

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Groeneveld v. Hissink*,  
2023 BCSC 621

Date: 20230419  
Docket: M213669  
Registry: New Westminster

Between:

**Hannah Groeneveld**

Plaintiff

And

**Kimberly Anne Hissink and Hyundai Capital Lease Inc.**

Defendants

Before: The Honourable Justice Schultes

## Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.  
October 11-17 & 17-21, 2022

Place and Date of Judgment:

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**Introduction**

[1] This trial dealt with the consequences to Ms. Groeneveld of a motor vehicle accident that she was involved in on June 8, 2016 in Abbotsford. She was 16 years old and in Grade 10 at the time. Liability for the accident on the part of the defendants was admitted.

[2] The defendants concede that Ms. Groeneveld suffered certain injuries as a result of the accident - a concussion and resulting difficulties with her memory, and soreness in her neck, shoulders and left knee. It is common ground that these injuries have resolved.

[3] However, the defendants dispute that the accident was responsible for her ongoing back pain, which they say relates to a pre-existing condition. They also dispute that she has suffered any impairment of housekeeping capacity, or of her future earning capacity in her chosen career as an elementary school teacher.

[4] The most contentious issues in the trial were (1) the relationship between Ms. Groeneveld's pre- and post-collision back symptoms, and (2) the significance of the differences between her testimony about those symptoms and her previous descriptions of them in her medical records.

**Ms. Groeneveld's Narrative**

**Background**

[5] She is now 23 years old. She is currently enrolled full-time in the teacher training program at the University of the Fraser Valley, which she expects to complete in June of this year. She and her fiancée Christopher Yee live together in a suite in his parents' home.

[6] When the accident occurred, her mother Seraina Groeneveld was driving her from their home in Abbotsford to an appointment at BC Children's Hospital. At that time, she was under the care of doctors there for an immune disorder called Sjogren's syndrome, as well as for rheumatoid arthritis.

**Accident**

[7] The defendant driver Ms. Hissink failed to stop at a red light. Her vehicle struck the passenger side of the Groeneveld vehicle, which was travelling through the intersection in question with a green light for traffic in its direction.

[8] Ms. Groeneveld said that the impact caused her to hit her head and shoulders on the “window seatbelt area” of her mother’s vehicle, which I took to be the area beside the front passenger window where the seatbelt comes out. This was with the right side of her body. Her right knee also struck the door area.

[9] Ms. Groeneveld’s counsel led a fair bit of evidence about the amount of force involved in the collision and the amount of damage that was caused to the vehicles, and also emphasized those matters in his submissions. However, I do not understand the defendants to be disputing that the collision was capable of inflicting the back injury that Ms. Groeneveld claims, only that this claim is inconsistent with her previous statements.

**Initial Symptoms and their Progress**

[10] Her mother drove her to the hospital, where she was examined and then allowed to go home. She was unable to recall anything between her time at the hospital and becoming aware of lying in her bed at home.

[11] She spent most of the next two weeks in bed with the lights off, feeling dizzy, disoriented and nauseous. When she attempted to go out to a restaurant with her mother, the sunlight gave her a severe headache. She managed to leave the house to see her family doctor, one or two days after the accident.

[12] Her mood was also affected, becoming one of constant anger and argumentativeness.

[13] She was “tender and sore” in her neck, shoulders and back. Her knee was bruised and felt tender. Overall, she “just kind of felt beat up a little bit.”

[14] The bruising and tenderness to her knee lasted “a couple of weeks”.

[15] She has a gap in her memory with respect to actually returning to school, but she recalled that the severe symptoms that had required her to lie in the dark went away after two weeks.

[16] She was able to complete her Grade 10 final exams and passed them, but described having to study longer than usual, because it was difficult to remember things, and because she felt pain in her neck, shoulders and back while she was studying.

[17] The pain in her neck and shoulder was a “stiffness”, she explained. The back pain could be compared to someone constantly jabbing their finger into her “mid to low back”, as she described it. In cross-examination she referred to the vertebrae involved, which she said were T-11, T-12, L-1, and L-2. Those are the bottom two vertebrae of the thoracic spine and the top two of the lumbar spine.

[18] This back pain increased the longer that she had to sit – the jabbing became more intense, and if she moved in the “wrong way”, she experienced a sharp pain. Besides sitting, this problem was provoked by bending backwards, and by holding things above her head.

[19] She was able to work as a hostess at a local Boston Pizza that summer, for “a couple of hours” per week. In her direct evidence she said that this job was not physically demanding, but that she found it difficult to retain information in the course of it, such as when she received takeout orders by phone. In cross-examination she added that, like all positions in the restaurant industry it was “a physical job”, but that her employer provided accommodations, such as not requiring her to carry as much when she was clearing tables, and reassured her that it was fine if she did not “take as much” as the other hosts. Despite these physical requirements, she then returned to her original position that most of the job involved taking phone calls and standing at the front of the restaurant to meet customers.

[20] By the start of her Grade 11 school year her constant feelings of anger had subsided. The soreness in her shoulders and neck had also gone away by then. Her

difficulty in retaining information and the resulting need to study longer continued though, as did the constant jabbing feeling in her back, which was aggravated by the metal chairs that students were required to use.

[21] She testified that by her Grade 12 year the effect of the concussion on her ability to concentrate was no longer “as much of an issue,” but she continued to struggle with memorization through the rest of that school year. She did not recall experiencing any cognitive symptoms from the concussion after that.

[22] While she was in secondary school she did not ask for any accommodations with respect to her back symptoms. She explained that was very insecure about speaking to her teachers and administrators about them, and would have been embarrassed to have to stand up in class to relieve those symptoms.

[23] Her back pain remained an impediment to studying, both in itself and in its effect on her concentration. She adapted her studying routine to try to manage her symptoms, such as by taking frequent breaks, reading while walking, and by stacking textbooks on her desk to raise the height of her laptop. Another strategy was minimizing the amount of material that she had to carry to and from school in her backpack.

[24] While she was still in secondary school, and into her first year of university, she had several other part-time jobs, all as a restaurant server. In each case her back symptoms reduced the amount she could carry and the speed at which she worked. Any physical demands beyond the basic ones required of a server, such as cleaning or heavier lifting, proved unsustainable.

[25] Once she was in university, the back problems caused by sitting became more acute, because she now had classes that lasted for as long as three hours. By the third hour of a class, her back was “really just stinging”, which also made it harder to focus on the lecture. When it was possible, she took the opportunity to stand up and stretch her back, or walk around briefly. She also had to stand or walk around “for a while” once she got home, before she could begin studying.

(Fortunately, a “big chunk” of her undergraduate classes ended up being online because of the COVID-19 pandemic, so she was able to stand and stretch as required, and she had a more suitable chair at home.)

[26] These problems with sitting continued throughout her undergraduate studies, which she completed in December 2021.

[27] She agreed that she had achieved very good marks in both high school and university, which she attributed to the significant amount of work she had put into her studies, especially to compensate for the physical challenge posed by her injuries.

[28] Her teaching program is even more challenging for her back symptoms, she said, because except when she is doing her practicums in elementary schools, her classes run from 9:00 am to 4:00 pm each weekday. She is required to sit for that entire period, interrupted only by the lunch break. She has sought and obtained a softer chair as an accommodation, which helps “a little bit”, as well as permission to take walking breaks and stand up as needed. She explained in cross-examination that the limitation on the effectiveness of standing in class is that she is unable to do it when she needs to take notes on her laptop.

### **Treatment**

[29] She pursued physiotherapy, massage therapy and chiropractic treatment for her back pain, and saw a kinesiologist, I infer for assistance with exercise. The physiotherapist also provided her with exercises to do on her own.

[30] Her family doctor was not helpful in addressing her back symptoms, she said. He referred her for aquatherapy, but she never heard from the organization that was to provide it.

[31] According to the receipts in support of her special damages claim, the physiotherapy was provided in 2016, as were most of the massage treatments. She said that the treatments in that year may also have included her neck and shoulder symptoms, which had not yet resolved. She saw the kinesiologist once in 2019, and

the chiropractic treatments continued until March 2020. Those treatments stopped because of the onset of the COVID-19 pandemic.

[32] She said that the physiotherapy did not help with her back pain at all, and massage therapy and chiropractic provided only temporary relief. Despite their limitations, she expressed her willingness to receive further massage therapy or chiropractic treatment in the future. She expected that once she qualifies as a teacher, her schedule would allow her to attend for such treatments once per month.

[33] She has also been prescribed various anti-inflammatory and muscle relaxant medications over the years, none of which was effective in managing her back symptoms.

[34] Walking is the only physical activity that has been recommended to her that actually helps with her symptoms.

