
CANADA / JUDGMENT

Wheeler v. Wilson

2021 BCSC 441

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2021 BCSC 441 Wheeler v. Wilson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wheeler v. Wilson,

2021 BCSC 441

Date: 20210312

Docket: M31757

Registry: Chilliwack

Between:

Anna-Marie Kristine Wheeler

Plaintiff

And

Zachary Wilson & Carri Barbara Ash

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

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J. Upper

Place and Dates of Trial:

New Westminster, B.C.

October 5-9, 2020

October 13-16, 2020

Place and Date of Judgment:

Chilliwack, B.C.

March 12, 2021

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Introduction

- [1] On December 31, 2014, the plaintiff was driving a Hyundai in Chilliwack. While waiting to make a left turn into a local store, she was struck from behind by a vehicle driven by Zachary Wilson. The collision resulted in injuries to the plaintiff's neck, shoulders, arms, hip, and between her shoulder blades; she suffered ongoing headaches, anxiety and sleep disruption.
- [2] On June 5, 2020 the plaintiff was involved in a second accident while driving a Honda Pilot on Terminal Avenue in Vancouver. She was stopped at the intersection of Terminal Avenue and Main Street when her vehicle was struck from behind. She claims to have suffered an aggravation of the injuries sustained in the first accident.
- [3] Liability for both accidents is admitted. The defence noted that no claim has been made in regard to the second accident but invited the court to assess damages caused in both incidents and award damages in this proceeding without a deduction for any of the contributing factors stemming from the second accident.
- [4] The plaintiff is seeking an award of damages caused by both collisions in the amount of \$125,000 for non-pecuniary damages; \$40,000 for past loss of income earning capacity; \$500,000 for impairment of her ability to earn income in the future; \$20,000 for loss of her housekeeping capacity; \$201,124 for the costs of future care; and \$23,910 for special damages.

Agreed Statement of Facts

- [5] The facts surrounding the plaintiff's claim are, generally uncontroversial. The parties presented an agreed statement of facts containing 35 paragraphs that disclose the bulk of background information relating to the plaintiff's circumstances and this claim. The agreed statement of facts was marked as an exhibit in the trial. This agreed statement of facts is marked as Schedule 1 of these reasons.

Background

- [6] The plaintiff testified at length supplementing the agreed statement of facts. She said she was raised and educated on Vancouver Island. Her early years were at Kyuquot, an Indigenous community on the island, and she resided in Campbell River from 1997 until her graduation. She attended university at a bible college in South Carolina for one year, followed by studying online at Thompson Rivers University with a view to becoming a social worker. She abandoned her goal of social work and began business studies at the University of Fraser Valley from 2007 to 2008. Throughout her childhood and university years, the plaintiff was an industrious worker. She held employment when at university followed by several other positions. The plaintiff eventually pursued a business/management position

with The Source, a former Radio Shack company, where she obtained a management position in retail cell phone sales.

- [7] The invitation to work for The Source led the plaintiff to give up university education to become a business manager. She enjoyed selling cell phone equipment and eventually obtained a position with Glentel, a cellphone company carrying on business within the Abbotsford Costco store. She appears to have been very successful with Glentel but was induced to leave that position for an opportunity to work with her husband in a business called MusicWorx. She and her husband contemplated purchasing this business, but after one year working for MusicWorx, determined that the opportunity was not something they wished to pursue.
- [8] The plaintiff returned to work at Glentel in the Abbotsford Costco store. She described duties at this location as requiring her regular attendance to prepare for the day's work. This included arranging for supplies to be taken from storage to the retail sales kiosk she attended.
- [9] There was considerable labour involved in managing the stock and accessories within the store including much bending and stretching in tight spaces. She was required to reach well above shoulder level to move products and other items necessary for the business.
- [10] The plaintiff became pregnant in March 2011 and continued to perform in management at the Glentel kiosk at Costco until shortly before the birth of their first child.
- [11] After their child was born, the plaintiff took advantage of a maternity leave for four months followed by parental leave for an additional eight months.
- [12] Their second child was born in April 2014. The plaintiff and her husband are also in the process of adopting their third child born in November 2018.
- [13] Throughout the plaintiff's early years and into high school, she was an accomplished seamstress. While in high school, she sewed for school musicals and made many costumes and dresses. After leaving high school, she continued to sew for friends and others. During her maternity/parental leave she continued sewing and designed and produced items such as soft toys, bibs, soother straps and blankets. By the fall of 2014 she had decided to sell her work product and found a willing market among friends and internet customers. She eventually made propositions to a Chilliwack retail outlet which happily took her products. This company eventually asked the plaintiff to prepare and produce specific products for sale in their store.
- [14] She continued to produce these craft items and several other retail outlets also agreed to purchase her products for resale.

- [15] As the business progressed, the plaintiff acquired higher quality equipment to compliment the sewing business that was developing. She invested in accumulating significant inventory and materials to meet the growing demands and realized that with her expanding business, she needed to obtain liability insurance.
- [16] The plaintiff's business continued to evolve and she formed a business relationship with a friend, Jennifer Gain.
- [17] In 2013, the plaintiff was invited to participate in a high level craft market in the city of Vancouver; her attendance was by invitation and her participation proved very successful. Following attendance at this event, new retail outlets became aware of her product and contacted her seeking supply of her products. She began selling her craft work to stores across Canada.
- [18] In 2014, the plaintiff was invited to participate in a Chilliwack craft market that was to take place in February 2015. She felt this Chilliwack craft market would be a promising outlet for her products; by December 2014, she was supplying six locations and three to four other parties were regularly ordering her items.
- [19] The plaintiff was in the accident on December 31, 2014, following which, she experienced significant symptoms.
- [20] After the accident the plaintiff took a break from her craft business until mid-January 2015. She was preparing for the Chilliwack craft fair but was having difficulty. She was a capable designer and was able to cut the fabric to the design required, but could not do the sewing part of the process. Sewing required the plaintiff to sit with her head down causing significant headaches to develop after 20-30 minutes of work. As a result, the plaintiff hired a contract sewer to assist in preparing her products for the February craft fair.
- [21] Sometime in January 2015 the ICBC adjuster in charge of her file agreed that she required the assistance of a sub-contractor to maintain her business output. The plaintiff hired two persons to assist her; they were paid on a piece-by-piece basis and ICBC agreed to fund the additional cost.
- [22] The plaintiff was able to produce sufficient product for the Chilliwack fair (Fraser Valley Women's Expo).
- [23] All of the labour necessary to set-up the plaintiff's display was done by her, Heather and Jennifer. The plaintiff was unable to do the heavy lifting and used a rug in the booth to ameliorate the symptoms she was experiencing.
- [24] At that time, the plaintiff was taking pain medications daily and attended the expo both days. She developed neck and shoulder stiffness and soreness and endured regular headaches.

- [25] Following the expo, the plaintiff was invited to participate in another Chilliwack craft fair in June 2015. She agreed to participate in this fair not expecting to be disabled by her accident symptoms. At around this time, her business continued to receive orders for product; she was doing design and cutting fabric, and her assistants were performing the bulk of the sewing.
- [26] Overall, production at the plaintiff's business was hampered by her physical limitations. The June 2015 craft fair was very successful notwithstanding the ongoing headaches, pain and discomfort experienced by the plaintiff. She brought chairs and rugs to this event to decrease the symptoms she otherwise experienced. The plaintiff was invited to attend a further event in the fall of 2015. At this point the plaintiff decided that she could not perform the duties necessary to attend at a market. She engaged another vendor to attend the market and sell her products. Her usual mark-up was 45% above cost, but since she had to work with another vendor, she earned less.
- [27] Nevertheless, the plaintiff continued to manufacture material at her home and eventually decided to rent a location in central Chilliwack that could be used by herself and her friend, Stephanie Doucette. This relocation of the business from the plaintiff's home worked well to accommodate Ms. Doucette's involvement in the business and the plaintiff's needs.
- [28] ICBC discontinued its financial support for her business at the end of January 2016. At that point she was continuing to supply as many eight retailers, but as retailers ceased doing business with her, she did not replace them due to her physical limitations. The plaintiff's relationship with Ms. Doucette eventually deteriorated and they ceased sharing production space.
- [29] The plaintiff and her husband eventually sold their Chilliwack home and moved to Agassiz, BC in 2017; this was closer to the plaintiff's husband's employment. By this time, the plaintiff had scaled back the number of retailers she supplied, but continued to manufacture her crafts in their new home.
- [30] By September 2017, the plaintiff obtained an appointment with Dr. Robinson; he informed her that her symptoms would probably not improve and that she needed to reduce her activity. He said the type of posture she adopted when doing her sewing work was contraindicated.

