

CANADA / JUDGMENT

Jenkins v. Irving

2020 BCSC 391

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 391 Jenkins v. Irving

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jenkins v. Irving,

2020 BCSC 391

Date: 20200316

Docket: M164451

Registry: Vancouver

Between:

Kathleen Ann Jenkins

Plaintiff

And

Dennis Casey, Donald Richmond Irving and

Bailey Judith Stanworth

Defendants

Corrected Judgment: This judgment was corrected at paragraphs 9, 15, 21, 111, 112, 114, 150, 175, 181, 183, 190, 222, and 224 on May 26, 2020.

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for Plaintiff:

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Robert Moore

Place and Date of Trial:

Vancouver, B.C.

July 8-12, 2019

July 15-19, 2019

July 22-26, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 16, 2020

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I. introduction

- [1] This personal injury claim arises from a four-vehicle accident that occurred on May 7, 2015 on Highway 1 in Coquitlam (the "accident").
- [2] The plaintiff Kathleen Jenkins is a 47-year-old lawyer, called to the bar in May 2002.
- [3] The drivers of the four vehicles were, in physical sequence: first, Donna Scramstad (not a party to this litigation); second, the plaintiff; third, the defendant Dennis Casey; and fourth, the defendant Bailey Stanworth. The remaining defendant, Donald Irving, is the owner of the Casey car and is a party by virtue of s. 88 of the Motor Vehicle Act, RSBC 1996, c. 318.
- [4] The defendants admit liability. Based on the evidence at trial, neither Mr Casey nor Ms Stanworth appear to have acted particularly negligently: they simply failed to brake quickly enough when the cars ahead of them suddenly stopped. What occurred could have happened to any driver.
- [5] The plaintiff claims that the accident caused constant neck and lower back pain, as well as constant headaches, including acute migraine headaches one or two times a month. She says that these conditions are ongoing, and prevent her from working more than 25 hours a week, prevent regular housekeeping, and deprive much of the enjoyment in her life. She seeks non-pecuniary and special damages, and compensation for past and future loss of earning capacity, cost of future care, and loss of housekeeping capacity, totaling \$3,956,103.
- [6] This case is marked by four particular challenges, the first of which is common in personal injury litigation, and the last three less so.

[7] The first challenge is that the plaintiff's pain is entirely self-reported. She does not suffer from specific injuries that can be confirmed with an X-ray or other medical imaging device. As the neurologist Dr Gordon Robinson states in his report presented by the plaintiff:

by their nature the symptoms of headache and neck pain are subjective. There are no objective measures such as a blood test or image that can document the presence, absence or magnitude of these complaints. However, this is almost universally true in patients with chronic headache disorders. The assessment of the headaches which includes diagnosis and impact can only be determined by self-report.

[8] In turn, all of the expert reports tendered by the plaintiff, and the clinical records of her doctors referred to in trial, are built upon the foundation of her subjective descriptions of her pain.

[9] The second challenge is the plaintiff's pre-existing chronic depression, with manifestations of fatigue, lack of motivation, household disorder, personal neglect, weight gain, and anxiety. A major theme of the defendants' case was that her present troubles are primarily attributable to this pre-existing condition, rather than the accident.

[10] The third challenge, related to the second, is that the plaintiff was terminated based on what plaintiff's counsel accurately described as "career ending allegations" just six weeks after the accident, leading to a three-month nervous breakdown. The termination and the serious allegations levelled at her struck at the core of what the plaintiff described as the most important thing in her life: her legal career. Again, it was the theme of the defendants' evidence and argument that this stressor is more to blame for the existence and persistence of her present complaints than the accident itself; she was able to work long hours between the accident date and the date of her termination.

[11] The fourth challenge is that the plaintiff has primarily worked as a defence-side motor vehicle accident lawyer, with detailed professional knowledge of motor vehicle accident injuries, medications, symptoms, treatments, and evidence.

II. ISSUES AND OVERVIEW OF POSITIONS

[12] Two issues remain for determination:

- 1) Causation; and
- 2) Damages.

[13] The parties presented radically opposed positions.

[14] Counsel for the plaintiff submit that the plaintiff is a credible witness who did not exaggerate her injuries, which injuries, consisting of neck and back pain, with persistent low-grade and occasional migraine headaches, have consistently plagued the plaintiff since the date of the accident.

- [15] Counsel for the defendants submit that the plaintiff is not credible: her injuries did not manifest themselves until after her termination. Her present unhappy financial and professional state motivates her to seek the large damages award, and her years of experience as a personal injury lawyer place her in a perfect position as witness and claimant. They argue that there is no medical or psychiatric reason that she cannot work more than 25 hours a week. They concede that she should be entitled to some modest damages for minor soft tissue injury and special damages for post-accident anti-inflammatory medication, but no more.
- [16] The plaintiff does not take the position that her termination is attributable to the accident: she accordingly does not seek compensation for lost earnings between her June 2015 termination and her next law job, which started in October.
- [17] The defendants did not pursue the defence that the plaintiff has failed to mitigate her damages by, for example, seeking alternative treatments or improving her diet or exercise.

III. FACTS

A. The plaintiff

- [18] The plaintiff is 47 years old. At the time of the accident, she was 42 years old.
- [19] She is unmarried, with no children. She lives in Chilliwack with her four small dogs.
- [20] She grew up in Ottawa, but has spent her student and adult life elsewhere. She had a comfortable upbringing. She is presently estranged from her parents.
- [21] The plaintiff received good marks in her undergraduate studies, and was accepted into her first choice for law school: the University of Victoria. She described her performance at law school as "okay." Part of her challenge at law school was her diagnosis of depression in her second year. She was prescribed medication and received counselling, which largely addressed her depression and anxiety. Her grades improved, and she graduated on schedule.

B. The plaintiff's employment history

- [22] Unfortunately, the plaintiff has never found a long-term home at a law firm or other legal employer. Before her present position, her longest stay was just over three years.
- [23] After a year of articling at a downtown Vancouver firm from 2001 to 2002, she joined Somers & Company, a New Westminster firm. She practised primarily in ICBC defence, that firm's focus. She left in February 2006, to broaden her skill set. When she departed she was an associate, earning \$80,000 per year.

- [24] She then went in-house at Manulife Financial, where she stayed from February 2006 to May 2009. That three-year period was stressful for her due to both work and personal matters. Despite these stresses, she never missed a day of work, but adjusted her anti-depressant medications accordingly. She ultimately decided to leave, as she found herself focusing solely on disability claims instead of gaining a broad range of experience.
- [25] She then went to Intrawest ULC on a one-year contract from June 2009 to June 2010, serving as a Litigation Manager. She testified that her one-year contract was not renewed, due to the 2008 financial crash.
- [26] Her next position was as Claims Manager for the Law Society of British Columbia. She says that there was dissent among the people who reported to her, including among some persons who had applied for the job. She was given working notice, and a generous severance package. She stayed there for eight months: August 2010 to April 2011.
- [27] Her next move entailed a physical move to Kamloops where she served as an associate at Bilkey Law from May 2011 to November 2014. She generally enjoyed her work at Bilkey Law, working on average over 1,800 hours a year. Her ICBC billing rate was \$195 an hour. During this time she was an active contributor to the legal community, volunteering for various CBA roles and contributing to a course at Thompson Rivers University law school. Unfortunately, in 2013 the Bilkey firm started on the road to dissolution. During this time, the plaintiff says that she provided much unpaid administrative work, and had to pick up work left by departing associates. It was a stressful time for her. In summer 2014 she decided to leave Bilkey Law and return to Vancouver.
- [28] In September 2014 she was hired by the Pacific Law Group, a defence-side personal injury firm. The plaintiff was excited to obtain more litigation experience at a firm helmed by a woman litigator: Mary Helen Wright. Unfortunately, as set out below, her stay at Pacific Law was brief: from November 2014 to June 23, 2015, when she was terminated five weeks after the accident.
- [29] Her first five months at Pacific Law went reasonably well, although Ms. Wright testified that the plaintiff was less experienced and qualified than she had represented before her hiring. At times she seemed to be in over her head, asking for assistance on matters that a lawyer of her call and professed experience should have known, and exhibiting anxiety. In January 2015 a number of the higher level, more complex ICBC files were transferred to another Pacific Law lawyer because it appeared that they exceeded the plaintiff's capabilities.
- [30] During her first six months at Pacific Law, from November 2014 to April 2015, the plaintiff worked solid hours of 170-190 hours per month.

C. May 2015: the accident

- [31] On May 7, 2015 she was driving westbound on Highway 1 from her home in Chilliwack to downtown Vancouver, where she worked. It was late rush hour: approximately 8:45 am. Her car, a 2003 Dodge Dart, was in the leftmost regular lane: the fast lane.
- [32] Towards the Brunette Avenue off-ramp, traffic became congested and slowed down. Ms Scramstad's vehicle, ahead of the plaintiff, came to a sudden stop. The plaintiff braked. Behind her, Mr Casey was driving at approximately 75-80 km an hour. He braked, but hit the back of the plaintiff's vehicle, causing the plaintiff's vehicle in turn to hit the Scramstad vehicle.[1] A second later the plaintiff felt a second jolt from behind: the car two cars back, driven by the defendant Ms Stanworth, hit Mr Casey's car, which in turn hit the plaintiff's car once again. Ms Stanworth estimates that her speed was less than 80 km an hour.
- [33] In discovery, the plaintiff first described her post-collision movement as being "jostled." She later described it more dramatically: "my body moved violently."
- [34] The plaintiff did not hit her head or appear to suffer any external injury. The airbag did not activate. In the aftermath of the accident she was somewhat stunned, and regained focus when she heard Ms Scramstad knocking on her window. She got out of her vehicle and felt so relieved that she did not appear to be injured that she hugged Ms Scramstad.
- [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.
- [36] Ms Scramstad was able to drive her car away, although a later inspection revealed its frame to be bent, rendering it a write-off.
- [37] The plaintiff's car was not in drivable condition. It was towed away for repair, and back on the road 12 days after the accident.
- [38] The only pain felt by the plaintiff immediately following the accident was a sore neck, mild discomfort in her left shoulder, and a mild headache. She told the attending ambulance, fire, and police that she was fine. She did not go to the hospital.
- [39] Instead, she took a cab downtown to Pacific Law. She says that in the cab she felt increasingly nauseous. She asked to get out a few blocks before arrival at the firm. On her walk to the firm, the fresh air made the nausea go away.
- [40] At the firm she spoke to Ms Wright. The plaintiff testifies that Ms Wright said words to the effect of "you are young. You are fine. It is not like it is anything neurological. You will get better."

