

CITATION: Fraser v. Persaud, 2023 ONSC 1449
COURT FILE NO.: CV-16-5017-00
DATE: 2023 03 02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
JANE FRASER and CLINT FRASER)
)
Plaintiffs) A. Kwinter and S. Guirguis,
) Counsel for the Plaintiff
– and –)
)
)
VISHUAL PERSAUD)
)
Defendant)
)
) S. Sandhu and P. Rollo for the
) Defendant
)
) **Heard:** January 13, 14, 17, 18,
) 19, 20, 21, 24, 25, 26, 27, 28,
) February 1, 2, 3, 4, 7, 8, 9, 10,
) and May 2, 2022

REASONS FOR JUDGMENT

L. SHAW J.

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Introduction

[1] At the outset of these reasons, I want to comment on how this trial was conducted. This four-week trial was conducted entirely on Zoom, using electronic documents. As CaseLines had not yet been launched for use by this court, time was spent at the commencement of trial sorting through how documents, witnesses, and exhibits would be managed. I relied on the co-operation and efforts of counsel to file all documents electronically in a manner that made them manageable, including with the use of proper indexes and bookmarks in the large PDF joint document briefs. I want to thank counsel, and the court staff, who all worked together to ensure that this trial was conducted effectively and efficiently.

[2] The Plaintiff, Jane Fraser, was in a motor vehicle accident on January 15, 2015 (the “2015 accident”) as she was driving to work. Liability for the accident was conceded as the trial progressed. Ms. Fraser was also involved in a motor vehicle accident on September 18, 2012 (the “2012 accident”). She was at fault for that accident and did not commence a claim for any injuries she sustained in it.

[3] Ms. Fraser sustained soft-tissue injuries in both accidents. Her current condition has been diagnosed as chronic pain, fibromyalgia, major depressive disorder, post-traumatic stress disorder, somatic symptom disorder, and mild head injury. She says that she currently suffers from headaches, left shoulder pain, and

low back pain. She reports being forgetful and depressed. She wears a back brace and has been using a cane for the past two years. Ms. Fraser's evidence was that she was 70% to 80% recovered from the 2012 accident by the time of the 2015 accident. She says that her current physical, psychological, and cognitive impairments are permanent and were caused by the 2015 accident. As a result of these impairments, she says she has been unable to work or live on her own since 2018 and has a permanent inability to return to work.

[4] In this action, Ms. Fraser seeks damages for her pain and suffering, past and future income loss, and future care costs as a result of her injuries. Her son, Clint Fraser, advances a claim under the *Family Law Act*, R.S.O. 1990, c. F.3 for loss of his mother's care, guidance, and companionship. He also seeks damages for the value of the care services he has provided to his mother.

[5] Ms. Fraser was treated for mental health issues in 2004/2005. The gravamen of this dispute is whether the 2015 accident was a cause of Ms. Fraser's current impairments, if I find that she has any, or if her current impairments would instead be a result of her pre-existing mental health issues and/or as a result of the 2012 accident. Also at issue is the extent to which Ms. Fraser was recovered from the 2012 accident at the time of the 2015 accident.

[6] The defence advances two theories in defending this claim. The first is with respect to causation. The defence argues that, at most, Ms. Fraser sustained minor soft tissue injuries in the 2015 accident from which she has recovered. The defence position is that any of Ms. Fraser's current physical and psychological impairments are unrelated to the 2015 accident and result from pre-existing health issues and injuries from the more serious 2012 accident.

[7] It is not in dispute that Ms. Fraser was diagnosed with a major depressive episode ("MDE") and post traumatic stress disorder ("PTSD") in 2004. Relying on medical opinions, the defence argues that she experienced another episode of MDE and PTSD as a result of the 2012 accident and that she was suffering from these conditions at the time of the 2015 accident. The defence argues that to the extent Ms. Fraser has any impairments today, it is a result of these pre-existing conditions.

[8] The second related theory is that Ms. Fraser is exaggerating her current pain and psychological complaints and is malingering. Relying on its litigation experts, the defence argues that Ms. Fraser is partially malingering by grossly exaggerating her current symptoms and is also falsely misattributing her current symptoms to the 2015 accident for financial gain. The defence asserts that since Ms. Fraser was at fault for the 2012 accident but not the 2015 one, she has a financial motivation to

misattribute her impairments to the 2015 accident to seek recovery in this tort action.

[9] Ms. Fraser's credibility and reliability was a key issue throughout this trial. The defence casts her as a malingerer, motivated by financial compensation. The Plaintiffs' theory is that Ms. Fraser was always a hard-working individual who worked continuously from a young age, had recovered quickly from her diagnosis of MDE and PTSD in 2005, and had also substantially recovered from the 2012 accident when she was involved in the 2015 accident. Being a dedicated worker who needed to support herself, Ms. Fraser continued to work for a number of years after the 2015 accident until her condition deteriorated to the point that she had to stop working.

[10] I will state from the outset that I accept Ms. Fraser's evidence about her current disabled condition. She qualified for a Canada Pension Plan Disability Pension ("CPP") effective in July 2018. Prior to that, she received short-term disability ("STD") benefits after she stopped working in March 2018. She also settled her claim for long term disability ("LTD") benefits in January 2020.

[11] I accept that Ms. Fraser cannot return to work and that she needs future care and assistance in the home. Ms. Fraser's current limitations and impairments are

well-documented in the medical records and in the oral evidence I heard during this trial.

[12] All health care practitioners, even those called to testify for the defence, except for the defence litigation experts, concluded that Ms. Fraser was not malingering or exaggerating her symptoms. Other than Dr. Cameron, an orthopedic surgeon, and Dr. Reznek, a psychiatrist, who testified for the defence, the health care practitioners who testified concluded that Ms. Fraser is genuinely struggling. The issue is what role, if any, did the 2015 accident play in her current level of impairment.

[13] I found that Ms. Fraser presented with a flat affect. While this trial was conducted entirely on Zoom, I was able to see and hear Ms. Fraser clearly. I heard her groan more than once; this appeared to be due to pain. She asked for breaks when she was in pain, and at times, she stood. She became emotional more than once, including when testifying about her decision to stop working. At times, she appeared genuinely confused and struggled to focus. That did not appear feigned or in any way deliberative in order to avoid answering questions. My impression was that she was trying her best to answer the questions put to her. The observations I made of her conduct and demeanour are consistent with the

evidence of not only the lay witnesses but also the health care practitioners who treated and assessed Ms. Fraser.

[14] Ms. Fraser is struggling with her current levels of pain and psychological impairments. I accept Dr. Cameron's opinion that she does not have any orthopedic injuries, but I also accept Ms. Fraser's evidence that she lives in constant pain. This pain has played a role in her psychological condition which includes struggles with depression. She has also been treated for cognitive issues that are either the result of having sustained a minor head injury or are a consequence of her depression.

[15] Ms. Fraser was a hard-working person who was proud of her steady employment after moving to Canada in 1990. For 28 years after arriving in Canada, she never had to rely on government assistance until she stopped working in 2018. She won several perfect attendance awards from her employer, even after the 2015 accident; this reflects her work ethic. She is not a person who was looking for an excuse not to work.

[16] I am mindful that I can believe some, none, or all of a witness's evidence. Thus, while I accept Ms. Fraser's evidence regarding her current condition, there is some evidence that I find more problematic, including the extent to which she was recovered from the 2012 accident at the time of the 2015 accident given conflicting

evidence about what she told a psychologist in March 2015, shortly after the 2015 accident. This conflicting evidence plays a critical role in the defence of this claim.

[17] During this four-week trial, I heard from a number of lay witnesses, including Ms. Fraser's two adult children, friends, co-worker, and employer. I also heard from several treating health care practitioners, as well as non-party, participant, and non-participant experts called by the Plaintiff. The Defendant relies on the evidence of three non-party expert witnesses who examined Ms. Fraser in connection with her accident benefit claims following each accident. The Defendant also relies on two non-participant experts who examined Ms. Fraser at the request of the Defendant and provided opinions regarding the nature of Ms. Fraser's injuries in the 2015 accident and the cause of her current condition. There were also thousands of pages of documents filed as exhibits.

[18] Medical opinions diverge about the extent to which Ms. Fraser had recovered from the 2012 accident at the time of the 2015 accident. There is also a difference in medical opinion about whether Ms. Fraser is malingering or exaggerating her symptoms. Dr. Reznek is the only expert who opined that Ms. Fraser is malingering by falsely attributing the cause of her psychological impairments to the 2015 accident for financial gain. Dr. Cameron is the only expert who testified that Ms. Fraser is exaggerating her complaints of pain and cannot be believed.

[19] Given the issues in dispute, it is necessary to consider Ms. Fraser's health and work history prior to the 2012 accident, between the 2012 and 2015 accidents, and then after the 2015 accident.

[20] The roadmap of these lengthy reasons are as follows:

- i. In the first section, I will go over the evidence of all the witnesses who testified.
- ii. In the second section, I will discuss my assessment of the credibility and reliability of the lay witnesses and of Ms. Fraser. I will also address some of the issues that must be resolved. This will involve a discussion about whether she is malingering or exaggerating her symptoms and address the causation issue. I will also assess the evidence of the various health care practitioners and experts who testified and provide my reasons for accepting or rejecting the opinions proffered on various issues.
- iii. The last portion of these reasons will discuss the damages claimed by the Plaintiffs and a consideration of the application of the thin skull and crumbling skull principles.

[21] I am satisfied, based on the totality of the evidence, that Ms. Fraser was injured in the 2015 accident and but for that accident, she would not have suffered

her current impairments. She was a thin-skull victim and is entitled to damages for pain and suffering, loss of income, and future care costs.

Issues

[22] The issues which will be address in these reasons are as follows:

- i. Did Ms. Fraser have any health issues before the 2012 accident?
- ii. What injuries did Ms. Fraser sustain in the 2012 accident and to what extent did she recover from those injures prior to the 2015 accident?
- iii. What injuries did Ms. Fraser sustain in the 2015 accident and what are her current impairments?
- iv. Was the 2015 accident a cause of Ms. Fraser's current impairments?
- v. What are Ms. Fraser's damages for pain and suffering as a result of the 2015 accident?
- vi. Did Ms. Fraser sustain a past or future loss of income as a result of the 2015 accident?
- vii. Does Ms. Fraser have any future health care needs, and if so, are they a result of the 2015 accident?

- viii. Did Ms. Fraser sustain a permanent, serious impairment of an important physical, mental, or psychological function?
- ix. Is Clint Fraser entitled to damages?

Part 1: Review of the Evidence

1. Agreed Statement of Facts

[23] The following are the agreed facts:

Liability

1. The parties were involved in a two-vehicle motor vehicle accident on January 15, 2015, at approximately 2:08 p.m., on Orenda Road near its intersection with Dixie Road in Brampton, Ontario (hereinafter referred to as “the Collision”).
2. At all material times, the Defendant was the owner and operator of a silver 2000 Acura RL (hereinafter referred to as “the Defendant Vehicle”).
3. At all material times, the Plaintiff Jane Fraser (hereinafter referred to as “the Plaintiff”) was the operator of a black 2003 Dodge SX 2.0.
4. Just prior to the Collision, the Defendant stopped at the Tim Hortons branch located at 8160 Dixie Road in Brampton, Ontario (hereinafter referred to as “Tim Hortons”).

5. Just prior to the Collision, after attending Tim Hortons, the Defendant Vehicle proceeded through the plaza containing Tim Hortons towards Orenda Road.
6. Just prior to the Collision, the Defendant was intending to make a left turn into the eastbound lanes of Orenda Road from the plaza containing Tim Hortons.

Accident Benefits (September 18, 2012, Date of Loss)

7. The Plaintiff applied for Accident Benefits from Wawanesa Insurance by Application for Accident Benefits (OCF-1) dated November 10, 2012.
8. As of October 20, 2015, the Plaintiff had used \$2,406.10 in medical and rehabilitation benefits, and \$0.00 in attendant care benefits.
9. On October 26, 2015, the Plaintiff settled her Accident Benefits claim with Wawanesa Insurance in the amount of \$13,000.00 for past and future medical rehabilitation benefits.

Accident Benefits (January 15, 2015 , Date of Loss)

10. The Plaintiff applied for Accident Benefits from Unifund Assurance Company by Application for Accident Benefits (OCF-1) dated November 12, 2015.
11. As of November 17, 2021, the Plaintiff had used \$39,354.79 in medical and rehabilitation benefits, and \$0.00 in attendant care benefits.

12. As of the date of this Agreed Statement of Facts, the Accident Benefits claim with Unifund Assurance Company remains open.

Employment with ABC Technologies

13. The Plaintiff became an employee of ABC Air Management Systems Inc., a division of ABC Technologies, effective October 2, 2000.
14. The Plaintiff transferred to ABC Group Product Development, a division of ABC Technologies, effective May 25, 2009.
15. Following the motor vehicle accident of September 18, 2012, the Plaintiff took September 19-25, 2012, inclusive, as vacation days.
16. Following the motor vehicle accident of September 18, 2012, the Plaintiff received short-term disability from Manulife Financial for the period of September 26, 2012-October 28, 2012, inclusive, in the total amount of \$1,728.16.
17. Following the Collision, the Plaintiff took January 15, 2015, as a vacation day.
18. Following the Collision, the Plaintiff returned to work on January 16, 2015.
19. Throughout her employment with ABC Technologies, the Plaintiff has been employed as a full-time Machine Operator.
20. The Plaintiff's last paid day of work with ABC Technologies was on March 13, 2018.
21. In 2012, the Plaintiff earned \$33,973 through her employment with ABC Technologies.

22. In 2013, the Plaintiff earned \$35,937 through her employment with ABC Technologies.
23. In 2014, the Plaintiff earned \$43,084 through her employment with ABC Technologies.
24. In 2015, the Plaintiff earned \$42,251 through her employment with ABC Technologies.
25. In 2016, the Plaintiff earned \$46,939 through her employment with ABC Technologies.
26. In 2017, the Plaintiff earned \$53,889 through her employment with ABC Technologies.
27. In 2018, the Plaintiff earned \$23,637 through her employment with ABC Technologies.
28. In 2018, the Plaintiff received short-term disability benefits from Organizational Solutions Inc. from March 14-September 11, 2018, inclusive, in the total amount of \$9,991.50.
29. On January 17, 2020, the Plaintiff settled her long-term disability claim with Manulife Assurance Company of Canada arising from the claim made for the period commencing September 12, 2018, in the total amount of \$60,000.00.
30. Of the total amount of \$60,000.00 settled for the Plaintiff's long-term disability claim with Manulife Assurance Company of Canada arising from the claim made for the period commencing September 12, 2018, the Plaintiff received \$40,137.18.

[24] I thank counsel for working on this Agreed Statement of Fact. It is always helpful when counsel turn their minds to what can be agreed upon, as that reduces the number of witnesses who must be called and, therefore, shortens the length of the trial. It also assists in focusing on the issues that remain in dispute.

2. Review of the Evidence of the Lay Witnesses and Treating Health Care Practitioners

a) Ms. Fraser's Background and Work History

[25] Ms. Fraser was born in the country of Grenada on June 26, 1961 and is 61 years of age. She moved to Canada in 1990. She has two adult children: Clint, who is 43, and Clinta, who is 40. She has five grandchildren. She was living on her own at the time of the 2015 accident. Since 2018, she has lived with Shanta Grant, her son's goddaughter.

[26] Ms. Fraser left school at the age of 16 to help support her family. She worked at a stone quarry five days per week. She also worked at a nutmeg factory in the afternoons and on weekends. Her son, Clint, was born when she was 18, and her daughter was born when she was 21.

[27] Ms. Jacinta Frederik, Ms. Fraser's friend from Grenada, testified that Ms. Fraser was very hardworking when she lived in Grenada. Clint also recalls his mother working two jobs while living in Grenada.

[28] In 1990, Ms. Fraser moved to Canada when the quarry closed. Her children were 7 and 9 at the time. She left her children in Grenada and planned to have them move to Canada when she was settled. While they lived in Grenada, she sent money to support them. Clint moved to Canada in 1998, followed by Clint in 2004. Clint lived with her mother until approximately 2008 and Clint lived with his mother until 2010.

[29] When Ms. Fraser arrived in Canada, she found work within days at a printing factory, where she worked for six months until it closed. She then became a live-in caregiver with a family, looking after seven children. Her next job was again as a live-in caregiver, where she worked for six years.

[30] On October 2, 2000, Ms. Fraser began working for ABC Air Management ("ABC Air"), earning \$9.25 per hour. She worked as a machine operator on a production line assembling auto parts. She initially worked night shifts. She also worked a second job at Baycrest Health Sciences, caring for an elderly client a few days a week and on weekends. She worked at Baycrest in the morning and then

took a bus to ABC Air to work at her second job. Both Clinta and Clint recalled their mother working two jobs. She did this until 2004, when the client passed away.

[31] Ms. Fraser worked at ABC Air for nine years until May 2009, when the plant in Etobicoke closed. Rather than being laid off, she chose to be transferred to a plant in Brampton. That same month, she began working afternoon shifts at ABC Group Product Development (“ABC Group”), a related company, doing the same type of work. She had a further commute to work: it took her one hour, and she needed to take three buses if she did not have a ride. On January 31, 2011, rather than being laid off, Ms. Fraser transferred to the midnight shift. She continued to commute to work using public transportation or drove with a co-worker, Ms. Constance Kankam.

[32] Ms. Fraser was working at ABC Group at the time of the 2012 and 2015 accidents.

[33] Based on the undisputed evidence regarding Ms. Fraser’s work history, I find that she was a hard worker throughout her life – working two jobs at different periods of time. She has worked physically demanding jobs and was working at such a job at the time of the 2015 accident. Ms. Fraser is not a person who has a history of moving from job to job. She has worked consistently since the age of 16. Even as

a new immigrant to Canada, she was able to find work as soon as she arrived and worked continuously until 2018. She has never had any extended periods of unemployment and has a history of a strong work ethic.

b) Ms. Fraser's Activities and Hobbies Prior to the 2012 Accident

[34] The focus of Ms. Fraser's life has been her family and religious faith. She testified that she hosted dinners for her family every other weekend. Clint's wife, Ava Hinds, testified that the family was very close. They would gather at barbecues and take trips to Niagara Falls. Ms. Fraser also liked to visit at her friend's homes, go to movies, and go out to dinner. She also enjoyed shopping trips to the United States. Ms. Hinds described Ms. Fraser as a highly active person with an outgoing, strong, and vibrant personality. She was also very involved with her five grandchildren, babysitting them and going to their activities.

[35] Ms. Fraser is a devout Christian. Her faith and church play an important role in her life. She was a member of Holiness Worship Centre. She was treasurer for her church, helped with the children, sang in the choir, and led a praise and worship team. She also attended weekly Bible studies and prayer meetings. She read her Bible daily.

[36] Ms. Gloria Embden is a friend of Ms. Fraser from the church. She was in the choir and prayer group with Ms. Fraser. Ms. Fraser was part of a 5:00 a.m. daily prayer line telephone call started by Ms. Embden. They socialized in their homes and at parks. She described Ms. Fraser as warm and welcoming. She said that she and Ms. Fraser had a close relationship; they did a lot in the church together, including attending service on Sundays, weekly choir, and Bible study classes. She said Ms. Fraser always had a very neat home.

c) Ms. Fraser's Pre-Accident Health

[37] According to Ms. Fraser, she never had any major health issue prior to the 2012 accident, other than chest pain, for which she saw a specialist who told her that her heart was fine. Her evidence was that she had no prior injuries before the 2012 accident, or any lengthy hospitalizations or issues with depression. Her children also testified that she was in good health prior to the 2012 accident.

[38] During examination in chief, Ms. Fraser was asked about records from St. Joseph's Health Centre ("St. Joseph's") where she attended for five treatment sessions for MDE and PTSD in 2004 and 2005. Even when shown the records, she did not have any memory of this diagnosis or receiving any treatment.

[39] Despite having no recall of this prior diagnosis at trial, Ms. Fraser told some doctors she saw following the 2015 accident about this treatment; she did not share this information with some other doctors she saw. In my view, Ms. Fraser was not being deliberately misleading at trial when she testified that she did not recall this prior mental health condition – rather, this was a result of her struggle with memory issues.

Dr. Valadka

[40] Dr. Valadka was Ms. Fraser’s doctor for approximately 20 years before he retired in 2019. I will be reviewing his evidence in some detail for several reasons. First, in my view, family doctors are often important witnesses who can testify in detail about their patient’s health, particularly if they have known their patient for several years. Second, in cases such as this, where there was more than one accident and other health issues, the family doctor will often be the health-care provider who can testify about their patient’s condition, contemporaneous to the dates in issue. In this case, Dr. Valadka is the only physician who testified who saw Ms. Fraser prior to the 2012 accident, at the time of the 2012 accident, between the 2012 and 2015 accidents, and then after the 2015 accident. His evidence about his observations and treatment of Ms. Fraser during this relevant time is crucial. A

number of other health care practitioners who testified agreed on the importance of a family doctor's records.

[41] I found Dr. Valadka to testify in an objective fashion. He did not appear as a zealous advocate for his patient as sometimes can occur. He did not have an ongoing therapeutic relationship with Ms. Fraser when he testified. Had their doctor/patient relationship been ongoing, I would have approached his evidence with some caution.

[42] Dr. Valadka was Ms. Fraser's family doctor between 1998 and 2019. He testified about her pre-accident health issues, which included hypertension, tension headaches, sleep apnea, and arthritis. His evidence was that she had occasional tension headaches caused by stress or muscle spasms. He also testified that she complained of heart pain prior to 2012, but that it was related to stress. Cardiac investigations in 2006 were negative.

[43] In 2004, Dr. Valadka referred Ms. Fraser to St. Joseph's for a psychiatric consultation for panic attacks, suicidal thoughts, depression, past sexual abuse, PTSD, hallucinations, and anhedonia (which is the inability to feel pleasure). According to Dr. Valadka, Ms. Fraser was working two jobs, had issues with her children, and had significant debt problems at the time. Dr. Marshall, a psychiatrist,

diagnosed Ms. Fraser with MDE with psychotic features and PTSD. She was prescribed Celexa, an anti-depressant medication.

[44] According to the records from St. Joseph's, Ms. Fraser had five appointments with Dr. Marshall and/or an occupational therapist, Mr. Dimou, between December 16, 2004 and May 30, 2005. According to the records, by the end of March 2005, Ms. Fraser reported that the auditory hallucinations had stopped, and by May 2005, she reported feeling "great" and reported feeling "good" about herself.

[45] According to Dr. Valadka, after receiving this treatment in 2005, Ms. Fraser's psychological health did not play a prominent role in his treatment of her. He testified that while she complained of tension headaches related to stress, between 2005 and 2012, she had no other complaints of psychological or mental health issues. He also testified that she was not often in a good mood when he saw her. The only references in his clinical notes to any psychological or mood issues after 2005 was a reference to anxiety at an office attendance on June 30, 2010, and to "depression but looking better" on August 15, 2011. In an entry dated September 27, 2011, he recorded "happier." On June 21, 2012, she reported being lonely and feeling hurt. This was the last attendance before the accident on September 18, 2012.

[46] There is no evidence that Ms. Fraser was treated for any other mental health condition between 2005 and 2012.

[47] According to Dr. Valadka, at an office visit on June 13, 2011, he noted in his records, “diagnosis possible arthritis.” He testified that this was not a definitive diagnosis but something he thought of due to her symptoms.

[48] At an attendance on February 22, 2012, Ms. Fraser was complaining of stress and not sleeping.

[49] At the next attendance on March 22, 2012, Dr. Valadka testified that he saw Ms. Fraser for a physical, during which he detected no problems.

d) The September 19, 2012 Accident

[50] Ms. Fraser was involved in a head-on collision on September 19, 2012 on her way home from work. She was at fault for the accident. She was unsure if the air bags deployed. Ms. Fraser testified that following the impact, she could not exit the vehicle and had to be removed by the emergency responders. She was taken from the scene by ambulance to the Brampton Civic Hospital. According to the ambulance call report, Ms. Fraser reported chest muscle pain and knee pain. She

denied head, neck, or back pain. She reported no loss of consciousness and was described as not being in distress.

[51] Ms. Fraser testified that she fell asleep while waiting to be seen in the emergency department. When she was examined, she complained of chest pain from the air bag deployment, had a laceration to her knee that required seven sutures, and right knee pain. She was discharged home. She saw Dr. Valadka three or four days later.

[52] Despite an objection from Plaintiffs' counsel, I found that photographs of the damage to Ms. Fraser's vehicle were admissible. The photographs show what I consider to be significant front-end damage with the hood crumpled, consistent with a head-on impact. I will address this further when I discuss causation.

e) Injuries and Treatment After the 2012 Accident

Dr. Valadka

[53] Dr. Valadka saw Ms. Fraser for the first time after the 2012 accident six days later on September 24, 2012. She told him about the accident. She complained of a laceration to her knee, a bruised chest, and pain in left arm, left knee, back and neck. She complained of trouble sleeping due to the pain.

[54] Ms. Fraser saw Dr. Valadka 11 more times before the 2015 accident. Only a handful of those attendances were connected to the 2012 accident. At the attendance on October 1, 2012, she complained of total body tenderness. Her left shoulder was bruised. Dr. Valadka referred her to physiotherapy and prescribed Flexeril, a muscle relaxant medication. He completed an attending physician's statement for Manulife because Ms. Fraser was not working at the time.

[55] At the next visit on October 24, 2012, Ms. Fraser told Dr. Valadka that she wanted to return to work. He gave her a note saying that she could return to work but with no heavy or repetitive lifting.

[56] The next visit was six months later, on March 5, 2013, when she complained of tension headache for the past 4 to 7 days.

[57] Dr. Valadka next saw Ms. Fraser on March 13, 2013 for a yearly physical. His notes record that she had concerns about the impact of the accident on her work duties. Her physical examination was normal. He also recorded "reassurance about back and neck". That was the last mention of the 2012 accident in Dr. Valadka's records.

[58] At the office attendance on April 11, 2013, there was no mention of any injuries from the accident. He diagnosed her with arthritic symptoms.

[59] On June 12, 2013, there was no discussion about injuries from the accident. He diagnosed her with hypertension and a bladder infection.

[60] When Dr. Valadka saw her on July 17, 2013, there was no discussion about any injuries from the accident.

[61] At the office attendance on February 6, 2014, there was a complaint of neck ache. He testified that he did not link that to the 2012 accident.

[62] At the next attendances on March 25, 2014; September 18, 2014; and November 17, 2014, there was no reference to any injuries from the 2012 accident.

[63] Based on Dr. Valadka's evidence, there were few references to any pain issues relating to the 2012 accident between the 2012 and 2015 accidents. Ms. Fraser last mentioned the accident in March 2013, just less than two years before the 2015 accident. Ms. Fraser did not complain to Dr. Valadka of any psychological or mental health issues between the 2012 and 2015 accidents.

Physiotherapy

[64] Ms. Fraser attended for physiotherapy at Lawrence Weston Rehab after the 2012 accident. The treating physiotherapist, Ranhoti Wjetunga, testified that Ms. Fraser initially complained of pain in her anterior chest, back of her neck, scapulae, shoulder, and upper back. On examination on October 1, 2012, she had 50% range of motion in her neck and 80% in her left shoulder. She also had muscle spasms in her neck and tenderness to palpation from the third to fifth vertebra in her back and in her chest area. She complained of dizziness, an inability to shower or dress herself, and difficulty lifting her left arm.

[65] Ms. Fraser attended four treatments in October 2012, six in November 2012, three in January 2013, and two in March 2013. The range of motion in her neck and shoulder improved during this time. Mr. Wjetunga testified that Ms. Fraser was 85-90% improved when he last saw her in March 2013.

[66] Ms. Fraser had no other treatment for her injuries after the 2012 accident.

f) Ms. Fraser After the 2012 Accident

Jane Fraser

[67] Ms. Fraser's evidence was that she recalled hurting her left knee, right hand, and upper back in the 2012 accident. She could not recall any left shoulder pain after the accident, although there were references to treatment for her left shoulder pain and reduced range of motion in the physiotherapy records.

