

CANADA / JUDGMENT

Laybolt v. Baylis

2021 BCSC 1798

COURT

Supreme Court of British Columbia

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2021 BCSC 1798 Laybolt v. Baylis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Laybolt v. Baylis,

2021 BCSC 1798

Date: 20210913

Docket: M184217

Registry: Victoria

Between:

Eileen Ruth Laybolt

Plaintiff

And:

Todd Paul Baylis and

Allied Power and Communication Ltd.

Defendants

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Plaintiff:

D. D. McKnight

Counsel for the Defendants:

H. F. Turnham

Place and Date of Trial/Hearing:

Victoria, B.C.

May 17 - 21, 2021

June 17, 2021

Place and Date of Judgment:

Victoria, B.C.

September 13, 2021

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A. INTRODUCTION

- [1] The plaintiff, Eileen Laybolt, was injured in a motor vehicle accident on November 26, 2016. She was standing on a sidewalk when a truck passed her and the truck's load of flooring fell on her.
- [2] The plaintiff claims injuries of mild traumatic brain injury, post-traumatic headaches, whiplash injury to the neck and back and other injuries as being causally related to the accident. She seeks damages for non-pecuniary loss, past and future wage loss, cost of future care and special damages.
- [3] The defendants accept liability for the accident and some of the injuries claimed by the plaintiff. However, they question whether there was or is any serious head injury and the amounts of damages claimed by the plaintiff.

B. BACKGROUND

- [4] The plaintiff was born on May 3, 1954. She was 62 years old at the time of the 2016 accident and 67 years old at trial. She lives with her common-law husband and has two sons from a previous relationship.
 - (a) Before the November 2016 accident
- [5] The plaintiff testified that she was generally in good health prior to the 2016 accident. She was active doing yoga and water exercise. She also participated in dancing with her partner two to three times a week, they danced many styles and they took private lessons. Dancing was the focus of her and her common-law partner's vacations on cruises. She also played golf, sewed clothes and read books.

- [6] She has a thyroid condition for which she takes medication. She has used massage therapy since about 2009 and seen a physiotherapist and chiropractor. And there was a motor vehicle accident in 2017 which she described as a "little rear-ender" that caused a whiplash injury but no ongoing problems. There were no regular problems with sleeping. She described her emotional state as very stable although a previous divorce was difficult.
- [7] The plaintiff worked as a dental hygienist primarily at the same dental office since 2004 (she left in 1997 for a few years), which she described as stressful work that caused some tightness in the neck and soreness in the feet. She worked eight hours per day and four days per week. She described taking pride in her work and it gave her the satisfaction of helping her patients. She received vacation and benefits, including free dental work. Her plan was to work "until I could not work any more", with the possibility of working less. She testified that some dental hygienists work into their 70s.
- [8] At the time of the November 2016 accident the plaintiff had been living with her common-law partner for about two months. He is retired and he did a number of the household chores including the cooking, some laundry and vacuuming.
- (b) The accident on November 6, 2016
- [9] On November 6, 2016 the plaintiff and her partner were out shopping and waiting to cross an intersection. She testified that the next thing she remembered was that she was on the ground. A load of flooring bundles from a passing truck had fallen off and hit her. She immediately felt pain in her right foot and her head. There is an issue about whether she lost consciousness.
- [10] She was taken to the hospital in an ambulance. She does not remember that but she received an invoice for the ambulance. The ambulance report is mostly illegible but a record of a Glasgow Coma Scale ("GCS") of 15 is legible.
- [11] At the hospital there was bleeding from an abrasion in the head and a CT scan was done. One chart note from the hospital records says that the "load of hardwood flooring hit [the plaintiff's] head." The GCS was also 15. Another note says "pt fell & hit back of head." The latter note also recorded no loss of consciousness but she "was 'out of it' for 10-15 sec as per husband". Her partner drove her home but she does not remember that.
- (c) After the November 2016 accident
- [12] After the November 2016 accident the plaintiff returned to work on December 12, 2016, working her regular four days per week. There was some modest overtime.

[13] She saw her family physician, Dr. David Bos, for the first time on January 27, 2017. She testified that she did not see him sooner because she had been in the hospital and she believed she would get better. She also saw Dr. Bos on February 10, March 31, April 28, June 23 and August 25, 2017. The chart entries for these visits are useful inasmuch as they record the plaintiff's description of her symptoms and they record medication and use of modalities such as physiotherapy.

[14] The entry in Dr. Bos' chart for January 27, 2017 is as follows:

She was involved in a motor vehicle accident on Nov, 26th: she was a pedestrian standing on the side of the road along with her partner Larry when a pickup truck rounding the corner lost its load of flooring which struck them. She fell backwards banging her head. She did go to the hospital and had a CT scan of her head. Lately she is describing symptoms similar to clinical depression. She was not working too much over the holidays but now she is back to her 4 day work. She is extremely fatigued. She finds herself weepy when she comes home. She is endorsing most of the vegetative symptoms of clinical depression. She was on Effexor many years ago around the time of her divorce for two years, which helped a bit. We discussed the difference between concussion and depression. For now she is willing to try a sample of Cymbalta 30mg. They are about to go on a cruise Feb. 12th to the Carribean [sic]. Follow up in two weeks.

[15] The plaintiff went on the cruise with her partner in February 2017. She was off work from February 13, 2017 for the cruise and returned to her regular work around February 27, 2017.

[16] Dr. Bos' chart entry on February 10, 2017 is brief and it noted "the Cymbalta is starting to help. A bit more energy, and less weepy."

[17] The chart for the third visit to Dr. Bos on March 31, 2017 noted:

Two issues. First, she has ongoing neck pains ever since the MVA in November. She never really did her full-time hours at her dental hygiene work (normally works 4 days a week) since the accident. There was a Carribean [sic] cruise in there, and she had done some weeks working only twice a week. Now she says by the fourth work day her neck becomes really sore and it is a struggle to do the work. I do notice that her right nuchal muscles seem extremely tight to palpation. She has decreased range of motion turning her head to the right, perhaps to about 45 degrees. She takes some Tylenol which helps a bit. She didn't really have physiotherapy after the MVA except for a couple of visits, I suggested trying physio/tens machine to see if that helps, I also prescribed her some Flexeril to try. Her sleep hasn't been the greatest because of the neck pains. She could also try a soft neck collar for sleep.

The other issue is the Cymbalta. It appears to be greatly helpful for her mood. However, she says she has a decreased libido since it started. Her partner Larry's libido has not decreased. They have sex perhaps once every two weeks. She will try staying on the Cymbalta for now.

[18] On April 28, 2017 Dr. Bos recorded:

Feels "like crap"; excessively tired. Feels like "I'm here but I'm not here". We had a discussion about her clinical hyperthyroidism (historically, she feels better when she greatly suppresses her TSH, now taking 88ug Synthroid). She thinks her mood is better since starting the Cymbalta 30mg QD, but not so much her energy level. She is agreeable to increase it to 60mg today. She will repeat some lab work.

She has ongoing aches and pains since her MVA last November. She is alternating physio, chiro and massage therapy. Her right upper back/neck is still quite uncomfortable.

[19] The chart note of June 23, 2017 recorded that the plaintiff had stopped taking the Cymbalta ten days previously "because she is sleeping all the time." A new medication, Celexa, was prescribed.

[20] And at the visit on August 5, 2017 Dr. Bos recorded the following, including a reduction in the plaintiff's work week from four days to three days:

She ran out of the new celexa 3 days ago; she definitely thinks it helps; starting to feel on edge, feels like she wants to cry, "I don't like any stimulus".

And since the ICBC pedestrian accident Nov 26, she has permanently decreased her work week from 4 to 3 days a week (dental hygienist) due to ongoing neck pains by the end of the week. Still does physio/massage/ acupuncture [sic]/chiro. She is also requesting a referral to sports medicine Dr. Lynne MacKean regarding ongoing post-concussion symptoms from the accident. A referral will be sent.

[21] In September 2018 the plaintiff was diagnosed with breast cancer and she had surgery in November 2018. There was a post-operative complication and a second surgery was necessary. In mid-February 2019, she went on a cruise, which had been scheduled prior to her November 2018 surgery. She started chemotherapy in February 2019, which was scheduled to continue until early 2020.

[22] She intended to return to work at various times following her surgery and cancer treatment, but in March 2020 she ultimately decided to retire.

C. EXPERT EVIDENCE

[23] The plaintiffs tendered evidence from three experts: Dr. Donald Cameron, an expert in neurology; Dr. Lynne MacKean, an expert in physical medicine and rehabilitation; and Robert Wickson, an expert in economics. The defendants did not tender any expert evidence. All experts were cross-examined.

[24] Dr. Cameron examined the plaintiff on June 4, 2018 and produced two reports, July 19, 2018 and June 14, 2019. His opinion of July 19, 2018 included his findings on examination:

26. At the time of my neurological assessment of Ms. Laybolt, I performed a neurological examination. She was able to recall 1 out of 3 items at three minutes on short term memory testing. With reinforcement she could recall the second and third items. She was able to tell

me the name of the Prime Minister of Canada, the President of the United States and the Premier of B.C. She could spell the word "world" backwards normally. She could subtract 7 from 100 in serial fashion normally. She was slow in processing information. Cranially nerves II to XII were normal. Motor examination including tone, bulk and power was normal in all extremities. Coordination testing, balance testing, gait and stance, tandem gait, and deep tendon reflexes were all normal. Sensation to pin, touch, temperature, position and vibration was normal in all extremities.

27. On general physical examination her blood pressure was 115/82 millimeters of mercury, right arm, sitting position. Her pulse was 68 beats per minute and regular. There were no bruits and no murmurs. Musculoskeletal examination revealed a normal range of movement of her neck and back.

[25] Dr. Cameron also provided the following opinion in his first report:

Opinion

28. Following my neurological assessment of Ms. Laybolt, and following my review of the hospital emergency records and the ambulance crew reports, as well as the family physician records and the consultation report of Dr. MacKean, physiatrist, it is my opinion that Ms. Laybolt probably did suffer an altered state of consciousness or loss of consciousness at the time of the pedestrian/motor vehicle accident on November 26, 2016.
29. Ms. Laybolt has no recall of the impact when the load of flooring struck her and caused her to fall to the ground. She has no recall of the ambulance crew checking her out at the scene of the ambulance. She has segmental recall of the ride to the hospital and no recall of being taken into the emergency department. She also has no recall of her husband driving her home from the emergency department after she was discharged from the emergency department. Ms. Laybolt indicated that she was disoriented when she first became aware of things at the scene of the accident following the impact. Patients remain in a period of post traumatic amnesia until they are able to lay down continuous new recall of events thereafter. It is my opinion that Ms. Laybolt probably remained in a period of post traumatic amnesia after the initial incident of altered state of consciousness or loss of consciousness, probably for several hours in duration based on the history that she provided to me at the time of my neurological assessment of Ms. Laybolt.
30. Ms. Laybolt had a Glasgow Coma Scale score of 15 out of a possible normal of 15 documented by the ambulance crew at the scene of the accident. The emergency physician indicated that she was amnesic for the events of the accident.

