

CANADA / JUDGMENT

Jenkins v. Casey

2022 BCCA 64

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 64 Jenkins v. Casey

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jenkins v. Casey,

2022 BCCA 64

Date: 20220217

Docket: CA46795

Between:

Kathleen Ann Jenkins

Appellant

(Plaintiff)

And

Dennis Casey, Donald Richmond Irving and Bailey Judith Stanworth

Respondents

(Defendants)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated

March 16, 2020 (Jenkins v. Irving, 2020 BCSC 391, Vancouver Docket M164451).

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Counsel for the Respondents:

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Place and Date of Hearing:

Vancouver, British Columbia

December 15, 2021

Place and Date of Judgment:

Vancouver, British Columbia

February 17, 2022

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Voith

Table of Contents

Paragraph Range

Introduction

[1] - [2]

Background

[3] - [7]

Findings at Trial

[8] - [22]

Credibility and Reliability

[8] - [11]

Non-pecuniary Damages

[12] - [15]

Income Loss

[16] - [20]

Loss of Housekeeping Capacity

[21] - [22]

Credibility

[23] - [48]

Consideration of the Respondents' Conduct

[26] - [26]

Consideration of the Extent of the Injuries of Others

[27] - [28]

Consideration of the Appellant's Description of the Accident

[29] - [31]

Inferences with Respect to Conduct Leading to Termination

[32] - [32]

Consideration of Statements with Respect to Pre-accident Health

[33] - [42]

Assessment of the Appellant's Demeanour as a Witness

[43] - [45]

Failure to Address Critical Evidence

[46] - [47]

Summary on Credibility

[48] - [48]

Findings of Fact

[49] - [73]

The Appellant's Pre-accident Health

[52] - [56]

Post-accident Depression

[57] - [70]

Limited Capacity to Work

[71] - [73]

Causation Analysis and Assessment of Damages

[74] - [87]

Mitigation of Damages

[88] - [90]

Summary

[91] - [93]

Summary:

The appellant was injured in a car accident. She appeals the damages award at trial, arguing the judge erred in assessing her credibility, drawing unsupported inferences with respect to her pre-existing condition, placing an inappropriate burden upon her to prove that her pre-existing condition would not have otherwise disabled her, and reducing the award to account for a failure to mitigate. Held: Appeal dismissed. There was evidence upon which the trial judge could come to adverse conclusions with respect to the appellant's credibility. There was evidence supporting the trial judge's finding that the appellant's pre-existing depression and anxiety made her susceptible to stress and that the termination of her employment, for reasons unrelated to the accident, triggered a major depressive episode. The trial judge did not place an inappropriate burden on the appellant with respect to causation. It was open to the trial judge, on the evidence, to find the appellant had not established that she suffered to the extent she claimed and the appellant's dismissal would have caused the appellant to suffer from the significant depression that ensued in any event. The trial judge did not reduce the award based on a failure to mitigate.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] The appellant was injured in a car accident in May 2015. She appeals the damages award at trial, arguing the judge erred in concluding that much of her post-accident loss of income earning capacity was not caused by the accident. She contends the trial judge erred in:
- a) assessing her credibility;
 - b) drawing unsupported inferences with respect to her pre-existing condition;

- c) placing an inappropriate burden upon her to prove that her pre-existing condition would not have disabled her in any event; and
 - d) reducing the award to account for a failure to mitigate that was not proved.
- [2] In my view, the finding that the appellant was not a credible witness is unassailable. The judge did not draw all of the negative inferences suggested by the appellant, and those he drew were sufficiently supported by evidence. No inappropriate burden was placed upon the appellant. For reasons set out in detail below, I would dismiss the appeal.

Background

- [3] The appellant was born in May 1972. She was called to the bar of British Columbia in May 2002. In the 13 years between her call to the bar and the car accident, she practiced law at a number of firms and organizations, primarily in the field of civil litigation.
- [4] She has a history of depression, symptomatic since high school but first diagnosed when she was in second year law school, and a social anxiety disorder, first diagnosed in 2008. These conditions were chronic, but managed by medication and therapy until the time of the accident.
- [5] Immediately following the accident, she worked long hours in preparation for an upcoming trial; however, six weeks after the accident she was dismissed by her employer, a litigation law firm, for reasons unrelated to the accident.
- [6] After her dismissal, she did not work for a period, during which she sought another position. She claims that when she returned to work in October 2015, her capacity to do her job was affected. Although she has continued to work, she argued at trial that her earning capacity is permanently diminished as a result of chronic pain in her back and neck and by headaches and fatigue which she attributes to her 2015 injury.
- [7] The assessment of her damages was complicated by the falling out with her last pre-accident employer, her ongoing depression and anxiety, and the trial judge's conclusion that she was exaggerating the extent of her accident-related problems.

Findings at Trial

Credibility and Reliability

- [8] The respondents challenged the appellant's credibility. They contended her testimony with respect to the extent and impact of her pain was inconsistent with her behaviour. They portrayed her as a person thoroughly familiar with how a plaintiff victim should present, and motivated by a desire to relieve the economic pressures she was facing.
- [9] The judge was troubled by the appellant's evidence, including the manner in which she minimized her pre-accident health issues and overstated the severity of the accident, and by the contrast between her description of her post-accident symptoms and the evidence of her

activity. He considered the appellant's evidence to be affected, consciously or unconsciously, by financial need. He found the appellant was living beyond her means and desperate for money before the car accident, and that pressure intensified after she was dismissed from her job.

