
CANADA / JUDGMENT

Pelley v. Frederickson

2021 BCSC 82

COURT

Supreme Court of British Columbia

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2021 BCSC 82 Pelley v. Frederickson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pelley v. Frederickson,

2021 BCSC 82

Date: 20210120

Docket: M1710888

Registry: Vancouver

Between:

Amanda Ashley Pelley

Plaintiff

And

Coby Jason Michael Frederickson

Defendant

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:

T.F. Dennis

Counsel for the Defendant:

J. Beggs

Place and Dates of Trial:

Vancouver, B.C.

September 8-11, 14-15, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2021

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Introduction

- [1] The plaintiff, Amanda Ashley Pelley, claims damages for injuries she sustained in a car accident that occurred on May 19, 2017 (the "Accident"). Ms. Pelley was driving her 2016 Mazda CX-5. She was stopped with her head turned to the left, intending to merge onto South Fraser Way in Abbotsford, when her car was rear-ended by a Ford Mustang driven by the defendant. Liability has been admitted.

- [2] Ms. Pelley alleges that the Accident caused soft tissue injuries in her neck and back, a concussion/mild traumatic brain injury, headaches, pain, insomnia, and related emotional and psychological symptoms including depression, leaving her with chronic pain and a permanent partial disability. She claims non-pecuniary damages as well as damages for loss of past and future earning capacity, loss of sick bank credits, loss of housekeeping capacity, and cost of future care. Special damages have been agreed at \$20,307.07. In total, including the uncontentious special damages, Ms. Pelley quantifies her claim at about \$1,300,000.
- [3] The defendant concedes that Ms. Pelley sustained injuries in the Accident which resulted in chronic pain in her neck and back, headaches, cognitive issues, noise and light sensitivity, and insomnia. The defendant concedes that the chronic pain has impacted Ms. Pelley's mental health, resulting in depression and anxiety. However, the defendant says recently commenced treatment by Dr. Audrey Chen and at the Advanced Concussion Clinic indicates a significant likelihood of future improvement in Ms. Pelley's condition. The defendant takes issue with the quantum of damages claimed by Ms. Pelley and submits that the evidence supports much more modest awards. In total, the defendant quantifies Ms. Pelley's claim in the range of about \$127,000 to about \$277,000.

Summary of the Evidence

The Plaintiff's Background and Pre-Accident History

- [4] Ms. Pelley was born in Montreal in 1986. Her parents separated when she was a young child, and she moved to Abbotsford with her mother and two older brothers. She has lived in Abbotsford since then. She is 34 years old. She is single. She does not have children. She lives alone in a rented basement suite.
- [5] Ms. Pelley referred to her childhood as difficult. She did not elaborate much, but she did say that her father, with whom she lived as a teenager, drank and was not emotionally supportive. She said her relationship with her mother was difficult. She indicated that the family struggled financially.
- [6] Ms. Pelley enjoyed school as a child and teenager. She formed close relationships with several teachers. She did well academically and was active in extra-curricular activities. She characterized herself as a nervous child who wanted to please.
- [7] While in high school, Ms. Pelley worked part time at a retail store, a movie theatre, and a concession stand at a baseball field. The concession stand business is owned by Joan Seymour, one of Ms. Pelley's former teachers.
- [8] When Ms. Pelley was 18 years old, she moved out on her own; she has supported herself financially since then.

- [9] Prior to the Accident, Ms. Pelley was a physically active person. She is athletic and has a competitive nature. She played high level soccer as a child and into adulthood, and was often one of the best players on her team. She also played high school volleyball. She enjoyed working out at the gym, running, hiking, swimming, rollerblading, snowboarding, and playing tennis. She played slow pitch ball for a couple of years.
- [10] When Ms. Pelly was in grade 12, she tore the anterior cruciate ligament in her right knee while playing soccer. She underwent surgery and a lengthy period of rehabilitation. This injury was emotionally devastating as it dashed her prospects for an athletic scholarship. She sobbed in court when describing the injury and its consequences.
- [11] About a year and a half after her first knee injury, Ms. Pelley was able to return to playing soccer. She played competitively on a Division 1 women's team. However, a few years later, she tore the anterior cruciate ligament in her left knee, again while playing soccer. She underwent surgery a second time. The rehabilitation plan she followed after the second knee injury was different from that after the first, and she experienced a better outcome. She returned to playing competitive soccer until about 2015.
- [12] In addition to the knee injuries, Ms. Pelley suffered a fractured hand, also playing soccer. In 2012, she hit her head in a fall while snowboarding after which she experienced headaches, sleepiness, dizziness, and nausea, all of which resolved.
- [13] Aside from the sports-related injuries I have noted, Ms. Pelley's medical history is unremarkable.
- [14] Ms. Pelley was socially active in high school. She had a wide circle of friends.
- [15] Ms. Pelley graduated from high school in 2003. She obtained a bachelor's degree in kinesiology in 2010, intending to pursue a career as a physical education teacher. She obtained her teaching certificate in 2011 from the University of the Fraser Valley. As mentioned, Ms. Pelley supported herself financially since she was 18 years old. While in university she lived on student loans and her income from part-time employment. She described being stressed by financial worries. This led to a period, while she was in university, during which she suffered from depression.
- [16] Ms. Pelley has worked as a teacher since late 2011, initially as a teacher on call and then in a temporary position. Between 2012 and 2014, Ms. Pelley worked full time at North Poplar Elementary teaching physical education, coaching sports teams, and organizing assemblies and other extra-curricular events. In September 2014, she started working at Dormick Park Elementary, covering a maternity leave. In her first year at Dormick Park she taught a grade 4/5 split class and in her second year there she taught a grade 2 class. She continued to be involved in coaching and extra-curricular activities. Her next teaching job was at Clayburn Middle School in Abbotsford, where she continues to work.

- [17] In 2013, Ms. Pelley embarked on a Masters program at Simon Fraser University. She obtained a Master of Education degree from SFU in 2015. She explained that she pursued a Masters degree because she did not want a stagnant career. Although her future plans were not well-formulated, she wanted to position herself to pursue a career as a principal or in some other administrative role.
- [18] Ms. Pelley described her passion for teaching in compelling terms. It was clear to me that she enjoys her work and is extremely dedicated to her profession.
- [19] Even after becoming a teacher, Ms. Pelley continued to work one or two shifts a week at Ms. Seymour's concession stand during the spring and summer months. During one period of about four months, while working at Dormick Park, Ms. Pelley supplemented her income by private tutoring for which she earned \$40 per hour (for a total of about \$2,000).
- [20] In summary, prior to the Accident, Ms. Pelley was an active, energetic, athletic, high-functioning young adult. She completed her Masters degree while also working full time as a teacher, coaching extracurricular sports teams, playing competitive soccer, and maintaining an active social life. She was organized and maintained a meticulous home. In the two years before the Accident, she regularly worked out at the gym, ran, hiked, and snowboarded. Although she suffered from depression for a period while in university, at the time of the Accident she was doing well emotionally and had a lot of passion for life. She characterized herself as "wildly successful" in her career as a teacher.

