

CANADA / JUDGMENT

Andreas v. Vu

2020 BCSC 1144

COURT

Supreme Court of British Columbia

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2020 BCSC 1144 Andreas v. Vu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Andreas v. Vu,

2020 BCSC 1144

Date: 20200805

Docket: M180443

Registry: Vancouver

Between:

Letitia Andreas

Plaintiff

And

Ngoc Vu and Ngo Truong

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

June 8-12 and 15-17, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 5, 2020

- [1] The plaintiff, Letitia Andreas, seeks damages for injuries sustained in a motor vehicle accident that occurred on January 21, 2016, on 201st Street near the 96th Avenue intersection in Langley (the "Accident"). The defendants have admitted liability but take issue with the nature and extent of the alleged injuries and the quantum of damages claimed.
- [2] Since the Accident and the commencement of this action, Ms. Andreas has married and now goes by the surname of Cliff. I will refer to her as Mrs. Cliff throughout the balance of these reasons.

Background

The Plaintiff

- [3] Mrs. Cliff is currently 29 years old. She was born in Burnaby, BC, and grew up in Abbotsford where she graduated high school in 2009. She has minimal post-secondary education, comprising one semester at the University of the Fraser Valley in 2015.
- [4] As noted, she was married in February of 2020 and lives with her husband, Nathan Cliff, in Chilliwack.

Pre-Accident Health, Activities and Employment

- [5] Mrs. Cliff said that her health prior to the Accident was generally good. She was in a car accident in high school but suffered no lingering effects. In the summer of 2015, she stumbled while hiking and hurt her knee. She also tweaked her back due to limping but this resolved within a couple of weeks.
- [6] She also experienced previous neck and shoulder tension that she attributed to working at a desk with a computer. Occasionally she experienced tension headaches. She did recall one instance in high school where she experienced a "memorable" headache but this was a single incident.

- [7] On December 16, 2015, just over a month before the accident, Mrs. Cliff went for massage therapy and completed a patient intake form in which she identified "Headaches / Migraines" as a problem. In response to the question "Please describe your current condition [and] symptoms", she noted "regular headaches and migraines. I carry my stress in my neck and shoulders so it is constantly tense." Further, on a pain diagram on the intake form, she indicated various types of pain in her neck, shoulders, mid and low back.
- [8] Mrs. Cliff was also taken to a clinical record of the massage therapist, dated December 23, 2015, which also notes her as reporting "regular" headaches and neck, shoulder and back pain.
- [9] When questioned about the form, Mrs. Cliff said she had experienced tension for a long time, largely due to the nature of her work. She agreed that she wrote on the form that she experienced "regular" headaches, but said she did not put a lot of thought into the answers she gave on the form. She also said that whatever headaches she experienced in the past were very different from the headaches she has had after the Accident.
- [10] Mrs. Cliff acknowledged struggling with some anxiety and depression prior to the Accident. As discussed below, Mrs. Cliff spent approximately three years living and working in England and she said she found it difficult to return to Canada. She enjoyed her time in England and felt it was taken away from her when she could not renew her visa further. She also found it challenging to resume her life in Canada. She talked to her doctor who prescribed Cipralext, an antidepressant medication which she said helped with her mood. She was continuing to take Cipralext at the time of the Accident.
- [11] Prior to the Accident, Mrs. Cliff said that she was very active. She enjoyed going to the gym, hiking and camping, dancing and attending concerts. She described herself as a "people person". She also had close groups of friends, inside and outside her church, with whom she often socialized.
- [12] Mrs. Cliff's mother, Laureen Janzen, described her in similar terms. She said that as a teenager and young adult, Mrs. Cliff was very outgoing and active in recreational and church related activities. A friend described her as a real planner of social events.
- [13] Mrs. Cliff has worked at various jobs during and after high school. When she was 19 years old, she moved to England to work with a church. She worked in the church daycare and volunteered with other church activities. While she was in England, she also had an administrative job with a Christian charitable organization.
- [14] Upon the expiry of her two-year visa, Mrs. Cliff returned to Canada and got an administrative position with a company called First Base. She then returned to England in April 2013 and resumed working with the church. That time she had a one-year visa and upon expiry she again returned to Canada.

- [15] In May 2014, she got a job with a tutoring company called Tutor Doctor, which was owned by a friend of her mother. Initially she worked part-time then increased to full-time, 40 hours per week. Her position involved administrative tasks, data entry and some marketing.
- [16] In May of 2015, she changed jobs and began working at Artex Barn Solutions ("Artex"), a farm equipment company. While working there, she completed her one semester at the University of the Fraser Valley. At Artex, she worked as the administrative and marketing coordinator and as executive assistant to the company president. She worked full-time, 8:00 a.m. to 4:00 p.m. daily, with additional hours as needed. She started at a salary of \$36,000 per year, which was increased to \$40,000.
- [17] After her return from England, Mrs. Cliff also volunteered with her church, assisting with youth and young adult programs. Mrs. Cliff's involvement with her church and her faith are very important to her.

The Accident

- [18] The Accident again occurred on January 21, 2016, at about 5:30 p.m. Mrs. Cliff was alone in her car and was driving from her home in Abbotsford to visit a friend in Pitt Meadows. She was travelling on 201st Street in Langley, approaching the intersection of 96th Avenue. At that location, 201st Street is one direction with four lanes all heading north. Mrs. Cliff was in the left, curb side lane.
- [19] She testified that another car veered suddenly into her lane and struck her car. She said that it was the other car's left front side that struck the right front side of her car, forcing her car up onto the curb. Mrs. Cliff said that she felt two jolts during the Accident, once when the other car struck her and the second when her car struck the curb.
- [20] Both drivers pulled up onto the adjacent curb and exchanged information. Mrs. Cliff then continued on to her friend's house. Emergency personnel were not called. She stayed at her friend's house for awhile and completed an ICBC claim form online. She said she felt "off" and in shock so she left and went home to bed.
- [21] The next day she felt pain in her neck, back and shoulders. Those symptoms persisted over the following weeks, along with headaches, nausea and dizziness. She developed sensitivity to light and loud sounds, which would trigger her headaches.