31. The Glasgow Coma Scale is of assistance to physicians evaluating patients following any type of brain injury. In this clinical context a Glasgow Coma Scale of 13 to 15 is diagnostic of a patient suffering a mild traumatic brain injury. A Glasgow Coma Scale of 9 to 12 is diagnostic of a patient suffering a moderate traumatic brain injury. A Glasgow Coma Scale of 3 to 8 is diagnostic of a patient suffering a severe traumatic brain injury.
- [26] Dr. Cameron noted that a CT scan at the hospital was normal but he nonetheless concluded that the plaintiff had suffered a mild traumatic brain injury from the November 2016 accident. He explained the normal CT scan at the time of the accident as follows:
32. As I have indicated above, Ms. Laybolt had a normal CT brain scan performed following her admission to the hospital on the date of the accident. The CT brain scan was reported to be normal by the radiologist. It is important to emphasize that the type of injury that occurs at the time of a mild traumatic brain injury is microscopic in nature and involves axonal disruption or disruption of intracellular and intercellular neuronal membranes. This in turn results in a cascading effect involving extravasation of excitatory neurotransmitters and the transfer of ions across these disrupted membranes. This in turn results in permanent damage of dendrites and axons which carry messages between different neuronal cell populations within the brain and neuronal cell death microscopically. CT brain scans and MRI brain scans are only able to visualize residual change following focal macroscopic injury and not microscopic injury. Therefore, a normal CT brain scan in the case of Ms. Laybolt does not alter my opinion regarding the diagnosis of a mild traumatic brain injury which she sustained at the time of this accident.
33. As Ms. Laybolt probably struck her head on the ground at the time of the impact resulting in the altered state of consciousness or loss of consciousness and the diagnosis of a mild traumatic brain injury, it is possible that an MRI brain scan, SWI sequence, will document residual change following focal macroscopic brain injury, specifically hemorrhagic shear injury or non-hemorrhagic shear injury. I would therefore recommend that Ms. Laybolt have an MRI brain scan, SWI sequence, performed at this time to document whether or not there are residual changes following focal hemorrhagic shear injury or non-hemorrhagic shear injury which would have occurred at the time of the accident on November 26, 2016, associated with the diffuse axonal microscopic injury of brain structures that she did sustained at the time of the accident.
- [27] An MRI brain scan was ordered, it was discussed in Dr. Cameron's second report and I set that out below.
- [28] In his first report Dr. Cameron then described his views of the progression of the plaintiff's symptoms and some treatment options:
34. It is also my opinion that Ms. Laybolt has developed symptoms of post traumatic brain injury syndrome following the mild traumatic brain injury that she sustained at the time of the accident. She was slow in processing information at the time of my neurological assessment. She reports decreased memory, decreased attention span, decreased

concentration, irritability, mood swings, disturbed sleep pattern, decreased ability to make decisions, decreased ability to multi-task, problems with being easily overwhelmed, difficulty learning new material and new things, decreased libido, decrease in balance, headaches and decrease in socializing and motivation. Her husband is of the opinion that her personality is changed since this accident because of the residual effects of the brain injury.

35. I have assessed Ms. Laybolt in June of 2018, almost two years following the date of the accident. Patients improve up to approximately two years following any type of physical injury including a traumatic brain injury. It is possible that Ms. Laybolt will have some further improvement over the next five or six months, but it is probable that she will remain permanently partially disabled because of her ongoing complaints and chronic pain, present as a result of soft tissue and musculoskeletal injuries that she sustained at the time of the accident, and associated post traumatic headaches. As well, anxiety and feelings of depression have developed as a result of the injuries that she sustained at the time of the accident.
36. Ms. Laybolt's headaches are probably a combination of post traumatic headaches following the mild traumatic brain injury that she sustained at the time of this accident. A high percentage of patients who have suffered a mild traumatic brain injury complain of headaches following such injury. These headaches are probably also post traumatic musculoskeletal or cervicogenic headaches associated with the chronic neck pain that she has developed as a result of soft tissue and musculoskeletal injuries that she sustained at the time of this accident, i.e. the whiplash injury.
37. I would defer to the specialists in psychiatry and/or psychology to provide an opinion regarding the recommended future psychological counseling and need for antidepressant/anti-anxiety medication and long term prognosis.
38. Ms. Laybolt has received some passive rehabilitation therapy following this accident. I would defer to a specialist in rehabilitation medicine such as Dr. MacKean, to provide an updated opinion with respect to the recommended future rehabilitation therapy, active and passive, and long term prognosis.
39. Ms. Laybolt does report suffering with ongoing post traumatic headaches and pain and discomfort, particularly around her neck and shoulder area. She is a candidate for prophylactic pain and headache medication such as gabapentin, Lyrica, amitriptyline, nortriptyline or topiramate. The medications can be prescribed and monitored by her family physician or a neurologist.

40. Ms. Laybolt is also a candidate for botulinum toxin injection therapy for her ongoing post traumatic headaches and associated neck pain and shoulder pain. I would recommend that she be assessed by a physiatrist or neurologist qualified in this therapy and that she receive between 100 and 200 units of botulinum toxin injected into the scalp muscles, cervical paraspinal muscles and the trapezius muscle in the shoulders bilaterally on at least two occasions to provide an adequate assessment regarding the possible benefit of this therapy.
- [29] With respect to work, Dr. Cameron opined:
41. Ms. Laybolt was rendered completely disabled for a period of 2 weeks following this accident. She then returned to work only two days. She has increased to three days per week but cannot work anymore because of decreased mental and physical stamina present as a result of the injuries that she sustained at the time of the accident on November 26, 2016. She was working full time prior to this accident. It is possible that Ms. Laybolt may be able to increase her workload to three and one half to four days per week, however at this late date since the accident, it is probable that she will remain permanently partially disabled, with respect to work capabilities, perform chores around the house, and recreational activities probably permanently in the future. It is my opinion that Ms. Laybolt's probable permanent partial disability is resultant from the residual adverse effects of the injuries that she sustained at the time of the pedestrian/motor vehicle accident on November 26, 2016.
- [30] Dr. Cameron's second report dated June 14, 2019 was done after he received the results of the brain MRI. He opinion included the following:
5. I have now reviewed the MRI brain scan reports of 05/06/2016 and May 10, 2019. These MRI brain scans reveal nonspecific deep white matter abnormalities within Ms. Laybolt's brain. These are nonspecific as to etiology and probably due to small vessel ischemic disease. Small vessel ischemic disease essentially involves patients related to normal aging develop atherosclerosis or hardening of the arteries within the brain and some of these arteries close off and result in very small cerebrovascular ischemic events or tiny strokes. These are subclinical. In other words, patients do not have a history of suffering a distinct event or incident associated with these changes on the MRI scan. These abnormalities on the MRI scan are probably not resultant from the brain injury that Ms. Laybolt sustained at the time of the accident on November 26, 2016. These changes on the MRI scan, as indicated above, were documented on the MRI brain scan that was performed prior to the motor vehicle accident on November 26, 2016.
6. I have reported in paragraph 34 of my previous report, the pathological changes that occur at the time of the mild traumatic brain injury. I have indicated in this paragraph in my previous report that CT brain scans and MRI brain scans are only able to visualize residual change following focal macroscopic brain injury, not microscopic brain injury. Therefore, a normal MRI brain scan and CT brain scan with respect to the injuries that Ms. Laybolt sustained at the time of the accident November 26, 2016, does not alter my opinion regarding the diagnosis of a mild traumatic brain injury which she probably sustained at the

time of this accident.

- [31] Dr. Cameron also gave evidence at trial. In cross-examination, when asked about his opinion regarding the start of the plaintiff's headaches, Dr. Cameron explained that headaches related to a specific injury must develop within five days from the injury. If they did not develop within five of days the injury, he would have said in his report that they were probably not related to the accident. He did not take accurate notes about the frequency or severity of headaches in his report. But he said that he would not have suggested medication for headaches (like Botox) in his report if the plaintiff did not suffer headaches.
- [32] When pressed in cross-examination about whether his testing of the plaintiff revealed a traumatic brain injury, Dr. Cameron explained that if she had symptoms such as loss of recall of time, a period of being confused or dazed at the time of the incident or mainly after the incident, or a period of amnesia before or usually after the incident, then the criteria for the condition has been met. And he said that there need not be a direct injury to the head for there to be a mild traumatic brain injury. They can be caused by the acceleration/deceleration motion of the head.
- [33] Dr. Cameron was also cross-examined on the importance of ambulance and emergency room records when assessing state of consciousness. He said that ambulance crews quite often say no LOC. Glasgow Coma Scale is 15 but the definition of a mild traumatic brain injury includes a Glasgow Coma Scale ranging from 13 to 15. As well, the diagnosis of mild traumatic brain injury is usually not made on the day of the event, as compared to a moderate or severe traumatic brain injury where the diagnosis is usually made on the day or the day after that because the patient is in an unconscious state. The majority of patients who are later diagnosed with a concussion do not even present to the emergency department in the first place. And they can have a normal GSC of 15.
- [34] Finally, when asked to elaborate on his opinion in his first report that the plaintiff's "probable permanent partial disability is resultant from the residual adverse effects of the injuries she sustained in the accident", he responded:

The -- the ongoing partial disability is resulting from all of the injuries that she sustained at the time of the accident, including the traumatic brain injury. She also has ongoing chronic pain and discomfort. And she has reported developing any, like, psychological issues in the form of anxiety or symptoms of depression as a result of the injuries -- in part as a result of the injuries that she sustained at the time of the accident. These -- this ongoing disability because of these residual adverse effects of the accident are causing her to not be able to return to work or function on a day-to-day basis in an unrestricted fashion like she did before the accident. And so the -- I'm not saying that she's completely disabled ongoing. She was completely disabled for a period of two weeks after the accident. The ongoing disability is partial because of these residual adverse effects of the accident. It is probably permanent because it's over one and a half years to two years since the original injury, since the accident. Patients in this age group improve up to approximately one and a half to two years following any type of physical injury, including the

residual adverse effects with the traumatic brain, as it is also a physical injury. And so that's why I have categorized it like that in that statement.

[35] Dr. MacKean, an expert in physical medicine and rehabilitation, examined the plaintiff on May 21, 2019 for her report of the same date. Dr. MacKean had previously examined the plaintiff in consultation for treatment on September 11, 2017 and she had prepared a previous medico legal report dated January 8, 2019.

[36] Her May 21, 2019 report described the September 11, 2017 examination as follows:

On physical examination on September 11, 2017, she demonstrated full range of motion of the shoulders and she described pulling felt in her right shoulder and upper back when reaching overhead with her arms.

