IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ross v. Dupuis,*
2017 BCSC 2159

Date: 20171127
Docket: M17337
Registry: Nelson

2017 BCSC 2159 (CanLII)

Between:

Kailee Ross

Plaintiff

And:

Daniel Dupuis

Defendant

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	M.A. Huot J. Mackoff M. Tucker, Articled Student
Counsel for the Defendant:	D. Graves
Place and Dates of Trial:	Nelson, B.C. October 31 and November 1–3, 6–9, 2017
Place and Date of Judgment:	Nelson, B.C. November 27, 2017

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INTRODUCTION

[1] On July 31, 2012, the plaintiff was the driver of a 1997 Ford Expedition travelling northbound on Highway 22 near Castlegar, British Columbia. The plaintiff's then two-year old son was in a car seat in the middle rear seat of the vehicle. The defendant was driving in the opposite direction at high speed in the plaintiff's lane passing other vehicles. The plaintiff was forced to brake sharply and swerve into a ditch in order to avoid a head-on collision (the "MVA").

[2] The defendant has admitted liability.

[3] The issue for determination is the quantum of damages to which the plaintiff is entitled for the injuries she sustained in the MVA.

EVIDENCE AT TRIAL

[4] The plaintiff is a 35-year-old married mother of two young children, McKenna now 9 and Tanner now 7.

[5] The plaintiff was born and raised in Castlegar where she has lived her entire life, except for approximately 18 months when she attended post-secondary school in Lethbridge, Alberta and Kelowna, British Columbia.

[6] The plaintiff was raised in a close-knit Italian family. She described her childhood as "wonderful". She had loving parents and siblings, and enjoyed many outdoor activities growing up with them, including, snow skiing, water skiing, golf, fishing and snowmobiling. The plaintiff's mother, Kimberly Tassone ("Kimberley"), described the plaintiff as a happy, energetic and active child who loved sports and recreation.

[7] The plaintiff has a form of dyslexia which resulted in her finding high school academically challenging. She has always enjoyed athletics, hence, her focus during her school years was on playing sports. She played volleyball and fastball and received a scholarship to play varsity basketball at Lethbridge College. However, her attendance there was short lived due to her dyslexia. Her wish to

become a Physical Education teacher was dashed. She attended the Sylvan Learning Center in Kelowna for approximately 18 months which gave her a better understanding of how to cope with her learning disability.

[8] The plaintiff decided to combine her love of the water with her desire to teach children by becoming a lifeguard. She obtained all of the necessary certifications and in September 2002, she was hired by the Central Kootenay Regional District Recreational Department ("CKRD") in Castlegar as a part-time lifeguard and swimming instructor.

[9] Working as a lifeguard became the plaintiff's passion. In April 2005, she was promoted to a full time position as a Lifeguard Supervisor 1 with a corresponding increase in pay and full benefits. She settled into the job and loved it. Both the plaintiff and Megan Pilla, currently the CKRD's head lifeguard who was recruited and mentored by the plaintiff, testified that lifeguarding is highly physical work requiring that the rigorous standards set by the National Lifeguard Society be met.

[10] In addition to having to demonstrate all of the swimming strokes and diving and rescue techniques, certification requires the ability to lift a 25-pound weight underwater and swim with it for 5 metres as well as the ability to pull people out of the deep end of a pool.

[11] In 2006, the plaintiff married Cory Ross ("Cory"). Both described their pre-MVA relationship as happy and involving many sporting and family activities.

[12] McKenna was born in February 2008 and Tanner was born in February 2010. The plaintiff went on maternity leave on both occasions. She was the primary caregiver for the children and was heavily engaged in their active lives.

[13] By September 2010, the plaintiff had achieved the highest level of lifeguarding certification that is available. She was a master instructor trainer. She was promoted by the CKRD to the position of Lifeguard Supervisor 2. Her duties included teaching advanced swimming and first aid courses. She received pay and

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benefits in accordance with the collective agreement that was in place. Her benefits included a superannuation pension.

[14] Despite the plaintiff's promotions, she had several "clashes" with her superiors at the CKRD. In August 2011, there was an incident at work which caused the plaintiff significant anxiety and stress. Shortly thereafter, she resigned from her full-time position and resumed part-time employment (20–25 hours per week) in part because of the conflicts with her superiors and in part to be able to spend more time with her children. She received 15% of her pay in lieu of benefits, again in accordance with the terms of the collective agreement. Her plan was to return to full-time work in September 2013 when her daughter was in school full-time. Upon doing so, she would have placed her son in daycare at a cost of approximately $40 per day. Ms. Pilla testified that, given the plaintiff's seniority within the union, she would likely have had no difficulty returning to full-time employment.

[15] Prior to the MVA, the plaintiff was generally a very active person who swam approximately one kilometre several times each week, played softball, went for walks, and participated in many other outdoor physical activities. She testified that she had occasional aches and pains from those activities and underwent periodic chiropractic and massage therapy treatments for them. The evidence shows that, since 2002, the plaintiff had attended regular massage therapy treatments with a registered massage therapist, Curtis Verigin, for neck and lower back pain as well as pain around her shoulder blades.

[16] Mr. Verigin testified that, prior to the MVA, his treatments of the plaintiff were primarily preventative in nature and that the plaintiff did not complain of any specific injuries. He did not treat the plaintiff for pain to her right shoulder and over the years, he never observed the plaintiff's ability to function was limited or restricted.

[17] In March and April 2011, the plaintiff saw a physiotherapist, Kaysry Gill, on six occasions for treatment of foot pain. During those appointments, the plaintiff mentioned she was also having pain in her right shoulder area. Ms. Gill's clinical note of the appointment on March 10, 2011 reads, in part:

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> wondering about right shoulder pain at night ongoing right shoulder issue x 7 years, worse with softball, better with massage but does not last.

[18] Ms. Gill observed on palpation that the plaintiff had tight muscles and weakness in her right shoulder blade area but also found that there was normal range of motion in the area. Ms. Gill considered that the plaintiff’s shortened shoulder muscles could be contributing to her pain. During that and subsequent appointments, Ms. Gill gave the plaintiff stretching exercises to strengthen the shoulder muscles.

[19] On July 17, 19, and 24, 2012, approximately one to two weeks before the MVA, the plaintiff saw a chiropractor, Dr. David Bzdel, for complaints of lower back and rib pain as well as muscle tension in her neck. She did not complain of shoulder pain during those appointments. Dr. Bzdel’s treatment included manipulation of the right shoulder as a means of improving the function of the plaintiff’s spine. Dr. Bzdel’s assessment was that the plaintiff’s neck muscle tension was possibly due to “unbalancing”.

[20] The plaintiff testified that her shoulder and back pain prior to the MVA was more a “tightness” between her shoulder blades which did not interfere in any significant way with her ability to function at work or her homemaking, child care or other activities. She did all of the family’s cooking and 90–95% of the housekeeping and laundry. She had the assistance of a housekeeper for three hours every two weeks. She had no driving anxiety and drove the children to all of their activities without any concerns.

[21] Each of the plaintiff’s mother, Kimberley, her brother, Blair Tassone (“Blair”), her sister-in-law, Des Profili (“Ms. Profili”), and Ms. Pilla confirmed that, prior to the MVA, they had not observed the plaintiff having any physical or functional limitations.

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The MVA and its Aftermath

[22] The plaintiff testified that, as she swerved off the highway and into the ditch during the MVA, she instinctively reached behind her to brace her two-year-old son by fully extending her right arm out and back towards him in his car seat.

[23] The plaintiff testified that, immediately after the MVA, she was in shock and felt pain "everywhere". The plaintiff's mother, Kimberley, was a paramedic and attended the accident scene. She described the plaintiff as being pale, cold, clammy, and in shock. She was crying and seemed inconsolable. The plaintiff's husband also attended the scene. He testified that the plaintiff was agitated and reported being very sore. He observed that the undercarriage of the plaintiff's vehicle was embedded in the dirt. It was removed from the ditch by a tow truck.

[24] The plaintiff was examined at the hospital in Castlegar by an emergency room physician. She complained of pain in the area from the back of her neck across the top of the shoulders and in her lower back. The physician who saw her did not consider whether the plaintiff had suffered an orthopaedic injury to her shoulder as that was not her focus. She diagnosed that the plaintiff had a soft tissue injury to her neck and back and released her with various pain medication prescriptions.

[25] The plaintiff's brother, Blair, testified that the plaintiff described what had happened during a telephone call he had with her shortly after the MVA, including that she had reached back to brace her son.

[26] The plaintiff's husband, Cory, testified that on the evening of the MVA, the plaintiff seemed "out of sorts" and complained of being very sore all over. He testified that she told him she had twisted around and extended her right arm to brace their son during the MVA.

[27] On August 2, 2012, the plaintiff went to see her chiropractor, Dr. Bzdel. He was not there and she was seen by his locum, Dr. Salmon, whose note of the consultation reads:

> MVA July 31, 2012. Veered over bank to avoid a head-on collision with a vehicle in her lane. When the car came to a stop, her right foot was on the brake and she was leaning to the right. She had shoulder (thoracic spine) pain and neck pain with lower back pain being the worst. No bruising. Had previous back pain aggravated by normal range of movement. Right foot numbness at night when she was in bed. There was no headache. She was off work.

