

CANADA / JUDGMENT

Raedwulf v. Kelly

2020 BCSC 915

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 915 Raedwulf v. Kelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Raedwulf v. Kelly,

2020 BCSC 915

Date: 20200619

Docket: M09316

Registry: Courtenay

Between:

Natalie Raedwulf

Plaintiff

And:

Lindsey Kelly and Josiah Jarc

Defendants

- And -

Docket: M09317

Registry: Courtenay

Between:

Natalie Raedwulf

Plaintiff

And:

Roxanne Grant

Defendant

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Plaintiff:

R. Bush and

M. Tinmouth

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K.J. Madsen

Place and Date of Trial:

Courtenay, B.C.

December 10-13, 2019

and December 16-20, 2019

Place and Date of Judgment:

Courtenay, B.C.

June 19, 2020

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INTRODUCTION

- [1] Natalie Raedwulf seeks damages for injuries suffered in two motor vehicle accidents that occurred in Courtenay, B.C. Liability is not in issue for either.
- [2] The first accident occurred on January 14, 2015. Ms. Raedwulf was in the Thrifty's parking lot with her family after grocery shopping. Her then husband Tristan James had just buckled their young daughter into her car seat. Ms. Raedwulf was leaning into the driver's side back seat putting groceries in the car when a truck struck the open driver's side rear door. The Raedwulf/James car moved and the frame of the vehicle hit her in the head and neck.
- [3] The second accident, which occurred August 6, 2016, was more significant. Ms. Raedwulf was stopped at a crosswalk waiting for a pedestrian to cross when her vehicle was struck from behind. Ms. Raedwulf's car was pushed forward into the crosswalk. Her five month old son Llyr was in the back in his infant seat. Both cars were written off by ICBC.
- [4] Ms. Raedwulf seeks monetary awards under the following heads of damage:
 - a. non-pecuniary damages;
 - b. loss of earning capacity;
 - c. cost of future care;
 - d. loss of housekeeping capacity; and
 - e. special damages.
- [5] The parties have agreed that Ms. Raedwulf be awarded \$28,801.80 for past wage loss and \$25,100 for special damages.
- [6] The defendants concede that Ms. Raedwulf suffered soft tissue injuries in the first motor vehicle accident but take the position that she had essentially recovered from them by the time of the second accident. They further concede that the soft tissue injuries were exacerbated in the second accident but argue that she has made a full recovery.
- [7] The parties agree that the injuries sustained in the two accidents are indivisible.
- [8] The defendants argue that any difficulties in Ms. Raedwulf's life are primarily the result of her psychological/emotional issues which were caused by other stressors/events in her life, and not the accidents.
- [9] With respect to her employment, the defendants argue that Ms. Raedwulf is capable of working full-time as a teacher but chooses not to.

ISSUES

- [10] The issues to be decided are:
 - 1) What injuries were caused in the accidents and have they resolved?

- 2) What is the appropriate award for general damages for pain and suffering?
- 3) What is the appropriate award for loss of future earning capacity? This will include the amount of pension lost as a result of the loss of earning capacity; and
- 4) What is the appropriate award for cost of future care? This will include loss of housekeeping capacity.

[11] I will begin by outlining the evidence.

THE EVIDENCE

The Plaintiff

[12] In January 2015, Ms. Raedwulf was working as a special education teacher on a temporary teaching contract with the Campbell River School District. Mr. James worked full-time. Ms. Raedwulf performed the majority of the housework and was the primary caregiver to their one-year old daughter, Faunus, and their 17 year old behaviourally challenged foster son. She had no difficulty keeping up with the household. She was also very active. She played competitive dodgeball, hiked regularly, did aerial silks, socialised with friends and frequented music festivals.

The January 14, 2015 Accident

- [13] After being struck by the frame of her vehicle, Ms. Raedwulf immediately felt pain in her head and neck. She was taken to the hospital where she was diagnosed as having whiplash type injuries and perhaps a concussion. She followed up with her family doctor, Dr. Galway, who diagnosed her with a concussion.
- [14] Ms. Raedwulf took the rest of the week off work due to pain in the head, back and shoulder and the foginess in her head. On her return Ms. Raedwulf found it difficult to work because of pain but she persevered as she did not want to lose her job. Jobs for new teachers were scarce and it was a position she really loved.
- [15] A couple of weeks later she was struck on the left side of the face with a basketball during Physical Education class. Aware of her pre-existing injuries, the vice principal took her to the hospital. Her symptoms from the first accident were aggravated by the blow but settled down to baseline level after a week.
- [16] Ms. Raedwulf continued to feel pain in her head, neck and shoulders. She suffered headaches, sensitivity to light and noise, and fatigue. She developed symptoms of anxiety and depression.
- [17] The pain in her upper back and neck interfered with her ability to perform physical tasks. She found it difficult to pick up her daughter. She could not keep up with the housework. She had to hire Erin Jamison to come in once a week to help with cleaning.

- [18] The back pain also made physical activities impossible. Ms. Raedwulf could not go for long walks, play dodgeball or do aerial silks. Her sensitivity to noise affected her enjoyment of music. Mr. James testified that music was an important part of their lives; they always had music playing. After the first accident there could no longer be music in the house- it was too much for Ms. Raedwulf.
- [19] Ms. Raedwulf wanted to get a Master's degree to make herself more desirable to employers. She started working toward her Master's in Special Education in July 2014 through Vancouver Island University (VIU). The course was designed for working teachers to complete at their own pace through a combination of online and in-person classes. Following the first accident, unable to keep up because of her injuries, she dropped a course. She returned to try to finish the program in the summer of 2017. She has still not finished.
- [20] Ms. Raedwulf engaged in many therapies after the first accident:
- i. Physiotherapy: helped with her upper back and neck, and headaches;
 - ii. Massage: was helpful used in conjunction with other therapies;
 - iii. Chiropractor: helped but not as much as physiotherapy;
 - iv. Counselling: ICBC set her up with an occupational therapist. It helped "somewhat" in managing chronic pain.
- [21] Ms. Raedwulf's relationship with Tristan James ended in early 2015. Ms. Raedwulf does not blame the breakdown of the relationship on the first accident, although Mr. James testified that the change in her put a strain on their relationship.
- [22] Ms. Raedwulf's temporary teaching contract ended mid-March 2015. She then worked as a teacher on-call. She had to turn down some jobs when she was experiencing too much pain or if she thought the class would be too demanding for her given her injuries. She is unable to recall how many jobs she turned down but said it was frequent.
- [23] Ms. Raedwulf became involved with Ron Pogue during the spring of 2015. She and Mr. Pogue had a son, Llyr, in March 2016. Ms. Raedwulf had to take medical leave before maternity leave due to the increasing back pain she experienced as her pregnancy progressed. She was on maternity leave until early February 2017 when she returned to being a teacher on-call.
- [24] By the time of the second accident, there had been significant improvement in her condition.

