

CANADA / JUDGMENT

Pearson v. Savage

2020 BCCA 133

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 133 Pearson v. Savage

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pearson v. Savage,

2020 BCCA 133

Date: 20200508

Docket: CA44727; CA45537

Docket: CA44727

Between:

Jessica Marie Pearson

Respondent

(Plaintiff)

And

Melanie Catherine Savage and Sheila Elaine Berry

Appellants

(Defendants)

- and -

Docket: CA45537

Between:

Jessica Marie Pearson

Respondent/

Appellant on Cross Appeal

(Plaintiff)

And

Melanie Catherine Savage and Sheila Elaine Berry

Appellants/

Respondents on Cross Appeal

(Defendants)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: Orders of the Supreme Court of British Columbia,
dated August 15, 2017 (Pearson v. Savage, 2017 BCSC 1435,
Vancouver Docket M126646), and July 25, 2018 (Pearson v. Whiteside,
2018 BCSC 1246, Vancouver Docket M126646).

Counsel for the Appellant:

M.-H. Wright

J.W. Joudrey

Counsel for the Respondent:

A. Leoni

J.L. Harbut

Place and Date of Hearing:

Vancouver, British Columbia

November 13, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 8, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Hunter

Summary:

The appellants challenge an award for damages arising out of a motor vehicle accident and, in a related appeal, challenge the award for financial management fees that accompanied the main award. The respondent cross appeals the award made for management fees. Held: Damages appeal dismissed; management fees appeal allowed; cross appeal dismissed. Given the deferential nature of the standard of review that applies to appeals from damages awards, there is no basis upon which this Court could properly interfere with the assessment of damages for loss of future earning capacity. The judge did not err in principle or in fact in her approach to the question of mitigation. With respect to management fees, there was no evidence justifying a conclusion that the respondent requires continuous investment management services to achieve the required rate of return. The appeal is allowed and the management fees award is reduced to \$25,000. With respect to the cross appeal, the judge erred in reducing the award to account for anticipated legal fees and disbursements. Given the disposition of the related damages appeal, the error is inconsequential.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] This case illustrates the challenges inherent in making an award that fairly compensates a young plaintiff who had a promising future, but an undeveloped work history, for debilitating losses suffered in an automobile accident.
- [2] In the main appeal, the appellants challenge an award for damages arising out of a motor vehicle accident (CA44727). In a related appeal (CA45537), the appellants challenge the award for financial management fees that accompanied the main award. The respondent, Ms. Pearson, cross appeals on the issue of management fees.
- [3] On November 26, 2010, Ms. Pearson was seriously injured in a head-on collision on the Sea-to-Sky Highway. When the accident occurred, Ms. Pearson was a rear-seat passenger in a vehicle being driven by the appellant, Ms. Savage. The accident occurred when another vehicle being driven by the appellant, Ms. Berry, crossed the centre line and struck Ms. Savage's vehicle.
- [4] Liability was admitted. The assessment of damages was the only issue at trial--the most significant being loss of future earning capacity and cost of future care.

- [5] At the time of the accident, Ms. Pearson was 21 years old. She was taking a year off from a business administration program at Capilano University to earn money to finance her education. Her ultimate goal was to obtain a master's degree in business administration and work in sports marketing or a similar field.
- [6] Ms. Pearson suffers from chronic pain due to soft tissue injuries sustained in the accident. She also suffers from serious and debilitating psychological challenges associated with those injuries, including somatic symptom disorder, depression and anxiety, and post-traumatic stress disorder ("PTSD").
- [7] The trial judge awarded Ms. Pearson \$1,871,561.53 in damages, including \$1,250,000.00 for loss of future earning capacity. At a subsequent hearing, the judge awarded Ms. Pearson \$278,500 in financial management fees.
- [8] By the appellants' admission, these are primarily fact-based appeals that, to a large extent, attract a standard of review of palpable and overriding error.
- [9] In the main appeal, the appellants challenge the award for damages on grounds that the trial judge erred: (1) in assessing damages for loss of future earning capacity; and (2) in applying the test for, and assessing the evidence regarding, mitigation. They seek a new trial or, in the alternative, an order that reduces the award for loss of future earning capacity and reduces the award across all heads of damages to reflect Ms. Pearson's alleged failure to mitigate.
- [10] In the related appeal, the appellants challenge the award for management fees largely on grounds that the trial judge misapprehended the evidence in ways that had a material impact on the outcome. Ms. Pearson cross appeals, arguing that the trial judge erred in principle by reducing the management fees award that would otherwise have been made to take into account the estimated legal fees and disbursements Ms. Pearson would have to pay following the litigation.
- [11] For the reasons that follow, I would dismiss the main appeal. Given the deferential nature of the standard of review that applies to appeals from damages awards, I see no basis upon which this Court could properly interfere with the assessment of damages for loss of future earning capacity. In addition, I am not persuaded that the judge made any reviewable error in her approach to the question of mitigation.
- [12] With respect to management fees, the amount awarded by the judge was, in my respectful view, unsupported by the evidence and wholly erroneous. Accepting, as I do, the factual findings of the judge, there was no evidence justifying a conclusion that Ms. Pearson is so incapable of managing her own financial affairs that she requires continuous investment management services to achieve the required rate of return on the two central components of the award--loss of future earning capacity and cost of future care. I would allow this appeal and reduce the management fees award to \$25,000.

- [13] With respect to Ms. Pearson's cross appeal, the judge erred in concluding that she was obliged to reduce the award for management fees to account for anticipated legal fees and disbursements. However, given my decision on the related (damages) appeal, the error is inconsequential. Accordingly, I would dismiss the cross appeal.