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[28] The plaintiff spent the aftermath of the MVA at home trying to recover from her pain. Her mother, Kimberley, and grandmother, Ms. Karen Smith ("Ms. Smith"), assisted with the housekeeping, cooking, childcare and driving, as well as with the plaintiff's own personal care and hygiene. Kimberley, Cory and Ms. Pilla each testified that the plaintiff seemed depressed, was always tired, was in obvious pain, and was generally unable to function.

[29] On August 7, 2012, the plaintiff saw Mr. Verigin complaining of significant right shoulder pain which radiated up to her neck and down her right arm. She also complained of a debilitating headache and pain on right side of her lower back. Mr. Verigin's contemporaneous clinical notes indicate the plaintiff told him that during the MVA she "… immediately felt a 'pulling' sensation to the neck and right shoulder/upper arm". Mr. Verigin testified that the plaintiff presented as being both physically and emotionally traumatized, reporting specific shoulder and back pain that was unrelated to the complaints she had prior to the MVA. Although not mentioned in his contemporaneous notes, Mr. Verigin distinctly recalls the plaintiff telling him that she had tried to protect her son in the back seat by extending her right arm and reaching back to him.

[30] On August 10, 2012, the plaintiff went to see her family doctor, Dr. Megan Taylor, but she was away and the plaintiff was seen instead by an associate in the office, Dr. Erica Alex. At the time, Dr. Alex had been a physician for only two years. Dr. Alex testified that she has no recollection of the plaintiff's visit and based her evidence on the notes that she made during the examination. Her notes reflect that the plaintiff reported tenderness in her right sacroiliac, gluteal and hip areas. There is no indication of shoulder pain being reported. Dr. Alex's notes indicate that the plaintiff had full rotational range of motion in her shoulders and that there were "NO

new issues". Dr. Alex testified that this note meant that there were no issues arising from the MVA.

[31] On that same day, August 10, 2012, the plaintiff told an adjuster of the Insurance Corporation of British Columbia ("ICBC") that she had pain in her back, neck, and shoulders.

[32] The plaintiff testified that after approximately two to three weeks at home trying to recover, her right shoulder became very painful after she reached for some Saran Wrap. She testified that the pain radiated to her upper arm and chest and that it was very different from the pain she previously had in her shoulder area prior to the MVA. It was in a different area and was much more localized.

[33] During the month of August 2012, the plaintiff saw her chiropractor nine times including on August 28 and 29. Eight of those appointments were with Dr. Bzdel. She also saw Mr. Verigin six more times. She did not complain of right shoulder pain during any of those visits. Rather, her complaints related to lower back and right hip pain. The plaintiff did not mention the saran wrap incident to either Dr. Bzdel or Mr. Verigin.

[34] However, during the plaintiff's next appointment with Dr. Bzdel on September 4, 2012, she did complain of right shoulder pain. After his assessment of her two days later on September 6, 2012, Dr. Bzdel diagnosed a right rotator cuff strain with impingement. After nine more treatments between September 10 and October 16, 2012, Dr. Bzdel reported to ICBC that the plaintiff was suffering from acute right shoulder pain, neck pain and back pain. In his report dated January 10, 2012, he described the plaintiff's right shoulder injury as chronic and severe.

[35] On September 11, 2012, the plaintiff visited her family doctor, Dr. Taylor, complaining of pain and decreased range of motion in her right shoulder, pain along the right side of her mid and lower back and pain in her right knee. She also complained of poor sleep, anxiety when driving, and frustration with her slow

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recovery and not being able to return to work. Dr. Taylor diagnosed a right rotator cuff and right biceps tendonitis, a lumbar sprain/strain and a right knee sprain.

[36] On September 28, 2012, the plaintiff was seen by her physiotherapist, Ms. Gill, who assessed her as having limited function, range of motion and tenderness in her right shoulder possibly from a strained or torn right rotator cuff. She also diagnosed right hip tenderness and a lower back strain including in her right sacroiliac joint. Ms. Gill described the plaintiff as having significantly more pain, stress and reduced shoulder range of motion than had been the case when she last saw her in April 2011.

[37] During the period between September 2012 and April 2015, Ms. Gill treated the plaintiff 79 times. During one of the earlier appointments, Ms. Gill has a distinct recollection of the plaintiff telling her that, during the MVA, she had reached back with her right arm extended to protect her son.

[38] The plaintiff was treated by Mr. Verigin on seven additional occasions between September 4 and October 22, 2012. It was evident to him that his massage therapy treatments were not resolving her symptoms. During his treatment of her on October 1, 2012, he questioned whether she had suffered a right rotator cuff tear.

[39] In September 2012, the plaintiff attempted to return to work on a graduated program without success.

[40] On October 25, 2012, CKRD advised the plaintiff that she would not be permitted to return to work until she had completed a "comprehensive gradual return to work plan" which included becoming re-certified by the National Lifeguard Society. She was advised by her doctor that she was physically unable to attempt re-certification.

[41] Blair testified that he saw the plaintiff during Christmas 2012 and that she was still in pain, seemed lethargic and "down" and emotionally drained. Blair said that his sister was not the same person she had been before the MVA. She was not

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keeping her house tidy and there seemed to be tension between the plaintiff and Cory, her husband.

[42] Over the course of the next two years, the plaintiff underwent extensive physiotherapy and massage therapy as well as chiropractic treatments for her right shoulder. She had cortisone injections, prolotherapy, pool therapy, and counselling. She was referred to several different orthopaedic surgeons and took various prescribed medications to help manage her pain, including Naproxen, Flexeril, Tylenol 3, Tramacet and Effexor. Her symptoms did not improve.

[43] In 2014, the plaintiff re-applied to CKRD for the positions of Supervisor 1 and 2, both of which had become available. With the assistance of her union, she was re-hired as a Supervisor 1, retroactive to October 1, 2013, but only if she was able to provide medical clearance from a qualified physician. Her medical condition was such that she was unable to do so.

[44] On February 21, 2014, Dr. Taylor referred the plaintiff to an orthopaedic surgeon, Dr. Seth Bitting, for her worsening shoulder pain. He took a full history from her and assessed her again on March 14, April 23, and August 12, 2014. During the latter assessment, he recommended arthroscopic surgery on an expedited basis.

[45] The surgery took place on September 3, 2014. Dr. Bitting found a medium-sized rotator cuff tear measuring 2 cm x 1 cm as well as a superior labral tear and significant biceps tendinitis. He surgically repaired the tears, released the long head of the biceps tendon, and performed subacromial decompression and acromioplasty.

[46] Following the surgery, the plaintiff's right arm was immobilized in a sling for approximately three months. She relied heavily on her husband, her mother and her grandmother for support, which included all cooking and housekeeping, child care, driving and her personal care and hygiene. The plaintiff attended physiotherapy and massage therapy sessions and did the recommended exercises.

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[47] In August 2015, with the assistance of her union, the plaintiff obtained new employment working part-time as a cashier at the CKRD's landfill operations. She did not enjoy the work.

[48] In February 2016, the plaintiff became employed in her current position as a sales and service coordinator for a company in Castlegar called Kootenay Columbia Home Medical Equipment ("KCHME"). She earned $16 per hour initially and in June 2017, her wage was increased to $18 per hour. She receives no employment benefits or pension. The plaintiff is happy in her new job.

[49] The plaintiff testified that before the MVA, her plan was to become a paramedic for the B.C. Ambulance Service once her children were old enough to be on their own if she was called out when her husband was not at home. Both her mother and her sister-in-law, Ms. Profili, were paramedics and she was very interested in following their career.

[50] Ms. Profili has been a paramedic for 13 years. She is also an instructor for the paramedic training courses. She described being a paramedic as a physically demanding job, requiring significant upper body, shoulder and back strength.

[51] Kimberley testified that the plaintiff always seemed to be interested in becoming a paramedic and was particularly interested in the first-aid aspects of the job. There was no question in Kimberley's mind that a paramedic career was in her daughter's future. Ms. Profili also testified that, prior to the MVA, the plaintiff had been looking forward to being able to start her paramedic training. This evidence was confirmed by Cory, the plaintiff's husband.

[52] The plaintiff anticipated that she would begin her paramedic training in approximately 2024 on a part-time basis in Nelson. It would have involved taking two separate courses at a total cost of approximately $15,000. She would take the courses on a part-time basis over an approximate 16-month period. The plaintiff would have also worked part-time as a lifeguard. Once hired as a paramedic, the plaintiff's plan was to reduce her shifts as a lifeguard to approximately 20% of her

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time and work as a paramedic for the remainder of her time. The plaintiff testified that, as a result of her MVA-related injuries, she is unable to meet the physical requirements necessary to qualify as a paramedic.

[53] Michelle Greene, who is involved in the recruitment and hiring of paramedics for the British Columbia Emergency Health Services, testified regarding the courses and other prerequisites to being hired as a paramedic in a smaller community like Castlegar. In addition to the Emergency Medical Responder and Primary Care Paramedic courses that must be taken and passed, the latter of which involves intensive classroom study of¸ *inter alia*, anatomy and physiology, an applicant must possess a Class 1, 2 or 4 British Columbia driver's licence, a minimum Grade 12 education, a clean driving record, and demonstrate a number of character traits including good judgment, independence, maturity and leadership skills.