- [41] She says that the pain persisted throughout the day. She went to a walk-in clinic to obtain a muscle relaxant. The clinical note for that visit recorded that the plaintiff complained of "some headache" and "some discomfort particularly in the left side of the neck and left shoulder." Range of motion for all portions of the spine, shoulders, hips, knees, and ankles was normal. The clinic doctor prescribed no further treatment or medication, and referred the plaintiff to her psychiatrist.

D. Her conditions after the accident

- [42] In the days following the accident, the plaintiff says that the pain increased and varied. Four days after the accident, while in court in Chilliwack, an intense stabbing pain started, apparently untriggered. The next day, the pain had travelled to her shoulders, back, and fingers.
- [43] She says that over the next few weeks her entire body hurt, and the pain spread to her feet.
- [44] As a follow-up visit to the walk-in clinic week after the accident, she reported that she had stiffened up considerably. The doctor noted a restrictive range of motion particularly in lateral rotation of the cervical spine, with stiffness in the shoulders and upper back.

E. May - June 2015: after the accident

- [45] The plaintiff's timesheets reveal that she worked long hours throughout her time at Pacific Law, both before and after the accident. At the time of the accident in May 2015, she was gearing up for a trial scheduled to start on June 1, 2015.
- [46] The defendants emphasised that the plaintiff's high daily billable hours were unaffected by the accident: in the weeks before and after the accident, the plaintiff regularly billed days in excess of 12 hours, in addition to a driving commute of about 3 hours to and from Chilliwack on most days.
- [47] Nor did the plaintiff present at work as injured. The offices at Pacific Law had glass walls. With the exception of the application of a heating pad, her movements and actions appeared to her colleagues to be normal and unaffected by the accident.
- [48] For her part, the plaintiff says that she was "running on adrenaline," as she prepared for trial. Given the culture of the firm and of defense-side work in general, she did not wish to let her physical or emotional pain be seen. She says that she suppressed her pain at work, but that in her brief hours at home during this period she would physically and emotionally "crash."
- [49] On May 19th, after billing 10.4 hours, she left work early at 4 pm, and dropped off her post-accident rental car.[2] She then went to Earls Restaurant[3] with a former co-worker, who was visiting from Kamloops to attend a dinner with several lawyers, including some senior counsel. She initially intended to work at a side table but joined and drank and dined with the group.[4] She said that it was the first time that she had relaxed and socialized since the

accident, and that she had enjoyed herself. At around 9 pm she and her friend left Earls and drove back to her home in Chilliwack. Unfortunately, there remained a problem with the Earls bill. A senior lawyer in attendance had offered to pick up her friend's tab, but had not paid for the plaintiff's portion of the bill. The plaintiff says that she left the restaurant under the impression that the senior lawyer would pay the entire bill, including her portion.

- [50] The group passed on the plaintiff's name to Earls. Earls left a voice message at work for the plaintiff the next day, May 20th. The following day, while the plaintiff was away from work, an assistant at Pacific Law heard the Earls message; the red light on the plaintiff's telephone thus no longer flashed to indicate a new voice message, and the plaintiff says that she did not hear the message until much later. In the interim, the assistant relayed the Earls message to Ms Wright, who concluded, rightly or wrongly, that the plaintiff had deliberately committed a "dine and dash" in failing to pay the bill.
- [51] Returning to the evening of May 19th, the plaintiff's friend drove her home to Chilliwack. The plaintiff and her friend testified that upon returning to Chilliwack, the plaintiff collapsed. The plaintiff says that she collapsed due to pain; the defendants assert that it was due to the drinks that she consumed at Earls.
- [52] The plaintiff claims that the next day she could not get out of bed due to pain and fatigue. She emailed work and said that she was sick. This was the only day she took off between the accident and the trial.
- [53] Despite her claim to her employer and to this Court that she was unable to get out of bed on May 20th, it appears that she did leave the house that day in order to pick up her repaired car, and then drive to Walmart to fill her prescription of trazodone.
- [54] May 20th was a very bad day for the plaintiff to miss work. Apart from the Earls problem, certain steps pursuant to a trial management conference ("TMC") order, for which the plaintiff was responsible, were due that day; Pacific Law lawyers and staff had to scramble in order to ensure compliance. They tried to email and call her. Most of the day, the plaintiff was unreachable. The plaintiff eventually spoke to Ms Wright, who stated her belief that the plaintiff was hung over from the Earls event, rather than immobilized by pain.
- [55] The plaintiff had another controversy brewing on May 19-20. She had apparently missed several teleconference calls with an out-of-town client to prepare for a discovery scheduled for May 20th. When the discovery was cancelled, she failed to advise the client (or anyone at Pacific Law) of the rescheduling, and missed the follow-up call with the client. This silence caused Pacific Law and the client considerable anxiety.
- [56] On May 21st the plaintiff returned to work. Based in part on the awkward conversation with Ms Wright the day before, she felt that she had no choice: she feared she would be dismissed. Ms Wright testified that the plaintiff arrived at work at 7 am that day, with no sign of any physical impairment. The plaintiff's timesheet indicates that she billed 12.90 hours that day.

- [57] On that day she met with Ms Wright. The plaintiff claimed that Ms Wright cross-examined her, and offered no sympathy or accommodation. Her employer did not propose any reduction or in hours or time off, or that another lawyer take over her upcoming trial.
- [58] She says that the May 21st meeting made her decide to leave Pacific Law group. She contacted ZSA, a legal recruiter. She drafted a new résumé. She also contacted the Lawyers Assistance Programme.
- [59] The clinical notes for her May 26th follow-up visit to the walk-in clinic record that the plaintiff "appears to be in a state," and crying, due to "problems with work." She reported pain in her neck and shoulders.

F. Early June 2015

- [60] The trial scheduled for Monday, June 1st settled after hours on Friday, May 29th.
- [61] She continued to work and bill until her final day at Pacific Law, on June 23rd, although at a less frenzied clip than her May month of trial preparation. She billed around 7 hours a day on average.
- [62] In a June 3rd visit to her family doctor, she recounted the history of the accident. She said that the significant pain started four days after the accident: her fingers and feet hurt. She felt pain in her neck and lower back, with headaches and stabbing pain through her eyes. On that day, the doctor recorded that she reported tight muscles and trapezius; pain between her shoulder blades; limited range of motion in her neck; and pain across her lower back. Her account of the development of her symptoms, is more extensive and dramatic than recorded in the three recent May visits to the walk-in clinic after the accident.

G. June 2015: the plaintiff's termination

- [63] On June 23rd the plaintiff met with Ms Wright and an office administrator at Pacific Law. The meeting was long and unhappy. The plaintiff says that Ms Wright cross-examined her for two hours. Ms Wright cited the Earls incident, the TMC Order issue, the cancelled client discovery, and the May 20th sick day (which she asserted was a hangover recovery day), as well as events pre-dating the accident, as grounds for terminating the plaintiff for cause. Ms Wright particularized a long list of shortcomings, criticizing in depth the plaintiff's reliability, integrity, and honesty.
- [64] In addition to the incidents recounted above, a significant cited ground for the plaintiff's termination flowed from her October 2014 purchase of a Dell computer and equipment costing \$1,666, as she prepared to start her work at Pacific Law. Instead of paying this modest amount up front, she opted for a payment installation plan. Documents generated by Dell's online order department record the billing contact for the computer purchase as "Kathleen Jenkins/Pacific Law Group", with the Pacific Law business address as the billing address; the Dell agreement, including the electronic signature (in text, rather than signed) records the buyer as Pacific Law rather than Ms Jenkins. She did not advise or seek approval

from Pacific Law before doing so.

- [65] In the termination meeting, and subsequently in the Human Rights Tribunal proceedings and at trial, Ms Wright asserted that the plaintiff had improperly used the credit of Pacific Law to purchase the computer, and specifically accused her of fraud.
- [66] The issue came to a head after Ms Jenkins missed several payments on the computer. Dell started issuing demand letters to Pacific Law, around March 2015. Despite Pacific Law's repeated requests to attend to these payments, and despite the plaintiff's repeated reassurances to her employer that she would pay off the debt, she failed to do so.
- [67] The plaintiff recognizes in retrospect that it was regrettable and inexplicable that she did not simply pay the amount due and make the issue go away; she attributes this failure to the anxiety of trial preparation. Ms Jenkins claimed that she did not intend to name Pacific Law as the purchaser, and merely provided her future workplace as her own billing address; she blames the reference to Pacific Law as the buyer as an error by Dell. In any case, no one from Dell was called to refute or support the plaintiff's evidence on this point, and it remains inconclusive. What is certain is that the plaintiff's ongoing failure to address the debt caused Dell to hound Pacific Law for payment and compromised her employer's credit.
- [68] The plaintiff believes that these reasons for her termination were after-the-fact justifications. She believes that the main concern was, as she claims Ms Wright stated on several occasions, that the plaintiff would eventually bring a claim requiring a defence by ICBC, Pacific Law's most important client.

H. Summer 2015

- [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 "[5]
- [70] The plaintiff suffered acute stress over finances, both immediate and future. She and Pacific Law disagreed on who owed money to whom, and her former employer withheld payments that she was expecting. Her car--the one involved in the accident--was repossessed after she failed to make payments. She had to borrow money from a friend. She lost access to a bank account.
- [71] She let her Law Society practicing status lapse, and had to renew it in order to start her new job at Somers & Co in the autumn.

- [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.
- [73] Unfortunately there is little contemporaneous objective or even subjective evidence of her injuries and symptoms from June to October 2015.
- [74] She reports that during that summer, she had trouble sitting down and standing up for extended periods of time.
- [75] She saw her psychiatrist Dr Claman on June 25, 2015, just after her termination. She referred to her delayed onset lower back, shoulder, and neck pain which interfered with her sleep and overall functioning, but reported that she was sleeping well with the use of a muscle relaxant and an anti-inflammatory. She reported that she was feeling anxious, and stayed in bed on weekends. She affirmatively denied any fatigue or cognition problems. Nor did she mention headaches, either persistent or migraine.
- [76] At the June 19, 2015 visit to her family doctor before her dismissal, the plaintiff reported that she had neck and back pain, and had suffered a headache the previous day, but was "overall much better," with "less sharp pain". Dr. Chen did not feel it was necessary to prescribe any additional medications, and recommended that Ms. Jenkins carry on with Advil.
- [77] At the July 10, 2015 visit to her family doctor after her dismissal, the plaintiff reported that her back pain was still quite bad, with tightness and bands across the whole back.