[68] Ms. Fraser testified that she was off work for three months following the 2012 accident, although according to the agreed statement of fact, she was only off for approximately six weeks. She took a week of holidays after the accident and then received STD benefits. When she returned to work in October 2018, she returned to her regular job without any restrictions, working full-time immediately. One to two months later, she began to again work overtime. Ms. Fraser had some pain to her knee and back when she returned to work. She asked Ms. Purchase, head of the human resources department at ABC Group, if she could do some modified work, but she was told she could not because she was not injured at work. She also testified that her co-workers would give her some assistance at work.

[69] Ms. Fraser testified that she had ongoing pain issues from the 2012 accident at the time of the 2015 accident. Her evidence was that she was 80% recovered by the time of the 2015 accident. She did not have any problems with her low back or left shoulder. She had occasional tension headaches. She denied any emotional or

psychological issues. She was able to take care of herself and continued to live on her own.

[70] Ms. Fraser testified that at the time of the 2015 accident, she was back to her regular activities, including cooking for her family and friends, going to movies, and shopping trips. She continued to be very involved with her church: attending services, working as treasurer, leading a praise and worship team, as well as attending Bible studies every Wednesday and choir practice on Fridays.

[71] She denied having any mental health issues in the two years before the 2015 accident. She described being happy and energetic prior to the 2015 accident.

Clint Fraser

[72] Clint Fraser testified that after the 2012 accident, his mother complained of chest and left knee pain. He did not recall any changes in her mood or personality. Six months after the accident, she returned to her regular activities that included babysitting her grandchildren. He testified that he drove her to appointments for her treatment three to four days per week. His evidence was that she was a hard worker who did not feel sorry for herself. He saw her daily. He helped her with cooking and cleaning after the 2012 accident for the first six months, and then she was back to

her normal routine, including regularly attending church, prayer meetings and reading the Bible daily. He described her as upbeat and encouraging.

Clinta Fraser

[73] Clinta Fraser testified that after the 2012 accident, her mother complained of a lot of back, neck, and knee pain. Clinta helped her mother with grooming and her laundry. Based on her observations, her mother was 75-80% recovered by the time of the 2015 accident and had returned to all her activities.

Ava Hinds

[74] Ms. Hinds testified that there was no change in Ms. Fraser's personality after the 2012 accident. By the 2015 accident, Ms. Fraser had returned to babysitting Ava's son, who was born in 2013. She testified that Ms. Fraser was an active grandmother who cooked for her grandchildren and went to activities with them.

Gloria Emden

[75] Ms. Fraser's friend from her church, Gloria Emden, testified that after the 2012 accident, the pastor and some church members took groceries to Ms. Fraser's home for about three weeks. Her observation was that Ms. Fraser recovered quickly from the 2012 accident and returned to her activities in the home and church, including shopping and attending barbecues. She did not observe any changes in

Ms. Fraser's mood or temperament. She did not observe Ms. Fraser to be in any discomfort or distress, nor did she hear Ms. Fraser complain of any problems.

Jacinta Frederik

[76] Jacinta Frederik, Ms. Fraser's friend, testified that after the 2012 accident, Ms. Fraser complained of aches and pains, but with therapy, she got over them. She was aware that Ms. Fraser had a sore back, but she did not know for how long. She saw her every weekend prior to the 2015 accident. She was unaware of the severity of the 2012 accident or that Ms. Fraser was extricated from her car by firefighters.

Constance Kankam

[77] Ms. Constance Kankam, a co-worker, testified that she worked with Ms. Fraser since 2009. In 2011, there was a slow down with the business, and rather than being laid off, they both changed to work the night shift. Between 2009 and September 2012, she saw Ms. Fraser daily at work. She was aware that Ms. Fraser was in a car accident in September 2012. She did not know she was injured. She did not work in the same zone as Ms. Fraser but would see her before and during there when she walked by. She said Ms. Fraser did her work and was "strong as usual."

Karen Purchase

[78] Karen Purchase, the Human Resource Manager at ABC Group, testified that she was unaware of any request from Ms. Fraser for accommodations at work after she returned to work in October 2012. She was unaware of any restrictions on Ms. Fraser's work leading up to the 2015 accident. Her performance reviews were positive.

Rozmina Jaffer

[79] Rozmina Jaffer is the payroll/benefits coordinator at ABC Group. She has known Ms. Fraser since 2005. She recalls that Ms. Fraser told her she was in a lot of pain following the 2012 accident. She filled out forms for Ms. Fraser's STD application.

[80] She recalled that Ms. Fraser returned to work at the end of October 2012, as she said she felt better, and her doctor provided a note that said she could return to regular duties. She confirmed that Ms. Fraser returned to her regular full-time duties. There was no graduated return to work when she returned. Between October 2012 and January 2015, Ms. Fraser did not complain to Ms. Jaffer about her work.

g) The January 15, 2015 Accident

[81] The 2015 accident occurred while Ms. Fraser was turning left into the parking lot at work. She was struck by an oncoming vehicle on the passenger side of her car. She recalled banging her head on the driver's door and hitting her chest and left knee on the steering wheel on impact. She was wearing her seatbelt. She testified that she did not lose consciousness.

[82] According to Ms. Fraser, right after the impact, she said to herself, "Lord, not me again." The other driver approached her car and opened the door and she said to him, "you could have killed me." She described the impact as heavy and if someone was in the passenger side of the car they would have been killed.

[83] After the impact, she waited for her son who came and drove her home. She did not go to the hospital. She testified that she felt nervous and scared. She said she was shaking. She did not return to work that day. While Ms. Fraser could not recall if she was off work for a day or a week, she was back at work the following day and worked full-time for three more years.

[84] The property damage photographs show denting to the front passenger side headlight area. Based on these photographs, her vehicle sustained much less damage than in the 2012 accident.

h) Injuries and Treatment After the January 2015 Accident

[85] According to Ms. Fraser, when she went back to work, she had pain in her lower back and left shoulder and headaches. While she testified and told other experts who assessed her that she saw her doctor the next day, she first saw Dr. Valadka on January 22, 2015, seven days after the accident. She testified that he referred her to massage and physiotherapy.

[86] In my view, nothing turns on Ms. Fraser testifying that she saw her doctor the following day when it was actually seven days later. I do not consider that any attempt on Ms. Fraser's part to be misleading, but, rather, see it as her best recollection of when she saw Dr. Valadka. Furthermore, when dealing with soft tissue injuries, waiting one week to see the family doctor after a motor vehicle accident is not a reflection of the degree of seriousness of the injuries.

[87] According to Ms. Fraser, she went to a clinic four times per week after the accident for massage therapy and acupuncture treatments. The records filed from Goodhealth Assessment Inc. indicate that it was chiropractic treatment she received. She said she found this treatment very helpful and that it helped her to work. The treatment ended when her insurance company refused to pay for further treatments.

[88] Clint testified that he drove her to treatment four times per week after the 2015 accident.

[89] Records from Goodhealth Assessment Inc. and Chesswood Rehab Centre were filed as part of a joint document brief pursuant to s. 35 of the *Evidence Act*, R.S.O. 1990, c. E.23. The records from Goodhealth indicate that Ms. Fraser saw a chiropractor, Dr. Komeilinejad, on a regular basis between January 28, 2015 and November 2015. The records from Chesswood are for physiotherapy treatment in 2017, 2018, and 2019.

[90] Ms. Fraser testified that she used prescribed pain medication until she stopped working in 2018, and since then, she uses over-the-counter pain medication. Before she stopped working, she took two pills for pain relief in the morning before work, two in the afternoon, and then two at night to help her sleep.

Dr. Valadka

[91] Dr. Valadka testified when he first saw Ms. Fraser on January 22, 2015, one week after the accident, she told him about the accident and mentioned that she did not go to the hospital. She said the pain was starting to act up. He prescribed pain medication and referred her to physiotherapy and for an x-ray of her neck.

[92] He next saw her on May 26, 2015 as she ran out of blood pressure medication. He testified that due to her financial circumstances, he would give her free samples of medication to use. She had been experiencing high blood pressure prior to the 2012 accident; it was reasonably controlled if she took her medication.

[93] Dr. Valadka testified that Ms. Fraser would not ask him for medication when she saw him, but he offered it to her so that she could work.

[94] When he saw Ms. Fraser on July 23, 2015, she complained of fatigue, but he did not connect it to the 2015 accident. His clinical note stated “MVA over” and also “?sleep apnea? Sleep study.”

[95] When he saw her next on November 9, 2015, she was complaining of pain in her lower back, shoulder, and leg. On examination, her entire back was tender to the touch. He could not explain that, so he diagnosed her as suffering from fibromyalgia. He prescribed pain medication.

[96] Dr. Valadka testified that Ms. Fraser successfully dealt with her injuries from the 2012 accident and that she was trying to do the same after the 2015 accident. She was initially doing fairly well, but he said that things changed in December 2015.

[97] At her attendance on December 17, 2015, she was complaining of insomnia, muscle tension, and depression. He gave her a sample of Cymbalta, an anti-depressant medication, to help treat her mood and sleep issues. He testified that she was not getting better even with the pain medication he gave her at the last visit. His diagnosis was reactive anxiety, depression, and fibromyalgia, which he thought the accident could have triggered. He testified that fibromyalgia could linger, and very often patients do not get better, but he was hoping she could be successfully treated. His evidence was that her condition was worse on this visit.

[98] At the office visit on February 24, 2016, Ms. Fraser complained of low mood and was tired. He described her as being in a stable, unhappy mood. At her attendance on April 21, 2016, he testified that she did not feel any better. She also had twitching of the muscles around her eye, which he said is usually a sign of fatigue.

[99] Dr. Valadka testified that he observed an increase in Ms. Fraser's unhappiness at her attendance on June 2, 2016. She told him that she was to be assessed by the insurance company and that she felt overwhelmed by that. She was still experiencing sleep disturbance, tension headaches, neck spasms, and lower back pain.

[100] On July 26, 2016, she complained to Dr. Valadka of increasing back pain. He observed her walking very slowly and painfully. While she thought she was weaker, he did not observe any decreased range of motion or atrophy of her muscles. She wanted an MRI. He also thought that she could have jaw pain from her temporal mandibular joint. He gave her samples of medication.

[101] At her attendance in September 2016, Ms. Fraser reported being angry. She had stress-related headaches. She told Dr. Valadka that she was told that she should stop working, as then her legal case would be more justifiable. She told Dr. Valadka that this made her angry, as it would put her in severe financial strain.

[102] On December 21, 2016, Ms. Fraser saw Dr. Valadka for ongoing sleep apnea, which he said was not related to the accident. He testified that sleep apnea can lead to fatigue if left untreated.

[103] On October 31, 2017, Ms. Fraser complained of “accident pain.” She was demonstrating reduced range of motion in her left shoulder. She also had many points of muscle tenderness.

[104] On January 28, 2018, Dr. Valadka ordered an ultrasound of her left shoulder. He said her range of motion was reduced by pain. He prescribed medication for

fibromyalgia and to help her sleep. At this point, she was still working. He did not tell her to stop working. His evidence was that she was under a lot of stress and in a lot of pain which would have been amplified if he told her to stop working, as she could not then afford to live.

[105] When he saw her on March 7, 2018, she was still suffering and in pain. He thought that her pain was preventing her from functioning. He suggested she attend at a chronic pain clinic, but he did not know if she went. He also suggested she see a psychiatrist.

[106] On March 12, 2018, Ms. Fraser told Dr. Valadka that she could no longer work. He testified that this was traumatic for her, as she knew it would be tough for her financially and that she would need assistance. He gave her a note that she could not work. He was under the impression that she was giving up.

[107] At the April 2, 2018 attendance, he referred Ms. Fraser to Dr. Milenkovich, a psychiatrist. She was more depressed and was in more pain. Her pain was also affecting how she walked.

[108] Dr. Valadka completed a physician statement for Ms. Fraser's employer dated January 26, 2018 in which he stated that her diagnosis was chronic pain and

depression. He noted that she had multiple tender points. In the form, he noted that her symptoms first appeared on September 18, 2012, which was the date of the first accident. His evidence was that the aforementioned date was incorrect and that he may have transcribed that date from an earlier form, or perhaps Ms. Fraser said that this goes back to 2012. It was his opinion, however, that the symptoms he described in that form were unconnected to the 2012 accident as she did not suffer from chronic pain or fibromyalgia after the 2012 accident.

[109] When he saw Ms. Fraser on May 14, 2018, she was feeling a bit better from her psychiatric treatment. On May 29, 2018, she complained of a lot of pain, and he gave her samples of Arthrotec, which is used to treat osteoarthritis. She reported improvement with that medication when he saw her on July 19, 2018.

[110] When he saw her on August 14, 2018, she reported improvements with her depression. She was still very tender to the touch. He injected her left shoulder with cortisone to help with her pain.

[111] He completed an attending physician's statement for Manulife on September 17, 2018. He reported that Ms. Fraser had pain and reduced mobility that prevented her from returning to work. He reported that the date of her first visit with him was January 24, 2015, and the last was September 10, 2018. In the form, he wrote that

his initial clinical findings were crying, despair, “shut down,” giving up due to pain, and poor mobility in her spine, hip, and left shoulder. He noted that she was in a state of total despair.

[112] According to Dr. Valadka, he reached a diagnosis of fibromyalgia and chronic pain based on the history given by Ms. Fraser, her complaints, and his physical examination which showed 18 points of tenderness.

[113] Dr. Valadka testified that it was difficult to answer if she had any health issues before the 2015 accident that could shorten her work life, as she said she wanted to work to age 70. He testified that she had health issues that could prevent her from working to a later age, but he also testified that those conditions, including diabetes and high blood pressure, were under control.

[114] Dr. Valadka testified that he did not detect any exaggeration or malingering by Ms. Fraser.

[115] On cross-examination, he was asked about another attending physician statement he completed in March 2018. In that report, in answer to a question about when her symptoms first appeared, he answered September 18, 2012, as he did in the form he completed in January 2018. He testified that when he was completing

the form in March 2018, it was in connection with the 2015 accident. He testified that he only diagnosed her with chronic pain after the 2015 accident. He testified that he may have copied the 2012 date from another form or wrote it down as that date if that is what Ms. Fraser told him.

[116] I note that in Dr. Valadka's records, there was another attending physician's statement that he completed after the 2012 accident. In that form, he indicated that the symptoms from the accident first appeared on September 18, 2012. This may be the form from which Dr. Valadka copied when he completed the two physician's statements in January and March 2018.

[117] I accept Dr. Valadka's evidence that despite the 2012 date in some of the forms, the condition he was describing arose, based on his observations and treatment, after the January 2015 accident.

i) Ms. Fraser's Employment After the 2015 Accident

Jane Fraser

[118] Ms. Fraser testified that after the 2015 accident, she used pain medication to work. Her evidence was that while her children did not want her to work, she had to continue to work, as she supported herself and had to pay her bills. She repeated this several times when testifying. She became emotional when she testified about

returning to work. Her evidence was that she returned to work as she had no choice; work was all she knew. She testified that she pushed herself to work as she had to pay her bills and her rent. A number of her friends also testified that they suggested to Ms. Fraser that she stop working but she repeated to them her concern about needing to support herself.

[119] According to Ms. Fraser, there were certain auto parts at work she could not lift. She did not know if her employer was aware of her pain. She testified that she worked in a crew and that when her co-workers saw she was in pain, they would send her to the washroom for a break. She also testified that one of her team leaders gave her a hard time for not meeting her quota of parts to make. Prior to 2015, no one complained about her productivity at work. She did not tell her employer of any difficulties she was having at work as she did not want to lose any time from work. She testified that she used her sick days and vacation to rest in order to deal with her pain. She testified that even after the 2015 accident, she received a certificate for her perfect attendance at work. Ms. Fraser appeared to be quite proud of her dedication to work, even when she was in pain.

[120] According to Ms. Fraser, she eventually applied for STD benefits because she could not continue to work due to being in pain; she had been told that there

were no light duties available for her. At the end of 2018, when her STD ended, she had to apply for social assistance as her claim for LTD was denied.

Karen Purchase

[121] Ms. Purchase testified that she first became aware of the 2015 accident when Ms. Fraser told her about it in December 2016, when she applied to transfer to work the day shift. According to Ms. Purchase, there was some lighter work available on the day shift. She recalls Ms. Fraser talking about her back pain, but not during every conversation they had.

[122] Ms. Purchase testified that between January 2015 and March 2018, Ms. Fraser worked full-time hours and overtime as well. She was not off work for any period. Her performance reviews were still positive.

[123] Ms. Purchase testified that 90% of the time, a machine operator is standing and walking. They are only able to sit on their breaks. There are no sedentary jobs at ABC Group.

[124] According to Ms. Purchase, there is no mandatory retirement age at ABC Group and there are some machine operators still working into their early 70s.

[125] On cross-examination, Ms. Purchase testified that Ms. Fraser had a certificate for perfect attendance for five years. In 2016, she was only late once for work and missed no time from work. She said that Ms. Fraser was always punctual for her work. She also took safety and other tests after the 2015 accident and did well.

[126] She agreed that Ms. Fraser had a supervisor or shift boss who would have observed Ms. Fraser at work daily and would be the best person to testify about how Ms. Fraser did at work. This person was not called as a witness.

Rozmina Jaffer

[127] Ms. Jaffer testified that Ms. Fraser told her about the 2015 accident the same day or the following day. Ms. Fraser said she was shaken up. She recalls Ms. Fraser telling her in 2017 that she was in a lot of pain; Ms. Jaffer suggested to her that maybe she should not work. She recalled that Ms. Fraser was coming to see her more often, about twice per month. Ms. Fraser told her she was in pain but did not know what to do if she did not work, as she would not have any money. She testified that Ms. Fraser was worried about her financial circumstances and was afraid to tell her manager about her difficulties. She could not recall when Ms. Fraser started telling her about her pain but thought it may have been a year after the accident.

She recalls Ms. Fraser complaining of pain in her back and shoulder. She also testified to observing that Ms. Fraser was in pain from her facial expression.

[128] Ms. Jaffer submitted a form dated May 23, 2018, when Ms. Fraser stopped working. She testified that there was no modified work available for Ms. Fraser. She recalled speaking to Ms. Fraser when she was initially in receipt of STD and Ms. Fraser telling her that she was in a lot of pain. Ms. Jaffer completed the employer portion of the LTD application form on October 1, 2018. She reported to the insurer, Manulife, that there were no modified jobs available for Ms. Fraser.

[129] On cross-examination, she agreed that Ms. Fraser's shift supervisors would best be able to comment on how Ms. Fraser was doing at work.

[130] She confirmed that in 2018 when Ms. Fraser applied for STD, her annual income was \$36,628 and she was paid at the rate of \$17.61 per hour. Overtime was paid at the rate of time and a half.

Constance Kankam

[131] Ms. Kankam, Ms. Fraser's co-worker at ABC Group, testified that she was going to work on January 15, 2015 and saw Ms. Fraser in her car after the accident. She asked Ms. Fraser if she was ok, and she said yes. She testified that there was

a lot of damage on the passenger side of the car. She described it as “big damage” and that if someone was in the passenger seat it would have been fatal. This seemed to parrot Ms. Fraser who also testified that someone sitting in the passenger seat could have died.

[132] According to Ms. Kankam, after the 2015 accident, when she asked Ms. Fraser how she was doing, Ms. Fraser would complain about her back.

[133] She testified that Ms. Fraser told her she had to work to pay her bills. She testified that at some point, Ms. Fraser told her that her pain was too much, so she decided to stay home for a while. When Ms. Fraser’s STD benefits expired, she said she could not return to work.

j) Ms. Fraser’s Activities and Homelife After the 2015 Accident

[134] According to Ms. Fraser, her son moved in with her after the 2015 accident. She clarified that he slept over three times per week. He cooked for her and cleaned the house. His wife would cook for her as well.

Clint Fraser

[135] Clint testified that he saw a big difference in his mother after the 2015 accident. He picked her up at the accident scene and brought her home. He observed that she was having trouble moving around her apartment, so he moved in with her for about seven months. His evidence was that her personality had also changed. He described her becoming a dark and cold person who would snap. She forgot doctor's appointments and to pay her bills. His evidence was that his mother took a lot of Tylenol 3 to help with her pain. He wanted her to stop working. She used her vacation days to take time off and rest. While he lived with her, he did her laundry, helped her dress, and walk, did her grocery shopping, and brought her to her medical appointments. His sister and his mother's friends helped by bringing meals to the house. He was concerned with his mother living on her own, so he reached out to Shante Grant, a friend, and his mother moved in with her in 2018.

[136] He urged his mother to stop working as she was in pain, but she was concerned with money. His mother complained of pain in her back and shoulder, a lot of headaches, and trouble sleeping. His evidence is that she now uses a cane to walk.

[137] After the 2015 accident, his mother stopped going to church and did not attend the online prayer meetings. His evidence is that she now watches television

all day. She is easily agitated. She no longer calls her grandchildren. He described her as distant and disconnected.

Clinta Fraser

[138] Clinta became upset when she described the changes in her mother since the 2015 accident. In my view, her emotion was genuine; it was not an act or strategy to engender sympathy from the court. Clinta testified that things went downhill after the second accident. She observed that her mother's mood changed; she would not want to talk on the telephone when she called her. Her evidence is that her mother appeared to be in pain, was agitated, and was always yelling.

[139] Clinta testified that after the 2015 accident, she helped her mother with laundry, dressing, cooking, and drove her to appointments. Her mother went back to work as she said she had bills to pay. Clinta said that she begged her mother not to go to work but her mother said she had no choice as she had to pay rent and buy food. Clinta say her mother used pain medication for her back. She heard her mother complain of pain, and 90% of the time it was about her back, but she also complained of her head and knee.

[140] Prior to the accident, Clinta testified that her mother always maintained a clean home. After the 2015 accident, Clinta saw dirty dishes and that her mother's

bed was unmade. Her mother told her she could not make the bed due to pain. Her mother used to cook every other weekend for their family. She has not done that since the 2015 accident. Clinta was aware that twice, her mother forgot she was cooking rice on the stove and the smoke alarm went off.

[141] Clinta testified that since the 2015 accident, her mother has not returned to singing in the choir at her church. She described her as agitated when the grandchildren are with her; Ms. Fraser will yell. Clinta has only left her children with Ms. Fraser twice since the 2015 accident. According to Clinta, her mother now spends the day doing nothing and she is always sad, moody, and agitated.

Ava Hinds

[142] Ava Hinds testified that after the 2015 accident, she observed that Ms. Fraser was in a lot of pain and could not do anything for herself. She helped her by cleaning, cooking, grocery shopping, and bathing her. Clint moved in with Ms. Fraser to help her; he would stay at his mother's home three days per week. Her evidence is that Ms. Fraser still needs help, as she cannot cook. She needs help to bathe and get out of bed. She walks with a cane in the house. She also testified that prior to the 2015 accident, Ms. Fraser's house was "spic and span," and now it is messy. Ms. Hinds described Ms. Fraser as withdrawn and depressed. She no longer participates in any activities with the family. It is hard to get Ms. Fraser out

of the house. Ms. Hinds testified that Ms. Fraser cries and no longer goes to church. She testified that she also encouraged Ms. Fraser to stop working after the 2015 accident.

Gloria Embden

[143] Gloria Embden, Ms. Fraser's friend from church, testified that when she saw Ms. Fraser after the 2015 accident, she broke down crying as Ms. Fraser was not the person she was used to seeing. Ms. Fraser appeared to be in a lot of pain. She was lying in bed. After the 2015 accident, Ms. Embden and other church members made a schedule to see her up to three times per week. They helped with laundry, cleaning, grocery shopping, and getting her mail from the mailbox. She was aware that Ms. Fraser had returned to work.

[144] Ms. Embden spoke with Ms. Fraser daily. She testified that Ms. Fraser would constantly complain of pain from her head to toe. Her mood also changed, and she became withdrawn and very depressed; she would break down crying in the middle of conversations.

[145] Ms. Embden testified that before Ms. Fraser stopped working, she would call her from work. She would go into the bathroom and cry. Ms. Fraser told her she did not want to be a burden on her children or church.

[146] According to Ms. Embden, Ms. Fraser has never improved. She described her currently as very depressed, moody, and withdrawn. She rarely cooks and has lost her joy for cooking and baking. Ms. Embden said that Ms. Fraser has lost her joy for living. She used to dress nicely and take care of her appearance but no longer does.

[147] According to Ms. Embden, Ms. Fraser uses a walker to walk. She does not leave her home.

Shanta Grant

[148] Shanta Grant is Clint Fraser's goddaughter. She has known Ms. Fraser for five years. She first met her after the 2015 accident. Ms. Grant, Ms. Grant's spouse and their son, moved in with Ms. Fraser in 2018 as she needed assistance. She testified that she cooks and cleans and helps Ms. Fraser with her daily routine. She testified that Ms. Fraser will forget if a pot is on the stove. She cannot stand for long. If she holds a knife for too long, her hand will shake. Ms. Fraser complains of pain in her low back. Ms. Grant has had to help Ms. Fraser stand up after going to the washroom. Ms. Fraser can shower on her own. Ms. Grant does her hair. According to Ms. Grant, Ms. Fraser always walks with a cane. She cannot walk long distances. Ms. Fraser does not do any cleaning in the home. She gets up each day, has breakfast with a friend, and then watches television. In the evening, she watches

television and will join the prayer group on the telephone. Ms. Grant described Ms. Fraser as moody and unhappy. Ms. Fraser does not want to go to church.

[149] Ms. Grant testified that she applied for the COVID-19 benefit for Ms. Fraser. She is now aware that the application was an error, and that Ms. Fraser had to pay the money she received back to the government.

Jacinda Frederick

[150] Ms. Frederick has known Ms. Fraser her entire life. She testified that after the 2015 accident, Ms. Fraser became a different person. She said that Ms. Fraser can no longer bend down and uses a “stick” to walk. They still pray together.

[151] Ms. Frederick sees Ms. Fraser every day as they live in the same apartment building and have breakfast together. She was unaware of the circumstances of the 2012 accident.

k) Ms. Fraser’s Current Condition

[152] Ms. Fraser testified that she cannot live on her own. Since 2018, she has been living in an apartment with Shanta Grant, Ms. Grant’s husband, and their child.

She receives a Canada Pension Plan disability pension of approximately \$800 per month. Her son supports her as well; he pays for her cable and phone.

[153] Ms. Fraser testified that she currently experiences constant headaches that can last all day. Prior to the 2015 accident, she experienced tension headaches. Aleve and Advil give her some relief. Some days are worse than others. The headaches are not getting better. When she has a headache, she lies down in her bedroom. She has not been told why she has these headaches.

[154] She has lower back pain. She wears a brace for support. Her lower back pain prevents her from making her bed. She is slow when dressing. Her daughter will spray her back with a spray called Icy Hot that gives her some relief. She cannot do her laundry, prepare meals, or do any cleaning.

[155] She has left shoulder pain that prevents her from combing her hair; Ms. Grant does that for her. Ms. Grant also helps her to dress. There are bars in the bathroom that she uses to get up from the toilet.

[156] She now uses a cane. She will use the walls for support if she is walking in her apartment. She believes that a therapist recommended that she use a walker, but she chose to use a cane. She thought it was Suneet Cheema, who is a speech

language therapist, who made the recommendation, but Ms. Cheema denied that. Ms. Fraser said that she has fallen a couple of times when not using her cane.

[157] According to Ms. Fraser, she is now forgetful. She has forgotten to turn the stove off and has left the refrigerator door open and taps running. She snaps at people. She has suicidal thoughts. She feels like her life is not worth living. She testified that she wants to go back to work and wants her grandchildren back in her life. She also wants to be alone. She does not participate in church activities. She does not attend services as they are two to three hours long and she cannot sit for that length of time.

[158] According to Ms. Fraser, she planned to stay working as long as she could. She knew of some people who were over 70 and still working. She testified that she would have worked to age 75 as that is all she knew.