The Plaintiff's Non-Work Activity

- [31] Before the accident, skiing was an important aspect of family life in the plaintiff's home. A few times each year they would go to Apex Mountain, Manning Park, or Sasquatch (Hemlock Valley) ski hills.

- [32] The plaintiff and her husband purchased a home on Menzies Avenue in Chilliwack in February 2010. This property needed considerable effort to bring it up to the parties' standards. She and her husband did most of the work; she did the painting of every room in the house. She also deconstructed the bathroom cabinets and did some tiling.
- [33] The outside of this new home was overgrown with blackberries and other weeds. The plaintiff cleaned out the blackberries and did most of the yard maintenance including cutting lawns, weed-eating and tending to the garden. The house renovations were conducted over time and were completed by 2016 when the parties sold the Chilliwack property.
- [34] The plaintiff enjoyed many domestic chores including canning and cooking. She would dedicate one-two weeks each year to can various preserves.
- [35] Before the accident, the plaintiff and her family travelled in British Columbia frequently; her parents lived on Vancouver Island at Campbell River and her husband's parents resided in the Okanagan.
- [36] The Campbell River trip would take eight hours travel time to reach, and the Okanagan could be reached in two-and-a-half to three hours.
- [37] Before the accident, the plaintiff was a hands-on mother and spent much time playing with her son; she could sit on the floor and engage with him. She lifted her child frequently. She would walk to the local playground with her child without assistance. She liked to hike with her child up Giant's Head Road in Summerland and Elk Falls in Campbell River.
- [38] The plaintiff loved to cook and would frequently serve family dinners at Thanksgiving; she would invite family and many friends.
- [39] Before the accident, the plaintiff was a youth leader at her local church and was in charge of a group of grade seven girls. She intended to stay with the group until high school graduation. She was involved in leading worship and a music ministry at her church.
- [40] Since the accident, the plaintiff has not returned to skiing; she accompanies her family to ski hills but limits her involvement to helping the children. The family has travelled to all three ski hills where they previously skied.
- [41] After the accident, the plaintiff needed to make repairs and modifications to her home. Some additional finishing work was necessary but due to limits on the plaintiff's capacity, they paid contractors to finish that work. The plaintiff was able to place some carpet on stairs and repair an appliance but did little else.
- [42] Before the accident and due to the plaintiff's pregnancy and birth of one child, they hired a person to cut the grass at their home; this was work the plaintiff enjoyed. However, after the accident, they continued to engage someone to do yard work for them because of the plaintiff's incapacity due to the accident symptoms. Once they moved to their current home in Agassiz, the plaintiff obtained a ride-on lawnmower and power driven push mower that

she is able to use within her limited capacity. Thus, the plaintiff is now mowing lawns and does some gardening accommodated by raised vegetable beds.

- [43] The plaintiff testified that she continues to do housework and receives more help from her husband and children. She said they divide the housework and she does laundry, dishes and cooking. She continues to can preserves but paces herself over longer time periods. She buys produce and freezes much of it until she is ready to can.
- [44] After the accident, the plaintiff and her husband had an opportunity to travel to Europe with her husband's employer. This trip had been in planning since 2014 and the plaintiff was able to travel with the group in March 2015 but had persistent pain symptoms that made her days "miserable" throughout the trip. Walking improved her condition but riding in cars and planes exacerbated her symptoms.
- [45] She said they have been to Las Vegas on two occasions since the accident. Walking is their preferred activity; she finds relief from symptoms when walking.
- [46] The plaintiff said that one of the more upsetting limitations she faces is an inability to play with her children. She said she was a hands on parent and is unable to sit on the floor and play with her children with the usual level of participation she enjoyed before the accident. She said she cannot pick up the children or swing them around because of symptom exacerbation.
- [47] The plaintiff and her husband are in the process of adopting a child and expect the process to be complete in the spring of 2021. The child resides with them in a fostering relationship and is approximately one year old. She said she has been able to lift and carry this child because of the relief afforded by Botox injections she receives. The plaintiff uses various carrying devices that have allowed her to transport her new son without significantly exacerbating her symptoms.
- [48] The plaintiff said that she is able to bicycle with family; she has had modifications done to a bicycle and is able to pull her son in a trailer-type device.
- [49] The plaintiff continues to hike with the children but does not go out on her own in case there are problems that she could not manage with her physical limitations. She said they are not serious hikers but enjoy that type of outing.
- [50] She uses a backpack which shifts the weight of the child onto her hips and permits her to hike with the family without irritating her symptoms.
- [51] The plaintiff continues to cook for her family; she has installed an anti-fatigue mat to enable her to stand longer in the kitchen. However, she struggles with the prospect of large groups of family or friends coming to dinner.

- [52] The plaintiff demonstrated an online presence related to meal preparations and baking; some of her projects were sold to consumers who watched her online presentations. Latterly, she also began working at photography and joined her husband on photography projects.
- [53] The plaintiff is a creative person and her son suffers celiac disease. She began modifying recipes to accommodate her son and posted those recipes on YouTube. They became quite popular but she stopped because the process required too much time on the computer.
- [54] The plaintiff has not returned to her role as a youth group leader in her church. She feels she does not have the energy to engage with young women in high school. She lacks the confidence that she can be reliable in participating in that type of church activity. She has not returned to her music leadership at the church; music was not available in the church for some time but she does not engage in the program because of childcare issues.

Current Treatment

- [55] The plaintiff testified that she receives Botox injections every three months; these are the most successful treatments she receives and following a Botox treatment she is almost pain-free. She suffers from lower neck and shoulder stiffness and discomfort. She receives trigger point injections that ameliorate her symptoms.
- [56] She is taking Tramadol, Tramacet and Naproxen. She receives Amitriptyline to assist in sleep and takes migraine medications when her headaches flare-up.
- [57] She uses her hot tub three to four times per week and attends massage therapy two to three times per year. She has had one physiotherapy treatment in the last 18 months. She uses heat wraps around her neck and shoulder when the pain occurs. She also uses ice packs, but she prefers heat.
- [58] The plaintiff says she struggles with the physical limitations triggered by the post-accident symptoms. She was always an active, vigorous and productive person before the collision; she is emotionally discouraged and has depression and anxiety for which she is receiving medications.
- [59] She is trying to stay positive and upbeat but recognizes that she will need to take treatment for symptoms on an ongoing basis.
- [60] Finally, she testified that her endometriosis that caused significant pain pre-accident no longer bothers her because of a recent hysterectomy. However, she continues to have some discomfort in her left ovary.
- [61] Before the second accident, the plaintiff was taking Botox injections approximately every 12-14 weeks. Her headaches were substantially resolved after taking these treatments. Once she receives a Botox treatment, it takes several days to achieve the optimum relief and towards the end of the 12 weeks after a Botox treatment, she has a period when the

symptoms of head tension returns. Her left shoulder is still bothersome but she limits her trigger point injections in the shoulder and neck. Those injections do improve the symptoms in those areas.

The Second Accident

- [62] In June 2020 the plaintiff was driving to Vancouver to attend an independent medical examination by a physiatrist obtained by the defendants. She was stopped at the intersection of Main Street and Terminal Avenue when her car was struck by the vehicle from behind as a result of a train reaction by a third car in the line behind her.
- [63] The plaintiff was looking to the right at the time of impact but does not remember if her car was moved forward.
- [64] She immediately noticed aggravation of her symptoms in her neck, head and shoulder. The onset of headaches was immediate. The plaintiff continued to the doctor's office and then returned home. She had extremely sore neck and shoulder, and headaches. She applied heat to her neck and shoulder.
- [65] The plaintiff had a telephone conference with her family doctor three to four days later. At that time, she was feeling sore and, notwithstanding that her Botox had been administered two weeks before, was experiencing significant symptoms. Her family doctor told her to follow the same routine she had been on from before the second accident. She obtained some trigger point injections in her neck and shoulder; the symptoms did not resolve completely. She was able to return for a new Botox injection within a short time and obtained some relief.
- [66] She reports ongoing neck pain and shoulder pain that is exacerbated by driving. Overall, her current state of health is poorer than before the second accident.
- [67] The defendants concede that the Court should assess the plaintiff's damages globally for both accidents and make an award without distinguishing between the two causes.

