IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *J.D. v. Chandra,*
2014 BCSC 466

Date: 20140319
Docket: M094259
Registry: Vancouver

Between:

J.D.

Plaintiff

And

Daniel Subhas Chandra

Defendant

- and -

Docket: M110495
Registry: Vancouver

Between:

J.D.

Plaintiff

And

Lauren Collier

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Plaintiff:	Paul G. Kent-Snowsell Perminder Tung
Counsel for the Defendants:	Lyle G. Harris, Q.C.
Place and Dates of Trial:	Vancouver, B.C. February 3-7, 11-14, & 17-18, 2014
Place and Date of Judgment:	Vancouver, B.C. March 19, 2014

Introduction

[1] The plaintiff was injured in two car accidents, one on February 18, 2006, when she was 17 years old and in her last year of high school, and the other on March 26, 2010, when she was in her fourth year of university. She suffered injuries that left her with pain in her back, neck and right shoulder. She eventually had surgery on her shoulder.

[2] The two actions were tried together, with evidence in one the evidence in the other.

[3] The issues at this trial had to do with the quantum of damages to which the plaintiff is entitled as a result of her injuries.

[4] The defendants do not contest that they are liable for the accidents and for some damages, nor do they require the Court to apportion damages as between the two accidents.

[5] The real dispute between the parties has to do with the significance of the injuries, and especially their impact on the plaintiff's future earning capacity. The plaintiff says that but for her injuries, she would have qualified for medical school; and that her injuries led to a one or two year delay in her completing her current course of study, which is law school and could impede her competitiveness once she is able to seek employment as a lawyer.

[6] The defendants say that the plaintiff would not have qualified for medical school even if the accidents had not occurred; and further, that the accidents did not cause any delay in her schooling nor will her injuries impede her earning capacity in the future.

[7] The plaintiff applied for an order anonymizing her name in these reasons, to which the defendants consented. I granted the order. Because the plaintiff is still quite young, about to start a career in law, and lawyers regularly read reasons for judgment (unlike other employers), and a great deal of the case dealt with how her

injuries might affect her future earning capacity, there is a real possibility that the plaintiff's future employability could be adversely affected by publication of her name in these reasons beyond that which will be compensated by the result. I have therefore referred to her as J.D. (representing her sought after degree, not her initials).

Issues

[8] I will make findings of fact in the following order:

(a) the plaintiff's abilities pre-accidents;

(b) the plaintiff's abilities post-accidents;

(c) the plaintiff's future prognosis;

(d) loss of past income;

(e) loss of future earning capacity;

(f) cost of future care;

(g) loss of housekeeping capacity;

(h) in trust claim; and,

(i) non-pecuniary damages.

[9] The plaintiff and defendants have reached agreement on special damages and so there is no need to determine the plaintiff's out-of-pocket expenses due to the accidents.

(a) The Plaintiff's Abilities Pre-Accidents

[10] The plaintiff was a very active and athletic girl before the accidents. She played many team sports in school, including qualifying for a high ranking volleyball team in her latter high school years and being an aggressive basketball player. She was also involved in track and field sports and softball. After classes and during evenings and weekends, she followed an intense athletic schedule of school team

practices and tournaments and her own recreational sports such as snowboarding or using the trampoline, tennis and golf.

[11] In Grade 10, the plaintiff applied for and was accepted into an elite athletic high school program known as the TREK Program. This required her to be and stay physically fit. In the TREK Program she had many outdoor adventures, including hiking trips, cross country skiing, camping, canoeing and portaging. Many of these excursions lasted over five days and required physical endurance. Her participation in the TREK Program in Grade 10 meant that she was required to do all the academics for that grade in one-half of the year, with the other half devoted to outdoor activities.

[12] Before the accidents, the plaintiff had no difficulties participating fully in these many rigorous physical activities. There is no doubt that she had a competitive instinct, and liked to and did excel in all manner of sports.

[13] The plaintiff also was active in other school activities. She played in band in Grade 9 and was on student council in Grade 12.

[14] The plaintiff also engaged in some volunteer activities. From the years 2006 to 2010, she volunteered as one of the organizers of a Terry Fox run. She was also a telephone volunteer during the annual Variety Club Telethon over the years, and participated in the Easter Seals 24 hour relay.

[15] In early 2010, the plaintiff was engaged in volunteer activity: assisting disabled seniors and new mothers; and assisting in a survey of the homeless population in Vancouver.

Plaintiff's Academic Abilities Pre-Accident

[16] The plaintiff was generally a B average student (or mid-70's to mid-80's) in her elementary and high school.

[17] In standardized provincial testing in Grade 7, the plaintiff scored an “M” for meets expectations in “reading comprehension and writing”; and an “E” for exceeds expectations in “numeracy”.

[18] In Grade 8, she received a C+ in each of Band and “Business Ed” and an A in “Technology 8”, and a B in eight of her subjects including English, French, Math and Science.

[19] In Grade 9, the plaintiff received a C+ in Band, French and Math; an A in Career Plan, and a B in her remaining 5 subjects, including English, Photography, Physical Education, Science and Socials.

[20] In Grade 10, when the Plaintiff was in the TREK Program, her marks ranged from a low of 67 to a high of 86, with the low being in Science (although another Science mark was 85).

[21] The plaintiff’s Grade 11 year was a completed school year most proximate to her first accident. In that year her marks were from a low of 65 and 67 in Physics and Math respectively, to a 73 in each of Chemistry and French, and a 76 in English and Social Studies.

(b) The Plaintiff’s Abilities Post-Accidents

[22] The first accident happened on Saturday, February 18, 2006. The plaintiff was driving through an intersection when another driver did not stop at the intersection and drove his car into the driver’s side of her vehicle. The plaintiff testified that she saw him at the last minute, slammed on her brakes and put her hand on her horn and tried to swerve.

[23] The plaintiff testified that after the impact her right shoulder hurt, which was the arm she had used to press the car horn. Also, the leg she had braked with, her right leg, also hurt. She felt that her left hip was bruised from the seatbelt. She felt neck and back pain. She said her whole body was hurting.

[24] On the Monday she went to see her family physician, Dr. Perlman. He told her to keep active and to come back if things did not get better.

[25] The plaintiff said eventually her leg and hip stopped hurting, but her neck and back continued to hurt. She returned to Dr. Perlman, who continued to recommend that she stay active. He also recommended massage therapy.

[26] The plaintiff followed the advice to stay active generally, but engaged in a lower level of activity then before the accident. For example, the plaintiff found that she could not continue playing on the school volleyball team, that her pain impeded her too much.

[27] The plaintiff did not contend that her injuries adversely affected her Grade 12 academic results.

[28] In Grade 12 she obtained grades in the low 80s in Biology, Geography and Math; she received a 62% in Chemistry and a 79% in English. Her Grade 12 GPA was 81.57%, as compared to her Grade 11 GPA of 78%.

[29] According to unchallenged evidence called by the defendants, in order to be considered for a Grade 12 Graduation Program Examinations Scholarship, a student needs to obtain a minimum threshold of 86% on three of their best provincial exam scores. There is no evidence that the plaintiff obtained a single grade in the 86% range on her provincial exams. She did not achieve this level in the classroom, except for one class: Geography 12.

[30] The plaintiff was not so injured that she did not carry on with other general plans. For example, she went on a trip to Europe with her sister and a friend in July 2006. She suffered some pain and discomfort during the trip, however, and did not have the same endurance as she would have enjoyed prior to the injuries.

[31] The long plane trip was extremely uncomfortable for her, and she discovered that she was unable to carry a backpack on the days walking about sightseeing.

Also, she tired much more than her sister and friend, and had to call it quits in the evening to lie down and rest her back while her sister and friend stayed up.