[159] On a typical day, she is up at 1:00 pm. She watches television and prays. Her life is about her pain.

3. Review of the Medical Evidence

a) Accident Benefit Assessors

[160] Ms. Fraser's accident benefit claim from the 2012 accident was still open at the time of the 2015 accident. In March and April 2015, shortly after the 2015 accident, Wawanesa, the accident benefit insurer from the 2012 accident, sent Ms. Fraser for medical examinations. The defence called two of these medical assessors to testify. The defence argues that these assessments, performed shortly after the 2015 accident in connection with the 2012 accident, are evidence that Ms. Fraser's physical and psychological health issues continued after the 2012 accident and had not improved by 2015 to the extent that she and the lay witnesses described. This is evidence, the Defendant argues, that it was the 2012 accident, not the 2015 accident, that caused or exacerbated her pre-existing major depressive disorder ("MDD") and PTSD. The defence submits that those mental health struggles were continuing at the time of the 2015 accident.

[161] The Plaintiffs assert that while the doctors who saw Ms. Fraser told her they were examining her about the 2012 accident, as the assessments were conducted so close to the 2015 accident, Ms. Fraser was, in fact, describing her current complaints caused by the 2015 accident. When she was cross-examined, Ms. Fraser testified that when she saw these doctors, she believed she was speaking to them about the 2015 accident.

Dr. Day

[162] Dr. Day, a psychologist, examined Ms. Fraser on March 4, 2015, about six weeks after the January 2015 accident, at the request of Wawanesa. He was called as a witness by the defence and testified as a non-party expert. His qualifications were not disputed. His report was marked as a lettered exhibit, as were all expert reports.

[163] As Dr. Day's opinion regarding the cause of Ms. Fraser's condition when he saw her is a source of significant dispute between the parties, I will review his evidence in some detail. His evidence stands in stark contrast with the evidence of all the lay witnesses, Dr. Valadka, and Mr. Wjetunga regarding the degree to which Ms. Fraser had recovered from the 2012 accident by the time of the 2015 accident.

[164] The purpose of Dr. Day's examination was to determine if, from a psychological perspective, Ms. Fraser fell into the minor injury guideline for accident benefits and to determine if a treatment plan submitted for psychological services was reasonable and necessary. Dr. Day's understanding was that the accident occurred in 2012, as he was given Ms. Fraser's Application for Accident benefits (OCF-1) dated November 16, 2012, and a Treatment and Assessment Plan (OCF-3) dated February 12, 2015, submitted by a psychologist recommending a

psychological assessment in connection with the 2012 accident. Dr. Day did not receive any other medical documentation to review.

[165] Dr. Day testified that while he made notes when examining Ms. Fraser, he no longer has them. When asked if he had an independent memory of examining Ms. Fraser, he testified that he had the most “attenuated memory,” and his one vague memory was that when he asked Ms. Fraser to describe the accident, she became emotionally distressed and said she did not want to talk about it. Dr. Day also said he did not remember much, as the examination occurred seven years ago.

[166] Dr. Day testified that the psychological treatment plan he was asked to review described the head-on 2012 accident. The treatment plan stated that Ms. Fraser woke up in the hospital after the accident and felt scared, panicked, and confused at the time the accident occurred. It also said she had many severe physical injuries in various parts of her body, including her head, neck, legs, shoulders, arms, and lower back.

[167] When he was asked how Ms. Fraser presented when he examined her, Dr. Day repeated that he did not have an independent memory of the assessment beyond what was in his report.

[168] According to Dr. Day, based on his report, Ms. Fraser presented as having low energy, was fatigued, and had a flat affect. Dr. Day said she was co-operative and expressed herself in a forthright but unsophisticated manner. These observations mirror my observations of how Ms. Fraser presented at trial.

[169] Dr. Day said Ms. Fraser was distressed when she described the accident to him. Ms. Fraser recalled that the accident occurred when she was driving home after work. She saw headlights and said there was a head-on impact. She, in her fear and distress, felt that she might die. She felt frozen and prayed to God to survive.

[170] According to Dr. Day, Ms. Fraser's describing the 2012 accident to him confirmed that she understood that he was asking her questions and examining her in connection with the 2012 accident.

[171] Ms. Fraser described her biggest concerns as pain, sleep problems, flashbacks of the bright headlights of the other car, anxiety in vehicles, and forgetfulness. She said she had concentration and memory problems, as well as a hard time retaining what she reads, including her Bible. She described feeling depressed for a portion of nearly every day.

[172] She told Dr. Day that her pain was in her back (at eight on the pain scale) and chest (at seven). She said that due to her pain, she could not clean her apartment, play with her grandchildren, or engage in activities that require bending. She said that the pain interfered with her sleep. At night, she had flashbacks of the headlights of the car coming at her. Starting in 2014, she began having nightmares of people attacking or chasing her.

[173] Ms. Fraser told Dr. Day that due to finances, she returned to work after 6 weeks.

[174] According to Dr. Day, he will always ask a patient if they have been in other accidents. Ms. Fraser told him that she was in an accident on January 15, 2015 when another vehicle T-boned her car. She said that this accident increased the frequency of the flashbacks from the 2012 accident and increased her anxiety with respect to driving.

[175] Dr. Day testified that he administered a number of psychological tests. He administered the Personality Assessment Inventory (“PAI”), a 344-item comprehensive measure of psychopathology and personality functioning. He said it also has several validity indices to assess for such things as exaggeration and malingering. It takes about an hour to complete. Ms. Fraser took an unusually long

time to get through it. He could not generate a valid score, as she did not respond to some items.

[176] Dr. Day administered a Pain Patient Profile (“P-3”) which measures the emotional functioning of a person who has ongoing pain. Compared to others who have chronic pain, Ms. Fraser scored significantly higher for depression and anxiety and in the average range on the somatization scale.

[177] He also administered the Pain Catastrophizing Scale (“PCS”), which measures negative thoughts and beliefs in response to pain. Ms. Fraser’s score was significantly elevated, indicating the presence of dysfunctional thoughts with respect to pain that have a negative impact on her functioning.

[178] According to Dr. Day, given the traumatic nature of the 2012 accident, and Ms. Fraser’s response when describing it, she met the criteria for PTSD.

[179] Based on his examination and the tests he administered, Dr. Day concluded that Ms. Fraser also met the diagnostic criteria for MDD, Single Episode, Moderate as a result of the 2012 accident.

[180] On cross-examination, Dr. Day testified that the physical pain caused by Ms. Fraser's injuries might have contributed to her depression.

[181] Dr. Day was not given any other medical material to review, such as Dr. Valadka's clinical notes and records. He testified during cross-examination that a family doctor's notes are central, as they have information about the person he is assessing, including her condition before the accident and what she reports to her doctor about her symptoms after the accident. He agreed that the family doctor's records are relevant and important.

[182] Dr. Day was unaware that Ms. Fraser had reported to others that she was 80% recovered from the 2012 accident at the time of the 2015 accident. His understanding was that her symptoms were continuous from the 2012 accident. When shown Dr. Valadka's clinical notes and records, Dr. Day was surprised that there were no psychological complaints after the 2012 accident, given the severity of her post traumatic stress, although he noted that a hallmark of PTSD is a reluctance to talk about the traumatic event. He testified that the lack of any mention of PTSD symptoms in the family doctor's records was therefore not inconsistent with his finding that she suffered from PTSD. He also said that Ms. Fraser might not talk about her symptoms to family and friends, but that this reticence did not mean that she was not suffering from PTSD since the 2012 accident.

[183] Dr. Day testified that given Ms. Fraser's inability to talk about the first accident due to her distress, a subsequent minor accident could trigger a significant reaction for someone like her. He agreed that a prior traumatic event will make a person more vulnerable to experience symptoms after another accident.

[184] Dr. Day agreed that Wawanesa did not ask him to comment on the 2015 accident. When asked if he inquired about Ms. Fraser's state of recovery before the 2015 accident, Dr. Day testified that the way Ms. Fraser reported her symptoms made them seem continuous since the 2012 accident, except for the nightmares that became a problem in 2014. He agreed that his written report did not state that Ms. Fraser told him that her symptoms were continuous since the 2012 accident. He could not recall if she said her symptoms were continuous since 2012, but that was his understanding, as she did not tell him that her symptoms only arose six weeks earlier, after the 2015 accident.

[185] Dr. Day testified that Ms. Fraser told him she was attending physiotherapy up to four days per week. He agreed that this was inconsistent with the physiotherapy records that he was shown, which state that after the 2012 accident, she was discharged from treatment on March 26, 2013. He assumed that her current physiotherapy treatment was as a result of the 2012 accident.

[186] I note that when Dr. Day saw Ms. Fraser, she had already commenced chiropractor treatments for the 2015 accident. This was likely the treatment Ms. Fraser was referring to when she met with Dr. Day.

[187] When shown the physiotherapist's pain drawing following the 2012 accident which noted pain in her upper back and chest, Dr. Day agreed that was different than the pain locations Ms. Fraser described to him. When the suggestion was put to him on cross-examination that what Ms. Fraser described to him were her physical symptoms from the 2015 accident, he responded, "I do not disagree." He also testified that he was more focused on her psychological symptoms.

[188] He testified that Ms. Fraser did not tell him that her pain had resolved prior to the 2015 accident or that her psychological symptoms only developed after the 2015 accident. When she told him about the 2015 accident, she did not report any change in her symptoms with the exception of being more anxious with respect to driving. Based on this, Dr. Day testified that the 2015 accident exacerbated her PTSD. He did not have enough information to comment on whether her depression worsened after the 2015 accident, but he could not rule it out.

[189] According to Dr. Day, he would have told Ms. Fraser that he was examining her in connection with the 2012 accident, as that is the process he follows in

general. Dr. Day did not consider it a possibility that when Ms. Fraser described her current symptoms, she was describing her symptoms from the 2015 accident. He reached that conclusion because when he asked her how the 2015 accident impacted her, she said there was no change in her symptoms other than increased driving anxiety.

[190] Dr. Day agreed that Ms. Fraser presented as a forgetful, unsophisticated person.

[191] According to Dr. Day, he had no reason to believe that Ms. Fraser was being inaccurate in reporting her current symptoms and had no reason to doubt her self-report. There was no evidence that she was malingering or exaggerating her symptoms.

[192] Dr. Day testified that psychologists have more training and administer a lot more psychometric tests than psychiatrists.

Dr. Gharsaa

[193] Dr. Gharsaa conducted an orthopaedic assessment of Ms. Fraser on August 25, 2015 at the request of Wawanesa in connection with the September 2012

accident. The defense called him to testify at this trial as a non-party expert. His qualifications were not disputed.

[194] Dr. Gharsaa explained that his examination was to determine whether a request for an orthopaedic assessment, dated July 22, 2015, was reasonable and necessary. He concluded that it was not. He agreed, when cross-examined, that he was not asked to provide an opinion on causation.

[195] Ms. Fraser told him about the 2012 accident. She recalled little about what happened. She remembered seeing bright lights and then waking up in the hospital.

[196] She reported having high blood pressure that was treated with medication. She denied being in any previous motor vehicle accidents, any work-related injuries, or surgeries.

[197] She told Dr. Gharsaa that she could do her basic activities of daily living but was slower and had discomfort. She said she could do some cleaning but could neither make her bed nor vacuum, and that her daughter would help her.

[198] When Dr. Gharsaa examined Ms. Fraser, he found her neck to be unremarkable. She had some tenderness to palpation on her back. Her range of

motion was within functional limits. She had full range of motion of her left shoulder and slight decrease in her right. She had some signs of inflammation in her right shoulder.

[199] He concluded that she sustained soft tissue injuries in the accident. He did not think that any passive treatments were helpful; rather, she needed to strengthen her core. He found no major musculoskeletal impairment other than mild restriction in the range of motion in her back and shoulder, but her movement in these areas was still within the functional range.

[200] He did not recommend any further physiotherapy because in his view, any such treatment after four to six months is unhelpful, and the patient can do the exercises independently. He recommended that she follow a self-directed home exercise program and do some strengthening work. He also said she should be encouraged to do all her pre-accident activities to avoid deconditioning.

[201] Dr. Gharsaa did not tell Ms. Fraser that he was examining her in connection with the 2012 accident. On cross-examination, he testified that he assumed Ms. Fraser knew she was seeing him in connection with that accident. She described the accident to him and did not mention any other accident. He did not keep notes of his interview with her and testified that he would have asked her if she had been

involved in any other accident, as that is a question he asks when he does these assessments.

[202] His opinion was that Ms. Fraser had some symptoms in her left knee that suggested some non-accident-related osteoarthritis in that knee. When he examined her back and shoulders, she did not want to do some movements due to pain. He testified that her reluctance did not mean she was malingering or exaggerating. He also testified that his examination revealed some inflammation under the rotator cuff of her right shoulder that was not caused by the 2012 accident, even if she had no shoulder symptoms before the accident, as the impingement of her right shoulder could be due to wear and tear over time.

[203] He did not ask Ms. Fraser when her current symptoms began, as he assumed her symptoms arose after the 2012 accident.

[204] Dr. Gharsaa agreed that based on a review of the family doctor's records and Ms. Fraser's discharge from physiotherapy in March 2013, she did not complain of right shoulder, low back, or left knee pain after March 2013.

[205] Dr. Gharsaa testified that Ms. Fraser told him she was still attending physiotherapy twice weekly in connection with the 2012 accident when he examined

her. That is incorrect, as her treatment for the 2012 accident ended in March 2013. She was receiving chiropractic treatments for the 2015 accident when she saw Dr. Gharsaa.

[206] Notwithstanding soft tissues healing, according to Dr. Gharsaa, pain can linger as a result of psychological issues. He agreed that a person can have pain absent any positive test on diagnostic imaging or from objective testing. He agreed that a person can have pain absent a physical cause. He testified that he sees patients that have been in pain for years; that is referred to as chronic pain. In cases where there are neither physical impairments nor arthritis, as an orthopaedic specialist, he can offer the person nothing else. He agreed that his opinion was limited to recommendations for further orthopaedic treatment and that he did not give any opinion on chronic pain.

Dr. Dimitrakoudis

[207] Dr. Dimitrakoudis is a neurologist. He examined Ms. Fraser on April 11, 2016 regarding the January 2015 accident at the request of Unifund Assurance, the accident benefit insurer from that accident. The defense called him to testify as a non-party expert. His qualifications were not disputed.

[208] He examined Ms. Fraser to determine if there was a neurological basis for a chiropractic treatment plan that had been submitted to Unifund.

[209] Ms. Fraser described the 2015 accident. She said her car was traveling at a low speed when struck by another car on the passenger side door. She hit her head on the door's window. There was no loss of consciousness. She saw her family doctor the following day, complaining of low back pain, headaches, as well as aches and pains. She reported having ongoing headaches and back pain since the accident. She did not tell him of any shoulder pain.

[210] Ms. Fraser's examination from a neurological perspective was normal. Dr. Dimitrakoudis recommended a CT scan to rule out any trauma-related finding for her headaches, such as a skull fracture or bleeding. He testified that there were no objective findings of any neurological deficit, such as increased intracranial abnormalities. He testified that the absence of objective findings in medical tests does not necessitate a corresponding absence of symptoms.

[211] He concluded that her headaches could have a traumatic origin, such as a head injury, or be from a neck strain, or be related to other conditions like high blood pressure or sleep apnea.

[212] His evidence was that Ms. Fraser was suffering from a soft tissue cranial injury, which means she had a bump on the head, and not a brain injury.

[213] He recalls that Ms. Fraser's gait was slow and laboured but he did not recall her using a cane or walker.

[214] On cross-examination, he testified that Ms. Fraser told him about the 2012 accident and that she hurt her left knee, had chest contusions, and sustained soft tissue injuries. She said she recovered from this accident.

[215] Dr. Dimitrakoudis agreed that he was unaware of any pre-existing issues with headaches. He agreed that the family doctor's clinical notes and records are important, and that if there had been a history of headaches in those notes, he would have made a note of it. He agreed that he did not see anything relevant in those records. He testified that it is common to see people with chronic headaches where the source of those headaches is sleep apnea, even when there is no reference in these people's family doctors' records of their ever having been diagnosed with sleep apnea.

[216] He agreed that when he examined Ms. Fraser, she reported pain in her neck, tenderness of the trapezius (the muscles from the shoulder to the neck), pain in the

occipital area (the back low area of the head), tenderness over the lumbar paraspinals, and pain in her left knee. She complained of pain with movement in general and her movements were slow. He agreed that she did not report these areas of pain to him initially but only when he examined her. She told him that she was forgetful. He agreed that she was pleasant and co-operative and did not exhibit pain-focused behaviour. He testified that she did not appear to be malingering. He was not suspicious that she was not telling the truth.

[217] He agreed that even if a CT scan were negative, that would not mean that her headaches are not accident related. He has seen many people with headaches absent positive findings on any imaging.

[218] He agreed that if there were no history of headaches prior to the accident, then the headaches would probably have been caused by the accident.

[219] On re-examination, he agreed that in the transcribed notes from the family doctor, which were received after he prepared his report and only shortly before the trial, there was a reference to bilateral occipital pain and signs of tension headaches on March 5, 2013.

b) Treatment After the 2015 Accident

[220] In addition to Ms. Fraser's family doctor, Dr. Valadka, I heard evidence from a speech language pathologist, a psychotherapist, and a psychiatrist who treated Ms. Fraser following the 2015 accident. Ms. Fraser also attended 35 chiropractic treatment sessions between January 28, 2015 and November 2, 2015 and numerous physiotherapy sessions in 2017, 2018 and 2019. Neither the chiropractor nor physiotherapist testified, but the records were filed and marked as an exhibit.

Anna Paliouris

[221] Ms. Anna Paliouris is a psychotherapist who testified about treating Ms. Fraser. She testified that Ms. Fraser was assessed by Dr. Hewchuk, a psychologist, in July 2018 and that he recommended treatment. As a psychotherapist working under Dr. Hewchuk, Ms. Paliouris implemented that treatment. She described her work as treating people to help them deal with their emotional states and thoughts and to help them adjust to what is happening in their lives. She does not provide a diagnosis or prognosis. She has experience treating people injured in motor vehicle accidents and people suffering from PTSD, depression, anxiety, and chronic pain.

[222] Ms. Paliouris treated Ms. Fraser during 63 sessions between November 2018 and June 2021. She was aware that Ms. Fraser was in a motor vehicle accident in 2015. She was aware, from reviewing Dr. Hewchuk's report, that Ms. Fraser was

diagnosed with Somatic Symptom Disorder (“SSD”) with Predominant Pain, and Specific Phobia: driving and passenger fear.

[223] When she first saw Ms. Fraser in November 2018, Ms. Fraser appeared distressed and frustrated, and did not understand psychotherapy. Ms. Fraser told her how she was hurt and how the 2015 accident changed her life. She talked about her injuries a lot, about how she could not work, and about how she was in pain. She expressed frustration at not being able to care for herself. Ms. Fraser told Ms. Paliouris that she had seen a psychiatrist for a few months in 2005. She also told Ms. Paliouris that she was in a prior accident and injured her left knee and took some time off work.

[224] Ms. Paliouris saw Ms. Fraser twice in person in the latter part of 2018 and then began seeing her remotely. Ms. Fraser spoke about her pain and financial difficulties. According to Ms. Paliouris, Ms. Fraser was upset about not being able to support herself. She was having panic attacks. She spoke about returning to work at every session. She talked about receiving welfare and about how it was not enough to live on. Her stress and anxiety continued into 2019.

[225] Ms. Paliouris administered the Beck Depression Inventory and the Beck Anxiety Inventory questionnaires at the end of each block of treatment. Ms. Fraser’s

scores fell in the severe range for both depression and anxiety. At times, she scored in the low severe range but would then rise to the severe range in subsequent blocks of treatment.

[226] In June 2019, Ms. Fraser expressed concerns with her forgetfulness, like forgetting to turn the stove off. She spoke of back pain that was getting worse and of constant headaches. In July 2019, she spoke of coming to terms with not being able to return to her former job.

[227] In November 2019, Ms. Polaris suggested that Ms. Fraser speak to her family doctor about anti-depressant medication, but Ms. Fraser said that she could not afford it. She continued to talk about her shoulder and back pain.

[228] Regular treatment sessions continued in 2020. In May 2020, Ms. Fraser said she was using a cane when she went outside, as she was unstable and afraid of falling. Her daughter was regularly helping with her laundry and took her grocery shopping. Her daughter also cooked meals for her. Her complaints of pain, problems with sleeping, feeling helpless, and wanting her old life back continued throughout 2020.

[229] Ms. Paliouris recommended further treatment, which was approved and funded by the accident benefit insurer into 2021. She treated Ms. Fraser with cognitive behaviour therapy to replace negative thoughts with positive ones. Ms. Fraser talked about her pain, about there not being modified duties where she worked, and about her anxiety. According to Ms. Paliouris, Ms. Fraser often talked about how she always worked and was now unable to take care of herself.

[230] Ms. Fraser continued to complain of pain in her back and shoulder and about her financial difficulties. In June 2021, Ms. Fraser was still testing in the severe range for depression and anxiety.

[231] According to Ms. Polaris, during the 31 months in which she treated Ms. Fraser, she saw her, on average, two to four times per month. She observed some improvements in Ms. Fraser's cognitive thinking. While she still complained of pain, she was less fixated on it. Ms. Polaris testified that that Ms. Fraser was not malingering or exaggerating her symptoms.

[232] Ms. Polaris testified on cross-examination that she was treating Ms. Fraser for injuries from the 2015 accident. She indicated that Ms. Fraser told her of the 2012 accident but said that her left knee problem had resolved and that she was able to work full-time.

Suneet Cheema

[233] Ms. Cheema, a speech language pathologist, testified. She saw Ms. Fraser 52 times for treatment. She is trained to evaluate and treat speech, language, and communication disorders. Ms. Fraser's lawyer referred her to Ms. Cheema. Unifund paid for the treatment.

[234] According to Ms. Cheema, she initially assessed Ms. Fraser on September 30, 2019 and determined that she required treatment for cognitive speech problems. She indicated that she does not provide any diagnosis but only treats communication challenges. Once her assessment and treatment was approved by the insurer, she began to treat Ms. Fraser in January 2020.

[235] According to Ms. Cheema, when she assessed Ms. Fraser, she had severe limitations with her ability to pay attention when someone was speaking, her ability to understand what was said to her, and her ability to remember things said to her. She also had severe limitations in her reading and writing. She was below average in her problem-solving ability.

[236] According to Ms. Cheema, her assessment of Ms. Fraser came primarily from her direct evaluation of Ms. Fraser and not from other medical reports. In cross-examination, Ms. Cheema explained that while it is important to have a history from

the client about the cause of her impairments, that does not guide her treatment. She explained that she treats the problems presented by clients rather than addressing why they have those problems.

[237] Ms. Cheema was aware that Ms. Fraser was in an earlier car accident in 2012 that led to some physical injuries, but she did not see anything that indicated that Ms. Fraser had any cognitive issues prior to the 2015 accident.

[238] According to Ms. Cheema, Ms. Fraser needed instructions repeated to her, struggled with high levels of information processing, and had memory issues. She had difficulty explaining her ideas and feelings. She could not express herself clearly. She had difficulty reading and retaining information. Based on her assessment, Ms. Cheema recommended weekly treatment for 12 weeks. This initial treatment plan was approved. Unifund also approved several subsequent treatment plans.

[239] Ms. Cheema's ability to treat Ms. Fraser in person was interrupted by the COVID-19 pandemic. After March 2020, Ms. Cheema saw Ms. Fraser virtually or spoke with her on the phone, as Ms. Fraser had difficulty using video-chat functions. She said that Ms. Fraser has had good attendance and has been engaged in the treatment sessions, the goal of which is to improve her daily functioning.

[240] Ms. Cheema testified that Ms. Fraser often talked about her back pain. She had periods of improvement and periods of decline. She often cried during their sessions and reported feeling low and down. Ms. Cheema said that while she does not do any formal testing for malingering or exaggeration, she does that informally and never questioned the validity of Ms. Fraser's symptoms.

[241] Ms. Cheema kept notes during each treatment session. She saw Ms. Fraser regularly throughout 2020 and 2021. During those sessions, Ms. Fraser often complained of poor sleep and of being fatigued. She mentioned her pain frequently. She reported that she could not interact with her grandchildren. She often said that she wished things could go back to the way they were. Sessions were cut short due to her pain. Ms. Cheema recommended tools to help with her memory issues, such as writing things down and using a whiteboard. In October 2021, she complained of eye problems.

[242] Ms. Cheema did not recall recommending to Ms. Fraser that she use a cane. She did not recall discussing sleep apnea or using a continuous positive airway pressure ("CPAP") machine with Ms. Fraser. All that she recalled is that Ms. Fraser complained of sleep issues. She was also aware that Ms. Fraser complained of hearing issues, and she recommended that Ms. Fraser set up testing through her

family doctor. She did not recall asking Ms. Fraser if she had any vision issues initially but knew that Ms. Fraser needed large text for reading.

c) Plaintiff Experts

Dr. Milenkovic

[243] Dr. Milenkovic is a psychiatrist who treated Ms. Fraser, commencing April 2018, at the request of Dr. Valadka. She was called to testify as a participant expert. Three years later, in May 2021, she was asked by Plaintiff's counsel to prepare a medicolegal report to provide an opinion on causation. As a result, she also testified as a non-participant expert. The Defendant did not oppose her testifying in both capacities but raised issues regarding her impartiality given her dual role that I will address later in these reasons.

[244] Dr. Milenkovic attended medical school in the former country of Yugoslavia in 1992. She moved to Canada in 1989 and became certified to practice as a psychiatrist in Ontario. She worked for the Centre of Addiction and Mental Health, treating mood and anxiety disorders between 1999 and 2002. Since 2022, she has worked in her own private practice. Dr. Milenkovic was qualified as an expert in the field of psychiatry to provide opinion evidence regarding Ms. Fraser's mental health and the cause of any mental health impairment from which she suffers, and whether

she sustained a permanent and serious impairment of an important psychological or mental function. She signed a Form 53, Duty of Expert to the Court, on January 14, 2022. Her qualifications were not disputed.

[245] Dr. Milenkovic treated Ms. Fraser on a monthly or bimonthly basis for one year between April 5, 2018 and May 2019. When she first saw Ms. Fraser in April 2018, Ms. Fraser was complaining of chronic pain; poor sleep due to pain; a lack of energy, motivation, and pleasure; as well as an inability to look forward to things. She had stopped socializing. She described being sad, frustrated, and angry. She complained of poor concentration and memory issues. She also disclosed to Dr. Milenkovic that the prior week, she harboured suicidal thoughts of jumping in front of a train.

[246] Ms. Fraser told Dr. Milenkovic about the 2012 and 2015 accidents. She described the 2015 accident as a T-bone impact that caused her to hit her head and left shoulder on impact. She thought she was going to die in the accident. She did not go to the hospital because her son came and took her home. She said that she saw her family doctor the next day.

[247] Ms. Fraser told Dr. Milenkovic that she went for investigations for her back and shoulder and a tear in her rotator cuff was found. The results from diagnostic tests confirmed this finding.

[248] She also told Dr. Milenkovic that ten years earlier, she had been hearing auditory commands and was depressed. She saw a psychiatrist at that time who prescribed anti-anxiety medication. She told Dr. Milenkovic that she did not have any other psychiatric treatment, experience any other psychiatric symptoms, or take any other medication for psychiatric issues since then.

[249] According to Dr. Milenkovic, when she treated Ms. Fraser, her symptoms were consistent with a diagnosis of MDD. Dr. Milenkovic testified that MDD is a set of symptoms characterized by depressed mood that lasts for more than two weeks daily, plus at least five other symptoms, such as a lack of sleep, motivation, or interest in food; cognitive difficulties such as trouble with concentration and memory; and suicidal thoughts.