The Accident

- [21] May 19, 2017 was the Friday before the Victoria Day long weekend. Ms. Pelley intended to spend the evening with her friend, Jennifer Martin. She and Ms. Martin went to Walmart to get supplies to make S'mores for Ms. Martin's children. Ms. Pelley was driving and Ms. Martin was in the front passenger seat. Ms. Pelley was stopped with her foot on the brake pedal, waiting to merge on to South Fraser Way. Her torso was turned to the left as she strained to see if there was a gap in the traffic on South Fraser Way sufficient to permit her to complete the merge. Suddenly, and without warning, Ms. Pelley's car was hit from behind by a Ford Mustang driven by the defendant, who was travelling about 60 kilometres per hour.
- [22] As a result of the Accident, the defendant's vehicle sustained significant damage that rendered it a total loss. Ms. Pelley's vehicle sustained damage that cost at least \$3,783.31 to repair.
- [23] Ms. Pelley described the force of the impact as "hard - so hard". She was wearing her seatbelt at the time. She said she does not know if her head or body struck anything in the car, but she recalls that the car rocked.
- [24] Ms. Pelley said that she was in shock immediately after the impact. She pulled her car into a nearby parking lot. Ms. Martin, who is a nurse, got out to check on the other driver. Ms. Pelley got out and looked at the back of her car. She then sat back down in the driver's seat.

She repeated this a few times - getting in and out of her car. She said she was confused. Ms. Martin asked her to fill out an ICBC claim form on a cell phone. She said she tried to do that but had a hard time focussing and concentrating. In cross-examination, she acknowledged that she remembers her conversation with Ms. Martin following the Accident. She acknowledged that she did not lose consciousness and did not have any bruising or lacerations on her head.

- [25] Ms. Martin testified that she, herself, was in pain after the Accident. She also said that Ms. Pelley was in shock, but that she was comfortable allowing Ms. Pelley to drive away after the Accident.
- [26] According to Ms. Pelley, she and Ms. Martin carried on with their trip to Walmart. They purchased their supplies and returned to Ms. Martin's house. Ms. Pelley said she does not remember much about being in Walmart. She said she spent the evening at Ms. Martin's house but was quiet and withdrawn.

Post-Accident Condition and Treatment

- [27] After spending some time at Ms. Martin's house on the evening of the Accident, Ms. Pelley went home to bed. She said she did not sleep well. The next morning she went to a walk-in clinic. When asked in her direct examination how she felt the next morning, Ms. Pelley said she does not have a clear memory but that she did not feel well. The doctor she saw at the walk-in clinic prescribed muscle relaxants and naproxen, which she took.
- [28] Ms. Pelley went to work on the Tuesday following Victoria Day. She was bothered by the bright lights and the noise. She said her head was pounding and it felt like her brain "was just squished". She made an appointment with her family doctor. She said she knew she should not be at work but she suffered through it.
- [29] Ms. Pelley saw her family doctor, Dr. Caroline Cook, a week or two after the Accident. She testified that Dr. Cook diagnosed a concussion. Ms. Pelley described her symptoms at this time as profoundly debilitating. She said she was not sleeping, was nauseous, and her neck hurt from her ear down her arm.
- [30] Dr. Cook suggested that Ms. Pelley attend physiotherapy. Ms. Pelley went to see the physiotherapist who she had seen following her second knee injury. Ms. Pelley testified that she got pounding headaches from the fluorescent lights at the physiotherapy clinic.
- [31] A few weeks after the Accident, Dr. Cook suggested that Ms. Pelley see a physiotherapist who specialized in concussions. Between June 30 and August 17, 2017, she attended physiotherapy sessions at Back in Motion which were "concussion based". She said she was relieved because there was a plan for her to get back into the gym. She said she was devastated by the pain and the loss of activity.

- [32] During the summer of 2017, Ms. Pelley also attended massage therapy sessions at Valley Wellness Centre. She said she was desperate to get better so she could return to work but initially found massage therapy to be a negative experience. She said the treatment hurt and was not relaxing.
- [33] In mid-August 2017, Ms. Pelley began attending chiropractic sessions with Dr. Matthew Germaine. She has continued to receive chiropractic treatments from him about once per week. She testified that the chiropractic treatments are effective in temporarily reducing her symptoms.
- [34] In February 2018, Ms. Pelley tried massage therapy again, this time at New Leaf Wellness. She finds these sessions effective in temporarily reducing her symptoms. The massage therapist at New Leaf Wellness recommended that she try acupuncture. She followed that advice and started receiving acupuncture and "cupping" treatments which she says provide relief that lasts a couple of days. She continues to attend massage therapy and acupuncture treatments at New Leaf Wellness approximately weekly.
- [35] Between August 2018 and November 2018, Ms. Pelley attended physiotherapy treatments at CBI Health Centre. These treatments focused on intramuscular stimulation. She said she did not find it helpful but was willing to try anything.
- [36] In July 2019, at her counsel's request, Ms. Pelley attended an independent medical examination with Dr. Malgorzata Sudol, a physiatrist. Later, I discuss Dr. Sudol's opinion evidence as expressed in her report dated July 30, 2019. For now I note that Dr. Sudol's recommendations as set out in her report included:
- nerve blocks and radiofrequency neurotomy treatments;
 - a rehabilitation program "with more dedicated deep core, neck and thoracic strengthening exercises"; specifically, 14 to 18 sessions with a physiotherapist followed by 14 to 18 sessions with a kinesiologist, ultimately progressing to a gym;
 - a trial of steroid injection in the area of the thoracic spine;
 - an ergonomic assessment of Ms. Pelley's workplace, with some kind of "assisted aides" for marking;
 - a trial of headache and sleep medications; and
 - cognitive behavioural therapy and counselling.
- [37] In November 2019, Ms. Pelley started counselling with Sharon Forbes, attending one treatment in each of November, December and January 2020.

- [38] In January 2020, at defence counsel's request, Ms. Pelley attended an independent medical examination with Dr. Rehan Dost, a neurologist. In March 2020, at defence counsel's request, she attended an independent medical examination with Dr. Christopher Gallimore, an orthopaedic surgeon.
- [39] Ms. Pelley resumed counselling with Ms. Forbes in the summer of 2020, attending six sessions in July and seven sessions in August.
- [40] In July 2020, Ms. Pelley started seeing Dr. Audrey Chen, a physiatrist. Dr. Chen performed a medial nerve block and another such treatment was planned for October 2020.
- [41] Around the same time, Ms. Pelley started attending the Advanced Concussion Clinic, where she sees an occupational therapist, a physiotherapist, and an athletic therapist. Initially, she also saw a counsellor there, but she has not continued with counselling through that clinic because she continues to see Ms. Forbes. The initial round of treatment at the Advance Concussion Clinic was to come to an end in October, 2020, and a second round of treatment is contemplated.
- [42] In her direct evidence, Ms. Pelley expressed some pessimism about the Advance Concussion Clinic, noting that "part of [her] feels it is too late". However, in cross-examination, she agreed that she has "glimmers of hope" and that there have been objectively assessed improvements in her balance, memory and reaction time since she started attending the Advance Concussion Clinic.
- [43] Ms. Pelley has taken medications to treat her symptoms. She continues to take naproxen and muscle relaxants, such as Flexeril, on an occasional basis. She tried Amitriptyline for sleep but said it made her dizzy and she stopped taking it. About a year ago she investigated CBD and THC oils. She takes CBD oil during the day and finds that it calms her down. She started taking THC oil at night for sleep but said it is of negligible help.
- [44] Ms. Pelley testified that she has become apathetic and depressed. She said she stopped exercising for a full year after the Accident and, by March 2020, she had gained 30 pounds. She acknowledged that since then she has lost about 20 pounds leaving her about 10 pounds above her pre-Accident weight. She said she often feels suicidal.
- [45] In summary, Ms. Pelley's testimony is that she has not experienced much, if any, actual resolution of her neck pain, back pain and headaches but that she experiences temporary relief following chiropractic, massage and acupuncture treatments. She said that her symptoms have significantly interfered with her ability to sleep and that this problem persists. Ms. Pelley testified that she has become irritable and depressed. When asked to describe her current psychological disposition she said she is not well and has to convince herself, several times a week, to stay alive to see if things will get better. She recently started attending counselling twice a week instead of once. Ms. Pelley said she has developed "learned helplessness" and feels hopeless and discouraged. She said she is grieving the loss of the person she was before the Accident. She acknowledged that the counselling helps but