Credibility and Reliability

- [68] In submissions the defendants conceded that the plaintiff appeared to be an earnest and forthright witness; he referred to her as a "fabulous witness" who appears credible. However, in submissions the defence raised questions concerning the plaintiff's reliability. Counsel referred to *Faryna v. Chorny*, [1952] 2 D.L.R. 354 as encouragement to consider the plaintiff's testimony as unreliable because it lacked the:

harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [69] The defence contends that the plaintiff exaggerated or overestimated her inabilities stemming from the symptoms and injuries. He contends she was a bright high functioning individual with a good work ethic and motivated to "get it done".
- [70] The defendant contends that if the plaintiff had genuinely experienced the problems she reported in 2016, she would not have expanded her business with Ms. Doucette. They contend that the plaintiff was confused and unreliable in her estimate of income loss.
- [71] They also contend that the plaintiff was not inclined to return to work while raising her children and her motivation is presently influenced by her desire to adopt their newest child.
- [72] The defendant contends that she has overstated the limitations on her ability to travel, to participate in her community activities, and find work. Overall he said her self-report is inconsistent with her actual activities.
- [73] The defence claims the plaintiff misled her family doctor because she wanted more time away from work to spend with her children; she was enlisting the doctor to support her claims.
- [74] The defence contends the plaintiff was not motivated to push through her pain and was actually functioning at a much higher level than she reported at trial.
- [75] The defence contends that the plaintiff reported 100% improvement from a September 2016 inter-muscular injection ("IMS") following which she had "no symptoms and no migraines". It is inconsistent to assert that her injuries improved and then deteriorated some three to four years after the accident. He also contends that the plaintiff's headaches were migraine type headaches and independent of any injury she sustained in the accident. The defence contends the migraines could have been caused by her hysterectomy and related treatments.
- [76] The defence contends that because the plaintiff was not entirely candid or accurate in her reports to Mr. Nordin his functional capacity evaluation cannot be relied on at this trial.
- [77] At this trial, the plaintiff introduced testimony from:
1. Jesse Wheeler, the plaintiff's husband;
 2. Kristy Millar a close friend of the plaintiff;
 3. Sharlene Wheeler the plaintiff's mother; and
 4. Megan Markloff.

- [78] The testimony of these friends and family was not successfully challenged in cross-examination. Although each of these people have a close relationship with the plaintiff, none of them testified in a manner or in detail in a way that undermined their credibility. For the most part, these corroborative and helpful witnesses gave testimony to the plaintiff's long-standing physical limitations and resilience.
- [79] Overall, I accept that the plaintiff's recollection of the details of her life spanning six years from the date of the first accident might be flawed. However, I conclude that her testimony on the important issues concerning her symptoms, the frequency and intensity of her headaches, and the ongoing limitations on her activity are not significantly undermined.

Medical Evidence and Findings

- [80] The major issue in the plaintiff's claim concerns the diagnosis and prognosis for those injuries caused to her in the accident. The most significant symptom of ongoing difficulty was the plaintiff's ongoing neck pain and headaches that she said were daily problems for her.
- [81] The plaintiff's family doctor, Dr. Ling Low, provided a report dated June 2, 2020 that chronicled her interaction with the plaintiff from the time of the 2014 accident until February 2020. She provided very little opinion in this report except when commenting on the outcome of each visit. The plaintiff also relied on a physical medicine and rehabilitation expert, Dr. Ansel Chu, whose report was dated January 22, 2018. The plaintiff obtained medical reports from Dr. Gordon Robinson, a neurologist and headaches specialist. His opinions are dated September 29, 2017, January 29, 2019, June 22, 2020, and September 8, 2020.
- [82] The defendants obtained a medical opinion from Dr. David Flaschner, a physical medicine and rehabilitation specialist, whose report is dated June 29, 2020.
- [83] A major issue to be resolved in this case centres on the discrepancies between the opinions of Dr. Robinson and Dr. Flaschner. Essentially, the defendants contend that the plaintiff's ongoing migraine headaches, currently treated with Botox injections, were not caused or contributed by the accident.

Dr. Ling Low

- [84] Dr. Low had been the plaintiff's family physician since August 1, 2013. Up to and after the plaintiff's accident, Dr. Low noted she suffered from endometriosis with severe pelvic cramps, rectal pain and diarrhea. She had premenstrual syndrome, mid cycle pain, Gastro Esophageal Disorder ("GERD"), and reflux disorder.

- [85] The plaintiff's first child was born in March 2012 and the second in April 2014, following which she had a worsening of her GERD symptoms but resolution of most of her pelvic pain. Dr. Low's clinical records include her observations from August 2013 including the plaintiff's severe low back pain accompanied by chronic PMS. She had cramps, diarrhea and rectal pain. She was taking the Zantac, Tylenol 3, Tramacet/Naproxen. By March 2014, the plaintiff reported being stressed with home and work, selling her house and business issues.
- [86] The records indicate the plaintiff complained of ankle, knee and shoulder pain bilaterally in August 2014; she had previously been treated with cortisone injections in her shoulder.
- [87] Dr. Low then set out a visit by visit description of the plaintiff's attendance that included the plaintiff's self-report, the doctor's examination observations and opinions.
- [88] After the accident, and on her first visit to the doctor on January 6, 2015, the plaintiff complained of headaches, neck and shoulder pain. She had good range of motion except for neck flexion. By May 2015 she continued to have headaches with moderate shoulder and neck pain after working 30 minutes. She told the doctor she was able to do so provided she took frequent breaks totaling 90 minutes per day. She had been taking physiotherapy and was urged to continue with that treatment and the use of anti-inflammatory medications. By June 3, 2015, the plaintiff was complaining of epigastric pain. The doctor recommended a kinesiology program and increased activity and a gradual return to work. The kinesiology program helped the plaintiff and she no longer had muscle fatigue with sitting or bending over to do housework. The main triggers were prolonged sitting for car travel and with lifting her child. By December 2015, the plaintiff's shoulder pain had improved and she was able to lift her child without pain. Her migraine headaches and neck pain were persisting after she had worked for 36 to 48 hours per week.
- [89] By March 2016, the plaintiff had no muscular spasms or tenderness to palpation over her neck and trapezius. She was working 15 to 20 hours per week - mostly cutting fabric and doing paperwork. She had full range of motion in her neck, shoulders and upper back. By June 8, 2016 the plaintiff had received three IMS injections. Her muscular headaches started in her left trapezius area. She was at a good level having rested from sewing, carrying children and housework. She did not need any medications for pain and was able to walk for exercise. She "had no issues with sleep, no headaches, no heat treatments needed". She did have a flare-up in her trapezius pain after sewing for 30 minutes. She had hired a contractor to help in her business.
- [90] In August 2016, the plaintiff had a pain flare-up after packing to move her residence and increased need to carry her children. Her neck pain caused her some headaches. By September 2016 she had had no migraine symptoms and some "mild pain" over two weeks. She told the doctor her IMS shots had worked well for her shoulder and she was not having ongoing pain. After recommencing sewing, pain in her neck triggered a migraine headache. Dr. Low noted that the plaintiff's lawyer had recommended her to receive Botox; the doctor said she was not recommended for that procedure because she had only had one headache

in the month.

- [91] By February 2017, Ms. Wheeler was reporting ongoing headaches, myofascial pain, and neck and her upper back pain. In the late fall 2017 the plaintiff had an increase in endometriosis pelvic pain every one to two months that she managed with non-steroidal anti-inflammatory medications. She had intermittent back pain related to her pelvic and urinary complaints.
- [92] By January 2018, she had been referred to Dr. Robinson to address her migraine symptoms.
- [93] In March 2018, the plaintiff suffered anxiety symptoms with palpitations as a reaction to steps taken to adopt a child. The doctor encouraged the plaintiff to practice self-care and exercise. She continued to have migraine headache triggers due to housework, driving and sewing in the fall of 2018. Her Botox continued every three months and was effective for migraine and myofascial pain control. There was a two week lag between the treatment and reduction in symptoms and a gradual wearing off of the benefit two weeks prior to the next treatment. Overall she was having anxiety related to the adoption of her son and associated lifting of the child. Her stress reactions aggravated headaches and muscular pain.

Dr. Ansel Chu

- [94] Dr. Chu was asked for an independent medical opinion concerning the plaintiff's injuries suffered in the 2014 accident. Dr. Chu provided a list of facts and assumptions relied on in preparing his report. He noted that the plaintiff had full range of motion of the neck with pain in the upper left neck when it was put into hyper extension. Flexion and rotation did not cause much pain; she had no mechanical problems with her shoulder and no mechanical problem with her back when he tested her range of motion. There was no neurological compromise but she had a focal pain in her left upper neck when he loaded and irritated the joint at C2-3.
- [95] The most painful region she complained about was her left upper neck. Pain was spreading from that area into the left shoulder. He said it was mechanical pain coming from her spine; a common source of mechanical pain is a whiplash injury to the facet joint. He noted that she was having headaches whenever her neck pain flared up; these were secondary headaches, sometimes severe, that caused nausea and photophobia. Neck pain can trigger migraine headaches especially in the upper neck.
- [96] Dr. Chu said the plaintiff's whiplash injury was the most likely cause of her chronic left neck pain and headaches in that they are related to the neck pain and secondary to the neck pain.