[32] The plaintiff's pain was something new, since the accident, as in the TREK Program she had carried heavy backpacks on camping excursions in the summer and winter, without any problem. She also had no problem keeping up with her peers prior to the accident.

[33] In the fall of 2006, the plaintiff began her first year at university. She and her sister lived in a house that had been their grandfather's, just down the street from their mother's house.

[34] The plaintiff was still seeing only her family physician and no specialist since the accident. Her family physician continued to recommend that she stay active and she followed this advice. The plaintiff joined a women's group that was like a sorority, and engaged in various occasional recreational activities with them and in the university in general, including recreational volleyball, softball, and the occasional special event such as an event called "Storm the Wall".

[35] The plaintiff explained that the level of physical ability required for the events she participated in at university was far lower than what she had done in high school and was much less frequent. She was hoping that she would build up muscle to make the back pain lessen but this was not happening, and instead her back continued to hurt. She said she would pay for her activities the next day, sometimes so much that she would be almost out of commission.

[36] Also, the plaintiff said that she found in her first year at university that science courses involving lab classes were very difficult for her as the labs could last four hours and require standing or if she wanted to sit, there would only be a backless stool. She said that she would be in so much pain afterwards that she would be crying.

[37] The plaintiff's first year at university was less than exceptional, academically. She failed Chemistry 121, earning only a 45% in the course. As for her other marks

in first year of university: she earned a 63% (C) in Physics 100 and a 59% (C-) in Physics 101; she obtained a 70% (B-) in Biology 140 and a 61% (C) in Biology 121; and she received a mark of 50% (D) in Math 184. These marks were either below the class average, or very close to the class average.

[38] The plaintiff earned above the class average in her courses in the humanities, namely Geography, and Psychology, however these marks were only in the range of C to B. Overall, her sessional average in first year university was 61.1%.

[39] The plaintiff did not take summer school after her first year.

[40] The plaintiff returned to university in the fall of 2007 for her second year.

[41] She decided at the same time to seek out medical advice beyond that of her family physician, and so attended a physician working for the UBC Student Health Service, Dr. Joyce Tsang-Cheng, whose report was tendered as evidence at trial. Dr. Tsang-Cheng recorded that the plaintiff saw her in September 2007 for mid upper back pain, reportedly due to the first accident and which increased due to sitting for long periods of time in class. She was recommended to try physiotherapy, massage therapy and a muscle relaxant treatment plan.

[42] The plaintiff then began a series of physiotherapy treatments at the Allan McGavin Sports Medicine Centre, starting in late September 2007, and continuing to April 2008. The physiotherapist gave her exercises to do at home, which she followed.

[43] This was now her second year at university. She had to re-take her failed chemistry class, and this time improved her mark in Chemistry 121 to 62% (C), just a percentage point below the class average. However, in Chemistry 123, she failed the class with a 41%, while the class average was 65%. These appear to be the only science courses that she took in second year regular school term, one course in the fall session and one in the spring session.

[44] The other courses that the plaintiff took in her second year were in the humanities and her grades were in the range of a high of 79 (B+) in English 110, and a low of 67 (C+) in Psychology 102. Overall, her sessional average in second year was 65.5%.

[45] In the spring of 2008 the plaintiff decided to try acupuncture to address her back pain, based on a recommendation of one of her physicians. She attended a few acupuncture sessions in May and June of 2008, but found that any relief was only temporary. After one of her sessions she experienced a bad back spasm and had to go to the university hospital for treatment and medication.

[46] The plaintiff took two courses in the 2008 summer session after her second year of university, a repeat of her failed Chemistry 123, in which she this time received a grade of 71% (B-), above the class average of 64%; and French 111, in which she received a 68% (or B-), below the class average of 74%. Her sessional average for the summer session was 69.7%.

[47] The plaintiff did not work at any summer employment in either the first or second years of her university. While in her evidence she suggested she would have liked to but did not pursue employment because of her back pain, no claim was pursued for loss of income in this regard and so I will not dwell on it.

[48] The plaintiff started her third year at university in September 2008. She said that while she had earlier planned on majoring in biology, she now felt it was not feasible because of her back pain, and so she ended up majoring in geography.

[49] The plaintiff continued to be active in university life and events. At some point she became president of the sorority-like group she had joined in first year. She took part in an event at the university, involving running through an inflatable obstacle course. She fell on the course, sending her to the UBC Student Health Services physician, Dr. Tsang-Cheng, on December 16, 2008, who noted that the fall caused her to have medial right scapular pain. However, this additional pain

eventually went away (and she will not be compensated in this case for her pain or injuries from that fall).

[50] In the spring session of her third year, around March 2009, the plaintiff began treatment with a chiropractor, Dr. Shimizu, who testified at trial. She continued with regular visits, often weekly or two or three times per month, through to approximately September 2009, and then saw him once again in December 2009 and twice in January 2010.

[51] Dr. Shimizu's evidence confirmed that he observed the plaintiff to have tenderness in the mid and upper back and a lack of motion, as well as pain off to her right side around her ribs.

[52] In the summer session of university following her third year, in the summer of 2009, the plaintiff took a French 112 course, in which she obtained a 58%; and a Biochemistry 300 Course, which she failed, achieving only a 38% (in contrast to the class average of 71% in both courses). The biochemistry course was not a laboratory course but she testified that it was a daily four hour course over a six week period, and that it did not allow her to rest her back and so she felt a lot of pain.

[53] In mid-August 2009, the plaintiff went to the UBC Student Health Services where she had an appointment with Dr. Behra. She reported to her doctor that she was having issues with her concentration and that her academic performance was lower than she expected. She reported feeling anxious and in a low mood, and reported worrying that she might have attention deficit disorder (ADD). She sought and was prescribed Ritalin. She was referred to UBC counselling services.

[54] On the counselling services intake form, in answer to a question about "when were things better", she wrote "couple years ago". The plaintiff also checked off "no" to the question on the medical intake form about whether she had any physical health concerns. This latter question followed questions about whether she had

thoughts of harming herself or others, and the plaintiff explained at trial that she thought the question related to suicidal thoughts.

[55] The counselling records indicate that the plaintiff expressed some emotional distress at the time, some of it related to family matters. In Court, the plaintiff denied that these issues were major issues at the time. She testified to the effect that she was at a low point, having suffered back pain for a long time, having experienced trouble sleeping, and was upset at having done badly in her courses, that she felt her back treatments were not helping, and so she was willing to try anything, including counselling. She testified that the counselling did not help and she soon dropped it; likewise the Ritalin she was prescribed.

[56] The evidence gave me the impression that the plaintiff's attendance at UBC counselling was designed by her to obtain a prescription for Ritalin. The evidence suggests she may have read on the internet that this medication could help people concentrate. This suggests to me that the plaintiff was searching out to find ways to improve her grades. The failure to pass the summer session biochemistry course was very devastating for the plaintiff.

[57] I do not infer from the fact that the plaintiff sought out help in her concentration abilities in the late summer of 2009 as meaning that she did not continue to have continuing back pain affecting her. The defendants make much of the fact that the medical records in relation to these counselling visits did not record the plaintiff reporting back pain from her accident. However, the plaintiff had been to UBC Student Health Services for treatment for back pain many times over the years and I do not consider it material whether or not she referred to back pain on these few visits in the late summer of 2009.

[58] It is clear from the ongoing chiropractic treatment that the plaintiff was seeking, and from the plaintiff's own evidence, that she was still suffering from back pain at the time she was referred to counselling in the late summer of 2009, regardless of whether or not she raised it in relation to her queries about Ritalin or in

counselling or whether or not the attending physician or counsellor wrote it down in the records.

[59] I also do not conclude that because the plaintiff decided to speak to a counsellor that she in fact had any independent ongoing psychological issues affecting her grades.

[60] All of the evidence satisfies me that the plaintiff's problems with chronic pain continued throughout this time, and indeed, through the rest of her university career.