[10] He accepted the incidents that led to the appellant being dismissed from her employment may have arisen from misunderstandings, but found that her failure to simply address those issues was "perplexing": at para. 112. Her explanations of the manner in which she addressed these incidents further undermined her credibility. He concluded his analysis of credibility as follows:

[113] I accept that the accident did cause injuries, including exacerbation of her pre-existing conditions, with some lingering physical and psychological sequelae and chronic pain. I also accept that these injuries have impacted her lifestyle and her ability to work. But, as set out below, the plaintiff has not persuaded the Court that her injuries are as serious or as functionally disabling as she alleges. Nor do I fully accept the plaintiff's self-assessment of the impact of those injuries on her work, her life, and her domestic maintenance. The plaintiff's testimony about her current state, and her attribution of her current state to the accident, are exaggerated. She was able to function and work normally in the weeks following the accident, and the symptoms about which she now complains did not significantly manifest themselves until after her termination.

[114] This conclusion is not based directly on an assessment of the plaintiff's credibility in the sense of honesty, or on the premise of deliberate deceit, as asserted by the defendants. Rather, it reflects all of the Bradshaw factors concerning both credibility and reliability. These include the plaintiff's dire straits, and disappointment about her current life, a state that she attributes excessively, consciously or unconsciously, to the accident rather than her pre-existing conditions, her own decisions, and the many other stressors in her life.

[Emphasis added; footnote omitted.]

[11] The reference to the "Bradshaw factors" is to the judgment in *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296, in which Dillon J. listed factors that may be considered in weighing a witness' credibility:

[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 (1951), [1952] 2 D.L.R. 354 (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).

Non-pecuniary Damages

- [12] The trial judge's assessment of non-pecuniary damages was affected by his adverse findings with respect to her credibility. He found the appellant understated the extent to which she was affected by depression and anxiety and her physical deconditioning before the accident.
- [13] He found the termination of the appellant's employment played a more significant role in her history than she suggested. He noted that the witnesses who testified to the appellant's changed personality, that she had become withdrawn and negative and that her affect was diminished, were not in a position to distinguish between the effects of the accident and the effects of the termination of her employment and other stressors on the appellant.
- [14] He discounted the appellant's evidence with respect to "her assertions of constant pain since the accident, and the effect on her lifestyle and independence": at para. 193. He found the evidence of her activities was not in accord with her description of her disability. In summary, he noted:
- [192] The parties differ with respect to the pain allegedly suffered by the plaintiff, and the source of that pain. The plaintiff says that the accident has impacted every area of her life, and that she lives in constant pain. The defendants submit that the pain, and the effects of the pain are exaggerated. I agree generally with the defendants in this respect.
- [15] He concluded that he was "not persuaded that the accident has diminished her quality of life to the extent she claims": at para. 197.

Income Loss

- [16] The appellant's past loss of income and her income earning capacity were found to have been modestly affected by the injuries she suffered in the accident. The judge found that the appellant was not as impaired in the practice of law as she claimed. He noted she had continued to work significant hours in the weeks after the accident, and concluded she was still able to do so, like "many lawyers functioning and thriving notwithstanding depression, headaches, neck and back pain, and other more debilitating conditions": at para. 204.
- [17] He found the appellant's income earning capacity was "slightly worse than what it likely would have been without the accident": at para. 205.

- [18] He considered the appellant's projection of the value of her pre-accident income earning capacity, based on annual income in the range of \$200,000 to \$250,000, to be optimistic but "plausible": at para. 206. He awarded a modest portion (10%) of the net present value of that income stream as damages for the loss of income earning capacity attributable to the accident: \$31,153. In doing so, he rejected the more substantial claim advanced by the appellant for the following reasons:
- [217] The defendants claim that there is no medical or other evidence to support [the plaintiff's] assertion that she is only capable of working 25 hours a week, specifically due to fatigue, pain, headache, and failing concentration in the afternoon. I agree. Further, while the Court must be cautious in assessing medical conditions based on demeanour in court, the plaintiff spent several days in the witness stand, with most of her cross-examination occurring in the afternoon. There was no sign of fatigue or cognitive problems. I do not rely upon this factor in isolation, but cite it in support of the general finding that the plaintiff has exaggerated her inability to function due to symptoms caused by the accident beyond the symptoms that she from which would have a reasonable risk of suffering in any case.
- [220] I agree that the plaintiff has not acquitted her onus to show that she is unable to work hours approaching full-time. Specifically, she has not convinced the Court that she is only able to work 25 hours a week.
- [19] In my opinion, having come to those conclusions, his further conclusions with respect to negative contingencies affecting the appellant's income earning capacity were not crucial to the assessment of the damages under this head. He used an optimistic figure as a starting point for the estimate of the award, and assessed the loss as a modest portion of that figure. His opinion that the starting point may have overstated the appellant's income earning potential could serve only to ensure that the award did not underestimate the loss, and that it was reasonable in all of the circumstances.
- [20] The negative contingencies affecting income earning potential were numerous: the appellant had limited experience as a trial lawyer; much was as a defence lawyer in low-complexity motor vehicle cases, a practice likely to diminish due to changes in the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231; she had none of her own clients; and her recent dismissal would reflect badly upon her.

Loss of Housekeeping Capacity

- [21] The trial judge found the plaintiff to have exaggerated her inability to care for her house, and concluded that her capacity to engage in housekeeping was not significantly different from what it was before the accident. He noted, at para. 240:

... The plaintiff agreed that housekeeping and house organization was a struggle before the accident: it was closely tied to her depressive symptoms of fatigue and lack of motivation, and triggered by stress and anxiety.

[22] A nominal amount, \$5,000, was awarded for loss of housekeeping capacity.

Credibility

[23] The appeal is primarily a challenge to the adverse conclusions with respect to the appellant's credibility, given the extent to which those conclusions affected the assessment of the claim. The appellant contends the negative assessment was based upon misapprehension of the evidence, unfounded inferences, and unreliable or collateral evidence. I address below the appellant's assertions in the order in which they were advanced.