added that she feels utterly dependent on the professionals in her life.

Post-Accident Employment and Activities

- [46] As mentioned, Ms. Pelley went to work on the Tuesday following the Accident (the Monday of that week being the Victoria Day statutory holiday). She worked that week but Dr. Cook then recommended that she stay off work. Ms. Pelley testified that this was the last thing she wanted. She said she did not want to be away from work long term and so suggested that Dr. Cook reassess her two weeks at a time. She held out hope that she could go back to work. As it turns out, she did not return to work for the balance of the 2016/2017 school year (a period of approximately four to five weeks).
- [47] Ms. Pelley said that in the summer of 2017 she started to experience some improvement in her symptoms, which she seemed to attribute to the chiropractic treatments, but she still had difficulty sleeping. She took a trip to Jasper, where she found it difficult to complete an easy walk. She described going on a hike on Labour Day which was very hard. She said she made slow progress at the gym. For example, she could ride a bike but had to monitor her heart rate because when her heart rate got high it triggered a headache. She said she did not sleep well all summer.
- [48] Ms. Pelley returned to work in September 2017. She was assigned to work in a three-person group with two other teachers. The group was responsible for 90 students. Ms. Pelley taught math and science. One of her teaching partners was a veteran teacher whose style and expectations aligned with those of Ms. Pelley. Ms. Pelley characterized this teacher as vital to her being able to continue to work.
- [49] Ms. Pelley testified that she was sick in October 2017 with mononucleosis (unrelated to the Accident) and was off work for a week as a result. In addition, she missed several days of work due to her symptoms from the Accident. She said her neck hurt all the time, particularly when her head was tilted with her chin pushed in towards her neck. Her right shoulder area was also very painful. Ms. Pelley also began to experience some pain in the middle of her back, by her bra line. She said she was confused and noticed that she was forgetting things and making mistakes. She had to write herself reminder notes and set reminders in her phone. She said her sense of self and confidence was deteriorating. She started to sweat and panic when she was teaching because she was not used to making mistakes and by the end of the day she was exhausted. She continued to have problems with sleep.
- [50] Ms. Pelley testified that in the fall of 2017 she tried to go to the gym and to keep up her exercises but found it difficult to do that and also work full time. She started running, slowly, and by Christmas was able to complete a slow 5 km run. However she got headaches after running. Eventually, by summer of 2018, she gave up running because she could not tolerate the headaches.

- [51] Ms. Pelley started a new school year in the fall of 2018. She was teaching grade 7 students. She continued to struggle at work. She found marking particularly difficult due to her neck pain. She testified that she had a difficult time with one particular student. She described an incident during which she became so agitated that she snapped at the student and humiliated her. She clearly considered this to be a serious professional failing and testified that she still has not forgiven herself for it.
- [52] Ms. Pelley said that in the fall of 2018, she felt she was getting to the edge of her limits at work so she spoke to Dr. Cook about working part time. She then worked only three days a week for the four weeks prior to Christmas break. She testified that in some ways this was worse than working full time because she had to communicate with the teacher who was substituting for her on the two days a week that she did not work, which meant more email and administrative work. The substitute teacher had a different approach and this led to behavioural problems in class. In the result, she returned to full-time work in January 2019.
- [53] Ms. Pelley testified that the 2019/2020 school year was very hard. Her teaching partner had some personal difficulties and Ms. Pelley wanted to pick up the slack. She found it to be a heavy burden, becoming frustrated and angry which she said increased her pain. Her principal provided some additional support but she continued to struggle. She said she was "about to snap" so she took about a week off work which gave her a "reset" and enabled her to press on. As mentioned, she started attending counselling in November 2019.
- [54] Ms. Pelley testified that she is terrified about how she will perform during the current school year. She said she wants "so badly" to keep her job but is "deteriorating so fast". She said she does not feel confident about the prospect of her symptoms improving but is not yet ready to "let go". She acknowledged in cross-examination that her employer has been supportive and she has not been disciplined as a result of any behavior associated with her symptoms.
- [55] When asked in her direct evidence about her current plans to pursue a career as a principal she said she "can't project forward". She said she did not apply for a position as a principal or vice-principal before the Accident because she first wanted to gain experience teaching in a middle school. She said she was young, loved teaching, and was not ready to leave teaching yet. In cross-examination, she admitted that she is not aware of all that is required to pursue an administrative position, such as a principal, although she believes one would have to demonstrate leadership skills and a mastery of teaching and communication. She explained that she had not looked into the details, as she was just getting started as a teacher. She said she is disappointed in herself and no longer knows whether she is fit to teach. She said since the Accident she has not been able to take on extra work and she now passes on leadership opportunities.

- [56] Ms. Pelley testified that her social life has been affected by her symptoms. She is exhausted and sleeps only about four hours in a row, if she is lucky. She said she has been isolating herself. She emphasized that she does not have close relationships with members of her biological family and that her friends have become her family. She said her moods are volatile and finds she is better off alone. Nevertheless, she said she tries to get out about once a week.
- [57] Ms. Pelley testified that she has lost control over her housekeeping. She said that she lives in a small suite but cannot keep it up. She said she does not even bother to fold her laundry after it is washed.

