
CANADA / JUDGMENT

Dale v. Vickers

2019 BCSC 821

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Supreme Court of British Columbia

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2019 BCSC 821 Dale v. Vickers

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dale v. Vickers,

2019 BCSC 821

Date: 20190523

Docket: M167174

Registry: Vancouver

Between:

Rachelle Ann Flores Dale

Plaintiff

And

Shivan Kerim Vickers and Victoria Louise Shannon

Defendants

- and -

Docket: M183055

Registry: Vancouver

Between:

Rachelle Ann Flores Dale

Plaintiff

And

Maureen Lynn Pazurik and Aaron John Pazurik

Defendants

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

October 9-12 and 15-19, 2018

Place and Date of Judgment:

Vancouver, B.C.

May 23, 2019

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Introduction

- [1] The plaintiff, Rachele Ann Flores Dale, seeks a range of damages in relation to injuries caused by three accidents that occurred on May 8, 2013, July 1, 2016, and January 12, 2018, each the subject of a separate action.
- [2] Only the second and third actions proceeded to a trial on the merits. The procedural history regarding the first action was as follows. Almost three years after the first accident, on April 26, 2016, Ms. Dale filed a claim against the other driver, Tom Sarosi. In his response, he pleaded a limitation defence. On February 15, 2017, Mr. Sarosi brought a summary trial application seeking a dismissal of the first action based on the expiry of the limitation period. Ms. Dale then applied to add Mr. Sarosi as a defendant and the first accident as a cause of action to her claim regarding the second accident, filed September 14, 2016. Justice Kelleher heard the applications together. Ultimately Ms. Dale did not oppose an order dismissing the first action, which he granted. Not persuaded it was just and convenient to add Mr. Sarosi and the proposed amendment, Kelleher J. also dismissed her application.
- [3] Arguing the injuries caused by all three accidents are indivisible and have resulted in a permanent chronic pain condition, Ms. Dale takes the position the defendants in the second and third actions are jointly and severally liable for all of her damages assessed globally.
- [4] The defendants strongly oppose any damages being awarded for losses that originate from the first accident, arguing Ms. Dale's ongoing symptoms had become a chronic condition by the time of the second accident, divisible from exacerbations caused by the second and third accidents. In the event a finding of indivisibility is made, the defendants say they cannot be liable because her claim against Mr. Sarosi was statute-barred. The defendants

also urge the court to find Ms. Dale has largely recovered from exacerbations resulting from the second and third accidents, and suggest although she experiences some ongoing pain and discomfort, her current condition is no worse than it was just before the second accident. They propose, consequently, modest non-pecuniary damages, and no award for a future loss of earning capacity or the cost of future care.

Preliminary Remarks

- [5] In addition to Ms. Dale's testimony, her mother, co-workers, a friend, her current physiotherapist, Timothy Muller, and her massage therapist, Tariq Dossa, testified on her behalf. Ms. Dale relies upon some of their clinical records and the expert opinion evidence of her family physician, Dr. Haseena Majeed, and physiatrist, Dr. Raphael Chow, as well as the work capacity evaluation and cost of future care recommendations of occupational therapist Nicholas Altieri. The defendants adduced no evidence except for the expert opinion evidence of orthopedic surgeon Dr. Paul Marks. They too relied upon some of the clinical records, particularly those of Dr. Majeed as well as a previous physical therapist.
- [6] In closing submissions, the defendants did not impugn Ms. Dale's credibility. I say at this stage that I found her to be a credible witness. She was straightforward, direct and reasonable throughout her testimony, as well as stoic, if not very stoic. I have no concern that she exaggerated any of her symptoms or their impact. During cross-examination she readily agreed with factual assertions that did not align with her interest. Understandably, given her involvement in three accidents over five years, Ms. Dale sometimes struggled to recall the details and chronology of her symptoms and other circumstances. She acknowledged what she could not remember or remember clearly and also testified to accurately reporting her symptoms to her treating professionals at the time. During cross-examination many of Dr. Majeed's records were put to her. Ms. Dale accepted them as accurate record of the symptoms she reported.

Before the First Accident

- [7] Ms. Dale, who was only 19 at the time of the first accident in 2013 and 24 at the time of trial, moved to Canada from the Philippines as a young child. She and her parents settled in Vancouver, along with an aunt and a cousin. Her father worked initially at a gas station and her mother as a care aide; her mother later worked and still does in hotel housekeeping. In 2007, Ms. Dale's younger sister was born. From the outset, Ms. Dale was very involved in her care.
- [8] Ms. Dale was always extremely active. She described loving sports in elementary school. She participated in basketball, track and field, dance and swim club, and "tried" volleyball. In high school she continued with swim club and joined the high school swim team. She also played basketball until grade 10. At some point during high school Ms. Dale became very involved in ultimate Frisbee ("Ultimate"), competing in tournaments. There were also other extracurricular activities. Ms. Dale managed the volleyball team. In grade 12 she was in

charge of score keeping for the school. Before that, in grade 11 she began working at McDonalds after school and on weekends. Not surprisingly she found it difficult to balance the demands of school, work, sports, other activities and caring for her sister. She indicated she was an "okay" student.

- [9] Ms. Dale's parents separated when she was in grade 12. Before moving to the rental home she now shares with her mother and sister, her father would occasionally bang on their door or phone her late at night drunk. He did not pay any child support until last year.
- [10] After graduating from high school, Ms. Dale decided to work for a year to help her mother financially. She was also responsible for getting her sister to and from school.
- [11] Ms. Dale continued to participate in Ultimate. It became her passion. She thrived on the intensity of the game, which involves lots of running, sprinting, "cutting" or darting one way or another at high speed, as well as diving and jumping for the Frisbee. She also enjoyed the social side, indicating she has met most of her friends through Ultimate.
- [12] In January 2013, Ms. Dale left McDonalds and started a job at a warehouse for Aritzia, a clothing retailer. In that same month, Ms. Dale was injured at work when a box of clothes fell onto her left shoulder. She took one month off and then returned gradually over three weeks. By the end of the three weeks, she was able to perform all of her duties. About two weeks later, however, she and some other employees were laid off without an explanation.
- [13] Ms. Dale later found a position in customer service with Best Buy. She said she had no trouble doing any of the physical tasks such as carrying and lifting items. Still responsible for picking her sister up from school, her employer was accommodating, assigning her morning shifts.
- [14] At home, Ms. Dale shared in completing all of the housework, including dishes, buying groceries and cleaning. In addition to playing Ultimate, Ms. Dale worked out at the gym and swam laps at the pool, without any pain or discomfort.
- [15] Ms. Dale turned 19 on May 3, 2013. She said her plan was to pursue pediatric nursing. She was also looking forward to having "more freedom" and experiencing new activities such as snowboarding and hiking because her sister was getting older and becoming more independent. Five days later, however, Ms. Dale was involved in the first accident.

The First Accident

- [16] While driving home in Vancouver along Main Street in the right hand lane, a vehicle in the left lane veered into her without any warning, hitting the driver side door and tire area of her car. Ms. Dale was wearing a seatbelt. She recalled her body moving from side to side with the impact. She and the other driver pulled over and exchanged information. Ms. Dale recalled shaking a lot. Too scared to drive, she called a friend to pick her up.

- [17] Ms. Dale could not remember if she felt pain at the scene. Without identifying her symptoms, she testified to knowing how she felt that night and attending a medical clinic in or about the next day and reporting all of her symptoms. Ms. Dale stopped playing Ultimate and missed about two months of work due to her injuries. During that time, she went to physiotherapy where she received a range of treatments (TENS machine, manual therapy, IMS needling and a heating pad) all of which she found helpful. In addition she was at home a lot looking after her sister.
- [18] After returning to work, Ms. Dale said she took many breaks and found standing a little difficult. She would ask co-workers to help with reaching and heavy lifting. She did not play Ultimate again until 2015.
- [19] Ms. Dale quit her job with Best Buy at the end of August 2013 to attend school full-time. In September she went to South Hill Education Centre to upgrade some of her grade 12 marks.
- [20] In need of money, at the end of October she began working at The Body Shop. The job involved carrying boxes which she found she could do with some difficulty, indicating it got easier over time.
- [21] In January 2014, Ms. Dale started attending Langara College taking prerequisites for the nursing program. Later she decided to switch to kinesiology, realizing, she said, she would find it hard to deal with sick children.
- [22] At some point Ms. Dale stopped physiotherapy because of the cost, \$80 per visit, estimating she and or her mother had spent "maybe a few thousand" on treatment expenses, not knowing how to pursue funding from ICBC.
- [23] By May 2015, two years after the 2013 accident, Ms. Dale testified, she was still feeling pain "here and there" in her neck, back and left shoulder, but the severity was a "lot less". She said she did not file a claim because she did not know she could seek reimbursement or compensation.
- [24] By that time, Ms. Dale was back to sharing in the housework at home and was playing Ultimate on two teams, but her performance was not as good as before.
- [25] In July 2015, Ms. Dale was hired by McComb Witten Marcoux, a personal injury law firm, as a client care liaison. She obtained the job through the office manager, Janita Ng Yee, who is a family friend. The position involves communicating with clients, obtaining updates about their injuries and treatment, and helping them with Part 7 benefits. Ms. Dale described mostly sitting for seven hours each work day, using the phone, and writing and typing. She stated that the pain in her back and neck had been coming back or increasing, and was accompanied by headaches. She was able to deal with her symptoms by moving around and stretching.
- [26] After three months at the law firm, Ms. Dale qualified for extended health benefits. She returned to physiotherapy and started chiropractic treatments.

- [27] By the winter of 2016, Ms. Dale was also going to the gym and doing workouts with a personal trainer.
- [28] She kept her job with The Body Shop until April 2016, working week-day evenings and on weekends. After she left, Ms. Dale became responsible for picking her sister up on weekdays and caring for her on weekends.
- [29] When asked in direct examination about her condition right before the second accident, Ms. Dale testified she was still experiencing some pain symptoms in her neck and back, mostly at work, which she dealt with by taking Tylenol or Advil occasionally. She had returned to all of her previous activities and felt she was getting back to how she was before the first accident. She intended to play Ultimate again that summer, was going to the gym, doing personal training and had hiked the first two peaks of the Chief, a challenging hike, not long before. She was also able to perform all of her work duties, which apart from sitting, also involved lifting big binders full of documents that were kept on shelves all over the office.

The Second Accident

- [30] On July 1, 2016, Ms. Dale was in the front passenger seat, wearing a seatbelt, but slouched down because she was asleep. Her boyfriend was driving. Her sister was also in the car. They were enroute to Watermania in Richmond when he hit the vehicle in front of them. The impact woke Ms. Dale. She said that after the accident she was in shock and shaken, but they carried on to Watermania not wanting to ruin the occasion for her sister. Ms. Dale recalled having a headache, neck and back pain, and taking Tylenol or Advil that day. When she got home and tried to pick up their cat, her lower back went into spasm causing her to drop to her knees. She had to lie down right away. Ms. Dale attended a walk-in clinic the following day.
- [31] She saw Dr. Majeed for the first time after the second accident on July 15, 2016. Her record for the appointment includes:

Subsequently noticing

Headaches (feels this is due to neck upper back) radiates to the sides and back of head, especially if she turns head

Feeling numbness and burning sensation in the left deltoid intermittently

Left hand feels weak

Hip flexors feel tight

Increased anxiety when driving in the passenger seat, can drive herself, but increased anxiety if someone else is driving (has to close her eyes or look down on the ground, can't look forward, feels on the verge of crying)

Has been attending physio and chiro - 2x a week for both initially, now for physio will be once a week, chiro will be 1-2x a week

Some improvement

Lower back improved, though still tight

Fewer headaches

More rotation in upper mid back

Non tender mid line cspine and upper thoracic spine tender bilaterally paraspinal cspine t spine
l spine L>R in all area

Cspine extension normal, flexion 40 deg, right and left lat flexion 30

Lumbar flexion 80 deg, ext 20, lat flx rt 20, lat flx lt 20

[32] Dr. Majeed prescribed Vimovo for pain. She also referred Ms. Dale for ongoing physiotherapy as well as massage therapy, and recommended a psychologist for treatment of anxiety symptoms. Additional pain medications were prescribed in the weeks and months that followed.