I. Legal proceedings against Pacific Law

- [78] The plaintiff's departure from Pacific Law resulted in two legal proceedings against her former employer.
- [79] In July 2015 she hired a lawyer for a wrongful dismissal claim against Pacific Law, and filed that claim on June 16, 2017; Pacific Law counterclaimed to recoup the advance and other monetary amounts; it also alleged defamation. The proceedings have since been discontinued.
- [80] On December 23, 2015 the plaintiff filed a human rights complaint against Pacific Law and Ms Wright, claiming that they had failed to accommodate her injuries. Those proceedings consumed several weeks of hearings, and resulted in five written decisions. It also led to a judicial review proceeding. The plaintiff was represented by counsel throughout. Those proceedings, and the cost of those proceedings, served as additional acute stressors on the plaintiff's post-accident life.[6]

- [81] On August 15, 2019, soon after the conclusion of this trial, the British Columbia Human Rights Tribunal issued its reasons for decision. The Tribunal concluded that Ms Jenkins had not proven, on a balance of probabilities, that she had a disability at the time of termination, or that Pacific Law was influenced by her disability in its decision to terminate the plaintiff: Pacific Law had non-discriminatory reasons for the termination.[7]

J. Employment since October 2015

- [82] In October 4, 2015, the plaintiff re-connected with Somers and Co., and specifically its manager Ms Harris. She told the firm about the motor vehicle accident but appears not to have told its principals about any physical or psychological injuries that would potentially affect her work performance. Nor did she divulge the full reasons for her termination from Pacific Law.
- [83] Somers & Co. rehired her as an employee. The plaintiff said to Ms Harris that she anticipated billing around 1,600 hours a year. Apart from serving as a hiring interview representation, the anticipated hours were the basis of her annual compensation of \$132,000.
- [84] The defendants point to these three discrepancies in the Somers & Co. interview as indicative of the plaintiff's lack of credibility: they say that the plaintiff knew that she would not be able to work 1,600 hours, and nefariously negotiated to be an employee rather than a contractor so as to trigger a duty to accommodate. That said, I am unable on the evidence to conclude that the plaintiff had anything but a good faith belief that she would do her utmost to achieve the 1,600 hours. As the defendants assert, even in her post-accident state at Pacific Law, she was able to work long hours. The defendants' thesis of a scheme by the plaintiff is undermined by her words in the key email chain: "Did you want to go salary as opposed to split on billings? I am totally flexible and in your hands. I was on billings split at Pacific Law I could easily commit to a 1500 billings target, and would expect to come out at closer to 1600 or 1650."
- [85] Unfortunately, the plaintiff failed to even approach the target of 1,600 hours. She testified that her life was a vicious cycle of being too sore to sleep, which in turn exacerbated her pain and triggered headaches, rendering her exhausted, and unable to work more than half days.
- [86] In June 2016 she received formal notice about her lower-than-expected hours, and was advised that she may have to pay back the firm if her hours fell short of the anticipated amount.[8] Based on this arrangement, as at the date of trial, the plaintiff owed the firm about \$11,000.
- [87] The plaintiff claimed to continue to be beset by exhaustion and pain. Her expected hours were reduced. She had to hand off an eight-day trial. She was taken off complex files, and only assigned to lower complexity files. Her billing rate is only \$130-\$140 an hour. She has not conducted a trial herself at Somers & Co., and indeed has not done so since around 2004.

- [88] She continues to work at Somers & Co. She states that she is unable to work for more than half a day. She says that she must adapt her work to accommodate her headaches and anxiety. For example, she must schedule discoveries on non-consecutive days in order to recover.
- [89] Neither Mr Somers nor Ms Harris of Somers & Co. observed any injury or pain symptoms in the plaintiff at work in 2015 and the first half of 2016. Both acknowledged that the plaintiff tended to work with her door closed.

K. Progression of her symptoms

- [90] At her July 2018 discovery, the plaintiff stated that the muscle pains in her back and neck were the worst, most frequent, and most intense right after the accident, and then in the three months after the accident (that is, roughly May to August 2015). At that time, she reported that her back had improved, but her neck was still causing pain.
- [91] The February 2016 clinical notes of her family doctor Dr Chen recorded the plaintiff's report that her "neck [was] really bad", and she still suffered from back pain. On the plus side, it was also reported that the sharp pains had gone, and that she was "recovering nicely."
- [92] Dr Chen's March 2016 clinical notes noted that her headaches and migraines were worsening. They also record that the plaintiff "feels as though good interval improvement," and that she is "continuing to make good improvement post-MVA."
- [93] The plaintiff was not prescribed specific medication for headaches, and specifically migraine headaches, until October 7, 2016, when she filled a prescription for zolmitriptan: a "rescue medication" for migraine headaches. The defendants placed great weight on the fact that this did not occur until some 17 months after the accident.
- [94] Similarly, the defendants emphasize that the plaintiff was not prescribed medication focused on neuropathic pain until January 2017 (pregabalin/Lyrica) and April 2017 (gabapentin/Neurontin).[9]
- [95] In December 2017 the plaintiff's family physician noted that the plaintiff was experiencing an increase in stress-related headaches due to work.
- [96] As set out below, examinations by experts retained for this litigation throughout 2018 and 2019 generally revealed the plaintiff's physical and neurological condition to be normal. She exhibited ordinary range of motion for her neck and back, albeit with reports of pain. Palpation of her neck and back resulted in complaints of pain.
- [97] As at the July 2019 trial, the plaintiff's neck and lower back pain remains chronic and persistent. The plaintiff confirmed that she no longer has regular pain in her shoulders, feet, ankles, hands, or arms, although at times pain returns to her shoulders, back and buttocks.

- [98] Her most disabling symptom is her headaches. She continues to suffer from a persistent low-grade headache, as well as, infrequently, debilitating migraine headaches. She reports that the pain starts in the neck, on both sides, travels up through the head, and create a stabbing sensation behind her eyes. She says that the pain tends to increase during the day, and crest in the afternoon.
- [99] At the time of trial she took a significant amount of medications. In addition to the over-the-counter pain medications of ibuprofen and Tylenol Ultra, she also took Lyrica and Cymbalta (chronic pain); Dexedrine (fatigue); almotriptan (migraine headaches); Abilify (antidepressant); cyclobenzaprine (muscle relaxant); nortriptyline (anti-depressant and sleep aid); trazodone (sleep); and an admixture analgesic cream (pain).

IV. CREDIBILITY AND RELIABILITY

A. Law

- [100] The injuries in this case are soft tissue injuries. There is no objective indication of those injuries; they cannot be detected on an MRI, X-ray, or other device. Thus the six expert medical reports and two vocational and rehabilitation reports adduced by the plaintiff all rely almost entirely upon the plaintiff's self-report of her pain symptoms. In cases such as the present, credibility findings are important.
- [101] The court must 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. As McEachern CJ stated in *Price v. Kostryba* (1982), 70 BCLR 397 (SC), citing his earlier decision in *Butler v. Blaylock Estate*, [1981] BCJ No. 31 (SC):

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. *[italics added]*

- [102] *Price* must be read with more recent authority that recognizes that even minor motor vehicle accidents can cause long-term and debilitating soft-tissue injuries. For example, in the recent case of *Sekhon v. Gill*, 2019 BCSC 811 at para. 39, N. Smith J tempered *Price*:

Medical knowledge has obviously advanced in the almost four decades since *Price* was decided. In this case, there is expert evidence of an identified medical/psychological condition -- chronic pain syndrome -- that explains the persistence of the plaintiff's symptoms.

- [103] In *Kallstrom v. Yip*, 2016 BCSC 829, Kent J stated:

- [329] Much scepticism, some might say cynicism, can accompany claims that significant injury has been sustained as a result of a minor MVA, and particularly so where there is little objective evidence of physical injury and where complaints of pain persist far beyond what most observers might consider to be "normal". It must be remembered, however, that not everybody has the mental or physical constitution of a rugby prop forward.
- [104] Kent J also notes (at para. 335) that the Butler decision cited in Price was later overturned: *Butler v. Blaylock Estate*, [1983] BCJ No. 1490 (CA), where the Court stated:
- [12] With the greatest respect, I am of the opinion that there is no evidence upon which one could reasonably conclude that the appellant did not continue to suffer pain as of the date of the trial. After careful consideration of the expert testimony and the evidence of that appellant and his wife, I have reached the conclusion that the only finding open to the learned trial judge was that as of the date of trial the appellant continued to suffer moderate pain and in the words of Dr. Lehmann, his symptoms 'will gradually subside with further time. Having been present for approximately two and a half years, it is doubtful that they will disappear completely'.
- [13] It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages. There is no suggestion in this case that the pain suffered by the plaintiff did not result from the accident. I would add that a plaintiff is entitled to be compensated for pain, even though the pain results in part from the plaintiff's emotional or psychological makeup and does not result directly from objective symptoms.[10]
- [105] In *Karim v. Li*, 2015 BCSC 498, Abrioux J (as he then was) usefully gathered the guiding authorities for assessing credibility:
- [88] As Madam Justice Dillon noted in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para.186, *aff'd* 2012 BCCA 296:
- [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), 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S.* (R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 (S.C.C.) at para.128). 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).

[89] In addition, the following principles should be taken into account by the trier of fact:

- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
- every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
- where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

B. The plaintiff's credibility

[106] The plaintiff argues that she is a credible witness. She kept her composure at trial. She generally answered questions directly. She was generally candid about her pre-existing conditions. She conceded troubling aspects of her personal history, generally recognizing that several of the events recounted above exhibited poor judgement.

[107] The defendants stake their case on credibility. They argue that the plaintiff is almost wholly unbelievable. They argue that her symptoms beyond the first few months are fictitious and exaggerated. They point, *inter alia*, to her ability to work long hours in the weeks following the accident. They note that as a motor vehicle accident lawyer, she has deep knowledge of how a plaintiff victim should present, in terms of both medical and lifestyle evidence, as well as deep knowledge of pain manifestation and medication.

[108] As for motivation, they point to the general desire for a monetary award, as well as the plaintiff's own specific economic pressures.

