pain as some of [the plaintiff's] back pain appears to be

musculoskeletal or mechanical in nature". According to his evidence, the "prognosis for recovery for [the latter] injury is poor".

[237] This leaves Dr. Street's conclusions about nerve pain in the plaintiff's lower extremities. He stands alone on this opinion.

[238] As noted, I am satisfied that in addition to mechanical back pain and pain associated with the lesion, the plaintiff experiences intermittent shooting pain down her legs, predominantly the right leg, and that this pain is functionally akin to the pain associated with nerve compression.

[239] I appreciate the MRIs do not show nerve compression and there are only limited reports or findings of numbness or tingling in the plaintiff's legs.

[240] However, within the circumstances of this case, I accept the viability of Dr. Street's alternative diagnosis for nerve irritation; namely, that the plaintiff's right leg pain is likely a product of leakage or some other form of nerve irritation resulting from the annular tear.

[241] An annular tear was apparent on both the January 2015 and December 2017 MRIs. Moreover, it was more "pronounced" on the second of these images.

[242] Dr. Street spent considerable time with the plaintiff during his December 2017 assessment; no one is suggesting that he does not have the experience or expertise to make this form of diagnosis; and, I have no reason to question the credibility or reliability of his evidence. The evidence of the other three surgeons does not undermine the alternative diagnosis provided by him; rather, their opinions on the likelihood of injury to the plaintiff's L5/S1 nerves are focused on the existence of disc herniation and compression specific to a herniation. As I understand Dr. Street's evidence, the absence of disc herniation and compression does not preclude the possibility of other forms of nerve irritation.

[243] Relying on the evidence of Dr. Paquette, the defendant argues that if the plaintiff is experiencing nerve pain in her right leg, one would expect the pain to

occur 24 hours per day, rather than intermittently. As such, the Court should be cautious about making any such finding.

[244] However, Dr. Paquette did not say that nerve pain can only ever manifest itself as always present. In cross-examination, he testified that a nerve injury *can* produce pain that is present "irregardless of movement, body position or the time of day"; not that it invariably will.

[245] I am not troubled by the fact that Dr. Street initially thought a herniation at the L5/S1 was causing the plaintiff's leg pain, but subsequently moved to the possibility of chemical leakage after learning the results of the December 2017 MRI. He gathered new information and understandably, within this context, he considered alternative explanations in light of the mobility and pain-related observations he made during his in-person assessment, which he found "very, very convincing".

[246] Dr. Masri (who focuses predominantly on knee and hip issues), saw the plaintiff in July 2014, more than three years before Dr. Street. At the time he authored his report, Dr. Paquette, the second of the defendant's experts, had not seen the image from the December 2017 MRI. Nor did he have access to the functional capacity assessments completed by Mr. Worthington-White.

[247] In my view, Dr. Street's assessment and consideration of the plaintiff's physical condition was more comprehensive than both of the defendant's surgical experts, and I have no principled basis on which to reject his diagnosis of nerve irritation in the lower extremities.

[248] Following his July 2014 assessment, Dr. Masri opined that if the plaintiff underwent "therapy for her back", a rehabilitation program to increase strength and flexibility, and engaged in regular exercise, "the prognosis is excellent … and she will be able to return to work in an administrative capacity and … have good resolution of her pain". He suggested that 12 to 18 months of therapy was required.

[249] The evidence shows that attempts at physiotherapy post-August 2014 aggravated the plaintiff's pain. Both the plaintiff and Ryan Webster testified to this

fact. Linda Worsley confirmed that exercise, such as yoga, aggravated the plaintiff's pain. The functional capacity testing done by Mr. Worthington-White in September 2016 and December 2017 aggravated her pain. At the first assessment, she did not "present as capable of durable full-time work". Her capacity for part-time work was also "compromised". In December 2017, she was in essentially the same condition.

[250] Samantha Gallagher, who conducted a vocational assessment in February 2018, said the plaintiff presented with "significant pain behaviours and emotional symptoms" at the assessment. She concluded that the plaintiff "is likely not ready to return to paid employment".

[251] The persons who interact with the plaintiff on a daily basis have observed first-hand the adverse effect of engaging in physical activity. The evidence establishes that the plaintiff's physical condition has deteriorated since Dr. Masri's July 2014 assessment. I find that the plaintiff has not had the capacity to engage in the treatment recommended by him. Nor is she positioned to.

[252] Dr. Gul opined that when back pain exists beyond 18 months from the triggering injury, the situation is unlikely to improve further. In June 2016, more than two years post-collision, he concluded that the plaintiff's lower back pain is likely to persist as "chronic pain". Moreover, the more strenuous her physical activities, the more likely she will experience "problematic flare-ups of lumbar spine lower back pain".