Dr. Gordon Robinson

- [97] Dr. Robinson is a neurologist with specific training, experience and skills in assessing and managing patients suffering from headache disorders. He has provided these medical services since the early 1990s. He has extensive training and was qualified to give expert opinion in this trial. He provided three opinions in support of the plaintiff's claim and one rebuttal opinion to the defence expert.
- [98] His first contact with the plaintiff was on September 26, 2017 on referral from plaintiff's counsel. In his September 29, 2017 report, he set out 38 assumptions based on the material he received from counsel and his examination of the plaintiff. He reviewed her treatment, history of headaches, her personal history, and personal circumstances.
- [99] He notes the plaintiff's claim is that her neck and headaches were causing problems daily.
- [100] He concluded that as a result of the accident, she sustained soft tissue injury to her neck and left shoulder without damage to her nervous system. Neck discomfort had continued since the accident and activities aggravating her neck pain were associated with headaches. The headaches were mild to moderate in severity and could become incapacitating with migraine features. His diagnosis of chronic post-traumatic headaches related to the whiplash was consistent with common symptoms following soft tissue injuries to the neck.
- [101] He said many patients recover from these injuries within weeks but a substantial number will continue to have headache and neck pain years after. Women are more prone to chronic difficulties due to the slender and less developed musculature in their necks.
- [102] He said that medications are often unhelpful in treating chronic post-traumatic headaches but exercise directed at improving general fitness may increase a person's ability to cope with pain. He said some daily medications could benefit and reduce her headache difficulties and she could be given trials of a number of medications. In the final analysis, Dr. Robinson concluded that the plaintiff would probably continue to have post-traumatic headaches and neck pain indefinitely. Her prognosis would be improved if her symptoms responded to treatments he outlined in the report, including medications.
- [103] Dr. Robinson's second report dated January 29, 2019 discussed the plaintiff's progress under Botox treatments. This neurotoxin therapy is usually effective for 12 weeks; improvement is gradual over the first few weeks after administration and wears off at the end of the third month after the injection.
- [104] On June 22, 2020 Dr. Robinson again reported on the plaintiff's response to Botox treatments that had begun in October 2018. He noted the plaintiff describing the treatments as "amazing" and describing the difference as "day and night". During these post treatment months, she may develop a headache once per month related to her activity level but takes medication and "it goes away". There had been no complications from her treatment.

- [105] He said that there had been a period when she was not under the influence of a treatment and her migraine headaches began occurring daily. Usually, the effects of Botox wear off prior to her scheduled appointment for another treatment; she takes medications and some topical substances that are helpful. He described the plaintiff's views concerning her activity levels; she told him that she could not sit and sew for longer than an hour and needed to pace herself when doing housework. She does not do yard work.
- [106] He concluded that her post-traumatic headaches will not likely improve but can be controlled with ongoing Botox treatments.

Dr. David Flaschner

- [107] Dr. Flaschner is a physical medicine specialist from Alberta who was retained by the defence to provide an independent examination and opinion. No issue was taken on questioning of his qualifications and he was qualified to give opinion evidence in the field of assessment and treatment of musculoskeletal disorders and management of chronic pain and headaches.
- [108] In his written report Dr. Flaschner opined that the plaintiff suffered a cervical thoracic muscular ligament sprain/strain, chronic and persistent headache attributable to whiplash.
- [109] He observed that migraine headaches did not appear to be concerns in the plaintiff's immediate post-accident notes but were reported to become daily by February 18, 2015. Her headaches improved by January 12, 2017 at which point the migraines occurred once or twice per month.
- [110] In providing a differential diagnosis, he said that if she had pre-existing migraines, the post-accident symptoms would represent an aggravation of the prior condition. If there were no pre-existing headache history, then the current presentation represents a consequence of the injuries sustained in the accident.
- [111] Dr. Flaschner concluded that cervical thoracic injury and associated headaches are not "expected to be progressive" with time. He speculated that the plaintiff's use of Lupron could be associated with migraine headaches. He also felt that other secondary causes should be investigated given the progressive symptoms in 2018 that led to her treatment with Botox. He believed Dr. Robinson had not been aware of improvements to her headaches after the accident and subsequent to the time of his consultation.

- [112] Dr. Flaschner said:

Given the injury described above, there is an expectation that Ms. Wheeler should be able to tolerate full-time sedentary to light level employment with the ability to change position and posture through the day. Prolonged static postures, heavier lifting and overhead tasks may exacerbate the cervical thoracic pain.

[Emphasis added.]

[113] He said it is important that Ms. Wheeler continue to exercise through her cervical thoracic region with kinesiology exercises on an indefinite independent basis.

[114] Dr. Flaschner was not familiar with the medical services plan in British Columbia and questioned Dr. Robinson's charge for services outside the program. On that point he was clearly wrong; Dr. Robinson pointed out that MSP does not permit billing for this service.

[115] Dr. Flaschner's recommendations included the following:

At this point in time it is likely that Ms. Wheeler will require some combination of ongoing medication management with either trigger point injection or Botox treatments. The Botox has been specifically for migraine, which as noted above had been well-controlled in early 2017. The worsening of migraine likely relates to factors not directly causally related to the collision of 2014 given the progression of symptoms greater than three years post injury.

[116] Thus, the plaintiff will require some combination of ongoing medication management with either trigger point injection or Botox treatments. Dr. Flaschner believed that her worsening migraine headaches were not likely related to factors "not directly causally related to the collision of 2014". Under examination in chief, he said that headaches with whiplash injuries usually peak after a period of time and then improve. Residual symptoms do not usually deteriorate and later declines are not direct consequences of the injury.

[117] He discussed the possibility of diagnostic blocks and also suggested that patients with post whiplash headaches will "often respond favourably to C2-3 medial branch blocks or third occipital nerve blocks." to treat the symptoms.

Conclusion Regarding Diagnosis

[118] The primary issue stemming from the medical opinions is whether the plaintiff's ongoing migraine headache symptoms have been caused by the injury she suffered in the 2014 accident and whether the ongoing Botox treatment directly related to the car accident injuries or some other cause. Dr. Robinson was firmly of the opinion that the accident was the cause of her ongoing headaches whereas Dr. Flaschner could only say that her worsening of migraine headaches from early 2017 were not likely "directly causally related to the collision". His opinion was premised on the proposition that a worsening of symptoms three years post injury indicated some other cause of those symptoms. Resolving this discrepancy will go a long way in determining the measure of the plaintiff's damages.

[119] In Dr. Flaschner's discussion, he noted that the plaintiff did not suffer a direct injury to her head but had experienced headaches that could be classified as "persistent headache attributable to whiplash". He said the migraine headache did not appear to be a concern in the initial post MVA notes but was reported as a daily occurrence from February 2015. Her headaches improved and by January 2017 were occurring once or twice per month.

[120] He went on to say that her symptoms appeared to "progress for reasons that are unclear in early 2018. He said headaches associated with whiplash symptoms usually peak after a certain time and then improve. He said residual symptoms do not "usually deteriorate". He noted that migraine headaches are not expected to be progressive.

[121] Dr. Robinson said that since he assessed the plaintiff in September 2017, there was nothing in her description suggesting that the headache disorder had been "progressive" or that the diagnosis of persistent post-traumatic headache is incorrect. Dr. Robinson set out the criteria for headaches attributed to whiplash including the following:

Description:

Headache of greater than three months duration caused by whiplash

Diagnostic criteria:

- A. any headache fulfilling criteria C and D;
- B. whiplash, associated at the time with neck pain and/or headache, has occurred;
- C. headache has developed within seven days after the whiplash;
- D. headache persists for more than three months after the whiplash;

E. not better accounted for by another IACHD -3 diagnosis

[122] He said whiplash injuries causing headache disorders can vary in frequency, duration and severity. Individual's ability to adapt vary from person to person. He diagnosed the plaintiff's headache injuries based on the temporal connection between the injury and the accident.

[123] He testified that some improvements from chronic headaches can occur after two years post accident but those improvements are unlikely. He said that people without previous headache disorder complaints are not likely to suffer headaches due to the use of analgesics. He also indicated that analgesics are often unhelpful in treating chronic headaches.

