**CITATION:** Morgan v. Saquing, 2015 ONSC 2647
**COURT FILE NO.:** 04-CV-265984CM2
**DATE:** 20150604

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| | ) | |
| NOEL MORGAN, TONIKA MORGAN, ANTHONY MORGAN and EMYLE MORGAN, a minor under the age of 18 years by his Litigation Guardian, NOEL MORGAN | ) | *Daniel I. Reisler* and *Christine M. Galea*, for the Plaintiffs |
| Plaintiffs | ) | |
| **– and –** | ) | |
| ROBERT L. SAQUING | ) | *James V. Maloney* and *Ryan O'Leary*, for the Defendant |
| Defendant | ) | |
| | ) | **HEARD: April 7-10, 13-17, and 21, 2015** |

**GLUSTEIN J.:**

**Nature of action and overview**

[1] In the present action, the plaintiff, Noel Morgan ("Morgan") brings an action for damages arising out of a motor vehicle accident which took place on April 25, 2002 (the "accident"). Morgan seeks (i) general damages in a range of $50,000-$75,000 for pain, suffering and the loss of enjoyment of life, (ii) damages of $102,330 for past income loss (including used sick days), and (iii) damages in a range between $436,420 and $1,197,521 for future income loss.

[2] The total damages claimed in the Amended Amended Statement of Claim are limited to $1 million, inclusive of pre-judgment interest.

[3] The remaining plaintiffs are Morgan's three children from a prior relationship. Those claims were not pursued at trial. On consent, I order that those claims be dismissed without costs. Consequently, the only claim before the court is that of Morgan for damages for personal injuries sustained.

[4] Liability is admitted for the accident. The only issue before the court is the determination of damages.

[5] Morgan's position as to damages is:

(i) Morgan sustained general (non-pecuniary) damages caused by the accident which resulted in "permanent serious impairment of an important physical, mental or psychological function". That language is commonly referred to as the "threshold" for claims for non-pecuniary loss. The *Automobile Insurance Rate Stability Act, 1996*, commonly known as Bill 59, governed the accident. Bill 59 amended the *Insurance Act*, R.S.O. 1990, to add s. 267.5 which required that the threshold be reached in order to claim non-pecuniary loss;

(ii) Morgan is entitled to general damages in the range of $50,000 to $75,000, less the statutory deductible of $15,000 which would apply under Bill 59;

(iii) Morgan was required to use his accumulated sick days and miss four years of employment as a secondary school physical education teacher as a result of the accident and, as such, is entitled to compensation for lost past income; and

(iv) There was a "real and substantial" possibility that (a) Morgan would have worked until age 65 or later but will have to retire earlier because of the injuries caused by the accident; and (b) he would have become a vice-principal by the age of 55 and cannot do so as a result of the accident. Consequently, there is a loss of future income.

[6] The defendant's position is:

(i) Morgan does not meet the threshold to claim non-pecuniary loss. In particular, (a) Morgan did not prove that his carpal tunnel syndrome was caused by the accident; and (b) the injuries Morgan suffered from the accident were not permanent, serious, or impaired an important physical, mental or psychological function;

(ii) General damages should be assessed in the range of $15,000 to $30,000, less the statutory deductible of $15,000 which would apply under Bill 59;

(iii) With respect to the claim for past income loss, (a) Morgan's decision to leave his job was not reasonable as he was capable of performing the functions of a secondary school physical education teacher; and (b) even if Morgan's decision was reasonable, the basis for his decision to leave work was carpal tunnel syndrome which was not caused by the accident; and

(iv) With respect to the claim for future income loss, the contingencies relied upon by Morgan are not established by the evidence. In particular,

(a) Morgan did not establish that there was a "real and substantial" possibility that (1) he would have retired at age 65; or (2) he would be required to retire earlier as a result of the injuries caused by the accident. Morgan was required to establish both aspects of this "early retirement" contingency and failed to do so. Consequently, this contingency cannot support a claim for future income loss; and

(b) Morgan did not establish that there was a "real and substantial" possibility that (1) he would have become a vice-principal; or (2) he could not do so as a result of the accident. Morgan was required to establish both aspects of this "vice-principal" contingency and failed to do so. Consequently, this contingency cannot support a claim for future income loss.

[7] For the reasons that follow, I dismiss the action. In brief, I find that:

(i) On the basis of the medical evidence, Morgan did not establish that the carpal tunnel syndrome from which he suffers was caused by the accident;

(ii) Morgan has not met the threshold to claim general damages because:

(a) The pain in Morgan's neck, back, and shoulder is not a permanent impairment. I accept the evidence of the defendant's medical expert, Dr. Erin Boynton ("Dr. Boynton"), that there are other contributing orthopaedic causes to that pain, *i.e.*, a muscular imbalance due to overdeveloped power muscles and lack of core stabilizing muscle strengthening as well as poor posture. I accept Dr. Boynton's evidence that those causes could be corrected under a proper exercise regime and if Morgan did so, his neck, back, and shoulder pain would be "reversible" and not chronic.

The video surveillance evidence also supports a finding that the neck, back, and shoulder pain is not permanent;

(b) Even if all of the injuries alleged to have been suffered by Morgan were permanent and caused by the accident, they have not caused a serious impairment. They did not cause a substantial interference with Morgan's ability to perform his usual daily activities or to continue with his regular employment; and

(c) I find that Morgan's ability to perform physical tasks such as weightlifting, running, and teaching physical education were an "important" function to him in that they "play a major role in [his] health and general well-being";

(iii) I assess general damages at $30,000 based on the evidence as to Morgan's pain and suffering. However, that amount is based on the pain and suffering caused by all of the symptoms on which Morgan gave evidence before the court, which includes carpal tunnel syndrome as a significant component.

Consequently, I reduce this amount by $10,000 to reflect the pain and suffering caused by the carpal tunnel syndrome. Carpal tunnel syndrome is one of the three sources of the pain and suffering alleged to be permanent and caused by the accident. Further, Morgan led considerable evidence as to this particular aspect of his pain and suffering and the effect it had upon him.

I then deduct from the reduced amount of $20,000 a further 25% due to the contributing causes of the pain (muscular imbalance and head posture), resulting in general damages of $15,000;

(iv) I dismiss the past income loss claim since (a) Morgan's decision to leave work was not reasonable, as he had no medical advice to do so and the video surveillance during the time he was away from teaching showed him engaging in activities fully compatible with his employment as a secondary school physical education teacher; and (b) even if Morgan's decision was reasonable, the best evidence contemporaneous with Morgan's departure in March 2004 is that he left work because of his carpal tunnel syndrome which was not caused by the accident; and

(v) I dismiss the future income loss claim since Morgan has not established a real and substantial possibility of either the "early retirement" or "vice-principal" contingencies. The evidence does not establish a real and substantial possibility that (a) Morgan would have retired at age 65 but will now be required to retire earlier as a result of the accident; or (b) Morgan would have become a vice-principal by the age of 55 and cannot due to the accident.

With respect to the "early retirement" contingency, I conclude based on the evidence that a retirement age of 58 is more appropriate. In any event, the early retirement contingency is not established because medical, surveillance and other evidence do not support a real and substantial possibility that Morgan would be required to retire early as a result of the accident.

With respect to the "vice-principal" contingency, the evidence demonstrates that there is no real and substantial possibility that Morgan would have become a vice-principal by the age of 55 (or at any time) if not for the accident. Morgan has never been qualified to become a vice-principal and has not taken the single sessional course which is required, all while engaged in other business and personal activities and taking numerous training courses required for the fitness facility he owns and operates.

In any event, even if there were such evidence, Morgan stated that he could be eligible to apply to be a vice-principal within two years, so he has not demonstrated a real and substantial possibility that he could not become vice-principal as a result of the accident (if he chose to do so).

[8] I now address the issues raised above.

**Analysis**

**Issue 1: Was the carpal tunnel syndrome caused by the accident?**

[9] In the present case, the issue arises as to whether the carpal tunnel syndrome suffered by Morgan was caused by the accident. This is an important issue as Morgan's claims for pain and suffering include carpal tunnel syndrome and Morgan's claim for lost past income raises the issue of whether he left his job as a secondary school physical education teacher (assuming his decision was reasonable, which is a separate issue I address below) as a result of carpal tunnel syndrome.

[10] Morgan submits that based on the evidence at trial and the opinion evidence of both his orthopaedic and chronic pain expert, Dr. Brian Alpert ("Dr. Alpert"), and his treating physiatrist, Dr. Pierre Kirwin ("Dr. Kirwin"), the court should conclude that Morgan's carpal tunnel syndrome was caused by the accident.

[11] The defendant relies on the evidence of his orthopaedic and pain management expert, Dr. Boynton, who reviewed the medical records. The defendant submits that given the evidence about the accident including the lack of any hand or wrist trauma, as well as Morgan's physical activities prior to the accident which involved repetitive wrist and hand movement, Morgan failed to establish that the accident caused his carpal tunnel syndrome.

**a) The applicable law on causation**

[12] It is settled law that proof by an injured plaintiff that a defendant was negligent without more does not make the defendant liable for the loss. The plaintiff must also establish that the defendant's negligence caused the injury. That link is causation (*Clements v. Clements*, 2012 SCC 32 ("*Clements*"), at para. 6).

[13] The rules of causation require the plaintiff to show on a balance of probabilities that "but for" the defendant's acts, the injury would not have occurred (*Clements*, at para. 8; *Blackwater v. Plint*, 2005 SCC 58 ("*Blackwater*"), at para. 78).

[14] The phrase "but for" incorporates the requirement that the defendant's negligence was necessary to bring about the injury. Consequently, the plaintiff must prove on the balance of probabilities that the injury would not have occurred without the defendant's negligence. This is a factual inquiry (*Clements*, at para. 8).

[15] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. A common sense inference of "but for" causation from proof of negligence usually flows without difficulty (*Clements*, at para. 9).

[16] Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss (*Clements*, at paras. 9 and 10).

[17] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage (*Blackwater*, at para. 78).

[18] The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered in any event (*Blackwater*, at para. 78).

[19] Consequently, even when liability is admitted (as in the present case), the court must still consider whether the plaintiff can establish on a balance of probabilities that "but for" the defendant's negligence, the injury would not have occurred.

[20] This is also a requirement under the threshold, as not only must the plaintiff establish that the three components of the threshold have been met, the plaintiff must also establish that the condition which satisfies the three requirements was caused by the motor vehicle accident (*Bisier v. Thorimbert*, [2006] OJ 4026 (SCJ), at para. 19).

**b) The relevant evidence**

[21] In the present case, the issue of causation arises only with respect to chronic pain arising from carpal tunnel syndrome. This issue depends on the medical evidence reviewing how the accident occurred, the treatment for injuries after the accident and Morgan's evidence as to his medical history, strength training and weightlifting and physical condition prior to the accident.

**1. A definition of carpal tunnel syndrome**

[22] The medical experts of all parties were in agreement that carpal tunnel syndrome arises when there is pressure on the carpal tunnel which is at the front of the wrists. The tunnel is formed by the bones on the bottom and a fibrous membrane on top of the tunnel. The median nerve travels through the tunnel providing sensation and physical contraction to the thumb, index finger, middle finger, and part of the ring finger. The ulnar nerve also travels through a portion of the tunnel for the same purpose to the little finger and a portion of the ring finger. If there is a decrease in the size of the tunnel, it can put pressure on the nerve.

**2. The evidence as to how the accident occurred**

[23] The accident took place on Thursday, April 25, 2002 after 11 p.m. as Morgan was on his way to visit a friend. Morgan was driving his 1990 VW Jetta and was at the intersection of Goreway Drive and Rexdale Blvd. He was stopped behind a car at a red light when he saw a van approaching the light. Morgan thought the van would go through the lights but the van struck Morgan's car in the rear, causing Morgan's car to strike the vehicle ahead of him. The Jetta was a total loss although there was no evidence as to the amount of damage or the value of the 1990 Jetta at the date of the accident.

[24] Morgan was wearing his seat belt at the time of the accident. He was not bleeding and did not lose consciousness. The air bag did not deploy.

[25] Morgan's evidence in his examination-in-chief was, at first, that he remembered that his leg moved forward and hit the dashboard but he did not remember any other physical contact. However, a few moments later in his examination-in-chief, he stated that his neck, back and knee made contact with the underside of the dashboard.

[26] Consequently, the evidence is inconclusive as to whether there was any contact between Morgan's leg, neck, back or knee and the car.

[27] However, there is no evidence from Morgan that his right hand struck any part of the car as a result of contact.

[28] In his examination-in-chief, Morgan's evidence was that he braced both of his hands on the steering wheel when he saw there would be contact, even though his car had a standard transmission.

[29] In cross-examination, Morgan was shown the report of Dr. Schlosser, a plastic surgeon he had seen on February 21, 2008, in relation to his carpal tunnel syndrome. In that report, Dr. Schlosser recorded Morgan's statement that "at the time of the injury his body was turned and he was holding on to the steering wheel with only his left hand". Morgan acknowledged that he was honest when asked questions by doctors.

[30] At that point in the cross-examination, Morgan acknowledged that he did not brace both of his hands on the steering wheel before the crash. I accept this evidence arising from the cross-examination.

[31] Police and ambulance attended the scene of the accident. Morgan was outside the car and walking when the paramedics arrived. The physical examination by the paramedics documented that Morgan was "conscious and alert" with no cervical neck or spine pain. There was no "step deformity" (in which paramedics feel the bones in the neck and spine) and no swelling was detected. Chest and abdominal examinations were normal.

[32] Morgan did report to the paramedics that he had "back pain" and that his "back is tight", but gave evidence that he attributed those muscular aches to the strength training he had done. Morgan had good range of motion in the lower lumbar muscle area. Sensation was intact in all extremities.

[33] Morgan was not taken to the hospital. A tow truck driver took Morgan to get a rental car and Morgan drove home.

### 3. Evidence as to Morgan's past wrist surgeries, strength training and weightlifting, and condition prior to the accident

[34] In 1983, in grade 11 of high school, Morgan had a "scaphoid" injury and fractured his right wrist. He did not know it was fractured and continued to play high school football with

chiropractic and laser treatment and taping of the wrist. In the course of a medical examination and X-rays while a football player and student at Simon Fraser University ("SFU"), Morgan learned that he had a scaphoid fracture and he then had two surgeries on the right wrist: one surgery to have a screw inserted and subsequent bone graft surgery to repair the right wrist.

[35] In Morgan's second year at SFU, when Morgan was 21, he had a scaphoid fracture of his left wrist. He had surgery to repair the scaphoid after the football season and had no permanent restrictions.

[36] Morgan's evidence is that scaphoid injuries were common for football players who used their hands at close range.

[37] Morgan's evidence was that he was actively involved in strength training and weight lifting at the date of the accident. Morgan lifted weights every day. He could bench press over 300 pounds and do squat lifts of close to 400 pounds.

[38] Morgan's evidence was that he returned to full physical fitness and had no permanent wrist restrictions from his surgeries at the time of the accident.

### 4. Morgan's medical evidence

[39] Dr. Kirwin and Dr. Alpert testified on behalf of Morgan that carpal tunnel syndrome was caused by the accident.

#### a. The evidence of Dr. Kirwin

[40] Dr. Kirwin was Morgan's treating physiatrist. A physiatrist is a medical doctor who is a specialist in physical medicine, who prescribes medication, exercise, physical modalities, heat, and ultrasound. A physiatrist manages rehabilitation with a focus to improve function and the hope to achieve the highest level of function in the patient. A physiatrist manages pain and tries to improve the patient's ability to do activities.

##### i. A preliminary issue: admissibility of opinion evidence from Dr. Kirwin

[41] Morgan's counsel did not call Dr. Kirwin as an independent expert under Rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("Rule 53.03") to provide his opinion on an issue in the proceeding. Instead, Dr. Kirwin was called as a "participant expert" under the recent case of *Westerhof v. Gee Estate*, 2015 ONCA 206 ("*Westerhof*").

[42] In *Westerhof*, the Court of Appeal held that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with Rule 53.03 where (a) the opinion to be given is based on the witness's observation of or participation in the events at issue; and (b) the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events (*Westerhof*, at para. 60).

[43] In *Westerhof*, the Court of Appeal held that if a participant expert also proffers opinion evidence extending beyond the above limits, the participant expert must comply with Rule 53.03 with respect to the portion of their opinions extending beyond those limits (*Westerhof*, at para. 63).