[253] Dr. Paquette accepts that the mechanical back pain is "permanent". Dr. Street is of the view that unless the plaintiff's symptoms materially improve (lower back pain, pain associated with the lesion and nerve irritation to the L5/S1 area), "she is likely to remain at her current level of disability and likely not to return to gainful employment in the foreseeable future". I accept this opinion and have no confidence, on the evidence, that the degree of improvement necessary to enable the plaintiff to return to work, even part time, is realistically achievable.

[254] I accept that the plaintiff is motivated to improve and surrounded by a support network that is prepared to assist her in any way they can. However, these aspects of her life have been in existence since the collision (4.5 years ago), and she has not improved. To the contrary, the evidence shows that her condition has deteriorated.

C. Damages

[255] The plaintiff claims non-pecuniary damages, past and future loss of earning capacity, loss of CPP entitlement, cost of future care, loss of homemaking capacity and special damages.

[256] The parties have agreed that special damages amount to $5,610.74.

Non-pecuniary Damages

[257] The plaintiff describes her injuries as "catastrophic". In light of her young age and the debilitating effects, she seeks non-pecuniary damages of $250,000.

[258] The defendant says non-pecuniary damages should be set at $140,000.

[259] In her written submissions, the plaintiff summarizes the effects of her injuries:

> She is unable to lie flat, presents with hunched, stooped posture and walks with a limp, which is pronounced at times. Her constellation of injuries limit her activity which has resulted in significant and unwanted weight gain. Ms. Broad has been unable to participate in her children's lives the way she would wish, and has limited intimacy with her partner, Ryan Webster. The Plaintiff continues to feel anxiety in a vehicle and avoids driving, when possible. She is precluded form doing most of the [recreational] activities she previously enjoyed, and spends her time on "the sidelines". The injuries necessitate the use of analgesics and over the last few years have required various trips to the emergency room …
>
> In terms of the prognosis of the [lesion on her lower back], there is no definitive course of treatment. No medical professional has yet to opine that it would be ultimately beneficial to the Plaintiff to have this surgically removed. In fact, the evidence to date from 3 spinal surgeons in this case, is that she is not a surgical candidate in their respective clinical practices. The opinions are united in that removal of this lump may not have any impact on Ms. Broad's pain presentation, and as with any surgery, there is a risk it could increase her symptoms.

[260] While acknowledging the seriousness of the plaintiff's injuries, the defendant submits that the situation is not as dire as suggested.

[261] In making this submission, the defendant points to the surveillance footage taken on May 31 and June 1, 2014, showing the plaintiff actively engaged in physical activity at a beach and attendance at one of her son's baseball games. Since the collision, the plaintiff has attended BC Lions games; she can socialize with Linda Worsley, friends and her sister, including the occasional outing; she can perform light housekeeping tasks; she is able to care for her children, drive Caleb to school in the mornings and is described by those close to her as a terrific mother; she has a strong, supportive network; and, as demonstrated through the Instagram and Facebook photographs, the plaintiff has a relationship with Ryan Webster, friends and family that enables a "happy life", including travelling to the United States for celebratory holidays. Modifications are required to accommodate the plaintiff's limitations; however, she is not completely disabled.

[262] The defendant also suggests that "there is room for improvement in the Plaintiff's condition". He says the plaintiff's symptoms have not been adequately treated and, although it is not alleged that the plaintiff has failed to mitigate damages, he says the physiotherapy, work hardening and active exercise programs recommended since 2014, but not accessed by her, represent "missed opportunities" that, if pursued, carry a realistic potential for better pain management and movement tolerance. The defendant argues that on the whole, the expert witnesses support this approach.

[263] The defendant suggests that surgical removal of the subcutaneous mass on the plaintiff's lower back has the potential to reduce the plaintiff's pain and, although there are no guarantees, this avenue of relief should be pursued. Again, he argues the expert opinion evidence does not foreclose this possibility.

[264] Finally, relying on Dr. Spivak's evidence, the defendant argues that the plaintiff's driving phobia is treatable through psychotherapy.

[265] The analytic framework for assessing non-pecuniary damages was addressed by Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34:

> [45] … I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal,* [[1981] 2 S.C.R. 629], at 637 is a helpful reminder:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
>
> [Emphasis added.]
>
> [46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris* (2004), 237 D.L.R. (4th) 193 (B.C.C.A.)] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[266] Both sides put a number of cases before me on *quantum*. The amount of the awards granted in those cases, set out below, have been adjusted for inflation.

[267] The plaintiff's cases include: *Ali v. Padam*, 2017 BCSC 1849 ($184,000); *Delli Santi v. PNE*, 2000 BCSC 716 ($212,000); *Cumpf v. Barbuta*, 2014 BCSC 1898 ($160,000); *Zwinge v. Neylan*, 2017 BCSC 1861 ($153,000); *Sebaa v. Ricci*, 2015 BCSC 1492 ($190,000); *Kallstrom v. Yip*, 2016 BCSC 829 ($180,000); *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 ($187,000); *Kim v. Lin*, 2016 BCSC 2405 ($182,000); *Felix v. Hearne*, 2011 BCSC 1236 ($223,000); *Shongu v. Jing*, 2016 BCSC 901 ($208,000); and *Turner v. Dionne*, 2017 BCSC 1905 ($204,000).