[54] Ms. Greene indicated that the plaintiff's first aid background and lifeguarding history as well as her living and wanting to stay in the Castlegar would be positive attributes during the interview process. Ms. Greene also provided evidence regarding the current pay scales for paramedics in British Columbia.

[55] Ms. Profili has taught many paramedics with dyslexia and other challenges. She testified that accommodations such as longer exam writing times are often made in such circumstances. She described the required courses as not overly difficult for anyone who is dedicated and prepared to put in sufficient time and effort. Ms. Profili testified that there is currently a shortage of paramedics in the Castlegar area and that qualified paramedics can work as many shifts as they wish. Paramedics are not precluded from working in other jobs as long as they are able to respond to calls as they come in.

[56] The plaintiff estimates that her shoulder is now 80% better. She still has pain any time she performs repetitive activities. She is unable to do a front or back crawl while swimming, lift heavy weights, ski, throw a ball or do repetitive housekeeping duties (stirring, sweeping, vacuuming, etc.) without experiencing pain. She no longer has the strength to perform the life-saving manoeuvers required for

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employment as a lifeguard. She is unable to stand or sit for long periods of time without lower back pain. She has trouble sleeping at night. Her pre-MVA weight of 225 pounds has increased to her current weight of 280 pounds. She testified that she feels as though she is not the same person she was before the MVA.

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[57] Kimberley testified that the plaintiff does not have the enthusiasm for life that she had before the MVA—her confidence level is significantly lower, she seems depressed and lethargic and does not want to try new things. The plaintiff has become much more dependent on Kimberley. She has become impatient with her children and does little cooking or housekeeping, which has led to some tension between the plaintiff and Cory. Cory testified that the plaintiff is a “totally different person” than she was before the MVA.

[58] Ms. Profili testified that the plaintiff has definite functional limitations that she did not have before the MVA. She is not as active and routinely asks others for help with physical tasks. Ms. Profili was confident that the plaintiff would not be able to perform the physical tasks necessary to become a paramedic.

[59] The plaintiff testified that, in addition to her MVA-related physical injuries, she continues to suffer emotionally from the MVA. She has driving anxiety and tries to avoid driving whenever she can, particularly at night. Her mother and grandmother have taken on most of the driving that the plaintiff otherwise would have done.

[60] The plaintiff also struggles emotionally with being unable to contribute financially to her family as much as she had before the MVA and with having to rely on her husband for support. She feels a loss from her inability to perform as many cooking and housekeeping tasks as she did before the MVA and from being less able to participate in activities with her husband and children. Sometimes she struggles to get out of bed in the morning. She has had to learn to accept that she can no longer work as a lifeguard and will never become a paramedic.

[61] Cory testified that he and the plaintiff have had to put their family’s life on hold because they have had to deal with many issues brought on by the plaintiff’s injuries,

including financial burdens and stress in their relationship. The plaintiff is able to fully function for only short periods of time. She continues to take anti-depressant medication and suffers from driving anxiety. Cory emphasized the emotional toll of not being able to continue working as a lifeguard has had on the plaintiff.

[62] The plaintiff testified that she is in favour of attending a chronic pain clinic as recommended by her physician, Dr. Taylor, but that it is something she has been unable to afford. She continues to undergo massage therapy with Mr. Verigin approximately once per month for ongoing pain management.

[63] The plaintiff acknowledged on cross-examination that she is involved in some basketball and hockey coaching/management and plays softball but not for a full game and only at first base where she is not required to throw hard. She also acknowledged that her right shoulder is "sometimes pain free" and that, when it is painful, she is able to tolerate it.

Plaintiff's Medical/Clinical Experts

[64] All of the plaintiff's expert witnesses were qualified without debate to give the opinions they expressed in their respective reports.

Dr. Megan Taylor

[65] Dr. Taylor has been the plaintiff's family doctor since August 2008. She testified that, prior to the MVA, she saw the plaintiff regularly regarding routine medical issues. She described the plaintiff as having been obese and somewhat of an anxious person but otherwise as being in reasonably good health with no chronic medical concerns. She had never treated the plaintiff for headaches or for right shoulder or back problems before the MVA.

[66] Dr. Taylor first saw the plaintiff post-MVA on September 11, 2012. The plaintiff presented with pain and spasms in her right shoulder, right knee and mid/lower back. She reported not sleeping well and being anxious and frustrated over her inability to return to work. Dr. Taylor found that, although the plaintiff's neck's range of motion was normal, the range of motion in her lumbar and thoracic

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spine was significantly diminished. Dr. Taylor diagnosed a Grade 2 injury to the plaintiff's upper and lower back, a right rotator cuff and bicep strain/impingement syndrome, a lumbar strain and a right knee strain. Dr. Taylor recommended physiotherapy and massage therapy, continued chiropractic treatments, and exercise. Dr. Taylor also prescribed anti-depressant medication for what she diagnosed as major depression with significant anxiety.

[67] Dr. Taylor saw the plaintiff again on September 26, October 3, 16 and 26. The plaintiff had shown little, if any, improvement. On October 26, 2012, Dr. Taylor injected the plaintiff's right shoulder with cortisone in an attempt to settle the pain the plaintiff was experiencing.

[68] Dr. Taylor continued to regularly treat the plaintiff after October 26, 2012, trying various medications and recommending various modes of therapy.

[69] Dr. Taylor's expert report is dated October 5, 2015. She opined that, as a consequence of the MVA, the plaintiff sustained a soft tissue injury to her neck, upper back and lower back as well as a tear of the rotator cuff (supraspinatus tendon), labrum and biceps tendon of the right shoulder. She opined that these injuries resulted in the plaintiff having chronic pain in her neck, lower back and right shoulder as well as chronic headaches.

[70] During her cross-examination, clinical records of Ms. Gill and Dr. Bzdel, indicating that the plaintiff had a history of shoulder pain pre-MVA, were put to Dr. Taylor. She responded that whatever the plaintiff went through prior to the MVA was not enough to impair her ability to function because, given that she was her family physician, she is confident that the plaintiff would have sought her help if that had been the case.

[71] Dr. Taylor agreed on cross-examination that, if the plaintiff has suffered a rotor cuff tear injury during the MVA, it is very likely that she would have been in significant and immediate pain and would have reported it to medical practitioners. She agreed that the MVA is unlikely to have been the cause of the plaintiff's

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shoulder pain if the pain did not start until two or three weeks later. She also agreed that a tear of the superior labium anterior/posterior is common among baseball players, but disagreed that tears to the rotator cuff were common for them. She also opined that it would be unusual for a person to suffer a rotator cuff tear simply by reaching with the arm without force.

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[72] Dr. Taylor agreed that the plaintiff's depression symptomology has largely resolved and that her ongoing neck pain is likely radiating from her right shoulder. She recommends that the plaintiff continue with massage therapy and daily exercise. She also recommends that the plaintiff have physiotherapy at least once every four to six weeks to ensure proper exercise techniques.

[73] I found Dr. Taylor to be an impressive witness who testified throughout in an objective and helpful manner. I have no hesitation accepting her opinion in its entirety.

Dr. Zeeshan Waseem

[74] Dr. Waseem is a physiatrist who performed an independent medical assessment ("IME") of the plaintiff from a physical and rehabilitation medical perspective on October 25, 2016. His expert report is dated November 10, 2016.

[75] Dr. Waseem noted abnormal muscle tone and texture of the supporting musculature of her cervical spine, increased tension and weakness in the right shoulder muscles, reduced shoulder and lumbosacral spine range of motion, pain on the right shoulder and in the right lumbopelvis both within well demarcated anatomical distributions and weakness in the right hip.

[76] Dr. Waseem noted that the plaintiff had no pain or abnormalities between her shoulder blades where he understood her pre-MVA pain had been located.

[77] Dr. Waseem performed a series of tests designed to stress the shoulder and lower back structures. He also tested the plaintiff's "pain behaviour" to determine

whether her reports of pain were exaggerated or amplified. He concluded that they were not.

[78] Dr. Waseem opined that the plaintiff suffers from the following:

a) chronic soft tissue (myofascial) pain in her cervical spine (neck);

b) right shoulder impingement syndrome, which causes pain because the shoulder structures get caught on the outer edges;

c) right shoulder labral (cartilage attached to the outer rim of the shoulder socket) dysfunction which is still not fully back to normal after her surgical repair;

d) right acromioclavicular joint dysfunction (pain);

e) right sacroiliac joint pain; and

f) right hip pain (bursitis).

[79] Dr. Waseem's opinion is that the plaintiff's injuries were likely caused by the MVA, based in large part on the plaintiff's shoulder and lower back injuries being consistent with the mechanism of the MVA, as he understands it and on the absence of any other event or injury that would explain her condition.

[80] Dr. Waseem's opinion is that the plaintiff's MVA-related injuries are chronic, and that the prognosis for further recovery is poor. The plaintiff's right shoulder impairment will limit her from repetitive and sustained movements of it, overhead reaching, and lifting more than 10 pounds. Her lumbopelvis impairments will limit her from repetitive and sustained bending. He opined that the plaintiff is medically precluded from working as a lifeguard and from intensive physical activity. Her recreational pursuits will be curtailed.