[24] In weighing these submissions, I bear in mind this Court's description of the onus upon an appellant advancing an appeal on these grounds in *Greenway-Brown v. MacKenzie*, 2019 BCCA 137, leave ref'd [2019] S.C.C.A. No. 231:

[19] A misapprehension of the evidence that goes to the core of the judge's reasoning process constitutes a palpable and overriding error: *Tambosso v. Holmes*, 2016 BCCA 373 at para. 30. A finding related to credibility constitutes a palpable and overriding error where it is unreasonable having regard to all the evidence and giving due regard to the advantages afforded to the trial judge: *H.L. v. Canada*, 2005 SCC 25 at para. 56.

See also *Oddy v. Waterway Partnership Equities Inc.*, 2019 BCCA 185.

[25] I am also cognisant of the caution expressed by Low J.A. for this Court in *Bradshaw*:

[22] The trial judge was obviously in the best position to assess the reliability of each witness and to assess each portion of the evidence. We have to look at the factual conclusions of the judge as a whole and determine whether the appellant has identified a palpable and overriding error. In a case with as much oral evidence as was before the court in this case, it would be unusual if the trier of fact did not make an error or two with respect to discrete factual matters. Such errors, individually or cumulatively, would have to significantly undermine critical findings of fact (including credibility) before palpable and overriding error could be found and appellate interference justified.

[Emphasis added.]

Consideration of the Respondents' Conduct

[26] The appellant says the trial judge's observation that the defendants did not act "particularly negligently" and that they "simply failed to brake quickly enough" which "could have happened to any driver" should give rise to concern that the degree of their blameworthiness, an irrelevant factor, played some role in the assessment of damages. In my view, the judge's observation was simply that a finding of civil liability may be founded upon inattention alone. There is no reason to conclude that observation affected the assessment of damages. At para. 121, the trial judge properly instructed himself, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 32-35, that his task when assessing damages was to place the plaintiff in the position she would have been if the defendants had not been

negligent: no better or worse.

Consideration of the Extent of the Injuries of Others

- [27] The appellant says the judge inappropriately placed some weight upon the fact the defendants were not injured or significantly injured in the accident, which she contends is also an irrelevant factor. The fact the other drivers were not injured was mentioned in the course of the judge's description of the accident. He wrote:
- [35] Apart from a mild and passing headache by Ms. Scramstad, none of the other three drivers was injured. Accident scene photographs show the crumpled hoods of the Casey and Jenkins vehicles. When the cars were separated, the front bumper of the plaintiff's car fell off.
- [28] The fact others were not injured appears to have played some role in the judge's conclusion that the impact was not as forceful as the appellant claimed. This evidence was certainly not described as a determinative or even a weighty factor in his conclusion. I can see no suggestion in the reasons that the trial judge was of the view that significant injury cannot be caused by an accident such as that which occurred in this case. It was not an error to consider this evidence for a limited purpose.

Consideration of the Appellant's Description of the Accident

- [29] The appellant says a finding that she misrepresented the severity of the impact to her treating doctors and experts is "not a finding of fact or an inference that could reasonably be made on the evidence". The judge held:
- [112] Certain aspects of the plaintiff's testimony were odd and at times troubling. She reported to several persons, including her doctors, expert witnesses, and a colleague, that the car behind her had been driving at 100-110 km an hour at the time of the collision. She claims that a police officer at the accident site had told her this speed. But based on the relatively minor damage to the vehicles, and the testimony of the other drivers, this speed is doubtful; the plaintiff, as a motor vehicle lawyer, must have known this. ...
- [30] The appellant did report to her doctors and expert witnesses that the car behind her was travelling at 110 kph at the time of the collision. She appears to contest the trial judge's view that she must have known that could not be true. She says the testimony of other drivers was consistent with her description of the collision. In support of this proposition, counsel referred us to passages in the transcript in which the two defendants described an impact at significant speeds. One driver testified that he was traveling at about 75-80 kph before applying his brakes, and that he was not able to brake much before impact. The other testified that he was travelling at about 80 kph before he anticipated a collision and applied his brakes. He did not estimate his speed at impact, but said it was less than 80 kph.

- [31] In my opinion, this evidence is not inconsistent with the judge's conclusion that the appellant must have known that the vehicle that hit hers was not travelling at a speed of 100-110 kph at the time of impact. I cannot say the judge erred in concluding the appellant exaggerated the speed of the vehicles at impact. Again, this was but one fact considered in the credibility assessment which was, as the trial judge noted, based on "all of the Bradshaw factors".

Inferences with Respect to Conduct Leading to Termination

- [32] The appellant says it was an error on the part of the trial judge to place any weight upon the suggestion she committed theft by failing to pay a restaurant bill, and upon the suggestion she tried to defraud her employer by purchasing a personal computer in the firm's name. She says wrongful conduct on her part was not proven. In my view, the appellant mischaracterizes the use the trial judge made of the evidence with respect to those incidents. He expressly did not conclude that the appellant had intentionally failed to pay a restaurant bill, or wrongly pledged the credit of her employer. Rather, he placed some weight upon the undisputed evidence that when questions arose with respect to the restaurant bill and the computer purchase, the appellant did not address those directly by explaining her conduct and attending to payment of the bills. He considered the appellant's conduct in this regard to be "inexplicable": at para. 67. The conduct in question did not play a significant role in the assessment of credibility, and I cannot say it was an error to consider it.