Post-Accident Health, Activities and Employment

- [22] Shortly after the Accident, Mrs. Cliff moved in with a friend for a while who helped care for her. She said she continued to experience pain in her neck, shoulders and back and the headaches persisted. Her mood became an issue. She felt down and lacked motivation.
- [23] Mrs. Cliff said that she still experiences headaches on a daily basis. She feels a dull ache in her temples and the headaches are, occasionally, quite severe. She was prescribed Topiramate which has helped somewhat. She was treated with Botox in January 2020 and

found that improved her symptoms, although they did not disappear entirely. She still experiences intense light sensitivity and certain sounds and smells can make her nauseous. In addition to headaches and nausea, she has had a constant ringing in her ears since the Accident.

- [24] She also still has neck symptoms, although the degree of pain varies. It tends to bother her when she is sitting at a desk and looking at a screen. She gets some temporary relief from over the counter medications and from massage and physiotherapy.
- [25] Her shoulders also bother her, particularly when doing things like working on the computer or cooking where she is required to bend over or stoop. Her lower back is also an ongoing issue for her. Increased activity tends to increase the pain in her back.
- [26] Mrs. Cliff testified that she has difficulty sleeping and, as a result, is often fatigued. She continues to experience anxiety. She said that she has found the litigation process stressful, particularly when she attended an examination for discovery. She said she had a panic attack shortly after the discovery and had to take time off work.
- [27] In terms of her post-Accident lifestyle and activities, in the summer of 2016, Mrs. Cliff went to Hawaii to visit a friend. While there, she was introduced to a Christian organization that provides education and mission opportunities. Mrs. Cliff subsequently decided to participate in a six-month program, which involved three months of training in Hawaii, followed by two months on a mission in India, and then some additional time in Hawaii. The initial time in Hawaii largely involved attending classes and other training activities and then the time in India involved visiting people in their homes and churches and volunteering at an immigration centre. She was engaged in that program from July to December 2016.
- [28] She visited Texas twice, once to visit a friend and another time to attend a wedding.
- [29] Other travel following the Accident included a trip to Disneyland in the summer of 2018 with her extended family. Disneyland has always been a favourite place for Mrs. Cliff, however she said she was unable to fully enjoy the experience due to her ongoing symptoms. She said she went on one ride the first day and the lights and sounds made her feel unwell.
- [30] In May 2019, she travelled again to Hawaii with her now husband to visit a friend.
- [31] Of particular note to Mrs. Cliff, on February 1, 2020, she married her husband Nathan, who she had met in November 2018. The wedding involved a small outdoor ceremony followed by a larger reception. Mrs. Cliff said that she enjoyed her wedding but aspects were difficult as she was experiencing pain throughout the day. She and her husband ended up leaving early due to her pain. She was particularly disappointed that she was unable to "dance the night away" with her husband and friends.

- [32] Following the wedding, Mrs. Cliff and Nathan left on their honeymoon. They initially went to Disneyland for a couple of days. According to Mrs. Cliff, she went on one ride the night they arrived but the following day she was unable to go on any rides, similar to her 2018 trip to Disneyland, and Nathan went by himself. It was a very disappointing experience. They then travelled to Mexico for a week, where, according to both Mrs. and Mr. Cliff, they largely hung out on the beach and went to restaurants.
- [33] Mrs. Cliff said that she is generally less able to do the things she did before the Accident. She is less active and less social. As noted, she continues to experience headaches and pain in her neck and back.
- [34] Her mother and the friends that testified painted a similar picture. They said that Mrs. Cliff is still active and social, but to a lesser degree than she was before the Accident. One friend described Mrs. Cliff having a similar personality as before but "diminished".
- [35] Mrs. and Mr. Cliff began living together following their return from the honeymoon. She said that she does most of the cooking, although Mr. Cliff tries to help. She does much of the lighter cleaning whereas he does the heavier tasks. Mrs. Cliff said she gets frustrated and feels like she is not contributing. Mr. Cliff gave similar evidence. He also said that Mrs. Cliff is often very tired when she returns from work at the end of the day.
- [36] Both Mrs. and Mr. Cliff testified about their desire to have children in the future, but both expressed concern about Mrs. Cliff's ability to care for children given her current condition.
- [37] In terms of employment, Mrs. Cliff was working at Artex at the time of the Accident. As a result of the Accident, she was away from work until May 2016, when she returned on a graduated basis, although she never resumed full-time work there. She said she found the work difficult as she was required to be at a desk for most of the time which caused stiffness and pain in her neck. The lighting in the office also bothered her and triggered headaches. Mrs. Cliff left this job when she decided to participate in the program in Hawaii.
- [38] On her return from Hawaii, in January 2017, she obtained a position with International Genealogical Search Inc. ("IGS"), a genealogical research company for whom her mother works. Her job was administrative in nature and required her to sit at a desk for most of the day. It was a full-time position, 40 hours per week, although she often worked longer hours Monday-Thursday, with a shorter day on Friday. She typically drove to work with her mother, which involved an hour commute each way. Mrs. Cliff said she did not miss any time while working at IGS, largely because there was a lot of work and it "needed to be done".
- [39] In September 2017, she left IGS and returned to work for Tutor Doctor, the tutoring company she had previously worked for. This too was a full-time position, typically 8:00 a.m. to 4:00 p.m. daily. Again, Mrs. Cliff worked at a desk for most of each day processing reports, invoices, etc. She said the prolonged sitting caused her pain and the lighting triggered headaches. Mrs. Cliff remained in that position until August 2018.