[33] Ms. Dale was cross-examined at some length about the similarity between her symptoms shortly before and after the second accident, based on Dr. Majeed's clinical records starting April 26, 2016, the first appointment related to the first accident since August 2013. The record for that day indicates Ms. Dale reported "ongoing issues" that included:

Neck pain and tightness => headaches at the base skull, sometimes radiating to the top of head

Bilateral trapezius pain L>R

Pain back of the shoulder blades L>R

Lower back soreness when sitting or standing for so long, cracking if flexing forward

Left knee discomfort, cannot sit cross legged on the floor or on the chair

Sleep disrupted due to neck and trapezius issues

Feels there is weakness with the left side "head to toe" eg. weaker grip left

Anxiety when passenger in car - becomes anxious, needs to grip on to something

More generally stressed out? Depression

Shins started to hurt last year

[34] Dr. Majeed's record for the next appointment on May 4, 2016 reads in part:

Follow up on issues related to health from MVA 8 May 2013

Has needed chiropractic weekly, paying out of pocket

Does help with symptoms but only temporarily, sore by the 6-7 day mark

Has physio from icbc - starting next tues

On reflection, notices that upper trapezius becomes sore if standing and working arms for long eg. doing dishes

Exam

Tender: bilateral cervical paraspinals L>R; bilateral thoracic paraspinals L>R; both upper trapezius area L>R

Non tender today: lumbar paraspinals

Tight/stiff upper trapezius areas L>R

- [35] The record for June 15, 2016 provides Ms. Dale reported her pain intensity had improved overall since starting treatment and she had good functional abilities, despite constant pain varying from a stabbing pain to tightness to soreness. Ms. Dale had been attending physiotherapy, chiropractic treatment, and personal training once per week. Dr. Majeed found tightness and mild tenderness "today" of the left cervical paraspinals, over the left upper trapezius, over the scapula into the axilla and a similar, but less significant, situation on the right side. Dr. Majeed also recorded intermittent numbness down the left arm that is worse when the area is tight or sore and mild altered sensation, difficult to describe, in some of Ms. Dale's left fingers.
- [36] In cross-examination, Ms. Dale acknowledged she was still experiencing ongoing symptoms by the time of the second accident, including daily neck, back and shoulder blade pain, as well as headaches. She also agreed her sitting tolerance was about 30 minutes, similar to what it is now. Both before and after the second accident, she was able to address that problem at work by standing and stretching for two or three minutes or taking breaks. She could not remember whether her sleep was disrupted by pain right before the second accident or when she told Dr. Majeed about feeling generalized weakness on her left side, but did not dispute the content of the records. Ms. Dale also made it clear that her symptoms fluctuated and were not as severe or "a lot less" before the second accident than they were after the subsequent accidents.
- [37] Ms. Dale gave limited evidence about experiencing jaw pain after the second accident, indicating talking for a long time and chewing particular foods, such as apples or tough meat, was painful. She found using a retainer at night and IMS needling helpful.
- [38] Ms. Dale remembered having nightmares and being anxious in cars after the second accident. In cross-examination she agreed she had experienced car-related anxiety before the second accident. After the second accident, however, when her boyfriend was driving her, she said she would close her eyes and yell at him. She said their relationship became

really rocky because she blamed him for the accident and he felt very guilty. She found counselling helped with her anxiety over time, although she also described herself as very moody, angry and feeling depressed.

- [39] In direct examination Ms. Dale indicated she had to stop playing Ultimate and put her personal training on hold after the second accident. In cross-examination she agreed she actually returned to the gym in late July 2016 and resumed "deadlifts", explaining her personal trainer was trying to strengthen her back. More than once during her evidence Ms. Dale described working out at the gym as a way of dealing with or getting rid of pain.
- [40] Ms. Dale missed two days of work following the second accident. In addition she sometimes left early or "called in sick", advising her employer when it was accident related. She said she found it more difficult to sit at her desk and concentrate. Although she tried not to show her pain, instead of reaching up for binders, she would ask for help. Ms. Dale described her headaches as "really bad" and as affecting her concentration. She took medication every day to reduce their severity. Similarly, she indicated her sleep became very restless and disrupted due to neck and back pain, although taking muscle relaxants helped.
- [41] Late in 2016, Ms. Dale attended a chronic pain clinic recommended by Dr. Majeed. She said she attended six sessions but found it unhelpful and upsetting. The idea she may be dealing with pain over the long term made her sad.
- [42] On the recommendation of her physiotherapist she did not try snowboarding that winter, something she had hoped to start.
- [43] In the spring of 2017, based on Dr. Majeed's recommendation, an occupational therapist completed an ergonomic assessment of Ms. Dale's workstation which resulted in a number of accommodations. Because her cubicle could not accommodate a sit-stand desk, she was provided with an Ergotron that attached to her desk and allowed her to use her computer while standing. She also received a new chair, an ergonomic keyboard and mouse, and some other equipment. She found the changes helpful, especially the Ergotron.
- [44] In April 2017, Ms. Dale's relationship with her former boyfriend ended. She blamed the second accident, stating they never really fought before the collision.
- [45] Ms. Dale testified that by May 2017 she was feeling much better. Her pain was still constant but lessening. She resumed hiking, including a 4.5 hour hike to and from Garibaldi Lake. In cross-examination she agreed that she was also feeling much better emotionally, and accepted that in June 2017 she told Dr. Majeed she felt her anxiety was fully gone.
- [46] In that same month Ms. Dale travelled to Japan.
- [47] On July 6, 2017 she "rear ended" another car that was stopped ahead of her. Ms. Dale described a spike in her symptoms that did not last more than one day or so. She recalled leaving work early the following day, a Friday, to attend a music festival in a park for eight or nine hours, where she could alternate between sitting and standing.

- [48] By then, Ms. Dale was working out regularly again and playing Ultimate. She said she could run, but had stopped diving or jumping because she was afraid of hurting herself. Ms. Dale also said she needed to stretch for quite awhile after each game, using a foam roller and a tennis ball. She kept a tennis ball at work to relieve muscle tension.
- [49] From October to December 2017, Ms. Dale had a second job at Best Buy. She worked two weeknights and one weekend day per week.
- [50] The following winter Ms. Dale again decided not to try snowboarding and continued to attend physiotherapy, massage therapy and counselling.
- [51] Asked about her use of medication by January 2018, Ms. Dale recalled taking naproxen and Tylenol or Advil in the morning when she felt very sore and then as needed. She found them helpful.

The Third Accident

- [52] The third accident occurred on January 12, 2018. Ms. Dale was driving to work in Vancouver along Commercial Drive in the right lane. Much like the first accident, a vehicle in the left lane side swerved into the driver's side of her car without any warning. After exchanging information, Ms. Dale drove herself to the office which was only two blocks away. She recalled speaking to one of the lawyers, shaking a lot, feeling "so sad", pain coming on slowly, being really nauseous, and vomiting. A co-worker drove her home. Ms. Dale took two weeks off. After returning to work, she left early sometimes because of pain or to attend treatment once a week or once every two weeks, and occasionally called in sick.
- [53] Mr. Hardern, a friend who dated Ms. Dale in the fall of 2017, gave some evidence about his observations of her around this same time. He remembered her adjusting her neck and back on one particular outing and asking for a ball to roll out her back while visiting his apartment. He testified that after the third accident she was "visibly in more pain".
- [54] In or about March 2018, Ms. Dale was promoted to the position of legal assistant, starting in June of that year. Trained on the job from March to June, she described a big learning curve, a much faster pace of work, and much more responsibility. The position included lots of deadlines and much more sitting. Ms. Dale also identified the workload and certain new job duties as physically difficult, such as reviewing and redacting clinical records and making books of documents using a coiling machine. Only five feet tall, she said she has to stand on her tippy toes and lean forward to use the machine. Because she requires a second computer monitor, her desk no longer accommodates the Ergotron. At the same time, she can no longer take breaks as needed. Unable to change her position or move about when she needs to, constantly looking down or left and right at her desk, Ms. Dale indicated she has had to take more pain medication such as Lyrica and naproxen up to twice a day and melatonin when she really needs help sleeping.

- [55] Testifying she is "not that efficient" compared to the other legal assistants, Ms. Dale said her headaches and her neck and back pain affect her concentration, "nagging, stabbing pain" makes it hard to work and she tends to "turn off". Ms. Dale referred to her mind as "all over the place".
- [56] Without complaining, she described the other two legal assistants in the office as frustrated and unhappy with her work performance, and the lawyer she works for telling her to "smarten up" not all that long ago. Ms. Dale acknowledged, however, that in addition to being promoted, her salary has been increased a number of times since she started at the law firm. She indicated that at least some of those raises were because everybody received one. Having started at an annual salary of approximately \$26,000, she was earning \$45,000 by the time of trial, up from \$40,000 since her promotion.
- [57] Ms. Dale's evidence about problems with her performance as a legal assistant were corroborated by Ms. Wong, the most senior legal assistant, and to a lesser extent by Mrs. Yee and Mr. Minhas, a case manager. As "team lead", Ms. Wong oversees Ms. Dale and another legal assistant. Ms. Wong gave detailed evidence about the demands of the job, including working longer hours particularly when preparing a file for trial. She estimated that roughly 80% of files are prepared for trial although only a small number actually proceed. Ms. Wong explained the legal assistants are expected to be in the office from 9:00 a.m. to 5:00 p.m. but typically she puts in one or two extra hours each day to keep up, and then another extra hour or two when a trial is pending. She confirmed Ms. Dale's evidence about breaks, testifying legal assistants are not permitted to take breaks aside from lunch. Both indicated overtime is rarely approved.
- [58] Ms. Wong described herself and the other legal assistant as able to manage the workload, but Ms. Dale "not so much", stating that for the last six months, she has been "very behind on her tasks", "not there half the time" and arriving five to 10 minutes late three or four days per week, which she then makes up. Ms. Wong's irritation with Ms. Dale was palpable. Although less than sympathetic, Ms. Wong acknowledged that Ms. Dale was competent in her former role and she often notices Ms. Dale taking "pain" medication, her "mood" is down sometimes, and she is not as energetic as she used to be. The two sit in side-by-side cubicles. Ms. Wong also confirmed that Ms. Dale too works nine or 10 hours per day. Although none of the employees has a sit-stand desk, Ms. Wong agreed the office could accommodate one.
- [59] Unlike Ms. Dale, Ms. Wong has completed a one year legal assistant course. She started at the law firm in 2015. Her current salary is \$60,000. Both she and Mrs. Yee testified that most of the staff have been trained on the job.
- [60] Mrs. Yee said she hired Ms. Dale because she knew her to be a hard worker, as well as very friendly and polite. Mrs. Yee recalled Ms. Dale working really hard and very effectively during her first year with the law firm, describing her as very good with clients, very organized, "thinking outside the box", taking initiative to improve efficiency and staying late "for free". Mrs. Yee said she was not even aware Ms. Dale had been in a car accident until

after the second one. Mrs. Yee could not recall Ms. Dale missing time from work before that, although in an email she sent to Ms. Dale in February 2016, Mrs. Yee described her being late often. Mrs. Yee estimated that Ms. Dale has taken about 10 days off since she returned to work two weeks after the third accident.