[44] The Court of Appeal did not accept that there would be "disclosure problems" for participant experts such that they should be required to comply with Rule 53.03. The Court held that (*Westerhof*, at para. 85):

> (i) "in many instances, these experts will have prepared documents summarizing their opinions about the matter contemporaneously with their involvement" and "those summaries can be obtained as part of the discovery process"; and
>
> (ii) "even if these experts have not prepared such summaries, it is open to a party, as part of the discovery process, to seek disclosure of any opinions, notes or records of participant experts and non-party experts the opposing party intends to rely on at trial. If the notes produced are illegible, the party producing them must provide a readable version".

[45] Given the decision in *Westerhof*, I find that Dr. Kirwin can give evidence as to the opinion he formed at the time of his diagnosis on whether the carpal tunnel syndrome he diagnosed was caused by the accident. His opinion is based on his observation or participation in the events at issue and is a diagnosis he could form as part of the ordinary exercise of his skill and training.

[46] However, Dr. Kirwin was not qualified as an orthopaedic expert. While it may have been within his training to make a diagnosis of carpal tunnel syndrome and conclude as to its cause, I attach less weight to his opinion as he is a physiatrist who specializes in physical medicine and rehabilitation management, not an orthopaedic specialist such as the Rule 53.03 experts called by the parties.

### ii. Dr. Kirwin's diagnosis and opinion

[47] Dr. Kirwin treated Morgan as a result of a referral from Dr. D'Onofrio. The first visit was November 5, 2002, more than 6 months after the accident. Dr. Kirwin took a medical history from Morgan and based on that history and his examination of Morgan, Dr. Kirwin listed a number of diagnoses including "bilateral carpal tunnel syndrome".

[48] As a result of the November 5, 2002 examination, Dr. Kirwin sent Morgan for an electromyography ("EMG") of his right hand and right leg. An EMG is a nerve conduction test to assess the speed of nerve impulses going through tissue. The test is done by connecting electrodes to the patient with the machine for measurements and graphics to show how muscles are contracting. The patient cannot influence the test. It is objective as the patient is not reporting results to the examiner nor can the patient modulate how it is done.

[49] Morgan met with Dr. Kirwin on November 27, 2002 to review the EMG nerve conduction studies. Dr. Kirwin advised Morgan that the EMG studies showed evidence of a severe right carpal tunnel syndrome and moderately severe left carpal tunnel syndrome.

[50] At trial, Dr. Kirwin provided his opinion that when he reported all of the conditions on November 5, 2002, including the carpal tunnel syndrome, his opinion was that they were caused by the accident.

[51] Dr. Kirwin saw Morgan twice in December 2014 after not seeing him for 7 years, a gap which Dr. Kirwin stated "somewhat" surprised him (I address this issue in my threshold analysis below). However, during his December 17, 2014 examination, Morgan confirmed, as set out in Dr. Kirwin's report to Dr. D'Onofrio, that "he was holding onto the steering wheel therefore there was a percussion injury to his hands". Dr. Kirwin's evidence was that how Morgan was holding onto the wheel was consistent with his conclusion that Morgan had suffered a percussion injury.

[52] On cross-examination, Dr. Kirwin fairly acknowledged that if Morgan was not holding the steering wheel in his right hand, it would change his diagnosis in his December 17, 2014 report that "there was a percussion injury to his hands".

[53] On cross-examination, Dr. Kirwin acknowledged that at the time of his November 5, 2002 examination, he had understood from Morgan that Morgan had only required "casting" for his prior scaphoid injuries, as set out in Dr. Kirwin's report to Dr. D'Onofrio dated that day. While Dr. Kirwin agreed that prior wrist injuries are important to a diagnosis of carpal tunnel syndrome, Dr. Kirwin believed that the carpal tunnel syndrome was caused by the accident, even if there had been some prior degeneration to the wrist or increased risk as a result of the prior injuries and surgeries. Dr. Kirwin based his opinion on the evidence that the surgeries had been 15 years prior to the accident and Morgan was symptom-free despite working out and being a physical education teacher.

[54] Consequently, while Dr. Kirwin acknowledged that past wrist injuries and surgeries could be relevant and possibly cause the carpal tunnel syndrome, it was his opinion that given the passage of time and the lack of symptoms as reported by Morgan, the cause was the accident.

[55] Dr. Kirwin acknowledged that carpal tunnel syndrome can be caused by repetitive strain including intensive physical activity with hands. Dr. Kirwin also acknowledged that carpal tunnel syndrome could be caused or contributed to by weightlifting and that if Morgan did a lot of weightlifting, the likelihood of carpal tunnel syndrome would increase.

**b. The evidence of Dr. Alpert**

[56] Dr. Alpert was qualified as an independent expert in the fields of orthopaedic surgery, chronic musculoskeletal pain and long-term disability.

[57] Dr. Alpert reviewed all of Morgan's treatment records, disability file records, and other documents and conducted a physical examination of Morgan which included taking a detailed history. Dr. Alpert also reviewed the report of Dr. Boynton, dated July 13, 2010.

[58] In the section of his report entitled, "history and mechanism of injury for motor vehicle accident on April 25, 2002", there is no reference to whether Morgan was holding both hands on the steering wheel at the time of the accident.

[59] In his examination-in-chief, Dr. Alpert explained that carpal tunnel syndrome can occur from repetitive strain to the wrist or hand area or from an acute traumatic event.

[60] Dr. Alpert's evidence was that when carpal tunnel syndrome is caused by a trauma, it occurs from injury to "soft tissue as well as to the bony structures around the wrist area" "that would lead to, again, inflammation with swelling, bruising, capillary small vessel bleeding into the area and then scar tissue, chronic inflammatory scar tissue forming affecting the median nerve function".

[61] Dr. Alpert relied on the EMG nerve conduction test performed approximately seven months after the accident to support a finding of chronic pain as a result of carpal tunnel syndrome caused by the accident.

[62] Dr. Alpert gave evidence in his examination-in-chief, as set out in his report, that he had conducted a physical examination to determine that Morgan had carpal tunnel syndrome. Dr. Alpert found that it was worse in Morgan's right hand than his left.

[63] Dr. Alpert reviewed the past scaphoid fractures and noted in his examination-in-chief that Morgan reported no problems well after the treatment and had no further symptoms.

[64] Dr. Alpert concluded that the carpal tunnel syndrome was caused by the accident. In his examination-in-chief, he relied on his opinion in his report that "[Morgan] was likely gripping and reaching for the steering wheel with his right arm at shoulder level". His evidence in examination-in-chief was that in the accident, Morgan "was likely reaching and gripping with his right arm at shoulder level or at an outstretched position, probably the steering wheel". He added that "hands can instinctively reach out to try to protect the person as they are being jolted" and "they may come in contact with a dashboard or a central console or a seat"; and "most drivers of a vehicle have their hands on or near the steering wheel".

[65] Dr. Alpert concluded in his examination-in-chief that "as the body is being jolted forwards and backwards forces are being applied to the carpal tunnel region" and "if the hands go from a neutral relaxed position into more of a bent or flexed position" then the wrists could flex dramatically which could cause the edge of the fibrous roof covering membrane to dig into the median nerve and soft tissue and lead to a reaction which would cause acute and chronic carpal tunnel syndrome.

[66] Dr. Alpert relied on the evidence that Morgan did not have any symptoms prior to the accident to conclude that the carpal tunnel syndrome was caused by the accident.

[67] On cross-examination, Dr. Alpert was presented with the evidence that Morgan was not holding the steering wheel with his right hand when the accident occurred. Dr. Alpert made a general comment that there are "any ways the body could be banged around in an accident", but acknowledged that in his report, he based his conclusion on the right arm "gripping and reaching

for the steering wheel". Dr. Alpert agreed that his opinion "could" change if the factual basis was not established, but then returned to his position that it would have had to come from the accident since Morgan did not have the carpal tunnel syndrome beforehand.

[68] Dr. Alpert stated in his cross-examination that if the factual basis was not established, he would have to modify his opinion to ask hypothetically "did [Morgan] in the jolting of his body hit his hand against the steering wheel, did he hit it against the interior portion of the vehicle, center console, gearshift, dashboard, etc., seat?" of the vehicle.

[69] Dr. Alpert then attempted to rely on the possibility that Morgan was reaching for the steering wheel with his right arm at the time of the accident since the hand could then impact with the steering wheel or an interior portion of the vehicle. Dr. Alpert said that if the right hand was in the vicinity of the steering wheel, his opinion "would still be correct". Dr. Alpert also stated that it would have been open to him to include "speculation" that Morgan might have hit his right hand or wrist against another interior portion of the vehicle.

[70] Dr. Alpert acknowledged that it would be "difficult to explain" how an area gets injured if there is no injury to the area and that the question would then be how close Morgan's hand was to the steering wheel and why Dr. D'Onofrio recorded right shoulder strain.

[71] Dr. Alpert agreed on cross-examination that he did not have a note of Morgan telling Dr. Alpert the location of Morgan's right arm at the accident, which is consistent with the history of the accident as Dr. Alpert recorded in his report which does not set this out.

### 5. The defendant's medical evidence

[72] Dr. Boynton was qualified as an expert in orthopaedic medicine, sports medicine and pain treatment/pain management.

[73] Dr. Boynton's opinion was that the carpal tunnel syndrome was not caused by the accident. She based her conclusion on the following medical basis:

(i) "Usually carpal tunnel syndrome is not acute". It is not a condition that is typically obtained because someone falls down or because someone grips a steering wheel;

(ii) When carpal tunnel syndrome is accident-related, it requires breaking the bone or having swelling or bleeding around the nerve or within the carpal tunnel to decrease the size of the tunnel so that the nerve becomes compressed and then painful and symptomatic;

(iii) The day the accident happened, Morgan had no pain, no bruising, and no swelling in his hands, nor any loss of motion;

(iv) On April 30, 2002, four days later, when Morgan went to the emergency room, none of these traumatic signs of carpal tunnel syndrome were documented. Morgan told the triage nurse that he had back pain localized to his shoulder blades

and lower back, and there was no discussion of any concern regarding hands in the report;

(v) The notes of the walk-in clinic on May 1, 2002 did not refer to trauma of the hands;

(vi) The Disability Certificate prepared by Dr. D'Onofrio on May 3, 2002 made no reference to trauma of the hands;

(vii) The far more common cause of carpal tunnel syndrome is repetitive use and Morgan would be predisposed to carpal tunnel syndrome because of his previous scaphoid fractures and surgery since the scarring and swelling from those fractures could have diminished the size of the carpal tunnel;

(viii) There would have been immediate symptoms if the accident caused the carpal tunnel syndrome. There were no immediate symptoms or trauma to the wrists; and

(ix) Morgan did many things that could lead to carpal tunnel syndrome such as sports and weightlifting with repetitive movement and would make him more predisposed to it.

[74] In her examination-in-chief, Dr. Boynton was asked to comment on Dr. Alpert's conclusion that Morgan had suffered carpal tunnel syndrome as a result of gripping the steering wheel during the accident. Dr. Boynton had prepared a supplemental report, dated July 24, 2011, in which she rejected that conclusion, and gave evidence in her examination-in-chief that carpal tunnel syndrome is usually associated with chronic repetitive activity and not with trauma, and in the unusual cases when carpal tunnel syndrome had been induced by trauma, it would usually be associated with fracture. Since there was no fracture, swelling or bleeding, Dr. Boynton maintained her conclusion that the carpal tunnel syndrome was not caused by the accident.

[75] Dr. Boynton stated that Morgan's previous history of fracture might have predisposed Morgan to carpal tunnel syndrome. However, there was no evidence that the accident exacerbated any predisposition since there was no immediate swelling or bruising around the carpal tunnel which is indicative that the accident did not cause the carpal tunnel syndrome, particularly as Morgan has "such significant other issues that could cause carpal tunnel".

[76] On cross-examination, Dr. Boynton agreed that she had not recorded the location of Morgan's hands at the time of impact, possibly because she may not have felt it was relevant.

[77] On cross-examination, Dr. Boynton accepted that Morgan could have returned to his full activities and experienced no symptoms after his surgeries.

[78] Dr. Boynton also agreed that if Morgan was predisposed to carpal tunnel syndrome due to his prior injuries, it would be more likely to be precipitated by injury than if he had not had the fractures. However, Dr. Boynton expressly disagreed with the premise (that she thought had been put to her by Morgan's counsel) that the accident could have contributed to the carpal

tunnel syndrome because of the prior surgeries. Dr. Boynton reiterated that there was no swelling of the wrists, no loss of motion in the wrist, and no bruising or fracture of the wrist.

[79] Morgan's counsel then stated that such was not the premise of his question but, rather, that Morgan was healthy with no wrist problems and Dr. Boynton agreed that the evidence of his prior medical history supported that finding.

[80] Dr. Boynton was not cross-examined on her opinion that if carpal tunnel syndrome occurs acutely (from an accident), there would be immediate signs of trauma in the wrist area.

[81] On re-examination, Dr. Boynton gave evidence that the repetitive movements of Morgan in exercise such as throwing a ball, lifting weights, or shooting hockey sticks would predispose him to carpal tunnel syndrome since they all require a great deal of wrist movement.

#### 6. Other relevant medical evidence

[82] On May 1, 2002, Morgan visited a walk-in clinic and no signs of trauma to his hands were documented.

[83] On May 2, 2002, Morgan was examined by Dr. D'Onofrio. Dr. Alpert gave evidence in his examination-in-chief, as set out in his report, that Morgan told Dr. Alpert that the examination found "decreased range of motion in his spine" and Dr. D'Onofrio prescribed a course of physical therapy and anti-inflammatory medication.

[84] On May 3, 2002, Dr. D'Onofrio completed a Disability Certificate which listed the following diagnoses with respect to the accident: (i) cervical WAD (whiplash associated disorder) II strain, (ii) lumbosacral strain, (iii) right shoulder strain, (iv) right knee strain, and (v) post-traumatic headache.

[85] Morgan states that he saw Dr. D'Onofrio because of pain in his neck, back, fingers, legs, shoulders and head (headache and numbness of scalp), but references to the fingers do not appear in the Disability Certificate or in the records of any earlier visit.

[86] Morgan told Dr. Alpert that he attended at the ACT Therapy Clinic after his visit with Dr. D'Onofrio several times per week for about 3 months for "hot packs, massage, and stretching exercises" and that he continued to have chronic musculoskeletal pain which led to his referral to Dr. Kirwin, after two MRIs in September 2002 of his cervical spine and right shoulder.

[87] Morgan states that he was referred to Dr. Kirwin as a result of, amongst other things, his difficulty in holding on to objects and numbness and tingling in his hands.

### c) The challenge by Morgan to the weight to attach to Dr. Boynton's opinion evidence

[88] During her cross-examination, Morgan's counsel asked many questions relating to Dr. Boynton's current practice. Dr. Boynton answered those questions in a forthright manner.

[89] In his closing submissions, Morgan asked the court to give little or no weight to Dr. Boynton's evidence because she no longer sees referral patients, has no hospital privileges and spends time frequently playing tennis as she is a competitive player on the national team. Dr. Boynton also spends her current time as an author and researcher and has designed a compression shirt to assist in athletic performance.

[90] I do not agree that it is appropriate to give Dr. Boynton's opinion less weight than Dr. Alpert because of Dr. Boynton's current practice.

[91] Dr. Boynton's credentials as an orthopaedic surgeon are no less impressive than those of Dr. Alpert. Both Dr. Boynton and Dr. Alpert graduated from the University of Toronto Faculty of Medicine. Dr. Boynton was awarded the most outstanding graduate orthopaedic resident (while Dr. Alpert graduated with first class honours). Dr. Boynton was chief orthopaedic surgeon and consultant to the Toronto Blue Jays and Toronto Maple Leafs and the chief orthopaedic consultant to the Toronto Marlies and Toronto Argonauts (while Dr. Alpert was the in-house orthopaedic consultant to two leading ballet companies). Both of them had prestigious fellowships at leading hospitals.

[92] Consequently, I do not find that Dr. Boynton's opinion should be given less weight because she has chosen at this point in her life to remove herself from an active practice.

