IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lawrence v. Parr,*
2014 BCSC 2004

Date: 20141024
Docket: M124275
Registry: Vancouver

Between:

Nancy Jane Lawrence

Plaintiff

And

Nina Jasmine Parr

Defendant

Before: The Honourable Mr. Justice Tindale

This judgment was corrected on the front page on October 29, 2014

Reasons for Judgment

Counsel for the plaintiff:	E.A. Orr-Ewing
Counsel for the defendant:	L. McCreery K. Powar
Place and Date of Trial:	Vancouver, B.C. April 14, 15, 16, 22, 23, 25, 2014
Place and Date of Judgment:	Vancouver, B.C. October 24, 2014

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INTRODUCTION

[1] The plaintiff claims damages as a result of a motor vehicle accident that occurred on September 23, 2010 ("the accident"). In particular the plaintiff seeks compensation for her non-pecuniary damages, past loss of earning capacity, loss of opportunity to earn income, future loss of earning capacity, loss of housekeeping capacity, cost of future care and special damages.

[2] The defendant has admitted liability for the accident.

[3] The issues in this case, in addition to the assessment of the quantum of damages for the plaintiff's injuries, are the causation of those injuries and a credibility assessment of the plaintiff's evidence.

THE ACCIDENT

[4] The accident occurred at the intersection of West 16th Avenue and Oak Street in Vancouver, British Columbia. The plaintiff was traveling westbound on West 16th Avenue however was stopped at a red light when she was struck from behind by the defendant's vehicle. The plaintiff says she was looking straight ahead with her foot on the brake at the time of impact. The plaintiff describes the impact as a "hard-hit" which caused her vehicle to move forward approximately 1 foot. She was wearing her seatbelt at the time of the accident.

[5] The plaintiff was driving a Honda Civic vehicle at the time of the accident. The damages to her vehicle amounted to $466.05.

[6] The defendant was driving a Ford Focus vehicle at the time of the accident. The damages to her vehicle amounted to $545.16.

[7] The defendant testified that she was driving westbound on West 16th Avenue when she began to stop for the intersection and her car started to skid. The roads were wet. She cannot say how fast she was driving nor how long or how far she skidded prior to impact.

[8] The defendant testified that her front bumper collided with the rear bumper of the plaintiff's vehicle.

[9] The defendant did not believe that the impact caused the plaintiff's vehicle to move forward. The defendant also testified that her seatbelt did not tighten nor did the airbags in her car deploy upon impact. The defendant also stated that she had a purse on the passenger seat of her vehicle and it did not move as a result of the collision. She described the accident as minor.

[10] After the collision both parties exited their vehicles and exchanged their relevant information. The plaintiff did not indicate to the defendant that she was injured at that time.

THE EVIDENCE

Witnesses for the Plaintiff

Robert Lewis

[11] The first witness called by the plaintiff was Robert Lewis. He was the program manager for 'A Chance to Choose' program which was designed to help at-risk youth between the ages of 15 to 30. He met the plaintiff originally in 2008 when he was the manager of that program in the downtown Eastside of Vancouver. The plaintiff was hired as an assistant to the program facilitator for one day per week. Mr. Lewis described the plaintiff as a really impressive employee.

[12] That program ran from March 2008 until 2009 when it closed down. Mr. Lewis then ran a similar program in Port Moody. In 2011 when he needed a part-time facilitator he again hired the plaintiff.

[13] In 2011 Mr. Lewis was aware that the plaintiff had been in an accident. He testified that occasionally the plaintiff would have headaches while at work and that she would need to attend medical or chiropractic appointments.

[14] Mr. Lewis was not aware of any hearing problems when the plaintiff was employed with him from 2008 to 2009.

[15] Mr. Lewis, in 2011, did notice that the plaintiff was having some hearing difficulties. He explained that every morning the staff would have meetings and the plaintiff would often ask to have people repeat things they had said. Mr. Lewis testified that the plaintiff had a preference to hear on her left side.

[16] On cross-examination Mr. Lewis agreed that the plaintiff's job performance was highly satisfactory. He was not aware of any difficulties in the plaintiff's ability to concentrate.

[17] Mr. Lewis was aware that the plaintiff had a second job as a telemarketer in 2011. He also said that the plaintiff worked all hours that were offered to her in 2011.

Andrea Mason

[18] Andrea Mason testified that she has known the plaintiff since 2006. She was aware that the plaintiff was involved in an accident on September 23, 2010. Prior to the accident she would see the plaintiff regularly. She described that she would go with the plaintiff on rigorous hikes in Pacific Spirit Park and that they would garden together.

[19] Ms. Mason testified that after the accident she no longer gardened with the plaintiff and they would go on less vigorous hikes together.

[20] Ms. Mason also testified that she worked with the plaintiff at On Page Media in 2012.

[21] Ms. Mason testified that after the accident she did notice that the plaintiff would ask her to repeat things during their conversations. On one occasion during a meeting at their On Page Media employer's house the plaintiff wanted everyone to be quiet because she said she could not hear. Ms. Mason did not notice any hearing problems with the plaintiff prior to the accident.

[22] On cross-examination Ms. Mason agreed that it was possible that the plaintiff had hearing problems before the accident that she did not notice.

Nancy Jane Lawrence – The Plaintiff

[23] The plaintiff was born November 7, 1972. She was raised in Vernon, British Columbia and graduated from high school in 1990. After graduating from high school she attended one year at the University of Victoria and then went travelling through Europe. In 1992 she returned to British Columbia and attended Langara College. She then travelled to Israel.

[24] The plaintiff next travelled to South Africa and upon returning home she took a two-year program in the hospitality industry. She worked at various hotels in Vancouver and in Mexico for three or four years up until 2001.

[25] The plaintiff began experiencing stomach problems in 2001 which hampered her ability to work in the hospitality industry and necessitated her return to British Columbia in approximately 2003.

[26] In 2005 the plaintiff began to consider a career as a counsellor. In the fall of 2008 the plaintiff began a program at the Rhodes Wellness College and on March 5, 2010 she graduated with a diploma as a Wellness Counsellor.

[27] The plaintiff would attend school at the Rhodes Wellness College Monday through Thursday and she would work on Fridays at the A Chance to Choose program. She finished working at the A Chance to Choose program on March 27, 2009. During this time she worked 7 1/2 hours per week at a rate of pay of $22.50 per hour.

[28] The plaintiff, during the period 2008 through 2009, would spend approximately three and half hours per week on housework, and participate in recreational activities such as hiking, yoga, cycling and gardening. The plaintiff said that she would go on rigorous hikes two to three times per week.

[29] The plaintiff testified that prior to the accident she did not have any pain or problems with her neck, back, headaches or jaw. She did testify that when she was a young child she had tubes put in her ears. The plaintiff was also candid in saying

that prior to the accident she did not have perfect hearing but she did not have the difficulties she experiences now.

[30] After graduating from the Rhodes Wellness Program the plaintiff's plan was to start her own business. She developed a business plan which included opening a business bank account, obtaining a business credit card and business cards.

[31] On August 6, 2010 the plaintiff submitted her application for registration of a sole proprietorship with the business name "Dream Earth Wellness Consulting".

[32] After the plaintiff's graduation from Rhodes Wellness College she applied for various business grants and was waiting to hear back as to whether or not she would receive them. Her intention was to go back to work as a counsellor by October 2010.