Consideration of Statements with Respect to Pre-accident Health

- [33] The appellant contends the judge erred in drawing the inference that she portrayed herself to expert medical witnesses as someone who was physically and socially active prior to the accident. She says she did not mislead experts when she described her pre-accident activity. She did not claim to have been active immediately before the accident, but in response to the physicians' questions had simply described activity in which she had been involved in prior years. She contends his conclusion that she had become increasingly sedentary in the years preceding the accident due to factors including stress at work, personal issues, and her moves between jobs and cities, was based on assumptions unsupported by the evidence.
- [34] In my opinion, it was open to the judge on the evidence, including the appellant's own testimony, to conclude that experts were led to believe she was socially and physically active in the period immediately preceding the accident, and that was not the case.
- [35] In cross-examination, the appellant acknowledged she told two doctors, Dr. Chin and Dr. Anderson, that prior to the accident she was horseback riding and hiking. Yet she acknowledged that she had not ridden a horse in years, and she had done little but work in the eight months before the accident. She claimed that she had described activities she had been involved in "historically" to the doctors.

[36] Dr. Chin testified that the appellant told him she was going to the gym and horseback riding and hiking before the accident. When referred to his notes he testified as follows:

Q And [as noted in your notes] she tells you that she was fairly active prior to this accident of May the 7th, 2015?

A Yes.

Q And did she relate to you as to when that was?

A No, but...

Q But you asked her, how active were you before the accident?

A Yes.

Q So it was your impression from what she told you that it was in the months before the accident?

A Correct. Because I asked, I specifically asked that. I don't say -- don't tell me what you were doing five, ten years ago.

Q Okay.

A Yeah, what were you doing, you know.

Q In the months before the accident?

A Correct.

Q She told you the gym, horseback riding, and hiking?

A Yes.

[37] Similarly, Dr. Anderson was under the misapprehension the appellant had gained substantial weight (50 lbs) after the accident, rather than over a long period beginning in 2009. Dr. Anderson was under the impression the appellant was able to do long trials and to engage in vigorous physical activity before the accident but not afterward. He agreed that he ought to have pursued the appellant's pre-accident functioning with more specific questions, but his testimony suggests the appellant was not particularly forthcoming.

[38] In cross-examination, the appellant testified as follows with respect to the history she provided to the doctors:

Q they asked you what activities you were doing prior to the accident and you told them horseback riding and hiking, and I think you told one of them the gym. Was that the case?

A Those are historically my activities that I have engaged in. For instance, horseback riding I haven't done since -- since I was at Somers & Company because it was in New West and close to Delta, so I horseback rode for four years while I was there.

Q This is the first time at Somers & Company? Sorry to interrupt. The first time from 2002 to 2006?

A Correct.

Q Okay. So that's when you were horseback riding?

A That's right. And I had planned to horseback ride upon living in Chilliwack because it's rural and there's lots of horses nearby.

Q Well, did you horseback ride at all in the latter part of 2014 up until May of 2015?

A No. I was working long hours and doing a long commute.

[39] In my view, this evidence provides sufficient support for the judge's conclusion that the appellant was not forthright with the experts with respect to her pre-accident fitness.

[40] The appellant further says the judge erroneously concluded that she had suffered from migraine headaches before the accident. She testified that she had not had migraines, and contends there was no admissible or reliable contradictory evidence. However, the trial judge's observations with respect to headaches were more nuanced than the appellant suggests. He wrote:

[139] The plaintiff suffered from headaches before the accident, including some significant headaches, both as a child and in law school. During the bar admission course, a stress-related headache required medical attention. She disputes that these headaches were migraines, despite some reference in her pre-accident clinical records to migraines.

[Footnote omitted.]

[41] That passage does not appear in the judge's assessment of the plaintiff's credibility but, rather, in his consideration of the impact and the cause of the post-accident headaches experienced by the plaintiff. His description of the evidence does not reflect a misapprehension. When medical records were put to her, the appellant admitted she experienced a headache lasting days when she did the bar admission course. That headache was referred to in the medical records of her physician, Dr. LaCombe, as a migraine headache. The appellant admitted in cross-examination that she may have told her treating doctor in 2002 that she had "a lot of headaches".

[42] The trial judge did not reject the plaintiff's evidence of headaches. He concluded, however, that the link between the accident and the appellant's headaches was tenuous, in part, because there was evidence that she was at risk of developing migraine headaches as a result of stress (because of a family history of migraines), and she was under considerable financial stress after her dismissal, and the headaches followed the dismissal. In my view, the credibility analysis was not affected by an unsupported inference with respect to pre-accident headaches. I address the findings with respect to causation below.

Assessment of the Appellant's Demeanour as a Witness

[43] The appellant contends the trial judge inaccurately described, and improperly considered, her ability to testify at trial for a protracted period without suffering from any apparent cognitive difficulty. He wrote, at para. 217:

[T]he plaintiff spent several days in the witness stand, with most of her cross-examination occurring in the afternoon. There was no sign of fatigue or cognitive problems. I do not rely upon this factor in isolation, but cite it in support of the general finding that the plaintiff has exaggerated her inability to function due to symptoms caused by the accident beyond the symptoms that she from which would have a reasonable risk of suffering in any case.

[44] The appellant says she never testified for a whole day but, rather, on nine partial days from July 8 to 22, 2019, usually for half days and only briefly after the afternoon break on July 12.

[45] In my view, the appellant does not identify a misapprehension on the part of the trial judge. The appellant testified in chief for part of the morning and all of the afternoon on July 8 and July 9. She testified under cross-examination for part of the afternoon of July 10, all morning and half of the afternoon of July 11, almost all of the afternoon on July 15 and 16, part of the morning and afternoon of July 17, all of the afternoon of July 19, and most of the morning of July 22. The judge was correct to say the appellant spent several days in the witness stand (he did not say she testified for several full days), and correct to say most of her cross-examination occurred in the afternoon. He was uniquely qualified to assess her demeanour as a witness, and the extent to which she demonstrated such cognitive impairment as to affect her ability as counsel.