- [40] While working for Tutor Doctor, Mrs. Cliff also started her own business "Collective Concierge" which provided contract administrative services. She had a number of smaller clients in 2017 and 2018.
- [41] One of her clients was Field House Brewing ("Field House"), a craft brewery located in Abbotsford. Her initial contract work for Field House ultimately developed into a permanent position beginning in January 2019 which continues today. Her job involves administrative and human resource matters. She currently works at 80% of full-time, or 32 hours per week. She has some flexibility about how and when she works those hours, although she typically works Monday to Thursday and takes Friday off. She describes work as going "pretty ok" and she appreciates the flexibility. She still experiences pain if she spends too long on the computer or sits for too long and she is usually very tired by the end of the day.
- [42] According to Mrs. Cliff, there is the opportunity to increase to full-time, and Field House would like her to, but she does not presently feel able to do so. It is apparent that Mrs. Cliff enjoys her work and her colleagues. She hopes to have a future with Field House and, in fact, is apparently being considered for a larger, leadership role.
- [43] One of the owners of Field House, Gina Vanderheide, testified that Mrs. Cliff is a valued employee and that there would be a full-time position available to Mrs. Cliff if she was able to work more. The owners are looking to further expand their business and Ms. Vanderheide said that there is the potential for Mrs. Cliff to move into a lead human resources role for the entire business, but she is not sure that is possible with Mrs. Cliff working at 80%. Ms. Vanderheide indicated that she would expect to pay in the range of \$60,000-\$80,000 per year for that position, depending upon the extent of the responsibilities.

Expert Evidence

- [44] Both parties adduced expert evidence. The experts relied on by Mrs. Cliff were:
- Dr. Daniel DeForge, an expert in physical medicine and rehabilitation (physiatrist);
 - Dr. Gordon Robinson, a neurologist;
 - Dr. John Pullyblank, a psychologist and vocational expert;
 - Andrew Hosking, a physiotherapist who prepared a functional capacity evaluation ("FCE") and cost of future care report; and,
 - Darren Benning, an economist who prepared a report setting out future income loss and cost of future care multipliers.
- [45] The defendants rely on the following experts:
- Dr. Mark Crossman, a physiatrist;
 - Dr. Meera Gupta, a neurologist;

- c) Dr. Paul Janke, a psychiatrist;
 - d) Cheryl Black, an occupational therapist who provided a critique of Mr. Hosking's FCE report; and,
 - e) Mark Gosling, an economist who provided a report setting out different multipliers from those provided by Mr. Benning.
- [46] Dr. Gupta and Ms. Black were not required to attend the trial for cross-examination.
- [47] I will not review the expert evidence in detail but will summarize the key points and then will discuss the evidence in greater depth as needed when making findings of fact about Mrs. Cliff's condition and when considering her claims for damages.
- [48] As noted, Mrs. Cliff was seen by two physiatrists. Dr. DeForge assessed Mrs. Cliff on October 5, 2019, and wrote a report dated November 10, 2019. At the time he saw Mrs. Cliff she was continuing to complain of headaches, myofascial (soft tissue) pain in her neck, dizziness, tinnitus, light and noise intolerance and some ongoing anxiety. Dr. DeForge noted that previous complaints of back pain had resolved.
- [49] With respect to her headaches, dizziness, tinnitus and light and noise intolerance, Dr. DeForge was of the view that these symptoms were post-traumatic in nature and related to the soft tissue injury to her neck. While the symptoms are similar to those resulting from a concussion, Dr. DeForge did not believe that Mrs. Cliff had suffered a concussion.
- [50] The second physiatrist, Dr. Crossman, examined Mrs. Cliff on February 18, 2020, and prepared a report on the same date. In his report, Dr. Crossman noted that Mrs. Cliff had a significant pre-Accident history of a number of symptoms similar to what she presented with when he saw her. Specifically, he referred to a history of headaches and pain in her neck, mid-back and lower back. In terms of her ongoing headaches, Dr. Crossman, like many of the experts who testified, was of the view that they were not the result of a concussion but were caused by muscle tension relating to her soft tissue injury to the neck. In his view, Mrs. Cliff's emotional state also affected her headaches. With respect to her soft tissue injuries, Dr. Crossman described her presentation as "perplexing" in that despite her description of significant pain, there was no tenderness in any of the affected areas.
- [51] Mrs. Cliff was also seen by two neurologists, Dr. Robinson and Dr. Gupta. Dr. Robinson noted that Mrs. Cliff suffered soft tissue injuries to her neck and back in the Accident. In terms of her headaches, Dr. Robinson, like Dr. DeForge, did not believe that Mrs. Cliff suffered a concussion but rather, the headaches were post-traumatic and related to her neck injury. Dr. Robinson did note that, at the time of his examination, Mrs. Cliff was not complaining of neck pain and there was no restriction of movement or tenderness.

- [52] Dr. Gupta examined Mrs. Cliff on March 7, 2020, and prepared a report of the same date. Dr. Gupta was also of the view that Mrs. Cliff did not suffer a concussion. In her view, Mrs. Cliff's headaches were suggestive of chronic tension-type headache with episodic migraine. In Dr. Gupta's opinion, Mrs. Cliff was not disabled from a neurological perspective.
- [53] Dr. Pullyblank interviewed Mrs. Cliff at some length and then she was subjected to a variety of tests. In his report dated March 13, 2020, he noted that Mrs. Cliff's results from the cognitive testing displayed good abilities. However, he found that she continued to display symptoms of depression that supported a diagnosis of Major Depressive Disorder, in partial remission. He also found that her ongoing anxiety was consistent with Posttraumatic Stress Disorder ("PTSD"). In Dr. Pullyblank's opinion, Mrs. Cliff's ongoing physical pain and psychological issues create barriers to employment and render her less than fully competitively employable. He noted that she requires certain accommodations that her current employment permits but that may not be available from other employers.
- [54] Dr. Janke assessed Mrs. Cliff on January 8, 2020, and prepared a report dated March 12, 2020. In Dr. Janke's opinion, prior to the Accident, Mrs. Cliff had a well-established history of Major Depressive Disorder that had responded well to antidepressant medication. He did not believe that Mrs. Cliff suffered a concussion in the Accident but rather, her ongoing headaches were post-traumatic in nature. She also displayed symptoms consistent with PTSD. Dr. Janke was of the view that Mrs. Cliff had not received the benefit of maximal medical therapy for her psychiatric and psychological symptoms but that with appropriate medication, she can expect a full recovery.
- [55] Mr. Hosking conducted an FCE of Mrs. Cliff. The FCE involved a range of tests intended to assess her capacity to perform various work-related activities. According to Mr. Hosking, Mrs. Cliff demonstrated limitations for activities that involve static postures of neck flexion (i.e. tilting the head forward), neck extension and stooped standing, as well as some limitations with reaching, pushing/pulling and carrying. She also demonstrated progressive fatigue over the course of the testing. Mr. Hosking said that these limitations indicate that Mrs. Cliff is best suited to work of a sedentary to light nature and that she requires accommodation. Further, she is likely limited to working no more than four days per week.
- [56] Ms. Black prepared a report dated April 22, 2020, commenting on Mr. Hosking's report. Ms. Black did not meet Mrs. Cliff or assess her in person. She critiques various aspects of Mr. Hosking's report including the absence of any objective means of comparing Mrs. Cliff's own perception of her function to her demonstrated capacity.
- [57] The two economists, Mr. Benning and Mr. Gosling, prepared reports setting out future income loss and costs of care multipliers. Their multipliers differ based upon different assumptions used. I will address their evidence in more detail as needed when considering Mrs. Cliff's claims for loss of future earning capacity and cost of future care.