- [109] The plaintiff has suffered financial difficulties both before and after the accident. It is clear from the evidence, including that of the plaintiff's own witnesses, that she was living beyond her means and desperate for money throughout this time. When she moved back to Vancouver in 2014, she lost a deposit on a Surrey property she hoped to rent, and had to stay with a friend for a while. She failed to file income tax forms for 2013, 2014, 2015.[11] She made the unusual request of Pacific Law for a \$30,000 advance, stating that she was still owed money from Bilkey & Co.; while surprised, Pacific Law advanced these funds. Her parents stopped helping her financially around the time of the accident. Telus and other creditors were seeking payment, calling her up at work at Pacific Law. After her dismissal, Pacific Law withheld funds from her. She had to retain lawyers for her litigation against Pacific Law. Her car was repossessed, and she had to borrow a friend's car.[12] The heat was turned off in her house for non-payment; she claimed that the rising heating charges were due to a broken door that she neither fixed herself nor hired another person to fix; she claims not to have reported the broken door to the landlord because she was ashamed of the mess.
- [110] The plaintiff's purchase of the Dell computer via a financial plan, and her seeming inability to pay off the small amount owed, in the face of the growing tensions with her employer, and despite her promises to pay, further indicate financial distress, and provide further evidence that her psychological issues, unconnected to the accident, create and compound stresses in life.
- [111] This economic pressure crested in the weeks following the accident. By May 22nd, she knew that her job at Pacific Law was in peril; this was confirmed a month later when she was terminated. Her lack of clients, low billing rate, lack of trial experience, and choppy employment history cast doubt upon future job prospects. In the years between the termination and this trial, her work at the Somers & Co. were neither professionally rewarding nor lucrative, focusing on low-complexity files. As a recent development, the amendments to the Insurance (Vehicle) Act, RSBC 1996, c. 231 in April 2019 likely limit future work on low-complexity files: Mr Somers predicts that such work will only have a future of some four years.
- [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. Similarly, while I accept that the Earls and Dell incidents may have arisen from misunderstandings, and the errors of other people, her failure to simply pay these debts in a timely way and make the issues go away was perplexing, and undermines her credibility even in the face of her explanations.

- [113] That said, 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.[13] 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.

V. CAUSATION AND DAMAGES

A. Causation: law

- [115] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. 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: *Athey v. Leonati*, [1996] 3 SCR 458 at para. 47. 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* at paras. 13-17.
- [116] The primary test for causation asks: "but for the defendant's negligence, would the plaintiff have suffered the injury?" This test recognizes that compensation for negligent conduct should only be made where there exists a substantial connection between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [117] 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: *Athey* at para. 34.
- [118] In determining causation, caution is required before drawing any inference that because one event follows another in time, the first event is the cause of the second: *White v. Stonestreet*, 2006 BCSC 801 at paras. 70-74.

B. Causation and psychological injury: law

- [119] The general principles of causation in law apply to psychological injury just as they apply to physical injury. In *Yoshikawa v. Yu* (1996), 21 BCLR (3d) 318 (CA), Lambert JA summarizes the principles to be applied in assessing claims of psychological injury (at paras. 12-13):
- a) The plaintiff must establish that the pain, discomfort or weakness is "real" in the sense that the victim genuinely experiences it.
 - b) The plaintiff must establish that his or her psychological problems have their cause in the defendant's unlawful act.
 - c) The plaintiff's psychological problems do not have their cause in the defendant's unlawful act if they arise from a desire on the plaintiff's part for such things as care, sympathy, relaxation or compensation.
 - d) The plaintiff's psychological problems do not have their cause in the defendant's unlawful wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or "will-power".
 - e) If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish to end, their existence or continuation must be said to have a subjective, or internal, cause.
 - f) If a court could not say whether the plaintiff really desired to be free of the psychological problems, the plaintiff would not have established his or her case on the critical issue of causation.
 - g) Any question of mitigation, or failure to mitigate, arises only after causation has been established.
 - h) It is not sufficient to ask whether a psychological condition such as "chronic, benign pain syndrome" is "compensable". Such a psychological condition may be compensable or it may not. The identification of the symptoms as "chronic benign pain syndrome" does not resolve the questions of legal liability or the question of assessment of damages.
 - i) It is unlikely that medical practitioners can answer, as matters of expert opinion, the ultimate questions on which these cases often turn.
 - j) There must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.
 - k) The general principles which apply in relation to causation in law will apply to psychological injury as they apply to physical injury.

[120] Based on Athey principles, the concept of reasonable foreseeability is subject to a qualification when the injury is psychiatric in nature. As Bennett JA stated in *Hussack v. Chilliwack School District*, 2011 BCCA 258 at para. 74:

where the psychiatric injury is consequential to the physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury even if this injury was unforeseeable.

C. Damages: law

[121] Damages awards seek to place plaintiffs in the position they would have been 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. The defendant is liable for the additional damage but not the pre-existing damage: *Athey* at paras. 32-35.

[122] As McLachlin CJC stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 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 v. Leonati*.

[emphasis added]

[123] L. Warren J further explained this principle in *Abbott v. Gerges*, 2014 BCSC 1329:

[55] The fundamental principle in assessing tort damages is that the quantum should be that which is required to place the plaintiff in her original position; that is, the position she would have been in absent the defendants' negligence: *Athey*, at para. 32. This requires a determination of the plaintiff's position after the negligence and an assessment of what the original position would have been. The difference between these positions represents the quantum of the defendants' liability: *Athey*, at para. 32.

[56] The defendants need not put the plaintiff in a position better than her original one and should not compensate the plaintiff for any damages she would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58, at para. 78. 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. This is the crumbling skull rule and, where applicable, it results in the damages award being reduced to reflect risks inherent in the plaintiff's pre-accident condition: *Athey*, at para. 35.

[57] As explained in *T.W.N.A. v. Canada* (Ministry of Indian Affairs), 2003 BCCA 670, at para. 48, a measurable risk need not be proved on a balance of probabilities:

Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

[emphasis added]

[124] In assessing the position the plaintiff would be in regardless of the accident, the court may consider injuries and incidents occurring after the accident: *Athey* at paras. 31-32; *T.W.N.A.* at para. 36.

[125] Major J discussed the ideas of "measurable risk" and "realistic chance" in *Athey* under the heading of "Adjustments for Contingencies." He contrasted past events, which must be proven on a balance of probabilities and are thereafter treated as certainties (at para. 28), with hypothetical and future events:

[27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J.C. Hutton Proprietary Ltd.* (1990), 160 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1997), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

VI. DISCUSSION AND DECISION: INJURIES, CAUSATION, and DAMAGES

A. The plaintiff's position

[126] The plaintiff argues that while several of the injuries she suffered in the collision improved, a number of her symptoms have developed into chronic pain. She has pain in her neck and lower back, and to a lesser extent in her upper back, shoulders, and buttocks. Her primary disabling symptom is her headaches. She says that the headaches have been present since almost immediately after the collision and have never gone away. The intensity of the headaches varies. The severe migraine type headaches occur infrequently. But she says that both the migraine and constant moderate headache disable her from working and functioning normally.

[127] The plaintiff seeks the following damages:

Non-pecuniary Damages

\$180,000

Loss of past earning capacity

\$311,528

Loss of future earning capacity

\$3,000,000

Cost of future care

\$388,000

Loss of housekeeping capacity

\$40,000

Special damages

\$36,575

Total

\$3,956,103

B. The defendants' position

[128] The defendants argue that the plaintiff's diminished and withdrawn present state cannot be blamed solely or even primarily on the accident. Instead, they point to the plaintiff's devastating dismissal and subsequent nervous breakdown as causes of her symptoms. As set out above, the dismissal was not based upon insufficient hours, or even poor legal skills, but cut to the core of the plaintiff's integrity and honesty: a lawyer's stock and trade. Further, the practice of law was not simply a job for the plaintiff: it was the most important thing in her life.

[129] The defendants also point to another stressor: the plaintiff's pre-existing depression, which manifested itself in the same manner as some of the central present complaints: fatigue, malaise, anxiety, neglect of self and home, and weight gain.

[130] The defendants strongly deny that the accident caused the plaintiff's current physical and mental injuries, and her current fatigue and inability to work a full day. Put bluntly, they assert that these complaints are conscious or unconscious fictions created by the plaintiff. They note that the plaintiff's experience as a defence-side motor vehicle injury lawyer puts her in the perfect position to stage the medical and medicinal profile of an injured plaintiff. They assert that the plaintiff could overcome her physical and psychological problems through willpower but she is attracted by the secondary gain of medical attention and accommodation by her work through reduced hours.

[131] That said, the defendants concede that the plaintiff suffered minor injuries as a result of the accident. They agree that she is entitled to some non-pecuniary damages and compensation for specific expenses such as anti-inflammatory medication in the weeks following the accident. They suggest a total damages range of \$40,000 to \$60,000.

C. Medical evidence

[132] The parties and the medical experts generally agree that the plaintiff suffers from a complicated constellation of symptoms caused by a complex interplay of physical and psychological conditions. Given this interplay, it is somewhat artificial to discuss each condition in isolation. As correctly stated in the plaintiff's submission, "[t]he very nature of pain does not lend itself to a mind-body dualism." That said, for clarity, the following section will discuss the evidence with respect to her main complaints: headaches, psychological conditions, and physical conditions.

[133] The parties called the following medical experts, whose testimony will be discussed in the next section:

Plaintiff

Defendants

Neurologist

Dr Gordon Robinson (November 18, 2018)[14]

Dr Tilak Mendis

(January 31, 2019)

Neurologist

Dr John Stewart

(August 1, 2018)

Psychiatrist

Dr Stephen Anderson (February 21, 2019)

Dr Alexander Levin (February 20, 2019)

Orthopaedic Surgeon / Pain

Dr Patrick Chin

(April 24, 2019)

Dr Robin Rickards (March 15, 2019)

Physician (Rehabilitation)

Dr Heather Underwood (May 24, 2018)

Family doctor

Dr Helen Chen

(April 13, 2019)

- [134] Except where noted below, I have generally accepted the expert evidence provided in the reports from both sides. Indeed, most of the physicians called by each side agreed on most of the diagnoses; their primary disagreements concern how much of these symptoms can be attributed to the accident, and the prognosis for improvement.
- [135] I am satisfied that the experts were provided appropriate facts and assumptions, including the plaintiff's personal history and her clinical records. All of the plaintiff's expert medical reports, for example, referred to her long history of depression. As a further example, those reports mention her termination, albeit briefly and incompletely.[15] 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.
- [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.
- [137] The ultimate qualification with respect to all of the expert reports, particularly those adduced by the plaintiff is, again, that they rest almost entirely on the plaintiff's subjective self-reports of symptoms and the progression of those symptoms. Their diagnoses are based upon an assumption of the accuracy of those reports, coupled with the inference that they started or worsened after the accident. The best opinion that any of the plaintiff's experts can provide is a qualified one: that the plaintiff's symptoms are consistent with the injuries one might expect in an accident of the sort reported by the plaintiff.

