

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Andrews v. Mainster*,
2014 BCSC 541

Date: 20140331
Docket: M111313
Registry: Vancouver

Between:

Brenda Andrews

Plaintiff

And

Gail Mainster and Harold Chaim Gutovich

Defendants

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Plaintiff:

I. Kordic
& D. Mah

Counsel for the Defendants:

J.W. Joudrey
& J. Grewal

Place and Date of Trial:

Vancouver, B.C.
March 11-15
& 18-22, 2013

Place and Date of Judgment:

Vancouver, B.C.
March 31, 2014

INTRODUCTION

[1] This is an assessment of damages for physical and psychological injuries sustained by the plaintiff, Brenda Andrews, in a motor vehicle accident which occurred on October 10, 2009 at the intersection of West 16th Avenue and Fir Street in Vancouver, British Columbia. The plaintiff was driving west on West 16th toward Fir Street when a vehicle driven by the defendant Gail Mainster and owned by the defendant Harold Chaim Gutovich struck her vehicle while making a left turn from Fir Street. Liability has already been determined. By Reasons for Judgment indexed as *Andrews v. Mainster*, 2012 BCSC 823, the Honourable Mr. Justice Masuhara found the defendant Gail Mainster to be entirely at fault.

[2] The plaintiff claims that she suffered a fractured sternum and soft tissue injuries to her chest, neck, right arm, shoulders, low back and right hip as a result of the defendants' negligence. She also claims that the motor vehicle accident caused her psychological injuries which have disabled her from employment in any capacity since October 10, 2009. Ms. Andrews claims non-pecuniary damages, special damages totalling \$78,833.57, damages for past wage loss, loss of future earning capacity and costs of future care.

[3] Counsel have requested that submissions on any income tax gross-up and management fees be deferred until after the court delivers Reasons for Judgment on the assessment of damages.

ISSUES

[4] The issues raised in this action are:

- (a) What injuries did the plaintiff suffer as a result of the October 10, 2010 motor vehicle accident?
- (b) Did the accident cause or contribute to the plaintiff's ongoing pain and psychiatric disorders?

- (c) What amounts, if any, are payable to the plaintiff for non-pecuniary damages, past income loss, loss of future earning capacity, cost of future care and special damages?
- (d) Has the plaintiff failed to mitigate her damages, and if so, to what extent?

[5] In order to address these issues, it will be necessary to assess the credibility and reliability of the plaintiff's evidence.

POSITIONS OF THE PARTIES

The Plaintiff

[6] The plaintiff submits that but for the motor vehicle accident of October 10, 2009 she would not have suffered the emotional and psychological collapse which continues to render her dysfunctional. Prior to the motor vehicle accident, the plaintiff experienced fluctuating levels of depression and anxiety and recurring complaints of pain in her neck and back, and pain that radiated from right shoulder down to her right hand. However, the plaintiff says none of these symptoms interfered with her functioning at work, or socially.

[7] The plaintiff submits that the motor vehicle accident was a highly traumatic experience for her and that her pre-accident history of emotional trauma and anxiety made her particularly vulnerable to further impairment of her emotional and psychological functioning. The plaintiff submits that she suffered both physical and psychiatric injuries in the motor vehicle accident. Ms. Andrews says although she has made a substantial but incomplete recovery from her physical injuries, her psychiatric injuries have severely impaired her emotional boundaries, disabled her from any employment at the present time, and may prevent her from ever resuming her former employment as a counsellor to First Nations residential school survivors.

The Defendants

[8] The defendants acknowledge that the plaintiff is entitled to damages for the physical and psychological injuries she sustained in the motor vehicle accident. However, they say that on the weight of the evidence, the plaintiff's psychological condition had reached a crisis point by September 2009, and that most of the plaintiff's post-accident complaints were caused by her pre-existing condition, rather than by the accident. The plaintiff had a long-standing history of fluctuating levels of anxiety and depression. Although the plaintiff had managed to function before the motor vehicle accident, the defendants submit that the clinical notes of the plaintiff's family physician, Dr. Zhang, for September 2009, that the plaintiff was depressed, irritable and "losing her mind", show that Ms. Andrews' psychological disorders had reached a crisis level shortly before the accident.

[9] The defendants argue it is probable that the plaintiff was suffering profound distress because she was unable to maintain emotional boundaries between herself and the clients she was counselling, who had serious psychological problems, and histories of childhood neglect and abuse similar to that suffered by the plaintiff. The defendants invite the court to find that the plaintiff's desire to help people with whom she empathized deeply, combined with her inability to cope with the demands of counselling residential school survivors, took a heavy emotional and psychological toll on the plaintiff, which reached the crisis point as her contract with Health Canada came to an end in September 2009.

[10] The defendants rely upon the evidence of their expert in psychiatry, Dr. Vallance, that the plaintiff should never have attempted to counsel residential school survivors, given her own emotional and psychological problems. Dr. Vallance also gave evidence that because the plaintiff's self-identity was so closely tied to her academic and workplace success, she would never admit to herself that she could not maintain proper emotional boundaries with her clients.

[11] The defendants submit that the motor vehicle accident caused a temporary exacerbation of the plaintiff's pre-existing physical and psychological symptoms

which had likely resolved by May 2010, before Ms. Andrews and her dog were attacked by two off-leash German Shepherds. The defendants contend that event, and subsequent traumatic incidents, including the plaintiff's second encounter in August 2011 with the owner of the German Shepherds and her witnessing of a sexual assault in July 2012, have all contributed to her ongoing anxiety, stress and dysfunction. The defendants submit that damages should be assessed for a seven month temporary exacerbation of the plaintiff's pre-existing conditions. They argue that Ms. Andrews has no entitlement to damages for loss of future earning capacity, or cost of future care.

FACTS

The Plaintiff

[12] The plaintiff, who was 51 years old at the time of the accident, and 55 at the time of trial, is a member of the Blood First Nation. She spent her early childhood, until age five on the Blood Reserve, located near Cardston, Alberta. The plaintiff was the second of her mother's four children. Sometime between the ages of three and five, Ms. Andrews spent approximately a year at St. Paul's Residential School, located on the Blood Reserve. The plaintiff was the youngest child at the school. She recalls that if one child misbehaved, they were all spanked. She has no other recollection of being subjected to any form of abuse at the residential school.

[13] In 1962, the plaintiff moved with her mother and step-father to Calgary, and two years later to Ottawa, where her step-father was employed as an engineer. Around 1969, her step-father moved the family back to Calgary, although he continued to work in Ottawa for another year. During the year she was alone in Calgary, the plaintiff's mother drank heavily, was unable to cope with the demands of four young children and physically abused the plaintiff.

[14] During grades eight and nine, the plaintiff associated with a group of friends and young adults who consumed alcohol and used drugs. Through her remaining years in school, and until 1987, the plaintiff abused alcohol and also used drugs

intermittently. Ms. Andrews completed grade eight, and took some courses in successive grades until she quit school in grade 11. After Ms. Andrews left school, she worked in various retail positions and as a waitress in nightclubs and restaurants. She also found some work as a model and actress.

[15] In 1981, the plaintiff moved to Vancouver where she continued to work as a waitress, bartender and model. In 1987, the plaintiff, then 30 years old, decided to put an end to her alcohol abuse. She was referred to the Aurora House Residential Treatment Centre where she successfully completed a six-week rehabilitation program. The plaintiff has not consumed alcohol or used illicit drugs since then.

[16] In 1988, Ms. Andrews enrolled in Langara College's University Transfer Program while continuing to work part-time as a waitress.

[17] In September 1992, the plaintiff enrolled at the University of British Columbia and obtained her Bachelor of Arts in Anthropology in 1996. While attending university she worked part-time for Air Canada as a customer service agent.

[18] In February 1997, Ms. Andrews obtained a part-time position as a First Nations Student Advisor at Vancouver Community College. She continued in that position until 2005.

[19] In 2000, the plaintiff began her Master of Education Degree in Counselling Psychology at the University of British Columbia. She obtained her Master's Degree in May 2004. Ms. Andrews achieved high grades throughout her studies at UBC, and takes well-deserved pride in her academic success.

[20] The plaintiff's objective, upon completing her Master's Degree, was to provide counselling services to residential school survivors.

[21] In July 2004, the plaintiff resigned from her position at Vancouver Community College in order to pursue her desired career. She then commenced employment with the Indian Residential Schools Survivors Society ("IRSSS") as a contractor, at an hourly rate of \$24.73. She was engaged by IRSSS to assist First Nations people

participating in the Residential Schools compensation process. In January 2005, the plaintiff obtained a full-time position with IRSSS as a Resolution Health Support Worker at an annual salary of \$50,000. In June 2005, the plaintiff moved into the position of a therapist at IRSSS and her salary increased to \$60,000 per year. While employed with IRSSS, Ms. Andrews also provided counselling services to First Nations youth at risk in the Downtown Eastside through the Watari Society, for 12 hours a week at the rate of \$30 per hour.

[22] The plaintiff left her employment with IRSSS in January 2007, when she obtained her certification as a Registered Clinical Counsellor. As a self-employed counsellor she provided services through Health Canada to claimants participating in the informal claims resolution process for residential school survivors. From June 2008 until September 2009, Ms. Andrews commuted on a weekly basis from Vancouver to Port Hardy in order to serve the large number of claimants located on northern Vancouver Island. Health Canada paid the plaintiff a per diem rate for counselling which started at \$650 and had increased to \$900 per day by September 2009 when she terminated her contract with Health Canada.

[23] Ms. Andrews testified that her services as an aboriginal counsellor to residential school survivors were in demand, that she received referrals from her clients, and from lawyers involved in the compensation process, and that she had never found it necessary to market her services in Vancouver.

[24] The plaintiff's last day of work before the accident was September 26, 2009. She estimated that 80 percent of her work at Port Hardy was on reserve. As a member of the Blood First Nation, the plaintiff was not required to pay income tax on income earned from on reserve employment.

[25] In November 2007, Ms. Andrews began a relationship with Mr. Frank Priolo, an aeronautical engineer who lives in Maryland, in the United States of America, but travels extensively for his work. The plaintiff described her relationship with Mr. Priolo as "up and down" until April 2009. Ms. Andrews and Mr. Priolo separated from February 2009 until April 2009 when they resumed their relationship. Since

then, they have maintained their relationship. Mr. Priolo has provided much needed emotional support, as well as financial assistance, to the plaintiff since the accident. Ms. Andrews and Mr. Priolo became engaged in February 2013, but at the time of trial had not yet set a date for their marriage.

[26] Immediately before the motor vehicle accident, the plaintiff was exploring her options for employment. She wanted to spend time with Mr. Priolo, and with her parents in Calgary. She was looking into opportunities for counselling work in Alberta, either through the Blackfoot Confederacy or in the Calgary area. The plaintiff was also considering the possibility of opening an office for her counselling practice in Vancouver. In addition, because Ms. Andrews anticipated that she and Mr. Priolo would be establishing a home base in the Washington, D.C. area, she had contacted an agency in Maryland to inquire about the requirements for licensing as a counsellor there. The plaintiff was also looking into the possibility of pursuing a Doctorate of Education at the University of British Columbia, either on a part-time basis or by distance education. She had made no firm plan to do so before the motor vehicle accident. However, if she enrolled in a doctoral program, she intended to work part time while she pursued her studies. The plaintiff had worked in order to support herself throughout her earlier post-secondary education. I accept her evidence that she planned to work part time if she enrolled in a PhD program.

[27] Mr. Priolo understood that at the time of the accident the plaintiff intended to take some time off, and to investigate obtaining work in Calgary similar to the work she had done in Port Hardy with residential school survivors. Mr. Priolo confirmed that he and Ms. Andrews were planning, at the time of the accident, to set up a home base in Washington, D.C. The plaintiff had looked into obtaining a licence to practice as a Clinical Counsellor in the Washington area and had looked into obtaining full-time employment with the Bureau of Indian Affairs in Washington.

[28] In direct examination, Ms. Andrews was asked about her mental health history prior to the motor vehicle accident. She testified that she only saw depression and anxiety affecting her relationships with men. During bouts of deep

depression or anxiety she would not eat, sometimes had difficulty sleeping, and would cry a lot. However, she was still able to work. The plaintiff testified that in the five years before the motor vehicle accident she had no personal counselling. Ms. Andrews explained that after she commenced her employment with IRSSS she was required to have counselling supervision. She met between one and three times a month with a psychologist, Tracy Good, to make sure that she was using the appropriate counselling methods with her clients and to ensure that she maintained boundaries between herself and her clients. The plaintiff testified that she had no counselling from Ms. Good for personal issues while she was employed with IRSSS but had seen Ms. Good previously for counselling during and after difficult relationships.

[29] Ms. Andrews testified that she never missed work due to depression or anxiety before the motor vehicle accident. When shown the clinical record, the plaintiff did acknowledge that in March 2006 she took 10 days stress leave from her employment with IRSSS. Ms. Andrews attributed her stress in the workplace at that time to a difficult relationship with her supervisor. I find this was the only time the plaintiff lost from work as a result of stress or anxiety before the accident.

[30] According to the plaintiff, in September 2009, neither physical nor psychological problems were interfering with her life. However she acknowledged she was highly conflicted about her decision to leave Port Hardy and no longer serve her clients there. She testified that she had no plan to retire and thought she could continue to work as a therapist into her 70s.

[31] In direct examination, the plaintiff gave evidence that in September 2009 she had a busy social life, was closely connected with the First Nations community, ran 20 to 30 kilometers a week and participated in a range of sporting activities, including playing golf, cross-country skiing and bowling. She also visited her parents in Alberta frequently, entertained friends, went to the movies, shopped and hiked.

The Plaintiff's Pre-Accident Medical History

[32] Ms. Andrews' pre-accident medical history involved a complex array of both physical and psychiatric conditions.

The Plaintiff's Pre-Accident Physical Condition

[33] The plaintiff had a history of fibromyalgia, first diagnosed in 1992. However there is no recent diagnosis or medical opinion suggesting that Ms. Andrews continued to suffer from that condition at the time of the October 2009 accident.

[34] In November 2005, the plaintiff saw her general practitioner, Dr. Mandy Karim, following an accident where the vehicle in which she was travelling as a passenger was rear-ended by another vehicle. Dr. Karim noted that the plaintiff complained of pain and numbness in her right shoulder and arm, and diagnosed a sprain to Ms. Andrews' cervical spine and right shoulder.

[35] In July 2006, following a slip and fall, the plaintiff complained of low back pain, tingling in her head, numb shoulders and a numb right arm. She received chiropractic treatment from Dr. Charles Campbell for her head, neck, upper and lower back symptoms.

[36] On February 6, 2008, the plaintiff attended at the Seymour Medical Clinic, where Dr. Rui Zhang, who was then her family physician, noted her complaints of neck, low back and right hip pain, and numbness and tingling in her right hand and toes. X-rays of the plaintiff's neck performed March 3, 2008 revealed the presence of degenerative disc disease from C5 to C7 and arthritis of the facets at C4-5 and C7-T1.

[37] On March 3, 2008, the plaintiff saw a physiatrist, Dr. Ian Murray about her complaints of right arm pain and numbness. Dr. Murray diagnosed the plaintiff with arthritis of her neck and associated nerve root impingement. A CT scan of the neck on April 28, 2008 indicated severe disc disease at C5-6 and C6-7.

[38] The plaintiff was last seen at the Seymour Medical Clinic before the accident on September 15, 2009, at which time she complained of headaches affecting the back and sides of her head, neck pains, shoulder pains, and stress.

[39] I find that before the accident, the plaintiff suffered from moderate to severe arthritis of the cervical spine that caused her neck pain and the radiating pain or numbness in her right shoulder and arm which troubled her intermittently. I also find that the plaintiff suffered from low back and right hip pain, headaches and insomnia from time to time before the motor vehicle accident.

The Plaintiff's Pre-Accident Psychiatric Condition

[40] The plaintiff reported that she suffered head injuries in 1981 and 1997. In 1981 Ms. Andrews struck her head on a dumpster lid while working as a waitress. In 1997, while riding in a jeep over rough terrain in Arizona, she struck her head on the vehicle's roll bar. Neither injury had any long term consequences. In light of her subsequent exceptional academic performance, I find that neither of these events impaired her cognitive abilities.

[41] The plaintiff had a long-standing history of anxiety, depression and mood disorders prior to the motor vehicle accident. In August 2004 the plaintiff completed a questionnaire for the diet clinic she was then attending in which she reported the following symptoms:

- (a) can't decide easily (moderate);
- (b) chronic fatigue (moderate);
- (c) lack of energy (moderate);
- (d) magnifies insignificant events (moderate);
- (e) sleepy after meals (moderate);
- (f) sleepy during the day (moderate);
- (g) insomnia (severe); and
- (h) poor memory (severe).

[42] In a further questionnaire, which the plaintiff completed on July 9, 2007, she endorsed as "moderate" the following symptoms: chronic fatigue due to weight gain; insomnia; and sleepy during the day. Ms. Andrews identified as "moderate to severe" symptoms of insomnia and lack of energy.