II. Background

- [14] The reasons of the trial judge underlying the main appeal are indexed as 2017 BCSC 1435. The judge heard testimony from 11 medical experts and a number of lay witnesses. The judge found that, before the accident, Ms. Pearson was an energetic, ambitious, enthusiastic, artistic and athletic person. The judge described her as "an extrovert and a social butterfly." She was also a good employee with a strong work ethic. She obtained her driver's license when she was 16 years old and drove regularly without anxiety. Her life and earning prospects were bright.
- [15] Ms. Pearson testified that after the accident she felt as if she had undergone a complete personality change. She tried to work, sometimes at the expense of attending physiotherapy sessions, but experienced increased pain, anxiety, irritability and difficulty sleeping. She noticed herself becoming forgetful. She was prescribed an antidepressant, but did not take this medication as prescribed. She testified that she was fearful of becoming addicted to prescription medications because of her family history of addiction. In addition, she sometimes forgot to refill a prescription. She found herself sinking into a "hole of depression" and became immobilized. She says she has more bad days than good. On the bad days, she describes having so much pain in her neck, ribs and lower back that she does not want to live. She still suffers from anxiety attacks and feels as if she can no longer participate in the joys of life. She is afraid of driving, particularly on the Sea-to-Sky Highway.
- [16] The judge found Ms. Pearson to be a credible witness. She concluded that Ms. Pearson does not consciously exaggerate the extent of her pain or feign pain-related symptoms. Rather, the pain she experiences is a product of a somatic symptom disorder characterized by multiple persistent physical complaints that are associated with excessive and maladaptive thoughts, feelings and behaviours. This disorder, a psychological injury, is attributable to the accident. The judge found the physical and psychological symptoms that Ms. Pearson describes experiencing were corroborated by the lay and expert witnesses called on her behalf.
- [17] I will briefly summarize only so much of this evidence as is necessary to put the grounds of appeal in context.
- [18] Dr. Travlos, a psychiatrist, assessed Ms. Pearson on November 9, 2011, at the request of her counsel. He found that Ms. Pearson was suffering from cognitive difficulties such as forgetfulness, as well as headaches, dizziness, and neck, back and left knee pain, all of which he attributed to the accident. He also found that Ms. Pearson's mental health had become fragile following the accident. Dr. Travlos made a number of treatment

recommendations, including that Ms. Pearson work with an occupational therapist, adopt an exercise program with a kinesiologist, and try different strategies such as meditation or yoga to alleviate her headaches. He also recommended that she begin taking an antidepressant, a muscle relaxant, and attend for counselling. Dr. Travlos concluded that while Ms. Pearson had significant limitations one year after the accident, there was a reasonable expectation that, if the medical recommendations were followed, she would continue to make gains over the next two years and experience substantial improvement.

- [19] Dr. Caillier, a specialist in physical medicine and rehabilitation, assessed Ms. Pearson on July 18, 2016, at the request of her counsel. The trial judge was impressed by Dr. Caillier's thorough grasp of Ms. Pearson's medical history and clinical records. She diagnosed Ms. Pearson as suffering from soft tissue injuries to her neck, upper back, posterior shoulder girdle, lower back and left anterior knee. As a consequence of these accident-related injuries, Ms. Pearson suffers from chronic pain, headaches, psychological symptoms of depression and anxiety, physical deconditioning, cognitive symptoms attributable to a mood disorder, and altered sleep. All of these symptoms were combining to negatively impact Ms. Pearson's ability to function at home, recreationally, and at work.
- [20] Dr. Caillier opined that Ms. Pearson's prognosis for becoming pain free is poor. She testified that while there may be improvement in Ms. Pearson's condition if she follows treatment advice and recommendations, she is unlikely to ever become pain free. Dr. Caillier testified that Ms. Pearson is capable of being employed in some capacity, but whether she will ever be able to consistently maintain a full-time workload is unknown. She would likely be able to work in a part-time position, provided there is improved management of her pain, mental health, sleep and headaches. Dr. Caillier testified that even if Ms. Pearson followed the medical advice and recommendations made, there was a possibility she would not realize any gains.
- [21] Dr. Bogod, a clinical neuropsychologist, conducted a full-day medical assessment of Ms. Pearson in 2012 and a reassessment in 2016 at the request of her counsel. His initial assessment found that Ms. Pearson was displaying severe symptoms of depression, significant anxiety, fatigue, and was having difficulty maintaining concentration. She was found to meet the criteria for a diagnosis of PTSD. Dr. Bogod opined that treatment would be fairly challenging. He testified that while the hope is people who get early and intensive treatment will show improvement, his prognosis was guarded because Ms. Pearson's symptoms were severe, complex and long lasting. Following the reassessment, Dr. Bogod reported that Ms. Pearson's cognitive complaints of "brain fog", including forgetfulness and poor concentration, are likely chronic. He found that she continued to meet the diagnostic criteria for a major depressive disorder that had now become chronic in nature with associated suicidal ideation. The previously diagnosed PTSD was found to be in partial remission. Dr. Bogod's neuropsychological testing revealed predominantly normal functioning.

- [22] Dr. Pullyblank, a psychologist, performed psychological and vocational assessments of Ms. Pearson in 2012 and 2013, and saw her again for an update in October 2016. Formal testing revealed that Ms. Pearson has an average to high average intellectual ability, but a comparative weakness in mathematics. He found her to have significant barriers to employment and to be in need of a clear rehabilitation plan. Her barriers to employment, all of which are attributable to the accident, included: chronic pain; high levels of anxiety and depression; a tendency to social isolation; and the absence of academic credentials as a consequence of her withdrawal from post-secondary education.
- [23] Dr. Kranz, a family physician, first saw Ms. Pearson at a clinic in Squamish, British Columbia, on September 22, 2011, when she came in seeking a referral to a physiotherapist and a refill for an antidepressant. He continued to treat Ms. Pearson up until the trial. Dr. Kranz testified that Ms. Pearson was concerned about the side effects of antidepressants. His understanding was that Ms. Pearson lacked the financial resources to pursue the treatments that would be most beneficial to her. Other evidence suggested that cost-prohibitive but beneficial treatments might include attendance at a multidisciplinary pain management clinic and a structured rehabilitation program.
- [24] Dr. O'Shaughnessy, a psychiatrist, conducted an assessment of Ms. Pearson on July 18, 2016, at the request of her counsel. He found that Ms. Pearson met the diagnostic criteria for PTSD in partial remission, major depressive disorder in partial remission, and somatic symptom disorder. Consistent with this latter disorder, Ms. Pearson was avoiding any activity she thought might worsen her pain. Dr. O'Shaughnessy recommended cognitive behavioural therapy and a focused rehabilitation program for her pain that would encompass both the physical and psychological components of Ms. Pearson's recovery. He testified that interventions of this kind would probably help Ms. Pearson but it was hard to determine how much benefit she would derive from participating in such a program. Dr. O'Shaughnessy's prognosis was guarded. He expressed hope that participating in a rehabilitation program would assist Ms. Pearson to better manage her day-to-day functioning.
- [25] Louise Craig conducted a functional capacity evaluation of Ms. Pearson in the fall of 2016. She concluded that Ms. Pearson was unable to sustain the full-time work she engaged in after the accident. Ms. Craig opined that Ms. Pearson was better suited to part-time work with light physical demands, but that Ms. Pearson would still require accommodation even with this type of work. She concluded that Ms. Pearson was likely at or close to maximum physical rehabilitation.

