

CANADA / JUDGMENT

Hauk v. Shatzko

2020 BCSC 344

COURT

Supreme Court of British Columbia

DECIDED

11 March 2020

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2020 BCSC 344 Hauk v. Shatzko

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hauk v. Shatzko,

2020 BCSC 344

Date: 20200311

Docket: M54872

Registry: Kamloops

Between:

Susan Cindy Lou Hauk also known as Cindy Hauk

Plaintiff

And

Kevin Shatzko, Robert Edward Trawin and Verna May Trawin

Defendants

Before: The Honourable Mr. Justice Marchand

Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Defendants:

G. Thomson

K.N. Schymon-Martin

Place and Date of Trial:

Kamloops, B.C.

November 19-22 and 26-28 and December 3, 2019

Place and Date of Judgment:

Kamloops, B.C.

March 11, 2020

Introduction

- [1] Cindy Hauk was injured in a motor vehicle accident on September 20, 2015 at the intersection of Highway 5A and Rogers Way in Kamloops (the "accident"). She was in the front passenger seat of a pick-up truck being driven by her then boyfriend and now partner, Kevin Shatzko. Mr. Shatzko drove through a red light. The pick-up truck was t-boned by another vehicle just behind the right rear passenger door. Both vehicles suffered significant damage. Mr. Shatzko has admitted liability.
- [2] Mr. Shatzko is personally supportive of Ms. Hauk but his insurer takes issue with certain claims being advanced by her. To distinguish between Mr. Shatzko's personal involvement with Ms. Hauk and positions being advanced by his insurer, at times I will refer to Mr. Shatzko by name and at other times I will refer to "the defence".
- [3] At the time of the accident, Ms. Hauk was 49 years old. She was employed in a very demanding full-time position as an Executive Assistant ("EA") with School District No. 73 (the "school district" or "SD 73"). She was performing very well at work and was leading an active, healthy and social lifestyle.
- [4] Following the accident, Ms. Hauk coped with headaches and soft-tissue injuries to her neck, back and shoulders. She did not take any time off work until April of this year when she says that a combination of her injuries plus workplace issues caused her to take a "stress leave". She fears that she will not be able to return to work. She has drastically reduced her level of activity and community involvement. Her family, friends and colleagues say that she is not the same person.

- [5] Ms. Hauk has been diagnosed with chronic regional myofascial pain syndrome, cervical facet joint dysfunction, chronic post-traumatic headaches, major depressive disorder, somatic symptom disorder and adjustment disorder with anxiety, all causally related to the accident. In 2018, Ms. Hauk developed right lateral epicondylitis (more commonly known as tennis elbow). She adduced expert evidence to establish that this was "facilitated" by her accident-related injuries.
- [6] Ms. Hauk seeks substantial damages for her pain and suffering, past income loss, loss of future earning capacity, future homemaking costs, cost of future care and special expenses. She also advances an in-trust claim in relation to Mr. Shatzko.
- [7] The defence admits that Ms. Hauk is currently off work due, in part, to her accident-related injuries but takes issue with the extent of her injuries and the damages she seeks. More specifically, subject to appropriate causation and mitigation deductions, the defence admits Ms. Hauk's past income loss as claimed, and acknowledges that she is entitled to relatively modest damages for her pain and suffering, loss of future earning capacity, cost of future care and special expenses. The defence denies that Ms. Hauk is entitled to any award for future homemaking costs. The defence also denies that the circumstances warrant an in-trust award.
- [8] The defence submits that Ms. Hauk has not undertaken all recommended treatment and has not plateaued. With further treatment, the defence submits that Ms. Hauk should be able to return to her pre-accident level of activity and employment.
- [9] The defence also submits that a number of other factors would have negatively affected Ms. Hauk even if she had not been injured in the accident. Foremost amongst these was a short-term but significant increase in Ms. Hauk's typing duties in a non-ergonomic setting, which the defence submits caused Ms. Hauk's tennis elbow.
- [10] Finally, the defence takes issue with a few of the special expenses claimed by Ms. Hauk. Mostly, these relate to expenses that the defence submits are not medically justified.

Personal Background and Pre-Accident Condition

- [11] Ms. Hauk is currently 54 years old. She was born and raised in Kamloops. Her father died about 12 years ago. Her mother, Luella Steffan, is 89 years old and lives in a seniors' residence in Kamloops. Ms. Hauk's father was a welder at Weyerhaeuser and her mother was a retail sales clerk at Sears. Both retired when they were 65. Ms. Hauk's older brother, Jan Steffen, lives with his wife and four children in Kelowna.
- [12] Ms. Hauk inherited a strong work ethic from her parents. She began working at a local restaurant when she was 13 or 14 years old. Over the next several years, she waitressed, bartended, washed dishes, made deliveries, prepared food, and even organized and ran banquets.

- [13] During high school, Ms. Hauk completed a practicum at a local law firm. After her graduation in 1983, the law firm offered Ms. Hauk a position. She worked for the law firm for 14 years. Over that time, she worked in the areas of conveyancing, corporate, wills and estates, land development and litigation. Though she never received any formal training, she worked her way up to the position of senior legal assistant. For two or three years, Ms. Hauk also ran a home-based scrapbooking business.
- [14] Ms. Hauk married Greg Hauk in 1989. The Hauks had two children together, Jayson who is now 26 and Evan who is now 25, and led a very busy life. Mr. Hauk worked very long days six and sometimes seven days per week. As a result, Ms. Hauk was primarily responsible for the children and got them to all of their appointments and activities.
- [15] Over the years, the Hauks enjoyed camping, hiking, boating, fishing, waterskiing, alpine and cross-country skiing, snowshoeing, snowmobiling, dirt biking, quadding and travelling. They also developed three properties. Ms. Hauk was very involved and "absolutely enjoyed" all aspects of building a cabin at East Barriere Lake about eight to ten years ago.
- [16] In 1998, Ms. Hauk was diagnosed with leukemia. Jayson was five and Evan was three and a half. Ms. Hauk spent substantial time receiving treatment in Vancouver. She went through two rounds of high dose chemotherapy to kill her bone marrow and then received a bone marrow transplant from her brother. She experienced some "depression" during this time (and from time to time afterwards). This "depression" was not clinically diagnosed and Ms. Hauk did not receive any treatment for it. In any event, on returning home from her cancer treatment, Ms. Hauk organized a surprise 50th wedding anniversary celebration for her parents.
- [17] Ms. Hauk's cancer treatment has proven to be a complete success. She also considers it to have been a life-changing experience. Being off work for two years really made her look at how she was living her life. She wanted to spend more time with her husband and children and thought that working for the school district would be a good fit. She made some inquiries with the Human Resources Manager for the school district and realized that she had fallen behind the latest technology. She took a number of training courses and, in September 2000, was hired as a "Relief Steno 1". Ms. Hauk was on call for the next two years covering clerical positions throughout the school district if anyone was ill.
- [18] In September 2002, Ms. Hauk was hired as the "Secretary-in-charge" at Westwold Elementary. As it was a small rural school with limited staff, Ms. Hauk had a wide variety of responsibilities. She was the school secretary, librarian and, when needed, custodian. Even though she had no formal training, she was also asked to assist with an autistic child.
- [19] In November 2006, Ms. Hauk took a new position as a "Steno 3" in the school board office as the Confidential Administrative Assistant to Assistant Superintendent, Marilyn Hogg (now McLean) and two District Principals. She worked fewer hours but was paid a higher wage and no longer had to commute to Westwold. Her job quickly grew from 20 to 35 hours per week plus some overtime. Ms. Hauk often worked extra hours without claiming them. She

testified that she was not a clock watcher and just wanted to get the job done. She also felt that if she claimed lots of overtime hours, she would be looked at as incompetent.

- [20] Outside of work, Ms. Hauk remained extremely busy. She was actively involved in landscaping a one acre property that she owned with Mr. Hauk in the Barnhartvale neighbourhood in Kamloops. She enjoyed cooking for others and regularly hosted large social gatherings of up to 40 people on special occasions. She was active with crafting and hobbies such as photography, woodworking, sewing, scrapbooking and baking. She took Zumba classes twice per week, went to the gym, ran, walked and hiked. She did fun activities with friends like going out for lunch, or participating in murder mysteries.
- [21] In about 2010, Ms. Hauk injured her left shoulder while waterskiing. With physiotherapy and acupuncture, Ms. Hauk fully recovered within one year.
- [22] In 2012, Ms. Hauk began volunteering with the Kamloops Mounted Patrol. She had a horse when she was younger and had always wanted another. She was at Riverside Park one night and spoke to the Director of the Kamloops Mounted Patrol, Rick Wanless. Very soon after, she submitted an on-line application and was invited to join. As a Kamloops Mounted Patrol volunteer, she was required to groom, tack up and transport the horses from Mr. Wanless' property in Hefley Creek to Kamloops. She then rode to greet visitors arriving in Kamloops on the Rocky Mountaineer and/or in Riverside Park. Following each ride, she had to remove tack and transport the horses back to Mr. Wanless' property. Ms. Hauk rode up to two to three times per week when time allowed.
- [23] In 2012, Ms. Hauk's marriage started to break down. Ms. Hauk felt like a failure and, being a private person, kept her difficulties to herself. Realizing that her marriage was unlikely to last, she took steps to take care of herself financially. In particular, she took on-line courses to increase her knowledge in business and administration in the hopes that doing so would help her to advance her career.
- [24] Ms. Hauk separated from Mr. Hauk in October 2013. After the Hauks sold their home, Ms. Hauk moved in with her mother. Ms. Hauk largely looked after her mother's house and yard work. Ms. Hauk also helped her mother "get rid of" 50 years' worth of memories and personal effects prior to her mother's move into the Ponderosa Apartments in Kamloops.
- [25] In January 2015, Ms. Hauk moved into her excluded (i.e. non-union) position as an EA with the school district. She primarily supported the Secretary Treasurer, Kelvin Stretch, but also supported the Superintendent and the Board itself. She regularly worked overtime, particularly when there were Board meetings, events or workshops. She was paid double time for her overtime hours or could take time off in lieu.
- [26] Ms. Hauk's EA position came with a number of benefits such as medical, dental and extended health benefits, a pension, life insurance, free parking and a cell phone. She was initially paid \$57,000 per year, which represented a significant pay increase from her previous union position.

- [27] Ms. Hauk met and began dating Mr. Shatzko in the spring of 2015. By all accounts they had and continue to have a good relationship.
- [28] Prior to the accident, Ms. Hauk was, overall, in excellent health. She remained on the hormone replacement therapy that she began following her chemotherapy in 1998. She occasionally felt down and had been experiencing numbness in her left big toe for one to two years. She had no issues with neck, back or shoulder pain, depression, anxiety, headaches or sleep. She was not on any pain medication. Her mood was happy and optimistic. She was enjoying her new job and her new relationship. She was looking forward to tackling many new challenges.

The Accident and the Immediate Aftermath

- [29] On Sunday, September 20, 2015, Mr. Shatzko offered to help Ms. Hauk haul some yard waste to the land waste depot on McGill Road. He was driving his 2004 Ford F150 pickup down Highway 5A with Ms. Hauk riding in the front passenger seat. Ms. Hauk was wearing her seatbelt and was looking down at her phone.
- [30] At the intersection of Highway 5A and Rogers Way, Mr. Shatzko yelled something. Ms. Hauk looked up but, by that time, Mr. Shatzko's pickup had already been t-boned just behind the rear passenger door by a 2012 GMC Terrain being driven by Verna Trawin. As mentioned at the outset, Mr. Shatzko had driven through a red light.
- [31] After the impact, Mr. Shatzko's pickup spun around. Ms. Hauk's head banged on the passenger side door and window but she did not lose consciousness. The air bags went off. Ms. Hauk described that there was a "pretty hard impact". Mr. Shatzko's pickup sustained extensive damage and was written off.
- [32] Following the accident, Ms. Hauk says that she was stunned and probably in shock. She became aware of her surroundings and felt the need to get out of the vehicle as soon as possible. She was afraid that the vehicle might ignite or be hit by another vehicle. Ms. Hauk does not recall exiting the vehicle. Her next memory is standing on the sidewalk next to it.
- [33] Firefighters attended the scene. Ms. Hauk knew one of the firefighters and felt quite embarrassed. The firefighters asked Ms. Hauk how she was feeling. Ms. Hauk told them that she was fine. The firefighters did not offer to take Ms. Hauk to the hospital. Mr. Shatzko called his aunt who picked up Ms. Hauk and Mr. Shatzko and took them back to Ms. Hauk's home.
- [34] Later that evening, Ms. Hauk began developing symptoms. She had a headache and the muscles in her neck and shoulders became very tight and tender. She and Mr. Shatzko went to the Emergency Room at the Royal Inland Hospital where both were assessed. Following x-rays, the attending physician confirmed that Ms. Hauk had not suffered any broken bones and that she had likely suffered whiplash soft-tissue injuries. The attending physician recommended that Ms. Hauk take anti-inflammatory medication as needed and mentioned

that if her symptoms persisted for more than a couple of weeks, she would likely need massage therapy or physiotherapy.

- [35] Ms. Hauk thinks that she probably took anti-inflammatory medication that night. She believes that she went to work the next day.