[250] According to Dr. Milenkovic, when she first saw Ms. Fraser, she was using an anti-anxiety/sleeping medication and Tylenol 3 that was prescribed by her family doctor. She was also using Aleve for pain. Dr. Milenkovic prescribed Cymbalta, an anti-depressant medication. She prescribed an anti-psychotic medication as Ms.

Fraser was having auditory hallucinations that she was “no good.” Dr. Milenkovic had to give her samples as the medication was not covered by the Ontario drug program and Ms. Fraser could not afford it. Dr. Milenkovic also prescribed sleeping medication.

[251] Dr. Milenkovic adjusted Ms. Fraser’s medication as she treated her. This included increasing her dosage of anti-depressant medication to the maximum therapeutic dose and doubling the dosage of the anti-psychotic medication.

[252] When Dr. Milenkovic saw Ms. Fraser in person on April 19, 2018, she observed that her speech and movements were slow. In June 2018, Dr. Milenkovic observed that Ms. Fraser’s depression was the same, but that the medication was helping with her sleep and her auditory hallucinations were gone.

[253] In September 2018, Ms. Fraser still complained of pain, depression, disturbed sleep, and forgetfulness. Her complaints continued into November 2018. She told Dr. Milenkovic that she recently lost her apartment because she did not pay her rent. Dr. Milenkovic observed that her depression seemed to have deepened again. In December 2018, she told Dr. Milenkovic that she wanted to go back to work as she was worried about her unpaid bills.

[254] In March 2019, Ms. Fraser told Dr. Milenkovic that her LTD claim was denied and that she was on welfare. She complained of poor sleep, lack of energy and motivation, and problems with her memory. She denied hearing voices. She told Dr. Milenkovic that she ran out of her anti-depressant medication and could not afford to pay for any.

[255] Dr. Milenkovic's opined that Ms. Fraser's complaints seemed genuine.

[256] Dr. Milenkovic did not see Ms. Fraser again until she had a phone session with her on May 6, 2021. Dr. Milenkovic testified that she was struck by Ms. Fraser's presentation at that time. She still complained of pain in her low back, and left shoulder, and constant headaches. Dr. Milenkovic said that without treatment, Ms. Fraser had become quite incapacitated. She was home-bound due to her depression and pain. Ms. Fraser appeared angry, upset, sad, and frustrated. She had suicidal thoughts. She spoke of her memory problems, such as not remembering why she was in a store or what to buy. She heard voices saying she was useless. She was not taking any medication as she could not afford it. Her daughter was making her meals and her son did grocery shopping for her. Her roommate cleaned.

[257] At the next appointment on May 11, 2021, Dr. Milenkovic restarted Ms. Fraser on both an anti-depressant and anti-psychotic medication.

[258] Dr. Milenkovic was asked to prepare a medicolegal report and provide an opinion as a litigation expert before she saw Ms. Fraser in May 2021. Dr. Milenkovic testified that to prepare the report and provide her opinion, she reviewed Ms. Fraser's background, as well as her work, social, and medical history. Ms. Fraser told her about the 2012 accident. She was not told much other than that Ms. Fraser was off work for some period but then returned and continued to work after that accident and was 80% improved by the time of the 2015 accident. She was not given any information about the seriousness of the 2012 accident. Ms. Fraser told her that she returned to full functioning after the 2012 accident.

[259] According to Dr. Milenkovic, her opinion would not change if she were told that Ms. Fraser was off work for several months after the 2012 accident, as Dr. Milenkovic was more interested in how Ms. Fraser could function after that accident. As Ms. Fraser was able to return to work and her recreational and social activities, Dr. Milenkovic believed that she was fully functioning at the time of the 2015 accident.

[260] She understood that Ms. Fraser worked at an automobile parts assembly plant and that her work required prolonged periods of standing and lifting automobile parts.

[261] She understood that after the 2015 accident, Ms. Fraser was off work for one to two weeks and then returned to modified duties. I note that this is inaccurate, as Ms. Fraser returned to working her full duties the day after the accident. Dr. Milenkovic understood that Ms. Fraser did modified light duties and only returned to work as she faced the pressure of unpaid bills. According to Dr. Milenkovic, Ms. Fraser stopped working in 2018 due to chronic pain, anxiety, and depression.

[262] Ms. Fraser told her that due to her pain, lack of energy, and motivation, she was spending most of her time in bed and could not cook because doing so was unsafe due to her memory problems. Ms. Fraser said that her daughter was bringing her meals and that her son did her grocery shopping and dealt with her finances. Her roommate did the cleaning.

[263] Dr. Milenkovic testified that she did not observe anything in Ms. Fraser's conduct inconsistent with her complaints.

[264] Dr. Milenkovic diagnosed Ms. Fraser using the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-V”). Based on this handbook, she diagnosed Ms. Fraser as suffering from MDD with psychotic features and anxious distress. This was based on Ms. Fraser suffering from a depressed mood that lasted at least two weeks for most of the day, every day. There were other criteria, including insomnia, lack of appetite, weight loss, suicidal ideation, cognitive difficulties, and anxiety. The psychotic feature was the hearing of voices.

[265] She diagnosed Ms. Fraser with PTSD since she developed enormous fears after the 2015 accident, thought she was going to die when she was in the accident, and had a vivid recollection and flashback of the accident. She also described being hypervigilant as a passenger and driver.

[266] Dr. Milenkovic also diagnosed Ms. Fraser as suffering from SSD with predominant pain. Dr. Milenkovic explained that this is a condition that involves perceived pain to several areas of the body of a severity beyond what might objectively be expected from a patient’s physical condition. This pain may cause lack of sleep, lack of energy, anxiety, and depression. SSD with predominant pain is characterized by preoccupation with pain and limitations on functioning.

[267] Dr. Milenkovic testified that pain and depression are connected, as chronic pain causes insomnia, anxiety, and depression, and once depression develops, it worsens the pain. It is a vicious cycle between these two conditions.

[268] She also diagnosed Ms. Fraser with Driving and Passenger Anxiety.

[269] Dr. Milenkovic recommended the use of anti-depressant and anti-psychotic medications. She opined that Mr. Fraser's prognosis is guarded to poor. She noted that it had been six years since the accident and that Ms. Fraser's symptoms have persisted. She also noted that there had been a significant decline in her cognitive functioning. She recommended that Ms. Fraser attend a chronic pain management program, group cognitive behavioural therapy, and a driver desensitization program. Additionally, she recommended psychotherapy.

[270] Dr. Milenkovic's thought that the 2015 accident was the main cause of Ms. Fraser's psychological impairment. While her prior psychiatric history and the 2012 accident left her vulnerable, but for the 2015 accident, Ms. Fraser would not have the psychological impairments that she does.

[271] On cross-examination, Dr. Milenkovic confirmed that Ms. Fraser was referred to her by Dr. Valadka, and that when she first saw Ms. Fraser, she had no medical

reports other than the referral letter. She relied on Ms. Fraser's self-reporting about her past psychiatric history and the 2012 accident. She was later sent a medical brief to review.

[272] Dr. Milenkovic testified that her practice was to contact a patient if she has not heard from them for two years. She said she called Ms. Fraser in 2021. She was then shown a letter from the Plaintiff's lawyer, dated April 20, 2021, asking her to write a medicolegal report about Ms. Fraser. She agreed that up to that point, she had only been providing treatment, and now she was being asked to write a report for this court proceeding. Dr. Milenkovic could not recall if she received this letter before or after she reached out to Ms. Fraser.

[273] Before speaking with Ms. Fraser in May 2021, Dr. Milenkovic had only diagnosed her with MDD. Following the assessment in 2021, Dr. Milenkovic agreed that Ms. Fraser's diagnosis expanded to include a number of other diagnoses, including PTSD. Her evidence was that she suspected PTSD from the outset. She explained that when she first started treating Ms. Fraser, she was overwhelmed with Ms. Fraser's presentation with MDD and her suicidal ideation; her predominant concern and focus at that time was Ms. Fraser's safety. When Dr. Milenkovic was asked to write a report for this litigation, she said she wanted to ensure that she elicited all diagnoses.

[274] She testified that Ms. Fraser's cognitive difficulties were part of her depressive symptoms.

[275] She testified that she did not recall reviewing Dr. Day's report. She agreed that she would have liked to have seen it but could not remember if she did or did not.

[276] Dr. Milenkovic testified that she did not have information to comment on the mechanics of the 2012 accident, other than that it was a head-on impact. She said she could nonetheless opine on causation based on information from Ms. Fraser that she was able to return to work and resume her social and recreational activities after the 2012 accident. Dr. Milenkovic was aware that Ms. Fraser had to take a few months off work. Ms. Fraser did not tell her that she feared for her life after the 2012 accident. She only told Dr. Milenkovic that information in connection with the 2015 accident.

[277] Dr. Milenkovic testified that she did not have training to do validity testing for malingering or exaggeration. Her evidence was that psychologists are trained to do this testing, not psychiatrists, and that she therefore did not administer validity tests.

[278] Dr. Milenkovic reviewed Dr. Reznek's report, and it was her opinion that Dr. Reznick was searching for a test to elicit malingering. She did not agree with his opinion that Ms. Fraser was malingering. She had no information regarding Dr. Reznek's training or experience to administer these tests.

Dr. Manjl

[279] Dr. Manjl was qualified, on consent, as a neurology expert to provide opinion evidence on the presence of any neurological injuries Ms. Fraser may have sustained and the cause of those injuries. He graduated from medical school in 1993 and completed his residency in neurology in 1996. He also completed a residency in internal medicine in 1999. He has held his specialist certificate in neurology from the Royal College of Physicians and Surgeons of Canada since 2000. He carries on a private practice in neurology and works as a consultant neurologist at Scarborough Health Network. He has conducted independent medical assessments for both plaintiffs and defendants. He has teaching experience.

[280] Dr. Manjl examined Ms. Fraser in April 2019 to determine if there were any accident-related neurological impairments and, if so, how those impairments affected Ms. Fraser's ability to work and do her household chores. He reviewed Ms.

Fraser's symptoms with her, conducted a physical examination, and administered a Mini-Mental State Examination.

[281] He knew that Ms. Fraser was in a car accident in January 2015. Ms. Fraser also told him about the 2012 accident. She informed him that she had sutures to her knee, and had neck pain, back pain, and psychological symptoms. He reviewed the hospital records from the 2012 accident.

[282] He was aware she worked as a machine operator and that her job involved lifting and inspecting parts. Her job required her to stand a lot. He knew she stopped working in 2018 due to increasing pain symptoms. Prior to the 2015 accident, she was independent in her personal care and household duties in addition to being involved with her church and grandchildren.

[283] Ms. Fraser told him that in the 2015 accident, she hit her head and left shoulder on the car door. She did not lose consciousness but felt she was in shock and shaky. Following the accident, she had headaches, left shoulder pain, neck pain, and back pain. She was prescribed Tylenol 3 and underwent physiotherapy, acupuncture, and psychological counselling. She was also using several Aleve pills per day.

[284] When Dr. Manjl examined Ms. Fraser, she was complaining of pounding headaches that could last up to three hours, nausea, tinnitus, and blurred vision. She also complained of pain in the middle of her neck and tingling in both hands. She complained of constant pain in her lower back with no improvement. She had left shoulder pain. She suffered from sleep disruption, was anxious when she drove a car, was depressed, cried frequently, had passive thoughts of suicide, and was easily distracted.

[285] He asked her about her functioning: she told him that she needs occasional assistance from her daughter and friend for her personal care, has difficulties with household chores, and no longer goes to church or work.

[286] Dr. Manjl observed that Ms. Fraser walked slowly with an antalgic gait (limp). She had pain to palpation in her middle and lower back. She had limited range of motion in her left shoulder. She had tenderness on both sides of her neck and limited range of motion.

[287] Dr. Manjl concluded that Ms. Fraser had sustained a mild closed-head injury based on her symptoms. He was concerned with the amount of Aleve she was using, noting that it could cause rebound headaches.

[288] He opined that her impairments could interfere with her ability to do the type of work she was doing at the time of the accident. He thought that she might be employable again, but a functional capacity assessment would assist in determining what type of work she could do.

[289] He concluded she suffered from post traumatic headaches. She also had overlapping migraine symptoms and cervicogenic headaches (headaches that start at the back of the neck and radiate up to the top of the head). He testified that symptoms of post-traumatic headaches can commence one to two weeks after an accident. While these headaches resolve in most cases, some people have persistent symptoms which can also affect memory.

[290] Dr. Manjl testified that he looked for malingering and symptom exaggeration when he examined Ms. Fraser but did not observe any. It was also his evidence that nothing in the medical records that he reviewed conflicted with his findings.

[291] He agreed during cross-examination that his diagnosis of a mild closed head injury was based on Ms. Fraser's own report of symptoms of headaches and dizziness. He did not agree that she had headaches after the 2012 accident. He testified that her not losing consciousness in the 2015 accident does not rule out a head injury. His evidence was that if she had lost consciousness, that would be

suggestive of a severe or moderate head injury rather than a mild closed head injury as he diagnosed.

[292] He was asked if the evidence that she did not see her doctor for one week after the accident and that she continued to work for three years were factors that he considered in determining if she had a head injury. According to Dr. Manjl, he has many patients with head injuries that work even though they ought not to. He testified that whether someone works depends on the severity of the head injury and the person's personality.

[293] He agreed that sleep apnea can cause headaches. He did not agree that high blood pressure inherently does only if it is not under control.

[294] He testified that based on what Ms. Fraser told him and from the medical records he reviewed, Ms. Fraser did not have headaches or cognitive symptoms before the 2015 accident. He agreed that he had no information about how the 2012 accident occurred or about the fact that she had to be removed from the vehicle by emergency personnel.

[295] On re-examination, his evidence was that he did not need to know how the 2012 accident occurred, as his focus was on her condition pre- and post-2015 accident.

Dr. Wilderman

[296] Dr. Wilderman was qualified as a non-party expert in chronic pain to provide opinion evidence in pain management. His qualifications were unopposed. After finishing a residency in family medicine in 2003 at Dalhousie University, he went to the Toronto Poly Clinic to train in pain management. That work involved caring for patients who had chronic pain, meaning pain that lasts more than three to six months and is accompanied by disability or disruption in social, work, and home life. Dr. Wilderman is a member of the Ontario Medical Association's chronic pain section. There is no chronic pain specialty with the Ontario College of Physicians and Surgeons. He is one of the founders of the Canadian Academy of Pain Management, an accreditation body for pain management doctors. He is a member of the International Association for the Study of Pain, which is a teaching and research body. He has been qualified three or four times as an expert on pain management.

[297] Dr. Wilderman saw Ms. Fraser on August 1, 2019, with Unifund's approval, to determine whether the injuries she sustained in the 2015 accident resulted in the development of chronic pain. He estimated that 90% to 95% of the patients he sees suffer from chronic pain.

[298] Ms. Fraser told Dr. Wilderman about her background. She told him about the 2012 accident and that she had almost recovered but still had some residual pain in her left knee when the 2015 accident occurred. She told Dr. Wilderman about her treatment for depression in 2005.

[299] Dr. Wilderman testified in detail about his examination of Ms. Fraser. He testified that she had previously undergone several diagnostic tests, such as ultrasounds, x-rays, and bone density tests. He noted that she presented with right shoulder pain, but the tests he reviewed were for her left shoulder. Upon further questioning, Dr. Wilderman concluded that his report was likely in error, and that it was her left shoulder that was painful – not her right. According to Dr. Wilderman, Ms. Fraser had complaints of lower back pain, headaches, and dizziness. He noted that she had some weakness and lack of balance when standing. He observed that she walked with a mild limp, which suggested that pain was preventing her from walking normally.

[300] He also observed multiple areas of tenderness, including in her head and neck; restricted range of motion of the neck, right shoulder, and bilateral hip joints; right shoulder impingement; decreased right arm muscle strength; pain in her lower back; and balance issues.

[301] He concluded that Ms. Fraser sustained a Whiplash Associated Disorder-type 2, as there was no neurological involvement. He also opined that she suffers from fibromyalgia. He testified that he reached this diagnosis by following the preliminary criteria of fibromyalgia developed by the American College of Rheumatology and confirmed by Canadian guidelines. Dr. Wilderman testified that fibromyalgia is characterized by hyperalgesia (generalized increased sensation to pain) and sometimes allodynia (extreme sensation of pain, untouchable). It may be associated with depression and anxiety and may coexist with other conditions. Fibromyalgia cannot be confirmed with any diagnostic imaging or bloodwork.

[302] Dr. Wilderman also diagnosed Ms. Fraser with chronic pain syndrome, as defined by the American Medical Association's Guides to the Evaluation of Permanent Impairment – Sixth Edition. To be diagnosed with chronic pain syndrome, a patient must answer at least 3/6 questions positively. Ms. Fraser was positive for 5/6 questions: 1) excessive dependence on healthcare providers, spouse, or family; 2) secondary physical deconditioning; 3) withdrawal from social

milieu; 4) failure to restore pre-injury function; and 5) development of psychosocial sequelae after the initial accident.

[303] Dr. Wilderman also diagnosed Ms. Fraser with, amongst other things, mechanical low back pain, chronic pain, post-traumatic headaches, several rotator cuff syndrome and impingement syndrome of the right shoulder, myofascial pain syndrome of the right rhomboid region, post-traumatic arthritis in the acromioclavicular joint, right bicipital tenonitis, and dizziness.

[304] Dr. Wilderman concluded that the 2015 accident caused Ms. Fraser's injuries. He concluded that her prognosis was guarded, meaning that he did not anticipate that Ms. Fraser would improve. He recommended a multidisciplinary rehabilitation approach to maintain her level of functioning. He opined that she required active and passive treatment modalities, such as acupuncture, physiotherapy, and psychological sessions.

[305] He testified that pain is subjective and that he must trust what the patient tells him. He did not administer any malingering test as he does not consider them accurate. His evidence was that he watches for exaggeration, inconsistencies, or malingering when examining the patient. He did not conclude that Ms. Fraser was exaggerating her symptoms or malingering.

[306] According to Dr. Wilderman, he has had many patients with chronic pain who have worked, as they have no other way to support themselves.

[307] Dr. Wilderman reviewed Dr. Cameron's report and testified that Dr. Cameron seemed to focus on malingering testing. He disagreed with Dr. Cameron that fibromyalgia does not exist.

[308] On cross-examination, Dr. Wilderman agreed that he could not recall examining Ms. Fraser's left shoulder, but he said what mattered was that one of her shoulders was impaired. He said that based on the documents he reviewed, he was mistaken when he said it was her right shoulder that was injured and had restrictions as his report described.

[309] He was asked about the information that Ms. Fraser gave him, that she saw her family doctor the day after the accident, when the medical records indicated that she waited seven days. He agreed that if a patient is not being honest or is exaggerating, that could affect his diagnosis or conclusion.

[310] He was then asked about the evidence that the 2012 accident was a head-on impact and that Ms. Fraser had to be extricated from the car, and that after the 2015 accident, she got out on her own and went home. He was asked if that have

any impact on his conclusion that her impairments were because of the 2015 accident. He seemed to avoid that question, as he responded by saying that Ms. Fraser told him that she only suffered from depression and knee pain because of the 2012 accident.

[311] He agreed that the pain disability index questionnaire was based on Ms. Fraser's subjective answers. He also agreed that when using the American Medical Association guidelines in diagnosing chronic pain syndrome, it is based on the reliability of the answers that the patient gives you.

Dr. Waxer

[312] Dr. Waxer was qualified on consent as a non-participant expert. He was qualified as a clinical psychologist to provide an opinion in the areas of testing of Ms. Fraser's mental state, mental health, and general psychological condition.

[313] Dr. Waxer earned his Ph.D. in psychology in 1969 from York University. He taught in the department of psychology between 1975 and 2006 at York University. He was chief psychologist at Humber River Regional Hospital between 1970 and 2000. He currently has a private practice in psychology. Most of his patients are motor vehicle accident victims. He has done a number of academic presentations over the years.

[314] Dr. Waxer examined Ms. Fraser on October 31, 2019 regarding the January 2015 accident. After conducting a clinical interview, Dr. Waxer testified that it is his standard practice to administer a number of psychological tests.

[315] Ms. Fraser told him about the 2012 and 2015 accidents. She could not recall the date of the first accident. She said she was 80% recovered by the time of the 2015 accident. She said she declined to go to the hospital after the 2015 accident. She said she was already in physiotherapy and on medication from an earlier accident. She saw her family doctor the following day and he referred her to physiotherapy.

[316] Ms. Fraser told Dr. Waxer that for financial reasons, she worked for two years after the 2015 accident with pain medication. Her co-workers told her she was worsening, so she applied for STD. She was living with a roommate when she saw Dr. Waxer. She said she was 50% capable of managing her pre-accident household responsibilities.

[317] Ms. Fraser was administered a World Health Organization Disability Assessment Schedule (“WHODAS”) questionnaire. She scored at the 100% level of impairment for household duties.

[318] Dr. Waxer recalled that she worked in a normal manner on the tests she was administered. He did not observe any verbal or nonverbal indications of distress, such as a moan, groan, or deep sighs. Ms. Fraser told him about her pain when asked. She said on a pain scale of zero to ten, with zero being no pain and ten the most severe level of pain, she ranked her head pain at a ten, her neck at an eight, and her left shoulder and low back at a nine. Pain in other areas of her body, including her right shoulder, upper and middle back, hips, thighs, knees, calves, feet, arms, wrists, hand, chest, and abdominal region, were in the range of five to nine. She said she saw flashes of light, and, at times, her vision goes white or dark. She had times of ringing in both her ears. She was using Tylenol 3 for pain management.

[319] Ms. Fraser told Dr. Waxer that she can read for five to ten minutes and watch television for 20 to 25 minutes. It takes her longer to text. She has left food on the stove that burned. She had problems with long term information, such as birth dates and where she lived as a youth. According to Dr. Waxer, this was an indication of cognitive difficulties. She described having impaired sleep. She complained of waking up due to pain and nightmares. Dr. Waxer testified that these symptoms accord with post motor vehicle accident behaviour. She did not drive on highways as she was highly nervous.

[320] She used to enjoy walking. Her social life revolved around her church. She was very active in her church. She went on shopping trips. She said that at the time of her conversations with Dr. Waxer, she only enjoyed about 5% of her pre-accident lifestyle. She no longer wanted to socialize or see her grandchildren, as they are too noisy. She felt that her life was over.

[321] According to Dr. Waxer, Ms. Fraser appeared to be dysphoric, meaning unhappy, sad, and depressed. He said her profile was stereotypical of someone who had experienced a significant trauma, such as a motor vehicle accident.

[322] Dr. Waxer testified that he administered several evidence-based and empirically established protocols, including the Beck Depression Inventory, the Spielberger State-Trait Anxiety Inventory, the Derogatis Symptom Checklist-90, and the WHODAS. On cross-examination and in response to the suggestion that a patient can state whatever they want on a test, Dr. Waxer testified that these tests exist because they follow certain strategies of test construction to be reliable and valid. He had no concern that Ms. Fraser was anything but honest and forthright in her responses.

[323] On the Beck Depression Inventory-II test, which is used frequently to assess a person's level of depression, Ms. Fraser scored 44 out of 63. That score is in the

range of extreme depression. She was also given the Spielberger State-Trait Anxiety Inventory to assess her level of anxiety before and after the accident. The test results showed that she had acute anxiety before the accident and even more so afterwards. He did not ask her why she was so anxious before.

[324] On the Derogatis Symptom Checklist-90, another test for anxiety, she scored high for anxiety and depression. Given her high levels of anxiety, he suggested that Ms. Fraser would qualify for a trial of anxiolytic medication (tranquillizer).

[325] Ms. Fraser's global assessment of functioning score ("GAF") was in the range of serious impairment of social and occupational function.

[326] Dr. Waxer testified that Ms. Fraser had high scores for exaggeration but explained that this exaggerated profile does not mean she was malingering. He testified that clinical research shows that a dishonest malingerer is much more careful and cautious in their responses to avoid suspicion. Dr. Waxer believed Ms. Fraser was honest and forthright.

[327] Dr. Waxer did not find Ms. Fraser to have a personality disorder. He deferred the diagnosis of her general medical condition to a specialist in physical medicine. He noted that she presented with the lifestyle of a chronic invalid. She also had

psychosocial problems, as her injury-triggered pain resulted in extreme social withdrawal. He concluded that her substantial psychological impairments interfered with her ability to return to gainful employment. He also was of the view that she was a candidate for psychotherapy and a multidisciplinary chronic pain program.

[328] Dr. Waxer could not recall if Ms. Fraser started the tests he administered and then finished them at home or if she did the tests at home, but he recalled that the tests were returned to his office quickly after he interviewed her. He agreed that someone else could have done the tests for her. He agreed that her answers were subjective.

[329] Dr. Waxer diagnosed Ms. Fraser with Persistent Somatic Symptom Disorder with Predominant Pain: Severe. He explained that this means someone who has an injury that persists, and the major characteristic is pain. This was a diagnosis based on the DSM-V used by specialists to diagnose mental health disorders.

[330] He also diagnosed her with a secondary diagnosis of Chronic Adjustment Disorder with Mixed Anxiety and Depressed Mood and a third diagnosis of a persisting Specific Phobia, Situational Type: Vehicular. An adjustment disorder means unhelpful behaviour. Chronic means it has persisted for more than six months.

[331] According to Dr. Waxer, part of his assessment is to consider if the patient is malingering. Ms. Fraser was given the Test of Memory Malingering (“TOMM”) to test for evidence of exaggeration, including malicious exaggeration. He explained that scores of 50% or lower on the first trial and 90% on the second trial raise the suspicion of possible exaggeration. Ms. Fraser scored 32% on the first test and improved to 78% on the second. The first test score fell in the range of purposeful malingering. Her second score was in the mild to moderate range for exaggeration. He testified that her second score was well above the 36% score for intentional malingering. Based on his interview and test results, he concluded that she was not malingering.

[332] His evidence was that while her responses to testing showed mild to moderate results for exaggeration, that is not consistent with malingering. He saw no evidence that she was a person who felt that her injury deserves compensation. She did not harbour neurotic expectations of a financial windfall.

[333] On cross-examination, Dr. Waxer testified that Ms. Fraser did not tell him what injuries she sustained in the first accident but said that the 2015 accident exacerbated her physical and psychological issues from the first accident. He did not delve into her injuries from the first accident, as he was focused on the 2015

accident. He agreed that he reviewed her past medical records after he interviewed her and that what she reported to him was consistent with what he read.

[334] Dr. Waxer agreed that she could have another medical condition that accounts for the pain. He did not recall if she told him that she was diagnosed with arthritis. He recalled that she told him she had diabetes.

[335] Based on his review of the medical documentation sent to him, Dr. Waxer was aware that Ms. Fraser was diagnosed with sleep apnea and that a CPAP machine was recommended for her to use. She did not tell Dr. Waxer that she was not using it. He did not comment on whether her fatigue was the result of her untreated sleep apnea, as that fell beyond the scope of his training.

[336] On cross-examination, he testified that he did not diagnose her as suffering from PTSD because there was insufficient evidence to do so. He agreed that there was no indication of any neurocognitive difficulty or any psychotic or dissociative behaviour.

[337] Dr. Waxer agreed that he was not given a report from Dr. Day, a psychologist who saw Ms. Fraser in 2015. When he was shown Dr. Day's report, he thought it

was consistent with what Ms. Fraser told him. He agreed that reviewing that report would have been useful to him.

[338] He agreed that every specialist should keep malingering in mind when they are examining a patient and that it is essential to administer tests for that. He agreed that there could be an external incentive for malingering but stated that it is up to the court to determine if it is intentional. He testified that there are several tests for malingering, such as the TOMM, which have their respective strengths and weaknesses. He recalled that he explained the test to Ms. Fraser but did not recall if she took it home. He testified that a third trial on the TOMM can be done but testified there is no need for it and that it is rarely used as it is not particularly helpful. He agreed that there are other validity tests that can be used, but he did not use them, as he was not asked to provide a forensic evaluation of possible malingering.