[93] Further, I do not agree with Morgan that Dr. Boynton's opinion should be discounted because she is not an expert in chronic pain. First, Dr. Boynton was qualified as an expert in pain treatment and pain management. Second, Dr. Boynton's opinions on the causation of carpal tunnel syndrome (or the bases for her belief that Morgan's pain is not permanent but is, rather, "reversible", as I discuss in the next section dealing with the "permanent" requirement under the threshold) are based on her knowledge as an expert in orthopaedic medicine and in pain treatment/ pain management, the same basis on which Dr. Alpert is qualified.

[94] For these reasons, I do not discount the evidence of Dr. Boynton on the basis of the above argument.

**d) Application of the law to the evidence**

[95] On the basis of the above evidence, I find that Morgan did not establish that the carpal tunnel syndrome was caused by the accident.

[96] The essence of Morgan's causation theory is that prior to the accident, Morgan was a healthy, athletic individual who could lift weights and do strength training, and after the accident, he was diagnosed with carpal tunnel syndrome. Morgan's submission is that the "common sense" conclusion is that the carpal tunnel syndrome was caused by the accident.

[97] Often, a "common sense" inference might be available that if an injury results after an accident, it is causally connected. However, Dr. Boynton's evidence is compelling that such an inference ought not to be drawn.

[98] At no point was Dr. Boynton challenged on her primary premise that if carpal tunnel syndrome occurs acutely (from an accident), there would be immediate signs of trauma in the wrist area. To the contrary, her evidence was entirely consistent with that of Dr. Alpert whose evidence was that carpal tunnel syndrome arising from a trauma leads to "inflammation with swelling" or "bruising".

[99] There were no recorded signs of swelling, inflammation, or fracture associated with Morgan's wrists or hands at any time immediately following the accident. While Morgan says that he suffered pain in his fingers after the accident and before he saw Dr. D'Onofrio, there is no record of any trauma relating to the hands or fingers in the emergency room notes, the walk-in clinic notes, Dr. D'Onofrio's May 2, 2002 examination, the Disability Certificate, or in Morgan's physiotherapy treatment discussed by Dr. Alpert upon his review of those records.

[100] Consequently, Morgan may be mistaken in his evidence that he felt pain in his fingers shortly after the accident, although he had those symptoms when he saw Dr. Kirwin six months later. I do not accept his evidence on that point given the medical records. In any event, there is no evidence of any trauma to the wrists (fracture, swelling or bleeding) at any time immediately or shortly after the accident, which is the basis of Dr. Boynton's opinion which I accept.

[101] Dr. Boynton reasonably acknowledged in cross-examination that the location of Morgan's hands in the Jetta might not have been relevant to her analysis. Her opinion is that post-accident trauma to the wrists is required in order to conclude that there could be causation.

[102] Dr. Boynton's analysis of causation of carpal tunnel syndrome by trauma which does not take into account location of hands is more consistent with common sense. Rather than speculate as to where Morgan's hands may have been in the accident, an analysis that focuses on any trauma to the hands or wrists after the accident is more logical to address whether carpal tunnel syndrome is caused by an accident. If there are no such signs of trauma, then it is not a "common sense" conclusion that carpal tunnel syndrome was caused by an accident, particularly when the plaintiff has past wrist surgeries and participates in intensive repetitive activity such as weightlifting that all physicians agree would make him more predisposed to carpal tunnel syndrome.

[103] Dr. Boynton reasonably agreed on cross-examination that if Morgan was predisposed to carpal tunnel syndrome as a result of his prior surgeries (a position not advanced by Morgan), then the carpal tunnel syndrome from an accident would be more likely to be precipitated. However, Dr. Boynton's answer is entirely consistent with her conclusion that the carpal tunnel syndrome was not caused by the accident as there was no bruising, swelling, or inflammation, a point Dr. Boynton emphasizes by referring to the Disability Certificate which makes no reference to any trauma affecting the hands even though Dr. D'Onofrio listed a multitude of injuries he believed arose from the accident.

[104] Dr. Alpert based his opinion on causation on a factual premise that Morgan either gripped the steering wheel with both hands or was gripping it with the left hand while his right arm reached for the steering wheel at the time of the accident. When faced with the uncontested

evidence that Morgan did not have his right hand on the steering wheel, Dr. Alpert speculated that the right hand must have hit some part of the car.

[105] The problem with Dr. Alpert's speculation is two-fold. First, Morgan did not lead any evidence at trial that his right hand made contact with any part of the car, and it is his right hand that has the most severe carpal tunnel syndrome.

[106] Further, there is no record of any bruising, swelling, inflammation, or bleeding associated with either hand, whether immediately at the accident, at the emergency room, at the walk-in clinic, or at any point immediately or shortly after the accident. If there had been such a violent acceleration and deceleration impact on Morgan's hands which would lead to carpal tunnel syndrome (whether or not from holding or reaching for the wheel), some signs of trauma would have existed as discussed by Dr. Boynton.

[107] Dr. Kirwin, on the other hand, while not an orthopaedic expert, acknowledged that if Morgan was only holding the steering wheel with his left hand at the point of impact, it would significantly affect his opinion that Morgan "was holding onto the steering wheel therefore there was a percussion injury to his hands".

[108] Dr. Boynton fairly accepted that Morgan did not have any symptoms of wrist pain prior to the accident. However, I accept Dr. Boynton's evidence that this still could not lead to an inference of causation since there is no evidence of trauma to the hands at the accident.

[109] On the facts of this case, it is not sufficient to submit (as Morgan does) that the fact that Morgan does not have carpal tunnel syndrome before an accident and is diagnosed with it six months later can establish causation.

[110] I accept Dr. Boynton's evidence that Morgan had a predisposition to carpal tunnel syndrome as a result of the intense repetitive exercise he undertook before the accident including weightlifting.

[111] I accept that Morgan was symptom-free for 15 years and I do not find that the carpal tunnel syndrome was caused by the prior surgeries, nor did Dr. Boynton take such a position. She commented that even though Morgan was symptom-free, the past surgeries did give him a predisposition to carpal tunnel syndrome.

[112] That predisposition, combined with the exercise-related factors which predisposed Morgan to carpal tunnel syndrome, and the lack of any signs of physical trauma to the hands and wrists from the accident, lead me to conclude that Morgan has not established that his carpal tunnel syndrome was caused by the accident.

**Issue 2: Has Morgan demonstrated that the injuries he suffered as a result of the accident meet the threshold for compensation?**

[113] The parties agree that with respect to the non-pecuniary damages, Morgan must establish that he has sustained non-pecuniary damages which result in an impairment that is (i) permanent, (ii) serious, and (iii) affects an important function. I address each of these issues below.

**a) Is there any impairment which is permanent?**

**1. Which conditions are at issue?**

[114] As I discuss above, Dr. Kirwin in his report of November 5, 2002 diagnosed numerous conditions based on Morgan's report of his history. Dr. Kirwin concluded:

> Mr. Morgan appears to be suffering from a grade II whiplash associated disorder of the cervical spine with a cervicogenic headache, bilateral TMJ syndrome, thoracic and lumbar myofascial strain, bilateral rotator cuff tendonitis, a mild costosternal syndrome, myofascial strains of the scalenes, bilateral carpal tunnel syndrome and possible peripheral polyneuropathy.

[115] Dr. Kirwin also diagnosed "non-specific" (a source could not be found) numbness over the right jaw.

[116] At trial, Dr. Kirwin provided his opinion that all of the above symptoms were caused by the accident, except for the non-specific jaw numbness, temporomandibular joint ("TMJ") syndrome (for which he said that a dentist's opinion would be required), and possible polyneuropathy.

[117] However, Dr. Kirwin provided no opinion about whether any of the conditions discussed in his November 5, 2002 report were permanent.

[118] The only physician who gave evidence for Morgan as to permanent medical conditions caused by the accident was Dr. Alpert. He found three chronic conditions: (i) moderate to severe chronic muscle ligament strain and zygapophyseal joint pain in the lumbar spine, thoracolumbar spine, trapezii and cervical spine (collectively, "neck and back pain"), (ii) moderately severe, chronic right shoulder rotator cuff tendinitis ("right shoulder pain"), and (iii) moderate to severe chronic bilateral carpel tunnel syndrome, worse on the right side than on the left.

[119] I found above that the carpal tunnel syndrome was not caused by the accident, so I do not need to consider whether it is permanent. However, I note that while the defendant submitted that surgery might repair the carpal tunnel syndrome, the medical evidence before me was from Dr. Alpert who stated that there would only be "a limited improvement at best". Consequently, if carpal tunnel syndrome were found to be an injury caused by the accident, I would find that it meets the test of "lasting indefinitely into the future" as that legal test is set out below.

[120] Dr. Alpert found that Morgan "has permanent physical restrictions and related long-term disability" arising out of his neck and back and right shoulder pain (as well as the pain from the carpal tunnel syndrome). Dr. Alpert expressly did not opine on Morgan's reported problems of "TMJ dysfunction, headaches and psychological difficulties, which I will defer to the appropriate specialists for further comment if indicated".

[121] I now address whether the neck and back pain, as well as the right shoulder pain, are "permanent" impairments as that test has been set in the case law.

### 2. The applicable case law

[122] Under the first branch of the threshold test, the plaintiff must prove that he or she sustained a permanent impairment that was caused by the motor vehicle accident. The trial judge will decide this issue based upon his or her assessment of the medical evidence and any other evidence presented (*Meyer v. Bright*, [1993] OJ 2446 (CA) ("*Meyer*"), at para. 18).

[123] A permanent impairment "means lasting indefinitely into the future as opposed to a limited time with a definite end" or when "a limitation in function is unlikely to improve for the indefinite future" (*Brak v. Walsh*, 2008 ONCA 221 ("*Brak*"), at para. 4).

[124] If chronic pain is established, it meets the requirement of permanence under the threshold (*Tulloch v. Akogi*, 2007 CarswellOnt 6375 (SCJ), at para. 3).

[125] Soft tissue injuries based on a patient's subjective complaints can constitute a permanent impairment (*Meyer*, at para. 18).

### 3. The relevant medical evidence

[126] In this case, there was general agreement between the experts that Morgan suffered some neck and back pain and shoulder pain as a result of the accident and, as such, I find that the accident was a cause of that pain. However, there was a significant disagreement between Dr. Alpert and Dr. Boynton as to whether that pain was permanent and whether there were other contributing causes to the pain.

[127] I address the relevant medical evidence below.

#### a. The evidence of Dr. Alpert

[128] Dr. Alpert concluded that the neck and back pain resulted in a "chronic, painful and disabling course" and that the accident caused "permanent ... residual musculoskeletal impairments" to Morgan's spine. Dr. Alpert found "chronic right shoulder rotator cuff tendinitis".

[129] Dr. Alpert concluded that:

> In my orthopaedic opinion, Mr. Morgan has permanent physical restrictions and related long-term disability as a result of the residual musculoskeletal impairments sustained to his cervical spine, trapezii, thoracic spine, thoracolumbar spine, lumbar spine, dominant right shoulder, and both wrist carpal tunnels, due to the [accident]. His permanent physical restrictions include no prolonged bending or twisting, no overhead work, no work with his right arm above shoulder level, no prolonged or forceful gripping with his wrists/hands, no prolonged writing with his right hand, no prolonged computer keyboard typing, no heavy pushing or pulling, and no heavy lifting.

[130] Dr. Alpert concluded that Morgan's orthopaedic progress was expected to be poor and he did not expect significant musculoskeletal improvement. Dr. Alpert's opinion was that Morgan's

disability had begun immediately after the accident in 2002 and would be acute or chronic with pain in the future and a likely worsening of problems. Dr. Alpert opined that the injuries would result in a permanent impairment on Morgan performing essential daily functions at work, at home, and for recreational sporting.

[131] Dr. Alpert commented in his report that "Dr. Boynton noted that on physical examination, Mr. Morgan had some forward carriage of his head and rounding of shoulders". Dr. Alpert also stated in his examination-in-chief that "Dr. Boynton did note that Mr. Morgan had poor development of his mid and lower trapezius muscles posteriorly" which Dr. Alpert stated was consistent with his finding of tenderness on palpation in those areas and the ropy thick scar tissue he found.

[132] Dr. Alpert had also noted Morgan's head posture in his physical examination and stated in his examination-in-chief that the finding supported the conclusion of chronic pain because Morgan complained of pain in that area and reflected an inability of Morgan to carry his head in proper position.

**b. The evidence of Dr. Boynton**

[133] Dr. Boynton gave evidence in her examination-in-chief that there were contributing causes to the pain which were unrelated to the accident and if those contributing causes were addressed, Morgan could reverse the pain. Dr. Boynton agreed that on the medical record she considered, Morgan would have suffered some neck and back pain and shoulder pain as a result of the accident but it ought to have resolved.

[134] First, Dr. Boynton conducted a physical examination of Morgan which she discussed in her report and in her examination-in-chief. Dr. Boynton concluded from her physical examination that while Morgan's "power" muscles (those that surround a joint) were well-developed, his stabilizing muscles (the small muscles that surround the spine, body core, and rotator cuff) were not well-developed. His front chest muscles were developed but not his back muscles.

[135] Dr. Boynton concluded from that finding that Morgan was not properly strengthening his stabilizing (occasionally referred to as "core") muscles. Dr. Boynton opined that if the core is not stable and the stabilizer muscles did not work properly, then Morgan would overload his spine when he would engage in activities such as weightlifting that would cause stress. That imbalance can lead to an overload of the muscular structure and pain.

[136] Second, Dr. Boynton conducted a test of Morgan's musculature during the course of her examination, which she also discussed both in examination-in-chief and in her report. She placed Morgan in a pelvic neutral position in which his spine was aligned so that he could place his hands slightly under his lumbar region. Dr. Boynton then asked Morgan to contract his core and move his hips.

[137] The purpose of this pelvic test was to evaluate Morgan's stabilizing muscles. Dr. Boynton's evidence was that it is important to have good stabilizing muscles if a person is going to use power muscles.

[138] In the pelvic test, Morgan moved his hips and his pelvis moved at the same time, demonstrating that he had problems with how he was activating his muscles. The purpose of the test was to see how balanced his soft tissues were and how his core functioned. Dr. Boynton concluded that Morgan had indications of poor muscle stabilization.

[139] Dr. Boynton was not challenged on any of these findings either on cross-examination or by Dr. Alpert when he was asked to comment on Dr. Boynton's report (either in his report or in his examination-in-chief).

[140] Third, Dr. Boynton noted in her report and gave evidence in her examination-in-chief that Morgan had a slight head forward carriage and rounding of shoulders. Morgan's chin sticks out in front of his clavicle. At trial, Dr. Boynton demonstrated how that head posture can cause pressure and neck pain as it causes overuse of the upper trapezius muscles which is prone to make them painful.

[141] Fourth, Dr. Boynton reviewed various MRI's, x-rays, and bone scans and noted minor degenerative changes which she found were consistent with an individual the age of Morgan with his active lifestyle.

[142] Consequently, Dr. Boynton concluded that Morgan's current pain was not consistent with trauma but with an active lifestyle and soft tissue imbalances. She concluded that the soft tissue imbalances were reversible with more back exercise and flexibility exercises. She would not limit Morgan but, instead, she would encourage him to work and participate in sports and activities. She would suggest changes to how he moves so as not to stress his back as much. In her opinion, Morgan could rebalance his body and reverse the pain with proper body mechanics and additional exercise to improve his core strength and muscle activation.

[143] Dr. Boynton fairly stated in her examination-in-chief that Morgan had some pain as a result of the accident but believed that his current pain and muscular discomfort would be reversible if he made changes to how he moves. He needed to use proper body mechanics and additional exercise to rebalance his body.

[144] Consequently, Dr. Boynton concluded that Morgan did not suffer a permanent impairment.

[145] In cross-examination, Dr. Boynton was challenged as to whether the improper head posture could be an involuntary response by Morgan to the pain. Dr. Boynton did not accept that as a likely reason for the posture and provided a well-reasoned response. Dr. Boynton noted that Morgan had no swelling in the muscles in his neck, no acute pain and no fracture. She noted that many people carry their head forward and it can often just result from gravity. Dr. Boynton explained that if Morgan used the correct posture and undertook exercise to improve core strength and muscle activation, his shoulder and neck pain would resolve.

[146] Dr. Boynton's evidence was that overuse of a muscle sends a message of pain to let the body know that it is being overused. A straight posture enables all of the muscles in the upper, middle, and lower trapezius to hold up the average 8 pound head so that it would not cause pain

instead of using just the muscles in the upper trapezius. Dr. Boynton has seen this problem with her patients frequently.

