

CANADA / JUDGMENT

Franklin v. Coco

2022 BCSC 1929

COURT

Supreme Court of British Columbia

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2022 BCSC 1929 Franklin v. Coco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Franklin v. Coco,

2022 BCSC 1929

Date: 20221103

Docket: S34775

Registry: Chilliwack

Between:

Christine Lynne Franklin

Plaintiff

And

Andrew Coco and

Kristina Caroline Lamha

Defendants

Before: The Honourable Mr. Justice Caldwell

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

Chilliwack, B.C.

April 4-8, 2022

April 11, 13-14, 2022

Place and Date of Judgment:

Chilliwack, B.C.

November 3, 2022

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INTRODUCTION

- [1] This action arises from a motor vehicle collision which occurred on November 22, 2016. Liability for the collision has been admitted. The collision itself was significant. Both the plaintiff's vehicle and the defendants' vehicle were written off as total losses.
- [2] The plaintiff seeks non-pecuniary damages along with damages for past and future income loss, future care, housekeeping, special damages, and in-trust damages for services rendered by family members.

PRIOR TO THE COLLISION

- [3] The plaintiff, Christine Franklin, is 52 years old. She is married and lives in a townhouse in Abbotsford. She has a long work history. After graduating from high school, she attended the Vallee School of Beauty and obtained her certification for hairdressing. Between 1989 and 2006, she worked in the hairdressing industry both as an employee and, at times, in her own business.
- [4] In 2006, Ms. Franklin was hired by Black Press, who controls and publishes a number of the local newspapers in the Fraser Valley. Her husband, Mr. Franklin, worked and continues to work for Black Press and was instrumental in her obtaining her position. She quickly established a positive reputation at Black Press. She was promoted within the organization and to different locations in the Fraser Valley including Chilliwack, Abbotsford and Langley. She generally worked 40 hours per week but frequently put in extra time.

- [5] Ms. Franklin enjoyed the work and the people with whom she worked. She earned approximately \$60,000 to \$65,000 per year, including commission, and enjoyed generous benefits including a good pension plan.
- [6] She testified that it was her intention to continue working for Black Press until retirement at age 65, but admitted in cross-examination that her husband is currently 59 years old, works in a senior position at Black Press, intends to retire at age 65 and wants her to retire when he does so that they can do things together.
- [7] Prior to the collision, Ms. Franklin enjoyed generally good health. She had no work-related injuries or Workers' Compensation claims. She had surgery for a knee injury which she suffered playing baseball at age 14 and had further corrective knee surgery when she was 16. She aggravated that knee in a fall in 2019. She was in a previous collision 27 years prior to this subject collision, but had essentially fully recovered. She had two other routine surgical procedures in the intervening years but neither are relevant to the issues before the court. She had occasional headaches, described as a few per month. They seemed to her to be related to allergies and the puffer which she takes for asthma. Those headaches tended to last for a couple of hours, but were not as severe as the headaches which she has experienced after the collision and certainly not as severe as the migraine type headaches which she says that she now gets.
- [8] Before the collision, Ms. Franklin testified that she enjoyed a variety of recreational pursuits including long walks and hikes 2-3 times per week, occasional canoeing, sewing and quilting, exercise with her home equipment, and community and charitable work. She and her husband enjoyed local and international travel. They became somewhat involved in the travel blogging industry. She frequently cared for her grandchildren who were very young at the time. She and her husband enjoyed an active social life.

THE COLLISION

- [9] Ms. Franklin was on her way to work at the time of the collision. She was stopped behind a line of cars and was wearing her seatbelt. She was struck by a vehicle driven by the defendant, Mr. Andrew Coco, and was pushed forward to collide with the rear of the car ahead of her. The airbag deployed. She felt immediate pain in the face and nose, her hand, her right ankle, her right hip and her shoulders, back and neck. She saw what she thought was smoke and became very frightened of possible fire. The jaws of life were required to remove her from the car. She was placed on the spine board and transported to Langley Hospital. She was released from hospital later that day and was driven home by a co-worker. She remained off work for four days and then returned, but worked from the Abbotsford office instead of the Langley office in order to reduce her drive to work. Over time, she developed anxiety, headaches, and experienced nightmares.

AFTER THE COLLISION

- [10] Ms. Franklin saw her family doctor, Dr. MacKenzie, two days after the collision complaining of pain involving her face, neck, shoulders, back, hips and feet. It is likely that she also complained of headaches at that time as well. Dr. MacKenzie recommended Flexeril and Tylenol, as well as physiotherapy.
- [11] The plaintiff testified that she suffers from acid reflux and that she has difficulty tolerating most of those types of medications, but did take at least some of the prescribed medications as needed.
- [12] She attended five of six intended physiotherapy sessions at CBI Sport & Spine Health Centre between November 25, 2016 and January 11, 2017. She did not continue with physiotherapy at that time, as she did not feel well-served by her sessions which consisted largely of being connected to a TENS machine and being left alone for 45 minutes. There was no evidence that she discussed her dissatisfaction regarding CBI with anyone, nor that she sought physiotherapy from another provider. She did not seek referral to, nor did she attend, massage therapy, chiropractic treatment, exercise therapy with the kinesiologist, a neurological consultation or psychological counselling of any kind.
- [13] Ms. Franklin and her husband travelled to England in late December 2016, to visit family. The trip was arranged and paid for prior to the collision. She testified about various difficulties with the flights and her time in England associated with the collision and her related injuries.
- [14] She saw Dr. MacKenzie two or three more times between that first visit and March 2017, regarding issues arising from the collision and her resulting injuries. Thereafter, she did not see Dr. MacKenzie for collision related matters or complaints until July 2020.
- [15] Ms. Franklin continued to work with Black Press until approximately July 2018, when she resigned and took over ownership and operation of Michael's on Main, a hair salon in Chilliwack. She blamed her continuing collision related symptoms for her move; at times she cited her neck and shoulder pain as the main reason for leaving Black Press, while at other times she said that the persistent headaches/migraines and mental fuzziness were the main cause.
- [16] Her evidence and that of the various experts, indicates that many of her symptoms were quite significant during the months following the collision but improved over time, may have reached as much as 90 percent improvement by late 2018, but then worsened "over the last two to three years". I note that this period of worsened symptoms coincides with or follows her move from Black Press to hair styling.