Injuries, Treatment and Recovery

- [36] After the accident, Ms. Hauk continued to experience neck, back and shoulder pain. She also suffered from headaches, and at times migraines, that she related to her neck pain. Her sleep became disrupted.
- [37] As a private person, she kept the accident and her injuries mostly to herself. She continued to work but her injuries affected all aspects of her life. She had reduced mobility. There were days when she could not hold her head up and nights when she had to hold her head to turn in bed. At times, Ms. Hauk needed Mr. Shatzko's help to get of bed and get dressed. She sometimes went to her mother's on her lunch break to take a nap.
- [38] Occasionally, Ms. Hauk's pain and headaches prevented her from going to work. For some time she was able to attend Zumba classes but she generally became less active around the house and yard. She discontinued her volunteer work with the Kamloops Mounted Patrol. She hosted fewer dinners and gatherings. She connected less often with her friends. Her mood, energy and enthusiasm generally decreased.
- [39] As recommended by the Emergency Room physician, Ms. Hauk began massage therapy for her accident-related injuries two and a half weeks after the accident. She has continued with regular massage therapy since that time.
- [40] In spite of her accident-related injuries, Ms. Hauk continued to perform well at work. In January 2016, Mr. Stretch reported that Ms. Hauk's position was "extremely complex" and had a "steep learning curve". Mr. Stretch also reported that he had been impressed with how quickly Ms. Hauk had learned her new role. As a result of her very positive performance review, Ms. Hauk moved up from "step 1" to "step 4" on the excluded staff pay grid and she received a significant pay increase.
- [41] Following the accident, Ms. Hauk had regular though not frequent appointments with her family physician. She raised accident-related concerns from time to time. On August 9, 2016, Ms. Hauk's family physician referred her to a kinesiologist and Ms. Hauk saw a kinesiologist on October 5 and 20, 2016.
- [42] On October 26, 2016, Ms. Hauk broke a toe at work. She missed a few hours of work but was back in the office the following day. The school district's Disability and Attendance Support Manager purchased a "scooter" for Ms. Hauk that assisted with Ms. Hauk's mobility.

- [43] While Ms. Hauk recovered from her broken toe, associated bone density testing revealed that she had osteoporosis. Ms. Hauk was referred to a rheumatologist in relation to bone density concerns. Ms. Hauk saw the rheumatologist two or three times in 2017. The rheumatologist recommended several medications to Ms. Hauk but Ms. Hauk declined to take them due to her concern that the risks and side effects would be worse than the condition.
- [44] Ms. Hauk had a number of routine follow up appointments concerning her leukemia in 2017. Apparently these are, happily and finally, no longer required.
- [45] On a referral from her family physician, Ms. Hauk attended an appointment with a neurosurgeon on March 1, 2018 regarding her chronic neck pain. The neurosurgeon concluded that Ms. Hauk's neck pain was "mainly myofascial" and referred her to a pain specialist named Dr. De Wet for facet blocks.
- [46] At about this time, work was extremely busy. Alison Sidow had become the Superintendent of the school district in 2016 and entered the job with an aggressive agenda. In April 2018, Ms. Hauk attended Board meetings in rural locations on four consecutive nights. She had to organize the materials and set up for these meetings. She understood that she was required to keep verbatim minutes. As a result, she engaged in what I would describe as excessive keyboarding in a non-ergonomic environment. She developed tennis elbow and was off work for six weeks. On the recommendation of the school district's Health and Safety Officer, she made a claim for compensation through WorkSafe BC.
- [47] On May 16, 2018, Ms. Hauk saw Dr. De Wet at his office in Salmon Arm. He thought Ms. Hauk would benefit from facet joint injections and performed them "then and there". Unfortunately, Ms. Hauk reacted badly to the injections. According to Ms. Hauk, the injections caused an increase in her pain, primarily in her neck where the injections had been done.
- [48] Ms. Hauk attended a further appointment with Dr. De Wet on June 13, 2018. Dr. De Wet recommended that Ms. Hauk see a psychiatrist, take anti-depressant medication, undergo cognitive behavioural therapy ("CBT"), engage in an active rehabilitation program and see a physiotherapist.
- [49] Ms. Hauk discussed Dr. De Wet's recommendations with her family doctor. She was hesitant to see a psychiatrist because she knew the likely outcome would involve anti-depressants. Given her cancer history, she was fearful of taking medications. With her family doctor's input, she settled on a different "holistic" path.
- [50] On July 19, 2018, Ms. Hauk was assessed by Melissa West at the Change Your Pain ("CYP") clinic in Kamloops. CYP offers an interdisciplinary program to recovery from motor vehicle accidents. Ms. West is a kinesiologist and registered massage therapist who owns, directs and offers services at CYP.

- [51] Ms. West recommended a recovery program for Ms. Hauk that focused on pain management, core stabilization, functional strengthening and stretching specific to Ms. Hauk's occupational demands. Ms. West described the program as "mostly an active rehabilitation program".
- [52] Starting on August 1, 2018, Ms. Hauk attended the CYP clinic very regularly until December 13, 2018. Ms. Hauk had numerous kinesiology and massage therapy sessions with Ms. West. She had eight sessions with a counsellor that focused on nervous system desensitization, mindfulness and coping strategies. She also saw a naturopath, mostly for Vitamin B injections, which Ms. Hauk understood would help with her stress levels and pain.
- [53] A CYP Progress Report dated December 17, 2018 indicated that Ms. Hauk had completed the recovery program and made significant progress. In the Progress Report, Ms. West recommended that Ms. Hauk continue with "a more strength focused movement therapy program" and further "manual therapy", which I understand to mean massage therapy.
- [54] At the same time, on referral from Dr. De Wet, Ms. Hauk attended an initial consultation appointment with a physiotherapist on September 18, 2018. Ms. Hauk then had regular physiotherapy treatments, which initially included acupuncture and later included intramuscular stimulation ("IMS").
- [55] In February 2019, Ms. Hauk and Mr. Shatzko enjoyed a four week holiday in south-east Asia. Ms. Hauk carried her belongings in a backpack because she found that easier than pulling a suitcase. There was no "backpacking" in the sense of hiking with a backpack involved. Ms. Hauk was able to relax and felt "slightly refreshed" for a short period of time but her headaches and pain were still there.
- [56] On April 2, 2019, Ms. Hauk resumed attending the CYP clinic. She had a massage therapy session with Ms. West that day and again on April 17, 2019. She also attended four one hour "CoreFit" sessions with Ms. West on April 5, 11, 18 and 26, 2019.
- [57] April 26, 2019 was a Friday. She was expected to produce school board meeting agendas and supporting materials that day. Unfortunately, there were some delays in getting the materials to Ms. Hauk. Ms. Hauk attended her CoreFit appointment with Ms. West over the lunch hour. At 3:30 p.m. that afternoon she attended a dental appointment that had been booked for over a year. She was then required to return to work to prepare the agendas that evening. That was the last time Ms. Hauk worked.
- [58] The following Monday, April 29, 2019, Ms. Hauk called in sick. She has not returned to work since. Ms. Hauk testified that she was in pain every day. She was not sleeping well. She had always been able to meet the demands of her position and had been trying to push through. She had, however, come to the point of feeling "very overwhelmed". She had what she described as a "breakdown". She had panic attacks. She was crying. She could not control how she was feeling any more.

[59] The next day, April 30, 2019, Ms. Hauk attended a physiotherapy appointment. On May 1, 2019, Ms. Hauk's family physician put her on "stress leave". Since then, Ms. Hauk has had several CoreFit sessions and regular massage therapy and physiotherapy, including acupuncture. She has had several appointments with her naturopath. She has also had a number of counselling sessions with a new counsellor named Gerald Loewen. She began taking anti-depressant medication in August 2019.

Current Condition

- [60] Currently, Ms. Hauk wakes up daily with a headache of some sort. Sometimes her headaches are mild but sometimes they are quite severe to the point that she is unable to get out of bed without taking pain medication to calm her headache down.
- [61] Ms. Hauk continues to experience pain from the base of her skull into her neck, shoulders, upper back, mid back and lower back and the side of her arms. She has pain in her left hip and occasional numbness in her fingers and toes on the right hand side.
- [62] Since the accident, Ms. Hauk does not sleep well. She wakes up for one to three hours in the middle of the night before falling back to sleep. Though she then sleeps longer than usual, she wakes feeling tired. She takes naps during the day but still has very low energy.
- [63] Ms. Hauk's emotions are "a bit of a mess". She is very sad most of the time. She has a hard time focusing and is forgetful, which she finds embarrassing. She feels anxious, particularly in a car. She has become a terrible back seat driver. Though she prefers to drive herself, she is not a confident driver. Her limited neck mobility makes it difficult for her to do shoulder checks. She is afraid that she will not see someone and will injure them when she is changing lanes or backing up.
- [64] To address her symptoms, Ms. Hauk attends massage therapy and physiotherapy on alternate weeks. She finds that these therapies provide temporary relief. Ms. Hauk stretches every day at home. Ms. Hauk is receiving regular counselling from Mr. Loewen through her Employee Assistance Program.
- [65] Despite some initial reluctance, Ms. Hauk has been on anti-depressant medication since August 2019. The anti-depressant medication has not helped with Ms. Hauk's pain, sleep and memory problems but has reduced her anxiety and has helped level her mood somewhat. Ms. Hauk is no longer crying but she also feels little emotion and finds it hard to motivate herself. She does not seem to care as much about things such as being organized and keeping her house clean. She describes not caring as "not an ideal feeling".
- [66] Ms. Hauk acknowledges that her grandchildren bring her joy but she says that she does not have much fun any more. Ms. Hauk no longer wants to see people. She "pretty much" hides in her house. She cannot think of anything she wants to do, and has a hard time reading a book or concentrating long enough to enjoy watching television. Ms. Hauk has recently attempted crocheting but some days is unable to do so.

- [67] As long as she does not overdo it, Ms. Hauk is able to go for daily walks. More vigorous activities aggravate her symptoms. She relies on Mr. Shatzko extensively around the house. Despite his full time work, he is primarily responsible for house and yard work, including cooking, cleaning and shopping. Ms. Hauk no longer hosts family dinners unless Mr. Shatzko is available to help.
- [68] Though her pain has reduced her libido to some degree, Ms. Hauk continues to have a good relationship with Mr. Shatzko. She says that he has been "wonderful" but she also describes that things are "hard". She is no longer the happy person she used to be and she is afraid that Mr. Shatzko is going to get fed up with all of the things he has had to take on.
- [69] Despite all of her treatment and being off work since April 29, 2019, Ms. Hauk believes that her condition is getting worse not better. Some days are better than others but she remains off work on the written recommendation of her family physician. No date has been set for her to return to work. She is receiving long term disability benefits.

Expert Evidence

- [70] Ms. Hauk submitted expert reports from four independent assessors, namely a physiatrist, psychiatrist, vocational rehabilitation consultant and occupational therapist ("OT"). Ms. Hauk also submitted an expert report from a labour economist, Mark Szekely.
- [71] The defence submitted two expert reports, one from a physiatrist who conducted an independent assessment of Ms. Hauk and one from an OT who did not. The defence OT prepared a critique of the report prepared by Ms. Hauk's OT without any contact with Ms. Hauk. The defence also had Ms. Hauk independently assessed by a psychiatrist but did not tender any evidence from that psychiatrist.
- [72] With the exception of Ms. West, neither party called any of the health professionals and/or therapists involved in Ms. Hauk's care. All of the experts testified.
- [73] With the exception of Ms. Hauk's labour economist, I will now summarize the evidence of Ms. Hauk's experts. I will then summarize the evidence of the defence experts. I will deal with the labour economist's report within my analysis of Ms. Hauk's pecuniary claims.

Ms. Hauk's Physiatrist - Dr. Maryana Apel

- [74] Dr. Maryana Apel is a physiatrist who was qualified to give expert opinion evidence in the field of medicine with special expertise in physiatry. Dr. Apel reviewed relevant medical and treatment records, assessed Ms. Hauk on October 27, 2017 and May 23, 2019, and prepared two reports on the same dates as the assessments.
- [75] At the time of Ms. Hauk's assessments by Dr. Apel, her primary complaints were neck pain in the upper and mid trapezius muscles radiating towards the epaulette area of both shoulders, and depression.

- [76] On examination during both assessments, Dr. Apel elicited pain responses from Ms. Hauk at "typical trigger points situated in her shoulder girdle, neck, [and] back of the head areas". Dr. Apel described Ms. Hauk's trigger points as being "hyper-tense muscles".
- [77] On examination during both assessments, Dr. Apel also elicited pain responses from Ms. Hauk at the C2-3 and C3-4 bilateral facet projections and found "very subtle residual features of left C4-5 radiculopathy". Dr. Apel found that Ms. Hauk's pain response was more significant at the C3-4 than the C2-3 level, with the right side being more affected than the left. Dr. Apel diagnosed Ms. Hauk with facet joint dysfunction at the C2-3 and C3-4 levels, worse on the right. In Dr. Apel's opinion, Ms. Hauk's facet joint dysfunction was directly caused by the accident.
- [78] Based on Ms. Hauk's constellation of symptoms, Dr. Apel diagnosed Ms. Hauk as suffering from "chronic regional myofascial pain syndrome affecting the upper quadrants bilaterally, worse on the right, on the background of upper quadrants myalgia." As I understood it, this means that Ms. Hauk has specific significant pain related to various trigger points on top of general pain throughout the whole area of her complaints. In Dr. Apel's opinion, Ms. Hauk's chronic regional myofascial pain syndrome and myalgia of the upper quadrants bilaterally was directly caused by the accident.
- [79] I took Dr. Apel to accept that Ms. Hauk's headaches are associated with her neck pain and to be of the view that they have therefore also been directly caused by the accident.
- [80] On examination during the second assessment, Dr. Apel found that Ms. Hauk had developed right tennis elbow that was mild to moderate in severity and chronic in duration. In Dr. Apel's opinion, Ms. Hauk's tennis elbow was caused by a combination of Ms. Hauk's accident-related injuries, an increase in her workload and working in a non-ergonomic environment.
- [81] In Dr. Apel's opinion, Ms. Hauk probably would not have developed tennis elbow without her increased work demands and non-ergonomic work environment. While Dr. Apel could not say that Ms. Hauk would not have developed tennis elbow if she had not been injured in the accident, Dr. Apel was of the view that Ms. Hauk's accident-related injuries "facilitated" her tennis elbow, meaning that Ms. Hauk was more prone to develop tennis elbow as a result of her accident-related injuries.
- [82] Dr. Apel was also of the view that the accident-related injuries have impaired Ms. Hauk's recovery from her tennis elbow. If Ms. Hauk had only been affected by her short-term increased workload, Dr. Apel testified that she would have expected Ms. Hauk to have acute tennis elbow for up to eight weeks. The fact that Ms. Hauk's tennis elbow is a recurrent/chronic problem indicates that the combination of Ms. Hauk's accident-related injuries and her short-term increased workload has created a chronic problem.
- [83] As I understood Dr. Apel's reports and testimony, other complaints, such as numbness and/or tingling in Ms. Hauk's extremities, were not caused by the accident.