1. Headaches

a) Current conditions

[138] The plaintiff's main present injury is in the form of constant low-grade headaches. She says that these sap her energy and concentration, and require her to stop work in the afternoon and to go to bed early in the evening. Further, one or two times a month she experiences acute migraine headaches. The headaches cause a shooting pain into the back of her eye, most often on the left side. The migraines cause hypersensitivity to smell, light, and sound. When a full-blown migraine besets her, she takes extra strength Tylenol and ibuprofen, and must go to bed early to avoid overdosing on those medications and suffering from a rebound headache.

b) Pre-existing conditions

[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.[16]

[140] At age four, the plaintiff hit her head on concrete after falling down a flight of stairs. At age ten, she was involved in a motor vehicle accident: she was not in a seatbelt, and hit her head into the windshield. Her father and brother suffer from migraine headaches, and her father's family had a history of migraines. Dr Stewart noted that family history can be a predictor of future migraines, as can acute infant carsickness, which the plaintiff experienced.

c) Medical evidence

[141] As with her physical symptoms, there is no clear clinical explanation for her headaches. Each of Dr Stewart, Dr Robinson, and Dr Mendis found the plaintiff's neurological exam to be normal.

[142] Dr Robinson, a neurologist specializing in headaches, gave the most qualified and direct evidence with respect to her headaches. Dr Robinson concludes that the plaintiff's history and examination were consistent with a diagnosis of persistent post-traumatic headache related to soft tissue injury to the neck: in other words, whiplash. He also noted that headache is a common symptom following soft tissue injury to the neck. He states that:

In the majority of cases clinical examination and investigation is normal in patients suffering from recurring headache and the diagnosis rests on the temporal relationship to trauma and the historical features reported by the patient. The headaches may reflect a worsening a pre-existing migraine or the development of head pain arising de novo from head and neck injury. Headache related to head and neck injury may be present from the outset or gradually developed in the weeks and months following injury.

[143] Dr Tilak Mendis, a neurologist who conducted an independent medical examination of the plaintiff on behalf of the defendants, recognized that the headaches and pain symptoms reported by the plaintiff may have been triggered by the accident.

[144] At the same time, 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]

[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.

[146] Dr Stewart confirmed that individuals with a family history of migraines are more likely to develop migraines and that those migraines could come on at any time.

[147] Dr Mendis notes that her headaches may be caused in part by the significant number of medications the plaintiff is currently taking, including chronic analgesic medications; Dr Anderson agreed. Dr Mendis believes that the plaintiff's headaches may improve with appropriate treatment by a treating neurologist, as well as the reduction in her analgesic medications.

[148] As with her physical injuries, the doctors generally agree that in most patients, any neurological effects of the accident would have resolved by now. Dr Mendis noted that prognosis for recovery from post-traumatic headaches is usually good, with most cases resolving within 3-6 months of the injury. He states that the daily headaches "have lasted longer than would normally be expected and may be attributed in part to non-neurological issues including psychological difficulties." On the other hand, Dr Robinson notes that while many patients may recover within weeks or months of an accident, there is a substantial number of patients that continue to have headaches and neck pain years after the injury.

- [149] Dr Robinson opines that there is a definite risk that the plaintiff's headaches will continue to be frequent and occasionally severe indefinitely. Dr Robinson recommends that the plaintiff maintain an active lifestyle. He also suggests left-sided medial branch blocking or Botox injections, which are often successful, but require ongoing and expensive treatment. Those treatments would not likely help the plaintiff, but may assist in pain reduction and thus improvement in quality of life.
- [150] Dr Mendis noted that prognosis for recovery from posttraumatic headaches is usually good. Dr Mendis did not believe that the plaintiff's neurological conditions, specifically, her headaches, would cause permanent disability. Those conditions would generally not limit her ability to work, except during an acute migraine attack. He did acknowledge, however, that the duration of the plaintiff's pain and headaches makes this prognosis less favorable.
2. Depression and psychiatric state
- a) Current conditions
- [151] The plaintiff argued at trial that even working 25 hours per week significantly compromises her quality of life. Work exhausts her, and she must go to bed early every night. Her house is a mess. She has stopped socializing with friends. Her personality is flat. She feels stress and anxiety. She lacks motivation. She is only able to engage in limited physical activity. She has gained significant weight. She does not attribute these conditions to any psychiatric condition, but rather chronic pain. She claims that even if she presently has major depression, that depression is and has been stabilized with psychotherapy and psychotropic medications, coupled with a diminished workload.
- b) Pre-existing conditions
- [152] Several of the conditions about which she now complains were largely manifest to some degree before the accident, and were attributable to her pre-existing depression. She describes fatigue as the "number one symptom of my depression."
- [153] She described these pre-accident depressive symptoms as "waxing and waning". They flared up in times of personal or professional stress, and created a vicious cycle of stress, anxiety, panic attacks, weight gain, self-neglect, oversleeping, lack of concentration, lack of motivation, household neglect, and fatigue.
- [154] She was formally diagnosed with depression in law school, although she acknowledges that she likely had it as far back as high school.[17] She reported that the medications prescribed in law school made a "world of difference". Before the accident, her depressive symptoms were largely kept in check with medication, including Dexedrine, a stimulant used to address fatigue. She reports that before the accident, she had never missed a day of work due to depression, even when faced with personal and work stress.

- [155] That said, her depressive symptoms--specifically fatigue and a lack of motivation, as well as anxiety--were present well before the accident. At times, these symptoms were overwhelming. In law school, her depression was at one point so intense that she was unable to leave the house to go to the grocery store. She has a long history of anxiety attacks: in particular, court appearances have caused significant episodes of anxiety.
- [156] In 2008 she felt like she was relapsing back into a more active depressive state. Specifically, she felt reduced motivation and fatigue. In April 2008, she began seeing Dr Claman, who has served as her psychiatrist since then. At that time she advised him that she had a long history of anxiety and low stress tolerance. She tended to oversleep due to depression and had been on a steady path of weight gain. Dr Claman diagnosed her with major depressive disorder, in remission, and social anxiety disorder.
- [157] Other clinical notes, confirmed by the plaintiff, recorded that at times the plaintiff resorted to alcohol when depressed or stressed, as well as a means of getting to sleep. In times of stress, she had difficulty focusing. She would neglect herself and her diet, and her house would fall into a prolonged state of untidiness. She would become reclusive and anti-social. At times she would discontinue medications, and miss medical appointments. Throughout her adult life she has suffered from insomnia, which in turn aggravates her other depressive symptoms.
- [158] From early 2013 to March 2014, she was suffering from fatigue, oversleeping, and limited motivation. At times during this period, she was doing very limited exercise, and would be exhausted and listless over the weekends after her workweek. In March 2014 stress with her work and family gave her another bout of active depression. She stopped working out and socializing, and had trouble sleeping. She felt too tired on weekends to do anything except the bare necessities. She feared that she was relapsing again. Dr Claman diagnosed her with chronic depression and social anxiety. Dr Claman's care, with an increased prescription of the stimulant Dexedrine, appeared to stabilize her depression.
- [159] Before the accident, she was prescribed, from time to time, Wellbutrin/buproptrin (anti-depressants), trazodone (an anti-depressant but used by the plaintiff as a sleep aid), propranolol/Ativan (for anxiety and sleep), and paroxetine (Paxil) (anti-depressant). At the time of the accident she was taking Paxil (30mg daily); Wellbutrin (300 mg daily); Dexedrine (10mg daily), and trazodone at bedtime.
- [160] 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.

c) Medical evidence

- [161] Although Dr Anderson (for the plaintiff) and Dr Levin (for the defendants) produced reply reports critical of the other's methodology, they generally agreed that the plaintiff had significant pre-existing psychological issues that would likely manifest themselves in major depressive issues throughout the plaintiff's life regardless of the accident. Importantly, both Dr Anderson and Dr Levin diagnosed the plaintiff with a major depression disorder.
- [162] Dr Anderson opined that the plaintiff's psychiatric difficulties are likely due to the accident superimposed on her pre-accident emotional and psychological issues. The plaintiff would not likely have suffered a marked deterioration of her mood if she did not have the pain, fatigue, functional and vocational limitations attributable to the accident. Dr Anderson fairly concedes that the plaintiff likely would have had chronic depressive symptoms requiring pharmacotherapy even if the accident had not occurred.
- [163] Dr Levin opined that the accident did not cause any clinically-significant worsening of her pre-existent chronic depression and social anxiety disorder. Dr Levin opined that the plaintiff suffers from persistent depressive disorder, with underlying residual symptoms of an incompletely remitted chronic depression. 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. On average, an individual with a history of depression will have five to nine separate depressive episodes in their lifetime. He concludes that, "[t]herefore, it is evident that, even in the absence of the subject MVA and related physical injuries, Ms Jenkins will continue to experience a fluctuating course of her pre-existing chronic depression."
- [164] Dr Anderson's primary criticism of Dr Levin was that he did not provide any reasons why the plaintiff, who was already emotionally vulnerable before the accident, would not have increased emotional difficulties as a result of having chronic pain, fatigue and functional limitations following the accident.
- [165] In turn, Dr Levin primarily critiqued Dr Anderson for underplaying, or not being aware of the other stressors in the plaintiff's life, including her termination. He also says that Dr Anderson underplayed the plaintiff's extensive pre-existing history of recurrent depression and its clinical implications for differential psychiatric diagnosis and prognosis, and was too ready to attribute her psychiatric conditions to the accident. Finally, he argued that Dr Anderson simply took the plaintiff's subjective self-reports at face value to reach his diagnosis. Dr. Levin contrasted this with his own, more forensic, methodology, asking the plaintiff specific questions to better gauge her true condition beyond her assertions and presentation.
- [166] I recognize and generally agree with the cross-critiques of these psychiatrists. I need not determine categorically who is correct, but I read their reports with these qualifications in mind. 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.