Credibility and Reliability

- [58] The defendants challenge the reliability of Mrs. Cliff's evidence and, to a lesser extent, her credibility. A helpful summary of the principles governing the assessment of reliability and credibility was provided by Justice Crabtree in *Yang v. Duralia*, 2020 BCSC 806:
- [40] Reliability is focused on the accuracy of a witness's evidence, while credibility has to do with whether the witness is telling the truth. Credibility involves the consideration whether the evidence is honestly given. Each involves an assessment of the witness's testimony, in the context of the evidence adduced at trial and in the consideration of various factors.
- [41] The distinction between reliability and credibility was explained in *R. v. H.C.*, 2009 ONCA 56, by Watt J.A. at para. 41:
- [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
- i. observe;
 - ii. recall; and
 - iii. recount
- events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).
- [59] Justice Crabtree, at paras. 42-43, cited the well-known and oft-cited decisions in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), and *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296, and then provided the following summary:
- [45] In summary, the assessment of a witness's credibility and reliability must include a critical assessment of the witness's evidence in the context of the evidence as a whole. This involves an assessment of whether the witness's evidence is at odds with other evidence in the case, and whether the testimony is implausible or improbable, having regard to the surrounding circumstances. The real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities, which a practical and informed person would readily recognize as reasonable in that place and in those conditions. A trier of fact must also bear in mind that an apparently honest, confident or convincing witness may not necessarily be an accurate witness.
- [60] In support of their position, the defendants point to certain inconsistencies between Mrs. Cliff's evidence at trial and answers given on her examination for discovery, for example about previous stresses in her family and problems at previous workplaces. In my view, these inconsistencies were minor and of minimal consequence.

- [61] Similarly, in her testimony, Mrs. Cliff sought to distance herself from comments she made on the massage intake form and as recorded in a related massage clinical record, referred to above (paras. 7-9). The defendants suggest that she changed her story at trial concerning past health issues.
- [62] In my view, the defendants overstate the importance to be attached to those records. In this regard, I endorse the comments of Justice Smith in *Edmondson v. Payer*, 2011 BCSC 118 at paras. 23-39, *aff'd* 2012 BCCA 114, about the limited evidentiary value of clinical records.
- [63] I found Mrs. Cliff to be a credible witness in the sense that I believe she tried her best to give honest and forthright answers. However, I do agree with the defendants that there are reliability concerns about aspects of her evidence, specifically about the severity of her ongoing symptoms and their impact on her. This concern stems from the apparent disconnect between Mrs. Cliff's description of her symptoms and limitations and the absence of any physical findings by many of the physicians who examined her. In addition, she has been able to work at a high level, albeit at less than full-time, and engage in numerous social activities despite her description of her symptoms as severely painful and disabling.
- [64] In the circumstances, the observations of Justice Abrioux, as he then was, in *Karim v. Li*, 2015 BCSC 498 at para. 89, are particularly apt:

where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence

Findings of Fact on Causation and the Plaintiff's Condition

- [65] The evidence is uniform that Mrs. Cliff suffered soft tissue injuries to her neck, shoulders and back as a result of the Accident. The evidence also establishes that Mrs. Cliff has experienced consistent headaches since the Accident. The consensus amongst the experts who gave evidence at trial is that the headaches are not the result of a concussion but rather are post-traumatic in nature and relate to the soft tissue injury to her neck. She has also experienced depression and anxiety since the Accident as well as tinnitus and sensitivity to light and sound.
- [66] The defendants submit that Mrs. Cliff suffered from pre-existing neck, shoulder and back problems as well as headaches. In support of this position, they rely heavily on the massage therapy intake form and the clinical record of a subsequent appointment described above at paras. 7-9. They submit that the Accident did not cause her physical symptoms but rather exacerbated her pre-existing condition.

- [67] I do not agree. I accept Mrs. Cliff's evidence on this point that she occasionally experienced prior tension and pain in her neck, shoulders and back that was related to working out and to her job, which involved long hours sitting at a desk and using a computer. The fact that she sought some massage therapy in December 2015 is not sufficient to establish that she suffered from a pre-existing condition. As set out above at para. 62, the defendants overstate the importance of the massage records. If pain of this nature was indeed a long standing problem, one would have expected evidence of a history of treatment by a family doctor or other healthcare practitioner. No such evidence was adduced. Further, there is no evidence that past pain issue interfered in any way with Mrs. Cliff's function.
- [68] The same is true for her headaches. Apart from the reference in the massage intake form and the clinical record, there is again no evidence of a history of treatment, a prior diagnosis or interference with Mrs. Cliff's ability to function. Further, I accept Mrs. Cliff's evidence that the headaches she has experienced since the Accident are unlike anything she has experienced in the past.
- [69] I am satisfied on the evidence that the Accident caused Mrs. Cliff's soft tissue injuries and resulting pain as well as her current headaches.
- [70] I do accept that Mrs. Cliff had experienced depression in the past that was ongoing at the time of the Accident. Shortly before the Accident, on January 6, 2016, her dosage of the antidepressant medication Cipralext was increased from 15 mg to 20 mg. The dosage had previously been increased in the fall of 2015 from 10 mg to 15 mg. That said, during this period, Mrs. Cliff was continuing to work and there is no evidence that her depression otherwise interfered with her ability to function.
- [71] I am satisfied that the Accident exacerbated Mrs. Cliff's pre-existing depression. Her mental state was further compromised as a result of the extreme reaction she had to the examination for discovery. Both Dr. Pullyblank and Dr. Janke agreed that the examination caused Mrs. Cliff to experience PTSD-type symptoms. As Dr. Janke explained, Mrs. Cliff's symptoms do not meet the established criteria for a diagnosis of PTSD because they do not result from a life threatening event. Nonetheless, her symptoms are consistent with that diagnosis.
- [72] The defendants submit that Mrs. Cliff's reaction to the examination for discovery was not foreseeable within the meaning of the test set out by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paras. 12-15, where the Court said (at para. 15):

unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.

- [73] Another complicating factor concerning Mrs. Cliff's PTSD-type symptoms and her emotional and psychological issues generally, as identified by both Dr. Pullyblank and Dr. Janke, is alleged childhood trauma experienced by Mrs. Cliff. Both suggested that this trauma may have contributed to her unusual reaction to the examination for discovery.
- [74] The difficulty is that Mrs. Cliff was not examined at trial about this alleged trauma and, as a result, the evidence does not prove that it occurred. Thus, one of the factual underpinnings for Dr. Pullyblank's and Dr. Janke's opinions was not established. A further challenge is that Mrs. Cliff gave minimal evidence about what occurred at the examination for discovery and, as a result, it is difficult to ascertain what exactly triggered her reaction.
- [75] In my view, it is well established that Mrs. Cliff experienced pre-existing depression and anxiety that were exacerbated by the Accident. Her anxiety was further exacerbated by the examination for discovery. I agree with Mrs. Cliff that it is not accurate to say that the examination was unrelated to the Accident given that the objective of the examination was to question Mrs. Cliff about the Accident and its impact upon her.
- [76] Further, the defendants' position misconstrues the foreseeability inquiry articulated in *Mustapha*. Although the test is objective, it is based on the specific negligence at issue. In this case, it cannot be said that a person of ordinary fortitude would not suffer similar psychological injuries as a result the Accident: *Mustapha* at para. 18; *Caffrey v Davies*, 2020 BCSC 792 at paras. 146-47.
- [77] The defendants' position conflates the principle of remoteness with the principles of causation and damages. In *Mustapha*, at para. 16, McLachlin C.J.C. noted that reasonable foreseeability of mental injury should not be confused with the "thin skull" rule, which is a rule of damages. The defendants do just that by focusing, in part, on the plaintiff's pre-existing mental vulnerability when asserting her psychological injury was not foreseeable.
- [78] With respect to causation, Mrs. Cliff's unusual reaction at her examination for discovery was a result of the fact that she was already emotionally and psychologically vulnerable. Since her depression and anxiety were exacerbated by the Accident, the Accident was more likely than not a necessary cause. Mrs. Cliff does not need to demonstrate the Accident was the sole cause: *Athey v Leonati*, [1996] 3 S.C.R. 458 at para. 17. The defendants' position that the examination for discovery triggered Mrs. Cliff's psychological injury, and as a result it was not foreseeable, ignores this principle of causation.
- [79] Returning to her condition at the time of trial, I am satisfied that Mrs. Cliff continues to experience some pain in her neck, shoulders and back, although it is not as frequent or as debilitating as she describes. It is notable that the physicians who provided expert opinion evidence all note considerable improvement in her physical symptoms. For example:
- a) Dr. Robinson's physical examination found a full range of motion in her neck and no tenderness in her neck and lower back. He did find some tenderness in her shoulders;

- b) Dr. DeForge found some tenderness at the base of her skull, but she demonstrated a normal range of motion in her neck. He noted that her back pain had resolved;
 - c) Dr. Crossman again found Mrs. Cliff's presentation "perplexing" given the absence of any tenderness in the affected areas; and,
 - d) Dr. Janke found that there had been a "general resolution of her physical complaints" other than headaches, dizziness and occasional nausea.
- [80] Further, it is apparent that Mrs. Cliff's injuries have not prevented her from engaging in numerous social, recreational and vocational activities since the Accident, including a six month mission program in Hawaii and India, additional travel to Disneyland, Texas, Hawaii and Mexico, several weddings, including her own, and various family and friend outings. Additionally, upon her return from Hawaii and India, she worked full-time from January 2017 to August 2018 in two demanding jobs.
- [81] The most challenging aspects of Mrs. Cliff's condition are her ongoing headaches and her emotional/psychological issues. With respect to the latter, I accept that she continues to experience symptoms of depression and anxiety and, as noted by various physicians, those symptoms enhance her subjective perception of pain and disability.
- [82] As noted by Dr. Janke, Mrs. Cliff has not received the benefit of "maximal medical therapy" for her psychiatric and psychological symptoms. However, he expects that with proper treatment, consisting of both counselling and medication, her long-term prognosis is good and she can expect a "full recovery". That said, each of the physicians also noted that the length of time over which Mrs. Cliff has continued to experience symptoms is a negative factor in terms of prognosis.
- [83] Dr. Robinson made that point specifically with respect to her headaches, suggesting that she will probably continue to experience post-traumatic headaches "indefinitely". Taken in its entirety, the evidence suggests that Mrs. Cliff's prognosis is uncertain. The evidence also makes it clear that Mrs. Cliff's physical complaints and emotional issues are interrelated, and that future treatments will need to address both.

Damages

Non-Pecuniary Damages and Loss of Housekeeping Capacity

- [84] The factors that the court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases, most notably by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken those factors into consideration.