Medical Evidence

- [58] Ms. Pelley relied on evidence from her family doctor, Dr. Cook, and the physiatrist she saw in July 2019, Dr. Sudol. The defence relied on evidence from the neurologist Ms. Pelley saw in January 2020, Dr. Dost, and the orthopedic surgeon she saw in March 2020, Dr. Gallimore.
- [59] There is no material dispute about the nature and cause of Ms. Pelley's injuries, although the severity of her ongoing symptoms is contested, as is her prognosis.
- [60] There is no dispute that Ms. Pelley sustained musculoligamentous injuries to the neck and thoracic region of her back in the Accident.
- [61] An MRI taken on August 2, 2019 showed a disc protrusion at T7-8. Dr. Cook expressed the view that this was caused by the Accident and resulted in nerve root impingement.
- [62] Dr. Sudol assessed Ms. Pelley before the MRI. In her report, she raised the possibility of mechanical factors in the upper cervical discs or facet joints, but noted that CT or MRI imaging would be required prior to intervention. Dr. Sudol proposed nerve blocks for diagnostic purposes and, if it is determined that the facet joints are contributing to the problem, suggested medial branch blocks and radiofrequency neurotomy treatments for pain management.
- [63] Dr. Gallimore expressed the opinion that the arthritic changes in Ms. Pelley's cervical and thoracic spine, as seen on the MRI, pre-existed the Accident. In his view, the Accident caused soft tissue injuries that temporarily aggravated the underlying arthritic changes. It is his opinion that, from an orthopedic standpoint, Ms. Pelley is not compromised or functionally limited. This opinion was not challenged on cross-examination. However, on cross-examination Dr. Gallimore agreed that chronic pain can persist and limit functionality notwithstanding the absence of structural damage, and that a patient with chronic pain can find herself in a "self-perpetuating loop" of pain interfering with sleep, lack of sleep affecting mood, and poor mood diminishing her ability to cope with pain.

- [64] In Dr. Sudol's opinion, in addition to the soft tissue injuries, Ms. Pelley also sustained a concussion with "sequelae of noise and light sensitivity, headaches, cognitive symptoms, and sleep and mood disturbances", and that she continues to struggle with the "cycle of pain, fractured sleep, and lowered mood".
- [65] Dr. Cook also diagnosed concussion and post-concussion syndrome with increased anxiety and insomnia.
- [66] Dr. Dost considered it unlikely that Ms. Pelley sustained a concussion/mild traumatic brain injury in the Accident because there was no evidence of loss of consciousness or amnesia, and little, if any, evidence of confusion following the impact. In his opinion, Ms. Pelley's headaches, which he accepted were chronic, were more properly attributed to whiplash and perpetuated by psychological factors, and her ongoing cognitive issues are due to pain, non-restorative sleep, and psychological factors. However, he expressed the view that pain, sleep problems, and psychological factors "individually have large effects on cognition with a synergistic effect if all are present", such that "whether one accepts that [Ms. Pelley] sustained an mTBI or not and whether one accepts [she] has structural brain damage as a result or not, we have a medical distinction without much of a difference".
- [67] In the result, there is no material dispute that Ms. Pelley sustained a combination of injuries in the Accident that has resulted in persistent, now chronic, neck and mid-back pain; headaches; light and sound sensitivity; and significant sleep and mood issues. Irrespective of whether Ms. Pelley actually sustained a concussion or mild traumatic brain injury, the pain, sleep problems, and mood issues, feed into a self-perpetuating loop that has resulted in a chronic condition.
- [68] There was no material dispute in the medical evidence as to the recommended future treatment. Dr. Cook recommended ongoing passive physiotherapy and possibly counselling. Dr. Gallimore suggested twice-weekly sessions with a kinesiologist or athletic therapist for three months and possible referral to a chronic pain facility. As mentioned, Dr. Sudol recommended:
- nerve blocks and radiofrequency neurotomy treatments;
 - a rehabilitation program "with more dedicated deep core, neck and thoracic strengthening exercises"; specifically, 14 to 18 sessions with a physiotherapist followed by 14 to 18 sessions with a kinesiologist, ultimately progressing to a gym;
 - a trial of steroid injection in the area of the thoracic spine;
 - an ergonomic assessment of Ms. Pelley's workplace, with some kind of "assisted aides" for marking;
 - a trial of headache and sleep medications; and
 - cognitive behavioural therapy and counselling.

- [69] In terms of prognosis, Dr. Sudol said that if her recommendations were followed, she expected Ms. Pelley "will be able to make gains" but would remain "prone to flares". She expressed the view that Ms. Pelley is "partially disabled as a teacher by her ongoing pain, sleep and mood issues". In her opinion, Ms. Pelley will most likely be able to sustain full-time or close to full-time work in the future, following a period during which the treatments she recommended are undertaken.
- [70] Dr. Cook said it was difficult to provide a prognosis (as of August 2019).
- [71] Dr. Dost expressed the view that "[i]rrespective of the label placed on [Ms. Pelley's] cognitive issues, the single best determinant of outcome is [her] demonstrated functional performance". He noted that she was able to return to full-time work, albeit with less efficiency because of cognitive interference.
- [72] Dr. Gallimore agreed in cross-examination that a patient with chronic pain, sleep problems, and mood issues persisting at the 3.5 year mark post-accident would attract a poor prognosis for improvement. However, he also indicated that this was pressing up against the limits of his expertise, noting he did not address these issues in his report and agreeing that he would refer a patient with this presentation to a chronic pain clinic.
- [73] As noted, shortly before the trial, Ms. Pelley started seeing Dr. Chen, who performed a medial nerve block with another such treatment planned for October 2020. Around the same time, Ms. Pelley started attending the Advanced Concussion Clinic, where she sees an occupational therapist, a physiotherapist, and an athletic therapist. She also saw a counsellor there, initially, but has not continued with counselling through that Clinic because she continues to see Ms. Forbes.

Discussion

Findings on Causation and the Plaintiff's Condition

- [74] As already noted, the defendant concedes that Ms. Pelley suffered injuries in the Accident which resulted in chronic pain in her neck and back, headaches, cognitive issues, noise and light sensitivity, and insomnia. The defendant concedes that the chronic pain has impacted Ms. Pelley's mental health, resulting in depression and anxiety that has progressed to suicidal ideation.
- [75] Dr. Sudol said that if her recommendations were followed, she expected Ms. Pelley "will be able to make gains" but would remain "prone to flares". Recently, Ms. Pelley began following many of Dr. Sudol's recommendations through Dr. Chen's treatments, her attendance at the Advance Concussion Clinic, and her counselling sessions with Ms. Forbes. While, Dr. Gallimore agreed in cross-examination that a patient with a chronic pain condition persisting at the 3.5 year mark post-accident would attract a poor prognosis for improvement, he also said he would refer such a patient to a chronic pain clinic. It appears that the combination of counselling with Ms. Forbes and attendance at the Advance

Concussion Clinic is akin to attendance at a chronic pain clinic.