3. Physical injuries and chronic pain

a) Current conditions

[167] The plaintiff also says that she suffers from constant pain in the back and sides of her neck, as well as lower back. While generally resolved, pain will develop in her shoulders, her upper and mid-back, and her buttocks from time to time. This pain interferes with her sleep and daily activities. These physical symptoms are exacerbated by prolonged sitting, bending, and driving. It is improved by stretching or changing position.

b) Pre-existing conditions

[168] As a child, the plaintiff fell off a horse and injured her back; this soon resolved. At age sixteen, she was involved in a motor vehicle accident that left her with whiplash symptoms for about a year.

[169] The plaintiff presented herself at trial as formerly fit and athletic, and driven to decline and weight gain by the accident. She cited to the Court and to the medical experts a half-marathon, hiking, running, horseback riding, and gym training as indicative of her fitness just before the accident. Cross-examination revealed those activities for the most part to be a decade in the past.

[170] Clinical records and cross-examination revealed the plaintiff to be on a steady path of weight gain long predating the accident. Ultimately, the plaintiff conceded that she had started gaining significant weight in 2008 or 2009. I agree with the defendants that the preponderance of the evidence is that she has been gaining weight on a consistent trajectory since 2002, with a parallel decline in physical fitness activity, and that her weight gain cannot be primarily attributed to the accident.

c) Medical evidence

[171] The medical experts were in general agreement that pre-existing depressive disorder makes one more vulnerable to developing chronic pain and depressive affects, and is itself affected by chronic pain.

[172] The medical experts were also in general agreement that the accident likely had a causal connection to her physical complaints. As an example, Dr Rickard, an orthopedic surgeon called by the defendants, acknowledged that "the relationship in time to motor vehicle accident of 2015 and onset of neck and low back symptoms suggest these two events are related in a cause-effect relationship."

- [173] The expert evidence and clinical records adduced at trial generally agreed that the plaintiff exhibited no objective signs of physical injury. Examinations of the areas of her body that were primarily subject of her complaints--shoulders, neck, and back--appeared normal. Similarly, those parts of her body, as well as others, generally exhibited a normal range of motion, albeit with pain or moderate restriction at times. Her stance and gait were normal.
- [174] As with the headaches, there was also general consensus that an ordinary person would generally have recovered from any myofascial injuries suffered by the plaintiff by now, within 6 to 12 weeks, and that there was no clear explanation for why she had not recovered. Dr Rickard opined that the plaintiff's condition, which he identified as "probable soft tissue symptoms lumbar spine/possible cervical facet joint syndrome" would likely not be permanent, and could be treated with a structured exercise regime, muscle strengthening, and weight loss. He conceded on cross-examination, however, that the conditions could be permanent in some persons.
- [175] At the same time, the experts generally did not dispute her subjective reports of pain, which she reports upon palpation, stretching, and rotation. None of the defence medical experts deny the possibility of this pain being real. All concede that pain is a subjective and idiosyncratic phenomenon and can exist, genuinely, even in the absence of objective injuries.[18]
- [176] The medical experts were in general agreement that the plaintiff's chronic pain has both a physical and psychological dimension, and that these sources are interrelated. Dr Anderson described a "vicious cycle" of stress and anxiety triggering pain, which in turn triggers more stress and anxiety. Dr Underwood and other experts called by the plaintiff confirm that stress can increase both pain recurrence as well as the impression of that pain, creating a revolving door of pain and depression.
- [177] Similarly, the medical experts were in general agreement, as noted above, that the plaintiff's professed pain, and lack of improvement, is also directly connected to her poor physical fitness and obesity. For example, Dr Underwood confirmed that the plaintiff's weight exacerbates the symptoms of headaches and fatigue. This in itself in turn would fuel the vicious cycle referred to above. The persistence of the physical and psychological symptoms would in itself be a further stressor hindering the rehabilitation of the plaintiff.

D. Discussion and decision: injuries, causation, and damages

- [178] First, I make the following findings on causation. I find that the accident exacerbated her pre-existing conditions and contributed to the plaintiff's injuries. This is sufficient to find causation and ascribe liability to the defendants. The defendants take the plaintiff as they find her. Because of her pre-existing depression, with related manifestations of anxiety and fatigue, the plaintiff 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.

- [179] I find that the accident has caused ongoing soft tissue injuries to the plaintiff's neck and lower back, with occasional manifestations of myofascial pain in her shoulders, mid-back, and buttocks. The accident has worsened to a modest extent the severity and frequency of the plaintiff's headaches, and made migrainous headaches more frequent, albeit still rare. I also find that the accident has adversely affected the plaintiff's resilience. It has made her more susceptible to depressive episodes and to chronic pain, and has made resistance to and recovery from that depression and pain more challenging.
- [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.
- [181] I also base this conclusion on the plaintiff's medical history. While I accept the evidence of Dr Robinson and others that pain and symptoms do not always manifest themselves immediately after an accident, but may develop months after, such a pattern is less common. Her condition in the weeks following the accident was less severe than the symptoms about which she now complains. The acknowledged clinical records indicate that the plaintiff's condition was improving as would normally be expected after an accident inflicting soft tissue injuries. She did not start to take medication specifically for migraine headaches (zolmitripan) until October 7, 2016. It was not until April 2017, long after the accident, that she began taking medication focused on neuropathic pain.
- [182] I also base this conclusion upon the expert testimony that whatever injuries she suffered ought to have resolved themselves soon after the accident, particularly had the plaintiff pursued an active lifestyle or exercised. None of the expert witnesses found any objective neurological, orthopaedic, or psychological reasons for the complaints presented by the plaintiff. Nor could any of the medical experts categorically trace her present conditions to the accident; they had to rely upon the inference, based upon the subjective report of the plaintiff, that these symptoms manifested themselves or worsened only after the accident.
- [183] I do not rest this conclusion primarily on credibility findings against the plaintiff, or on the medical evidence. Rather, the 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. The Court's conclusions are not a direct condemnation of the plaintiff's integrity or honesty. As stated in *F.H. v. McDougall*, 2008 SCC 53 at para. 44:

Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffmann explained in *In re B* at para. 2:

If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

[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.

[185] Second, I make the following findings with respect to damages, as a general guide to assessing the various categories of damages later in these reasons. In assessing damages, the Court must ask itself where the plaintiff would be had the accident not occurred. How much does her present condition differ from her measurably plausible present condition absent the accident?

[186] I conclude that there is a measurable risk and realistic chance that the plaintiff would be in a similar position today had the accident never occurred. I base this on several factors:

- a) her pre-existing depression, anxiety, stress, and headaches, and the interrelationship between these conditions: while she was generally able to keep these in check with medication before the accident, she was just barely holding on. A significant stressor, be it the accident or the Pacific Law termination, or another hypothetical stressor, would have a realistic risk of triggering many of the symptoms about which she now complains;
- b) her pre-existing tendency and movement towards weight gain and a more sedentary lifestyle unconnected to the accident;
- c) as a related point, the strong possibility that this decline, coupled with the natural degradation of ageing in one's 40s, could cause the headaches, and neck and back pain;

- d) her inconsistent and unstable employment, with associated stress;
- e) the psychological effects and related physical effects of her traumatic termination from Pacific Law. Even without the accident, there is a strong possibility that the stress of that event, 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.

[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.

VII. DAMAGES

A. Non-pecuniary damages

1. Law

[188] 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. Fairness is measured against awards made in comparable cases. Comparable cases serve only as a rough guide, however: each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[189] The oft-cited case of *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 sets out a non-exhaustive list of factors to be considered when assessing non-pecuniary damages:

- age of the plaintiff;
- nature of the injury;
- severity and duration of pain;
- disability;
- emotional suffering;
- loss or impairment of life;
- impairment of family, marital and social relationships;
- impairment of physical and mental abilities;
- loss of lifestyle; and
- the plaintiff's stoicism.

2. Discussion and decision

- [190] As with all aspects of this case, the parties are very far apart with respect to non-pecuniary damages. The parties paint very different pictures of the plaintiff's pre-accident lifestyle.
- [191] The plaintiff portrays herself as physically and socially active up to the days immediately before the accident. The defendants argue that those days were long behind the plaintiff, and that her quality of life had already declined in the years preceding the accident due to a variety of factors, including her work, her personal issues, and her moves between jobs and cities.
- [192] The parties of course 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. As set out above, I agree generally with the defendants in this respect.
- [193] In addition to the evidence cited under credibility above, certain aspects of evidence undermined her assertions of constant pain since the accident, and the effect on her lifestyle and independence. With respect to her neck and back pain, she makes regular long drives from Chilliwack; and there was evidence that she occasionally makes one-day trips to and from Kamloops to visit friends. This evidence does not accord with the degree of pain she claims to be suffering. Her professed inability to maintain her house and garden is exaggerated, and manifested itself regularly before the accident.
- [194] Several of the plaintiff's old friends testified as to her markedly changed personality after the accident and termination. Before the accident she was energetic, enthusiastic, physically fit, and enthusiastic about crafts and hobbies, positive, sunny, and happy. After the accident, she became withdrawn, negative, of lessened affect, fatigued, and stiff. None of these witnesses, however, regularly saw the plaintiff immediately before, or have seen the plaintiff since the accident, such as to provide meaningful testimony on changes in her personality and activities, or to distinguish between the effects of the accident versus the effects on the plaintiff of the termination and other stressors.
- [195] The plaintiff argues that an award of \$180,000 would be appropriate under this head of damages. In support of this claim, she cites several cases, including *Myers v. Gallo*, 2017 BCSC 2291 (\$175,000), *Sebaa v. Ricci*, 2015 BCSC 1492 (\$180,000), and *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 (\$185,000). The plaintiffs in these cases suffered severe, chronic, and likely permanent pain that was directly attributable to the accidents in question. Their physical impairment was found to have profoundly diminished their quality of life. The plaintiffs in *Myers* and *Sebaa* also developed serious psychological impediments as a result of the accidents, including depression, anxiety, and, in the case of *Sebaa*, post-traumatic stress disorder.
- [196] The defendants argue for an award of non-pecuniary damages in the range of \$40,000 to \$60,000. They cite a number of cases, including, most notably, *Wainwright v. Llewellyn*, 2014 BCSC 177 (\$60,000), *Moritz v. Schmitz*, 2013 BCSC 668 (\$80,000), *Siddall v. Bencherif*,

2016 BCSC 1662 (\$60,000), and Lehtonen v. Johnston, 2009 BCSC 1364 (\$40,000). The plaintiffs in these cases suffered from various pre-existing psychological conditions, which they alleged were exacerbated by the accidents in question. Their physical injuries ranged from relatively minor soft-tissue injuries (Lehtonen) to serious chronic pain (Moritz). Crucially, in assessing non-pecuniary damages in these cases, the court was careful to distinguish between the symptoms attributable to the accident, and those that were the "result of a complex interplay of social, psychological and emotional factors unrelated to the accident". These latter symptoms were properly considered as part of the plaintiffs' original positions: Siddall at paras. 220, 227.