[147] Consequently, while Dr. Boynton fairly agreed in cross-examination that it could be possible that pain prevents Morgan from holding his head in an upright position, she concluded that it was not probable.

### 4. Application of the law to the expert opinion evidence

[148] On the basis of the above evidence, I find that the neck and back pain, as well as the right shoulder pain, were not permanent. Morgan did not establish that they would be impairments lasting into the future.

[149] Dr. Boynton conducted a detailed physical examination which included a review of Morgan's musculature and posture. Dr. Boynton conducted a pelvic test designed specifically to assess whether stabilizing muscles were appropriately strengthened to support power muscles. Other than the issue of head posture, none of those tests or Dr. Boynton's conclusions was challenged by Dr. Alpert.

[150] Dr. Alpert's conclusion on chronic pain is based on the premise that after 13 years of pain, he is satisfied that Morgan has reached a point when it has become chronic.

[151] However, Dr. Boynton's tests and conclusions provide a reasonable and cogent explanation for the "reversibility" of the pain, and for a finding of contributing causes for the pain. I accept Dr. Boynton's evidence that if stabilizing muscles are not strengthened, muscular imbalances can develop and cause pain.

[152] I also accept Dr. Boynton's evidence that if the head is carried forward, pressure will be placed on the limited upper trapezius muscles used to carry the head, and I accept Dr. Boynton's explanation that Morgan can correct this problem (as opposed to it being an involuntary reaction).

[153] For these reasons, I accept the evidence of Dr. Boynton and conclude that the neck and back pain as well as the shoulder pain are not permanent.

### 5. A note on the relevance of surveillance evidence

[154] I review the surveillance evidence in some detail below in my analysis of the "serious impairment" requirement under the threshold. However, I agree with the defendant that I can also consider that evidence when determining whether the impairment is permanent.

[155] As I discuss below, the video surveillance is clear that throughout 2005 to 2014, there is no evidence that Morgan is unable to do anything which Dr. Alpert says in his report are permanent physical restrictions such as "no prolonged bending or twisting", "no prolonged or forceful gripping with his wrists/hands", "no heavy pushing or pulling", or "no heavy lifting". As in *Spittal v. Thomas*, [2006] OJ 1615 (SCJ) ("*Spittal*"), at paras. 18-19, the video surveillance

evidence in the present case demonstrates that Morgan does not have the permanent restrictions claimed by Dr. Alpert.

[156] Consequently, although it is not necessary for me to find that the impairment is not permanent based on the surveillance evidence (as I accept the medical evidence of Dr. Boynton on this issue), I find that the surveillance evidence is an additional basis on which to conclude that the impairment is not permanent.

**b) Is the impairment serious?**

**1. Approach to the issue of serious impairment given my finding that Morgan did not establish that the carpal tunnel syndrome was caused by the accident**

[157] For the purposes of this analysis, I do not distinguish between the individual impairments alleged to have been caused by the accident. I assess the effect of the impairments as a whole, although I note that some of the pain is caused by carpal tunnel syndrome, an injury which I do not find was caused by the accident. Consequently, my analysis considers the impairment caused by injuries unrelated to the accident.

**2. The applicable law**

**i. General principles**

[158] A serious impairment is one that the court considers to have caused a substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment (*Meyer*, at para. 34). Because only a serious impairment will qualify as an exception to the rule that non-pecuniary losses are not recoverable (unless the threshold is met), the legislature intended injured persons to bear some interference with their enjoyment of life without being able to sue for it (*Meyer*, at para. 70).

[159] Impairment must go beyond what is tolerable. Residual discomfort, even if frustrating or unpleasant, falls below the degree of impairment that can be regarded as serious (*Frankfurter v. Gibbons*, [2004] OJ 39 (Div. Ct.), at paras. 22, 26).

[160] The requirement that impairment must be serious may be satisfied when a plaintiff through determination resumes his or her activities of employment and the responsibilities of household but continues to experience pain. The issue in such cases is whether the continuing pain "seriously affects their enjoyment of life, their ability to socialize with others, have intimate relations, and engage in recreational pursuits" (*Brak*, at para. 7).

[161] The test is whether the impairment has a significant effect on a person's enjoyment of life even when the person returns to carry on daily activities (*May v. Casola*, [1998] OJ 2475 (CA), at para. 1).

[162] Similarly, serious impairment has been found if a person can undertake many activities but not enjoy consistent completion and enjoyment of those activities (*Mader v. Hunter*, [2012] OJ 1169 (SCJ), at para. 46).

[163] The plaintiff's ability to return to work is not fatal to a threshold motion. The courts consider the totality of the evidence, including the impairment on the plaintiff's ability to continue working and the impact of continued work on the plaintiff (*Cadorette v. Cadotte*, [1998] OJ 2993 (Gen. Div.) ("*Cadorette*"), at paras. 23-26; *Jones v. Mazolla*, [2004] OJ 366 (SCJ) ("*Jones*"), at para. 47; affirmed [2005] OJ 5541 (CA)).

**ii. Particular cases relied upon by the parties**

[164] Morgan relies on *Jones*, *Skinner v. Goulet*, [1999] OJ 3209 (SCJ) ("*Skinner*"), at para. 38; and *Del Rio v. Lawrence*, [2009] OJ 676 (SCJ) ("*Del Rio*"), at paras. 7-9, to make the following submission:

> In fact, the court has held that the fact that a plaintiff continues to work in the face of significant pain can be a tribute to the plaintiff's work ethic not an admission of freedom from pain, particularly when the plaintiff is left exhausted with an inability to enjoy her previous daily activities once home from work.

[165] Morgan relies on *Ivens v. Lesperance*, [2012] OJ 3363 (SCJ) ("*Ivens*"), at paras. 45-46 to submit:

> Where a commissioned sales employee returned to work, with accommodation, Justice Mulligan found he suffered a permanent impairment of an important function that is serious. The plaintiff was unable to work his previous long hours, had difficulty standing and was tired at the end of the day. As a commissioned employee, the plaintiff was required to seek out and work with clients. The plaintiff's inability to participate in outdoor activities with friends interfered with his usual activities of daily living which he enjoyed not only for recreation, but as a source of contacts for his commissioned sales employment.

[166] The defendant's submissions on the case law can be summarized as follows:

(i) Video surveillance evidence can be considered by the court to determine whether an injury is serious (*Spittal*, at paras. 18-19);

(ii) A plaintiff with neck, shoulders, and upper back pain who (i) can cope with the back pain by exercise, (ii) had a lasting impairment of an inability to sit or stand for more than one-and-a-half hours due to pain, an inability to participate in more demanding activities, and an inability to dance as she used to, (iii) "continues to suffer some pain which affects her enjoyment of life", but (iv) "is engaging in the normal activities of life for a person of her age", does not suffer a serious impairment (*Smith v. Sabzali*, [2005] OJ 2014 (SCJ) ("*Smith*"), at para. 22);

(iii) A plaintiff who "still has a painful pulling feeling in his back, neck and shoulder" but can return to work with assistance "if anything requires heavy lifting" "would fall squarely within the category of motor vehicle negligence cases in which, the legislature has decreed, there is no right to sue, not because there were no

damages but because the consequences of the negligence were not sufficiently serious" (*Xiao v. Gilkes*, [2009] OJ 735 (SCJ), at paras. 33, 37);

(iv) A plaintiff who "maintained not only her usual pre-accident work but picked up another job … and has consistently maintained a quite physical and socially active lifestyle", including working out at the gym, annual camping trips and walking her dog does not suffer a serious impairment (*Sherman v. Guckelsberger*, [2008] OJ 5322 (SCJ) ("*Sherman*"), at para. 130); and

(v) A plaintiff who continues to suffer neck and back pain but returns to work as a plumber but took on fewer side jobs doing renovations, stopped playing sports and went to the gym less frequently suffers "frustrating and unpleasant" impairments which "render the plaintiff's life more difficult", but [those impairments] do not "qualify as 'serious' according to the standard in *Meyer v. Bright*" (*Malfara v. Vukojevic*, [2015] ONSC 78 (SCJ) ("*Malfara*"), at paras. 35-36).

[167] I now consider the evidence as to serious impairment.

### 3. The relevant evidence

[168] I consider the evidence as to Morgan's daily activities and employment before and after the accident. I then consider the surveillance evidence which relates to these issues.

#### i. Evidence from Morgan and others as to his daily activities before the accident

##### 1. Curricular and extracurricular involvement at Rosedale Heights prior to the accident in 2002

[169] Morgan taught at Rosedale Heights School of the Arts ("Rosedale Heights"). On a typical work day, Morgan would teach three classes per day for 70 minutes, combining academic activities (teaching health and nutrition) with active and instructional activities.

[170] Morgan had one 70-minute preparatory period which he would use for marking or covering the class of an absent teacher. Exams would have a short turn around – occasionally with over 100 exams to mark in a two-day window to submit for report cards. Exams would be in writing with a repetitive "mental component" and the fatigue of marking by hand.

[171] At Rosedale Heights, Morgan was involved in school coaching for competitive teams and assisted in organizing black heritage assemblies at the school. Morgan coached 6 teams per year.

[172] Morgan was involved in intramural sports. He was part of the teacher team who played floor hockey or basketball. Morgan refereed intramural events.

[173] Morgan was also involved after school in fitness and weightlifting. He supervised students, demonstrated the proper technique and lifted weights himself.

[174] Morgan also supported the arts programs at Rosedale Heights. He organized students to volunteer to sell soft drinks at events such as dances and musicals. He worked with other teachers to coordinate events and assisted in marketing, putting together the event and helping with security.

[175] Morgan would also coordinate student mentors from classes. Morgan took students on leadership trips.

**2. Morgan's involvement with his own children prior to the accident in 2002**

[176] While teaching, Morgan was actively involved with his own children. His older boys were involved in competitive hockey, with practices in the early morning. Upon Morgan's return to home, he would attend with his boys at their practices or games. Both boys played AAA hockey, which is the highest level at each age group.

**3. Morgan's involvement in training (and Fitness For Success) up to the accident in 2002**

[177] While teaching, Morgan became involved in physical training outside of high school. Morgan provided a program at Rosedale Heights for summer sports and worked with youth to improve fitness and self-esteem. Morgan was also a trainer for his son's hockey team and helped with the fitness program.

[178] Other parents began to inquire about Morgan doing additional training and Morgan contacted coaches and some parents contacted him for strength and conditioning. Further, Morgan developed a program to keep children fit off the ice and worked with soccer and hockey teams for off-ice fitness for children aged 6-17 years.

[179] Morgan also created a training program from April to August and developed a year-round program for athletes to follow.

[180] Morgan developed a sole proprietorship called "Fitness For Success", which provided training program services both to players on his son's soccer and hockey teams but also to individuals. Most training was done at the arena or at a soccer field with some training at the York University track and field centre. Morgan would charge for his services which would cover the approximately $12,000 for expenses of his children to play hockey. He would do that work while his children were at practices or games.

[181] He worked on a book about a year-long off-ice strength and conditioning program. It is 95% finished and was started in 1999 when he started working with coaches of hockey and soccer teams. The book is not published.

[182] Some of the athletes he trained prior to the accident (who were teammates on his sons' teams) went on to play in the National Hockey League ("NHL").

#### 4. Morgan's interest and abilities in personal fitness prior to the accident in 2002

[183] Fitness was a passion for Morgan. He played golf, soccer, basketball, and ultimate frisbee and ran several Toronto half-marathons with his work colleagues. He ran before classes and would run with each of his physical education classes.

[184] Morgan lifted weights every day. He did strength training and weight lifting. He could bench press over 300 pounds and did squat lifts of close to 400 pounds.

[185] Morgan stated that fitness was "everything" to him, it "means the world to me" and was "how I define myself". He saw exercise as necessary not only physically but also psychologically since regardless of what was happening in his daily life, the opportunity to sweat, breathe, and engage in cardiovascular activity made him feel much better.

#### 5. Morgan's general health prior to the accident

[186] Morgan was healthy prior to the accident. He had very few visits to physicians for minor issues which did not impact his general health.

### ii. Evidence from Morgan and others as to his daily activities after the accident

#### 1. Curricular and extracurricular involvement at Rosedale Heights after the accident

[187] Morgan returned to Rosedale Heights after the accident with a full course load. He left in March 2004 and returned in September 2008 with a full course load which he still maintains.

[188] Morgan currently teaches civics and history, as well as one physical education course. Morgan requested a physical education course since it would minimize marking. The physical education tests are practical and easier to manage. His pain gets worse with numbness and tingling and a closed grip is painful which affects marking.

[189] Since 2008, he coaches two teams per year.

[190] In 2008, Morgan created the "Kids for Kenya" program in which he takes high school students to Kenya for 11-12 days. They work with Free the Children for programs on language, water, sanitation, building schools, and working with children. There is some physical aspect required to build schools. Morgan took his first trip with the students in 2010 and went back again in 2012. He did not attend the third trip in 2014, but had planned to go this year although the trip might not proceed due to current conditions in Kenya.

[191] Morgan participates less in his physical education classes than he did prior to the accident.

[192] At Rosedale Heights, Morgan has an ergonomic chair and an overhead projector which was provided to assist him upon the request of Dr. D'Onofrio.

### 2. Morgan's involvement with his own children after the accident

[193] Morgan has two young children with his new family. Both boys play competitive hockey and other sports. Morgan goes to the majority of games and practices. Morgan currently assists with his sons' soccer team and is on the bench occasionally on his boys "4 on 4" hockey and occasionally is on the ice. Both boys will play hockey next year and this summer Morgan will have them play other sports.

[194] Morgan also continued to be active with the sports activities of his older children after the accident. He worked on the bench as a trainer and with the defence to correct errors.

### 3. Morgan's involvement in training (and Fitness 4 Success) after the accident

[195] Morgan's evidence is that after the accident he did not reach out to as many groups with Fitness For Success. He would still assist players on his sons' teams but would not train many other athletes and teams. By way of example, he did some training with a player he had previously trained but it was sporadic, unpaid, and eventually the father found a full-time personal trainer for his son.

[196] Also, Morgan stopped training some teams he had trained in the past.

[197] Morgan remained involved with the training programs of his children and their friends and acted as conditioning coach for his sons' hockey teams who would then waive part of the costs. Morgan would outline a program to follow with respect to warm ups, stretching and sports specific training which he would conduct at the arena or at York University but only during hockey season. He would demonstrate some of the exercises, usually at the arena.

[198] He still has a few young athletes he is training, including three football players and a soccer team. Morgan guides them through an hour-long training session with warmup, stretches, skills and drills.

[199] Morgan continued to guide athletes through training programs, including elite athletes, mostly hockey players, some of whom went on to professional and Olympic careers. He outlined programs and guided them through the programs by setting up pylons, hurdles and directing the training. These athletes were motivated so training was easier. He could still run with them although not at the same pace as prior to the accident.

[200] Morgan was not paid to do the training. At York University, athletes would come while Morgan was there for physiotherapy, cardiovascular and training exercises.

[201] Morgan has a strong relationship with some of the professional players he has trained, as demonstrated by him taking his family on a recent road trip to watch some of his athletes play in an NHL game and then visiting with the players after the game.

[202] With respect to "Fitness 4 Success" (the prior sole proprietorship was called "Fitness For Success"), the new facility came into existence in 2008 before Morgan went back to work. He had looked at number of premises, and signed an agreement for the lease and a 6,000 square foot facility in Vaughan in May 2008, with his wife's support and a home line of credit. By that date, he had ordered the equipment since he needed to do construction work on the premises.

[203] By July 2008, Morgan incorporated Fitness 4 Success which opened in October 2008. Morgan and his wife purchased the equipment. His wife is not involved in business operations.

[204] The concept of Fitness 4 Success is to use interactive video-based technology to help children become active and fit. Fitness 4 Success attempts to network with schools and have them participate in field trips. It has an educational director as a contract employee and two other contract employees (a facility manager during the day and another involved in strength and conditioning), as well as five other occasional staff.

[205] Fitness 4 Success delivers training programs for hockey players and elite athletes and uses the facility for that training. It also has a not-for-profit arm for children to participate in programs if they cannot afford it. The non-profit branch seeks to access grant programs for such children and absorbs the cost or has the children pay a modified amount.