[61] The plaintiff testified that it was recommended to her by the UBC Student Health Services that she reduce her course load in the fall of 2009, and so she decided to follow this advice and she reduced the number of her classes in her fourth year. This meant that instead of graduating in four years, in the spring of 2010, she would not graduate until May 2011.

[62] The first term of the plaintiff's fourth year of university, in 2009, she took two courses in the humanities and received B grades, just slightly above the course average. She also repeated the Biochemistry 300 course over her first and second terms, ultimately receiving a grade of 56% or C- (compared to the class average of 69%).

[63] On March 26, 2010, the second accident occurred. This was in the second term of the plaintiff's fourth year at UBC.

[64] The accident occurred when the plaintiff was in a line of stopped traffic. The defendant Ms. Collier was approaching the area of the accident and did not expect the traffic to be stopped and drove her car into the back passenger side of the plaintiff's vehicle.

[65] The plaintiff saw Ms. Collier's vehicle approaching and braced herself on the steering wheel before the impact.

[66] The plaintiff went home after the accident, but had such pain in her right shoulder that she went to emergency treatment. She was given a pain killer and told to come back in a week.

[67] The plaintiff missed a week of school. She felt her neck was very stiff and obtained a soft neck collar to help her. She returned to her family physician, who advised her to stretch and go to physiotherapy. She was also referred to a physiatrist, Dr. O'Connor, but felt that the exercises he gave her aggravated her right shoulder pain.

[68] The plaintiff testified that before the second accident, her back pain was daily but had plateaued at about a 4 on a scale of 1 to 10; after the second accident her back pain increased to a 6 or 7 and her neck was very stiff. She felt that this affected her during her impending fourth year exams, as she found that sitting and writing exams was difficult.

[69] The plaintiff attended at physiotherapy 17 times over the course of May, June, July and August 2010.

[70] After the first few weeks her back pain went back to the level it was pre-the second accident, about a 4 out of 10.

[71] On July 29, 2010, the plaintiff wrote the Medical College Admission Test, or MCAT. She travelled to Bellingham the day before and took the exam there. It was a five hour exam, written on a computer. The plaintiff said that she found that computer use aggravated her right shoulder and so she was taking Advil. The plaintiff found that she had to take the optional breaks every two hours but found that her pain worsened over the course of the exam. She said that by the time she got to the writing section, near the end of the exam, her pain had increased to an 8 out of 10. She did not pass the writing section, although she said prior to that she had always been good at writing.

[72] The plaintiff returned to her fifth year at UBC in the fall of 2010. She said that she was in a low mood, having struggled with pain in her previous years and now

feeling worse after the second accident. It appears that by this time she accepted that she was not going to qualify for medical school and so she did not apply.

[73] In October and November 2010, the plaintiff attended the Karp Rehabilitation program, sponsored by the Insurance Corporation of British Columbia. She also on occasion went for physiotherapy and to her chiropractor.

[74] In her final year at UBC, the plaintiff took courses in the humanities and received grades ranging from a low of a C+ in two courses, to a high of A- in one course; and received Bs or B+ in her remaining five courses over that year, graduating with a B.A. in Geography in May 2011.

[75] It appears that the plaintiff did not have immediate plans to continue her education when she graduated. She decided to pursue employment and took a job at a company partially owned by her father, namely Real Car Cash Inc. The business of the company is to provide personal loans based on the security of a motor vehicle. The plaintiff claims that she was unable to work as many hours as she otherwise would have worked in 2011 and 2012, and so advances a claim for past wage loss. I will return to this.

[76] The plaintiff felt that something was wrong with her right shoulder and felt that it was not getting better. Eventually a sports medicine physician at UBC Student Health Service, Dr. D. Lloyd-Smith referred her for a diagnostic scan, an MR arthrogram, which was conducted on June 14, 2011.

[77] The report from the radiologist who conducted the MR arthogram reported some fraying of the superior labrum extending posteriorly, consistent with a SLAP 1 tear plus mild subacromial bursitis.

[78] The plaintiff was seen by Dr. Regan, an orthopedic surgeon in early September 2011. He recommended continued conservative treatment, namely daily exercises, including a possible subacromial injection if the pain persisted.

[79] The plaintiff was unable to get relief for her shoulder from exercises or physiotherapy. Dr. Lloyd-Smith gave her an injection of a local anesthetic in her shoulder on October 21, 2011. The plaintiff did not feel that it helped in any significant way.

[80] Based on the plaintiff's lack of improvement in her shoulder symptoms, Dr. Lloyd-Smith referred her to Dr. Michael Gilbart, an orthopedic surgeon.

[81] In the meantime, the plaintiff decided that she would pursue education in law. She wrote the Law School Admissions Test, or LSAT, in December 2011. Not entirely satisfied with her results, she wrote the LSAT again in February 2012. The test was a four hour handwritten test, and the plaintiff testified that it was a physical struggle for her, because her back and shoulder were hurting. Nevertheless, she achieved a score in the 77th percentile.

[82] The plaintiff applied to and was accepted into a Canadian law school, with the first term to commence in September 2012.

[83] Eventually the plaintiff had surgery on her shoulder performed by Dr. Gilbart on July 17, 2012. There was some dispute on the medical evidence at trial as to whether or not the surgery was medically necessary, with the defendants' expert, Dr. Leith, disputing that it was. Nevertheless, the defendants concede that the plaintiff did receive medical recommendations for the surgery and that it was causally related to the accidents.

[84] Prior to her surgery, the plaintiff went on a three week trip to China with her sister and friends. She testified that this was to take advantage of what the group felt would be a once in a lifetime opportunity to take the time for such a trip. She found the long flight painful, and had to modify her activity during the trip to accommodate her pain. She had to take frequent breaks to sit down while the rest of the group was able to walk around and sightsee more extensively. She also took frequent pain killers.

[85] After the return from her trip to China, the plaintiff had the surgery on her right shoulder, as mentioned on July 17, 2012. After the surgery she was discharged but had to keep her shoulder hooked up to an ice machine. She was in considerable pain, weak, and on strong pain killers. Her mother and sister assisted her during her immediate recovery period.

[86] The plaintiff eventually reported to Dr. Gilbart experiencing a 50% improvement in her shoulder after the surgery.

[87] The plaintiff went ahead with her first year of law school and obtained marks in the B range.

[88] In the last two weeks of August 2013 the plaintiff took a job in the accounting office of the Pacific National Exhibition ("PNE"). Her hours of work were 8:00 a.m. to 2:00 p.m., or six hours a day, five days a week. For the most part she was required to audit envelopes of money and receipts to ensure they added up. She found that the sitting and standing for her hours of work did make her back stiff and eventually, with no rest, she suffered a very bad back spasm. She ended up being taken to hospital after one of her shifts.

[89] One aspect of the plaintiff's work at the PNE involved lifting bags of coins, weighting approximately 25 pounds. She had difficulty which her supervisor, Bonnie Anderson noticed and so Ms. Anderson assigned someone else to that task. Ms. Anderson testified that she observed the plaintiff looking in pain at times, by way of the look on her face, or because she was rubbing her back or neck or stretching. If there was an opportunity to go home early, the plaintiff would take it. I find that this behaviour is at odds with the plaintiff's pre-accident competitive energy and I accept that the plaintiff suffered from pain when working at this job.

[90] The plaintiff is currently completing her second year of law school, with an expected graduation date in the spring of 2015. Her marks are in the B range. She says that she does better with take-home assignments than in class exams. She says that she does not perform as well in class because of her pain.

[91] The plaintiff says that most of her exams are three hours long and by the end her pain is severe.

[92] The plaintiff feels that her pain in her back is generally a little worse than the pain in her right shoulder now. She finds that using a computer aggravates her back. In this regard, she confessed to being a little proud and not wanting to use aids such as an external keyboard in front of other students.