- [61] Mrs. Yee indicated she was aware Ms. Dale was struggling in her new role, but not recently. Yet when asked how Ms. Dale has presented over the last six months, Mrs. Yee described her as "not the old Rachelle I knew before", "she is very down", and not really focusing when they talk. Mrs. Yee also said she can see Ms. Dale is in quite a bit of pain. Sometimes she asks for help to carry binders, she walks around the office to relieve pain, and wears running shoes, which is not permitted by the dress code.
- [62] Regarding the salary trajectory for legal assistants, Mrs. Yee indicated a senior legal assistant can earn up to \$65,000 after four or five years. She also said the law firm will pay for schooling.
- [63] Mrs. Yee described the transition and Ms. Dale's new role somewhat differently from hers and Ms. Wong's, indicating the firm was changing the structure of their team by integrating some of the roles and that her training as a legal assistant was not yet over. If Ms. Dale is not able to manage the job, however, Mrs. Yee testified, she will go back to working as a client care liaison or be given another position with less responsibility. Either would mean a salary of no more than \$50,000. Mrs. Yee emphasized that she will find a way to keep Ms. Dale because of her interpersonal skills and ability to relate to clients.
- [64] Employed by the law firm since 2012, Mr. Minhas has known Ms. Dale since she started. She has always been on his "team". Similar to Mrs. Yee, Mr. Minhas described Ms. Dale as doing well, having a very bubbly, outgoing personality and not complaining of pain until more recently. He testified that for the last six to eight months she has looked flustered, more visibly in pain, and appears to be struggling in her new role as a legal assistant. She sometimes misses days. He has seen her holding her back and bottles of medication. He described her mood as definitely down and has noticed she is not as social with the other women in the office, keeping to herself instead.
- [65] Regarding future plans, Ms. Dale said she still planned to return to school for kinesiology, a four year bachelor program, at some point in the future, although she had not taken any concrete steps to pursue this. In cross-examination she acknowledged her discovery evidence which was she wasn't "exactly" sure why she stopped going to Langara along with, "I just didn't like school".
- [66] Ms. Dale continues to attend physiotherapy twice and massage therapy once per week. She stopped counselling in June 2018, but said Dr. Majeed recently recommended it again. Her physiotherapy involves manual manipulations and IMS needling. She usually attends early in the morning before work. She finds both forms of treatment helpful in reducing her pain symptoms. She also works out with a personal trainer once or twice per week, and exercises on her own at the gym other days after work. Ms. Dale described the workouts as "really

helpful", indicating that if she misses them she feels weak and her back symptoms worsen.

- [67] In May or June 2018, Ms. Dale went on a trip to Thailand. She did a lot of walking and took trains which she found hard on her back especially.
- [68] At home she continues to share the housework with her mother. Her only limitation is lifting the 20-pound bag of cat litter.
- [69] Both her physiotherapist, Mr. Muller, and her massage therapist, Mr. Dossa, gave evidence. Mr. Muller started treating Ms. Dale in March 2017 for chronic neck and shoulder pain. The treatments include manual therapy and "dry needling" or IMS needling that involves inserting a needle into her paraspinal tissues, jaw muscles and around her gluteal muscles to release tense muscles. He has measured Ms. Dale's range of motion as less restricted following a treatment but finds it is restricted again at the start of the next appointment.
- [70] Mr. Dossa treated Ms. Dale from October 27, 2016 until March 2017 and from February 2018 onwards. Unfortunately his clinical records are difficult to decipher. He testified, however, to finding a lot of hypertonicity (tightness) in various areas of Ms. Dale's muscles during appointments. He described the muscles throughout her back, neck and sometimes in the gluteals feeling firmer than normal or hypertonic. He has also measured her range of motion from time to time. At their first appointment he found a reduction in her neck range of motion. After the third accident on February 14, 2018, he found some limitation in her neck flexion and the rotation slightly reduced.
- [71] Consistent with the evidence, Ms. Dale frequently appeared physically uncomfortable during her testimony. She often changed her sitting position and alternated between sitting and standing. She testified to taking medication over the lunch break, because of pain symptoms. Further, although polite and reasonable throughout her evidence, she was quite subdued.

Expert Evidence

Dr. Haseena Majeed

- [72] Dr. Majeed was qualified to provide expert opinion evidence regarding the diagnosis, prognosis and treatment of injuries resulting from motor vehicle accidents. A family doctor since 2004, she has a great deal of experience with pain management, partly because her practice has included significant involvement in palliative care, both as a clinician and as an instructor.
- [73] Dr. Majeed's report dated May 9, 2018 includes many of the details set out in her clinical records regarding her accident-related assessment and treatment of Ms. Dale. Her report and records indicate that at Dr. Majeed's first appointment with Ms. Dale after the accident, on May 14, 2013, Ms. Dale reported left-sided headaches lasting around three hours, left neck pain, left thoracic and upper back pain, lumbar pain and left upper leg pain radiating down to her knee. Dr. Majeed assessed "possible" post-concussion syndrome, neck/cervical

spine pain and thoracic and lumbar spine pain. She referred Ms. Dale to the GF Strong Acute Concussion Service, which she did not attend, as well as physiotherapy and massage therapy for the soft tissue pain.

- [74] Dr. Majeed assessed Ms. Dale again in late May and August 2013 in relation to the first accident but then not again, as I have said, until April 2016.
- [75] Her report reviews the symptoms, functional limitations and examination findings set out in the clinical records from shortly before and after the second accident that I have already outlined. Significantly, she did not prescribe any medication including any pain medication to treat Ms. Dale's symptoms between April and June 2016.
- [76] Dr. Majeed's assessment of Ms. Dale's condition on July 15, 2016, their first appointment after the second accident, was: headache, significant neck and back strain/sprain and significant anxiety.
- [77] In a CL19 dated August 26, 2016, a document physicians complete and submit to ICBC, Dr. Majeed described Ms. Dale as 85-90% recovered from the first accident by the time of the second accident. In cross-examination, Dr. Majeed acknowledged, somewhat reluctantly, that three years after the first accident Ms. Dale's ongoing symptoms had a "chronic nature to them", and she was experiencing some degree of pain that was chronic. Dr. Majeed also testified that after the second accident, Ms. Dale's symptoms were likely worse in intensity and distribution, noting it was only after the second accident that she consistently required a variety of pain medications. In addition to prescribing Vimovo for pain on July 15, 2016, Dr. Majeed prescribed cyclobenzaprine in September 2016, Celebrex, a slightly different anti-inflammatory in October 2016, and Lyrica for neuropathic pain in November 2016. Dr. Majeed said she prescribes Lyrica when she suspects chronic pain spectrum. In cross-examination, she disagreed that absent the second accident, Ms. Dale's pain likely would have persisted, testifying that persistent pain can resolve over time.
- [78] Dr. Majeed continued to assess Ms. Dale's symptoms after the second accident at multiple appointments, the last before the third accident occurring on December 22, 2017. Her report and clinical records indicate that on that day Ms. Dale reported more frequent headaches affecting her concentration, more pain in cold weather and bilateral aches in her jaw, worse on the left. She also reported ongoing pain in her neck and shoulders, and lower back pain with standing or walking for more than 30 minutes, radiating down her left leg. Dr. Majeed found Ms. Dale tender bilaterally in the cervical paraspinal, upper trapezius and the scapular areas, all worse on the left, tender over the left thoracic paraspinals, and tender bilaterally over the lumbar paraspinals, again worse on the left. Dr. Majeed's assessment was: ongoing headaches, possible temporomandibular joint (TMJ) dysfunction, bilateral cervical, thoracic, and lumbar soft-tissue injuries, generally worse on the left.
- [79] Dr. Majeed recommended more physiotherapy and continued counselling, based on Ms. Dale's report of recurrent anxiety related to driving at night in the rain.

- [80] Dr. Majeed's findings and treatment of Ms. Dale after the third accident are not discussed in her report. Her clinical records indicate however that on January 16, 2018, Ms. Dale reported worsened neck pain, continued headaches on and off, and taking Advil for pain. Dr. Majeed found tenderness over the "trapezius muscles b/l neck" more so on the left. She also noted pain with palpation of the paraspinal muscles in the lower back (L3-5) again worse on the left, and pain with all range of motion in the hips, but mostly flexion and extension.
- [81] The clinical record for the next visit, January 24, 2018, shows Dr. Majeed found tenderness in the mid-thoracic to lumbar spine and bilaterally in the cervical paraspinals and upper trapezius, both worse on the left. Aspects of Ms. Dale's "c-spine" range of motion were "less than normal" and "l-spine" flexion was significantly limited. Dr. Majeed prescribed Vimovo again that day, as well as propranolol to settle anxiety and baclofen for muscle spasm.
- [82] On February 6, 2018, Dr. Majeed stopped the Vimovo prescription, continued baclofen and prescribed Tramacet, closer to an opioid, for pain and sleep management, because Ms. Dale reported not sleeping well. She also recommended a magnesium supplement to help with soft-tissue myofascial pain.
- [83] At Ms. Dale's next appointment on May 1, 2018, Dr. Majeed made no changes to the medications. On May 18, 2018 however, she prescribed duloxetine, an anti-depressant she said can be helpful with chronic pain, as well as baclofen and referred Ms. Dale to a psychologist.
- [84] Ms. Dale's last visit with Dr. Majeed prior to trial was on June 19, 2018. She recommended magnesium again.
- [85] Dr. Majeed's report identifies a number of diagnoses related to both the first and second accidents:
1. Chronic headache
 2. Period of post concussion syndrome
 3. Temporomandibular joint dysfunction
 4. Soft tissue injuries of the neck, thoracic and lumbar back with the left side affected to a greater degree than the right
 5. Intermittent paraesthesias of the left arm
 6. Intermittent pain left leg/knee
 7. Significant anxiety disorder, possible post traumatic stress disorder
 8. Chronic/persistent pain related to injuries from [the accidents]

- [86] When asked in cross-examination about causation regarding each diagnosis, Dr. Majeed attributed the TMJ dysfunction to the second accident and the soft-tissue injuries to the first and second accidents. She also indicated the intermittent pain in the left leg/knee was minor. She agreed, based on her clinical records, Ms. Dale felt her anxiety was resolved by June 2017. Dr. Majeed clarified that post-traumatic stress disorder ("PTSD") was simply a possibility, not a diagnosis.
- [87] In her report, Dr. Majeed described Ms. Dale's "functional" prognosis as "too difficult" to assess because she was still in the early to intermediate phase of recovery from the third accident. She also wrote, however:

in reviewing her trajectory, one concern that I have is that each injury that she has had, both WCB related and her MVAs has potentially generated both central and peripheral sensitization, such that she has increased risk for the development of chronic pain.

In this I am reflecting on the fact that her workplace injury in early 2013, resulted in predominantly left sided soft tissue pain. Though perhaps not captured in my notes, my impression is that each injury caused a progressive worsening of both her pain and her anxiety and emotional difficulties, which on reflection may be a manifestation of both peripheral and central pain sensitization arising from each of these accidental injuries.

- [88] In direct-examination, Dr. Majeed explained central sensitization as a change to normal pain processing that occurs in the brain and spinal cord, involving neural expansion or more brain cells being dedicated to pain perception. Her explanation for peripheral sensitization was much the same but involving the peripheral sensory neurons. The result is an amplified pain response and perception. For example, a light touch may feel painful.
- [89] Similarly, Dr. Majeed testified that each subsequent accident compounded the symptoms from the first, causing progressively more and worse symptoms, with the area affected becoming bigger and bigger. In her opinion, the second accident caused a significant exacerbation of Ms. Dale's symptoms. Dr. Majeed said, however, she viewed the third accident as the most worrisome, partly because of the increase in Ms. Dale's distress or emotional symptoms, also describing her physical symptoms as more severe.
- [90] Regarding future care, Dr. Majeed specified that Ms. Dale needs ongoing physiotherapy, massage therapy, chiropractic treatment, active rehabilitation, and psychology treatment, assessment and treatment by a dental specialist, with expertise in orofacial pain syndromes. Dr. Majeed also stated she may benefit from medication such as duloxetine.