- [26] Dr. Koch, a registered psychologist, saw Ms. Pearson in September and October 2016 at the request of the appellants' trial counsel. He was of the opinion that Ms. Pearson was probably suffering from PTSD and persistent depressive disorder, and possibly suffering from generalized anxiety disorder. He recommended that Ms. Pearson attend a multidisciplinary pain management clinic with a substantial psychological treatment component. Even so, Dr. Koch was pessimistic about Ms. Pearson's future given her wide variety of somatic problems.
- [27] Of note, Dr. Koch initially suggested that, even before the accident, Ms. Pearson suffered from somatic symptom disorder and panic disorder with agoraphobia. When challenged during cross-examination and presented with other evidence, Dr. Koch resiled from his pre-accident diagnoses. In closing submissions, counsel for the appellants said, "we're not taking a position that there was any pre-existing condition such that the defendants are not responsible for the plaintiff's injuries arising from the accident". This position was said to be based on the concessions Dr. Koch made in cross-examination.
- [28] The judge concluded that, as a result of the accident, Ms. Pearson sustained soft tissue injuries and now suffers from chronic pain in her neck, back, and left knee as well as debilitating headaches. The judge also found that Ms. Pearson sustained psychological injuries and suffers from depression and anxiety, symptoms of PTSD and a major depressive disorder that are in partial remission, physical deconditioning, symptoms of cognitive dysfunction, altered sleep, somatic symptom disorder, difficulties with her former recreational activities, and an impairment of her ability to work. The judge determined that Ms. Pearson's prognosis was poor. Although there was hope that with a focused rehabilitation program she would be better able to manage her physical and psychological symptoms, the judge concluded that Ms. Pearson would likely never be pain free.
- [29] The judge concluded that there was an "obvious error" in an entry in clinical records relied on by Dr. Koch to suggest that Ms. Pearson had a pre-accident history of chronic back pain. She found nothing in the pre-accident clinical records to suggest that Ms. Pearson suffered from chronic back pain or agoraphobia. She determined to give his evidence no weight.
- [30] The judge also dismissed the evidence of two defence experts, Dr. Sovio, an orthopedic surgeon, and Dr. Dost, a neurologist, as being irrelevant to any injuries claimed by Ms. Pearson.
- [31] With respect to her pre-accident earning potential, the trial judge noted that although Ms. Pearson did not have definite career plans, she had high career goals and was motivated to achieve them. I will discuss the reasoning of the judge in assessing Ms. Pearson's loss of future earning capacity in further detail below.
- [32] The judge awarded damages to Ms. Pearson as set out below:

1.

Non-pecuniary damages

\$175,000.00

2.

Past income loss

\$35,211.00

3.

Loss of future income earning capacity

\$1,250,000.00

4.

Cost of future care

\$401,868.50

5.

Special damages

\$9,482.03

Total

\$1,871,561.53

[33] Following a subsequent hearing, and in reasons for judgment indexed as 2018 BCSC 1246, the judge awarded Ms. Pearson \$278,500 in management fees.

III. Grounds of Appeal

[34] In the main appeal, the appellants argue that the judge erred by:

- a) failing to address material contingencies and by misapprehending the evidence in assessing damages for lost earning capacity; and
- b) failing to apply an objective test to the question of mitigation and failing to reconcile contentious evidence material to the resolution of this issue.

[35] In the appeal of the management fees award, the appellants argue that the judge erred in assessing management fees by:

- a) failing to apply the proper legal test and follow precedent; and
- b) misapprehending the evidence and engaging in speculation.

[36] In her cross appeal, Ms. Pearson argues that the trial judge erred by:

- a) reducing the award for financial management fees to account for anticipated legal fees and disbursements.

A) Loss of future earning capacity

i) The court below

- [37] The judge began her analysis by citing this Court's well-known judgments in *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 8-11, and *Perren v. Lalari*, 2010 BCCA 140 at paras. 12, 30 and 32. She noted that an award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset that has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. She recognized that quantification of the loss of earning capacity could be based on an earnings approach or capital asset approach. She was cognizant of the challenges associated with assessing a loss of earning capacity for a young person who did not have an established career path. She acknowledged the advantages of the capital asset approach over the earnings approach in cases like the one at bar. She appreciated her obligation to consider the likely duration of Ms. Pearson's working life, and to account for negative and positive contingencies in the award.
- [38] Against this background, the judge found that Ms. Pearson would have obtained a bachelor's degree. Given her exceptional attributes and high motivation to achieve, the judge concluded that she would earn more than the average female with a bachelor's degree.
- [39] Based on the medical evidence, the judge held that, with appropriate treatment, Ms. Pearson could hope to maintain her present level of functioning. The judge determined that, given her injuries, Ms. Pearson's future earnings would be \$10,000-\$15,000 annually. In coming to this conclusion, the judge expressly noted that Ms. Pearson's annual earnings since the accident were approximately \$25,000 annually. She concluded, however, that Ms. Pearson could not sustain working at the pace required to maintain this level of income.
- [40] The judge considered whether an actuarial or economic multiplier might be more appropriate in considering loss of future earning capacity. What she said about this has given rise to controversy on appeal:
- [208] The actuarial cumulative multiplier from the date of trial to age 65 is [28,001], and includes allowances for premature death. The economic cumulative multiplier from the date of trial to age 65 is [19,945]. The economic multiplier includes allowances for the negative labour market contingencies, including non-participation in the work force, unemployment, part-time work, and part-year work. The labour market contingencies result in a reduction of lifetime earnings by about one-third.
- [209] Mr. Benning [an economist] testified that those who do not have a bachelor's degree have lower participation in the work force and higher unemployment compared to those who do have a bachelor's degree.

[210] I find that using the economic multiplier includes negative contingencies that do not apply to Ms. Pearson. The actuarial multiplier is more appropriate, but I recognize that if the accident had not occurred, Ms. Pearson may have taken some time - but not much time - to have a family. I doubt that she would have become a homemaker given her strong attachment to the work force, or become economically dependent on her partner or spouse.

[211] Assuming that Ms. Pearson earned an average of \$15,000 over her expected lifetime, and based on the economic multiplier, her lifetime with injury earnings is \$299,175. Had the accident not occurred her earnings would have ranged from approximately \$1,036,000 (economic multiplier) based on the average earnings, to approximately \$1,800,000.

[Emphasis added.]

ii) The positions of the parties

a) The appellants

[41] The appellants argue that the judge misapprehended material evidence, failed to consider relevant evidence, or failed to explain why relevant evidence relating to positive contingencies was not reflected in the awards. The appellants concede that there was some evidence to support most of the findings of fact made by the trial judge, but argue that contrary evidence was disregarded for reasons not explained in the judgment.

[42] On the issue of positive contingencies, the appellants argue, among other things, that the judge did not consider Ms. Pearson's prospects for improvement with treatment, her prospects for achieving higher education, or her potential to work more than part-time hours in a low-paying job. They submit the judge was incorrect in concluding that Ms. Pearson's condition would not improve, noting the expert evidence that suggested future treatment could boost Ms. Pearson's capacity to work. The appellants also say the judge failed to factor in positive contingencies arising from Ms. Pearson's recent response to new treatments, including the introduction of a new antidepressant and Botox injections.