[124] Dr. Flaschner said that "secondary causes of migraine should be investigated given the progressive symptoms in 2018 that led to the prescription for Botox." Dr. Flaschner did not opine on the causes of the plaintiff's migraine headaches, save to say that they were not a direct result of the accident injuries.

[125] Dr. Robinson reiterated his opinion that the plaintiff suffers chronic post-traumatic headaches. He opined that headache related to neck injuries may be present from the outset or can gradually develop in the weeks and months following an injury. He also said that headaches can be caused by 340 different triggers including diet, caffeine use, alcohol, hormonal changes and other factors.

- [126] In cross-examination, Dr. Flaschner said he would not defer to the opinion of Dr. Robinson because assessing post-traumatic headaches is a core part of his practice; he recognizes that Botox can be effective for treating migraine headaches but he insists the plaintiff's migraine headaches were not caused directly by the accident.
- [127] He testified that by the fall of 2016 the records indicate the plaintiff was not having migraines on consecutive days; she was having those symptoms once per month. He contends that Dr. Robinson did not address the worsening of the plaintiff's migraine symptoms after 2017 or her achievement of 100% relief after the combination of trigger point injections. He contends that she did not have a diagnosis of migraine headaches before 2018.
- [128] Dr. Robinson believes that the plaintiff may increase her sense of well-being and ability to cope with pain if she takes regular exercise and improves her general fitness.
- [129] Of some significance in the defendants' case is Dr. Flaschner's reference to an opinion obtained from a Dr. Wu in a pain clinic note from July 26, 2018 indicating "Her pain history is significant for migraine headaches. She is a smoker."
- [130] No one testified in this trial that the plaintiff had a history of migraine headaches prior to the accident. Although the plaintiff said she had some headaches during her pregnancy, she did not believe her acid reflux medications triggered headaches. She said she experienced significant pain during ovulation and mid cycle pains that could become excruciating, stabbing and burning, but she was not questioned about pre-accident history specifically about migraine headaches.
- [131] The major point taken by Dr. Flaschner is that "migraine" headache would not be an "expected" or "likely" consequence of the neck injury she suffered in the accident and that any ongoing reliance on Botox would not be "directly" necessary due to the defendants' negligence. He believed the changes in the plaintiff's headache presentation around January 2017 (occurring once or twice per month) progressed into early 2018. Botox was not necessary in 2017, and because he would not have expected cervical thoracic injury and associated headache to progress with time, he believed other causes should be investigated.
- [132] Dr. Robinson opined that the plaintiff's headaches were associated with mild to moderate pain that could be incapacitating with "migrainous features" and caused by the accident. He said that headache is a common symptom following soft tissue injury to the neck and "may have various characteristics that are similar to primary headaches such as migraine and tension-type headaches."
- [133] Dr. Robinson formed the opinion that the plaintiff has suffered headaches since the accident but does not apply the diagnosis of "migraine headache"; he described her condition as chronic post-traumatic headaches that are consistent with the International Classification of Headache Disorders (2013).

- [134] It appears that the term "migraine" was used by Dr. Low as early as December 9, 2015 and continued into 2016. In January 2018, Dr. Low referred to the plaintiff's headaches as "progressing with migraine features".
- [135] The defendants argued that the plaintiff's headaches were independent of any effects caused by the accident. They contend the migraines could have been caused by her hysterectomy and that causation has not been established.
- [136] The defendants argued that the plaintiff received headache relief from trigger point injections and that Dr. Chu did not recommend Botox treatments. They contend that Dr. Chu's description of the plaintiff's symptoms is the most reliable.
- [137] The defendants argued that Dr. Robinson was evasive, allusive and argumentative in his testimony, and would not accept elementary propositions. I did not find that in Dr. Robinson's testimony. The defence conceded that Dr. Robinson is a leading authority in the field but urged the Court to find that Dr. Robinson had overstepped his role.
- [138] The defendants argued that the plaintiff was not motivated to push through and endure her symptoms en route to recovery. He contends the plaintiff misled her family physician because she wanted more time away from work with her children. As an example, they cited Dr. Low's report that the plaintiff said she was 100% better after her first trigger point injection; the plaintiff denied 100% recovery, although her symptoms were greatly diminished. She had no symptoms and no migraines for two weeks.
- [139] Dr. Flaschner and Dr. Robinson agree that the plaintiff's current presentation is consistent with cervical thoracic sprain/strain that has become chronic. She has "persistent headache attributable to whiplash."
- [140] Dr. Flaschner has suggested further investigation in conjunction with his opinions that the plaintiff's current headaches are "not expected" or "are not likely" consequences of the injuries sustained in the accident. He clearly had some doubt or uncertainty concerning the causes of the plaintiff's headaches. He did not opine that the headaches could not have been caused by the neck and shoulder injuries. Given Dr. Robinson's extensive practice and experience in neurology and the assessment and management of persons suffering headache disorders, where his opinion conflicts with Dr. Flaschner's, I accept Dr. Robinson's opinion.
- [141] I conclude that the plaintiff has continuing chronic post-traumatic headaches caused by the accident and that the optimum treatment continues to be with Botox injections. Weighing the evidence given by Dr. Flaschner in contrast to the opinions of Dr. Robinson, I am satisfied that Dr. Robinson's opinions establishes, on the balance of probabilities, that the plaintiff's headaches and neck pain have and will continue to impact her overall capacity to function on a day-to-day basis in between the periods following Botox treatments and were caused by the injuries she suffered in the accident.

Non-Pecuniary Damages

- [142] The plaintiff seeks an award of \$125,000 under this head of damages. The defendant argued that the more appropriate range is \$40,000-\$60,000 if the plaintiff's complaints of increased headaches after June 2017 are not related to the accident. They contend that, if the plaintiff's headache complaints after June 2017 are related to the accident, a fair award would be \$80,000-\$100,000.
- [143] At the time of the accident, the plaintiff was a bright high functioning individual with a good work ethic and multiple creative skills. She took initiative in developing a successful business in which she was able to fill a niche for retailers. She was a person with great energy in her family life, social interactions with others, entrepreneurial effort, and her overall creative and energized activities.
- [144] Before the accident, she was successful in struggling with symptomatic endometriosis, premenstrual syndrome, mid cycle pain, GERD, reflux disorder and a heart anomaly. Immediately after the accident, she developed symptoms in her shoulder and neck accompanied by ongoing headaches. She made changes in her lifestyle to accommodate her limitations. Headache, left neck and trapezius symptoms continued to affect her, with specific limitations in her fabrics business, long drives, standing, and bending over.
- [145] The plaintiff had two children at the time of the accident and enjoyed a wide range of physical activity including skiing, house care and maintenance, church and youth group activity, social and entertainment activity, and several creative activities involving her business and cooking.
- [146] She reported significant pre-accident symptoms connected to her gynecological difficulties eventually leading to a hysterectomy in 2017. This condition was accompanied by a long history of medications including Tylenol, Tramacet and others. In August 2013 she had received a prescription for 300 Tramacet tablets.
- [147] She testified about significant pain and discomfort that was initially disabling but has evolved into periodic disabling symptoms that are intermittently relieved by her Botox treatments. Her mood has been negatively affected by the ongoing symptoms and care for her children, driving, walking and hiking have been problems.
- [148] She testified that the second accident merely aggravated the pain levels in the areas affected by the first accident. In support of her claim for \$125,000 non-pecuniary damages the plaintiff cited:
1. Stapley v. Hejslet, 2006 BCCA 34 for the general principles of non-pecuniary damage assessments [Stapley];
 2. Morlan v. Barrett, 2010 BCSC 1767 where nonpecuniary damages of \$125,000 was awarded [Morlan];

3. Slater v. Gorden, 2017 BCSC 2265 where nonpecuniary damages of \$135,000 was awarded [Slater]; and
4. Noori v. Hughes, 2018 BCSC 965 where non-pecuniary damages of \$125,000 was awarded [Noori].

[149] The defendants refer to three cases:

1. Duffy v. Dutt, 2020 BCSC 995 where the plaintiff was awarded \$55,000 non-pecuniary damages [Duffy];
2. Johnson v. Heer, 2020 BCSC 1168 where the plaintiff was awarded \$75,000 non-pecuniary damages [Johnson]; and
3. Richmond v. Osztovits, 2019 BCSC 1984 where the plaintiff was awarded \$70,000 non-pecuniary damages [Richmond].

[150] The principles concerning non-pecuniary damages awards were summarized in Stapley as follows:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from Lindal v. Lindal, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

[Emphasis added.]