She demonstrated decreased range of motion of the cervical spine with side flexion to the left greater than right side and rotation right greater than left side with pulling and discomfort felt in the back of the neck and into the right upper trapezius muscle and right scapular region, more so than the left side.

With palpation, she complained of pain and she had muscular tightness on the right greater than left side of the neck, right upper thoracic spine, upper trapezius muscles, and upper scapular region.

IMPRESSION:

My impression following my assessment of her on September 11, 2017 was that she had sustained a grade 2 whiplash-associated disorder involving the neck and upper back, right greater than left side, with post-concussion symptoms.

RECOMMENDATIONS:

1. I recommended an x-ray of the cervical spine which was done on January 12, 2018.
2. I suggested that she could continue with physiotherapy, massage therapy, and acupuncture treatment if these treatments provided her with relief of her pain symptoms.
3. I recommended that she try four to six sessions with trigger point injections to see if this could give her some relief of her neck pain and headaches.

I asked her to follow up with me in about a month, but I did not see her after that.

[37] The January 8, 2019 examination was described as follows in Dr. MacKean's May 21, 2019 report:

I then saw her in my office on January 8, 2019 for the purposes of a medicolegal assessment.

After I last saw her, she had done some trigger point injections with Stephen Simonis at Coastal Health Alliance. She found she did get some relief of her neck pain with the injections and she would go for treatment every three to four weeks from the fall of 2017 until the fall of 2018.

She was diagnosed with breast cancer in the fall of 2018 and she had surgery for right mastectomy and reconstruction surgery on November 28, 2018.

At the time that I assessed her on January 8, 2019, she was still recovering from that surgery.

She had been off work just prior to having the surgery and she had not been driving or dancing during that time.

She stated that her neck and upper back pain and shoulder pain was not nearly as bad and that she had not had significant problems with headaches during that time since being off work.

She stated that she was considering continuing to work until the age of 67 before being diagnosed with breast cancer.

She found, with her work as a dental hygienist, working three days a week, that she would have increased neck and upper back pain and persistent headaches and also cognitive problems with her work. She has worked as a dental hygienist for over 30 years.

She stated that for exercise she was doing some walking, but she was not allowed to do anything involving physical exertion.

MEDICATIONS:

Gabapentin 300 mg two to three times per day, Cipralex, Cytomel, Synthroid.

ALLERGIES:

Latex, dogs, eggs.

She is a non-smoker.

PHYSICAL EXAMINATION:

On physical examination, on January 8, 2019, she had full range of motion of the thoracolumbar spine with no complaints of pain on movement.

She had full range of motion of the shoulders and she described pulling felt through the right anterior chest region, where she had her recent surgery, when reaching overhead with her arms.

She demonstrated decreased range of motion of the cervical spine in extension, side flexion, and rotation with complaints of neck pain with all of these movements.

With palpation, she complained of pain on the right greater than left side of her neck, upper thoracic spine, upper trapezius muscles, and upper scapular region, right greater than left side.

I reviewed cervical spine x-rays that were done on January 12, 2018 and showed findings of multi-level facet arthropathy with no significant foraminal narrowing.

My impression following my assessment of her on January 8, 2019 was that of a grade 2 whiplash-associated disorder, cervical spine and upper back, with post-concussion symptoms and posttraumatic headaches.

It was my opinion that the above conditions were due to injuries sustained in the motor vehicle accident that occurred on November 26, 2016.

I felt she was probably close to the point of maximum medical improvement as it had been over two years following the date of the motor vehicle accident.

She had also undergone recent surgery for breast cancer and she was still recovering from that surgery. She had been off work for the previous six weeks.

Since being off work she had not had as many symptoms involving her neck, upper back, and her headaches were much improved.

She was going to be following up at the cancer clinic regarding further treatment for her breast cancer.

While she was undergoing treatment for her breast cancer, she had not been able to pursue therapy or previous treatments under the recommendation of her cancer specialist.

I recommended that she continue with walking and gentle stretching exercises during the time that she was undergoing treatment for the breast cancer.

I stated that when she was cleared to return to work following her breast cancer treatment that she would probably have increased neck and upper back pain symptoms and increased headaches when she was working as a dental hygienist, even three days a week.

I did not provide an opinion on the cognitive issues as this is outside of my area of expertise.

It was my opinion that she would have ongoing limitations regarding activities requiring heavier lifting, particularly with her arms out in front of her or above shoulder level, as these type of activities would cause ongoing aggravation of her neck and upper back pain and headache symptoms.

I stated that once she had recovered from her surgery and finished her breast cancer treatment, that she could do physiotherapy, massage therapy, or trigger point injections if these treatments helped with management of her chronic pain symptoms.

[38] Dr. MacKean then described her examination of May 21, 2019:

I then saw her in my office on May 21, 2019 for the purposes of a medicolegal assessment.

She has just finished 12 weeks of chemotherapy once a week. She will now continue with chemotherapy treatment, Herceptin, every three weeks for the next nine months.

With the treatment she feels fatigued and short of breath, and she will have nosebleeds.

She has not returned to work and her cancer specialist has advised her that they do not want her to consider returning to work until she has finished her cancer treatment.

She is walking up to an hour, five times a week. She is not dancing very much, but she will go on occasion to the dance sessions and she will do one or two dances.

She is holding off on all treatments such as physiotherapy, massage therapy, or trigger point injections on the advice of her cancer specialist.

She states she is not having any symptoms of neck, upper back, or shoulder pain at this time. She describes minimal problems with headaches.

Current medications are Synthroid, Cytomel.

She also takes dexamethasone prior to chemotherapy.

She has not used gabapentin since December 2018.

She states her husband is retired and he does most of the grocery shopping, cleaning, and cooking. She does not do anything that requires physical exertion.

She describes ongoing problems with her memory and ongoing cognitive issues.

She uses CBD oil to help her sleep and she has a good mattress and comfortable pillows.

She does drive on occasion, but she finds driving to be very stressful, so she does not drive very often.

PHYSICAL EXAMINATION:

On physical examination, she was a very petite woman, standing less than five feet tall. She had a mild upper thoracic kyphosis.

She demonstrated full range of motion of the thoracolumbar spine with no complaints of pain on movement.

She demonstrated full range of motion of the shoulders with no complaints of pain.

She demonstrated decreased range of motion of the cervical spine in extension, side flexion, and left greater than right rotation.

She complained of increased neck pain in the right upper cervical spine region with extension of the cervical spine.

With palpation, she complained of pain in the right upper to mid cervical spine. She did not complain of pain on the left side of the cervical spine or in the upper, mid back, or scapular region.

[39] Dr. MacKean's impression and recommendations on May 21, 2019 were:

IMPRESSION:

Grade 2 whiplash-associated disorder involving the neck and upper back, right greater than left side, with post-concussion symptoms and posttraumatic headaches.

It is my opinion that the above conditions are due to injuries sustained in the motor vehicle accident that occurred on November 26, 2016.

In my opinion, she is at the point of maximum medical improvement following injuries sustained in the motor vehicle accident that occurred on November 26, 2016.

I also based my opinion on studies I have reviewed regarding whiplash-associated disorder.

She states that her husband does the housework and cleaning.

In my opinion, if she had to do the housework and cleaning, I would recommend that she have help for heavier cleaning activities such as washing floors, cleaning bathrooms, or more vigorous cleaning activities.

I would also recommend that she not do activities where she has to work with her arms out in front of her or above shoulder level for sustained periods of time as these activities will cause aggravation of her neck and upper back pain symptoms, and could trigger more significant headache symptoms.

RECOMMENDATIONS:

For the time being, while she is continuing with chemotherapy treatment for the breast cancer, she should continue with her regular walking program and gentle stretching and light physical activities as tolerated.

She does not need to do physiotherapy, massage therapy, or trigger point injections at this time, and her cancer specialist has advised her not to do these treatments while she is undergoing chemotherapy treatment.

She has also been advised to stay off work while she is undergoing chemotherapy treatment.

When she does finish the chemotherapy treatment, I would recommend that she does not go back to work as a dental hygienist.

She will probably have increased neck and upper back pain and increased headache symptoms if she did return to work as a dental hygienist, even on a part time basis.

In my opinion, she is at the point of maximum medical improvement following injuries sustained in the motor vehicle accident that occurred on November 26, 2016.

[40] In his expert report dated January 22, 2021, Mr. Wickson, an economist, provided opinions about the plaintiff's "accident-to-valuation earning losses" and the present value of her possible future earnings loss. In cross-examination he was asked about the plaintiff's employer continuing her benefits beyond her last day of work and he agreed that they should be included in his calculations.

D. ANALYSIS

- [41] The plaintiff's notice of civil claim, filed September 27, 2018, claims damages for traumatic brain injury, post-traumatic headaches, Grade II whiplash-associated disorder to neck and upper back, soft tissue injury to the right foot, sleep disturbance and anxiety disorder.
- [42] Looking at the evidence of these injuries, Dr. McKean, in her report of May 21, 2019 about an examination the same day, described the plaintiff as "not having any symptoms of neck, upper back, or shoulder pain at this time. She describes minimal problems with headaches." She also described a Grade II whiplash involving the neck and upper back (more on the left than the right) from the accident. In his report of July 19, 2019 Dr. Cameron described various neurological tests that were normal and he concluded that the plaintiff had a mild traumatic brain injury as a result of the 2016 accident. I find below that he has exaggerated the issue of headaches. The chart of Dr. Bos, the family physician, described depression and neck pain on August 25, 2017 (the last chart entry from Dr. Bos) and the plaintiff did not complain to Dr. Bos about headaches. This medical evidence accords with the plaintiff's evidence. She also describes problems with memory and concentration. The other injuries in her claim have, fortunately, resolved.
- [43] I am proceeding on the basis of this evidence as representing the current problems the plaintiff suffers from the 2016 accident.
- [44] The following issues require consideration:
- (a) Psychological issues: diagnosis and causation
 - (b) Special damages
 - (c) Past loss of income
 - (d) Non-pecuniary damages
 - (e) Future loss of earning
 - (f) Cost of future care
- [45] My discussion of those issues follows.
- (a) Psychological issues: diagnosis and causation
- [46] The primary issue here is what weight, if any, is to be given to the opinion of Dr. Cameron, the plaintiff's expert in neurology. Specifically, did the plaintiff suffer a mild traumatic brain injury from the 2016 accident? The plaintiff answers this question in the affirmative, relying on Dr. Cameron's reports. On the other hand, the defendants say there was no mild traumatic brain injury and there are a number of reasons to give no weight to Dr. Cameron's reports and opinions. The defendants have not tendered any expert evidence.