- [17] Between December 11, 2018 and August 13, 2019, she had 40 sessions with a personal trainer, Heather Therrien. She felt positive about these sessions which involved stretching, yoga, light weights, and stretch bands. Ms. Therrien is no longer involved in personal training and the plaintiff has not sought out similar assistance from other personal trainers.
- [18] In November 2020, she attended at the Wellington Natural Health clinic and received treatment from Gagandeep Watts, a registered manual osteopath. She returned for two further treatments in November 2021. She found these sessions helpful for her headaches and dizziness, but testified that she has not continued with them because ICBC will not pay for the sessions. No evidence, oral or documentary, of requests for such treatment on behalf of the plaintiff or refusal on behalf of the insurer was presented.
- [19] In late 2020 or early 2021, Ms. Franklin was advised to attend further physiotherapy and six further sessions were approved. In March 2021, she attended two of those physiotherapy sessions, this time at Optimum Sport. She felt these sessions were more productive, but she tested positive for COVID-19 after those first two sessions and has not returned to physiotherapy.
- [20] Ms. Franklin further testified:
- since the collision she has been unable to "hike" and only occasionally goes on level walks with her husband;
 - she very rarely canoes or kayaks and is limited in her ability to help propel or steer the craft;
 - her quilting has been curtailed as she can no longer manage handling the larger quilts and her sewing has been reduced from what it previously was;
 - she still travels with her husband but less frequently, and generally for shorter distances and lengths of time;
 - when she and her husband travel, she is not able to participate in activities to the extent that she was able prior to the collision and usually spends most of her time resting in their hotel room;
 - she finds air travel difficult due to the crowds, noise (including the engine drone and vibration) and handling of luggage. After a longer trip, she finds that she needs a day or two to recover from the travel itself. That was not the case prior to the collision;
 - initially, she testified that her headaches/migraines had arisen or at least gotten much worse during the last two to three years but, on reconsideration, changed her testimony to say that they had been ongoing since the collision;
 - she gets headaches four to five times per week, and each can last for days at a time;

- she gets migraines approximately twice per month, they are debilitating, usually located behind the left eye, last for two days, and are followed by a one-day migraine hangover; they have gotten worse since she contracted COVID-19; and
- her shoulder pain and headaches/migraines limit the type of services that she can provide to her clients and the number of clients she is able to service at the hair salon.

[21] On cross-examination, Ms. Franklin acknowledged:

- between March 2017 and July 2020, she did not consult her family doctor regarding matters related to the collision, including headaches, but she did consult him regarding matters not related to the collision and, on at least one occasion, received a referral to a specialist to deal with those unrelated complaints;
- she did see Dr. Grover, her orthopaedic surgery expert, in November 2018 and again in November 2021, on direction of her lawyer;
- regarding her first visit to Dr. Grover, she disputed having told him that she was ninety percent better and could not recall talking to him about migraines;
- she did not consult her family doctor or other specialist of any kind prior to resigning from Black Press;
- her position producing the Real Estate Weekly at Black Press in 2016 turned out to be more computer-centered and less "in person" focused than she had expected;
- other than seeking and obtaining a larger monitor at work, which was provided on request, she sought no further ergonomic accommodation from her employer;
- she did not ask for other/different work at Black Press nor did she consult other sources ("head-hunters") regarding other possible employment opportunities prior to resigning and moving to Michael's;
- her social media presence increased significantly following the collision and includes blogging about travel and restaurants;
- she did not seek or obtain referrals to specialists regarding her dizziness, headaches or other complaints but did see Dr. Cameron, her neurological expert, in October 2019 on direction of her lawyer;
- she saw her move to Michael's as "meaningful" - she heard that the owner was retiring, and the salon would be closing. She reached out to the owner because she "had to do something else";
- returning to hair styling and business ownership gave her freedom and got her back to face-to-face contact. She indicated that "I like a challenge"; and

- she was aware from previous experience that hair styling was physically demanding, as she had suffered a repetitive strain injury to her right wrist in the past.

LAY WITNESSES

Lisa Farquharson

- [22] Ms. Farquharson has worked for Black Press for approximately 24 years, the last eight as a Group Publisher. She hired the plaintiff to manage the Real Estate Weekly from the Langley office approximately 18 months before the collision and then continued as her supervisor for approximately the same length of time following the collision.
- [23] Ms. Farquharson described the plaintiff as "a great employee" prior to the collision. She was not aware of any pain complaints or problems at that time and described the plaintiff as bubbly, loud, and fun. She confirmed that the plaintiff's job involved considerable computer use or screen time, simply due to the nature of the job.
- [24] Ms. Farquharson described the plaintiff as "uncomfortable" after the collision but indicated that although she had "driving issues" and some things that she could not do, she was still very good at her job. Ms. Farquharson described that the plaintiff's mood changed after the collision and she became less bubbly, seemed frustrated, and sometimes appeared to be in pain.
- [25] Ms. Farquharson testified that Black Press accommodates physical and ergonomic requests whenever possible. Adjustable ergonomic chairs, height adjustable workstations and desks, oversized or additional monitors - all were and are available for the asking. The employer recognizes that desk and computer work are essential - "the nature of the beast". They make such accommodations available and encourage employees to stretch and move around regularly, to offset the effects of such sedentary and screen-oriented work.
- [26] The plaintiff did request a new or different monitor/screen and it was provided. She made no other requests or inquiries about accommodation.
- [27] Both before and after the collision, Ms. Farquharson said she had "lots of respect" for the plaintiff as an employee and for the quality of her work. She was surprised at the plaintiff's resignation and said that it was not expected. The plaintiff simply came to her, gave her two weeks' notice and said that she was "moving on to something else". She gave no stated reason for resigning. There had been no complaint as to the plaintiff's quality or quantity of work from the employer prior to the plaintiff's resignation.

June Neufeld

- [28] Ms. Neufeld went to the Vallee School of Beauty with the plaintiff in 1988/89. They worked together for some years until approximately the late 1990s when Ms. Neufeld left to open her own shop. She has now returned to work at Michael's.

- [29] Ms. Neufeld says that now the plaintiff has "issues" doing hair. The plaintiff's body position, particularly that of her arms and shoulders, is different than it was 20 years ago. She observes the plaintiff heating up and applying hot bags to her shoulders and neck and in fact, she and other employees have taken to preparing hot bags in the microwave so that they are available for the plaintiff. She has seen the plaintiff cry at work quite regularly, apparently from pain; and has on occasion seen her leave early, as she seems unable to continue.
- [30] Ms. Neufeld previously suffered an injury which led to "frozen shoulder" and she knows what it is like to work in the hair industry with such an injury, and the related pain and limitations. She said that, from her observations over time, shoulder pain is common in the industry.
- [31] She did not know why the plaintiff left the hair industry back in 2006, but is aware that the plaintiff returned when she heard that Michael's could be closing. The plaintiff has indicated to her that she did not want that to happen and that she was and is excited to keep the business going. She describes the plaintiff as an excellent hair stylist, an excellent leader, an excellent manager, and an excellent person.
- [32] Ms. Neufeld gave no evidence regarding headaches.