- [85] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by that specific plaintiff. Moreover, the compensation award must be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89; *Miller v. Lawlor*, 2012 BCSC 387 at para. 109, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.
- [86] Mrs. Cliff seeks an award of non-pecuniary damages of \$125,000. She cites the following cases in support:
- a) *Ferguson v. Watt*, 2018 BCSC 1587 (\$140,000);
 - b) *Alafianpour-Esfahani v. Jolliffe*, 2017 BCSC 701 (\$120,000); and,
 - c) *Kam v. Van Keith*, 2015 BCSC 1519 (\$125,000).
- [87] The defendants submit that non-pecuniary damages should be \$60,000, relying on the following cases:
- a) *Carleton v. Warner*, 2020 BCSC 436 (\$60,000);
 - b) *Olson v. Farran*, 2016 BCSC 1255 (\$65,000);
 - c) *Williamson v. Rutter*, 2016 BCSC 381 (\$65,000); and,
 - d) *Cummings v. Hitt*, 2015 BCSC 530 (\$65,000).
- [88] In my view, the cases relied upon by Mrs. Cliff all involve plaintiffs who were more severely impacted by their respective accidents. In *Ferguson*, a key factor supporting the non-pecuniary award was the fact that the plaintiff there was required to abandon a central element of her chosen profession. Here, Mrs. Cliff has continued to work after the Accident and, in fact, found and has flourished in her position at Field House. In *Alafianpour-Esfahani*, the court found that the plaintiff's injuries had negatively impacted all aspects of her life to a significant degree. The same was true in *Kam*. Here, while there is no question that Mrs. Cliff has been adversely impacted, as described above, she has continued to work, travel and engage in social activities, albeit on a somewhat diminished basis.
- [89] Conversely, the cases cited by the defendants involve plaintiffs less severely injured and impacted than Mrs. Cliff. In *Carleton*, which the defendants submits is similar factually to the case at bar, the plaintiff experienced similar chronic soft tissue injuries but there were not the same emotional or psychological issues.
- [90] Having considered the evidence, the submissions and authorities cited by counsel, and the relevant factors as set out in *Stapley*, I find that an appropriate award of non-pecuniary damages is \$80,000.

- [91] Mrs. Cliff did not advance a discrete claim for loss of housekeeping capacity. Instead, she seeks damages in the nature of future care costs of approximately \$70,000 for both regular household cleaning and annual heavier seasonal cleaning assistance. If treated as a pecuniary loss, whether the damages are assessed as a loss of capacity claim or a future cost claim is relatively unimportant since the court may look to the cost of hiring replacement services in assessing such an award: *Kim v. Lin*, 2018 BCCA 77 at para. 34. The issue is essentially the same: has Mrs. Cliff established that her ability to carry out household tasks has been interfered with to the extent that an award of pecuniary damages is warranted?
- [92] However, there is a preliminary question that must be addressed in this regard: whether the loss is more properly considered pecuniary or non-pecuniary in the circumstance of this case. In *Kim* at paras. 28-32, Chief Justice Bauman reviewed a number of cases and academic writings addressing the question of whether loss of housekeeping capacity should be dealt with as an element of non-pecuniary damages or as a separate head of pecuniary damages and concluded:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- See also: *Riley v. Ritsco*, 2018 BCCA 366 at paras. 96-103; *Abraha v. Suri*, 2019 BCSC 1855 at paras. 68-73.
- [93] In *Campbell v. Banman*, 2009 BCCA 484 at para. 19, the Court of Appeal cited its earlier decision in *Ellis v. Star*, 2008 BCCA 164, in support of the observation that a "relatively minor adjustment of duties within a family will not justify a discreet assessment of damages. There will be applied a robust appreciation of household realities within a family and an understanding of the normal give and take that necessarily is part of family life."

- [94] Here, Mr. and Mrs. Cliff met, married and commenced living together after the Accident so there is no historical division of household responsibilities against which to measure their current circumstances. Mrs. Cliff testified that she is less capable of doing certain heavier tasks and finds this frustrating. There was no suggestion on the part of Mr. Cliff that he is unable or unwilling to contribute to basic household responsibilities, although he noted that it can sometimes be "challenging" to do so after working a long day.
- [95] In my view, the circumstances described by both Mrs. and Mr. Cliff reflect the "normal give and take" that is necessarily part of family life, particularly where both partners work. To the extent that Mrs. Cliff experiences difficulty in carrying out some tasks and feels that she is not contributing enough, that is in the nature of a loss of amenities and is properly addressed as part of the award for non-pecuniary damages. I am satisfied that the non-pecuniary damages award set out above properly encompasses and accounts for this claim.

Past Loss of Earnings

- [96] Mrs. Cliff missed some time after the Accident from her employment at Artex and, indeed, never returned to full-time work there. Mrs. Cliff gave some evidence that she received wage subsidy benefits during that period but no details were provided. The value of the time missed by Mrs. Cliff was calculated at \$12,615.36. The parties agreed that they will adjust that figure upon getting confirmation of the wage subsidy received by Mrs. Cliff.
- [97] The balance of the past loss claimed by Mrs. Cliff relates to her time at Field House beginning in January 2019. She claims the difference between what she would have earned if she was able to work full-time and what she actually earned working at 80%. As this is a loss of earning capacity claim, I will consider it alongside her claim to future loss of earning capacity below.

Loss of Earning Capacity

- [98] The Court of Appeal has discussed the principles governing claims for loss of earning capacity in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53, the court, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge as follows:

in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach or the capital asset approach

[Emphasis in original.]

[99] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his or her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.); and *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.

[100] The capital asset approach involves consideration of a number of factors such as whether the plaintiff:

- a) has been rendered less capable overall of earning income from all types of employment;
- b) is less marketable or attractive as a potential employee;
- c) has lost the ability to take advantage of all job opportunities that might otherwise have been open to them; and,
- d) is less valuable to him or herself as a person capable of earning income in a competitive labour market.

See: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.); *Gilbert* at para. 233.

[101] Applying the capital asset approach, courts have often awarded the equivalent of one or more years of a plaintiff's salary as the measure of damages: see e.g. *Miller* at paras. 136-40; *Mackie v. Gruber*, 2010 BCCA 464 at paras. 14, 18-20.