[35] More recently, she has had some relief of her back symptoms from injections of a pain-reducing drug into her spine by a physiatrist, Dr. Chu. She began those treatments about a year and a half before the trial dates, and by the time she testified she had received five or six of them. Each treatment reduces her pain by about 30%, for about two months.

[36] She has not yet formed any long-term plans to continue with them. She is currently using them to help her get through school. As of the trial dates she had put her name on the list for another one, and had an appointment coming up with Dr. Chu to discuss them.

### **Other Effects**

[37] Her back symptoms have curbed her exercise routine, which before the accident had consisted of running for at least 30 minutes three or four day per week, and weightlifting at a gym, usually with free weights, approximately four days per week. In addition to this previous regimen giving her more energy, she said that in general having an active lifestyle was very important to her.



[38] After the accident she tried to do some “light jogging” on occasion, but could not run on pavement without experiencing pain. Her attempts to resume lifting weights were unsuccessful, also because of the back pain that it caused. She found the loss of her ability to engage in these former activities disheartening.

[39] She and Mr. Yee now focus on physical activities that she can do without severely aggravating her back symptoms, although they still cause her pain. They go for walks frequently, do mild amounts of paddle boarding and swimming in season, and play pickleball with each other in a restrained manner.

[40] Her back symptoms have also had a negative effect on her social life. She feels tired and drained as a result of sitting in class all day, and has to lie down to relieve the pain, rather than being able to go out and socialize. She still maintains her friendships, but does not see her friends as frequently.

[41] She has concerns about the likely effects of her back problems on her teaching career. Her preference is to teach Grade 2, which will involve a lot of getting down to the children’s level physically, including sitting on the floor with them. While she has received accommodations in her previous jobs, she is apprehensive about ending up in a situation where her employer does not understand her physical limitations.

[42] She agreed that she was able to work full time in 2021 in a summer camp program for children aged six to ten, without needing any specific accommodations, but said that was because someone else was always available to handle physical tasks that were too demanding for her, and there were plenty of opportunities for her to take breaks.

[43] She also agreed that before being admitted to the teacher training program she was able to carry out volunteer work very successfully at schools with children of her preferred grade level, and that her references for the teacher training program, who were extremely positive about her performance, had not suggested that she had any limitations in pursuing a teaching career.

[44] Her inquiries have revealed that there are quite a few teaching vacancies in the Fraser Valley for her preferred grade level. If she obtains a full-time contract in September, her starting salary will be approximately \$50,000 per year, with ongoing increases according to seniority. By means of a notice to admit, her counsel submitted an excerpt from a provincial government website that shows a median salary for teachers in this province of \$75,499 per year.

[45] She and Mr. Yee will be getting married this year. She explained that their sexual relationship requires a great deal of care on his part to avoid provoking her symptoms.

[46] They plan to have children once she has a full-time contract and a school that she can return to after maternity leave. Like the physical demands of her teaching career, she is worried about the aggravating effects of being pregnant on her back symptoms, since pregnancy is known to cause low back pain even in women who had no previous problems. The demands of picking up her own small children and carrying them around raise similar concerns about the future.

[47] Her back symptoms have also had a significant impact on her domestic responsibilities. She enjoys cooking, but is usually too tired to manage it at the end of a day of prolonged sitting. Because of the bending involved, she is unable to vacuum, sweep, mop or carry out any other intensive cleaning. She also cannot do any heavy lifting. She is essentially restricted to minor cleaning tasks, such as wiping countertops.

[48] Mr. Yee does all of the physical tasks that are required to maintain their household that she finds too demanding. His mother cooks meals for them about twice per month, and helps with cleaning in their suite “once every couple of months”.

### **Exploration of Inconsistencies in Reporting Back Pain**

[49] Ms. Groeneveld’s initial description of her pre-accident problem was that she had “a little bit of back pain further up [her] mid back”, in Grade 6 or 7. When she

was asked to point to the area where she had experienced the pain, she referred to the part of her spine that is even with the bottom of her shoulder blades, well above the T-1 to L-2 area in which she currently experiences it.

[50] She said that this pain lasted for two or three months. She linked it to a growth spurt, and said that she began to experience migraines at the same time. The nature of this pain was different than the pain from the accident. It was sharp, and would occur randomly. She received treatment for it, as well as for her migraines, from a chiropractor.

[51] As I mentioned at the outset, the defendants' counsel sought to contradict the pre- and post-accident symptoms that Ms. Groeneveld described by referring to statements attributed to her in the records of Children's Hospital about her treatment for Sjogren's syndrome, and in the records of other care providers.

[52] She recalled being diagnosed with that disorder in 2015. It can cause dry eyes and a dry mouth, although she has not experienced any significant symptoms from it. As part of the same process, she was also diagnosed with rheumatoid arthritis, which caused her occasional pain in her wrists and ankles. She was prescribed the drug Plaquenil for the rheumatoid arthritis, which managed its symptoms effectively.

[53] Her appointment at Children's Hospital on the day of the accident, which she was ultimately unable to attend, was for a checkup on these conditions.

[54] She was cross-examined on a report by a rheumatologist at Children's Hospital arising from an appointment with her and her mother in August 2015. The report quoted both her and her mother as stating that her back problem began when she was "13.5" years old, with "lower thoracic back pain". She responded that "[t]he low back pain doesn't really coincide with my experience and what I remember." She reiterated her belief that the pain had actually been around her shoulder blade area.

[55] She assumed that this report was addressing the back pain from when she was in Grade 6 or 7 that she had testified about. She said that the chiropractic

treatment had helped with the pain, and that it had gone away for a while, but suggested that “maybe” it was “apparent” (by which I took her to mean “present”) when she went to Children’s Hospital for that appointment. Later in cross-examination she asserted more firmly that her back pain was “at its worst for two or three months”, as she had originally described it, and then had gone away, “perhaps” resurfacing when she saw the rheumatologist in August 2015.

[56] It was also put to her that she had described the pain to the rheumatologist as ongoing, and that that it was made worse “by running and by lying on her back or stomach, as well as extending her spine”, although it had improved with regular chiropractic adjustments. Somewhat incongruously, the rheumatologist also recorded that Ms. Groeneveld was now running for 40 minutes at a time on concrete, and that “[r]unning does not seem to make the pain better or significantly worse”. (She clarified in re-examination that in 2015 she was not having any difficulty performing physical activities.)

[57] In addition, the doctor had recorded that “[t]wisting motions seem to make the pain better, and it is better with leaning forward.” Ms. Groeneveld responded that twisting and bending are now painful for her, and that the report described a “completely different kind of pain” from what she currently experiences.

[58] When the portion of the report dealing with the physical examination performed by the rheumatologist was put to her, she did not agree with its description of her having tenderness along her entire spine, from cervical to lumbar, and tenderness in the muscles around the spine in the lumbar region, including the area of the post-accident back pain that she had testified about. She pointed out the additional comment by the rheumatologist that she had complained “of some tenderness with palpation over the cervical spinous processes”, which is part of the general area in which she claimed the pain had been located.

[59] Addressing a radiology report from the same day as that appointment, which referred to her history of “mid-thoracic[*sic*]/low back pain...?”, she said that it was “very possible” that she was “just not very good at explaining the area that the pain

was actually in”, and returned to the point that she had specifically complained about pain in her cervical area. She added that the injections that she currently receives from Dr. Chu go into a completely different area of the spine than what she had been describing in these reports.

[60] She believed that the radiology results, which revealed “[m]ild endplate irregularities of mid thoracic spine”, had been discussed with her after they were received. She pointed out that the irregularities identified in the results were with respect to vertebrae T-5 to T-10, while her injections from Dr. Chu have been from T-11 to L-2.

[61] Her next Children’s Hospital appointment was in October 2015. The rheumatologist who saw her then quoted her as describing “a diffuse pain, but...mostly at the level of the lower thoracic area.” She agreed that the rheumatologist had described finding “tenderness over [her] lumbar spinal processes” and the soft issues around the vertebrae in that area during the physical examination.

[62] Once again, she stressed that this pain “could have been something that resurged after not being there for a while”, as well as the difficulty of being precise with the doctors about the location of her pain. She said that she would “revert” to saying the pain was “mid back”, when in reality it was higher up her back. (In re-examination she elaborated that this pain “came and went” and was not a “constant thing”. In particular, it did not restrict her from running or lifting weights.)

[63] According to the rheumatologist who saw her at Children’s Hospital in February 2016, about four months before the accident, she had experienced “significant improvement” since the last appointment. With respect to her back symptoms, the rheumatologist recorded that she “continue[d] to have some back pain with prolonged periods of sitting [,] or if she lies on her stomach.”