[43] Between July 11, 2007 and August 7, 2008 the plaintiff attended at the Seymour Medical Clinic on fifteen occasions for treatment for mood disorder, anxiety or depression. She received prescriptions for Wellbutrin, an anti-depressant, Seroquel, a psychotropic medication, and Ativan to relieve her anxiety.

[44] In July 2008, the plaintiff was referred by Dr. Zhang to the University of British Columbia Mood Disorders Clinic for a psychiatric assessment. Dr. Kevin Solomons saw the plaintiff. On December 4, 2008, he noted the plaintiff's history of childhood abuse and neglect, and reported that she was feeling "empty, worthless and miserable". Dr. Solomons diagnosed dysthymia, a mood disorder characterized by chronic low grade depression, and found no signs of post-traumatic stress or major depression. He recommended that the plaintiff continue Wellbutrin and counselling.

[45] On March 27, 2009, during the plaintiff's separation from Mr. Priolo, Dr. Zhang noted that Ms. Andrews had no anxiety attack since breaking up with her boyfriend, but "still feels low".

[46] Prior the accident, the plaintiff's treatments included medications, counselling and Eye Movement Desensitization Reprocessing Therapy ("EMDR"). At the time of the accident, the plaintiff still had prescriptions for Wellbutrin, Seroquel and Ativan.

[47] On September 1, 2009, the plaintiff saw Dr. Rui Zhang, who was then her family physician, at the Seymour Medical Clinic. Dr. Zhang's clinical note included the following entry:

Depression

"Losing mind" depressed, irritable, angry moments of despair not cleaning rooms. No suicidal plans but sleeps doesn't wake up.

Saw psychiatrist twice. Doesn't find he helps.

[48] The plaintiff last saw Dr. Zhang on September 15, 2009. Dr. Zhang recorded that the plaintiff had a lot of worries, felt tense, lacked support in Vancouver and wanted to move back to Calgary and stay close to her family.

[49] Dr. O'Shaughnessy, a leading forensic psychiatrist, examined Ms. Andrews at the request of her counsel on November 20, 2012.

[50] Dr. O'Shaughnessy thought that before the accident the plaintiff suffered from dysthymia, which he described as a mood disorder characterized by "chronic low grade depressed moods often associated with significant psycho-social difficulties and/or underlying personality trait difficulties". He also diagnosed the plaintiff's pre-accident condition as involving possible previous episodes of major depressive disorder in remission with medications. Dr. O'Shaughnessy thought that before the accident the plaintiff also met the criteria for Cluster B personality traits or disorder. He explained that condition describes people who have problems with emotional regulation, relationship difficulties, problems with self-esteem as well as difficulties with their identity and self-management. He thought those symptoms had waxed and waned over the years, depending on the particular stresses affecting the plaintiff and how she was able to cope with them at the time.

[51] I accept the opinion of Dr. O'Shaughnessy, shared by Dr. Vallance, that before the accident the plaintiff suffered from dysthymia, and had for many years experienced fluctuating levels of anxiety and depression that waxed and waned depending on the particular stressors affecting her from time to time. I also find that the plaintiff's sense of identity and self-worth was closely tied to her high level of academic achievement and her work as a counsellor for residential school survivors. I accept Dr. O' Shaughnessy's opinion that before the accident the plaintiff also had the problems with emotional regulation, low self-esteem and difficulties with relationships that he identified as comprising the Cluster B personality traits or disorder.

THE ACCIDENT

[52] On October 10, 2009, at approximately 2:50 p.m., the plaintiff was driving home from Vancouver International Airport, where she had picked up Mr. Priolo. She was driving west on West 16th Avenue, toward the intersection of West 16th and Fir Streets at a speed of 40 to 45 kilometers per hour. Mr. Priolo was in the front passenger seat, holding the plaintiff's dog, Dixie. As the plaintiff proceeded toward the intersection with the green light in her favour, the defendant Mainster attempted a left turn and collided with the front end of the plaintiff's vehicle, which sustained significant damage. Ms. Andrews testified that upon impact she felt a "shock wave" and experienced excruciating pain in her chest. She recalled that Mr. Priolo undid her seatbelt and that she then opened the door, exited the vehicle and lay down on the road. The plaintiff testified that she "blacked out" briefly and then recalled someone assisting her onto the grass by the roadside, where she laid down.

[53] Mr. Priolo recalled that immediately after the collision the plaintiff was screaming and that he helped her out of her seatbelt. After he exited the vehicle, he found the plaintiff lying on the roadside crying, and complaining of chest pain. With the help of passersby, he assisted the plaintiff to the side of the road and remained with her until the plaintiff was taken by ambulance to hospital.

[54] The plaintiff was transported by ambulance to Vancouver General Hospital ("VGH"). Ms. Andrews testified that she was shocked, scared, felt pain in the center of her chest, and thought she was going to die.

[55] X-rays taken at VGH of the plaintiff's chest and neck showed no acute injuries but revealed degenerative changes to the neck from C4 to C7. The emergency room records indicate there was no evidence of a head injury or head trauma. Ms. Andrews was given Extra Strength Tylenol and was discharged from the hospital. Mr. Priolo took her home.

[56] When Ms. Andrews attended the Seymour Medical Clinic on October 13, 2009, she complained of chest pain, difficulty breathing, neck pains, right arm numbness, tingling and weakness, difficulty with sleep and anxiety.

[57] On October 16, 2009, the plaintiff saw Dr. Karim and complained of chest pain at that time.

[58] The plaintiff underwent MRI scans of her brain and chest at Canadian Medical Imaging on October 20, 2009. The brain scan showed the presence of encephalomalacia, or atrophic changes of the brain in certain areas, as well as a right frontal lesion that was thought to be consistent with haemosiderin deposition due to high blood pressure or possibly trauma.

[59] The MRI chest scan showed two small undisplaced fractures of the plaintiff's sternum.

[60] In his medical/legal report of October 17, 2012, Dr. Andrew Travlos, a physiatrist retained by the plaintiff to provide an opinion for this litigation, noted that the MRI brain scan took place 10 days after the accident and that this would not be sufficient time for wasting of the brain to have arisen from the accident, or for the development of a haemosiderin stain. Dr. Travlos opined that if there had been bleeding from the accident, the MRI scan would have shown an area of bleeding in the brain rather than the haemosiderin staining. I accept Dr. Travlos' opinion that the MRI brain scan findings pre-dated the accident, and find that the plaintiff did not suffer a concussion, or any traumatic brain injury as a result of the accident. I also note the plaintiff reported no loss of consciousness when she was examined at the VGH Emergency Department.

[61] As for the plaintiff's evidence that she "blacked out", Dr. Travlos explained that patients who are concussed do not recall the experience. He thought that Ms. Andrew's detailed recollection of the accident and its aftermath weighed against a head injury or concussion.

[62] If Ms. Andrews blacked out after getting out of her vehicle, she did so only briefly. She was conscious when Mr. Priolo came round to her side of the vehicle and assisted her off the road. Again, I accept Dr. Travlos' opinion, and find that the delayed onset of any blacking out militates against a concussion and was more likely due to low blood pressure or shock.

The Plaintiff's Injuries

[63] When Mr. Priolo saw the plaintiff at VGH after the accident she complained of pain in her chest and right shoulder. He also noticed that she would lose her train of thought, and seemed to have lapses of memory during their conversations.

[64] Ms. Andrews was discharged from hospital later on the day of the accident. After Mr. Priolo took the plaintiff home, he cared for her for several days. He testified that during this time the plaintiff continued to be in a lot of pain, that she needed his help to get into and out of bed and to shower, and that she could not cook or do any laundry. The plaintiff also had difficulty sleeping and complained of nightmares.

[65] I accept the plaintiff's evidence that in the days immediately following the motor vehicle accident, she had bruising to her chest and right shoulder, experienced pain in her chest, and numbness and tingling in her right arm. She had difficulty sleeping, and when she did sleep, experienced nightmares.

[66] Following the motor vehicle accident, Mr. Priolo increased the frequency of his visits to Vancouver to help care for the plaintiff. Before the motor vehicle accident, he typically travelled about four times a year from Washington, D.C. to Vancouver, and Ms. Andrews travelled about the same number of times each year to Washington, D.C. Since the accident, Mr. Priolo travels to Vancouver between 15 and 20 times a year.

[67] Mr. Priolo testified that the plaintiff continues to have memory lapses, expresses fear of her own death, and fears that he and her parents will die. When

Mr. Priolo comes to Vancouver, he makes sure that the plaintiff is paying her bills and attends her medical and therapeutic appointments.

[68] As a result of the injuries she suffered in the accident, Ms. Andrews required some assistance with personal care, cleaning and cooking until about February 2010. The physical injuries she attributes to the motor vehicle accident include increased pain in her neck, headaches, fractured chest, whiplash injuries, pain and numbness in her right arm and shoulder, and pain in her right hip and lower back.

[69] Ms. Andrews described her psychological injuries as nightmares, isolation, rage, a loss of emotional boundaries, irrational fear, and fear of driving, which has improved over time. Whereas previously she had been able to work through her depression and anxiety, Ms. Andrews said she is now unable to do so.

[70] The plaintiff received physiotherapy which started soon after the motor vehicle accident and was continuing at the time of trial. She has found the physiotherapy to be helpful.

[71] Ms. Andrews testified that counselling from Dr. Jung, a psychologist, which began in June 2010, and continued on a weekly basis until July 2012 was "helpful to a point". In July 2012, she changed to Dr. Joanne MacKinnon for EMDR therapy which she has found to be quite helpful. She is no longer as anxious with Mr. Priolo and has more hope for the future.

[72] Ms. Andrews described the May 2010 incident where Dixie, her small terrier, was attacked by two off-leash German Shepherds. In August 2011, she had a second encounter with the owner of the German Shepherds, who was threatening and abusive to her. The woman who owned the German Shepherds drove up to her while the plaintiff was walking her dog, threatened to kill her dog and told the plaintiff that she knew where she lived. Ms. Andrews was understandably disturbed and fearful following this incident. When asked why she had not related this incident to Dr. O'Shaughnessy and others she saw for medical/legal purposes, Ms. Andrews said that she did not recall the incident until it was brought up at her discovery.

[73] The plaintiff also described the incident in July 2012 where she witnessed a sexual assault very near her apartment and said that she was fearful when walking her dog following this incident.

[74] The plaintiff testified that her physical injuries have improved. Her right arm is no longer numb and she has the full use of her right arm, although she believes it is still a little weak. Ms. Andrews said that her right hip gives her trouble from time to time but she is learning to manage it.

[75] The plaintiff testified in direct examination that by the time of trial she was 75 percent recovered from the physical injuries she sustained in the motor vehicle accident.

[76] Ms. Andrews testified that on a typical day, if she has no appointments for treatment or therapy, she gets up between 10:00 a.m. and noon, takes the dog for a brief walk, and then returns to her apartment where she lays on the couch until 4:00 or 5:00 p.m. watching television or playing on her iPad. She walks to Granville Island to purchase groceries, and often will not shower. Typically, she spends her evenings on the couch watching television or reading. When Mr. Priolo is not in Vancouver, she will telephone him, or her parents. These are the only people she contacts on a regular basis. Ms. Andrews said she is still struggling with self-care, although she is able to look after herself when Mr. Priolo visits. Despite advice from her caregivers that she should go to bed and get up at consistent times, she continues to sleep during the afternoons and early evenings.

[77] Ms. Andrews described the state of her apartment as "embarrassing". She said she finds completely cleaning her 700 square foot one bedroom apartment overwhelming.

[78] The plaintiff thought she had gained over 20 pounds since the accident and said that she did not really have to struggle with her weight before the accident because she was in good physical condition. However, the clinical record indicates the plaintiff attended weight loss clinics in 2004 and 2007 and in 2007 complained of

chronic fatigue that she attributed to weight gain. I find that the plaintiff's weight fluctuated before and after the accident, and probably did so as her depression, and level of physical activity, waxed and waned.

[79] Ms. Andrews has not worked since the motor vehicle accident. In 2011, she applied for two positions – one with Vancouver Community College and the other with an addiction center for seniors in Richmond. Ms. Andrews said that neither prospective employer called her for interviews, and that she had sent the wrong covering letter with her application to Richmond. She attributed that error to an impairment of her cognitive functions caused by the accident.

[80] With respect to future employment, Ms. Andrews testified that she dislikes being dependent and would like to return to work as a counsellor but is not yet ready to do so. She accepts that in her present psychological condition she would not be able to maintain appropriate boundaries with her clients. However, she hopes to return to work as a therapist and to serve clients in the First Nations community.

[81] In her direct examination, Ms. Andrews was asked about previous car accidents. She recalled an incident around 2004 when her vehicle was rear-ended but said she was not injured. The plaintiff did not recall a motor vehicle accident in 2005 and did not remember receiving any treatment for it. Ms. Andrews did remember striking her head on the roll bar of the Jeep while in Arizona in 1997. She remembered somebody telling her to have the blow to her head checked as she was having neck problems at the time. However, Ms. Andrews does not recall receiving any treatment.

THE EXPERT MEDICAL EVIDENCE

Dr. Thomas Kay

[82] Dr. Thomas Kay, a psychologist, performed a two-day neuro-psychological evaluation of the plaintiff one year after the accident, on October 5 and 7, 2010. Unfortunately, Dr. Kay died before the trial. By reasons indexed as *Andrews v. Mainster*, 2013 BCSC 501, I ruled that those parts of Dr. Kay's report that recorded

the history he took from Ms. Andrews, discussed the tests he administered and set out his opinions on the results of his testing of the plaintiff's cognitive functioning met the requirements of necessity and reliability for their admission into evidence.

[83] Dr. Kay was asked by plaintiff's counsel to evaluate the nature and extent of possible psychological or neuro-psychological injuries suffered by the plaintiff in the motor vehicle accident of October 10, 2009. In addition to interviewing Ms. Andrews, Dr. Kay administered a battery of cognitive tests. He found that the plaintiff performed extremely well on all of those tests with scores in the high average to superior range. On the Wechsler Adult Intelligence Scale, the plaintiff obtained an IQ of 126, at the 96th percentile, which falls in the superior range. She scored in the 99th percentile for immediate memory, and in the 97th percentile for delayed memory.

[84] Dr. Kay's tests revealed no evidence of any memory deficit. There was nothing in Dr. Kay's neuro-psychological evaluation to suggest the plaintiff had suffered brain damage. Dr. Kay also concluded, on the basis of his interview of Ms. Andrews, that she had essentially continuous recall of the accident. He thought that any confusion the plaintiff experienced immediately following the accident was most likely due to pain and emotion, rather than to the plaintiff having suffered a concussion in the motor vehicle accident. Dr. Kay's report provides a unique assessment of the plaintiff's cognitive functioning one year following the accident.

Dr. Roy O'Shaughnessy

[85] At the time of his examination in November 2012, Dr. O'Shaughnessy diagnosed the plaintiff as having:

1. pain disorder;
2. generalized anxiety disorder;
3. possible PTSD in partial remission.

[86] He described a pain disorder as a somatoform illness in which the person's complaints of pain are thought to have a significant psychological component.

Commonly, and in the plaintiff's case, both medical and psychological factors play a role in the patient's pain.

[87] Dr. O'Shaughnessy described generalized anxiety disorder as "chronic fears in a wide group of areas accompanied by free-floating anxiety symptoms. Persons with this disorder experience catastrophic thoughts and unrealistic fears which they are unable to suppress or control".

[88] At page seven of his report, Dr. O'Shaughnessy offered this opinion:

In review of the material here, it is clear that this woman did have pre-existing Anxiety Disorder but it became much worse post accident. Many of the anxiety themes have car accident content and certainly there are elements of PTSD evident. It is difficult, however, especially in retrospect, to determine how much of this is a new disorder, i.e. PTSD, versus aggravation of the pre-existing Anxiety Disorder. From a functional perspective, the issue is really somewhat moot insofar as this lady clearly has become much worse post accident whether it be due to an increase in the Anxiety Disorder or a new Anxiety Disorder, i.e. PTSD. Further, it interacts with the pain, resulting in the Pain Disorder.

The Pain Disorder is more likely than not caused by the accident in question. I note in the past that she has had complaints of pain but not to the point where it caused any dysfunction nor did she have the same degree of preoccupation or perception of being impaired as she currently demonstrates.

[89] Dr. Vallance, the defendant's expert in psychiatry, agrees with Dr. O'Shaughnessy's opinion that Ms. Andrews' pre-existing anxiety disorder became much worse after the accident and that her anxiety disorder interacts with her pain resulting in the pain disorder.

[90] With respect to causation, Dr. O'Shaughnessy offered this opinion:

Issues of causation in this instance are clearly complicated. As above, she does have a pre-existing Anxiety Disorder and possible Mood Disorder and has had waxing and waning of symptoms depending on stresses over the years. From my review of the records and from my discussions with her, there appears to be a clear worsening of her symptoms post accident. This is entirely expected given that Anxiety Disorders and Mood Disorders themselves are extremely sensitive to

psychosocial stresses in general and in particular to traumatic events such as car accidents of this type. Certainly the self-report and the medication and medical records documents indicate both an increase in symptoms and increase in dose of antidepressant medications consistent with the aggravation or worsening of her pre-existing disorder. She had been more functional before the accident and has become dysfunctional now.