The August 6, 2016 Accident

- [25] After being rear-ended, Ms. Raedwulf was taken by ambulance to the hospital on a spine board. She felt pain in her head, neck, left shoulder, arms, lower back and right hip. She was released from the hospital that night.

- [26] Along with the pain, Ms. Raedwulf had constant headaches, nausea, dizziness, brain fog and mental confusion. She was extremely sensitive to noise and light. She suffered from disequilibrium or motion sickness. It felt like the world was moving beneath her. She felt depressed, anxious and irritable.
- [27] She had trouble caring for her children. She was unable to pick up Llyr as it hurt her back. Breastfeeding hurt her back. She found the children too noisy. She could not keep up and felt like a failure as a parent.
- [28] Her ability to perform housekeeping duties decreased after the second accident. She found it difficult to complete almost any household chore. She had to hire Erin Jamison to help.
- [29] She continued with the therapies she had started following the first accident. Physiotherapy and massage relieved symptoms. She went to a chiropractor until treatments ceased being effective.
- [30] In addition, Ms. Raedwulf saw Robert Johnston, a neurophysiotherapist, who prescribed her anti-glare lenses for her glasses to help with her light sensitivity and had custom earplugs made to help with the noise sensitivity. He gave her some vestibular exercises to improve her balance and coordination issues. The glasses have helped. The earplugs work too well as she cannot hear anything with them in.
- [31] She was referred to Kelly McKenzie, a kinesiologist who set up a program for her to work on her balance. She continues to do those exercises at least twice a week.
- [32] Ms. Raedwulf was referred to Dr. Prenger, a registered psychologist in Nanaimo who she continues to see every two weeks for Eye Movement and Desensitization therapy. She reports that it helps with her depression and anxiety.
- [33] She tried one or two sessions of acupuncture but did not find it helpful.
- [34] She was prescribed medicinal marihuana which helps her sleep. Without it she wakes up in pain.
- [35] In May 2017 Ms. Raedwulf was hired as a temporary part-time contract at Robron Learning Centre as a life skills teacher. That job ended when the school year ended at the end of June 2017, however she was offered and accepted a full-time temporary contract at Robron as an independent learning support teacher starting in September 2017. The job involved assisting a small number of students. Ms. Raedwulf described the job as "atypically easy." The contract ended in June 2018.
- [36] Ms. Raedwulf accepted a full-time continuing contract as a learning support teacher with School District 72 at Carihi High school in Campbell River which began September 2018. It was very difficult and demanding work but according to Ms. Raedwulf it was to her, the perfect job. She quickly realised however that managing the large number of students in a busy, noisy classroom and juggling many things at once was extremely challenging given her injuries. It made her aware of the impact of the injuries and how much she struggled

with multitasking and memory.

- [37] She became overwhelmed and anxious. She was upset because she had done so well at a similar job in China a few years prior and was unable to do so at Carihi High. She reached out to her union in October 2018 and was referred to a wellness representative who organized a number of assessments with a psychologist, occupational therapist, kinesiologist and neuro optometrist. Many changes were made in the classroom to help accommodate Ms. Raedwulf. Fluorescent lights in the classroom were replaced with lamps for softer light. A soundproof office within the classroom was built for Ms. Raedwulf to retreat to. Blinds were put on the window to her office so she can shut out light.
- [38] Still unable to cope, Ms. Raedwulf cut her hours to .6 of full-time beginning in January 2019. She remains at this job working three days a week. Fifty percent of her missed time was paid by her union. This short-term disability ended in April 2020.
- [39] After a day's work Ms. Raedwulf is often in pain/discomfort and needs to rest. Her children are with her every second week. Most often she does not feel well enough to take the kids to the park or play with them. On days off she goes to appointments and rests up for the next day of work.
- [40] Her relationship with Mr. Pogue has been affected as her mood is low and her patience limited.
- [41] Ms. Raedwulf still has the knitting "hobby business" she started in 2014, but finds it difficult to maintain the business side. She does not have the energy to put as much effort into it.
- [42] Overall Ms. Raedwulf finds that she is not as mentally competent since the accidents. Her mood is compromised and she is in constant pain. She testified that because of her injuries she has difficulty dealing with everything.

Lay Witnesses

Ron Pogue

- [43] Ron Pogue is Ms. Raedwulf's husband. They met in early 2010 and became friends. They became romantically involved following Ms. Raedwulf's separation from Tristan James and moved in together in June 2015, between the first and second accidents.
- [44] Mr. Pogue described Ms. Raedwulf before the first accident as vivacious and upbeat. She enjoyed dancing and music. He saw her often at music festivals. She loved travelling. She was extremely caring and was always looking for ways to give back to her community. He testified that Ms. Raedwulf was very capable cognitively.
- [45] After the first accident, Ms. Raedwulf was fatigued. She had to lay down every day after work. She was in so much pain she would roll up into a ball on the couch. She became sensitive to light and often had to squint.

- [46] There were definite changes after the second accident. Everything became overwhelmingly difficult for her. She could not read. She was unable to plan her day. The smallest thing upset her. She had trouble processing things and needed them repeated in order to do so. She became very frustrated with herself.
- [47] Ms. Raedwulf began to avoid crowds and noise. Even the family was too much for her. Mr. Pogue had to take on most of the child care. She began taking what he called "massive amounts" of pain killers. She constantly complained about the pain in her head.

Tristan James

- [48] Tristan James met Ms. Raedwulf at a music festival in 2011. They married in 2013 but lived together prior to that.
- [49] Mr. James went to China with Ms. Raedwulf. He described life in Wuhan as being bombarded with people, pollution and sound. It was noisy, busy, and non-stop. Ms. Raedwulf biked to and from work which was very risky. She loved living there. She thrived and excelled.
- [50] Ms. Raedwulf got pregnant shortly after they returned to Canada. She was a good mother. She had no difficulty with being a new mother and caring for the teenage foster son that lived with them.
- [51] Ms. Raedwulf changed after the first accident. She was up and down emotionally. She became sensitive to lights. She got headaches more frequently and with greater intensity than before. Before the first accident they played music all the time. After the accident they could not as it caused Ms. Raedwulf migraines almost instantly.
- [52] The basketball incident increased symptoms; it was "more of the same."
- [53] The changes in Ms. Raedwulf put a strain on their relationship. They became emotionally distant and separated in early 2015.