[64] When these passages were put to her, she repeated that she had been describing different type of pain, in a different area of her back, than what she

experiences as a result of the accident. She pointed out that at the time she gave that description, she was still maintaining her exercise regimen, and had taken physical education the previous semester, without any problems (in other words, this pre-accident pain was not disabling in the way that her post-accident symptoms are).

[65] Along the same lines, she wrote on an intake form that she completed for a massage therapy appointment in January 2018, that she had first noticed her back pain “4 years ago”, which would have been well before the accident. On the form she described that pain as “steady” and as being in her “lower back, mid back (occasionally other areas)”.

[66] She did not agree that this note was a reference to the pain that she was experiencing at the time of the appointment. She explained that “[t]he wording of these documents is sometimes awkward, and when trying to be concise with my information, I may have listed the pain that I had experienced a long time ago”. She also suggested that, given how small that section of the intake form was, she had “most likely” decided to combine her pre- and post-accident back pain in the description.

[67] Her mother, who completed part of the form for her, had written only “concussion, whiplash” in relation to the accident. Ms. Groeneveld thought that her mother might have “missed” referring to her back pain, and pointed out that her pain in that area was the entire purpose of the appointment.

[68] A similar contradiction was contained in the report of Dr. le Nobel, one of the expert witnesses who testified on her behalf. He quoted her as recalling that “her pre-collision thoracolumbar spine [pain] was in about the same area as her post-collision spinal pain.” She did not believe that she had physically shown him the area of her previous pain, and instead may have described it as “mid-back”. She emphasized that she was not claiming that Dr. le Nobel had recorded her comments inaccurately, but rather that she had not explained herself to him with sufficient accuracy.

[69] When she was asked, based on the records that had been put to her, whether she was experiencing some back pain on the day of the accident (that is, before it occurred) she said “potentially”. She went on to explain that while it was hard to remember the exact times that she was experiencing pain, she believed that it was earlier in her series of visits to Children’s Hospital, rather than later on.

[70] She was also cross-examined on the intake form that she completed to see a physiotherapist on June 28, 2016, about three weeks after the accident. On the form she referred to her head as the area that was affected, by headaches and feeling “tired and moody”, but she did not mention any back problems. In particular, she did not tick the box for “low back disc injury”. This appeared to contradict her claim that she had experienced mid to low back pain right after the accident, and had received physiotherapy with respect to it.

[71] She responded that she saw this physiotherapist in 2018 for back pain, but that in 2016 she was seeing other specialists for that type of treatment. She also considered it possible that because she had been lying in bed for two weeks after the accident, her back pain was not as apparent to her as it became later, when she was back at school full-time. (In re-examination, the physiotherapist’s clinical notes were put to her, and she agreed that in addition to drawing a circle around her neck and upper shoulder area on a diagram of her body, she had drawn one around her lower back. She also identified the referral note for physiotherapy from her family doctor, which included “back strain” in the list of her symptoms.)

[72] Further contradiction of her post-accident back pain was provided by statements in the report of her first visit to Children’s Hospital after the accident, in August 2016. She was recorded in that report as advising that she had “not had any significant back pain” since the last appointment in February. She also described herself as being “active without limitations”. Her reference to the accident in the report was that she had received “a concussion and soft tissue neck injury” from it, which had resolved by the time of the visit.

[73] In response, she explained that because it was the summer, she was not sitting all the time, unlike her experience once she went back to school. She thought that her description of the resolution of her back symptoms “potentially...could be [her] just hoping that this was something that was resolved”, which was proven to be incorrect when school began. Later in her cross-examination, she added the possibility that the rheumatologist who wrote that report may just have been recapping the fact of the accident in June, rather than quoting her directly on its physical effects. She also doubted that a rheumatologist would be specifically concerned about motor vehicle accident injuries.

[74] During her visit to Children’s Hospital in January 2017, the report of the rheumatologist who dealt with her indicated that “[s]he occasionally has some back pain, but since she has been doing more general activity, this has improved.”

[75] She thought the reference to “doing more general activity” may have reflected the fact that “walking and things like that” help her back pain. She also offered the more general explanation that she was always “conflicted” during these Children’s Hospital visits about how much she should be talking to the rheumatologists about her back pain, particularly since the symptoms that they were dealing with were all resolved by her taking Plaquenil. She added that “as a young person” she was not comfortable in doctors’ offices, and sometimes she did not know what to say.

[76] The report of her last visit to Children’s Hospital, in February 2018, featured comments attributed to her that present yet another perspective on her back issues. This time, the rheumatologist recorded that:

She goes to a gym and runs on a treadmill without difficulties. She still has every day mid to low back pain, which is related to certain activities such as bending down or extending her back. The pain is mild; she does not need any additional medication.

[77] Ms. Groeneveld reiterated that the pain that was described in that passage would be worsened with sitting. “Jogging” on a treadmill is something that helps the pain, she added.



**Potential Supporting Evidence**

**Seraina Groeneveld**

[78] She and Ms. Groeneveld’s father separated in September 2015.

Ms. Groeneveld began living with her in March 2016.

[79] Overall, she confirmed Ms. Groeneveld’s account of the effects of the accident. This included her immediate post-accident recovery period, especially the change in her personality, to become angry and argumentative. For the first two weeks after the accident Ms. Groeneveld was also very “foggy” in her thinking, and could not find a comfortable position to sit or lie in.

[80] Her sense of how long that change in personality lasted was different from Ms. Groeneveld’s – she said it was “less frequent” by the time Ms. Groeneveld moved in with Mr. Yee in August 2018, but not non-existent. However, later in cross-examination she said that the “intense period” of this problem was for four to six months after the accident.

[81] Relevant details that she added were that that after returning to school Ms. Groeneveld’s attendance was “sporadic” for the next four to six months, due to the discomfort caused by sitting (which included headaches), and that Ms. Groeneveld was given the accommodation for her Grade 10 exams of being able to write them in a room with a supervisor, rather than as part of the general group of students.

[82] Her observation of Ms. Groeneveld’s ongoing back problem was that “it was into her...low [thoracic]-spine, so there was a lot of sharp pain and there was discomfort with moving... [j]ust a deep ache that she couldn’t seem to relieve.” This pain became noticeable after Ms. Groeneveld’s other accident symptoms began to decrease. She said it was “very steady”, and distinguished it in that aspect from the pre-accident back pain, which “came and went”.

[83] She noted that with gentle stretching and rest, Ms. Groeneveld “could cope”. Muscle relaxants and Advil took the edge off of the pain, but did not relieve it completely.

[84] Contrary to Ms. Groeneveld’s position, she recalled “a very slow decrease [in her pain level] over time, years.”

[85] She said that Ms. Groeneveld’s summer job after Grade 10, both the standing and the cleaning of tables involved, aggravated her symptoms, requiring her to lie down and rest, and take Advil when she got home. Her subsequent restaurant jobs, especially her last one, left her in pain at the end of a shift from carrying dishes to and from the tables.

[86] She confirmed that Ms. Groeneveld’s symptoms also ended her previous involvement in running and weightlifting, which she eventually replaced with walking. She added that Ms. Groeneveld asked to be excused from physical education.

[87] As Ms. Groeneveld progressed through high school, her mother noticed indications of ongoing back pain, such as being unable to find a comfortable position, being unable to sleep, and doing stretches in her room. Her dedication to studying would aggravate the symptoms, her mother said, and she had to remind her to take regular breaks from studying. In general, Ms. Groeneveld had to spend a lot more time studying to keep her grades up than she had before the accident. She described her as being very motivated and determined to pursue her studies.

[88] She and Ms. Groeneveld saw each other less frequently after Ms. Groeneveld moved in with Mr. Yee. When they got together, she continued to observe Ms. Groeneveld’s discomfort with prolonged sitting, which included attempts to stretch her back and wincing when she made sharp movements.

[89] Her evidence also dealt with the relationship between Ms. Groeneveld’s back problems before and after the accident.

[90] She said that although Ms. Groeneveld saw a chiropractor for migraines from the age of 12 onwards, which reduced their frequency, she never received any treatment for her back issues before the accident.

[91] Her position was that before the accident Ms. Groeneveld had only “milder symptoms”, associated to her “auto-immune issue”, and that those were focused on her wrists and ankles. Those pains (along with a rash) were the initial reason that she pursued medical attention on her daughter’s behalf and they ended up being referred to Children’s Hospital.

[92] These symptoms did not prevent Ms. Groeneveld from engaging in her usual physical activities of running or lifting weights at any point before the accident.