[43] The appellants also say it cannot be known from the reasons for judgment whether the judge used an actuarial or economic multiplier. They say that the judge appears to have rejected all negative labour market contingencies and, in doing so, rejected contingencies that necessarily apply to everyone. They argue that if negative labour market contingencies had been appropriately applied, the starting point for the assessment would have been reduced by 30%.

[44] The appellants suggest that because the trial judge did not expressly refer to contingencies that arose from the evidence, her reasons are inadequate. I note, however, that they do not raise insufficiency of reasons as a distinct ground of appeal.

- [45] The appellants also argue that the trial judge's conclusion that Ms. Pearson has a residual earning capacity of \$15,000 annually assumes no functional improvement. They submit that the trial judge took no account of the possibility that Ms. Pearson would improve with treatment so as to be able to work full-time. The appellants contend that a residual earning capacity of \$15,000 annually is unreasonably pessimistic. They say that \$15,000 is lower than all of Ms. Pearson's post-accident annual incomes, and that Ms. Pearson had just started a more lucrative job. I note that Ms. Pearson's post-accident annual incomes were: \$20,778 in 2011; \$25,113 in 2012; \$26,739 in 2013, \$27,567 in 2014; and \$27,842 in 2015.
- [46] The appellants submit that the trial judge misapprehended evidence relating to the clinical documentation of pre-accident lower back problems Ms. Pearson had experienced.
- [47] The appellants also take issue with the failure of the judge to deal with inconsistencies in Ms. Pearson's evidence, including the frequency with which she attended physiotherapy appointments.
- b) The respondent
- [48] Ms. Pearson submits that she was not feeling better shortly after the accident, nor was she doing better closer to trial. She was continuing to experience debilitating pain, panic attacks and she was withdrawing socially. She submits that the evidence supports these conclusions.
- [49] Ms. Pearson argues that the appellants' submissions amount to a thinly disguised re-argument of the issues litigated at trial and a plea for reduced damages on the basis of speculative future improvement. Ms. Pearson also argues that the judge took into account positive contingencies with respect to her future income, and that the judge used an economic multiplier to assess the loss despite determining that it included negative contingencies that did not apply.
- [50] In addition, Ms. Pearson argued that a residual earning capacity of \$15,000 annually was, if anything, optimistic given that her 2016 annual income was only about \$8,000.

iii) The law

- [51] Damage assessments are case-specific and fact-intensive. They attract a deferential standard of review: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 14. An appellate court should not alter a damage award because it might have come to a different conclusion. To intervene, an appellate court must be satisfied that the trial judge proceeded on a mistaken or wrong principle of law, that there was no evidence upon which the trial judge could have reached a particular conclusion, or that the result reached at the trial was a wholly erroneous estimate of the damage: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435-436; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 9, leave to appeal ref'd [2009] S.C.C.A. No. 197, citing with approval *Nance v. British Columbia Electric Railway Company Ltd.*, [1951] A.C. 601 at 613-14 (P.C.).

iv) Analysis

- [52] I am not persuaded that the judge committed palpable and overriding error in the factual findings she made. The judge was not obliged to deal with every evidentiary point, argument or potential inconsistency raised by the appellants. With one exception, it has not been shown that the alleged errors are palpable--much less material--to the reasoning process of the judge.
- [53] The exception relates to the judge's conclusion that there was nothing in Ms. Pearson's clinical records justifying Dr. Koch's observation that she had a pre-accident history of back pain. While it is apparent that the judge misapprehended the evidence on this point, as counsel conceded in oral argument, the oversight was not material to her reasoning process. Dr. Koch was clearly wrong about Ms. Pearson's psychological diagnoses prior to the accident and it was open to the trial judge to place less weight on his evidence in light of this error.
- [54] At trial, Ms. Pearson highlighted aspects of the opinion evidence that supported a more pessimistic prognostication of what the future would hold for her, while the appellants focussed on the possibility of future improvement in Ms. Pearson's condition and capacity to work. It was the task of the trial judge to sift through competing evidence and make factual findings on a balance of probabilities. That is what the judge did in this case. The factual findings that underlie the award for loss of future earning capacity are supported by the evidence and are entitled to deference.
- [55] In any event, as I read the judge's reasons, the possibility of improvement in Ms. Pearson's functional capacity was built into the award. At minimum, the judge used the high end of Ms. Pearson's predicted future annual earnings (\$15,000) as the starting point for her analysis. This is almost twice what Ms. Pearson earned in 2016.
- [56] The appellants suggest that the judge brought a double standard to her assessment of the reliability of the expert witnesses. I accept that it is an error in principle for a trial judge to use a higher degree of scrutiny in assessing the reliability of the evidence led by one party. But this is a difficult ground of appeal to successfully advance. Findings of fact lie within the province of the trial judge. Appellate courts view with scepticism arguments of this kind because they often amount to a thinly veiled invitation to reassess the factual findings made below. In my view, this ground of appeal has not been made out here. Put simply, I see no basis upon which this Court could properly conclude that the judge brought to her task an unbalanced assessment of credibility and reliability.
- [57] I turn next to the question of whether the judge used an actuarial or economic multiplier. If paras. 208-210 of the reasons for judgment on the damages award are read in isolation, I agree there is room for ambiguity about whether the judge used an actuarial or economic multiplier. But appellate courts do not read passages in reasons for judgment in isolation; rather, reasons are read in context and as a whole. Approaching the impugned passages in this way, and having regard to the figures mentioned in para. 211, it is obvious, in my view,

that the judge applied an economic multiplier to assess Ms. Pearson's loss of future income.

[58] In para. 211, which I reproduce here for convenience, the judge wrote:

[211] Assuming that Ms. Pearson earned an average of \$15,000 over her expected lifetime, and based on the economic multiplier, her lifetime with injury earnings is \$299,175. Had the accident not occurred her earnings would have ranged from approximately \$1,036,000 (economic multiplier) based on the average earnings, to approximately \$1,800,000.

[Emphasis added.]

[59] All of the figures mentioned in para. 211 are based on an economic multiplier. The passage is unclear because it appears the judge misstated which figures she was citing: she was not referring to Ms. Pearson's lifetime earnings had the accident not occurred, but rather to the difference between what Ms. Pearson would have earned had the accident not occurred and what she will earn with her injury. In short, the final sentence may have been clearer had it read:

Had the accident not occurred, the difference between what she would have earned and what she will earn ranges from approximately \$1,036,000 (economic multiplier) based on the average earnings, to approximately \$1,800,000.

[Changed language emphasized.]