Other friends and co-workers

- [33] Other lay witnesses, including the plaintiff's sister, testified to various similar observations including changes in the plaintiff's personality and general outlook, facial expressions which they interpreted as indicative of pain, occasional crying, leaving work at Michael's early, use of pillows and frequent changing of position at her work station at Black Press, and heat pads at Michael's.

Andrew Franklin

- [34] Mr. Franklin is the plaintiff's husband. They met in 2005 and married in June 2011. He is a long-standing employee of Black Press and currently holds the title of Vice President. He provided some background regarding Black Press and how the plaintiff first became employed there.
- [35] Mr. Franklin's description of the plaintiff prior to the collision was consistent with the evidence presented by the plaintiff and her other lay witnesses.
- [36] Mr. Franklin's stated description and observations of the plaintiff following the collision includes the following:
- she was sore immediately following the collision, got better for a while but then got worse;
 - he sees expressions of pain on her face daily and she remains unsteady and wobbly on her legs to the present day;

- she continues to suffer from headaches most days and migraines "every couple of days"; she treats them with hot or cold pads and by retreating to a dark area of the house;
- she suffers from anxiety when she is in a vehicle - this began immediately following the collision and continues to the present day;
- in the year-and-a-half following the collision, and while she continued to work at Black Press, the plaintiff's main struggle was with headaches and migraines, followed by pain in her left shoulder, a perceived reduction in her communication skills, and anxiety;
- her left shoulder and low back pain got better for a while but then got progressively worse and both have negatively affected her sleep patterns;
- the relationship has suffered in that there is less physical intimacy, more conflict, the plaintiff is more irritable and suffers a higher level of anxiety; and
- the plaintiff is much less able to travel, participate in quilting and sewing, care for her grandchildren, hike, exercise, and attend community events.

[37] In cross-examination, Mr. Franklin acknowledged that:

- the plaintiff returned to work a few days following the collision;
- she attended "a few" physiotherapy sessions" in the weeks following the collision but discontinued that attendance, and did not return to physiotherapy for approximately four years. She did not pursue massage therapy, chiropractic treatment, kinesiology consultation, or psychological counselling;
- she did not consult medical authorities prior to resigning from Black Press;
- Black Press is a progressive employer in terms of employee requests for ergonomic accommodation;
- the situation involving Michael's hair salon came "out of the blue", that the plaintiff was very sad about the possibility of that business closing and that she was "excited" about rebuilding the business; and
- his memory regarding dates of travel may be inaccurate given some of the blog posts and other documents which were produced - in particular a trip to San Francisco and Alcatraz, a trip to San Diego, and a trip to Las Vegas which involved kayaking on the Colorado River may have occurred after the collision. He was unable to distinguish some of the pre-collision trips from the post-collision trips in terms of activities, particularly their trips to Las Vegas.

EXPERT WITNESSES

Russell McNeil

[38] Mr. McNeil is an occupational therapist, work capacity evaluator, and certified disability analyst. He assessed the plaintiff on December 12, 2021 - five years after the collision and three-and-a-half years after the plaintiff left Black Press and returned to a career in hair styling. He produced his report shortly thereafter.

[39] Mr. McNeil's examinations normally consist of a single, four to eight hour long assessment. They include an interview, objective testing, work simulations, task performance and timing, level of effort assessment, and reliability of complaint assessment.

[40] The details of his interview and various testing were contained in his report. Some of his recorded findings include:

- that she put forward a consistent best effort in performing the tests;
- there was measured restricted functional mobility in the left shoulder;
- there were measured restrictions in trunk flexion, extension, and rotation;
- there were restrictions in her capacity to perform static and dynamic vertical reaching, both above and below shoulder level;
- there were restrictions in her capacity to perform activities while looking up or looking down;
- there was a slight restriction in her sitting tolerance - she is able to sit for periods of 60 to 90 minutes on a frequent basis but would benefit from the use of ergonomic devices to reduce strain on the neck shoulders and upper back;
- there was a slight restriction with her static standing tolerance to approximately 30 minutes at a time, but if she was able to move and stretch she would be able to manage standing on a modified frequent to constant basis throughout the day; and
- several of her day-to-day avocational activities appear to be slightly to moderately restricted.

[41] In Mr. McNeil's assessment of overall work capacity, beginning at para. 81 of his report, he said:

Sedentary Work: Based on the assessment results Ms. Franklin is capable of working in occupations that fall within the sedentary physical demands characteristics. She will struggle with sitting combined with prolonged static spinal positioning and reaching, but she would be able to manage by pacing herself and she would also benefit from ergonomic accommodations.

There may be cognitive and/or visual perceptual restrictions in her ability to perform computer work over the long term and I would defer to the neuropsychologist and/or neurologist to comment on this.

Overall, she has the capacity to manage working with accommodations and would be able to maintain a competitively employable work pace. However, the need for accommodations may adversely affect her ability to compete for work in the open job market.

Light Work: She demonstrated the capacity to obtain the strength demands of light work.

She would be restricted in her capacity to perform the prolonged (frequent) standing requirements of light work and she would require accommodations to pace herself over the course of the work day.

She would be restricted in her capacity to perform occupations in the category that required static and dynamic vertical reaching (above shoulder level). She would require accommodations and would be restricted in her capacity to maintain a productive work pace, depending on the work.

She would be restricted in her capacity to perform occupations in the category that required static and dynamic horizontal reaching (below shoulder level). She would require accommodations and would be restricted in her capacity to maintain a productive work pace, depending on the work.

She would be restricted in her capacity to perform work in this category that required static or dynamic (dynamic) spinal positioning such as bending (trunk flexion), twisting, looking down, and looking up and she would require accommodations which would adversely affect her productivity.

[42] Later in his report, at para. 96, Mr. McNeil indicates that the work of a hairstylist is light level work and that the plaintiff is capable of performing it on both a full-time and part-time basis. He goes on to say at para. 96:

Demonstrated Capacity: Based on the biomechanical measurements and the resulting physical restrictions, along with the diagnosis and prognosis provided by the various experts, Ms. Franklin has demonstrated restrictions in her capacity to perform her work as a hairdresser on a full-time or part-time basis at a competitively employable work pace.

While she has been working full-time she has had to make accommodations to manage including limiting the type of work and number of hours in order to manage. This has also had an adverse effect on her tolerance for activity outside of work including leisure and household chores.

She has demonstrated the capacity to perform the strength requirements of the work. She has demonstrated restrictions in her capacity to perform the stamina requirements of the work and she would require accommodations. Specifically, she has demonstrated significant restrictions in her capacity for prolonged static and dynamic reaching and static spinal positioning.