[81] Dr. Waseem recommends that the plaintiff continue her home exercise program, have the benefit of an occupational therapist for four to six in-home therapy

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and activation sessions and for advice regarding proper body mechanics to prevent re-injury as well as adaptive equipment/devices to assist the plaintiff's level of activity within her home. He also recommends monthly physiotherapy and massage therapy for supportive care.

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[82] Although Dr. Waseem is obviously a knowledgeable and experienced physiatrist, his practice is primarily, if not exclusively, in Ontario. He travels to Vancouver to conduct medical-legal assessments of plaintiffs, often scheduling nine assessments per day. He works with a chiropractor who takes the patient's history before he sees the patient himself because it is more "efficient".

[83] In this case, Dr. Waseem's physical examination and assessment of the plaintiff took only ten to fifteen minutes, although he testified that he spent additional time with the plaintiff confirming with her the medical history that had been obtained by his colleague.

[84] I am concerned by what appears to be a growing trend among some medical practitioners to view medical-legal reports as a profit-motivated business to be run as efficiently as possible. I find it difficult to accept that any medical specialist, regardless of experience and expertise, is able to accurately opine on the cause of a patient's injury by simply reviewing the clinical records prepared by others and conducting a 15-minute physical examination in respect of an injury sustained over four years after a motor vehicle crash. My concern is heightened in this case by the fact that the primary interview of the patient was conducted by someone other than the expert. This form of assumption-based, mass-produced, "cookie cutter" opinion evidence is generally unconvincing and unhelpful to the court.

[85] Dr. Waseem's opinion is little more than an analysis of what is contained in the clinical records prepared by others. In my view, a more in-depth scrutiny is required of medical experts who choose to opine on the cause of an injury.

[86] For those reasons, I have given Dr. Waseem's opinion evidence less weight than I may otherwise have given to it. However, I, nevertheless, found some of his

answers to questions put to him on cross-examination to be compelling as they provided helpful guidance and insight into the nature of the plaintiff's shoulder injury and how the pain may have been masked by other pain and not specifically identified until many days after the MVA.

Dr. Seth Bitting

[87] Dr. Bitting is the orthopaedic surgeon who performed surgery on the plaintiff's shoulder on September 3, 2014. He performed follow up assessments of the plaintiff on October 27, 2014, January 27, 2015, March 27, 2015, June 3, 2015 and September 22, 2015. His expert reports are dated April 29, 2015 and October 13, 2015. Dr. Bitting also provided a rebuttal report dated November 3, 2016 to the expert report of Dr. Hirsch which was relied upon by the defendant.

[88] When Dr. Bitting assessed the plaintiff on September 22, 2015, he found that the plaintiff's right shoulder range of motion and her rotator cuff power were both very good although she continued to have positive impingement signs. He opined that it is unlikely that the plaintiff will be able to return to work as a lifeguard.

[89] Dr. Bitting opined that the plaintiff needs to continue focusing on regaining full range of motion and strength in the rotator cuff and parascapular musculature surrounding her right shoulder. He opined it is likely that the plaintiff will be restricted by discomfort from her future activity levels and that she is unlikely to fully recover from her shoulder injury. She will require ongoing treatment in the form of chronic pain management and focused physiotherapy and massage therapy. He conceded on cross-examination that the cost of a chronic pain specialist is likely to be covered by British Columbia's Medical Services Plan.

[90] Based upon the assumption that, during the MVA, the plaintiff had extended her right arm backwards and braced her son or his car seat, Dr. Bitting opined that there would likely have been sufficient traction force exerted on her right shoulder to have caused her right shoulder rotator cuff and labral tear and related injuries.

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[91] Dr. Bitting agreed on cross-examination that the plaintiff would have been in immediate pain from such tears in her shoulder structures and that it was unusual for her not to have reported that specific pain for several weeks. However, he went on to observe that the onset of pain is often unpredictable when there has been significant trauma and that it is common for patients not to report pain in a specific area until they attempt normal day-to-day activities which aggravates the body’s structure in that area.

[92] Dr. Bitting was an excellent witness who testified in an objective, sincere and helpful manner. I have no hesitation accepting his opinions.

Mary DeVan

[93] Ms. Devan is a registered clinical counsellor who has treated the plaintiff since October 2012. Her expert reported dated October 28, 2016 was introduced in evidence without the requirement that she attend the trial.

[94] The plaintiff was referred to Ms. DeVan after the MVA for treatment of her emotional distress and frequent episodes of crying and irritability as a result of having to cope with the decrease in her overall functioning, her inability to work, her difficulty in taking care of her children, her inability to engage in the physical activities she had enjoyed prior to the MVA, and the strain in her relationship with her husband.

[95] Ms. DeVan reported that, between October 12, 2012 and July 23, 2014, the plaintiff’s progress varied from “being hopeful that she would recover from her injuries and resume her pre-MVA level of functioning” to “being overwhelmed by her chronic pain”.

[96] Ms. DeVan’s treatment of the plaintiff included Cognitive Behavioral Therapy to try to decrease her driving anxiety and relaxation methods to assist her in her ability to cope.

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[97] Ms. DeVan opined that the plaintiff's anxiety and decreased emotional state were caused by the MVA. She also opined that the plaintiff's post-MVA chronic pain, stress, and her inability to engage in her usual activities and to be an active parent have negatively affected her self-image and her optimism for the future.

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Defendant's Medical/Clinical Experts

[98] Each of the defendant's expert witnesses was qualified without debate to give the opinions they expressed in their respective reports.

Dr. Gabriel Hirsch

[99] Dr. Hirsch is a physiatrist who conducted an IME of the plaintiff on March 29, 2016. His report is dated that same day.

[100] Based upon his review of the plaintiff's clinical records and his understanding that the plaintiff had a longstanding history of right shoulder pain prior to the MVA, Dr. Hirsch opined that the plaintiff's MVA-related injuries were limited to soft tissues such as muscles, tendons and ligaments in her shoulder girdle area and her lower back, from which she had made an excellent recovery. He opined that she did not sustain any structural injury to her neck or back, but rather that the MVA aggravated her pre-existing posterior shoulder girdle condition and thereby contributed to her regional myofascial pain in her right shoulder area. Dr. Hirsch was unable to determine what portion of the plaintiff's post-MVA pain was attributable to her pre-MVA condition.

[101] Given his understanding that the acute pain in the plaintiff's right shoulder did not start until two to three weeks after the MVA, Dr. Hirsch was unable to formulate an injury mechanism in relation to the MVA which would have caused the structural damage found by Dr. Bitting. He opined in his report that an injury to the long head of the biceps tendon, a rotator cuff tear and a labrum lesion would have resulted in acute pain.

[102] Dr. Hirsch based his opinion in large part on a radiologist's interpretive report of an MR arthrogram performed on December 11, 2012 as well as on a CT scan.

He testified that neither scan detected any tears in the plaintiff's right shoulder. However, neither those scans nor the radiologist's report(s) interpreting them were put in evidence. Moreover, there is no evidence of who the radiologist was or of his/her qualifications.

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[103] Dr. Hirsch also opined that, if the plaintiff had been suffering from a rotator cuff or labrum tear prior to the imaging, he would have expected the plaintiff to have derived some relief in her pain symptoms from the injections she had been given, assuming they had been given correctly. The plaintiff reported no relief.

[104] Dr. Hirsch conceded on cross-examination that he relied, for his opinion, primarily on his interpretation of the medical records of others, both before and after the MVA and that he would have liked to have had more information regarding the plaintiff's pre-MVA shoulder pain complaints because he could not discern whether her pain before the MVA was in the same area as it was after the MVA. He testified that he was "not sure what to make" of Mr. Verigin's August 7, 2012 clinical notes, which report the plaintiff having complained of acute pain in her right shoulder.

[105] In Dr. Hirsch's own words, his opinion was "educated academic guesswork".

[106] Dr. Hirsch also confirmed on cross-examination that many people have rotator cuff and/or labrum tears and do not know it, because the pain "overflows" to other areas. He stated that such injuries can result in a "gentle attribution" of pain or the pain can be acute. He also testified that patients often mis-describe their shoulder pain.

[107] As mentioned above, Dr. Waseem provided a rebuttal opinion to that of Dr. Hirsch. Although both agree that the plaintiff suffers from low back pain, they disagree on the source. Dr. Hirsch performed only one test (Gillet Test) and formed the view that the source of the pain is soft tissue injury and mechanical posture. In contrast, Dr. Waseem performed three separate tests and was able to determine that the source of the plaintiff's low back pain is the right sacroiliac joint.

Dr. Waseem opined that all three tests must be performed because one may be negative while the others positive for sacroiliac joint pain.

[108] Dr. Waseem also disagrees with Dr. Hirsch's assessment of the plaintiff's shoulder issue on the basis that her pre-MVA shoulder pain was between her shoulder blades which is anatomically and pathologically an entirely different area. Dr. Hirsch was unable to determine the source of the plaintiff's current shoulder pain and concluded it was diffuse and not specific. In contrast, Dr. Waseem found specific causes of the shoulder pain.

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[109] Dr. Hirsch is obviously a knowledgeable and experience physiatrist. He gave his evidence in an assertive, confident and objective manner. He was forthright about having not considered various records that had been provided to him and was quick to concede that he had misinterpreted others. He was an impressive expert witness and I accept his opinions to the extent they are based upon the facts that have been proven. I underscore that the veracity of the MRI arthrogram and CT scan relied upon by Dr. Hirsch has not been proven.