Dr. Raphael Chow

- [91] Dr. Chow, a physiatrist, also provided expert opinion evidence at the request of Ms. Dale. His report dated May 28, 2018 sets out her current symptoms in some detail as well as what seemed to aggravate and help them. The symptoms she reported included generalized, frequent headaches; daily neck, shoulder girdle, and left forearm pain; pain in the TMJ; and

low back pain, all of which range in severity. She also reported anxiety, depression, stress, irritability, and sleep disturbance. In relaying her history, Ms. Dale told Dr. Chow she was 95% better before the second accident, meaning she had residual neck and shoulder girdle pain with prolonged exertion and strenuous tasks or desk work, which he testified to accepting based on his review of the clinical records.

- [92] Dr. Chow's examination findings included the following. Ms. Dale could open her mouth normally, but there was some clicking, deviation of the jaw and some tenderness in the right TMJ measured consistently at 2.1 kg/cm² with an instrument called an algometer. He testified that a reading of anything less than 4 kg/cm² indicated a significant tender point. Ms. Dale had normal range of motion in her cervical spine but complained of neck tightness in all ranges. She also had tenderness in the occiput (3.5 kg/cm²), paraspinal muscles of the neck (3.2 kg/cm² at C5-6), and the left shoulder girdle and trapezius area. Dr. Chow noted a trigger point with a taut band in the mid trapezius with referred pain to her left hand. The tenderness over the trigger point measured 2.9 kg/cm². She also had pinprick and cold hypersensitivity in the neck and left shoulder girdle. While her thoracic spine range of motion was pain free, she complained of pain in the low back on extension and lateral flexion and had tenderness in the paraspinal muscles of the lumbar spine, measured at 3.8 kg/cm². Ms. Dale also had left shoulder girdle pain with shoulder elevation. Dr. Chow assessed her muscle tone and strength as normal.
- [93] In his report, Dr. Chow expressed the view that Ms. Dale's symptoms have plateaued and she has permanent impairment of the cervical and lumbar spine. He opined Ms. Dale had "almost recovered from" the first accident when the second occurred causing "a flare-up of pre-existing neck pain", and the development of back pain, left hip and knee pain, headaches as well as TMJ pain, based on his review of the clinical records and his "assessment from a physical perspective". He characterized the third accident as re-aggravating her "underlying problems".
- [94] Dr. Chow was cross-examined at some length about the accuracy of his opinion that Ms. Dale had nearly recovered by the time of the second accident. He indicated he was not aware that Ms. Dale was attending physiotherapy shortly before the second accident, although his report suggests otherwise. Confronted with clinical records regarding the nature and frequency of Ms. Dale's pain symptoms and other symptoms from April to June 2016, and her sitting tolerance of 30 minutes, Dr. Chow was somewhat unresponsive, but validly pointed to a lack of specificity about the intensity of the pain and queried whether she was experiencing a flare up during that period.

- [95] Among the records put to Dr. Chow was a physical therapy record dated May 6, 2016 which describes Ms. Dale's subjective complaint as: " pain in neck, trapezius area medial areas of scapula, lower back, pain goes to head sometimes. All structures are tight feels more stiff when get up in morning. Also feels very much tired after work." Under the heading "Behaviour of Symptoms" the record noted "dull ache", "constant", "all time", and sharp "sometimes".
- [96] Ultimately, Dr. Chow agreed the picture that emerged was not consistent with Ms. Dale being 95% recovered.
- [97] In his report, Dr. Chow diagnosed Ms. Dale with "accident-related conditions" that included chronic jaw pain; chronic headache; chronic neck, shoulder girdle and left upper extremity pain that involve soft tissue injuries to the cervical spine, including the muscles, ligaments, tendons, joint capsules and facet cartilage; chronic low back pain from a soft tissue injury to the lumbar spine; late whiplash syndrome; and left hip and knee pain caused by a soft tissue injury that is no longer symptomatic. Dr. Chow explained the diagnosis of late whiplash syndrome as based on Ms. Dale's constellation of symptoms and their intensity, including chronic headache, neck and back pain with psychological and cognitive issues and sleep disturbance. Related to this he wrote: "[s]he has findings suggestive of the central sensitization process", noting also her cold and pain hypersensitivity in the neck and shoulder girdle with TMJ syndrome. His explanation of central sensitization included molecular and genetic predisposition components.
- [98] During cross-examination, Dr. Chow readily agreed that not all chronic pain involves sensitization of the central nervous system, indicating it depends on the degree of pain and the "whole" presentation over time. He also agreed that Ms. Dale's pain symptoms were chronic by the time of the second accident, meaning they had continued for more than three to six months. He testified however that because he had not examined her at that time, he could not determine whether she was experiencing CNS sensitization by then, also resisting the suggestion it was the most likely differential diagnosis.
- [99] Regarding her functional status, Dr. Chow wrote and testified that Ms. Dale should avoid activities that "reproduce or aggravate her neck and back pain", opining they will "perpetuate the peripheral and central sensitization of the pain pathway associated with chronic pain". In his view, sitting, standing, walking, carrying, lifting, pulling, pushing, reaching, crouching and stair climbing beyond the "mid frequent rate" and physical demands beyond "light-medium level" would likely aggravate the pain.
- [100] Dr. Chow characterized Ms. Dale's prognosis as poor, writing that she has reached maximum medical recovery. He also predicted her condition will deteriorate over time, although not when or by how much:

[She will] likely experience further worsening of her symptoms and deterioration of her functional ability with the passage of time and the aging process. From a physical perspective, in my opinion, over time, it is unlikely that she will be able to perform at her current level of function.

[101] Aware of her involvement in Ultimate and regular gym workouts, Dr. Chow's recommendations for future care include the need for Ms. Dale to pace her activities, and to use adaptive strategies and accommodations at work. He recommends occupational therapy intervention; a sleep study and sleep consultation; a trial of tricyclic antidepressants; referral to a headache specialist, ongoing physiotherapy and massage given the recent accident and the likelihood of future flare ups; exercise within her tolerance; long term analgesics; cognitive behavioural therapy for pain management; a range of myofascial pain treatments; and further investigation of her cervical spine.

Mr. Nichols Altieri

[102] The work capacity evaluation of occupational therapist Nicholas Altieri dated July 13, 2018 includes a much more detailed assessment of Ms. Dale's functional capacity. A summary of Mr. Altieri's test findings include:

- The results of effort testing in combination with clinical observations show Ms. Dale participated with high levels of effort. Test results are therefore considered an accurate measure of her present physical capacity.
- Her self reports of function were consistent with clinical measures of functional abilities and limitations, with the exception of sometimes underestimating her lifting and carrying abilities. Her reports regarding the effect of pain, however, were consistent with what he observed during testing.
- Ms. Dale is able to perform jobs that require some reaching, handling, fingering and/or feeling, keyboarding, writing, and upper limb coordination skills.
- She is functional for forward reaching activity below shoulder level, so long as she is able to work with her neck in a near neutral position (mild neck flexion). She is capable of overhead reaching using her right hand. She is not suited to more than occasional reaching above shoulder level involving the left arm. She is functional for short intervals of writing and keyboarding (15-20 minutes) before she requires a break or a change in activity. She is not suited to prolonged periods of writing or continuous keyboard use, relating to demands for neck flexion or rotations (i.e. required when using a document holder or referring to multiple monitors).
- Ms. Dale is functional for mild stooping activity. She is not suited to more than intermittent short intervals (15-20 seconds) of sustained moderate to extreme degree stooping activity. She is functional for activity requiring kneeling and crouching, basic balance, stair climbing and crawling activity.

· Ms. Dale is capable of sedentary, light and entry medium strength demands and select heavy strength demands (i.e. occasional bilateral lifting of 60 pounds between floor and waist). According to National Occupation Classification (NOC) criteria, she is capable of limited, light, entry level medium carrying, and select entry heavy strength demands (lifting from floor to waist level). She is limited to carrying up to 20-30 pounds to shoulder level.

· Ms. Dale is functional for basic standing and walking. She demonstrated an ability to stand for at least one hour. She is not suited to prolonged periods of sitting. A reasonable sitting tolerance is between 20-30 minutes before she requires a short break (3-5 minutes) to stand or walk about to manage her symptoms.

[103] Mr. Altieri's opinion regarding Ms. Dale's work capacity addressed her previous position as a client care liaison, her current position as a legal assistant, as well as her capacity to complete educational training in kinesiology and to work as a kinesiologist.

[104] He concluded Ms. Dale could meet the "full individual basic physical demands" of a client care liaison based on the results of her testing, so long as her employer provided accommodations that included frequent breaks in standing or alternating between sitting and standing as needed, meaning access to a sit/stand work station. Without those accommodations, he concluded she would not be suited to the job or similar administrative type jobs. Regarding her current position as a legal assistant, in his opinion, Ms. Dale is capable of the individual physical demands and working full time up to eight hours per day, but she is not suited to "frequent, more than 10 hour shifts", and the additional repetitive and sustained work intensive postures required when reviewing files and medical reports, without access to a sit/stand station. He wrote:

It is my opinion that given her increased hours, increased demands and lack of access to ergonomic aids (i.e. sit/stand work station), Ms. Dale's current work participation is at risk. Given her reported increase in symptom response to her current work activity (including the intensity of her headaches), despite having supportive treatments, symptoms management strategies (therastick, and prescription medications), it is my opinion she is not suited to her current work involvement.

[105] During his testimony, Mr. Altieri identified his past experience in evaluating other legal assistants, the NOC, and Ms. Dale's description, as informing his understanding of her current work duties as a legal assistant which included working eight to 10 hours per day.

[106] In the event she were to return to school to study kinesiology, Mr. Altieri's opinion is she would have difficulty tolerating the "work intensive" sitting and other postures, namely prolonged neck flexion associated with taking notes and reading. His view is that without accommodations such as computer based textbooks and exams, more time to complete exams, as well as ergonomic equipment including a chair, sit/stand desk, document holder and slant board to better help her manage her symptoms, she will likely be unable to tolerate the physical demands associated with attending school.

- [107] Regarding Ms. Dale's ability to work as a kinesiologist, Mr. Altieri expresses the view she is not able to meet the full physical demands of some areas of work, including those related to repetitive or sustained reaching above the shoulder level involving her left arm and the 20 to 30 pound limit on her capacity to lift to the shoulder level. He explained if working with clients in a gym setting, she would not be able to load certain exercise equipment or retrieve heavier dumb-bells for them, suggesting she would be better suited to working with older clients or clients in a rehabilitation setting where the weights being used are significantly lighter.
- [108] With respect to Ms. Dale's participation in recreational activities, Mr. Altieri said she will continue to have to limit her participation in some activities, modifying for example the extent and intensity of her participation in Ultimate and gym activities. In cross-examination he testified to being aware she was attending the gym three to five times per week. The fact she is performing dead lifts and lifting 20 pound dumb-bells did not affect his opinion. He accepted that Ms. Dale's "ability to be durable" as a legal assistant was dependent on the ergonomic set up at her work place, as well as limiting her exposure to working longer days.
- [109] Mr. Altieri's recommendations regarding the cost of future care are discussed below.