[43] Mr. McNeil's report at para. 101 identifies work in sales and advertising design as sedentary, and indicates that she is capable of such work on both a part-time and full-time basis, with restrictions and accommodations. He goes on to say:

Demonstrated Capacity: based on assessment results of December 12, 2021, Ms. Franklin has demonstrated restrictions in her capacity to perform her previous work in advertising sales and design on a full-time basis at a competitively employable work pace.

She has demonstrated the capacity to perform the strength requirements of the work. She would be restricted in her capacity to perform the stamina requirements of the work and she would require accommodations.

She would also be restricted in her capacity to perform prolonged sitting combined with static positioning.

[44] There was no evidence that the accommodations available from Black Press were known to, or discussed with, Mr. McNeil as part of the assessment.

Dr. Donald Cameron

[45] Dr. Cameron is a neurologist. He conducted an examination and assessment of the plaintiff on September 12, 2019, approximately three years after the collision and approximately 14 months after the plaintiff returned to working in the hair industry. He produced a report shortly thereafter. He discussed several of the plaintiff's complaints and symptoms but his main focus was on the issue of headaches.

[46] In preliminary direct examination, he corrected an error in para. 35 of his report. In the final sentence of that paragraph he intended to say that she did and does have lower back pain but no radicular type pain into her lower extremities following the collision.

[47] Dr. Cameron did standard neurological and musculoskeletal examinations as a preliminary aspect of his assessment, along with an interview of the plaintiff. He reviewed medical records and other documentation after the exams and interview to avoid bias.

[48] Examination results for both the neurological and musculoskeletal exams were noted as being normal for a person of the plaintiff's age. He catalogued her various pain complaints and resulting limitations. He noted that she quit her "desk job" because it aggravated her pain, discomfort, and headaches. He was not told, nor was he aware, that the plaintiff has had a rather unusual sleeping pattern throughout her life. She testified that since the age of four, she has only ever slept an average of four hours per night. She did testify, and apparently told Dr. Cameron, that her sleep since the collision has been more difficult and disturbed in terms of position and comfort.

[49] Based on his overall examination and interview of the plaintiff, Dr. Cameron opined:

- that she probably suffered soft tissue and musculoskeletal injuries to her neck, left shoulder, right foot, upper extremities, right hip, and neck in the collision;
- that she has developed chronic pain involving her back and upper extremities as a result of these injuries;

- that she probably did not suffer a concussion or mild traumatic brain injury in the collision;
- that she has developed posttraumatic musculoskeletal or cervicogenic headaches with some probable intermixed posttraumatic migraine headaches;
- that she is a candidate for various prophylactic daily medications for her posttraumatic headaches, subject to prescription and monitoring by her family doctor;
- that she is a candidate for botulinum toxin injection therapy for her ongoing headaches, neck pain, and shoulder pain;
- that the chronic pain and problems with anxiety are probably the main factors contributing to her complaints of decreased memory, concentration, and attention span; and
- that she has been rendered partially disabled due to the chronic pain and headaches caused by the collision.

[50] Dr. Cameron testified that the botulinum toxin treatments are quite expensive, running between \$400 and \$800 per treatment, are normally done every three to four months, and are usually quite successful. He recommended at least two treatments be done to determine whether they would be successful in the plaintiff's case.

[51] The plaintiff did not pursue the botulinum toxin treatments, saying that they were too expensive. There was no evidence led suggesting that she had sought funding for such treatments from the insurer or that the insurer had refused such funding.

Dr. Deepak Grover

[52] Dr. Grover is an orthopaedic surgeon. He examined the plaintiff at the request of counsel on two occasions: first in December 2018 and later, in November 2021. He produced full reports on each occasion.

[53] In his first report from December 2018, Dr. Grover recorded the following based on the plaintiff's complaints and his examination:

1. Headaches and dizziness - The frequency of her headaches has gone down very substantially since the first few months following the collision. She now gets a headache once every week to 10 days although they can be quite severe. She typically lays down, closes her eyes and "sleeps that off". She continues to get episodes of dizziness and vertigo triggered by random events such as travel on elevator or escalator or experiencing flickering lights.
2. Neck pain - Her neck pain has now resolved although she showed some degree of tenderness on palpation of both trapezius muscles.

3. Left shoulder pain - The substantial pain in her left shoulder following the collision has improved by 90 percent but she does report some degree of mild intermittent instability and clicking when moving her shoulder. Examination revealed some degree of pain and a palpable clunking sensation in her left shoulder when it moved in certain directions.
 4. Lower back pain - She continues to report some lower back pain which is intermittent. It seems aggravated with sleeping in unusual positions, lifting heavy weights and sitting in one spot for an extended period of time. She gets relief from stretching and application of heat. She showed a significant tenderness over the lumbar spine processes. Examination showed pain in extension and flexion of the lumbar spine in all directions.
 5. Right ankle pain - Her right ankle pain resolved entirely within two weeks following the collision and has not reoccurred.
 6. Pain in fingers of left hand - Although no fractures or dislocations were found she indicates some degree of intermittent pain.
 7. Functional impairment - she continues to report some degree of impairment of her activities of daily living but that is now fairly minimal and very occasional. She no longer requires any assistance from her husband regarding those activities. She has resumed heavier household chores and does them unassisted. She has never hired a cleaner. She continues to report some degree of anxiety related to driving but it is intermittent and not disabling.
 8. Imaging - She has evidence of early degenerative disc disease in the cervical and lumbar spine as noted on the plane radiograph performed at Langley Memorial Hospital on the day of the collision.
- [54] Dr. Grover opines that the plaintiff suffered myofascial injuries to the neck and lower back, aggravation of pre-existing and previously pain-free degenerative disc disease of the cervical and lumbar spine, a probable labral tear, and has developed chronic low back pain. He says that all of these were caused by the collision. He feels that her lower back pain has largely reached the point of maximal medical improvement and that she will continue to have some degree of intermittent back problems. He feels that her left shoulder has not reached the point of maximal medical improvement and that it may well improve very substantially with further treatment or management.
- [55] Prior to Dr. Grover's second examination, the plaintiff underwent an MRI arthrogram of her left shoulder in June 2020. It showed a full thickness delaminating tear through the supraspinatus along with other tears. She was also found to have articular and bursal tears of the infraspinatus. She has not received any specific treatment for her left shoulder, has not seen a shoulder surgeon, and has not had a subacromial injection of cortisone followed by a rotator cuff strengthening exercise program.