Failure to Address Critical Evidence

[46] A lawyer who worked closely with the appellant at the firm where she was an associate the time of the accident and briefly thereafter, Mr. Joudrey, testified to conduct on the part of the appellant, and to statements she made that were inconsistent with her having suffered a real or significant injury. This testimony was strongly challenged by the appellant's counsel. Mr. Joudrey's evidence is not mentioned in the reasons for judgment. The trial judge appears to have considered it unnecessary to resolve the question of how much weight should be afforded to Mr. Joudrey's testimony.

[47] The appellant says it cannot be determined what effect Mr. Joudrey's testimony had on the assessment of her credibility. The appellant's argument can only be that the credibility assessment was affected by this extremely damaging evidence, despite the fact the judge placed no express reliance upon it. That suggestion implicitly calls into question the integrity of the judge and is ill-founded. We must take the reasons at face value, and accept that the reasons fully set out the pathway to judgment. I would not accede to this argument.

Summary on Credibility

[48] Having considered all of the appellant's assertions of error on the part of the trial judge, I can find no support for the proposition that his assessment of the appellant's credibility was faulty. None of the appellant's criticism of the judgment undermines the judge's critical findings. Like this Court in *Bradshaw*, I am of the view that, in this case, the trial judge's extensive reasons for regarding much of the appellant's testimony with scepticism were in accord with the evidence.

Findings of Fact

[49] The trial judge found the appellant was not in fact suffering the pain and consequent disability and loss of the amenities of life that she asserted, and he attributed some of the symptoms she does have to other causes, pre-existing or subsequent to the accident. The appellant says both the attribution of symptoms to pre-existing conditions and the attribution of symptoms to post-accident events were founded upon misapprehensions of the evidence, and the application of an erroneous test for causation (in particular, the placement of an inappropriately onerous evidentiary burden upon her).

[50] The appellant contends that certain "central factual findings" were clearly and palpably wrong. They are embodied in the judge's summary of the opinions of the experts, at para. 166 of the reasons for judgment:

... Their reports together confirm the conclusion reached by the Court on both causation and damages: while the accident to some extent exacerbated the plaintiff's pre-existing depressive conditions, there is a measurable risk and a realistic chance that she would be suffering similar depressive debilitation, with specific manifestations of stress, anxiety, fatigue, obesity, and chronic pain, regardless of the accident.

[51] The appellant says the trial judge:

- a) misapprehended the nature and extent of her pre-existing depression, and wrongly found there was a significant risk that the disabling depression would have occurred in any event;
- b) incorrectly concluded that she was, in fact, disabled by depression manifested in anxiety, fatigue, chronic pain and headaches after the termination of her employment; and
- c) was wrong to say there was no medical or other evidence to support the appellant's assertion that she is only capable of working 25 hours per week.

The Appellant's Pre-accident Health

[52] The appellant says the evidence was insufficient to permit the judge to describe her pre-accident condition, at para. 160, as follows:

In short, while medication was able to keep her depressive symptoms generally in check, allowing her to carry on a more or less regular existence, this normalcy was fragile: a traumatic event such as the accident or her termination could trigger a major depressive episode with long-term inter-related psychological, physical, and personal effects that would be difficult to reverse.

- [53] She says there was no evidence her condition was progressive or degenerative, and no evidence she ever experienced chronic pain, chronic headaches or migraines prior to the accident. Pre-existing conditions did not impair her previous activities, particularly her employment, and there was no evidence to support the view that depression would have detrimentally affected her in the future beyond episodic depression similar to that she experienced in the past. She says while stress, anxiety, fatigue and weight gain were manifestations of her depressive disorder, there was no evidence that any of them, individually or in combination, were debilitating.
- [54] However, the trial judge did not describe the appellant's pre-existing condition as progressive or degenerative but, rather, as persistent. He described her state as "fragile", and the evidence as supporting the conclusion that psychological issues would likely manifest themselves in major depressive episodes throughout her life. He expressly referred to and relied upon the evidence of Dr. Levin, who was of the view the appellant was affected by "persistent depressive disorder, with underlying residual symptoms of an incompletely remitted chronic depression": at para. 163. He noted, referring to Dr. Levin, at para. 163:
- ... He cited studies that at least 50% of patients who recover from a first episode of depression have one or more additional episodes in their lifetime, with approximately 80% percent of those with a history of two or more episodes having another recurrence. ...
- [55] He did not conclude that her depression would worsen or lead to chronic pain without significant stressors but, rather, that she was susceptible to stress and that there was an apparent cause of stress that preceded her lowest point: the termination of her employment.
- [56] There was medical evidence that from 2008 onward the appellant suffered from reduced motivation and fatigue, and evidence that the appellant herself attributed those symptoms to depression. The medical records, to which the appellant and her doctor testified, recorded a significant pre-accident history of anxiety and low stress tolerance, and a steady path of weight gain. The record indicates that from early 2013 to March 2014, the appellant was affected by fatigue and limited motivation. In March 2014, stress led to a bout of active depression. This was the foundation for the judge's conclusion that while medication was able to keep the appellant's depressive symptoms generally in check, her normalcy was fragile. The appellant's own case at trial was that her pre-existing depressive disorder made her vulnerable to developing chronic pain.