[206] Morgan has operated Fitness 4 Success for seven years. While Morgan stated that it has not earned a profit, he has paid the rent on the property and made payroll with some assistance from a government program to pay 18 weeks of salary for youth.

[207] Fitness 4 Success is one of the very few (and might be the only) "TRX-certified" facility in Canada. Morgan did not know if there is another. Since 2008, Morgan obtained seven TRX training certifications through courses which included physical components in each of them.

### 4. Morgan's interest and abilities in personal fitness after the accident

[208] Morgan's evidence was that he stopped working out for one and a half years after the accident, but he did return to some running after Dr. Kirwin advised him in November 2002 that Morgan should be more physically active.

[209] Morgan advised Dr. Kirwin at his November 5, 2002 examination that Morgan was doing some light weightlifting and jogging about a mile per day.

[210] Morgan no longer plays competitive sports such as basketball, and cannot run a marathon as he hoped to do since after 25 to 30 minutes of jogging, he has neck, back, shoulder, and finger pain. Morgan's evidence is that he cannot sprint and is no longer at an elite level and is limited to some demonstrations in his training rather than being physically involved.

[211] On cross-examination, Morgan acknowledged that as of May 23, 2007, he could lift 29.5 kg from floor to waist and 18.2 kg from waist to shoulder on a frequent basis.

### 5. Morgan's current state of general health

[212] Morgan stated that he does not like to think of himself as limited and tries to do as much as he can as long as he can physically cope with the activities.

[213] Morgan's evidence is that he deals with the pain through physical activity, weights, strength, jogging, mindfulness meditation, and a vibration chair. Morgan takes ibuprofen depending on the severity of headaches. Morgan states that it is a challenge for him to hold things if his fingers face down and that he cannot do an activity if his hand is exposed to the cold as his fingers fall asleep and become painful. Morgan's evidence is that he has difficulty chewing and enjoying a meal due to cracking and pain and is often the last to finish. Still, he tries to do as much as possible.

[214] Morgan's wife gave evidence that he has issues performing tasks for a long period of time. She has seen him drop things and lose the ability to grasp. Morgan can no longer do longer activities such as hikes.

[215] Morgan is currently taking medication for low testosterone. There was no medical evidence that this condition was caused by the accident.

[216] Morgan's wife noted that he has difficulty sleeping. She rarely sees him sleep 6 hours straight or without moaning and groaning. He generally does not seem comfortable sleeping. There was evidence by Dr. Kirwin that carpal tunnel syndrome could affect sleep comfort which is why he prescribed wrist braces.

[217] Morgan did not see his family doctor, Dr. D'Onofrio, between 2008 and 2013, and he did not see his treating physiatrist, Dr. Kirwin, for more than seven years between June 2007 and December 2014. Dr. Kirwin agreed on cross-examination that he was "somewhat" surprised to see Morgan after that time period, when Dr. D'Onofrio referred Morgan back to see Dr. Kirwin.

[218] Between September 2008 and September 2011, Morgan used two of his 60 available sick days.

### 6. Additional interests since the accident

[219] In addition to the school trips to Kenya and the incorporation of Fitness 4 Success, Morgan became involved with the Canadian Multicultural Hockey League. Different teams participate by ethnic group and compete in a four-day tournament from Boxing Day. It is an adult hockey league and Morgan recruited players to participate.

[220] Morgan organized events and brought Herb Carnegie to speak with the players and drop the puck at the tournament. He obtained sponsorship and was on the bench when the "Nubian Kings" team played. This took place after the accident and started in 2004-05.

### iii. Surveillance evidence

[221] The surveillance evidence in this case is extensive, starting in 2005 and continuing until 2014. At no point during this video surveillance is Morgan in any visible discomfort. I review the surveillance evidence in detail below.

#### 1. December 27-29, 2005

[222] The video surveillance during this time period shows:

(i) Morgan is coaching a hockey tournament over the three days. He coaches 4 games in the 3-day period, each for 45 minutes of game time and additional time after the game;

(ii) He is standing at all times while coaching;

(iii) While he frequently has his hands in his pockets while coaching, he is not wearing gloves during this time period. He is seen with his hands outside his pockets on many occasions, clapping enthusiastically with both hands during the games and giving fist bumps to players. He shakes hands with a large number of hockey players using his right hand;

(iv) He is able to turn his head with full extension to the left and right without difficulty;

(v) He lifts various items such as hockey sticks;

(vi) He is able to climb over the boards to attend to an injured player and squatted on one knee to help a player;

(vii) He frequently bends to talk to players on the bench;

(viii) He escorts a person onto the red carpet at the hockey arena since Morgan was part of the organizing committee and had made arrangements for that person to be at the tournament;

(ix) He is seen holding a cell phone in his right hand for approximately 3 minutes, and a bundle of papers in his right hand for approximately 5 minutes;

(x) Between games, he often drives back either to his home in Mississauga or to his [now] wife's home;

(xi) Morgan is seen pumping gas into his car with his right hand; and

(xii) Morgan is seen squatting down at a bookshelf in a store.

### 2. April 2007

[223] The video evidence shows Morgan on April 7, 17-19, and 27-28, 2007. In this video surveillance:

(i) Morgan is seen bending over the trunk of a car and rummaging for 7 minutes;

(ii) Morgan is seen training various athletes;

(iii) Morgan conducts a training session with a female athlete. Morgan (a) bends over at weights to set up an incline bench press, (b) holds and carries dumbbells, (c) demonstrates a lunge when he jumps up on a bosu ball with his left leg and lunges with his right leg, (d) demonstrates how to move arms for strides, (e) sits on the back of a bench press to spot and guide the athlete through proper motion, (f) stabilizes the athlete at mid-length while she jumps on a stability ball (an inflated rubber ball about 65-75 cm high), (g) throws and catches a medicine ball (which weighs 2 to 4 pounds) 20 times with both hands over 35 seconds, and (h) holds the athlete's feet and moves up and down with her;

(iv) Later that same day, Morgan is observed jogging at a steady pace while holding his dog's leash in either his right hand or left hand for 30 minutes;

(v) Morgan is seen training some young men at York University. He stretches and holds his leg with his right hand and does the same with his left leg. He bends over at the waist and holds his right toe with right hand and then does the same with his left hand and left foot. He bends and touches the floor with both hands. He places his right foot in front of his left foot and bends over his waist and reaches over and touches the floor to demonstrate the activity to the men. He is able to bend forward to touch his right toe with his right hand. He squats down frequently. After the training, Morgan is seen jogging for 15 minutes;

(vi) Morgan lifts weights of an estimated 225 pounds with both hands for 15 repetitions. Morgan then adds an additional 90 pounds and does 12 more repetitions. Morgan lifts dumbbells from waist level to shoulder height alternating between his left and right arm for 14 repetitions per arm. He lifts a dumbbell from squatting to over his head in a single fluid motion. Once over his head, he raises and lowers the dumbbell for 24 repetitions. After his personal training, Morgan trains the female athlete he had worked with on an earlier occasion (see subparagraph (iii) above). The training session lasts approximately 50 minutes;

(vii) In the training session, Morgan set up a circuit. He did some spotting and had the woman lift weights from the ground to overhead. He then had her do rowing sit-ups and then dumbbell swings from left to right. They then threw the medicine ball back and forth with both hands. Morgan then demonstrated squatting and showed her the process of how to do "clean" lifts (albeit not with weights). They then threw the medicine ball with 17 throws in under a minute. He also had her

lift weights. There was then a second sequence of 16 throws of the medicine ball in 34 seconds and another series of her working with weights;

(viii) Later that same day, Morgan takes a 30-minute jog holding his dog's leash. At one point, Morgan is seen pulling on the leash with his right hand;

(ix) Later that night, Morgan drives to a hockey rink where he stands behind the bench coaching a hockey game;

(x) The next day, he returns twice to the hockey rink to coach two more hockey games. He also pumps gas with his right hand on the nozzle for a few minutes;

(xi) At the first hockey game, Morgan walks to the bench carrying numerous filled water bottles. He carries the end of a banner with his right hand and uses both hands above his head to fasten the sign to the wall with duct tape. Morgan stands all of this time. At the end of the game, Morgan shakes hands with his right-hand with numerous players; and

(xii) After the first game, Morgan drove home and returned that night to the arena. During this second game, he repeatedly took photos or video, with his bare hands, and held the camera for lengthy periods of time. Morgan stood all during this time.

**3. June 2007**

[224] Between June 20-23, 2007, Morgan trains young men for three days over a four-day period. In this video evidence:

(i) On June 20, 2007, Morgan trains and gives instructions as to the appropriate exercises. He provides support to the athletes (some of whom reached the NHL) as they work on a stability ball, even when they fall. Morgan holds the feet of one of the men while doing crunches and uses both his hands on the man's two feet. Morgan kneels on his leg to provide support for oblique twists;

(ii) During this training session, Morgan demonstrates weightlifting by doing a "squat" in which he places the barbell behind his neck, rests it on his shoulder with his hands outstretched to the sides and then does squats with his hands on the bar and the bar on his shoulder. Morgan guides them through the squats and the incline bench press and adds weights as required. Morgan also demonstrates three squats with the bar behind his neck and his hands on the bar;

(iii) On June 22, 2007, Morgan talks on his cell phone in his left hand and holds for at least six minutes a piece of paper in his right hand. Morgan then trains another young man;

(iv) On June 23, 2007, Morgan trains another person. Morgan demonstrates high step running which is an exercise he wants the young man to do. High stepping is an exercise athletes do before they start sprinting;

(v) At the same training session, Morgan demonstrates knee lifts and the young man does what Morgan shows him. Morgan directs the athlete to do "crunches" which are sit-ups with legs elevated in air. Morgan puts his hands over his head to demonstrate a different form of exercise;

(vi) At the same training session, Morgan demonstrates the "V" sit-up in which his arms are extended over his head and he leans forward to touch his legs. Morgan is able to do seven rapid and consecutive V sit-ups; and

(vii) At the same training session, Morgan and the young man sprint up a grassy hill four consecutive times. Morgan said at trial that he "tries to lead by example".

**4. July 2008**

[225] Morgan is seen in July 2008 training two athletes, one of whom went to play in the NHL. He also gives advice to another athlete training at the York University facility. In this video, he (i) throws and catches a ball with both hands without difficulty, (ii) demonstrates squatting exercises, (iii) crouches to hold someone's legs while they do sit-ups, (iv) demonstrates an exercise by running forwards, sideways and backwards, and (v) twists his torso without difficulty.

**5. February 2010**

[226] Morgan jogs for 30 minutes on a 5-kilometre route pushing a runner's baby stroller. He frequently pushes it with his right hand.

**6. Marketing video for Fitness 4 Success - 2010**

[227] In a marketing video made by Morgan in or around 2010 for Fitness 4 Success, Morgan:

(i) performs an exercise with his right leg tied to a piece of equipment (TRX frame) while doing a push-up followed by a single jump on his left leg,

(ii) leans backwards and grips onto handles with each hand while he pulls himself forward with his 2-year-old son supported on his chest, and

(iii) bends while holding both of his children in his arms.

[228] Morgan acknowledged that the video was a marketing effort placed on YouTube and on the website of Fitness 4 Success to encourage business. Morgan said that he was required to do some modifications to make these exercises a bit easier for him.

### 7. August 2011

[229] Morgan leads a training session for about 20 young men as part of Fitness 4 Success. He demonstrates a number of exercises including push-ups.

[230] During the training session, Morgan holds his youngest son (almost 2 years old) in his left arm for 15 minutes to keep him away from pylons being used in the test, and uses his right hand to (i) talk on his cell phone, (ii) put the phone back in his pocket, and (iii) tend to the music player while crouching down with his son still in his left arm.

### 8. September 2011

[231] In September of 2011, Morgan cleans and sets up a barbecue at Rosedale Heights. He demonstrates dexterity in both his left and right hand while squatting down to attach and adjust a propane tank. He vigorously cleans the barbecue. He unloads a number of cases of water and pop from his car onto a cart using each hand and is seen pushing the cart with his right hand.

### 9. June 15, 2014

[232] Morgan lifts a heavy piece of equipment off the roof of his vehicle. He then moves the frame further inside the building with both hands.

## 4. Analysis of the evidence and the law

[233] I find on the above evidence that Morgan has not established that any impairment arising from the accident (even assuming that all of his alleged impairments were caused by the accident) had a significant effect on his enjoyment of life.

### i. A general comment on surveillance evidence

[234] In his written submissions, Morgan's counsel warned against the "seductive quality" of video surveillance, since, in his submission, it was:

> inviting the court to act as its own medical expert and to decide, based on looking at the various vignettes, that the plaintiff was or was not in pain, that he did or did not have significant limitations or that he could not work full-time 8-9 hours a day, 5 days a week as a high school physical education teacher. Respectfully, the court is not qualified to make these judgments based on looking at the video.

[235] I do not agree.

[236] The court can review the surveillance evidence to assess the functions performed by the plaintiff to determine if the impairment "causes substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment" (*Meyer*, at para. 34).

[237] The court is not assuming the role of an expert on pain by considering video evidence. Under *Brak*, even if Morgan continues to experience pain during his activities, the test remains "whether the continuing pain seriously affects their enjoyment of life, their ability to socialize with others, have intimate relations, and engage in recreational pursuits" (*Brak*, at para. 7).

[238] In the present case, even without considering the video surveillance evidence, Morgan did not establish a substantial interference with his usual daily activities.

**ii. A review of the non-surveillance evidence**

[239] On his evidence, Morgan returned to school full-time for the past seven years with only minor accommodation for an ergonomic chair and an overhead projector. It was harder to mark papers and to do so in a timely manner; he did less demonstrations in his physical education class; and he coached fewer extracurricular teams.

[240] He does several physical activities "with modification" and provides examples of no longer playing basketball, and jogging for 25-30 minutes instead of being able to run longer distances such as a half-marathon.

[241] Morgan's evidence was that prior to the accident, he had not missed a day of work and as such had accumulated a significant number of sick days. However, from September 1, 2008 until the end of sick day availability under the collective agreement as at September 1, 2011, Morgan used only 2 of the 60 sick days which were available to him.

[242] Further, Morgan did not visit his family doctor from 2008 until 2013, and did not visit his physiatrist, Dr. Kirwin, a specialist in physical medicine, from November 2007 until December 2014, a significant gap which "somewhat" surprised Dr. Kirwin, particularly as Morgan was to schedule another appointment after his last appointment in 2007 so that Dr. Kirwin could review a "work hardening" report from a program that Morgan completed.

[243] Morgan remains extremely active in physical fitness. He can lift significant amounts of weights, comfortably runs 25-30 minutes with either a stroller or a dog leash, has completed 7 TRX training courses with physical components, and can demonstrate training activities to athletes he is training. He remains active with his sons' teams. He has a sufficiently close relationship with some of the NHL players that he has trained that he took his family on a road trip to watch them play and visit with them after the game.

[244] Consequently, the present case is unlike those relied upon by Morgan. In *Cadorette*, the evidence was that (i) work became so tiring for the plaintiff "that by day's end, she is exhausted from the pain that has built to a crescendo, as it were over the day"; (ii) "her energy level at the conclusion of the day is at an all time low, if non-existent" such that "she is unable to socialize in any meaningful fashion with friends and customers of Mr. Lupien at night and on weekends, an activity in her life which was more than trivial"; and (iii) she suffered an "inability to maintain the intimacy which she previously enjoyed with Mr. Lupien" (*Cadorette*, at paras. 23-24). The evidence led on behalf of Morgan did not lead to any such finding in this case.

[245] In *Jones*, the plaintiff had returned to work but (i) "has headaches every day that sometimes turn into migraines ... which may be accompanied by dizziness, nausea or vomiting as well as sensitivity to light and sound", (ii) "generally gets only 2 hours of sleep and is up for the rest of the night", (iii) has "difficulty focusing her eyes and difficulty concentrating", and (iv) "She does not enjoy things. Everything is an effort. She gets through the day on extra-strength Tylenols, muscle relaxants, several long, [*sic*] showers and exercises" (*Jones*, at paras. 18-19). Morgan does not suffer the significant impact as in *Jones*.

[246] In *Skinner*, the plaintiff (i) "requires muscle relaxants and Tylenol with codeine daily", (ii) can do "very little housework", (iii) has "limited standing, walking, sitting or reaching ability", and (iv) her relationship with her husband had suffered (*Skinner*, at para. 43). On Morgan's evidence, he does not suffer such significant impact.