- [56] In his second report from December 2021, Dr. Grover recorded the following based on the plaintiff's complaints and his examination:
1. Headaches and dizziness - Her headaches and dizziness returned approximately 18 months before this examination and are described as much worse. They are reported as occurring approximately every other day and have no specific triggering factors. She experiences dizziness and vertigo with the headaches. She alleviates the pain with over-the-counter pain medications and anti-inflammatories.
 2. Neck pain - She reports some degree of recurrence including tightness and spasms in her neck which she describes as mild and intermittent and not a disabling problem. It does not affect her ability to work but is worse than it was three years ago. It is aggravated by sitting at a computer screen for too long or driving for more than an hour. Examination revealed tenderness in her trapezius which was more severe on the left side, discomfort in both flexion and extension of her neck with pain on rotation of the head to the right.
 3. Left shoulder pain - She says that her left shoulder pain impacts her activities of daily living to a substantial degree, both at work as a hairstylist and in her domestic and personal care activities. Elevating her left arm is reported as a particular problem and the reported pain is significant. She has not hired a cleaner or yard worker but requires assistance from her husband occasionally. Examination revealed pain in lifting, flexing and rotating her left shoulder.
 4. Lower back pain - She continues to report lower back pain as being present at all times. The pain is significant and is aggravated by sleeping in unusual positions, lifting heavy weights, sitting in one spot for a long period of time and driving for more than an hour. She also described neurological symptoms in her legs. She manages her back pain with stretching, application of heat and the use of over-the-counter pain medications.
- [57] Dr. Grover repeats his basic diagnosis from his first examination and report, clarifies the left shoulder problem as a confirmed labral tear, and adds chronic left shoulder pain to the diagnosis. He notes that while there was a substantial initial improvement, there seems to have been a deterioration again in the last year-and-a-half. He expects that she will continue to report pain at work as a hairdresser, will continue to suffer with reduced productivity, and that this is likely to be permanent.
- [58] Dr. Grover notes that she has not had any specific treatment for her left shoulder and has not been seen by a shoulder surgeon. He expects that the left shoulder problems would be treated non-surgically with a subacromial injection of cortisone followed by rotator cuff strengthening exercises. Her ongoing neck and back complaints are best managed with the daily stretching, exercises, working out, doing yoga and Pilates. He recommends that she continue to consult with the osteopath for her neck.

[59] In terms of prognosis, Dr. Grover continues to believe that there is considerable room for improvement with the left shoulder with appropriate treatment, however the indicated chronic pain in her neck and back is likely to be permanent. He does not comment on or provide a diagnosis or prognosis regarding headaches, dizziness or vertigo.

Dr. Mark MacKenzie

[60] Dr. MacKenzie has been the plaintiff's GP since 1999. He currently has over 1,500 patients. In 2007, his office converted to an electronic charting system and thus his current charting is done electronically.

[61] Dr. MacKenzie's normal office visit lasts approximately 10-15 minutes and he normally sees 30 to 35 patients per day, although some of those may be seen in whole or in part by residents or locums in his office.

[62] He speaks to the patient about their reason for attending, does any required or appropriate examinations, forms his impression and plan for dealing with the situation, makes brief notes in that regard and communicates them to the patient along with prescriptions and recommendations. Later in the morning or afternoon, he expands on his actual interview notes as appropriate or as needed.

[63] Dr. MacKenzie had no independent recollection of the plaintiff's attendances or the matters discussed, other than what was recorded in his clinical notes.

[64] His notes from 2007 to the date of the collision do not record any musculo-skeletal complaints or complaints related to headaches.

[65] Dr. MacKenzie saw the plaintiff regarding the collision on:

- November 24, 2016, with headache, neck, upper back and bilateral shoulder pain which was worse on the left side, significantly reduced range of motion; he diagnosed significant soft tissue injuries, prescribed Flexeril at night, Tylenol for pain and made a referral for physiotherapy;
- December 20, 2016, with headaches and vertigo, difficulty focussing and concentrating, pain in the left shoulder and upper arm, tailbone and lower back, crepitus in her neck, paraspinal muscle pain and spasm, and burning pain down right leg; her neck range of motion was improved and the right ankle pain was completely resolved; he recommended and explained Epley's maneuver for vertigo, and Ativan and Ibuprofen for her planned trip to England;

- January 19, 2017, on return from England for persisting foggiess and dizzy spells; he records that her left shoulder is better, that she returned to normal work January 9, is working 8.5 hours per day plus commuting 35-60 minutes each way daily but is having anxiety attacks associated with driving; she was continuing to attend physio twice per week and was going to have massage therapy; he felt that she was slowly resolving the soft tissue and concussion symptoms and was tolerating her return to work; and
- March 30, 2017, when he simply records a reference to the CL-19 form and a prescription for Ativan and Flexeril.

[66] Thereafter, Dr. MacKenzie did not see the plaintiff regarding complaints arising from the collision until July 6, 2020 - more than three years later and two years after the plaintiff's move from Black Press to hair styling. On that occasion, they reviewed an MRI arthrogram of the left shoulder. It showed a full thickness supraspinatus tear and partial thickness tear infraspinatus. She is noted as continuing to have significant left shoulder pain and was referred to an orthopaedic surgeon, Dr. Wickham. COVID-19 has affected referral times and the plaintiff has not yet seen Dr. Wickham. There was no evidence that an appointment had even been sought with Dr. Wickham.

[67] Dr. MacKenzie next saw the plaintiff over a year later, on August 27, 2021, almost five years after the collision. His notes of that meeting, with limited further explanation, indicate:

- left shoulder pain - MRI has confirmed supraspinatus tear but she declines surgery referral;
- concussion;
- fingers;
- heat sensation into left foot and toes;
- frustration and anger;
- job change required because of shoulder pain;
- sleep issues;
- fearful of driving;
- challenges with balance post air travel;
- tinnitus and vertigo; and
- low back pain.

[68] The notes of the same meeting also include the following:

- all pre-COVID post accident;
- since her COVID - headaches and migraines have been worse;
- vertigo problematic - worse than before COVID;

- bone tired - extreme fatigue;
- on exam: good active and passive ROM left shoulder; and
- on exam: Hallpikes negative for nystagmus but positive bilateral for vertigo - refer to Intuitive Rehab.