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

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

(f) loss or impairment of life;

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

(g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[151] Non-pecuniary damage assessments in other cases are helpful to orient the court to a specific range of damages in the present case. In every case, the plaintiff has unique features and variable symptoms that impact their lives differently. As an example, the plaintiff's symptoms and lifestyle after the accident in this case are not as severe as those in the case of *Morlan*.

[152] In *Slater*, the plaintiff's psychiatric condition was substantially worse than Ms. Wheeler's condition but she would continue working with the police in an accommodated position. Her injuries were neck, left shoulder, low-back and left hip area leaving her with chronic pain in low back and hip. The plaintiff was withdrawn from social activity and prone to emotional breakdown.

[153] In *Noori*, the plaintiff suffered a low back injury limiting performance at her employment, household and recreational activities, as well as limiting her ability to endure prolonged sitting, standing, and stooping, and impacting recreational physical activity. She was permanently disabled due to the injuries. She suffered from back, neck and shoulder complaints in addition to headaches.

[154] In *Duffy*, the plaintiff suffered neck and back pain with occasional headaches occurring once or twice a month and sometimes severe. Her prognosis was poor and she had chronic neck and back pain. She was continuing to improve but was expected to have ongoing neck and back symptoms. The plaintiff had some low back pain and had a poor prognosis for the chronic complaints. The court did not accept the medical opinion that the plaintiff's symptoms had plateaued.

[155] In *Johnson*, the plaintiff was experiencing daily pain and taking over-the-counter drugs and other therapies. The symptoms were not likely to resolve and she would live with those symptoms for a long period of time. She had anxiety but no clinical diagnosis concerning that condition. She is able to work without accommodations but some pain required modification in her duties. She had some moderate limitations and the ability to perform domestic chores and was otherwise a stoic individual.

- [156] Finally, in Richmond, a pre-accident healthy and active plaintiff suffered continuing chronic neck, shoulder and upper back pain and headaches. The symptoms were likely to continue; the headaches prevented the plaintiff from participating in the same type or intensity of physical activity. She could not run or hike and had limitations in playing with her children. She was a teacher who was expected to have ongoing chronic pain and related fatigue. Some improvement was possible.
- [157] The plaintiff is able to bicycle with her family; it is equipped with upright handlebars to prevent her crouching over. She continues to hike with her family but will not hike on her own in case of difficulties developing with the children. She also hikes with friends. She is able to use a backpack which shifts the weight to her hips and enables her to walk. She uses an anti-fatigue mat in her home which enables her to cook and perform other in-house chores in the kitchen. She has a particular interest in preparing gluten-free meals. She says she is unable to do home renovation work as she had before the accident. She goes to the ski hill with her family, but does not ski.
- [158] Overall, the defendant argues that the plaintiff's self-reports of her pain and disability are inconsistent and exaggerated. They contend the plaintiff's evidence is unreliable while accepting that she has suffered headaches and soft tissue injuries resulting from the accident.
- [159] The defendants conceded that if I find that the plaintiff's headaches are attributable to the car accident and Botox is an appropriate treatment for those symptoms, then her non-pecuniary award should be in the range of \$80,000-\$100,000. If I reject the plaintiff's claims concerning the cause of her headaches, then she should be awarded between \$50,000 and \$75,000 for mild-to-moderate injuries that were resolved by June 2017.
- [160] Taking into account the permanent or long-term effects of the plaintiff's injuries and the broad effects on her overall lifestyle, pre-accident interests and activities, I conclude the plaintiff's life has been dramatically impacted. I also conclude that the plaintiff has some improved capacity after Botox treatments that lead to restoration of her energy, focus on her interests and her activity levels. During the post-accident recovery phase, the plaintiff's online presence related to food preparation, crafts, and other activities such as photography indicate that she has the capacity to overcome some of the physical limitations that have affected her.
- [161] I find on the uncontroversial evidence of the physicians that the plaintiff will continue to have ongoing symptoms from the injuries suffered in the accident. I accept there is some prospect of improvement in those symptoms but, the long-term prognosis may involve some changes but do not include complete resolution of her symptoms.

[162] I accept the defendant's contention that the plaintiff's pre-accident health was punctuated with some complaints including endometriosis and reflux; none of these interfered with her ability to work. The plaintiff has received ongoing treatment with Botox and achieves almost complete symptom resolution shortly after a treatment followed by a deterioration in symptoms before the next treatment.

[163] Taking into account the plaintiff's age and her high achieving abilities, the interference with her social relationships, severity and duration of her neck and headache symptoms and changes brought about to her lifestyle, I award the plaintiff non-pecuniary damages of \$100,000.

Loss of Past Income Earning Capacity

[164] The plaintiff contends that the loss of her earning capacity from the date of the accident to the trial is \$40,000. The defendant contends that any reduction in the plaintiff's gross income from the date of the accident to 2020 was not caused by the accident but by other unrelated personal circumstances.

[165] Her reported earnings since 2009 are:

- a) \$42,562 in 2009
- b) \$32,442 in 2010
- c) \$33,200 in 2011
- d) \$29,101 in 2012
- e) \$10,761 in 2013
- f) \$9119 in 2014
- g) \$7560 in 2015
- h) \$7481 in 2016
- i) \$8352 in 2017
- j) \$588 in 2018
- k) \$125 in 2019

[166] This range of incomes reflects the plaintiff's choice to give up employment opportunities and concentrate on her personal business plans in 2012. Her line 150 income for 2019 (\$125) is derived from \$1,066 of gross business income.

[167] The plaintiff is a talented and creative craftsperson with a wide variety of interests and skills that permitted her to excel in her sewing, cooking, and creative endeavours. She was and is a dedicated mother caring for three children; they are in the process of adopting their third child and that process is expected to complete in the spring of 2021.

- [168] The plaintiff referred to the principles informing past loss of earning capacity awards set out by Dickson J. (as she then was) in *Hardychuk v. Johnstone*, 2012 BCSC 1359 [Hardychuk] at paras. 175-178. The goal of this award is to restore a plaintiff and compensate for lost income or earning capacity existing when the accident happened. Madam Justice Dickson noted that the burden of establishing losses under this head of damages is on the balance of probabilities and involves a consideration of hypothetical events. It is the hypothetical possibility that is to be taken into consideration and, as long as there is a real and substantial possibility of loss, an award should be made.
- [169] The defence contends the plaintiff suffered no loss because her 2015 income exceeded her gross income from 2013 and 2014. The defence contends that any increased labour costs incurred for her business were reimbursed between \$7,000 and \$8,000 by ICBC during 2015. In the result, she sustained no overall post accident loss.
- [170] In assessing the plaintiff's claim, it is important to recognize that some of her increased labour costs were reimbursed by ICBC and she had some relative success in increasing her income in 2016. It is apparent that her pre-accident health caused difficulties in 2016.
- [171] The defendant contends the plaintiff made a choice to devote her energy and effort to caring for her children and would, absent the accident, have been less engaged in her business affairs because of that devotion. They contend the plaintiff did not suffer damage in the nature of the capital asset loss because the sewing business was not a capital asset.
- [172] The defendants point to the many online income earning activities pursued by the plaintiff after the accident including cooking special meals, creative work with her crafts business, organizing the Agassiz market, executing a photography program for residents of Agassiz during the Covid-19 pandemic, and working in her husband's professional photography business. They contend that the plaintiff said her earned income from the photography business was "about \$2000" and there was no clear or convincing testimony concerning her income or her capacity to perform this work.
- [173] The defendants also point to the plaintiff's rejection of a job offer at Prospera Credit Union in the Agassiz area and her rejection of possible employment at Canada Post based on the physical requirements she expected would limit her ability. She also acknowledged that she was employed by her husband's company to perform filing, computer work and invoicing in four-hour shifts.
- [174] Overall, coupled with the demands of her family including three children, and maintaining her home, the defendants argue it is unlikely the plaintiff would have earned more income if she had not been injured in the accident.
- [175] It is important to recognize that past income loss is not achieved by mathematical calculations. In assessing past income losses, the analysis focuses on the diminution in capacity to earn income as the basis for compensation. In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, the Court of Appeal said at para. 30:

- [30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.
- [176] In this case, I accede to the plaintiff's argument that her capacity to earn income between the date of the accident and the trial has been affected and that, but for the accident, she would have been able to perform more of her income earning activities.
- [177] During the year 2015, she was compensated by ICBC for the wages paid to Stephanie Doucette, who performed some of the sewing work the plaintiff would otherwise have performed.
- [178] The plaintiff invites the Court to simply accept that her average earnings before the accident were \$11,000 per year (totaling \$63,250 for the 69 months between the accident and trial) and subtract actual earnings of \$23,270 to arrive at a past income loss of \$39,980.
- [179] The plaintiff did not provide copies of her full income tax returns; she tendered Canada Revenue Agency assessments for each year to demonstrate her income. I note that in 2013 her netted business income was \$4,666 and in 2014 it was \$7,219. This sum contrasts with 2015 where she had business income of \$3,724 (after consideration of the money paid to her by ICBC). In 2016 her net business income was \$7,481, to \$8,352 in 2017, \$588 in 2018, and \$125 in 2019.
- [180] Based on her income in 2014, it seems likely that she would have earned approximately \$40,000 between the accident and trial. Taking into account the other priorities in the plaintiff's life, her success in managing headache symptoms between treatments, her capacity to engage in her online business, and her skills overall, I assess the impact of her impaired earning capacity before trial at \$16,500 subject to the statutory deductions. If any erasure arises concerning these calculations liberty to make further submissions is granted.