- [84] In Dr. Apel's opinion, Ms. Hauk's accident-related injuries "interfere with her ability to perform sustained activities, such as sitting, standing or lying down" as well as "her ability to manage sustained positions, especially in a non-ergonomic environment". Dr. Apel also reported that "[a]ll activities with significant torque or high impact potentially also would aggravate her cervical pain, hence increase [her] headaches and shoulders' pain."
- [85] In her first report, Dr. Apel made a number of recommendations to address Ms. Hauk's symptoms and improve her "comfort, level of fitness, functional abilities and life enjoyment." In particular, Dr. Apel recommended:
1. An active rehabilitation program, including strengthening and stretching exercises, "with attention to core muscles and cardiovascular conditioning via low impact activities" such as rowing or modified swimming;
 2. "[T]ime contingent passive therapy", emphasizing deep tissue sensitization massage;
 3. "[J]udicial pre-emptive analgesia";
 4. C3-4 cervical facet injection;
 5. Botulinum toxin ("Botox") injections in trigger points;
 6. Ergonomic modifications such as neck and back supports for sustained positions and a sit-stand desk; and
 7. Possibly professionally guided cervical traction.
- [86] In her second report, Dr. Apel also recognized that Ms. Hauk's emotional difficulties were negatively affecting Ms. Hauk's pain and engagement in rehabilitation. Dr. Apel recommended that Ms. Hauk be assessed by a psychiatrist to consider pharmacological management of her depressive symptoms in addition to counselling. Dr. Apel noted that exercise programs with cardiovascular, strengthening and stretching components have been found to be as beneficial for the management of emotional/psychological symptoms as medication and counselling.
- [87] Dr. Apel was not critical of Ms. Hauk's rehabilitation efforts but she was somewhat critical of some of the treatment Ms. Hauk has received.
- [88] In Dr. Apel's view, Ms. Hauk's active rehabilitation program and ongoing exercises were not what Dr. Apel envisioned when she wrote her first report. In Dr. Apel's view, Ms. Hauk had been focused mostly on stretching with some cardiovascular work without appropriate strengthening exercises.
- [89] Further, Dr. Apel was not satisfied that the facet blocks performed by Dr. De Wet had been done appropriately and did not consider the ongoing IMS that Ms. Hauk was receiving to be appropriate.

- [90] In terms of the facet blocks, Dr. Apel explained that these are typically done to eventually burn the nerves going into the facet joint. As the nerves grow back, they are insensitive which opens a window of opportunity to pursue a more aggressive exercise program. In that way, when the nerves have grown back, the patient's neck will be better.
- [91] In Ms. Hauk's case, Dr. Apel could not tell from the available clinical information whether Dr. De Wet used appropriate imaging guidance to make the injections in the correct location. It also appeared that Dr. De Wet injected at the C2 to C5 levels, rather than at only the C3-4 level. Further, facet injections are normally done in conjunction with the patient keeping a pain diary but that does not appear to have been done in Ms. Hauk's case.
- [92] Dr. Apel was concerned that Ms. Hauk's increase in pain following Dr. De Wet's facet injections were the result of technical deficiencies in the procedure. In particular, Dr. Apel was concerned that injections in the wrong location and across the C2 to C5 levels may simply have resulted in post-injection soreness and a false-negative result.
- [93] Finally, Dr. Apel considered the IMS Ms. Hauk received to be a poor substitute for Botox injections. Dr. Apel explained that Botox is a muscle paralyzing toxin. When properly injected into trigger points, the hyper tense muscles within the trigger point are weakened and become less tense, allowing for the muscles to be stretched more. IMS is intended to do something similar. Dry needles are inserted into the trigger points in an effort to destroy muscle fibre with the needle. The problem is that if the procedure is repeated too frequently, the muscle starts to scar and scars cannot be stretched. Dr. Apel is against IMS in Ms. Hauk's case.
- [94] Dr. Apel reported that Ms. Hauk was "somewhat improved" between her first and second assessments. These improvements were, however, limited to reduced cervical radiculopathy (which was not accident-related in any event) and marginal improvements in the range of motion in her neck. These improvements may have been due to Ms. Hauk being off work, the short-term effects of recent treatments or warmer weather at the time of the second assessment.
- [95] Moving forward, Dr. Apel is of the view that Ms. Hauk can make improvements if she follows Dr. Apel's treatment recommendations. In her second report, Dr. Apel stated that Ms. Hauk's condition should not worsen and "largely Ms. Hauk should be able to return to her preferred level of avocational activities". That said, Dr. Apel recognized that Ms. Hauk's symptoms may flare up if exposed to physical or psychological stress. While Dr. Apel hopes that the recommended treatment will prevent flare ups, if they occur "time contingent massage, physiotherapy, injections, increase of pharmacological care should be helpful."

Ms. Hauk's Psychiatrist - Dr. Raymond Ancil

- [96] Dr. Raymond Ancil is a psychiatrist who was qualified to give expert opinion evidence in the field of medicine with special expertise in psychiatry. Dr. Ancil reviewed relevant medical and treatment records, assessed Ms. Hauk and interviewed Mr. Shatzko on July 4, 2019, and prepared a report dated August 2, 2019.
- [97] At the time of the assessment, Ms. Hauk had a number of physical and emotional complaints. She also shared with Dr. Ancil how these issues have affected her.
- [98] In terms of physical complaints, Ms. Hauk reported having headaches, neck pain, upper back pain radiating down both arms, upper chest pain, and residual tingling and numbness in both arms. In terms of emotional complaints, Ms. Hauk reported feeling irritable, easily overwhelmed, depressed, tearful, anxious and hyper-vigilant. Ms. Hauk also reported having felt bullied and harassed at work, which contributed to her leaving work in April 2019.
- [99] As a result of her physical and emotional complaints, Ms. Hauk reported that she has low energy, disturbed sleep, and poor concentration and memory. She shared that she has become less physically active resulting in weight gain. She also reported struggles with her housework, gardening, other leisure activities and her sex life. Of course, she also informed Dr. Ancil that she was off work.
- [100] Based on his assessment, Dr. Ancil diagnosed Ms. Hauk with several psychiatric and medical disorders that were all caused by the accident. Specifically, Dr. Ancil diagnosed Ms. Hauk with:
- Major Depressive Episode, chronic, moderate severity;
 - Somatic Symptom Disorder ("SSD") - predominantly pain;
 - Adjustment Disorder with anxiety - chronic;
 - Chronic pain; and
 - Post-Traumatic Headaches - chronic.
- [101] Dr. Ancil explained that the term "Major Depressive Episode" is used to describe a depressive illness. He explained that there are four clinical ranges of depression. The first range describes people who feel sad or depressed but are clinically within the normal range of human behaviour. After that, there are mild, moderate and severe ranges. A person in the severe range may require hospitalization. A person in the moderate range, like Ms. Hauk, requires treatment but on an out-patient basis.
- [102] Dr. Ancil explained that the term "SSD - predominantly pain" describes a psychiatric illness when a person has undue focus on their pain that results in major distress and dysfunction. As a psychiatric illness, there does not need to be an underlying medical issue though in Ms. Hauk's case there is. The causes of SSD are complex and include organic or medical

causes such as injury, stress, functional impairment, loss and emotional distress. In Ms. Hauk's case, her SSD has been caused by her injuries, functional impairments and the stress and distress associated with them, which in turn increase her perception of the severity of her symptoms.

- [103] Dr. Ancil explained that, in Ms. Hauk's case, the term "Adjustment Disorder with anxiety" refers to post-trauma anxiety that has features of but does not rise to the level of post-traumatic stress disorder. Dr. Ancil further explained that people with Adjustment Disorder - anxiety can nevertheless be quite dysfunctional.
- [104] While the term "chronic pain" needs no explanation, Dr. Ancil noted that chronic pain is itself a stressor. Like other forms of stress, the stress associated with chronic pain impacts the nervous system. For people like Ms. Hauk, chronic pain changes the nervous system in ways that bring about anxiety and depression, which in turn exacerbate the chronic pain.
- [105] From a neurophysiological perspective, chronic pain is associated with "recruitment" and "central sensitization". Dr. Ancil explained that "recruitment is where non-injured areas become perceived as painful as non-affected pain nerve fibres are induced to react by the constant firing of adjacent affected pain fibres." Dr. Ancil explained that "central sensitization is a condition in which the brain and nervous system are in a persistent state of heightened reactivity (which) lowers the threshold for the perception of pain and will maintain complaints of pain even after the initial injury has healed." As a result, persons with central sensitization may experience pain from events that would normally not be painful and may perceive a stimulus that is typically painful as more painful than would ordinarily be the case. Essentially, the brain becomes over-sensitized and begins to interpret every input as painful.
- [106] Dr. Ancil explained that the relationship between chronic pain and depression is complex. He explained that the neurochemistry and neurophysiology of chronic pain and depression overlap such that the two often co-exist.
- [107] Dr. Ancil made clear that the term "post-traumatic headache" does not refer to a brain injury and that Ms. Hauk does not have a brain injury. Rather, Ms. Hauk has headaches associated with the neck injury she suffered in the accident. In Dr. Ancil's experience, these types of headaches are expected to "relapse and remit" over the longer term and will be exacerbated by fatigue, physical effort and stress. If Ms. Hauk's neck injury is not successfully treated, her post-traumatic headaches are likely to persist.
- [108] Dr. Ancil noted in his report that post-traumatic headaches have a poorer outcome than non-traumatic headaches. Patients with post-traumatic headaches tend to have increased frequency of headaches, more disability and greater propensity for unstable mood, depression and anxiety, as has happened with Ms. Hauk.

- [109] In Dr. Ancil's opinion, pre-accident history of some sort of depression may indicate that Ms. Hauk had a pre-existing vulnerability to developing psychiatric consequences from the accident. Nevertheless, in Dr. Ancil's opinion, the accident was the only reasonable explanation for the emergence and persistence of Ms. Hauk's post-accident complaints and functional impairments. In Dr. Ancil's view, Ms. Hauk's accident-related injuries have negatively impacted her level of function at work, at home, and in her leisure and social activities.
- [110] More specifically, given how well Ms. Hauk coped with various stressors prior to the accident, he is of the view that her chronic pain, anxiety and depression have rendered Ms. Hauk "less able to cope with the travails of life" and "contributed to her having taken stress leave from work."
- [111] During cross-examination, Dr. Ancil was asked whether Ms. Hauk's cancer, separation, workload, tennis elbow, perception of having been harassed and bullied at work, and other stressors may have caused Ms. Hauk to leave work in any event. Dr. Ancil "guessed so" but added that he considered the question to be "too hypothetical" such that he was unable to give "much of an expert opinion."
- [112] Dr. Ancil went on to address the importance of increases in Ms. Hauk's workload and any workplace bullying or harassment to her decision to take a stress leave. If the increased workload and any bullying or harassment were significant, Dr. Ancil would have expected Ms. Hauk's condition to have improved once she was out of her work environment. The fact that she did not led Dr. Ancil to conclude that these issues were "not relevant significantly" to when he examined her.
- [113] Looking forward, Dr. Ancil is of the view that Ms. Hauk requires "aggressive treatment" to deal with her depression, anxiety and chronic pain. Dr. Ancil recommended that Ms. Hauk be referred to a treating psychiatrist and begin a course of anti-depressant medication. Dr. Ancil recommended duloxetine (Cymbalta) which can be effective in the treatment of depression, anxiety and chronic pain. Dr. Ancil noted that there are a number of other medications, such as gabapentin, that can be useful in modifying the perception of pain.
- [114] Once Ms. Hauk's symptoms have improved, Dr. Ancil recommended that Ms. Hauk undergo CBT. In Dr. Ancil's opinion, the combination of anti-depressant medication and psychological therapy is the most likely treatment to result in sustained improvement.
- [115] That said, since Ms. Hauk's symptoms have persisted for more than four years, Dr. Ancil considers Ms. Hauk's prognosis to be poor. In his view, "it is unlikely that Ms. Hauk will have a sustained remission and full recovery of function." Dr. Ancil considers it more likely that Ms. Hauk's condition will wax and wane over the longer term. In his view, treatment will not "cure" Ms. Hauk and should be considered "palliative".

Ms. Hauk's Vocational Rehabilitation Consultant - Niall Trainor

- [116] Niall Trainor is a vocational rehabilitation consultant who was qualified to give expert opinion evidence regarding Ms. Hauk's employment assets, barriers to employments, training options and vocational potential. Mr. Trainor reviewed relevant medical, treatment and employment records, interviewed Ms. Hauk and utilized a number of tests to systematically assess Ms. Hauk's vocational interests and aptitudes. He prepared reports dated August 22 and September 4, 2019.
- [117] After the preparation of his first report, Ms. Hauk provided Mr. Trainor two reports prepared by the OT retained by Ms. Hauk dated August 23, 2019. These reports did not change Mr. Trainor's opinion so I will not refer to his second report any further.
- [118] According to Mr. Trainor, prior to the accident, Ms. Hauk had a number of "employment assets" and no "employment barriers". Ms. Hauk had positive lifestyle factors and life skills, a high school diploma, specific vocational training in office administration, computer literacy, significant work experience, functional literacy and numeracy, vocational interest, and job search skills. As a result, absent the accident, Ms. Hauk was well positioned for employment in a wide range of semi-skilled and skilled occupations in office administration with potential to advance into supervisory and office management positions.
- [119] Based on Dr. Wong's opinion (which I will deal with below), Mr. Trainor concluded that Ms. Hauk's accident-related injuries have not had a significant impact on her ability to work.
- [120] Based on the opinions of Dr. Apel, Dr. Ancil and various treating physicians, Mr. Trainor assumed that Ms. Hauk has suffered chronic pain, functional impairments, depression and anxiety as a result of the accident. Mr. Trainor noted that people with physical ailments and depression are more likely to be disabled than people with physical ailments only.
- [121] Under cross-examination, Mr. Trainor very helpfully explained the complex relationship between chronic pain, workplace stress and decisions workers make to go on stress leave. According to Mr. Trainor, "when people struggle with chronic pain life becomes a series of cost-benefit equations". On a daily basis, a person with chronic pain has to decide whether it is "worth it" to go to work that day. If a person really enjoys their work, that person is more likely to persevere. If they do not like their work, the motivation to overcome their pain and go to work is diminished and the likelihood of a stress leave is increased.
- [122] In Ms. Hauk's case, Mr. Trainor was unable to objectively assess whether the work demands placed on Ms. Hauk prior to her stress leave were unreasonable and whether she was bullied, harassed and unsupported at her workplace. As a result, in his opinion, it was difficult to know whether, absent the accident, Ms. Hauk would have taken a stress leave. Mr. Trainor noted, however, that it is common for workers with chronic pain, depression and anxiety to express difficulty in keeping up with job demands. He also noted Dr. Ancil's opinion that, if not for the accident, Ms. Hauk would have shown more resilience to workplace stressors.