In addition, she has now developed a Pain Disorder that more likely than not would not have occurred but for the injuries sustained in the accident.

As above, it is possible she also developed a PTSD that was more evident early on. Certainly Dr. Kay notes greater symptoms when he saw her in 2010 consistent with a Post-Traumatic Stress Disorder than were evident when I saw her in 2012. The fright of the accident was obviously a significant event for her with evidence of anxiety at the scene and in the emergency room with increased anxiety symptoms thereafter.

[91] Dr. O'Shaughnessy concluded his report with these observations on the plaintiff's functioning:

From a functional perspective, she was doing better before the accident although had been in a difficult period in the weeks preceding the accident given the decision to shift job and location. She has clearly had significant dysfunction post accident that persists to the present. At this point she is not working and frankly, given the nature of her symptoms and preoccupation, I do not think she is capable of work at the current time. It is likely that with appropriate treatment she will experience reduction in symptoms that will possibly allow her to return to her chosen field as a counsellor.

[92] Dr. Vallance agreed that the plaintiff was probably not capable of work at the time that Dr. O'Shaughnessy prepared his report.

[93] Dr. O'Shaughnessy refers at page three of his report to the difficulty in assessing the impact of the plaintiff's underlying and ongoing anxiety on her functioning. He described the plaintiff as having a complex presentation, which includes difficulties with mood regulation. Throughout much of her life, the plaintiff has experienced fluctuations in anxiety and depression. She sees herself as the victim of relationship difficulties and lacks full insight into the impact of anxiety and depression upon her functioning.

[94] In Dr. O'Shaughnessy's opinion, these are long-standing difficulties that preceded the accident. However he thought there was a notable increase in the plaintiff's symptoms after the accident of October 10, 2009. He explained that whether one views the plaintiff's post motor vehicle accident symptoms as a new condition or as the exacerbation of a pre-existing condition, her functional capacity has worsened and she has experienced more mood disruptions and more catastrophic thoughts than she did before the accident.

[95] Dr. O'Shaughnessy thought that the plaintiff cannot function as a therapist or counsellor dealing with clients with high levels of anxiety, depression and trauma when she is preoccupied with her own symptoms and dysfunction.

[96] Dr. O'Shaughnessy said in cross-examination that he relied more on the documented clinical record for the history or timelines of the plaintiff's psychological condition and its treatment than he did on Ms. Andrews' subjective reporting.

[97] When Dr. O'Shaughnessy interviewed the plaintiff, she acknowledged that she had difficulties in setting and keeping appropriate boundaries. He agreed that anxiety disorders will wax and wane depending on what is happening in the patient's life.

[98] Nothing that the plaintiff told Dr. O'Shaughnessy explained Dr. Zhang's clinical note of September 1, 2009 that the plaintiff was depressed, irritable, and was "losing her mind". At this time, the plaintiff had restored her relationship with Mr. Priolo.

[99] Based on his interview with the plaintiff, it was clear to Dr. O'Shaughnessy that Ms. Andrews was experiencing on and off periods of anxiety and depression. He described the plaintiff as having a way of looking at her life that is different from what an objective observer would report. Dr. O'Shaughnessy said that the plaintiff sees events as much more dire than would the average person in similar circumstances.

[100] Dr. O'Shaughnessy was aware that the plaintiff, from her early childhood to age five, experienced periods of neglect and separation from her mother. He thought her recollection of the time spent at the residential school between the age of three and five was likely based on what she was told later. Dr. O'Shaughnessy explained that the memory of children under five is not reliable.

[101] Dr. O'Shaughnessy understood that the plaintiff had abused alcohol between the ages of 15 to 30. Dr. O'Shaughnessy said the plaintiff told him that she had been involved in drug use through her teenage years. He understood that while the plaintiff, like other teens, had used drugs from time to time, there was no pattern of drug abuse by the plaintiff. He contrasted this with the clear pattern of abuse of alcohol by the plaintiff to age 30.

[102] In cross-examination, Dr. O'Shaughnessy acknowledged that there is no objective way of determining the extent to which the plaintiff's complaints of physical pain were or are attributable to the accident or her pre-existing conditions. However, when the plaintiff is exposed to trauma, her underlying psychological and physical conditions are worsened. Following the motor vehicle accident, the plaintiff's functioning deteriorated. Previously, she had been able to function in her work as a counsellor when experiencing periods of anxiety or depression. However, she was unable to do so after the motor vehicle accident.

[103] Dr. O'Shaughnessy agreed that both the incident of May 2010 when Ms. Andrews and her dog were attacked by two off-leash German Shepherds, and her encounter with the owner of the German Shepherds on August 15, 2011, who screamed obscenities at her and threatened to kill her and her dog would have elevated the plaintiff's level of anxiety and could have caused a set-back. Later in his cross examination, Dr. O'Shaughnessy agreed that the plaintiff's encounters with the German Shepherds and their abusive owner were events that traumatized the plaintiff.

[104] The plaintiff did not disclose to Dr. O'Shaughnessy that she had observed a sexual assault from the balcony of her home. He agreed that this was an event that

would likely have a greater impact on an emotionally vulnerable person than on others.

[105] Dr. O'Shaughnessy agreed that the fact the plaintiff was attending for her treatments at the time of trial, was making more of an effort to follow the recommendations of her care providers, was letting go of her emotional attachment to the accident, and reported that she was benefitting from seeing her psychologist, Ms. McKinnon, were all positive factors.

Dr. Maelor Vallance

[106] Dr. Maelor Vallance performed an independent psychiatric examination of the plaintiff for the defendant on March 12, 2012. In his report of March 23, 2012, Dr. Vallance offered this opinion on the effect of the motor vehicle accident on the plaintiff's psychological condition:

Rather than produce features of a Post-Traumatic Stress Disorder I believe that having to deal with the increased pain that she experienced after the accident together with the disruption in her usual routines aggravated her pre-existing emotional problems. Dr. Solomons, in his report of December 4, 2008, described her vulnerabilities and ongoing emotional problems which he attributed to "a protracted and pernicious experience of childhood neglect and abuse." I agree with his summation and particularly the effect on self image bolstered only by her academic achievement and her issues of emotional dependency impacting on her interpersonal relationships, particularly with men. Given the post accident threat of an exacerbation of her pre-existing physical problems, her enforced dependency, not having the ego boost of her job, and lacking emotional supports for a time at least, she had an exacerbation of her pre-existing anxiety and depression. While these problems may have been escalating just before the accident such as reflected in her family doctor's records, even so, the effect of the accident would have added to that escalation. In turn, the increase in anxiety and depression would have increased her perception of pain and impairment and in that regard, I agree with Dr. Pisesky who refers to her emotional problems contributing to the presentation and her physical problems.

...

When I met with Ms. Andrews, her emotional state had improved but she still presented with some features of clinical depression. She had been taking the antidepressant Cymbalta, presumably since it has a

reputation, albeit controversial, of assisting in the management of pain. She reports that her mood was improving on the Cymbalta but she apparently developed a reaction to it and discontinued it. As she describes it, she went into withdrawal and had problems until about six or seven weeks ago when she again began to improve. She reported being somewhat brighter and less irritable and was feeling more hopeful. She was not at the time on antidepressant medication but I believe that she should be, most likely the Wellbutrin that she had been taking over a number of years. Prescriptions for Wellbutrin, Seroquel (Quetiapine) and Ativan had all been renewed just prior to the accident. Her condition when I met with her was probably as good, if not better, than her condition emotionally just prior to the accident as reflected in the records of Dr. Zhang.

[107] In cross-examination, Dr. Vallance agreed that the plaintiff was vulnerable and fragile at the time of the accident and that her vulnerability and fragility arose in part from her history of childhood neglect and abuse, her pre-existing depression and anxiety and her personality type, which included a compulsive nature and borderline personality traits, including emotionality, fluctuations in mood and poor self-image. He also agreed that depression and anxiety will increase a patient's sense of pain.

[108] Dr. Vallance noted that the plaintiff had a long history of fluctuating levels of anxiety and depression and thought that Dr. Zhang's clinical records for September 1 and September 15, 2009, which note depression, irritability, and the plaintiff "losing her mind", suggested that her depression and anxiety were escalating before the motor vehicle accident.

[109] Dr. Vallance testified in cross-examination that the plaintiff had pulled herself up by her boot straps after age 30. She had overcome her alcohol abuse and achieved academic success in which she took justifiable pride. She experienced considerable gain from her work, however her work had become central to her sense of self. Dr. Vallance thought the plaintiff's work as a counsellor was particularly stressful for her. Because her work was so central to her sense of identity and self-worth, she could not acknowledge her work as a source of her stress. Dr. Vallance does not believe the plaintiff should return to her former work as

a counsellor to clients who are highly traumatized. He does believe that with therapy Ms. Andrews could return to work as a counsellor in some less stressful capacity.

[110] Dr. Vallance agreed that the plaintiff's background made her more vulnerable to psychological dysfunction but thought she was already deteriorating before the motor vehicle accident, which escalated her downward path.

[111] In cross-examination, Dr. Vallance was unable to identify any evidence that would prove that the plaintiff's pre-accident downward path was not simply part of her normal long-standing patterns of emotional ups and downs. Dr. Vallance gave the following evidence:

Q Would you agree that in this case Brenda Andrews perceived this car accident as being a terrifying event that nearly cost her her life?

A That was her perception, but keeping in mind, as he says, she does tend to catastrophize.

Q Dr. Vallance, you said a few minutes ago that Brenda Andrews was on a downward path shortly before this accident. Have you anything that would prove that that downward path wasn't simply part of the normal long-standing patterns of emotional ups and downs this woman had had for years before this accident?

A Well, it certainly was one of these. When it would have ended, I don't know, because I don't know what was triggering it at that particular point in time. If it was something of great significance, then it could have taken her right down to the depths, but I would need to know, for example, if there was any counselling records at that time. That would be helpful, but I -- they're not available to me.

Q So you're saying that there may be some records that would allow you to say that this downward path was leading to a collapse, but you don't have those records, so you can't say that?

A That's correct.

[Transcript of Proceedings, Lines 7 to 27 at p. 48, March 21, 2013]

[112] Dr. Vallance also agreed in cross-examination that the accident would have added to or escalated the plaintiff's psychological difficulties; agreed that additional

traumas over time might increase a person's vulnerability and fragility; agreed that the effect of trauma is based on the person's perception of the trauma; and that Brenda Andrews perceived the motor vehicle accident as a terrifying event that nearly cost her her life.

[113] In cross-examination, Dr. Vallance further agreed that Ms. Andrews was dysfunctional after the motor vehicle accident and acknowledged that her condition could have been worse when Dr. O'Shaughnessy saw her than when he saw her.

[114] In re-examination, Dr. Vallance said that in his opinion the plaintiff was in no worse condition at the time he saw her than she was prior to the accident in September 2009.

Dr. Andrew Travlos

[115] Dr. Andrew Travlos is a specialist in physical medicine and rehabilitation who, at the request of plaintiff's counsel, performed an independent medical assessment of the plaintiff on October 17, 2012.

[116] Dr. Travlos took a detailed history from the plaintiff and reviewed her extensive clinical records. He noted that Dr. Wayne Smith had made a diagnosis of fibromyalgia dating back to 1992; that there were multiple entries relating to depression, fatigue, stress and anxiety; and that Dr. Karim, one of the plaintiff's general practitioners, had noted the plaintiff was involved in a motor vehicle accident in November 2005 after which she experienced right shoulder and arm numbness that later resolved. The Seymour Medical Clinic records included notes of visits for mood disorder in July 2007. In an entry of December 11, 2007, Dr. Zhang noted that the plaintiff's complaints, which included dizziness, fears about her health, and involuntary movements of her right foot and left lower leg were unlikely due to physical causes and most likely due to her anxiety. On September 15, 2009, Dr. Zhang noted that the plaintiff was complaining of headaches, neck pains, shoulder pains and stress and a lack of peer and family support in Vancouver. X-

rays and a CT scan in the spring of 2008 showed moderate degenerative disc disease of the neck.

[117] Dr. Travlos noted that the plaintiff's history before the October 10, 2009 accident was substantial, rather than simple, as she described. While the plaintiff was functioning, active and employed before the accident, in Dr. Travlos' opinion, she was not the healthy person easily managing her life that she reported to him. The clinical records revealed a person who was struggling with both pain and ongoing mental health concerns. Dr. Travlos thought that the plaintiff was "an individual at substantial risk of being de-railed by a new event or injury such as this accident".

[118] Dr. Travlos concluded that Ms. Andrews' complaints of chest pain, difficulty breathing, neck pains, right arm numbness and tingling, sleep problems and anxiety were a direct consequence of the October 10, 2009 motor vehicle accident. He thought the accident aggravated the plaintiff's pre-existing problem of arthritis in the neck which caused her symptoms of numbness and tingling in the right arm. The two small fractures of the sternum were new injuries caused by the accident.

[119] In Dr. Travlos' opinion, the plaintiff's ongoing mental health problems are the driving force behind her slow recovery and low level of functioning, more than her physical complaints. He describes the plaintiff's overall reduced level of functioning as "a complex interplay between her pre-accident physical and mental health problems, along with the effects of the accident".

[120] Dr. Travlos noted that it was possible that the plaintiff might have become dysfunctional in the absence of the motor vehicle accident. However, she appeared to be functioning relatively well, was independent, employed, exercising regularly and had a healthy relationship with her current partner, Mr. Priolo. In Dr. Travlos' opinion, the accident is the primary cause for the onset of the plaintiff's symptoms and the deterioration of her emotional and psychological health.

[121] On causation, Dr. Travlos said this at pages 12 to 13 of his report of October 17, 2012:

Exploring the issue of causality more deeply, it is certainly possible that Ms. Andrews may have become derailed and dysfunctional in the absence of this accident, especially if she had had difficulties with her partner or social support system. All in all, however, she appeared to be functioning relatively well despite her difficulties and was independent, working and exercising regularly, and had a healthy relationship with her partner. Of note is that she has not lost her partner, despite the difficulties she has been through and her partner has stuck with her, making it unlikely that the partner would have left if things were even better than they had been since the accident. She would have continued to work and it is clear that she had certainly established the capacity to do so. There is no reasonable expectation that she would have suddenly decompensated, barring any substantial new events. It is therefore my opinion that, although Ms. Andrews was substantially at risk of decompensation, there was no expectation that she was going to do so and would certainly not have done so at the time that she did in the absence of this accident. It is my opinion, therefore, that this accident was primarily responsible for the onset of her symptoms and the substantial upheaval in her emotional health and her current residual difficulties functioning in society.

[122] Dr. Travlos explained that decompensation occurred when the plaintiff was functioning at a level "and then everything sort of falls apart on her".

[123] In cross-examination, Dr. Travlos was asked whether if the plaintiff had stopped work 10 days before the accident that could have caused her to decompensate:

Q So if she stopped work 10 days before the accident, she's also in a position where she has time to dwell on those same problems; right?

MR. MAH: Perhaps, My Lord, Mr. Joudrey could clarify the evidence with respect to "stopping work," as he puts it.

MR. JOUDREY:

Q She was not working as of 10 days before the accident.

A Because ...

Q That's something for the court to decide, ultimately. But the fact that she wasn't working and staying occupied and so on would

give her time to dwell on whatever was troubling her and causing her to lose her mind in September?

A I think the -- if the stopping work was a stressful course, that would certainly apply. If the stopping of work was just part of the time between contracts -- because she was doing contract work, my understanding is. If it was just contract work, it wouldn't necessarily have been stressful unless there was no hope of her renewal of the contract. That would have been stressful.

Q Well, let me put it to you hypothetically that if -- if -- the only reason the plaintiff could think of for telling Dr. Zhang that she was losing her mind the month before the accident was from emotional stresses related to her counselling practice, from that point forward if she stops working for any reason or if that is the reason she actually stopped working --

A M'umm-hmm.

Q -- you would expect her to continue to decompensate when she's got time on her hands and can dwell on it and perseverate; right?

A She could have, yes.

Q And from what we see in the records she's always had the physical complaints, the underlying depression in varying degrees and underlying anxiety disorder. September is the first time we see her saying that she's losing her mind; correct?

A Yes.

[Transcript of Proceedings at Trial, March 18, 2013, p. 66 line 40 to p. 67 line 35]

[124] The plaintiff terminated her contract with Health Canada about 10 days before the motor vehicle accident. I accept Ms. Andrews' testimony that before the accident, she was considering her options for employment in Calgary, Vancouver, or possibly Maryland, and that she did not intend to stop working altogether.

Ms. Andrews testified that when she terminated her contract with Health Canada, she experienced anxiety about leaving her clientele in Port Hardy. She feared that her clients would perceive her as abandoning them. She said this caused her anxiety but denied that working with residential school survivors was a source of emotional stress to her. Despite her history of pre-existing anxiety and bouts of depression, the plaintiff had worked with and counselled residential school survivors. She intended to continue to do so at the time of the accident.