[268] The defendant's cases include: *Fox v. Danis*, 2005 BCSC 102 ($125,000), aff'd 2006 BCCA 324; *Hosseinzadeh v. Leung*, 2014 BCSC 2260 ($133,000); *Clayton v. Barefoot*, 2018 BCSC 239 ($130,000); *McLeod v. Goodman*, 2014 BCSC 839 ($138,000); *Bellaisac v. Mara*, 2015 BCSC 1247 ($149,000); *Redmond v. Krider*, 2015 BCSC 178 ($158,000); and *Mullens v. Toor*, 2016 BCSC 1645 ($145,000).

[269] The plaintiff was only 23 at the time of the collision and since then, she has suffered considerable pain and emotional distress because of her injuries, with a significant reduction in functional capacity.

[270] There have been "good days" and even a period of five months, or so, during which the plaintiff seemed to be doing better (February to July 2014). The video surveillance shows that such was the case.

[271] However, it is also clear that the plaintiff sustained multiple soft tissue injuries and although the injuries to her neck, shoulder and hip have resolved, the plaintiff continues to struggle with a vehicular-specific phobia, and significant pain and disability resulting from injury to her lower back.

[272] I find that the soft tissue injury to the lower back was severe, leading to multiple and complex issues that have worsened in their cumulative impact since July 2014, including: mechanical low back pain; a painful lesion on her lower back that has grown; and, intermittent nerve irritation that causes pain to "shoot" down her legs, particularly the right leg.

[273] I also find that the plaintiff is likely to be impacted by these conditions, in one form or another, for the entirety of her life. The overall prognosis for improvement is poor. The plaintiff presents as an unusual case, with multiple issues simultaneously affecting her lower back. The lesion, in particular, appears to be a rarity.

[274] The evidence establishes that the plaintiff's life has been profoundly impacted by her lower back injury. The video footage from May and June 2014, the Facebook photographs and Instagram postings do not persuade me to the contrary. They represent moments in time. The video footage predates the time at which the lower back injury took a turn for the worse.

[275] The evidence, considered in its entirety, proves the existence of chronic pain and limitations to physical capacity that adversely impact the plaintiff's emotional health; relationships with friends and family; her ability to physically engage with her children; intimacy with her partner; an incapacity to complete everyday tasks, including maintaining a household and meeting her children's needs; and, the plaintiff's physical struggles keep her out of the external work force and unable to achieve the independence and self-sufficiency goals that she set for herself. She now spends a large portion of her life in pain and on the "sidelines", unable to avail herself of opportunity for active engagement and advancement. She is only 28.

[276] In this sense, I agree with the plaintiff that her situation is analogous to (although not as severe as), *Turner v. Dionne*.

[277] In that case, the plaintiff was awarded the equivalent of $204,000 in non-pecuniary damages. She was 19 at the time of the collision and, as a result of her injuries, she was left with chronic back pain and severe psychological/psychiatric problems.

[278] Ms. Turner sustained soft tissue injuries to her neck and back, and compression fractures of two vertebrae. She also suffered a mild traumatic brain injury or concussion, bruising to her head, extensive facial bruising and injuries to her chest and other parts of her body, including her shoulder and neck area.

Although the fractures healed, Ms. Turner was left with debilitating, chronic pain in her lower back. Its impact on her ability to successfully complete the education and training necessary to become a registered nurse (her "dream"), fuelled depression and severe anxiety. Ultimately, she developed significant psychiatric symptoms, including an adjustment disorder with depressed mood, a generalized anxiety disorder and a panic disorder.

[279] Ms. Turner also experienced cognitive difficulties, with negative impact to her memory, focus and concentration. She became dependent on oxycodone for pain relief. Her injuries, and their cumulative effect, forced her to withdraw from a nursing program. By the time of trial, her situation had worsened. Attempts at employment were unsuccessful. She was socially isolated. Her anxiety and depression had increased in its severity. Her "days and life are seriously lacking in purpose and direction": *Turner v. Dionne* at para. 303.

[280] In the case before me, I do not find the plaintiff's injuries, or the manner in which they have impacted her life, to be quite as severe as Ms. Turner's. I do not have evidence of severe psychiatric symptoms fuelled by her physical condition, social isolation or opiate dependency.

[281] The defendant argues that this case is most analogous to *Clayton v. Barefoot*, in which $130,000 was awarded for non-pecuniary damages. I disagree.

[282] The injuries sustained in *Clayton v. Barefoot* were not as multi-faceted or severe as the ones in the case before me. The plaintiff in that case struggled with chronic low back pain with "flare-ups of more intense pain", but had seen an improvement in her standing and sitting tolerance since the collision: at paras. 63 and 75. Although she can no longer pursue labouring positions, which she enjoyed, she was employable and working at the time of trial.