Erin Jamison

- [54] Erin Jamison met Ms. Raedwulf in about 2011 when they both worked at a winery/farm. Ms. Raedwulf worked on the farming side. She had no difficulty with her physically demanding duties. Ms. Raedwulf was upbeat and very positive. She loved dancing, talking, laughing.
- [55] Since the accidents Ms. Raedwulf has changed. She used to talk excitedly and loudly about a number of different things at once. Now she talks about one thing at a time, slowly and quietly. She is withdrawn, low energy and tired all the time. She does not go out dancing anymore.
- [56] Ms. Jamison helps Ms. Raedwulf with her cleaning when she needs it, usually every two or three weeks. Ms. Raedwulf pays her \$30/hour.

Barbara Ann Greene

- [57] Ms. Greene, Ms. Raedwulf's mother, testified that Ms. Raedwulf has always been a hard worker. She got her first job when she was 15 and has worked since, often at more than one job at a time.
- [58] She described her daughter before the accidents as a free spirit, full of life and energy, happy go lucky. She loved learning and was always extremely determined. She loved music and music festivals. She loved to travel.
- [59] Since the accident there is a "big change." She is a lot quieter and has to take things slowly. She cannot handle stimulation. She will disappear into another room if there is too much activity. Because of this she has missed many special gatherings, including her best friend's wedding.
- [60] When Ms. Raedwulf comes home from work she is done for the day. She bathes or showers two to three times a day to try to relieve pain. She suffers from chronic headaches.

Kimberley Akow

- [61] Ms. Akow is Ms. Raedwulf's best friend. They have been friends since Grade 4.
- [62] Prior to the accidents Ms. Raedwulf was lively, energetic, active, outgoing and high functioning. Since the accidents she is anxious, depressed, withdrawn and not as active. Her memory is bad. She repeats conversations. She is overwhelmed in loud or social situations or when there are a lot of things going on and is unable to cope. When she gets overwhelmed she has trouble carrying on a coherent conversation. Ms. Raedwulf was not like this before the first accident.
- [63] Ms. Akow visited Ms. Raedwulf in China and attests that Ms. Raedwulf excelled in that chaotic environment.

Sheri Halpin

- [64] Ms. Raedwulf's co-worker, Sheri Halpin, has been a teacher for 25 years, the last 15 as a special education teacher. Ms. Halpin, Ms. Raedwulf and two other teachers work together in the special education classroom at Carihi High. Each of them maintains a case load of students with whom they form a close connection. They develop learning plans for these students and work with them and their teachers. She described the job as very demanding and busy. They all have "lots of balls in the air."
- [65] The four teachers have offices off the classroom. Ms. Raedwulf's has been made concussion friendly. By the third of her three work days each week, Ms. Raedwulf is drained and "not on her game." She retreats into her office more frequently. She is constantly wearing her beanbag warmer around her neck/shoulders to relieve pain. She often is unable to work the third day.

[66] Ms. Raedwulf has trouble remembering things. She will often forget things they discussed days before. Ms. Halpin makes sure to follow up with Ms. Raedwulf to make sure she remembers.

The Plaintiff's Expert Medical Evidence

Dr. Clair Sira

[67] Dr. Clair Sira, a clinical psychologist with expertise in neuropsychology, provided the following opinion:

1. Prior to the accidents Ms. Raedwulf was coping well and was able to handle stress. Since the accidents she is in moderate to severe distress and is less able to cope. As an example, Ms. Raedwulf became overwhelmed during the testing;
- ii. Ms. Raedwulf was recovering quite well from the first accident when the second accident occurred. The second accident exacerbated her anxiety. The trauma of the accidents form the basis of the anxiety disorder. The various other stressors in Ms. Raedwulf's life were not the cause. Her triggers and fears centre on driving and harm to her children and pedestrians;
- iii. Before the motor vehicle accidents, Ms. Raedwulf was a good coper, capable of dealing with quite a bit of stress before becoming overwhelmed. She now suffers with moderate to severe distress;
- iv. Ms. Raedwulf exhibits sufficient symptoms to merit a diagnosis of adjustment disorder with anxiety as a result of the accidents.

Dr. Bella Wen Wu

[68] Dr. Bella Wu is an otolaryngologist, head and neck surgery, that is, a medical doctor specializing in disorders of the head and neck, particularly those disorders related to the ears, nose and throat.

[69] After extensive testing performed over two days, Dr. Wu came to the following conclusions regarding Ms. Raedwulf's hearing and balance:

- i. Ms. Raedwulf experienced disturbance of her balance system after the motor vehicle accidents and the basketball incident;
- ii. Her symptoms are consistent with an inner ear balance disorder called Visual Vestibular Mismatch (VVM), a condition where the balance input supplied by the visual and the vestibular systems fail to co-ordinate properly resulting in sensations of imbalance. VVM can occur where there is a lot of movement around an individual with the condition which then causes confusion, distress and dizzy symptoms. Bright lights may cause dizziness as well;
- iii. This dizziness causes sufferers anxiety surrounding their balance;

- iv. The fact that the onset of the dizziness was in close proximity to the accidents supports the conclusion that they are the cause;
- v. Treatment/exercises may improve the condition but will not eliminate it;
- vi. The injury to Ms. Raedwulf's balance system is likely permanent and makes her more vulnerable to further balance issues in the future.

Dr. Gihan Perera

- [70] Dr. Gihan Perera is an expert in physiatry with expertise in the treatment, assessment and prognosis of injury, including traumatic brain injury.
- [71] Dr. Perera is of the opinion that Ms. Raedwulf suffered:
- i. A mild traumatic brain injury which has caused post-concussion syndrome with ongoing physical, emotional and cognitive impairments;
 - ii. Cervical musculoligamentous strain/sprain with chronic back pain, peripheral vestibulopathy (an inner ear disorder which causes vertigo/dizziness) and occipital neuralgia (headache);
 - iii. Biomechanical disorder of the lumbosacral spine with associated SI joint pathology.
- [72] Standing exacerbates her chronic back pain. There is an increased likelihood that the lower back injury will lead to progressive joint degeneration and arthritis beyond what would be expected from normal aging.
- [73] Regarding headaches, Dr. Perera is of the opinion that Ms. Raedwulf has developed occipital neuralgia that presents as a sharp, burning headache. The headaches are caused by the neck injury and are aggravated by neck movement, bright lights, loud noises and physical activity. Dr. Perera believes that Botox injections may provide relief from pain. Botox injections are not covered by MSP and cost \$1,000 to \$1,200 per treatment. Ms. Raedwulf would need an injection every two and one-half months. Treatment with Botox can continue indefinitely.
- [74] Dr. Perera is of the opinion that the injuries/impairments developed from the first accident and are permanent.