- [76] The defence concedes that Ms. Pelley was a credible witness. I agree that Ms. Pelley was a credible witness. Her testimony was reasonable and not shown to be internally or externally inconsistent. Her demeanor was consistent with her descriptions of her mental health; she cried often while giving her evidence and I did not perceive her distress to be feigned. However, her evidence about the way her condition continues to impact her life and, in particular, her ability to function at work, was somewhat vague.
- [77] The medical evidence satisfies me that Ms. Pelley sustained soft tissue injuries in the Accident. I am not persuaded that the Accident caused any injury to the disc in Ms. Pelley's spine. Dr. Gallimore expressed the opinion that the arthritic changes seen on the MRI pre-existed the Accident. I prefer his opinion over Dr. Cook's on this point because of his specialized expertise and because Dr. Cook provided little if any rationale for concluding that the disc protrusion was caused by the Accident. I am satisfied that it is more likely than not that Ms. Pelley sustained a concussion in the Accident. This was Dr. Sudol's opinion and she was not cross examined, which left this opinion untested. I wish to be clear that I found Dr. Dost to be a careful, objective, credible witness. His opinion that Ms. Pelley did not sustain a conclusion was based largely on his perception, from her self-report, that she was not disoriented or confused in the moments after the Accident. However, Ms. Pelley testified that she was confused and I accept that evidence. This, combined with the fact that Dr. Sudol's opinion was not tested in cross-examination, caused me to conclude that more weight should be given to Dr. Sudol's opinion on the issue of the concussion.
- [78] Having said that, I am also satisfied that little, if anything, turns on whether Ms. Pelley sustained a concussion. The combination of injuries caused by the Accident has resulted in persistent, now chronic, neck and mid-back pain; headaches; light and sound sensitivity; and significant sleep and mood issues. Irrespective of whether Ms. Pelley actually sustained a concussion or mild traumatic brain injury, the pain, sleep problems, and mood issues, feed into a self-perpetuating loop that has resulted in a significant chronic condition, but one that is likely to improve, leaving her prone to periodic flares, if she follows the recommendations of her care providers.

Non-pecuniary Damages

- [79] An award of non-pecuniary damages is intended to compensate for pain, suffering and loss of enjoyment of life prior to the trial and into the future. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle. I have taken these factors into consideration.

- [80] Awards of non-pecuniary damages in other cases provide a useful guide; however, the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by a specific individual. Moreover, the compensation award must be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89; *Miller v. Lawlor*, 2012 BCSC 387 at para. 109, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.
- [81] As mentioned, Ms. Pelley's evidence about the way her condition continues to impact her life, and, in particular, her ability to function at work, was somewhat vague, especially since about the summer of 2018. This made it difficult for me to make the findings of fact required to ground my assessment of her damages.
- [82] I am satisfied that Ms. Pelley continues to suffer from daily neck and back pain and frequent headaches; light and sound sensitivity; and significant sleep and mood issues. I am satisfied that her condition causes her to suffer from anxiety and fear, and this has a substantial impact on her enjoyment of life.
- [83] However, it is difficult on the evidentiary record for me to make findings about more specific, ongoing lifestyle impacts. From Ms. Pelley's description of her symptoms in the year or so following the accident, it is reasonable to infer that she was not able to participate in many, if any, of the physical activities she enjoyed before the Accident such as playing tennis, snowboarding, hiking and running. However, she testified that she did return to the gym and by late 2017 she resumed running. She said she stopped running in the summer of 2018 because of her headaches. However, she provided little, if any, evidence of her ability to participate in physical activities since the summer of 2018. She did say that she cannot keep up with her housework and it appeared that she was speaking about her current ability in that respect. She testified that she continues to see friends about once a week, but I was not told how that compares to her pre-Accident social activities.
- [84] The evidence from Ms. Pelley's collateral witnesses did not add much detail:
- a) Ms. Seymour described Ms. Pelley as bubbly, bright, sparkly and joyful before the Accident and she said Ms. Pelley changed "a little" after the Accident, becoming less helpful and short with the children at the concession stand.
 - b) Samantha McDaniel, one of Ms. Pelley's co-workers, testified that Ms. Pelley's disposition deteriorates throughout the day. She described Ms. Pelley as more capable and happy in the morning but temperamental in the afternoon. However, Ms. McDaniel did not know Ms. Pelley before the Accident and so could not comment on any change.
 - c) Jennifer Martin testified about Ms. Pelley's active pre-Accident lifestyle but since the Accident she has seen Ms. Pelley only a handful of times. She said when she saw Ms. Pelley after the Accident she found her to be "emotionally negative" but offered no details.

- d) Shane Hipwell provided evidence through an affidavit. He is a teacher who worked with Ms. Pelley before the Accident. He described Ms. Pelley as a joyful, energetic, effective and dedicated teacher. However, he has not had the opportunity to observe Ms. Pelley at work since the Accident, and his knowledge of her post-Accident lifestyle and condition appears to be limited to what she told him during one or two social visits.
 - e) Karen Harrison also provided evidence by affidavit. She, too, is a teacher who worked with Ms. Pelley before the Accident. She described Ms. Pelley as having a high energy teaching style before the Accident. She testified that before the Accident they worked out together and did some hiking, two to three times a week, off and on, for three to four years. She testified that after the Accident they continued to work out and hike together but "at times" Ms. Pelley had to stop due to headaches and pain, and eventually she discontinued the workouts and hikes. Ms. Harrison did not say when the workouts and hikes stopped.
- [85] Again, I am satisfied that Ms. Pelley continues to suffer from daily neck and back pain and frequent headaches; light and sound sensitivity; and significant sleep and mood issues. I am satisfied that her condition causes her emotional suffering; that she is very anxious and fearful, and this has a substantial impact on her enjoyment of life. I also find that, for a period of at least about 18 months to 2 years, the injuries Ms. Pelley sustained in the Accident prevented her from participating in many, if not most, of the physical activities she enjoyed before the Accident. It is not apparent on the record whether Ms. Pelley has attempted to resume any physical activities over the past couple of years, but I find that she remains unable, whether due to physical limitations, fatigue, or depressed mood, from keeping up with housework.
- [86] That said, Ms. Pelley has been able to continue to socialize with friends, getting out about once a week. Also, it is my view that the medical evidence supports the conclusion that her condition is likely to improve, provided she follows the recommendations of her care providers. She has recently started doing so, through her treatments from Dr. Chen, her attendance at the Advance Concussion Clinic, and her counselling sessions with Ms. Forbes. As noted, there have already been some objective indications of improvement.
- [87] Ms. Pelley cites a number of cases which she submits support an award of non-pecuniary damages of \$185,000, including:
- a) Sebaa v. Ricci, 2015 BCSC 1492;
 - b) Cantin v. Petersen, 2012 BCSC 549;
 - b) Alden v. Spooner, 2002 BCCA 592; and
 - c) Ali v. Padam, 2017 BCSC 184.
- [88] The defendant submits that a range of \$70,000 to \$85,000 is more appropriate, citing:
- a) Sears v. Olsen, 2020 BCSC 1289;

- b) *Richmond v. Osztoivits*, 2019 BCSC 1984;
- c) *Baird v. Lam*, 2020 BCSC 615; and
- d) *Hrnic v. Bero*, 2018 BCSC 1880.

[89] In my view, *Alden* is not particularly helpful because it reflects a jury award. The other cases relied on by Ms. Pelley appear to concern plaintiffs who suffered more profound life impacts because of their injuries. The plaintiff in *Cantin* was found to have experienced a "drastic reduction in her functional mobility for almost 8 years" and had "lost the ability to work in a competitive labour market". In *Sebaa*, the plaintiff's injuries led to very significant, specific lifestyle impacts including a move from Canada to a Middle Eastern country and the suspension of the plaintiff's plans to pursue IVF. In addition, the plaintiff in that case had a less optimistic prognosis. In *Ali*, the plaintiff's physical injuries appear to have been worse than those sustained by Ms. Pelley, leading to disc decompression surgery, and, in addition, the plaintiff's prognosis was less optimistic.