- [123] In Mr. Trainor's opinion, Ms. Hauk is likely not precluded from occupations that she is vocationally suited to pursue. Given the length of her work in office administration, he was of the view that, absent the accident, Ms. Hauk would have remained in that field. With a current annual salary of \$70,000, Mr. Trainor noted that Ms. Hauk is very well paid for her line of work and that it would be very difficult for her to replace that salary through a change in her employment. Further, Mr. Trainor is concerned that a job change would not solve anything for Ms. Hauk. There would remain a risk that her chronic pain and mental health problems would create the same issues in a new workplace.
- [124] While Ms. Hauk may not be precluded from occupations she is suited for, as a person with chronic pain, depression and anxiety, Mr. Trainor is of the view that she is less likely to achieve the same level of career advancement. In Mr. Trainor's opinion, Ms. Hauk requires a sympathetic employer who is willing to make accommodations for her such as job modifications, reduced standards, support from co-workers, additional breaks, ergonomic equipment and possibly part-time hours.
- [125] According to Mr. Trainor, people with chronic pain and mental health issues like Ms. Hauk are often forced to make concessions to secure employment. Typical concessions include things like lower wages, temporary work, shorter hours, uncertain hours, minimal or reduced benefits, and less job security.
- [126] Mr. Trainor recommended that, if Ms. Hauk elects to return to her work with the school district, she work part-time and solicit other supports and accommodations while she seeks treatment for her chronic pain and mental health issues.
- [127] If Ms. Hauk decides to seek other employment, Mr. Trainor recommends that Ms. Hauk receive job search support from a vocational rehabilitation consultant.

Ms. Hauk's OT - Meghan Sears

- [128] Meghan Sears is an OT who was qualified to give expert opinion evidence regarding functional capacity evaluations, future care needs, and the cost of recommended future care items and services. Ms. Sears reviewed relevant medical and treatment records, completed a clinical interview and functional testing of Ms. Hauk, obtained cost estimates for Ms. Hauk's future care needs and prepared a report dated August 23, 2019.
- [129] Based on the medical opinions, functional test results and Ms. Sears' observations, Ms. Sears is of the view that Ms. Hauk has a number of functional limitations and will require a number of future care items and services. In Ms. Sears' view, Ms. Hauk is limited with respect to her homemaking, lawn and garden care, leisure activities and work.
- [130] In Ms. Sears' opinion:
- Ms. Hauk should not lift frequently or repetitively as this exacerbates her neck, back and shoulder symptoms and results in disabling pain;

- Ms. Hauk requires "future considerations" to allow for neutral neck positioning to address demonstrated limitations with respect to static/sustained and repetitive neck positioning in flexion and extension;
- Ms. Hauk should limit repetitive and static forward bending and static stooping to reduce the risk of neck and back symptoms;
- Ms. Hauk is capable of reliably and consistently working on a part-time basis with "significant ergonomic and workload modifications";
- Ms. Hauk's inadequately treated psychiatric issues are impeding her recovery from the injuries she sustained in the accident; and
- It is possible that Ms. Hauk may be capable of full-time work but her prospects of doing so are guarded without adequate treatment of her psychiatric issues.

[131] Ms. Sears outlined what she considered to be an effective treatment plan to improve Ms. Hauk's prospects of functional and vocational recovery. The elements are:

- Review by a psychiatrist for pharmacological management of her psychiatric issues;
- Review by a chronic pain specialist/physiatrist to address her physical pain symptoms;
- Review by a kinesiologist to implement an active rehabilitation program, preferably in a water-based environment;
- Physiotherapy;
- Counselling with a registered psychologist;
- Once gains have been maximized, review by an OT to assist with workload and ergonomic modifications in the workplace to maximize Ms. Hauk's productivity and minimize her exposure to activities that exacerbate her symptoms; and
- If Ms. Hauk's physical and psychiatric conditions remain unresolved, review by a vocational rehabilitation consultant to help her identify suitable work with a sympathetic employer.

[132] Finally, Ms. Sears estimated costs for recommended medications, psychological support, rehabilitation interventions, equipment, homemaking assistance, and yard maintenance. I will deal with the specifics in my analysis of Ms. Hauk's claim for cost of future care.

Defence Psychiatrist - Dr. James Wong

[133] Dr. James Wong is a physiatrist who was qualified to give expert opinion evidence regarding physiatry, rehabilitation and assessing patients' pain, function and rehabilitation. Dr. Wong reviewed various clinical and treatment records, had Ms. Hauk complete a questionnaire, assessed Ms. Hauk on July 17, 2019 and prepared a report dated July 26, 2019. Dr. Wong did not review any of Ms. Hauk's expert reports prior to his assessment. He reviewed Dr. Apel's reports prior to testifying.

- [134] During Dr. Wong's assessment, Ms. Hauk informed him of her complaints of neck, back, shoulder and right elbow pain, and headaches. Dr. Wong was unable to identify any trigger points, or areas of muscle tightness or tenderness to support a finding of an ongoing soft-tissue injury in Ms. Hauk's neck, back and shoulders. Dr. Wong found Ms. Hauk's right elbow to be swollen and tender. Dr. Wong acknowledged that Ms. Hauk was emotional during his assessment of her.
- [135] In Dr. Wong's opinion, Ms. Hauk suffered soft-tissue injuries as a result of the accident but these had resolved. In Dr. Wong's view, any ongoing pain Ms. Hauk experiences is due to her employment activities and is not related to the accident. Dr. Wong related Ms. Hauk's tennis elbow to her employment and not to the accident.
- [136] In Dr. Wong's opinion, Ms. Hauk does not require treatment for any physical injuries and has no accident-related impairments or disabilities to prevent her from working or enjoying recreational activities. That said, Dr. Wong acknowledged that Ms. Hauk had complaints of psychological problems which were outside his area of expertise. He recommended that she see a psychiatrist.
- [137] During cross-examination, Dr. Wong acknowledged that pain can be caused by psychological injuries. He also acknowledged that complaints of headaches, insomnia and stress are symptoms of and consistent with chronic pain.
- [138] I asked Dr. Wong if he had any medical explanation to help me rationalize his findings with Dr. Apel's findings of trigger points and tenderness only two months before his assessment. Initially, Dr. Wong pointed out aspects of Dr. Apel's second report that he considered to be consistent with his, specifically including her report that Ms. Hauk was "somewhat improved" since the time of Dr. Apel's first report. He went on to make comments that I took to be somewhat critical of Dr. Apel. Only on specific questioning from me did Dr. Wong acknowledge that Ms. Hauk's condition could wax and wane.

Defence OT - Janita le Roux

- [139] Ms. Hauk objected to the admissibility of the "critique" report prepared by Ms. le Roux regarding Ms. Sears' report. Ms. Hauk submitted that Ms. le Roux's report was irrelevant, unnecessary, unfair, and amounted to no more than advocacy. While I agreed with many of Ms. Hauk's submissions, I declined to exclude Ms. le Roux's report in its entirety. I concluded that Ms. le Roux's report was not so flawed that it demonstrated that she was unwilling or unable to provide fair, objective and non-partisan evidence. I concluded that the appropriate remedy was to redact objectionable passages from her report.
- [140] Following my ruling on the admissibility of Ms. le Roux's report, Ms. le Roux was qualified to give expert opinion evidence as an OT with expertise in the areas of functional capacity evaluations, future care needs, and the cost of recommended future care items and services.

- [141] Ms. le Roux did not assess Ms. Hauk. Rather, she reviewed relevant medical and treatment records in order to comment on Ms. Sears' report. In doing so, Ms. le Roux did not have access to Ms. Sears' raw data. Ms. le Roux prepared a report dated September 30, 2019
- [142] I do not consider it necessary to summarize all of Ms. le Roux's critiques of Ms. Sears' report. Broadly, I am able to dismiss many of Ms. le Roux's critiques on the bases that she did not personally assess Ms. Hauk, that she did not have access to Ms. Sears' raw data and/or that Ms. Sears adequately explained why she took steps that Ms. le Roux considered to be less than ideal. I consider it adequate to provide a few examples.
- [143] In her report, Ms. le Roux noted that it was "unclear" whether Ms. Sears observed Ms. Hauk's capacity for sitting on the second day of her assessment and believed that Ms. Sears only did one repetition of something called the Complete Minnesota Dexterity Test. During her cross-examination, however, Ms. Sears made clear that her observations with respect to Ms. Hauk's capacity to sit on both days were recorded in the raw data and that her raw data also included the results of two repetitions of the Complete Minnesota Dexterity Test.
- [144] In her report, Ms. le Roux noted that Ms. Sears had not provided sufficient information in her report to determine something called Ms. Hauk's Global Effort Rating. Ms. Sears, however, noted that she used other methods to determine that Ms. Hauk had demonstrated a consistent and good effort. In any event, Ms. le Roux acknowledged that on the incomplete data available to her, it appeared that Ms. Sears had in fact made a good effort.
- [145] In her report, Ms. le Roux suggested that "placebo testing" was very important in a case like Ms. Hauk's involving SSD to ensure that Ms. Hauk's subjective perceptions of pain were reliable. During her cross-examination, Ms. Sears agreed and maintained that she did complete appropriate testing to determine that Ms. Hauk's perception was reliable. Furthermore, Ms. Sears testified that Ms. Hauk's reports of pain were consistent with Ms. Sears' observations of Ms. Hauk. If Ms. Sears' observations of Ms. Hauk had raised concerns, she would have done more testing.
- [146] After stripping away the questions raised by Ms. le Roux that were eliminated by Ms. Sears' responses to these questions, my main takeaways from Ms. le Roux's report and testimony were that, in Ms. le Roux's opinion:
- Ms. Hauk is capable of carrying laundry and grocery bags, and most yard work with the use of various techniques such as pacing and load splitting;
 - Based on the typical demands of such positions, Ms. Hauk is physically capable of working as an EA, particularly if provided with ergonomic devices or utilizing alternative postures, such as kneeling;
 - Ms. Hauk's response to physical activity is limited by her multiple psychiatric diagnoses;
 - Ms. Hauk's test results indicate that she requires medical intervention for symptoms of depression;

- The level of stress Ms. Hauk experiences at work influences her level of pain and perceived ability to return to work. Addressing Ms. Hauk's workplace stress will likely to improve her capacity to work full-time;
- Ms. Hauk has already acquired adequate skills through the CYP program and does not need to attend a further pain clinic;
- Ms. Hauk does not require further physiotherapy or massage therapy as neither addresses her somatization of pain nor the effect Ms. Hauk's emotional state is having on her level of pain; and
- Ms. Hauk requires CBT, time with a kinesiologist to review her exercise routine, a pool pass for one year, support of an OT, ergonomic equipment at work, access to a vocational rehabilitation consultant (in the event she is unable to return to her current position), specialized gardening equipment, some homemaking assistance and some seasonal assistance with yard maintenance.

Credibility and Reliability

- [147] In addition to Ms. Hauk and the experts, the parties called a significant number of lay witnesses.
- [148] Ms. Hauk called: her mother, Luella Steffen; her son, Jayson Hauk; her brother, Jan Steffen; her former co-worker and current friend, Jola Belliveau; the Director of the Kamloops Mounted Patrol, Rick Wanless; former Trustee and Chair of SD 73, Denise Harper; former co-worker and current friend, Maxine Roberts; and former Assistant Superintendent of SD 73, Marilyn McLean.
- [149] The defence called: SD 73 Superintendent, Alison Sidow; SD 73 Secretary Treasurer, Kelvin Stretch; and SD 73 Disability and Attendance Support Manager, Darlene Doricic.
- [150] Happily, the parties did not raise any concerns regarding the credibility and reliability of the many lay witnesses who testified. This was sensible in that each of these witnesses was sincere, bright, articulate and responsive. None was prone to exaggerate. All were candid, forthcoming and provided an appropriate level of detail. They acknowledged when they were uncertain. They gave testimony that was logical, coherent and largely externally consistent.
- [151] With respect to the expert witnesses, the evidence of Dr. Ancil, Mr. Trainor, and Mr. Szekely was not challenged on grounds of credibility and reliability. There were of course differences of opinion between Dr. Apel and Dr. Wong, and between Ms. Sears and Ms. le Roux. I do not consider it necessary to do a separate analysis of the credibility and reliability of the expert witnesses. Rather, I will address their opinions in my analysis of Ms. Hauk's various claims for damages.
- [152] With respect to Ms. Hauk, the defence acknowledged that she was a credible witness. The defence submitted, however, that she was not always a reliable witness. I will address the credibility and reliability of Ms. Hauk's testimony below.