Dr. Andrais O'Breasail

- [75] Psychiatrist Dr. Andrais O'Breasail assessed Ms. Raedwulf on May 8, 2019.
- [76] As a result of his examination, Dr. O'Breasail provided the following opinion:
- i. As a result of the first accident Ms. Raedwulf suffered anxiety, depression and pain. She sustained a head injury when she banged her head. If she suffered a concussion it was mild;
 - ii. Ms. Raedwulf was improving from the injuries suffered in the first accident when the second accident occurred. The second accident was much more serious and aggravated the symptoms from the first accident;

- iii. Her anxiety is now the most prominent symptom with Ms. Raedwulf having intrusive thoughts about her children dying and motor vehicle accidents. She meets the criteria for anxiety disorder;
- iv. While Ms. Raedwulf has had other stressors in her life, it is the combination of the two accidents that caused her injuries;
- v. The disabling symptoms- cognitive difficulties, low energy and fatigue, anxiety, low frustration tolerance and irritability- combine to limit her ability to function at the level that she would have had these accidents not occurred. Her vocational functioning is significantly impacted;
- vi. While there will be improvement over time, Ms. Raedwulf will likely be left with residual symptoms that will affect her ability to function at her optimum level;
- vii. It is appropriate that she work three days a week at this time;
- viii. It is unlikely that Ms. Raedwulf will be able to operate at her full functional vocational level in a full-time position in the future.

The Defendants' Expert Medical Evidence

Dr. David Morgan

- [77] While Forensic Psychiatrist Dr. Morgan agrees with Dr. O'Breasail's opinion that Ms. Raedwulf developed an Adjustment Disorder as a result of the accidents, he is of the view that it is better conceptualized as Somatic Symptom Disorder. A Somatic Symptom Disorder occurs when a patient has some physical symptoms or complaints but suffers from anxiety or stress about those symptoms that exceeds what would normally be expected. An Adjustment Disorder is similar except that the extreme anxiety may result from any kind of stressor, not necessarily a physical injury. Dr. Morgan opines that the Somatic Symptom Disorder was caused by the second accident.
- [78] According to Dr. Morgan, Ms. Raedwulf's symptoms impair her functioning and are chronic. The cycle created by the disorder can be permanent if not broken by the Cognitive Behavioural Therapy (CBT) and medication. In Dr. Morgan's opinion, the CBT that Ms. Raedwulf did via skype was ineffectual as CBT needs to be in person and over a longer period (12 weeks).
- [79] With respect to prognosis, Dr. Morgan says that it is questionable. The chances of improvement are reduced because of the delay in effective CBT, the chronicity of the symptoms and Ms. Raedwulf's inability to be treated with antidepressants due to side effects she developed.

Dr. Rehan Dost

- [80] According to Dr. Dost, a neurologist, Ms. Raedwulf does not demonstrate the requisite symptoms for a formal diagnosis of concussion/mild traumatic brain injury (MTBI) from either the first or second accident. He bases this opinion on two things: first, his review of the medical documentation did not reveal that Ms. Raedwulf suffered a loss of consciousness, confusion or disorientation following either accident; and second, in his opinion there are "far more plausible explanations" for her cognitive issues including the effects of pain and disturbed sleep. This is a significant distinction as cognitive difficulties caused by non-restorative sleep and psychological factors can show improvement with treatment. Cognitive difficulties caused by a concussion or MTBI will not. I will return to this.
- [81] Dr. Dost is of the opinion that Ms. Raedwulf's headaches are chronic. They are attributable to whiplash from the first accident and exacerbated by the second. Dr. Dost opines that these headaches have not been "optimally treated" and are being perpetuated by "sleep alteration and psychological factors." Like Dr. Perera, Dr. Dost recommends the headaches be treated with Botox injections. However he testified that the injections cost between \$500 and \$750 per treatment and that treatments should be every three months as long as the injections are helping. Dr. Dost is unable to predict the response Ms. Raedwulf will have to this therapy.

Dr. Paul Robert

- [82] Dr. Robert, an orthopedic surgeon, saw Ms. Raedwulf on June 7, 2019. His examination was extremely brief, between 35- 45 minutes in total. He took a personal phone call in the middle. The physical examination was 10 minutes.
- [83] His report lacks detail. Although he claims to have reviewed reports and records of other medical professionals, they were not referenced in his report or in his evidence. In fact, in his report he listed only one item under the heading Review of Medical Documents: "Consultation with Dr. Davidson, March 19, 2018." Of note I did not hear from a Dr. Davidson in this trial. In his evidence Dr. Morgan stressed that he was just giving his opinion, not commenting on anyone else's. If he did in fact review the records, he had no memory of them whatsoever.
- [84] He approached the examination with very strongly held ideas such as:
- i. "I expect any severe soft tissue injury to be completely healed within 40 days";
 - ii. "People complain beyond 40 days because of behaviour magnification which is propagated by the medical and legal system. That's my belief";
 - iii. "Pain is part of being human. It is a part of life. We all have pain";

iv. Muscle spasms last 2 to 3 weeks. If someone says that they have a muscle spasm, "I take it with a grain of salt".

[85] I find that Dr. Robert failed to fairly and comprehensively examine Ms. Raedwulf. His assessment of her injuries is tainted by his strongly held views which preclude the possibility of any plaintiff ever experiencing lasting soft tissue physical injury. His report is superficial. He overstepped his field of expertise by commenting on her ability to work full-time. He also overreached when he concluded that Ms. Raedwulf needs no treatment. In doing so, he completely dismissed her self reports of pain as well as the reports of other medical professionals.

[86] In all I find Dr. Robert's evidence unworthy of reliance. I reject it. I note that the defendants did not ask me to accept Dr. Robert's evidence in their closing submissions, nor did they rely on it.

ISSUE 1: WHAT INJURIES WERE CAUSED IN THE ACCIDENTS?

Causation

[87] Causation is established when the plaintiff proves on a balance of probabilities that the defendant caused or contributed to his or her injury. This is the "but for" test as set out by the Supreme Court of Canada in the seminal decision *Athey v. Leonati*, [1996] 3 S.C.R. 458.