Post-accident Depression

- [57] The appellant contends it was an error on the part of the trial judge to conclude that a traumatic event such as either the accident or her termination could trigger a major depressive episode with long-term inter-related psychological and physical effects.
- [58] The appellant says the trial judge wrongly concluded that while she was subjectively suffering from chronic pain, she was not suffering from a physical injury; that he "conflated" symptoms of pain and disability in the absence of objective findings with psychological injury, specifically depression; and he incorrectly found she was disabled by depression.
- [59] The appellant says she suffered a physical injury that caused chronic pain and headaches; there was medical evidence to that effect; and the judge was wrong to conclude that the medical examinations for litigation in 2018-19 "generally revealed the plaintiff's physical and neurological condition" to be normal: at para. 96. She says while her examinations were near normal, she was diagnosed with several abnormal conditions including occipital neuralgia, post-traumatic headaches, and myofascial pain; the effects of the physical injury were aggravated by her psychological state, and there was no medical evidence to the effect that her pain was a symptom of depression; and she has chronic depressive disorder and social anxiety but she has never met the criteria for a diagnosis of Somatic Symptom Disorder.
- [60] The appellant says that while both psychiatrists who testified were of the opinion the accident exacerbated her pre-existing depressive condition to some extent, neither opined that she would be suffering depressive debilitation, obesity and chronic pain in the absence of the accident. She points out that Dr. Anderson expressed the opinion that the termination of her employment contributed to the worsening of the appellant's mood, but was not the cause of her disability. He was of the view that the appellant was unlikely to return to full-time work "unless she experiences a marked reduction of her physical symptoms". Dr. Levin says the appellant's psychological reaction to the accident did not exceed a normative reaction and did not exacerbate or worsen her pre-existent psychiatric disorder, and in the absence of the accident she would have continued to experience her pre-existent clinical course.
- [61] The appellant says the judge wrongly concluded that she was likely to suffer headaches even if she had not been injured in the automobile accident. Even if there was evidence that the stress of the termination "may well have" triggered headaches, as the judge says, that susceptibility was not proven on a balance of probabilities. She says there is no similarity in the severity or frequency of her headaches before and after the accident, or before and after her dismissal, and there was no expert evidence supporting the conclusion that the stress arising from her dismissal would have triggered the headaches or any other physical symptoms.

- [62] In my view, there are two problems with this argument. The first is that the trial judge found the appellant to be overstating the extent of her physical injuries and limitations; and the second is that there was a significant body of evidence in support of the judge's finding that the appellant was significantly affected by what the judge described as "depressive debilitation, with specific manifestations of stress, anxiety, fatigue, obesity, and chronic pain" following her dismissal.
- [63] The evidence of the expert psychiatrists is of limited value in determining the extent to which, if at all, the appellant was disabled by pain or physical limitations. There was evidence upon which the judge could properly have concluded that the appellant's physical injury, which was primarily manifested in pain and subjective symptoms and unlikely to persist, was relatively minor.
- [64] The judge concluded that the appellant's principal complaint of ongoing pain was associated with "constant low-grade headaches": at para. 138. It was the plaintiff's own evidence that the headaches affected her energy and ability to concentrate.
- [65] In considering the cause of those headaches, the judge placed some weight upon the fact the appellant continued to work without pause following the accident, and that she only took medications specifically for migraines beginning in October 2016, and for neuropathic pain beginning in January 2017, after the stress of unemployment and under financial pressure. The temporal link clearly played some role in his reasoning.
- [66] There was medical support for his attribution of headaches to stress, as he observed at para. 145:
- Drs. Stewart, Mendis, and Underwood confirmed that stress and other psychological issues can trigger or exacerbate headaches, or increase their risk. The plaintiff herself acknowledges that stress frequently triggered her headaches, both before and after the accident.
- [67] While the physicians did not describe the appellant's dismissal in particular as a cause of stress or headaches, the trial judge noted that they were not in a position to do so:
- [135] One shortcoming, inherent in the process, is that the enormous effects of the termination and the subsequent nervous breakdown would not have been apparent to the medical experts as it presented over the course of the trial. The experts did not have a full sense of the allegations of fraud and lack of integrity that Pacific Law asserted as grounds for terminating the plaintiff, and the effect that these allegations, and the termination itself, had on her. Nor were the plaintiff's medical experts asked to consider the relative effects of the termination and other non-accident stressors on the development and persistence of the plaintiff's symptoms, or the plaintiff's likely present state absent the accident.
- [68] The judge noted that the appellant's counsel had referred to the allegations made by her employer when she was dismissed as "career ending", and referred to the appellant's reaction as "a three-month nervous breakdown": at para. 10. He elaborated:

- [69] Summer 2015, immediately following the accident and her termination, was a low point in the plaintiff's life. She admits that she spent that summer doing "nothing". The shock of the termination resulted in more or less a nervous breakdown. She described to Dr. Anderson that her "mood deteriorated significantly" after her termination, and that she "reached her lowest point emotionally during the summer of 2015 "
- [72] The plaintiff also missed several medical appointments without explanation. Her psychiatrist Dr. Claman attempted to contact her, but was unable to do so. When he was finally able to meet her in August 2015, she reported that she been depressed, withdrawn, and feeling hopeless.

[Footnote omitted.]

- [69] The appellant's counsel correctly points out that there was no expert evidence describing the criteria for diagnosing a "nervous breakdown" but, in my view, erroneously regards this as a diagnosis rather than a description of the appellant's profound reaction to a stressful situation. The description, in my view, is supported by the evidence.
- [70] The trial judge did not find that the appellant had suffered no physical injury. He found she suffered an injury that was exacerbated by her fragility. He also found, however, that her termination triggered a major depressive episode marked by anxiety, fatigue, chronic pain and headaches. In my view, the conclusion that the appellant suffered a relapse of her chronic depression months after the accident, and after her dismissal, was not a palpable error founded upon a misapprehension of the evidence, nor was it unsupported by the evidence.