[33] The accident occurred on September 23, 2010. The plaintiff testified that immediately after the accident she felt very shaky and was in shock. That evening her back and neck began to hurt. By the next day she had pain in her jaw, neck, upper back, middle back, lower back and was experiencing headaches.

[34] The plaintiff went to see her family physician, Dr. Crosby, for the first time regarding the accident on October 5, 2010.

[35] In approximately November of 2010 the plaintiff started to experience left ear pain and hearing issues. She said that it "felt like I had headphones on". The plaintiff saw Dr. Crosby on December 5, 2010 regarding her left ear pain.

[36] The plaintiff saw Dr. Crosby on February 2, 2011 at which time Dr. Crosby referred her to an otolaryngologist, Dr. Dickson. The plaintiff says she was upset when told that she had damage to her hearing and would require hearing aids.

[37] The plaintiff continued to experience neck, back and jaw pain as well as headaches. She was referred to physiotherapy and massage therapy.

[38] On December 2, 2010 the plaintiff started work with On Page Media where she could work from home and was paid $15 per hour for approximately 15 to 20 hours of work per week. The plaintiff said that she took this job because she did not feel she could do the work of a Wellness Counsellor.

[39] During the period February 2011 to July 2011 the plaintiff was experiencing pain on a regular basis. Dr. Crosby referred her for acupuncture as well as physiotherapy and massage therapy. The plaintiff testified that these treatments provided temporary relief.

[40] On August 3, 2011 the plaintiff began work again at the A Chance to Choose program. At that time she was paid $25 per hour and she was working approximately 14 hours per week. This lasted for approximately 3 months until the position that the plaintiff was filling was no longer available to her. She was then paid $22.50 for a different part-time position. She worked there until March 2012 at which time the plaintiff testified that she was feeling spent and needed time to rest and recharge.

[41] The plaintiff testified that when she was working at A Chance to Choose for the second time they would do group check-ins with the clients and a lot of the time she would have difficulty hearing what was said.

[42] The plaintiff, in March 2012, was still experiencing flare ups with pain in her neck and back. She also suffered from headaches.

[43] In April 2012 the plaintiff's boyfriend suffered two severe concussions and she testified that she had to focus on his recovery.

[44] The plaintiff finished work in May 2012 with On Page Media. By that time she was doing approximately 2 1/2 hours of housekeeping per week.

[45] In August 2012 the plaintiff and her boyfriend moved to Kelowna. There she found part-time employment as a virtual administrative assistant. She worked from home at that job from September 2012 until January 2013.

[46] The plaintiff next found a job at the Canadian Mental Health Association as a nutritional coach at a wellness center. This was part-time employment where she was paid $18 per hour and worked approximately 18 hours per week. This employment lasted from February 2012 until June 2013. During this period of time the plaintiff says her symptoms had improved and the pain was much more manageable.

[47] By April 2013 the plaintiff said that her housekeeping abilities had improved, however, she was unable to vacuum or wash the floor. The plaintiff explained that the residence she is now living in is considerably larger than her residence in Vancouver and that she needs help with the housekeeping. The plaintiff says that it would cost approximately $25 an hour to hire somebody to clean her house.

[48] The plaintiff testified that it was her neck that prevented her from doing larger jobs around her home such as scrubbing her floors. The plaintiff said that by this time she was doing yoga and some hiking.

[49] The plaintiff next found employment in June 2013 as a wellness coach for youth recovering from addictions and traumatic abuse. This was full-time employment where she worked 40 hours per week. The plaintiff found this work demanding and only worked there from June 2013 to October 2013.

[50] The plaintiff next found a job in Kelowna working with troubled and violent teenagers. She initially worked approximately 8 hours a week though this increased over time to 30 hours per week. She was employed with this job from November 30, 2013 to December 19, 2013.

[51] During this period of time the plaintiff explained that her neck and upper back were the most symptomatic. Her pain in her mid-to lower back subsided between 2012 and 2013.

[52] The plaintiff next found a job on January 7, 2014 with Interior Health as an Activities Coordinator where she created activities for a senior's day program. This work was full-time. She worked 37 1/2 hours per week and received approximately

$22.50 per hour. This is a one-year contract position. The plaintiff explained that if the contract is not renewed because of her hearing problems she would not apply for jobs in a classroom or group therapy setting.

[53] Most recently the plaintiff has experienced symptoms of pain in her upper back and neck. The plaintiff also indicated that her hearing was not back to her pre-accident level.

[54] On cross-examination the plaintiff confirmed that in 2009 she was diagnosed with ulcerative colitis and that she takes the medication Asacol for that condition.

[55] The plaintiff also confirmed that beginning in 2001 she had problems with fatigue and digesting food. She testified that she had these problems under control by 2003 or 2004.

[56] The plaintiff agreed that prior to the accident she had been attending at the Armstrong Physiotherapy Clinic which is located in Armstrong, British Columbia. These visits began in August of 2009.

[57] On cross-examination the plaintiff agreed that she told Dr. Crosby for the first time about the difficulty she was having with her ear pain on December 5, 2010. She explained that she waited this long because she was waiting to see what happened with her hearing.

[58] The plaintiff was cross-examined in regard to Dr. Crosby's letter of December 29, 2013. In particular she was asked why she told Dr. Crosby on July 13, 2011 that she had been attending acupuncture treatment daily. The plaintiff did not recall telling Dr. Crosby that. The plaintiff was also asked why she told Dr. Crosby again on July 13, 2011 that she was attending massage therapy weekly. The plaintiff said that she did not recall telling Dr. Crosby that either. The plaintiff did however agree that between December 16, 2010 and June 8, 2011 she only attended 10 massage therapy sessions.

[59] The plaintiff was further cross-examined on the September 29, 2011 entry in Dr. Crosby's report which indicated that her pain had reduced to 1/10 on a scale of 1 to 10. The plaintiff answered that she could not remember what she told Dr. Crosby and that her pain fluctuated.

[60] The plaintiff did agree that when she attended at Dr. Hershler's office she told him that by April 2013 she felt almost completely recovered. She however did not feel it was correct for Dr. Hershler to say in his medicolegal report dated January 15, 2014 that this improvement was in part due to her relocating to Kelowna, British Columbia.

[61] The plaintiff was cross-examined regarding Dr. Boyle's medicolegal report dated December 19, 2013 where she told Dr. Boyle that "she can do all the chores that are required of her". The plaintiff, relative to that reference, said "I have no idea what I told him".

[62] The plaintiff was cross-examined with regard to the medicolegal report of Dr. Longridge. At page 16 of that report Dr. Longridge has included a vestibular assessment from Art Mallinson, PhD, which states the following "She is a dancer and feels that she is as good as she always was". The plaintiff denied saying that.

Kaitlyn Warmerdam

[63] Kaitlyn Warmerdam testified that she met the plaintiff in 2009 at the Rhodes Wellness Program. She stated that after the accident, when she attended at the plaintiff's for her birthday, she remembered that they had to turn the volume up quite loud on the television while they were watching a movie because the plaintiff could not hear it. She also testified that on a number of occasions when she would phone the plaintiff she would be asked to repeat herself.