[339] On re-examination, he testified that he had no concern with Ms. Fraser doing the test at home, as he sometimes has patients do that. He also testified that he reviewed the family doctor's clinical notes and records and saw nothing about psychological issues between the first and second accidents.

[340] The Defendant was critical of Dr. Waxer who appeared to testify directly from his report with little if any recall of his actual assessment of Ms. Fraser. I agree, but

both Dr. Day and Dr. Cameron also testified that they had no or little recall of seeing Ms. Fraser and relied on their report to refresh their memory as they testified.

[341] When non-participant experts are hired to do one-time assessments of individuals and are then asked to testify about that assessment years later at trial, it is not unusual that the person testifying will have little recall. That is one of the reasons I find that health care providers who have a longer therapeutic relationship with a patient often have a more nuanced, insightful understanding of a patient's condition. I do not fault non-participant experts who cannot recall seeing a person they assessed once, years earlier. It is not a basis to completely discount their evidence.

[342] Much of the Defendant's criticism of Dr. Waxer was how he administered and interpreted the TOMM scores. Dr. Waxer explained that the developer of TOMM said you should not advance the finding of malingering based on a score of this one test alone. Dr. Waxer testified that there are many reasons for there to be mild to moderate exaggeration.

d) Defendant Experts

Dr. Reznek

[343] At the Defendant's request, Ms. Fraser was examined by Dr. Reznek, a psychiatrist, on February 26, 2020. He was qualified, on consent, as a non-participant expert. He was qualified as an expert in psychiatry to provide opinion evidence on depressive disorders, trauma and stress related disorders, somatoform disorders, anxiety disorders, and cognitive disorders. He was also qualified to provide opinion evidence on the mental and psychological injuries sustained by Ms. Fraser, as well as whether those injuries were caused by the 2015 accident and, if those injuries have caused any impairments, whether those impairments have caused a permanent and serious mental impairment of an important mental function.

[344] Dr. Reznek graduated from medical school in 1981 from the University of Cape Town. He obtained his Ph.D. from the University of Oxford in 1985. His thesis was on diseases of the mind. In 1993, he earned his Fellowship of the Royal College of Psychiatrists in Canada. He is an Associate Professor of Psychiatry at the University of Toronto but is currently not teaching. He has worked as a staff physician at various hospitals, including St. Michael's, Toronto General, and Sunnybrook Health Sciences Centre. He has a clinical practice caring for patients. About 50% of his work is doing medicolegal assessments.

[345] Both Dr. Milenkovic and Dr. Waxer testified that psychological testing, such as validity testing, is administered by psychologists who do such testing. Dr. Milenkovic testified that psychiatrists are not trained to do that testing. Dr. Reznek did not agree. He testified about his training to administer psychometric or validity testing. His evidence is that he has administered hundreds of such tests in his work at several hospitals in Toronto and has taught psychiatry students how to administer and interpret these tests. While he was not qualified to provide opinion evidence on validity testing in general, he was permitted to testify about the tests he administered and his interpretation of those tests.

[346] Dr. Reznek explained the general process he follows when he is asked to provide a medicolegal opinion. He first reviews the medical brief sent to him. He then meets with the patient, obtains information about the accident and her personal history, and does a mental state examination. He also observes the patient for signs of mental illness and does some cognitive and validity testing.

[347] Ms. Fraser told Dr. Reznek that the 2015 accident occurred when she was turning to enter the parking lot and another car T-boned her vehicle. She said she felt anxious after the accident, as she had been in another accident before that point.

[348] According to Dr. Reznek, when he asked, Ms. Fraser told him that she never had prior mental health problems, such as depression or anxiety, that required treatment. When he reviewed the medical records sent to him, he saw that in 2004/2005, she had significant mental health problems and was diagnosed with MDD and PTSD. There were also references to auditory hallucinations, meaning it was a psychotic depression. According to the medical records, Ms. Fraser was experiencing significant financial debts and had difficulties in her relationship with her two children and partner at the time.

[349] Dr. Reznek testified that MDD is a recurrent chronic condition, and that after a diagnosis, a patient will have repeated episodes of major depression approximately every five years. Between those episodes, there will be ongoing symptoms. Someone diagnosed with MDD will have low mood, an inability to enjoy things, negative thoughts, poor sleep and appetite, and cognitive problems such as poor memory.

[350] He noted that in Dr. Day's report, Ms. Fraser was reporting symptoms of MDD after the 2012 accident. He therefore concluded that the 2012 accident precipitated her second episode of MDD that was first diagnosed in 2004. He also considered Dr. Day's evidence that Ms. Fraser told him that after the 2015 accident, the only increase in her symptoms was some increase in driving anxiety. He noted that Dr.

Day concluded that the 2015 accident did not exacerbate her MDD. I note, however, that Dr. Day testified that he could not conclude if her MDD was exacerbated in the 2015 accident and that it could have been.

[351] Dr. Reznek testified that PTSD is a cluster of symptoms experienced after a traumatic event. Those symptoms include flashbacks, increased levels of arousal, and avoidance of any reminders of the trauma. He noted that Dr. Day found that Ms. Fraser also suffered from PTSD as a result of the 2012 accident. According to Dr. Reznek, Ms. Fraser was also diagnosed with PTSD in 2005 because of a sexual assault earlier in her life. There was no evidence of any exacerbation of her PTSD following the 2015 accident. Again, I note that Dr. Day did testify that the 2015 accident exacerbated Ms. Fraser's PTSD.

[352] Ms. Fraser told Dr. Reznek that she had headaches as well as pain in her lower back and left shoulder. The pain made it hard for her to sleep. She had a hard time raising her left arm. She complained of memory problems and said she was very depressed. She denied having any nightmares, flashbacks, or intrusive thoughts of the 2015 accident.

[353] Dr. Reznek testified that his examination commenced from the moment he met Ms. Fraser. He observed if she moved slowly, if she appeared anxious, and

noted her facial expressions and tone of voice. He evaluated her level of concentration and memory issues.

[354] He then moved on to formal testing. He administered the Montreal Cognitive Assessment to determine if she had any cognitive issues. A score of 26 out of 30 suggests that there are such issues. She scored 17 out of 30, which is a score to be expected from someone who has moderate to severe dementia. He testified that he was surprised at how low her score was. His evidence was that a person who suffered a severe traumatic brain injury could have traumatic dementia. There was no evidence that Ms. Fraser sustained a severe traumatic brain injury.

[355] He also administered the TOMM, which is a cognitive validity test. He explained that for this test, a patient is shown 50 images to remember. They are then shown two images, one of which was in the group of 50, and they must select which photo they remember. The test is administered twice and then a third time 15 minutes later. If someone scores less than 45 out of 50, it is likely that they are manufacturing or exaggerating their cognitive difficulties.

[356] Ms. Fraser's scores were 39, 42, and 40. According to Dr. Reznek, persons administered the test will usually improve their score each time. A threshold of 45

is used as patients with real cognitive problems will score 45. A person who scores below 45 is suspect.

[357] He noted that Dr. Waxer also administered this test and that Ms. Fraser failed to score above the threshold score of 45. When the test was administered by Dr. Waxer, she scored 39, which is below the level of someone who is making an effort. He testified that he was puzzled by Dr. Waxer's opinion that Ms. Fraser showed no fabrication of her mental difficulties, as she failed the test administered. According to Dr. Reznek, Dr. Waxer ought to have concluded that she exaggerated her mental difficulties. He also did not agree with Dr. Waxer's view that sometimes the third test is not done. Dr. Reznek explained that there is a good reason why the third test is administered 15 minutes later, and that Dr. Waxer should have done the third test, as Ms. Fraser did not do well on the second test.

[358] I note, however, that Dr. Waxer testified that there was evidence of mild to moderate exaggeration but said this was not consistent with malingering.

[359] Dr. Reznek administered another test to detect malingering. This was the Structured Inventory of Malingered Symptomatology ("SIMS"), a symptom validity test. This is a self-administered questionnaire made up of 75 questions. The answers are true or false. The theory behind the test is that it includes statements

about bizarre or unusual symptoms. If a person were to say that they have those symptoms, they would likely have been making them up. The test also includes some genuine symptoms. If a person gets a high score, they are exaggerating their complaints. Like the TOMM, the SIMS is based on testing on genuine patients with depression, anxiety, and cognitive disorders to see what scores they obtain.

[360] On this test, Ms. Fraser scored 44. Dr. Reznek was confident that this was not a false positive score. Based on her high score, he concluded she was exaggerating her symptoms.

[361] Dr. Reznek addressed whether Ms. Fraser was malingering. He explained that malingering or symptom exaggeration means the intentional production of false or grossly exaggerated physical or mental symptoms for external gain. It is not a diagnosed disorder in the DSM-V. There are pieces of evidence to use to help determine if there is likely a diagnosis of malingering.

[362] Pure malingering means you have no symptoms at all, but you say you do. Partial malingering means that you are grossly exaggerating your symptoms. False imputation malingering means that you have some genuine symptoms that you intentionally attribute to a different cause.

[363] According to the DSM-V, the factors to consider to strongly suspect malingering include the presence of external incentives (such as compensation), marked discrepancy between subjective complaints and objective clinical presentation, a lack of cooperation during the diagnostic evaluation, and scores on validity testing. He concluded that all factors were present and, thus, there was a basis to strongly suspect that Ms. Fraser was malingering.

[364] First, he concluded that there was an external incentive, as Ms. Fraser is hoping to receive compensation through this court action from the 2015 accident. Second, he concluded that there was a discrepancy between her subjective complaints and objective clinical presentation, as she said that her pain was 9/10 on the pain scale when she appeared to be sitting comfortably throughout the interview. On cross-examination, he testified that if her pain were that high, it would be impossible to suffer in silence and it would be reasonable to expect some physical manifestation of pain. Third, Dr. Reznek testified that Ms. Fraser did not cooperate during the diagnostic evaluation, as she did not tell him about her first episode of MDD and PTSD in 2004 or that she was depressed after the 2012 accident. According to Dr. Reznek, Ms. Fraser did not cooperate, as she gave the impression that all her problems were caused by the 2015 accident. Lastly, she failed the validity testing.

[365] He also testified that other things did not fit, such as her three years of working full-time after the 2015 accident in a physically demanding job. He testified that she would have been functionally impaired and unable to work based on the degree of pain and depression that she described after the 2015 accident.

[366] He concluded that Ms. Fraser suffered from MDD which was first diagnosed in 2004/2005. According to Dr. Reznik, Ms. Fraser had a second episode after the 2012 accident. He opined that she had another episode of MDD because of the 2015 accident based on the opinion of Dr. Day, who saw her after the 2015 accident and said she had a depressive disorder after the 2012 accident.

[367] According to Dr. Reznick when he examined Ms. Fraser in February 2020, she was not in an MDD episode. He noted that she had several physical conditions which are associated with a high incidence of MDD, including rheumatoid, osteoarthritis, and sleep apnea. His opinion is that even if she had not been in any motor vehicle accidents, given her initial diagnoses in 2004 and her other physical health issues, Ms. Fraser will continue to have relapses of her MDD.

[368] His opinion is that she did not suffer PTSD following the 2015 accident. She was diagnosed with that in 2004/2005 and after the 2012 accident, as noted by Dr. Day. She was also not diagnosed with PTSD by Dr. Waxer as a result of the 2015

accident. He noted that after the 2015 accident, she drove through the intersection where the accident occurred everyday when she went to work, which flies in the face of one of the pillars of PTSD: avoidance.

[369] According to Dr. Reznick, a somatoform disorder is a disorder characterized by chronic pain, meaning pain that continues for more than 6 months. It is a disorder where pain has a psychological origin, as psychological factors play a significant role in the initiation and maintenance of the pain. He found that she did not meet the criteria for that diagnosis, as her pain had its origins in physical factors rather than psychological factors.

[370] He testified that it was important to look at the nature of her work when examining the origins of her pain. He said her work was physically demanding, fast-paced, and involved repetitive movement. She was able to do that work for three years, without using any sick days, after the 2015 accident. His opinion was that if Ms. Fraser had a chronic pain disorder from the 2015 accident, she would not have been able to function in that job and would have stopped working right after the accident. Thus, if she had a pain disorder, it was not as a result of the 2015 accident.

[371] He concluded that she had no mental or psychiatric impairments as a result of the 2015 accident. She had a pre-existing diagnosis of MDD and PTSD before

the 2015 accident. There was no evidence that the 2015 accident exacerbated or caused a relapse of these conditions. She continued to work for three years until she felt she could not continue due to pain caused by other health issues, including arthritis. His opinion was that after the 2015 accident, she deteriorated to the point that she could not work but misattributed this to the 2015 accident.

[372] His evidence is that chronic pain syndrome is a psychological issue and that Dr. Wilderman is not qualified to comment on it. I have not, however, placed any reliance on Dr. Wilderman's diagnosis of chronic pain syndrome as opposed to chronic pain.

[373] On cross-examination, Dr. Reznek agreed that there was only one other reference to Ms. Fraser feeling depressed in the family doctor's records after her last appointment at St. Joseph's in May 2005, and that was on August 15, 2011, where Dr. Valadka noted, "depression but looking better." Dr. Reznek testified that the entries on February 22, 2012, where Dr. Valadka recorded, "complains of stress and not sleeping," and on June 21, 2012, where he recorded "lonely feeling," also suggested mental health issues.

[374] According to Dr. Reznek, the absence of recorded issues in the family doctor's records does not mean Ms. Fraser did not have symptoms, but she may not have complained of them.

[375] According to Dr. Reznek, when there is an external incentive, malingering has to be ruled out before the plaintiff's evidence of symptoms can be accepted at face value.

[376] He was aware that after the 2012 accident, after a few months off work, she returned to work full-time and returned to all her social and family activities. He agreed that other than physiotherapy that ended in March 2013, there was no other reference to further treatment following that accident. He did not agree that according to the medical records she made a good recovery after the 2012 accident. He reached that conclusion based on Dr. Day's report that Ms. Fraser was describing high pain levels in March 2015, from the 2012 accident.

[377] Dr. Reznek agreed that Ms. Fraser has MDD but says that it started in 2004 and that she had another episode following the 2012 accident. There was no evidence from Dr. Day that it was exacerbated by the 2015 accident. He concluded that the 2015 accident did not cause or exacerbate her MDD.

[378] While he agreed that MDD can be triggered to make the symptoms recur, he did not agree that the 2015 accident triggered her pre-existing MDD. He formed this opinion based on Dr. Day's opinion that her MDD was triggered by the 2012 accident and her symptoms were continuous at the time of the 2015 accident. While he agreed that her pre-existing MDD could have been triggered by the 2015 accident, he concluded that it was not based on Dr. Day's report. He also formed that opinion as Ms. Fraser worked for three years in a demanding job, which suggested that the 2015 accident did not trigger a significant episode of depression. According to Dr. Reznek, her level of functioning after the 2015 accident did not support the proposition that the 2015 accident triggered another episode of MDD.

[379] He concluded that Ms. Fraser had partial malingering and false imputation malingering. He did not agree with any of the health care practitioners who said there was no evidence of malingering or exaggerating. He was of the view Ms. Fraser met the criteria from the DSM-V to strongly suspect the presence of malingering.

[380] When asked if she used her symptoms to stop working, he testified that she wanted to exploit her symptoms for the benefit of compensation from an insurance company. According to Dr. Reznek, when her other medical problems such as

osteoarthritis, rheumatoid arthritis, and MDD gradually worsened, she misattributed her deterioration to the 2015 accident.

[381] He was aware that she complained of memory problems to other doctors, but he could not confirm that she had serious memory problems. He noted that Dr. Waxer reported about her memory problems, but she failed the validity test with him, so Dr. Reznek questioned whether her memory problems were valid. His evidence was that she may perceive and believe that she has memory problems, but unless validity testing is done, you cannot conclude that she has genuine serious memory problems.

[382] Dr. Reznek clarified that his opinion is not that Ms. Fraser is malingering but that he strongly suspects it. He testified that Ms. Fraser had a hard life and that she carried on until she no longer could, and then “clutched at straws” by pointing to the second accident as the cause of her problems.

[383] He did not agree with the suggestion that what Dr. Day was reporting were Ms. Fraser’s problems after the 2015 accident and not from the 2012 accident.

[384] He did not agree with Dr. Valadka’s evidence that but for the accident, she would have continued to work, as there was no other medical impediment for her to

work. He disputed that, as she worked for three years after the accident. If the 2015 accident was the straw that broke the camel's back, it was his opinion that she would have stopped working right after the accident and not have waited three years to do so.

[385] It was his opinion that while Ms. Fraser complained to many doctors and to him of memory issues, when she did not tell him of the 2004 diagnosis of MDD and PTSD, she was not being forthcoming, which was close to deliberately concealing. He agreed that she told other doctors about the 2004 diagnosis. He saw no reason why she could not remember the 2004 diagnosis when he assessed her and was not prepared to consider the possibility that she may have forgotten. Rather, he found it implausible and improbable that she did not recall the 2004/2005 treatment and diagnosis.

Dr. Cameron

[386] At the request of the Defendant, on February 26, 2020, Ms. Fraser was examined by Dr. Cameron, an orthopedic surgeon, regarding the 2015 accident.

[387] There was a dispute regarding Dr. Cameron's qualifications. Dr. Cameron is an orthopedic surgeon who has been qualified as an expert and testified as an expert on many occasions before this court. The dispute was about whether he

could be qualified to give opinion evidence about chronic pain, as he made no reference to chronic pain in his written report. For oral reasons given at trial, I found that Dr. Cameron could not be qualified as an expert in chronic pain. I found that he was qualified as an orthopedic surgeon to provide opinion evidence regarding Ms. Fraser's orthopedic injuries, their causation, and her future care needs.

[388] Dr. Cameron qualified as a doctor in Canada in 1972. He has been a Fellow of the Royal College of Physicians and Surgeons of Canada since 1975. He has taught at the University of Toronto. His 47-page CV lists over 200 publications. He currently operates a clinic seeing people with orthopedic needs. He has been qualified several times as an orthopedic expert in this court.

[389] According to Dr. Cameron, Ms. Fraser said she stopped working in 2018 due to pain in her left shoulder. On examination, he found that Ms. Fraser actively restricted the range of motion of her left shoulder but, on passive examination, she had full range of motion in her left shoulder with no evidence of a frozen shoulder. There was no significant muscle wasting.

[390] He testified that she complained of pain on all provocative tests of her shoulder, which he said meant she was exaggerating her symptoms.

[391] Dr. Cameron testified that every orthopedic examination has a test followed by a validity test to see if the initial test is accurate. He said that all orthopedic surgeons are trained to do this. For example, one test is to put a finger on the top of the patient's head and press down. If the patient complains of neck pain, that means the complaint is meaningless, as neck pain cannot be generated in this fashion. According to Dr. Cameron, Ms. Fraser failed every validity test. On that basis, he concluded that you could not believe anything that she said.

[392] He found that she had full range of motion in her neck. He testified that she had skin tenderness when he touched her back, so any complaint of pain was meaningless. He said that on formal examination, she had limited range of motion in her lumbar spine but on casual observation, she had more range of motion.

[393] He testified that it was "ridiculous" that she could not do some tests. His evidence was that she exaggerated her symptoms.

[394] His opinion was that there was no evidence that Ms. Fraser sustained any injury of any significance in the 2015 accident. The injuries she did suffer were minor, uncomplicated soft tissue injuries that were of "no significance." Dr. Cameron testified that Ms. Fraser did not sustain any orthopedic injuries in the 2015 accident.

[395] Dr. Cameron testified about reviewing Ms. Fraser's income tax returns and commented that they showed no income loss from the accident, as her income increased after the accident.

[396] Dr. Cameron was critical of Dr. Wilderman's diagnosis saying six were essentially the same finding relating to Ms. Fraser's right shoulder. According to Dr. Cameron, you cannot have six positive tests of the shoulder. He was critical of his diagnosis of sacroiliac joint dysfunction, saying it was "nonsense."

[397] He was also critical of Dr. Wilderman for using the term "fibromyalgia," as according to Dr. Cameron, it has been replaced with the term chronic pain syndrome.

[398] It was his opinion that as there were no injuries, the future care cost report was "meaningless," as she has no future care needs.

[399] It was his opinion that from an orthopedic viewpoint, there was nothing to prevent Ms. Fraser from returning to her work or from performing her activities of daily living.

[400] On cross-examination, Dr. Cameron agreed that he has been doing medicolegal examinations and reports for 40 years and has done a large volume of such reports. He testified that he did not read the referral letter sent to him by defence counsel, as some judge said in the past that such letters might influence him, so he no longer reads them. All he needed to know was that Ms. Fraser was in a car accident.

[401] He agreed that he had filled out hundreds of Acknowledgments of Expert's Duty forms. He was aware that the form includes a provision that he was to provide opinion evidence that is related only to matters within his area of expertise. Dr. Cameron agreed that he was aware of this duty to the court. He insisted, however, that in his report, he could comment on something of significance, such as if she had a prior psychiatric history or if a psychologist did not do validity testing. His evidence was that while he cannot give an opinion in that regard, he can state a fact. He insisted that he can make a factual comment about other experts, outside his field of expertise, so long as he does not give an opinion. He said he can point out facts that are outside his area of expertise, as a fact is a fact and has nothing to do with expertise.

[402] According to Dr. Cameron, he could comment on whether a psychologist used any validity testing, as it is significant if an expert in another field did not do

such testing. His evidence was that he could comment on Dr. Waxer's testing as he was pointing out an alleged deficiency which, in his mind, was a fact and not an opinion.

[403] Dr. Cameron also testified that he could raise issues about whether any other psychologist did any validity testing as he was merely making an observation about that, which is not violating his duty to the court.

[404] He testified that when he said in his report that "in his opinion," Ms. Fraser had a troubled past, he did not breach his duty to the court, but that he was mistaken in having prefaced that by saying "in my opinion." He agreed that he cannot give an opinion on psychiatric issues and that if he did, that was a breach of his duty to the court.

[405] While he did not review the entire medical brief sent to him, Dr. Cameron did review the records from Ms. Fraser's 2005 treatment for psychological issues and was asked why he reviewed those records.

[406] He did not agree that treatment, which was 15 years earlier, was irrelevant to his orthopedic examination as he explained that when you operate on someone, you need to understand the patient's history. When it was pointed out to him that

he was not going to operate on Ms. Fraser, he said that it did not make a difference since a patient is a patient.

[407] When he was asked why he did not include in his report that four months after her first attendance for treatment in 2005, she was feeling great, he said that may be of significance for a psychologist, but it was not relevant for an orthopedic opinion. He testified that it was of interest to him, as an orthopedic surgeon, that she had such treatment. He was not, however, interested in the speed or extent of her recovery with that treatment,

[408] He testified that because Ms. Fraser failed all the validity tests, she could not be believed about the level of her complaints. When it was put to him that no other health care provider who examined her detected any symptom exaggeration or magnification other than Dr. Reznek, his response was that they should have used the tests he did. His evidence was that if the doctors did not do proper tests, then they do not know what they are doing, as validity testing is key in a medicolegal report. His evidence was that your conclusions are wrong if you do not do testing.

[409] On re-examination, he testified that he reviewed the psychological records and reports to assess the validity of Ms. Fraser's complaints and to understand her background, such as whether there are psychological, financial, or marital issues.

He confirmed that he did not come to any psychological or psychiatric diagnosis, nor did he give an opinion regarding her diagnosis in that regard.

Part 2: Analysis

[410] This analysis will be structured around addressing the issues which are listed in paragraph 23. In order to answer each question raised by the issues, I will start with my assessment of the credibility and reliability of Ms. Fraser and of the lay witnesses who testified. I will also address the medical evidence and discuss the reasons why I either accept or reject the various expert opinions proffered on a number of disputed facts.

[411] The Defendant urges me to accept the evidence of Dr. Reznek and Dr. Cameron that Ms. Fraser is exaggerating and malingering. The Defendant also argues that Ms. Fraser is not a credible or reliable witness and that any medical diagnosis or prognosis that relies on information from Ms. Fraser about her subjective complaints should not be accepted by the court.

[412] In order to accept the Defendant's theory that Ms. Fraser is misattributing any of her current impairments to the 2015 accident for financial gain, I would have to reject the evidence of Ms. Fraser and the lay witnesses. For the reasons that follow, I am not prepared to do so.

Assessment of the Lay Witnesses

[413] This is a case that involves soft tissue injuries, which are invisible injuries. There are no imaging reports such as x-rays, CT scans, or MRIs that show an injury. Ms. Fraser did not have a broken bone. She did not require surgery. She was not hospitalized. Some people would be unable to understand how a person could claim to be suffering impairments years after a relatively minor accident when there were no visible injuries. As several health care practitioners testified during this trial, a person can suffer from chronic pain even absent any positive findings on diagnostic imaging. A person can also work when in pain.

[414] In these types of cases, much of the medical diagnosis is based on the individual's subjective complaints. A number of the health care practitioners who testified agreed that there are no tests to prove or evaluate pain. Some testified about tests designed to show that a person is exaggerating their pain or malingering, but there are no tests to objectively evaluate a person's pain level. A person's experience with pain is individualized and subjective; thus, health care practitioners must rely on the patient's description of their pain when evaluating and treating them. Of course, that opens the door to people who deliberately, intentionally, and knowingly exaggerate their pain levels for a variety of reasons that

may include financial motivation if they are involved in an action, such as this one, where they are seeking financial compensation.

[415] For these reasons, in a case dealing with an invisible injury, the credibility and reliability of the injured plaintiff is the focus and often one of the key factors in the trier of fact's assessment of the evidence.

[416] When lay witnesses such as friends, family, and co-workers testify about their observations of the Plaintiff, their reliability and credibility is also an important consideration, particularly if their evidence, as in this case, is at odds with some of the medical opinions. These lay witnesses often include those who know the plaintiff most intimately and see him/her on a regular basis. They can often testify about how the plaintiff is functioning both before and after the accident.

[417] As people closest to the plaintiff, despite naturally having some of the most relevant evidence, they are often considered biased witnesses whose objective evidence may be tainted by their desire to support the plaintiff at all costs. In this case, Ms. Fraser's two children and close friends would fall into that category. Her children, in particular, stand to benefit if their mother is successful in this action, as there may be funding available to help care for her, and no doubt, they will be less

worried about their mother if she has some financial stability in her life. Furthermore, Clint has advanced his own claim as a result of his mother's injuries.

[418] When assessing evidence of family and friends, I am therefore mindful of their inherent bias in testifying and I approach their evidence with caution. To be clear, however, that does not mean that I automatically discount their evidence just because they are close family and friends.

[419] In this case, some of the evidence appeared overly rehearsed, as several witnesses had very similar evidence about, for example, what they did to help Ms. Fraser after the 2015 accident. Despite similarity in their evidence, the credibility and reliability of these witnesses was unchallenged on cross-examination. The evidence of observations made by Ms. Fraser's family and friends regarding her complaints of pain, change in her mood and temperament and inability to work or carry on with her daily activities was consistent with the evidence I heard from several of the health care practitioners who have treated Ms. Fraser over the years.

[420] Consistency in the evidence from a number of lay witnesses does not mean they are colluding or deliberately working together to ensure that their evidence aligns with one another's. While there was consistency amongst the lay witnesses,

I did not find any evidence that this was due to a deliberate attempt to mislead the court.

[421] Having found the lay witnesses credible and reliable, I conclude that their evidence corroborates Ms. Fraser's evidence regarding her condition prior to and following the 2015 accident.

[422] Each of the witnesses described Ms. Fraser as a very hard-working person throughout her life, from her early days in Grenada to finding work almost immediately after arriving in Canada as a new immigrant. For a number of years, she worked two jobs. There is also undisputed evidence that Ms. Fraser is a person of deep faith whose involvement with her church was a cornerstone in her life.

[423] When she was not working or involved with her church, she spent time with her children and grandchildren. In my view, Ms. Fraser had a full life before the 2012 and 2015 accidents. I accept the evidence of the witnesses who testified about Ms. Fraser's life both before and after the 2012 and 2015 accidents.