[283] Finally, the plaintiff in *Clayton v. Barefoot* did not have children. In my view, this is an important distinguishing feature. The evidence before me establishes that Ms. Broad's ability to actively engage with her children, in a manner consistent with

the parenting style she earlier employed with Caleb, is no longer possible. She has become an observer and has to stand by while her partner, sister and others engage with her children. In my view, this is not insignificant.

[284] Recognizing that no two cases are ever exactly alike, after reviewing the authorities cited by the parties and applying the factors from *Stapley v. Hejslet*, it is my view that non-pecuniary damages within the context of the plaintiff's individual circumstances are appropriately set at $185,000.

Loss of Past Earning Capacity

[285] The parties are not far apart on past loss of earning capacity. The plaintiff seeks $147,580.60 for lost earnings between the date of the collision and first day of trial. Using a calculation provided by Curtis Peever as a starting point, the requested amount takes into account one year of maternity leave between April 2016 and April 2017, as well as a cumulative four weeks of medical leave that would have occurred because of surgeries undergone between the collision and the first day of trial.

[286] The defendant argues that past wage loss is more appropriately assessed at $135,000 to account for a "small contingency" that the plaintiff would have earned less than what was estimated by Curtis Peever, or, that she would have "work[ed] reduced hours for some part of the 4.5 years to the day of trial".

[287] *Grewal v. Naumann*, 2017 BCCA 158 summarizes the principles applicable to an assessment of past and future earning capacity:

> [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>
> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical

> events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21. [Emphasis added].

[288] The plaintiff was working at Starline Windows at the time of the collision. The evidence establishes, and I find as a fact, that prior to the collision, she was eager to work; committed to economic self-sufficiency; determined to make life choices different from her parents; she wanted to role model those choices for her son; the plaintiff enjoyed her work at Starline, as well as the environment; and, there were no issues with her performance. I am satisfied that but for injuries sustained in the collision, the plaintiff likely would have worked continuously as a "Receptionist/Office Administrator" with Starline until the first day of trial. At the very least, there is a real and substantial possibility that such would have been the case. The only times away from work would likely have consisted of maternity leave, following the birth of Layla in April 2016, and four weeks' leave necessitated by surgeries relating to endometriosis and tonsillitis.

[289] A representative from Starline testified that the person currently working in the "Receptionist/Office Administrator" position is paid $45,000 per annum. This is not inconsistent with the figure used by Mr. Peever to estimate the plaintiff's employment income for 2018 had she remained working ($44,669). The defendant's economist, Mr. Hildebrand, took no issue with Mr. Peever's calculations or methodology in assessing past wage loss.

[290] I consider it fair and reasonable to award the plaintiff the amount she seeks for loss of earning capacity between the collision and the first day of trial: $147,581.

Loss of Future Earning Capacity

[291] The plaintiff says she is "totally and completely disabled" from gainful employment. She argues that but for the collision, she would have continued to work full time in the role of "Receptionist/Office Administrator" (or its equivalent) until age 70.

[292] The plaintiff acknowledges she would have faced average health risks over her employment, but says she otherwise would have maintained a full-time position. She would not have voluntarily withdrawn from the workforce and, in fact, because of her determination to be self-sufficient, it is possible she would have achieved job advancement, moving to a higher paying position. More than one witness described the plaintiff as an extraordinary young woman who does not allow herself to be defined by her difficult childhood. Pre-collision, she demonstrated resiliency and the capacity to overcome. Had she not been injured, these characteristics would have ensured a long-term attachment to the workforce and positive career growth.

[293] The plaintiff seeks $1.5 million for loss of future earning capacity (consisting of projected earnings and benefits, other than CPP). This amount represents about 8.5% less than the total loss estimated by Mr. Peever under the first of his three income streams; that is, full-time, full-year earnings in the National Occupation Classification of "Administrative officer" until age 70, with no negative labour market contingencies (valued at $1,619,815). The plaintiff says an 8.5% deduction adequately accounts for health risks that she likely would have faced over her work history.

[294] The defendant disagrees that the plaintiff will not be gainfully employed. In his view, with "further treatment and support, as well as the tools to help [the plaintiff] manage her pain", she can improve her functioning and tolerance and return to work, albeit at a "modest level".

[295] Among other things, the defendant points to Dr. Paquette's opinion that long term, the plaintiff is "likely capable of some form of part-time work"; Mr. Worthington-White's view that "once she is better able to manage her emotional and reported pain symptoms", the plaintiff "would be able to begin a supervised gradual return to work to a physically suitable position"; and Samantha Gallagher's suggestion that "several steps" are available to "improve the likelihood of a successful return to work in the future", including volunteer work, counselling and working with a job placement provider.