Dr. Peter Zarkadas

- [69] Dr. Zarkadas is an orthopaedic surgeon who examined the plaintiff on November 24, 2020, at the request of defence counsel. He produced a report of his findings and opinions on that same date.
- [70] It appears that Dr. Zarkadas obtained most of his background information from a brief interview with the plaintiff and a somewhat extensive review of various medical documents including Dr. MacKenzie's clinical records, Abbotsford Regional Hospital clinical records, Dr. Cameron's expert report and file material, Dr. Grover's December 2018 expert report and file material, and various radiological investigations.
- [71] On examination of the plaintiff, Dr. Zarkadas noted tenderness in the upper back, trapezius and lumbar spine musculature on palpation. He found no visible atrophy of her neck or shoulder muscles and found that she had full mobility of her left shoulder, although he noted Neer signs and Hawkins signs - pain with the internal rotation and full flexion of the arm/shoulder in different positions. He also noted tenderness over the bicep's tendon and a positive O'Brien's sign, again indicative of pain during certain motions.
- [72] Dr. Zarkadas opines that the plaintiff's neck pain and stiffness, left shoulder pain and lower back pain are related, at least in part, to the November 2016 collision. He feels that the findings on the MRI regarding the left shoulder (full thickness supraspinatus tendon tear) were incidental and degenerative rather than traumatic - that it is equally likely that it was caused by the collision or by the plaintiff's work as a hairstylist. He agrees with a nonsurgical approach to the left shoulder favouring subacromial injection of cortisone. He says that she would benefit from active rehabilitation under the guidance of a kinesiologist and or personal trainer, performed on a weekly basis over approximately six months.

CAUSATION

- [73] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury, so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

- [74] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [75] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:
- [78] 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. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [Athey].
- [76] The most basic principle of tort law is that the plaintiff must be placed in the position she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule): Athey at para. 34. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): Athey at para. 35.
- [77] Liability for the collision has been admitted by the defendant. I am satisfied that the evidence as outlined above establishes, on the balance of probabilities, that the collision caused some level of injury to the plaintiff, particularly injury to her neck, left shoulder, and lower back area. The evidence of Dr. MacKenzie, Dr. Grover, and Dr. Cameron supports this finding and I accept that evidence. The evidence of Dr. Zarkadas also supports that finding to some extent, although he is equivocal on the issue of the labral tear and the effect of the plaintiff's move to hair styling and its aggravation of particularly her lower back and shoulder problems. I am also satisfied that she developed some level and frequency of posttraumatic musculoskeletal or cervicogenic headaches with some probable posttraumatic migraine headaches as a result of injuries suffered in the collision. This finding is supported by the evidence of Dr. Cameron which I also accept, it being essentially unchallenged. According to Dr. Cameron's report and testimony, the plaintiff did not suffer a concussion.

CREDIBILITY AND RELIABILITY OF EVIDENCE

- [78] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296 [Bradshaw], as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)).

The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont. H.C.); Faryna v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Faryna]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

- [79] If the plaintiff's account of their change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: Samuel v. Chrysler Credit Canada Ltd., 2007 BCCA 431 at paras. 15, 44.

MITIGATION

- [80] A plaintiff has an obligation to take all reasonable measures to reduce their damages, including undergoing treatment to alleviate or cure injuries: Danicek v. Alexander Holburn Beaudin & Lang, 2010 BCSC 1111 at para. 234 [Danicek].
- [81] Once the plaintiff has proved the defendant's liability for their injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: Gilbert v. Bottle, 2011 BCSC 1389 at para. 202 [Gilbert].
- [82] Chiu v. Chiu, 2002 BCCA 618 at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:
- [57] In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. [Also see Wahl v. Sidhu, 2012 BCCA 111 at para. 32; and Morgan v. Galbraith, 2013 BCCA 305 at para. 78.]

DISCUSSION

- [83] The plaintiff alleges that she suffered serious injuries in the collision and, in particular, disabling injuries to her neck, left shoulder and lower back. She also alleges that these injuries caused her to suffer frequent headaches including debilitating migraines. She says that the symptoms were so severe that she left employment, which she had held for 13 years

and hoped to continue in until retirement at age 65, because of the injuries and related symptoms. She says that these injuries and the related symptoms have also had a significant impact on her personal, marital, and social life.

- [84] I find it difficult to reconcile the plaintiff's evidence with her actions, her non-actions and her involvement, or lack thereof, with medical and rehabilitative resources.
- [85] The plaintiff initially said that her migraines got better, presumably after March 2017, but then returned and got worse two to three years ago. She then changed that evidence at the beginning of day two of the trial and indicated that she has suffered with migraines unabated since the collision. She described them as debilitating to the extent that she must leave work. They occur about twice per month, last for about one to two days followed by a "migraine hangover" which lasts for a further day. The pain is behind her left eye and causes blurred vision and "spots" in her vision field.
- [86] In spite of these severe symptoms, she failed to consult her personal doctor about any collision related complaints between March 2017 and July 2020. When she did consult him in July 2020, his notes mention nothing about headache issues of any kind.
- [87] A year later, in August of 2021, she returned to Dr. MacKenzie who noted that her migraines and headaches had gotten worse since she contracted COVID-19. He noted that she left her job due to shoulder pain. At no time from March 2017 to late August 2021, a period of four-and-a-half years, did she complain to her doctor about headaches or migraines, nor did she seek referral to a specialist for such complaints.
- [88] In September 2019, the plaintiff attended a neurological examination at the instance of her counsel. Dr. Cameron found that she had developed cervicogenic headaches and intermixed migraine headaches. She advised him that she had left her previous job due to headaches. He noted her to be a candidate for various prophylactic daily medications which could be prescribed and monitored by her family doctor. He also noted that she was a candidate for botulinum toxin injection therapy for ongoing headaches, neck and shoulder pain.
- [89] There is no indication in the evidence that the plaintiff ever discussed any of these options with Dr. MacKenzie. In her evidence, she raised the issue of acid reflux regarding medications and the high cost of the botulinum toxin injections. There was no evidence that the suggested medications would aggravate acid reflux nor that the plaintiff had at any time sought funding for the injections and been denied.
- [90] Mitigation requires that the plaintiff take all reasonable measures to reduce her damages, including undergoing treatment to alleviate or cure injuries: Danicek at para. 234. Whether the plaintiff acted reasonably is a question of fact and involves a consideration of all of the circumstances: Gilbert at para. 202.

- [91] Counsel for the plaintiff cites Thomasson v. Moeller, 2016 BCCA 14 at para. 39 [Thomasson] for the proposition that experts retained by counsel are not treating doctors and that mitigation does not require the plaintiff to follow their recommendations or even to discuss such recommendations with their treating doctors.
- [92] I am not convinced that Thomasson is as clear on that point as counsel suggests but, even if that is the general proposition regarding mitigation, I am of the view that the conflict between the plaintiff's evidence and actions are also properly considered in the context of credibility as indicated by Dillon J. in Bradshaw:
- [186] whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally [citation omitted] .
- [93] I find it unreasonable, impossible, or at least unlikely that a person experiencing the types of headaches and migraines (and other physical symptoms) that the plaintiff describes would fail to in any way consult with her treating doctor about such symptoms and possible treatments or medication. I find it even more unreasonable or unlikely that, upon discovering that potential treatments are available, she would prefer continued suffering and pain over medical consultation and pursuit of relief - not for days, weeks or months, but for years.
- [94] Other instances of actions inconsistent with the evidence given by the plaintiff include:
- she did not follow her doctor's advice regarding physiotherapy in that she attended only five the initial six sessions, and then discontinued physiotherapy without advising or consulting with her family doctor;
 - she advised her doctor that she was, or would be, undergoing massage therapy but never did;
 - she did attend approximately 40 sessions with a personal trainer which she testifies had a positive effect but when those sessions stopped, partly due to COVID-19, she did not and has not sought similar services elsewhere;
 - she received medical advice to resume physiotherapy, attended two of the intended six session set but stopped attending when she contracted COVID-19 and has never resumed the program;
 - there is no evidence that she ever sought her doctor's referral to a specialist regarding her headaches and Dr. MacKenzie's notes indicate that she declined a referral to an orthopaedic surgeon regarding her left shoulder;