[424] I also heard from Ms. Purchase and Ms. Jaffer from ABC Group. Unlike Ms. Fraser's family and friends who testified, they did not have any inherent bias or interest in the outcome of this litigation. Their evidence, and in particular Ms. Jaffer's

evidence, corroborates Ms. Fraser's evidence regarding the difficulties she was having at work after the 2015 accident.

[425] I must, however, reconcile the evidence of the lay witnesses regarding Ms. Fraser's condition between the 2012 and 2015 accidents with Dr. Day's evidence of what Ms. Fraser told him about her condition when he assessed her in March 2015.

[426] I must also reconcile their evidence with that of the Defendant's experts who testified about validity testing leading Dr. Cameron and Dr. Reznek to conclude that Ms. Fraser was exaggerating and malingering.

Is Ms. Fraser a Credible and/or Reliable Witness?

[427] Ms. Fraser appeared confused and lacked focus at times when she testified. There were inconsistencies in what she told various assessors about the accidents and her symptoms. These inconsistencies do not raise credibility concerns but, rather, make her less reliable as a witness. However, much of Ms. Fraser's evidence regarding her symptoms and the impact on her life following the 2012 and 2015 accidents was corroborated by the lay witnesses, witnesses from her employer, and various health care practitioners. Thus, my concerns with her reliability are addressed through this corroborative evidence.

[428] One area of concern is Ms. Fraser's description of the 2012 and 2015 accidents and her reactions to them. This is connected to the causation issue. The objective evidence, including the property damage photographs, points to the 2012 accident being the more serious accident. That does not directly lead to a conclusion that Ms. Fraser was more seriously injured in that accident. Ms. Fraser told Dr. Milenkovic that she thought she was going to die in the second accident, which was a more minor T-bone type impact on the passenger side door. She told Dr. Day, however, that she thought she was going to die in the 2012 accident.

[429] Her response to these two accidents is relevant as it relates to the causation of her current psychological condition. One might want to jump to the conclusion that Ms. Fraser's response to fearing for her life seems logical given the mechanisms of the first accident, but not the second. However, she also testified that when the second accident occurred, she thought, "here we go again" and then told the other driver that he could have killed her. She also said the impact could have killed a passenger sitting in her car. While the property damage photographs do not appear to support Ms. Fraser's description of and reaction to the 2015 accident, I accept that the more minor 2015 accident was a frightful event for Ms. Fraser. Her response would have been heightened as a result of being in a more serious accident 2.5 years earlier. Thus, I do not find that Ms. Fraser was untruthful

when she said that she thought she was going to die in both accidents. While others may not have had that same sort of visceral response to the more minor 2015 accident, given all of the circumstances, I accept Ms. Fraser's evidence that she thought she was going to die in the more minor 2015 accident. This inconsistency in her description of her response to the accidents does not raise any credibility or reliability concerns.

[430] All of the health care practitioners who testified, except for Dr. Reznek and Dr. Cameron, opined that they had no concerns that Ms. Fraser was exaggerating or malingering. While she failed to tell Dr. Reznek about her mental health treatment and diagnosis in 2005, in my view, that was not a deliberate attempt to mislead either Dr. Reznek or the court. Ms. Fraser is a poor historian with memory issues.

[431] The Defence suggests that Ms. Fraser's evidence that she uses a cane is not supported by the majority of the health care assessors, as they did not see her using a cane. This, the Defence argues, calls into question her credibility. To be clear, however, Ms. Fraser testified that she started using a cane a couple of years ago, which was in 2020, which would have been well after she saw the assessors. The first time she mentioned it was to Ms. Anna Paliouris on May 29, 2020.

[432] The defence also calls into question Ms. Fraser's credibility as she applied for and received the Canada Emergency Response Benefit ("CERB") when not entitled to. Ms. Grant testified that she applied on Ms. Fraser's behalf by telephone as she believed that the CERB was for everyone. Ms. Grant spoke with Clint when she learned she was mistaken. Ms. Fraser testified that she has repaid this money to the Canada Revenue Agency. Ms. Fraser was not cross-examined on this issue, and I accept her and Ms. Grant's evidence. In my view, it is fair to say that there was some initial confusion amongst many people about who was entitled to CERB. That is not a basis to challenge Ms. Fraser's credibility.

[433] I also do not find Ms. Fraser's repeated inaccuracy that she saw her doctor the day after the 2015, rather than one week later as was the case, to have any bearing on her reliability and credibility. Ms. Fraser consistently reported that she saw her doctor the day after the accident as that is what she recalled. The difference of one day versus seven days later is of little consequence and I place no weight on it as determinative of any issue.

[434] I conclude that Ms. Fraser was a credible witness. I must next consider whether I accept the evidence that she was exaggerating or malingering.

Is Ms. Fraser Malingering or Exaggerating her Symptoms?

[435] Until February 2020, when Ms. Fraser saw Dr. Reznik and Dr. Cameron, no other health care practitioner was of the view that she was exaggerating or malingering. This includes the accident benefit assessors the defence called to testify as non-party experts. According to Dr. Day, he had no reason to believe that Ms. Fraser was not being accurate in reporting her current symptoms or to doubt her self-report. There was no evidence she was a malingerer or exaggerating her symptoms. Dr. Dimitrakoudis agreed that Ms. Fraser was pleasant and co-operative and did not exhibit pain-focused behaviour. He testified that she did not appear to be malingering. He was not suspicious that she was not telling the truth.

[436] Dr. Reznik's opinion was that he suspected the presence of partial malingering, which is the intentional gross exaggeration of symptoms, and false imputation malingering, which is the intentional misattribution of genuine symptoms to the 2015 accident.

[437] In reaching his conclusion that he suspected Ms. Fraser was malingering, he testified that he relied on the DSM-V which identifies four factors, one of which was a lack of cooperation during the diagnostic evaluation. In that regard, I am troubled by Dr. Reznik's finding that Ms. Fraser deliberately did not tell him about her 2004

diagnosis. He appeared to reach that conclusion without considering that she reported memory issues, had received treatment for memory and cognitive issues, and had reported the prior treatment to other assessors, which indicates she was not deliberately trying to “hide” her prior diagnosis. The implication from Dr. Reznik was that Ms. Fraser did not want him to know of her earlier diagnosis.

[438] There would be no advantage to be gained by Ms. Fraser not disclosing her prior diagnosis and treatment to Dr. Reznik. Disclosing a pre-existing mental health issue may actually explain why she has ongoing psychological symptoms from a relatively modest accident. My concern is that Dr. Reznik reached a conclusion that she deliberately did not tell him about this based on his own view that it was implausible that she did not remember treatment from 15 years earlier.

[439] He was also of the opinion that she deliberately did not tell him of feeling depressed after the 2012 accident and said all her problems were caused by the 2015 accident. The underlying assumption is that she was depressed, but there is no mention of that in the family doctor records. Furthermore, all the lay witnesses testified that she returned to full functioning after the 2012 accident.

[440] Dr. Reznek relied on Dr. Day's report in concluding that Ms. Fraser was not being truthful about having psychological symptoms following the 2012 accident that were continuing at the time of the 2015 accident.

[441] According to Ms. Fraser and her family and friends, she was working full time and engaged in all her regular activities prior to the 2015 accident. I am satisfied that even if Ms. Fraser had feelings of anxiety or depression from time to time after the 2012 accident, as noted in Dr. Valadka's records, she would have considered herself to be fully functioning based on her work, home life and activities. Based on Dr. Valadka's records, Ms. Fraser's real struggles began after the 2015 accident. She had far more extensive treatment after the 2015 accident that included significantly more physical therapy, psychiatric intervention, and treatment with a speech language therapist and psychotherapist. She also had to stop working after the 2015 accident and eventually qualified for a CPP disability benefit. No doubt, in Ms. Fraser's mind, her condition, when she saw Dr. Reznek, was caused by the 2015 accident as it was after that accident that her functioning declined, and she received significant treatment.

[442] Accordingly, I reject Dr. Reznek's finding that Ms. Fraser did not cooperate with the examination, which is a factor he relied upon pursuant to the DSM-V, to concluded that he strongly suspect malingering was present. While I accept that

other factors were present, such as external motivation, I have reason to doubt Dr. Reznek's conclusion that there is a reason to suspect that Ms. Fraser is malingering.

[443] There was also a dispute between Dr. Waxer and Dr. Reznek on the administration and interpretation of the TOMM test, which is a cognitive validity test. Despite a dispute about how the test was administered and whether a third test ought to have done, Dr. Waxer found that there was evidence of exaggeration. Dr. Reznek also found evidence of exaggeration. Where they diverge is on their finding on malingering. Dr. Waxer found that her tests scores were still above the criteria for malingering and concluded that she was not malingering.

[444] I prefer Dr. Waxer's opinion in this regard. For reasons that I will address, I have concerns that Dr. Reznek was not fair and balanced in his assessment of Ms. Fraser in a way that is expected from a litigation expert. My impression was that he was overly focused on why Ms. Fraser should not be believed that she was injured in the 2015 accident.

[445] Thus, while rejecting Dr. Reznek's evidence that Ms. Fraser was malingering, given the totality of the evidence from other health care practitioners who did not agree, I accept the evidence of both Dr. Reznek and Dr. Waxer that there was some

degree of exaggeration of her symptoms. To be clear, this does not detract from Ms. Fraser's overall credibility. I consider it Dr. Valadka's evidence that Ms. Fraser had an active level of interest in her own health.

[446] I also reject Dr. Cameron's opinion that I should not believe anything Ms. Fraser says based on the validity tests he performed.

[447] I will start first by commenting on the use of orthopedic surgeons as experts in cases where a person suffers soft tissue injuries and where there are psychological health issues. Dr. Cameron found that Ms. Fraser sustained no significant musculoskeletal injuries in the 2015 accident and that from an orthopedic perspective, there was nothing preventing her from working.

[448] I accept his opinion that Ms. Fraser did not sustain any orthopedic injuries. However, this is not a case about orthopedic injuries. This is a case about chronic pain and psychological impairments. Dr. Gharsaa, another orthopedic surgeon called by the Defendant as a non-party expert, agreed on cross-examination that a person can have pain in the absence of a physical cause and in the absence of any positive diagnostic testing. He testified about seeing patients who have chronic pain where there is no physical impairment. Thus, the lack of orthopedic injuries does

not mean that Ms. Fraser was not injured in the 2015 accident as such injuries are not a prerequisite to a determination of chronic pain or psychological harm.

[449] Dr. Cameron's medical opinion was of minimal assistance. In my view, he also seemed to be primarily focused on why Ms. Fraser should not be believed and why other experts, outside of his field of expertise, erred in not properly administering validity tests.

[450] I also reject Dr. Cameron's evidence that as an orthopedic surgeon, he could comment on validity testing, or the lack thereof, done by other health care practitioners in other fields such as psychology, on the basis that he is stating a fact and not an opinion. Dr. Cameron stepped beyond his area of expertise in his written report.

[451] I also am at a loss to understand why Dr. Cameron thought he should review medical records of psychiatric treatment from 15 years ago but not physiotherapy records, which I consider to be more relevant to an orthopedic assessment.

[452] Dr. Cameron's tone was dismissive when he was questioned in chief and when cross-examined. He used, more than once, terms such as "ridiculous," which reflects his dismissive attitude towards the plaintiff and several other health care

practitioners involved with Ms. Fraser's care. While I have not considered Dr. Cameron's demeanour and tone to be a factor in assessing his opinion, in my view, it was not the tone or demeanour expected from a litigation expert, particularly one with so much experience testifying in court.

[453] If I was to accept Dr. Cameron's opinion that I should reject anything Ms. Fraser says about her symptoms, I would have to conclude that over the past number of years, she has successfully duped her family, friends, family doctor, treating health care practitioners, and medical experts into believing she was experiencing pain when she in fact does not have any. Alternatively, I would have to find that her family, friends, family doctor, and treating health care practitioners were dishonest when they testified about observing her in pain. I am not prepared to make that finding.

[454] I also note that according to Dr. Gharsaa, when he examined Ms. Fraser's neck and left shoulder, she had full range of motion, although she did not want to do some movements. He did not find that this reluctance meant she was malingering or exaggerating, which appears to be contrary to Dr. Cameron's opinion.

[455] Thus, while I accept Dr. Cameron's opinion that Ms. Fraser did not sustain any orthopedic injuries in the 2015 accident, I reject his opinion that nothing Ms. Fraser says should be believed.

[456] I will now turn to address the issues to be determined.

a) **Issue One: Did Ms. Fraser have any Health Issues Prior to the 2012 Accident?**

[457] There is no dispute that Ms. Fraser was diagnosed with MDE and PTSD in 2004 and attended five treatment sessions. I heard evidence during this trial that Ms. Fraser was diagnosed with MDD after the 2012 accident. I heard no evidence about the difference between MDE and MDD, although one refers to an episode and the other a disorder. As it is not clear what, if anything, turns on the difference in the conditions, I will proceed as if it is one and the same.

[458] When she testified, Ms. Fraser did not recall having any mental health issues prior to the 2012 accident. She did, however, inform Ms. Paliouris, Dr. Milenkovic, and Dr. Wilderman that she had treatment for mental health issues. She did not tell Dr. Day, Dr. Waxer or Dr. Reznek about this.

[459] As I have already found, I do not agree with Dr. Reznek's opinion that Ms. Fraser was deliberately deceptive when she failed to inform him of her prior mental health condition. Based on the totality of the evidence that I have reviewed in some detail, I do not accept that Ms. Fraser was sophisticated enough to attempt to deliberately conceal her prior health issues for some kind of gain. The inconsistency of her recall of the prior diagnosis is, in my view, consistent with the evidence that she suffers from memory issues.

[460] Had she been strategizing about how to best present her prior health diagnosis she would have consistently told all assessors about her diagnosis and how she recovered from it and was able to carry on with her full life. That would have set the stage for a finding that she was a thin-skull victim who was vulnerable to injury as a result of her pre-existing condition.

[461] I also note that other than Dr. Reznek, no other health care practitioner who treated or assessed Ms. Fraser for any of her psychological or cognitive issues raised any concern that she was exaggerating or malingering, although Dr. Waxer concluded there was evidence of mild to moderate exaggeration, which he said is not the same as malingering. I find the evidence of those who had a therapeutic relationship with Ms. Fraser over an extended period of time, such as Ms. Paliouris and Dr. Milenkovic, to be more persuasive regarding a lack of concern with

exaggeration and malingering, than a practitioner who saw Ms. Fraser for one assessment.

[462] The inconsistency of Ms. Fraser's recall about the prior health diagnosis does not detract from her credibility as a witness but does affect her reliability.

[463] Dr. Valadka testified about Ms. Fraser having some isolated complaints of anxiety, depression, stress, not sleeping, and feeling lonely prior to the 2012 accident. Despite these entries in his records, Dr. Valadka's unchallenged evidence was that he did not treat Ms. Fraser for any mental health issues after her treatment in 2004/2005. I accept that evidence. In my view, it is not uncommon for people to have moments of stress, anxiety, and feelings of depression from time to time and to discuss that with their family doctor. In particular, for someone diagnosed with MDE and PTSD in 2004/2005, reports of feelings of some degree of periodic low mood would not be unexpected. This is consistent with Dr. Reznek's opinion that between periods of bouts of deep depression, someone diagnosed with MDD will have some ongoing symptoms. From a functional perspective, however, there is no evidence that any of these complaints interfered with Ms. Fraser's work and activities leading up to the 2012 accident.

[464] I accept the unchallenged evidence from Ms. Fraser's family and friends that Ms. Fraser had a full life prior to the 2012 accident which included a focus on her family, friends, and church.

[465] Dr. Reznick's evidence is that MDD is a chronic condition. Having been diagnosed with it in 2004, Ms. Fraser was going to face periods of recurrent episodes with some ongoing symptoms between each episode. His evidence in this regard was not challenged and I accept his opinion regarding the chronic nature of this condition. It is also consistent with Dr. Valadka's evidence that Ms. Fraser was not often in a good mood when he saw her.

[466] Nonetheless, the uncontroverted evidence is that prior to the 2012 accident, Ms. Fraser was fully functioning and was not being treated for any significant health issue.

b) Issue Two: What Injuries did Ms. Fraser Sustain in the 2012 Accident and to What Extent did she Recover Prior to the 2015 Accident?

[467] The issue of the extent to which Ms. Fraser recovered after the 2012 accident is crucial. There is a consistency in the evidence of the lay witnesses that is corroborated by Dr. Valadka and Mr. Wjetunga regarding the extent of Ms. Fraser's recovery from the injuries she sustained in 2012. That evidence conflicts, however,

with the evidence of Dr. Day, who found that she suffered from PTSD and MDD as a result of the 2012 accident and that her symptoms were continuous up to the time of the 2015 accident.

[468] I will start first with Ms. Fraser's complaints of pain following the 2012 accident. Ms. Fraser sustained a laceration to her left knee for which she required sutures. She complained of pain to her left shoulder and upper back. There is no evidence of any complaints of low back pain following the first accident. Nor is there evidence of any orthopedic injury.

[469] After the 2012 accident, Dr. Valadka and the physiotherapist, Mr. Wjetunga, were the only health care practitioners who treated Ms. Fraser. As I reviewed, there were only a handful of attendances with Dr. Valadka after the 2012 accident where Ms. Fraser complained of accident-related injuries. The last time she mentioned the accident to Dr. Valadka was in March 2013. Mr. Wjetunga testified that when he last saw Ms. Fraser in March 2013, she was 85% to 90% recovered. This is consistent with Ms. Fraser's evidence that she had recovered by 70% to 80% at the time of the second accident.

[470] Neither Dr. Valadka's nor Mr. Wjetunga's evidence was challenged.

[471] The evidence from family and friends that Ms. Fraser needed some help around her home after the 2012 accident but had returned to her same activities and work prior to the 2015 accident accords with the medical evidence of Dr. Valadka and Mr. Wjetunga.

[472] The evidence of Ms. Purchase and Ms. Jaffer regarding Ms. Fraser's performance at work was also unchallenged. Ms. Purchase was unaware of Ms. Fraser requesting any accommodations at work after the 2012 accident. Ms. Jaffer was aware that Ms. Fraser applied for STD benefits and then returned to her full-time duties near the end of October 2012. There was no issue with Ms. Fraser's performance at work leading up to the 2015 accident.

[473] There was no evidence that Ms. Fraser complained to her family doctor about any psychological or mental health issues after the 2012 accident. Dr. Valadka testified that he did not treat her for any mental health issue. This is also consistent with the evidence of Ms. Fraser's family and friends that they observed no change to her mood or temperament after the 2012 accident.

[474] Dr. Valadka's evidence that there were no complaints of psychological or mental issues after the 2012 accident is at odds with Dr. Day's opinion. Dr. Day opined that Ms. Fraser suffered from MDD and PTSD as a result of the 2012

accident and that her psychological symptoms were continuous up to the time of the 2015 accident.

[475] Dr. Day presented as a witness attempting to do his best to answer questions about an examination of which he had little independent memory. My impression was that he was trying to remain fair and objective. Dr. Day became frustrated at times, which was understandable, as he was cross-examined vigorously about medical records that were not given to him by Wawanesa who arranged the assessment. This included Dr. Valadka's and Mr. Wjetunga's records.

[476] Ms. Fraser saw Dr. Day six weeks after the 2015 accident. The Plaintiffs argue that when Dr. Day saw Ms. Fraser, although he understood it was in connection with the 2012 accident, when he asked Ms. Fraser about her problems and condition, she was telling him how she felt at the moment, following the 2015 accident.

[477] According to Dr. Day, Ms. Fraser's son was with her in the waiting room and Dr. Day saw him help Ms. Fraser out of her chair. According to the evidence of the lay witnesses and Ms. Fraser, prior to the 2015 accident, she was functioning with few restrictions. If she needed help out of the chair in March 2015, it is reasonable

to infer that was as a result of the injuries from the 2015 accident for which she was already receiving chiropractic treatment.

[478] When Dr. Day saw Ms. Fraser, he did not know that she was already receiving chiropractic treatment for her injuries from the 2015 accident. When she told him she was receiving regular treatments, he assumed it was for the 2012 accident. I am certain that if Dr. Day had been given Dr. Valadka's records and the physiotherapy records from Mr. Wjetunga, he would have asked Ms. Fraser a number of additional questions to clarify her condition after the 2012 accident and the degree to which she recovered prior to the 2015 accident as well as when she had commenced treatment and why.

[479] My observation was that Ms. Fraser was easily confused when she testified. It is entirely likely that when Ms. Fraser saw Dr. Day, having just been in another accident for which she was already experiencing symptoms, receiving treatment, and using prescribed pain medication, she was describing to him how she was feeling at that moment, which was as a result of the 2015 accident.

[480] If I accept Dr. Day's evidence that Ms. Fraser's symptoms, as she described to him in March 2015, were continuous since 2012, I must reject the evidence of Ms. Fraser, the lay witness, Dr. Valadka, and Mr. Wjetunga who testified that Ms.

Fraser had substantially recovered following the 2012 accident. I am not prepared to reject that evidence. As discussed, I found the lay witnesses to be credible and reliable witnesses. I also found Ms. Fraser to be credible.

[481] Dr. Day's report did not say her symptoms were continuous, but he testified that he assumed they were, based on the way she described her symptoms. He testified that she did not tell him that her symptoms arose only since the 2015 accident. However, she also did not tell him that the treatment she was attending four days per week was as a result of the 2015 accident or that her son had only moved in with her after the 2015 accident.

[482] Dr. Day testified that he diagnosed Ms. Fraser with PTSD as a result of the nature of the 2012 accident and her avoidance and reaction when discussing it with him. In my view, when he made his observations of Ms. Fraser and her reaction to the 2012 accident she described her symptoms. Dr. Day did not consider that her presentation might have been because of the 2015 accident. Similarly, he did not consider that her scoring on the psychological testing may have impacted by her injuries from the 2015 accident. Thus, his diagnosis of PTSD and MDD was made assuming that Ms. Fraser was describing symptoms from the 2012 accident when in fact she was describing how she felt after the 2015 accident.

[483] That does not mean that I do not accept Dr. Day's opinion that she sustained MDD and PTSD in the 2012 accident. Given her pre-existing mental health diagnosis and treatment and the traumatic nature of the 2012 accident, I accept Dr. Reznek's opinion that the 2012 accident caused a recurrence of her pre-existing MDD and PTSD.

[484] I do not accept Dr. Day's conclusion that Ms. Fraser's symptoms were continuous since 2012. Until Dr. Day's evaluation in March 2015, there was no evidence that Ms. Fraser's symptoms were continuous. She never complained of or received treatment for any mental health condition since discharged from treatment in 2005. While the 2012 accident may have exacerbated her pre-existing mental health condition, based on the evidence that I do accept, she had recovered prior to the 2015 accident and was able to resume her work and activities with her family, friends, and church.

[485] Thus, Ms. Fraser was left in a vulnerable position at the time of the more minor 2015 accident.

[486] Dr. Day's evidence of Ms. Fraser's complaints when he saw her and his testimony about the impact of symptoms on her activities accords with Ms. Fraser's

own evidence of her symptoms and the lay witnesses' observations of her after the 2015 accident, not before.

[487] I accept Dr. Day's evidence that he thought that Ms. Fraser was, at all times, talking about the 2012 accident when he met her with six weeks after the 2015 accident. After all, Dr. Day was not given any medical material to review showing a lack of complaints to her family doctor for any mental health or pain concerns for an extended period prior to the 2015 accident. Dr. Day himself recognized the importance of having a patient's family doctor records. Had he been given those records he may have concluded that her presentation when she saw him was as a result of the 2015 accident and not the 2012 accident or, at the very least, that her symptoms were not continuous since the 2012 accident.

[488] I am somewhat concerned that a psychologist was recommending a psychological assessment in February 2015, because of a 2012 accident. That is the treatment plan that Dr. Day was asked to review. This suggests Ms. Fraser may have been having some ongoing psychological issues from the 2012 accident.

[489] I note, however, that the treatment plan was completed after the 2015 accident, and thus the need for that treatment may in fact be related to the 2015 accident rather than the 2012 accident.

[490] Both Dr. Day and Dr. Reznek testified that an absence of any complaints of mental health issues, such as PTSD, in the family doctors' records does not mean there were no symptoms; rather, it only means that the patient did not tell her doctor of any symptoms.

[491] In my view, had Ms. Fraser been feeling depressed or anxious as a result of the 2012 accident that rose to the level that she needed to discuss that with Dr. Valadka, she would have done so. I reach that conclusion based on Dr. Valadka's evidence that Ms. Fraser discussed with him how she was feeling emotionally and mentally. That is why he referred her to St. Joseph's in 2004. Furthermore, in entries leading up to the 2012 accident, Ms. Fraser told Dr. Valadka how she felt, even telling him in June 2012 that she felt lonely. Commencing December 2015, Ms. Fraser repeatedly told Dr. Valadka about how she was feeling, including having a low mood, being unhappy, and feeling depressed. He prescribed anti-depressant medication in December 2015 and eventually referred her to a psychiatrist. I am satisfied that Ms. Fraser, despite being stoic as Dr. Valadka described, discussed her emotional and mental health with him when needed. Her lack of complaints between 2012 and 2015 was not because she did not discuss those issues with him but because she did not have mental health concerns that she felt she needed to

discuss with Dr. Valadka, as she had prior to the 2012 accident and after the 2015 accident.

[492] To be clear, that does not mean that Ms. Fraser may not have been experiencing symptoms of PTSD and MDD after the 2012 accident but not to the degree that it impacted her functioning or required discussing with her family doctor.

[493] Ms. Fraser sustained soft tissue injuries in the 2012 accident and an exacerbation of her pre-existing MDD and PTSD. She had substantially recovered from these injuries at the time of the 2015 accident.

[494] I prefer the evidence of Dr. Valadka, who had a long-term therapeutic relationship with Ms. Fraser over that of Dr. Day who met her only once, that Ms. Fraser did not have any ongoing mental health issues that required treatment after the 2012 accident. In other words, her symptoms were not continuous leading up to the 2015 accident as found by Dr. Day. When Dr. Day saw Ms. Fraser, he assessed her and administered psychological tests shortly after another accident. Given the lack of medical information given to Dr. Day, coupled with what I consider to be confusion regarding the impact of the 2015 on the symptoms Ms. Fraser was experiencing when she saw him, leads me to prefer the evidence of Valadka and

the lay witnesses who testified about Ms. Fraser's condition prior to the 2015 accident.

c) Issue Three: What Injuries did Ms. Fraser Sustain in the 2015 Accident and What are her Current Impairments?

[495] Ms. Fraser sustained soft tissue injuries in the 2015 accident. She complained of pain to her left shoulder and low back as well as headaches. She received chiropractic treatment for the first year following the accident and physiotherapy treatment for three years, commencing in 2017. She did not sustain any orthopedic injuries.

[496] As a result of the 2015 accident, Ms. Fraser has been diagnosed with chronic pain by Dr. Wilderman, and with a number of mental health conditions including MDD and PTSD by Dr. Milenkovich. She was also diagnosed with a mild traumatic head injury by Dr. Manjl. While Dr. Reznek agrees that Ms. Fraser suffers from MDD and PTSD, his opinion is that these were pre-existing conditions that were not caused or exacerbated by the 2015 accident.

[497] The Defendant argues that any injuries Ms. Fraser sustained in the 2015 accident were minor and relies on her ability to work full time, in a physically demanding job for three years after the 2015 accident in support of that position.

[498] In my view, despite being able to work full time, earn a perfect attendance award, and work overtime, there is evidence that Ms. Fraser was struggling to work before she eventually applied for STD in March 2018.

[499] Ms. Purchase testified that Ms. Fraser requested a transfer to the day shift in December 2016 and that is when she was first made aware of the 2015 accident. Ms. Purchase's evidence was that there was light work available on the day shift. From this evidence, I find it reasonable to infer that Ms. Fraser sought to move to the day shift due to her ongoing pain issues and struggles at work.