[296] The defendant also argues that even if the plaintiff cannot return to work, it is unlikely she would have remained employed full time until age 70 and the loss of future earning capacity must reflect this reality. Her employment history does not include a strong attachment to the workforce; she is a devoted parent who wants to be actively involved in the lives of her children and likely would have sought opportunity to do so by working part time; Linda Worsley is her role model and she stopped running her own business in her 50s; and, the NOC for which the defendant says the plaintiff is factually best suited, "General office support worker", reveals that on average, only 42% of persons in this category work full time. From the defendant's perspective, the plaintiff's voluntary withdrawal from the workforce before age 70 was a realistic potential.

[297] In light of these considerations, the defendant says the plaintiff's loss of future earning capacity is more appropriately set at $819,500 (projected earnings and benefits, other than CPP). This amount represents an approximate 17% deduction from the total of Mr. Peever's second estimated income stream, which the defendant's economist, Mr. Hildebrand, valued at $907,000. The second income stream reflects full-time, full-year earnings reduced for the impacts of average labour market contingencies, including "risk" contingencies and "choice" contingencies (voluntary withdrawal to work part time). The 17% deduction represents the salary differentiation between an "Administrative officer" and "General office support worker", as defined by the NOC system.

[298] I have found as a fact that in light of the plaintiff's current physical condition, multiple lower back/lower extremity symptoms, as well as her overall poor prognosis, it is not realistic to project a return to work, even part time. The opinions offered in support of a return are contingent on material improvement to the plaintiff's mobility, activity tolerance and pain management. Based on the evidence before me, I have no confidence that the plaintiff's condition, even with removal of the lump or lesion on her lower back, will improve to the degree necessary to render her employable. Two attempts at starting a home-based business, making items for sale, failed because of her physical limitations even though she was presumably free to do this

at her own pace, on "good days" and in a manner that best accommodated her physical needs.

[299] I furthermore accept, based on her pre-collision circumstances, that had the injuries not occurred, the plaintiff would have formed a strong attachment to the workforce and likely worked full time until age 70. In her written submissions, plaintiff's counsel identified various factors in support of this determination, most of which I accept, including: a demonstrated determination and drive in the face of hardship, including completing high school and upgrading her office skills; the plaintiff was already working by the age of 14; she returned to the workforce full time after the birth of Caleb; she does not plan on having more children; and, the plaintiff has asserted a desire to work, role model this choice for her children and maintain independence through economic self-sufficiency and attachment outside of the home. The credibility of this assertion was not undermined at trial.

[300] In assessing loss of future earning capacity, I am satisfied it is appropriate to complete this assessment with reference to the third income stream identified by Mr. Peever; that is, full-time, full-year earnings reduced for the impacts of involuntary, "risk-only" labour market contingencies. Mr. Peever calculated the plaintiff's cumulative probable earnings under this income stream as $1,420,752. This number represents "probable earnings for the hypothetical BC female with [the plaintiff's] assumed occupational and educational characteristics, after probabilistic consideration of "risk-only" contingencies".

[301] One of the involuntary contingencies accounted for in the "risk-only" stream is health risks, which the plaintiff acknowledges is a legitimate factor for consideration in her case. Indeed, evidence of the plaintiff's medical conditions and/or illnesses unrelated to the collision, requiring both hospitalization and surgical intervention, bear this out. In 2012, she had to leave her employment with Time Limousine for medical reasons. She also had two surgeries post-collision that were unrelated to injuries sustained in the collision. There was evidence of other issues requiring hospital attendance and intervention.

[302] Mr. Peever's calculation under the "risk-only" stream estimates total probable earnings that are 12.3% lower than his first stream, which carries no negative labour market contingencies. The plaintiff seeks a *quantum* on future loss that reflects less of a difference between the two streams. Recognizing I have the discretion to make such an award, and that the economists' calculations are not determinative, I am not persuaded a principled basis has been shown in the circumstances of this case to depart from the calculations brought to bear by Mr. Peever.

[303] In my view, maintaining the 12.3% differentiation is fair and reasonable, particularly in light of the plaintiff's health history. Health issues forced her to withdraw from the workforce at least once pre-collision and had she been working between October 22, 2013 and the first day of trial, health issues would have necessitated two leaves for surgical reasons. It is not speculative to hold there would likely be other occasions during her employment history where her health impacted her ability to work.

[304] I also agree with the defendant that for the purposes of assessing loss of future earning capacity, the "Administrative officer" classification is not the appropriate NOC category to apply to the analysis. Mr. Peever testified that he used this classification because the term "Office Administrator" was in the plaintiff's position title at Starline Windows. He did not take into account the plaintiff's actual job responsibilities at Starline, which do not accord with the NOC description of an "Administrative officer":

> Administrative officers oversee and implement administrative procedures, establish work priorities, conduct analyses of administrative operations and co-ordinate acquisition of administrative services such as office space, supplies and security services. They are employed throughout the public and private sectors. Administrative officers who are supervisors are included in this group.

[305] Mr. Peever testified that 70% of persons who work within the "Administrative officer" category have university degrees. The plaintiff does not. Ms. Lee, from Starline Windows, testified that functionally, the company's "Office Administrator"

position is a receptionist position. It does not involve any form of supervisory work. The plaintiff's primary tasks were to greet customers and answer the phone.