[247] In *Del Rio*, Gans J. held that "while she can work and attend to her personal needs and grooming, she more often than not returns home from work effectively unable to do anything but lie down as a result of the pain" (*Del Rio*, at para. 8). Morgan did not lead such evidence.

[248] Finally, in *Ivens*, J.P. Moore J. held that as a result of her pain, the plaintiff "is now living a quite reclusive, lonely and inactive life" which is "unlikely to change" (*Ivens*, at para. 45). Morgan did not lead such evidence.

[249] Consequently, in all of the cases relied upon by Morgan, while the return to work of the plaintiff was not determinative of the substantial impairment, the courts applied the *Brak* test and found that the continuing pain seriously affected the plaintiff's enjoyment of life.

[250] The evidence from Morgan fell far short of the serious impairment requirement. He may have some trouble sleeping but there is no evidence that it affects his ability to carry on a full range of activities in school and outside of school, with a new business and active participation in his children's sporting activities. Morgan leads school trips to Kenya, still coaches extracurricular teams, and still participates in weightlifting and running.

[251] Morgan has difficulty marking papers but has been able to do so for the past seven years.

[252] He cannot lift as much weight as he did in the past, and is limited to 30 minute, 5-kilometre runs instead of being able to train and run for half-marathons. If his hands are exposed to cold, they become numb (although Morgan did not wear gloves while attending at the numerous hockey rinks). He trains fewer athletes but that must be considered in light of the evidence of his new family and his new training facility business. These are not the significant impairments required under the *Meyer* analysis.

[253] Any suggestion by Morgan that his current low testosterone is caused by the accident is not supported by the medical evidence.

[254] Finally, the fact that Morgan did not see Dr. D'Onofrio for 5 years between 2008 and 2013 and did not see Dr. Kirwin for seven years from November 2007 until December 2014 further supports a finding that Morgan's impairments were not significant.

[255] At its highest, Morgan faces the same type of impairments as in *Malfara* and *Sherman*, cases relied upon by the defendant. While it may be "frustrating and unpleasant" for Morgan to have the conditions he sets out in his evidence, and that may render his life "more difficult" when it comes to marking or physical fitness (*Malfara*, at para. 35), Morgan "maintained not only [his] usual pre-accident work but picked up another job … and has consistently maintained a quite physical and socially active lifestyle" (*Sherman*, at para. 130).

[256] In *Smith*, the plaintiff dealt with back pain by exercise and it did not limit her significantly. Her lasting impairment was an inability to sit or stand for more than one-and-a-half hours due to pain, an inability to participate in more demanding sports activities, and an inability to dance as she used to (*Smith*, at para. 10). Howden J. dismissed the action because the "serious impairment" test had not been met (*Smith*, at para. 22). Morgan's impairments do not reach the level in *Smith*.

[257] It was after the accident that Morgan (i) started a new business in a 6,000 square foot facility, and (ii) started a new family with two very active young boys in whose life he fully participates. He continues to train athletes, exercises regularly, and there is no evidence that his social or marital lives have been affected. He has taught full-time for the past seven years. He still participates at school events such as barbecues.

[258] For these reasons, I find that even without considering the surveillance evidence, and even if all of Morgan's impairments were caused by the injuries from the accident, Morgan has not established a serious impairment as required under *Meyer*.

### iii. A summary of the video surveillance evidence

[259] The surveillance evidence is compelling that there has been no substantial interference with Morgan's abilities to perform his usual activities or continue his employment. In summary:

(i) He stands for long periods of time behind the bench at hockey arenas for several games over a few-day period which is fully consistent with standing during a secondary school physical education class;

(ii) He lifts heavy weights, which is fully consistent with his past interests of lifting weights (even if the amounts are smaller);

(iii) He trains athletes, including doing demonstrations, which is fully consistent with his past work with athletes (even if there may be less demonstrations) and with the requirements of providing direction and demonstrations as a secondary school physical education teacher;

(iv) He grips objects in a repetitive manner for intensive and sometimes lengthy intervals such as throwing balls and making lengthy cell phone calls, which is consistent with the requirements to hold a pen or pencil to mark papers;

(v) He conducts difficult physical demonstrations in his Fitness 4 Sports marketing video, again consistent with his past interest in physical activity (even if he has to make some modifications to what he might have done in the past); and

(vi) He bends for long periods of time, which is consistent both with requirements of his job as a secondary school teacher and his interest in physical fitness.

[260] Dr. Boynton, who has assessed thousands of patients with pain, gave expert evidence that Morgan's surveillance evidence does not demonstrate the signs of a person with significant impairment from pain. She describes him as "incredibly active" and contrasts him to patients she has treated with serious pain who cannot bend over to put toothpaste onto their toothbrush. Dr. Boynton was qualified as an expert in pain management and has taken many courses in that area. Her evidence is consistent with surveillance evidence.

[261] When Dr. Alpert was cross-examined as to the video surveillance, he consistently searched for an explanation as to why Morgan might have been able to accomplish all of the tasks on the video surveillance. By way of example, Dr. Alpert suggested that Morgan was using his arms or elbows (not his shoulders) to lift weights, kept his wrists neutral (not flexed) when adjusting the barbecue tank, only needed a "reasonable" (not "good") grip to lift weights, and kept his right arm below shoulder level when he carried and pushed numerous heavy items with his right hand. These explanations do not support the serious impairments Dr. Alpert opines are caused by the accident, such as an inability to do mopping or vacuuming, and do not suggest that Morgan is significantly affected in his abilities to do the activities (including employment) that he enjoyed before the accident.

[262] The permanent restrictions imposed by Dr. Alpert in his report include "no prolonged bending or twisting", "no prolonged or forceful gripping with his wrists/hands", "no heavy pushing or pulling", and "no heavy lifting". Dr. Alpert opines that Morgan "is substantially disabled and unable to perform his pre-accident essential housekeeping/home maintenance duties". These restrictions are not supported by the video surveillance evidence and there is no supporting evidence from Morgan's wife as to any change in his housekeeping abilities. Dr. Alpert's conclusions are not consistent with Morgan's own evidence and the surveillance evidence before the court.

[263] The issue for the court is whether the pain has seriously affected Morgan's enjoyment of life by restricting his daily activities, even if Morgan modified to some extent the activities he did or their duration. The evidence does not support such a conclusion. Morgan still engages in extensive physical fitness, trains athletes, stands for hours, bends with ease, moves his neck with ease, and continues to run. He is a very active individual.

[264] Consequently, the surveillance evidence establishes that any impairment alleged by Morgan has not caused a substantial interference with his ability to perform his usual daily activities or continue his regular employment.

### iv. Summary

[265] For the above reasons, I find that Morgan has not met the "substantial impairment" requirement of the threshold. I make this assessment without distinguishing which of the injuries were caused by the accident. Consequently, my assessment is based on my consideration of the effect on his daily activities of all of the injuries Morgan claims were caused by the accident.

[266] Morgan continues to function effectively as a secondary school physical education teacher and has done so for the past seven years. He did not see his primary treating physicians for five and seven years until recently. He continues training athletes. He operates a new business. He remains an active parent involved with his children's activities. There is no evidence of any marital issues. Even if all of the injuries are considered to have been caused by the accident (which I do not accept for the reasons I discuss above), there has been no substantial interference with his ability to perform his usual daily activities or his regular employment.

### c) Is the impairment of an "important" function?

#### 1. The applicable law

[267] Both parties rely on the test from *Meyer* that the court must determine whether the function is important to the particular injured person. It is an issue of fact to be determined on the evidence in each case. An important function plays a major role in the health, general well-being and way of life of the particular injured plaintiff (*Meyer*, at paras. 19-27).

[268] The court must consider the injured person as a whole and the effect which the bodily function involved has upon that person's way of life in the broadest sense of that expression (*Meyer*, at para. 26).

#### 2. The relevant evidence and analysis

[269] Morgan's evidence at trial was that physical fitness played a major role in his health and general well-being. He was not challenged on that evidence and I accept it.

[270] In the present case, pain is an "important" impairment to Morgan (albeit not as a "serious" impairment as I discuss above) since it restricts him from engaging in physical fitness which plays a major role in his health and general well-being.

[271] Consequently, I find that Morgan has satisfied this element of the threshold.

### d) Conclusion on the threshold

[272] For the above reasons, I find that Morgan has not established that he has a permanent or serious impairment and, as such, failed to satisfy the requirements of the threshold. Consequently, I dismiss his claim for non-pecuniary damages.

**Issue 3: Assessment of damages**

[273] Both parties provided the court with several authorities which they submitted supported the assessment of damages in the range they proposed.

[274] Morgan provided a series of recent chronic pain cases in which damages were awarded in a range of $50,000 to $90,000. Based on those cases, Morgan proposed an appropriate range of $50,000 to $75,000.

[275] The defendants produced cases (mostly jury decisions) with a range from $0 to $45,000, and proposed a range of $15,000 to $30,000.

[276] I rely principally on the cases provided by Morgan, as those cases arise in the context of chronic pain. However, I find that all of them rely on facts in which the impairment caused by the pain and suffering are much more serious than in the present case.

[277] For the purposes of these reasons, I consider the decision in *Jones*, the lowest damage award in the range of the cases provided by Morgan.

[278] In *Jones*, Herman J. made the following findings of fact:

(i) "She has headaches every day that sometimes turn into migraines" (para. 18);

(ii) "The migraines can last from 5 to 30 minutes. When she has migraines it feels like her head is swelling from the pressure" (para. 18);

(iii) "Her migraines may be accompanied by dizziness, nausea, or vomiting as well as sensitivity to light and sound" (para. 18);

(iv) "She generally gets only 2 hours of sleep and is up for the rest of the night" (para. 19);

(v) "She has difficulty focusing her eyes and difficulty concentrating" (para. 19);

(vi) "She does not enjoy things. Everything is an effort." (para. 19);

(vii) "She gets through the day on extra-strength Tylenols, muscle relaxants, several long, [*sic*] showers and exercises" (para. 19);

(viii) "Ms. Jones' activities with her children have decreased. She used to coach her daughter's soccer team and take her to games and practices. She now rarely attends those games" (para. 21);

(ix) "In contrast to a busy pre-accident social life with friends she now rarely goes out" (para. 21); and

(x) A neighbour testified that "after the accident, Ms. Jones 'life was over'" (para. 33).

[279] The difference between *Jones* and the present case is telling. Morgan does have headaches but there is no evidence that they approach the frequency or severity of Jones. Although Morgan has trouble sleeping, he gets more than 2 hours per night. Morgan has no difficulty focusing his eyes or concentrating. He continues to enjoy life and does not like to think of himself as having limitations. He does not need daily (and multiple) medication to get through the day. He has maintained his activities with his children and continues to be involved with their teams. There is no evidence that Morgan rarely goes out, and Morgan certainly does not think that his life is "over".

[280] In the circumstances, I assess general damages at $30,000 (in comparison to the $50,000 award in *Jones*).

[281] As I discuss above, my assessment of general damages does not distinguish between pain and suffering caused by carpal tunnel syndrome, neck or back pain, shoulder pain, or any of the other conditions (including TMJ pain) Morgan alleges that were caused by the accident.

[282] However, because I do not distinguish between injuries for the assessment of total general damages, it is necessary to deduct from the total amount a percentage to reflect my conclusions that (i) Morgan did not establish that carpal tunnel syndrome was caused by the accident; and (ii) there were other contributing causes to Morgan's pain and suffering.

[283] Consequently, I deduct one-third ($10,000) of the $30,000 in damages (for an amount of $20,000) because carpal tunnel syndrome is one of the three alleged permanent impairments and I have found that it was not caused by the accident. Further:

(i) A large percentage of Morgan's complaints (gripping objects, numbness in hands, marking papers) arose from his carpal tunnel syndrome as opposed to his neck and back and shoulder pain. The carpal tunnel syndrome is one of the three conditions relied upon by Dr. Alpert as causing permanent chronic pain; and

(ii) There were other injuries (TMJ pain and headaches are some examples) which Dr. Alpert "defer[ed] to the appropriate specialists" and no evidence on causation was led by an independent expert. The only evidence on causation for those other injuries was from Dr. Kirwin and he expressly stated that he could not give an opinion on TMJ pain causation since "this is for a dentist to deal with or a TMJ expert".

[284] I have also accepted Dr. Boynton's evidence that there were other contributing causes to the injuries, such as poor musculature development of the stabilizing muscles and poor head posture. As set out in *Blackwater*, "damages of the tortfeasor may be reduced by reason of other contributing causes" (*Blackwater*, at para. 80).

[285] I reduce the amount of $20,000 by 25% to reflect the other contributing causes, for a total assessment of $15,000.

**Issue 4: Has Morgan established a loss of past income?**

[286] Morgan retained Ms. Arlene Posel to provide an expert opinion on loss of past income. Ms. Posel was qualified as a litigation accountant to give opinion evidence in the field of litigation accounting and damages quantification.

[287] Ms. Posel prepared a report in which she assessed damages for both loss of past income and loss of future income. I first address the claim for loss of past income.

**a) Overview of the loss of past income claim**

[288] Morgan did not teach between March 2004 and September 2008. As a teacher, he was required to use his "sick days" (called a "retirement gratuity" in the collective agreement) prior to claiming his disability benefits. The use of those sick days expired on January 10, 2005.

[289] Consequently, Morgan claims a loss of past income of (i) net lost income in the amount of $81,604 for the period from January 11, 2005 until August 31, 2008, and (ii) $20,726 for the loss of the used sick days less the reduced sick day payment Morgan is now entitled to receive (as that payment would not have been available if he had not used the accumulated sick days). The total claim for loss of past income (including lost sick days) is $102,330.

[290] With respect to the claim for the net lost income, Ms. Posel applied Morgan's gross income that he would have earned under the collective agreement and deducted source deductions to arrive at a projected net income. She then applied a factor of 80% (based on the *Insurance Act*) and then deducted from that amount the short-term disability benefits and long-term disability benefits Morgan obtained in settlements with his insurers.

[291] With respect to the calculation of the benefit of sick days, Ms. Posel reviewed the collective agreement to determine the value of the sick days without the accident ($34,053), and then deducted from that amount the value of sick days which were now available to Morgan and would not have been available if he had not used the accumulated sick days ($13,327), for a net amount of $20,726. Ms. Posel did not apply a present value factor to that amount since she could not know when the payout would take place.

[292] Ms. Posel's evidence was that the sick day benefit was terminated in the collective agreement (on a going forward basis) as of September 1, 2011.

[293] The defendant did not challenge any of Ms. Posel's calculations for loss of past income or the methods she applied.

[294] Instead, the issue before the court on the past income loss claim arises from two factors:

(i) First, the defendant submits that on the evidence, it was not reasonable for Morgan to leave work between March 2004 and September 2008. The defendant relies on, amongst other things, the surveillance evidence reviewed above during the time period Morgan was not teaching; and

(ii) Second, the defendant submits that even if it was reasonable for Morgan to take four years away from teaching, the best evidence is that he did so because of his carpal tunnel syndrome, which was not caused by the accident.

[295] Ms. Posel did not provide any opinion on either of the above issues, as was appropriate since it would not be within her expertise.

[296] I review the relevant evidence on these issues below.

**b) The relevant evidence**

**1. Morgan's evidence as to the "reasonableness" of why he left work in March 2004 and returned in September 2008**

[297] Morgan gave evidence as to the reasons why he left work in March 2004 and returned in September 2008. I summarize his evidence below.

[298] While he went back to teaching after the accident, by December 2003 he was considering leaving his position at Rosedale Heights as a result of the accident. He became more irritable, coached fewer teams, and found that he was not completing marking and was not returning assignments on time. He felt that his relationship with students was not the same and that he could not do his job as effectively as he wanted.

[299] Morgan met with his senior students in December 2003 and told them he did not think he could continue but his students told him they would try to help him get through his difficulties.

[300] In March 2004, Morgan had report cards to complete and the marking was difficult. Morgan still had irritability and ongoing shoulder, back, and neck pain as well as headaches. There were few or no chairs in the gym so if he sat on the floor, his legs would fall asleep.

[301] Consequently, Morgan decided to stop working. In March 2004, he advised Rosedale Heights of his decision and made arrangements for a supply teacher. He obtained a medical note from Dr. D'Onofrio confirming that he could not attend at work and had that note renewed on a yearly basis until his return to work in September 2008.