Loss of Future Income Earning Capacity

- [181] The plaintiff contends that her future earning capacity has been much diminished and that \$500,000 is a fair assessment of the impact of the accident and her injuries on her earning capacity.
- [182] Under this head of damage, the plaintiff also relies on the summary in Hardychuk setting out principles for future impaired earning capacity claims: see paras. 192-198.
- [183] The plaintiff concedes that for the next three years she will not be returning to full-time work even without the accident because of her commitments to their new child. She contends that her income for the next three years would, but for the accident have been the same as her pre-accident income loss; she claims \$33,000.

- [184] The plaintiff relies on a functional capacity evaluation report dated August 9, 2019 prepared by Lana Malinowski. She reported that Ms. Wheeler is not "well-suited to working as a seamstress" as a result of her injuries. She said the plaintiff could reasonably move into an alternate line of work but any new position would take into account her overall limitations. Ms. Malinowski said that her present limitations might prevent her from moving into another career.
- [185] Ms. Malinowski reported in her August 2019 report she does not believe there are any accommodations or modifications to the workplace that would eliminate the plaintiff's need for neck flexion, which is an essential part of cutting fabric. Limitations on her capacity are more significant for the periods leading up to any one of her frequent Botox injections.
- [186] The plaintiff asks the Court to take into account her 2009 to 2011 incomes as a measure of her capacity to earn income. In those years she earned: \$42,562 in 2009; \$32,442 in 2010; and \$33,200 in 2011.
- [187] The plaintiff argued that her first child was born in March 2012 and she earned only \$16,000 in three months that year. Extrapolating forward from 2012, she argues her income for 2012 would have been \$63,000 if she had remained employed full time with Glentel. She contends her average of earnings from 2009 to 2012 were \$42,800 per year.
- [188] The plaintiff relies on the report from Derek Nordin dated April 27, 2020. Mr. Nordin opines that retail sales persons working full-time earned \$38,941 in 2016. The plaintiff contends that she was a sales supervisor for Glentel before the accident her earnings would have been in the order of \$43,000; Mr. Nordin opined that a retail sales supervisor could have earned \$43,344 in 2016.
- [189] Mr. Nordin recognized that the plaintiff had intellectual capacities to pursue higher education but did not think that plan would be a viable option due to problems she has with pain and headaches. The plaintiff concedes that she will earn income in the future but at a reduced level from the average income she expected to earn prior to the accident. Since 2019 she had applied for a variety of jobs with incomes based on \$18 and \$22 per hour. She asks the Court to assume that she would work part-time at \$20 per hour; working 20 hours per week at this rate she would earn almost \$21,000 per annum.
- [190] The plaintiff also relied on the actuarial opinion of Mr. Curtis Peever who determined that an annual loss of \$23,000 in present-day value would result in a \$560,000 cumulative loss for the plaintiff up to age 70.
- [191] The plaintiff suggests that after taking into account both positive and negative contingencies that this "high energy or entrepreneurial spirited individual" could have earned income significantly more than \$43,000 per year. On that basis a lump-sum award for impaired earning capacity should be \$500,000.

- [192] The defendants contend that the plaintiff will not suffer any future loss of earnings nor has she suffered any diminution in her income earning capacity as a result of the accidents. In any event, if she has suffered a loss under this head of damage, loss is nominal.
- [193] The defendants contend that Ms. Malinowski did not test the plaintiff or assess her ability to perform sewing functions essential to her craft business. Further, she did not attend the plaintiff's home to observe her in the context of the domestic situation nor to assess her in sewing. It was noted she could sew for a period of one hour before the onset of headaches.
- [194] The defendants argue the plaintiff's expert opinions on this point were each dependent on her self-report and she tended to overstate or exaggerate her circumstances. The defendants contend the plaintiff is a determined person who can overcome limits caused by pain and can persevere in goals she wishes to obtain.
- [195] The principles concerning assessment of impaired earning capacity claimshave been described in *Perren v. Lalari*, 2010 BCCA 140 [Perren] and in *Morgan v. Galbraith*, 2013 BCCA 305 [Morgan]. In *Perren*, the Court said:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
- [196] The underlying analysis focuses on loss of earning capacity and not loss of earnings. The assessment is based on a "real and substantial possibility and not mere speculation": see *Perren* at para. 30.
- [197] The Court in *Morgan*, in referring to *Perren*, endorsed the approach articulated in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (S.C.) as follows:
- [53] As already noted, in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach (rejected by the trial judge here) or the capital asset approach, as described in *Brown* (the approach adopted by the trial judge) to determine Mr. Morgan's lost earning capacity, given Mr. Morgan's career path was uncertain at the time of the accident. The trial

judge stated at para. 56:

Brown v. Golaiv (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), cited above, and cited elsewhere by our Courts many times, provides the approach to use for a person whose path is unclear. The plaintiff's injury is treated as the loss of an asset. Finch J., as he then was, listed the following as considerations in *Brown* for awarding loss of future income:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[198] The plaintiff invited the Court to conclude that she has established a real and substantial possibility that her future income earning capacity has been limited by the symptoms stemming from the car accident that will permanently impact her.

[199] I am not satisfied that a mathematical calculation as presented by the plaintiff's actuary is supported by the evidence. It is uncertain if the plaintiff will achieve much improvement, although some changes may occur if she pursues a kinesiologist's intervention and engages in an appropriate exercise program. She may also move into an alternate line of work albeit with limitations.

[200] The plaintiff was and is a dedicated mother and I conclude she will devote her time and energies to the needs of her children even after they are all enrolled in school. Absent the accident, I conclude the plaintiff would likely have followed the same pattern of caring for her children and would not have taken full time employment or expanded business responsibilities.

[201] I am satisfied the plaintiff will enjoy prolonged periods of symptom relief from Botox treatments and that her creative abilities, entrepreneurial spirit, and capabilities may equip her to achieve some level of income commensurate with her expectations before the accident. Remembering that it is the loss of capacity that is measured in determining her economic future, I am satisfied that more likely than not she will not be limited to the extent suggested in her submissions and that her residual income will likely be greater than \$20,000 per annum. It is not possible to make an accurate assessment of her potential earning power, safe to say that it will likely exceed \$20,000.

[202] There were shortcomings in the functional capacity evaluation. There was no testing of the plaintiff's ability to sew. Ms. Malinowski said the plaintiff was not well-suited to working as a seamstress because of her limited neck flexion. She could not estimate the extent of the plaintiff's limitations shortly before receiving a Botox treatment without further

assessment. That assessment was not done. She also opined that the plaintiff might not be able to schedule any work as a seamstress for times she was benefiting from Botox injections. However, Ms. Malinowski said that the plaintiff "could reasonably move into an alternate line of work, it is important that one take into account the overall limitations that the client has, as outlined in the above table." There were some limitations that might prevent her from moving into another career.