[93] The plaintiff's goal upon graduation from law school is to article with and eventually be hired by a full service corporate based law firm in downtown Vancouver. She is worried that the hours of work required will be very difficult for her to manage with her pain. She is afraid that lawyer positions are very competitive and employers would prefer to hire someone healthy rather than accommodate someone with limitations.

[94] The plaintiff also says that she finds it very difficult to ask for accommodation for her pain. Given her demeanour in giving her evidence, I attribute this to her shyness and a sense of shame or embarrassment that she is not as physically capable as she would like to be.

(c) The Plaintiff's Future Prognosis

[95] The weight of the medical evidence, which places some emphasis on the length of time over which the plaintiff has suffered pain, leads me to the conclusion that the plaintiff suffered soft tissue injuries in the accidents that left her with chronic pain in her back, right shoulder, and to some extent her neck. The evidence leads to the conclusion that it is unlikely that she will improve significantly and more likely that she will continue to suffer from chronic pain for the rest of her life.

[96] As mentioned, the plaintiff testified that her back pain will generally plateau to a 4 out of 10; and that her shoulder pain has subsided since recovering from the surgery and is usually somewhat less than the back pain.

[97] The expert evidence must naturally defer to the plaintiff's own history as to how much sitting or standing she can tolerate. The degree of her pain and her level of day-to-day tolerance of it cannot be easily independently measured.

[98] The plaintiff was assessed by an occupational therapist and certified work capacity evaluator, Ms. Latifa Kassam, on March 7, 2012. This was before the plaintiff's shoulder surgery. Ms. Kassam found her capable of work activity in the sedentary and light strength categories. She found the plaintiff to have a reasonable sitting and standing tolerance of 1.0 to 1.5 hours at a time, so long as she could shift her weight or move around and take brief stretching breaks. It was her opinion that the plaintiff is best suited to jobs that provide her the ability to alternate between sitting, standing and/or walking as needed. Ms. Kassam measured the plaintiff's ability to carry with her right arm for a distance of 50 feet as being 20 pounds.

[99] The plaintiff testified that after being put through the functional tests by Ms. Kassam, she was in considerable pain the next day.

[100] The plaintiff testifies that she finds it difficult to remain in one position for more than half an hour at a time. She finds it difficult to work on the computer for extended lengths of time. The greater the amount of time she must sit or stand continuously, her discomfort continues to rise until eventually she cannot concentrate. She also finds that if she carries anything over 10 pounds that it can have negative consequences for her pain.

[101] I pause to address credibility.

[102] I found the plaintiff to be a credible witness. The plaintiff readily admitted some areas of pain went away after the first accident -- her leg and her hip, for example. She also did not seek to blame everything on her injuries. For example, while the accident happened in the second-half of her grade 12 high school year she did not contend that this adversely affected her marks that year, for example.

[103] The plaintiff was highly competitive and loved team sports. With her history and personality, it is easy to conclude that she would have continued being as active

as possible if she was able. Her history since the accident speaks of a person seeking out many different kinds of treatment, persistently, in an effort to find a way to overcome the problems she was experiencing. She did not simply give up and do nothing to try to get better.

[104] Other witnesses who knew the plaintiff before and after the accidents supported her evidence as to how the injuries caused by the accidents affected her.

[105] Ms. Kassam put the plaintiff through many functional tests. She found that the plaintiff gave high levels of physical effort in the tests. This is consistent with the plaintiff's competitive nature, her desire to attempt to perform exercises, and is inconsistent with the notion that she was deliberately exaggerating or malingering. None of the medical evidence suggested that the plaintiff's symptoms were potentially inconsistent with her injuries.

[106] The defendants suggest that at times the plaintiff's evidence was directly contradicted by other evidence, undermining her overall credibility. Numerous examples were given by the defendants but I was unconvinced that any of them amount to a material inconsistency or support an inference that the plaintiff was attempting to exaggerate or mislead.

[107] For example, the defendants argued that it was material that the plaintiff described a needle she was given in her shoulder as a "long needle" that "hurt very bad", whereas the physician who gave the injection testified and said the needle was a short one and that typically patients report that they are surprised how little the needle hurts. With respect, I do not see this as a material as patients' individual perspectives can vary greatly. The plaintiff had nothing to gain by exaggerating the size of the needle; it was hardly going to increase her damages award if it was a big or small needle.

[108] As another example, the defendants pointed to various photographs of the plaintiff which she had posted on her Facebook page, showing her engaged in many activities since the accidents. The defendants suggest that these photographs are

inconsistent with the plaintiff's evidence in court, as thought she might be over-playing the degree to which her back pain and later her shoulder pain affected her daily life. I do not give any weight to these criticisms. A snapshot does not show anything but a moment in time, and does not disprove that the plaintiff also had many times when she declined to participate in activities or felt in significant pain after trying to engage in activities. Furthermore, the plaintiff's physicians encouraged her to stay as active as she could.

[109] With respect to any impression that the plaintiff's evidence at times focussed more on the impact of her injuries than on her remaining abilities, I attribute to the nature of her recounting the past several years of her history under guidance of her lawyer's direct examination in the courtroom setting. Her lawyer's role is to educate the court on how her injuries affected her. Thus, her emphasis in her direct evidence on her injuries, as opposed to focussing on her remaining abilities, is a natural outcome of this process.

[110] The defendants also argue that at times the plaintiff's evidence as to conversations she had with others was directly contradicted by the other person's evidence, whether it be a comment she purportedly made to Dr. Hirsch about disliking math (which she denies), or a comment she said was made by the defendant Ms. Collier immediately after the second motor vehicle, denied by Ms. Collier. The situations of these conversations allow for mistaken memories on the part of all of the involved witnesses. These conversations are not material and the inconsistencies do not undermine the plaintiff's credibility as to how she continues to suffer pain from her injuries.

[111] The defendant fairly conceded that the plaintiff does have some ongoing "discomfort" caused by her injuries.

[112] The plaintiff does not argue that she is completely incapable of movement or of some level of activity in her daily life.

[113] The issue for this Court to decide has to do with how significant is the pain suffered by the plaintiff, and how might it affect her in the future.

[114] I accept the plaintiff's evidence that she continues to have pain in her back and right shoulder and sometimes her neck if she sits or stands for any extended length of time, and that she must continually shift and move around and stretch to try to limit the negative effects of sitting or standing. I find that this is likely to continue into the future. I find that, but for the accidents, she would not be suffering from this chronic pain.

(d) Loss of Past Income

[115] Following her graduation with a B.A. in May 2011, the plaintiff worked for Real Car Cash Inc. until approximately June of 2012, when she took a trip to China and following that had surgery.

[116] The plaintiff said that when she started working at Real Car Cash, she wanted to work only seven hours a day, five days a week, as she felt that working eight hours would be too much. She said she took some days off to go to medical appointments.

[117] The plaintiff said that the job was mostly a desk job requiring lengthy sitting at the computer. She found she had to take frequent breaks because of shoulder pain, but the job did provide her with some flexibility to move around and stretch.

[118] She testified that in November 2011, she cut her work hours back to 3 days per week, continuing until May 2011.

[119] It was her view that if she did not have the shoulder injury, she would have been able to work full-time, 40 hours per week.

[120] The plaintiff called the de facto manager of Real Car Cash to testify at trial, Helen Yang. Ms. Yang testified that Real Car Cash was willing to provide the plaintiff with more hours of work, and wanted her to work full-time.

[121] Ms. Yang produced a document to identify the hours the plaintiff actually worked, in comparison to the hours the plaintiff could have worked if working full-time from April 2011 to May 2012. It turns out that there were some errors in the document, and so a new version was created mid-trial.

[122] Based on this evidence the plaintiff argues that she missed 780 hours of work in that time period.