[125] Dr. Travlos provided a diagnosis for the plaintiff's symptoms. He thought the accident aggravated the plaintiff's pre-existing degenerative condition of her neck, causing the symptoms of numbness and tingling in her right shoulder, arm and hand to reoccur. He attributed the plaintiff's continuing symptoms of pain in the neck and shoulders to myofascial pain and reported that her chest fractures had healed and would be of no further concern to her. He thought some underlying mechanical back pain contributed to the plaintiff's lower body symptoms on the right side of her lower back and right hip. Dr. Travlos thought those symptoms were predominantly myofascial in origin.

[126] Dr. Travlos' prognosis is that the plaintiff will probably continue to improve steadily for the next one to two years, although the key to her improvement will be her response to therapy for her mental health.

[127] Physically, Dr. Travlos thought that the plaintiff needs to become more active. He strongly recommended that Ms. Andrews stop exercising at home and start a regular program of exercise at a community center or gym. Dr. Travlos thought a more structured exercise environment would provide some incentive for the plaintiff to complete her exercises. Dr. Travlos recommended that the plaintiff's exercise program include walking, cardiovascular exercise, yoga and Pilates, and that over time, the plaintiff should work up to one and a half to two hours of exercise per day, five days a week.

[128] Dr. Travlos also recommended that Ms. Andrews establish progressive goals for her recovery and thought that an occupational therapist could assist her in setting goals and ensuring that they were met. He also recommended that the plaintiff establish regular times of sleeping, and that she avoid sleeping during the day to assist her in overcoming her problems with lack of sleep and fatigue. He recommended that she continue to use Amitriptylin to assist her in sleeping.

[129] Dr. Travlos expected that if the plaintiff acted on those recommendations and made progress with her mental health, she should be able to achieve daily social functioning. In the concluding paragraph of his prognosis, Dr. Travlos said this:

... She should be able to maintain her home, she should be able to exercise regularly, and should, indeed, be able to go out shopping and to all the physical things required of her. I defer to my colleagues in psychiatry regarding the issues pertaining to her mental health recovery, as this will certainly guide where she ultimately ends up. From a rehabilitation perspective, she is physically capable of increasing her activities and there is every expectation of her returning back to her pre-accident level of symptoms and complaints, including her pre-accident level of physical activity.

[130] With respect to the plaintiff's vocational abilities and limitations, Dr. Travlos felt that there was no physical bar to the plaintiff returning to counselling, but recognized that her mental health was a limiting factor. Again, he deferred to psychiatrists for their opinions regarding the effect of her mental health on her vocation.

[131] If the plaintiff's mental health improved, Dr. Travlos thought the plaintiff might be able to return to full-time, gainful employment, although he could not provide a definitive opinion at the time of his report. He noted that the plaintiff is a highly intelligent person who may need to make a decision about whether or not she wishes to return to counselling and its associated stresses. Alternatively, he thought she might seek employment in Human Resources, a field in which she had already indicated some interest, and where the emotional demands would be less.

CREDIBILITY AND RELIABILITY OF PLAINTIFF'S EVIDENCE

[132] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*,

[1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[133] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431, at paras. 15, 49-50.

[134] All of the experts agree that this case involves a complex interplay between the plaintiff's psychological condition and her continuing complaints of pain. Ms. Andrews had a fragile sense of her self-worth and suffered from varying levels of anxiety and depression before the motor vehicle accident. The court's task of assessing damages for the injuries caused to the plaintiff by the accident is challenging in any case where the plaintiff's complaints are based largely on subjective complaints of pain that have persisted beyond the normal time for recovery.

[135] That task is rendered more difficult in this case by two factors. First, as Dr. O'Shaughnessy explained, Ms. Andrews has a tendency to catastrophize, and to focus on the accident as the source of all of her physical and psychiatric complaints. Her perception of events is coloured by her pre-existing personality trait difficulties relating to her self-esteem, self-image, and mood regulation. As a result, she is not a reliable historian of her pre-accident physical and psychiatric condition.

[136] Second, the plaintiff has relied entirely upon the medical opinions of various experts retained to provide independent assessments of Ms. Andrews, in most cases, years after the accident. The plaintiff has not called any of the general practitioners, psychologists, or psychiatrists involved in the actual treatment and care of Ms. Andrews, either before or after the motor vehicle accident.

[137] The plaintiff says that given the complexities of her case, general practitioners lack the qualifications and expertise necessary to assist the court, particularly regarding her psychiatric condition. I do not suggest that the opinions of

Dr. O' Shaughnessy and Dr. Travlos have not assisted the court. However, evidence from the general practitioners, and in particular from Dr. Zhang would likely have helped the court in understanding the evolution of the plaintiff's mood and anxiety disorders before the accident. Furthermore, evidence from Dr. Zhang might have shed light on the source and severity of the plaintiff's depression in September 2009.

[138] Nor did the plaintiff call Dr. Tracy Good, the psychologist who had seen Ms. Andrews off and on for 11 years. Dr. Good advised counsel that she had shredded her records shortly before the trial. However, her testimony would likely have assisted the court in determining when and to what extent the plaintiff received therapeutic counselling for her own problems from Ms. Good, rather than counselling supervision related to her employment.

[139] The plaintiff bears the burden of proving her case on the balance of probabilities. If, as a result of her failure to call any of the care providers involved in her treatment she is undercompensated, she will have to bear that consequence.

[140] The defendants submit that Ms. Andrews was not only an unreliable witness, but also lacks credibility. Despite the fact that cognitive testing of the plaintiff one year post-accident showed that her delayed memory is at the 97th percentile, Ms. Andrews professed to have no memory of telling her care providers much of what they recorded in their clinical notes.

[141] At trial, the plaintiff attributed her current complaints of pain, anxiety, and inability to maintain emotional boundaries to the car accident. She testified that immediately before the accident she was happy in her relationship with Mr. Priolo and was considering a variety of career options. Ms. Andrews did acknowledge that she was conflicted, and suffering some anxiety as a result of her inability to continue to provide services to clients at Port Hardy, and one elder in particular, following the termination of her contract with Health Canada.

[142] The defendants argue that the plaintiff's recollection of her state of mind in the weeks leading up to the motor vehicle accident is difficult to reconcile with her complaint to Dr. Zhang of September 1, 2009 that she was losing her mind, and with the fact that at that time Dr. Zhang increased her dosage of the anti-depressant Wellbutrin from 100 mg per day to 300 mg per day.

[143] During cross-examination, Ms. Andrews agreed that on her examination for discovery of March 19, 2013 she was asked and answered the following question:

Q And then September 1st, 2009, so about a month before the accident it says:

"Losing mind."

So that's apparently your term.

Depressed, irritable, angry, moments of despair, not cleaning rooms. No suicidal plans, but sleeps. Doesn't wake up.

Do you know what was causing all that just before the accident?

A I have no idea because -- I have no idea because I was with Frank then and things were pretty good.

[144] At trial, Ms. Andrews testified that she did not recall her conversation with Dr. Zhang. She gave the following evidence in cross-examination:

Q You don't recall telling Dr. Zhang that you were losing your mind, depressed, irritable, angry, moments of despair, not cleaning rooms? You don't remember that?

A I believe that I told her that, but I don't remember saying that, no.

Q Okay. You don't specifically remember the conversation --

A No.

Q -- but you do remember telling her that.

A No. I believe that I told her that, but I don't remember telling her that. Because she wrote it down, I guess, and she quoted it, so

...

[Proceedings at trial March 19, 2013, p. 67 line 42 to p. 68 line 6]

[145] Questions and answers 623 to 627 from her examination for discovery were then put to Ms. Andrews:

- Q Okay. But obviously something was really getting to you. Increasing Wellbutrin to 300 milligrams. That seems to be a peak so far. That's the biggest dosage and it's just before the accident?
- A A lot of times I took myself off of the medication without the doctor's guidance, so I don't remember going -- I don't remember going up that high, to be honest with you.
- Q Okay. But if -- so you've stopped taking your medication?
- A Um-hum.
- Q And you started to feel low again. Wouldn't you just take the medication that you had before, the leftovers?
- A You know what? I don't -- I don't remember. I don't know if I threw them out or what.
- Q But, in any event, the last time there seems to have been a prescription, it was 100 milligrams and then it's up to 300. Do you recall anything about what was upsetting you just before the accident?
- A I don't know. The only thing I can think of was a situation one of my clients was in was grave.
- Q And it affected you a lot emotionally?
- A Well, that's the only thing I can think of that was going on at the time.

[146] The plaintiff confirmed she was asked those questions and that her answers were true. She went on to explain in cross-examination that at the time she saw Dr. Zhang in early September 2009 she was excited about her future with Mr. Priolo and that the positives in her life outweighed the negatives.

[147] She was then asked the following questions in cross-examination:

- Q Okay. But despite all of the positives --
- A M'mm-hmm.
- Q -- that should improve your mood, you were depressed, irritable, angry, not cleaning rooms, tripled your medication. And you're saying that at that time the positive outweighed the negative?

A Yes, I'm saying the positive outweighed the negative. And also I didn't stay on that dosage of medication, and I don't remember telling her I couldn't clean my rooms. I don't remember that at all, because I had been in preparation for leaving and every time I left I would clean up.

Q And yet you --

A I believe I told -- I believe that I told her that during that time, but I don't believe that it was something that impacted me to the point that I wasn't able to finish my job and I wasn't able to continue the plans that I was doing and I wasn't able to continue looking forward to the future and being happy. It didn't impact me to that extent.

In fact, throughout all my records that I haven't seen till everything's been splayed out in front of my face, so many times I would say comments like that. And in my recollection of my life I was just living my life and taking care of what I needed to in privacy with my doctor and moving on, you know, and just leaving it where I needed to leave it and move on. And that's how I saw myself, and that's how I still see myself back then.

[148] When defence counsel suggested to Ms. Andrews that before the accident she had lost her boundaries and had started having emotional reactions to her clients' problems, she vehemently denied that was the case. Ms. Andrews emphasized that "this job was my purpose" and that she knew she was competent and doing a good job. Ms. Andrews said that after the car accident she does not have any boundaries. When asked by defence counsel why a car accident would change her boundaries, the plaintiff became angry and distraught.

[149] Later in her cross-examination, Ms. Andrews acknowledged that before the accident when her contract with Health Canada was coming to an end she was already struggling with depression and having difficulty keeping herself organized. However, she was still productive, still with Mr. Priolo, and still functioning. Ms. Andrews said that she did not remember ever being so damaged that she could not function.

[150] Mr. Priolo also testified that he was unaware of any circumstances that would have caused the plaintiff to make her complaint of September 1, 2009 to Dr. Zhang that she was "losing her mind".

[151] I find that Ms. Andrews' report to Dr. Zhang on September 1, 2009 that she was "losing her mind" was more probable than not a manifestation of her tendency to catastrophize. At that time, the plaintiff, as she acknowledged at trial, was suffering from a significant bout of depression, and anxiety related to her decision to cease counselling her clients at Port Hardy. However, she continued to work for the next several weeks, until her contract with Health Canada came to an end. Before the accident, the plaintiff and Mr. Priolo were planning their future. Ms. Andrews was considering various opportunities for employment, but intended to continue to work as a counsellor to First Nations clients. I find that before the accident the plaintiff was struggling with depression and anxiety, but was still functioning in her work and social life.

[152] Much of the history provided by the plaintiff to Drs. O'Shaughnessy, Travlos and Vallance was inconsistent with the clinical records. Dr. Travlos remarked on the plaintiff's tendency to under-report her physical difficulties before the accident.

[153] As defence counsel noted in his written submissions, the clinical records contained in Exhibit 19 show Ms. Andrews made the following statements to her care providers before the October 10, 2009 motor vehicle accident:

- (a) she had been in a previous automobile accident in 1977 when she was broad-sided and suffered a neck injury;
- (b) on June 29, 2004, she cancelled an appointment with a dermatologist as a result of a car accident;
- (c) on November 14, 2005, she was involved in a motor vehicle accident where she was a passenger in a vehicle that was rear-ended. She reported right shoulder pain. Her physician diagnosed musculoligamentous sprain to the cervical spine and right shoulder.
- (d) she took stress leave from her employment in March 2006;
- (e) on July 4, 2006 she reported to Dr. Charles Campbell, a chiropractor, that her major complaints were fibromyalgia dating back to 1992 and lower back pain and numbness since a fall on July 1, 2006. Ms. Andrews also reported that she had previously suffered from dizziness, nausea, loss of sleep, depression and PTSD;

- (f) on November 24, 2006, Ms. Andrews reported extreme stress at work, and that she was seeing a counsellor. She denied being depressed, but was prescribed Effexor, an anti-depressant;
- (g) in December 2006, the plaintiff reported she was still depressed. At that time she was on Wellbutrin 100 mg per day.
- (h) On May 29, 2008, Ms. Andrews provided a history to Dr. Christine Chapman that included a long history of low back pain, neck pain and depression. She reported she was in a lot of pain, and was concerned that her symptoms at that time would lead her to be in a wheelchair. Despite her complaints, a neurological examination on that date was entirely normal.
- (i) On November 17, 2008, the plaintiff reported to Dr. Solomons that she had previously suffered from fibromyalgia and osteoarthritis and was currently on Wellbutrin, Ativan, Seroquel and Emtec 30 as needed. The plaintiff also reported that there had been times when she was so easily distracted by things around her that she had trouble concentrating or staying on track. The plaintiff told Dr. Solomons that she had been diagnosed with PTSD and had a previous history of childhood abuse, neglect and abandonment.

[154] Immediately following the accident, Ms. Andrews reported to the emergency department at VGH that she had not suffered a head injury, was able to get out of the car without assistance, and reported no neck pain, no loss of consciousness, dizziness or vision change. She complained of pressure/ache in her chest and right shoulder, and chest pain. The plaintiff reported a previous history of neck arthritis and anxiety and that she was taking Wellbutrin and Seroquel at the time of the accident.

[155] At trial, the plaintiff either denied or did not recall making many of the statements contained in the clinical records. She denied telling any of her care providers that she had been diagnosed for PTSD. When confronted with Dr. Solomons' record of December 4, 2008 that "Ms. Andrews says she has been diagnosed with post-traumatic stress disorder", the plaintiff denied telling him that. Her suggestion that she may have been discussing her mother's diagnosis is not plausible. She also suggested that her fibromyalgia was actually osteoarthritis. Dr. Travlos gave evidence that fibromyalgia is only diagnosed when a person has

generalized pain in all four quadrants of her body, rather than pain confined to the neck. Again, the plaintiff's suggestion that physicians who treated her before the accident may have confused her complaints of the pain induced by her arthritis of the neck with fibromyalgia is implausible.

[156] Ms. Andrews did not remember taking medication for depression or anxiety at the time of the accident, although the medical records showed that she had been prescribed Wellbutrin in varying doses, Ativan and Seroquel from 2007 onward.

[157] Ms. Andrews also gave evidence that she had no recollection of the November 17, 2005 automobile accident, going to the doctor, or seeking treatment for that event.

[158] When Ms. Andrews completed the Mood Disorder Clinic questionnaire for Dr. Solomons on November 17, 2008, she reported that she had received psychological treatment for mood disorders from Dr. Tracy Good and that those treatments started in 1997 and continued periodically. She was unable to explain why she had not also included Ms. Susan Rungstra, the psychologist she had been seeing since August 2008.

[159] At Question 292 of her examination for discovery, when asked whether she or her dog had been attacked when out for a walk since the accident, the plaintiff answered that she did not think so. At trial, Ms. Andrews testified that at her discovery she did not remember that Dixie had been attacked by the two German Shepherds in May 2010. Ms. Andrews also gave evidence that she did not remember writing her e-mail on August 16, 2011 to Tony Grant, her occupational therapist, Dr. Jung, and her counsel, which contained a detailed account of the May 2010 attack and her subsequent and frightening encounter with the owner of the German Shepherds. Ms. Andrews testified that she had also forgotten about that incident at her examination for discovery. This was a traumatic event which the plaintiff regarded as sufficiently serious to report to the police. The plaintiff had been confronted by an aggressive woman who threatened to kill her dog and to do her harm.

[160] Dr. Kay's findings regarding the plaintiff's superior memory are inconsistent with the plaintiff's professed inability to recall her encounters with the German Shepherds and their owner.

[161] It is simply not consistent with the probabilities of the situation that the plaintiff would forget about two frightening encounters with the owner of the German Shepherds. I find that the plaintiff's evidence that she did not remember these incidents is not credible.

[162] While I have rejected the plaintiff's evidence that she forgot about these significant traumatic events, I do accept that since the accident Ms. Andrews has from time to time experienced temporary disruptions of her concentration, or train of thought. Mr. Priolo has described his observations of the plaintiff losing track of a conversation in mid-sentence. During both her direct and cross-examination, there were occasions when the plaintiff asked counsel to remind her of the question put to her midway through her answer. In light of the results of Dr. Kay's neuropsychological testing, Dr. O'Shaughnessy's opinion of the impact of anxiety and depression on the plaintiff's functioning, and Dr. Vallance's opinion that any forgetfulness the plaintiff noticed was likely due to the distraction of pain, lack of sleep, the effects of medication, or her ongoing anxiety and depression, I find those temporary disruptions of the plaintiff's memory or ability to focus are more likely caused by her pain disorder, anxiety, depression and disrupted sleep, rather than by any permanent impairment of her cognitive abilities.