[500] Dr. Valadka testified about Ms. Fraser's escalating complaints of pain and mental health struggles after the 2015 accident which she was still working. He knew that she was struggling at work. Ms. Fraser testified that she was able to work by using pain medication. Dr. Valadka corroborated this. There was evidence that 100 tablets of Teva-Lenoltec No. 3 were dispensed on September 15, 2015, and 66 tablets of diclofenac sodium were dispensed on May 30, 2018. Both are pain medications. In addition, both Dr. Valadka and Dr. Milenkovic testified that Ms. Fraser could not afford medications and they both gave her samples, including Cymbalta (anti-depressant) and Tridural (pain medication), that would not be recorded in a prescription summary from a pharmacy Furthermore, Ms. Fraser

testified that she was using over-the-counter pain medications daily, which I find supports her evidence of using medication to enable her to work.

[501] Ms. Fraser also testified that the physical therapy she was receiving helped her to work. Her increasing complaints to Dr. Valadka also correspond with the time when the funding for her chiropractic treatments ended in November 2015.

[502] Ms. Jaffer testified about Ms. Fraser's struggles when she returned to work after the 2015 accident, and that by 2017, Ms. Jaffer suggested to Ms. Fraser that she should consider stopping work. Ms. Jaffer's evidence corroborates Ms. Fraser's evidence of increasing difficulties with work.

[503] in addition, Ms. Fraser was receiving a great deal of assistance in her home, with meal preparation and housekeeping which also would have helped her to focus her energy on working.

[504] I do not agree, therefore, that Ms. Fraser's ability to work full-time for three years after the accident is determinative evidence that she sustained only minor injuries in the 2015 accident.

[505] Ms. Fraser testified that she has ongoing pain. If I accepted Dr. Cameron's opinion, which I do not, I should not believe Ms. Fraser at all about her pain. A number of participant and non-participant experts and treating health care providers testified that pain is a subjective experience. When there is no objective basis for the pain, such as a broken bone, torn ligament, or injured tendon, the physician or treating professional must rely on the patient's subjective description of their pain. This includes the location of their pain and its severity. As many testified, they asked Ms. Fraser to rate her pain on the pain scale of 0 to 10 with 0 being no pain and 10 being the worst pain you can imagine. If the patient is not being honest, then the health care provider's diagnosis, prognosis, and treatment recommendations will be of little value.

[506] Other than the two defence litigation experts, no other expert or health care provider doubted the veracity of Ms. Fraser's complaints. She was not found to be malingering. As I have found Ms. Fraser to be a credible witness, I accept her complaints of pain in her neck, back, left shoulder, and her struggles with daily headaches.

[507] Dr. Wilderman's opinion that Ms. Fraser suffers from chronic pain was not challenged. The Defendant did not call a chronic pain expert to refute his opinion. While I am troubled by Dr. Wilderman making an error regarding what shoulder Ms.

Fraser said was painful and had restricted range of motion, I am not prepared to disregard his opinion entirely as suggested by the Defendant. Ms. Fraser complained of shoulder pain, and he made a number of observations about her shoulder. If he wrote “right” rather than “left” throughout his report, that is not a basis to completely disregard his evidence, although it does suggest carelessness on his part.

[508] Ms. Fraser also suffers from a number of psychological impairments. Dr. Milenkovic testified that Ms. Fraser suffers from PTSD, MDD, chronic pain, and driving and passenger anxiety as a result of the 2015 accident. Dr. Waxer testified that she suffers from Persistent SSD with Predominant Pain, Severe; Chronic Adjustment Disorder with Mixed Anxiety and Depressed Mood; and Specific Phobia: Situational Type: Vehicular. He did not diagnose her with PTSD as a result of the 2015 accident.

[509] The Defence urges me to either not accept Dr. Milenkovic’s opinion or to place little weight on it. The Defendant’s position is that she was not an impartial expert, as she treated Ms. Fraser first before being asked to write a medicolegal report and testify as a non-participant or independent expert.

[510] To address this argument, I will review some of the general principles regarding the admissibility of expert evidence.

[511] The admissibility of expert evidence is governed by what I refer to as the trilogy of cases:

- 1) *R. v. Abbey*, 2009 ONCA 624
- 2) *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182
- 3) *R. v. Mohan*, [1994] 2 S.C.R. 9.

[512] *Mohan* established four criteria that the court must consider in determining whether to admit an expert report. Those criteria are relevance; necessity in assessing the trier of fact; the absence of any exclusionary rule, separate and apart from the opinion rule itself; and a properly qualified expert.

[513] In *Abbey*, the court found that once the *Mohan* factors are considered, the second step is balancing the potential risks and benefits of admitting the evidence. This is the gatekeeping function to which the courts often refer. It is no longer acceptable to just allow the admission of the expert evidence with only a determination of weight. The question is whether the probative value of the evidence outweighs its prejudicial impact.

[514] Lastly, in *White Burgess*, the court found that the witness must be willing and able to provide evidence that is impartial, independent, and unbiased.

[515] While the defence did not oppose Dr. Milenkovic testifying as a non-participant and participant expert, I am urged to approach her evidence with caution, based on her potential partiality.

[516] The defence also points out that this was the first time that Dr. Milenkovic was qualified as an expert in this court. While she has written medicolegal reports for other matters, she has never been called upon to testify at trial. I do not find that argument persuasive. Every expert must have their first time in court testifying as an expert. The fact that this was Dr. Milenkovic's first time being qualified as an expert is not determinative.

[517] The issue of a participant expert testifying as a non-participant expert was addressed in *Imeson v. Maryvale (Maryvale Adolescent and Family Services)*, 2018 ONCA 888, where the court held as follows at paras. 60-63:

In the civil litigation context, a litigation expert is subject to r. 53.03. This rule requires, among other things, an expert report that sets out the expert's opinions, as well as an acknowledgment of the expert's duty. Typically, an expert report provides a "roadmap of the anticipated testimony and specific limits may be placed on certain areas of testimony": *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, 138 O.R. (3d) 584 (Ont. C.A.), at para. 62, leave to appeal refused, (2018), [2017]

S.C.C.A. No. 343 (S.C.C.). The expert's report will provide the framework for discussion about the proper scope of the expert's testimony.

In contrast, under *Westerhof* [*Westerhof v. Gee Estate*, 2015 ONCA 206], participant experts may give opinion evidence without complying with r. 53.03. Typically, any opinions that are sought to be introduced are found in the clinician's clinical notes and records, or in reports prepared for the purpose of consultation and treatment.

In *Westerhof*, this court explained the proper role of a participant witness, at para. 60, as follows:

[A] witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training, and experience while observing or participating in such events.

If participant experts proffer opinion evidence extending beyond these limits, they must comply with r. 53.03 "with respect to the portion of their opinions extending beyond those limits": *Westerhof*, at para. 63. In acting as a gatekeeper, trial judges have the important task of ensuring that participant experts do not exceed their proper role or, if they do, that there is compliance with r. 53.03.

[518] When Dr. Milenkovic first started seeing Ms. Fraser in 2018, she was focused on treating her for the symptoms she presented with at the time. She was not focused on whether her symptoms arose from the 2012 or 2015 accident. When Dr. Milenkovic was asked to provide an opinion on causation, and on whether Ms. Fraser has suffered a serious and permanent impairment of an important psychological function, Dr. Milenkovic was required to comply with rule 53.03 and

complete a report and execute a form confirming her duty as an expert. She met this requirement. There was nothing improper about having Dr. Milenkovic testify as a non-participant expert after having met the requirements of r. 53.03.

[519] Having said that, I agree with defence counsel that Dr. Milenkovic's evidence as an expert must be approached with some caution given her prior relationship with Ms. Fraser. For one year, she provided psychiatric treatment for Ms. Fraser when the only diagnosis was MDD. It was only when she was asked to prepare a medicolegal report to address other issues that her diagnosis of Ms. Fraser expanded to include several other diagnoses. The defence suggests that this calls into question her impartiality as a witness and questions why her diagnosis expanded only once retained as an expert.

[520] When I assess Dr. Milenkovic's evidence as an expert, I must be mindful of this to ensure that I am satisfied that she testified as an impartial, independent, and unbiased expert whose duty is, at all times, to the court.

[521] I accept Dr. Milenkovic's explanation of why her diagnosis expanded when she examined Ms. Fraser for the purpose of preparing a medicolegal report. When she first saw Ms. Fraser, she was providing treatment for her. She was not focused on preparing reports that were going to be used for litigation. As Dr. Milenkovic

explained, when asked to prepare a report for the court as an expert addressing causation, she wanted to ensure that she provided a complete diagnosis. When she was treating Ms. Fraser, she was focused on keeping her safe, given Ms. Fraser's suicidal ideation at the time. What I infer from that is that Dr. Milenkovic was more focused on treating Ms. Fraser than ensuring she accurately recorded all her diagnoses in a report format. It is understandable that when she wore the hat of an expert, Dr. Milenkovic wanted to ensure she accurately recorded her full diagnosis of Ms. Fraser. I do not see anything nefarious in doing that.

[522] The Defence was critical of Dr. Milenkovic for not having done validity testing or having little knowledge of such testing. Dr. Milenkovic testified that validity testing is not part of the formal education for psychiatrists. Dr. Day, who testified for the defence, agreed that psychologists have more training than psychiatrists in administering psychometric tests.

[523] Dr. Marshall, the psychiatrist who assessed and treated Ms. Fraser in 2004/2005, and whose diagnoses were accepted and relied upon by Dr. Reznek, also did not complete any validity testing. Dr. Reznek also agreed with and relied on Dr. Day's opinion although Dr. Day did not do any validity testing. Accordingly, I do not agree that Dr. Milenkovic's opinion can be dismissed due to the lack of

validity testing when the Defendant's own expert relied on the opinions of others who did not do any validity testing.

[524] The Defence argues that Dr. Milenkovic did not diagnose Ms. Fraser with any type of cognitive or somatoform disorders. On cross-examination, Dr. Milenkovic testified that she did not diagnose Ms. Fraser with a cognitive disorder because she considered her cognitive impairments part of her depressive symptoms. Additionally, Dr. Milenkovic diagnosed Ms. Fraser with SSD with predominant pain, which is a somatoform disorder in the DSM-V.

[525] When she examined Ms. Fraser for the purpose of a medicolegal report, Dr. Milenkovic's diagnosis included PTSD as a result of the 2015 accident, in addition to MDD. Both Dr. Day and Dr. Reznek also diagnosed her with PTSD. The difference is with respect to what accident caused that condition. Dr. Milenkovic diagnosed Ms. Fraser with PTSD on the basis that Ms. Fraser told her that she developed enormous fears after the 2015 accident, thought she was going to die when she was in the accident, and had a vivid recollection and flashback of the accident. She also described being hypervigilant as a passenger and driver.

[526] Dr. Milenkovic was not aware that Ms. Fraser had also said to other assessors that she thought she was going to die following the 2012 accident and

had flashbacks of headlights coming at her, which is consistent with the head-on impact of the 2012 accident. According to Dr. Milenkovic, her opinion was that Ms. Fraser had recovered from the 2012 accident by the time of the 2015 accident and that her current PTSD symptoms were the result of the 2015 accident. Had she been aware of the serious nature of the 2012 accident and Ms. Fraser's response to it, as she told others, Dr. Milenkovic may have concluded that Ms. Fraser also suffered from PTSD after the 2012 accident. That does not, in my view, detract from her opinion that Ms. Fraser had recovered from the 2012 accident and that the cause of her current complaints, she saw Dr. Milenkovic, was the 2015 accident.

[527] Dr. Milenkovic's opinion was that the 2012 accident played a role in Ms. Fraser's current condition. According to Dr. Milenkovic, her prior psychiatric history and the 2012 accident left her vulnerable, but she concluded that but for the 2015 accident, Ms. Fraser would not have the psychological impairments that she currently does.

[528] Dr. Milenkovic gave clear evidence about the interplay between pain and depression. She explained that chronic pain causes insomnia, anxiety, and depression, and once depression develops, it worsens the pain. It is a vicious cycle between these two conditions. I find that this is the vicious cycle in which Ms. Fraser has found herself for several years.

[529] While Dr. Reznek agreed that Ms. Fraser suffered from chronic MDD and from PTSD, he did not agree with Dr. Milenkovic's opinion regarding the cause of Ms. Fraser's current impairment. He considered Dr. Day's report to be key and relied on that report to conclude that Ms. Fraser's symptoms were continuous since 2012, up to the time of the 2015 accident. He reached this conclusion despite being aware of other evidence that Ms. Fraser returned to her full-time work and her social and other activities after the 2012 accident. He was also aware of the lack of reporting of ongoing symptoms to Dr. Valadka about seven months after the 2012 accident and that her physiotherapy ended in March 2013.

[530] In accepting Dr. Day's opinion, Dr. Reznek, who had the benefit of being provided an entire medical brief to review, did not reconcile the discrepancy between Dr. Day's opinion and the lack of any complaints of mental health issues in the medical records between 2012 and 2015. Dr. Reznek speculated that Ms. Fraser may not have been reporting her symptoms to Dr. Valadka. As previously discussed, that speculation is not borne out when you review Dr. Valadka's records. Ms. Fraser saw him several times between the two accidents and there were no references to complaints about her mental health.

[531] As Dr. Valadka testified, starting in December 2015, less than one year after the accident, Ms. Fraser started to go downhill and thereafter there were regular

complaints of depression and unhappiness. Based on Dr. Valadka's records, I am satisfied that if Ms. Fraser had ongoing psychological issues after the 2012 accident, she would have reported them to Dr. Valadka.

[532] In my view, the only way Dr. Reznek can reconcile Dr. Day's opinion with the medical records is by speculating that Ms. Fraser must have had symptoms that she did not report to anyone. Dr. Reznek was not prepared to accept another possibility: that there were no records of ongoing psychological issues leading up to the 2015 accident because there were no ongoing psychological issues.

[533] While Dr. Reznek administered validity tests, which he explained he could do as a psychiatrist, he did not administer any tests to assess her psychological condition, as Dr. Waxer, Dr. Day, and Ms. Paliouris had done, including the Personality Assessment Inventory, the Pain Patient Profile, the Beck Depression Inventory, and the Beck Anxiety Inventory, and others. While I accept Dr. Reznek's evidence of the importance of doing validity testing in the context of a medicolegal assessment, I am puzzled that he only chose to do those tests and not others to assess her current condition.

[534] I am also troubled by Dr. Reznek's decision to not include some important information in his report which, in my view, would have resulted in a fairer and more objective opinion.

[535] During cross-examination, he agreed that he was aware, from reading the extensive material sent to him for review, that Ms. Fraser had a long history of being a hard worker both before and after she moved to Canada. This included, at times, working two jobs. He agreed that she was a very hard-working person but did not put any of this background in his report.

[536] In my view, this background information is important as it describes Ms. Fraser as a person with her own unique life story. She was a hard and dedicated worker for many years. There is no evidence from her past work history that she was looking for a way out of work. In fact, to the contrary, she told various health care providers that she wanted to return to her old life and to return to work. This information would have provided a more balanced and objective opinion.

[537] Dr. Reznek agreed that while he recorded in his notes that Ms. Fraser told him that she had occasional nightmares of killing herself, he did not include that in his report. He agreed that nightmares are an important part of a psychological evaluation. His evidence was that if she had nightmares about the accident, that

would be relevant for a PTSD diagnosis. He testified that Ms. Fraser's occasional nightmares of wanting to kill herself by walking in front of a car was irrelevant to his conclusion that there was no accident-related psychopathology. He testified that what would have been relevant is if she had nightmares about being in a car accident. It was his opinion that her nightmares were not related to the accident even though her nightmares were about walking in front of a car.

[538] In his report, Dr. Reznek said that Ms. Fraser had no current suicidal ideation. He testified that although Ms. Fraser told him she was occasionally suicidal and said to him, "what's the use of living," as she last had those thoughts two to four weeks earlier, it was not recurrent suicidal ideation, which he said meant occurring once per week.

[539] Given Ms. Fraser's suicidal complaints to various health care practitioners over the years and what she told Dr. Reznek about her dreams, as an expert whose duty is to assist the court, I am concerned with his decision not to include this information in his report.

[540] Dr. Reznek did not agree that Ms. Fraser was happy and outgoing and enjoyed her family and friends, since Dr. Marshall, who she saw in 2004, said she had been unhappy. He relied on that to say that she was a very unhappy woman.

It was his opinion that the reports from her treatment in 2004/2005 were crucial. He noted that the doctor reported that she had a long-standing period of unhappiness, and her symptoms had worsened over the past year. From that, he inferred that she had several years of depression. He testified that when he asked her about being diagnosed with MDD and PTSD, she said she could not remember. He did not think it plausible that someone who had psychiatric care would forget about it.

[541] He did not include in his report the speed from which she recovered from the 2004 diagnosis and the fact that there was no record of any ongoing significant psychological issues between 2005 and 2015 in the family doctor's records. In my view, that was also important information that he chose to exclude.

[542] He did not include in his report that Ms. Fraser was using pain medication while working, although she did tell him that when he assessed her. While he did not consider that critical, at the same time, in formulating his opinion regarding causation, he placed great reliance on her being able to work.

[543] Dr. Reznek also did not include in his report his review of the entry in Dr. Valadka's clinical note of May 2, 2018, where Dr. Valadka recorded that Dr. Milenkovic diagnosed Ms. Fraser with MDE with psychotic features. Dr. Reznek

agreed on cross-examination that this was a significant finding that should have been in his report.

[544] According to Dr. Reznek, Ms. Fraser eventually stopped working not because of injuries from the 2015 accident, but because of her worsening MDD that was not triggered by the 2015 accident (given Dr. Day's opinion), and because of other health issues such as sleep apnea, rheumatoid arthritis, and osteoarthritis.

[545] While I heard evidence that Ms. Fraser suffered from other health issues such as high blood pressure, sleep apnea, and osteoarthritis, there was no evidence that these conditions played any role in her decision to stop working. I find Dr. Reznek's opinion in this regard to be nothing more than speculation. I heard no evidence about the degree of pain that Ms. Fraser's arthritis or osteoarthritis was causing her or if it interfered in her work or activities of daily living. While there was evidence that untreated sleep apnea can cause fatigue, and that sleep apnea may have contributed to Ms. Fraser's complaint of fatigue.

[546] If the Defendant's theory is that Ms. Fraser's complaints of pain that led her to stop working are as a result of pre-existing conditions such as arthritis, I would expect that an expert in rheumatology would have been called to testify about her pre-existing condition and how the pain from that condition increased and led her

to stop working and/or is the cause of her current pain levels and psychological distress, not the 2015 accident. No such evidence was called, nor is Dr. Reznek qualified to give opinion evidence on such conditions. Based on the evidence I heard, Dr. Reznek's opinion that Ms. Fraser's other medical problems such as osteoarthritis and rheumatoid arthritis worsened and that she deteriorated to the point that she could not work is nothing more than speculation and I place no reliance on it.

[547] I am left with some concern of Dr. Reznek's objectivity testifying as a litigation expert. I reach this conclusion as he did not include in his report information from his notes that, in my view, should have been included to reflect a fairer, more balanced report. He was also quick to find Ms. Fraser deliberately did not tell him about her prior mental health diagnosis rather than consider that she may not recalled the episode from 15 years earlier.

[548] Ms. Cheema and Ms. Paliouris testified about their treatment of Ms. Fraser after she stopped working. They did not form any opinion about the cause of Ms. Fraser's psychological and cognitive issues. Their evidence is consistent with the evidence of Ms. Fraser and her family and friends that Ms. Fraser has ongoing pain issues and suffers from both depression and anxiety. Both describe a person clearly struggling with her memory, mood, and other cognitive deficits. They provided the

most continuous treatment for Ms. Fraser over an extended period. I found their evidence to be helpful given their long therapeutic relationship with Ms. Fraser. While I note that the treatment was funded by the accident benefit insurer who would have found the treatment to be reasonable and necessary in connection with the 2015 accident, that is not determinative of the causation issue. Neither Ms. Cheema nor Ms. Paliouris had any concerns that Ms. Fraser was exaggerating or malingering.

[549] I found them to both be strong witnesses whose evidence was unshaken on cross-examination.

[550] There is disputed evidence about whether Ms. Fraser sustained a mild traumatic head injury in the 2015 accident. Dr. Manjl, a neurologist, testified that she did. I found Dr. Manjl testified in an objective, impartial fashion. His testimony was not challenged on cross-examination. Dr. Dimitrakoudis, who examined Ms. Fraser at the request of Unifund following the 2015 accident, who was also appeared to be impartial and objective, did not agree and found she had a bump on her head. He did, however, suggest some further testing for her headaches.

[551] Ms. Fraser complains of constant headaches that can last a day and require her to lie down in her room when the headaches strike. Both Dr. Manjl and Dr.

Dimitrakoudis noted Ms. Fraser's complaints of headaches. While Dr. Valadka's records do show some prior complaints of tension headaches, there was no indication in his records that those headaches incapacitated Ms. Fraser to the extent they now do.

[552] There is evidence that she also has cognitive issues that are either the result of her depression or mild traumatic head injury. Whether these cognitive issues were caused by a head injury or depression, according to Dr. Valadka, Ms. Fraser never had any cognitive issues prior to 2015. Therefore, while there may be a dispute about the cause of the cognitive issues, I find that these deficits arose after the 2015 accident and that Ms. Fraser continues to suffer from cognitive issues as described by Ms. Cheema.

[553] The evidence of Ms. Fraser's family and friends, as reviewed above, corroborates Ms. Fraser's evidence regarding her current condition. They describe her as withdrawn, irritable, and depressed. She is no longer as involved with her church, once a focal point in her life. According to several of her family and friends, Ms. Fraser walks with a cane (or a stick, as described by Ms. Frederick). They all describe her limitations with her activities for daily living, such as cooking, cleaning, and caring for herself.

[554] Other than the evidence of Dr. Cameron and Dr. Reznick, there was no evidence that Ms. Fraser's current impairments are imaginary or that she is malingering for financial gain. I observed some degree of physical and psychological distress when she testified which I find to be genuine.

d) Issue Four: Is the 2015 Accident a Cause of Ms. Fraser's Current Impairments?

[555] The Supreme Court of Canada clarified the law of causation in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181. The plaintiff has the burden to prove, on a balance of probabilities, that the defendant's action caused the injuries complained of, and that "but for" the defendant's negligence, the injury would not have occurred.: *Clements* at para. 8.

[556] The plaintiff does not have to establish that the defendant is the sole cause of the injury. In *B.(M.) v. 2014052 Ontario Ltd.*, 2012 ONCA 135, in discussing causation at para. 29, the court referred to a paper written by Erik Knutsen in "*Clarifying Causation in Tort*" (2010), 33 Dal. L.J.153 at p. 169: "Successive and cumulative injury cases, including those involving pre-existing conditions, can also satisfactorily meet the 'but-for' test." This is because a "defendant's negligence need only be 'a' cause, not 'the' cause [of the injury]."

[557] The Defence argues that to the extent that Ms. Fraser has any ongoing pain or psychological issues, those result from the 2012 accident which the Defence says was far more serious than the 2015 accident. In addition to the evidence from the experts it called, the Defence urges me to consider the following evidence to support the position that the 2015 accident was not a cause of her current impairments:

- The 2012 accident was far more serious than the 2015 accident as evidenced by the property damage file and as Ms. Fraser had to be removed from her car in 2012 by emergency personnel;
- She was taken by ambulance to the hospital in the 2012 accident but was driven home by her son following the 2015 accident;
- She was off work for several weeks after the 2012 accident;
- She missed only one day of work after the 2015 accident and then worked for three years, performing her regular duties, without missing any time from work;
- She did not seek out any medical attention after the 2015 accident until seven days later, when she saw Dr. Valadka.

[558] The Defence submits that while the extent of the damage to a car does not determine the seriousness of the accident or the injuries a person may sustain, a common-sense inference can be drawn that Ms. Fraser sustained more significant injuries in the 2012 accident and that it would have had a more profound psychological impact, as it was a head-on collision more serious than the 2015 accident.

[559] The Plaintiff disagrees and argues that the severity of property damage to a vehicle does not directly correlate with the severity of injuries. The Plaintiff argues that the best evidence regarding the seriousness of Ms. Fraser's injuries and, more importantly, her recovery, is found in the medical records and Ms. Fraser's evidence as opposed to the property damage file and the length of time she took off work.

[560] I agree with the Defendant that the 2012 accident was a more serious accident than the 2015 accident. However, I also agree with the Plaintiffs that the best evidence of the injuries Ms. Fraser sustained, and more importantly, her recovery, is the evidence from her family, friends, and health care practitioners.

[561] The Defence relies on *Saleh v. Nebel*, 2015 ONSC 747. In that case, the plaintiff alleged that he suffered chronic pain and stomach issues as a result of the accident. In his threshold decision, Justice Myers found that the plaintiff was not a credible witness. He did not accept the plaintiff's evidence that he suffers from chronic pain caused by the car accident. At para. 23, he found:

There is insufficient independent evidence that does not depend solely on the credibility of the plaintiff's statements to find that that the car accident has caused the plaintiff to suffer chronic pain from soft tissue injuries alone.

[562] According to Justice Myers, the plaintiff was grossly exaggerating, and his complaints of pain were self-serving to maximize his claim. He found that it was

unnecessary to find that the plaintiff suffered no pain at all. The plaintiff's exaggeration, lack of candor, and lack of corroborative evidence were determinative.

[563] In my view, *Saleh* is distinguishable, as I find Ms. Fraser to be credible and note that there is a significant amount of corroborative evidence regarding her condition prior to and following the 2015 accident.

[564] The key opinion regarding causation, from the defence perspective, is that of Dr. Day, who opined that Ms. Fraser's psychological symptoms from her PTSD and MDD that he says she sustained in the 2012 accident were continuing at the time of the 2015 accident. Dr. Day's opinion formed the bedrock of Dr. Reznek's opinion that the 2015 accident did not cause Ms. Fraser's psychological injuries.

[565] For the reasons set out above, I do not accept either Dr. Day's or Dr. Reznek's opinions regarding the continuity of her injuries between the 2012 and 2015 accidents. The evidence that I do accept is that Ms. Fraser recovered from her 2004 diagnosis of MDD and PTSD, as corroborated in the records from St. Joseph's and Dr. Valadka. She was injured in the 2012 accident and had substantially recovered by March 2013. She had limited treatment and was working full-time after the 2012 accident.

[566] I also accept the corroborative evidence of the lay witnesses who testified that Ms. Fraser was fully engaged in her activities with her friends, family, and church prior to the 2015 accident.

[567] When the 2015 accident occurred, Ms. Fraser's accident benefit claim from the 2012 accident was still open. The 2012 accident benefit claim was settled in October 2015 with Wawanesa for \$13,000 for all past and future medical and rehabilitation expenses. By that point, Ms. Fraser had only used up \$2,406.10 for medical expenses, which would have been for the physiotherapy treatment she received at Lawrence Weston Rehab.

[568] The chiropractic treatment she received after the 2015 accident and the treatment provided by Ms. Paliouris and Ms. Cheema was all funded by Unifund, the accident benefit insurer from the 2015 accident. In total, \$39,354.79 has been paid by Unifund for medical and rehabilitative treatment in connection with the 2015 accident and the accident benefit file remains open.

[569] While this evidence is not determinative of the causation issue, it is a factor I have considered in finding that but for the 2015 accident, Ms. Fraser would not have suffered her current impairments.

Part 3: Damages

Is the Thin or Crumbling Skull Rule Applicable?

[570] Once causation is established, the next step is to assess the extent of harm. I will address the thin skull rule and crumbling skull rule in this section. As noted at para. 31 in *B.(M.)*, causation deals with connecting the defendant's fault to the plaintiff's harm whereas the focus of damages is to repair that harm by putting the plaintiff in the same position she would have been in but for the defendant's fault. The defendant is not, however, required to put the plaintiff in a better position than her original one: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32.

[571] A fundamental principle in tort law is that you take your victim as you find them. If an individual has a pre-existing condition that made her more susceptible to injury or her injuries were more extensive than would have been the case for someone else, the thin skull rule may apply.