[93] In cross-examination, she added that when Ms. Groeneveld first saw their family doctor about those symptoms, she also had general “aches and pains” in her knees, elbows and shoulders, including in the area of her thoracic spine between her shoulder blades. She also had “muscle tension” in her low back. These general aches and pains were “sporadic...maybe every other month, if that.” She also said that they would be “in a new area every month”, and that they felt like “tight muscles”. Ms. Groeneveld was still experiencing them in the year leading up to the accident.

[94] She also reiterated that before the accident Ms. Groeneveld complained about pain between her shoulder blades, whereas afterwards it was “into the low back”. However, when the Children’s Hospital record from August 2015 showing tenderness to palpation along Ms. Groeneveld’s entire spine was shown to her, she said that “sometimes the pain was higher up...[s]ometimes the pain was lower down”. Or, as she later put it:

...[T]he pain was transient. Sometimes it was that middle thoracic, lower thoracic, sometimes lumbar, sometimes the pain wasn't there, and it was just in her ankles and knees. But again, there was no effect in her activities of daily living. She continued on.

[95] In her recollection, the areas of pain were “random” and “not continuous”. More specifically, she disagreed that Ms. Groeneveld had begun to have intense lower thoracic back pain when she was 13, as the report quoted them describing to the rheumatologist. She offered the possible explanations that (1) the pain would “come and go”, so it could have been intense on this particular visit, or (2) the pain when Ms. Groeneveld was 14 was more than she had ever experienced to that point in her life (hence Ms. Groeneveld’s description of it as “intense”, I took her to mean). She did agree with the notation that the pain made it difficult for Ms. Groeneveld to lie on her stomach however.

[96] She described the pre-accident pain as being “mid-thoracic”. She defined that area as from the top of the shoulder blades to just beneath them, or from vertebrae T-5 to T-7, or T-8. (Although her expertise was not drawn on in her testimony, she is a massage therapist, so she has a more detailed knowledge of anatomy than the average person.)

[97] When the Children’s Hospital report from August 2016 indicating that Ms. Groeneveld had not had any significant back pain since February of that year was put to her, she stressed that Ms. Groeneveld was at that appointment in relation to her Sjogren’s syndrome, and not for any motor vehicle accident issues. That report did not accord with her own memory of Ms. Groeneveld’s accident symptoms, although she agreed that the “transient” pain that Ms. Groeneveld had been experiencing before the accident had definitely improved. She went as far as to assert that the “issues” from the accident were not brought up at these Children’s Hospital appointments.

[98] She similarly disagreed with the indication in the January 2017 report that Ms. Groeneveld had occasional back pain, but that it had improved since she had been doing more general activity. Instead, she maintained the post-accident back symptoms were “chronic”, including days when Ms. Groeneveld was in “a lot” of pain.

[99] Addressing to the report from June 2017 that Ms. Groeneveld continued “to have low back pain without activity or functional limitations”, she reaffirmed the contrast between the “diffuse” pre-accident pain, which did not interfere with her activities, with the effects of the post accident pain, which “continued to bother her” as of that appointment.

[100] On the other hand, the comments in the February 2018 visit in which Ms. Groeneveld had described “everyday mid to low back pain which is related to certain activities such as bending down or extending her back”, and the pain being “mild” and not requiring medication, did accord with her memory of the accident symptoms during that period, which she said involved “daily pain in different degrees”. As to the finding in the report of mild tenderness at the T-12 vertebrae, she emphasized that the pre-accident symptoms had been in Ms. Groeneveld’s thoracic spine and were not worsened by the accident, but her lumbar spine was definitely worsened by it.

[101] She said that in general Ms. Groeneveld was not particularly intimidated or worried by her visits to Children’s Hospital, and appeared to be able to understand and participate in what was going on during them.

[102] She agreed that she had filled out the second page of the January 2018 intake form that was previously shown to Ms. Groeneveld, although her recollection was that the visit was in relation to chiropractic treatment, rather than massage therapy as Ms. Groeneveld believed. Her explanation for including only “concussion, whiplash” under the section dealing with “auto accidents”, and the absence of any reference to Ms. Groeneveld’s back injury was that:

...there's such a small space to write in here, and we're sitting, talking with the chiropractor and we're explaining to her the situation. So you can't list everything in these pages, and chatting with the chiropractor face-to-face to explain to her what was going on was much easier than trying to detail everything on small lines.

[103] When it was pointed out to her that there was a significant amount of blank space remaining after her answer to that question, she said that because

Ms. Groeneveld had already written “steady back pain” on the first page, she did not feel it was necessary to refer to that, but she did want to add the other accident symptoms, because their previous chiropractor had assisted Ms. Groeneveld with her migraines.

**Christopher Yee**

[104] He and Ms. Groeneveld met in the summer of 2016. He worked at the same Boston Pizza where she had her part-time job.

[105] His initial observations of her in that workplace were that she moved more slowly than one would expect, did not do anything strenuous, and was careful when picking things up and putting them down.

[106] Once they began dating, he noticed that when they were watching movies on TV she would have trouble sitting for extended periods. She would stand up and stretch, or “roll” her shoulders, and her face would bear a pained expression. When he picked her up from high school, the weight of her backpack appeared to be a burden to her.

[107] When she worked in her subsequent jobs as a restaurant server, it would leave her stiff and sore, he observed, and she would have to lie down and stretch her back out for 15-20 minutes after a shift. Her lower back would then be “very tender” for the rest of the evening.

[108] As their relationship progressed and they moved in together, he noted that her difficulty with sitting for extended periods arose in all situations, such as when she was riding in a vehicle or taking online university classes during COVID. Through trial and error, they have found a chair that reduces her discomfort somewhat, and his mother has provided her with a desktop stand for her books and laptop that approximates the effect of a sit/stand desk.

[109] With respect to recreational activities, he described their attempt to go skiing at a local mountain, which ended after an hour on the beginners run because she

was too uncomfortable. They turn down opportunities to do any strenuous hiking with their “outdoorsy” friends, and stick to walks instead.

[110] They keep their restaurant meals short to minimize the amount of sitting, and choose aisle seats at the movies so Ms. Groeneveld can get up and walk around without disturbing anyone.

[111] When they took a trip to Europe together she had to stand and walk up and down the aisles frequently to relieve her back, and she was unable to lift her own luggage.

[112] He confirmed that walking and occasionally playing pickleball together are the main recreational activities that she can manage.

[113] He also said that he does most of the cooking in their home, which he later clarified meant four nights a week. However, in cross examination he said that he cooks “almost every dinner”, and then added that he tries to make breakfast and lunches for her as well. His recollection of the extent of any support from his mother with meal preparation is that every two to four weeks they will eat a family meal with his parents.

[114] He does all of the household tasks that require any sort of bending or lifting, and the grocery shopping. Ms. Groeneveld is limited to light tasks such as wiping surfaces, dusting or tidying.

[115] He needs to be careful when he is touching Ms. Groeneveld’s back, because he can inadvertently cause her pain. He confirmed her evidence about the similar degree of care that has to be applied to their sexual activities to avoid hurting her back, and, in light of their plans to have children, the apprehension she feels about the physical toll of pregnancies on her.

[116] His description of the effect of the spinal injections that Ms. Groeneveld has been receiving is that “they provide some small temporary relief for a few days or

weeks after the procedure has taken place”, and that they “take the edge off”, rather than completely alleviating her pain.

[117] He said that when she is suffering from back pain, such as after a day of school, her mood can be sad or irritable, and she is pessimistic about the likelihood of any improvement in her condition, and its effect on her teaching career.

**Dr. Cameron**

[118] He is a neurologist who has been qualified in that specialty since 1990. He conducted his examination of Ms. Groeneveld by Zoom in July of 2022. As part of the examination he carried out a neurological assessment, and took a history from her.

[119] In his opinion, she likely suffered a concussion in the accident, including a period of post-traumatic amnesia following it. He also considered it likely that she developed a mild case of post-concussion syndrome, which featured decreased memory, disturbed sleep, increased irritability and anger, and sensitivity to light and noise.

[120] She advised him that her “academic studies were back to normal” by the time she went back to school the September following the accident, and that all of her cognitive problems had resolved by the summer of 2018. He attributed the occasional decrease in her memory over that longer period to pain and discomfort (from her other ongoing injury, I took him to mean) and its effect on her sleep.

[121] He said that she suffered from “post-traumatic musculoskeletal or cervicogenic (generated in the neck) headaches” after the accident, which had also resolved. Ms. Groeneveld did not tell him specifically when that resolution had occurred, but he believed that it was in the first two years following the accident.