[163] Ms. Andrews was also cross-examined on various entries from the clinical records of Turning Point Rehabilitation Consultants Ltd. which suggested that she was improving between May 2010 and January 2011. On May 13, 2010, Turning Point noted that Ms. Andrews completed a resume and was working on a covering letter. The plaintiff denied that she ever sent these materials to prospective employers.

[164] The entry in the Turning Point records for May 13, 2010 also recorded that the plaintiff was walking daily for about two to three hours with her dog.

Ms. Andrews denied this and said she had only walked her dog for two to three hours prior to the October 10, 2009 accident.

[165] Ms. Andrews also reported in May 2010 that she would continue to exercise (swim and bike) while away from Vancouver. The plaintiff denied telling anyone that she was swimming, said that she had not done so for the last three and a half years. She testified that she only started biking while working with her current kinesiologist. Ms. Andrews initially denied that she went on a holiday in May 2010 but later acknowledged that she may have been travelling to Arizona to meet Mr. Priolo at that time.

[166] On December 3, 2010, Turning Point noted that the plaintiff had redone her resume and was applying for jobs, and that she was cleaning her own apartment at that time. Ms. Andrews testified that she did not recall these events and did not believe she had applied for any jobs at that time. She recalled feeling better in December 2010 but said that when she cleaned her own apartment, she was only cleaning two rooms.

[167] The Turning Point note for January 21, 2011 recorded that the plaintiff's right back and hip pain were clearing up quite nicely. When asked in cross-examination whether her back and hip pain was clearing up "quite nicely" as of January 21, 2011, Ms. Andrews answered "Yes, I guess. That's what it says."

[168] Ms. Andrews was unable to explain why her care providers would record information regarding her progress if it did not occur.

[169] I have found that some portions of Ms. Andrews' testimony lack credibility. However, for the most part, the many discrepancies between the plaintiff's evidence regarding her medical history and the medical records raise issues of reliability rather than credibility. The plaintiff's underlying personality disorder, as described by Dr. O'Shaughnessy, leads her to perceive the motor vehicle accident as the sole source of her continuing complaints, to view her condition as more dire than it is, and to focus on the motor vehicle accident to the exclusion of her pre-accident condition.

[170] Drs. O'Shaughnessy and Travlos both testified that the plaintiff's perception of her condition is distorted. I find that the plaintiff's testimony regarding her prior medical history is unreliable, and where there are discrepancies between Ms. Andrews' evidence about her medical history prior to the motor vehicle accident and the medical records, I prefer the clinical record to the plaintiff's testimony.

[171] Dr. O'Shaughnessy agreed that the event of May 2010, when the plaintiff and her dog were attacked by two off-leash German Shepherds, and the plaintiff's subsequent encounter with the abusive owner of the German Shepherds in August 2011, were events that traumatized the plaintiff. Ms. Andrews did not disclose either of these events, or tell Dr. O'Shaughnessy about witnessing a sexual assault in July 2012. Dr. O'Shaughnessy said that seeing the sexual assault would be distressing for anyone, but would have a greater impact on an emotionally vulnerable person such as the plaintiff.

[172] The plaintiff did not tell Dr. Travlos about her previous motor vehicle accidents or about past stress at work. She described herself as healthy before the motor vehicle accident. As Dr. Travlos observed, the plaintiff's subjective recollection did not correspond with the clinical records.

[173] Drs. O'Shaughnessy and Travlos both recognized that Ms. Andrews had a more complex and difficult pre-accident medical history than she reported. Where there were discrepancies between the clinical records and the history Ms. Andrews provided to them, they relied on the clinical record. Accordingly, despite the fact that Ms. Andrews was not a reliable historian, the expert opinions of Drs. O'Shaughnessy and Travlos are still worthy of significant weight in determining the cause of the plaintiff's injuries.

Adverse Inference from Plaintiff's Failure to call Treating Physicians and Psychologists

[174] The defendants invite the court to draw an adverse inference from the plaintiff's failure to call any of the health care providers who treated her either before or after the accident. The defendants submit that the court should draw the

inference that if the plaintiff's treating health care providers had been called their testimony would not have supported the plaintiff's evidence respecting the minimal impact of her pre-existing conditions and would not have supported the plaintiff's theory that all of her post-accident symptoms and functional impairments result from the motor vehicle accident. The defence submits there is a compelling case for drawing that inference when none of the persons most familiar with the plaintiff's pre-accident mental health were called, including the psychologists Tracy Good and Susan Rungstra, and the psychiatrist Dr. Solomons, and where the plaintiff also failed to call any of the psychologists who have treated the plaintiff since the motor vehicle accident.

[175] Generally, an adverse interest cannot be fairly drawn except from the failure to call witnesses whose testimony would be superior to the evidence already adduced in respect of the fact to be proved: *Buksh v. Miles*, 2008 BCCA 318 at para. 30.

[176] In *Buksh* at para. 35, the Court of Appeal identified the following factors for consideration on the question of whether the trier of fact can reasonably draw an inference that the witness not called by a party would have given evidence detrimental to that party's case:

- (a) the evidence before the court;
- (b) the explanations offered for not calling the witness;
- (c) the nature of the evidence that could be provided by the witness;
- (d) the extent of disclosure of the physicians' clinical notes; and
- (e) the circumstances of the trial, for example, an initial agreement to introduce clinical records that works contrary to the inference, or incorporation of the witness' views or observations in the report of a witness called by the other side.

[177] In *Willing v. Ayles*, 2009 BCSC 1035, the plaintiff failed to call the general practitioner who had assessed her shortly after the collision and followed the progress of her recovery for the first year following the accident. The plaintiff relied on medical evidence from a family doctor who treated her approximately two years

after the accident, and provided no explanation for the failure to call the physician who had first treated her.

[178] In *Willing*, at para. 178, Mr. Justice Parrett drew an adverse inference that the evidence of the general practitioner who had initially treated the plaintiff would not have supported her claim of making a complete recovery from pre-existing conditions before the accident. Parrett J observed the absence of evidence from the general practitioner left the court without any evidence from her doctor concerning the extent of her recovery at the time of that accident.

[179] Here, the evidence before the Court includes the plaintiff's often unreliable history of largely subjective complaints, and the reports of specialists retained to examine the plaintiff for the purposes of this litigation. The experts who examined the plaintiff did so between one and three years following the motor vehicle accident. The Court has no expert evidence from any family physician who assessed the plaintiff either before or after the accident. The psychiatrist, Dr. Travlos, did not see the plaintiff until three years after the accident. The only explanation offered by counsel for the plaintiff for the failure to call Dr. Zhang, or any general practitioner who has treated the plaintiff since the accident, is the assertion that general practitioners lack the expertise required to provide medical evidence in this case. I have already noted that evidence from Dr. Zhang would likely have aided the Court in understanding Ms. Andrews' psychological state before the accident. Dr. Zhang's clinical records were disclosed. Her notes of the plaintiff's history and her observations of Ms. Andrews' condition are discussed in the reports of Dr. Travlos and Dr. O'Shaughnessy. However the Court is left with no medical opinion on the progress of the plaintiff's recovery from her physical injuries until three years post-accident.

[180] In addition to not calling any of the general practitioners who treated Ms. Andrews before the accident of October 10, 2009, the plaintiff has not called as witnesses any of the psychologists who might have provided evidence concerning the treatment and evolution of the plaintiff's pre-accident mental health, or the

progress of her treatment following the accident. None of the clinical records of the plaintiff's pre-accident treating psychologists, Dr. Tracy Good and Ms. Susan Rungstra have been produced. Aside from advising the Court that Dr. Good had destroyed her notes, the plaintiff has provided no explanation for her failure to call any of her treating psychologists, or Dr. Solomons. The clinical notes of Dr. Chuck Jung, the psychologist who treated Ms. Andrews between June 2010 and April 2012 have been produced. Dr. Jung's notes provide a terse summary of what the plaintiff told him from time to time regarding her pain, anxiety and mood. However, while both Dr. Jung and Dr. MacKinnon were well positioned to provide assessments of the plaintiff's post-accident mental health and the progress of her treatment since the accident, the Court is left without the benefit of either of their opinions on Ms. Andrews' progress. In these circumstances, the requirements for drawing an adverse inference are met. The inference is that if the plaintiff had called her treating healthcare practitioners, their evidence would not have supported the attribution of all of her post-accident physical and psychological symptoms to the accident.

CAUSATION

The Law

[181] The basic test for determining causation is the "but for" test. The plaintiff bears the burden of establishing that "but for" the negligent act or omission of the defendant, the injury would not have occurred: *Resurface Corp. v. Hanke*, [2007] 1 S.C.R. 333 at paras. 21.

[182] As the Court observed in *Resurface* at para. 23:

[23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, per Sopinka J.

[183] The "but for" test must be proved on a balance of probabilities, rather than with scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 13, 16.

[184] It is not necessary for the plaintiff to establish that the defendant's negligence is the sole cause of the injury. As long as the defendant is part of the cause of the injury, the defendant is liable, even if his or her act alone was not enough to create the injury: *Athey v. Leonati*, at para. 17.

[185] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*...

[186] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey v. Leonati*, at paras. 32-35.

[187] At para. 23, the Court in *Athey v. Leonati* explained that apportionment between tortious and non-tortious causes is contrary to the principles of tort law because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated because he or she would not be placed in the same position that he or she would have been in absent the defendant's negligence. The Court held that

where there is a single indivisible injury, any defendant found to have negligently caused or contributed to the injury will be fully liable for it: at para. 25.

[188] However, where the injuries are distinct and divisible, separation is permitted, in recognition of the principle that a defendant is only liable for the injury that he or she has caused. In *Athey*, at para. 24, the court held:

...The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: *Fleming, supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

[189] In determining causation, I also bear in mind that caution is required before drawing any inference that because one event follows another in time, the first event is the cause of the second: *White v. Stonestreet*, 2006 BCSC 801 at paras. 70-74.

Discussion

[190] With respect to physical injuries, the parties agree that the plaintiff suffered two small fractures to her sternum as a result of the accident. In addition, I accept Dr. Travlos' opinion and find that Ms. Andrews suffered an exacerbation of the pain in her neck and pain and numbness in her right arm associated with her pre-existing degenerative arthritis of the neck. As a result of the accident, the plaintiff also suffered soft tissue injuries to her right shoulder, upper back, low back and right hip. Ms. Andrews had a history of right shoulder, low back and right hip pain. The accident exacerbated those symptoms.

[191] Dr. Travlos reported in October 2012 that the plaintiff's chest fractures had healed. I find that Ms. Andrews had substantially recovered from that injury by February 2010, the end of its acute phase.

[192] Ms. Andrews acknowledged that by January 21, 2011, some 15 months after the accident, her right back and right hip pain were clearing up "quite nicely". At trial, the plaintiff said that her right hip troubled her intermittently but she was learning to manage it. Ms. Andrews gave evidence that she continued to experience neck pain,

shoulder pain, upper and lower back pain and pain in her right hip but estimated that she had made a 75% recovery from the accident. Her complaint of right arm numbness had returned to its pre-accident level.

[193] Taking into account the plaintiff's heightened perception of impairment, and her tendency to downplay her pre-accident symptoms, I find that by late January 2011, Ms. Andrews had substantially recovered from the physical injuries caused by the motor vehicle accident, and that by the time of trial, with respect to her physical injuries, she had returned to her original position.

[194] Prior to the accident, the plaintiff experienced fluctuating levels of anxiety and depression triggered by stress that was often related to difficulties in her relationships. She had a tendency to catastrophize, and her perception of events were coloured by her underlying personality trait difficulties relating to her self-esteem, self-image and mood regulation. As Dr. O'Shaughnessy observed, the plaintiff sees the world differently than others would objectively view it. Her pre-existing anxiety disorder and dysthymia rendered her vulnerable to traumatic events. The motor vehicle accident of October 10, 2009 was such an event. At the time, the plaintiff perceived the accident as life-threatening.

[195] Despite her vulnerability, before the accident, the plaintiff was able to function socially, and coped, albeit with some difficulty, with the demands of her work until her contract with Health Canada came to an end on September 26, 2009. Her decision to terminate her services at Port Hardy was a source of anxiety, but she was still functioning. Her relationship with Mr. Priolo was positive, and she was exploring options for continuing her career as a counsellor to First Nations clients. Drs. O'Shaughnessy and Vallance agree that her depression and anxiety disorders were much worse after than before the accident. The plaintiff suffered more catastrophic thoughts and mood disruptions. After the accident, Ms. Andrews became dysfunctional. While she was able to cope with the demands and stresses of her work as a counsellor to residential school survivors before the accident, she was unable to maintain the emotional boundaries essential for that work after the

accident. After the accident she was disinterested in caring for herself, and had difficulty with her social functioning. She confined her social contacts to Mr. Priolo, and an old friend, Ian Liang, who visited her once a week.

[196] Dr. Vallance thought that Ms. Andrews had already begun her downward spiral into dysfunction by September 1, 2009 when she reported to Dr. Zhang that she was "losing her mind". However, in cross-examination, he acknowledged that there was nothing he could identify to show that the escalation of the plaintiff's depression and anxiety in the weeks before the accident was any different from her longstanding pattern of waxing and waning depression and anxiety.

[197] All of the experts agreed that Ms. Andrews' pre-existing mood and anxiety disorders made her more vulnerable to decompensation, and that the accident, as a traumatic event, would have exacerbated the plaintiff's pre-existing psychological condition.

[198] I find that but for the motor vehicle accident, Ms. Andrews would not, on a balance of probabilities, have suffered the serious exacerbation of her anxiety disorder and dysthymia that she experienced in the fall of 2009. The plaintiff has met the test of establishing that the defendant's negligence was a "cause in fact" of the exacerbation of the plaintiff's anxiety and mood disorders and of the onset of her pain disorder: *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 at para. 15 (C.A.). I am also satisfied that the motor vehicle accident was a proximate cause of those psychological injuries. Referring to the factors discussed in *Yoshikawa* at para. 12, sub-paras. 3, 4, 5 and 6, this is not a case where Ms. Andrews could be expected to overcome her psychological problem through "will power" or where the psychological problems continue because the plaintiff "does not wish them to end". I accept the plaintiff's testimony that she wants to return to her pre-accident level of functioning. Ms. Andrews has previously demonstrated resilience and determination in overcoming years of alcohol abuse. Dr. O'Shaughnessy, whose opinion I accept on this point, has emphasized that the plaintiff requires both psychotherapy and medication in order to manage her anxiety, depression and pain disorder and to

assist her in improving her functioning. Although I have found some portions of Ms. Andrews' testimony are not credible, on the whole of the evidence I am satisfied that the plaintiff suffered an exacerbation of her anxiety and depression; that the onset of the pain disorder was caused by the accident; and that the plaintiff's psychological problems do not arise from a desire on her part for care, sympathy or compensation.

[199] Ms. Andrews had complained of pain prior to the motor vehicle accident. However, she had not previously developed the heightened perception of impairment that she experienced following the accident, nor had her sense of pain rendered her dysfunctional. I find that there is a substantial connection between the motor vehicle accident and the plaintiff's pain disorder and that but for the motor vehicle accident, Ms. Andrews would not have experienced the onset of her pain disorder when she did. As a result of the motor vehicle accident, the plaintiff's anxiety disorder interacted with her pain causing the pain disorder which has left her with an elevated perception of impairment that was not present before the motor vehicle accident.

[200] However, I am not satisfied that the accident caused all of the plaintiff's ongoing psychological symptoms. Both Dr. O'Shaughnessy and Dr. Travlos viewed the plaintiff's reduced level of functioning after the motor vehicle accident as involving a complex interaction between her pre-accident physical and mental health problems and the effects of the accident. The plaintiff's pre-existing personality disorder and her anxiety and mood disorders continue to affect her.

[201] Given the longstanding pre-existing pattern of waxing and waning depression and anxiety, I find that it is likely that even in the absence of the accident, Ms. Andrews would have suffered recurrent bouts of elevated depression or anxiety.

[202] I also find that each of the events of May 2010, when Ms. Andrews and her dog were attacked by the two German Shepherds; August 2011, when Ms. Andrews had a frightening encounter with the owner of those dogs; and July 2012, when

Ms. Andrews witnessed a sexual assault, were traumatic incidents which have contributed to the plaintiff's ongoing anxiety disorder.

[203] Doing the best that I can with all of the available evidence, I find that 50% of the plaintiff's present symptoms are attributable to the accident, 40% are attributable to the plaintiff's pre-existing mood and anxiety disorders and 10% to subsequent intervening events which include the plaintiff's two frightening encounters with the German Shepherds and their owner, and her witnessing of the sexual assault.