- [47] In the recent decision of *Duncan v. Hanson*, 2021 BCSC 937 [Duncan], Weatherill J. summarized the legal test for causation in a personal injury context as follows:
117. The legal test for causation is the "but-for" test: the plaintiff must prove on a balance of probabilities that, but for the defendant's negligence, she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32 at paras. 8-10; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28-29; and *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
118. The classic statement of the law of causation was given by Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: "... causation need not be determined by scientific precision ..." It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff needs to establish only a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
119. Where the plaintiff has a pre-existing condition that was active or was likely to become active, the defendant is liable only to the extent that the accident caused an aggravation to the existing condition: *Filsinger v. ICBC*, 2009 BCSC 232 at para. 26.
- [48] It is also recognized that, "[a]s long as the defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury" (*Baglot v. Fourie*, 2019 BCSC 122, at para. 280, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 17).
- [49] Dr. Cameron had the benefit of the medical documentation following the 2016 accident, a neurological assessment of the plaintiff on June 4, 2018, and a review of two MRI brain scan reports dated May 6, 2016 and May 10, 2019. He concluded that the plaintiff probably suffered a mild traumatic brain injury at the time of the accident. His reasoning is that a normal CT or MRI brain scan does not necessarily negate the existence of a brain injury because such injuries are often microscopic and therefore undetectable by CT and MRI scans. He explained that ambulance and hospital records made around the time of the accident "may or may not be" important. This is because a diagnosis of a mild traumatic brain injury is not usually made on the day of the accident and the "vast majority" of people who report amnesia are later diagnosed as suffering from "mild traumatic concussion." Dr. Cameron also opined that it is irrelevant whether the plaintiff was hit on the head by lumber, or whether she hit her head on the ground, because "it is the same impact."
- [50] The plaintiff takes the position that Dr. Cameron's opinion about a brain injury causally related to the accident is determinative. She says that Dr. Cameron is an "experienced and eminently-qualified neurologist" and that, in giving his opinions, he carried out his duty to the court impartially and without bias. She adopts his opinion that ambulance and hospital records made following the accident are not necessarily indicative of whether the plaintiff in fact suffered a brain injury (*Sirna v. Smolinski*, 2007 BCSC 967, at paras. 35-36).

- [51] On the other hand, the defendants submit that Dr. Cameron's evidence in respect of a mild traumatic brain injury diagnosis should be rejected for a number of reasons. Counsel for the defendants says that Dr. Cameron's diagnosis of a brain injury is also contradicted by what the plaintiff has been able to accomplish since the accident and by the medical documentation, including the VGH emergency records, clinical records and Dr. MacKean's September 2017 report.
- [52] The defendants also take issue with Dr. Cameron's methodology in arriving at his diagnosis. Specifically, counsel submits that he overlooked the CT scan conducted on the day of the accident (which was normal); he used repetition in his report to reinforce his opinion; his notetaking or recordkeeping was substandard; he over-relied on the plaintiff's self-reporting to reach his conclusions; he did not have the plaintiff's pre-accident medical records to consider for his report; and he failed to conduct sufficiently thorough testing of the plaintiff for a brain injury. The defendants characterize Dr. Cameron's evidence at trial as being prone to "lengthy speeches which bore little or no reference to questions he had been asked."
- [53] In support of their position, the defendants rely on cases in which this court has rejected Dr. Cameron's evidence regarding a mild traumatic brain injury diagnosis (*Miller v. Dent*, 2017 BCSC 1177, at paras 99-101, 137-138; *Smith v. Shu*, 2020 BCSC 523, at paras. 123-133; and *D.H. v. Doe*, 2021 BCSC 112, at paras. 41-48).
- [54] I will provide a brief review of the cases relied on by the defendants as part of the inquiry of what weight, if any, is to be given to Dr. Cameron's evidence in the present case.
- [55] In *Miller*, the plaintiff was involved in a motor vehicle accident in which the defendant struck his car at an intersection. The defendant maintained that the plaintiff's post-accident symptoms were attributable to pre-existing conditions and were not caused by the accident. Dr. Cameron noted that the plaintiff did not know if he hit his head at the time of the accident and his complaints of memory problems, headaches and personality change occurred after the accident (para. 100). His opinion was described in the judgment as follows:
100. Dr. Cameron's opinion, based on both his assessment of Mr. Miller and his review of medical records, was that Mr. Miller probably suffered a brief period of altered state of consciousness or loss of consciousness as a result of the car accident. This was despite the ambulance crew assessment of Mr. Miller at the scene of the accident in which they documented his Glasgow Coma Scale to be 15 out of a normal 15, which Dr. Cameron said indicated his brain injury was minor. Based on the provided history, the medical records and the ambulance crew testing Dr. Cameron concluded that Mr. Miller probably did sustain a mild traumatic brain injury or concussion in the car accident.

- [101] Dr. Cameron noted that Mr. Miller was assessed by a neurologist (Dr. Medvedev) shortly after the accident and a CT head scan and CT angiogram of cranial arteries were normal, and a subsequent MRI scan was essentially normal. The single "nonspecific" change noted on the MRI scan was "not necessarily indicative of the residual change of a traumatic brain injury" and would be considered normal for an adult patient in his mid-40s.
- [56] As can be seen, Dr. Cameron provided a similar opinion in Miller to the case at bar: despite the paramedic's assessment of a GCS of 15 at the scene of the accident, no medical documentation of a brain injury, and "normal" CT and MRI scans briefly following the accident, Dr. Cameron nonetheless concluded that it was likely that the plaintiffs suffered mild traumatic brain injuries as a result of the accidents.
- [57] In Miller the court rejected Dr. Cameron's opinion that there had been a mild traumatic brain injury. It preferred the evidence of a psychiatrist who acknowledged the possibility of a mild traumatic brain injury but he did not think it was probable. The reasoning of the court for not accepting Dr. Cameron's opinion was that the basis for it "was very thin" since the GCS was normal and the plaintiff did not know if he lost consciousness (paras. 137-139).
- [58] In the Smith case, the plaintiff was rear-ended at a red light. Despite the accident being relatively low impact, the plaintiff alleged that she suffered a traumatic brain injury and that, over the first few months following the accident, she suffered from headaches and symptoms of depression. The day after the accident, she typed a statement in which she stated that she had full recollection of the accident, thus countering the idea of a loss of consciousness. Various expert reports beginning two years after the accident were produced, including reports by a forensic psychiatrist, a neuro-ophthalmologist and a neurologist, Dr. Cameron.
- [59] The court accepted the opinion of the psychiatrist that there was no mild traumatic brain injury over that of the other experts. The psychiatrist's methodology was thorough and her opinions accorded with the preponderance of the other medical evidence. Dr. Cameron's evidence was in support of the plaintiff, having examined her four years after the accident.
- [60] For his part in Smith, Dr. Cameron opined that the plaintiff suffered a mild traumatic brain injury and she had developed symptoms of post-traumatic brain injury syndrome. This was based on the plaintiff's confused recollection of the accident, her snapshot recall of the accident scene and no recall of riding home after the accident. However, her written account of the accident was a full and accurate account.
- [61] The court rejected Dr. Cameron's evidence in its entirety because his opinion did not accord with the evidence and he arrived at it by "selecting and interpreting pieces of the history in order to reach a finding that the plaintiff suffered a brain injury." As well, he was cautioned by the trial judge that he was not answering the questions that counsel was asking of him. The overall impression was that he was advocating for the plaintiff and not attempting to assist the court with honest and unbiased answers to questions (paras. 125-133).

- [62] Lastly, in D.H., the plaintiff was involved in two "very minor" motor vehicle accidents in which he was rear-ended at low speed. In both accidents, the damage to the vehicle was "miniscule." No injuries were reported at the time of the accidents. The plaintiff was subsequently examined by various medical professionals, including Dr. Cameron. The court did not accept Dr. Cameron's opinion that the plaintiff suffered a concussion and a mild traumatic brain injury from the accident because there was "no credible evidence to support this opinion." In fact, the plaintiff did not rely on Dr. Cameron's opinion. There were also conscious exaggerations of the first accident by the plaintiff in an attempt to mislead his medical examiners and bolster this lawsuit (paras. 26, 27, 47-48).
- [63] In the subject claim, I am unable to reach similar conclusions about Dr. Cameron's evidence. I do not find that the plaintiff deliberately misled Dr. Cameron or the other medical professionals who examined her, nor do I find that she exaggerated her evidence at trial. To the contrary, I find Ms. Laybolt to be a credible, forthright witness who endeavoured to provide her evidence to the court as best she could. Additionally, it cannot be said that the accident here was "very minor" as in D.H.
- [64] I note that in Miller, Smith, and D.H., the court had the benefit of various expert opinions (including from psychiatrists) in addition to that of Dr. Cameron on the issue of whether the accident(s) caused a brain injury. Here, there is only Dr. Cameron's evidence (the existence of brain injuries and loss of consciousness are outside of the scope of Dr. MacKean's expertise). For reasons that are unknown, the defendants have chosen not to tender any expert evidence on this issue; an issue that is strictly within the realm of expert opinion. There are only the submissions of counsel for the defendants.
- [65] It is also noteworthy that in Miller, the plaintiff had no recall of whether he lost consciousness. In Smith, a day after the accident the plaintiff gave an express statement that she did have recollection of the accident. In D.H., shortly after the first accident, the plaintiff reported that he had never lost consciousness and confirmed that he had no physical pain and, after the second accident, he did not report a loss of consciousness.
- [66] By contrast, in the present case both the plaintiff and her husband have consistently maintained that the plaintiff briefly lost consciousness immediately following the accident. This is corroborated in part by the ambulance report which noted that the plaintiff complained of a bump on her head and that she "does not remember hitting the pavement"; as well as the emergency room physician, Dr. Ross, who noted that the plaintiff fell and hit the back of her head and that the plaintiff "was 'out of it' for 10-15 sec[onds] as per husband ... BACK OF HEAD PAIN." Dr. Ross also noted that the plaintiff experienced a sudden, sharp headache in the "occiput" region, which he marked down as "CURRENT 5/10." The defendants challenge these facts but do not have any contrary evidence.
- [67] Given the nature of the accident and all of the medical evidence, I am not persuaded that Dr. Cameron's evidence should be rejected. I find that Dr. Cameron's opinion that "CT and MRI brain scans are only able to visualize residual change following focal macroscopic brain

injury, not microscopic brain injury [such as mild traumatic brain injury]" is uncontroverted on the evidence before me as there is no expert opinion to the contrary. In addition I do not have any expert evidence to counter, for example, Dr. Cameron's opinion that a normal CT or MRI brain scan does not necessarily negate the existence of a brain injury because such injuries are often microscopic and therefore undetectable by CT and MRI scans.