[122] With respect to her back pain, he noted that her post-accident MRI did not reveal any disc or nerve problems, which would have offered other explanations for that pain. He further noted that this pain was not related to her pre-accident



diagnoses of Sjogren's syndrome and rheumatoid arthritis. Back pain is not a symptom of the former, and the kinds of degenerative changes that can result from the latter are not present, he explained. His understanding is that the mechanical back pain described in the Children's Hospital records referred to "a soft tissue musculoskeletal injury of some sort".

[123] He offered the additional opinion that she is suffering from chronic back pain due to soft tissue and musculoskeletal injuries that she received in the accident. However, he ultimately deferred to a physiatrist "to provide an opinion regarding the chronic back pain" that she suffered.

[124] In cross-examination he explained that even though they only met by Zoom, he was able to make that diagnosis based on Ms. Groeneveld's history, having ruled out any neurological deficit as the cause of her pain. In the absence of such a deficit, he would normally recommend that the patient see a physiatrist, and refer them back to their family doctor. However, because the waiting time to see a physiatrist is so long, he often initiates treatment for patients' mechanical pain himself, before referring them back to the family doctor.

[125] Although the medical records that he reviewed indicated that she had back pain in 2015, she did not tell him that during the assessment, and he did not ask her about it. His practice is to assess the patient before reviewing their medical records, so that there is no bias in his assessment, and so he does not unintentionally "feed" information to the patient when he is asking about their history.

[126] When he was challenged on his view of the significance of her pre-accident back pain, based on the ongoing entries about it in the Children's Hospital records up to February, 2016, he responded that those records do not describe her having back pain up to the time of the accident, and that she did not tell him that either. If she did have back pain at that point, then she "probably...suffered an exacerbation of that pre-existing back pain" from the accident injuries. If it was present before, she reported a different pattern of back pain after the accident, he pointed out.

[127] On this issue of exacerbation of a pre-existing injury, in re-examination he was shown the entries in the Children's Hospital records from February 2016, which indicated that Ms. Groeneveld suffered back pain with prolonged periods of sitting or from lying on her stomach. He said that such a situation would not meet the definition of "chronic back pain pre-accident", because she was reporting that the pain was "gone, other than [when she was in] those two positions."

**Dr. le Nobel**

[128] He has been a medical doctor since 1975 and qualified as a physiatrist in 1984, after initially pursuing training in orthopedics.

[129] He examined Ms. Groeneveld in person, also in July 2022.

[130] His opinion is that she has pain in her thoracolumbar area (the junction between the thoracic and lumbar spine), and in the muscles surrounding and attached to them, due to myofascial (soft and connective tissue) injuries in those areas, caused by the accident. The fact that bending backwards aggravates her pain means that the facet joints of her spine may be generating the pain. He explained that "forceful backwards bending" of the facet joints of the lumbar area occurs in vehicle accidents, and may cause injury to them.

[131] These injuries have been "superimposed" on spinal deformities that can be seen in her pre- and post-collision x-rays and MRIs. More importantly, they have been superimposed on her pre-accident history of "similarly located pain." He added that during his examination Ms. Groeneveld had told him that her pre-accident pain was in the same part of her body.

[132] There are no strict anatomical parameters for the thoracolumbar area, but he offered the suggestion that it consists of "something like" the T-9 to L-3 vertebrae.

[133] Without the accident injury, Ms. Groeneveld would not have had the abrupt increase in pain in this area, he said. In other words, the worsening of her back

symptoms was due to the accident. Based on its duration, her current pain qualifies as chronic.

[134] He said that this pain is worse than it was immediately following the accident, and worse “and more limiting” than it was before the accident. It continued to worsen for several years after the accident and then became stable, she had told him.

[135] He was challenged in cross-examination on his use of the term “abrupt increase” in her pre-accident pain levels immediately afterwards. He pointed out that during her visit to her family doctor two days after the accident she completed a pain diagram that included her thoracolumbar area. He also said that spending most of her time in bed for two weeks following the accident “would not have put her back to much of a test”.

[136] He said that he did not review the Children’s Hospital record from August 2016, which said that she “had not had significant back pain” and was working at the restaurant job “without limitations”, with her during their meeting. She also did not make any comments to that effect to him. He agreed that those entries were inconsistent with what she had told him, but noted that they were also inconsistent with the other medical records about her symptoms. When he was asked why he had not commented on that inconsistency in his report, even though he had listed the record in question, he responded “That’s an excellent question. I don’t really have an answer for that.” He did not think there would have been any value in putting the inconsistency to her during his examination however.

[137] With similar candour, he responded “I don’t have any...satisfactory answer for you” when he was asked why he had not commented on the Children’s Hospital report from January 2017, that indicated that Ms. Groeneveld “occasionally has some back pain, but since she's been doing more general activity, this has improved.”

[138] He agreed that his summary of the Children’s Hospital report from June 2017, which included the note that her “muscular low back pain continues” omitted the

further comment that this pain was “without activity or functional limitations”. He agreed that this further comment was not consistent with his opinion. However, he commented, as Ms. Groeneveld had in her cross-examination, that the primary purpose of that appointment with a rheumatologist had been her Sjogren’s syndrome, rather than her accident injuries.

[139] He did not consider the entry in the Children’s Hospital record from February 2018 that Ms. Groeneveld “... still has every day mid to low back pain, which is related to certain activities such as bending down or extending her back...[t]he pain is mild...[s]he does not need any additional medication” to be inconsistent with his opinion. He noted that the comment did not suggest that the pain had fully resolved or that she had returned to her full pre-accident function, and there was no reference to her sitting tolerance.

[140] He was also not troubled by the examination finding in that report of only “mild tenderness” around T-12. The important point to him was the daily nature of her back pain, and her restriction of her pre-accident activities, which might have produced more severe pain symptoms if she had engaged in them, because of that pain. Once again, he considered it important to keep in mind the purpose of those Children’s Hospital visits, as well as the difficulty of assessing her comments without knowing what specific questions she had been asked, and what kinds of physical activities she was engaging in at that time.

[141] When her family doctor’s comments on an x-ray from February 2019, which showed “worsening of pre-existing osteoarthritic changes” in the thoracic and lumbar areas was put to him, he said that he could not tell whether the worsening was due to trauma, but that it was a “possibility”. He did not agree with the proposition that her Sjogren’s syndrome was a factor in her post-collision back issues.

[142] He said that Ms. Groeneveld has been unable to continue with her pre-accident level of physical activity, and has become “relatively deconditioned” compared to what her level of fitness would otherwise have been. She also has “a reduced capacity for seated school work or physically demanding tasks...” which,

given its duration since the accident, he expects to continue. He concluded that if Ms. Groeneveld were to be “employed in a job requiring sustained capacity for sitting, symptoms and limitations attributed to the...collision would render her relatively less capable and impair her earning capacity”.

[143] This injury places her at an increased risk for “worse consequences” if she suffers another one, he explained. The persistence of her pain since the accident also raises her likelihood of sustaining another such injury “above [the] baseline”.

[144] As I have referred to when summarizing Ms. Groeneveld’s evidence, his examination revealed that bending her lumbar spine straight back and or tilting it to the right or left reproduced her low back pain, and that she was tender to “fist percussion” along the spinal column in the thoracolumbar area. He agreed that these findings, along with her difficulties doing push ups and leg raises, were the only abnormal ones in the examination. In his practice he has not found the presence of muscle spasm to be helpful in identifying the presence of an injury, so he does not test for it, although he agreed that it is considered an objective finding by some other physicians.

[145] Unlike Dr. Cameron, he referred to post-accident headaches only as part of her concussion symptoms. He noted that the concussion places her “at increased risk for worse consequences” should she receive another one.

[146] As to treatment, he recommended that she continue with her spinal injection treatments, which have provided some symptom reduction. He also recommended additional strength training under the supervision of a kinesiologist, in addition to running on a treadmill and stretching, which she advised him she currently engages in. This should be specifically focused on her thoracolumbar area, and “may help” with her symptoms.

[147] He listed a variety of strength and resistance exercises to achieve this purpose, and the types of gym equipment that are required to perform them. The value of a kinesiologist’s supervision would be to ensure that she exercises

correctly, increase her capacity incrementally, and substitute other exercises if any of the initial ones are unsuitable. It will be beneficial for her to keep a diary of her participation this regimen.

[148] He expected that these exercises will increase her pain, and recommended that she have access to a range of pain relief, including analgesics, manual or physiotherapy, and transcutaneous nerve stimulation. These should be used to the extent that they “facilitate increased activity”.

[149] The exact duration of such a program would “best be known in time”, he said, but he recommended liberal access to an exercise facility and the pain modulators, as well as the assistance of a kinesiologist three or four times per month, for 12 to 14 months, although these requirements might change.