Dr. Jordan Leith

[110] Dr. Leith is an orthopaedic surgeon. His expert reported dated May 5, 2014 pre-dates the plaintiff's shoulder surgery. It was introduced in evidence without the requirement that he attend the trial for cross-examination.

[111] Dr. Leith opined that "the principle of diagnosing any shoulder pathology arises from a thorough history and physical examination that is highly suggestive of an acute injury to the labrum or rotator cuff tendons". Yet he neither had the benefit of either a complete history or a physical examination of the plaintiff. Rather, his opinions are based solely upon a review of the clinical records in existence at the time of his report. He noted that "there was no indication that any of the structures of the right shoulder joint were injured at the time of the subject accident". He did not know that, four months later, the plaintiff would undergo surgery during which significant tears were found in that very structure.

[112] Dr. Leith stated, at p. 7 in his report, that:

> A SLAP tear is a tear of the Superior Labrum Anterior to Posterior. This is a less prevalent lesion most often seen in overhead athletes and rarely if ever seen from motor vehicle accidents. It is the result of high energy torsional forces applied to the shoulder as seen with pitchers. It can also result from a significant compressive force combined with rotational torsion in a motor vehicle accident.
>
> …
>
> To tear the anterior inferior labrum one must have a dislocation or a partial dislocation of the shoulder joint, both of which are immediately evident to a patient when a traumatic event occurs to cause a dislocation or partial dislocation.

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[113] Dr. Leith went on to opine that “the clinical presentation from an acute SLAP tear is immediately evident with acute pain localized deep in the joint” and does not present with superficial tenderness or pain about the shoulder girdle.

[114] At p. 8 of his report, Dr. Leith further stated that:

> … the mechanism of not striking another vehicle or hitting anything solid and coming to an abrupt stop is not consistent with anything that would cause an acute shoulder dislocation, rotator cuff tear or labral injury.

[115] Dr. Leith was not asked to assume that the plaintiff had extended her right arm backwards to brace her son during the MVA.

[116] Given the timing of Dr. Leith’s report and the assumptions he relied upon, which are not consistent with the evidence presented at trial, I decline to place much weight on his opinions.

ANALYSIS

Credibility/Reliability

[117] As is the case in most personal injury actions, the most important witness is the plaintiff herself. Once an assessment of the credibility and reliability of the plaintiff’s evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.

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[118] A plaintiff who accurately describes her symptoms and circumstances before and after the collision without minimizing or embellishing them can reasonably anticipate that the court will find his or her evidence to have been credible and reliable.

[119] As Mr. Justice Ehrcke cautioned in *White v. Stonestreet*, 2006 BCSC 801, at paras. 74–75, it is important to examine more than the temporal connection between an event and the alleged symptoms after the event. Other events happening at the same time must also be examined when determining causation. Moreover, the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods of time beyond the normal or usual recovery: *Buttar v. Brennan*, 2012 BCSC 531, at para. 24.

[120] Overall, I found that the plaintiff to be a genuine and honest witness who testified in a sincere, forthright, and credible manner. Her credibility was enhanced by her willingness to agree, without hesitation, with questions put to her on cross-examination when appropriate even when her answers went against her interest, for example, her pre-existing pain symptoms and her candid acceptance of statements attributed to her in the various clinical records of physicians who were not called to testify on the basis that “if it’s recorded there I probably said those things”. However, she was also steadfast when describing the pain she experienced after the MVA and the effect it had on her, although she had difficulty explaining why some of the clinical records in the month following the MVA make no mention of her having right shoulder pain immediately after the MVA. The best she could do was to say “I don’t remember”.

[121] Each of Ms. Pilla, Ms. Gill, Dr. Bzdel, Ms. Greene, Kimberley, Cory and Ms. Profili gave his/her evidence in a forthright, objective and helpful manner. I have no hesitation accepting their evidence in its entirety.

[122] Generally, I found Mr. Verigin to be an objective, sincere and helpful witness when it came to his discussions with and observations and assessments of the plaintiff during his treatments of her. However, he became somewhat of an

advocate for the plaintiff when the questioning of him permitted him to stray into areas beyond his personal knowledge, such as the plaintiff's ability to function as a lifeguard.

[123] I found the plaintiff's brother, Blair, to be excessively anxious to help his sister's case. His testimony was, in many respects, overly rehearsed and replete with hearsay. I give it little weight.

[124] Dr. Alex acknowledged that she had no recollection of having examined the plaintiff on August 10, 2012 and that her evidence was reconstructed based entirely on her clinical note of that date. It was clear that her evidence regarding her assessment of the plaintiff and the tests she said she performed were based on what she "usually does". She did not attempt to differentiate between what she does now, with eight years of experience, and what she did then with only two years of experience. I find that, beyond the brief clinical note she made, and given the "time constraints" she said she was under at the time, Dr. Alex's evidence was not reliable and reject it to the extent it is inconsistent with the testimony of those evidence whose opinions I accept.

Causation

[125] The central issue in this case is causation.

[126] The "but for" test is the general test for factual causation: the plaintiff must prove on a balance of probabilities that but for the defendant's negligence, she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32, at paras. 8–10 (see also: *Ediger v. Johnston*, 2013 SCC 18, at paras. 28–29; *Resurfice Corp. v. Hanke*, 2007 SCC 7, at paras. 21–23).

[127] The plaintiff need only establish a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Sam v. Wilson*, 2007

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BCCA 622 at para. 107. A substantial connection is something beyond the *de minimus* range: *Farrant v. Laktin*, 2011 BCCA 336, at paras. 9–11.

[128] It is common ground that the plaintiff suffered a rotator cuff tear, superior labral tear and significant biceps tendinitis that required surgical repair. She also suffered low back pain. Her symptoms have improved but are still present. The question is whether those injuries were caused or contributed to by the MVA.

[129] It is clear from the evidence that the plaintiff had pre-existing pain between her shoulder blades. She also had pre-existing back pain issues. Indeed, she saw her chiropractor, Dr. Bzdel, one week before the MVA complaining of acute pain in her right sacroiliac joint and lumbar spine. These facts make it very difficult to assess the extent to which the plaintiff's shoulder and lower back/right sacroiliac joint pain was caused by the MVA.

[130] There was no direct blow to the plaintiff's right shoulder during the MVA. Dr. Waseem opined that the jarring and other forces of the vehicle going at highway speed to a stop in the ditch with the right arm extended backwards would have been a plausible mechanism for a rotator cuff tear. However, there is no evidence of how fast the plaintiff's vehicle was travelling when it went into the ditch or how sudden the deceleration was. Dr. Bitting opined that the vehicle coming to a stop when the plaintiff had her right arm extended backwards with her hand bracing her son's car seat could have generated sufficient traction force on her shoulder to cause a tear in the rotator cuff and labrum. The plaintiff did not testify that her hand was actually in contact with her son or his car seat during the MVA, only that she had reached back in his direction. However, she did testify on re-examination that she likely told one of the orthopaedic surgeons she consulted, Dr. Tarazi, that:

> … at the time of impact, she had her right hand <u>against</u> her son in the back seat.
>
> [Emphasis added.]

[131] I agree with counsel for the plaintiff that it is open on the evidence as a whole to find that the plaintiff had extended her right arm behind her such that either her

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hand was in contact with the car seat and/or her shoulder was pressed against the driver's seat, either or both of which likely exerted force on her shoulder as the vehicle came to an abrupt stop in the ditch.

[132] All of the medical experts agreed that, had the plaintiff suffered a torn rotator cuff and/or labrum during the MVA, she would have experienced immediate and significant pain. Both Drs. Waseem and Biting testified that the plaintiff told them the pain in her right shoulder and neck started immediately after the MVA. Yet, it appears from the relevant clinical records that the plaintiff did not report significant or acute shoulder pain to the emergency room physician or to anyone other than her massage therapist for several weeks.

[133] Drs. Waseem and Bitting pointed out that rotator cuff and labral tears are complex injuries that are rarely diagnosed in the emergency room. Rather, they take time to diagnose.

[134] Given the evidence of the experts that a torn rotator cuff injury is an acute trauma that would have resulted in significant and immediate pain, the evidence given by the plaintiff on her examination for discovery on September 17, 2013, a little more than one year after the MVA, is important to the issue of causation. Her evidence was that the pain in her right shoulder did not start immediately but rather approximately two to three weeks after the MVA:

> Q The pain in your right shoulder, did it start immediately on the day of the accident?
>
> A No.
>
> Q How long after the accident did it start?
>
> A Approximately two to three weeks after.
>
> Q And do you have a specific recollection of it starting? And what I mean by that, some people say I woke up one morning and there was a shooting pain in my -- or I went to grab a cup from the drawer and all of a sudden my shoulder just went into a spasm. What do you remember?
>
> A Yes, I was getting Saran Wrap out of the -- and I went to pick it up, and I couldn't grip it.

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Q So in addition to -- obviously you felt kind of a severe pain in the shoulder, correct?

A Mm-hmm.

Q And so is it true that up until you had that -- you noticed when you went for the Saran Wrap you didn't really notice any pain in your shoulder after the accident until that point?

A Not -- not like that, no.

Q Okay. It was more just a general pain in your upper back and neck?

A Yes.