[88] As stated at para. 17 of *Athey*, the plaintiff does not have to establish that the defendant's negligence was the sole cause of the injury:

There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[89] The defendant's contribution must be material in that there is a substantial connection between the accident and the injury beyond a de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11. If the injury is divisible, a plaintiff can recover from the defendant only the damages attributable to the injury caused or contributed to by that defendant. If the injury is indivisible, a plaintiff can recover from the defendant 100% of the damages attributable to the injury caused or contributed to by that defendant, regardless of the contribution to the injury by others: *Athey*, at para. 24.

[90] Under the "crumbling skull" doctrine, the defendant is not liable for debilitating effects of pre-existing conditions that the plaintiff would have experienced without the accident. This was discussed by the Supreme Court of Canada in *Athey* at p. 473:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, supra. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*; *Malec v. J. C. Hutton Proprietary Ltd.*, *Cooper-Stephenson*, supra, at pp. 851-852.

[91] I will now apply the law to the facts.

Analysis

[92] As stated at the outset, while the defendants concede that Ms. Raedwulf suffered soft tissue injuries in the first accident, which were exacerbated in the second accident, they take the position that all of those injuries have resolved. They further take the position that Ms. Raedwulf's emotional/psychological issues were caused by the other stressors in Ms. Raedwulf's life and not the accidents.

[93] I disagree. I am satisfied that neither the physical nor the emotional/psychological injuries have resolved. I am further satisfied that although Ms. Raedwulf does have stressors in her life, her emotional/psychological issues were caused by the accidents. The evidence does not establish a link to any other source.

[94] The court heard much evidence regarding the changes in Ms. Raedwulf after the two accidents. People close to Ms. Raedwulf corroborated her evidence that she was in good health before the accidents and that that changed after the first accident and worsened after the second.

[95] The defendants argue that Ms. Raedwulf's evidence should be approached with caution. They submit that she "cleverly colours her evidence" and that this is another attempt of hers to gain financially without working.

[96] While I accept that the evidence shows that Ms. Raedwulf knows how to access maximum benefits, I do not find that it casts a shadow over her testimony. Nor do I find that she carefully coloured her evidence. I found Ms. Raedwulf to be credible and forthright. She did not exaggerate her injuries. Her evidence fit with the observations I made of her throughout the trial, both on and off the witness stand. She clearly had trouble with light, she was uncomfortable sitting for long periods of time and at points she seemed to be extremely tired. Overall I found her affect to be flat. She presents as unwell physically.

- [97] As set out in the evidence portion of this ruling, I heard from many civilian witnesses including Ms. Raedwulf's current and former spouse, a couple of her friends, her mother, and a co-worker. I found all of them to be forthright and honest. They were unshaken in their cross-examination. Their evidence fits together and it fits with the evidence of Ms. Raedwulf. It also fits with the medical evidence that I accept.
- [98] For clarity from this point forward, when I speak of the medical evidence, I am referring to the evidence of all of the medical experts, save Dr. Robert.
- [99] I do not agree with the defendants' submission that the emotional/psychological injuries were caused by other stressors in Ms. Raedwulf's life and not the accidents. Although she testified that she suffered from self described depression and anxiety in high school, it centered on her father's battle with cancer and eventual death weeks before her graduation. She never saw a doctor, only a school counsellor. She was never diagnosed with depression or anxiety, nor does she recall taking medication. She described the symptoms as experiencing sadness, worry and concern. I take that as a common reaction to dealing with a family tragedy and not as a history of depression and anxiety as urged on me by the defendants.
- [100] Nor do I agree that other events in her life have caused the emotional/psychological injuries. The medical experts agree that Ms. Raedwulf was a good copier until the accidents and that her injuries: psychological, emotional and cognitive, were caused by the accidents. The injuries are temporally linked to the accidents. The anxiety is rooted in fear of her children being hurt and motor vehicle accidents.
- [101] All experts but Dr. Dost take the position that Ms. Raedwulf suffered a head injury. If Ms. Raedwulf's symptoms are the result of a brain injury, then they are not treatable. If not, treatment may make a difference.
- [102] As set out above, Dr. Dost concluded that it is a more plausible explanation that Ms. Raedwulf's cognitive symptoms are caused by lack of sleep and pain rather than a brain injury. He bases this opinion on the fact that he did not see mention in the medical records that Ms. Raedwulf suffered a loss of consciousness, confusion or disorientation immediately following the accidents. This is incorrect. Following the first accident the emergency room physician noted that Ms. Raedwulf complained of "mild head foggy" and dizziness. Under diagnosis, the emergency room doctor noted, "? Concussion", and under discharge instructions entered "Head Injury sheet." Ms. Raedwulf described herself as stunned, confused, foggy headed. After the second accident she described herself as having brain fog and suffering mental confusion. In addition, when Ms. Raedwulf's sleep improved through the use of CBD oil, her symptoms persisted.
- [103] Having considered all of the medical evidence, I prefer the opinion of the other medical experts to Dr. Dost's. I am satisfied that Ms. Raedwulf suffered a mild traumatic brain injury in the accidents.

[104] The medical experts further agree that the injuries have not resolved. Most are of the opinion that they are permanent.

[105] Having considered all of the evidence, I am satisfied that Ms. Raedwulf suffered the following injuries in the accidents:

- a. mild traumatic brain injury;
- b. anxiety disorder (Adjustment Disorder and/or Somatic Symptom Disorder);
- c. chronic headaches;
- d. an inner ear disorder;
- e. lower back injury.

[106] I am further satisfied that although there may be some improvement with treatment, these injuries are permanent and will continue to cause Ms. Raedwulf anxiety, chronic pain, fatigue, headaches, dizziness and cognitive impairment.

ISSUE 2: WHAT IS THE APPROPRIATE AWARD FOR GENERAL DAMAGES FOR PAIN AND SUFFERING?

[107] Ms. Raedwulf seeks an award in the range of \$175,000 to \$190,000. The defendants take the position that the appropriate range for the award is \$80,000 to \$90,000.

The Law

[108] A plaintiff is entitled to reasonable damages for his or her pain and suffering. The general rule is that the plaintiff is to be restored to his or her original position and not to a better position: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

[109] An award of non-pecuniary damages does not depend upon the seriousness of the injury, but on its ability to ameliorate the condition of the victim considering his or her particular situation. The gravity of the injury alone is not determinative. An appreciation of the individual's loss is the key. There is no "tariff". An award will vary in each case to meet the specific circumstances of the individual case: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.