[90] The cases relied upon by the defence concern plaintiffs whose pain and suffering was more similar to that of Ms. Pelley. The case I found most helpful as a comparison in relation to physical injuries and impacts was *Sears*, where the award for non-pecuniary damages was \$85,000. However, the plaintiff in that case did not appear to suffer the significant psychological symptoms borne by Ms. Pelley.

[91] Considering the substantial psychological impacts of the Accident on Ms. Pelley, the vagueness in the evidence as to her current physical limitations, and her fairly optimistic prognosis, I find that an award of \$120,000 for non-pecuniary damages is appropriate.

Past Loss of Income and Earning Capacity

[92] A claim for past loss of income or income earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[93] A common method of assessing this value is to project the income the plaintiff would have earned in the period between the injury and the trial had the injury not occurred, taking into account all realistic contingencies, and to award the difference between the projected income and the actual income the plaintiff did earn or was capable of earning during that period. In doing so, it is necessary to weigh possibilities and probabilities of hypothetical events, which are given weight according to their relative likelihood: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

- [94] Projecting what a plaintiff would have earned in the past had she not been injured is a hypothetical exercise. While the standard of proof relating to actual past events is a balance of probabilities, a hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.
- [95] Ms. Pelley's claim under this head of damage has two components: she seeks \$22,587 for loss of sick bank credits and \$5,000 for loss of the opportunity to earn extra income from working at Ms. Seymour's concession and from tutoring.
- [96] The first component of the claim is not very controversial. It is apparent from records maintained by the Abbotsford School District that Ms. Pelley missed 72 days of work since the Accident, of which 25 occurred at the end of the 2016/17 school year. Ms. Pelley testified that all 25 of the absences at the end of the 2016/17 school year were due to the injuries she sustained in the Accident. Of the remaining 47 absences, Ms. Pelley testified that five were due to a bout with mononucleosis, unrelated to the Accident. She said that there might be a few additional absences not due to the injuries she sustained in the Accident, but the balance was Accident-related. Ms. Pelley submits this evidence supports the conclusion that 40 of the remaining 47 absences are Accident-related, for a total of 65 missed days due to the Accident. The defence says I should find that only 35 of the remaining 47 absences are Accident-related, for a total of 60 days.
- [97] There is no dispute that the value of each day missed is \$347.49. Accordingly, Ms. Pelley seeks \$22,587 for this loss (\$347.49 x 65), while the defence says \$20,850 is appropriate (\$347.49 x 60). The record does not permit me to determine which of these two approaches better reflects the loss. In the circumstances, I split the difference and award Ms. Pelley \$21,719 for loss of her sick days.
- [98] I am satisfied that there is a real and substantial possibility that but for the Accident, Ms. Pelley would have supplemented her income in 2018 and 2019 by working at the concession stand.
- [99] Before the Accident, Ms. Pelley worked part time at the concession stand during the spring and summer months. She testified that she enjoyed this work. However, her evidence about the extent to which she did this after the Accident was less than clear. Ms. Pelley did not say when she stopped working at the concession stand or specifically why she stopped doing that work, although she acknowledged that the concession did not open in 2020 due to the COVID-19 pandemic. She did not testify about having plans to take over the concession stand business from Ms. Seymour, although this prospect was alluded to by her counsel. Ms. Seymour commented upon a decline in Ms. Pelley's performance at the concession stand after the Accident, the implication being that Ms. Pelley did work there for some period post-Accident. According to Ms. Seymour, Ms. Pelley last worked at the concession stand "probably 2 ½ years ago", which would have been in the spring of 2018 (that is, about a year after the Accident). When asked about her plans for the concession stand, Ms. Seymour said

that at one time "she hoped" Ms. Pelley might take over, but that Ms. Pelley has not been able to work "as much" because of her pain issues, so she will "wait and see".

[100] On the basis of Ms. Pelley's evidence of her condition generally (she said by the fall of 2018, she had to decrease even her teaching hours to part time) and Ms. Seymour's evidence, I find that Ms. Pelley stopped working at the concession stand in the spring of 2018 because of the chronic pain condition caused by the Accident. I find that but for the Accident, it is likely that she would have worked at the concession stand about one shift per week during the spring and summer (the five months from April to August) in 2018 and 2019. The concession stand was not open in 2020 due to the COVID-19 pandemic.

[101] Ms. Seymour testified she was paying Ms. Pelley \$20 per hour by 2017. One shift a week for ten months amounts to about 40 shifts. If each shift was eight hours long, this would translate to a loss of \$160 a shift, for a maximum total loss of \$6,400. However, it is necessary to account for some contingencies.

[102] Ms. Pelley may not have worked at the concession stand every week during the spring and summer of 2018 and 2019. On the other hand, she may have worked two shifts during some weeks. Those contingencies offset each other. However, it is likely that not all the shifts would have been eight hours long. Ms. Seymour said the shifts varied from three to eight hours in duration. Also, Ms. Pelley might have decided to stop working at the concession stand for reasons unrelated to the Accident. As mentioned, she did not testify about having any specific plan concerning the concession stand work, or that she planned to take over the business in the future. Considering these additional negative contingencies, I award Ms. Pelley 50% of the maximum amount calculated above, that is \$3,200, for the past loss of opportunity to supplement her teaching income by working at the concession stand.

[103] I am not persuaded that there is a real and substantial possibility that but for the Accident, Ms. Pelley would have supplemented her income by working as a tutor in the period prior to trial. She testified she made a small amount of income from tutoring while working at Dormick Park Elementary. The students she tutored were referred to her by a colleague at Dormick Park. Ms. Pelley testified that she would like to continue tutoring, but there is no evidence that she ever attempted to continue this work once she started working at Clayburn Middle School or that she even contemplated doing so. Also, she did not actually say that her injuries prevent her from tutoring. In the circumstances, the prospect that Ms. Pelley would have supplemented her teaching income from tutoring in the period prior to the trial had she not been injured in the Accident is speculative at best.

Future Loss of Income Earning Capacity

[104] To establish a claim for future loss of income earning capacity, a plaintiff must first prove a real and substantial possibility of a future event leading to a loss of income, as opposed to a speculative loss: *Tisalona v. Easton*, 2017 BCCA 272 at para. 47; *Perren v. Lalari*, 2010 BCCA 140 at para. 32. As stated in *Tisalona* at para. 51, "[t]his is the threshold finding necessary to

establish entitlement to damages for loss of earning capacity -- a real and substantial possibility that future employment will be foreclosed to the plaintiff by reason of the injuries". If the plaintiff discharges that burden, then the loss must be assessed, taking into account all realistic positive and negative contingencies.