[197] The plaintiff's injuries are, for the most part, more severe than in the cases cited by the defendants. Her pre-existing conditions, including fatigue, depression, and anxiety, must be considered as part of her original position. In addition, as explained above, I am not persuaded that the accident has diminished her quality of life to the extent she claims. The extent of the pain, suffering, and loss of enjoyment of life actually attributable to the accident is not comparable to that of the plaintiffs in Myers, Sebaa, or Danicek.

[198] Guided in part by the Stapley factors, and the cases presented by each side, as well as the unique facts before the Court, non-pecuniary damages of \$100,000 are appropriate in this case.

B. Loss of past earning capacity

1. Law

[199] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: Rowe v. Bobell Express Ltd., 2005 BCCA 141 at para. 30; M.B. v. British Columbia, 2003 SCC 53 at para. 49.

[200] The trial judge has discretion to determine what periods are appropriate for the determination of net income loss: Lines v. W.D. Logging Co. Ltd., 2009 BCCA 106 at paras. 181-186. In exercising this discretion, the trial judge should keep in mind that the plaintiff is to be put back in the position he or she would have been in had the accident not occurred (Lines at paras. 185-186).

[201] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: Athey at para. 27; Morlan v. Barrett, 2012 BCCA 66 at para. 38.

2. Discussion and decision

- [202] The plaintiff confirms that she seeks no past income loss before October 15, 2015, when she joined Somers & Co. She concedes for the purpose of the present action that the accident did not cause her dismissal from Pacific Law. The defendants are therefore not liable for the plaintiff's income loss between the date of the accident and the date she started at Somers & Co.
- [203] The defendants argue that the plaintiff is entitled to no damages under this head.
- [204] For the reasons set out above, I generally agree with the defendants that the plaintiff is not as impaired in practicing of law as she now claims. She described the period immediately after the accident as the worst point in pain, particularly with respect to her neck and back. Nonetheless, she was able to work and bill significant hours from the date of the accident to her termination six weeks later. I also agree with the defendant's general observation that there are many lawyers functioning and thriving notwithstanding depression, headaches, neck and back pain, and other more debilitating conditions. Indeed, it is rare to meet a lawyer approaching the age of fifty who does not suffer from some combination of neck and back pain and headaches, even in the absence of a motor vehicle accident. Testifying in another much-cited case, the plaintiff's neurological and headaches medical expert Dr Robinson acknowledged that people can be productive and high functioning even in the presence of chronic pain: Danicek, *supra*, at para. 285.
- [205] That said, I agree that the residual effects of the accident on the plaintiff's pre-existing physical and psychological conditions have reduced her past earnings to some degree. I also agree that the present earnings capacity of the plaintiff is slightly worse than what it likely would have been without the accident.
- [206] The plaintiff adduced an expert report by the economist Mr Benning with respect to past and future loss of employment income. His past income loss calculation to the first day of trial totals \$311,528, before prejudgment interest. This amount is based on an assumption that absent the accident, the plaintiff would have earned \$200,000 in 2015, increasing to \$250,000 per year by 2019. Based on the evidence cited above, this hypothetical appears optimistic, but plausible. With an eye to the positive and negative contingencies of how the plaintiff's career may have unfolded between 2015 and 2019 absent the accident, coupled with my finding that the accident has only modestly reduced her earning capacity, the Court awards \$31,153, or 10% of the amount to Mr Benning's report.

C. Loss of future earning capacity

1. Law

- [207] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiv* (1985), 26 BCLR (3d); *Pett v. Pett*, 2009 BCCA 232.
- [208] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [209] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines*, supra, at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [210] *Savage J* (as he then was) summarised the principles for assessing loss of future earning capacity in *Parker v. Lemmon*, 2012 BCSC 27 at para. 42:
- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
 - (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
 - (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
 - (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
 - (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
 - (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
 - (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
 - (8) An earnings approach will be more useful when the loss is more easily measurable;
 - (9) The capital asset approach will be more useful when the loss is not easily measurable.
- [211] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a

person capable of earning income in a competitive labour market: *Brown v. Golaiy*, supra; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56. Although the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan* at para. 56.

2. Discussion and decision

[212] The plaintiff argues that before the accident, she was a successful, focused, and hard-working lawyer dedicated to practising law. She says that due to neck pain and the headaches, she is unable to work more than 25 hours a week. If she works more than 5 hours a day, she says that her physical discomfort, and particularly her headaches, leave her exhausted, and can impair her functioning for days.

[213] The plaintiff's medical reports provide some support of diminished vocational capacity during income. For example, Dr Anderson confirms that:

If the treatment suggested [medial branch blocking and botox] do not result in the substantial improvement in her headache, neck and shoulder pain she will most probably have a persistent partial disability indefinitely. This will reduce her capacity to work as a lawyer making it unlikely that she will be able to advance her hours.

[214] Mr Pakulak, an occupational therapist specializing in rehabilitation, and Mr Lawless, a vocational consultant, both called by the plaintiff, also believed that the plaintiff would face challenges at work.

[215] At the same time, as noted above, Dr. Levin and Dr Mendis think that her condition should not interfere with her work.

[216] For loss of future earning capacity, Mr Benning was asked to assume that absent the accident, the plaintiff would earn \$250,000 per year by 2019 and \$350,000 per year by 2029, and that she would retire no later than age 73. This future is then contrasted to a post-accident future limited to 25 hours per week at a billing rate of \$173 per hour to 2020, and then \$250 per hour, and working 12.5 hours per week after 2023, to a retirement no later than age 65. Mr Benning's current valuation of the plaintiff's loss of future earnings after considering the negative contingencies and mortality risk is \$3,015,901.

[217] The defendants claim that there is no medical or other evidence to support her 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.

[218] The defendants argue that the plaintiff is entitled to no damages under this head. The defendants do not put forward their own alternative future loss model, but maintain their position that the plaintiff is simply choosing to work part time, and that there is no evidence that she is incapable of working longer hours. They say the plaintiff is electing and desiring to reduce her workload, to accommodate her pre-existing conditions. Her clinical records confirm, and the plaintiff acknowledges, that throughout her legal career she has suffered from significant stress, which in turn triggers depressive symptoms such as fatigue, oversleep, and neglect of self and home. In 2014, she was already reporting to her psychiatrist that she planned to reduce her work to 4 days a week.

[219] In this, they cite the opinion of Dr Levin:

.it is most likely that, even in the absence of the subject MVA, Ms Jenkins would continue to struggle in certain areas of her interpersonal and occupational functioning .

.in other words, it is evident that, even in the absence of the subject MVA and related physical injuries, Ms Jenkins still struggled with her occupational performance, most likely due to a combination of her underlying chronic depression and social anxiety disorder.

As a result of the subject MVA, Ms Jenkins did not develop any major mental illness or clinically-significant psychiatric condition that would require her to take any time off work or ward any change to her pre-existing psychiatric treatment. Ms. Jenkins presented with a pre-existing history of a chronic depression and social anxiety disorder. However Ms. Jenkins' psychological, emotional and behavioral response to the subject MVA, as reported during her interview my office and described in her medical file, did not exceed a normative reaction to such an event and did not constitute any type of trauma that would exacerbate or worse in her pre-existent psychiatric disorder.

[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.

[221] Further, as alluded above, there are several significant negative contingencies weighing upon the exercise of forecasting the plaintiff's future earnings.

[222] The defendants envision a less lucrative future for the plaintiff as a lawyer, based on limitations in her work both before and after the accident. A consistent theme of her practice history over the past decade, at three litigation firms, is that with a few rare exceptions, she has not led trials or attracted her own clients.

[223] The plaintiff's employment history will pose a problem. This history is not of the defendants' making, and they are not obliged to return her to a position of having a more desirable résumé. As set out above, I am specifically making no finding with respect to the Earls restaurant bill or Dell computer purchase episodes, or the circumstances or justification for Pacific Law's dismissal of the plaintiff. That said, as unfair and unwarranted as these allegations and her dismissal may have been, they will significantly hinder her

future employment prospects.

- [224] Recent developments cast a further shadow on her future job prospects: the April 2019 amendments to the Insurance (Vehicle) Act with respect to minor injuries will likely decrease the amount of profitable work from low complexity files.[19] Mr Somers confirmed that he expected that such work would dry up within around four years. This form of work is the primary source of income for the plaintiff.
- [225] Mr Lawless acknowledged on cross-examination that the plaintiff would face bleak employment prospects even without the effects of the accident.
- [226] As with the calculation of loss of past earning capacity, I will start with the model set out in the Benning report. Based on my findings that the plaintiff's earning capacity as a lawyer has only been modestly impaired, and with a view to the significant negative contingencies based on her pre-existing issues and employment history, and the likely future of low-complexity ICBC defence work, the Court awards damages for loss of future earnings at 10% of the Benning model: \$301,590.

D. Cost of future care

1. Law

- [227] 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 insofar 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 BCLR (2d) 33 (SC); *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30. The court is to assess the reasonable future care needs of an injured plaintiff, not to impose a miserly exercise in how to save money: *Williams (Guardian ad litem) v. Low*, 2000 BCSC 345 at para. 25.
- [228] 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 medical justification for future care costs; and (2) the claims must be reasonable: *Milina v. Bartsch*, *supra*, at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. That said, the opinion of the physician is not necessary to support every item sought for future care: *Gregory*, *supra*, at para. 39. There must be some evidentiary connection between the physician's assessment of pain and disability, and the care recommended.
- [229] 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 v.*

Bottle, *supra*, at para. 253.