[306] I find that the plaintiff's role at Starline Windows, as described by both herself and Ms. Lee, is more closely aligned to the NOC category of "General office support worker":

> General office support workers prepare correspondence, reports, statements and other material, operate office equipment, answer telephones, verify, record and process forms and documents such as contracts and requisitions and perform general clerical duties according to established procedures. They are employed in offices throughout the public and private sectors.

[307] More importantly, with specific reference to the evidence of Samantha Gallagher, I find that this is the occupation category in which the plaintiff's skills are factually best suited for long-term engagement with, and attachment to, the work force. To calculate her loss of future earning capacity based on achieving and maintaining long-term status as an "Administrative officer" would, in my view, be speculative.

[308] I note, from Ms. Gallagher's report, that the plaintiff scored "below average verbal ability and numerical ability" on the occupational aptitude testing. Moreover, her "general learning ability score" was in the below average range. On a test of academic achievement, the plaintiff's "sight reading, spelling and math computation are in the low average range. Her sentence comprehension is average. [Her] scores are at the middle school level and are weaker than would be anticipated for her level of formal education". Her reading comprehension is at the low end of the average range and approximately a grade 8 level. The plaintiff's "overall occupational aptitude profile is weak with the majority of her scores falling in the below average and low average range", and she is considered best capable of short, practically based on-the-job training.

[309] A close examination of the NOC definition of "Administrative officer" indicates that the "main duties" of this role typically includes overseeing office procedures; supervision and delegation; coordinating office services; overseeing administrative

operations in relation to budgeting, project planning and management processes; or preparing operating budgets. For this reason, a university degree or college diploma is often required, as well as experience in senior clerical or executive secretarial positions, and project management.

[310] In *Perren v. Lalari*, 2010 BCCA 140, at paras. 30–32, Garson J.A. summarized the principles governing the assessment of loss of future earning capacity:

> [30] … These principles are:
>
> 1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation …, and
>
> 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made …
>
> [32] A plaintiff must always prove … that there is a real and substantial possibility of a future event leading to an income loss …
>
> [Emphasis in the original. Internal references omitted.]

[311] Claims for loss of future earning capacity must be realistic: *Graydon v. Harris*, 2014 BCCA 412. Moreover, any award made on this issue must be fair and reasonable: *Rosvold v. Dunlop*, 2001 BCCA 1.

[312] Respectfully, it is my view that the evidence does not establish a real and substantial possibility that but for her injuries, the plaintiff would have worked until age 70 in the capacity of an "Administrative officer", as defined by NOC. On the evidence, the job responsibilities and required competencies go well beyond the plaintiff's experience, demonstrated skill-set and, in my view, her occupational learning capacity as assessed by Ms. Gallagher. The evidence does establish a real and substantial possibility that the plaintiff would have remained employed full time until age 70 in the area of "General office support worker".

[313] Curtis Peever opined that the average salary in the "Administrative officer" category until age 70 would be $54,083. Samantha Gallagher's evidence was that the highest median wage most suitable for the plaintiff is about $22 per hour (or

$45,760 per annum). Recognizing this is an estimate based on current-day wages only, it nonetheless more closely aligns with the average salary in the "General office support worker" classification as determined by Statistics Canada data and I find it informative.

[314] I appreciate the descriptions of the plaintiff as an extraordinary young woman, with drive and determination. It is with these characteristics in mind, at least in part, that I considered it appropriate to assess her future loss based on the "risk-only" income stream, rather than "risk and choice". As noted by Mr. Hildebrand, the "risk-only" stream assumes a labour market attachment that is "significantly" stronger than for other similarly educated females. I have given the plaintiff the benefit of the doubt on this issue, notwithstanding her relatively short employment history prior to the collision. The approach I have taken also adequately compensates, in my view, for any otherwise unfair differentiation that could arise from calculations based on gender-specific statistics. See *Clayton v. Barefoot* at para. 128.

[315] As such, the plaintiff's loss of future earning capacity is appropriately set at $1,179,224 ($1,420,752 ["risk only" stream] - $241,528 [17% reduction based on the more appropriate occupational category]). According to the evidence of Curtis Peever, 10% of this amount should be added to any award to account for lost benefits (an additional $117,922), bringing the cumulative loss of future earning capacity to $1,297,146.

CPP Entitlement

[316] The parties agree that the plaintiff should receive an amount for loss of CPP benefits she would have been entitled to until the age of 70. The plaintiff seeks $26,728 based on a calculation provided by Curtis Peever (and not disputed by Mr. Hildebrand). The defendant argues that $24,585 is appropriate, applying a 3% calculation to the total loss of earning capacity (probable earnings plus benefits), as calculated by the defendant.

[317] In light of my findings on loss of earning capacity, I am satisfied it is appropriate to award the plaintiff the amount she seeks: $26,728.