[150] Despite these recommendations, he considered Ms. Groeneveld’s prognosis to be “guarded”. He projected only “some improvement” if she follows them. With the exercise program an increase in her function “may precede an actual resolution of her symptoms, or may occur without it”. It is possible however, that the exercise may increase her pain symptoms (temporarily I took him to mean) to the extent that she cannot tolerate the recommended program. Perhaps most importantly, his opinion is that a “[r]eturn to Ms. Groeneveld’s pre-collision state is not certain through these steps or any others of which I am aware.”

**Progress of the Trial**

[151] At the conclusion of the plaintiff’s case, I denied an application by the defendants for an adjournment to call the rheumatologists who had dealt with Ms. Groeneveld at Children’s Hospital. The defendants’ purposes in calling them were to (1) prove those of her inconsistent statements to them that she did not explicitly admit having made; and (2) to elicit further details of the physical examinations of her that they carried out.

[152] In response, her counsel admitted that any such statements were contained in records of Children’s Hospital that were kept in the usual and ordinary course of

business, and that the doctors in question were under a duty to record her comments accurately (those records, as well as the records of other care providers that Ms. Groeneveld was cross-examined on, had already been rendered admissible by a notice to admit them served by the defendants, but their status as business records was not specified in the notice).

[153] I concluded that nothing useful would be added by calling the rheumatologists to affirm the correctness of statements in their reports when those reports had been admitted as business records; and that it was too late in the trial for the defendants to be leading new substantive evidence about their examination of her physical injuries.

## **Discussion**

### **Credibility and Essential Findings of Fact**

[154] The correct approach to inconsistencies between a plaintiff's testimony and their previous statements to medical care providers was summarized in *Cunningham v. Slubowski*, 2003 BCSC 1854:

14 The defendants may cross-examine the plaintiff on his prior statements recorded by Dr. Abelman [the author of the records in question] in the clinical records. If the plaintiff admits that he made a particular statement to Dr. Abelman, and it is inconsistent with his testimony at trial, the statement can generally be used only to assess the plaintiff's credibility. The statement is not admissible for its truth unless it constitutes an admission against the plaintiff's interests. If it is an admission against interest, it is admissible for the truth of its content, depending on the jury's assessment of it.

15 Also, if the plaintiff admits he made the prior statement to Dr. Abelman and he adopts it in his testimony, that prior statement becomes admissible for the truth of its content, depending upon the jury's assessment of it.

16 Of course, if the plaintiff denies having made the prior statement, a pre-requisite to any of the above results is proof that he in fact made the statement to Dr. Abelman. This can be established through the testimony of Dr. Abelman who apparently recorded the statement when the plaintiff made it.

[155] The degree of caution that is required when assessing the significance of inconsistencies with statements found in clinical records was explained in *Edmondson v. Payer*, 2011 BCSC 118:

30 ...[T]here are important qualifications that apply to such statements in clinical records, whichever purpose they are being used for.

31 In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

32 That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.

...

34 The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

35 Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:

... the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.



[156] Ms. Groeneveld did not ultimately dispute that she made the statements that are attributed to her in the various reports and other treatment-related documents on which she was cross-examined. Instead, she took the position that, for various reasons, some of them did not accurately reflect the actual nature and severity of her back symptoms at the time they were provided. To the extent that there was ambiguity in her acceptance of any of those statements, the Children's Hospital reports, which contained the most significant potential contradictions, were admitted to be business records, and provide substantive proof that those statements were made. Similarly, Dr. le Nobel confirmed in his testimony what she told him about the location of her pre-and post-accident pain. Concerned as they are with the ongoing injury that she claims, these are certainly admissions against interest, and admissible for their truth.

[157] The weight that should be attributed to them must be conditioned by the factors identified in *Edmondson*. I would add to those factors the concerns that arise from Ms. Groeneveld's youth during most of the period covered by the records, the uncertainty about how much of the information during the August 2015 Children's Hospital visit was actually provided by her mother (who was jointly quoted by the rheumatologist who wrote that report), and the fact that while the rheumatologists investigated and monitored her back pain as one of her ongoing conditions, their main focus was on her immune disorders.

[158] Even when qualified in that manner however, I conclude that Ms. Groeneveld's evidence was inconsistent with them in a meaningful way, on the location of her pre-accident back problem, and its persistence over time. She strove at every opportunity to locate that problem higher up her back, but the inescapable conclusion that arises from the totality of her previous statements is that it was in the area that was subsequently affected by the accident. Crucially, that is what she told Dr. le Nobel, an expert retained on her behalf. At that point she was a mature young adult, and it was only months before the trial.

[159] Further, while it is likely that studying provoked her back symptoms to a much greater extent once school resumed in the fall of 2016, so as to at least partially explain her comment in August of that year that the back pain that she had reported in February had resolved, her subsequent statements to rheumatologists about ongoing low back pain - which did not impose any limitations and was “mild” - must inevitably undermine her testimony about its constant severity.

[160] I do not consider the omission of reference to accident-related back pain in her 2016 physiotherapy intake form, or the reference to having had back pain for four years in the 2018 form for massage therapy, to be as significant as the statements in the other records. With respect to the former, it is plausible that she did not appreciate the full significance of her back problems until her concussion symptoms had receded and she had resumed studying. With respect to the latter, I think it was reasonable for her not to have distinguished between the two different sources of her back pain, when she was explaining to a massage therapist how long she had been suffering from it.

[161] The manner in which Ms. Groeneveld responded to the previous inconsistencies in the records gave me some concern as well. As I have summarized, she had a tendency to argue her position when presented with them, rather than providing straightforward factual responses to the words that were being attributed to her. Her attempts to explain those inconsistencies away were not convincing.

[162] Her tenacity in adhering to a location for her pre-existing injury that is so different from her contemporaneous descriptions of it left the impression that she was trying to separate the two locations so that there could be no suggestion that the previous injury is responsible for her current symptoms. Given the opinion of her own expert witness that they are in the same location this was ultimately a pointless exercise, but it showed her trying a bit too hard to present the perfect case on her own behalf. I was also not convinced by her efforts to escape the implications of her

statements in the Children's Hospital records about the extent of her post-accident back pain.

[163] I would not say that the shortcomings in her testimony reduce the credibility of her entire narrative, but the somewhat strategic approach that they demonstrate raises the possibility that there has been a degree of exaggeration of her symptoms and their effects, to advance her position in the litigation. This requires me to be cautious about accepting her version of events unreservedly.

[164] Mr. Yee's testimony did not have these kinds of limitations, and provided reliable support for her description of the effects of her injury. Although he obviously has the closest possible personal connection with her, I did not detect any hint of exaggeration or strategic purpose in his testimony, which sounded like a realistic description of the effects of her pain in their daily lives, with the idiosyncrasies that frequently accompany actual memories. This testimony restores a meaningful degree of confidence in Ms. Groeneveld's testimony about her post-accident symptoms.

[165] Her mother struggled to an even greater degree than Ms. Groeneveld did in her attempts to harmonize the apparently inconsistent statements in the records with Ms. Groeneveld's current position on her pre-existing symptoms. This similar attempt to deny the obvious diminishes her ability to provide objective support for Ms. Groeneveld's testimony on the contested points. On the other hand, her testimony about the way in which Ms. Groeneveld was affected by her post-accident pain around their home did not have the same strained quality, and instead offered a low-key narrative of the kinds of observations that I think a parent would be likely to make in such a situation. Accordingly, that aspect of her evidence is entitled to some weight.

[166] Dr. le Nobel's failure to address the inconsistent statements made by Ms. Groeneveld, despite having documented them in his report, suggests some lack of care on his part, or perhaps some inclination towards advocacy. Either explanation requires his conclusions to be scrutinized carefully, but taken as a whole

I still found his report and testimony to be balanced and sensible. He found some objective signs of injury in his examination, and his opinion about the injury from the accident being superimposed on the area of her pre-existing pain, as well as its more serious effect on her ability to engage in physical activities than she experienced before it, resonated with the contemporaneous descriptions of its location and effects that she provided in her statements to the rheumatologists.

[167] The main point of Dr. Cameron's report – confirmation of Ms. Groeneveld's concussion and its effects – turned out not to be disputed. To the extent that he offered a diagnosis of her back injury, it was one of exclusion, based on his finding that there were no neurological problems contributing to it, and he ultimately deferred to a physiatrist for a more specific opinion. I would say that his report adds some general confirmation of Dr. le Nobel's opinion, but does not form a significant part of the analysis on the disputed point.