EXPERT EVIDENCE

The plaintiff's experts

Dr. Longridge

[64] Dr. Longridge was qualified as a medical doctor with expertise in otolaryngology. Dr. Longridge provided a medicolegal report dated December 11, 2013. He also provided an addendum report dated January 21, 2014.

[65] Dr. Longridge saw the plaintiff on October 23, 2013. Dr. Longridge states that the plaintiff told him that it was somewhere between six months to a year post-accident when she started having difficulty with her hearing.

[66] Dr. Longridge, in his report of December 11, 2013, also detailed the hearing testing which was performed on the plaintiff at Vancouver General Hospital on October 22, 2013. Those tests revealed that the plaintiff has a bilateral sensorineural hearing loss with a very small conductive component slightly more in the right than the left ear.

[67] Dr. Longridge, at page 7 of his report dated December 11, 2013, opines the following:

> Pre accident this patient stated that she would have some difficulty hearing when someone spoke from a long way away. This was not something which had been a substantial problem to her in the recent past as an adult. She had tube insertion to improve hearing when she was young and at that time did have difficulty with hearing. Subsequent to the accident she became aware of hearing difficulty and she had difficulty hearing her boyfriend speaking to her when lying in bed in the morning on waking for the first 5 to 30 minutes and since then is aware that she is having trouble with hearing in the counselling situation she now finds herself in. Based on her statements to me that she is now hearing with more difficulty than she did pre accident, in my opinion the accident is the cause of this change for the worse. However, she did have some difficulty pre accident so it is impossible to know what the pre accident hearing level was from which she has come to her present level of mild bilateral symmetrical sensorineural hearing loss with a minimal conductive component. It should be noted that she was doing some work in a counselling situation pre accident without substantial difficulty, something which she is finding difficult at the moment, indicating that there has been a significant change in hearing for the worse.

[68] Dr. Longridge also reported that since the accident, on a very occasional basis, the plaintiff suffered from tinnitus for 5 or 10 minutes which he opined was not a handicap or intrusive in any way. Dr. Longridge further opined the following:

> Tinnitus is frequently seen associated with hearing loss and this combination probably means that the tinnitus and hearing loss are connected, though the very mild and intermittent nature of the tinnitus, in my opinion, means that it should be regarded as of no significance and is in my opinion unlikely to increase or become intrusive.

[69] Dr. Longridge did agree on cross-examination that if the tinnitus was caused by a traumatic incident such as the accident it should be apparent shortly after the accident. He did however qualify his answer by saying that patients often have more acute problems which need to subside before they become aware of the less intrusive problems.

Dr. Hershler

[70] Dr. Hershler was qualified as a medical doctor with an expertise in physical medicine and rehabilitation. Dr. Hershler provided a medicolegal report dated January 15, 2014. He saw the plaintiff on December 1, 2011, June 20, 2012, April 9 and September 3, 2013.

[71] On physical examination Dr. Hershler noted the following:

> Nancy Lawrence is a slim, well- toned Caucasian female. She was able to walk into the interview room unaided. Her gait pattern was symmetrical, with no antalgic features. She was able to get up on her heels and toes and could squat fully and stand erect unaided. Inspection of her spine did not reveal scoliosis or kyphosis. The pelvis was level and there was no leg length discrepancy.
>
> Movements generally of the entire spine were fluid, pain-free and attained full range. Palpation of the spine was well tolerated.
>
> The major findings were on palpation of muscle structures. There were numerous tender points on both sides of the neck, across both shoulders and down the spine (noted by wincing, withdrawal from pressure and verbal indication of pain).
>
> There was no evidence of any weakness. Shoulder muscles were strong and she had full shoulder movements. Handgrips were strong.
>
> The neurological examination was normal. Tone, deep tendon reflexes, coordination, strength and sensation were normal.

[72] Dr. Hershler opined that the plaintiff findings are consistent with myofascial pain and that this myofascial pain was caused by the accident of September 23, 2010.

[73] Dr. Hershler recommended that the plaintiff, over the next 1 to 2 years, should focus on daily stretching and yoga. He also prescribed a topical anti-inflammatory gel to the plaintiff.

[74] On cross-examination Dr. Hershler agreed that on April 9, 2013 the plaintiff told him that she felt “almost completely recovered”.

[75] He also agreed on cross-examination that if the plaintiff was having neck or back pain in the months preceding the motor vehicle accident this is information that would be relevant to his opinion.

Dr. Crosby

[76] Dr. Crosby was qualified as a medical doctor with an expertise in family medicine. She provided a medicolegal report dated December 29, 2013.

[77] Dr. Crosby first saw the plaintiff about the accident on October 5, 2010. Upon physical examination Dr. Crosby noted increased tone of the upper back. She found increased tone of the trapezius especially on the right side and increased tone and spasm of the right neck musculature. She also found marked tenderness of the seventh thoracic vertebra spinous process of the mid-back.

[78] Dr. Crosby noted that the plaintiff was having ear pain on December 5, 2010. Dr. Crosby testified that the plaintiff did not have complaints about hearing until after the accident.

[79] Dr. Crosby agreed on cross-examination that the plaintiff’s hearing loss was first reported to her in February 2011.

The defendant's experts

Dr. Boyle

[80] Dr. Boyle gave evidence by way of a video deposition. Dr. Boyle was qualified as an orthopedic surgeon with expertise in the assessment, diagnosis and treatment of musculoskeletal conditions and disorders.

[81] Dr. Boyle provided a medicolegal report dated December 19, 2013. He examined and interviewed the plaintiff on December 10, 2013.

[82] Dr. Boyle, in his medicolegal report dated December 19, 2013, opined that the plaintiff may have sustained a myofascial strain. He further opined that there was no likelihood that the plaintiff would develop early or late instability and it was unlikely that the plaintiff would undergo late degenerative changes in the cervical spine as a result of the motor vehicle accident.

[83] Dr. Boyle also opined to the following:

> There is little, if any, disability that can be attributed to the events surrounding the motor vehicle accident. None is expected in the long-term.
>
> The same can be said regarding leisure and household activities.

Dr. David

[84] The defendant, during the course of the trial, sought to tender an expert medicolegal report of Dr. David who is an otolaryngologist. The defendant also sought the admission of the evidence taken at a video deposition on April 8, 2014 of Dr. David.

[85] The plaintiff challenged the admissibility of the report of Dr. David on the basis that it does not comply with the mandatory conditions as set out in Rule 11-6 of the *Supreme Court Civil Rules*.

[86] During the trial I ruled that the medicolegal report of Dr. David, as well as his video deposition evidence, was not admissible. These are my reasons for doing so.

[87] The trial of this matter began on April 22, 2014. The deadline for serving expert reports was January 20, 2014. The plaintiff served a number of reports in that timeframe including a report from Dr. Longridge who is also an otolaryngologist.

[88] The deadline for service of a responsive expert report was March 3, 2014. The defendant served the report of Dr. David which they purport to be a responsive report on February 28, 2014. It is not clear from the report what it is in response to.

[89] On March 3, 2014 the plaintiff's counsel sent a letter to counsel for the defendant outlining 11 objections to the admissibility of the report of Dr. David. In particular the plaintiff complained that Dr. David's report of February 6, 2014 did not include the certification as required under Rule 11-2 (2), a curriculum vitae, the instructions provided to Dr. David, or a description of the factual assumptions on which the opinion was based.