Cost of Future Care

[318] As noted in *Tsalamandris v. McLeod*, 2012 BCCA 239:

> [62] The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):
>
> > 3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.
>
> [63] McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:
>
> > The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

[319] Relying on the recommendations put forward by Mr. Worthington-White (Appendix A), costed by Curtis Peever, the plaintiff seeks an award of $224,000 for cost of future care. She accepts that her needs do not include coverage for childcare (Linda Worsley will assist without compensation), and, given her lack of employability, no coverage is required for equipment or other items specific to a return to work. Accordingly, the plaintiff has deducted these expenses from Mr. Peever's calculation. She has added the cost of psychotherapy sessions as recommended by Dr. Spivak, which were not included in Appendix A. He recommended 10 to 20 sessions, at a range of $100 to $250 per session.

[320] The defendant does not dispute the plaintiff is entitled to a reasonable amount for future care. Nor does he take issue with the range of costs put forward by the plaintiff.

[321] However, the defendant disagrees with coverage for several of the items sought, arguing they are either unnecessary or that the cost should be reduced. This includes: cost of a gym pass that extends beyond two years; homemaking assistance for life; coverage for seasonal household cleaning, yard maintenance and home upkeep; ergonomic equipment for use at home; and prescription medication.

Once these items are either removed from Appendix A, or reduced in *quantum*, the defendant argues that the cost of future care is appropriately assessed at $175,000.

[322] Upon reviewing Appendix A, in light of the medical evidence, the plaintiff's overall prognosis and the evidence surrounding her pre-collision lifestyle, I am satisfied that the plaintiff's future care needs require an award of $199,585. This represents the mid-point between a low of $177,505 and a high of $221,665.

[323] In reaching this determination, I have removed the following items from Mr. Worthington-White's recommendations: cost of a gym pass beyond two years (Item A6); vocational consulting (A8); yard work/maintenance (B3); home upkeep/maintenance (B4); childcare assistance (B5); cordless headset (C5); steno chair (C6); and functional/work capacity assessment (E). I have added in the cost of psychotherapy sessions as recommended by Dr. Spivak.

[324] Mr. Worthington-White opined that two years' access to a gym should provide sufficient time for the plaintiff to improve her general conditioning and learn exercises appropriate to her capacity and needs. She demonstrated, pre-collision, that she has the commitment necessary to remain active without a gym facility. She will also receive monies for home exercise equipment as part of her future care award to assist. On the evidence, I find that funding for gym access beyond two years has not been shown medically necessary.

[325] The cost of vocational consulting is denied, as this item has already been addressed. I do not consider funding for yard work/maintenance and home upkeep/maintenance as medically necessary. In his report, Mr. Worthington-White indicates that the plaintiff currently has no yard maintenance or gardening responsibilities. However, he says this could change in the future, if the plaintiff lives in a residence that requires "regular yardwork responsibilities". It may be, within that context, that she "shares such demands with her partner". I find this possibility speculative and note that as part of the plaintiff's future care award, she will receive monies for both homemaking/household cleaning and seasonal household upkeep (both of which, in my view, have been justified).

[326] I am of the same view with respect to suggested funding for home upkeep/maintenance tasks, which Mr. Worthington-White says includes things such as "painting of the inside of the home, small renovation type work, redecorating, etc.". Pre-collision, this did not play a part of the plaintiff's lifestyle and neither she, nor anyone who interacts with her on a daily basis, suggested that it is something she would likely undertake.

[327] The plaintiff concedes she does not require funding for childcare assistance. She also accepts that because of her unemployability, she does not require a steno chair or another functional/work capacity assessment. Accordingly, these items are removed from Appendix A. I also find that a cordless headset has not been medically justified. Mr. Worthington-White opines that this is necessary to "perform long periods of phone work". There is no evidentiary basis from which to conclude that this type of work will likely form part of the plaintiff's future.

Loss of Homemaking Capacity

[328] The plaintiff seeks $35,000 for loss of homemaking capacity.

[329] The defendant does not oppose compensation under this head of damages, but submits that the amount should be limited to $10,000 in light of the fact that the plaintiff has not been rendered completely unable to maintain a home, and monies for cleaning and maintaining her home are included under the cost of future care.

[330] I am satisfied that in the circumstances of this case, $24,000 is appropriate for loss of homemaking capacity.

[331] There is ample evidence of Ryan Webster, Linda Worsley, Tammy Broad and the plaintiff's son, Caleb, having to do things around the home post-collision to fill the gap left by the plaintiff's inability to complete household tasks. This assistance is required on a daily basis, even though a cleaning service attends for three hours each week. The assistance is wide-ranging, including: cooking; cleaning; caring for Layla; and carrying groceries from the vehicle into the home. Work previously done by the plaintiff, and its value, has been replaced by the efforts of others.