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[135] It is noteworthy that, of all of the medical practitioners whom the plaintiff saw, only one noted the plaintiff reporting having extended her right arm during the MVA to protect her son. Equally noteworthy is that none of the clinical records written within the first month of the MVA, with the exception of those of Mr. Verigin dated August 7, 2012, indicate that the plaintiff reported having experienced immediate right shoulder pain at the time of the MVA. Rather, they indicate her right shoulder pain did not develop until approximately three weeks after the MVA, which is in-keeping with the plaintiff's discovery evidence.

[136] Counsel for the defendant argues that this puts the plaintiff's credibility and reliability squarely in issue. I agree that these irregularities are such that the evidence must be scrutinized with care.

[137] I note first that, although the plaintiff complained of shoulder and lower back pain prior to the MVA, her shoulder pain was between her shoulder blades, a different area than where her post-MVA shoulder pain was. Moreover, the evidence is uncontroverted that none of the plaintiff's pre-MVA pain symptoms limited her ability to function in her activities of daily living and, importantly, work as a lifeguard, a job that she loved.

[138] Second, much of the defendant's challenge to the plaintiff's credibility is based on what was contained (or not contained) in the clinical records. In this regard, I agree with the comments of Mr. Justice N. Smith in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, at para. 36 to the effect that the absence of a record is not, in itself, evidence of anything:

> [36] … For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

[139] Third, Dr. Waseem opined that the pain from a torn rotator cuff could have been masked by the pain the plaintiff was feeling in her neck and back and non-specific for some time. Dr. Bitting opined that it is common for trauma patients to complain only of generalized at the time of the trauma and not to complain of specific pain until sometime later. Dr. Hirsch pointed out that the pain caused by such injuries sometimes overflows to other areas and that patients often mis-describe their shoulder pain.

[140] Fourth, on August 7, 2012, one week after the MVA, the plaintiff did complain to her massage therapist, Mr. Verigin, of significant right shoulder pain which radiated up to her neck and down her right arm. According to his clinical records, she told Mr. Verigin that she:

> immediately felt a 'pulling' sensation to the neck and right shoulder/upper arm.

In my view, this evidence is compelling.

[141] Fifth, with the exception of Dr. Hirsch who testified that rotator cuff/labrum tears can occur through wear and tear, the medical experts agree that such tears do not arise in the absence of some kind of trauma. In this case, there is no evidence of any event that could explain the trauma to the plaintiff's shoulder other than the MVA. Rather, the evidence shows that, for approximately one month after the MVA, the plaintiff was essentially immobile due to her overall pain. Dr. Hirsch testified that the pain from rotator cuff and/labrum tears can be acute or more diffuse and that many people have rotator cuff and labrum tears and do not know about it because "there is always an overflow of pain to other areas". This type of injury is complex and does not always present clearly.

[142] The facts in this case are remarkably similar to those in the recent decision of this court in *Chappell v. Loyie*, 2016 BCSC 1722. There, like here, one of the

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primary issues in dispute was whether the accident caused the plaintiff's rotator cuff injury. In the immediate aftermath of the accident, the plaintiff's focus was primarily on the injuries to his back and lower extremities. He did not mention shoulder pain to the paramedics, to the hospital staff or even when he attended his family physician two days after the accident (para. 147). It was not until approximately one month after the accident that he first complained of shoulder pain and not until 14 months after the accident that his shoulder injury was diagnosed (paras. 35, 149).

[143] Madam Justice Fisher, as she then was, noted, at para. 82, that a physician who regularly follows a patient is in a much better position to opine on causation than is a physician who examines the patient months or even years later. She found it entirely plausible on the whole of the evidence before her that Mr. Chappell did not experience acute pain in his shoulder immediately following the accident despite sustaining an injury to his rotator cuff: at para. 151.

[144] *Chappell* is an example of a case where an injured person's description of his or her symptoms after a traumatic event have later been shown to have been imprecise.

[145] Here, although the clinical records of the emergency room physician are somewhat vague and ambiguous, it is clear that the plaintiff identified pain across her shoulders at a time when she was still traumatized by the MVA. Two days after the MVA, she complained of shoulder pain when she visited her chiropractor. Five days after that, she specifically identified acute pain in her right shoulder and sought treatment for it. Her massage therapist noted that her right shoulder was inflamed. She also complained of shoulder pain to ICBC three days later. Thereafter, the plaintiff's focus was on the pain she was experiencing in the other areas of her body. As her inflammation settled and she stopped taking Flexeril, her right shoulder pain again became the focus of her complaints.

[146] Counsel for the defendant places great emphasis on Dr. Alex's clinical record of August 10, 2012 which indicates that the plaintiff had full range of motion in her

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shoulder and "NO new issues". For the reasons stated above, I am unable to give Dr. Alex's note much weight.

[147] On balance, I do not agree with counsel for the defendant that, because there is no clinical record of the plaintiff immediately complaining of acute pain in her right shoulder, she must be taken to be retrospectively attempting to manufacture a link between her injuries and the MVA. As was stated by this Court in *Edmondson v.* at para. 37:

> … There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

[148] Here, there is nothing in the evidentiary record to suggest any cause for the plaintiff's right shoulder injury other than the MVA. She had no pre-MVA functional issues. She was working as a lifeguard, playing softball, and lifting and carrying her young children. Her pain and loss of function coincided with the MVA. She wanted to return to work as a lifeguard as soon as possible and was extremely frustrated and emotionally distraught that she was physically unable to due to her pain. There is no suggestion that she was malingering or exaggerating her symptoms.

[149] It is in cases like this where an application of the classic statement of the law of causation in *Snell v. Farrell*, [1990] 2 S.C.R. 311 is apposite. Mr. Justice Sopinka stated, at para. 29, that "causation need not be determined by scientific precision". It is a practical question of fact that can often be answered by ordinary common sense. That said, the 'but for' test should not be relaxed to the point where it becomes nothing more than a common sense or anecdotal analysis. There must be some evidence supporting a finding of causation: *Boon v. Mann*, 2016 BCCA 242, at paras. 14–19.

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[150] On the evidence as a whole, I find it is more probable than not that the plaintiff stretching her right arm back to brace her child during the MVA was the mechanism by which she suffered her shoulder injury. The resulting pain was immediate but masked by her other injuries such that she did not discern specific pain from her rotator cuff/SLAP injury for several days. I find that the plaintiff's evidence that the acute pain did not begin immediately after the MVA, and indeed not until approximately two to three weeks later, to have been imprecise.

[151] I find on the whole of the evidence that the plaintiff suffered a moderate tear to her rotator cuff, a superior labral tear, significant biceps tendinitis, and myofascial soft tissue injuries to her shoulder, neck and lower back sacroiliac joint during the MVA when she braked hard, swerved, and jolted over an embankment with her right arm extended backwards to brace her two-year-old son.

[152] I also find that she suffered significant psychological injury and emotional distress, including depression and anxiety as a result of the MVA.

Assessment of Damages

[153] Once factual causation is found, liability may still be limited in the assessment of damages: *Blackwater v. Plint*, 2005 SCC 58, at paras. 78–81. It is a well-established principle of tort law that the defendant need not place the plaintiff in a better position than his or her original position and should not compensate the plaintiff for damage he or she would have suffered in any event, otherwise known as the crumbling skull rule. When the plaintiff is contributorily negligent, or if a second wrongful act occurs after or along side the first wrongful act, the crumbling skull rule may apply: *Athey v. Leonati,* [1996] 3 S.C.R. 458, at paras. 34–35.

[154] It is clear that, prior to the MVA, the plaintiff had ongoing shoulder, neck and lower back pain complaints in respect of which she had been treated for years. Although those complaints were not functionally limiting, they must be taken into account when assessing whether the plaintiff would have suffered loss regardless of the MVA.

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Non-Pecuniary Damages

[155] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] SCCA No. 100, Madam Justice Kirkpatrick, writing for the Court, outlined the factors to be considered in awarding non-pecuniary damages at para. 46:

> [46] The inexhaustive list of common factors cited in *Boyd* 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, 2005 BCCA 54).

[156] Although the plaintiff did have pre-existing symptoms of shoulder and back pain, I find on the whole of the evidence that they did not reach the level of causing an inability to function in her job or in day-to-day living.

[157] The plaintiff is currently 35-years-old. At the time of the MVA, she was 31. The nature of her injuries caused by the MVA is described above. The severity and duration of the pain the plaintiff has suffered as a result are also set out above. She has undergone countless hours of treatment. Although she believes that her shoulder is 80% healed, it has been over five years since the MVA and she continues to have persistent right shoulder pain which frequently causes her to waken at night. She is no longer the fun, outgoing, active and energetic person she was before the MVA. She has suffered emotionally and continues to struggle as a result of her pain and loss of functioning and the job she loved. She has driving

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anxiety. She takes anti-depressant medication (Effexir) daily. She attempted within a month of the MVA to move on with her life as best she could. She is now employed in a job that she likes. She has involved herself in the community through volunteer work.