[123] In addition, the plaintiff claims for lost wages in July and August 2012, when the plaintiff was unable to work when recovering from the shoulder surgery. The plaintiff suggests that she would have been able to work 280 hours in these two months, for a total of 1,070 hours missed of work.

[124] The plaintiff argues that she would have earned $15/hour plus 4% holiday pay, for a total past wage loss claim of $16,692.

[125] For the most part the plaintiff was only earning $14/hour, but it was her and Ms. Yang's evidence that she would have been paid $15/hour if working full-time.

[126] I accept the plaintiff's evidence that due to shoulder pain she limited her hours of work at Real Car Cash, and that this was caused by the accidents. While the evidence is not perfect, the weight of the evidence is that she would have earned $15/hour if working full time and I so find.

[127] However, there are many problems with the plaintiff's calculations, including:

(a) the evidence as to whether or not Ms. Yang included statutory holidays in her calculations of missed work is confusing. The plaintiff was paid for statutory holidays, and so she should not have a claim for missing work on those days;

(b) Ms. Yang of course cannot testify that every day that the plaintiff did not work was due to her injuries. However, the plaintiff was not taken through the chart prepared by Ms. Yang and so never confirmed in her evidence that all of the days or hours she did not work were due

> entirely to her injuries and not for other reasons. There could be other reasons she did not attend work some days but this was never canvassed (such as holidays or special occasions she wanted to attend or other illnesses such as a cold or just because she did not feel economic or employer pressure to work).

[128] The defendants argue that the evidence does suggest that the plaintiff worked markedly fewer hours in the November 2011 to May 2012 period, namely an average of 43.71 hours per pay period, as compared to the April 2011 to October 2011 period when she worked 63.21 hours per pay period. Based on the defendants' calculation, the plaintiff worked approximately 19.5 hours less per two week pay period in the November to May 2012 period than she did before. The defendants argue that given the unreliability of the evidence, a fair calculation of lost wages would be 19.5 hours over 14 pay periods, or 273 hours.

[129] The defendants' approach is based on the premise that in the April to October 2011 time frame, the plaintiff did not lose any time at work due to her injuries and that her average hours worked per pay period, namely 63.21 hours, would be all that she would have worked in any event. This means that the fact she worked 19.5 hours less than this in the November 2011 to May 2012 time frame can be attributed to her injuries.

[130] I agree with the defendants' approach that at least 19.5 hours of work were lost to the plaintiff due to her injuries. However, her entire time at this job was pre-shoulder surgery. I accept the plaintiff's evidence that her shoulder was giving her some significant trouble and that because of the pain it was causing her she worked fewer hours during the whole time frame than she otherwise would have.

[131] As noted, the plaintiff worked an average of 63.21 hours per two week pay period in the April to October 2011 time frame. I conclude she would have worked more hours but for the injuries she suffered. The problems with the evidence permit me to make only a modest estimate of four additional hours per pay period (i.e. two

hours per week). There were a total of 27 pay periods, so this amounts to an additional loss of 108 hours.

[132] The defendants argue that a $14/hour wage rate should be used. I accept the evidence that had the plaintiff been able to work full-time, she would have earned $15/hour. This means that her past wage loss for the time period prior to her shoulder surgery can be roughly estimated as 273 hours plus 108 hours multiplied by $15/hour, for a total of $5,715.

[133] The defendants agree that the plaintiff was unable to work after her shoulder surgery, either for one month or two. I find that she was unable to work for two months given the extent to which the surgery debilitated her and her need for time for recovery. This amounts to four pay periods. Estimating her average hours at work per pay period as 63.21 hours plus 4 hours, or 67.21 hours per pay period, multiplied by four pay periods and $15/hour, a rough estimate of this wage loss amounts to $4,032.60.

[134] The two past wage losses added together, $5,715 plus $4,032.60 total $9,747.60. The defendants agree that holiday pay of 4% should be added to the past wage loss, which would be another $389.90.

[135] I find that the plaintiff suffered a past wage loss of $10,138 (rounded off) as a result of her injuries suffered in the accidents.

(e) Loss of Future Earning Capacity

[136] A plaintiff who advances a claim for loss of future earning capacity must prove that “there is a real and substantial possibility of a future event leading to an income loss”: *Morgan v. Galbraith*, 2013 BCCA 305 [*Morgan*] at para. 24. The approach to assess such a future loss of earning capacity may either be on an earnings approach or by considering the plaintiff’s loss as a loss of capital asset: *Morgan* at para. 24.

[137] Here, the plaintiff did not have earnings before the accident. The plaintiff prefers to characterize her claim as a loss of a capital asset, based on the discussion in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*]. In *Brown*, Finch J. as he then was held at paras. 7-8:

> In *Andrews et al. v. Grand & Toy Alberta Ltd. et al.* (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50 Dickson J., as he then was, characterized the problem of assessing a claim for lost ability to earn income in this way (p. 469 D.L.R.):
>
> > "We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity of which compensation must be made: *The Queen v. Jennings*, *supra*. A capital asset has been lost: what was its value?"
>
> The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> > 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> >
> > 2. the plaintiff is less marketable or attractive as an employee to potential employers;
> >
> > 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> >
> > 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[138] An inability to perform an occupation that never was a realistic occupation for the plaintiff pre-accident is not proof of a future loss of earning capacity, as noted in *Steward v. Berezan*, 2007 BCCA 150.

[139] There are three potential arguments in relation to loss of future earning capacity that I must address:

(a) that the plaintiff would have qualified for medical school but for the injuries caused by the accident, and have earned more than she could earn as a lawyer;

(b) that the plaintiff's career path suffered a one or two year delay, and so she has suffered a loss of future earning capacity due to this delay;

(c) due to her injuries, she is less capable working in her planned legal career than she would have been, as she will not have the same work tolerance and endurance.

Qualifying for Medical School

[140] The plaintiff testified that she always wanted to attend the Faculty of Medicine at the University of British Columbia to become a doctor since her early years. Her counsel argues that because of the pain that she suffered in university, due to the accidents, she was unable to attain the marks that would have been necessary to qualify for medical school at UBC.

[141] The problems with the plaintiff's theory that she did not qualify for medical school because of her ongoing pain are that she did well in some courses and tests, and not others; and the evidence is lacking that she was a better student pre-accident. She did well enough in arts and humanities courses and on the LSAT exam and she is doing well in law school. She did not do well in some science courses, even those that did not involve laboratory work, and she not do well on the MCAT.

[142] Other than the plaintiff's stated desire to be accepted into medical school at UBC, the plaintiff called no evidence as to what the requirements were to qualify. The defendants called evidence in this regard, and the plaintiff did not challenge its accuracy.

[143] The evidence called by the defendants illustrated that less than 1/6 of the people who applied to UBC medical school were accepted in 2009, 2010 and 2011. In the pre-requisite courses (which includes the science courses in which the plaintiff did poorly), the average marks were in the low 80% range in the years 2009, 2010, and 2011. Many applicants who were BC residents and whose marks were in the A- to A + range on average were refused entry into UBC medical school.

[144] The plaintiff's marks in the sciences were far off the range required to qualify for medical school.

[145] The plaintiff's evidence as to how her pain affected her studies at UBC in my view tended to amplify the impact on her science grades and to attribute this to the fact that she found it hard to bear the four hour laboratory sessions in her science courses. This may be a real perception that she has but she was not asked in direct to specifically identify the actual lab courses where her grades suffered.

[146] On closer study of her transcript it was clear that not all of her science courses involved lab work, and that whether or not a course contained lab work was not necessarily a predictor of her grades. For example, in her first year, she achieved a 70% grade in Biology 140, a lab course, and only a 61% grade in Biology 121, a classroom course.