[60] Nevertheless, the origin of these numbers is clear. The figures are based on an economic multiplier of 19,945.

[61] That the judge used an economic multiplier (despite noting that she had earlier found the actuarial multiplier to be more appropriate in Ms. Pearson's case) is also clear from the award actually made. Had an actuarial multiplier been employed, the award for loss of future income would have been something in the range of \$1.5-\$2.5 million. That the judge used the economic multiplier operates in the appellants' favour. As the appellants concede, the economic multiplier incorporates the usual negative contingencies. As a result, I see no merit in the appellants' submissions on this point.

[62] Given the deferential nature of the standard of review that applies on appeals from damages awards, I see no basis upon which this Court could properly interfere with the award for loss of future earning capacity.

B) Mitigation

i) The court below

[63] The judge recognized the onus was on the appellants at trial to prove that Ms. Pearson could have avoided all or a portion of her loss.

- [64] The trial judge found the appellants failed to prove that Ms. Pearson had unreasonably failed to mitigate her damages. On this issue, the judge relied on the opinions of Drs. Caillier, Travlos and Kranz, that patients with chronic pain and depression often have difficulty following treatment recommendations. There was a considerable body of evidence before the judge that individuals suffering from a mood disorder commonly retreat into social isolation and display a chronic lack of energy, initiative and motivation to complete everyday tasks. It is not uncommon for chronic pain patients to start medication and then stop. As the judge put it, "[t]hey understand what they should do, but do not carry it out."
- [65] The judge observed that there are few, if any, required rehabilitative resources available to Ms. Pearson in Squamish and that, as a result of the accident, she is now too frightened to drive to Vancouver. The judge also noted that Ms. Pearson could not afford to pay for the costly treatment she required.
- [66] The trial judge found that Ms. Pearson was too depressed and too tired from working to seek treatment after work or, on occasion, even refill a prescription. She concluded that "[i]f Ms. Pearson has failed to follow any of the treatment recommendations, the failure is largely a result of the symptoms she suffers as a result of the accident."

ii) The positions of the parties

a) The appellants

- [67] The appellants argue that the trial judge erred by concluding that it had not been shown that Ms. Pearson failed to take objectively reasonable steps to mitigate her damages and that, had she done so, she would have derived functional benefit from treatment. The appellants assert that the evidence of Dr. Travlos and Dr. Caillier established a reasonable expectation for significant functional improvement had Ms. Pearson followed treatment recommendations. The appellants emphasize that Ms. Pearson does not appear to have been in a major depression when she first saw Dr. Travlos, yet did not follow up on his treatment recommendations.
- [68] The appellants submit that Ms. Pearson made what amounts to a conscious choice to discontinue taking her medications. The appellants argue that motivation was not an issue for Ms. Pearson with respect to work, and so should not have been considered with respect to treatment. In addition, the appellants highlight the judge's alleged failure to address Ms. Pearson's decision to self-medicate with alcohol and drugs rather than pursue treatment.
- [69] The appellants argue that the judge failed to apply an objective test for mitigation, which is required unless a plaintiff is incapable of making rational decisions. The appellants argue there was no evidence that Ms. Pearson was incapable of making rational decisions.

- [70] The appellants also submit that the evidence relating to Ms. Pearson's forgetfulness was insufficient to ground the trial judge's conclusions. They say the only evidence that Ms. Pearson is forgetful came from her and that none of the experts opined she was forgetful. In addition, while the judge found Ms. Pearson to have memory problems, this conflicts with Dr. Bogod's neuropsychological performance testing results, which did not disclose any issues with memory.
- [71] In addition, the appellants submit the judge's finding that Ms. Pearson was unable to drive on the Sea-to-Sky Highway to pursue treatment conflicts with evidence suggesting she was able to drive on the highway during the same period for other reasons. They also argue that it was inconsistent for the judge to find Ms. Pearson incapable of driving the highway to avail herself of recommended treatment, but able to drive the highway to follow future treatment recommendations, as reflected in her cost of future care findings.
- b) The respondent
- [72] Ms. Pearson contends that the trial judge demonstrated a firm grasp of the issues and evidence related to mitigation. Ms. Pearson maintains that the medical evidence was clear that her struggles with depression, anxiety, PTSD, social self-isolation, and reduced motivation created barriers to seeking treatment that were so significant she was incapable of following treatment recommendations. Ms. Pearson also says there was ample evidence, from her and other lay witnesses, to support a conclusion that she struggled after the accident to drive on the highway.
- [73] Ms. Pearson further argues that the appellants failed to discharge their onus to prove that close adherence to recommended treatments would have improved her condition and reduced her damages.
- iii) The law
- [74] Mitigation limits recovery based on the unreasonable failure of an injured party to take steps to limit the loss: *Graham v. Rogers*, 2001 BCCA 432 at para. 35, leave to appeal ref'd [2001] S.C.C.A. No. 467. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant argues that the plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on the issue.
- [75] Where a plaintiff has not pursued a course of recommended medical treatment, the defendant must prove that the plaintiff acted unreasonably in eschewing the recommended treatment, and the extent, if any, to which the plaintiff's damages would have been reduced had he or she acted reasonably: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

- [76] The test set out in Janiak is objective. If a plaintiff had capacity to make decisions about treatment that ought to have been pursued, and the advice to pursue a particular form of treatment was sound, the question is what would be expected of a reasonable person in the circumstances considering the plaintiff's medical condition at the material time: *Cassells v. Ladolcetta*, 2012 BCCA 27 at para. 26. If, through no fault of her own, the plaintiff did not have the capacity to make the decision, the issue of mitigation does not arise.
- [77] Determining what is "reasonable" to mitigate a loss involves both a question of fact and law: *The Owners, Strata Plan K855 v. Big White Mountain Mart Ltd.*, 2017 BCCA 438 at para. 66. A defendant is not entitled to complain of a failure to mitigate that is caused, or materially contributed to, by the defendant's own actions: *2438667 Manitoba Ltd. et al. v. Husky Oil Limited et al.*, 2007 MBCA 77 at 18, cited with approval in *The Owners, Strata Plan K855*.

iv) Analysis

- [78] I am not persuaded that the judge made any reviewable error in her approach to the question of mitigation. The appellants suggest that no one other than Ms. Pearson can say that she was forgetful and that memory loss was not confirmed on neuropsychological tests. However, the fact remains that Ms. Pearson's evidence was accepted and that certain cognitive deficits, including complaints relating to memory, were acknowledged by the medical experts to be common symptoms of a major depressive disorder. I see no merit in this point.
- [79] I do not accept that the judge's findings are consistent with the appellants' suggestion that Ms. Pearson made a conscious and informed choice to discontinue taking antidepressant medication. The situation, as the judge recognized, is much more nuanced. The trial judge accepted evidence establishing Ms. Pearson's ongoing emotional struggles with depression, self-isolation, PTSD and feelings of personal worthlessness. In light of Ms. Pearson's ongoing struggles, the judge found that it was unreasonable to expect her to have pursued the treatment recommendations that were made. I emphasize this portion of her reasons:
- [162] If Ms. Pearson has failed to follow any of the treatment recommendations, the failure is largely a result of the symptoms she suffers as a result of the accident.
- [80] This is a finding of fact that Ms. Pearson did not have the capacity to engage in the treatment the appellants say she should have engaged in following the accident.
- [81] I am satisfied that the judge's finding on this point amounts to a conclusion that Ms. Pearson was, as a consequence of her depression and related cognitive symptoms, incapable of following the treatment recommendations of which she was aware. In my view, there is no basis upon which we could properly interfere with this finding. I would not accede to this ground of appeal.