Dr. Paul Marks

- [110] The defendants rely upon the expert evidence of orthopedic surgeon Dr. Paul Marks. His report dated July 26, 2018 indicates Ms. Dale described essentially the same current symptoms: left greater than right sided neck, mid-back and thoracic pain that is constant but varying in intensity, worse in the morning and involving occasional discomfort at night; daily headaches; some jaw pain; diffuse pain in her left arm and a little bit of numbness in her upper left extremity. She also described her neck pain as aggravated by movement; her neck and back pain as alleviated with medication, heat, rest, stretching, therapy, massage therapy and chiropractic treatment; lifting and bending as bothersome; and described 30 to 45 minute standing, 10 minute sitting, and 30 minute walking tolerances. Ms. Dale estimated her neck is now 50-60% of normal. She rated her neck pain at five to six out of 10 and her back pain at six to seven out of 10 while in the office.
- [111] Dr. Marks' examination findings are inconsistent with those of Dr. Chow, and those of Dr. Majeed following the third accident, as well as the observations of Ms. Dale's physiotherapist and massage therapist. Dr. Marks writes she was non-tender to palpation in the cervical spine, and there was no evidence of any muscle spasm, hypertonicity or increased tone or taut bands. She also had full range of motion in the cervical spine with end of range tightness but no pain; non-tender to palpation through the thoracolumbar spine from T1 to T12 and from L1 to L5; and again no evidence of muscle spasm, hypertonicity or increased tone. His report describes her as able to sit on the examination table for 37 minutes in "no apparent distress", although she did get up once for three minutes.

[112] In discussing his findings and opinion he writes:

Ms. Dale's orthopaedic and musculoskeletal examination is within normal limits. I have not been able to identify any specific, accident-related, orthopaedic impairment, injury or disability.

It is my opinion that Ms. Dale sustained simple soft tissue strains as a result of these accidents. These would normally be expected to recover in timeframes of six to perhaps twelve weeks given normal biologic healing parameters. I have not been provided with any evidence of any significant pathology or residual musculoskeletal impairment. Ms. Dale's subjective complaints are not consistent with lack of objective findings. I do not suspect any underlying pathology that requires further medical investigation or consultation with other specialists. There are no medical restrictions for her circumstances for all activities including activities of daily living, self-care, household chores and vocational responsibilities.

[Emphasis added.]

[113] Dr. Marks diagnoses Ms. Dale with cervical, thoracic and lumbar strain. He identifies her prognosis as excellent for full recovery "in timeframes as detailed above" without any "residual issue or sequelae anticipated", based on the six to 12 week time frame for what he refers to as the normal biologic healing of soft tissue injuries. Not surprisingly, he also expresses the view that Ms. Dale's ability to work has not been affected and no additional treatment or therapy is indicated, writing: "[i]t is my opinion that any further formal therapy might serve only to reinforce a perception of disability and have no utility in altering outcome."

[114] Although Dr. Marks provides opinions about the plaintiff's injuries in relation to all three accidents, the defendants chose not to provide him with any of Dr. Majeed's clinical records after July 15, 2016. He also received very few treatment records, and none for treatments Ms. Dale received after the second accident. The same is true regarding pharmacological and MSP records. In other words, he received no "evidence" regarding the progression or treatment of Ms. Dale's reported symptoms after the second and third accidents, the objective findings of Dr. Majeed and other treatment providers, or the medication that were prescribed to address those symptoms.

[115] His conclusion that Ms. Dale's subjective complaints are not consistent with the lack of objective findings is limited, therefore, to his own findings. Given Dr. Majeed's findings of tenderness and pain and restricted range of motion on several occasions, those of Dr. Chow regarding tenderness, restricted range of motion, hypertonicity and a taut band of muscle based on repeated measurements, and the observations of Ms. Dale's physiotherapist and massage therapist, I do not regard Dr. Marks' examination findings as probative. His opinions simply fail to account for Ms. Dale's ongoing and significant pain symptoms. In these circumstances and having found her credible, I give his opinions very little weight.

Discussion

- [116] Ms. Dale asks me to find that, as a result of the indivisible injuries she sustained in all three accidents, she now suffers from a chronic pain condition with central and peripheral sensitization that includes chronic headaches, chronic neck, shoulder girdle and low back pain, psychological and cognitive issues, and sleeplessness. She also asks me to find that she suffers from chronic jaw pain due to the second accident and a concussion due to the first and third accidents. She submits that I should accept Dr. Chow's opinion that her pain condition will deteriorate over time. In the event I find the injuries she suffered in the first accident divisible, she suggests findings that she was "recovering to a very high degree", had minimal, if any, functional impairments by the time of the second accident, and the second and third accidents were the most severe in terms of causing her pain condition and ongoing functional impairments.
- [117] In contrast, the defendants dispute what they describe as Dr. Chow's mere suggestion that Ms. Dale has a pain condition involving central sensitization and his opinion she will deteriorate. They argue that by the time of the first accident, Ms. Dale's ongoing symptoms had become a chronic condition, divisible from the second accident and third accidents which temporarily exacerbated her neck and back pain, except for the onset of mild and largely resolved jaw discomfort caused by the second accident alone. More specifically, they suggest, by the spring of 2017, Ms. Dale had improved substantially from the second accident. She was feeling much less pain, finding work easier, and back to participating in competitive Ultimate. The defendants characterize her recovery from the third accident similarly. Relying on her intensive gym workouts four to five days per week, including two with a personal trainer, and arguing that any struggles she had or has in her new role as a legal assistant are unrelated to the exacerbations of her chronic pain, they state she again "bounced back" relatively quickly.
- [118] Before turning to consider the parties' arguments about divisibility and whether damages from the first accident are recoverable in light of the dismissal of the expired first claim, I will discuss and make findings about the nature, extent, and effect of Ms. Dale's injuries and symptoms.
- [119] Having largely rejected Dr. Marks' opinion evidence, I am left to assess the opinion evidence of Drs. Majeed and Chow. The defendants attack the credibility of both, suggesting Dr. Majeed's opinions reflect an element of advocacy given her role as the family doctor, and Dr. Chow was not a straightforward witness. Ultimately, they challenge the notion that Ms. Dale's ongoing pain symptoms involve a chronic pain condition at all or one that is any worse than her condition at the time of the second accident.
- [120] For the most part, although not entirely, I disagree. Regarding Dr. Chow's credibility, he was, as I have indicated, unresponsive during cross-examination when challenged about his opinion that Ms. Dale had nearly recovered before the second accident. Eventually, he did acknowledge this was not consistent with the clinical records. I am not persuaded that

his resistance on this point undermines the integrity of his findings or his other opinions. Significantly, both his and Dr. Majeed's reports, as well as Dr. Majeed's clinical records, reflect a careful and detailed approach to examining Ms. Dale, as well as history-taking. Dr. Chow's findings, consistent with those of Dr. Majeed made earlier, are particularly probative given the objective measurements and repeated testing involved, which I therefore accept.

- [121] That does not mean, however, that I accept all of his opinions. Given the timing of the third accident, I put limited weight on his opinion that Ms. Dale's symptoms had plateaued by the time he saw her about five months later and his opinion that her condition will deteriorate over time, which he did not explain.
- [122] Although Dr. Majeed was similarly reluctant to agree Ms. Dale's condition was chronic before the second accident, I am satisfied her evidence was sincerely given. Rather than avoiding the truth, Dr. Majeed struck me as trying to be precise and attempting to convey, as accurately as possible, the complexity, uncertainty, and nuance involved in diagnosing and predicting outcomes related to soft tissue injuries that result in ongoing pain and other symptoms. Again, while I accept her clinical findings and much of her opinion evidence, I do not accept all of it. Most significantly, I am not persuaded by her diagnosis of concussion, noting that after the first accident she assessed only possible concussion syndrome.
- [123] Based on my assessment of the evidence I make the following findings.
- [124] The first accident caused injuries to the soft tissues in Ms. Dale's neck, back, and left shoulder blade areas. Those injuries resulted in significant, ongoing pain and discomfort worse on the left, headaches, and altered sensation into her left arm. She also experienced some anxiety related to driving. Due to her injuries, Ms. Dale was unable to work for two months. After returning to work at Best Buy, she took frequent breaks and sought help with tasks that involved reaching and heavy lifting due to her injuries. Her ongoing symptoms did not interfere with her ability to study in the fall of 2013 or 2014, but they did prevent her from returning to high intensity activities such as Ultimate until in or about 2015. Ms. Dale's neck and back symptoms, as well as her headaches, increased after starting at the law firm in July 2015, due to the prolonged sitting and other tasks, such as writing and typing. Ms. Dale was well enough, however, to work full-time at the law firm and part-time at The Body Shop.
- [125] Although Ms. Dale felt as though she was getting back to the way she was before the first accident when the second accident occurred, and she certainly had in terms of functioning, in late April and May 2016 she was experiencing daily, but variable, neck and shoulder blade pain. She also had intermittent pain in her lower back with prolonged standing or sitting, headaches sometimes, as well as some anxiety when being driven in a car. After she resumed physical therapies in April or May 2016, the overall pain intensity reduced by mid-June 2016. In other words, although her pain symptoms were chronic, they responded, and

responded quickly, to additional treatment.

- [126] Despite her ongoing symptoms, Ms. Dale was and had been participating fully, for some time, in Ultimate. In June 2016, she completed a difficult hike. She was also working out at the gym regularly. Ms. Dale was performing very well at work. From the outset of her job at the law firm, her only limitation was prolonged sitting which she dealt with by moving around and stretching for a few minutes. Only occasionally did she find it necessary to take an Advil or Tylenol for pain or headaches.
- [127] The second accident reinjured the soft tissues in Ms. Dale's neck, shoulder blade and back, significantly aggravating her pain symptoms and headaches and increasing the sensory symptoms in her left arm and hand. The second accident also caused jaw pain and worsened Ms. Dale's anxiety symptoms related to driving. I accept that she found it more difficult to sit at her desk and concentrate because of "really bad" headaches and much worse pain which required daily pain medication.
- [128] By the late spring of 2017, Ms. Dale was feeling much better. Although she still had constant pain, her symptoms had lessened considerably. She returned to playing Ultimate, but did not participate fully out of fear of hurting herself. She also had to stretch after each game, at work, and at home more often using a foam roller and tennis balls. Again, Ms. Dale was well enough to take on a second job from October to December 2017.
- [129] Based on Dr. Majeed's records, however, I also find that shortly before the third accident, in late December 2017, Ms. Dale was experiencing increased headaches; more pain in cold weather; ongoing pain in her neck and shoulders; pain in her low back with prolonged standing and walking; and an aching jaw, worse on the left. Her anxiety, which had been much improved, reoccurred in relation to driving at night in the rain.
- [130] Like the second accident, the third accident again injured the soft tissues in Ms. Dale's neck and back, causing a more severe aggravation of her physical symptoms, and significant emotional distress. Initially, Dr. Majeed prescribed Vimovo for pain and other medications for muscle spasm and anxiety. She replaced Vimovo with Tramacet, closer to an opioid, for pain and sleep management. She also recommended supplements to help with soft tissue pain. In May 2018, Dr. Majeed prescribed an anti-depressant for Ms. Dale that can be helpful with chronic pain. By the time of the trial, Ms. Dale was still taking Lyrica and naproxen as often as twice a day due to pain.
- [131] I accept that since the third accident, although there has been some improvement, Ms. Dale's pain symptoms have remained more severe than they were before the second and third accidents. Her psychological symptoms have also been worse; her mood has certainly deteriorated. Working in significant pain and discomfort, she struggles to concentrate far more than before, making her much less efficient. No longer outgoing and upbeat with co-workers, instead she keeps to herself. She needs help lifting and carrying heavy binders. I have no doubt the loss of her Ergotron and the ability to take breaks as needed along with a new and much more demanding job has also made it difficult for her to manage her

physical and psychological or emotional symptoms. Just as they did after the first and second accidents, exercise and physical treatment continue to provide temporary relief.

- [132] Given the number of times the same soft tissues have been injured; Ms. Dale's constellation of ongoing symptoms despite physical therapy and a high level of physical activity; the objective findings; her amplified and altered pain response; her distress; and the opinion evidence of Drs. Chow and Majeed, I am satisfied that Ms. Dale now suffers from a chronic pain condition. This condition involves chronic headaches; chronic neck and back pain; some psychological and cognitive issues, namely anxiety and poor concentration; as well as disrupted sleep. Although I also accept that she is unlikely to ever fully recover, given the timing of the third accident and the trial, and the trajectory of improvement over time following the first and second accidents, there is, in my view, a realistic and substantial possibility Ms. Dale's condition will further improve. By this I mean there is a chance the intensity and frequency of her symptoms will reduce and over time become less intrusive and or more easily managed.