Credibility and Reliability of Ms. Hauk

- [153] The basic position of the defence is that Ms. Hauk perceives her injuries to be greater than they are. As a result, the defence submits that Ms. Hauk's perception that she is getting worse and her fear that she will never work again are unreliable. Further, the defence submits that as a result of her perceptions, she has over-reported her symptoms to the various experts who assessed her, casting their opinions into doubt.
- [154] While no witness is perfect, overall, I considered Ms. Hauk to be both a credible and reliable witness.
- [155] Ms. Hauk is obviously a bright and hardworking person. She has capably handled a number of demanding jobs and demonstrated the ability to learn new skills quickly.
- [156] Ms. Hauk is clearly not a complainer or a malingerer. She is a private person who, over the years, has kept her troubles mostly to herself. She worked extra time to complete her work to her own high standards without reporting or seeking to be paid for her overtime. She did not take time off work following the accident. Instead, she persevered. Even when she broke her toe, she did not miss any work. Instead, she got a scooter so she could get around her workplace.
- [157] Ms. Hauk was an articulate, attentive, respectful, polite and responsive witness. She was clearly doing her best to give complete answers to the questions she was asked and to do so honestly.
- [158] My observations of Ms. Hauk in the courtroom were, for the most part, consistent with her complaints. She maintained a very erect posture as if being in another position would cause her pain. She also presented with a rather flat affect consistent with her complaints of depression. At certain times, she became tearful, again in a fashion consistent with her description of her mood. When offered a break she preferred to soldier on.
- [159] Ms. Hauk was generally not prone to exaggerate and acknowledged information that could potentially harm her case. For example, she testified that at times her headaches are mild and that her tennis elbow was not caused by the accident. Further, she admitted that she is off work in part due to workplace stress, that the tingling she has experienced has mostly resolved, that she has found it difficult to fully dedicate herself to treatment, and that she has had a number of other stressors in her life. When it was suggested to her in cross-examination that she was catastrophizing her pain, she replied "I hope not". Finally, she did not portray her life as being completely devoid of happiness. In particular, she acknowledged the joy that her grandchildren bring to her life.
- [160] Ms. Hauk testified with an appropriate and believable level of detail. Her testimony about appointments, treatments and dates was supported by her meticulous notes.

- [161] Her testimony was mostly internally and externally consistent. Importantly, her testimony lined up with the testimony given by the lay witnesses, including those called by the defence. For example, her mother, brother, son, friends and former co-workers generally supported her testimony about her previous level of performance at work, her level of activity away from work, and how things have changed since the accident.
- [162] Her testimony was also mostly consistent with the information she shared with the various experts who assessed her. To Ms. Hauk's credit, she appears not to have exaggerated her symptoms during her assessments. As noted above, Ms. Sears observed Ms. Hauk to put forth a good effort during her functional capacity evaluation ("FCE"). Dr. Apel found "negative Waddell's signs", apparently indicating that Ms. Hauk's complaints were likely not psychosomatic and that she was not malingering.
- [163] While my overall impression of Ms. Hauk's testimony was very positive, I acknowledge that at times she was somewhat defensive during cross-examination. She disagreed with a number of indications in the clinical records that she was improving and occasionally took issue with propositions of little significance. That said, Ms. Hauk explained that she may have reported feeling "better" on occasion due to the temporary relief she was deriving from her treatments.
- [164] There were also times when Ms. Hauk appears to have exaggerated or overstated her evidence. For example, Ms. Hauk probably overstated the length of her work days to Ms. Sears. Further, during various assessments, she overstated and mischaracterized how her very accommodating employer treated her. She was not fully open with her employer regarding how she was feeling and then reacted negatively to being asked to fulfill the high demands associated with her position. Had she been more open with her employer and/or asked for help, perhaps her workload issues could have been resolved without hard feelings. With all due respect to Ms. Hauk, on the evidence I heard, she was not "harassed" or "bullied" at work. To her credit, Ms. Hauk acknowledged this during her testimony.
- [165] Despite some imperfections in her testimony, based on all of the evidence, I am unable to agree with the basic proposition of the defence that Ms. Hauk perceives her injuries to be greater than they are. Whether I accept the opinion of Dr. Apel or Dr. Wong regarding the objective signs of Ms. Hauk's physical injuries, I believe her reports of how she feels. Her perception is her reality. The pain she experiences is real. She is not making that up.

Assessment of Damages

Causation

- [166] The evidence clearly establishes the accident caused a drastic change in Ms. Hauk's level of functioning. This is not in dispute. In fact, the defence even acknowledges that Ms. Hauk is currently off work due to her accident-related injuries.

[167] The defence submits, however, that Ms. Hauk's tennis elbow was not caused by the accident and that other stressors would have negatively impacted Ms. Hauk even if she had not been injured in the accident. The defence seeks to exclude Ms. Hauk's tennis elbow from my assessment of damages and to apply a global causation discount to any damages I award Ms. Hauk.

Legal Principles

[168] As stated by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position").

[169] Accordingly, Ms. Hauk must prove on a balance of probabilities that her injuries would not have occurred "but for" the accident: *Athey* at para. 14; *Blackwater v. Plint*, 2005 SCC 58 at para. 78; *Clements v. Clements*, 2012 SCC 32 at paras. 8 and 13; *Ediger (Guardian ad litem of) v. Johnston*, 2013 SCC 18 at para. 28.

[170] Ms. Hauk does not need to prove that the accident was the sole cause of her injuries. If there is a substantial connection between the injury and the accident beyond the "de minimus" range, Mr. Shatzko will be fully liable for the injury, even if other factors were at play: *Athey* at para. 15; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11; *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[171] Mr. Shatzko is, however, only liable for the injuries caused by his negligence. He does not need to put Ms. Hauk in a better position than her original position: *Athey* at para. 32; *Blackwater* at para. 78.

[172] Mr. Shatzko is liable for Ms. Hauk's injuries even if they are unexpectedly severe due to a pre-existing condition: *Athey* at para. 34

[173] On the other hand, if there is a measurable risk that Ms. Hauk had a pre-existing condition that would have detrimentally affected her in the future, regardless of the accident, then that risk can be taken into account in reducing the damage award. Any such pre-existing condition would have been inherent in Ms. Hauk's original position: *Athey* at para. 35; *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 28 and 48.

[174] A pre-existing risk that would have detrimentally affected Ms. Hauk in the future need not be proven on a balance of probabilities. It is a contingency that is given weight according to its relative likelihood: *T.W.N.A.* at para. 48.

[175] The basic task for me is to award damages to Ms. Hauk to compensate her for the difference between her original position and her injured position.

Causation Findings

[176] At a high level, I am satisfied on a balance of probabilities that Ms. Hauk was seriously injured in the accident. Specifically, I am satisfied on a balance of probabilities that the accident was the primary cause of Ms. Hauk's chronic pain in her neck, back and shoulders, chronic headaches, problems sleeping, depression and anxiety. I am unable to conclude that the accident has caused Ms. Hauk to experience significant memory problems. I am also unable to conclude that the accident caused Ms. Hauk's tennis elbow, but I accept that Ms. Hauk's accident-related injuries have impaired her recovery from it.

Chronic Neck, Back and Shoulder Pain

[177] Prior to the accident, Ms. Hauk did not suffer from any neck, back or shoulder pain. All of the experts agree that the accident changed that. The experts differ only in their diagnoses and, with respect to Dr. Wong, how long Ms. Hauk's physical injuries lasted.

[178] After carefully considering all of the evidence, I accept Dr. Apel's opinion that Ms. Hauk has ongoing physical injuries due to the accident. I also accept Dr. Apel's specific diagnosis of "chronic regional myofascial pain syndrome affecting the upper quadrants bilaterally, worse on the right, on the background of upper quadrants myalgia." In reaching this conclusion, I am in the unfortunate position of having to reject Dr. Wong's opinion that Ms. Hauk's accident-related soft-tissue injuries have resolved.

[179] I prefer Dr. Apel's opinion over Dr. Wong's opinion for the following reasons:

1. Dr. Apel had more contact with Ms. Hauk, having assessed her on two occasions;
2. Dr. Apel did not review the related clinical records until after she had assessed Ms. Hauk for herself while Dr. Wong did the opposite, raising the prospect that Dr. Wong pre-judged Ms. Hauk's condition;
3. In his report and testimony, Dr. Wong "cherry-picked" entries in the clinical records and other reports that supported his conclusions rather than fairly reporting entries that were at odds with his conclusions;
4. When I asked questions of Dr. Wong to help me understand why two highly qualified and respected specialists could have such different findings, Dr. Wong's responses were not very helpful. In particular, Dr. Wong seized on one small passage in Dr. Apel's second report (that Ms. Hauk was "somewhat improved") to support his conclusion when, as Dr. Apel explained, those improvements were marginal and did not support his opinion at all;
5. Based on Ms. Hauk's testimony, which I accept, Dr. Wong under-reported the pain his examination of Ms. Hauk elicited; and

6. Dr. Apel's testimony was more consistent with the balance of the evidence, including Ms. Hauk's complaints, the observations of various lay witnesses, Dr. Ancil's opinion, Ms. Sears' FCE and Ms. West's testimony that she noted muscle tightness and pain responses during her massage therapy treatments of Ms. Hauk.

[180] I also accept Dr. Ancil's opinion that the accident has caused Ms. Hauk's SSD and chronic pain. As Dr. Ancil explained, as a result of "recruitment" and "central sensitization", Ms. Hauk is experiencing heightened levels of pain. As such, it is understandable that she may be overly focused on her pain - but that is itself a result of the accident. Further, that focus does not make Ms. Hauk's pain any less real or any less debilitating.

[181] In terms of how Ms. Hauk's physical injuries affect her level of function, I generally accept the results of Ms. Sears' FCE. Ms. Hauk gave good effort during the evaluation and Ms. Sears was able to adequately address concerns with the results of her FCE raised by Ms. le Roux. Further, the results were generally consistent with the balance of the evidence.

Headaches

[182] Having accepted Dr. Apel's opinion regarding Ms. Hauk's neck, back and shoulder pain, it should come as no surprise that I also accept her opinion that the accident has caused Ms. Hauk to experience chronic headaches. Dr. Apel's opinion in this regard is well supported by Ms. Hauk's testimony and Dr. Ancil's opinion.

Problems Sleeping

[183] I accept that Ms. Hauk's physical injuries and headaches have, in turn, disrupted her sleep as she has described.

Depression and Anxiety

[184] I have no hesitation in accepting Dr. Ancil's uncontested evidence that the accident has caused Ms. Hauk to experience depression and anxiety. It is completely understandable that the grind of having daily pain for several years has worn on Ms. Hauk and caused her to feel irritable, easily overwhelmed, depressed, tearful, anxious and hyper-vigilant.

Memory Problems

[185] I am sure that suffering from chronic pain, headaches, sleep problems, depression and anxiety has clouded Ms. Hauk's thinking. I am sure she does not feel as sharp as she did before the accident. Nevertheless, I am unable to conclude that the accident has had a significant effect on her memory.

[186] Ms. Hauk's memory issues were not a central feature of her various assessments and only one lay witness, Mr. Steffan, testified about memory issues. Those issues related to Ms. Hauk's inability to find keys on a couple of occasions. Further, during her assessments and testimony, Ms. Hauk did not appear to have any difficulty remembering fine details of many events over many years, including since the accident.

Tennis Elbow

[187] I accept Dr. Apel's and Dr. Wong's opinions that Ms. Hauk's increased work demands and non-ergonomic work environment were necessary causes of her tennis elbow. I say this because her tennis elbow developed immediately following four days of marathon typing sessions in a non-ergonomic environment.

[188] In my respectful view, Dr. Apel's opinion that Ms. Hauk's accident-related injuries "facilitated" her tennis elbow falls short of establishing that these injuries were a further necessary cause. Dr. Apel simply could not say and did not say that Ms. Hauk would not have developed tennis elbow if she had not been injured in the accident. Even Ms. Hauk herself testified that she did not think the accident caused her tennis elbow.

[189] That said, I accept Dr. Apel's opinion that Ms. Hauk's accident-related injuries have impaired her recovery from her tennis elbow. If not for the accident, Ms. Hauk's tennis elbow probably would have resolved by now.

[190] In short, based on all of the evidence, I have concluded that Ms. Hauk probably would have developed tennis elbow even if she had not been in the accident but her accident-related injuries have exacerbated her condition.

Contribution of Other Stressors

[191] The defence submits that a number of stressors unrelated to the accident have impacted Ms. Hauk's "original position" such that a global deduction of 20% ought to be made to Ms. Hauk's award of damages. In particular, the defence highlights increases in Ms. Hauk's workload, her tennis elbow, ongoing cancer concerns, her aging mother and separation issues.

[192] Based on my findings above, Ms. Hauk's tennis elbow arose due to a four day spike in her typing duties in a non-ergonomic work environment. Ms. Hauk was off work for six weeks in 2018 due to her tennis elbow but was then able to gradually return to full-time work. Ms. Hauk's right elbow remains somewhat symptomatic due, in part, to the accident. Nevertheless, Ms. Hauk's tennis elbow is not a significant driver of her chronic pain and distress. I do not consider Ms. Hauk's tennis elbow to be much of a factor going forward. I will, however, take its ongoing impact into account in my assessment of damages.

- [193] With respect to the remaining factors identified by the defence, I am unable to agree that, absent the accident, they individually or collectively would have significantly impacted Ms. Hauk's level of functioning. In fact, prior to the accident, Ms. Hauk demonstrated a rather remarkable ability to weather many storms. For example, she bounced back from her cancer treatment, coped well with the death of her father, excelled at positions of ever-increasing complexity and responsibility, and was largely back on her feet following the breakdown of her lengthy marriage.
- [194] I have no reason to think Ms. Hauk's ability to cope with life's difficulties would have changed if she had not been injured in the accident. Absent the accident, I am sure that Ms. Hauk would have had some ups and downs, like we all do. I will take these understandable and expected ups and downs into account in my assessment of damages. They were, after all, inherent in Ms. Hauk's original position. I will not be doing so by way of a global deduction.

Mitigation

- [195] The defence submits that Ms. Hauk has not sought proper treatment for her physical and psychiatric injuries and that a global deduction of 15% ought to be made to her award of damages to account for her failure to mitigate her loss.