[90] In addition the plaintiff argued that the report of Dr. David provided a fresh opinion which is not proper rebuttal evidence.

[91] The plaintiff also argued that the report of Dr. David contains arguments, advocacy and draws conclusions beyond the qualifications of Dr. David. The plaintiff further argued that Dr. David usurped the role of the trier of fact, opined on the ultimate issue of the trial and is not an impartial expert.

[92] On March 27, 2014 the defendant served the plaintiff with another letter from Dr. David which does contain the certification as required by Rule 11-2. No other reports were tendered by Dr. David.

[93] Rule 11-6 (1) reads as follows:

> An expert report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:
>
> (a) the expert's name, address and area of expertise;
>
> (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
>
> (c) the instructions provided to the expert in relation to the proceeding;

> (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
>
> (e) the expert's opinion respecting those issues;
>
> (f) the expert's reason for his or her opinion, including
>
> > (i) a description of the factual assumptions on which the opinion is based
> >
> > (ii) a description of any research conducted by the expert that led him or her to form the opinion, and
> >
> > (iii) a list of every document, if any, relied on by the expert in forming the opinion.

[94] Rule 11-7 (6) reads as follows:

> At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if
>
> (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,
>
> (b) the non-compliance is unlikely to cause prejudice
>
> > (i) by reason of an inability to prepare for cross-examination, or
> >
> > (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or
>
> (c) the interests of justice require it.

[95] In order to determine if the report of Dr. David was fatally flawed I declared a *voir dire* and reviewed the video deposition of Dr. David.

[96] The plaintiff made the following general statements regarding the law in this area:

1. An expert report must set out the facts and assumptions on which it is based and a list of every document relied on by the expert in forming his opinion. *Mazur v. Lucas*, 2010 BCCA 473; *Goerzen v. Sjolie,* [1997] BCJ No. 44 (BCCA), and *Ketza Construction Corp. v. Mickey*, [1998] YJ No. 99 (YTSC).

2. That compliance with Rule 11-6 is not simply a matter of form. *Jones v. Ma*, 2010 BCSC 867.

3. That in order for a responding report to be admissible it must be responsive to the expert evidence of a witness called by the opposing party. *Wright v. Brauer*, 2010 BCSC 1282.

4. Expert opinion evidence must not be argument in the guise of opinion and should not usurp the role of the trier of fact. *Yewdale v. ICBC*, [1995] BCJ No. 76 (BCSC); *Rai v. Wilson*, [1999] BCJ No. 611 (BCCA); *Neudorf v. Nettwerk Productions*, [1998] BCJ No. 2690 (BCSC).

[97] The plaintiff makes the specific argument that Dr. David failed to follow the instructions he was provided.

[98] The plaintiff also argued that Dr. David did not state the underlying facts or assumptions upon which his opinion was based. He did not list the documents he reviewed in forming his opinion. Also, Dr. David did not set out in his report the nature of the opinion being sought. In this regard the plaintiff is concerned that an incorrect conclusion could result from incorrect facts. The failure to list the facts and assumptions on which Dr. David relied would make it impossible for the trier of fact to know what the factual underpinnings of the report were.

[99] The plaintiff further argues that there are unknown facts that are weaved into Dr. David's analysis obscuring what is opinion and what is a factual assumption.

[100] The plaintiff complains that Dr. David provided commentary on certain documents but did not specifically state what portion of the document he was referring to or relying on.

[101] The plaintiff submits that Dr. David is argumentative in his report and takes on the role of an advocate. The plaintiff provided a number of examples of this, in particular, at page 2 of Dr. David's report under the heading Commentary, Dr. David wrote the following:

> Documented history of TMJ dysfunction and exacerbation of this is typically a behavioral response to stressors and anxiety. The TMJ is the front wall of the external ear canal, and increased clenching of the TM joint, grinding of the

> teeth, and tenderness of the masticatory muscles as noted on specialist examination are suggestive of exacerbation of TMJ dysfunction.

[102] Further down Dr. David opines that "It is possible that the MVA played a causal or exacerbatory role in NLs Pre-existing conditions of TMJ dysfunction". However, during cross-examination Dr. David argued that it is more probable than not that the plaintiff was not suffering from TMJ from the accident.

[103] The plaintiff also argues that Dr. David does not state (as he is required to do) what the purpose of his report is. The plaintiff makes note that Dr. David only stated that "I am in receipt of your January 31, 2014 written request for a medicolegal report regarding Nancy Jane Lawrence (NL)", in referring to the retainer letter sent by the defendants counsel to Dr. David.

[104] The plaintiff argues that Dr. David's report is not responsive to that of Dr. Longridge's and that Dr. David provides new opinion evidence. In that regard the plaintiff points to the fact that at page 6 of Dr. David's February 6, 2014 report he comes to the opinion that the plaintiff's use of a drug called Asacol and the nature and onset of her hearing loss are suggestive of outer hair cell toxicity.

[105] The plaintiff argues that there will be significant prejudice to her if this report is admitted into evidence because the plaintiff was not in a position to properly cross-examine Dr. David at the video deposition and Dr. David is not available for this trial.

[106] The plaintiff says that the entire report of Dr. David should be excluded as well as the evidence taken on the video deposition because the report does not comply with the mandatory requirements of Rule 11-6. It would be impossible for the trier of fact to determine what exactly Dr. David relied on in forming his opinion.

[107] The defendant argues that Dr. David's report is not significantly flawed and the video deposition evidence makes it very clear what documents and facts Dr. David relied on. The defendant further argues that the factual assumptions are not in issue.

[108] The defendant acknowledged that through inadvertence the certification that is required under the Rules was omitted. They say this has been fixed.

[109] The defendant goes on to point out that there is no question who the author of the report is and it became clear during the video deposition as to the factual underpinnings of Dr. David's report.

[110] The defendant relies on the decision of *Lennox v. Karim*, 2012 BCSC 930, which dealt with the admission of a responsive expert report. In particular, the court, at paragraph 34, states the following:

> The defendant in this case is responding only to the plaintiff's expert and is not being tendered to give evidence of an independent opinion. Rather, his opinion is tendered to explain the reasons why he disagrees with the opinions and conclusions of Dr. Stewart.

[111] The defendant argued that Dr. David's report should be admitted into evidence and that he referenced the documents that he reviewed. They say it is clear that Dr. David reviewed the documents and what facts he relied upon.

[112] I have reviewed the approximate 3 ½ hours of video deposition of Dr. David, of which 3 hours were a very thorough and comprehensive cross-examination of Dr. David by counsel for the plaintiff.

[113] The report of Dr. David was tendered as a responsive report. Dr. David did not take a medical history from the plaintiff nor did he conduct a medical examination of the plaintiff.

[114] Dr. David is clearly the sole author of this report however despite the fact that he was requested by the defendant to complete a document review he does not list all of the documents that he reviewed. He does say on the first page of his report the following "I am in receipt of your January 31, 2014 written request for medicolegal report regarding Nancy Jane Lawrence (NL)". That letter was made an exhibit at the deposition of Dr. David which purportedly enclosed a number of documents relating to the medical condition of the plaintiff. I also note that the letter specifically requested that Dr. David critique the opinions of Dr. Longridge and Dr. Crosby.