[110] In *Gohringer v. Hernando-Lazo et al.*, 2009 BCSC 420, Russell J. outlined the factors to be considered by the Court in assessing non-pecuniary damages:

[81] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, B.C.J. No. 1535 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Kuskis v. Tin*, 2008 BCSC 862, B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis* at para. 136.

[82] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

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

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

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

Analysis

[111] The court heard from many witnesses regarding the change in Ms. Raedwulf following the accidents. Without exception they describe her before the accidents as a free spirit, full of life and energy, vivacious and upbeat. She enjoyed dancing and music. She loved music festivals and travelling. She was hard working and determined. She got her first job at an early age and often had and has more than one job at a time. As Ms. Raedwulf's husband Ron Pogue testified that she "would do more work before work than most people do at work." She was very capable cognitively.

[112] Ms. Raedwulf changed after the first accident. She was very fatigued and up and down emotionally. She became sensitive to lights and noise. She could no longer tolerate music. She got headaches more frequently and with greater intensity.

[113] The basketball incident increased symptoms but it was "more of the same." That "increase" subsided after a couple of weeks.

[114] There were more changes after the second accident. Everything became difficult for Ms. Raedwulf. She was unable to read or plan her day. The smallest thing upset her. She had trouble processing things and needed them repeated in order to do so.

- [115] The changes persist. Before the accidents Ms. Raedwulf would talk excitedly and loudly about a number of different things at once. Now she talks about one thing at a time- slowly and quietly. She has become withdrawn, avoiding crowds and noise. Even her family is often too much for her. Housework is difficult for Ms. Raedwulf. She has had to hire Erin Jamison usually every two or three weeks to help with cleaning. Ms. Raedwulf pays her \$30/ hour.
- [116] Ms. Raedwulf's cognitive abilities have been affected as well. As co-worker Sheri Halpin described, Ms. Raedwulf has challenges at work multi-tasking and memory. The noise, busyness and lights of the classroom are often overwhelming for her. After a day at work Ms. Raedwulf is done, mentally and physically.
- [117] These observations of Ms. Raedwulf are in stark contrast to how she was before the accidents. Her experience in China provides a pre-accident benchmark in terms of her functioning. In February 2011 she took a full-time teaching job at an international school in Wuhan. She worked until June 2011 then returned in August 2011 to work at the school for another year. Tristan James moved with her in August 2011. She taught five blocks a day to classes of 30-35 students and she ran a knitting club. By all accounts she was highly regarded by the school, students and parents. She lived above a store on a busy street. She rode her bicycle through chaotic streets. Ms. Raedwulf thrived in the busy environment. The continuous noise and lights did not bother her in the least. She loved it. Both Mr. James and Kimberley Akow corroborated this.
- [118] I accept the evidence regarding the changes in Ms. Raedwulf. It is consistent between all of the witnesses and it fits with Ms. Raedwulf's evidence and her presentation. It also fits with the medical evidence.
- [119] In my view, the following factors are significant in the assessment of Ms. Raedwulf's general damages:
- i. As a result of the accidents, she suffers chronic pain, anxiety, dizziness and headaches;
 - ii. She is young and is the mother of young children. At the time of the accidents, she was just starting her career, a career that is her passion;
 - iii. The injuries affect every part of Ms. Raedwulf's life;
 - iv. She is less capable at work;
 - v. She has been unable to finish her Master's program;
 - vi. She no longer thrives in busy, high energy, noisy challenging settings. She now hides from them;
 - vii. Ms. Raedwulf can no longer participate in the physical activities she enjoyed. Even walking is painful;

viii. The injuries have caused Ms. Raedwulf to suffer emotionally and have impaired her relationships. She is unable to enjoy her children as she did before. She is less present with her husband. She can no longer enjoy music or go to music festivals, a big part of her previous life. She has withdrawn from friends and has missed important gatherings/life events;

ix. The injuries are permanent and may lead to other problems in the future such as arthritis and other balance problems.

[120] I have no trouble concluding that the injuries suffered in the accidents have had a devastating impact on Ms. Raedwulf. The simplest things are visibly difficult. I observed her having trouble sitting in court over the two week trial. She had to turn away from the windows and shield her eyes from the light. She tired noticeably throughout the day. And as I mentioned earlier, her presentation is far from the spirited, energetic person her family and friends described. There is a shroud of heaviness that surrounds her.

[121] The question is, given these findings, what is the appropriate monetary award?

[122] As stated above, Ms. Raedwulf seeks an award in the range of \$175,000 to \$190,000. In support she relies on the following cases:

- a. Domil v. Cheung, 2017 BCSC 65;
- b. Watkins v. Dormuth, 2014 BCSC 543;
- c. Kim v. Lin, 2016 BCSC 2405;
- d. Culver v. Skrypnyk, 2019 BCSC 807.

[123] These cases involve plaintiffs that suffered a constellation of injuries similar to that of Ms. Raedwulf. In each case, the court awarded \$175,000.

[124] The defendants argue that the appropriate range is \$80,000 to \$90,000. They rely on these decisions that range in award from \$85,000 to \$110,000:

- a. Evans v. Kiell, 2018 BCSC 1651;
- b. Ponsart v. Kong, 2017 BCSC 1126;
- c. Parhar v. Clarke, 2017 BCSC 550.

[125] While every case turns on its own facts, I find Domil and Culver to be closest factually to the case before me. In Domil, the plaintiff suffered a multitude of injuries in two motor vehicle accidents, including headaches, neck, shoulder and back pain, numbness in her arms and legs, dizziness, anxiety, depression, problems sleeping and heightened sensitivity. She was diagnosed with Adjustment Disorder with anxiety and Somatic Symptom Disorder, the prognosis for improvement of which is guarded. As a result of her injuries, she was unable to maintain her employment at the Canada Revenue Agency despite trying to return to work a number of times. She can no longer multi-task, she has problems with her memory and concentration. Her relationship with her husband and children has been impacted as

have her relationships with friends. She is able to perform housework and participate in recreational activities. Ms. Domil was awarded \$175,000 in general damages. These injuries are similar to Ms. Raedwulf's, however while Ms. Raedwulf is able to work, albeit part-time and with difficulty, she has not been able to engage in recreational activities and is unable to handle her housework.

[126] In Culver, the plaintiff who was in his early 30's, was involved in two car accidents. He suffered a number of injuries including low back injury with sciatica, anxiety and depression. As a result of his injuries, he is no longer able to engage in the physical activities he so enjoyed. His relationships with his partner and friends have suffered. He has to rest long hours and take pain medication to recuperate from work. His prospects for full recovery and a pain free life are slight. He has lost much of his enjoyment of life. He was awarded \$175,000.