[147] As another example, in the plaintiff's third year at UBC, in the summer session of 2009, she took a biochemistry class and failed it, receiving only a 38% mark. This was a non-lab course. Nevertheless her evidence was that the class was four hours long, daily, and that she found this physically very difficult.

[148] I have little doubt in concluding that someone in pain will be less effective in studying and learning complex information. The plaintiff described how her pain would worsen to the point that it was all she could think about. I accept that at times her pain does grow to affect her in this way.

[149] Nevertheless, the plaintiff's evidence in my view did not sufficiently address the trend visible from her pre and post-accident school and university marks, namely, that she had a greater than average aptitude in arts courses, a variable aptitude in math, but at best an average in some science courses and at worst a lesser than average aptitude in the complex science courses such as chemistry, physics and biochemistry. This is so even where the complex science courses did not involve lab classes, such as biochemistry.

[150] While the plaintiff was no doubt suffering from pain at times during her university career, and it would escalate and affect her concentration at times, her competitiveness and drive enabled her to override this and succeed in courses in the

arts and humanities and now law. It makes me conclude that the reason she did not succeed in the complex science courses was largely due to other factors, such as simply not having the academic aptitude.

[151] I am also struck by the fact that the plaintiff made no effort to seek accommodation at the university if her science courses were made more difficult than her other courses due to her ongoing pain.

[152] University is often the place where a young person's dreams meet up with the practical realities of the person's abilities. Mere desire and hard work is sometimes not enough. Most people have talents but not many people have every talent.

[153] I am not persuaded that there was a real and substantial possibility that the plaintiff would have had the talent to succeed academically in the way necessary to qualify her for medical school, and that she would have been one of the select few chosen for medical school, but for the accidents. The evidence has to be more than a mere hope and desire. I realize that it was difficult evidence to gather, given that the plaintiff was injured by the first accident when she was still in high school and so there is no way to compare how she would have done at the university level absent the accidents. Nevertheless, here I do not even have evidence that she had been much more than an average student or that she excelled in sciences in high school.

[154] Lastly, I am not convinced that there is a real possibility that the plaintiff would have earned more had she become a doctor than she will earn by becoming a lawyer (not taking into account any other impairments on her career, which I will address next).

[155] The plaintiff provided at trial the written expert opinion evidence of an economist, Robert Carson. Mr. Carson provided tables of 2006 Census data setting out average earnings for BC women with completed medical degrees and those with completed law degree. Over a career estimated to begin in 2013 as a doctor, or in 2013 as a lawyer, the present value of lifetime earnings (plus 10% attributed to benefits) is $2,141,500 for a medical graduate versus $2,111,802 for a law school

graduate. The difference of $29,698 in my view is not statistically significant when considering the very general nature of these statistics and the many lifetime variables that may affect actual earnings.

[156] The plaintiff explained how she wishes to work in a large downtown Vancouver law firm, in the corporate law field. Given her competitive nature and her academic abilities, this would be a realistic possibility if her injuries were ignored. Absent any injuries there is a realistic possibility that this type of lawyer would make well above the average income of lawyers revealed in the statistics.

[157] In contrast, the plaintiff did not give any evidence as to the type of doctor she hoped to become if accepted to medical school. This in itself is somewhat interesting, and suggests that her stated long term goal to become a doctor was not fully formed or strongly directed prior to the accident. But it also suggests that there is a real possibility she would not have earned more and could have earned less than what is revealed by the statistics of medical doctors' earnings.

[158] In other words, considering contingencies and all else being equal, the plaintiff may have been a below average income earning doctor had she been accepted to medical school but an above average income earning lawyer in her legal career. This especially so if her academic strengths were more in the arts and humanities than in the sciences, as revealed by her school transcripts. In my view these contingencies negate the small percentage difference in lifetime doctor versus lawyer earnings revealed by the statistics tables.

[159] I conclude that there is not a real or substantial possibility that the plaintiff's injuries caused her to suffer a loss of future earning capacity by preventing her from qualifying for medical school.

Delay

[160] There are two theories of a delay in career start advanced by the plaintiff.

[161] First, the plaintiff testified that following her third year at UBC, in the summer of 2009, before the start of her fourth year, she attended at a doctor or counsellor at UBC Student Services. She said that she was told it would alleviate her back pain if she took fewer classes. She said that she followed this advice, and took a lesser course load in her fourth year. Because of this, she graduated with her B.A. in five years instead of four, graduating in May 2011 rather than May 2010.

[162] Another theory, less formed, seems to be that because the plaintiff's injuries prevented her from qualifying for medical school, she did not know what to do when she finished her B.A. She needed time to reassess her situation, and so took a year out of school during which she decided ultimately to write the LSAT and apply to law school.

[163] The problem with both theories is that there is a lack of evidence to support a sufficiently strong link between the plaintiff's university career and the accidents.

[164] The plaintiff called no medical evidence to support her evidence that she was advised for medical reasons related to the back pain caused by the first accident to take a lesser course load just before the beginning of her fourth year, and her own evidence as to who told her this was very vague. While the plaintiff's state of mind at the time may have been such that she felt that it was back pain that made it necessary to reduce her course load, more evidence is required to link this decision causally to the accidents.

[165] It is to be remembered that around the same time the plaintiff was searching out other possible causes for her poor grades, including ADD, and attended a few counselling sessions. She was at a low point in her mood after failing another science course. It is possible that the person who recommended she reduce her course load based this on concerns about the plaintiff's emotional state and not her back pain and I do not have sufficient medical evidence to conclude that the emotional state was caused by the back pain.

[166] The decision to reduce her course load also could be linked to the fact that the plaintiff had persisted in taking science courses in which she could not succeed to the extent necessary to qualify for medical school and may have thought that with fewer courses she would overcome this.

[167] This comes back to the problem that the plaintiff did very poorly in the more complex science courses in her years of university. She failed some courses and had to make up the courses in the summer. She appeared determined to keep trying to take the science courses necessary to qualify for medical school, despite her poor showing. She remained determined to write her MCAT in the spring of 2010, despite having a poor academic record in the science courses. She was not willing to consider other options.

[168] As a highly competitive person who had not faced such setbacks in high school, no doubt her lack of success in the university science courses was very difficult for her. This situation is encountered by many students in university whose dreams are not achieved. It can take time for any such student to reassess.

[169] Again, I want to emphasise that I do not have difficulty accepting the plaintiff's evidence that she was bothered to some extent by pain. I am satisfied that she tired more easily, had to take more breaks, and that her concentration was affected. But for the reasons already stated, I have found that the plaintiff's failure to qualify for medical school at UBC cannot be attributed to the injuries suffered in the accidents as I am not satisfied that there was a real possibility she would have qualified for medical school in any event.

[170] That being so, I also find that there is insufficient evidence to conclude that there was a real and substantial possibility that but for the accident, she would have been able to complete her university earlier and made the decision to go to law school earlier than what she did do. If the plaintiff was determined to try to succeed in her science courses, but did not have an aptitude for them, then her same competitive drive to keep trying and her determination which made her unwilling to consider a "plan B" alternative career path, means that she still could have taken as

long to do her degree, and upon being disappointed in her failure to succeed in her medical school goal, taken as long as she did to decide to try for law school.

[171] In short, I am not persuaded that there is a real possibility that the plaintiff would have embarked on a post-university income-earning career earlier than she will do, but for the accidents.

[172] Furthermore, I am not convinced that a delay would be significant in terms of the plaintiff's overall income earning potential. Many lawyers take time out from their legal employment mid-career, others work past age 65. There are many variables that may have affected the plaintiff's lifetime earnings as a lawyer and I am not convinced a one or two year delay would not be offset by the many other variables.

[173] In *Hillman v. Esaryk*, 2014 BCSC 170 at para. 25, McEwan J. found that a one year delay in the start of a career as a pilot would be meaningless over a lifetime. I conclude the same here, even if there was a possibility that the accident contributed to a delay in the start of the plaintiff's career as a lawyer.