- [105] There is more than one way to assess a loss of future income earning capacity: see Perren at paras. 11-12. The "earnings approach", which is generally appropriate where the court can more easily measure the loss mathematically, typically involves a determination of the plaintiff's estimated annual income loss, multiplied by the remaining years of work, and then discounted to reflect current value. The "capital asset approach", which is typically used when the loss is not as easily measurable, involves the 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. Gola* (1985), 26 B.C.L.R. (3d) 353 (S.C.).
- [106] Irrespective of the approach used, the Court is required to quantify a pecuniary loss, and the quantification must be grounded in the evidence and the particular facts of the case. There must be a "reasoned analysis to explain and justify the award": *Schenker v. Scott*, 2014 BCCA 203 at para. 56. The loss need not be calculated with mathematical precision but mathematical, statistical, and/or economic evidence will inform the assessment. This reflects the fact that an award for loss of earning capacity, irrespective of the quantification approach adopted, is "not simply at large": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 20.
- [107] As already noted, the standard of proof relating to hypothetical events, which, of course, includes future events, is simple probability. Such events are to be given weight according to their relative likelihood.
- [108] Ms. Pelley submits that she has been rendered less capable overall from earning income from all types of employment. However, as explained above, this is a factor used to assess the value of a loss of earning capacity once such a loss has been established.
- [109] Ms. Pelley submits that she suffers from disabling symptoms that have diminished her capacity to teach, emphasizing that the lights in her classroom must be dimmed, she cannot tolerate strong scents, she must schedule meetings for mornings because she is exhausted in the afternoons, she cannot tolerate marking and looking at a computer screen to the extent she did in the past. She submits that as a result it is likely that she will not be able to work more than "just less than four (4) days per week" as a teacher, which reflects a 22.5% diminishment in her capital asset.
- [110] Ms. Pelley submits that but for the Accident, she likely would have pursued an administrative position such as principal, at some point, which would have increased her maximum earnings, and that she likely would have taken over Ms. Seymour's concession stand earning a profit of about \$15,000 a year. She says that in less than two years she will

reach the maximum pay rate for a teacher, which is about \$96,000. She says that if she obtained an administrative position, her annual salary would increase by between \$10,000 and \$30,000. As a result of those considerations, and the potential profit from the concession, she says that her "weighted average annual income for extrapolation" should be assumed at \$115,000 per year. Using a discount rate of 1.5% and assuming retirement at age 65, she then calculates the present value of her without injury lifetime earnings at \$2,834,301. The application of a 22.5% discount to that amount to reflect the diminishment in her capacity results in her claim to an award of \$617,718 under this head of damages.

- [111] In my view, the evidence does not support an award of that magnitude.
- [112] I am satisfied that there is a real and substantial possibility that Ms. Pelley's chronic pain condition (by which I mean the constellation of physical and psychological symptoms she continues to experience as a result of the Accident), will cause her to suffer a future loss of income. Specifically, I am satisfied that there is a real and substantial possibility that during some period or periods in the future, her chronic pain condition will prevent her from working full time and/or will cause her to be absent from work.
- [113] I am not satisfied that there is a real and substantial possibility that Ms. Pelley will be unable to pursue an administrative position, however. There was insufficient evidence upon which to conclude that there is a real and substantial possibility that a career as a principal or vice-principal has been foreclosed by her condition.
- [114] I am also not satisfied that there is a real and substantial possibility that, but for the Accident, Ms. Pelley would have taken over Ms. Seymour's concession business. As mentioned, she did not testified about having any such plans before the Accident. However, I am satisfied by her work history that there is a real and substantial possibility that she would have supplemented her income with some kind of extra summer work during at least some future summers.
- [115] Accordingly, the threshold finding necessary to establish an entitlement to damages for loss of earning capacity has been met because of the possibility that Ms. Pelley will experience periods during which she cannot work full time and/or during which she will have to be absent from work.
- [116] Quantifying those damages is more difficult. Except for an eight-week period in late 2018, when she reduced her teaching to three days a week, Ms. Pelley has continued to work full time, albeit with some days off due to her symptoms, particularly in the acute period immediately following the Accident. In the circumstances, it is not possible to adopt a pure "earnings approach". Applying the "capital asset approach", I conclude that because of her condition, Ms. Pelley is less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, and is less valuable to herself as a person capable of earning income in a competitive labour market.

- [117] Again, irrespective of the approach adopted I must quantify a pecuniary loss, and the quantification must be grounded in the evidence and the particular facts of the case. In my view, the place to start in this case is with a consideration of the time Ms. Pelley lost from work during the 2017/18, 2018/19, and 2019/20 school years. The time she missed from work in the spring of 2017 adds little to the analysis because that was during the acute phase of her injuries. In my view, the subsequent three years provide a better foundation upon which to commence an analysis of the impact of her now chronic condition.
- [118] According to records maintained by the Abbotsford School District, Ms. Pelley missed ten days of work in the 2017/18 school year, not including the days she missed due to mononucleosis. In the 2018/19 school year she missed 20 days, and during the 2019/20 school year she missed 12 days. The average number of missed days over those three years is 14. If one assumes about 20 teaching days a month without any vacation or statutory holidays, there would be about 200 teaching days in a school year of ten months' duration. Assuming two weeks' vacation in March and another two weeks' vacation in December (20 days) plus a few more statutory holidays, 175 annual teaching days is a fair estimate of a full workload. An average annual number of missed days of 14, translates to about 8% of that full workload.
- [119] As mentioned, the evidence establishes that the maximum annual salary for a teacher is about \$96,000, and that Ms. Pelley will reach that level within a couple of years. For purposes of quantifying her damages under this head (which I emphasize is an assessment and not a calculation), I agree that it is reasonable to assume a without injury earning capacity of \$115,000 per year given the combination of the near certainty that teachers' salaries will increase on a regular basis, the real possibility that Ms. Pelley will become a principal or vice-principal at some point, and the real possibility that she will also supplement her income with "side-work" during at least some summers. I am satisfied, for the reasons expressed by Ms. Pelley's counsel, that the present value of that earning capacity is \$2,834,301.
- [120] If Ms. Pelley's earning capacity was permanently decreased by 8%, this would translate to a loss of about \$226,000. However, it is necessary to account for what I have found is an optimistic prognosis for improvement. As already discussed, Dr. Sudol said that if her recommendations were followed, she expected Ms. Pelley will be able to make gains, will remain prone to flares, and will most likely be able to sustain full-time or close to full-time work in the future. Ms. Pelley has only recently started to implement Dr. Sudol's recommendations through her treatments from Dr. Chen, her attendance at the Advance Concussion Clinic, and her counselling from Ms. Forbes. Some improvements have already been achieved in her balance, memory and reaction time. In the circumstances, a discount must be made to reflect the very real and substantial likelihood of improvement in Ms. Pelley's condition. Of course, it is possible her condition will not improve and may even worsen, but the possibility of either of those contingencies is more than offset by the much more substantial possibility of improvement.

[121] Considering all of the forgoing, I award Ms. Pelley \$175,000 as damages for future loss of earning capacity.

Cost of Future Care

[122] In *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63, the Court of Appeal confirmed the well-established test for future care damages emanating from *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.). The test is an objective one based on medical evidence; there must be a medical justification for claims for cost of future care and the claims must be reasonable.

[123] Ms. Pelley seeks an award of \$413,939.56 for future care. That amount is based on a claim of \$14,890 per year for 41 years (to age 75) and a discount rate of 2% (which generates a multiplier of 27.7995 according to Appendix E of CIVJI). The following specific items make up the annual claim of \$14,890:

- Physiotherapy/kinesiology (6 sessions per year at \$95 per session) - \$570;
- Massage therapy (40 sessions per year at \$110 per session) - \$4,400;
- Chiropractic therapy (40 sessions per year at \$53 per session) - \$2,120;
- Pain medications and antidepressants - \$200;
- Counselling (80 sessions per year at \$80 per session) - \$6,400;
- Cannabinoids for sleep and pain - \$200;
- Botulinum toxin (twice a year) - \$800; and
- Mileage - \$200.