[115] Dr. David does refer specifically to some of the documentation he reviewed and commented on it.

[116] During the video deposition of Dr. David he was asked questions relating to documents that he had reviewed prior to creating his medicolegal report. He said the following at page 17 line 4 through line 27:

> Q Doctor, in your report, you listed every document you relied on in forming your opinion; correct?
>
> A Correct.
>
> Q And there are no documents on which your opinion is based and you relied on forming your opinion that you have not listed; correct?
>
> A To the best of my knowledge.
>
> Q So you would agree with that, then?
>
> A Correct.
>
> Q If a document was not listed in your report, then you did not review it in forming your opinion; correct?
>
> A Not correct. I reviewed every document that was presented and included the information that was material within my area of expertise.
>
> Q Doctor, in performing a records review opinion, the documents you reviewed in forming your opinion are also a foundation of your report; is that correct?
>
> A Correct.
>
> Q And , Doctor you're aware of your duty to list every document relied on by you in forming your opinion; correct?
>
> A Correct.

[117] It is not clear from either a review of Dr. David's report or the evidence of the video deposition what documents he actually reviewed. It is also not clear what Dr. David means when he says he reviewed every document “that was presented”.

[118] Dr. David is inaccurate in his recounting of the documents he reviewed. In particular Dr. David, in referring to the February 2011 consultation report of Dr. Dickson, says “there is a notation of history of clenching teeth and grinding (bruxism)”.

[119] That is not what is in Dr. Dickson's consult report. What Dr. Dickson said was "her dentist recently thought she was grinding her teeth". There is no indication as to clenching her teeth.

[120] Interestingly Dr. David does not mention the following from Dr. Dickson's consult report that reads in part as follows:

> She also has surprisingly some significant nerve loss in her ears and this needs to be monitored. She is borderline needing a hearing aid at the present time. She needs to be rechecked in the future as she misses things.

[121] Dr. David opines that the use of Asacol can cause hearing loss. This is a fresh opinion which is not responsive in nature. Dr. David also extrapolates from a College of Pharmacist of British Columbia Pharmanet printout the number of Asacol tablets that the plaintiff took. In my view that is speculation on the part of Dr. David as he did not interview the plaintiff with regard to her Asacol use. While Dr. David refers to Dr. Crosby relative to the prescription for the Asacol he surprisingly does not address Dr. Crosby's opinion that the plaintiff's hearing loss may have been caused by the accident. This begs the question as to whether or not he reviewed Dr. Crosby's medicolegal report dated December 29, 2013. In the instruction letter from the defendants counsel he was asked to do this.

[122] Dr. David, at page 7, paragraph 5 of his report, states: "Dr. C Hershler (physiatry); in IME dated January 2014 there is no noted complaint of tinnitus, hearing loss or imbalance". This is not a totally accurate statement because Dr. Hershler does state in the section of his report headed Diagnosis the following:

> From a review of the documentation and, in particular, the reports of Dr.'s Crosby & Longridge, I have become aware of Ms. Lawrence's complaints with ear pain and decreased hearing etc. These issues were not addressed in my medicolegal opinion and, in any event, are outside of my area of expertise. I would defer to Dr. Longridge with regard to diagnosis, causation, management and prognosis.

[123] I question how thoroughly Dr. David read Dr. Hershler's report.

[124] Dr. David also, in the commentary portion of his report, refers to various notations that have come from the records though he does not identify which records they came from.

[125] In my view, even after reviewing the deposition evidence, it is not clear what documents Dr. David relied on in forming his opinion nor am I capable of determining the factual assumptions on which he relied. His report does not list the documents he reviewed in detail, it is not clear what documents he had in preparing his report and there are a number of oblique references to notations which are presumably found in the records but it is not clear where in the records he found them.

[126] Rule 11-6 (1) states a number of mandatory requirements of an expert report. Dr. David's report did not contain the certification required under Rule 11-2 (2) though that was remedied at a later date. It does not contain the instructions provided to Dr. David. His report is not clear as to the nature of the opinion being sought and the issues in the proceeding to which the opinion relates. But most importantly it does contain a description of the factual assumptions on which his opinion is based. There is not a comprehensive list of the documents that he relied on. Where he does discuss a document that he relied on he either makes vague, inaccurate or misleading references to that document.

[127] I am mindful of Rule 11-7 (6) however. The admission of this report will cause prejudice to the plaintiff because despite a very lengthy cross-examination it is not clear what the purpose of Dr. David's report was and what his factual assumptions were.

[128] In my view, for all the above noted reasons Dr. David's report and evidence at the video deposition are inadmissible.

POSITION OF THE PARTIES

The plaintiff

[129] The plaintiff argues that they have proved on a balance of probabilities that the defendant's negligence caused or materially contributed to her injuries. In particular the plaintiff argues that the totality of the evidence supports the conclusion that but for the defendant's negligence the plaintiff would not have suffered any injury.

[130] The plaintiff argues that she had worked prior to the accident at the A Chance to Choose program without any physical limitations or difficulties with her hearing. She also points to the fact that the year before the accident she graduated from the Rhodes Wellness College and was a highly active person.

[131] The plaintiff says that prior to the accident she did not have any problems in her neck, back, jaw, or problems with headaches or hearing.

[132] The plaintiff argues that she was involved in a rear-end collision with no prior warning of the impact and that her body was thrown forward and back as a result of that impact. Dr. Crosby and Dr. Hershler opine that the accident was the cause of her injuries and myofascial pain.

[133] The plaintiff also argues that Dr. Longridge opined that her hearing loss or worsening of her hearing is a result of the accident. The plaintiff points to the fact that Andrea Mason and Kaitlin Warmerdam noticed problems with her hearing after the accident.

[134] The plaintiff argues that the appropriate range for an award for non-pecuniary damages is $55,000 to $70,000. The plaintiff submits in assessing these damages the factors cited in the decision of *Stapley v. Hajslet*, 2006 BCCA 34 apply. She also relies on the decisions of *Strazza v. Ryder*, 2012 BCSC 1693; *Turner v. Coblenz*, 2008 BCSC 1801; *Mayenburger v. Lu*, 2009 BCSC 1308; *Kelly v. Kotz*, 2014 BCSC 244; and *Chingcuango v. Herback*, BCSC 268.

[135] The plaintiff argues that she is entitled to compensation for delay and loss of opportunity to earn income as well as past loss of income earning capacity. The plaintiff argues that as a result of the accident she was unable to work in her chosen field from the date of the accident until August 2011. This equates to a period of 42 weeks that she was unable to earn income.

[136] The plaintiff argues that using her rate of pay of $25 per hour from the A Chance to Choose program and assuming that she could have worked 35 hours per week she would have earned $36,750 during this period of time.

[137] The plaintiff states that the money that she did earn from the On Page Media job as well as her job as a Secret Shopper during the same period of time which was $8,882.50 should be deducted from the $36,750. This would equate to a loss of $27,867.50. The plaintiff then argues that this amount should be increased by 4% or $1,114.70 to account for the minimum statutory vacation pay as dictated by the *Employment Standards Act*, R.S.B.C., Chapter 113. This would amount to a total loss of $28,982.20.