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[158] Counsel for the plaintiff submits that non-pecuniary damages in the range of $150,000 to $175,000 are appropriate. He relies on the following decisions:

a) *Carmichael v. Kwan,* 2016 BCSC 265	$175,000
b) *Cantin v. Petersen*, 2012 BCSC 549	$150,000
c) *Cumpf v. Barbuta*, 2014 BCSC 1898	$150,000
d) *Felix v. Hearne*, 2011 BCSC 1236	$200,000
e) *Manoharan v. Kaur*, 2016 BCSC 692	$170,000

[159] *Carmichael* involved a previously happy, active, young mother (23 years-old at the time of the accident) whose motor vehicle-related injuries included mood issues, strain on her relationships and reduced ability to perform her normal household duties. The plaintiff testified that her relationship with her six-year old son from a previous relationship had been negatively affected and that she had acquired a new irritability with him. The plaintiff's fiancé described her as a "totally different person" who was "emotionally fragile, irritable and depressed". She worked full-time after the accident despite experiencing chronic pain symptoms in a job that was not within her chosen field. The court emphasized the non-pecuniary award of $175,000 was based on the plaintiff's youth, the fact that she and her fiancé had intended to have two children but now decided that she was emotionally or physically incapable of caring for young children, the emotional suffering from fractured relationships with her fiancé and her son, the effect of her physical limitations on her enjoyment of recreational activities and participating in child care/ household duties, the chronic and increasing pain associated with her hip injury and the long rehabilitation period expected following a future hip replacement surgery.

[160] *Cantin* involved a female plaintiff who, at the time of trial eight years after the motor vehicle accident, continued to suffer back, shoulder, neck, hip, leg and foot

injuries that led to chronic pain syndrome, joint dysfunction, severe and ongoing headaches and cognitive/ psychological complications. The accident drastically reduced her functional ability despite therapy. In assessing non-pecuniary damages at $150,000, the court considered the plaintiff was incapable of finding employment in a completive labour market, could not carry out household chores, and “has no social or family life due to the emotional complications arising out of her chronic pain syndrome. However, the court stated that the non-pecuniary award would have been higher but for her significant pre-accident history of chronic pain and the reduced award reflected the impact of her pre-existing condition.

[161] *Cumpf* involved a 44-year-old mother of two children who suffered from pre-existing injuries from an earlier accident, though she was able to attend the gym and swim on a regular basis. The subsequent accident resulted in her suffering a chronic pain condition which significantly affected her day-to-day functioning. She was disabled from participating in activities at work and at home. She was also affected emotionally, diagnosed with adjustment disorder with depressive mood as a result of the MVA. However, after receiving therapy, her mood improved, she pursued new employment training, and felt generally calmer and stable. In assessing non-pecuniary damages at $150,000, the court considered her chronic pain condition which affected her daily life and her family relationships, her inability to perform household chores, and a prognosis that had “plateaued and will not likely improve further without significant further treatment”.

[162] *Felix* involved another 44-year-old mother of twin girls who was self-employed and who had been engaged in several recreational sports. She sustained injuries to her neck and back, left shoulder, elbow and wrist, pelvis, knee and ankle as well as a concussion and damage to her ulnar nerve. The court accepted that her pain was chronic despite her ability to continue playing competitive soccer and go jogging. She also suffered from post-traumatic stress disorder symptoms and anxiety around driving which was treated with anti-depressant medication and ongoing therapy. After the accident, she was only able to work part-time. In awarding non-pecuniary damages at $200,000 the court considered her chronic pain, the diminished

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functionality of her left wrist, her loss of self-reliance around the house, the "devastating" effects on her personal and work life and the fact her emotional difficulties were likely permanent.

[163] *Manoharan* involved a 47-year-old plaintiff who suffered injuries to her shoulders and back and developed left arm pain with tingling which later spread to her right arm. The injuries prevented her from continuing in her accounting career and, though they improved over time with treatment, she continued to suffer chronic pain and emotional difficulties. The Court assessed non-pecuniary damages at $170,000 based on the fact she was unable to return to many of her pre-accident recreational activities, was diagnosed with major depression, and her relationship with her husband was "seriously disrupted".

[164] Each of the foregoing cases relied upon by the plaintiff involves injuries that were more severe than those suffered by the plaintiff.

[165] Counsel for the defendant submits that non-pecuniary damages in the range of $85,000 with some upward adjustment to take into account her physical activity reduction and emotional issues would be appropriate. He submits that an award of $100,000 is suitable. He relies on the decision of this court in *Mitchell v. Martin*, 2016 BCSC 1544, where a 47-year-old plaintiff who worked in the forest industry suffered a soft tissue injury to his neck and back as well as a shoulder injury consisting of a labral tear and a rotator cuff tear. The plaintiff had a pre-existing shoulder injury but, after accepting the evidence of a medical expert who had actually treated the plaintiff rather than an expert who based his decision solely on medical records, the court concluded that the accident was the sole cause of the plaintiff's injuries. There was no finding that he suffered any emotional distress. In assessing non-pecuniary damages at $85,000, the court considered that while the plaintiff's condition improved markedly after surgery, he still experienced some lingering chronic pain issues that would likely not improve and the pain decreased his productivity at work and diminished his enjoyment of life by restricting him in his capacity for recreational activities.

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[166] In the case at bar, the plaintiff suffered considerable pain and instability of her shoulder while undergoing treatments over the last four and-a-half years. While her shoulder function has improved over time, she still suffers pain associated with the shoulder, which has been shown to cause her other emotional and psychological issues which persist.

[167] After considering all of the evidence and the submissions of counsel, as well as the case authorities they rely upon, I find that an appropriate award for non-pecuniary damages in this case is $120,000.

Past Income Loss

[168] Compensation for past loss of income is actually a claim for loss of earning capacity and is based on the value of the work that the plaintiff *would* have, not merely *could* have, earned, but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 30; *M.B. v. British Columbia*, 2003 SCC 53, at para. 49.

[169] An assessment of loss of past income earning capacity requires that the plaintiff demonstrate a real and substantial possibility that the income would have been earned: *Athey*, at para. 27; *Morlan v. Barrett*, 2012 BCCA 66, at para. 38.

[170] Counsel for the plaintiff submits the evidence demonstrates that, but for the MVA, the plaintiff would likely have returned to working full-time in October 2013 in the Lifeguard Supervisor 1 position to which the CKRD reinstated her after the MVA, conditional on her re-certifying.

[171] Plaintiff's counsel submits further that the income thereafter earned by Ms. Pilla, currently the CKRD's head lifeguard, is a reliable indicator of what the plaintiff would have earned. Taking into consideration the wage increases the plaintiff would have received under the collective agreement plus 15% to reflect the value of her benefit, the plaintiff calculates her past income loss as a lifeguard as follows:

August to December 2012	$8,309

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2013	$26,456
2014	$46,000
2015	$46,874
2016	$47,811
2017	$48,766
Sub-total	$224,216
Total: Sub-total plus value of lost pension (8%) = $224,216 x 1.08	$242,153

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[172] From August 2012 to the date of trial, the plaintiff actually earned $64,418.

[173] The plaintiff claims a gross past income loss of $177,735 ($242,153 - $64,418). From this amount, the plaintiff proposes a reduction of 20% to reflect the income tax that she would have paid resulting in a net claim of $142,188 ($177,735 x 0.8).

[174] Counsel for the defendant submits there is no evidence that the plaintiff's work environment at the CKRD, which caused her anxiety and stress and was, at least in part, the reason she chose to work part-time, had changed. He submits it is likely that, but for the MVA, the plaintiff would have continued her part-time employment with CKRD, earning the same monthly income as she did immediately prior to the MVA ($1,660), at least until October 1, 2013. The parties are in agreement that the plaintiff's lost income for this 14-month period was likely $23,240.

[175] An assessment must be made of how much the plaintiff reasonably would have worked after October 1, 2013 when the evidence shows she would have been given a full-time position. She was guaranteed between 25 and 35 hours per week in that position. The defendant submits that it would be reasonable to use an average of 30 hours per week, thereby taking into account the realistic possibility that the plaintiff would have worked less than full hours for work-life and work-stress reasons. There were 210 weeks between October 1, 2013 and the date of trial resulting in a total of 6,300 hours lost. Using the plaintiff's own estimate of 70%

(4,410 hours) at regular pay ($18.60/hour) and 30% (1,890 hours) at increased pay for teaching advanced courses ($24.17/hour), the total comes to $127,707. During that same period the plaintiff actually earned $47,830. Accordingly, the defendant calculates the plaintiff's gross past lost income as follows:

August 1, 2012 to September 30, 2013	$23,240
October 1 to 31, 2013	$127,707
Less: Actual Income	<$47,830>
	$103,117

[176] The defendant acknowledges that this calculation must be increased to reflect a reasonable amount for the plaintiff's lost benefits. The evidence indicates that the value of the plaintiff's benefits at the CKRD was approximately 15% and that, once she resumed full-time employment, she would also have been entitled to pension benefits. The defendant does not take issue with the plaintiff's use of 8% for the value of her pension benefits. Accordingly, the defendant's past income loss calculation becomes:

$103,117 x 1.15 + $127,707 x 0.08 = $128,802.

[177] Using the same reduction of 20% for income tax, the defendant's calculation reduces to $103,042 ($128,802 x 0.8).

[178] Having considered the submissions and calculations put forward by counsel in their respective written submissions, as well as the likely contingencies and exigencies of the plaintiff's work and family circumstances, I assess the plaintiff's past loss of income at $120,000.