[302] Morgan returned to teaching in September 2008 because he saw many "troubling issues" with "teenagers and black youth" and felt that it was important for him to be a role model. Morgan said that this was a "huge part" of why he decided to return to work.

[303] By September 2008, Morgan could cope with the pain through his "mindfulness" (meditation) program he had completed in 2005 and through rehabilitation and training.

[304] On cross-examination, Morgan acknowledged that he had not sought medical advice about his decision to leave work. Morgan also acknowledged on cross-examination that Dr. Kirwin had not advised Morgan that he should go back to work.

**2. Evidence as to the "cause" of why Morgan left work in March 2004 and returned in September 2008**

[305] As I discuss above, Morgan's evidence was that the reason why he left work in March 2004 was due to his irritability, ongoing shoulder, back and neck pain, headaches, difficulty in marking, and pain in his legs if he sat on the gym floor.

[306] Morgan saw Dr. Kirwin in May 2004, six to eight weeks after he left work, and that was the first time Morgan advised Dr. Kirwin that Morgan had left teaching.

[307] Morgan "specifically" advised Dr. Kirwin that the reason Morgan left work was related to injuries in his hand. Morgan told Dr. Kirwin the following, as set out in Dr. Kirwin's report of May 10, 2004:

> Mr. Morgan tells me he is off work because the numbness involving the right hand has gradually increased. In particular, it seemed to increase with the repetitive marking he was required to do around Christmas time and around March break, i.e. a lot of exams. Not only does the hand feel numb, it feels heavy when performing these repetitive marking tasks.

[308] Dr. Kirwin confirmed that Morgan had told him that the reason he had left work was due to "right hand numbness".

**3. Video surveillance evidence**

[309] The relevant video surveillance evidence is from the time period while Morgan was off work, as summarized at paragraphs 222 to 225 above.

[310] On cross-examination about the video surveillance evidence taken during the period he was off work, Morgan acknowledged that the videos demonstrated that he was standing for lengthy periods of time during hockey tournaments, giving instructions to athletes in training through "circuits" (*i.e.*, training programs) he had developed, demonstrating exercises such as "V" sit-ups, throwing balls back and forth, lifting weights, jogging regularly for 30 minutes at a time, and sprinting up hills.

**4. No request for part-time work or modification of duties**

[311] Ms. Posel stated in her cross-examination that she would have seen if Morgan had applied for part-time or modified work in 2004 since she reviewed his employment file. Ms. Posel did not see such an application.

**c) Analysis**

[312] Neither party provided any applicable law on the past income loss claim. In essence, the issues are factual based on an assessment of the evidence: (i) was Morgan's decision to stop working in March 2004 until September 2008 reasonable in the circumstances?; and (ii) if so, what was the cause of Morgan stopping work in March 2004?

[313] I address each issue below.

**1. Was Morgan's decision to stop working reasonable in the circumstances?**

[314] Morgan submitted that the video surveillance evidence ought not to be considered by the court because the court should not take on the role of an "expert" to determine whether Morgan could have been a secondary school physical education teacher between 2004 and 2008 based on "sporadic" videos of Morgan performing various activities.

[315] There was no expert evidence before the court as to whether it was reasonable for Morgan to stop working. Dr. D'Onofrio delivered an annual statement to the school to confirm that Morgan was not available to work, but he was not called as a witness at trial and, as such, the reasons for his decision were not available.

[316] Dr. Kirwin was not asked for his opinion on this issue.

[317] Dr. Alpert was asked in his examination-in-chief for his opinion on the reasonableness of Morgan's decision to stop working but the question was not pursued after an objection by defendant's counsel (even though the court advised that it would permit the question subject to later consideration of its admissibility). Instead, Dr. Alpert's evidence was that he concluded that Morgan's disability began "right after" the accident and has been an "ongoing process", but he does not assess the reasonableness of the decision to stop working.

[318] Even if Dr. Alpert had been able to provide such an opinion, the court would have been required to consider the reasonableness of that opinion in light of the video surveillance evidence.

[319] I find that the surveillance evidence is compelling that Morgan was able to perform his duties as a secondary school physical education teacher.

[320] I rely on the following evidence from the surveillance in the 2004-08 period when Morgan was off work:

(i) Morgan engages in tasks which were not "sporadic". He stood for hours on end at a hockey tournament over a 3-day period and did not show any signs of visible discomfort. Morgan stands for long periods of time in exercise facilities while training athletes. Standing and providing direction would be consistent with his role as a secondary school physical education (or other subject matter) teacher;

(ii) Morgan demonstrates activities for lengthy periods of time, including "V" sit-ups, jumping from his left to right foot repeatedly while demonstrating kicking exercises and sprinting, and push-ups, all of which are consistent with the demonstrations he would occasionally need to provide as a secondary school physical education teacher;

(iii) Morgan fully extends his neck to the left and right without difficulty, which would be consistent with the functions of a secondary school teacher; and

(iv) Morgan throws and catches a ball repeatedly. He jogs for 30 minutes with a leash or running stroller often in his right hand (and in any event, in one of his hands). He grasps objects on numerous occasions, and often for lengthy periods of time. Again, these functions are fully consistent with the tasks of Morgan as a secondary school physical education (or other subject-matter) teacher.

[321] This case does not present the hypothetical example relied upon by Morgan's counsel of a pianist whose finger is damaged but can still perform small musical pieces at a friend's party. In that case, the surveillance evidence might not allow the court to conclude that the pianist could continue as a concert pianist required to perform for hours.

[322] In the present case, the surveillance evidence is extensive, covering lengthy periods over days of activities, showing an individual who during the time he was off work, had a high level of activity fully consistent with his functions as a secondary school physical education (or other subject-matter) teacher.

[323] Consequently, I accept the defendant's position that the surveillance evidence, when considered in light of the evidence that Morgan decided to leave work without medical advice and did not ask for any accommodation, demonstrates that he was able to work as a secondary school physical education teacher between March 2004 and September 2008, and, as such, his decision to leave cannot support a claim for lost past income.

**2. What was the cause of Morgan stopping work in March 2004?**

[324] At trial, Morgan attempted to provide many reasons for his decision to stop working, which included irritability, ongoing neck, back, shoulder, and headache pain, and difficulty sitting on the gym floor during exercises.

[325] However, the best evidence for the reason Morgan left work was that he did so because of the problems with his hands arising from carpal tunnel syndrome.

[326] Morgan's discussion with Dr. Kirwin on May 10, 2014 is contemporaneous with his decision to leave, taking place 6 to 8 weeks from that decision. Dr. Kirwin treated Morgan for all of his pain-related symptoms. Morgan saw Dr. Kirwin regularly for all of those symptoms throughout the period from November 5, 2002 until Morgan's decision to stop working.

[327] However, when meeting with Dr. Kirwin, the only reason Morgan provided to Dr. Kirwin about why Morgan left work related to the effects on his hands as a result of the accident. Morgan told Dr. Kirwin (as set out in his November 5, 2002 report) that the numbness in his right hand had "gradually increased" and "seemed to increase with the repetitive marking he was required to do around Christmas time and around March break, i.e. a lot of exams." Morgan went on to describe (again as set out in Dr. Kirwin's November 5, 2002 report) that "[n]ot only does the hand feel numb, it feels heavy when performing these repetitive marking tasks."

[328] The above description of the reason for leaving work is very specific, and Morgan acknowledged the specificity of the explanation on cross-examination. To ask the court to now accept that Morgan's decision to leave work was based on a myriad of other factors which

Morgan attributes to the accident is inconsistent with his explanation to Dr. Kirwin and the timing of his decision which took place just after the March report cards.

[329] Consequently, even if I found that Morgan's decision to leave work in March 2004 was reasonable (which I do not accept), I would dismiss the claim for lost past income on the basis that the cause of Morgan stopping work was the pain in his hands due to carpal tunnel syndrome which I have already found was not caused by the accident.

[330] For the above reasons, I dismiss the claim for lost past income.

**Issue 6: The claim for loss of future income**

**a) Overview of the claim for loss of future income**

[331] Ms. Posel prepared an analysis of loss of future income. Her calculations are based on two assumptions: (i) Morgan would have worked until age 65 if not for the accident but will now be required to take early retirement (the "Early Retirement Contingency"); and (ii) Morgan would have become a vice-principal at the age of 55 but now cannot do so (the "Vice-Principal Contingency").

[332] Ms. Posel prepared an analysis of the loss of future income based on these two contingencies. She calculated the present value of lost future income under the Early Retirement Contingency if Morgan remained as a teacher, with "Scenario 1" calculating the present value of lost future income if Morgan retired at age 55 instead of 65 (a loss of $884,490) and "Scenario 2" calculating the present value of lost future income if Morgan retired at age 60 instead of 65 (a loss of $436,420).

[333] Ms. Posel then applied the Early Retirement Contingency and the Vice-Principal Contingency to calculate the present value of lost future income if Morgan became a vice-principal at age 55 and would have worked until age 65 if not for the accident but will now be required to take early retirement at either age 55 or 60. Under "Scenario 3", with Morgan retiring at age 55 (instead of 65) but earning the salary of a vice-principal as at 55, the present value of the lost future income was $1,197,521. Under "Scenario 4", with Morgan retiring at age 60 (instead of 65) but earning the salary of a vice-principal as at 55, the present value of the lost future income was $749,451.

[334] The defendant took no issue with the calculations including present value determination.

[335] Instead, the defendant challenges whether the evidence supported a "real and substantial" possibility of the contingencies on which the report was based.

[336] For both the Early Retirement Contingency and the Vice-Principal Contingency, Morgan must establish both of the constituent elements of each contingency.

[337] For the Early Retirement Contingency, Morgan must establish a real and substantial possibility that (i) he would have retired at age 65 if not for the accident; and (ii) he will be

required to retire earlier (at age 55 or 60 in the scenarios considered by Ms. Posel) as a result of the accident.

[338] Morgan must establish a real and substantial possibility of both underlying constituent elements to claim damages for lost future income based on the Early Retirement Contingency.

[339] Under the Early Retirement Contingency, if the court accepts (i) a different age when Morgan would likely retire, or (ii) a different age when he would be required to retire, then a calculation of lost future income could be determined based on that time frame, the appropriate present value multiplier, and whether the Vice-Principal Contingency is also established.

[340] For the Vice-Principal Contingency, Morgan must establish a real and substantial possibility that (i) he would have become a vice-principal by age 55; and (ii) he could not become a vice-principal as a result of the accident. Morgan must establish a real and substantial possibility of both underlying constituent elements to claim damages for lost future income based on the Vice-Principal Contingency.

[341] If the court accepted that Morgan would have been a vice-principal at a different age but could not become a vice-principal because of the accident, then a calculation of lost future income could be determined based on (i) the difference in compensation, and (ii) any additional lost future income if the Early Retirement Contingency is accepted.

[342] If neither the Early Retirement or Vice-Principal contingency is proven (by both constituent elements of each contingency being established on a "real and substantial" possibility basis), the loss of future income claim fails in its entirety.

[343] I address the applicable law and then the relevant evidence for each contingency below.

**b) The applicable law**

[344] The principles of loss of future income are settled: (i) the plaintiff must establish a real and substantial possibility of future pecuniary loss (*Graham v. O'Rourke*, [1990] OJ 2314 (CA) ("*Graham*"), at para. 41); (ii) speculative and fanciful possibilities unsupported by experts or other cogent evidence should be ignored (*Schrump v. Koot* (1977), 18 OR (2d) 337 (CA) ("*Schrump*")); and (iii) the greater the risk of loss (established on a real and substantial basis), the greater the compensation (*Graham,* at para. 41).

[345] Factors affecting the degree of risk of economic loss and the possibility that all or part of those losses may have occurred apart from the wrong which is the subject of the litigation are referred to by the Court of Appeal as "contingencies" (*Graham*, at para. 42).

[346] If the plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for the contingency. The evidence must be capable of supporting the conclusion that the occurrence of the contingency is realistic as opposed to a speculative possibility (*Graham*, at para. 47).

### c) The relevant evidence

[347] The defendant did not rely on any "negative" contingencies with respect to Morgan's claim for lost future income. Rather, the defendant submitted that Morgan had not satisfied the court of a "real and substantial" possibility of either of the Early Retirement Contingency or the Vice-Principal Contingency.

[348] I address the relevant evidence for each contingency below.

#### 1. The Early Retirement Contingency

[349] For the Early Retirement Contingency, Morgan must establish a real and substantial possibility that (i) Morgan would have retired at age 65 if not for the accident; and (ii) Morgan will be required to retire earlier than 65 as a result of the accident. I address the evidence for each of these underlying contingencies below.

##### i. Evidence relevant to whether Morgan would have retired at age 65

[350] Ms. Posel used a retirement age of 65 for the basis of her determination of the loss if Morgan was required to retire at age 55 or 60 (or other ages based on a table she prepared).

[351] Ms. Posel used a retirement age of 65 since (i) the average age of retirement has been increasing over the years; (ii) Morgan did not express any particular retirement plans to Ms. Posel; (iii) old age security would be obtained only at 67 by the date of Morgan's retirement; (iv) Morgan's personal circumstances; and (v) Morgan's statement to her that he would work as long as he wanted. On that basis, Ms. Posel took the "average normal retirement age currently".

[352] Morgan's evidence is that before the accident, he thought he would work as long as could do a good job and he had not considered a particular retirement date. Morgan noted that there was no mandatory retirement and that the current principal at Rosedale Heights was in his 70s.

[353] In her cross-examination, Ms. Posel agreed that the income of a spouse would affect an individual's decision as to when to retire. Morgan's spouse is five years younger than Morgan and is an emergency room physician with the University Health Network.

[354] Ms. Posel did not consider the average retirement age of teachers. The defendant introduced evidence that according to Employment and Social Development Canada, the average retirement age for secondary school teachers in 2012 was 58.

[355] Morgan had active interests outside of teaching, including training young athletes, volunteering and coaching. Morgan also owned and operated his own fitness facility, and hoped to become a trainer in the NHL.

### ii. Evidence relevant to whether Morgan will be forced to retire early

[356] Expert evidence was led on this issue, based on the different conclusions of Dr. Alpert and Dr. Boynton as to the existence of permanent chronic pain.

[357] Dr. Alpert's opinion that Morgan had an increased risk of early retirement was based on his finding of permanent and increasing pain and resulting restrictions on Morgan's physical abilities. Dr. Alpert's evidence was consistent with the statement in his report that "Mr. Morgan is at increased risk and medical probability for having to take earlier retirement from the workforce than the standard age of 65 years, due to anticipated ongoing, moderate to severe chronic musculoskeletal pain in his spine, right shoulder, and bilateral carpal tunnel syndrome, with acute on chronic flare-ups and gradual deterioration in the coming years, as a result of the motor vehicle accident injury".

[358] Dr. Boynton's opinion was that Morgan's pain was reversible, based on her physical examination of Morgan which demonstrated improper balance in his musculature between weak core and stabilizer muscles and strong power muscles which she confirmed with a pelvic test, as well as her opinion that Morgan's head posture could be corrected.

[359] Consequently, Dr. Boynton would not have restricted Morgan from any activities.

[360] Morgan's evidence is that retirement is a "pressing concern" but that the issue is health-related. Morgan hopes that the problems with his hands can be corrected with surgery and that would affect his decision to retire. He is also concerned about his back pain not being resolved. Morgan has discussed the "potential" of retiring early but has kept in mind that "we have two young children as well that we have to care for". Morgan and his wife have not made a decision about his early retirement but the decision will be "based on my medical condition".

[361] Morgan's evidence on cross-examination was that he does not know nor has he investigated when he is eligible to retire with an unreduced pension.

[362] Since 2008, Morgan has been employed full-time as a teacher. He gave no evidence of any restrictions on his ability to work (other than he has an ergonomic chair and an overhead projector).

[363] In addition to his full-time teaching responsibilities, Morgan operates a business. He is working towards a masters' degree on which the topic (the use of energy by children playing interactive games) is linked to programs offered by Fitness 4 Success. Morgan remains involved in extra-curricular activities and coaching, including taking a group of students to Kenya.

[364] Finally, the surveillance evidence which I discuss above (and is conducted up to December 2014) is relevant to Morgan's functional abilities to continue to work as a secondary school teacher.