Limited Capacity to Work

- [71] Finally, the appellant says the judge was "clearly and palpably wrong" to say there was no medical or other evidence to support the appellant's assertion that she is only capable of working 25 hours per week, and that the appellant's condition should not interfere with her work.
- [72] While I agree with the proposition that it was incorrect to say there was no evidence to support the appellant's claim, it does not appear to me that the trial judge was under a misapprehension. At paras. 212-220 of the reasons for judgment, the trial judge directly addresses the evidence in support of the appellant's case, and the inadequacy of that evidence. He expressly refers to the evidence of Dr. Anderson that unless proposed treatment is effective to reduce her headache, neck and shoulder pain it is "unlikely that she will be able to advance her hours": at para. 213. That may be considered to be medical evidence that the appellant is capable of working only 25 hours per week. However, importantly, the trial judge noted that neither Dr. Levin nor Dr. Mendis was of the view that the appellant's psychiatric, psychological or cognitive limitations or restrictions would impair her ability to work full-time, and Dr. Mendis did not describe accident related injuries that would interfere with her work. He then concluded:

[220] I agree that the plaintiff has not acquitted her onus to show that she is unable to work hours approaching full-time. Specifically, she has not convinced the Court that she is only able to work 25 hours a week.

[73] In my view, that conclusion is unassailable.

Causation Analysis and Assessment of Damages

[74] The appellant further argues the trial judge erred in law in the manner in which he addressed causation.

[75] The trial judge began his analysis of causation and damages by correctly describing the guiding principles, including the following principles of causation:

- a) If the defendant's negligence is one cause of an injury, or if it exacerbates or aggravates an existing condition, then the defendant is liable for causing the resulting injury: at para. 115, citing *Athey* at para. 47.
- b) The primary test for causation asks: "but for the defendant's negligence, would the plaintiff have suffered the injury?": at para. 116, citing *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- c) Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person: at para. 117, citing *Athey* at para. 34.
- d) The general principles of causation in law apply to psychological injury just as they apply to physical injury: at paras. 119-120, citing *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.); *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 74.

And the following principles applicable to the assessment of damages:

- a) Damages awards seek to place plaintiffs in the position they would have been in if the defendant had not been negligent: no better or worse. The defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would likely have experienced regardless of the defendant's negligence: at paras. 121-22, citing *Athey* at paras. 32-35; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- b) In determining the plaintiff's original position, it may be necessary to reflect any debilitating effects of a pre-existing condition, or a measurable risk that such a condition would have detrimentally affected the plaintiff in the future regardless of the defendant's negligence: at para. 123, citing *Abbott v. Gerges*, 2014 BCSC 1329 at para. 56.
- c) A measurable risk or hypothetical or future events need not be proved on a balance of probabilities: at paras. 124-125, citing *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, at para. 48; *Athey* at para. 27.

[76] Applying these principles, he then made findings with respect to causation:

- a) The accident exacerbated the appellant's pre-existing conditions, and contributed to her injuries: at para. 178.
- b) Because of her pre-existing depression, with related manifestations of anxiety and fatigue, the appellant was more prone to aggravation of these conditions, as well as to chronic pain. She had a decreased ability to recover from the psychological aspects of her physical injury: at para. 178.
- c) The accident had caused ongoing soft tissue injuries to her neck and lower back, with occasional manifestations of myofascial pain in her shoulders, mid-back, and buttocks: at para. 179.
- d) The accident had worsened, to a modest extent, the severity and frequency of the appellant's headaches, and made migrainous headaches more frequent, albeit still rare: at para. 179.
- e) The accident had adversely affected her resilience, made her more susceptible to depressive episodes and to chronic pain, and has made resistance to and recovery from depression and pain more challenging: at para. 179.

[77] These findings were qualified, however, in a passage the appellant says misstates the burden she must discharge:

[180] The plaintiff has not convinced me, however, that her injuries are as severe, debilitating or omnipresent as described. Nor has she convinced me that they are caused (in a general, rather than legal sense) predominantly by the accident. I make this finding based in part upon the credibility findings set out above, particularly her inexplicable behaviour in the months leading to and following her termination. A significant factor in reaching this conclusion is the fact that she was able to work unaffected for a month after the accident. In fact, the injuries did not seem to affect her life profoundly until after her termination from Pacific Law, and her nervous breakdown following that termination. I agree with the defendants that the stress of the termination was at least equal to whatever stress the accident may have inflicted. I also agree that had the accident never occurred, the stress of the termination may well have triggered the headaches, and recurring depressive symptoms.

[Emphasis added.]

[78] This conclusion is elaborated upon in a passage from the judgment, which follows a detailed review of the medical evidence and the appellant's testimony:

[183] [T]he evidence as a whole has not convinced the Court that the plaintiff has discharged her burden of proof to establish that the injuries remain to the extent that she claims, or are as severe as she claims, or that they are attributable to the accident. The evidence of the plaintiff's actions and conditions before and after the accident establish sufficient doubt such that for the most part the plaintiff has failed her persuasive burden.