[102] As held by the Court of Appeal in *Perren and Morgan*, the key threshold question is whether the plaintiff has proven a real and substantial possibility that her earning capacity has been impaired.

[103] I am satisfied that Mrs. Cliff has met this threshold test. While she demonstrated the ability to work full-time hours upon her return from Hawaii, I accept that her condition in January 2018 was such that she was only able to take on an 80% position with Field House, despite there being the opportunity to work full-time. Continuing in the same position at this reduced level, at least for the present, is supported by the evidence of Dr. DeForge, Dr. Pullyblank and Dr. Crossman, as well as by the FCE conducted by Mr. Hosking.

[104] In terms of past loss of capacity, Mrs. Cliff seeks damages of \$11,129.94 (gross) for the period of January 2019 to the date of trial, which represents the difference between what she would have earned at Field House working full-time and what she actually earned working at 80%. She submits that the 20% difference constitutes her diminished capacity. I accept her claim for this amount, subject to the parties agreeing on the appropriate net amount.

[105] Mrs. Cliff seek a further award of \$850,000 for loss of future earning capacity. She notes that the present value of her earnings using her current salary through until age 67 (using Mr. Benning's multiplier) is \$770,000. She contrasts that with lifetime future earnings at \$45,000

per year, which is just above the full-time salary for Mrs. Cliff's current position (\$990,000); \$60,000 per year, which Ms. Vanderheide identified as a possible future salary (\$1,320,000); \$80,000 per year, also identified by Ms. Vanderheide as a possible future salary (\$1,760,000); and \$100,000 per year, identified by Dr. Pullyblank as the upper end of salaries available to someone with Mrs. Cliff's experience (\$2,200,000).

- [106] Assuming that Mrs. Cliff is never able to advance her career beyond her current salary, she submits that her future loss ranges from \$220,000, using the \$45,000 annual salary figure, to \$1,430,000, using Dr. Pullyblank's high end figure of \$100,000 per year.
- [107] In my view, Dr. Pullyblank's figure of \$100,000 per year is of no assistance. It is highly speculative that Mrs. Cliff could potentially ever earn that much, particularly in light of her evidence that she has no intention of leaving Field House. The \$60,000 and \$80,000 figures put forward by Ms. Vanderheide are also highly speculative. She described these positions as something her company might create in the future if it proceeds with expansion plans and that Mrs. Cliff might have an opportunity to take on these roles.
- [108] The evidence also does not establish that Mrs. Cliff is permanently disabled and will never be capable of working more than her current level. As I indicated above at para. 83, the best that can be said on the evidence is that her prognosis is uncertain.
- [109] While I again am satisfied that Mrs. Cliff has met the threshold test of proving a real and substantial possibility that her earning capacity has been impaired, given the uncertainty about both her prognosis and her career path, the earnings approach to assessing damages is of no assistance.
- [110] Rather, this is a case in which Mrs. Cliff meets the criteria established under the capital asset approach, specifically that she "has been rendered less capable overall of earning income from all types of employment" and "has lost the ability to take advantage of all job opportunities that might otherwise have been open".
- [111] Using this approach, I award Mrs. Cliff \$105,000, which equates to approximately three years' earnings based on her current salary. In doing so, I have considered various positive and negative contingencies that may affect her earnings, including the possibility that she will continue to improve and thus be able to work more, as well as the possibility that her condition will worsen.
- [112] I would add to this figure an additional \$17,500.00, which represents two years of continued employment at 80% of full-time and a corresponding income loss of \$8,750.00 per year. I do so in contemplation of the treatments described below that are intended to ameliorate Mrs. Cliff's physical and emotional issues. It is reasonable to expect that she will pursue those treatments over the next two years. Beyond that time frame, the future is very uncertain, hence the application of the capital asset approach to assessing damages.

[113] I therefore award a total of \$122,500.00 for loss of future earning capacity. In applying the capital asset approach in this manner, it is not necessary for me to resolve the differences between the multipliers put forward by Mr. Benning and Mr. Gosling.

Cost of Future Care

[114] The test for an award of future care costs is that the treatments or care items be reasonable and medically justified in the sense that they are intended to ameliorate the impacts of the plaintiff's injuries and to promote the physical and mental health of the plaintiff: *Owen v. Folster*, 2018 BCSC 143 at paras. 311-12; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[115] There are a number of recommendations for future care that are consistent amongst the various healthcare practitioners. I will address those first then will deal with some additional items claimed by Mrs. Cliff. Those items for which there is some consensus, and that I find are reasonable and medically justified, include:

- a) Consultation with an occupational therapist to assess Mrs. Cliff's work environment (recommended by Dr. DeForge, Dr. Pullyblank, Mr. Hosking and Dr. Crossman). I accept Mr. Hosking's cost estimate of \$900.00 for three two-hour sessions;
- b) Consultation and work with a kinesiologist to develop an active rehabilitation program (recommended by Dr. DeForge, Dr. Crossman and Mr. Hosking). I accept Mr. Hosking's cost estimate of approximately \$1,300.00 for 19 sessions with a kinesiologist. The intent of the kinesiology consultation is to facilitate a return to regular exercise and, in this regard, I also accept Mr. Hosking's recommendation for two years of gym membership and his cost estimate of approximately \$1,000. In my view, these services largely duplicate Mrs. Cliff's claim for additional physiotherapy and, as such, I do not accept that claim;
- c) Cognitive behavioural therapy to help Mrs. Cliff address her emotional issues (recommended by Dr. DeForge, Dr. Pullyblank, Dr. Crossman and Dr. Janke). Both Dr. Pullyblank and Dr. Janke recommend 10-20 sessions. Using the midpoint of 15 sessions and Mr. Hosking's cost estimate of \$150.00 per session, results in an award of \$2,250.00;
- d) Vestibular therapy to address Mrs. Cliff's dizziness and related symptoms (recommended by Dr. DeForge and Mr. Hosking). Mr. Hosking estimated a range of \$970.00-\$1,290.00 for 12-16 sessions. I award \$1,200.00; and,
- e) Antidepressant medications (recommended by Dr. Pullyblank and Dr. Janke). The evidence is that Mrs. Cliff has generally done well using the antidepressant medication Cipralex. The evidence establishes that the annual cost of this medication is \$204.00. Using Mr. Benning's multiplier (which is the same as Mr. Gosling's for the future care calculation), the plaintiff claims \$6,620.00 for a lifetime supply of the medication. However, I note Dr. Janke's opinion that Mrs. Cliff is likely to require "intermittent" psychiatric medication in the future, as distinct from constant and permanent medication. Taking account of Dr. Janke's opinion, I

award \$3,000.00 for the psychiatric medications.