[168] To summarize the resulting findings of fact, I am satisfied that:

- Ms. Groeneveld suffered a back injury in the accident in the area and of the nature described by Dr. le Nobel, which was the same area as her pre-accident back pain;
- It has interfered with her ongoing functioning to the general extent that she described, except that there have been periods since the accident, as described to the rheumatologists, in which the pain was ongoing, but not as severe or disabling as she testified;
- Unlike her pre-accident pain, it is particularly aggravated by prolonged sitting, and it has limited the previous range of her physical recreational activities;
- The progress for her recovery is guarded, although the exercise program recommended by Dr. le Nobel may provide her with some relief from her symptoms; and

- The significant inconsistencies in her testimony with previous statements about her back symptoms, and her occasional descent into what I perceived to be a litigation focus, indicate that although her symptoms are certainly present and have largely had the effects that I have summarized, they are not quite as serious and pervasive as she maintained.

[169] As I indicated at the outset, there is no dispute about the extent and duration of Ms. Groeneveld's concussion symptoms and other physical injuries.

[170] I am satisfied that the back injections from Dr. Chu do not play any meaningful role in her prognosis. No report or records of his involvement were provided, and the only information we have about the effectiveness of his treatments are the descriptions by Ms. Groeneveld and the observations of Mr. Yee. While I doubt that she would not have continued to submit to such an invasive procedure if the discomfort was not outweighed by the benefits, the only evidence we have is that the relief they provide is partial and temporary, and will not moderate the ongoing effects of her injury in any meaningful way.

[171] Finally in terms of essential findings, I am not satisfied that the damage awards to which Ms. Groeneveld would otherwise be entitled should be subjected to any negative contingency based on the likely effects of her pre-existing back problem.

[172] The principle underlying the assessment of such negative contingencies was set out concisely in *T.W.N.A. v. Clarke*, 2003 BCCA 670

48...Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

[173] Or, as it was expressed in *K.L.B. v. British Columbia*, [2003] 2 SCR 403:

60 ...This rule is intended to ensure that the plaintiff is not put in a position better than that which he or she would have been in had the tort not been

committed. It applies where the plaintiff has a pre-existing condition that would have caused or increased the risk of damage in any case...

[174] There is no evidence in this case that gives rise to a possibility that in the absence of the accident, Ms. Groeneveld would have suffered any of the harms or deprivations for which she now claims damages based on her pre-existing back condition alone.

[175] As I have summarized, her descriptions to the rheumatologists showed that her level of physical activity was not interrupted by the pre-existing symptoms, and there was no suggestion that her tolerance for sitting had been reduced. Further, there was no evidence that the degenerative changes that were identified during her treatment at Children's Hospital would have resulted in symptoms like her present ones. Dr. le Nobel was only able to say that it was possible that the degenerative changes identified in 2019 were related to the accident trauma. He rejected the suggestion that her Sjogren's syndrome was implicated in those changes, and he was not asked if they would have occurred as a progression of her pre-existing back problem even without the accident.

### **Non-Pecuniary Damages**

[176] The purpose of non-pecuniary damages is to compensate a plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, at para. 134.

[177] Among the factors that can influence the amount of the award are the age of the plaintiff; the nature of the injury; the severity and duration of the pain; and the degree of disability, emotional suffering and impairment of life experienced by the plaintiff, including impairment of their important relationships and lifestyle pursuits. Crucially, a plaintiff should not generally be penalized for their stoicism: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46.

[178] The amount of the award is guided by what is required to ameliorate the condition of the plaintiff in their particular situation. Their need for solace may not

necessarily correlate with the seriousness of their injury. Because of this need to recognize the specific circumstances, there can be no general "tariff" of awards: *Lindal v. Lindal*, [1981] 2 S.C.R. 629, at 637. That said, other decisions dealing with similar circumstances can serve as a guide in arriving at an award that is "just and fair" to both parties: *Kuskis v. Tin*, 2008 BCSC 862 at paras. 135-136.

[179] Ms. Groeneveld's counsel submits that an award of \$125,000 is appropriate under this heading. He emphasizes the broad effects of the back injury on her ability to enjoy life, which includes the apprehension she feels about embarking on motherhood. He characterizes her as a stoic and determined young person, whose strong personality has enabled her to accomplish her goals despite her ongoing pain. It is important, he emphasizes, that she not be punished in the amount of damages she receives for persevering to attain a higher level of function.

[180] Her counsel submits that the following cases are appropriately compared to her situation, with the necessary adjustments for inflation since they were decided:

- *Kodelja v. Johal*, 2017 BCSC 164: a 40-year-old primary school teacher was found to suffer from chronic myofascial pain and thoracic outlet syndrome because of the accident. Her main areas of pain were the left side of her neck, shoulder and upper back. She also had headaches that ranged from dull to severe, with the severe ones occurring every two weeks. Her overall condition had improved 50% since the accident. She was still able to participate in social and recreational activities, except for more rigorous ones such as running and swimming. Award: \$80,000 (\$95,297 in 2023 dollars<sup>1</sup>).
- *Raun v. Suran*, 2010 BCSC 793: The plaintiff, who was 17 years old when the accident occurred, was still suffering from neck, shoulder and lower back pain at the time of the trial five years later. The prognosis for the recovery of his shoulder was good, but it remained guarded for his neck and back. These injuries were found to have "significantly affected" him because "[f]rom the

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<sup>1</sup> Based on the inflation calculator on the Bank of Canada website

summer he was 17 he has been prevented from pursuing his athletic interests with the competitiveness, rigour and youthful abandon that would have been open to him but for his injuries.” On the other hand, he could still perform “normal functions” and participate in sports. Award: \$75,000 (\$100,238).

- *Sharma v. Kandola*, 2019 BCSC 349: the plaintiff had been in Grade 12 when the accident occurred. She suffered from soft tissue injuries to her left neck and shoulder, chronic headaches and moderate depression and anxiety as a result of it. Award: \$75,000 (\$100,238).

[181] Although the defendants’ primary position was that the accident did not cause the injuries that Ms. Groeneveld claims, their counsel also provided some authorities on an appropriate range in the alternative:

- *Cheung v. Gregson*, 2021 BCSC 204: The plaintiff, who was 22 at the time of the accident, was found to suffer from “regular soreness and tightness on the left side of her neck and shoulder, as well as her upper, mid-, and lower back”. The trial judge found that these symptoms were largely manageable, had “generally and steadily improved since the accident, and could possibly continue to do so in future”. She was found to have exaggerated the effects of the driving anxiety that she also claimed. Award: \$50,000 (\$55,616).
- *Brass v. Von Chudentiz*, 2020 BCSC 343: A plaintiff who was 20 years old when her accident occurred suffered pain in her neck, shoulder and upper back, as well as headaches, due to it. Her symptoms had a significant effect on her social life. They were expected to continue, but they could be made more manageable by a rehabilitation program. Award: \$50,000 (\$56,223).

[182] Keeping in mind the need to individualize the award to Ms. Groeneveld’s circumstances, but looking at these decisions to ensure that the award is fair to both parties, I would say that although her continuing pain is only in one area, the effect on her function more closely resembles the cases that were provided on her behalf than the ones provided on behalf of the defendants. I would not say that



Ms. Groeneveld's symptoms exceed the severity of the ones in the cases referred to by her counsel however, as the award she seeks would imply.

[183] The plaintiff's symptoms in *Cheung* were more manageable and had a much greater prospect of resolution than Ms. Groeneveld's. *Brass* also involved greater prospects for improvement of the plaintiff's symptoms that Ms. Groeneveld can expect, and the trial judge referred to the comments in *Rizzolo v. Brett*, 2010 BCCA 398, at para. 37 that "trial judges have assessed non-pecuniary damages at well over \$100,000 [\$130,650 in 2023 dollars] where there is an element of significant ongoing pain and, particularly, where the plaintiff had previously enjoyed an active lifestyle or a physical vocation".

[184] Balancing these various considerations, including my concern that there has been a degree of exaggeration, I conclude that an award of \$95,000 is appropriate.

#### **Loss of Housekeeping Capacity**

[185] The nature of this claim was addressed in *O'Connell v. Yung*, 2012 BCCA 57, citing Cooper-Stephenson, *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 315:

[65]...The claim for loss of homemaking capacity is for the loss of the value of work which would have been rendered by the plaintiff, but which because of the injuries cannot now be performed. The plaintiff has lost the ability to work in a manner that would have been valuable to her- or himself as well as to others. The claim is not the same as that under future cost of care, which is for the value of services that must now be rendered to the plaintiff.