- [184] I accordingly find that the plaintiff's medical reports, based on her subjective reports of symptoms, and her causal connection of those symptoms to the accident, are correspondingly qualified. If the plaintiff's account of his or her 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, 49-50.
- [79] The judge then turned to the assessment of damages, which required consideration of positive and (principally in this case) negative contingencies affecting the appellant's health and employment prospects. He found that even without the accident there was "a strong possibility" that the stress of her dismissal from her employment in June 2015--coupled with some combination of genetics, obesity, stress, depression, a sedentary lifestyle and work, and the natural ravages of middle age--would have resulted in chronic headaches and back and neck pain, in addition to more long-lasting manifestations of her depressive symptoms: at para. 186.
- [80] He concluded:
- [187] Damages will accordingly be adjusted down to reflect the modest differential between the state attributable to the accident, and the state the plaintiff would very possibly be in today, in any case.
- [81] The appellant, focusing upon the passage I have highlighted in para. 180 of the judgment, cited above, contends the judge reduced her award of damages because she had not categorically persuaded or convinced him that her injuries were predominantly caused by the accident. It is sufficient to show, as she did, that she was vulnerable (or predisposed) to injury and that the loss or damage that occurred was contributed to by the tortious cause.
- [82] The passage cited is unclear and confusing. It is unclear to me why the judge distinguished injuries that are caused 'in a general sense' and injuries that are caused 'in a legal sense' by a tortfeasor. Consideration of whether an injury is predominantly caused by a tortfeasor is also confusing. However, reading the judgment as a whole, and particularly in light of the judge's description of the relevant principles, it does not appear to me that the judge imposed an inappropriate burden upon the appellant. He expressly acknowledged that it was sufficient for the appellant to show that the accident was one cause of the injury, and expressly found that she had done so.
- [83] The evidence referred to after the impugned phrase--the appellant's pre-existing condition and susceptibility to injury, the fact she continued to work hard after the accident and before her termination, and what he referred to as her "nervous breakdown" following the termination of her employment--suggests that the judge was considering the extent to which the termination of her employment, rather than the accident, was the cause of her symptoms. That exercise was necessary in order to ensure, when assessing damages, that the appellant was placed in the position she would have occupied had the accident not occurred. He concluded: "had the accident never occurred, the stress of the termination

may well have triggered the headaches, and recurring depressive symptoms": at para. 180.

[84] The appellant says the fact an inappropriate burden was placed upon her is reflected in the judge's observation that the expert medical witnesses did not "categorically" conclude her headaches were caused by the accident, and that no expert could "categorically" trace her present condition to the accident. In my view, the trial judge did not impose a burden upon the appellant to show that her symptoms were categorically related to the accident. He was simply emphasizing (as he noted at para. 184, cited above) that the supportive medical opinions were dependent upon the appellant's own evidence, and were not persuasive because that evidence was unreliable. That conclusion was open to him on the evidence.

[85] For example, the trial judge considered the evidence of Dr. Robinson that the appellant's headaches were likely post traumatic, but noted:

[144] Dr Robinson, responsibly, does not categorically conclude that the headaches are caused by the accident. He and other medical experts confirm that the headaches could be caused wholly or partly by sources and triggers unconnected to the accident, or only indirectly connected to the accident. Dr Robinson notes that:

Many patients will have a constant background discomfort upon which moderate to severe headache episodes may occur. Triggers or aggravators to the condition often include physical activities requiring repetitive neck movement or the need to maintain a fixed neck position. In some cases, typical migraine triggers may be present even in patients with no pre-existing history of headache. These may include attacks associated with stress, lack of sleep, oversleeping, menstrual periods, whether change, alcohol and/or certain foods.

[Emphasis added by the trial judge.]

[86] Given that the opinions on causation were thus qualified, and the fact there was evidence the experts were unaware of the extent to which the appellant was affected by other stressors before and after the accident, it was appropriate for the judge to note that the opinions were not categorical, and open to him to discount them as he saw fit.

[87] In short, I am of the opinion that the trial judge properly considered the appellant to have met the onus of establishing that the accident caused soft tissue injuries to the neck and lower back, with occasional manifestations of myofascial pain in her shoulders, mid-back, and buttocks. He properly found she had established that the injuries worsened the severity and frequency of her headaches, and made migrainous headaches more frequent. He properly found that she had established that the accident had adversely affected her resilience, made her more susceptible to depressive episodes and to chronic pain, and had made resistance to and recovery from depression and pain more challenging. In my opinion, it was also open to him to find that she had not established that she suffered to the extent she claimed. Further, it was open to him, when assessing damages, to find that the appellant's dismissal--an unrelated event--would have caused the appellant to suffer from the significant depression that ensued in the summer and fall of 2015 in any event.

Mitigation of Damages

[88] Finally, the appellant argued the trial judge wrongly discounted the award to take account of what he considered to be a failure to mitigate. This argument is founded upon the statement in the reasons that lack of exercise and the appellant's weight hindered her physical and mental health and rehabilitation, and that could be the cause of her symptoms to some extent. That statement, however, is found in the trial judge's weighing of the medical evidence, and must be read in context. He wrote:

[136] Another shortcoming lies in the assumptions provided to the plaintiff's experts that the plaintiff was physically healthy and active leading up to the accident; evidence at trial revealed this to be incorrect. This would have given to the medical experts a greater sense that the accident itself caused more dramatic and immediate physical and psychological decline. The medical experts generally agreed that exercise, weight loss, and muscle strengthening would not only improve the plaintiff's physical but mental health and likely encourage interrelated rehabilitation. They also agreed to the corollary: that lack of exercise and obesity hinder her physical and mental health and rehabilitation, and could be the cause of her symptoms to some extent.

[Emphasis added.]

[89] It was not the impugned statement but its corollary that was significant to the trial judge. The point was that the treating doctors were not fully aware of the appellant's deconditioning, a factor they acknowledged would affect her mental health.

[90] The appellant, citing *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, and *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 203, correctly submits the respondent bore the onus of proving a failure to mitigate. However, in my view, the trial judge neither expressly nor implicitly reduced the award on that account. It follows that I would not accede to this ground of appeal.

Summary

[91] In my view, the appellant has not established that the trial judge misapprehended the evidence in any material respect. There was evidence upon which he could come to adverse conclusions with respect to the appellant's credibility. That being the case, it was open to him to discount her evidence and that of the experts that was dependent upon her reliability.

[92] I would not accede to the argument that the judge imposed an inappropriate burden upon the appellant. He clearly described the principles that guided him in seeking to make an award that put the appellant in the position she would have occupied had the May 2015 accident not occurred.

[93] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Voith"

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