- [203] Mr. Nordin confirmed the plaintiff could complete a post-secondary degree involving two to four additional years at school. He said that she would be unlikely to re-enter the workforce as she had intended and that because of the flexion difficulties retraining did not appear to be a viable option; I infer from his comment that he is speaking about retraining in the area of creative and sewing activities. He encouraged her to pursue her interest in photography.
- [204] It is important to note that before the accident the plaintiff had changed her focus from retail sales to her home-based business following the birth of her first child. It is evident that the plaintiff would not have returned to any type of full-time work before her youngest child (not yet adopted) is at school, sometime in 2024 or 2025 when she will be approximately 38 years old.
- [205] The plaintiff has in her pre-and post accident life demonstrated a determination and ability to accomplish goals in spite of limitations caused by the symptoms of her injury. I am satisfied that the evidence establishes the plaintiff's ability to earn income in the future has been diminished. I have accepted that the plaintiff's headaches, sometimes migraine-type headaches, were caused by the injuries sustained in the accident and that there is a real and substantial possibility that her future income will be diminished due to these symptoms.
- [206] I find that the proper approach to the assessment under this head of damages is to consider the capital asset approach. The plaintiff is less capable overall of earning income from all types of employment or entrepreneurial efforts. In part, this is demonstrated by her reliance on Botox treatments that do not provide permanent relief and leave her at a diminished capacity leading up to the next injection. For the foreseeable future she will be less marketable or less attractive to potential employers after 2024 or 2025. Working with an understanding and flexible employer will, more likely than not improve her income earning capacity. The physical limitations described by the plaintiff, in particular looking down when focused on sewing and similar type of activities, deprive her of the advantage of many job opportunities that were otherwise open to her. On a cumulative basis, the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

- [207] I accept there is some room for improvement, some possibility of improving her education, some possibility of finding work within her capacity during the months between Botox injections, all coupled with her energetic and determined efforts at a wide range of endeavours. These latter endeavours were well-chronicled in the online presence she had established and activities she had been able to engage in.
- [208] Taking into account all of the positive and negative contingencies I assess the plaintiff's loss of future earning capacity at \$325,000.

Loss of Housekeeping Capacity

- [209] The plaintiff contends that her ability to perform household chores and yard work has been reduced as a result of her injuries. She contends that \$20,000 would be a fair assessment of that loss of capacity. The defendants contend she has suffered no loss of capacity for housekeeping or performing yard work and should not be awarded any sum under this head of damages.
- [210] The Court of Appeal outlined the options for assessing impaired capacities to perform housekeeping duties in *Liu v. Bains*, 2016 BCCA 374, it said:
- [25] Since the decision in *Kroeker*, it has been well-established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63.
- [26] 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. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.
- [211] In *Quigley v. Cymbalisty*, 2021 BCCA 33, at paras. 71-72, the Court of Appeal reiterated:
- [71] The loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 73; *Kim* at para. 28. It is within 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: *Liu v. Bains*, 2016 BCCA 374:
- [26] 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. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding

necessary replacement costs.

- [72] In Kim, Chief Justice Bauman suggested that 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, 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, this is not an inflexible rule. It remains within the judge's discretion to determine whether pecuniary or non-pecuniary damages are more appropriate: Kim at para. 33.
- [212] In this case I conclude that for a period of time the plaintiff struggled to perform the household tasks she had performed before the accident. I also accept that on an ongoing basis, the plaintiff is more likely than not to experience some reduction in her capacity to do the household work and yard work. She seeks a "capital asset" approach to the impairment in her capacity.
- [213] It is important to note that in between her Botox treatments, the plaintiff is not encumbered by the symptoms that have limited her activity; however, in the times shortly before she receives Botox and in the short while after receiving the treatment, she suffers more pronounced symptoms. In these times her capacity will be affected. I am satisfied that a fair measure of her loss capacity is \$20,000.

Costs of Future Care

- [214] The plaintiff claims that her needs for future treatment and care related to the injuries caused by the accident should be assessed at \$201,124. The defence contends that her future care needs will be nominal for increased medications used to manage her occasional ongoing subjective symptoms.
- [215] The plaintiff's claim for these damages is supported by the opinion of Ms. Malinowski who listed the costs for kinesiology services, a gym pass, massage therapy, ergonomic equipment and tools, occupational therapy assistants, ergonomic cleaning supplies, and home cleaning support, but not the Botox treatments.
- [216] The plaintiff has continued to use Botox to address her headache and neck symptoms and contends she will continue with that treatment on an ongoing basis. Neither doctor predicted if nor when Botox injections might be discontinued. Conversely, neither doctor opined that she will require Botox injections for the balance of her life.
- [217] Dr. Robinson said that she will probably have post-traumatic headaches and neck pain indefinitely but her prognosis may improve if her headaches respond to treatments including daily preventative drugs, neurotoxin and a cervical facet blocking.

- [218] The plaintiff argued that Dr. Robinson currently charges \$100 per treatment of Botox, but that when he retires, she will be faced with treatment costs of up to \$250 per visit. The plaintiff travels 242 km to Vancouver to receive Botox. She contends that she will need to spend \$1350 per year on accident related medications. Each Botox treatment costs \$781 for the medication and \$100 for Dr. Robinson's fee. She also contends that she will spend \$105 four times per year for massage therapy, which she takes as the Botox ceases to be effective at the end of each interval. Thus, she contends that taking into account all of the Botox and medication costs and massage therapy expenses she will incur \$6,370 per year.
- [219] The plaintiff contends that the appropriate multiplier derived from Mr. Peever's report is 31.955 representing the costs to the plaintiff's age of 107 to 111 years. I assume there was an error when this NPV was incorporated into the plaintiff's submissions. I do not accept that the plaintiff can expect compensation for Botox services at \$250 per treatment simply because Dr. Robinson intends to retire; Dr. Robinson said other neurologists charge between \$100 and \$350 for each Botox session. There was no evidence concerning an average charge or reasonable charge for the services.
- [220] The plaintiff referred the Court to *Sirak v. Noonward*, 2015 BCSC 274 for summarizing the principles applicable to a future care costs claim at paras. 213-215 These include:
- a) compensation must be based on what is reasonably necessary to restore a plaintiff to their pre-accident condition and based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's health;
 - b) the test is an objective test that considers the justification for a cost for medical services and the reasonableness of that cost; and
 - c) the analysis does not involve a precise accounting exercise but is assessed once and for all time. Evidence is to what the care cost is likely to be should be used to calculate the net present value after adjustments for contingencies.
- [221] Absent evidence concerning future changes in Botox administration costs, I am satisfied that an award for that item should reflect a physician's fee of \$150 per treatment (allowing for future uncertainties), \$800 for Botox medication, and \$1,000 per year transportation cost, for a total of \$4,280 per year.
- [222] I also accept that \$1,350 for medications and \$420 per year is a reasonable measure of the cost of massage therapy sessions that will ameliorate the plaintiff's symptoms on an ongoing basis. In total, the plaintiff's annual future care costs will be in the order of \$6,000.
- [223] This assessment is like the other heads of damage is not easily calculable with mathematical precision. It represents an overall finding on all of the evidence and subject to positive and negative contingencies. I award the plaintiff \$160,000 for future care costs subject to the usual gross up calculations.

Special Damages

- [224] The plaintiff presented evidence of expenditures for special damages, including treatment-related costs at \$23,910.17. The defendants argued that the expenses presented should, before an award is made, be reduced because of her pre-existing condition and her unrelated headache disorder.
- [225] The defendants concede that the plaintiff's claim for \$682 in regard to intuitive rehabilitation services, \$135 for Fraser Valley rehabilitation, and \$1,762.80 for mileage are properly due as special damages.
- [226] The plaintiff claimed \$8,800 as a cost of a hot tub she and her husband acquired as a means of ameliorating her symptoms. She claims entitlement to a one-time allowance for this cost. The defendants contend that unnecessary costs for the replacement of a hot tub should not be allowed and mileage costs should be reduced accordingly. I am not satisfied that the cost of a hot tub is recoverable as a special damage; in my view, the benefits received from use of a hot tub are more appropriately awarded as non-pecuniary damage.
- [227] The plaintiff also claims \$13,276.46 for eight sessions of Dr. Robinson's Botox, including his fees and the medications. I was informed that some medical receipts are missing from the plaintiff's documents tendered at this trial. No argument was advanced on the impact of those documents not being included in the plaintiff's claim. In sum, I award the plaintiff \$15,000 as compensation for special damages.

Conclusion

- [228] Taking into account the evidence and arguments presented by the parties, the plaintiff will receive:

Head of Damage

Award

a. Non-Pecuniary Damages

\$100,000

b. Loss of Past Income Earning Capacity

\$16,500

(subject to a reduction pursuant to section 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231)

c. Loss of Future Income Earning Capacity

\$325,000

d. Loss of Housekeeping Capacity

\$20,000

e. Costs of Future Care

\$160,000

f. Special Damages

\$15,000

TOTAL

\$636,500

[229] It appears the plaintiff has been substantially successful in this claim and would in the usual course be entitled to costs. If there is any issue concerning costs either party may seek to make further submissions on those questions, provided that any submissions be provided to the Court within 30 days of this order.

"Armstrong J."

Schedule 1

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