- [116] In addition to the above items for which there is again considerable support throughout the medical evidence, Mrs. Cliff claims \$14,571 for continued use of the headache medicine Topiramate and \$115,013 for ongoing Botox injections. Dr. Robinson's opinion is that Mrs. Cliff should continue with the Topiramate and that Botox is "a reasonable consideration for her and probably the treatment of choice." He says further that if there is a "substantial response", the Botox treatments should continue indefinitely. Dr. DeForge also suggests a trial of Botox in consultation with Mrs. Cliff's neurologist. In contrast, Dr. Crossman doubted the utility of the Botox treatments given what he perceived to be the poor response by Mrs. Cliff to the initial injection she had received.
- [117] At the time of trial, Mrs. Cliff had only had one injection of Botox. Her evidence was that the Botox did not make her headaches "magically go away". She said she saw some improvement in that she had some "ok" days.
- [118] In my view, the evidence falls short of establishing that Mrs. Cliff will require, or benefit from, perpetual, lifetime injections of Botox. Her evidence does not suggest the "substantial response" referred to by Dr. Robinson that might justify indefinite Botox treatments. Further, and in any event, "indefinite" does not equate to permanent.
- [119] Moreover, to the extent that Mrs. Cliff's headaches are related to her physical and emotional issues, as set out above, an award of damages is being made to cover treatment modalities aimed at addressing those issues. It is reasonable to expect that improvement in her physical and emotional condition will also contribute to improvement with her headaches.
- [120] Allowing for a period of continued use of Topiramate as well as a further trial of Botox for a reasonable period of time, I award \$20,000.00 to cover headache medications and treatments.
- [121] As noted above, Mrs. Cliff seeks future care costs for regular household cleaning as well as heavier seasonal cleaning. For the reasons set out at paras. 91-95, I decline to make such an award.
- [122] She also seeks an award for the future cost of childcare of \$6,795.00, which represents the present value of two years of childcare, or one year each for two children. Mrs. and Mr. Cliff do not presently have children and both expressed some question about whether they will have children in the future. Further, there is nothing in the medical evidence to support the need for childcare assistance. At best, Mr. Hosking suggests that "[i]n the event that [Mrs. Cliff] has children, her physical status indicates the need for assistance for regular child care."
- [123] This claim is entirely speculative and I decline to award anything for childcare expenses.
- [124] In summary under this head, the items that I accept total \$29,650, which I round up to \$30,000.

Special Damages

- [125] Mrs. Cliff claims special damages in the amount of \$4,469.53 comprising her cost for various treatments, medications and associated expenses. The defendants submit that any expenses incurred after Mrs. Cliff returned from Hawaii in December 2016 are unrelated to the Accident.
- [126] There is a certain inconsistency in the defendants' position. As discussed below, they allege that Mrs. Cliff failed to mitigate her damages by failing pursuing recommended treatment, yet at the same time they take issue with the treatment that she did obtain.
- [127] I am satisfied that the special damages claimed by Mrs. Cliff were reasonably and properly incurred and I award the amount claimed.

Mitigation

- [128] The defendants submit that Mrs. Cliff failed to adequately mitigate her damages. In particular, they submit that she failed to pursue recommended psychological counselling as recommended by her family doctor and she discontinued taking her antidepressant medication without first getting proper medical advice.
- [129] In *Jason Chiu v. James Chiu*, 2002 BCCA 618 at para. 57, the Court of Appeal stated the test for mitigation as follows:

The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

- [130] I do not accept the defendants' position. With respect to counselling, the defendants rely on entries in the clinical records of Mrs. Cliff's family doctor indicating a referral to counselling in March of 2016. A further referral was made in May 2019. Mrs. Cliff acknowledged the referrals but said she chose not to go for counselling, in part because she preferred to rely on her faith.
- [131] In my view, there is insufficient evidence about the nature and objective of the referrals for psychological counselling to assess whether Mrs. Cliff acted reasonably in not pursuing such counselling. Specifically, there was no evidence from the referring physicians establishing why the referrals were made or what the intended course of treatment was. Further, apart from vague acknowledgements by certain of the medical witnesses that the sooner one commences therapy the better the anticipated result, there was no direct evidence that Mrs. Cliff's damages would have been reduced had she sought counselling sooner.

[132] With respect to her medication, while she discontinued taking Cipralelex on her own initiative, which Dr. Janke suggested was a contributing factor to the re-emergence of her psychiatric symptomology, it was for a relatively short period of time. Further, as noted by Dr. Janke, she was "not able to access appropriate medical care" through her clinic and, in any event, she resumed taking Cipralelex consistent with Dr. Janke's recommendation.

[133] The defendants have not established that Mrs. Cliff failed to mitigate her damages.

Conclusion

[134] In summary, Mrs. Cliff is awarded the following:

- a) Non-pecuniary damages: \$80,000.00
- b) Past loss of earnings: \$12,615.36*
- c) Loss of past earning capacity: \$11,129.94*
- d) Loss of future earning capacity: \$122,500.00
- e) Cost of future care: \$30,000.00
- f) Special damages: \$4,469.53

Total: \$260,714.83

(*To be adjusted by agreement of the parties.)

[135] Unless there are circumstances of which I am unaware, Mrs. Cliff is entitled to her costs at Scale B. If the parties cannot agree, they may make arrangements to speak to the matter within 90 days from the date of these reasons. Each party will provide a written submission, not to exceed ten pages double-spaced, one week in advance of any further hearing into costs.

"Skolrood J."

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