MITIGATION

[204] The defendants submit that Ms. Andrews' damages should be reduced for failing to mitigate. Specifically, the defendants contend that the plaintiff acted unreasonably by not attending for psychological counselling before June, 2010, and by failing to follow the recommendations of medical professionals that she make efforts to sleep at regular times. In addition, the defendants argue that although the plaintiff initially complied with the recommendations of her treating professionals, between May 2010 and mid-2012 she frequently missed or cancelled therapies, was at times uncooperative with her therapists and failed to follow recommended exercise regimes. Later in 2012, Ms. Andrews attended regularly, consistently cooperated with her therapists and reported some improvement in her symptoms.

[205] In *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, Low J.A. stated:

The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[206] All of the medical experts agree that the treatment of Ms. Andrews' psychological conditions is the key to her recovery. The defendants point out that Ms. Andrews did not begin to receive psychological counselling until June 2010. Ms. Andrews was referred, through Turning Point, to Dr. Jung. Her evidence, which

was not contradicted cross-examination, was that she had asked to see Susan Rungstra, but was told that she should see a psychologist who specialized in motor vehicle trauma. She went to see Dr. Jung in June 2010 when arrangements were made for her to do so. I find there was no delay on the plaintiff's part in obtaining psychological counselling.

[207] Between June 25, 2010, when Ms. Andrews had her first appointment with Chuck Jung Associates and July 5, 2012, the plaintiff had 53 scheduled appointments with Dr. Jung or his associates. She cancelled or failed to attend only two of those appointments. Ms. Andrews began to see Dr. MacKinnon in July 2012 and continued to receive therapy from her to the time of trial. During that time, Ms. Andrews occasionally missed appointments, had no appointments in August 2012, but otherwise attended for psychological counselling between three and four times per month. The defendants, who bear the onus of proof, have not shown that the plaintiff unreasonably refused or declined recommended treatment for her psychological condition, or that the few appointments that she did miss delayed her recovery.

[208] The plaintiff has not followed the recommendations of her care providers and Dr. Travlos that she establish regular hours of sleep. At p. 15 of his report, Dr. Travlos stated that Ms. Andrews "has to stop sleeping in the day at all costs". He thought it was essential for the plaintiff establish a regular sleep pattern in order to reduce her fatigue and improve her functioning. The plaintiff has not shown that her psychological condition has prevented her from following the recommendations of all of her care providers, and Dr. Travlos that she establish a regular sleep pattern.

[209] There were periods of time between June 2010 and mid-2012 when the plaintiff, with some frequency, either cancelled or failed to attend for her physical and occupational therapy appointments. Ms. Andrews has reported some improvement since mid-2012 when she resumed regular attendance for her therapies. I find that Ms. Andrews' failure follow her care providers' recommendations concerning sleep and her failure to attend for scheduled therapies other than psychotherapy has

delayed her recovery. I find that had the plaintiff followed these recommendations, there would have been some earlier improvement in the plaintiff's functioning. In this case, a reduction of 10% in the award of non-pecuniary damages for the plaintiff's failure to mitigate is appropriate.

DAMAGES

Non-Pecuniary Damages

Facts

[210] In the previous section of these reasons I have set out my findings concerning the physical and psychological injuries suffered by the plaintiff as a result of the accident.

[211] With respect to her social life since the accident, the plaintiff continues to see Ian Laing, an old friend and former co-worker, once or twice a week but has lost touch with many of her friends. She no longer entertains, describes her house as a mess, and says she avoids other people in order to reduce the likelihood of getting into arguments with them. Aside from attempting golf a couple of times with Mr. Priolo, she has not played any sports. She no longer has any interest in arts and crafts, and no longer makes jewellery or sketches. When Mr. Priolo is not in Vancouver, she spends most of her time alone.

[212] Ms. Andrews testified that there has been some improvement in her psychological condition. Her irrational fears of death have diminished somewhat, although she continues to experience fear of her family or Mr. Priolo dying. The plaintiff complains of a loss of emotional boundaries, panic attacks, and outbursts of anger directed at persons she encounters on the street or in stores. The plaintiff testified that she dislikes being touched, and no longer has intimate relations with Mr. Priolo. She still loses her train of thought from time to time, which is a source of frustration and anger.

[213] With respect to recreational activities, before the motor vehicle accident, Mr. Priolo said Ms. Andrews enjoyed long walks, travel, movies, hiking, cooking, running and playing golf. The plaintiff and Mr. Priolo dined out frequently, worked out at the gym together and competed with each other in completing crossword puzzles.

[214] Mr. Priolo testified that they no longer dine out as often, they rent movies and go for shorter walks. The plaintiff avoids crowds and no longer enjoys attending sporting events. She has not completed a full game of golf since the accident.

[215] Mr. Priolo described the plaintiff before the accident as loving and intelligent, a person with a lot of patience and someone who was very confident in her abilities and enjoyed her work. Since the accident, she loses her train of thought, gets frustrated, has become withdrawn, and on occasion curses at people on the street or in stores. Her personal hygiene has suffered and where she formerly kept a tidy apartment, she no longer does so. She continues to suffer from nightmares.

[216] Mr. Priolo says that since the accident the plaintiff has been a very nervous and anxious driver, although this has improved with the passage of time.

[217] Overall, my impression was that Mr. Priolo was a forthright witness; he did not exaggerate the plaintiff's injuries, or her pre-accident abilities, attributes and personality. However, Ms. Andrews appears to have kept to herself her pre-accident bouts of depression and any treatment she was receiving for them.

[218] Mr. Ian Laing is a 58-year-old restaurant employee who has known the plaintiff since 1985, when she was working as a waitress. They became good friends, went for walks together, and to the movies and restaurants. Mr. Laing continues to see the plaintiff about once or twice a week when he visits her at her home. He testified that before the motor vehicle accident, Ms. Andrews' home was neat, clean and well organized, and now is cluttered. He described the plaintiff as energetic and upbeat before the collision. Since the accident, Mr. Laing has observed changes in the plaintiff. She is lethargic, rather than active, cries for no

apparent reason, has sudden changes in mood, has become short-tempered, swears a lot, is impatient, and no longer pays much attention to her grooming. Mr. Laing also described the plaintiff losing her train of thought in mid conversation. When they walk, it is only to take the dog out. They no longer attend movies, or play board games.

[219] Ms. Doreen Antifaev has known the plaintiff since she was first a student at Langara College, and later, a First Nations student counsellor at Vancouver Community College. Ms. Antifaev described the plaintiff before the motor vehicle accident as friendly, outgoing, always ready to help others, and someone with a great sense of humour. She has seen the plaintiff since the motor vehicle accident about once every four months. Ms. Antifaev testified that the plaintiff cries frequently, lacks concentration, is angry much of the time, does not seem to care much about her appearance, and does not want to be around people very much. She has not observed any improvement in the plaintiff since the accident. I found Ms. Antifaev to be a forthright and disinterested witness who presented her evidence without embellishment.

Law

[220] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide.

Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[221] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal identified a non-exhaustive list of the factors to be considered when assessing non-pecuniary damages. They include the age of the plaintiff; the nature of the injury; severity and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and

mental abilities; and loss of lifestyle. Generally, stoicism should not penalize a plaintiff.

[222] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[223] The correct approach to assessing injuries which depend on subjective reports of pain, and which have persisted beyond the normal period for recovery was discussed in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.), by McEachern C.J. (as he then was). In referring to an earlier decision, he said:

In *Butler v. Blaylock*, [1981] B.C.J. No. 31, decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that 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 extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[224] The plaintiff, relying upon *Tsalamandris v. MacDonald*, 2011 BCSC 1138, *Polovnikoff v. Banks*, 2009 BCSC 750, and *Young v. Anderson*, 2008 BCSC 1306, submits that the appropriate range for non-pecuniary damages in this case is between \$100,000 and \$220,000 for Ms. Andrews' soft tissue and psychological injuries. None of the plaintiffs in those cases had the complex pre-existing psychological conditions that distinguish Ms. Andrews' case. In *Tsalamandris*, the 47 year old female plaintiff had pre-existing neck and back pain that was not severe, and did not impair her activities. She had no pre-existing anxiety or mood disorder. The court found that the two motor vehicle accidents in issue had caused the

plaintiff's major depressive disorder and anxiety, and assessed non-pecuniary damages of \$100,000. In *Polovnikoff*, the court found that the plaintiff suffered a mild traumatic brain injury and psychotic disorders as a result of the accident, and that the psychotic disorder rendered the plaintiff completely unemployable. The court assessed damages for the brain injury and the psychotic disorder separately, awarding \$50,000 for the brain injury and \$220,000 for the psychotic disorder before reducing the latter award to take into account the plaintiff's alcoholism and various tortious intervening events.

[225] The defendants submit the appropriate range for non-pecuniary damages in this case is between \$30,000 and \$60,000. The defendants rely upon *Hubbard v. Saunders*, 2008 BCSC 486, *Lehtonen v. Johnston et al*, 2009 BCSC 1364, *Chamberlain v. Giles*, 2008 BCSC 171, *McCreight v. Currie*, 2007 BCSC 127, and *Piper v. Hassan*, 2012 BCSC 189.

[226] In *Hubbard*, the court awarded a 37-year-old plaintiff with a prior history of both physical and psychological symptoms non-pecuniary damages of \$45,000 as compensation for mild to moderate soft tissue injuries and depression for a period of 18 months. The plaintiff's psychological injuries were less severe than Ms. Andrews'. In *Chamberlain*, the court, in awarding non-pecuniary damages of \$50,000 to a plaintiff with a complex history of both pre-accident and post-accident back and neck injuries, depression and anxiety disorders, found that 60% of the plaintiff's ongoing symptoms were caused by her pre-existing injuries and conditions.

[227] In *McCreight*, the court awarded \$40,000 in non-pecuniary damages to a 43-year-old plaintiff with extensive pre-accident physical and psychological conditions. There, the court found that the effects of the motor vehicle accident on the plaintiff's mental health were spent by the time of trial. In *Piper*, the court found that the accident did not contribute to the plaintiff's pre-existing depression and post-traumatic stress disorder, and awarded \$50,000 for non-pecuniary damages for mild to moderate soft tissue injuries that lasted for about 18 months.

Conclusion

[228] Returning to the *Stapley* factors, the plaintiff was 51 years old at the time of the accident and 55 at the time of trial. I find that her symptoms and complaints attributable to the physical injuries she suffered in the accident had all returned to their pre-accident position by the time of trial. However, Ms. Andrews continues to suffer from her pain disorder, anxiety and depression. I have found that 50% of her ongoing psychological injuries are attributable to the accident. There is no doubt that the accident caused a significant escalation of her depression and anxiety, and the onset of her pain disorder, although all of her ongoing psychological symptoms cannot be attributed to the accident. However, that event rendered her dysfunctional. Ms. Andrews identified with her work and was dedicated to her clients. The accident caused or contributed to her loss of emotional boundaries. The plaintiff's ongoing anxiety, depression and pain disorder have prevented her from seeking and obtaining new employment as a counsellor to First Nations clients. Ms. Andrews' psychological injuries have impaired her social life and adversely affected her intimate relations with Mr. Priolo. Since the accident, the plaintiff has led a much diminished lifestyle. She no longer participates in the recreational activities, hobbies or many of the social activities she previously enjoyed with Mr. Priolo and others. The plaintiff has become withdrawn and lethargic and no longer pays the same attention to her personal care and grooming as she did before the accident.

[229] Leaving aside for the moment the physical injuries suffered by the plaintiff as a result of the accident, I find that the appropriate award of non-pecuniary damages for the plaintiff's psychological injuries is \$100,000. That amount must be discounted by 50% to take into account my finding that only half of Ms. Andrews' ongoing psychological injuries and symptoms were caused by the accident. I must assess non-pecuniary damages for all of the injuries suffered by the plaintiff as a result of the accident. Taking into account Ms. Andrews' physical injuries, as well as her psychological injuries attributable to the accident, I assess the plaintiff's overall damages for pain and suffering and loss of enjoyment of life in the total amount of

\$85,000. This award is subject to a 10% reduction for the plaintiff's failure to mitigate.

Past Loss of Earning Capacity

[230] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained:

Rowe v. Bobell Express Ltd., 2005 BCCA 141; *M.B. v. British Columbia*, 2003 SCC 53.

[231] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62; *Lines v. Gordon*, 2009 BCCA 106.

[232] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati* at para. 27.

[233] On a claim for past loss of earning capacity, the plaintiff must first establish on a balance of probabilities that the injuries she sustained caused an impairment of her earning capacity. Then, in determining what might have happened in the past to enable the plaintiff to earn income, but for the accident, the court must decide if the event was a real and substantial possibility, and then determine the likelihood of it occurring: *Smith v. Knudsen*, 2004 BCCA 613 at paras. 28, 29, 36 and 37.

[234] The plaintiff says that as a result of the accident she has been unable to work at all and has lost the opportunity to practice as a counsellor to First Nations clients in Vancouver, Calgary, or Maryland. Ms. Andrews submits that based on her employment record as a counsellor before the accident, the importance of her work

to her sense of identity and her dedication to counselling First Nations clients, it is likely that she would have continued to work as a clinical counsellor to the date of trial and would have earned annual remuneration at least equivalent to the average of her earnings in the three years before the accident.

[235] In her income tax returns for the years 2006 through 2008, the plaintiff reported net business income of \$23,074 in 2006, \$9,963.10 in 2007 and \$28,800.93 in 2008. In addition, the plaintiff earned non-taxable income on reserve in the amounts of \$56,999.84 for 2006, \$37,357.38 for 2007 and \$25,715.32 for 2008.

[236] In 2009, the plaintiff received payments from Health Canada totalling \$81,225, as evidenced by the T1 issued to her. Ms. Andrews has not produced an income tax return for that year.

[237] The plaintiff's accounting expert, Mr. Benning, has estimated Ms. Andrews' net business income for the nine months she worked in 2009 before terminating her contract with Health Canada shortly before the accident at \$73,108. Based on Ms. Andrews' reported income for 2006 through 2008 and her estimated net business income for 2009, Mr. Benning calculated the plaintiff's average annual income from January 1, 2006 to October 10, 2009 in the amount of \$67,673. Again, based on the plaintiff's pre-accident sources of income from 2006 to October 2009, Mr. Benning estimated that 34% of the plaintiff's income was taxable and 66% was non-taxable income earned on reserve.

[238] Based on the assumption that the plaintiff would have remained in the labour force and worked throughout the pre-trial period, and using Ms. Andrews' average annual earnings for the period January 1, 2006 through October 10, 2009, Mr. Benning estimated the plaintiff's past loss of income of earning capacity, net of income tax, in the amount of approximately \$234,000.

[239] The defendants argue that before the accident the plaintiff had terminated her contract with Health Canada, had no definite plans for future employment, was already suffering from depression and was at risk of decompensation in any event.

The defendants say that in the absence of any convincing evidence of the availability of any employment opportunities lost by the plaintiff, and in light of Ms. Andrews' pre-existing psychological conditions, any award of damages for past loss of earning capacity should be modest.

Discussion

[240] The plaintiff was not employed at the time of the accident. She intended to take three or four weeks off work before she pursued a new counselling opportunity. She had no settled plan and was considering opening an office in Vancouver or Calgary, or even finding work as a counsellor to Native Americans in the State of Maryland. Ms. Andrews would have required time to investigate her options and open a new practice in Vancouver, Calgary or elsewhere. I find that the plaintiff has not established a real and substantial possibility that she would have earned any income for the remainder of 2009.

[241] I am however satisfied that but for the accident the plaintiff would likely have sought and found work as a counsellor to First Nations clients. Ms. Andrews was dedicated to working in that field and had done so continuously since completing her Masters' Degree. While it is probable that she would have established a full-time practice as a counsellor, there is also a chance, which I would rate at no more than five percent, that she might have enrolled in a Doctorate of Education program before the trial date, and worked part-time, either as a counsellor or in some other capacity, while pursuing her studies.

[242] Mr. Benning made no allowance for the time required for Ms. Andrews to start up a new practice and then build it to the point where it could generate income in excess of her overhead. The court has no reliable evidence of the costs Ms. Andrews would have incurred in setting up her own practice in either Vancouver or Calgary. Nor has Mr. Benning made any allowance for the contingency that absent the motor vehicle accident, the plaintiff might have lost time from work before the trial date as a result of illness or disability.

[243] Dr. Travlos thought that Ms. Andrews was substantially at risk of decompensation before the motor vehicle accident, although she would not have suffered her emotional and psychological collapse when she did, absent the accident. Drs. O'Shaughnessy and Vallance both agreed that the plaintiff's pre-existing anxiety and mood disorders rendered her extremely sensitive to psychosocial stresses. I find there is a real and substantial possibility that the plaintiff would have suffered a disabling bout of anxiety and depression or decompensation without the motor vehicle accident at sometime between the date of the accident and the date of trial.

[244] Ms. Andrews also wanted to spend more time with Mr. Priolo, which would likely have resulted in additional time out of the workforce.

[245] In addition to these negative contingencies, I take into account the possibility that Ms. Andrews might have earned income at a level higher than her annual average in one or more of the years before trial.