- [68] I am asked to dismiss Dr. Cameron's report and evidence on the basis of submissions of counsel about problems with them and not on the basis of alternate expert evidence. In an extreme case, that is not impossible but here I find there is some basis for Dr. Cameron's opinions (discussed above and below). Thus, I am also inclined to accept his conclusion in his second report that "a normal MRI brain scan and CT scan with respect to injuries that the plaintiff sustained at the time of the accident November 26, 2016, does not alter my opinion regarding the diagnosis of a mild traumatic brain injury which she probably sustained at the time of the accident."
- [69] Finally, since the defendants urge me to make negative interferences about Dr. Cameron's opinions from previous judgments, I must add that there are the other decisions relied on by the plaintiff where the court has accepted Dr. Cameron's opinions (*Dinnissen v. Lee*, 2019 BCSC 1729, at paras. 84, 112, 113, 162, 171; *Tan v. Mintzler and Miller*, 2016 BCSC 1183, at paras. 30-41).
- [70] That is not to say, however, that I do not have some concerns about Dr. Cameron's opinions. In my view, it is noteworthy that the plaintiff did not see a physician after she was discharged from the hospital until January 27, 2017, approximately two months after the accident. That may have been because she had minimal (or even no) symptoms or it could have been explained by the plaintiff's resilience following the accident. Dr. Cameron does not address that issue or assist in resolving it. When she did see Dr. Bos, there was no mention of her having lost consciousness at the time of the accident despite the fact that Dr. Bos clearly discussed the accident with her.
- [71] With respect to headaches, in his reports, Dr. Cameron has a general discussion of them in the context of traumatic brain injury but his one record of headaches for the plaintiff is that "[s]he describes headaches as a pulling sensation in the right side of her head area." There is no other information such as the onset of the headaches, their frequency or severity or the use or need for medications. He was questioned about this in cross-examination and he replied that he would not have recommended Botox treatment if he did not think the headaches were significant. This was an opinion given spontaneously and without much consideration, although it was on an obvious and important issue. If the headaches were/are a significant feature of the plaintiff's medical condition (i.e. the mild traumatic brain injury) then some more direct information about them would be expected.
- [72] Looking at the other evidence of headaches, there is a record from the hospital on the date of the accident (November 26, 2016) which describes "back of head pain." There is then a box for "Headache" which is not checked but the word "sudden" is handwritten. It is not at all

surprising that the plaintiff immediately suffered head pain from the accident but it seems to me that ongoing headaches is a different matter. Indeed, I take from Dr. Cameron's reports that they can have some significance in neurological conditions. Dr. Bos, the family physician, has no record of any complaints of headaches from the plaintiff on January 27, 2017, February 10, 2017, March 31, 2017, April 28, 2017, June 23, 2017 or August 25, 2017. The last chart note of Dr. Bos in evidence is the one for August 25, 2017.

- [73] Dr. McKean, the specialist in rehabilitation medicine and rehabilitation, saw the plaintiff on September 11, 2017, January 8, 2019 and, for medicolegal purposes, on May 21, 2019. There is a general reference to ongoing problems with neck and upper back pain and headaches" following the accident. The notes for the September 11, 2017 visit stated that the "neck and upper back and shoulder pain was not nearly as bad and she had not had significant problems with headaches" while off work for the cancer surgery. Then on May 21, 2019 Dr. McKean recorded no neck, upper back or shoulder pain and "minimal problems with headaches." That latter comment is consistent with the plaintiff's evidence and I adopt it as an accurate description of the current situation with headaches.
- [74] I conclude that Dr. Cameron has exaggerated the significance of the issue of headaches in the case of the plaintiff and that headaches can be related to mild traumatic brain injury. The weight of his report has to be considered in light of that conclusion.
- [75] Dr. Cameron's finding that the plaintiff likely suffered a mild traumatic brain injury is also somewhat at odds with the medical documentation immediately following the accident. As above, the ambulance report assigned a GCS of 15 and no loss of consciousness was noted. Dr. Ross also noted that the plaintiff did not lose consciousness. Dr. Cameron's opinion that a GCS of 13 to 15 includes a loss of consciousness rounds down the range in favour of some loss of consciousness and in fact, the findings by the ambulance attendants and ER staff was a normal GCS of 15.
- [76] However, there is also Dr. Cameron's opinion that the absence of ambulance and hospital records about loss of consciousness, in conjunction with normal CT and MRI scans, near the time of the accident do not necessarily negate the probability of a traumatic brain injury. He has also opined that a GCS of 15 does not necessarily negate the probability of a brain injury. I must also bear in mind that an absence of a medical record is not evidence of anything and it cannot be the sole basis for any inference about the existence or non-existence of a symptom (*Carvalho v. Angotti*, 2007 BCSC 1760, at paras. 32-36). It is possible, for instance, that a loss of consciousness or brain injury was not discussed or recorded when the plaintiff saw Dr. Bos in January 2017.

[77] Despite these problems and without the assistance of other expert medical evidence to the contrary, I am not in a position to question the veracity of Dr. Cameron's opinion with respect to a probable brain injury given his extensive experience and qualifications in this area. As I have outlined above, I find that there is a sufficient evidentiary basis, beyond the plaintiff's subjective reporting, upon which Dr. Cameron could form his opinion that the accident caused a mild traumatic brain injury.

[78] In conclusion, I find that the plaintiff has established on a balance of probabilities that she suffered a mild traumatic brain injury at the time of the November 2016 accident. It was a serious event that resulted in either the vehicle's load hitting her on the head or from falling down and hitting her head on the pavement (or from the whiplash injury). I will proceed with my damages analysis on that basis.

(b) Special damages

[79] A plaintiff is entitled to recover reasonable out-of-pocket expenses as a result of an accident. Some evidence of medical justification is required (*Carrillo v. Deschutter*, 2018 BCSC 2134, at para. 165; *Moody v. Hejdanek*, 2018 BCSC 380, at para. 33).

[80] The plaintiff seeks special damages in the amount of \$7,434 for the therapies she has received and items she has purchased in respect of the accident, which consists of the following:

Chiropractic

\$ 390

Physiotherapy

\$ 890

Massage therapy

\$1,250

Acupuncture

\$ 630

Trigger point injections

\$1,764

Yoga sessions

\$ 160

Neck support

\$ 26

Pad for TENS machine

\$ 25

(USD)

Head pad

\$ 61

Travel pillow

\$ 39

Private MRI

\$2,190

- [81] The defendants say no special damages are payable. They say that, as part of her duty to mitigate her damages, the chiropractic, physiotherapy, massage therapy and acupuncture bills should have been submitted by the plaintiff to her extended health plan provider since they were from the same practitioners she had seen prior to the accident. Therefore, they say that the plaintiff should receive only \$250 for massage therapy and \$1,394 for trigger point injections. In addition, they say that there should be no payment for yoga, a pad for the TENS machine, a heat pad and a travel pillow.
- [82] I accept that it was open to the plaintiff to have made a claim for these expenses through her health provider. But she did not and, in my view, to the extent they are related to the 2016 accident, they are appropriate expenses here. I note that Dr. MacKean recommended physiotherapy, massage therapy, acupuncture and trigger point injections in her report of May 21, 2019. Her evidence is uncontroverted on this point and, accordingly, I find that the expenses incurred for those treatments are reasonable and medically justifiable. I make the same finding with respect to the chiropractic treatment.
- [83] The expense for the TENS pad is reasonable as Dr. Bos recommended on March 31, 2017 that the plaintiff use a TENS machine. Given the plaintiff's neck injury as a result of the accident and her evidence that Dr. Bos "mentioned it", her claim for the expense of the neck brace is also reasonable.
- [84] The plaintiff is not entitled to special damages in respect of the yoga sessions (which she participated in prior to the accident and which were not recommended or prescribed), heat pad and travel pillow because they are expenses she likely would have incurred in any event of the accident.
- [85] In terms of the MRI bill, the defendants say that expense is a legal disbursement because it arises from Dr. Cameron's July 19, 2018 medical-legal report, the MRI was not completed until May 10, 2019 and the plaintiff's lawyer was billed for it. The plaintiff says that she has yet to pay the bill for the MRI but that is compensable as an accident-related medical

expense because the MRI scan was requested by her family physician, Dr. Bos, on the recommendation of Dr. Cameron. In support of her position, she relies on, among other authorities, *Pupo v. Hua*, 2020 BCSC 1682 [Pupo], at paras. 125-126, in which Sharma J. found a private MRI expense to be justifiable and reasonable.

[86] Here I find that the private MRI is a reasonable expense. The reason the plaintiff had the MRI scan was because Dr. Cameron had questions regarding whether there were residual changes following a brain injury which would have occurred at the time of the November 2016 accident. Dr. Bos made the referral on that basis. Accordingly, I am of the view that it was necessary for the plaintiff to obtain an MRI. It was considered to be important by Dr. Cameron to diagnose the plaintiff's injuries from the accident (although in his July 2019 report he concluded that the changes on the MRI scan were "probably not resultant from the brain injury" but that a normal MRI scan did not alter his opinion regarding the diagnosis of a mild traumatic brain injury because MRIs are unable to detect microscopic brain injury). I share the view of Sharma J. in *Pupo* that urgency is not the only consideration and I find that the MRI scan is a legitimate medical expense.

[87] I therefore award special damages in the amount of \$7,165.

(c) Past loss of income

[88] A claim for past loss of earnings is for the loss of earning capacity or the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 30). In addition, a claim for past (or future) lost earning capacity is an assessment rather than a calculation, it requires considerations of fairness and reasonableness and all negative and positive contingencies are to be taken into account (*Abbott v. Gerges*, 2014 BCSC 1329, at para. 165).

[89] The different ways of calculating loss of income has been usefully set out in the following (*Personal Injury Damages in Canada* at p. 205-06):

The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[Emphasis in original.]

[90] The plaintiff claims \$105,000 for past loss of earning; the defendants dispute the plaintiff's claims and say that at most she is entitled to \$22,325 under this head of damages.

[91] The income history of the plaintiff since 2013 has been:

Year

Income

2013

\$69,103

2014

\$76,964

2015

\$81,182

2016

\$85,402

[Date of accident: November 26, 2016]

2017

\$73,081

2018

\$56,129

[Cancer diagnosis: September 2018; surgery: November 2018]

2019

not available

[Start of chemotherapy: February 2019]

2020

not available

[Retirement: March 2020]

[92] The plaintiff's economist, Mr. Wickson, calculated that the plaintiff's net of tax earnings to be approximately \$218,700 (from May 8, 2017 to the day of trial). This figure does not include absences in May 2017 (when the plaintiff reduced her workload from four days to three) to November 28, 2017 (the last day the plaintiff worked after receiving her cancer diagnosis) and March 1, 2020 (the date Mr. Wickson was asked to assume the plaintiff would return to work) to May 17, 2021 (the first day of trial). That estimate also did not take into account time off from the plaintiff's use of Anastrozole (a cancer medication) which led to the development of "trigger finger". According to the plaintiff, assuming that she would have returned to work on September 1, 2020 and deducting any net earnings she actually earned

until the date of trial (as well as the time lost from work in December 2016 as a result of the accident), her total claim for net loss of income is approximately \$105,000.