[186] As to how the loss should be compensated, *Kim v. Lin*, 2018 BCCA 77 explained:

33 ...[W]here a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity - - that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu v. Bains*, 2016 BCCA 374], "it lies in the trial judge's discretion whether to

address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[187] Damages for loss of capacity to complete homemaking tasks are not dependent upon whether replacement costs are actually incurred, because what is being compensated is the loss of capacity itself: *O'Connell* at para. 67. Such awards are to be assessed rather than mathematically calculated, although a court can certainly rely on labour-market figures for the replacement cost of the lost capacity, if they are available: *Liu v. Bains*, 2016 BCCA 374 at para. 28.

[188] Ms. Groeneveld's counsel seeks \$30,000, as a separate pecuniary damages award. The defendants' position is that any award should be included in the non-pecuniary damages, as the decision in *Kim* permits.

[189] Ms. Groeneveld's evidence was that she is essentially precluded from engaging in any physically demanding household task. She was confirmed on this specific point by Mr. Yee's actual observations, so there is less of a need to moderate that claim to reflect a degree of exaggeration that there is for her non-pecuniary damages. Even with that support however, the amount she seeks seems excessive in the circumstances. I assess the appropriate amount as \$15,000.

### **Impairment of Future Earning Capacity**

[190] *Rab v. Prescott*, 2021 BCCA 345, at para. 47, helpfully clarified the correct approach to a claim for damages of this nature. First, the trier of fact must determine whether the evidence discloses a potential future event that could lead to a loss of capacity. The next question is whether the evidence shows a real and substantial possibility that the future event will lead to a pecuniary loss. Finally, the value of that possible future loss must be assessed, including the relative likelihood of the possibility occurring.

[191] The identified loss may be then quantified either on an "earnings" approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[192] The capital asset approach, which focuses on the loss or impairment of the plaintiff's earning capacity as an asset available to them, will be more appropriate when the loss is not easily measurable. Even when that approach is used, there still has to be proof of a real and substantial possibility of a future event leading to an income loss: *Perren* at para. 32. In other words, there is no award for a loss of capacity in itself.

[193] Even when it is clear that the future event will lead to a pecuniary loss, as in the case of a significant and lasting injury, "it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies": *Rab* at para. 29.

[194] In essence, "the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened": *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32.

[195] Ms. Groeneveld's counsel submits that her loss of capacity should be quantified using the capital asset approach, and should result in an award of \$200,000. He stresses Dr. le Nobel's opinion about her future vulnerabilities and limitations, and their impact on her employment. Aside from the sitting requirements of her current employment goal, her reduced tolerance for it will impair her eligibility for future administrative positions that require much more of it. There is also the increased vulnerability to future similar injuries that Dr. le Nobel identified, which her counsel submitted could take the form of flareups of her symptoms caused by her life circumstances, including pregnancy and caring for small children.

[196] As support for an award in the range he seeks, her counsel provided the decision of *Layes v. Stevens*, 2017 BCSC 895. In that case the 29-year-old plaintiff, who was pursuing a career as a freelance journalist, was found to be precluded by her injuries from continuing in the kinds of physical jobs that she had relied on to obtain her degree, and might have to resort to again. The trial judge concluded that

the plaintiff's earning capacity "was in its early stages". Based on a comparison between the plaintiff's circumstances and awards of \$300,000 in a case involving a much higher-earning plaintiff who was at a more advanced stage of her career, and \$100,000 for a plaintiff whose risk of a loss of earnings due to her injuries was found to be quite small, the trial judge assessed the appropriate award as being \$200,000. In doing so, she rejected a "purely mathematical" calculation of the plaintiff's loss over her lifetime that her counsel had sought, which was estimated to be in the range of \$1.5 million.

[197] The defendants' counsel take the position that no loss of earning capacity has been proven. They cite examples of decisions of this Court in which plaintiffs have failed to demonstrate any reasonable possibility of a future pecuniary loss arising from their injuries, such as *Allen v. Luca*, 2021 BCSC 14 at paras. 97-98; and *Wong v. Pannu*, 2020 BCSC 1158 at paras 57-58.

[198] I am satisfied, based on my findings of fact and Dr. le Nobel's opinion on Ms. Groeneveld's disability and vulnerability to future injuries, that there are potential future events that could lead to a loss of a capacity, and that there is a real and substantial possibility of a pecuniary loss resulting from it.

[199] Because she has not actually begun her career, we do not know exactly how much sitting will be required of her as a primary school teacher, or whether she can entirely avoid the more onerous physical tasks that aggravate her symptoms, such as lifting and carrying. I feel comfortable finding, based on the effects on her symptoms of her academic career and the sitting requirements of primary school teaching that she provided in her testimony, that her job requirements will certainly have some aggravating effects.

[200] I also feel comfortable taking notice that resiliency to pain decreases as one ages, and it is realistic to expect that she will not always be able to work through her pain in the workplace, as she currently does in a school setting.

[201] I think it is a real possibility that the actual physical requirements of the job will eventually require her to consider something less than a full-time position and may, as her counsel suggested, preclude her from advancing into administrative positions, which I take notice would require even more sitting. Dr. le Nobel's general opinion that she will be at a disadvantage in jobs that require sustained sitting is entitled to some weight on this point. More generally, her need for accommodations on the job may well harm her competitiveness in seeking either an initial teaching position, or future ones.

[202] The physical demands of child-raising, should her plans with Mr. Yee become a reality, and her increased susceptibility to additional myofascial injuries or concussions, as identified by Dr. le Nobel, are additional potential complications that increase the possibility of a loss of capacity that will affect her earning.

[203] When valuing her loss, there is also the possibility that she will be able to fulfil all of the job requirements of a primary level teacher for her working career, which must be also given weight according to its likelihood.

[204] Ultimately, I consider the possibility of loss to be twice as likely as that of no loss occurring, as a result any award must be reduced by one-third to reflect the realistic possibility that no loss will be suffered.

[205] It has been said that courts should generally undertake the capital asset approach when the loss of earnings in question has not occurred yet. It is also "particularly helpful" when there is not yet a settled career path, because it "allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future": *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 17.

[206] In the frequently-cited decision of *Pallos v. Insurance Corp of British Columbia* (1995), 100 BCLR (2d) 260 (CA), the Court explained that:

[43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award

the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so.

[emphasis added]

[207] In *Rab* at para. 71, the Court approved of an award of one year's salary in *Rozendaal v. Landingin*, 2013 BCSC 24, noting that “[o]nce again we see a plaintiff continuing in her pre-accident area of employment with the prospect that, in future, her ability to maximize her income in that field will be limited by her injuries.” More generally, the Court noted:

72 These are the sort of cases this Court had in mind in *Pallos*, where the plaintiff continues to earn income at or close to his or her pre-accident level, but has suffered an impairment that may affect that plaintiff's ability to continue doing so at some point in the future. In such cases, using the plaintiff's immediate pre-accident income as a tool in assessing her lost capacity makes sense...

[208] Of course, Ms. Groeneveld is not yet earning a particular salary, but we know with a significant amount of certainty how she will be employed by September of this year, and both her expected starting salary at that point and the median one in her profession. In those circumstances, I think that an award of two years of the median salary, or \$151,000, reduced by one-third for the contingency that no pecuniary loss will be suffered, is appropriate. I therefore award \$100,000 under this heading.

[209] While it reflects a perfectly sensible analysis for its time, I do not think the award in *Layes* can still be justified, in light of the more rigorous approach to valuing loss of capacity claims under the capital asset method that is required in the wake of *Rab*.

### **Special Damages**

[210] An award of \$2,655.36 has been agreed to by the parties under this heading.

**Conclusion**

[211] The damage awards are:

- Non-pecuniary: \$95,000
- Loss of housekeeping capacity: \$15,000
- Impairment of future earning capacity: \$100,000
- Special damages: \$2,665.36
- Total: \$212,665.36

[212] I have not made any award for cost of future care, as recommended by Dr. le Nobel, because there was no evidence of the cost of such services.

Ms. Groeneveld's counsel initially submitted that I could look to the hourly rate for physiotherapists, which is referred to in the evidence on special damages, as a basis for awarding the cost of the recommended kinesiology services. However, in his final summary of the awards being sought, her counsel did not seek a specific amount under that heading. That was a wise decision, because I would not have felt comfortable drawing an inference about the cost of such care based solely on the rate charged by a different health care professional.

[213] Ms. Groeneveld has succeeded in establishing liability and obtaining a remedy, although the damages were not in the amounts that she sought (see *Loft v. Nat*, 2014 BCCA 108, at para.46), so in the absence of any other factors that might affect costs, she is entitled to receive her costs, at the ordinary scale of difficulty. If there are such factors, counsel can arrange to make written submissions on costs, according to whatever schedule for the exchange and filing of the submissions is suitable to them.

“Schultes J.”