[138] The plaintiff further argues that she continues to have difficulties and limitations which impact and diminish her ability to earn income. In particular the plaintiff says that in her current job there are physical requirements which include lifting and transferring clients which she is not able to do. Also the plaintiff argues that both Drs. Longridge and Crosby opine that her hearing loss did impact her ability to do her counseling work.

[139] In terms of future loss of income earning capacity the plaintiff submits that the capital asset approach is the appropriate method to be used. At present the plaintiff makes $41,857.92 per year. The plaintiff was 37 years old at the time of the accident and continues to have physical symptoms and limitations as well as permanent hearing loss.

[140] The plaintiff argues that utilizing the capital asset approach she should be awarded the equivalent of 1 to 2 years' of income. The plaintiff says that this amount is $40,000 to $80,000.

[141] The plaintiff also argues that she has a loss of housekeeping capacity. In that regard the plaintiff says that prior to the accident she worked approximately 3 1/2 hours per week on housework. As a result of the accident she was limited in the amount of housekeeping duties that she could perform. She was unable to scrub her floors, toilet, or wash her mirrors and windows until September 2011. During this time the plaintiff was also unable to vacuum and only did about 1 hour of housekeeping work per week.

[142] The plaintiff says that for the first year after the accident she was only able to do 1 hour per week of housework instead of her usual 3 1/2 hours per week. The plaintiff says her loss can be assessed over that year at 130 hours. The plaintiff says that a figure of $20 per hour should be used to calculate this loss which would equate to $2,600.

[143] The plaintiff says from September 2011 to May 2012, which is 39 weeks, the plaintiff was only able to do 1 ½ hours of work per week which equates to 78 hours less than she would normally do. The damages amount to $1,560.

[144] The plaintiff says that from May 2012 to May 2013, which is a period of 52 weeks, she was only able to do 2 1/2 hours per week of housekeeping which equates to a loss of 52 hours or $1,040.

[145] The plaintiff says the total loss of past housekeeping capacity is $5,200.

[146] The plaintiff also argues that she is entitled to damages for loss of future housekeeping capacity. In that regard the plaintiff says she's entitled to $1,000 per year in damages for a period of 10 years. The plaintiff argues that factoring in a discount rate of 2.5% this would equate to a loss of $8,752. The plaintiff is seeking an award for future loss of housekeeping capacity of $8,000.

[147] The plaintiff is also seeking an award for cost of future care.

[148] The plaintiff points to the fact that Dr. Crosby opined that she should have access to physiotherapy, massage therapy and acupuncture on an as needed basis indefinitely. Also Dr. Longridge opined that the plaintiff requires binaural hearing aids which presently cost $2,500. These hearing aids have a life expectancy of 5 years. The plaintiff argues that she will require hearing aids over the next 25 to 30 years. This would equate to a loss of approximately $25,000 to $30,000.

[149] The plaintiff argues that for her physical limitations massage therapy costs approximately $150 per session and physiotherapy costs approximately $60 to $80 per session. The plaintiff says that she will need 12 to 15 sessions per year of physiotherapy as well as 6 massage therapy sessions per year. This would average $2,265 per year. The plaintiff argues that she should be awarded damages which will compensate her for at least 10 to 20 years of therapy. This equates to damages in the amount of $22,650 to $45,300.

[150] The plaintiff argues that her total future care needs range between $47,650 to $75,300.

[151] Finally the plaintiff argues that she is entitled to special damages which can be found in Exhibit 1 at tabs 9-19. The parties have agreed that the amounts incurred by the plaintiff are $4,641.67 subject to the defendant being able to argue whether or not these expenses were necessary, reasonable or related to the accident.

The defendant

[152] The defendant argues that the plaintiff has not proven on a balance of probabilities that her injuries were caused by the accident. In the alternative the defendant argues that any of the plaintiff's ongoing complaints are not related to the accident.

[153] The defendant argues that the force of the impact of the accident and the plaintiff's credibility are important and relevant considerations in assessing whether she has proven her claim on a balance of probabilities.

[154] The defendant argues that the plaintiff acknowledged on cross-examination that she had attended Armstrong Physiotherapy on 10 occasions between August 2009 and the accident date despite the fact that she had originally said she was not having any ongoing pain or problems with her neck, back, jaw or headaches prior to the accident. The defendant points to the fact that the plaintiff was actually driving from Vancouver to Armstrong for this purpose.

[155] The defendant argues that the plaintiff's credibility is impacted because she has denied the authenticity of the clinical records of Armstrong Physiotherapy. The defendant says that the plaintiff knew that her physiotherapist had moved to France making it impossible for him to be subpoenaed to court.

[156] The defendant argues that neither Dr. Crosby nor Dr. Hershler were made aware by the plaintiff that she was attending physiotherapy and acupuncture prior to the accident. Both doctors agreed that this information would be material facts that they would have taken into consideration in coming to their opinions.

[157] The defendant says that with regard to the plaintiff's physical complaints she has had limited physician visits over the last 3 1/2 years. And the defendant points to the fact that the plaintiff did not see Dr. Crosby until two weeks after the accident.

[158] The defendant also points to the fact that the plaintiff denied the accuracy of some of the notes in Dr. Crosby's clinical records. The defendant states, that the plaintiff attended physiotherapy less often in the three months after the accident than in the three months before the accident.

[159] The defendant argues that the plaintiff’s self-report to Dr. Crosby on July 13, 2011 when she says “since the MVA she had never been without pain” is inaccurate and unreliable because other clinical records show that she had pain-free periods.

Also the plaintiff had incorrectly told Dr. Crosby on July 13, 2011 that she was attending acupuncture daily.

[160] The defendant argues that the plaintiff's own expert, Dr. Hershler, on December 1, 2011 found that she had a pain free, fluid and full range of motion of her entire spine.

[161] The defendant argues that Dr. Boyle found that the plaintiff did not have any objective symptoms when he saw her on December 10, 2013. Dr. Boyle noted that the plaintiff told him that she had resumed her pre-accident activities such as hiking, dancing and yoga.

[162] The defendant also argues that Dr. Crosby's opinion should be given little weight because she had no record of receiving the clinical records from the plaintiff's previous physician and she was not an impartial expert.

[163] Specifically the defendant says the plaintiff has not proven that there was a change in her hearing following the accident or that the accident was a cause of her hearing problem. The defendant says that the plaintiff gave inconsistent evidence regarding her hearing because she at times has both acknowledged that she did not have perfect hearing her whole life yet at other times she has denied any ongoing problems prior to the accident. Also any denial by the plaintiff of hearing problems before the accident contradicts the history that she gave to Dr. Longridge. Dr. Longridge states that the plaintiff told him that she had difficulty pre-accident with regard to her hearing.

[164] The defendant argues that the plaintiff told Dr. Longridge that she noticed difficulty with her hearing 6 to 12 months after the accident, which is consistent with Dr. Crosby's records that February 2011 was the first time she complained of hearing problems. However, during the trial the plaintiff testified that she noticed a difference in her hearing within a month after the accident.

[165] The defendant submits that the appropriate range for non-pecuniary damages is $11,000 to $17,000. In that regard the defendant relies on the following cases:

Morales v. Nielsen, 2009 BCSC 1890; *Mohamadi v. Tremblay*, 2009 BCSC 898; and *Lessay v. Canuel*, 2013 BCSC 455.