- [93] The defendants take issue with a number of the plaintiff's (and Mr. Wickson's) assumptions. They say that Mr. Wickson's assumptions that there were pay rate increases, that the plaintiff lost her employment benefits and that the plaintiff could have returned to work on March 1, 2020 are all incorrect. Instead, they say the only wage rate in evidence is that the plaintiff was paid \$44.16 per hour and that, according to the plaintiff's former supervisor, Meredith Walker, there was not an increase in the pay rate until August 2020. As above, it is also agreed that the plaintiff did not lose any of her extended health benefits as a result of reducing her workweek from four days to three. The defendants say it was February or March 2020, not September 2020, that the plaintiff made the decision to retire due to the repercussions of her cancer treatment. They point to the fact that in September 2020 the plaintiff was in hospital for two to three days regarding issues with her hands and, in October and November 2020, she expressed frustration with difficulties associated with cleaning her son's teeth and using the x-ray machine.
- [94] Except for the first two weeks following the accident, the defendants say that the plaintiff was able to perform her duties four days a week for the first four and a half months after she returned to work and then three days a week until November 2018. In their submission, the plaintiff cannot now attempt to ascribe her post-November 2018 difficulties at work to the accident when she performed her work competently and reliably for more than two years following the accident.
- [95] Looking at the medical evidence, according to Dr. MacKean's May 2019 report, the plaintiff's injuries from the 2016 accident are, again, a whiplash-associated disorder involving the neck and upper back with post-concussion symptoms and post-traumatic headaches. In her May 21, 2019 report, Dr. MacKean recommended that she not go back to work following her chemotherapy treatment because "[s]he will probably have increased neck and upper back pain and increased headache symptoms", even if she were to return on a part-time basis. At trial, Dr. MacKean confirmed that continuing to work would cause the plaintiff's pain symptoms to worsen.
- [96] In his July 2018 report, Dr. Cameron diagnosed the plaintiff as having sustained a mild traumatic brain injury with associated symptoms of anxiety, depression, headaches, as well as soft-tissue and musculoskeletal injuries due to sustaining whiplash at the time of the accident. He opined that "it is probable that she will remain permanently partially disabled because of her ongoing complaints and chronic pain present as a result of a soft tissue and musculoskeletal injuries that she sustained at the time of the accident, and associated post traumatic headaches.

- [97] Prior to the accident in November 2016, the plaintiff was working Monday to Thursday, eight hours per day at a wage of \$44.16 per hour, earning approximately \$353.18 per shift. Following the accident, she returned to work full-time on December 12, 2016. According to the defendants, using Mr. Wickson's calculations, the plaintiff's net wage loss for the first two weeks following the accident is \$2,261.
- [98] The plaintiff continued to work four days a week, eight hours a day until January 24 and 25, 2017. She says she took those days off of work because of headaches, which she says are noted in a pain diary. Even though no headache is documented by Dr. Bos in the medical records pertaining to his January 27, 2017 visit with the plaintiff, I find that, given Dr. Cameron's diagnosis of headaches related to a brain injury as a result of the accident, it was reasonable for the plaintiff to miss those two days of work. The net wage loss for those two days is \$565.25.
- [99] On May 1, 2017, the plaintiff stopped working on Mondays and reduced her schedule to three days a week, without consultation with or the recommendation of Dr. Bos. She continued to work on that basis until November 22, 2018, just prior to undergoing surgery for breast cancer.
- [100] In light of the medical evidence, I conclude that the Mondays that the plaintiff missed starting in May 2017 should also be included in the past loss of income calculation. But for the injuries she sustained in the November 2016 accident, she would have continued to work as a dental hygienist four days per week, eight hours per day until her cancer diagnosis in November 2018. Due to the physically demanding nature of her work as a dental hygienist coupled with the neck and back pain and headaches, it was reasonable for her to have reduced her work schedule.
- [101] According to the defendants, the plaintiff missed 69 Mondays between May 1, 2017 and November 19, 2018. Accounting for income tax, the net wage loss for those Mondays is approximately \$19,500.
- [102] As above, the plaintiff had intended to return to work in March 2020 but decided instead to retire. Relying on *Morlan v. Barrett*, 2012 BCCA 66, at paras. 39-41, 70-72; *Riley v. Ritsco*, 2018 BCCA 366 [Riley], at paras. 81-84, the plaintiff says that while her decision not to return to work as a dental hygienist in March 2020 was not out of medical necessity, it was a reasonable one because working as a dental hygienist caused her pain and aggravation of her injuries.
- [103] Mr. Wickson estimated that, but for the accident the plaintiff would have earned a net income of \$70,491 in 2020 (assuming she started work in March) and \$31,390 in 2021 (up to the date of trial on May 17). However, due to the intervening event of her cancer diagnosis and the complications that arose from it, I am unable to conclude that she would have been able to work at the same frequency as she had prior to the cancer diagnosis and subsequent treatments.

- [104] I am satisfied, however, that her decision to retire in March 2020 was a reasonable one and that even following her cancer diagnosis, but for the accident she could have returned to work as a dental hygienist, albeit on a reduced schedule. Her employer certainly wanted her to return. On that basis, it is reasonable to conclude that she would have earned \$50,000 from January 2020 to May 2021.
- [105] I find that the plaintiff is entitled to an award of \$72,326 in respect of past loss of income.
- (d) Non-pecuniary damages
- [106] The plaintiff seeks damages for non-pecuniary loss in the range of \$180,000 to \$200,000. This is on the basis of all of the plaintiff's physical and psychological symptoms being causally related to the 2016 accident.
- [107] Cases relied on by the plaintiff to support this figure include: *Wong v. Towns*, 2015 BCSC 1333 (\$180,000 in non-pecuniary damages); *Dubitz v. Knoebel*, 2019 BCSC 1706 (\$180,000), *Dinnissen* (\$180,000), *Young v. Anderson*, 2008 BCSC 1306 (\$200,000), *Adamson v. Charity*, 2007 BCSC 671 (\$200,000), *Sirna* (\$200,000), *Burdett v. Eidse*, 2010 BCSC 219 (\$200,000), *Dornan v. Stephens*, 2019 BCSC 701 (\$200,000), *Mickelson v. Sodomsy*, 2019 BCSC 806 (\$200,000), *Wallman v. John Doe*, 2014 BCSC 79 (\$210,000), *Harrington v. Sangha*, 2011 BCSC 1035 (\$210,000), *Tan* (\$210,000; \$223,000 w/ inflation), *Windsor v. Cawley*, 2020 BCSC 678 (\$220,000).
- [108] According to the defendants, at the very most, total non-pecuniary damages in the amount of \$40,000 are appropriate in this case. They provide no authorities in support of their position and instead they distinguish the plaintiff's authorities as being about long-term, disabling injuries that are not comparable here.
- [109] An award of non-pecuniary damages "acts as a substitute for the pleasure and enjoyment which has been lost and endeavours to alleviate, as far as possible, the pain and suffering that the plaintiff has endured and will have to endure in the future" (*ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 106). The broad framework for the assessment of non-pecuniary damages has been set out by the Court of Appeal (*Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to S.C.C. refused 2006 CanLII 35804):
- [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] 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

Giang v. Clayton, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54). [Emphasis omitted.]

[110] The ability to work is relevant to non-pecuniary damages because it may impact a person's enjoyment of life (*Dabu v. Schwab*, 2016 BCSC 613; *Ken Cooper-Stephenson*, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough: Carswell, 1996) at 553; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at 368; *Boyd v. Harris*, 2004 BCCA 146, at para. 54).

[111] Assessments of non-pecuniary damages must be assessed individually and although similar cases provided as comparators may be helpful, they serve only as a rough guide (*Hanger v. Shin*, 2019 BCSC 99; *Tzotzolis v. Wyman*, 2019 BCSC 2026; *Duncan*, at para. 24).

[112] In the subject claim, the plaintiff was 67 years old at trial. I have found above that her neck, upper back, or shoulder pain from the 2016 accident are, fortunately, no longer a concern and she has minimal problems with headaches. Dr. McKean recorded this and she also concluded there was a Grade II whiplash involving the neck and upper back (more on the left than the right) from the accident. Dr. Cameron concluded the plaintiff suffered a mild traumatic brain injury as a result of the 2016 accident. I have found above that he has exaggerated the issue of headaches in the plaintiff's case and, generally, there is limited medical evidence about the plaintiff's headaches. The plaintiff also describes problems with memory and concentration.

[113] The plaintiff is in a common law relationship and has two sons from a previous relationship. Prior to her cancer diagnosis in November 2018, she was working as a dental hygienist in Victoria. She submits that the injuries she has sustained as a result of the accident have had, and continue to have, a detrimental impact on most aspects of her life. She says she continues to suffer numerous cognitive difficulties associated with her mild traumatic brain injury and she is no longer able to enjoy dancing or riding a motorcycle with her common law spouse as she did before the accident. As a result of the accident, she has had to undergo extensive therapies, she is far less independent and she has become more reliant on her common law spouse for household and other assistance.

[114] The plaintiff's common law spouse testified that the plaintiff did not complain of pain or headaches prior to the accident. At that time he described her as "a very intelligent, outgoing, social, active, loved to dance woman". Immediately following the accident, he said she complained of headaches, was unable to do much around the home, and after work she

"came home very unhealthy every day" (i.e. she had headaches and a sore neck). Since the accident the plaintiff and her partner are unable to enjoy activities together like they used to, such as dancing and riding on his motorcycle. In addition, he has shouldered a greater burden of the household responsibilities.

- [115] I have reviewed the plaintiff's cases and I will consider the ones in the lower range of \$180,000 here. As will be seen in my view that is a high amount of non-pecuniary damages in this case and there are reasons to distinguish them in favour of a lower amount.
- [116] In Wong, the plaintiff was 80 years old at the time of the accident (83 years old at trial) involving a rear-end collision. She received \$180,000 in non-pecuniary damages. She was "very active" and "highly functioning" prior to the accident and as a result of the accident, she suffered a concussion or mild traumatic brain injury, whiplash and a broken tooth (at para. 87). The court found that the plaintiff's quality of life was drastically reduced as a result of the brain injury as her cognitive function had declined significantly to the point that she could no longer live independently (at paras. 91-92). By way of contrast, although the plaintiff in the subject case sustained a brain injury as a result of the accident, her level of cognitive impairment and the corresponding impacts on her quality of life are not nearly as severe as that of the plaintiff in Wong.
- [117] In Dubitz, the plaintiff was 31 years old and was involved in a rear-end collision. She received \$180,000 in non-pecuniary damages. Prior to the accident, she had suffered a moderate traumatic brain injury as a child, was diagnosed with anxiety disorder, was in an abusive relationship and had experienced a number of post-accident stressors unrelated to the accident. The court found these would have had some cumulative impact on her psychological functioning regardless of the accident. As a result of the accident she sustained soft tissue injuries to her neck and back; a mild traumatic brain injury; symptoms of post-traumatic stress disorder, anxiety and depression; chronic myofascial pain; occipital headaches; and central nervous system hypersensitivity (at para. 133). Based on the psychiatric evidence, the court found that the mild traumatic brain injury "played a meaningful but diminishing role in her cognitive difficulties following the accident" but it did not limit "her level of function" (at para. 263).
- [118] The court concluded in Dubitz that the soft tissue injuries, headaches and chronic pain would limit the plaintiff's functioning long-term (at para. 266). The accident was the "primary cause" of her psychological injuries; the symptoms of which, in the court's view, were unlikely to improve in the future (at paras. 275-276). In terms of non-pecuniary damages, the court found that the plaintiff's injuries were likely to cause "serious adverse impacts to her activities, career, relationships, disposition and outlook"; that she would have to modify her life and lower her expectations. She was "simply not the same person" (at para. 287).