C) Management fees

- i) The court below

- [82] As noted earlier, the trial judge awarded Ms. Pearson \$278,500 in management fees. Reasons for judgment are indexed as 2018 BCSC 1246.
- [83] The judge properly framed the issue as being the level of management service required to assist Ms. Pearson in achieving the required rate of return: *Bystedt v. Hay*, 2007 BCCA 84 at para. 18. She noted that the real discount rate Ms. Pearson must obtain is 2.0% on her future cost of care award and 1.5% on her loss of future earnings award.
- [84] The parties relied on expert reports tendered by two economists. The reports were prepared in 2017 and 2018. Neither party sought to cross-examine the other party's expert. The parties appear to have proceeded on the basis that evidence related to prevailing economic conditions and projected rates of return was properly admissible in a case where there was a suggestion that actual rates of return on fixed-income securities would fall short of the statutory rate. I will return to this point below.
- [85] Ms. Pearson sought Level 3 management fees with a modification from Level 4: management services in relation to custody of the fund and accounting for investments on a continuous basis and discretionary responsibility for making and carrying out investment decisions. In support of this submission, she relied on two reports prepared by an economist, Darren Benning. Mr. Benning estimated management fees associated with: (1) a portfolio in which all of the funds are invested in interest-bearing securities; and (2) a mixed portfolio consisting of 60% interest-bearing securities and 40% equities. The management fees associated with the first type of portfolio were estimated to be \$156,080. It is unclear to me how a portfolio consisting entirely of interest-bearing securities would require Ms. Pearson to incur \$156,080 in management fees. The issue is not addressed in Mr. Benning's reports. The management fees associated with a mixed portfolio of interest-bearing securities and equities were estimated to be \$350,764, representing 21% of the grossed-up amount of the combined award for future income loss and cost of future care.
- [86] The appellants relied on a report also prepared by an economist, Mark Gosling. Mr. Gosling noted in his report that Mr. Benning's calculations assume that Ms. Pearson requires full-service investment and management. Mr. Gosling concluded that "[i]f Ms. Pearson is capable of seeking advice from her financial institution and making decisions based on that advice, it is likely that she could obtain the required rate of return without incurring any fund management fees." Mr. Gosling noted that while current returns on long-term Government of Canada bonds are low by historical standards, the 2016 Survey of Canadian Investment Perspectives suggested that 30-year real bond yields are expected to improve to about 1% from 2017-2020 and to about 1.8% from 2021-2030. He also noted that real returns on fixed income securities were projected to increase to 2.6% by 2025 and remain around 2.5-2.6% thereafter. The real return on equities was estimated to be 4.8% per annum throughout the future period. Based on this information, Mr. Gosling came to this conclusion:

The above information suggests that the 2.0% required real return could perhaps be obtained with a portfolio consisting entirely of interest-bearing securities over the longer term. A 2.0% real return would be expected to be readily attainable if [Ms. Pearson] invests in a mixed portfolio consisting of bonds and blue chip securities.

- [87] The appellants argued that Level 3/4 management fees were inappropriate because Ms. Pearson is not brain-injured or mentally incapacitated and unable to manage her personal financial affairs. Citing authorities said to be similar to the case at bar, the appellants argued that the granting of Level 3/4 management fees for a chronic pain case is excessive and unjustified. They argued that Level 2 management fees were reasonable. This would involve the costs associated with a financial planner developing a straightforward investment plan sufficient to obtain the required rate of return and updating the plan every five years. Mr. Gosling estimated the cost associated with Level 2 investment management service to be approximately \$15,270.
- [88] The judge noted that Ms. Pearson's award must last her almost 60 years and she needed both liquidity and stability for the future. The judge also noted that Ms. Pearson has below-average math skills, and that her injuries have given rise to cognitive deficits that make her prone to bouts of forgetfulness and confusion. She found that the symptoms would negatively impact her ability to manage and invest over \$1.5 million in such a way as to ensure that she had access to sufficient funds for the remainder of her life:
- [29] If Ms. Pearson is so forgetful about a medical prescription she needs for her depression and anxiety, or is so depressed that she has difficulty getting out of bed or getting her own lunch, or suffers a panic or anxiety attack such that she cannot make a decision, I fail to see how she could always remember to manage her investments over the internet, remember what she needs to do to meet her financial needs, or make a financial decision when it needs to be made.
- [30] Ms. Pearson may not be brain injured or require a committee but her psychological symptoms prevent her from being able to properly manage hundreds of thousands of dollars to meet her present and future needs without management assistance.
- [89] The trial judge concluded that a hybrid of Levels 3 and 4 was appropriate for the financial management assistance Ms. Pearson requires. As noted earlier, Mr. Benning's first report indicated that management fees for a mixed investment portfolio would require an allowance of \$350,764, before any deduction for legal fees and disbursements.
- [90] The trial judge reduced the award to \$278,500 to account for Ms. Pearson's legal fees and disbursements.