[230] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

2. Discussion and decision

[231] The plaintiff relies upon Mr Pakulak's cost of future care report based upon his own recommendations and the recommendations of the medical experts. The economist Mr Benning then prepared a current value calculation of the lump sum necessary for the plaintiff to purchase those items in the future. Mr Benning sets out both a low grand total (\$363,966) and a high grand total (\$467,995). The primary difference between the two models is that in the low model discounts the proposed Botox injections, which would not be pursued if the trial treatment does not work, and the chronic pain management program, which is unlikely to be pursued as a full-time endeavour, given the plaintiff's employment, and the ineffectiveness of the plaintiff's earlier attendance at a pain management clinic. The plaintiff argues that the low mid-point figure of \$388,000 is an appropriate award under this head.

[232] The defendants argue that the plaintiff is not entitled to any damages under this head. They do not provide a comprehensive rebuttal of the recommended treatments. Their first submission is that one of the main recommendations of the plaintiff's experts -- that she exercise and lose weight -- costs nothing. Their second main submission is, again, that her post-accident state is not significantly different than her pre-accident state. Her need for assistance with her yard, exercise equipment, and vocational assistance are not significantly different post-accident than pre-accident. She was already taking many of the recommended medications, or similar medications, before the accident.

[233] The plaintiff acknowledges a significant limitation in the future care projections. There was no way for either Mr Pakulak or Mr Benning to determine the degree to which the plaintiff's need for the recommended items, including medications, increased due to the accident; accordingly, the plaintiff has included full amounts are included in the reports, with no discount to reflect what items plaintiff would have required regardless of the accident.

[234] The Pakulak report also suffers from the limitation that it was based upon his assessments of the plaintiff's limitations and needs carried out in October 2018 and March 2019. At that time, the plaintiff not only described the neck and back pain and the headaches that she continues to suffer from, but also ongoing shoulder, mid-back, and buttock pain. That pain was largely resolved by the time of trial.

[235] With these limitations in mind, and with a view to the medical opinion evidence and the reasonable needs of the plaintiff, I award \$104,420.75 in future costs of care, based on the following categories sought:

- a) massage and kinesiology to assist with pain management: \$10,000;
- b) Botox trial and ongoing, as recommended by Drs Robinson, Anderson, and Underwood.[20] As suggested by the plaintiff, I have discounted this amount reflect that it may not be effective, and may not be continued: \$40,000;
- c) homemaking and yard assistance: for the reasons set out below under "loss of housekeeping capacity", reduced to \$20,000;
- d) medications: the plaintiff seeks \$137,683 as the present value cost of 13 medications. On the basis that many of these medications or similar medications were required before the accident, and many of these medications address conditions that would likely exist regardless of the accident, I award 25% of this amount: \$34,420.75.

E. Loss of housekeeping capacity

[236] The plaintiff seeks \$40,000 for loss of housekeeping capacity.

[237] The plaintiff claimed that the accident has rendered her unable to keep her house tidy. Bending over to pick up items causes pain. Vacuuming and other repetitive cleaning exercises are exhausting. The plaintiff cited the evidence of her friend who visited and stayed with her in the week of the accident. That friend described the plaintiff's house as a disaster: "knee deep in laundry." I agree with the defendants that this is implausible: how could the accident have caused the mess described by the friend, only days after the accident, when the plaintiff had spent most of that time in the office? I also agree that her complaints of an inability to keep house are inconsistent. She admitted that she was able to mow the grass, but complains that she is unable to vacuum.

[238] Nor is her claim supported by her medical evidence. For example, her orthopaedic expert Dr Chin confirmed that there was no medical reason that the plaintiff could not bend over to pick up fallen items. She was able to reach things on the floor, and had full forward flexion.

[239] I agree with the defendants that the plaintiff exaggerated her inability to care for her house. She is the sole inhabitant of her house, and even if repetitive tasks are tiring, she could space them out or otherwise arrange them so that they could be accomplished. Her reduced work week should provide the time to do so.

[240] When confronted with a 2013 clinical note that her Kamloops house was a mess due to depression, she admitted that at times her depression rendered her unable to focus on housekeeping. 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.

[241] The plaintiff's housekeeping capacity and challenges are not significantly different from what it was before the accident. The Court awards \$5,000 for loss of housekeeping capacity.

F. Special damages

[242] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is also based on the governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X v. Y*, 2011 BCSC 944 at para. 281; *Milina v. Bartsch*, *supra*, at 78.

[243] For each item of expense claimed as special damages, a plaintiff must prove, on a balance of probabilities, both the amount claimed and the fact that the expenditure is causally connected to the injuries sustained in the accident. Generally speaking, claims for special damages are subject only to the standard of reasonableness. As with claims for the cost of future care, however, where a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: see *Klingler v. Lau*, 2019 BCSC 1776 at para. 197.

[244] The middle column sets out the special damages sought by the plaintiff:

Plaintiff seeks

Award

Physiotherapy, rehabilitation, and therapy

\$9,462.93

\$5000

Housekeeping

\$4,313

\$400

Gardening

\$2,001

\$800

Miscellaneous

\$11,373

\$5000

Prescriptions

\$9,425

\$3,256

Total

\$36,574.93

\$14,456

[245] The plaintiff calculates prescriptions at 75% of what she actually spent for the period (\$12,567), to reflect the medications she would have been on notwithstanding the accident.

[246] The defendants do not comprehensively critique the items claimed, but raise some examples to question whether those specific expenses are appropriately compensated, as they are not causally linked to the accident, or would have been incurred in any case. Examples are dog grooming, and fitness equipment that she did not use. They also dispute unparticularized parking and other expenses.

[247] Once again, I agree that many of the expenses, particularly the prescriptions, would have been incurred in any case. The plaintiff was taking many of the prescriptions before the accident. Similarly, a significant portion of the physiotherapy and rehabilitation and psychologist costs should be attributed to the plaintiff's baseline physical and mental state regardless of the accident. Some of the expenses were incurred but not used to any degree. Housekeeping and gardening are reduced on the basis discussed above under "loss of housekeeping capacity." Based on those principles, and the evidence in total, and the plaintiff's evidentiary burden to prove the special damages, the Court awards special damages of \$14,256, as set out in the rightmost column above.

VIII. SUMMARY AND CONCLUSION

[248] The plaintiff is awarded the following damages:

Non-pecuniary damages

\$100,000

Loss of past earning capacity

\$31,153

Loss of future earning capacity

\$301,590

Cost of future care

\$104,420.75

Loss of housekeeping capacity

\$5,000

Special damages

\$14,256

Total

\$556,419.75

[249] If the parties are unable to agree on costs, they may speak to the issue.

[250] I am grateful to counsel for their generally helpful submissions, as well as their responsible cooperation and agreement with respect to many of the evidentiary and procedural issues that arose during the trial. They are also to be commended for the extent to which they allowed junior counsel to participate meaningfully in the trial.

" Crerar J"

[1] Mr. Casey's airbags did not deploy.

[2] I agree with the defendants that the time sheet itself makes no sense, even if the plaintiff generally arrived at work at 7am as she claimed. On cross-examination, the plaintiff claimed that, first, the adding up of rounded-up 0.1s and 0.2s on a billing sheet can result in greater billing hours than temporal hours. She then testified that the excessive billing likely reflected an ICBC requirement to bill all hours for certain tasks in a single day.

[3] The trade and corporate name is "Earls", with no apostrophe.

[4] Her evidence at trial, on discovery, and before the Human Rights Tribunal proceedings varied on the number of drinks that she consumed at Earls: between one and three drinks. I find that it was more likely three, and that this consumption of alcohol contributed significantly to whatever discomfort she states she felt that evening, and the next day.

[5] Later in Dr Anderson's report, he records that the plaintiff "reached her lowest point in early 2016 after realizing that she was unable to work full-time hours at Somers Poulin Hall."

[6] During this period, the plaintiff suffered another significant stressor: her mother became very ill in December 2017.

[7] The issue before the Human Rights Tribunal was different from that before the Court, and I am not guided or influenced by its decision. The defendants, appropriately, did not assert an argument based in issue estoppel or res judicata.

[8] The plaintiff filed the present claim on June 10, 2016. I do not need to make a finding with respect to the timing of this litigation and the emergence of problems with the plaintiff's work output at Somers & Co.

[9] The plaintiff points to the April 22, 2016 prescriptions of Aventyl and Cymbalta as prescriptions for migraines and neuropathic pain. The evidence does not indicate that they were primarily prescribed for those symptoms. In any case, the defendants' point still applies: these medications are prescribed almost a year after the accident.

- [10] The Court of Appeal made similar comments in *Greenway-Brown v. MacKenzie*, 2019 BCCA 137, leave to appeal ref'd [2019] SCCA 231 at paras. 31-33.
- [11] She filed these tax returns just before the start of this trial, as a result, the CRA was regularly following up with her.
- [12] Her evidence was also inexplicable on this point. On cross-examination she denied any obligation to pay for the leased car. She claimed that the dealership had allowed her to take the car from the lot, and that as she had signed no papers, she had no obligations under the lease, despite driving the vehicle for many months. She denied being the owner of the vehicle, in the face of ICBC documents indicating otherwise.
- [13] Usefully discussed and expanded in *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 8-11 by Dickson J (as she then was).
- [14] Dates in brackets indicate when each doctor examined the plaintiff, except for that of Dr Chen, the plaintiff's family doctor: that date is the date of her report.
- [15] The plaintiff appears to have told several of her medical experts that she was terminated for taking time off work, rather than the actual grounds cited by Pacific Law.
- [16] Interestingly, Dr Robinson, a neurologist called by the plaintiff, referred to current theories that do not categorize headaches as migraine or non-migraine, but see headaches as gradients on a spectrum, possibly with common causes.
- [17] As with headaches, there is a history of depression and depressive symptoms, on both sides of her family.
- [18] The cases canvassed above, under the heading of "credibility" confirm that subjective idiosyncratic chronic pain is nonetheless compensable. See especially *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114.
- [19] While I have not directly incorporated this post-trial development in these reasons, the February 2020 announcement that British Columbia will move towards a 'no fault' regime starting in May 2021 would act as a significant negative contingency in the assessment of lost future earning capacity for a lawyer dependent on such files such as the plaintiff.
- [20] I have included this amount as a placeholder, to represent the real possibility that the plaintiff will pursue other ongoing pain treatments cited and recommended by the medical experts, if Botox injections are unsuccessful.

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