[332] I find as a fact that the plaintiff's partner, family and friends will likely have to continue to fill this gap into the future, particularly while Caleb and Layla are still at home. The need for them to do so is directly attributable to the plaintiff's physical limitations. In my view, an award of $1,500 per year for the equivalent of 16 years (when Layla turns 18) constitutes fair and reasonable compensation under this head of damages.

[333] Compensation for loss of homemaking capacity and cost of future care are legally distinct: *O'Connell v. Yung*, 2012 BCCA 57 at paras. 59–68. However, to avoid double-recovery, my assessment of *quantum* on this item has been informed by the fact that the plaintiff is able to do some work in the home; her award for cost of future care includes the provision of housekeeping services, including seasonal; and, the $185,000 awarded in non-pecuniary damages, at least in part, takes into account and gives effect to the adverse impact on homemaking capacity.

V. DISPOSITION

[334] For the reasons provided, I make the following orders:

a) The defendant is 100% liable for the collision on October 22, 2013;

b) As a result of injuries sustained in the collision, the plaintiff is awarded the following damages:

Non-pecuniary damages	$	185,000.00
Past wage loss	$	147,581.00
Loss of future earning capacity	$	1,297,146.00
Loss of CPP entitlement	$	26,728.00
Cost of future care	$	199,585.00
Loss of homemaking capacity	$	24,000.00
Special damages	$	5,610.00
Total Damages	**$**	**1,885,650.00**

[335] At trial, the parties agreed that the following issues should await release of my *Reasons for Judgment*: a) tax gross up; b) management fees; c) a subrogated claim under s. 83 of the *Motor Vehicle Act*; d) costs; and e) court-ordered interest.

[336] In the absence of the parties reaching agreement on these issues, for inclusion in a final order by consent, they are at liberty to appear back before me to address them.

"DeWitt-Van Oosten J."

APPENDIX A – SUMMARY OF COSTS

ITEM	COST	REPLACEMENT TIME
A) TREATMENT/ INTERVENTIONS		
1. Pain Management/ Intervention/Medication Management Cost (Assessment) Cost (Program)	 $2,500 $11,000 - $13,000	 One-time expense Onetime expense
2. Psychological Intervention	$2,400 - $4,800	One Replacement
3. Psychiatric & Medical Follow-up	MSP Funded	As medically recommended and deemed MVA related.
4. Occupational Therapy 12 – 15 sessions Contingency of OT services (6-8 hours)	 $1,320 - $1,650 plus approximately $660 - $825 for travel and expenses $660 - $880 plus $330 - $440	 One-time Expense 2 – 3 Replacements
5. Treatment for Symptom Management	$720 - $1,200	6 – 7 years. If ongoing treatment is medically recommended $480 - $1,000 is recommended ongoing.
6. Fitness Pass/Exercise Program	$450 - $650 (they commonly reduced by half at the age of 65)	2 – 3 years then 50% funding ongoing.
7. Kinesiology Services	$1,080 - $1,680 plus travel and mileage ($324 - $504) plus GST	One-time expense
8. Vocational Consulting • Assessment • Vocational Consulting	 $3,500 $2,200	 One-time expense. One-time expense.

B) Services		
1. Homemaking/Cleaning Current Living Scenario (3 hours weekly)	 $4,212 - $4,680 per year plus GST	 Yearly, in her current living scenario. Reducing to 2 hours weekly every week once her children are finish school ($2,808 - $3,120) and then reducing by 50% at the age of 80
2. Seasonal Household Maintenance	$423 - $480 plus GST	Yearly, reducing by 50% at the age of 75 and ending at 80
3. Yardwork/Maintenance	No funding in currently living scenario, but if in their own home, $560/year	Yearly, until the age of 75

4. Home Upkeep/Maintenance	No current funding is required. If living in their own home and Ms. Broad assists with such activity, $400/year plus GST	Yearly, reducing by 50% at the age of 75 and ending at 80
5. Childcare assistance	$4,320 - $4,896	4 years until both children are in full-time school

C) Equipment		
1. Home exercise equipment	$100 plus applicable taxes	7 years
2. Ergonomic Equipment	$200 plus applicable taxes	5 years
3. Ergonomic Chair	$800 - $1,000 plus applicable taxes	8 – 10 years
4. Adjustable Work Surface	$800 - $1,500	2 replacements if not provided by employer
5. Cordless Headset	$200 - $500 plus applicable taxes	5 – 8 years
6. Steno chair	$195 plus applicable taxes	5 – 7 years
7. Sit/Stand Stool	$200 - $300	8 – 10 years
D) Supplies		
1. Prescription Medications *	439.86 - $633.31	Yearly, as medically prescribed and deemed accident related
2. Non Prescription Medications	$500	One-time contingency

* Ms. Broad also occasionally uses morphine, actual cost would be dependent on usage as well as medical prescribed dosages and recommendations. I defer costs in this area to the medical experts.

E) Future Considerations		
No further recommendations at this time. If further improvements are obtained then re-assessment of her functional status would likely be beneficial. The expense of a functional/work capacity re-evaluation would be approximately $3,000 - $3,500.		