[572] As a matter of law, damages are not reduced because a person has a pre-existing condition such that she suffers greater injury from the accident than would otherwise be the case. Even if the injury appears to be out of all proportion to the event, if it is genuine, the damages must be given for the full extent of the injuries

even though they would have been less in the case of a person who did not have this pre-existing condition: *Athey* at para. 34.

[573] However, as opposed to the thin skull rule, the “crumbling skull principle” applies where the defendant’s act causes the premature or accelerated degeneration of the plaintiff’s pre-existing condition. In *B.(M.)*, the court described it as follows at para. 36:

If there is a “measurable risk” that the condition suffered by the plaintiff would have affected the plaintiff in the future regardless of the defendant’s tortious act, the defendant will be liable for the effect of his act on the degenerative process. However, the defendant need not compensate the plaintiff for any debilitating effects of the pre-existing condition that would have occurred in any event: see *Athey* at para. 35.

[574] The question is whether there was anything inherent in Ms. Fraser’s original condition – that is, her pre-2015 accident condition – that posed a “measurable risk” that she would develop her current problems notwithstanding the 2015 accident.

[575] In *B.(M.)*, the court reviewed the evidence and found at para. 59 that there was “no more than a vague possibility that the respondent’s depression and post-traumatic stress would have developed to some degree in the absence of the sexual assaults.” Evidence of a vague possibility is not reasonable evidence of a material risk.

[576] The Defence submits that the “thin skull” rule is not applicable on the basis that Ms. Fraser’s pre-existing health issues were still ongoing at the time of the 2015 accident and had not yet stabilized. There is no dispute that Ms. Fraser had not completely recovered from her 2012 accident by the time of the 2015 accident. The evidence heard at trial was that she was somewhere between 75% and 90% recovered from the 2012 accident. However, she was working full-time and engaged in all of her activities.

[577] I do not find Ms. Fraser’s condition to have been deteriorating prior to the 2015 accident. There is no evidence that I accept in this trial which suggests that her condition would have deteriorated had the 2015 accident not occurred. Ms. Fraser had some ongoing pain symptoms at the time of the 2015 accident. The evidence I accept is that she had no ongoing depressive or anxiety symptoms after May 2005 for which she sought or required any treatment. She was functioning at the time of the 2015 accident and there was no evidence of any cognitive complaints.

[578] The key question is whether Dr. Reznek’s evidence that MDD is a chronic recurring condition that results in major depression approximately every five years satisfies the test of a “measurable risk,” or if his evidence only establishes a vague

possibility that Ms. Fraser's MDD would have developed to some degree in the absence of the 2015 accident.

[579] While I have accepted Dr. Reznek's evidence of the chronicity of MDD, there was no evidence led that when Ms. Reznek would eventually experience another episode of MDD it would have any impact on Ms. Fraser's employment or functioning in her activities of daily living and other activities. There is also no evidence that should she experience another MDD episode that she would not fully recover, with treatment, as she did in 2004/2005. There was insufficient evidence to establish a measurable risk that Ms. Fraser's MDD would eventually result in her being unable to work or function in her activities. There was no evidence that she would require medical assistance due to pain and cognitive issues.

[580] Furthermore, for reasons set out herein, I have rejected Dr. Day's opinion that when he examined Ms. Fraser, she was describing to him symptoms she had been experiencing continuously since 2012. I accept Ms. Fraser's evidence and the evidence of the lay witnesses and Dr. Valadka that Ms. Fraser had resumed all of her pre-2012 accident work and activities and that she did not complain of or require treatment for any mental health conditions between 2015 and 2015. There is no evidence that I accept which suggests that her condition was deteriorating at the time of the 2015 accident.

[581] I accept Dr. Milenkovic's opinion that given Ms. Fraser's pre-existing underlying condition of MDD and PTSD, and the 2012 accident, she was vulnerable and more susceptible to psychological injury from the more minor 2015 accident. Those serious consequences materialized. I therefore find that the thin-skull, and not the crumbling-skull, principle applies.

e) Issue Five: What are Ms. Fraser's Damages for Pain and Suffering?

[582] Having found that Ms. Fraser was injured in the 2015 accident and that the accident was a cause of her current impairments, and that the thin-skull principle applies, the next issue to address is damages. Ms. Fraser is claiming general damages for pain and suffering, past and future income loss, as well as future medical care and housekeeping.

[583] Ms. Fraser is entitled to be compensated for her pain and suffering. I accept the diagnosis of MDD, PTSD, chronic pain, adjustment disorder, and fibromyalgia. Based on the evidence that I have reviewed in these reasons, I find that Ms. Fraser's life has been significantly impacted by these injuries, which I find to be permanent. While she has had some treatment for her injuries, as is often the case where a person suffers from invisible injuries, she did not have the benefit of early treatment,

such as the care of a chronic pain clinic, that may have given her better coping tools.

[584] Assessing damages is a highly personalized exercise. You cannot look at any prior decision and find a case where all the facts are identical. As we tell juries, there is no chart or formula you can look to when trying to determine the proper amount that will compensate Ms. Fraser for such things as pain, suffering, disability, inconvenience, and loss of enjoyment of life. Instead, the overarching consideration is that the amount must be fair and reasonable.

[585] In the recent decision from Justice Lemon in *Graul v. Kansal*, 2022 ONSC 1958, he said this at para. 557 in reviewing the general principles in assessing general damages:

The principles related to fixing personal injury damages are well known. I am to assess an amount to restore Mr. Graul to the position he would have enjoyed but for the accident, to the extent that money can do so. No such amount can be perfect compensation but must be reasonable and fair to both parties. The award must be consistent with other decisions involving similar injuries. It cannot be based on sympathy for the plaintiff nor retribution to the defendants. There can be no dispute that such an award will have to be arbitrary and be decided on the circumstances of each individual, both in terms of physical and psychological suffering: *Andrews v. Grand and Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 261.

[586] To arrive at my determination of the appropriate amount to award, I have considered the case law submitted by the Plaintiffs and Defendant. Again, no single case is determinative on this issue.

[587] I have found the evidence of the lay witnesses to be credible and reliable and corroborative of Ms. Fraser's evidence of her current impairments. I do not intend to review all that evidence again.

[588] I have also accepted the medical evidence that Ms. Fraser suffers from chronic pain, MDD, and PTSD. I find that she suffers from cognitive issues as described by Ms. Cheema. The level of her emotional distress is reflected in the evidence of Ms. Paliouris and Dr. Milenkovich.

[589] Ms. Fraser had one prior episode in 2004/2005 of a mental health episode from which she made an excellent recovery. After sustaining soft tissue injuries in the 2012 accident, Ms. Fraser was able to recover, but not completely, and still had some residual pain issues at the time of the 2015 accident. As Dr. Valadka testified, Ms. Fraser successfully dealt with her injuries from the 2012 accident, and she was trying to do the same after the 2015 accident.

[590] Ms. Fraser, although diagnosed with MDD, a recurring and chronic condition, was able to recover in 2004 and live a full life without any further mental health treatment. Following the 2012 accident, she again was able to substantially recover. However, the 2015 accident was the proverbial straw that broke the camel's back.

She used her mental and physical resources to recover from the 2012 accident but could not do the same after the 2015 accident.

[591] Ms. Fraser thought she could recover after the 2015 accident, as she did after 2012. She returned to work and persevered. After the 2015 accident, she was receiving regular chiropractor and physiotherapy treatment and used prescribed and over-the-counter pain medication to cope. I also accept her evidence that she had co-workers who would let her take breaks when she was struggling at work. Additionally, she had moved to another shift where light duties were available. She used her vacation days to rest.

[592] Ms. Fraser did not work in a unionized environment that might offer support to a vulnerable worker. She needed her job to support herself. She did not want her employer to know about her struggles, which explains why she did not discuss her issues with Ms. Purchase, the Human Resources Manager. She was concerned she could lose her job. She shared her concern with Ms. Jaffer, who was made aware of Ms. Fraser's pain issues sometime in the first year after the accident and, by 2017, was suggesting she stop working. Ms. Fraser repeated her concern to Ms. Jaffer, as she did to her family and friends, that she needed to support herself. Her focus on this concern is reflected in the evidence of Ms. Paliouris, Ms. Cheema, and Dr. Milenkovic.

[593] Being unable to work was Ms. Fraser's fear. She testified that if she could not work, without an income, she would find herself where she is today: living on social assistance and needing to live with a roommate. Ms. Fraser worked hard, all her life, and persevered until March 2018, beyond which she could no longer continue due to chronic pain and her deteriorating psychological condition.

[594] Ms. Fraser had a full life prior to the 2015 accident. Her life has since become much more limited and confined. She spends her days watching television. She does not leave her apartment often. She is not involved with the church. She spends little time with her grandchildren. She is in pain every day.

[595] In my view, the appropriate quantum for general damages for pain and suffering is \$175,000.

f) Issue Six: Did Ms. Fraser Suffer a Past and Future Loss of Income as a Result of the 2015 Accident?

[596] Given the permanency of Ms. Fraser's physical and psychological condition, she will be unable to return to work. She stopped working in March 2018 and received STD for a period and then settled her LTD claim. In March 2019, she qualified for a CPP disability benefit.

[597] Both Dr. Manjl and Dr. Wilderman testified that Ms. Fraser cannot return to any work for which she is reasonably suited by education, training, or experience. Ms. Purchase testified about the heavy demands of Ms. Fraser's job that involved attaching components to auto parts, that come out of a machine, in order to do quality checks, and then placing the parts in a bin. The job requires standing.

[598] While Ms. Fraser has told Ms. Paliouris and Ms. Cheema that she wants to return to work, based on the totality of the evidence, I am satisfied that Ms. Fraser is permanently unable to return to any work. Other than Dr. Cameron who testified that from an orthopedic perspective, she could work, there is no other evidence from the Defendant that Ms. Fraser can return to any kind of work.

Vivek Gupta – Forensic Accountant

[599] Mr. Gupta is a fellow of the Society of Actuaries. He is the founder of TCL Economic Valuation Experts. Called by the Plaintiff, he prepares reports about losses of income and future costs of care. He has been qualified as an expert in the past in this court. His expertise was not challenged by the Defendant. He was qualified as a forensic accountant to provide an opinion on future care costs as well as past and future income loss in Ms. Fraser's case. The Defence did not call any expert evidence to challenge Mr. Gupta's report. His initial report was dated May 8,

2020. He then prepared an updated report dated January 2022, using a valuation date of January 7, 2022.

[600] The Defence made the following argument in the written submissions:

Mr. Gupta put forth three future income loss scenarios. Two involved the plaintiff working full time until the age of 65, with her slowly reducing her working hours on an annual basis until the age of 70. The other projected the plaintiff working full time until the age of 70. These scenarios were chosen either because the plaintiff selected them, or Mr. Gupta was instructed by plaintiff's counsel to do so. This is not indicative of an independent assessment. Rather, in cross examination, Mr. Gupta suggested that the most appropriate retirement age for the plaintiff is likely the average age of retirement for female private sector employees without a pension. However, this scenario was not considered by Mr. Gupta independently, nor was any evidence proffered as to what that age might be. There was no suggestion that such evidence does not exist, there was simply a failure to source and provide it to the Court.

[601] I do not agree that Mr. Gupta is not an independent and impartial witness. He prepared his report based on scenarios provided to him by Plaintiffs' counsel. He is not providing any opinion on what age Ms. Fraser might retire. Rather, he provided the calculation for past and future income loss based on instructions he received.

[602] Based on the evidence I heard at trial and the documentary evidence, it is left to me to find, as a fact, Ms. Fraser's likely retirement age had this accident not occurred. Mr. Gupta cannot be faulted for the work he did at counsel's request. It is

not his role to review the evidence and determine what is the appropriate retirement age to use. That is my role.

[603] Mr. Gupta calculated Ms. Fraser's past loss of income to be \$116,382 on January 10, 2022. The Defence took no issue with that figure. This is 70% of her gross income, as if no accident had occurred, less CPP disability benefits she received. I find that this as her past loss of income.

[604] With respect to Ms. Fraser's future loss of income, the first issue is retirement age. The Defendant did not call any evidence to challenge Mr. Gupta's report other than a document from Statistics Canada stating that the average retirement age for private sector employees was 64.9 in 2021. Mr. Gupta accepted this as an authoritative source.

[605] The average retirement age from Statistics Canada is but one piece of evidence to consider when making a finding regarding Ms. Fraser's anticipated retirement age. It is also not clear to me if that statistic is the retirement age for someone with or without an employment pension. Ms. Fraser did not have an employment pension and would have been relying on CPP and Old Age Security Retirement benefits. Mr. Gupta testified that based on his experience, people who

do not have a retirement pension retire later than those who have an employment retirement pension.

[606] Ms. Fraser was earning a modest income. She testified that she had planned to work to age 70. Ms. Purchase testified that there are employees at ABC Group who are over 70. Dr. Valadka hesitated when asked if Ms. Fraser had any pre-existing health issues that might have impaired her ability to work to age 70 although he noted that when he last treated her, her health conditions such as hypertension, were under control.

[607] Ms. Fraser worked in a physically demanding job. She was required to stand and move parts all day. Light duties are not available at ABC Group. Given her pre-existing issues with arthritis, rotator cuff tear in her left shoulder (which I heard no evidence of being accident-related), as well as the heavy physical demands of her job that required standing and repetitive motion, I find that she would have retired at age 65 and then worked part-time to age 70 to supplement her government retirement income.

[608] This was one of scenarios considered by Mr. Gupta. Based on that retirement age, he calculated the present-day value of Ms. Fraser's future loss of income to be

\$375,590. It is my understanding from his report, that this calculation takes into account that Ms. Fraser will receive CPP disability benefits to age 65

[609] From the total of past and future income loss, Mr. Gupta then deducted \$40,137 as the net LTD settlement Ms. Fraser received and \$4,363 for Ontario Works, resulting in a total loss for past and future income of \$447,473.

[610] The Defendant takes issue with the income Mr. Gupta used to calculate future income loss. The defence position is that Ms. Fraser's earnings in 2014, the year before the 2015 accident, should be used as that was her income at the time of the 2015 accident, rather than her income in 2018, when she stopped working. Her income in 2014 was \$43,084.

[611] Mr. Gupta relied on Ms. Fraser's income tax returns. In 2016 she earned \$46,939 and in 2017 she earned \$53,889. She worked between January 1, 2018 and March 14, 2018 and earned \$11,646. Extrapolating that over the year, her income in 2018 would have been about \$53,000 had she kept working. That was the income Mr. Gupta used to calculate her future loss of income.

[612] I agree that her income when she stopped working was the appropriate income to use. After the accident, Ms. Fraser demonstrated an ability to earn

\$53,000 per annum before her pain and psychological condition prevented her from continuing. Using a lower income would be unfair and not reflect the reality of Ms. Fraser's actual earnings and therefore her actual loss of future income.

[613] Mr. Gupta agreed that it is generally accepted by actuaries that a disabled person works less but said that it depends on the personal injury, the person's health, and their own choices. He agreed that it is less common for someone to work more overtime after an accident. He did not look at how much overtime Ms. Fraser worked but just considered her total earnings. He did not consider her pre-accident 2014 earnings when she earned less than she did after the 2015 accident.

[614] The Defendant also takes the position that not all of the collateral benefits Ms. Fraser received were properly deducted from the income loss calculation. It was not clear to me, however, what other benefits should be deducted. If the parties need to make further submissions on this issue, they are to contact my office to schedule a hearing, on Zoom, to address that issue.

g) Issue Seven: Does Ms. Fraser have any Future Care Costs as a Result of the 2015 Accident?

Ms. Mukherjee – Future Care Cost

[615] Ms. Mukherjee was qualified, on consent, as an expert in the field of life care planning to provide opinion evidence regarding Ms. Fraser's future care and medical needs as a result of her current impairments and the cost to provide that care.

[616] She explained that a life care planner outlines what a person who has chronic health issues will require over their life because of those health needs. She graduated from occupational therapy at Queen's University in 1996. She worked in a hospital setting until 2003. She began to work as a consultant for Carol Bierbrier & Associates in 2003.

[617] She enrolled in a course to become certified as a life care planner in 2004 and earned her certificate in 2006. After becoming certified as a life care planner in 2006, Ms. Mukherjee has worked in that capacity for 16 years for Carol Bierbrier & Associates. She has been qualified as an expert in life care planning in the Ontario Superior Court of Justice on nine prior occasions.

[618] The defence did not call any evidence to challenge Ms. Mukherjee's opinion.

[619] In addition to reviewing a medical brief, Ms. Mukherjee also met with Ms. Fraser in her home in October 2019. Her goal was to assess Ms. Fraser in her home

to see if she had any accessibility needs and to see if any changes were needed in the home to accommodate her impairment. Ms. Fraser's son was also present.

[620] Ms. Mukherjee was aware that Ms. Fraser was in two car accidents. She knew Ms. Fraser was 80% recovered from the first when the second occurred. She was told that Ms. Fraser was still receiving assistance with some of her housework, such as grocery shopping, laundry, cleaning, and financial tasks when the 2015 accident occurred. She was still able to work and pursue her leisure interests after the 2012 accident. She testified that she was not concerned with how the accidents occurred but, instead, focused on what Ms. Fraser's impairments were as a result of the accidents.

[621] Ms. Fraser told Ms. Mukherjee that she has daily headaches dizziness; tinnitus; blurred vision; light sensitivity; chronic pain in her neck, hands, left shoulder, chest, low back, and both knees; and cognitive limitations. She was aware that Ms. Fraser has been diagnosed with many conditions, including chronic pain, fibromyalgia, post concussive syndrome, chronic whiplash disorder type II, and post-traumatic chronic headaches. Ms. Fraser had also been diagnosed with cervicogenic headaches/post-traumatic migraine headaches, depression, severe PTSD, and other things.

[622] Ms. Mukherjee reviewed Ms. Fraser's physical functioning and noted that she had standing and walking tolerances limited to 10 minutes due to pain in her neck, low back, and knees, and that she had a sitting tolerance of one hour. Her balance appeared to be impaired for dynamic standing, but she stabilized herself by holding onto walls/furniture for support. Her forward bending was limited to a moderate degree due to low back pain. Her lifting/carrying and pushing/pulling abilities were limited to light items due to neck, back, chest, left shoulder, and knee pain. She presented with moderate to severe limitations in her left shoulder's range of motion and mild reduced range of motion in her right shoulder. Her neck movements were within functional limits.

[623] Ms. Fraser reported that her emotional health has declined considerably. Clint reported that his mother's mood was lower and that her anxiety in a car was higher. She becomes angry quickly and is highly negative.

[624] Ms. Mukherjee testified that Ms. Fraser gave short answers and had a flat affect – she was emotionless. She noticed that Ms. Fraser deferred to her son and had difficulties with her memory. Ms. Fraser said she now has problems with attention, concentration, memory, and organization.

[625] Ms. Fraser told Ms. Mukherjee that prior to the 2015 accident, she was independent with showering, dressing, and feeding. She could do meal preparation but relied on her family to clean, do laundry, and shop. She has not returned to her church activities or reading, as she has problems with concentration and attention. Ms. Fraser told her that she was using three to nine Tylenol 3 pills per day before she stopped working and used vacation days to take time off. Her peers at work would cover her when she needed a break.

[626] Ms. Fraser said that she does not own a car and now will drive only short distances. When she is a passenger in her son's car, she has passenger anxiety.

[627] Ms. Mukherjee broke down future care needs into three categories. One was for medication and assistive devices, another was for professional care services, and the remaining was for personal care services. Costs were estimated based on one-time costs or annual recurring amounts. She did not include any contributions from publicly funded programs or other insurance coverage, as those alternate funding sources cannot be precisely forecasted over the lifetime of a disability. She testified that she did not include any contingencies for possible reductions in medication, but she also did not consider any increase. She did not address whether Ms. Fraser would require some future care, even if the accident had not occurred.

[628] An award for future care is based on what is reasonably necessary on the medical evidence. The award must be reasonable to both a plaintiff and defendant: *Milina v. Bartsch*, 1985 CanLII 179 (B.C.S.C.).

[629] The Defence relies on Dr. Cameron's opinion that Ms. Fraser only sustained minor, uncomplicated soft tissue injuries that were of no significance as a result of the 2015 accident and has no future care needs. I have rejected that opinion. I have accepted the considerable evidence regarding Ms. Fraser's current impairments, the resulting limitations, and the cause of those impairments.

[630] If the Defendant were of the view that there were other funding sources available, I would have expected that a life care planning expert would have been retained to address any deficiencies in Ms. Mukherjee's report. Absent that evidence, I am unprepared to engage in speculation about what other funding source might be available, for how long it may remain an option to Ms. Fraser, and how much of Ms. Fraser's expenses it would have covered.

[631] Dealing first with the medication and assistive devices, Ms. Mukherjee included a yearly amount for a CPAP machine and mask. I heard no evidence that Ms. Fraser's sleep apnea was connected to the accident. I do not find that expense reasonable or necessary. Most of the balance of the times were recommended by

Dr. Wilderman so there is a medical basis for the assistive devices. The other items included the cost for Aleve/Advil, orthotics, a back brace, a microcurrent machine and a grab bar.

[632] Mr. Gupta provided the present-day value of the future needs as set out by Ms. Mukherjee. He testified that on average, a 60-year-old person has an average life expectancy to age 85. Mr. Gupta calculated the present-day value of those costs to be \$32,235. This calculation was not challenged by the Defendant.

[633] With respect to professional services, a chronic pain management program was recommended by Dr. Manjl and Dr. Wilderman. The recommendation is that Ms. Fraser attend the pain clinic at Hamilton Health Sciences to participate in a four-week program. Ms. Fraser would have likely benefited from that intervention earlier on. Also included in the future care assessment are the costs for psychotherapy, including cognitive-behavioural therapy, also recommended by Dr. Wilderman. Ms. Mukherjee recommended occupational therapy, gym membership and a trainer, a neuropsychological assessment, and a driving desensitization program. Each of these services or treatment were recommended by a health care practitioner who saw Ms. Fraser.

[634] Ms. Mukherjee recommends the use of a case management service. This is someone who would accompany Ms. Fraser to her appointments to ensure that information is being relayed accurately and to assist her with the organization of other medical and rehabilitation appointments. According to Ms. Mukherjee, Ms. Fraser's son is filling that role now and should not have to continue to do so.

[635] The present-day value of the professional services is \$140,672. This calculation was not challenged by the Defendant.

[636] Ms. Mukherjee also recommends a personal support worker ("PSW") for 4 hours per week, at a cost of \$34.93 per hour for an annual cost of \$7,244 to provide foot care and meal preparation tasks. The present-day value of that is \$169,471. This calculation was not challenged by the Defendant.

[637] The present-day value for all recommended future care is \$342,278. From that amount should be deducted the cost of the CPAP machine. I have not done that math.

[638] The Defendant did not challenge any of the specific recommendations made by Ms. Mukherjee. The Defendant argued that there was no evidence that the Plaintiff had to pay anyone for housekeeping, but I note that this report does not

include any claim for housekeeping services other than the PSW that includes an amount for meal preparation, as Ms. Fraser claims that she can no longer make meals as she was able to do prior to the 2015 accident.

[639] As I accept Ms. Fraser's evidence regarding her current level of impairment, in my view, the future care claim is modest, including the claim for 4 hours per week by a PSW. In the absence of any report challenging Ms. Mukherjee's recommendations, other than the CPAP machine which I find is not connected to the 2015 accident, I find her recommendations reasonable and necessary for Ms. Fraser's future care.

[640] On cross-examination, Ms. Mukherjee confirmed that she had not been retained to opine about the cause of Ms. Fraser's impairments and whether they were caused by the 2012 or 2015 accident. She also testified it was insignificant that Ms. Fraser did not see her doctor for seven days after the accident and returned to work the following day. This had no impact on her recommendations.

[641] Ms. Mukherjee did not see any need for a cane or walker for Ms. Fraser based on her assessment of Ms. Fraser.

h) Issue Eight: Did Ms. Fraser Sustain a Permanent and Serious Impairment of an Important Physical or Psychological Function as a

Result of the 2015 Accident?

[642] I do not intend to spend much time on this issue as my reasons are clear.

[643] Pursuant to s. 267.5(5) of the *Insurance Act*, R.S.O., 1990, c. I-8, the plaintiff must have sustained a permanent and serious impairment of an important physical, mental, or psychological function in order to recover damages for non-pecuniary loss or health expenses.

[644] I find that Ms. Fraser is now unable to work as a result of the 2015 accident. She suffers from chronic pain in her left shoulder, lower back, and neck. She has chronic headaches. She has cognitive impairments. She requires future medical care. Her physical and psychological functioning has been permanently impaired by chronic pain and psychological conditions, including MDD and PTSD. The threshold is clearly met.

Is Clint Fraser Entitled to Damages?

[645] Clint has advanced a claim for loss of care, guidance, and companionship of his mother pursuant to s. 61 *Family Law Act*. He also advances a claim pursuant to s. 61(2)(d) of the *Family Law Act* which permits recovery where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person and includes a reasonable allowance for loss of income or the value of the services.

[646] With respect to the claim for loss of care, guidance, and companionship, I find that Clint has suffered a loss as a result of his mother's impairments, as I have found them to be. Again, each claim for such damages is unique and turns on its facts. No two cases are the same as each parent/child relationship is unique. Given all of the circumstances, I assess Clint's loss at \$25,000 gross, meaning the deductible applies to that amount.

[647] The Plaintiffs rely on *Rolley v. MacDonell*, 2018 ONSC 6527 in support of their position that Clint should be compensated for the care he has provided his mother to the date of this trial. . At para. 369, the court found it was reasonable to compensate the plaintiff's wife for the attendant care she provided at the same hourly rate that would have been paid to a PSW had one been hired. They also rely on *Hummel v. Jantzi*, 2019 ONSC 3571. At para. 305 the court that where no records were kept of the time spent caring for the injured family member that it was not practical to do an arithmetical calculation to determine an amount to compensate for the value of the services provided to the date of trial. The court found that the claimants devoted significant amount of their time to caring for the plaintiff and using an approach that is more "art than science", awarded each of the claimants \$100,000 for the care they provided.

[648] The unchallenged evidence in this case is that Clint stayed with his mother, three days per week, for the first seven months after the 2015 accident. Ms. Fraser then continued to work, but family and friends were helping her with such as meals, cleaning, grocery shopping, and taking her to her medical appointments. Based on the evidence I heard, there were several people helping Ms. Fraser, in addition to Clint. There was no evidence of the amount of time Clint spent assisting his mother given all of the other help she was receiving in her home. He did stay with her initially and then took her to medical appointments. Using art and not science, I find that \$25,000 is an appropriate amount to award him for the services he provided.

SUMMARY

[649] I assess damages for Ms. Fraser as follows:

General Damages	\$175,000
Past Loss of Income	\$116,382
Future Loss of Income	\$375,590*
Future Medical Care	<u>\$342,278**</u>
Total	\$1,009,250

*subject to further submissions, if necessary

** the cost of the CPAP machine shall be deducted from this amount

[650] I assess the damages for Clint Fraser to be:

Loss of Care Guidance and Companionship	\$25,000, gross
Care Services provided to the date of trial	\$25,000

[651] Pre-judgment interest is to be added to these amounts.

[652] If the parties cannot agree on costs, the Plaintiffs shall serve their Bill of Costs and cost submissions, which shall be no more than five pages, double spaced with 12 pt. font, and any relevant offers to settle by April 3, 2023. The Defendant shall file his Bill of Costs and cost submissions, which shall be no more than five pages, double spaced with 12 pt. font, by May 1, 2023. The Plaintiffs may file a two-page reply by May 15, 2023.

L. Shaw J.

Released: March 2, 2023

CITATION: Fraser v. Persaud, 2023 ONSC 1449
COURT FILE NO.: CV-16-5017-00
DATE: 2023 03 02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JANE FRASER and CLINT FRASER

Plaintiffs

– and –

VISHUAL PERSUD

Defendant

REASONS FOR DECISION

L. Shaw J.

Released: March 2, 2023