Legal Principles

- [196] A plaintiff in a personal injury action has a positive duty to take reasonable steps to limit their loss: *Graham v. Rogers*, 2001 BCCA 432 at para. 35, leave to appeal ref'd [2001] S.C.C.A. No. 467.
- [197] Where a plaintiff has not pursued a course of recommended treatment, the onus is on the defendant to prove that the plaintiff acted unreasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
- [198] The test is a subjective/objective one. The question is whether a reasonable patient, with all of the information that the plaintiff had at hand, ought reasonably to have undergone the recommended treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.
- [199] The onus is further on the defendant to prove the extent to which the plaintiff's loss would have been reduced if the plaintiff had acted reasonably: *Chiu* at para. 57.

Analysis

- [200] In this case, Ms. Hauk did not precisely follow all of the recommendations Dr. Apel made in her first report dated October 27, 2017 nor all of the recommendations made by Dr. De Wet on June 13, 2018. In particular, Ms. Hauk's active rehabilitation program and facet blocks were not exactly what Dr. Apel envisioned, Ms. Hauk opted not to undergo the Botox injections recommended by Dr. Apel and Ms. Hauk did not see a psychiatrist as

recommended by Dr. De Wet. In spite of these shortcomings, the defence has not established a failure to mitigate on Ms. Hauk's part.

- [201] Ms. Hauk did not ignore the recommendations made by Dr. Apel and Dr. De Wet. Instead, she discussed her treatment options with her family physician. As noted by Dr. Ancil, it was up to Ms. Hauk's treating physicians to establish treatment and address any concerns that Ms. Hauk had.
- [202] In this case, Ms. Hauk continued with massage therapy following Dr. Apel's first assessment. She saw a neurosurgeon on March 1, 2018 and Dr. De Wet for facet blocks on May 16, 2018. With the support of her family physician, she entered the inter-disciplinary CYP program on July 5, 2018. She understood the CYP program to be an active rehabilitation program and followed the program's recommendations. She began physiotherapy on September 18, 2018, which included acupuncture and IMS.
- [203] With respect to anti-depressants, these were never prescribed by Dr. De Wet. Rather Dr. De Wet referred Ms. Hauk to a psychiatrist, who Ms. Hauk decided not to see. Having not seen the psychiatrist, there is no direct evidence to establish that Ms. Hauk would have been prescribed an anti-depressant. Based on how Ms. Hauk was feeling and Dr. Ancil's report, however, that seems likely.
- [204] Given her cancer history, Ms. Hauk was understandably concerned about taking any new medication. She testified that she had had some adverse reactions to medications while she was battling her leukemia, including after her bone marrow transplant. She had apparently been told that if she took a medication that boosted her immune system too much, she could develop graft versus host disease. She hoped to avoid the issue by pursuing "natural means" to control her stress and emotions.
- [205] Eventually, Ms. Hauk revisited the use of anti-depressant medication with her family physician after taking her stress leave from work. Based on clinical records put to Ms. Hauk in cross-examination, it appears that this may have occurred on June 26, 2019. Ms. Hauk then discussed the topic with her cancer specialist in Vancouver on July 23, 2019. After receiving reassurance from her specialist, Ms. Hauk began taking anti-depressants in August 2019.
- [206] In retrospect, Ms. Hauk may not have followed an ideal course of treatment. Mitigation is not, however, to be judged retrospectively nor to a standard of perfection. Based on her history, the information available to her, the input of her family physician and the recommendations of other treating professionals, Ms. Hauk followed an objectively reasonable path.

[207] In the result, I do not need to set my mind to whether the defence has established that Ms. Hauk's failure to follow Dr. Apel's recommendations "to a T" or Dr. De Wet's recommendation to see a psychiatrist would have reduced her loss and, if so, to what extent. The defence has simply not met its onus of establishing that Ms. Hauk acted unreasonably with respect to caring for herself.

[208] I will not be making any deduction on account of mitigation.

Non-Pecuniary Damages

Legal Principles

[209] Non-pecuniary damages are awarded to compensate an injured party for their pain and suffering, loss of enjoyment of life and loss of amenities. They must be fair to all parties. While each case is unique, fairness is often measured against awards made in similar cases: *Gill v. McChesney*, 2016 BCSC 1416 at para. 180; *MacGregor v. Bergen*, 2019 BCSC 315 at para. 98.

[210] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A No. 100, the Court of Appeal provided a non-exhaustive list of factors to consider in assessing non-pecuniary damages at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

Comparators

[211] To provide further guidance to me in my assessment of Ms. Hauk's non-pecuniary damages, Ms. Hauk relies on: *Noftle v. Bartosch*, 2018 BCSC 766; *Cornish v. Khunkhun*, 2015 BCSC 52; *Myers v. Gallo*, 2017 BCSC 2291; and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81.

[212] In response, the defence relies on: *Belos v. Michaels*, 2017 BCSC 1217; *Carreon-Rivera v. Zhang*, 2014 BCSC 709; *Mullens v. Toor*, 2016 BCSC 1645; *Chong v. Nguyen*, 2017 BCSC 1564; and *Smusz v. Wolfe Chevrolet Ltd.*, 2010 BCSC 82.

[213] I summarize the essential features of these cases below:

PLAINTIFF'S CASES

Case

Relevant Circumstances

Non-Pecuniary Damages

Noftle v. Bartosch, 2018 BCSC 766

The 42 year old plaintiff (46 at the time of trial) was struck on the driver's side of her vehicle by a flatbed truck. Prior to the accident, the plaintiff was a "bubbly person possessed of a strong work ethic" who was deeply involved in church and community activities. The accident changed virtually all aspects of her life. She suffered injuries to her neck, collarbone, left shoulder, right shoulder, and mid back, all of which chronically affected her emotions. The prospect for improvement of her injuries was not good, even with a chronic pain program.

\$170,000

(present day value: \$173,169)

Cornish v. Khunkhun, 2015 BCSC 52

The 58 year old plaintiff (63 at trial) sustained injuries when the defendant's vehicle turned left into her path at an intersection. She was diagnosed with major depressive disorder and somatic symptom disorder, and she experienced confusion and memory loss. While she previously had symptoms of depression, it was in remission at the time of the accident. The accident also aggravated her prior back pain, leaving her with increased pain and limitation. The injuries affected her social life, ability to care for her grandchildren, and level of activity. The injuries left a "once vibrant woman" a different person.

\$160,000 (reduced by 50% for equal apportionment of liability)

(present day value: \$171,824)

Myers v. Gallo, 2017 BCSC 2291

The 46 year old plaintiff (50 at trial) was cut off by the defendant's vehicle as they both headed towards an exit. The impact of the accident on her life was "dramatic". She became socially isolated, was unable to perform parenting tasks as before, and experienced low self-esteem. She suffered injuries to her neck and shoulders, headaches, and jaw pain. The head and neck pain was severe, permanent and chronic. The plaintiff also suffered with depression, somatoform disorder, anxiety and symptoms akin to PTSD. Although the depression and somatoform disorder were chronic, it was possible the symptoms could improve with proper treatment.

\$175,000 (reduced by 10% for failure to mitigate)

(present day value: \$182,620)

Pololos v. Cinnamon-Lopez, 2016 BCSC 81

The 41 year old plaintiff was rear ended in a multi-vehicle collision. He was diagnosed with soft tissue injuries to his neck, lower and mid back, bruising on his chest, pain in both shoulders, arms, and elbows, as well as pain in his tailbone and abdomen. Most of these injuries had worsened since the accident, and prognosis was poor. He also suffered with headaches, dizziness and nausea. He was diagnosed with anxiety and symptoms of depression; the prognosis for these psychological injuries was unclear. The once "social, positive, and active" plaintiff became isolated and his family relationships deteriorated. He was often angry and did not attend to hygiene.

\$180,000

(present day value: \$190,457)

DEFENDANT'S CASES

Case

Relevant Circumstances

Non-Pecuniary Damages

Belos v. Michaels, 2017 BCSC 1217

The plaintiff (37 at trial) was injured in a motorcycle accident when the defendant's vehicle drove into his path and he tried to avoid collision. He endured multiple ongoing symptoms, including some permanent scarring, ongoing chronic pain due to soft tissue injuries, and somatic symptom disorder. His enjoyment of life, ability to sleep, fitness level, and ability to participate in recreational or family activities was affected. He had just enough energy to work for the day. While flare-ups were likely, they would likely be short and dependent on other stressors in his life.

\$75,000

(present day value: \$78,266)

Carreon-Rivera v. Zhang, 2014 BCSC 709

The plaintiff (50 at trial) was struck when the defendant's vehicle made a sudden lane change. She sustained soft tissue injuries to her neck, right shoulder and back, depression, and somatic symptom disorder. Her pre-existing headaches were worsened, and she aggravated her pre-existing cervical spondylosis. The previously "active and animated" plaintiff was very involved in sports and her children's activities. She became withdrawn. Her condition was likely to improve with proper treatment.

\$80,000 (reduced by 10% for failure to mitigate)

(present day value: \$78,119)

Mullens v. Toor, 2016 BCSC 1645

The 29 year old plaintiff, a high performing junior bank executive, suffered soft tissues injuries in a collision, resulting in ongoing headaches, neck pain and lower back pain. She was left with chronic pain syndrome, anxiety and depression. Previously, she enjoyed a "happy, full, active relationship" with her family, but withdrew from her husband and became socially isolated. Her symptoms had improved, but her prognosis remained uncertain.

\$140,000 (reduced by 50% for failure to mitigate)

(present day value: \$74,067)

Chong v. Nguyen, 2017 BCSC 1564

Plaintiff (22 at the first accident; 27 at trial) was injured as a result of three motor vehicle accidents. She suffered a whiplash injury as a result of the first and second accident, and ongoing pain in her neck and back. She was diagnosed with an adjustment disorder with depression and anxiety, which impaired her life and enjoyment. With proper counselling, there was a "reasonable" prospect of improvement.

\$110,000

(present day value: \$114,790)

Smusz v. Wolfe Chevrolet Ltd., 2010 BCSC 82

The 43 year old plaintiff (46 at trial) was sideswiped in her car and suffered "significant" injuries. Disc herniation in her neck and a bulging disc in her lumbar spin left her with chronic left-sided neck and low back pain, dizziness and headaches. Once "happy and energetic", she was diagnosed with PTSD, which had largely resolved, and insomnia, depression, and chronic pain. While she could improve with treatment to find minimal part-time work, she was likely no longer employable full time.

\$100,000 (reduced by 10% for failure to mitigate)

(present day value: \$116,354)

Analysis

- [214] Assessing non-pecuniary damages is a highly individualized process. While each case relied on by the parties has some degree of similarity to Ms. Hauk's case, no two cases are exactly the same. Having said that, the cases establish a broad range for awards of non-pecuniary damages to middle-aged, active, happy adults who have suffered some combination of chronic physical injuries and/or psychological distress that limit their work, recreational and/or domestic activities.
- [215] Prior to the accident, Ms. Hauk was a happy, healthy, resilient 49-year-old woman who was employed full-time in a demanding position as an EA with SD 73. She had successfully battled leukemia and managed the end of her long-term marriage very well. She was in a new relationship. She was social, often planning and hosting large family gatherings. She spent time with and supported her aging mother. She was physically active. She enjoyed various hobbies and volunteering. She was meticulous in her housekeeping and yard maintenance. She was well-liked by her family, friends and co-workers.
- [216] As a result of the accident, Ms. Hauk suffered soft-tissue injuries to her neck, back and shoulders. These led to headaches and disrupted sleep. Ms. Hauk persevered and did not take time off work. She did her best to recover from her injuries yet they persisted. She ultimately developed chronic pain, depression and anxiety that got so bad that she had to take a leave from her position with the school district. She developed tennis elbow as a result of a short-term increase in her workload but her accident-related injuries have impaired her recovery from this condition.
- [217] Today, Ms. Hauk does not derive nearly the same joy out of all aspects of her life as she did prior to the accident. She is not working. She is not social. She hosts gatherings less frequently and only when Mr. Shatzko is available to help. She no longer volunteers in the community. She has given up many of her pastimes and hobbies. She is of less assistance to her mother. She relies on Mr. Shatzko around the home and yard. She is less physically active. She does not have much fun. She is simply not the same person.

- [218] To be sure, other factors have been at play in Ms. Hauk's current level of physical dysfunction and emotional distress. In particular, Ms. Hauk has had to cope with work-related stress, the initial onset of her tennis elbow, ongoing cancer concerns, the needs of her aging mother and separation issues. While these issues have individually and collectively affected Ms. Hauk, absent the accident, she would have managed them much better and she would still be the same happy, healthy, hard-working, active person she was prior to the accident. Because of the accident, she is not.
- [219] The biggest issue in Ms. Hauk's case is the crystal ball gazing involved in predicting what the future holds. On the one hand, she has received all kinds of treatment and had a substantial amount of time off of work yet remains quite limited in her level of function. On the other hand, there are several treatments that Ms. Hauk received that were not ideal and there are several more treatment options that hold promise.
- [220] Given the history, it is not surprising that the medical opinions are divided on Ms. Hauk's prognosis. In Dr. Apel's view, Ms. Hauk can make improvements and, subject to periodic flare ups, largely return to her preferred level of avocational activities. In Dr. Ancil's view, given the chronicity of Ms. Hauk's symptoms, her prognosis is poor.
- [221] On all of the evidence, I come down somewhere in the middle. Ms. Hauk is a determined person. She would love not to be struggling. She is bright and has seen the limits of the treatment she has undertaken to date. She is aware of the experts' recommendations and is committed to following them. I am optimistic that she will make some progress but doubt that she will ever fully return to her pre-accident level of vocational and avocational activities. In my view, Ms. Hauk's prognosis is guarded.
- [222] In my respectful view, the comparator cases relied on by Ms. Hauk involved somewhat more serious injuries and/or a worse prognosis than the view I take of Ms. Hauk's case. In contrast, the comparator cases relied on by the defence generally involve less serious injuries and/or a better prognosis.
- [223] While there are differences, the case that most closely approximates Ms. Hauk's situation is Mullens in which the plaintiff received an award of just under \$150,000 for non-pecuniary damages in present day dollars. I consider a similar award to be appropriate and award Ms. Hauk non-pecuniary damages of \$150,000.