ii) The positions of the parties

a) The appellants

- [91] Relying on *Townsend v. Kroppmanns*, 2004 SCC 10 at paras. 5 and 12, the appellants argue that the statutory discount rate is, as a general rule, intended to avoid litigation of the kind that took place in this case by establishing what amounts to a "presumption" that a plaintiff will earn the required rate of return from investing in fixed-income securities.
- [92] The appellants did not, however, challenge the admissibility of the economic evidence led in the court below, nor did they suggest that the presumption was irrebuttable. Further, I do not understand the appellants to suggest on appeal that *Townsend* precludes leading evidence in an effort to show that actual rates of return will be less than the statutory rate. As I understand it, both parties read the judgment of this Court in *Pestano v. Wong*, 2019 BCCA 141 at paras. 63-65, as standing for the proposition that, in a case where a plaintiff asserts there is a risk that the statutory rate of return will not be achieved by investing in fixed-income securities, it is open to the plaintiff to lead evidence rebutting the presumption that the actual rate of return will equal the statutory rate. Having accepted that the presumption is rebuttable, the parties focussed their arguments on the economic evidence and on whether Ms. Pearson could obtain the requisite rate of return on a long-term fixed-income portfolio.
- [93] The appellants argue that the judge erred in holding that Ms. Pearson could not obtain the requisite return on her funds through an interest-only portfolio. Further, they say that on the only evidence before the judge, a mixed portfolio that would make the required rate of return readily obtainable would not require substantial management fees. The appellants also submit there is no evidence to support the judge's finding that Ms. Pearson lacks the capacity to obtain and follow cost-effective financial management advice that would likely achieve the required rate of return.
- [94] The appellants also say the judge failed to have regard to the entirety of the evidence by focusing on the suggestion in Mr. Gosling's report that 30-year real bond yields would be inadequate to obtain the required rate of return, while ignoring other parts of his report that suggest the required rate of return would be readily obtainable with only interest-bearing securities. Mr. Benning's report did not suggest otherwise. Thus, Mr. Gosling's report on this issue was not contradicted.
- [95] Finally, the appellants argue that the trial judge also misapprehended the opinion of Mr. Gosling by assuming that a mixed portfolio necessarily required active management. They submit that his opinion was actually that if Ms. Pearson could attend a financial institution and take advice, the requisite rate of return could be achieved for free.
- b) The respondent
- [96] Ms. Pearson says the judge's finding that she was incapable of making financial decisions was based on a combination of her pre-accident difficulties with math and her serious injuries.

- [97] Relying on Pestano at paras. 7 and 65, Ms. Pearson submits there is no legal presumption that a plaintiff will earn the required rate of return from investing in fixed-income securities or, if there is, the presumption is rebuttable when interest rates fall below what is necessary for a plaintiff to achieve that return. Ms. Pearson says that is why the evidence was led in this case. She contends that given the current low-interest investment climate, a mixed portfolio is appropriate to preserve the award and an interest-only option is insufficient.
- [98] Ms. Pearson says Mr. Gosling's report gives rise to a risk that she will not make the required rate of return on 30-year bonds until at least 2030. That is, if she were to invest in 30-year bonds, Ms. Pearson would be detrimentally impacted as real bond yields are below the required rate of return. At the hearing of the appeals, counsel for Ms. Pearson suggested that the potential loss over this 14-year period could amount to approximately \$100,000.

iii) The law

- [99] A management fee is meant to compensate a plaintiff for the cost of managing and investing lump sum damage awards made for the loss of future earning capacity and the cost of future care. It is given to ensure that an award is not eroded by the expense of professional management or exhausted prematurely as a result of a plaintiff's inability to adequately invest their award: Lines at paras. 108-109. A management fee should be awarded if the plaintiff's condition is such that he or she is either unable to manage his or her affairs or lacks the acumen to invest the funds awarded so as to produce the requisite rate of return: *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650 at 651. A plaintiff must establish that investment management assistance is necessary and, if so, the cost of the services that are required to achieve a rate of return equal to the statutory discount rate: *Mandzuk* at 651; Lines at paras. 109, 117; Pestano at para. 11.
- [100] The appellants do not suggest that investment management assistance is unnecessary in this case. They do, however, seek a substantial reduction in the award for management fees.
- [101] The level of investment management assistance an injured plaintiff needs to achieve the required rate of return will necessarily involve a case-specific determination: *Mandzuk* at 651; *Bystedt* at para. 18; Lines at para. 116. Like damages generally, a decision to grant management fees is a factual finding subject to a deferential standard: Gregory at para. 14.
- [102] In *Townsend* at para. 10, the Supreme Court of Canada recognized the four-level classification for management fees set out in the Law Reform Commission of British Columbia, Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages (Vancouver: Ministry of Attorney General, 1994) at 45-46:

Level 1 - The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover.

Level 2 - The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award.

Level 3 - The plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis.

Level 4 - The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary responsibility for making and carrying out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs.

[103] Discount rates and management fees are complementary but distinct components of an award for damages: Townsend at para. 9. The statutory discount rates reflect that a damages award is "discounted" to reflect the present value of future lost earnings or care costs. As Justice Deschamps explained in Townsend at para. 5:

Compensation aims at restoring the victim to the position that person would have been in had no loss been incurred. Compensation is awarded in the form of a lump sum payment. The dollar amount received for future costs is actually lower than projected costs because it is assumed that the amount paid will be invested and will earn income before being used for future needs. The same reasoning applies for loss of future income. The victim is awarded a lower amount for income than that person would have actually earned at a future date. In other words, the amounts are discounted to reflect the present value of the expenses incurred or the income earned at a future date, taking inflation adjustments into consideration. The purpose of the discount rate is thus to insure that victims will be fully compensated but that defendants will not be called on to overpay. In British Columbia, to avoid courts' having to hear expert evidence in every case in order to determine the appropriate discount rate, s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which was added in 1981 (S.B.C. 1981, c. 10, s. 30), authorizes the Chief Justice of the British Columbia Supreme Court to set the discount rate.

[Emphasis added.]

[104] As explained above, s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253 was added to obviate the need to resort to expert evidence on discount rates in every case. This section allows the Chief Justice of the Supreme Court of British Columbia to make regulations prescribing the discount rate. On future awards, defendants receive the benefit of a "discount" on the assumption that a plaintiff will earn investment returns on the award. The rates establish the expected return on invested sums in excess of the rate of inflation. The regulation currently sets a discount rate of 1.5% for loss of future earnings and 2% for the cost of future care: Law and Equity Regulation, B.C. Reg. 352/81, s. 1.

- [105] The statutory discount rates are predicated on the assumption that awards for lost income and the cost of future care will be invested in low-risk fixed-income securities which will produce the required rate of return: *West v. Cotton* (1995), 10 B.C.L.R. (3d) 73 at para. 30 (C.A.); *Pestano* at para. 7. In the ordinary course, the purchase of such securities requires only the advice of a bank and can be obtained without a fee: *West v. Cotton* at para. 30.
- [106] The statutory discount rate is assumed to reflect reality as a matter of law: *Cherry (Guardian ad litem of) v. Borsman* (1992), 70 B.C.L.R. (2d) 273 (C.A.); *Pestano* at para. 65. In *Townsend*, the appellants argued that with investment advice, the potential rate of return on the investment of an award for damages would exceed the statutory rate, and so the parties should share in any overpayment. As *Deschamps J.* held at para. 12:

The appellants' argument, which seeks to compare the potential rate of return with the statutory rate, defeats the whole purpose of the deeming provision. The statutory discount rate is mandatory and renders irrelevant any evidence on actual or potential rates of return or inflation. In order to entertain the appellants' approach, courts would have to enquire into the potential rates of return and inflation with the assistance of expert actuarial evidence, compare it with the statutory rate to determine whether the victim is likely to achieve a higher rate than the one provided for by the statute, and then apportion any perceived overpayment between the victim and the defendant. This kind of inquiry is exactly the one that the legislature allowed the parties to avoid by adopting a mandatory deeming provision. With the deeming provision, parties no longer need to adduce evidence on rate of return. Assessment of management fees should not be an indirect and incidental means of reverting to costly complex evidence.