Loss of Future Earning Capacity

[179] An award for loss of future earning capacity recognizes that a plaintiff's capacity to earn income is an asset that has been taken away. If a plaintiff's permanent injury limits her capacity to perform certain activities and consequently impairs her income earning capacity, she is entitled to compensation: *Rosvold v. Dunlop,* 2001 BCCA 1, at para. 8. The plaintiff must demonstrate both impairment to

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her earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss. The standard of proof is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49, at para. 101.

[180] Once that threshold is met, the plaintiff may prove the amount of loss by one of two calculation approaches, as set out by the British Columbia Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, at para. 32:

> [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa.* But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
>
> [Emphasis in original.]

[181] The plaintiff submits that an earnings approach is appropriate in this case because she had a designated job and full-time position that she would have returned to had the MVA not occurred. He submits that Ms. Pilla’s income is a very good indicator of what the plaintiff would likely have been. The plaintiff submits that, but for the MVA, there is real and substantial possibility that she would have returned to her Lifeguard Supervisor 2 position by the beginning of 2018 when her children were well into their school years. Using the pay scale set out in the current collective agreement, the plaintiff would have earned approximately $20,000 per year more than what she is earning in her current position. Assuming an annual differential of $20,000 per year until the plaintiff reaches the age of 65 (30 years from now), and using the agreed multiplier of 23.451 ($23,451/$1,000), the plaintiff’s loss of future earning capacity is calculated as follows:

> $20,000 x 23.451 = $469,020

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[182] The plaintiff also submits that there was a real and substantial possibility that, but for the MVA, she would have become a paramedic by the age of 42 and would have worked 80% of her time in that capacity until the age of 65 (23 years) and 20% of her time as a lifeguard. The evidence shows that a fully qualified paramedic is currently paid approximately 20% more than what the plaintiff would have earned as a lifeguard. Based upon the foregoing, the plaintiff would have earned a differential of 80% x 20% = 16%, rounded to 15%. Applying this differential to the above loss of future income calculation, the plaintiff's claim becomes:

$469,020 x 1.15 = $539,373.

[183] The defendant concedes that the plaintiff has a diminished future earning capacity based upon her right shoulder injury, but submits that an earnings approach for calculating her loss is inappropriate because:

a) there is no evidence as to what the average paramedic earns in the Castlegar area or how many hours would likely have been available to the plaintiff if she had been able to begin working as a paramedic in 2024;

b) there is a real and substantial possibility that the plaintiff's current job is not her "last and best career" and she may earn greater amounts in the future;

c) there is no certainty that the plaintiff would have been able to complete her training as a paramedic and there would likely have been loss of earning while she was taking the training, in addition to the costs of the training itself; and

d) there is no evidence regarding labour market contingencies, the value of the pension paramedics become entitled to after six years or of the benefits to which they are entitled.

[184] The defendant submits that a reasonable award under this head of damages using the capital asset approach is $36,000 per year for two years or $72,000.

[185] I accept that there was a real and substantial possibility that, but for the MVA, the plaintiff would have continued working part-time as a lifeguard until October 2013, at which time she would likely have returned to full-time employment as a lifeguard.

[186] I also accept that there is a real and substantial possibility that she would have qualified and become employed as a paramedic by the age of 45. As a result of the MVA, she has lost the ability to take advantage of these opportunities and is less marketable as an employee generally. This loss is not easily measurable. In my view, the appropriate approach in the circumstances of this case is the capital asset approach. Once impairment of a plaintiff's earning capacity as a capital asset has been established, the court must do its best to put a value on it: *Rosvold*, at para. 11.

[187] The factors to be considered in assessing loss of future earning capacity under the capital asset approach were set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), cited with approval by Mr. Justice Taggart in *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.) at para. 25:

> [25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in *Brown v. Golaiy*. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But, I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons, have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:
>
>> The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>>
>> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>> 2. the plaintiff is less marketable or attractive as an employee to potential employers;
>> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>> 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

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[188] Quantifying the plaintiff's loss of earning capacity is not an easy task. I must consider the risk that the plaintiff's pre-existing pain complaints would have detrimentally affected her in the future. I must also consider the normal chances and hazards of life. Taking all of the foregoing into consideration, I assess the plaintiff's loss of future earning capacity at $200,000.

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Cost of Future Care

[189] The plaintiff seeks an award of $24,199 less a modest reduction to reflect present value for ongoing physiotherapy for five years ($3,300), massage therapy for five years ($5,880), occupational therapy ($1,200) and Effexor medication until the age of 75 ($13,819). The plaintiff did not attempt to provide a present value calculation of these amounts.

[190] An award for the cost of future care is based on what the evidence shows is reasonably necessary to preserve and promote the plaintiff's mental and physical health: *Gignac v. Rozylo*, 2012 BCCA 351, at para. 30. The extent to which the award should be adjusted for contingencies depends on the specific facts of each case. There must be some evidentiary link between the assessment of pain and the care recommended by a qualified health professional: *Gignac* at para. 31.

[191] In *Penner v. Insurance Corp. of British Columbia,* 2011 BCCA 135, at para. 13, the Court of Appeal recognized that claims for cost of future care require a measure of common sense.

[192] I accept the opinion evidence of Drs. Bitting and Waseem that the plaintiff will likely require some occupational rehabilitation, some ongoing treatment for chronic pain management, and some focused massage therapy and physiotherapy.

[193] The difficulty is that no meaningful evidence was presented by the plaintiff regarding the likely future cost of these treatments. Moreover, some account must be taken for the plaintiff's pre-MVA propensity of utilizing these same forms of treatment.

[194] This is a case where the court is left to assess on its own what an appropriate award should be. Having considered the plaintiff's pre-MVA use of massage therapy and physiotherapy, and the likelihood that those treatments would have continued regardless of the MVA, and having considered that although the plaintiff continues to take Effexor daily for her MVA-related emotional symptoms, there is no evidence as to how long she will likely need to continue to take it, I assess her entitlement for the cost of future care at $3,000.

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Loss of Housekeeping Capacity

[195] The plaintiff seeks an award of $25,000 for her loss of housekeeping capacity.

[196] Although the evidence shows that the plaintiff has more difficulty performing her usual household duties as a result of the MVA, it also shows that the frequency of the attendances of a housekeeper hired by the plaintiff did not increase after the MVA.

[197] In my view, the evidence supports no more than a modest award under this head of damages. I find that an award of $2,000 is appropriate.

In-Trust Claim

[198] The purpose of an in-trust award is to compensate a plaintiff for the diminished ability to carry out household tasks in situations where they have been performed gratuitously by family members or others: *Etson v. Loblaw Companies Ltd. (c.o.b. Real Canadian Superstore)*, 2010 BCSC 1865, at para. 81. The factors to be considered were set out in *Etson* at para. 83:

a) the services provided must replace services necessary for the care of the plaintiff as a result of her injuries;

b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;

c) the maximum value of such services is the cost of obtaining the services outside the family;

d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will lower the amount;

e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and

f) the family members providing the services need not forgo other income and there not be payment for the services rendered.

[199] Here, the plaintiff claims on behalf of her mother, Kimberley, and her grandmother, Ms. Smith, for the personal care they provided to her for the several weeks immediately following the MVA as well as after her shoulder surgery. That care included having to bathe the plaintiff, change her clothing, perform housekeeping duties as well as providing care for the plaintiff's husband, Cory, and their children that the plaintiff was unable to perform. Kimberley and Ms. Smith also drove the plaintiff to her medical appointments.

[200] On the basis that it would have cost approximately $33 per hour to hire someone to replace the plaintiff's contributions to housekeeping and childcare, and on the assumption that Kimberley and Ms. Smith worked 315 hours performing those tasks, the plaintiff makes an in-trust claim in the amount of $10,395.

[201] The difficulty here is that there is no evidence regarding the value or frequency of the services that were provided. There is no basis upon which the court can assess a true and reasonable value of the caregiving that Kimberley and Ms. Smith provided to the plaintiff or how much of what was done was beyond what would have been expected from them.

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[202] In my view, the failure on the part of the plaintiff to provide this evidence is fatal to her claim under this head of damages and, accordingly, it is dismissed.

Special Damages

[203] The parties are in agreement that, after the MVA, the plaintiff spent $16,070.75 in respect of medication and physiotherapy and massage therapy.

[204] However, the defendant submits that the plaintiff would likely have incurred some of these expenses regardless of the MVA. I agree. The plaintiff's pre-MVA history of massage, chiropractic and physiotherapy treatments is such that it is more probable than not that she would have continued with at least some of them had the MVA not occurred.

[205] In my view, it is reasonable to conclude that the plaintiff would have spent approximately $750 per year, or $3,500 for these therapies had the MVA not occurred.

[206] The plaintiff is entitled to an award of $12,570.75 for special damages.

CONCLUSION

[207] The plaintiff is entitled to judgment against the defendant for the following amounts:

a)	Non-pecuniary damages:	$120,000
b)	Past income loss:	$120,000
c)	Loss of future earning capacity:	$200,000
d)	Cost of future care:	$3,000
e)	Loss of housekeeping capacity:	$2,000
f)	In-trust claim:	$0.00
g)	Special damages:	$12,570.75
	TOTAL	**$457,570.75**

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[208] Subject to any submissions the parties wish to make, the plaintiff is entitled to his costs of the action at Scale B.

"G.C. Weatherill J."

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