[127] Having considered the impacts of the accidents on Ms. Raedwulf, the fact that they will continue to impact her for the rest of her life, the principles outlined above and the authorities cited by the parties, I find that an award of \$175,000 for general damages is appropriate.

ISSUE 3: WHAT IS THE APPROPRIATE AWARD FOR LOSS OF FUTURE EARNING CAPACITY?

[128] As stated at the outset, the parties have agreed that the appropriate award for loss of past earning capacity is \$28,801.80.

[129] Ms. Raedwulf seeks an award for loss of future earning capacity of \$750,000 to \$850,000. The defendants take the position that the appropriate award is \$31,500. In taking these positions, the parties differ on key issues including whether Ms. Raedwulf could be working part-time and, if so, for how long; whether her choice to work part-time is due to the accidents or other issues in her life; if and when she can return to work full-time; and whether, but for the accidents, Ms. Raedwulf would have finished her Master's degree (putting her in a higher wage category).

The Law

[130] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of her pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. It is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position she would have been in had the negligence not occurred. It is the difference between the plaintiff's original position, just before the occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey* at paras. 34-35.

[131] Our Court of Appeal provided guidance as to how to assess these damages in *Grewal v. Naumann*, 2017 BCCA 158:

- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events.
- [132] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Voith J. described the legal principles that pertain to this head of loss as follows:
- [133] The relevant legal principles are well-established:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss: *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence: *Rosvold* at para. 11.

- [133] Hypothetical events, such as how the plaintiff's life would have proceeded, need not be proven on a balance of probabilities. Rather, they are simply given weight according to their relative likelihood. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27.

Analysis

- [134] It is clear from the evidence that Ms. Raedwulf is both enterprising and a hard worker. From the time she was a teenager Ms. Raedwulf has always worked. Prior to becoming a teacher, Ms. Raedwulf worked as a farm labourer, in retail sales and as a support worker at a child development centre. She was a foster parent to a high needs teen. She follows her passions. For example, she formed a not-for-profit reptile rescue organization.
- [135] It was always her dream to be a teacher. It is clear from the evidence from Ms. Raedwulf and others that teaching is more than a job to her, it is a passion.
- [136] As mentioned above, in July 2014 she started working toward her Master's in Special Education to make herself more desirable to employers. She has been unable to finish it due to the impacts of the accidents. This is relevant to the analysis of future earning capacity as a teacher with a Master's degree is in a higher pay category. Her long-term goal was to move into administration. She intended to work until her mid-60s.
- [137] In April 2014 she started her online knitting design business, Wolf & Faun Knits, which she continues to run at varying degrees. She calls it a "hobby business." Ms. Raedwulf is an accomplished knitter/knitwear designer. Knitting is a big part of her life.
- [138] Although the doctors differ in their diagnoses, they agree that Ms. Raedwulf's vocational functioning is significantly impacted. The majority of experts concur that it is unlikely that she will be able to return to full-time work.
- [139] The court heard from two experts with respect to Ms. Raedwulf's ability to continue working as a teacher.
- [140] Brent Armstrong, a kinesiologist, provided the court with a functional capacity evaluation emphasizing Ms. Raedwulf's employment as a learning support teacher.
- [141] Throughout his July 19, 2018 eight hour assessment of her, Mr. Armstrong observed that Ms. Raedwulf had difficulty with multitasking, focussing, bright lights and noise. She struggled in a busy, noisy environment.
- [142] As a result of his assessment, Mr. Armstrong concluded that:
- i. Ms. Raedwulf is not competitively employable in her position as a learning support teacher which means that she is capable of work but has disabilities or accommodations have to be made for her that make her less desirable to an employer; and

ii. She is not capable of working full-time. Pain and fatigue affect her tolerance and capacity to participate on a sustained basis.

[143] Occupational therapist Tim Winter was retained by the defendants to evaluate Ms. Raedwulf's functional capacity.

[144] In his report dated September 12, 2019, Mr. Winter gave the following opinion:

I am of the opinion Ms. Raedwulf's health status is somewhat complex. She continues to contend with physical symptoms of pain and fatigue, she reports cognitive weakness, as well as the presence of depression and anxiety symptoms. While outcomes of functional testing indicate largely stable physical and cognitive functions across prolonged work periods, in my view her mental health status likely influences her current functional capacity. In my experience these issues, combined with maladaptive patterns of coping with pain, will interfere with her ability to reliably engage in full time work.

These issues warrant clinical attention in my view and I will defer to the engaged experts in psychology and/or psychiatry for diagnoses, potential treatment direction and prognosis.

[145] In his testimony, Mr. Winter conceded that during his eight hour evaluation of Ms. Raedwulf, there was a decline in her functioning. Of note, in the late afternoon Ms. Raedwulf made a critical error in the telephone answering/message taking exercise by incorrectly recording who the message was for. She also made three errors on a bookkeeping test. Mr. Winter noted that Ms. Raedwulf looked tired throughout their session and had a muted affect and testified that he has concerns about Ms. Raedwulf's ability to maintain her current employment at three days per week.

[146] Ms. Raedwulf's ability to teach has been affected as a result of injuries suffered in the accidents. Based on the evidence, I find that Ms. Raedwulf will not be able to sustain working three days a week. Based on all of the evidence, I am satisfied, with the accommodations that have been made for her at Carihi High, that there is a real and substantial probability that she will be able to sustain working half-time.

[147] Ms. Raedwulf seeks an award under this heading between \$750,000 and \$850,000. In coming to this figure, she asks the court to accept the following:

- i. The evidence supports that there is a real and substantial possibility that she would have worked until at least age 67;
- ii. Her employment is stable;
- iii. She is dedicated to her profession; and
- iv. She would have completed her Master's degree.

[148] The defendants take the position that:

- i. Regardless of the accidents, Ms. Raedwulf would not have finished her Master's degree;

ii. She is capable of working full-time but is choosing not to.

[149] In the alternative, the defendants argue that if the court accepts that Ms. Raedwulf is not voluntarily working part-time, she will likely be able to return to full-time work by January 2022.

[150] The parties each called an economist to assist the court calculate the present value of future earnings. While the economists agreed on the method of calculation (the earnings approach) and the contingencies that should be employed, the two differed as a result of the hypotheticals they were given by their clients.