[166] In the alternative the defendant argues that if it is accepted that the plaintiff's pre-existing condition was non-contributory and that she has some minor ongoing complaints as well as some degree of hearing loss then the appropriate range of compensation for non-pecuniary damages is $27,000 to $30,000. In that regard the defendant relies on the following cases: *Vela v. MacKenzie*, 2012 BCSC 438; *Co v. Watson*, 2010 BCSC 950; *Nair v. Cindric*, 2013 BCSC 2128; *Basi v. Buttar*, 2010 BCSC 9; and *Miller v. Kamloops (City)*, 2003 BCSC 908.

[167] The defendant further argues that the plaintiff has not proven a loss of income or opportunity to earn income as a result of the accident. The defendant points to the fact that there is no medical opinion that the plaintiff has been disabled from work. The defendant argues that the plaintiff's bare assertion of past loss of income or opportunity to earn income does not correspond with the evidence in this case.

[168] The defendant also argues that the plaintiff has not proven a real and substantial possibility of a future event leading to an income loss. The defendant points to the fact that there is no expert evidence such as a functional capacity evaluation outlining the limitations of the plaintiff.

[169] The defendant further argues that the plaintiff has not proven on a balance of probabilities that she has required or will require housekeeping services. Again they say there is no expert opinion that she is limited in her housekeeping capacity as a result of the accident. Also the defendants point to the fact that Dr. Crosby gave evidence that housework was not raised with her by the plaintiff in their meetings.

[170] The defendant also argues that there is no evidence from the plaintiff that she cannot vacuum or clean floors but rather, at best, the plaintiff limited herself from these activities due to fear. The defendant also argues that the plaintiff's common-law partner Mr. Craig Brown did not give evidence at this trial and as such an adverse inference should be drawn from his absence.

[171] In regard to special damages the defendant admits the plaintiff has incurred expenses in the amount of $4,641.67 but disputes that they were necessary, reasonable or related to the accident.

[172] The defendant submits that there is a lack of medical evidence that physiotherapy, massage therapy and acupuncture expenses were medically justified and says that the plaintiff would likely have incurred these expenses in any event.

[173] The defendant argues that the plaintiff has failed to prove that she will incur costs related to future care as a result of the accident. The defendant argues that Dr. Boyle has opined that massage therapy, chiropractic treatment and acupuncture are not appropriate for the plaintiff. The defendant also argues that Dr. Hershler recommended daily stretching and yoga.

DECISION

Non-Pecuniary Damages

[174] The central issue in this case is whether the accident caused the plaintiff's injuries and in particular her hearing loss. The plaintiff must establish on a balance of probabilities that but for the defendant's negligence she would not have suffered any injury: *Clements v. Clements*, 2012 SCC 32, at para. 8.

[175] I found the plaintiff's evidence troubling with regard to the injuries she says that she sustained in the accident as well as the progression of those injuries. With regard to the plaintiff's evidence relating to her hearing loss she testified that she first noticed difficulties with her hearing approximately one month after her first visit with Dr. Crosby following on October 5, 2010. She says that she did not mention it to Dr. Crosby initially because she was frightened about losing her hearing. The plaintiff did not mention her hearing loss to Dr. Crosby until February 2011.

[176] This does not accord with the history that she gave to Dr. Longridge wherein she said that she noticed difficulties with her hearing 6 to 12 months after the accident.

[177] The plaintiff testified that she did not have perfect hearing for most of her life yet during this trial she denied any ongoing hearing problems at the time of the accident.

[178] I appreciate the plaintiff may have been frightened about the potential of her hearing diminishing. However, given the fact that she had hearing problems most of her life, it makes little sense that she would not mention it immediately to her family doctor, Dr. Crosby.

[179] I also have difficulties with the plaintiff's credibility because she denied the accuracy of comments attributed to her by her own treaters, Dr. Crosby and Dr. Hershler. She also denied comments attributed to her by Art Mallinson, PhD., in his vestibular assessment.

[180] I found the plaintiff's evidence flippant at points and in particular when she was cross-examined regarding Dr. Boyle's comments attributed to her that she could do all the chores that were required of her. As already mentioned she responded that she had no idea what she told Dr. Boyle.

[181] The plaintiff gave vague evidence in regard to the onset, duration and intensity of her various pains.

[182] It is also interesting to note that despite the fact that the plaintiff denied any ongoing pain or problems prior to the accident she did, on cross-examination, acknowledge that she had attended Armstrong Physiotherapy on 10 occasions between August 2009 and the accident. I found her to be evasive as to the reason for these attendances and I found it very suspicious that she has denied the authenticity of the clinical records of Armstrong Physiotherapy. I say that because Mr. Kowalik, who was her registered physiotherapist, had moved to France and was unavailable for the trial yet the plaintiff is still claiming her visits there as special expenses.

[183] In my view the plaintiff is an unreliable witness.

[184] Dr. Longridge opined that the accident was the cause of the plaintiff's hearing loss. However his opinion was based on the plaintiff's statement that she is now having more difficulty hearing than before the accident. Dr. Longridge did strongly suggest that the plaintiff should try to obtain her old hearing tests to determine what her pre-accident hearing status was for comparison. This has not been done.

[185] Dr. Longridge also noted that the plaintiff, on a very occasional basis, will suffer from tinnitus. He agreed that the onset of the tinnitus, if it was as a result of the accident, should be in close proximity in time to the accident. There are no reports by the plaintiff to her treating medical practitioners as to suffering from tinnitus shortly after the accident.

[186] I am also mindful that this was a relatively minor accident with no obvious mechanism which would have caused an injury to the plaintiff's hearing.

[187] I also have difficulty with Dr. Longridge's opinion given that he does not have any baseline information as to what the plaintiff's hearing deficit was pre-accident to determine if there was in fact any loss of hearing post-accident.

[188] Dr. Crosby also opined that the accident was the cause of the plaintiff's hearing loss, however Dr. Crosby was not aware of the plaintiff's pre-accident hearing difficulties. Dr. Crosby also does not have any special expertise to diagnose or treat hearing loss. For that reason I am putting no weight on Dr. Crosby's opinion as to the cause of the plaintiff's hearing difficulties.

[189] I am also mindful of the lay witnesses that described some difficulties with the plaintiff's hearing after the accident however Andrea Mason agreed that the plaintiff may have had hearing problems before the accident. Robert Lewis and Kaitlyn Warmerdam described a few occasions where the plaintiff appeared to be having hearing difficulties.

[190] I reject the plaintiff's evidence as it relates to the onset and worsening of her hearing problems. In my view the plaintiff has not established that but for the accident her hearing loss would not have occurred.

[191] I do accept that the plaintiff suffered neck and upper back injuries as a result of the accident. These are well documented by Dr. Crosby. Dr. Hershler opined that the plaintiff suffered myofascial pain as a result of the accident. Dr. Boyle also opined that the plaintiff may have sustained a myofascial strain as a result of the accident.

[192] Dr. Crosby, in her medicolegal report dated December 29, 2013, noted on September 29, 2011 that the plaintiff indicated that her pain had reduced to 1/10 on a scale of 1 to 10.

[193] Dr. Crosby also noted on February 9, 2012 that the plaintiff's neck and back symptoms flared since the plaintiff stopped attending physiotherapy, massage therapy and acupuncture.