Legal Principles Regarding Causation and Damages

- [133] The parties' dispute over the divisibility of Ms. Dale's injuries and her entitlement to damages from the first accident engages a number of well-established principles of tort law regarding causation and damages. In addition, there is the critical question of what effect the expired limitation period and the order dismissing the first action and Ms. Dale's "cross-application" have on the application of some of those principles.
- [134] The distinction between indivisible and divisible injuries flows from principles regarding factual causation. Those principles and the distinction itself were discussed and clarified, most significantly, in *Athey v. Leonati*, [1996] 3 S.C.R. 458 (paras. 13-17). In summary, the plaintiff must prove on a balance of probabilities that the defendant's negligent act or omission was a, not the sole, cause of the injury and loss. The basic test for cause in fact is the "but for" test, which requires the plaintiff to show the injury and loss would not have occurred but for the negligence of the defendant. Indivisible and divisible injuries are those with multiple causes that can and cannot be separated (paras. 13-15). Where a plaintiff's damage is caused by the negligence of two or more other persons, each defendant is separately liable for a divisible injury he or she has caused, and joint and severally liable for an indivisible injury he or she and others have caused: *Schnurr v. Insurance Corporation of British Columbia*, 2015 BCSC 1630 at para. 156. Apportionment between tortious and non-tortious causes is not permitted, allowing as it would a defendant to escape "full liability" even though he or she caused (or contributed) to the plaintiff's "entire injuries" (*Athey* at para. 23). A tortfeasor will also be liable for the plaintiff's injuries even if they are more severe than they might otherwise have been due to a pre-existing condition.

[135] This last point leads to the most fundamental principle of damages, also reiterated in *Athey*, which is the plaintiff must be returned through compensation to her original position at para. 32:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence ("the original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.

[Emphasis in the original.]

[136] Both causation and damages principles play a role in the so-called "thin skull" and "crumbling skull" rules. The thin skull rule provides a tortfeasor will be liable for the plaintiff's injuries even if they are more severe than expected due to a pre-existing condition. The crumbling skull rule recognizes the defendant is not required to compensate the plaintiff for the detrimental effects of a pre-existing condition that would have been experienced anyway. Similarly, if there is a measureable risk the pre-existing condition would have detrimentally affected the plaintiff in the future in any event, this will be taken into account in reducing the overall award.

[137] *Blackwater v. Plint*, 2005 SCC 58 distinguished causation and damage assessment principles at para. 78:

It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been.

[138] In *Moore v. Kyba*, 2012 BCCA 361, Justice Levine observed the concept of divisible and indivisible injury as relevant to both the analysis of causation and the assessment of damages (paras. 36 and 37).

[139] All of the parties rely upon *Bradley v. Groves*, 2010 BCCA 361 for its discussion of the distinction between divisible and indivisible injuries:

[20] Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes.

[140] *Bradley* considered the question of aggravation:

- [37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.
- [141] In *Estable v. New*, 2011 BCSC 1556, Justice Gropper summarised indivisible injuries as those that cannot be separated, "such as aggravation or exacerbation of an earlier injury, an injury to the same area of the body, or global symptoms that are impossible to separate", citing *Bradley and Athey* (para. 55).
- [142] In arguing Ms. Dale's injuries from the first accident are divisible, the defendants relied upon *Schnurr and Deol v. Sheikh*, 2016 BCSC 2404.
- [143] In *Schnurr*, Justice Skolrood distinguished *Athey and Bradley* and found the plaintiff's chronic condition, resulting from three previous accidents, to be divisible from exacerbations caused by three subsequent accidents in 2007, 2010 and 2012. In doing so, he noted the plaintiff had provided minimal evidence regarding the first three accidents or the terms of a settlement reached shortly before the 2007 accident, preventing determinations of liability. At the same time, there was substantial medical evidence from prior to the settlement, making it possible to assess the plaintiff's original position at the time of the 2007 accident, even though some of her complaints from the three subject accidents related to injuries sustained in the previous accidents. Based on the medical evidence, Skolrood J. made a finding the plaintiff's condition had become chronic, meaning several of her "afflictions" had "been in effect for years" and was likely to be ongoing, long-term. He wrote:
- [169] Significantly, the evidence does not indicate that Ms. Schnurr's condition was unstable or significantly improving, or that there was a realistic chance that she would begin a new program or treatment or experience some other change of circumstances that would affect her injuries or chance of recovery.

- [170] In short, by October 2007 Ms. Schnurr's condition had plateaued. The afflictions she complained of prior to that point were no longer a series of ongoing injuries, but rather chronic conditions. To use the terminology of Athey, the chain of events caused by the first three accidents had ended.
- [144] Schnurr was applied in *Deol*. Justice Griffin also found the plaintiff's pre-existing condition, caused by a previous accident in 2006, to be divisible from exacerbations caused by the subject accident in 2012, based on "abundant" evidence establishing the plaintiff developed a chronic pain condition after the first accident that was relatively stable with the possibility of flare ups six years later. At paras. 155 and following she explained:
- [155] We therefore know the original position she would have been in, had the 2012 Accident not occurred.
- [156] It is important to note that the 2012 Accident did not tip the scales from one condition to another. It was not the cumulative effect of the 2012 Accident and the 2006 Accident that caused Ms. Deol to develop a chronic pain condition. Rather, she had a serious condition before the 2012 Accident.
- [157] The language in *Ashcroft* refers to the negligence of both the settling defendant and the respondent tortfeasor as being "necessary causes" of the injury. Again, the 2012 Accident did not cause the chronic pain condition. That condition pre-existed and was going to continue regardless of the 2012 Accident.
- [145] In support of their alternative position, that Ms. Dale is not entitled to damages from the first accident regardless of the nature of her injuries, the defendants rely upon *Pinch v. Hofstee*, 2015 BCSC 1888. In that case no damages were awarded for injuries resulting from a second accident although the plaintiff's injuries from the first and second accidents were found to be indivisible. Justice Burnyeat determined any claim from the second accident was barred by s. 10 of the Workers Compensation Act, R.S.B.C. 1996, c. 492 [WCA]:
- [60] I conclude that the Legislature has made it clear that the principles set out in *Bradley*, *supra*, do not apply where there is a statutory bar to recovery of what may be found to be indivisible damages. Section 10(1) of the Act is but one example of the inability to recover indivisible damages arising out of a separate breach of duty of care.
- [146] Continuing at para. 60, in obiter, Burnyeat J. also discussed the effect of an expired limitation period in relation to a previous tortious act:

A further example might be illustrated by a situation whereby proceedings relating to a first tortious act were not commenced within the limitation period and a second tortious act occurred. In those circumstances, I cannot conclude that damages would be available where an action was not commenced relating to the first act, a subsequent act caused injuries which were found to be indivisible from the first act, and a claim was advanced against the second tortfeasor for damages for the injuries caused both by the first and the second tortious acts. Just as a claim for damages for the second tortious act could not "give life to" recovery of damages for a first act

where a limitation period has expired so also s. 10(1) of the Act has taken away "any right and rights of action" available to Mr. Pinch and any recoverable "damages, contributions or indemnity" that might have been available to Mr. Pinch as result of MVA #2.

[147] I note that in dismissing Ms. Dale's claim in the first action based on the expired limitation period, Justice Kelleher agreed with this reasoning.

[148] In *Griffioen v. Arnold*, 2017 BCSC 490 (appeal allowed in part on different grounds 2019 BCCA 83), however, Pinch was distinguished. Significantly, the plaintiff brought an action for the first but not the second accident, allowing the limitation period to expire instead. Justice Bracken found the injuries from both accidents indivisible and refused to reduce the damages on account of the second accident:

[122] I do not agree that the situation here is the same as where an action is statute-barred as in both Pinch and Sandhu.

[123] In both Pinch and Sandhu, the plaintiffs were not simply beyond the time limit for commencing an action, but would be barred by statute from commencing an action even if they had done so within the statutory time limits.

[149] The plaintiff's husband was one of the defendants in the action and the tortfeasor in the second accident. Justice Bracken remarked it was open to the defendants to commence a third party action when they became aware they may be liable for damages from the second accident, noting the time limits for a third party action "may not be the same" as for an action by the plaintiff.

[150] Other cases have mentioned but not applied Pinch. In *Kallstrom v. Yip*, 2016 BCSC 829, for example, the plaintiff suffered injuries in multiple accidents between 2001 and 2004 that were found to be indivisible. The defendants argued an amount should be deducted from the damage award based on subsequent workplace incidents. Justice Kent determined the "WCB defence" did not apply and expressed some ambivalence regarding Pinch at para. 373: "[i]t was the subject matter of an appeal and cross-appeal, but the case was settled and thus no definitive ruling on this interesting (and highly debatable) point of law has yet to be made by the Court of Appeal."

[151] Pinch was also referred to in *Saadati v. Moorhead*, 2017 SCC 28. There the plaintiff had been involved in five accidents and experienced chronic pain since the first. On appeal, the defendants challenged the trial judge's finding of indivisibility regarding psychological injuries caused by second accident and any injury caused by the third. During oral argument the defendants raised s. 10 of the WCA and Pinch for the first time. Justice Brown declined to determine the effect of the legislation on the "divisibility of injuries", expressly neither endorsing nor rejecting the reasoning in Pinch.

- [152] Ms. Dale argues Pinch is distinguishable for the same reasons Bracken J. provided in Griffieon. However, neither she nor Griffieon addressed the Supreme Court of Canada's decision in Blackwater.
- [153] The trial in Blackwater involved multiple plaintiffs seeking damages for sexual abuse, physical punishment and other harms suffered at an "Indian" residential school decades earlier. The trial judge found the claims that did not involve sexual misconduct were barred by the expiry of the statutory limitation period. In assessing damages for Mr. Barney, who also suffered significant trauma at home before being compelled to attend the school, as well as statute-barred harms once he was there, the trial judge limited the award to the loss caused by the "actionable tort", namely the sexual misconduct.
- [154] Mr. Barney's injuries were serious and psychological. He attempted suicide many, many times, starting shortly after he was sexually abused for the first time, he was violent before and after he left the school, and he developed a long term problem with alcohol and drugs as a teen. Although the trial judge found the prior non-sexual abuse made it likely Mr. Barney would have suffered serious psychological difficulties even if the sexual abuse had not occurred, he did not find the injuries to be divisible. Nor did McLachlin C.J. characterize them in this way in upholding the decision of the trial judge. Regarding the effect of the prior and statute-barred abuse on the assessment of damages, she wrote:
- [74] The calculation of damages for sexual assault to Mr. Barney is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong.
- [Emphasis in original.]
- [155] Recognizing Mr. Barney's original position was compromised, McLachlin C.J. went on to discuss the application of the crumbling skull rule, noting the defendant was not required to compensate the plaintiff for the debilitating effects of the other wrongful acts that would have occurred anyway.
- [156] Turning to the statute-barred wrongs, she stated:
- [82] Similarly, there was no legal basis upon which [the trial judge] could allow damages suffered as a result of statute-barred wrongs committed at AIRS, like the beatings to increase the award of damages.
- [157] In dismissing an argument based on *ex turpi causa non oritur actio*, she added at para. 85:

- [85] Applying it to permit damages to be awarded for wrongful acts that are subject to limitation periods that have expired would subvert the legislation and compensate for torts that have been alleged but not proven. It would be to override legislative intent and fix liability in the absence of legal proof.
- [158] Here of course Ms. Dale provided proof in the form of uncontradicted testimony regarding the circumstances of the first accident. The defendants have not suggested her evidence is insufficient to ground findings of negligent conduct or factual causation.
- [159] Nonetheless the problem remains that Ms. Dale's claim in negligence against Mr. Sarosi was "statute-barred" and dismissed for that reason, along with the cross-application to add him and the first accident as a cause of action in the second action. Not surprisingly Ms. Dale's pleadings in the third as well as the second action say nothing about the first accident or her resulting injuries and damages. In making this observation I have not ignored Ms. Dale's argument that the defendants could have but chose not to issue third party proceedings. However, in my view the expiry of her claim, a complete defence to liability for Mr. Sarosi, and the order dismissing it must be given effect. Ultimately, I can see no basis for distinguishing Blackwater. Applying it, Mr. Sarosi's statute barred wrong is not actionable. I therefore conclude Ms. Dale is not entitled to compensation for damages caused by the first accident.
- [160] Returning to the question of Ms. Dale's injuries, to the extent a finding remains necessary, I am not persuaded Ms. Dale's condition at the time of the second accident is properly characterized as divisible from the injuries, temporary exacerbations of that condition according to the defendants, caused by the second and third accidents. Although Ms. Dale was still experiencing ongoing and therefore chronic neck, shoulder and back symptoms when the second accident occurred, overall her condition was much improved and her symptoms were variable, if not dynamic and responding to treatment. In other words, Ms. Dale's condition had not plateaued. I therefore find Ms. Dale's injuries from all three accidents indivisible.
- [161] I have already found the second and third accidents reinjured the soft tissues in her neck, shoulder and back and in doing so aggravated and worsened her pain and other symptoms including headaches and anxiety. Even on this analysis however the defendants are not liable for any losses that occurred before the second accident. Obviously, the defendants caused no injury or loss to Ms. Dale until the second and third accidents occurred.
- [162] Again, applying Blackwater, Ms. Dale's original position is as asserted by the defendants: her condition when the second accident occurred. The crumbling skull rule applies. Ms. Dale was compromised in so far as the same soft tissue injuries had already been injured leaving her with ongoing physical symptoms and some anxiety. She was also left more vulnerable to re-injury.

- [163] In assessing damages for Ms. Dale, I must consider the difference between her current condition and her original position which requires me to also consider what would have happened to Ms. Dale's symptoms absent the second and third accidents.
- [164] Before doing so it is necessary to make causation findings regarding the most significant feature of Ms. Dale's current condition, her chronic pain condition. Given the nature of the injuries and symptoms caused by each of the accidents and Ms. Dale's ongoing symptoms from the first accident by the time of the second accident, and her vulnerability to the effect of re-injury, I accept the first accident was a necessary but insufficient cause of her chronic pain condition. In other words, I am satisfied it results from the cumulative effect of all three accidents.
- [165] Regarding the difference between her current and original positions, in addition to finding Ms. Dale would not have developed her chronic pain condition absent the second and third accidents, I find her current symptoms are significantly more severe and intrusive than those she was experiencing when the second accident occurred. I have already found that she is also unlikely to recover from the chronic pain condition, although there is a real and substantial possibility she will improve over time. That leaves the question of what would have happened to Ms. Dale's symptoms had the second and third accidents not occurred.
- [166] There is very little opinion evidence on this point. In cross-examination, Dr. Chow would not agree Ms. Dale's chronic symptoms constituted a chronic pain condition before the second accident, although he agreed her symptoms were chronic because of their duration. Similarly Dr. Majeed disagreed that absent the second accident, Ms. Dale's pain likely would have persisted.
- [167] The evidence allows me to be no more precise than to find Ms. Dale symptoms would have continued for some period of time. The quick reduction in her overall pain in response to treatment shortly before the second accident and the extent to which all of her symptoms had gradually improved from the time of the first accident to the second satisfies me it is more likely than not the symptoms would have eventually resolved. I find she would have remained vulnerable to worse effects from re-injury, as well as some of the demands of her current job.

Non-Pecuniary Damages

- [168] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a defendant's negligence. The amount of the award is not determined based on the nature or seriousness of the plaintiff's injuries alone. The court must consider additional factors including: the plaintiff's age; the severity and duration of the pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and his or her stoicism, which should not be penalized (*Stapley v. Hejslet*, 2006 BCCA 34 at para. 46). An appreciation of the plaintiff's loss is the key: see *Lindal v. Lindal*, [1981] 2 S.C.R. 629.

- [169] Ms. Dale is not entitled to non-pecuniary damages related to the first accident. That means I cannot consider the pain and suffering she experienced after the first accident, prior to the second accident, and any further pain and suffering she would have experienced had the second and third accidents not occurred. At the same time, however, to the extent her ongoing symptoms at the time of the second accident left her vulnerable to more severe symptoms from the further soft tissue injuries caused by the second and third accidents, she must be compensated.
- [170] Ms. Dale seeks an award of non-pecuniary damages in the range of \$90,000 to \$140,000. The defendants argues \$30,000 to \$40,000 is appropriate.
- [171] Similar cases are of some assistance in assessing an award for non-pecuniary damages. It is recognized however that each plaintiff is unique and no other case will ever involve exactly the same circumstances: *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155, at para. 525.
- [172] Ms. Dale relies upon *Clayton v. Barefoot*, 2018 BCSC 239 and *Severud v. Smit*, 2016 BCSC 1021, both of which awarded \$130,000 in non-pecuniary damages. Like Ms. Dale, Ms. Clayton was young, 26, at the time of the accident, and suffered soft tissue injuries that resulted in chronic low back pain. The level of pain and its effect on all facets of her life, however, were more severe. Similarly in *Severud*, the plaintiff's ongoing neck and shoulder pain was not only permanent, but significantly restricted her enjoyment of all aspects of her life, well beyond the consequences Ms. Dale has and will encounter.
- [173] The defendants rely upon several authorities involving plaintiffs who experienced mild to moderate exacerbations of pre-existing soft tissue injuries lasting several years but having a comparatively modest impact. *McKay v. Raiwal*, 2015 BCSC 220, where non-pecuniary damages of \$30,000 were awarded, provides the most, but still limited, guidance. The 23-year-old plaintiff suffered an exacerbation of pre-existing chronic soft tissue injuries for about four years, but her ongoing chronic pain was only somewhat worse than it was before the accident, unlike Ms. Dale's.
- [174] Turning to the Stapley factors, the most significant for Ms. Dale are her young age and the severity and duration of her pain. Since July 2016 she has lived with increased, significant pain that improved but did not resolve by 2017, increased shortly before the third accident and then was then worsened considerably after the third accident. She now has a chronic pain condition that may improve, but she is unlikely to recover and has most of her life ahead of her.
- [175] Ms. Dale's non-pecuniary loss includes the loss that arises from working in pain and with headaches severe enough to interfere with her concentration and ability to perform. Although after each accident she has returned to being very active, whether due to fear or actual pain, she is no longer able to participate the way she did in Ultimate, a sport that has been her passion, and as Dr. Chow observed, part of her identity.

[176] She has also suffered psychologically experiencing increased anxiety and since the third accident significant emotional distress related to her pain condition since the third accident. Previously outgoing, bubbly and enthusiastic, Ms. Dale is no longer that person, at least in the workplace. Also bearing in mind the limited guidance provided by the cases I have been provided with, I assess Ms. Dale's non-pecuniary damages at \$80,000. From that amount I deduct \$10,000 to account for the negative contingency that she would have experienced some pain and suffering from some ongoing symptoms absent the second and third accidents. I therefore award Ms. Dale \$70,000.

Loss of Earning Capacity

Legal Principles

- [177] Claims for past loss of earnings and future loss of earning capacity are subject to the same legal principles. The plaintiff must demonstrate that the injuries and symptoms caused by the accidents have impaired her capacity to earn income, resulting in a pecuniary loss. While actual past events must be proven on a balance of probabilities, hypothetical events including those in the past will be considered where there is a real and substantial possibility they would occur. Where proven, a hypothetical event must be given weight according to its relative likelihood and compensation must be awarded based on an estimation of the chance the event would have occurred or will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17. The onus is not a heavy one, but it must be met in order to justify a pecuniary award: *Kim v. Morier*, 2014 BCCA 63 at para. 7.
- [178] Although a claim for past loss of income is often characterized as a separate head of damages, it is a component of the loss of earning capacity, being a claim for the loss of the value of the work the injured person was unable to perform because of the injury: *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45. The plaintiff is entitled to compensation based on what she would have, not could have, earned but for the injuries caused by the accidents: see *Munoz*.
- [179] In general, the value of the plaintiff's capacity to earn is equivalent to the value of the earnings she would have received, in the past or the future, had the tort not been committed: *Kallstrom* at para. 389.
- [180] The loss or impairment of earning capacity is valued using either an earnings or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach is viewed as more appropriate where the plaintiff has a history of earnings and the loss is more easily measured. The capital asset approach is typically used when the plaintiff has no clear earnings history, although it is not restricted to this circumstance. This approach involves considering a number of factors including whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been available to her, and is less valuable to

herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8.

- [181] Under either approach, the court must endeavour to quantify the financial harm accruing to the plaintiff from the loss or impairment of her earning capacity, taking into account the relevant and realistic contingencies: *Pett v. Pett*, 2009 BCCA 232 at para. 19; *X. v. Y.*, 2011 BCSC 944 at para. 183. The assessment is an exercise of judgment, not a mathematical calculation, firmly grounded in the particular facts of the case.

Past Loss of Earnings

- [182] This part of Ms. Dale's claim is modest and simple. She seeks an award of \$2,898 for past loss of earnings resulting from the second and third accidents. Her calculation is based on 22 days of missed work at a rate of \$40,000 per year. The missed days include two days following the second accident and two weeks following the third, plus ten additional days.
- [183] The defendants complain Ms. Dale called "no evidence" and adduced no records to quantify her past wage loss. They are prepared to accept however the second and third accidents caused her to miss a total of two weeks of work. They also accept a salary of \$40,000 as a basis for the calculation. There has been no suggestion of any reduction in the award for negative contingencies.
- [184] Mrs. Yee testified that Ms. Dale has missed about 10 days of work since she returned after the third accident, which I accept, but she did not specify why. Ms. Dale testified to missing time here and there sometimes due to the accidents. Taken together I accept that Ms. Dale has missed some additional days as a result of her injuries. Absent more precise evidence I assess that time at five days.
- [185] In total then I award Ms. Dale the net amount for 17 days of lost earnings based on a salary of \$40,000. I leave counsel to calculate what that amount is.

Future Loss of Earning Capacity

- [186] Ms. Dale relies upon a capital asset approach. She argues there is a substantial risk she will lose her current job and face the financial consequences of a reduced earning capacity based on all of the *Brown* factors. She suggests her chronic pain condition would prevent her from completing a bachelor's degree in kinesiology while working, a necessity given her family's financial circumstances, and that she has also lost her capacity to work at multiple jobs.
- [187] Regarding Mrs. Yee's evidence that she is intent on keeping Ms. Dale if she does not succeed as a legal assistant, Ms. Dale asks me to consider how legislative changes to the Motor Vehicle Act, R.S.B.C 1996, c. 318 could negatively impact on employment prospects with personal injury law firms. Her main argument, however, is that absent the second and third accidents, she would have continued to work as a legal assistant for the foreseeable future

and now that trajectory is unlikely. Assuming steady salary increases of \$5,000 per year up to \$65,000 until age 65, she calculates her residual life earnings at \$1,939,690, using the weighted average of \$63,682 and the "CIVJI" multiplier of 30.4590. Based on a 25% reduction to her capacity to earn, she proposes an award of \$484,922.