[151] Mark Szekely for the defendants based his calculations on the assumption that the plaintiff would return to full-time work on January 1, 2022. Peter Sheldon for the plaintiffs based his calculations on the assumption Ms. Raedwulf would work until she was 67.

[152] I do not accept either scenario as a realistic possibility. Based on all of the evidence, I find there to be a real and substantial possibility of the following:

i. Ms. Raedwulf will never be able to work full-time. She will be unable to sustain working three days a week. She will be able to maintain half-time work;

ii. But for the accidents, Ms. Raedwulf would have obtained her Master's in Special Education, putting her in the Category 6 pay scale for teachers;

iii. But for the accidents, Ms. Raedwulf would have worked until she was 65 years of age.

[153] Given Ms. Raedwulf's work history, I accept that the earnings approach is appropriate in this case.

[154] Considering all of the evidence and all of the circumstances, I find that a fair and reasonable award for loss of future earning capacity is \$725,000.

[155] Having regard to the evidence of Mr. Sheldon, I am satisfied that a reasonable award for loss of net pension benefits is \$100,000.

[156] The total award for loss of future earning capacity, including loss of pension benefits, is \$825,000.

ISSUE 4: WHAT IS THE APPROPRIATE AWARD FOR COST OF FUTURE CARE?

The Law

[157] The principles that determine an award for the cost of future care were set out by Schultes J. in *Warick v. Diwell*, 2017 BCSC 68; *aff'd* 2018 BCCA 58:

[203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).

- [204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.
- [205] The question has often been framed as being whether a reasonably-minded person of ample means would be ready to incur a particular expense: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at p. 245.
- [206] The evidence with respect to the specific care required does not need to be provided by a medical doctor: *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63, (S.C.) at para. 182. However, there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [207] Damages for the cost of future care are assessed, not mathematically calculated: *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31. There is an inherent degree of uncertainty and discretion in making such awards. Because awards are made "once and for all" at the time of trial, judges must "peer into the future" and fix the damages "as best they can". This includes allowing contingencies for the possibility that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.
- [208] While no award should be made in relation to an expense that the plaintiff will not actually incur (*Izony v. Weidlich*, 2006 BCSC 1315 at para. 74), the focus of inquiry when a justified item or service was previously unused, is whether it is "likely to be incurred on a going forward basis": *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 251.
- [209] A plaintiff is not entitled to an award for that portion of their costs of future care that will be publicly funded. However, the risk that access to public funds may be lost in future is a proper basis to provide a contingency in the award: *Boren v. Vancouver Resource Society for the Physically Disabled*, 2003 BCCA 388 at para. 25.

Analysis

- [158] The plaintiff seeks an award of \$25,000 for future care and loss of housekeeping capacity.
- [159] The defendants contest this on the basis that while the experts recommend various treatments, there is no evidence that the plaintiff is willing to engage and more particularly, with a couple of exceptions, there is no evidence of cost.

[160] With respect to the defendants' latter argument, I agree. Other than the cost of Botox injections, counselling and housekeeping, there is a lack of evidence regarding price. Does that mean that the court cannot make an award? I think not. While it makes the task more difficult, as per Warick above, cost of future care is not a mathematical exercise, it is an assessment. Judges must do the best they can to fix damages.

[161] The treatments recommended by the experts include:

Botox injections for headaches

Every 2 ½ - 3 months indefinitely at a cost of \$1,000- \$1,200 per session.

Every 3 months at a cost of \$500-\$750 per session

Dr. Perera

Dr. Dost

Massage

monthly

Dr. Perera

IMS (intramuscular trigger point injections), occipital nerve blocks and sacroiliac joint injections
monthly

Dr. Perera

Kinesiology exercise sessions

monthly

Dr. Perera

Counselling for mood

Twice a month indefinitely

Dr. Perera

Counselling for anxiety

Dr. Sira

Psychological support to improve her cognitive functioning

Weekly for at least 6 months

Dr. Sira

Yoga

Dr. Sira

Mr. Winter

Weighted blanket

Dr. Sira

Vestibular physiotherapy for dizziness

2-4 sessions per month while symptoms last

Dr. Wu

Large surround tinted sunglasses

Dr. Wu

Cognitive behavioural therapy for anxiety and related symptoms

Weekly for 6 months then once every 2-4 weeks for the following 18 months.

12 sessions

Dr. O'Breasail

Dr. Morgan

Antidepressant medication

Dr. O'Breasail

Occupational Therapy assessment

\$1,150

Mr. Winter

Strength training

Mr. Winter

[162] In addition to the above treatments/therapies, Ms. Raedwulf seeks an award for loss of housekeeping under this heading. As touched on above, she has difficulty with the housework and hires Ms. Jamison to help with cleaning every few weeks, paying her \$30/hour. This fits with Mr. Armstrong's assessment and conclusion that Ms. Raedwulf will likely need "occasional help to stay ahead of heavier jobs (floors, tub, windows)."

[163] Ms. Raedwulf's willingness to participate in the suggested treatments is evidenced by the fact that she is already engaged in the majority of them. She goes to counselling, physiotherapy and massage. She has not seen her kinesiologist or neuropsychologist for some time but intends to reconnect with them. She gets Botox trigger point injections. She goes to the gym or yoga when she feels well enough. I am satisfied that Ms. Raedwulf will continue to pursue all avenues to try to improve her health.

[164] In my view, the recommendations are reasonable and have the potential to help ameliorate the injuries suffered by Ms. Raedwulf in the accidents or at least help her deal with the symptoms. Applying the Andrews test, I am satisfied that a reasonably-minded person of ample means would be ready to incur these expenses.

[165] Despite there being little information about cost, I find that \$25,000 is a reasonable assessment, likely at the low end of what could have been sought. In coming to this conclusion I note the number of suggestions, the frequency and the fact that most of the therapies programs will continue indefinitely.

[166] The award for future care is \$25,000.

CONCLUSION

[167] In summary, Ms. Raedwulf is entitled to the following damages:

General Damages:

\$175,000.00

Loss of Past Earning Capacity:

28,801.80

Loss of Future earning Capacity:

725,000.00

Loss of Net Pension Benefits:

100,000.00

Cost of Future Care:

25,000.00

Special Damages:

\$ 25,100.00

Total

\$1,078,901.80

[168] Unless there are matters of which I am unaware, Ms. Raedwulf is entitled to her costs of this proceeding on Scale B.

[169] The parties may set a date through Supreme Court Scheduling to address tax add backs and management fees if required.

"The Honourable Madam Justice Murray"

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