[194] Dr. Crosby noted on August 19, 2013 that the plaintiff's myofascial pain symptoms had been much better over the course of the one-year since Dr. Crosby last saw the plaintiff. The plaintiff also noted that her right neck was tight and would bother her when she drove though her overall pain level was manageable.

[195] Based on the evidence I find that the plaintiff suffered regular myofascial pain symptoms until approximately September 29, 2011. Since then she has experienced occasional flare-ups.

[196] In *Stapley v. Hejslet*, 2006 BCCA 34, our Court of Appeal outlined the factors, at para. 46, to be considered when assessing non-pecuniary damages:

> The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;

> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[197] Taking into account all of the relevant facts and upon a review of the case law provided by counsel, I find that an appropriate award for non-pecuniary damages is $30,000.

Past Loss of Earning Capacity/Loss of Opportunity to Earn Income

[198] The plaintiff argues that as a result of the accident she was unable to work in her chosen field from the day of the accident until August 2011 when she returned to work at A Chance to Choose.

[199] The plaintiff, in part, attributed her inability to work in her chosen field to her hearing problems. As I have already found the plaintiff has not proven that this problem was as a result of the accident.

[200] The plaintiff testified that after graduation from Rhodes Wellness College she was waiting to hear about financial grants that she had applied for in order to start her own business. I have no evidence as to whether or not the plaintiff received these grants.

[201] There is no evidence that the plaintiff's myofascial pain disabled her from working at any point after the accident.

[202] I reject the plaintiff's claim for delay and loss of opportunity to earn income or past loss of income earning capacity.

Future Loss of Income Earning Capacity

[203] The plaintiff argues that she should be awarded $40,000 to $80,000 to compensate her for future loss of income earning capacity.

[204] In *Parker v. Lemmon*, 2012 BCSC 27, Mr. Justice Savage, at para. 42, summarized the approach to such claims as set out in the decision of *Perren v. Lalari*, 2010 BCCA 140, as follows:

> [42] The approach to such claims is well set out in the decision of Garson J.A. in *Perren v. Lalari*, 2010 BCCA 140 at paras. 25-32, which I summarize as follows:
>
> (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
>
> (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
>
> (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
>
> (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
>
> (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
>
> (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
>
> (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
>
> (8) An earnings approach will be more useful when the loss is more easily measurable;
>
> (9) The capital asset approach will be more useful when the loss is not easily measurable.

[205] Dr. Hershler opines in his January 15, 2014 medicolegal report that the prognosis for the plaintiff is that she (as of her last visit with him in September 2013) is likely to experience episodic symptoms for at least another one-to-two years.

[206] The plaintiff testified that her current employment requires her to lift and transfer patients which she is not able to do because of the pain in her neck and back. I accept this evidence.

[207] I accept there is a real and substantial likelihood that the plaintiff may suffer a loss of employment because of her inability to lift and transfer patients and because of the likelihood that she will experience episodic symptoms or flare-ups in the future. In my view the capital asset approach is the proper approach to take. The plaintiff's earning capacity has been diminished albeit in a relatively small way.

[208] The appropriate amount of damages for loss of earning capacity is $10,000.

Loss of Housekeeping Capacity

[209] The plaintiff argues that while the loss of housekeeping capacity is a distinct pecuniary loss the court can also address this loss by including an award for it in non-pecuniary damages.

[210] The plaintiff seeks both past housekeeping capacity and future loss of housekeeping capacity.

[211] There is no evidence in this case that the plaintiff either hired somebody to do her housekeeping work or that her boyfriend did the work.

[212] There is also no medical evidence that the plaintiff cannot perform her household chores.

[213] The plaintiff has failed to prove any loss relating to her housekeeping capacity as a distinct pecuniary loss. The award for non-pecuniary damages in my view adequately compensates the plaintiff for any upset she may have had in not being able to clean her residence.

Cost of Future Care

[214] The plaintiff seeks compensation for the cost of future physical therapy, massage therapy and acupuncture treatments for at least 10 to 20 years based on the opinion of Dr. Crosby.

[215] Dr. Crosby, in her medicolegal report dated December 29, 2013, states the following:

> In terms of her myofascial soft tissue injuries, I would expect that she will require a stretching and physical conditioning program for the years to come. I concur with Dr. Hershler's report that it would be appropriate to integrate such conditioning into her yoga and exercise program. However, she is still not completely recovered and continues to experience neck symptoms. Also earlier this year, she found that when she stopped physiotherapy, her condition worsened. Hence, I would expect for the months and possibly for the years to come, physiotherapy, massage therapy and acupuncture may be of benefit to her at least for symptom palliation. Thus, I would recommend that she have access to these modalities on an as-needed basis indefinitely.

[216] Dr. Hershler recommended daily stretching and yoga for the plaintiff. He also prescribed a topical anti-inflammatory cream.

[217] Dr. Boyle agreed with the recommendations of Dr. Hershler and also did not think that massage therapy, chiropractic treatment and acupuncture were appropriate.

[218] I prefer the opinion of Dr. Hershler over that of Dr. Crosby as Dr. Hershler's expertise is in physical medicine and rehabilitation. Also Dr. Crosby does not explain why these modalities of treatment should be on an as-needed basis indefinitely.

[219] Dr. Hershler opined that the plaintiff will experience episodic symptoms in the foreseeable future. Both Dr. Hershler and Dr. Boyle agree that yoga and stretching are appropriate for the plaintiff. The plaintiff has proven that she will require some future care. An appropriate amount for future care is $1,500.

Special Damages

[220] The parties have agreed that the plaintiff has incurred expenses in the amount of $4,641.67 as set out in Exhibit 1, tabs 9 -19. This is subject to the defendant's argument as to whether the expenses were necessary, reasonable or related to the accident.

[221] I accept the defendant's argument that the expenses related to Armstrong Physiotherapy was likely to have been incurred by the plaintiff in any event, and in addition, the plaintiff has not proven on a balance of probabilities that these expenses were necessary. I will reduce the special expenses by $450.

[222] Also, based on the submissions of the parties that the claim for taxi expenses had been abandoned in relation to the plaintiff's attendance at the examination for discovery, I will reduce the special expenses by an additional $76.20.

[223] I will also reduce the claim for reimbursement for the plaintiff's attendance at Crossroads Physiotherapy for the visits dated July 21, 2011, November 3, 2011 as well as April 7, 2011, which appeared to be for unrelated matters. This reduction will be in the amount of $75.

[224] Finally, I accept the defendant's argument that gas expenses in the amount of $153.69 should be deducted from the special expenses as they relate to the plaintiff's travel for this litigation from Kelowna. The plaintiff's move to Kelowna was not related to this accident.

[225] The plaintiff is entitled to special expenses in the amount of $3,886.78.

SUMMARY

[226] The plaintiff is entitled to damages in the following amount:

1)	Non-pecuniary damages:	$30,000.00
2)	Future loss of earning capacity:	$10,000.00

3)	Cost of Future Care	$ 1,500 .00
4)	Special expenses:	$ 3,886.78
	Total:	$45,386.78

COSTS

[227] The plaintiff is entitled to her costs of this action unless there are circumstances that I am unaware of in which case the parties are at liberty to address me on the issue of costs.

"R. S. Tindale, J."