[124] This claim is neither reasonable nor supported by the evidence.

[125] The claim contemplates Ms. Pelley attending 166 therapy sessions (physiotherapy, kinesiology, massage, chiropractic, and counselling) each year for 41 years. That is about three sessions a week, each week, from now until 2061. It is not reasonable to conclude that Ms. Pelley is likely to maintain that kind of treatment schedule for 41 years. Further, there is no medical justification for such a claim. In particular, there is no medical justification at all for ongoing massage or chiropractic therapy.

[126] As already noted, Dr. Sudol recommended 14 to 18 sessions with a physiotherapist followed by 14 to 18 sessions with a kinesiologist to assist with the transition to independent training in a gym. Dr. Gallimore made a similar recommendation. However, these services have been made available to Ms. Pelley through the Advance Pain Clinic, and it is apparent that the expectation is that these treatments will teach Ms. Pelley how to independently manage her chronic condition.

- [127] Dr. Cook recommended ongoing physiotherapy but did not comment on frequency or duration. Dr. Sudol expressed the opinion that Ms. Pelley's condition is likely to improve (if she follows the medical recommendations), but that she is prone to future flares. The combination of this evidence provides a medical justification for ongoing, periodic physiotherapy during future flares. Doing the best I can with the unfortunately vague evidence, it is reasonable to find that Ms. Pelley is likely to require six physiotherapy sessions per year to age 75 during flare-ups in her symptoms. Ms. Pelley's special damages claim shows that she has paid between \$35 and \$55 per session for physiotherapy. On the assumption that rates will increase periodically in the future, it is reasonable to assume a cost of about \$60 per session, which is likely to overcompensate in the early years and undercompensate in the later years. On this basis, I find that Ms. Pelley is likely to incur costs of about \$360 a year for periodic physiotherapy.
- [128] Both Dr. Sudol and Dr. Cook recommended counselling but neither of them commented on frequency or duration. Nevertheless, Ms. Pelley's condition is chronic and she is prone to future flares even if her current condition improves. In the circumstances, I am satisfied that there is a medical justification for ongoing, periodic counselling, particularly during future flares. Again, doing the best I can with the vague evidence, it is reasonable to find that Ms. Pelley is likely to require six counselling sessions per year to age 75. Ms. Pelley's special damages claim shows that she has paid \$80 per session for counselling with Ms. Forbes. On the assumption that rates will increase periodically in the future, it is reasonable to assume a cost of about \$90 per session, which is likely to overcompensate in the early years and undercompensate in the later years. On this basis, I find that Ms. Pelley is likely to incur costs of about \$540 a year for periodic counselling.
- [129] Dr. Sudol recommended a trial of headache medication, but did not comment on duration or cost. There is evidence that Ms. Pelley does take naproxen and Flexeril, on occasion, but not daily. There is no evidence of the costs she has incurred as a result. Dr. Sudol's recommendation combined with the fact that Ms. Pelley's condition is chronic and she is prone to future flares, provides a justification for ongoing pain medication, but given the vagueness of the evidence only a marginal amount is reasonable. I find that Ms. Pelley is likely to incur costs of about \$50 a year for pain medication.
- [130] Ms. Pelley testified that she has been using CBD and THC oils but there is no medical evidence justifying a claim for future costs associated with those products.
- [131] Dr. Dost recommended Botox injections for headaches. He suggested two trials, three months apart, and said that subsequent dosing and frequency would have to be determined by the treating physician. He said the cost of each treatment is between \$300 and \$500. Ms. Pelley has not tried Botox and there is no evidence on this point from her treating physicians. In the circumstances, I am satisfied that it is reasonable to award Ms. Pelley \$1,000, one time, to permit her to comply with Dr. Dost's recommendation, but the evidence does not support an award for ongoing Botox treatments.

- [132] Ms. Pelley claimed mileage of \$200 per year, on the assumption that she would be attending 166 therapy sessions a year. I have found that the evidence supports a claim for 12 sessions a year (six physiotherapy and six counselling), which is about 7% of her claim. I award her mileage costs of \$14 per year (7% of \$200).
- [133] In summary, I award Ms. Pelley future care costs of \$360 per year for physiotherapy, \$540 per year for counselling, \$50 per year for pain medication, and \$14 per year for mileage, plus \$1,000 for Botox injections. This translates to annual costs of \$964, plus the one time cost of \$1,000. Using Ms. Pelley's approach to quantifying annual costs (a multiplier of 27.7995), the total award under this head is \$27,798.72 (\$964 x 27.7995, plus the one time \$1,000).

Loss of Housekeeping Capacity

- [134] An award for loss of housekeeping capacity provides compensation for the value of the housekeeping the plaintiff would have done but was, or will be, incapable of performing because of the injuries caused by the Accident. It does not depend on replacement housekeeping costs actually being incurred. Loss of housekeeping capacity reflects the loss of personal capacity, an asset, and is therefore compensable as a pecuniary loss. In some circumstances, however, it can be compensated by a non-pecuniary award.
- [135] In *Kim v. Lin*, 2018 BCCA 77 at paras. 33-34, the Court of Appeal considered how to properly characterize and value a loss of housekeeping claim, concluding:
- [33] Therefore, where a plaintiff suffers an injury, which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [136] The cases have also recognized that any award should be approached conservatively: *Yip v. Saran*, 2014 BCSC 1283 at para. 82.
- [137] Ms. Pelley seeks an award of \$35,000 for loss of housekeeping capacity.

[138] I am satisfied that loss of housekeeping capacity should be assessed as a separate pecuniary award in this case. Ms. Pelley testified that she has effectively given up or lost control over her housekeeping due to the ongoing symptoms from the injuries caused by the Accident. I accept that evidence. There is no evidence that she has hired replacement services, but it is clear that her capacity was and remains diminished although it will likely be restored to some extent if her condition improves as I have found it likely will. Absent any evidence about the replacement cost, I approach the claim conservatively and award Ms. Pelley \$15,000 for loss of housekeeping capacity.

Special Damages

[139] As already mentioned, special damages have been agreed at \$20,307.07.

Conclusion

[140] In summary, the damages awarded to Ms. Pelley are:

Non-pecuniary damages

\$120,000.00

Past loss of income and earning capacity (gross)

\$24,919.00

Future loss of income earning capacity

\$175,000.00

Cost of future care

Loss of housekeeping capacity

\$27,798.72

\$15,000.00

Special damages

\$20,307.07

[141] I have not expressed the total of the damages awarded because the past loss of income and earning capacity award has been quantified on a pre-tax basis. I leave the calculation of any tax consequences and the issue of pre-judgment interest for the parties to resolve. If counsel are unable to reach agreement on these matters, they may make arrangements to speak to them.

[142] Ms. Pelley is entitled to her costs. If the parties cannot agree or if there are circumstances I am unaware of, they may make arrangements to speak to that issue as well.

"Warren J."

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