### 2. The Vice-Principal Contingency

[365] There are two underlying contingencies for the Vice-Principal Contingency. First, Morgan must establish a "real and substantial" possibility that he would have become a vice-principal except for the accident. Second, Morgan must establish a "real and substantial" possibility that he now cannot become a vice-principal.

[366] I address the relevant evidence on these issues below.

#### i. Evidence relevant to whether Morgan would have become a vice-principal

[367] Ms. Posel assumed Morgan would have become a vice-principal at the age of 55, but fairly acknowledged on cross-examination that she did not evaluate the reasonableness of that assumption.

[368] Morgan gave evidence in his examination-in-chief that at the time of the accident, he planned to move towards administration and become a vice-principal or principal.

[369] The requirements to become vice-principal were (i) a permanent teachers' contract (which Morgan had obtained in 1995), (ii) 5 years' teaching experience, (iii) being observed in a leadership role with development of a plan to improve in certain areas, (iv) being qualified in three of the four age divisions being primary, junior, intermediate and senior, and (v) taking the principal qualification process courses, parts 1 and 2, through the Ontario principals' council or Ontario Institute for Studies in Education or York University.

[370] Morgan understood that the course for primary or junior qualification could be taken in the summer. Morgan was qualified in the intermediate and senior age levels.

[371] Morgan understood that there were no set criteria for minimum education, although guidelines currently recommend a masters' degree or a partly-completed masters' degree, if the candidate is not a "specialist" or an "honours specialist".

[372] A specialist does not have a primary degree in an area but can take three sessional courses to become a specialist. An honours specialist has a primary degree in an area and takes three sessional courses in that area. There was no evidence that Morgan had either designation.

[373] Morgan's evidence was that once someone has the paper qualifications, the person can apply to be a vice-principal. This is a political process that depends "partly on who you know". A candidate needs letters of referral and a superintendent or principal to mentor the candidate through the process.

[374] Morgan's evidence was that by April 2002, he had a leadership component since he had been the head of the physical education department starting in 1999. Becoming a department head was a competitive process and part of what was required to get into further administration.

[375] However, Morgan lost his position as head of the physical education department before the accident when the physical education department was amalgamated with the history department and another teacher was named department head.

[376] Morgan felt that the route of becoming vice-principal was available since he had the support of the principal at that time (who remains the principal). However, I do not consider that hearsay evidence as the principal was not called as a witness.

[377] Morgan stated in his examination-in-chief that he still would have to take the "third division" sessional course and both principal qualification process courses and that it was recommended to him that he should have his masters' degree. Morgan says that he was planning to take the third division course even though he was not enrolled in it prior to the accident.

[378] Morgan started a Masters of Kinesiology in 2008 at York University. His thesis is based on how much energy children have at school fitness time compared to interactive video games. Morgan assesses the children's heart rates at school during fitness times and then has them come to his facility to conduct similar assessments while the children participate in interactive video games. The topic was approved.

[379] Morgan is still currently enrolled in the masters' program and has completed his academic course work. However, he needs to do the other half of his field research, submit his thesis, and revise and defend his thesis. The masters' degree would have taken two years if he had done it full-time but it is taking longer since (i) he is doing it on a part-time basis; and (ii) it has been difficult to find grade 4 female students. Morgan recently found a girls' soccer team that would participate.

[380] Morgan also led evidence from Ms. Rizwana Jafri, a former teaching colleague of his at Rosedale Heights (prior to the accident) who is now a principal. She gave evidence that she had started as a teacher in 1991, became a vice-principal in 2003 and has been a principal for four years.

[381] Ms. Jafri added in her examination-in-chief that if a person lost a position as department head, it would weaken their candidacy to become a vice-principal.

[382] Ms. Jafri also added that the support of the candidate's principal would be very important.

[383] Ms. Jafri gave evidence of the qualifications similar to that of Morgan. She added that a candidate would need to prepare a resumé and show leadership in different areas such as curriculum, instructional leadership or equity. She cited being a department head as an example of leadership, as well as being involved in the life of the school through committees, field trips or curriculum leadership.

[384] Morgan also led evidence from Mr. Russell Parker, another former teaching colleague of his prior to the accident. Mr. Parker's evidence was that there was a group of young teachers who often talked about becoming a vice-principal and that the issue was a "hot topic". Mr. Parker felt that at Morgan's age and experience at the time of the accident, he could have

considered moving up to become vice-principal, and that the board would have considered him a candidate, particularly as the board had a mandate to promote younger people and female and visible minority candidates were encouraged to become part of management.

[385] In cross-examination, Morgan acknowledged that he did not have the academic credentials required to apply to be a vice-principal at the time of the accident and still does not have them today.

[386] Morgan acknowledged in cross-examination that it would not be difficult to take the remaining sessional course to be qualified to teach the three age divisions, but he had not done so prior to the accident, nor in the 13 years from the accident (or in the 7 years since he returned to work).

[387] Morgan had taken the fall of 2012 off from school to complete the academic portion of his masters' degree.

[388] Morgan acknowledged that since 2008, he took and completed seven full-day TRX training courses for the purposes of his new business.

[389] Morgan acknowledged in cross-examination that as of his last examination for discovery two years ago, his only knowledge of the qualifications required to be a vice-principal came from talking to colleagues. At that time, he had not personally researched the requirements.

[390] Morgan agreed in cross-examination that even teachers with all of the qualifications do not necessarily get appointed since it is somewhat of a political process.

[391] Morgan stated that he hoped to be a strength and conditioning coach or trainer in the NHL. Morgan acknowledged in cross-examination that he could not engage in that profession if he were a vice-principal since the school year and the NHL season run concurrently.

[392] Morgan acknowledged in cross-examination that while teaching, he had two children, opened a new business, attends at his children's hockey games and is a very active person.

[393] Unreasonably, Morgan would not agree that his work on his masters' thesis would help his business, even though the focus is on the energy of children while playing interactive games.

[394] On cross-examination, Ms. Jafri's evidence was that she became a vice-principal within 12 years. She did not know that Morgan had lost the position of department head before the accident and she knows that Morgan does not have the credentials to become a vice-principal.

[395] Mr. Parker acknowledged in cross-examination that a person would need the appropriate qualifications before he or she could apply to become a vice-principal. Mr. Parker did not know that Morgan is not qualified and never applied.

### ii. Evidence that Morgan could still become qualified to become a vice-principal

[396] Ms. Jafri and Mr. Parker gave evidence about the decreased likelihood of becoming a vice-principal. Ms. Jafri stated that it is more difficult to become a vice-principal today at a secondary school.

[397] Mr. Parker stated that it is now more difficult to become a vice-principal since many secondary schools have closed and people retire less early and even work past 65. Teachers also tend to delay retirement so there are fewer openings. Mr. Parker understood that there were no interviews last year of people who could become vice-principal.

[398] There was no evidence that Morgan would be physically unable to work as a vice-principal should the opportunity arise.

[399] Morgan acknowledged in cross-examination that if he were to obtain his sessional qualification course and complete his masters he could be qualified to apply to be a vice-principal within two years (by age 52). Morgan has a girls' soccer team available to assist him with the testing of his thesis and Morgan took time off from Rosedale Heights in the fall of 2012 to complete the academic component of his degree.

[400] Morgan has partly completed his masters' degree.

## d) Analysis

[401] I review each of the contingencies below to determine whether Morgan has established a real and substantial possibility of future pecuniary loss.

### 1. Early Retirement Contingency: Morgan would have worked at least until age 65 if not for the accident but will now be required to take early retirement

[402] As I discuss above, Morgan must establish a real and substantial possibility of both of the underlying constituent elements: (i) he would have worked until age 65 if not for the accident; and (ii) he must retire earlier as a result of the accident. I analyze the evidence on each of these underlying contingencies below.

#### i. Would Morgan have worked until age 65 if not for the accident?

[403] I agree with the defendant that Morgan has not satisfied the court that there is a real and substantial possibility he would have worked until age 65 if not for the accident.

[404] The average age of retirement for a secondary school teacher is 58 years old. Morgan's wife is five years younger than him and an emergency room physician which is a factor that could influence the age of retirement. Morgan is a busy and active individual and teaching is just one of his interests.

[405] Morgan owns and operates his 6,000 square foot facility in Vaughan. His masters' thesis will assist his future business efforts and Morgan is working diligently to make Fitness 4 Success a business success.

[406] Based on all of the above factors, I find that there is not a real and substantial possibility that Morgan would have worked until the age of 65. Based on Morgan's many outside interests and the average age of retirement for a secondary school teacher, I find that Morgan would retire at 58, the age typical for his profession.

[407] Consequently, if I accepted that there was a real and substantial possibility Morgan would be required to retire earlier as a result of the accident (which I do not for the reasons I discuss below), damages for lost future income would be limited to the time period from the date he would be required to retire until the age of 58, and would be calculated based on Morgan's salary as a teacher (as I do not find that Morgan established a real and substantial possibility of the Vice-Principal Contingency, for further reasons as I discuss below).

[408] In any event, although I do set Morgan's anticipated retirement age at 58, it is not necessary to do so. Morgan needs to prove both underlying contingencies to succeed on the Early Retirement Contingency and as I discuss below, he has not established a real and substantial possibility that he will be required to retire earlier as a result of the accident.

**ii. Will Morgan be required to retire earlier as a result of the accident?**

[409] This is an underlying contingency that Morgan must establish. If he cannot do so, then he receives no "early retirement" damages and, at best, would be limited to the difference in compensation between a teacher and a vice-principal for the period between when he would have become a vice-principal until age 58, if I had accepted a real and substantial possibility of the Vice-Principal Contingency (which I do not for the reasons below).

[410] On the basis of the above evidence, I do not find that Morgan has established a real and substantial possibility that he would be required to retire earlier as a result of the accident.

[411] First, as I discussed above, I accept the evidence of Dr. Boynton that carpal tunnel syndrome was not caused by the accident. Consequently, any early retirement resulting from that condition would not be the basis of compensation.

[412] Morgan stated in his examination-in-chief that part of his decision to retire earlier will be based on the condition of his hands after proposed surgery, so carpal tunnel syndrome continues to play a major role in his decision.

[413] Second, I accept the evidence of Dr. Boynton as set out above that Morgan could continue with his current active lifestyle, including teaching, with no restrictions since any pain he suffers is reversible by strengthening exercises and proper posture.

[414] Third, Morgan has worked as a full-time teacher since September 2008 with no modifications to his work except an ergonomic chair and an overhead projector.

[415] Fourth, Morgan not only has a full-time position as a teacher, he also operates his own business, continues to coach, actively participates in his sons' sport teams, and takes a group of students to Kenya every other year. I adopt the conclusion of the defendant in his written submissions: "These are not the actions of an individual who is struggling to continue to work".

[416] Fifth, the surveillance evidence does not demonstrate someone who would need to retire early due to struggles with the requirements of work, for the reasons I discuss above.

[417] Consequently, I do not find any cogent expert or other evidence to support a real and substantial possibility that Morgan will be required to retire earlier as a result of the accident.

[418] For the above reasons, I find that Morgan has not established a real and substantial possibility of the Early Retirement Contingency.

**2. Vice-Principal Contingency: Did Morgan establish a real and substantial possibility that he would have become a vice-principal at the age of 55 but now cannot do so**

**i. Would Morgan have become a vice principal at the age of 55?**

[419] Using the language of the Court of Appeal in *Schrump*, I find that the evidence that Morgan would have become a vice-principal at the age of 55 (or at any time as that issue is before me on the determination of future income loss) is "speculative" and not "real and substantial".

[420] By way of contrast, Ms. Jafri became a teacher in 1991, took all of the steps necessary to become a vice-principal, and obtained the position in 2003, 12 years after becoming a teacher. She has been a principal for four years.

[421] Morgan became a teacher in 1993, two years after Ms. Jafri. He had not even taken a sessional qualifying course by 2002 when the accident occurred. He had lost his position as department head which he only maintained for a few years. He showed no interest at all at that point in taking steps toward that position. Morgan did not have the credentials to apply in 2002.

[422] His lack of effort in taking the steps necessary to become a vice-principal prior to the accident was consistent with his active life. He operated Fitness For Success, was very involved with his children's hockey activities, and acted as a trainer for those teams with the hopes of becoming an NHL trainer.

[423] The evidence is uncontested that becoming a vice-principal was a "hot topic" at Rosedale Heights, yet unlike Ms. Jafri, Morgan took no steps to complete that process by the time of the accident even though Mr. Parker's evidence was that visible minorities were encouraged to become part of management.

[424] The accident took place on April 25, 2002. Thirteen years later, Morgan has barely moved further towards his stated goal of becoming a vice-principal. Morgan provided no admissible evidence of support from his principal who was the same principal before and after

the accident. He still has not taken a sessional course that he could easily complete in the summer. His masters' program started in 2008 and is not complete.

[425] As recently as two years ago at his examination for discovery in 2013, Morgan had not personally looked into the requirements to become a vice-principal and only had knowledge from colleagues, again despite it having been a "hot topic" in discussions with Mr. Parker and colleagues approximately 15 years prior to that time.

[426] Meanwhile, in the same time period after his accident, Morgan opened a new business, with a 6,000 square foot facility aimed at interactive exercise that can be used for training as well as birthday parties, with marketing videos available on YouTube and on the website of Fitness 4 Sports. Since his accident, Morgan took seven TRX-certification courses.

[427] The above evidence does not support a "real and substantial" possibility that Morgan would have become vice-principal at any time, let alone by the age of 55. It is nothing more than a vague and speculative possibility as that test has been defined by the Court of Appeal.

**ii. Is Morgan unable to become a vice-principal by the age of 55?**

[428] Given my finding above on the first underlying contingency, the Vice-Principal Contingency cannot be supported in any event. However, I agree with the defendant that even if the first underlying contingency had been established, the second underlying contingency that Morgan is unable to become a vice-principal by the age of 55 is also not established as a "real and substantial" possibility.

[429] In particular, while Ms. Jafri and Mr. Parker gave evidence that, in general, it is harder to become a vice-principal given the closing of schools and later retirement, this anecdotal evidence only supports an argument that it might be more difficult for Morgan to succeed in his application today than in the past.

[430] Morgan acknowledged that he could apply within two years if he obtained his third division (junior or primary) and completed his masters. Consequently, the only evidence is that Morgan could apply within two years but that, anecdotally, it is more difficult today to become a vice-principal.

[431] On the above evidentiary record, I am not satisfied that Morgan has established a real and substantial possibility that he is unable to become a vice-principal by the age of 55. Such a possibility should not be based solely on anecdotal evidence. Morgan could complete his outstanding requirements within a few years and send in his application, which would be considered on the basis of conditions at that time and the many factors (leadership, involvement in school activities, etc.) relevant to that determination.

[432] In any event, even if there was a real and substantial possibility of this underlying constituent element, *i.e.*, that Morgan is unable to become a vice-principal by age 55, the issue is irrelevant as Morgan needs to establish both underlying elements of the Vice-Principal Contingency and he has not established the first underlying contingency as I discuss above.

[433] For the above reasons, I find that Morgan has not established a real and substantial possibility of the Vice-President Contingency.

**e) Conclusion**

[434] Based on the analysis above, I find that Morgan failed to establish a real and substantial possibility of either the Early Retirement Contingency or the Vice-Principal Contingency. For these reasons, I dismiss the claim for loss of future income.

**Order and costs**

[435] For the above reasons, I dismiss the action. If counsel cannot agree on costs, I will consider written costs submissions from each party of no more than three pages (not including a bill of costs), to be delivered by the defendant within 30 days of this order, with the plaintiff to respond within 30 days from receipt of the defendant's submissions. The defendant may provide a reply of no more than two pages to be delivered within 14 days of receipt of the plaintiff's costs submissions. All written costs submissions shall be delivered to my assistant.

[436] I thank counsel for their thorough preparation at trial and the assistance provided to the court through their oral and written submissions.

Justice Glustein

**DATE:** 20150604

**CITATION:** Morgan v. Saquing, 2015 ONSC 2647
**COURT FILE NO.:** 04-CV-265984CM2
**DATE:** 20150604

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

NOEL MORGAN, TONIKA MORGAN, ANTHONY MORGAN and EMYLE MORGAN, a minor under the age of 18 years by his Litigation Guardian, NOEL MORGAN

Plaintiffs

**– and –**

ROBERT L. SAQUING

Defendant

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**JUDGMENT**

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GLUSTEIN J.

**Released: 20150604**