[Emphasis added.]

iv) Analysis

- [107] As noted earlier, neither party in this case sought to contest the admissibility of the economic evidence adduced in the court below or suggest that *Townsend* precludes the introduction of evidence of this kind. Both parties rely on *Pestano* at paras. 63-65 for this proposition: the presumption that the statutory discount rates reflect reality can be rebutted by evidence showing that real rates of return on fixed-income securities will fall short of the statutory rates.
- [108] In the absence of concerted argument on appeal as to the scope of *Townsend*, we are prepared to address the issue on the basis upon which it was argued before us; namely, that *Pestano* authorizes the admission of economic evidence of the kind that was adduced in this case.
- [109] Assuming, without deciding, that *Pestano* authorizes the evidence adduced in the court below, it is my view that there was no evidence upon which the judge could conclude that the management fees she awarded were necessary to achieve the statutory rate of return.

- [110] At the hearing of the appeals, counsel suggested that Ms. Pearson could face a loss of just under \$100,000 over a 14-year period if the awards were invested at the 30-year bond rate.
- [111] There are at least two problems with this submission. First, as my colleague Justice Willcock noted at the time of the hearing, it is difficult to justify in principle a management fees award of \$350,764 to avoid the possibility that over a 14-year period the fund would earn approximately \$100,000 less than the required rate of return.
- [112] Second, I consider the approach of Ms. Pearson's counsel to be methodologically flawed. Counsel for Ms. Pearson submitted that the total loss to the fund for the first four years (2017-2020) based on an interest rate differential of 1% would be approximately \$16,000 per year, or a total of \$64,000. The total loss to the fund based on an interest rate differential of 0.2% between the years 2021-2030 is \$3,300 per year or \$33,000 over 10 years. Thus, the total deficit Ms. Pearson is said to face if she were to rely on 30-year bonds and the return rates set out in Mr. Gosling's report would amount to approximately \$97,000 less than if she were to earn the required rate of return.
- [113] It would appear from the calculations undertaken by counsel for Ms. Pearson that he applied an interest rate differential of 1% from 2017-2020 and 0.2% from 2021-2030 to both the cost of future care and the loss of future earning capacity to arrive at the estimated loss. The error in methodology lies in applying the same differential to both the cost of future care and the loss of earning potential. This is wrong because the required rates of return are different for these two types of awards. As the trial judge notes, the real discount rate that Ms. Pearson must obtain is 2.0% on her future cost of care award and 1.5% on her loss of future earnings award. The forecasted 30-year bond yields are, after 2020, actually higher than the required rate of return for the loss of future earnings (1.8% as opposed to 1.5%).
- [114] Based on the interest rate projections relied on by Ms. Pearson's counsel, Ms. Pearson stands, by my calculations, to lose somewhere in the range of only \$10,000-\$15,000 over this time period if she were to invest in bonds with the real rate of return reflected in Mr. Gosling's report as opposed to an investment that yielded the required rate of real return. To avoid the potential loss of \$10,000-\$15,000 over 14 years, Ms. Pearson was granted management fees in the amount of \$350,764 (mistakenly reduced, as discussed below, to take into account her anticipated legal fees and disbursements). In my view, this result reflects a wholly erroneous approach to the determination of an appropriate award for management fees in this case.
- [115] In my view, it was also unreasonable for the judge to focus on the most pessimistic scenario that might arise only in the short term. The only evidence before the judge on this point, from Mr. Gosling's report, was that the required rate of return "could perhaps" be obtained with a portfolio consisting entirely of interest-bearing securities, and that the required rate of return would be "readily attainable" with a mixed portfolio. There was no evidence that Ms. Pearson would need full investment management services on a continuous basis to maintain a mixed portfolio.

- [116] In light of the uncontradicted evidence on this point, the issue became whether Ms. Pearson had the capacity to obtain and follow financial advice.
- [117] I agree with the appellants that there is no evidence that would justify a conclusion that Ms. Pearson is incapable of seeking out and acting upon investment advice such as to require what amounts to a Level 3/4 investment management service.
- [118] Mr. Gosling was of the opinion that Level 1 management fees would be adequate to provide for a financial planner to develop a straightforward investment plan sufficient to obtain the required rate of return at the outset of Ms. Pearson's investment. The difference between Level 1 and Level 2 financial management fees is that Level 2 services provide for a review of the plan every five years. Given the length of time over which the award must last Ms. Pearson, I accept that periodic updates to an investment plan will be required over Ms. Pearson's lifetime.
- [119] Mr. Gosling said that Level 2 management fees sufficient to achieve the required rate of return would cost \$15,270. I accept, as the appellants did at trial, that Ms. Pearson may require a "higher touch" level of service given her persistent, post-accident difficulties managing anxiety.
- [120] In the result, I would allow the appeal and reduce the management fees award to \$25,000.

D) The cross appeal

- [121] Ms. Pearson cross appeals on the issue of management fees. In her reasons for judgment on the management fees award, the trial judge discounted the award for management fees to account for anticipated legal fees and disbursements:
- [32] Mr. Benning states that his estimate of \$350,764 for management fees of a mixed portfolio is based on award values before any deduction for legal fees or other disbursements. I have no evidence of Ms. Pearson's legal fees and disbursements, but there is no doubt they will reduce the amount she has available for investment.
- [33] Doing the best I can, I find an award of \$278,500 for management fees is appropriate.
- [122] Ms. Pearson says the trial judge erred by reducing the award on this basis. The appellants (respondents on cross appeal), concede that the judge erred in this regard.
- [123] In Townsend at para. 21, Deschamps J. said this:

Consequently, management fees and tax gross-up are to be assessed based on the first assessment of damages and not according to the amount available for investment as eventually found at some indeterminate future date. In other words, the appropriate basis for calculation is the one determined at trial, without considering what happens thereafter.

[124] I agree with the parties that the judge erred in principle by discounting the award on this basis, but the error is inconsequential given the way in which I propose disposing of this issue on the related appeal. Accordingly, I would dismiss Ms. Pearson's cross appeal.

IV. Conclusion

[125] I would dismiss the main appeal. I would allow the related appeal relating to the award for management fees and reduce that award to \$25,000. I would dismiss the cross appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Hunter"

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