[246] Mr. Benning's estimate of the plaintiff's damages for past loss of earning capacity in the net amount of \$234,000 is based on the flawed assumption that but for the accident the plaintiff would have worked continuously as a full-time counsellor from October 10, 2009 to the date of trial, with no adjustment for non-participation in the workforce. However, Mr. Benning's estimate of the plaintiff's average pre-trial annual earnings in the \$67,000 to \$68,000 range provides a useful starting point for the assessment of the plaintiff's damages under this head. I find that the plaintiff's average annual income, as estimated by Mr. Benning, provides a realistic measure of the annual income Ms. Andrews would have earned as a full-time counsellor providing services to First Nations clients, before adjusting for the contingencies applicable to her circumstances.

[247] Mr. Henry Big Throat, the Vice-President of Student Services at Red Crow College on the Blood Reserve, testified that his institution employs five counsellors at salaries of between \$65,000 and \$70,000 per year. For a First Nations counsellor, that income, earned on reserve, would be tax free. However, Mr. Big

Throat gave evidence in cross-examination that no counselling positions have become available at Red Crow College since 2005. Mr. Big Throat also testified that at the time of trial, Lethbridge College was advertising for a counsellor for First Nations students at an annual salary of \$75,000.

[248] I have found there was no real or substantial possibility that Ms. Andrews would have earned any income during the remainder of 2009. Accordingly, Ms. Andrews would not have earned the income attributed to her for the balance of 2009 in Mr. Benning's estimates.

[249] In my view, there are real and substantial possibilities that the plaintiff would have required additional time in 2010 to build her practice to the point where it would generate income in excess of overhead; that the plaintiff would have taken additional time off work as her relationship with Mr. Priolo developed; and most importantly, that the plaintiff might have been disabled from employment by her pre-existing psychological conditions for some part of the time between October 10, 2009 and the date of trial. I have also found that there was a small chance that the plaintiff might have withdrawn from full-time employment to study for her Doctorate while working part-time. Taking all of these factors into account, I would assess the overall chance of those events reducing or impairing the plaintiff's earning capacity to the date of trial at 50%.

[250] Mr. Benning estimated the plaintiff's gross income loss from October 10, 2009 to the date of trial in the amount of \$243,304. Deducting the amount Mr. Benning estimated for the remainder of 2009 - \$15,675, would leave a balance of about \$227,000. Accordingly, I assess the plaintiff's past loss of earning capacity in the gross amount of \$113,500, that being half of the remaining amount from Mr. Benning's estimate. I must adjust that amount by deducting the income tax payable on the gross lost earnings.

[251] But for the accident, the plaintiff would most likely have established a counselling practice in either Vancouver or Calgary, where her mother and step-

father reside. Because she would be earning her income off reserve, the whole of her income would be taxable.

[252] Under ss. 95 and 98 of the *Insurance (Vehicle) Act*, the court has the discretion to determine the period or periods appropriate for the determination of the plaintiff's net income loss: *Lines* at para. 184.

[253] In *Lines* at paras. 183, 185 and 186, the Court of Appeal gave examples and directions concerning the trial judge's exercise of discretion:

[183] Another example is a situation where the plaintiff was unemployed at the time of the accident and had no imminent prospects of employment. The judge or jury could make an award for loss of past earning capacity, but it would be artificial to allocate it among different periods.

...

[185] By way of contrast to the two examples I have given, in the situation where, at the time of injury, the plaintiff was working at a job and returned to that job after sufficiently recovering from the injuries, it would be appropriate, absent any complications, for the judge to allocate the gross income loss to the calendar years between the date of the accident and the date of trial as if the plaintiff had continued working. This would accord with the principle that, insofar as is possible, the plaintiff should be put in the position he or she would have been in if not for the injuries caused by the defendant's negligence.

[186] There will be a wide variety of circumstances facing trial judges. In each case, the trial judge will have to decide whether it is appropriate in the circumstances before him or her to calculate net income loss on the basis of one period, calendar-year periods or other multiple periods. In making a decision in this regard, the trial judge should consider all of the circumstances and apply s. 98 in a manner that is most consistent with the principles of damage assessment to which I have referred.

[254] Here, the plaintiff was not employed at the time of the accident, and had no firm plan about where she would operate her counselling practice. While I am confident that she would have found an opportunity to continue her practice, I am not able to say, with any precision, on the evidence adduced at trial, when in 2010 she would have opened an office in Vancouver or Calgary. Nor am I able to allocate to a particular year or years the period, or periods, of time when the plaintiff might have withdrawn from the workforce as a result of illness or disease unrelated to the motor vehicle accident. I have therefore concluded that I must assess the plaintiff's net

income loss in a lump sum for the whole of the period from January 1, 2010 to the first day of trial, as if the gross income award were received by the plaintiff on the first day of trial.

Conclusion

[255] As at the date of trial, the income tax payable on \$113,500 at the applicable rate of 26% was \$29,510. Accordingly, after making the deduction for income tax, I assess the plaintiff's damages for past loss of earning capacity in the amount of \$84,000.

Loss of Future Earning Capacity

[256] The standard of proof for the evaluation of hypothetical events that may affect an award of damages for future loss of earning capacity is simple probability, rather than the balance of probabilities: *Athey v. Leonati*. As the Court of Appeal held in *Rosvold v. Dunlop*, 2001 BCCA 1 at para 9:

[9] ... Possibilities and probabilities, chances, opportunities and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

[257] In *Rosvold* at paras. 10 and 11, the Court of Appeal described the task of the trial judge as follows:

[10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, aff'd [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.); and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:

- [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
- [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
- [3] whether 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] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware, supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[258] In *Perren v. Lalari*, 2010 BCCA 140, Garson J.A., after reviewing the authorities, identified the basic principles articulated in *Athey* and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, as:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings, but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

[259] As Garson J.A. emphasized in *Perren* at para. 32, the plaintiff must always prove there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff meets that burden, then the plaintiff may prove the quantification of the loss of earning capacity on either an earnings approach or a capital asset approach. Where the loss is not readily measurable, the capital asset approach will be more useful than the earnings approach.

[260] Where the assessment is based on the capital asset approach, the court must consider four questions in *Brown* and make findings of fact concerning the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[261] I must first determine whether the plaintiff has established a real and substantial possibility of a future event leading to an income loss. If so, the court

must assess, rather than calculate damages according to the likelihood of the event occurring. The award must be adjusted for both positive and negative contingencies, and the court must consider the overall fairness and reasonableness of the award: *Rosvold* at para. 11.

[262] Dr. O' Shaughnessy thought the plaintiff's degree of anxiety, depression and dysfunction at the time he saw her prevented her from working. He explained Ms. Andrews could not work as a therapist for others when she was so preoccupied with her own symptoms and dysfunction.

[263] Dr. O'Shaughnessy thought that it was likely that with appropriate treatment, including psychotherapy and medication, the plaintiff would experience a reduction in her symptoms that would possibly allow her to return to work as a counsellor.

[264] Dr. O'Shaughnessy agreed in cross-examination that Ms. Andrews' recent regular attendance or treatments and heightened cooperation with her various health care providers, her diminished emotional attachment to the motor vehicle accident as her major stressor, her report of progress with Dr. MacKinnon and her engagement to Mr. Priolo were all positive indicators for improvement in her psychological condition.

[265] Dr. Vallance thought that the plaintiff, with her history of childhood neglect and abuse, her personality traits and anxiety and mood disorders ought never to have worked as a counsellor to residential school survivors. In Dr. Vallance's opinion, there would have to be a massive improvement in the plaintiff's depression and anxiety disorder, which he did not anticipate, in order for the plaintiff to return to her former counselling work. However, he thought that with further therapy, the plaintiff could perform other, less strenuous counselling work. In cross-examination, Dr. Vallance said he thought the prospects of that were quite good, although both her depression and anxiety would need to improve significantly.

[266] Dr. Travlos also thought the plaintiff might be able to return to full-time employment with an improvement in her mental health. He was unable to provide

any definitive opinion on timing. Dr. Travlos also thought the plaintiff would have to make a decision about whether she could return to counselling, or should pursue an alternate career, perhaps in the field of Human Resources, an area in which she had expressed some interest.

[267] The plaintiff led no evidence about the levels of income earned by Human Resources practitioners.

[268] Mr. Janmohamed, an occupational therapist and certified work capacity evaluator, performed a functional capacity evaluation of the plaintiff on November 8, 2012. Mr. Janmohamed's assessment and his report of December 12, 2012 focused on the plaintiff's physical abilities and limitations, rather than her psychological limitations. Based on the history he took from the plaintiff and the tests he administered, Mr. Janmohamed found that Ms. Andrews tended to underrate her functional abilities. He also observed some inconsistencies in the plaintiff's performance over the course of his evaluation. During testing, the plaintiff could only bend her neck forward 30 degrees, however later in the day he observed a 45 degree range of motion. Similarly, formal testing revealed only 52 degrees of left shoulder flexion, although Mr. Janmohamed later observed the plaintiff demonstrate 110 degrees of shoulder flexion. Mr. Janmohamed found that the plaintiff's self-reporting of her neck and upper back symptoms during testing were inconsistent with his observations and testing of her functional capacity.

[269] The plaintiff's subjective estimates of the functional impact of her pain exceeded the functional impact Mr. Janmohamed observed on objective tests about 50% of the time. Mr. Janmohamed thought that the plaintiff was capable of performing the sedentary physical duties of a counsellor and that she had the physical ability to return to work as a counsellor on a graduated basis.

[270] In Mr. Janmohamed's opinion, at a purely physical functional level, the plaintiff had sufficient sitting, reaching, handling, neck flexion and lifting tolerance to return to her occupation as a counsellor for two to four hours per day on an extended graduated return to work program over 12 to 20 weeks. Mr. Janmohamed was

aware of the plaintiff's psychological symptoms and deferred to her examining psychologists and psychiatrists on that aspect of her functioning.

[271] Mr. Janmohamed felt that if the plaintiff was going to attempt to return to work as a counsellor, an urban practice would likely be better for her because she would avoid extended travel and the extended sitting which caused her discomfort.

[272] Mr. John Lawless, who was qualified as an expert in vocational rehabilitation, provided a report dated November 30, 2012. In Mr. Lawless' opinion, it is improbable that the plaintiff will return to work as a counsellor. In direct examination, Mr. Lawless thought it probable that the plaintiff is not competitively unemployable, although there was a chance, assuming some improvement in her psychological condition, that she could find other and less demanding employment. In cross-examination, Mr. Lawless agreed that the plaintiff has marketable qualities, including superior intelligence. She is well educated and in the past has demonstrated resilience from adversity and the will-power to overcome substantial obstacles. Mr. Lawless agreed that the plaintiff's primary problems are psychological. The plaintiff told Mr. Lawless that she did not think she could maintain boundaries between herself and her clients any longer. In Mr. Lawless' opinion, the plaintiff's inability to maintain boundaries undermined the counsellor/client relationship and precluded the plaintiff from returning to work as a counsellor.

[273] Based on the history he took from the plaintiff and his vocational testing, Mr. Lawless thought that if there was some future improvement in the plaintiff's psychological condition, she might be able to return to work in less skilled service occupations that involved duties less likely to engage her emotional and interpersonal difficulties. The positions Mr. Lawless thought might be suitable included community and social service workers, airline sales and service agents, customer service, information and related clerks, and personnel clerks. Annual earnings for these positions range from \$36,000 to \$45,000.

[274] Dr. Travlos offers a more optimistic prognosis for the plaintiff's return to the workforce than Mr. Lawless did.

[275] I attach less weight to Mr. Lawless' opinion than I do to the opinions of Drs. Travlos and O' Shaughnessy respecting the prospects for Ms. Andrews' future return to the workforce. Unlike the other experts, Mr. Lawless appears to have accepted the plaintiff's self-reporting without reservation, despite having had the opportunity to review contradictory clinical records. Mr. Lawless also thought, erroneously, that the plaintiff had suffered a traumatic brain injury in the accident.

[276] I find that Ms. Andrews has met the burden of establishing a real and substantial possibility that her capacity to earn income has been impaired by the accident. However, in my view, the extent of that impairment is not as severe as she claims. She has recovered from the physical injuries caused by the accident. I accept the evidence of Dr. Travlos and Mr. Janmohamed that Ms. Andrews has the physical capacity to return to work as a counsellor. However, all of the experts agree that her psychological condition has impaired her functioning. One of the effects of the plaintiff's pain disorder is her exaggerated perception of the extent of her disability. As a result of her psychological condition, Ms. Andrews' ability to motivate herself is significantly impaired. Her psychological prognosis is guarded. Much depends upon her progress in treatment for anxiety, mood and pain disorders. The accident exacerbated her pre-existing psychological disorders. Her symptoms have also been prolonged by subsequent intervening events.

[277] I find that as a result of her psychological injuries Ms. Andrews has been rendered less capable overall from earning income from all types of employment, and that she is less marketable or attractive to potential employers. Until the plaintiff is able to motivate herself, re-establish emotional boundaries, and cope with her anxiety and mood disorders, she has lost the ability to take advantage of all of the job opportunities that might have otherwise been available to her, but for the motor vehicle accident. The plaintiff, whose sense of identity was closely tied to her work, clearly places less value on herself as a person capable of earning income in a competitive market.

[278] I find that but for the accident, Ms. Andrews would likely have continued her counselling practice, probably in Vancouver or Calgary, but possibly in Maryland.

[279] The plaintiff called a number of witnesses who gave evidence concerning Ms. Andrews' strong academic performance, her skills and attributes as a counsellor, and the availability of work for counsellors providing services to First Nations clients. Mr. Big Throat first met the plaintiff when she applied to attend the University of British Columbia for her Bachelor of Arts degree, and later her Master's Degree in counselling. He described her as a hard-working and a very strong academic student who received straight As. He testified that he wanted to hire her for the Red Crow College counselling program, however no positions were available.

[280] Chief Joe Norris is a hereditary Chief and a member of the Board of Directors of the IRSSS, which employed the plaintiff as a counsellor from 2004 through 2007. Chief Norris described the plaintiff as a respectful and excellent worker with a sense of humour.

[281] Chief Norris testified that IRSSS currently employs six counsellors and that if Ms. Andrews were interested in returning to work with the Society he would likely have work available for her. Chief Norris also thought the plaintiff was well qualified for employment at the drug and alcohol treatment facility at Lantzville on Vancouver Island, or other treatment facilities located on First Nations' reserves throughout the Province where similar work might be available.

[282] In cross-examination, Chief Norris agreed that listening to the stories of residential school survivors takes its toll on counsellors, who in turn need counselling themselves. Ms. Andrews participated in twice yearly retreats that the IRSSS conducted for its counsellors. Chief Norris said that following those retreats, the plaintiff was able to continue providing services to her clients.

[283] Dr. Marvin Westwood, a Professor in the Department of Education at the University of British Columbia, supervised the plaintiff's clinical training program. He described Ms. Andrews as a highly competent, mature and skilled student whose

knowledge of indigenous people and sensitivity equipped her to work in First Nations' communities. Dr. Westwood rated the plaintiff in the top 10 to 15 percent of students he had taught over 30 years.

[284] Similarly, Dr. Rod McCormick, a Professor of Counselling Education at the University of British Columbia who had taught the plaintiff's clinical course, described her as a strong student who obtained the top mark in her section of the clinic course. Dr. McCormick testified that there is a high demand for aboriginal students who complete the Master's counselling program. He thought there would be opportunities for employment with the new Aboriginal Health Authority established by the Province and said there are counselling positions across the country at facilities operated through the national Drug and Alcohol Treatment Program, and at healing centers run by tribal groups. Dr. McCormick understood these positions now paid salaries in the low \$80,000 range.

[285] But for the accident, it is likely that the plaintiff, with her particular skills, high intelligence, and connections to the Aboriginal community would have found work as a counsellor. Given the demanding nature of her work, and the stressors involved, it is unlikely she would have worked beyond age 65.

[286] The plaintiff has suffered an impairment of a capital asset, that is, her ability to earn income.

[287] I turn now to the positive and negative contingencies affecting an award of damages for loss of future income in this case. Absent the accident, the plaintiff may have been unemployed for periods of time due to such factors as reductions in funding for Aboriginal counselling programs, or unrelated illness. There is also a substantial risk of disability as a result of the exacerbation of her pre-existing psychological conditions in the absence of the accident and her possible decompensation in any event. The plaintiff may also have chosen to work part-time while pursuing her Doctorate.

[288] There is also a real possibility, in my view, that with the benefit of further cognitive behavioural therapy, as recommended by Dr. O'Shaughnessy, the plaintiff's psychological condition will improve, she will learn to manage her anxiety, mood and pain disorders, and she will be able to return to full-time employment, although probably not as a counsellor to residential school survivors.

[289] Dr. Travlos thought that it was possible that the emotional challenges would be too much for Ms. Andrews and that she might have to seek alternate employment. He opined that any type of return to work would be beneficial for the plaintiff for both physical and mental health reasons.