- she left established and longstanding employment (described by her OT as "sedentary") to take over a hair styling business (described by her OT as "light" level work) without consulting any medical authority and without seeking any form of employment space accommodation in spite of her employer's well-established policies and programs for such accommodation; and
- she testified that she received good results from either two or three treatments received from Gagandeep Watts, a registered manual osteopath, but discontinued such treatments, claiming that they were too expensive and that the insurer would not pay. No evidence of any request for such payment or refusal by the insurer was provided.

DAMAGES - EXECUTIVE SUMMARY

Non-Pecuniary Damages

[95] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[96] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

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

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

[Emphasis omitted.]

[97] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[98] The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostyba* (1982), 70 B.C.L.R. 397, 1982 CanLII 36 (S.C.) at 4 by Chief Justice McEachern (as he then was) (recently quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In referring to an earlier decision, McEachern C.J.S.C. said:

In *Butler v. Blaylock I* referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[99] It is clear that the injuries suffered by the plaintiff have caused her some pain and suffering and have had an impact on her overall enjoyment of life to a varying extent over an extended period of time. It is also clear that while her injuries have not disabled her from working, they have caused her to work in some discomfort and sometimes in pain.

Travel

[100] Prior to the collision the plaintiff and her husband travelled somewhat extensively including to Abu Dhabi, Greece, Italy, Thailand, and the Netherlands. The period of time over which that travel occurred, and thus the frequency of such travel, was not revealed in the evidence.

[101] In addition, the plaintiff and her husband, having family in England, generally travelled to England approximately every two years. During those trips, it was not uncommon for them to take side-trips to other locations in Europe.

[102] They also travelled within British Columbia and the western United States prior to the collision, but again the frequency of the travel was not revealed in the evidence.

- [103] Since the collision, the plaintiff has travelled to England on at least two occasions: once in December 2016 to January 2017; and once in December 2019 to January 2020. On the latter of these two trips, she and her husband took a side trip to Berlin where they engaged in a walking tour.
- [104] I accept the evidence of the plaintiff and her husband that she experienced some difficulties during these trips, including discomfort during and for a period following travel, limitation on activities particularly during the first trip, and pain or discomfort associated with activities which she did undertake on both of those trips. I am satisfied that the plaintiff's long-distance international travel will be somewhat curtailed or reduced as a result of her injuries; and that when she does engage in such travel, she is likely to continue to experience the difficulties outlined above.
- [105] In addition to this long distance international travel the plaintiff and her husband went on trips involving shorter distances and durations both before and after the collision. It seemed clear on their evidence that they had been to Las Vegas, San Francisco and Los Angeles both before and after the collision. Both had difficulties determining which trips had occurred before the collision and which had occurred after, even considering the activities which they undertook during those trips.
- [106] These shorter trips, particularly those which have occurred after the collision, included the following:
- February and March 2017 - they went on one or possibly two trips to Vancouver Island and/or Qualicum Beach;
 - May 2017 - they flew to the Yukon Territories, took a road trip along the Alaskan Highway, participated in canoeing or kayaking, and reported details of their trip on Trip Advisor;
 - August 2017 - they flew to San Francisco where they went on a hop on/hop off bus tour of the city, toured Alcatraz prison, went on a wine tour by bus, and visited Carmel and other tourist sites;
 - May 2018 - they flew to Las Vegas where they attended a Celine Dion concert, a David Copperfield show, and went kayaking on the Colorado River;
 - June 2019 - they visited San Diego and Los Angeles;
 - August 2020 - they travelled to Whistler, B.C., where they went for an on and off road jeep excursion, and went kayaking at Green Lake.
- [107] Since there was no evidence led regarding the frequency of similar types of trips prior to the collision, I am unable to conclude that there has been a significant reduction in such trips since the collision. I accept that the plaintiff has experienced and continues to experience some pain, discomfort, and associated limitations regarding her travel since the collision and as a result of the injuries suffered. These difficulties were probably most significant during approximately the first year following the collision but continue to a

lesser degree today.

Work challenges

[108] The plaintiff testified that she experienced pain and discomfort following the collision, both at her work with Black Press and later, at Michael's on Main. None of her injuries or symptoms have disabled her from working, rather they have caused her to work while experiencing a certain level of discomfort and related challenges. I am satisfied that the symptoms had improved considerably over time as indicated to Dr. MacKenzie and Dr. Grover, but that they worsened after she left Black Press and returned to a career in hair styling. I am also satisfied that even had the plaintiff remained at Black Press, she would have experienced some similar, albeit perhaps not identical, discomfort and pain along with certain related limitations.

Other limitations

- [109] I accept that the plaintiff's injuries caused somewhat of a change in the form of a reduction in her ability to hike, perform at least the physical aspects of babysitting grandchildren, engage in certain craft work, perform some forms of physical exercise, engage in extensive levels of charitable work, community involvement, and social interaction. I am also satisfied that her relationship with her husband, including their intimate relationship, has suffered as a result of the collision.
- [110] While I accept that the plaintiff may well have suffered some collision-related driving anxiety, I note that she lives in Abbotsford, essentially mid-way between Langley and Chilliwack. She left work in Langley to work in Chilliwack and she drives to and from work daily. Once again, her symptoms have not disabled her from driving, they have rather rendered her driving less enjoyable and more challenging.
- [111] Quantification of non-pecuniary damages is not an exact science. Case authorities provide guidance, but each individual case is to be decided on its own unique set of facts.
- [112] I have reviewed the cases provided by counsel and find the plaintiff's cases of Carrillo v. Deschutter, 2018 BCSC 2134 and Hart v. Hansma, 2014 BCSC 518 and the defendants' cases of Jansson v. Malone, 2021 BCSC 585 and Allen v. Figueira, 2020 BCSC 1864 to be particularly similar and somewhat instructive. Having said that, it is worth noting that while the facts in these cases are somewhat similar to the present case, and in many ways to each other, the awards range from \$55,000 to \$130,000.
- [113] In the present case, I find that the plaintiff suffered soft tissue injuries to her neck, upper back and left shoulder, activation or triggering of degenerative disc problems (previously not symptomatic) in the lower back, and onset of related headaches and migraines that lessened over several months but became worse following her change of work and worse again, when she contracted COVID-19. Her injuries and related symptoms caused her, and continue to cause her, some discomfort and sometimes pain at work and in her social and

interpersonal activities; however, I am not satisfied that the injuries or their effect on the plaintiff are as severe as indicated in her evidence.