- [188] Although I accept that Ms. Dale's chronic pain condition has impaired her future earning capacity, in my view this amount significantly overvalues her future pecuniary loss. Absent any evidence, I am not prepared to consider what effect legislative change may have on the labour market as it relates to personal injury law firms. Nor is there any basis upon which to infer that the maximum salaries paid to legal assistants at law firms generally is any less than what she could earn if she remained in her current position.
- [189] The evidence as a whole establishes that Ms. Dale was very successful in her prior role as a client care liaison before and after the second accident. Accepting Mr. Altieri's opinion, I find that despite her chronic pain condition, Ms. Dale has the functional capacity to work regular full-time hours as a legal assistant, if accommodated ergonomically, but not to continue working as she is now, that is nine or 10 hours per day and sometimes more when preparing for trial without accommodations.
- [190] Unfortunately, despite working where she does and being injured in a third accident, her promotion to the position of legal assistant involved not only a dramatic increase in her workload resulted in a loss of the accommodations she relied upon to manage her symptoms. These are most importantly the Ergotron and the ability to take move around and stretch as needed. Although Ms. Dale does not have the capacity to meet the demands of her current position, I am not prepared to infer that she could not find employment as a legal assistant elsewhere where the hours and expectations would align with her capacity. I do accept however, that in order to secure a comparable position, Ms. Dale may have to complete formal training comparable the one year program Ms. Wong described, which would involve time out of the work force and the cost of the program itself. Further, given her chronic pain condition, Ms. Dale is likely to experience periodic symptom flare ups from time to time that will require her to miss some time from work, resulting in some losses of employment earnings.
- [191] I also accept that Ms. Dale is no longer capable of working as a kinesiologist but place little value on this loss of opportunity because the evidence indicates she was unlikely to pursue the degree program in any event. Similarly, while I accept Ms. Dale is no longer able to work at both a regular full-time job and a part-time job, something she did on and off until shortly before the third accident, in my view, I do not accept she would have continued taking second jobs once established as a legal assistant. It is my impression Ms. Dale's part-time positions were largely driven by financial need. Her starting salary at the law firm was a modest \$26,000. It jumped from \$40,000 to \$45,000 after the third accident and her promotion.

- [192] Bearing in mind the income loss and the cost associated with completing formal training, the delay involved in reaching a salary of \$65,000 elsewhere, a modest amount for the loss of opportunity to complete a kinesiology degree and to earn some part-time income, I assess Ms. Dale's loss at \$120,000.
- [193] I must also take into account the chance that Ms. Dale's ongoing symptoms from the first accident absent the second and third accidents would have resulted in some future pecuniary loss. I have found on a balance of probabilities that those symptoms would have resolved gradually over time but Ms. Dale experienced a flare in symptoms after starting at the law firm in July 2015 and had a continued need to move around and stretch by the time of the second accident. In all of the circumstances, and in particular given the demands of her current position, I assess the chance of a re-emergence in her symptoms resulting in a future pecuniary loss and the amount of that loss at 15%. Therefore I deduct \$18,000 and award her \$102,000.

Cost of Future Care

Legal Principles

- [194] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible and to preserve and promote her mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, *aff'd* 2004 BCCA 290; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [195] The test for assessing an appropriate award is an objective one based on the medical evidence. An item of future care must be medically justified, not medically necessary, and reasonable, to be recoverable: *Milina*.
- [196] Ms. Dale seeks \$96,542 in future care costs, relying on Mr. Altieri's high cost estimates for his own and Dr. Majeed's care recommendations, plus an additional amount for Dr. Chow's recommendations which were not estimated. Mr. Altieri's cost of care report provides a cost range and specifies the replacement time for many of the care items. Those items include a number of treatment items such as consultation with an oral specialist, kinesiology, home ergonomic assessment, physiotherapy, massage therapy, psychological treatment, and equipment and supply items (prescription medication, ergonomic equipment and orthotics). Economist Curtis Peever's report includes cost of care multipliers and present values for the low (\$41,969) and high (\$70,655) cost estimates for the care items found in Mr. Altieri's report.

- [197] The defendants argue Ms. Dale has not established a claim for any cost of future care because she takes no medication, Dr. Marks has opined that further treatments will have no utility, the cost of any necessary treatment would have been incurred in any event, and the workstation accommodations she claims are to accommodate conditions that cannot be said to have their origin in the subject accidents.
- [198] I do not accept Dr. Marks' opinion regarding future treatment and some of the defendants' assertions do not accord with my findings of facts.

Cost of Care Items

- [199] Consultation with an Oral Specialist: Dr. Majeed recommended Ms. Dale consult a dental specialist about her TMJ pain, which Dr. Chow diagnosed as chronic jaw pain. There is no dispute her jaw symptoms were caused by the second accident. Mr. Altieri estimates the cost of any initial consultation and one follow up appointment at \$610.00 to \$725.00. Noting that any treatment recommendations would involve an additional cost, and should any oral appliance be required (\$950.00), follow-ups would be once per month for six to 12 months, he estimates the cost of subsequent follow up and treatment at \$4,250.
- [200] Based on the medical evidence, I accept the cost of the consultation and some follow up is medically justified and reasonable. Absent more specific opinion evidence about the likelihood Ms. Dale will require any specific treatment, I view a significant deduction from the estimate for the cost of subsequent follow up as appropriate.
- [201] I award \$3,000 for this item.
- [202] Kinesiology: Noting Dr. Majeed's recommendation for active rehabilitation and based on his own observations of Ms. Dale's limitations regarding prolonged sitting and sustained neck flexion, Mr. Altieri agrees she would benefit from 12 sessions with a kinesiologist to facilitate a focused exercise program at a cost of \$900.00.
- [203] I accept this item is medically justified and the cost estimate reasonable, also bearing in mind Ms. Dale's chronic pain condition, as well as Dr. Chow's caution about the need to avoid activities that reproduce and aggravate her pain. Although Ms. Dale was participating in personal training sessions long before the second accident and has consistently relied on gym workouts to manage her pain through strength training, aerobics and stretching, a focused exercise program to help her avoid the risk of worsening her pain symptoms aligns with the objective of restoring and preserving her physical health.
- [204] Home Ergonomic Assessment: Mr. Altieri recommends a home ergonomic assessment related to Ms. Dale returning to school to complete a degree in kinesiology. In my view this item is not reasonable because Ms. Dale has no concrete plan to pursue this goal.
- [205] Physical Therapy: Based on Dr. Majeed's recommendation for ongoing physiotherapy, massage therapy and chiropractic treatment, Ms. Dale's rate of attendance and reported benefit and the timing of the third accident (five months prior), Mr. Altieri recommends

she begin to reduce the frequency to 12 to 14 physiotherapy sessions per year starting in 2019 for symptom management, while she continues to work in an office role or attends school, estimating \$960 to \$1,400 per year (physiotherapy - \$80 per session; massage - \$100 per session). Mr. Peever's low and high estimates for the present value of ongoing treatment are \$25,412 and \$37,060. Ms. Dale suggests the amount for this item should be increased because Dr. Majeed also recommended chiropractic treatment and Dr. Chow recommended periodic brief courses of multiple forms of physical therapy for pain control during symptoms flare ups such as physiotherapy, massage therapy, acupuncture, and chiropractic and manual therapy "down the road".

- [206] In my view, the high range of Mr. Altieri's estimate, but no more, is medically justified and reasonable, allowing as it does for up to 14 appointments per year ongoing. While I accept that physical therapy provides Ms. Dale with much needed symptom relief and she is likely to experience flare ups intermittently over the long term, I also accept that there is a realistic possibility she would have required some, although far less, treatment absent the second and third accidents, and any risk of deterioration is offset by the chance her symptoms will improve. I therefore award \$37,060 for this item.
- [207] Psychological Treatment: Dr. Majeed recommends ongoing psychological treatment. During her testimony, as I have indicated, she expressed concern about the increase in Ms. Dale's level of distress following the third accident which had subsided with psychological treatment following the second. Dr. Chow recommends a psychological assessment and cognitive behavioural therapy or a mindfulness program for pain control because of her chronic pain and psychological issues. Mr. Altieri recommends four to six sessions at cost of \$200 per session based on a review of Ms. Dale's treating psychologist's clinical records, which are not in evidence.
- [208] In my view four to six sessions is a very conservative estimate for this care item. I accept the anxiety Ms. Dale experienced following the first accident was worsened by the second and third accidents. Ms. Dale's mood also deteriorated quite significantly after the third accident. Not satisfied that Ms. Dale would have incurred future counselling costs as result of the first accident, I deduct nothing from the high estimate of \$1,200.
- [209] Prescription Medication: Advised by Ms. Dale she was taking baclofen and naproxen for pain management, Mr. Altieri estimated their annual cost at \$120.56 to \$126.80. Dr. Chow's report recommends long term analgesics but nothing more specific. Dr. Majeed indicated that Ms. Dale may benefit from Cymbalta but there is no evidence regarding its cost or for how long. Whether or not Ms. Dale is currently prescribed medication, she has taken a number of different kinds since the second accident to manage pain symptoms. It seems inevitable she will need to rely upon them in the future, perhaps intermittently. Absent other evidence I am only able to award the amount proposed by Mr. Altieri: \$126.80.

- [210] Ergonomic Equipment: Mr. Altieri provides cost estimates for a range of ergonomic equipment pending an ergonomic assessment of her home that includes a wireless keyboard and mouse, slant board, document holder, ergonomic chair (to be replaced every 10 to 15 years), sit/stand desk (to be replaced every 10 to 15 years) and a laptop bag with wheels (to be replaced every three to five years), along with a delivery fee and installation charge of \$150. The last item contemplates Ms. Dale transporting the laptop and other materials to school.
- [211] Except for the last item, I am satisfied the others are medically justified and reasonable given the limits on Ms. Dale's sitting tolerances and other work-related limitations. I am more than satisfied she requires a sit stand desk and the other equipment to function in her current position as a legal assistant and for any other desk job she may take on in the future. From the mid-point between the low and high estimates, \$7,118, I deduct 20% to account for the chance Ms. Dale would have required some of these same accommodations absent the second and third accidents.
- [212] Custom Orthotics: Mr. Altieri estimates their cost but defers to the medical experts to identify whether Ms. Dale's need for them is caused by her accident related injuries. There is no such evidence. Unable to find orthotics are medically justified, I make no award for this item.

Special Damages

- [213] Claims for special damages are subject to a standard of reasonableness in the context of the injuries suffered: *Redl v. Sellin*, 2013 BCSC 581 at para. 55. Medical justification for a treatment related expense aimed at promoting the plaintiff's physical or mental well-being is a factor in determining whether it is reasonable. Subjective factors can also be considered, including whether the plaintiff believes the treatments were medically necessary. With respect to cost, the courts have been prepared to allow claims for expenses at the level of optimum care, although plaintiffs are not entitled to recovery for the cost of any procedure they believe will make them feel better.
- [214] The parties have agreed Ms. Dale incurred \$17,920.53 in treatment expenses for all three accidents. She claims \$12,330.53, the amount incurred following the second accident. Those expenses include the cost of physical treatment, psychological treatment and personal training sessions, as well as the cost of a foam roller and memory foam pillow.
- [215] The defendants argue they should not be responsible for the cost of personal training sessions, because there is no evidence they are medically necessary and the plaintiff engaged in personal training long before the subject accidents. They also argue they are only liable for half of the cost of 15 psychological treatment which total \$885.00. Finally they suggest they should not be responsible for more than 70% of the cost of physiotherapy from July 1, 2016 onward because Ms. Dale would have attended some of the sessions in any event to manage her chronic pre-existing symptoms.

[216] In my view, all of the psychological treatment costs following the second accident are reasonable. Although Ms. Dale had some anxiety related to the first accident, it was worsened by the second and third. I have already indicated I am not satisfied she would have required further treatment in any event. While I agree some deduction needs to be made from the cost of physical therapy to account for her ongoing symptoms, I regard 80% of the cost as reasonable. Absent evidence that would establish Ms. Dale's personal training sessions were medically recommended or more frequent than they would have been but for the second and third accident, I am not prepared to award their cost. I trust counsel can agree on the calculation.

"Fleming J."

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