- [119] Again, I find Dubitz distinguishable on the basis that the plaintiff in that case suffered far more severe injuries as a result of the accident, and the impacts of those injuries on her life were much more significant. The plaintiff here has, to her credit, by and large been able to carry on with her lifestyle as it was prior to the accident with some obvious limitations to her ability to work and leisure activities (notwithstanding her battle with breast cancer and the limitations imposed by the COVID-19 pandemic), and her symptoms appear to have mostly resolved, particularly since she has stopped working.
- [120] Lastly, in Dinnissen, the plaintiff was a pedestrian struck at speed by a car and she received \$180,000 in non-pecuniary damages. She suffered serious injuries including a fractured collarbone, a fractured wrist and a "complicated" brain injury (Dr. Cameron, an expert for the plaintiff in that case, opined that the plaintiff suffered a "complicated mild traumatic brain injury or moderate traumatic brain injury": at paras. 80, 103, 112, 121, 176). At the time of trial, the plaintiff's bone and soft tissue injuries and headaches had mostly resolved. In my view, the plaintiff in the subject case suffered a much less serious brain injury and associated symptoms than the plaintiff in Dinnissen.
- [121] The other cases relied on by the plaintiffs involve non-pecuniary damage awards in excess of these cases and I conclude they are also distinguishable on the basis that the plaintiffs' injuries and ongoing symptoms were more severe than those of the plaintiff here. For example, the conditions of mild traumatic brain injuries seem to have been more pronounced in the cases relied on by the plaintiff and the issue of headaches appears to have been well established in the above cases.
- [122] As a final matter I note that the plaintiff did not claim damages in respect of loss of housekeeping capacity. However, she did urge me to consider loss of housekeeping capacity under non-pecuniary damages (Kim v. Lin, 2018 BCCA 77, at para. 28). It is well-established that damages for loss of housekeeping capacity are payable where "the services are routinely performed gratuitously by family members or friends." (Riley, at para. 101). I was not given a specific amount for housekeeping expenses required by the plaintiff.
- [123] In her submissions in respect of cost of future care, the plaintiff says that Dr. MacKean recommended that she "have help for heavier cleaning activities such as washing floors, cleaning bathrooms, or more vigorous cleaning activities". However, I note that Dr. MacKean qualified this recommendation with "if she had to do the housework or cleaning". The evidence is that her common law spouse is responsible for more strenuous housekeeping duties since the accident. Indeed, the plaintiff testified that she does "very little at home" and acknowledged that her spouse does most of the work, something she expressed feeling guilty about. She said she does a "couple loads of laundry a week", "a little vacuuming" and cleans up after dinner. In my view, the plaintiff's loss of housekeeping capacity should be compensated by way of non-pecuniary damages.

[124] Having regard to the totality of the evidence and the parties' submissions as well as the factors in Stapley, and including the plaintiff's loss of housekeeping capacity, I conclude that an appropriate award for non-pecuniary damages in this case is \$110,000.

(e) Future loss of earning

[125] According to the plaintiff the loss of her future earning capacity justifies damages in the amount of \$275,680 on the basis of a loss of earnings approach.

[126] The defendants' position is that there should be no award for loss of future earning capacity as it is highly unlikely that, in the aftermath of her cancer diagnosis and treatment, the plaintiff would have continued to work three days per week until age 70. Also, and in any event, if her earning capacity has been diminished at all, it is the result of her cancer diagnosis and treatment. The defendants also say that any loss of earning capacity due to a head injury did not disable the plaintiff from her employment beyond the first two weeks.

[127] I note at the outset that unfortunately, the defendants in this case took no alternative position with respect to this head of damages. The problem with this approach of course is that the court is left only with the plaintiff's argument on an issue that is factually and legally nuanced. In these circumstances, one approach taken by this court has been to consider only the plaintiff's submissions on the issue (see *Cummings v. Tellier*, 2019 BCSC 2067, at para. 71; *Sahota v. Slupsky*, 2019 BCSC 215, at para. 199).

[128] The following sets out the general approach to the assessment of future earning capacity (*Tsalamandris v. McLeod*, 2012 BCCA 239, at para. 31):

[31] The appellants do contest how the trial judge then went about assessing that loss [of future earning capacity]. The trial judge set out to apply the principles canvassed in *Rosvold v. Dunlop*, 2001 BCCA 1, saying at para. 259:

The principles that govern the measurement of damages for loss of earning capacity were thoroughly discussed in *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158. The principles set out in that case can be summarized as follows:

1. the assessment of damages is not a precise mathematical calculation but a matter of judgment;
2. a plaintiff is entitled to be put in the position she would have been but for the accident;
3. an award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves compensation if this asset has been taken away or impaired;
4. since these damages must often be based on a hypothetical, the standard of proof of a hypothetical is "real and substantial possibility" and not mere speculation;
5. the court must consider the real and substantial possibilities, and give weight to them according to the percentage chance they would have happened or will happen;

6. one starting approach to valuation may be to compare the likely future of the plaintiff had the accident not happened, and the likely future of the plaintiff after the accident has happened, and to consider the present value of the difference between the amounts earned under these two scenarios. (I note that in using the word "likely", the Court on this point was meaning what hypothetical was a real and substantial possibility);
7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[129] Loss of future earning capacity can be quantified on an earnings approach or a capital asset approach (*Perren v. Lalari*, 2010 BCCA 140, at para. 32). The two approaches were summarized by Warren J. in *Hosseinzadeh v. Leung*, 2014 BCSC 2260 as follows:

[126] The earnings approach is generally appropriate where the loss is more easily measured, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate what the plaintiff's likely future earning capacity will be: *Perren*, at para. 32; *Clemas v. Gabrlik*, 2013 BCSC 1412 at para. 170. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Clemas*, at para. 170. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.

[127] The capital asset approach, typically used in cases where the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8.

[130] The capital asset approach is not restricted to cases where the plaintiff has no clear earnings history. It is more appropriate than the earnings approach in any case "where the loss, though proven, is not measurable in a pecuniary way": *Perren*, at para. 12. One example is *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.), which was discussed in *Perren* at para. 11 as follows:

... In *Kwei*, where it was not possible to assess damages in a pecuniary way as was done in *Steenblok* [(1990), 46 B.C.L.R. (2d) 133 (B.C.C.A.), *Taggart J.A.*, speaking for the Court, held that the correct approach was to consider the factors described by *Finch J.*, as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. Mr. *Kwei* had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice *Taggart* cited the *Brown* factors with approval:

[25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in *Brown v. Gola*. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. 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. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[131] In addition, I note that evidence of ongoing pain may be sufficient to ground a substantial possibility the plaintiff's ability to work will be adversely affected in the future, even if the plaintiff has not missed work due to injury (*Ahmad v. Pandher*, 2017 BCSC 1732, at para. 107). Finally, a determination of whether there is a real and substantial possibility of future loss of income is one of common sense (*Green v. International Cosmetics Inc.*, 2020 BCSC 1187, at para. 148, citing *Morlan v. Barrett*, 2012 BCCA 66, at para. 41).

[132] Turning now to the evidence, the plaintiff testified that the only occupation she has had during her adult life is as a dental hygienist. Prior to the accident she did not experience physical pain or discomfort while performing her work, nor did she require any assistance or accommodation. She said she loved her job including the patients themselves and the sense of satisfaction she got from seeing a patient improve their hygiene. She explained that she was never the subject of complaints or disciplinary action at work, nor of poor performance reviews. Before the accident she said her "general plan" was to retire at age 67 and would "maybe work on relief" if someone was needed on short notice.

[133] After returning to work two weeks after the accident, she testified that working four days per week was "exhausting" and that she "wasn't coping well". She said she experienced neck and back pain as well as headaches, she more trouble with the computer and it took longer to do things. Unlike before the accident, she started to come in early and stay late so things were more organized for the start of the day and to complete things at the end of the day.

- [134] In cross-examination, she said that after the accident she "was working differently" than she was before. When asked about reducing her workweek from four days to three, she said that she loved her work before the accident but it became a "chore" to go to work. She said she managed to maintain her three-days-a-week schedule until her cancer surgery in November 2018 because she could "power" through the three days and then have four days off. She did not know how difficult that was until after her surgery.
- [135] When pressed in cross-examination about the impacts of the positional strain of working as a dental hygienist, the plaintiff responded that even though she received treatment for work-related pain before and after the accident, she would work even if she was in pain. She agreed that, once she ceased working, she noticed an improvement of symptoms like headaches and pain and she assumed this was from not working. When asked whether she would return to work if it was offered and she did not have cognitive problems or headaches, the plaintiff responded that "absolutely" she would and she emphasized that she missed her work, her patients and her colleagues.
- [136] Meredith Walker, a dental hygienist and former supervisor of the plaintiff since 2007, testified that before the accident the plaintiff was a "perfect employee" who was "rarely ever sick" and always on time or early" for her shifts. She described the plaintiff's skills as a hygienist before the accident as "exceptional" and "clinically excellent". She said the plaintiff "was always going above and beyond" and "would be the person making sure everybody had the literature they needed to do their treatment appropriately". Ms. Walker said the plaintiff's relationship with her patients was "excellent" and that the plaintiff was "probably the best hygienist I have ever met". She did not observe the plaintiff having pain or discomfort or difficulty using technology.
- [137] Ms. Walker testified that in 2017, after the 2016 accident, the plaintiff did not have the stamina to take extra shifts when the office was short-staffed. She said that after the accident and before the cancer diagnosis the plaintiff "was a different person", that her "spark was gone" and that everyday for her was a struggle due to headaches and pain.
- [138] Dr. Robert Walker, a dentist and one of the owners of the dental office where the plaintiff worked, testified that he had known the plaintiff since 2005 and regularly observed her work as a dental hygienist. He testified that before her accident he had never heard the plaintiff complain of pain or headaches at work, nor did he observe her struggling with a computer or X-ray equipment. When asked to describe the plaintiff's personality prior to the accident, Dr. Walker said that she was always there early, she was very hardworking and always prepared, she held herself to an extremely high level of performance and she was passionate about her job, noting that she was "not just there for the pay cheque". He was not asked about the plaintiff's work performance after the accident, but he did say that if the plaintiff asked to come back to her job, he would say "start tomorrow".