[114] The lower back issues are probably permanent. The left shoulder and headache issues may be treatable non-surgically, but it is likely that some level of lingering effects may remain permanently. I find that the effects of all of the injuries have been aggravated or worsened by the plaintiff's decision to leave sedentary work where extensive opportunity for accommodation existed, for the more physically demanding work of hair styling at her own salon.

[115] In all of the circumstances, I award \$100,000 to the plaintiff for non-pecuniary damages.

Past Loss of Income

[116] I am not satisfied on a balance of probabilities that the plaintiff left her employment at Black Press due to the injuries suffered in the collision. I find that it is more likely that she left her employment to take over ownership and operation of Michael's on Main for personal reasons unrelated to the collision or its effects. In particular, I include the following in coming to my conclusion in this regard:

- her stated reasons for leaving Black Press are inconsistent - sometimes, and to some persons, she indicated that she left due to the left shoulder and to others, she cited headaches and foginess;
- she did not consult with any medical or rehabilitative authorities prior to resigning her position;
- the only accommodation which she sought at work was for a new and/or larger computer monitor, which accommodation was immediately approved;
- she did not seek further accommodation at work even though she was aware of the employer's progressive policies for accommodation, as confirmed by both her supervisor and her husband;
- she did not seek short or long-term disability relief, although both were available to her;
- she continued to work at a perfectly acceptable level after the collision, raised no concerns or issues with her supervisor prior to resigning, but simply gave two weeks' notice and told her supervisor that she was "moving on to something else"; and
- in her evidence, and to others, she clearly expressed excitement about moving on to her new business, the challenge of it, the fact that she would be working in a more sociable face-to-face environment, and the fact that she was saving a long-standing local business from closure.

[117] I dismiss the claim for past loss of income, save for the four days which she missed immediately following the collision prior to returning to work.

Future Loss of Income

[118] For the same reasons as itemized above regarding past loss of income, I also dismiss the claim for future loss of income and capacity to earn income.

Cost of Future Care

[119] The 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, in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.) [*Milina*]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104, aff'd 2004 BCCA 290; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[120] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care:

- (1) there must be a medical justification for claims for cost of future care; and
- (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[121] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. An assessment of damages for cost of future care is thus a matter of prediction as to what will happen in future, not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[122] If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.

[123] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert*, at para. 253.

[124] One of the major matters to be addressed when dealing with this head of damage is the plaintiff's prior actions, including:

- discontinuing and not completing recommended physiotherapy regimes;
- failing to return to any type of personal trainer-based activity regime in spite of her own evidence that the previous program was of assistance; and
- refusing to pursue, investigate or even request funding for the Botox injections recommended by Dr. Cameron to address her headaches and migraines.

[125] As noted above, future care costs are justified if they are both medically necessary and likely to be incurred by the plaintiff. If the plaintiff has not pursued a treatment, item, or service in the past, it may not be appropriate to include it as a future cost. There was no, or certainly no significant, evidence led by the plaintiff indicating that she had or has any intention of changing pattern regarding services in the future.

[126] The plaintiff has known about the Botox option for over three years. Far from presenting evidence that she intends to pursue such treatment in the future, counsel presented argument and case authority suggesting that the plaintiff has no obligation to follow recommendations provided by experts such as Dr. Cameron. Similarly, no evidence was presented suggesting that the plaintiff has any desire or intention of returning to physiotherapy or other form of either passive or active physical rehabilitation.

[127] I have reviewed the report of Mr. McNeil as to his recommendations for future care, treatments, and even hardware, but there was no evidence presented to indicate that the plaintiff intends to or has any interest in pursuing such recommendations. I do note, however:

- the plaintiff did attend modest exercise sessions with a personal trainer in the past, did see those through until the service was discontinued, and indicated receiving benefits from that regime;
- Dr. Zarkadas, the expert testifying for the defendants, recommended a physical training regime under the supervision of a kinesiologist; and
- the plaintiff did attend at and receive benefit from Gagandeep Watts at the Wellington Natural Health clinic and did express a wish to continue with his services.

[128] I award a total of \$5,000 for continuing kinesiological based sessions and \$5,000 for continuation of the services of Mr. Watts or a similar osteopath.

[129] Save for these specified awards totalling \$10,000 I dismiss the claim for future care.

Loss of Housekeeping Services

[130] I am satisfied that during approximately the first 18 to 24 months the bulk of, and certainly the heavier, housekeeping responsibilities fell to be performed by Mr. Franklin.

- [131] Dr. Grover noted that by December 2018, the plaintiff had resumed "doing the household chores herself". By December 2021, approximately three-and-a-half years after returning to hair dressing as her career, Dr. Grover noted that the plaintiff and her husband share the household chores but that he (Mr. Franklin) quite often has to do her share of the heavier chores. They have never hired a cleaner to assist with housework.
- [132] I am satisfied that, save for heavier type chores, the plaintiff's need for housekeeping support ended by the end of 2018, as indicated to and by Dr. Grover. I find that any subsequent limitations (save for heavier chores) are at least as likely related to the plaintiff's decision to take on a more physically demanding career, with a consequent negative impact on her physical symptoms.
- [133] I award \$10,000 for past housekeeping assistance services from the date of the collision to and including December 31, 2018. I award a further \$15,000 for assistance services with regard to her share of heavier household tasks in the future, which I find would have been necessary on an ongoing basis due to the injuries resulting from the collision, regardless of the change of career.

Special Damages

- [134] I have reviewed the special damages as claimed, find them to be reasonable in all of the circumstances, and award the plaintiff \$1,614.21.

Summary

- [135] Awards for damages are summarized as follows:

Damages Summary

Non-pecuniary damages:

\$100,000.00

Past wage loss:

To be determined - 4 missed days

Future loss of earning capacity:

\$0.00

Cost of future care:

\$10,000.00

Loss of housekeeping capacity:

\$25,000.00

Special damages:

\$1,614.21

Total damages:

\$136,614.21

Plus 4 days loss of net income

[136] The parties will have liberty to apply if they cannot agree on the net loss regarding the four lost days of employment.

[137] If the parties are unable to agree on costs, they may apply to speak to that matter.

"Caldwell J."

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