[290] Ms. Andrews will require additional psychotherapy to restore her functioning to the point where she is able to return to the work force. She may also require some retraining. There is a real and substantial possibility that she will not return to counselling First Nations residential school survivors and may find employment that is less stressful and less remunerative than her former employment. I also recognize the real possibility that as a result of her pre-existing psychological condition the plaintiff may have suffered some loss of earning capacity as a result of decompensation in any event. Further, only 50% of her ongoing psychological symptoms are attributable to the motor vehicle accident.

[291] Taking all of these factors into account, and adopting the capital asset approach, I find that an amount approximating two years' earnings as a counsellor is a reasonable award for Ms. Andrews' future loss of earning capacity. Mr. Benning estimated the plaintiff's without-accident income at the time of trial at \$74,259. I assess the plaintiff's damages for loss of future earning capacity in the amount of \$150,000.

[292] The defendants have not shown that the plaintiff's damages for loss of future earning capacity would have been reduced had she followed her treatment providers' recommendations to establish a regular sleep and exercise schedule. Accordingly, there will be no reduction from this head of damages for failure to mitigate.

Cost of Future Care

[293] Claims for cost of future care must be medically justified and reasonable. The award of damages must be moderate and fair to both parties: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at para. 210.

[294] In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22 McLachlin C.J. stated:

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

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

[295] The plaintiff claims the costs of future care that are medically justified and reasonable in order to increase Ms. Andrews' level of independence and participation in her life activities to her pre-accident status and potential include the costs of psychological counselling, kinesiology, physiotherapy, fitness centre classes, occupational therapy, and the services of a rehabilitation assistant. In addition, the plaintiff claims the costs for replacing an ergonomic chair and foot rest. The plaintiff bases her claim on the recommendations made by Ms. Allison McLean in her cost of future care report.

[296] Ms. Andrews initially founded her claim for cost of future care on the assumption that she will require all of those services for her lifetime. The plaintiff's economist, Mr. Benning, valued those costs at \$314,780. However, the plaintiff, recognizing she may have required some of this care without the accident, and that there is a possibility she will improve, now claims a total of \$150,000 for cost of future care.

[297] The defendants submit that the plaintiff had returned to her original position before trial, and therefore has no entitlement to damages for costs of future care. The defendants also argue that the plaintiff's original position is such that she would likely have required many of the recommended expenses in any event.

[298] Ms. Allison McLean, an occupational therapist, provided a cost of future care evaluation report dated December 14, 2012, marked as Exhibit 8. Her recommendations are based on her assessment of what is necessary for the plaintiff in terms of functional necessity, and what is medically reasonable. In cross-examination, Ms. McLean agreed that she has assumed that the information in the medical and clinical reports she reviewed is accurate. She relied on the accuracy of the plaintiff's self-reporting, and agreed that inaccuracies or omissions in the medical reports and clinical records could affect her opinion.

[299] Ms. McLean noted that during late 2009 and early 2010, the plaintiff progressed gradually in physiotherapy, so that her sessions were reduced from twice a week to once a week, and that she implemented an exercise program with a kinesiologist. The plaintiff was able to cook more and carry more groceries. However, as time went on, her functioning deteriorated. The plaintiff cancelled or missed treatment appointments and was often late for treatment. From November 2010 to February 2011, Ms. Andrews had little contact with her occupational therapist. Ms. McLean understood that the plaintiff's psychological difficulties affected her ability to keep appointments and participate in her rehabilitation program.

[300] Ms. McLean agreed in cross examination that over the three to six months before she assessed the plaintiff, she understood that Ms. Andrews was attending for her therapies and was slowly improving.

[301] Ms. McLean was aware that there were various stressors affecting the plaintiff's life from mid-2010 through 2012. She said that she would defer to a psychiatrist or psychologist for advice on whether a person would benefit from counselling or psychiatric treatment.

[302] At page 11 of her opinion, Ms. McLean said the following:

It is my opinion that, although Ms. Andrews is independent in personal care activities, she is otherwise significantly disabled with regard to her capacity to engage and participate in the other major areas of occupational performance in her life – including work, homemaking, and social, leisure and fitness activities. Prior to the accident, despite some physical/pain symptoms and despite ongoing emotional difficulties over the years, she was working as a clinical counsellor in a job that required travel to other parts of the province, she took care of her apartment including taking her dog for multiple walks in a day and, as her schedule permitted, she participated in fitness and social activities.

Ms. Andrews' pre-injury level of function contrasts with her current status: she is not working, she struggles to maintain her household in particular in terms of organization and clutter, and she has some fears relating to being outside on her own and to her (or others in her life) becoming physically hurt. She does not carry out fitness activities on her own. She walks her dog only about once per day at most. Since the time of the accident, she has struggled with motivation and self-organization and has not consistently attended and followed-through with her therapies – although she is gradually improving over time, in particular over the last few months.

I agree with other experts that Ms. Andrews' psychological/emotional symptoms are the primary barriers to her recovery from the accident. It is my opinion that this includes a return to pre-injury level of participation in her life activities.

[303] Ms. McLean made recommendations for psychological counselling and physical conditioning, including the continuation of the services of a kinesiologist over the next two years, and a physiotherapist for 12 sessions per year for the next two years. She has also made recommendations that Ms. Andrews attend a fitness

center and that she continue to be provided with occupational therapy services for the next two years. In addition, she has recommended that the plaintiff be provided with a rehabilitation assistant to help her with de-cluttering and reorganizing her apartment. With respect to equipment, her report includes costing for the replacement of an ergonomic chair and foot rest.

[304] The plaintiff is not making any claim for the costs of prescription medication. She continues to use pre-accident medications, including Wellbutrin, Ativan for the treatment of depression and anxiety, and Elavil to assist her in sleeping.

[305] At the time of trial, the plaintiff was seeing her psychologist, Dr. Joanne MacKinnon, about once a week, although she missed some appointments in order to travel to the United States to visit Mr. Priolo, or as a result of unanticipated events. Dr. O'Shaughnessy has recommended cognitive behavioural therapy for Ms. Andrews. Ms. McLean reported Dr. MacKinnon was providing the plaintiff with both cognitive and emotional therapy.

[306] Dr. MacKinnon recommended that Ms. Andrews would require an additional one to two years of counselling, ideally on a weekly basis. However, it is likely that the plaintiff will continue to miss or cancel some of her appointments. Based on Dr. MacKinnon's hourly rate of \$180 per hour, Ms. McLean has estimated the annual cost of psychological counselling for 40 sessions at \$7,200. Based on the cost of future care multipliers provided by Mr. Benning, the present value of two years psychological counselling at 40 sessions per year is \$13,810.

[307] Considering the complexity and persistence of the plaintiff's anxiety, mood and pain disorders, I find that she will likely require and would benefit from further psychotherapeutic counselling. As Dr. O'Shaughnessy reported, the plaintiff will benefit from cognitive behavioural therapy that assists her in managing her anxiety and coping with her pain disorder so that she may function even when in discomfort.

[308] Bearing in mind that Ms. Andrews' current psychological conditions and symptoms were not all caused by the accident and that the plaintiff was at risk, in

any event, of intermittent escalation of her pre-existing anxiety and depression, I find that a reasonable award for future cognitive behavioural therapy is \$7,000.

[309] Ms. McLean has recommended that Ms. Andrews be provided with occupational therapy services for four hours per month for two years at an estimated cost of between \$6,048 and \$6,300 per year, based on the most recent fee structure for British Columbia occupational therapists. The occupational therapist would assist the plaintiff in setting and meeting realistic goals in her day to day functioning. Dr. Travlos also recommended occupational therapy. He thought that if the plaintiff had the assistance of an occupational therapist, established regular sleeping patterns, and made progress with her mental health, she would be able to achieve normal social functioning. Dr. Travlos thought that the key to the plaintiff's recovery would be her response to psychotherapy. There is a real possibility that as her psychotherapy proceeds, the plaintiff's ability to function and manage her own daily activities will improve, and her need for the assistance of an occupational therapist will diminish. The current impairment of the plaintiff's functioning results from her psychological condition, rather than any ongoing physical disability caused by the accident. I have found that 50% of the plaintiff's current psychological symptoms are attributable to the motor vehicle accident. Taking all of these factors into account, I would allow \$6,200 for occupational therapy services, representing half the amount recommended by Ms. McLean, or one year of services.

[310] Ms. McLean has also recommended that Ms. Andrews be provided with the services of a rehabilitation assistant to help her with de-cluttering and reorganizing her apartment for 13 sessions over a period of three months at a cost of \$812.50. I am satisfied that the plaintiff would benefit from that assistance. Again, recognizing the possibility that Ms. Andrews might have required help in organizing her home in any event, I would allow half of the amount claimed for this item.

[311] I have found that by the time of trial the plaintiff had returned to her original position with respect to her physical complaints and symptoms. Accordingly, I make no award for costs of future care for physiotherapy or the replacement of the

plaintiff's ergonomic chair and footrest. However, one of the recommendations made by Dr. Travlos to assist the plaintiff in achieving "functional daily societal participation" was that she increase her level of physical activity by exercising at a community centre or gym, where she would be more likely to complete an exercise regime than if left to her own devices at home. Dr. Travlos recommended that the plaintiff start with two sessions a week and gradually increase to four to five sessions per week, including Bikram yoga and Pilates fitness classes.

[312] Ms. McLean has recommended that the plaintiff continue have the assistance of a kinesiologist over the next two years to assist her in following through with an exercise program. Ms. McLean has proposed that the kinesiologist initially work with the plaintiff three times a week for three months, and then reduce her involvement in stages to one session per month in the second year. Annual membership for a community recreation centre would cost \$357. Ms. McLean has recommended adding one Pilates or yoga class per week starting in the fourth month of the proposed two-year program at a cost of \$18 per session for yoga or \$14 per session for Pilates.

[313] Mr. Benning has estimated the present value of the two years of kinesiology recommended by Ms. McLean at \$6,183, and the cost of two years' membership at a community centre plus the recommended fitness classes at \$2,182, for a total of \$8,365.

[314] The plaintiff's inability to organize and motivate herself to increase her physical activity is only attributable in part to the motor vehicle accident. In addition, based on the plaintiff's past irregular attendance at exercise classes, there is a significant risk that she may not take advantage of the entire recommended exercise regime. Taking those factors into account, I find that \$2,500 is a reasonable allowance for future costs of kinesiology, a fitness centre membership and classes.

[315] Bearing in mind that the award for costs of future care must be moderate and fair to both parties, and that I have found that 50% of the plaintiff's ongoing

psychological symptoms are attributable to causes other than the motor vehicle accident, I assess damages for cost of future care in the total amount of \$16,000.

[316] I make no deduction from the award of damages for cost of future care for the plaintiff's past failure to follow certain recommendations of her care providers. By the time of trial, the plaintiff was following the recommendations of her treating professionals, and was reporting progress.

Special Damages

[317] An injured person is entitled to recover reasonable out-of-pocket expenses incurred as a result of an accident, in order to restore the claimant to the position he or she would have been in had the accident not occurred: *X. v. Y*, 2011 BCSC 944 at para. 281; *Milina v. Bartch* at para. 170.

[318] The plaintiff claims special damages of \$76,924.07 for costs of treatment she has incurred since the motor vehicle accident.

[319] The defendants submit that in light of the plaintiff's original position, she would have incurred many of the expenses she has claimed in any event. The defendants also contend that because the plaintiff testified she had not paid for any of the claimed expenses, she has failed to prove her entitlement to special damages. Alternatively, the defendants argue that if special damages are awarded, they should be limited to a specific time period for which Ms. Andrews required the treatments claimed as a result of her injuries rather than other causes.

[320] The plaintiff's solicitors paid the invoices for the expenses claimed as special damages. I am satisfied that those expenses were paid on the plaintiff's behalf, and she is ultimately responsible for them. Accordingly, the plaintiff is entitled to an award of special damages for the out-of-pocket expenses which were reasonably incurred as a result of the accident.

[321] Based on my finding that 50% of the plaintiff's ongoing psychological symptoms are attributable to the motor vehicle accident, I would allow 50% of the

amounts claimed for the psychological counselling provided by Chuck Jung Associates in the amount of \$4,817.50 and half of the psychological counselling provided by Dr. Joanne MacKinnon in the amount of \$2,293.75, for a total of \$7,111.25.

[322] I have found that the plaintiff required home support assistance through February 2010. Therefore I award the amount claimed for home support services from November 2, 2009 through February 28, 2010 in the sum of \$1,338.75.

[323] The plaintiff claims a total of \$20,346 for physiotherapy, including \$6,440 for massage therapy and \$6,150 for active rehabilitation. The plaintiff claims for 114 physiotherapy sessions, 67 massage therapy sessions and 71 active rehabilitation sessions. I have found that Ms. Andrews had substantially recovered from her physical injuries caused by the motor vehicle accident by late January 2011. The total expense incurred for physiotherapy, massage therapy and active rehabilitation services through January 2011 was \$14,661.

[324] The plaintiff suffered minor to moderate physical injuries in the motor vehicle accident. Much of her ongoing pain was and is attributable to her psychological condition, and in particular, her pain disorder, which has impeded her recovery. Ms. Andrews also missed appointments for physiotherapy and massage therapy, which probably set back her recovery time. Further, the plaintiff has a history of flare-ups of her pre-existing neck and back pain. Bearing in mind the necessity for the court to exercise caution in arriving at fair and reasonable compensation where the plaintiff's complaints of pain have persisted beyond any normal recovery period for the soft tissue injuries she sustained in the accident, I award \$7,500 as special damages for physiotherapy, including massage therapy and active rehabilitation.

[325] The plaintiff also claims \$2,240 for the MRI brain and chest scan performed October 20, 2009. I am satisfied that expense was reasonably incurred in the investigation of the plaintiff's complaints of acute chest pain and cognitive impairment. The MRI scan enabled Ms. Andrews' medical care providers to

diagnose her fractured sternum and indicated that the plaintiff had not suffered a traumatic brain injury as a result of the accident.

[326] The plaintiff claims \$36,798.19 for occupational therapy services provided by Turning Point Rehabilitation between October 31, 2009 and the date of trial. In addition to providing occupational therapy to Ms. Andrews, Turning Point, acting under the direction of the plaintiff's solicitors, managed or coordinated all of the plaintiff's multiple therapies. The Turning Point invoices, which I have reviewed, contain multiple entries for e-mail, telephone calls, and meetings with the plaintiff's lawyers, paralegals and other health care providers, time devoted to preparation for team meetings and other administrative matters. The plaintiff called no witness from Turning Point to establish the reasonableness of the amount claimed, or explain the efficacy of or benefit to Ms. Andrews of the "indirect" or administrative services provided by Turning Point. The plaintiff has not shown that all of the out-of-pocket expenses claimed for occupational therapy services were reasonably incurred in order to restore Ms. Andrews to the position she would have been in but for the accident. On my review of the Turning Point invoices, about 60% of the amount claimed represents time and disbursements incurred for one-on-one occupational therapy sessions with the plaintiff and related travel, including the kinesiology provided by Turning Point. Sixty per cent of the amount claimed is roughly \$ 22,080. Bearing in mind the real possibility that the plaintiff might have decompensated before the trial date even if the accident had not occurred, and would then have required occupational therapy in any event I find that the reasonable allowance for this item is 50% of \$22,080, which I have rounded to \$11,000.

[327] Ms. Andrews has claimed \$2,352.25 for cab fare between February 28, 2011 and November 30, 2012 to attend her various treatments. In addition, the plaintiff has claimed mileage, at 50 cents per kilometer in the amount of \$1,417.88 for visits to her physiotherapists, yoga classes, a fitness centre, her family doctors and treating psychologists. Some of the mileage and taxi fare claimed relates to travel for counselling sessions and other attendances for treatment that were not

attributable to the accident. I would allow the plaintiff \$1,000 for her taxi fares and \$700 for mileage.

[328] I allow the claim for yoga in the full amount of \$142.80, but do not allow the amounts claimed for gym membership. The latter expenses were incurred at a time when the plaintiff was not following a regular exercise regime. I am not persuaded that the plaintiff derived any benefit from this expense.

[329] Finally, I would allow \$350 of the \$672 claimed for the clean-up or "de-cluttering" of the plaintiff's home, recognizing that she would likely have incurred some of this expense in any event.

CONCLUSION

[330] To conclude, damages are awarded as follows:

(a) Non-pecuniary damages	\$ 85,000.00
(b) Past loss of earning capacity	\$ 84,000.00
(c) Future loss of earning capacity	\$150,000.00
(d) Cost of future care	\$ 16,000.00
(e) Special damages	\$ 31,386.60
TOTAL:	\$366,386.60

[331] This award is subject to a reduction for failure to mitigate of 10% on non-pecuniary damages. Accordingly, after that deduction is made, the total award of damages is \$357,886.60.

DEDUCTIONS AND COSTS

[332] Counsel have requested that any matters relating to deductions for advances, amounts deductible pursuant to s. 83 of the *Insurance (Vehicle) Act*, any tax gross-

up, and costs all be addressed following the delivery of these Reasons. Accordingly, counsel are at liberty to set a hearing date, through the Registry, to address those matters.

“PEARLMAN J.”