Is the Plaintiff Less Capable?

[174] The evidence is uncontradicted that the plaintiff still suffers from chronic pain due to her injuries. The likelihood is that this will continue.

[175] I found the plaintiff to be entirely credible in describing how her pain affects her concentration and affects her sitting and standing tolerance.

[176] The medical evidence agreed that the injuries would not prevent the plaintiff from sedentary work but would require her to move around. It was not directed to the question of how chronic pain might affect someone who otherwise would plan on working very long hours in a sedentary job, often at a computer.

[177] The defendants argue that the plaintiff's chronic pain will not cause her to suffer a loss of future income as a lawyer, because she will be able to guard against her injuries affecting her work by purchasing proper equipment and taking breaks to move around regularly.

[178] The defendant argues that the evidence goes no further than establishing that the plaintiff believes she is less valuable as an employer, which is not sufficient evidence. I disagree and find that the evidence goes well beyond a mere perception by the plaintiff.

[179] The defendants say that the plaintiff can move around and will not be tied to a desk. But common sense tells us that lawyers are increasingly tied to their desks metaphorically. As a lawyer, the greatest majority of the plaintiff's work will likely be spent at her computer: reading and replying to email correspondence; writing, analyzing and researching legal memoranda and legal documents.

[180] The plaintiff is a highly competitive person. I have no doubt that absent the injuries caused by the accident she would want to pursue a law career that would be highly demanding and competitive.

[181] For a lawyer at the top of her field the work hours are often intense. Lawyers in a competitive work environment can regularly be required to work in very long continuous stretches up to ten or 12 or more hours per day on end, often continuing into the weekends and evenings. These working hours often involving considerable stress, for example, as urgent legal research is needed, or documents need to be negotiated and drafted for the impending closing of a corporate transaction, or preparation for direct or cross-examination of witnesses is needed each night and weekend prior to and during a trial.

[182] Physical stamina is an asset and the lack of good health a hindrance to a highly competitive legal career.

[183] As a matter of logical deduction and common sense of how the real world works, I find that the chronic pain suffered by the plaintiff and likely to continue to be suffered by her will not prevent her from a legal career, but there is a real and substantial possibility that it will make her less competitive in such a career path: that her pain will take a toll on her and make her less able to endure the long days, nights and weekends of intense concentration that is often required of a lawyer.

[184] There is a real and substantial possibility that the plaintiff's chronic pain and limited tolerances for extended periods of work even in sedentary positions will lead her to hold back from extra activities or taking on work that might advance her legal career, as she will not have the energy to do what other young lawyers could do, because of her pain. There is a real and substantial possibility that this reticence would lead to her being overlooked by her superiors for work assignments or business development activities, and would inhibit her ability to advance as quickly or to the same salary level as her peers.

[185] I conclude therefore that the plaintiff has suffered a loss of future earning capacity in her future career as a lawyer.

[186] It is difficult to assess the impairment to the plaintiff's future earning capacity.

[187] The plaintiff's counsel argues that she has suffered a 40% impairment of her future earning capacity, measured as 40% of the average earnings of a female lawyer or $844,720.

[188] I find this to be too great an estimate, not justified on the evidence. As the defendants point out, the plaintiff has been managing in obtaining B grades in law school.

[189] However, achieving B grades in three years of law school is one thing, but working day after day and year after year putting in long hours as a lawyer is another thing.

[190] In considering an appropriate assessment, I have considered that the statistics used by the plaintiff are a very conservative starting point, taking into account potential negative contingencies, for two reasons.

[191] The plaintiff has put forward a table of historical average earnings of females which is lower than males, presumably based on a number of factors including time off work to have children but also presumably based on historical discrimination, the

latter of which may hopefully decrease in the future. The tables thus might undervalue future female lawyers' incomes.

[192] Also, the average statistics for lawyers in all fields likely show less earnings than the average earnings of corporate lawyers in full service Vancouver law firms, and less earnings than lawyers who are the most highly competitive and work very long hours in private practice. I consider that the plaintiff could have realistically achieved higher than average earnings as a lawyer but for the accident, given her competitive spirit and her interests.

[193] I have also taken into account the positive contingency that due to her injuries, there is a good chance that from time to time the plaintiff may suffer set-backs and need to take time off work. I have considered the fact that the plaintiff suffered considerable pain and a back spasm working a six hour a day, five days a week job at the PNE.

[194] I conclude that the plaintiff has suffered a loss of earning capacity equivalent to 20% of the lifetime earnings of an average female lawyer. I consider this fair to both parties as it acknowledges that the plaintiff can still work, but also recognizes she cannot work to the extent she would have but for the accidents and, as mentioned, is based on conservative average earnings statistics.

[195] The present value of the lifetime earnings of a female lawyer, which the plaintiff relies on, who starts a legal career in 2015, is $1,864,800. I assess the plaintiff's damages for loss of earning capacity as 20% of this, namely $372,960.

(f) Cost of Future Care

[196] The plaintiff filed the report of Ms. Kassam to support a claim for future care costs with a present value in the range of $150,000 to $200,000.

[197] Ms. Kassam's report was prepared before the plaintiff's shoulder surgery.

[198] With respect, Ms. Kassams' report contained many items for which the groundwork was simply not laid in the evidence.

[199] I do not consider there to be a realistic possibility the plaintiff will use or purchase some of the items described in Ms. Kassam's report such as: multiple sessions with each of a physiotherapist, kinesiologist and recreational therapist, as these services overlap; or special cleaning equipment.

[200] The defence concedes that some future care costs are warranted, and suggests these would consist of: a number of sessions with a kinesiologist or physiotherapist; some sessions with a massage therapist, some sessions with a psychologist regarding pain management; an ergonomic assessment of the plaintiff's office; an ergonomic chair; and an exercise program. The defence argues that these costs would total $5,650.

[201] I tend to agree with the defence approach but I estimate that the plaintiff will likely require more of the treatments over her lifetime than estimated by the defence, and at least two ergonomic assessments and ergonomic chairs (for example, she may well need a chair at home when she takes her work home, as well as at her office, or more than one chair in a long career, and more than one ergonomic assessment). Given that the costs are an assessment rather than a calculation, I assess the plaintiff's damages in relation to her future care needs to be $11,300, approximately double the defence estimate, but far less than the plaintiff's estimate.

(g) Loss of Housekeeping Capacity

[202] The plaintiff claims $15,000 for loss of housekeeping capacity.

[203] The defendants argue that there is no medical evidence supporting a claim for loss of housekeeping capacity. The defendants rely on the evidence of one of the plaintiff's experts, Dr. Hirsch, who testified that the plaintiff did not need housekeeping assistance so long as she paced herself.

[204] If the plaintiff is to maximize her earning capacity, even if working at 80% of her pre-injury capacity, I consider that she will not likely have the residual capacity or time to always be able to "pace herself" to perform more rigorous housekeeping tasks.

[205] I am also satisfied on the plaintiff's evidence regarding her pain limits, and the evidence of Ms. Kassam as to the plaintiff's tolerances, that because of her injuries suffered in the accidents the plaintiff is no longer capable of regularly performing some of the more rigorous regular household tasks, such as those requiring extended bending, reaching or scrubbing.

[206] Over a lifetime I find it reasonable to assess the plaintiff's loss of housekeeping capacity as $15,000.

(h) In Trust Claim

[207] The plaintiff advances a claim in trust for the help of her mother and sisters on two occasions: for two weeks after her shoulder surgery; and on the plaintiff's move to law school. The claim totals $10,690 estimating that the services were worth the equivalent of $25/hour.

[208] The defendants initially objected to this claim as it had not been pleaded. However, by the close of trial the defendants quite reasonably abandoned the objection on the basis that they were not prejudiced in being prepared to meet it on the evidence.