[139] Ms. Christina Torontow, a former dental hygienist and colleague of the plaintiff from 1987 to 1996 and again from 2012 to 2018, testified that before the accident the plaintiff was a "very competent hygienist" who was "always up to date on everything". She described the plaintiff as being "always sort of upbeat and very conscious" in her dealings with patients and she said she had "lots of energy". She never observed the plaintiff have any difficulty using computers or X-Ray equipment. Ms. Torontow testified that before her own retirement in 2018 she observed the plaintiff for approximately eight months following the November 2016 accident. She said that the plaintiff had constant headaches and appeared to be exhausted during the day. Ms. Torontow described the plaintiff having problems with her memory, she wrote more things down and she had difficulty concentrating.

[140] The plaintiff, Ms. Walker, Dr. Walker and Ms. Torontow each confirmed that over the course of their careers in the dental industry, they have known dental hygienists that have worked beyond age 65 and into their 70s.

[141] In his July 2018 report, Dr. Cameron opined as follows in regards to the plaintiff's future employment prospects:

Ms. Laybolt was rendered completely disabled for a period of 2 weeks following this accident. She then returned to work only two days. She has increased to three days per week but cannot work anymore because of decreased mental and physical stamina present as a result of the injuries that she sustained at the time of the accident on November 26, 2016. She was working full time prior to this accident. It is possible that Ms. Laybolt may be able to increase her workload to three and one half to four days per week, however at this late date since the accident, it is probable that she will remain permanently partially disabled, with respect to work capabilities, perform chores around the house, and recreational activities probably permanently in the future. It is my opinion that Ms. Laybolt's probable permanent partial disability is resultant from the residual adverse effects of the injuries that she sustained at the time of the pedestrian/motor vehicle accident on November 26, 2016.

[Emphasis added.]

[142] Dr. MacKean recommended in her May 2019 report that the plaintiff not go back to work as a dental hygienist. She opined that the plaintiff "will probably have increased neck and upper back pain and increased headache symptoms if she did return to work as a dental hygienist, even on a part time basis". She also concluded that the plaintiff "is at the point of maximum medical improvement following injuries sustained in the motor vehicle accident that occurred on November 26, 2016".

[143] In my view the evidence is that the plaintiff's decision to retire in March 2020 was not taken lightly. She had originally hoped to return to work in March 2018 following her surgery, but due to various complications that arose from the surgery and chemotherapy, she revised her plan to return to work in September 2019. She then developed issues with her hand as a result of her cancer medication and intended to return to work in March 2020.

- [144] According to the plaintiff, in February or March 2019, Ms. Walker contacted her to enquire when she would be returning to work and informed her that her job would be available when she was ready to return. When asked whether her employers were pressing her to come back to work following her cancer surgery, the plaintiff responded "yes, and no". She confirmed they did want her back but that it was "hard for them to schedule somebody to replace me if they don't know how long that's going to be and when it's going to be".
- [145] At a meeting in March 2020 with Dr. Walker and Ms. Walker, the plaintiff told them that she was not comfortable "to keep them hanging" and not knowing when she would be back to work. She explained her decision to retire and advised that she was doing so. She said they understood her decision but that they would prefer that she came back. When Ms. Walker was asked about this meeting, she said that the plaintiff was "devastated" and that she did not want to leave her work. She confirmed that the plaintiff "felt bad for keeping us waiting for making a decision" and that she felt that she was hurting holding things up.
- [146] Dr. Walker testified that although he did not remember the "exact conversation", he recalled the plaintiff was "very emotional" about retiring, that she was not ready for retirement and that she did not feel like she was "doing it on her own terms". He also recalled the plaintiff being tearful when she told him and Ms. Walker that she would not be returning to work.
- [147] On or about this time, she attempted to clean her sons' teeth at the office of her employer. She testified that the experience was "very frustrating". Although she could do the physical work, she felt "lost" doing the computer work and X-rays and struggled with the X-ray equipment. She said that she had no difficulty doing these tasks prior to the accident. She also had problems with her trigger finger/thumb as a result of one of her cancer medications. The complications arising from her medication did not resolve until the fall of 2020.
- [148] As above, she plaintiff does not have to prove that she retired out of necessity; she must show only that her decision to retire was a reasonable one (Riley, at para. 83). While medical evidence is not required to justify the reasonableness of that decision (Tannberg v. Hare, 2021 BCSC 30, at para. 135, citing Gill, at paras. 22, 26), here there is some evidence from Dr. MacKean to that effect. In all of the circumstances I have little difficulty in finding that the plaintiff's decision to retire early was reasonable.
- [149] In light of the evidence, I find the plaintiff has established that her accident-related injuries have impaired her capacity to earn income, that those injuries are likely to persist in the future if she were to resume her work as a dental hygienist and that there is a real and substantial possibility that she will suffer a loss of income as a result. I accept the plaintiff's evidence that, but for the 2016 accident, she would have continued to work as a dental hygienist until the age of 70. While the plaintiff may have had a tentative plan to retire at age 67 prior to the accident (and subsequent cancer diagnosis), it is clear that she flourished in her occupation, which brought her a sense of purpose and satisfaction. She also lost income due to cancer and associated treatments, which she says would have required her

to work beyond age 67 in any event.

- [150] As above, the plaintiff submits that the earnings approach is appropriate given that the plaintiff has been employed as a dental hygienist throughout her working life and she has had a consistent and reliable income history. I agree.
- [151] Mr. Wickson's calculations indicate that, but for the accident, if the plaintiff would have worked at the average rate she did during 2016 and allowing for increased earnings and non-wage benefits, the plaintiff would have earned \$104,030 per year. Assuming she would have remained employed until age 70, the present value of those future earnings totals \$275,680 (taking into account employment contingencies and average mortalities).
- [152] There is no evidence (or submissions) about any other employment that the plaintiff may be capable of in the future. Unfortunately, considering Dr. MacKean's and Dr. Cameron's opinions regarding the plaintiff's future employment prospects and my findings with respect to her "early" retirement, I find that the plaintiff will not be able to resume employment as a dental hygienist in the future.
- [153] However, as I have observed above with respect to past loss of earning capacity, in my view the plaintiff would not have continued to work at the same frequency or capacity as she did in the 2016 year due to the intervening event of her cancer diagnosis and related treatments. These are not causally related to the accident. In order to adjust for this contingency, it is reasonable to reduce the award for loss of future earning capacity the plaintiff would otherwise receive by \$100,000.
- [154] Therefore, the plaintiff is entitled to a total award of \$175,680 for loss of future earning capacity.
- (f) Cost of future care
- [155] The test for assessing costs for future care is well settled; the question is whether they are reasonable and medically necessary (*Tsalamandris v. McLeod*, 2012 BCCA 239, at paras. 62-63; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, at 83-84 (S.C.)).
- [156] There is an absence of expert evidence on this issue. This is primarily explained by amendments in 2020 to the Evidence Act, R.S.B.C. 1996, c. 124. They limit the number of experts to three per party in respect of motor vehicle proceedings, which includes personal injury claims (s. 12.1). The plaintiff says that limitation mean that she was not assessed by an occupational therapist who could have provided an opinion about future care for the purposes of this claim and for care itself.
- [157] In *Lacroix v. Bourdon*, 2021 BCSC 586, Marchand J., as he then was, observed that a plaintiff cannot be blamed for "choosing not to adduce expert evidence to quantify this aspect of her loss and the defendants cannot complain about her failure to do so" (at para. 130). Expert evidence is not required to justify an award for cost of future care (*Kohli v. Josan*, 2020 BCSC 2028, at para. 102). In the absence of expert evidence in relation to the cost of medications

or treatments, "the Court of Appeal has exhorted a trial court to 'do the best it can' in such circumstances" (*Grewal v. Sanghera*, 2021 BCSC 621, at para. 182, citing *Loewen v. Bernardi*, (1994), 93 B.C.L.R. (2d) 242 (C.A.)).

- [158] The plaintiff relies on the May 2019 report of Dr. MacKean, specifically in terms of her recommendations made in September 2017 which included physiotherapy, massage therapy and acupuncture treatment, if those treatments relieved her pain. At that time she also recommended the plaintiff try four to six trigger point injections. Dr. MacKean saw the plaintiff again in January 2018 and recommended that, after she recovered from cancer surgery and finished the required treatment, she could undertake the same therapies if they helped in managing her chronic pain. In May 2019, Dr. MacKean recommended the plaintiff hold off on all therapies such as physiotherapy, massage therapy and acupuncture on the advice of her cancer specialist, who advised against them while the plaintiff was undergoing chemotherapy treatment.
- [159] In his July 2018 report Dr. Cameron recommended that the plaintiff try Botox therapy as treatment for her headaches. At trial, the plaintiff testified that she did not try Botox therapy because "it was too expensive". At trial, Dr. Cameron provided evidence in respect of Botox therapy. He testified that after receiving Botox, a significant number of patients will have improvement in their headaches after one and a half years such that they no longer require injections. He said it is "hard to predict" how long a patient will require Botox injections if their headaches continue.
- [160] Regardless of what the value of any of these treatments are, the evidence before me is that the plaintiff presently has minimal to non-existent complaints of neck, back or shoulder pain or headaches. It seems that this is perhaps due in large part to the fact that she is no longer working as a dental hygienist and absent that obligation, her current lifestyle is presumably better-suited to her rehabilitation. From a medical and daily living point of view this is good news.
- [161] I find that there is a reasonable likelihood that now the plaintiff has completed chemotherapy, she may yet benefit from physiotherapy, massage therapy, and acupuncture treatment, as recommended by Dr. MacKean. However, the plaintiff has failed to demonstrate an evidentiary link between her pain symptoms and the Botox treatments, particularly since her complaints about headaches are now minimal. Until she retired she was entitled to use up to \$500 annually per modality of treatment via her extended health plan. That plan would have continued had she worked until age 70.
- [162] Therefore, the plaintiff is entitled to a cost of future care award of \$4,500. This is calculated on the basis of three modalities (physio, massage, acupuncture) costing \$500 per year for three years, or \$1,500 per year.

E. SUMMARY

[163] The admitted liability of the defendants for the accident on November 26, 2016 resulted in injuries to the plaintiff.

[164] The plaintiff is entitled to damages in the amount of \$369,671, as follows:

Special damages

\$ 7,165

Past loss of income

\$ 72,326

Non-pecuniary damages

\$110,000

Future loss of earning

\$175,680

Cost of future care

\$ 4,500

Total

\$369,671

[165] The defendants may apply under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 for appropriate reductions to the special damages award.

[166] The plaintiff has been substantially successful and, subject to any application made within 60 days of this judgment (or appeal judgment), she is entitled to her costs at Scale B against the defendants. As I stated to counsel, the plaintiff's request for a transcript of the trial was unnecessary and unusual and she is not entitled to the costs of the transcript.

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

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