Past Income Loss

- [224] The parties agree that Ms. Hauk has suffered a "net" past income loss of \$28,999.98 running from the commencement of her stress leave to the first day of trial. Having rejected the defence arguments regarding global causation and mitigation deductions, I award this amount, in full, to Ms. Hauk.

Loss of Future Earning Capacity

Legal Principles

- [225] In *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, our Court of Appeal succinctly summarized the relevant legal principles for determining an award for loss of future earning capacity as follows:
- [101] The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring. The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition. However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered. Moreover, the task of the Court is to assess the losses, not to calculate them mathematically. Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong [Cites omitted.]
- [226] There are a number of ways to assess a plaintiff's loss of future earning capacity. An "earnings approach" may be appropriate in cases where the loss is relatively easy to measure in a mathematical way. The "capital asset" approach is more appropriate in cases where the loss is not as easily measured: *Perren v. Lalari*, 2010 BCCA 140 at paras. 12 and 32.
- [227] In *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10, our Court of Appeal held that all relevant factors must be taken into consideration in assessing a future loss of earning capacity, including:
- [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
 - [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 - [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

Analysis

- [228] The parties agree that Ms. Hauk has suffered a loss of future earning capacity but take quite different approaches to quantifying the loss. Not surprisingly, their assessments are also quite different.

- [229] Ms. Hauk submits that, prior to the accident, she had the capacity to earn between \$85,000 and \$90,000 annually comprised of her salary, and non-wage benefits including her pension. Given her secure position, strong attachment to the workforce and the financial consequences of her divorce, Ms. Hauk also submits that she would have worked full-time until at least age 65, probably longer.
- [230] Mr. Szekely calculates the present day value of \$1,000 to age 65 to be \$10,044 and to age 67 to be \$11,633. Using total annual earnings of \$87,500, Ms. Hauk submits that her pre-accident earning capacity was \$878,850 ($\$87,500/\$1,000 \times \$10,044$) to age 65 and \$1,017,887 ($\$87,500/\$1,000 \times \$11,633$) to age 67.
- [231] As a result of the accident, Ms. Hauk submits that she may never return to work. If she does go back to work, Ms. Hauk submits that it will be in a part-time position at a lower salary, and that she will likely experience relapses and time off work. In all of the circumstances, Ms. Hauk submits that an award of \$850,000 would properly reflect her loss of future earning capacity.
- [232] The defence submits that Ms. Hauk is physically capable of handling the demands of her EA position but acknowledges that she will be off work for a period of time to address her psychological injuries and perceived physical limitations. The defence notes that Ms. Hauk works for a highly supportive and accommodating employer and that, with appropriate treatment, Ms. Hauk should be able to return to her current position. The defence submits that an award of two years of earnings would adequately compensate Ms. Hauk for the time she can be expected to be off work for the treatment she needs now and during any periods of future flare ups. Using Ms. Hauk's average earnings from 2016 to 2018 of approximately \$73,000, the defence submits that an award of \$146,000 would properly reflect Ms. Hauk's loss of future earning capacity.
- [233] In the alternative, if Ms. Hauk is unable to return to her current position, the defence submits that her residual earning capacity would be that of an average EA in a less demanding position. The defence submits that the average EA in BC earns \$53,477[1]. Using a retirement age of 65, the defence submits that Ms. Hauk's loss of earning capacity, before the usual contingencies would be \$196,089.01 [$(\$73,000 - \$53,477)/\$1,000 \times \$10,044$]. After a typical deduction for contingencies of 20%, Ms. Hauk's loss of earning capacity would be \$156,871.21.
- [234] Despite Ms. Hauk's age, employment history, secure position and known wage, in the circumstances of this case, I consider the capital asset approach to be the appropriate way to assess Ms. Hauk's loss of future earning capacity claim. I say this because there is so much uncertainty regarding how long Ms. Hauk will be off work, what employment Ms. Hauk will have when her condition plateaus, how much time she may need off during flare ups and what age she will retire.

[235] Had Ms. Hauk not been injured in the accident, she may very well have maintained her EA position until retirement at age 65 or later. Based on Mr. Trainor's opinion, absent the accident, it is unlikely that she would have done better. In other words, there are no significant positive contingencies. On the other hand, there are a number of real and substantial possibilities that she would have done worse. Some of the negative contingencies are:

1. Though Ms. Hauk has been cancer-free for 20 years, she may have needed time off work for health-related reasons, just as she did when she initially developed tennis elbow;
2. Due to what she considered to be a stressful work environment, she may have chosen to leave her current position to take a lower paying position that brought her more joy; and
3. Having worked for an excellent public sector employer with good pension benefits for many years, Ms. Hauk may have chosen to retire prior to age 65.

[236] Courts often make deductions in the range of 20% to account for these sorts of contingencies. In Ms. Hauk's case, I consider a lower deduction to be appropriate. She has always been a hard worker with a strong attachment to the workforce who has persevered through various challenges. Both of her parents retired at age 65. She had a secure position with an excellent salary and benefits. She suffered a financial setback following her divorce and needed to work to ensure her future financial security.

[237] Having considered all of the circumstances and contingencies, I consider Ms. Hauk to have had a pre-accident future earning capacity of \$750,000 to \$850,000.

[238] Ms. Hauk's post-accident future is filled with uncertainty. There are many real and substantial possibilities, including:

1. Given the chronicity of her accident-related injuries despite extensive treatment, Ms. Hauk may never successfully return to the workforce;
2. Ms. Hauk may be off work for a time to seek further treatment, following which she may gradually return to full-time work in her current position working to age 65 or later;
3. Ms. Hauk may be off work for a time to seek further treatment, following which she may gradually return to full-time work in a less demanding and lower paying position with the school district working to age 65 or later;
4. Ms. Hauk may be off work for a time to seek further treatment, following which she may gradually return to part-time work in a less demanding and lower paying position with the school district working to age 65 or later;
5. Ms. Hauk may be off work for a time to seek further treatment, following which she may gradually return to full-time work in a less demanding and lower paying position with a new employer working to age 65 or later;

6. Ms. Hauk may be off work for a time to seek further treatment, following which she may gradually return to part-time work in a less demanding and lower paying position with a new employer working to age 65 or later;
 7. In any of the realistic scenarios involving Ms. Hauk returning to work, she may need time off from time to time to deal with flare ups in her condition;
 8. In any of the realistic scenarios involving Ms. Hauk returning to work, she may have to retire early due to her injuries; and
 9. In any of the realistic scenarios involving Ms. Hauk returning to work, she may be affected by other negative contingencies causing her to miss time from work or retire early.
- [239] It is impossible to determine the likelihood of the various real and substantial possibilities with any precision. The best I can do is say that I consider it most likely that Ms. Hauk will need to be off work for a substantial period of time following which she will need to make some of the compromises identified by Mr. Trainor to return to work.
- [240] Given her skill set and work ethic, I consider it to be likely that Ms. Hauk can find appropriate work with a sympathetic and supportive employer. More specifically, I consider it to be likely that Ms. Hauk will return to work in a part-time or otherwise less demanding (and therefore lower paying) position. The school district does not have a part-time EA position so any part-time work would likely be at a reduced rate of pay, whether with the school district or another accommodating employer. I also consider it likely that Ms. Hauk will need time off in the future from time to time to deal with expected flare ups in her condition.
- [241] After taking into account all of the real and substantial possibilities, and various contingencies, overall, I consider Ms. Hauk's future earning capacity to be 50% of her pre-accident earning capacity. I, therefore, award Ms. Hauk \$400,000 for her future loss of earning capacity.

Loss of Homemaking Capacity

- [242] Though Ms. Hauk presented a claim for future homemaking costs, I consider it appropriate to assess this aspect of her claim as a claim for the loss of homemaking capacity.

Legal Principles

- [243] In its recent decision in *Kim v. Lin*, 2018 BCCA 77 at paras. 31-33, our Court of Appeal reaffirmed that a true loss of homemaking capacity is a compensable pecuniary loss that should be valued as the loss of an asset. That means it should be compensated regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased. The Court also held that a loss of homemaking capacity that is more in line with a loss of amenities may be compensated through an appropriate award of non-pecuniary damages.

[244] As I read the Court's judgment, a cautious approach grounded in reasonableness is to be taken but "[s]o long as the award is justified on the basis of evidence of the plaintiff's incapacity it will be commensurate with the plaintiff's loss": paras. 33-37.

Analysis

- [245] Ms. Hauk's homemaking capacity includes a yard maintenance component. The evidence clearly establishes that Ms. Hauk is less able to perform homemaking, including yard maintenance, tasks as a result of the accident. At the same time, the evidence is clear that Ms. Hauk has not utilized any hired help to maintain her home and yard since the accident. Instead, Mr. Shatzko has significantly increased his contributions.
- [246] Ms. Sears notes that, prior to the accident, Ms. Hauk was responsible for all of the homemaking activities in her home. Now, Ms. Hauk is unable to tolerate heavier cleaning demands such as cleaning bathtubs, vacuuming, mopping floors, cleaning windows, etc. Ms. Sears recommends that Ms. Hauk be provided weekly homemaking assistance at an annual cost of \$3,120 as well as bi-annual homemaking assistance at an annual cost of \$900. Mr. Szekely calculates these items to have a present value to age 80 of \$54,395 and \$17,972 respectively.
- [247] Ms. Sears also notes that, prior to the accident, Ms. Hauk performed the majority of the yard work. Now, she is unable to tolerate many of these activities, especially those that involve repetitive above the shoulder activity. Ms. Sears recommends four hours of labour twice per year at an annual cost of \$320. Mr. Szekely calculates the present value of yard maintenance services to age 80 to be \$12,780.
- [248] Ms. le Roux suggests that homemaking tasks seldom exceed the strength requirements that Ms. Hauk demonstrated during her FCE. Further, Ms. le Roux suggests that Ms. Hauk could easily manage many tasks by pacing herself appropriately. In Ms. le Roux's opinion, Ms. Hauk would benefit from homemaking assistance of two hours every two weeks for six months to enable her to initiate her CBT and begin making some lifestyle changes that will enable her to resume her regular homemaking tasks. Ms. le Roux estimates the one-time costs to be \$780.
- [249] Ms. le Roux supports Ms. Sears' recommendation regarding yard maintenance services. Given her opinion with respect to annual yard maintenance, I am not sure why Ms. le Roux does not see the need for Ms. Hauk to receive bi-annual help with the heavier aspects of spring and fall cleaning.
- [250] Given Ms. le Roux's opinion, it is not clear to me why the defence did not include any amount for loss of homemaking capacity (or, as characterized by Ms. Hauk, the cost of future homemaking and yard maintenance) in their final submissions. An award for loss of homemaking capacity is clearly supported by the evidence. The only issue is quantum.

- [251] While there is some risk that Ms. Hauk's condition will not improve, I expect Ms. Hauk's condition to improve to the point that she will generally be able to resume her regular homemaking activities. Even so, I anticipate that she will require bi-annual help with the heavier aspects of spring and fall cleaning. I also anticipate that Ms. Hauk will experience flare ups from time to time during which she will need further homemaking assistance. I agree with Ms. Sears and Ms. le Roux that Ms. Hauk will need annual assistance with heavy yard maintenance work.
- [252] In my view, it is fair and reasonable for a loss of homemaking capacity award to recognize that Ms. Hauk will continue to require significant homemaking assistance while she begins to tackle the various treatment recommendations of the medical experts and then from time to time during future flare ups. I also consider it to be fair and reasonable for a loss of homemaking capacity award to recognize that Ms. Hauk will require assistance with heavier spring and fall homemaking, and yard maintenance tasks for the foreseeable future.
- [253] Taking all of the contingencies into account, I award Ms. Hauk \$40,000 for her loss of homemaking capacity.

Cost of Future Care

Legal Principles

- [254] The purpose of an award for cost of future care is to restore the injured party, as best as a monetary award can do, to the position they would have been if the accident had not occurred: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29.
- [255] Claims for future care must be medically justified, reasonable and fair to both parties. The court must determine the services, medications, and aids that are reasonably necessary to promote the health of the injured party and assess the likelihood that they will use them in the future: *Aberdeen v. Zanatta*, 2008 BCCA 420 at paras. 41-42.
- [256] While it is not necessary to have a physician testify to the medical necessity of each and every item of future care, there must be "some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional": *Gregory* at para. 39; *Gignac* at para. 30.
- [257] Future care costs awards should be adjusted for contingencies. These may be positive or negative and will depend on the particular facts of the case: *Peters v. Ortnier*, 2013 BCSC 1861 at para. 144.

Analysis

- [258] Ms. Sears provided cost estimates for various future care items for Ms. Hauk based on Ms. Hauk's current practices and the recommendations of the experts. That said, Ms. Sears was unable to cost several recommended future care items because she was not provided sufficiently specific information to do so.
- [259] Mr. Szekely then calculated the present value of these costs to the end of Ms. Hauk's life expectancy. As an alternative, Mr. Szekely also provided multipliers to convert any annual care cost into a present value.
- [260] Mr. Szekely calculated the present value of the future care items identified by Ms. Sears to be \$330,165. This amount includes two alternative options for anti-depressant medications, one of which must be excluded. However, this amount does not include any cost for the Botox treatments, certain medications and trigger point injections recommended by Dr. Apel and/or Dr. Ancil. This amount also does not include the cost of any CBT treatments that may be required if and when Ms. Hauk's depression relapses.
- [261] Taking all of the evidence into account, the plaintiff seeks an award of \$300,000 for her cost of future care. I note that this amount includes roughly \$85,000 for weekly homemaking, bi-annual heavy house cleaning and yard maintenance all to age 80. I have dealt with these homemaking and yard maintenance claims in my award of loss of future homemaking capacity. As a result, I take Ms. Hauk to seek an award for cost of future care in the range of \$215,000.
- [262] Based on its view of Ms. Hauk's condition, the defence acknowledges that Ms. Hauk should receive a modest award for her cost of future care comprised of the following:
- Over-the-counter pain medication - \$2,500.00
 - Anti-depressant medication for two years - \$7,356.52
 - Physiotherapy for two years - \$2,040.00
 - Massage for two years - \$2,640
 - Botox - \$1,000
 - CBT - \$5,448.00
 - Kinesiology/Active Rehabilitation (including gym/pool pass) - \$1,500
 - Total - \$22,484.52
- [263] I will analyse each of Ms. Hauk's claims below.