[209] The defendants argue that the hourly rate of $25/hour is not supportable. The defendants also argue that a more reasonable claim would be in the range of $5,000 to $7,000.

[210] The defendants argue that there is evidence to support only one week of care of the plaintiff after her surgery. Any other services were equivalent to what a loving family member would ordinarily provide.

[211] I agree that the plaintiff had so many items to move when she went to university she required three car loads that it is likely her family would have helped her with this move in any event. Her mother's decision to stay on and help her for approximately a week after her move was based on love and affection.

[212] I agree with the defendants submissions for the most part on the quantum of the in-trust claim. I assess the in-trust claim, for services provided by the plaintiff's mother and sister, as $7,000.

(i) Non-Pecuniary Damages

[213] The plaintiff seeks non-pecuniary damages of $150,000; the defendants submit that an appropriate award would be in the range of $60,000 to $70,000.

[214] This category of the damages award is to ameliorate the non-financial losses suffered by the plaintiff as a result of the injuries caused by the accidents.

[215] An inexhaustive list of factors to be considered in awarding non-pecuniary damages include: the age of a plaintiff; nature of the injuries; severity and duration of the pain; residual disability or physical or mental impairment; emotional suffering; loss or impairment of enjoyment of life; the plaintiff's need for solace; impairment of family, marital or social relationships; loss of lifestyle; and the fact that the plaintiff's stoicism should not penalize her: *Stapley v. Hejslet*, 2006 BCCA 34.

[216] Awards in other cases involving similar facts are looked at for comparison purposes. However, no two cases and no two plaintiffs are alike, and each claim must be assessed based on the circumstances of the individual plaintiff.

[217] The plaintiff relies on *Morlan v. Barrett*, 2012 BCCA 66, in which an award of $125,000 non-pecuniary damages was made by the trial judge and upheld by the Court of Appeal. The case involved a 46 year old female plaintiff involved in two accidents. The accidents left her with fibromyalgia, chronic neck, shoulder and back pain. While she could work, she was a changed person. A high-energy perfectionist at home and at work before the accident, she had to significantly adjust her lifestyle. The accidents robbed her of her energy and left her unable to do much of what she did before. She required medication to help get through each day.

[218] The plaintiff also relies on *Smith v. Fremlin*, 2013 BCSC 800 [*Smith*]. The plaintiff was 31 years old and was completing articles to become a lawyer when she

was injured. The accident left her with an ongoing pain in her shoulder, which was aggravated by any activity causing her to elevate her arms and move them forward, including using a computer. She also had regular significant headaches.

[219] The plaintiff in *Smith* was previously an active person and in particular a serious cyclist. After the accident the plaintiff could no longer pursue cycling. She could and did participate in other activities after the accident, including yoga and running.

[220] The plaintiff in *Smith* adjusted her work plans after the accident, concluding that she could not withstand the rigours of private practice due to her injuries. She decided to pursue a career in academia instead. The trial judge found that the injuries had a significant impact because she was required to change her career path. He awarded her $90,000 in non-pecuniary damages.

[221] Amongst other cases, the defendants rely on *Chaban v. Chaban*, 2009 BCSC 87. This case involved a woman who was injured in her 30s. She suffered three accidents. She was left with some chronic pain in her hips and SI joints, interrupting her sleep and day-to-day activities. She also suffered from PTSD. The trial judge found her prognosis to be “moderately optimistic” (para. 50). Her injuries did not cause her work or personal life to suffer (para. 51). She was awarded $75,000 in non-pecuniary damages.

[222] Alternatively, the defendants refer to *Harvey v. Yanko et al.*, 2007 BCSC 216, and *Wong v. Hemmings*, 2012 BCSC 907, involving a 22 year old female plaintiff and a 35 year old female plaintiff respectively. Both were left with chronic pain after accidents. In the former case, the plaintiff was awarded $90,000, in the latter case the plaintiff was awarded $100,000 non-pecuniary damages.

[223] Turning to the facts of this case, the plaintiff was at a very young age when the accidents occurred. Her life has changed dramatically since the accidents.

[224] Before the accidents she was extremely athletic and competitive, involved in many activities.

[225] Since the accidents she has had to give up many activities and limit her involvement in those in which she does participate. She has been more socially restricted than before and suffered from a low mood at times in university. The plaintiff has been in pain continually, with some significant spikes in the pain at times when she over-exerts or sits or stands too long. She has had trouble sleeping and trouble concentrating. She frequently takes over the counter muscle relaxants or pain killers.

[226] The lowest point since the accidents for the plaintiff was after her shoulder surgery. The immediate week after the surgery was extremely difficult for her, as she was incapacitated by the surgery and suffered from side effects of the pain medication and needed assistance with all of her daily needs. She also was left with a scar on her right shoulder, which embarrasses her.

[227] The plaintiff appears very sad about the loss of her former vibrant athletic self; she is very concerned about how her back pain will affect her as a mother and worker, and as a lover. Certainly it is likely that she will need to make accommodations in all areas of her life. She may find benefit in some counselling to find ways to accept her limitations and to focus on her abilities and not her loss.

[228] Over the years since the accidents, the plaintiff's injuries have not prevented her from some enjoyment of life. She has taken frequent trips with friends or family, including the trips to Europe and China already mentioned, as well as trips to warmer climates such as Cancun, Cuba, Palm Desert, Florida, the Dominican Republic, and Honolulu. She posted some photographs of these trips on her Facebook page, and was cross-examined about them. The photographs are of course snapshots of her looking happy on these occasions.

[229] Non-pecuniary damages can assist the plaintiff in purchasing devices which can limit her lifting and which can allow her to change her posture frequently so that she is not standing or sitting for long periods of time in a single position, and so that she can enjoy her work and daily life without as much pain. As but one example, perhaps she will need to buy a desk that allows for up and down movement between

sitting and standing positions. She may need to invest in voice recognition computer software that allows her to speak into a microphone and have her speech automatically transcribed, so she can pace and move about rather than sit and type continuously (although this will not help her with conducting research).

[230] In her non-work life, the plaintiff will also have to make adjustments. Whereas once the plaintiff would have had the option of a vigorous sporting activity to socialize with friends and dissipate the stress of working long hours in a competitive work field, she will no longer have this option. These are mere examples meant to illustrate that the plaintiff will have to make adjustments because she has lost some of the opportunities to enjoy life that were previously open to her. Non-pecuniary damages can serve to assist her with these adjustments.

[231] However, it is important to keep in mind that the plaintiff will be able to participate in social activities. As she admitted, she still enjoys shopping with friends; she also occasionally rollerblades although the evidence of this latter activity did not persuade me that it has happened often. She can do many day-to-day activities and can look after her daily needs.

[232] Given the plaintiff's age at the time of her injuries, the fact that her university years were marked by reduced social activity and by frustration caused by the limitations that pain forced on her, and the fact that she is likely to continue to suffer significant pain the rest of her long life ahead of her, but also finding that she will still be able to obtain employment in an interesting field and enjoy many activities, I find that a reasonable assessment of non-pecuniary damages is $100,000.

Conclusion

[233] For the reasons set out above, I have awarded the plaintiff the following damages as against the defendants:

Loss of Past Income	$10,138
Loss of Future Earning Capacity	$372,960
Cost of Future Care	$11,300
Loss of Housekeeping Capacity	$15,000
In Trust Claim	$7,000
Non-Pecuniary Damages	$100,000
Total:	$516,398

[234] The plaintiff is entitled to the usual order of interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[235] There was no request to reserve the right to make submissions relating to income tax implications.

[236] I consider this case one in which costs should be awarded at Scale B. The plaintiff is entitled to costs unless there are issues of which I am not aware which the parties seek to bring to my attention.

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The Honourable Madam Justice Susan A. Griffin