Medications and Supplements

[264] Ms. Sears provided annual cost estimates of Ms. Hauk's current medications and supplements, and additional medications that have been recommended. Mr. Szekely then calculated the present value of these costs to the end of Ms. Hauk's life expectancy. The results are:

Aleve - \$1,470 Tylenol - \$102 Ibuprofen - \$294 Robaxacet - \$867 Magnesium glycinate - \$4,260
Phosphatidylserine - \$12,405 Cymbalta - \$65,078 (90 mg tablets) or \$85,900 (120 mg tablets) Botox - \$1,000[2] Duloxetine, gabapentin, pregabalin and/or lamotrigine - no cost provided Total - \$85,476 - \$106,298

[265] In my view, it is reasonable to expect Ms. Hauk to continue using the very modest amounts of the over-the-counter medications she is currently using (Aleve, Tylenol, ibuprofen and Robaxacet), as needed, in the long-term. It is different with respect to the balance of the items she seeks.

[266] No evidence was led to provide medical justification for Ms. Hauk's use of magnesium glycinate and phosphatidylserine. These are supplements that were recommended to Ms. Hauk by her naturopath but I have no expert evidence on the purpose or effectiveness of these items. Ms. Hauk may subjectively believe they help her in some way but that is not good enough. I am unable to make any award for these items.

[267] With respect to the claim for Cymbalta, it is the anti-depressant medication that has been recommended for Ms. Hauk but no evidence was led to suggest that Ms. Hauk would be required to take the medication every day for the rest of her life. Further, Ms. Hauk is cautious about medications and I am unable to find that she would do so even if that was recommended.

[268] I took from the evidence that Ms. Hauk will need and will take anti-depressants until her mood stabilizes, and from time to time in the future during periods of relapse. While it is impossible to predict how much or how long Ms. Hauk will take anti-depressant medication, it is reasonable and fair to conclude that she will need to take the medication for relatively prolonged periods now and occasionally in the future. I consider an award in the range of \$12,500 to be adequate for the anti-depressant medication that Ms. Hauk needs and will use.

[269] Even though Ms. Hauk had a bad experience with facet joint injections, Botox injections are made in different locations and serve a different purpose. I accept that Ms. Hauk is likely to follow Dr. Apel's recommendations to have Botox injections. I also accept that there is likely to be an out-of-pocket cost. The best (and only) evidence is that the cost will be roughly \$1,000.

- [270] With respect to the various other medications that have been recommended, I simply have no way of quantifying how much of these medications Ms. Hauk will require, whether she will take them and how much they will cost. Nevertheless, I consider it fair and reasonable to make an allowance for Ms. Hauk to take some sort of pain relieving prescription medication from time to time in the future. In the absence of specific evidence, I am only able to make what I consider to be a nominal award in the range of \$2,500.
- [271] After considering all the real and substantial possibilities and various contingencies, I consider an award of \$19,000 for medications to be appropriate.

Counselling

- [272] There is no dispute that Ms. Hauk requires CBT to deal with the mental health issues that have emerged for her as a result of the accident. During cross-examination, Dr. Ancil specifically recommended an initial course of 24 sessions with two follow-ups of between 6 and 12 further sessions over the following year or two. In the event of relapse, Dr. Ancil testified that this counselling would have to "start over again".
- [273] Ms. Sears estimates the cost of 24 sessions of CBT to be \$5,400. Given the depth and chronicity of Ms. Hauk's mental health struggles, I consider it likely that she will experience periodic setbacks and possibly full relapses in the future. I consider an award of \$15,000 to fairly and reasonably reflect Ms. Hauk's need for CBT in the future.
- [274] Ms. Sears has responsibly concluded that Ms. Hauk already understands "the cycle of pain, and how her psycho-emotional responses negatively feed into the chronic pain loop." As a result, Ms. Sears has referred Ms. Hauk to free resources to further assist her to manage her chronic pain in the future.

Passive Therapies

- [275] Ms. Sears provided annual cost estimates for Ms. Hauk's current massage and physiotherapy. Mr. Szekely then calculated the present value of these costs to the end of Ms. Hauk's life expectancy to be \$30,826 and \$23,820 respectively. Ms. le Roux suggests that no further massage or physiotherapy will be helpful.
- [276] I am unable to accept Ms. le Roux's opinion over Dr. Apel's opinion that Ms. Hauk will require time contingent passive therapies from time to time. Not only does Dr. Apel have superior qualifications, unlike Ms. le Roux, Dr. Apel also personally assessed Ms. Hauk.
- [277] Turning to the amounts sought by Ms. Hauk, these amounts are at odds with the recommendations of Dr. Apel and Ms. Sears. Dr. Apel recommends that Ms. Hauk receive "time contingent" passive therapies while Ms. Sears recommends that Ms. Hauk continue her monthly massage and physiotherapy treatments for one year with provision for four treatments every year into the future.

- [278] Clearly Ms. Hauk receives temporary symptomatic relief from massage and physiotherapy. In her current fragile emotional state, the thought of giving these up is understandably very upsetting to Ms. Hauk. Given the chronicity of her chronic pain, I accept that any relief, no matter how temporary, is good for Ms. Hauk's emotional well-being.
- [279] Nevertheless, the medical experts have made recommendations that I accept Ms. Hauk will follow. These do not include monthly massage and physiotherapy for the rest of Ms. Hauk's life. Further, in any event, while there are no guarantees, there is a real and substantial possibility that Ms. Hauk's condition will improve to the point that she will only require passive therapies from time to time during periods of flare ups.
- [280] I consider an award of \$15,000 to fairly and reasonably reflect Ms. Hauk's need for accident-related massage and physiotherapy in the future as recommended by Dr. Apel.

Active Rehabilitation

- [281] In Dr. Apel's opinion, Ms. Hauk will benefit most from a true active rehabilitation program via low impact activities such as rowing or modified swimming. Given the areas of injury and Ms. Hauk's self-reports that she experiences symptomatic relief in a water environment, Ms. Sears has recommended that Ms. Hauk establish a new exercise plan with a kinesiologist and then have ongoing access to a pool facility on an ongoing basis. Ms. le Roux agrees that Ms. Hauk should have further access to a kinesiologist, but suggests that a one-year pool pass or perhaps drop-in passes would suffice for any necessary water-based therapy.
- [282] I consider Ms. Sears' recommendation for a kinesiologist to be fair and reasonable. Though Ms. Hauk has learned a number of exercises with the help of a kinesiologist in the past, these have not been water-based.
- [283] I also consider Ms. Sears' recommendation for Ms. Hauk to have ongoing access to a pool facility on an ongoing basis to be mostly fair and reasonable. I note that Ms. Hauk has a recreational property on a lake where she spends a great deal of time in the summer. I consider it unlikely that Ms. Hauk will utilize a swimming pool in the summer. Further, as Ms. le Roux noted, drop in passes may be adequate for the amount of pool-based activity that Ms. Hauk will undertake. Finally, I consider it unlikely that Ms. Hauk will utilize an annual swimming pass from now until the end of her life.
- [284] In my respectful view, there is a real and substantial possibility that Ms. Hauk's condition will improve to the point where she no longer needs to maintain a regular swimming routine, she may change her exercise routine to something she can do in her home and/or she will get to an age where she simply slows down and no longer swims regularly.

[285] Ms. Sears estimates the costs of six sessions with a kinesiologist to be \$390 and the cost of an annual pool pass to be \$408. To the expected end of her life, Ms. Szekely calculates the cost of an annual pool pass to be \$10,005. Overall, I consider an award of \$4,000 for active rehabilitation to be fair and reasonable.

OT Assistance

[286] Dr. Apel has recommended ergonomic modifications for Ms. Hauk for sustained positions and a sit-stand desk. Ms. Sears has recommended that Ms. Hauk have six to eight hours with an OT who can assist her to source, set up, implement and monitor ergonomic equipment for her workplace as well as assist her with good "workplace habits". Ms. le Roux agrees. Ms. Sears has estimated the cost to be \$720 to \$960.

[287] I agree that Ms. Hauk needs the assistance of an OT but I am not sure that she will be out-of-pocket to secure all of the assistance she needs. In particular, I note that Ms. Hauk works for a supportive employer that has a Workplace and Disability Support Manager. Though it is not certain that Ms. Hauk will return to work for the school district, if she does, I am not convinced that she will need quite as much support as estimated by Ms. Sears.

[288] In all of the circumstances, I consider an award of \$600 to be fair and reasonable.

Equipment

[289] Dr. Apel and Ms. Sears have both recommended ergonomic modifications for Ms. Hauk. Ms. Sears has specifically recommended the following:

- Office equipment contingency[3] - \$3,000 - \$3,500
- Gardening equipment[4] - \$1,048
- Replacement TENS machine - \$17.99 (every ten years)
- Gel and replacement pads for TENS machine - \$30.60 (annual cost)
- Replacement massage device - \$16.65 (every ten years)

[290] Ms. le Roux agrees with many of Ms. Sears' recommendations but notes that Ms. Hauk's current employer would likely provide any ergonomic office equipment she requires. She further considers some of the equipment recommended by Ms. Sears to be standard equipment in any office environment. If Ms. Hauk changes employment, Ms. le Roux considers \$2,000 to be adequate for the ergonomic equipment, including replacement equipment, that Ms. Hauk will need[5]. Ms. le Roux supports Ms. Sears' recommendation that Ms. Hauk purchase a tool cart with an adjustable seat for her garden.

- [291] I agree with Ms. le Roux that if Ms. Hauk remains with the school district, it is unlikely that she will need to purchase any of the office equipment recommended by Ms. Sears. Even with a new employer, I agree that some of the items recommended by Ms. Sears appear to be standard equipment that would be provided by the employer.
- [292] With respect to the TENS machine and massage device, I respectfully note that there was no expert evidence to establish that they are medically necessary or effective. Ms. Sears simply noted that Ms. Hauk uses them and provided costs for operating and replacing them. I am unable to make any award for these items.
- [293] I accept Ms. Sears' recommendations for gardening equipment. Gardening is something that Ms. Hauk has enjoyed over the years and the recommended equipment is necessary to enable her to return to one of her favourite pastimes.
- [294] Taking all of the contingencies into account, I consider an award of \$2,500 to be appropriate for equipment.

Total

- [295] Based on the above, I award Ms. Hauk \$56,100 for her cost of future care.

In-Trust Claim

Legal Principles

- [296] In *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124, D. Smith J., as she then was, summarized the factors to be considered in the assessment of "in trust" claims at para. 180 as follows:
- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
 - (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
 - (c) the maximum value of such services is the cost of obtaining the services outside the family;
 - (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
 - (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
 - (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

Analysis

- [297] I agree with Ms. Hauk that Mr. Shatzko has provided exceptional support to her since the accident. In particular, he has significantly increased his share of the housekeeping and yard maintenance work.
- [298] While some of Mr. Shatzko's efforts would be expected of a loving and supportive partner, Mr. Shatzko has gone above and beyond the call. In *Iwanik v. Hayes*, 2011 BCSC 812 and *Popove v. Attisha*, 2019 BCSC 1587, the court awarded \$10,000 to the plaintiff in somewhat similar circumstances. I make the same award to Ms. Hauk.

Special Damages

- [299] The parties largely agree on Ms. Hauk's special damages. Ms. Hauk seeks an award of \$14,624.43 while the defence submits that she is entitled to \$13,293.27. The difference relates to various naturopathic remedies that Ms. Hauk's naturopath recommended.
- [300] There was no medical or other evidence regarding the efficacy of the naturopathic remedies. Further, Ms. Hauk only testified that some, not all, of these remedies helped. Ms. Hauk's testimony regarding the items that helped was, with the greatest respect, not specific, detailed or compelling. On the evidence, I am not convinced that any of the naturopathic remedies were necessary or helpful. As a result, I award Ms. Hauk \$13,293.27 for her special damages.

Summary

- [301] In summary, I award Ms. Hauk the following:

Non-pecuniary damages - \$150,000 Past loss of income - \$28,999.98 Future loss of earning capacity - \$400,000 Cost of future care - \$56,100 Loss of homemaking capacity - \$40,000 In-trust claim - \$10,000 Special expenses - \$13,293.27.

- [302] My award totals \$698,393.25.

- [303] Unless there are issues relating to offers to settle, I award Ms. Hauk costs.

- [304] In the event they are unable to agree, the parties have leave to bring typical post-trial topics, such as the deductibility of collateral benefits, subrogation of long-term disability payments recovered by Ms. Hauk, healthcare recovery costs and tax gross-ups before me.

- [305] I thank counsel for their able assistance and wish Ms. Hauk all the very best.

"L.S. Marchand J."

MARCHAND J.

- [1] There was no expert evidence to establish this number but it does reflect Ms. Hauk's average employment earnings between 2013-2015.

- [2] This was the estimated "pharmacy cost" provided by Dr. Apel. No evidence was led with respect to any other costs of Botox treatment.
 - [3] Consisting of a desk with drop down adjustable tray, ergonomic chair, foot stool, document holder, headset, docking station, wireless keyboard, wireless remote and recording/dictation software.
 - [4] Consisting of a tool cart with an adjustable seat to store multiple tools and limit transitions up and down, and raised garden beds to reduce stooping and neck flexion.
 - [5] Consisting of a sit-stand desk, ergonomic chair and foot rest.
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