

CANADA / JUDGMENT

Locke v. Rowantree

2024 BCSC 852

COURT

Supreme Court of British Columbia

DECIDED

17 May 2024

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2024 BCSC 852 Locke v. Rowantree

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Locke v. Rowantree,

2024 BCSC 852

Date: 20240517

Docket: M83179

Registry: Nanaimo

Between:

Tammy Locke

Plaintiff

And

Leonard Rowantree, Patricia Rowantree,

Gary Cunningham and Cody Locke

Defendants

And

Insurance Corporation of British Columbia qua Gary Cunningham

Third Party

Corrected Judgment: The text of the judgment was corrected at paragraph 110 on May 24, 2024.

Before: The Honourable Justice Thompson

Reasons for Judgment

Counsel for the Plaintiff:

P. Snelling

J. Kohne

Counsel for the Defendants, Leonard Rowantree and Patricia Rowantree:

P. MacNeil

N. Unrau

No other appearances

Place and Dates of Trial:

Nanaimo, B.C.

February 6-9, 12-14, 16 & 20, 2024

Place and Date of Judgment:

Nanaimo, B.C.

May 17, 2024

- [1] This action for damages arises out of a motor vehicle accident on the Island Highway, south of Nanaimo. Tammy Locke, the plaintiff, is now 55 years old. On Christmas Day in 2015, she was on the Island visiting her two adult sons. She was the front-seat passenger in a pickup truck (the "Locke vehicle") that was struck on the driver's side by a lane-changing vehicle driven by the defendant Leonard Rowantree and owned by the defendant Patricia Rowantree (collectively, "the defendants").
- [2] The action has been discontinued as against the driver and owner of the Locke vehicle. The Insurance Corporation of British Columbia filed a statutory third-party notice relating to the owner of the Locke vehicle; this statutory notice has essentially lapsed with the discontinuance against this owner.
- [3] The plaintiff's evidence is that the collision caused her head to strike the passenger-side window and its frame. The next morning, she took her flight home to Ottawa, as scheduled. Within days she returned to her work as a personal care aide. However, neck pain and other symptoms of concussion continued, and she went off work in April 2016.
- [4] A CT scan of her head and neck carried out on 3 November 2016 disclosed two small intracranial aneurysms, congenital in nature. She received advice about these aneurysms from a neurologist, an interventional radiologist, and a neurosurgeon. The plaintiff elected to have surgery with the goal of eliminating the slight risk that these aneurysms would rupture, and a clipping procedure on the larger of the two aneurysms was done on 25

September 2017. There were no surgical complications, and the plaintiff was discharged from hospital on 29 September 2017.

- [5] A follow-up angiogram procedure was scheduled and conducted on 4 October 2017. The plaintiff suffered a series of strokes during this procedure; it is common ground that this unfortunate turn of events occurred without medical negligence. The plaintiff was in hospital for 16 months following these strokes, and was discharged home in February 2019. The strokes have left her wheelchair-bound and with significant cognitive difficulties, particularly with short term memory and concentration. In the aftermath of the strokes, she is permanently disabled from employment and requires assistance to perform some activities of daily living.
- [6] Of the various issues in this case, the principal one is causation - in particular, whether the plaintiff has established the requisite causal connection, in fact and in law, such that the defendants are liable for losses related to the October 2017 strokes. The following excerpts from the plaintiff's closing submissions cogently summarize her case on this key issue:

Within a few months of the collision [Ms. Locke's] physical head injury had healed but she still suffered headaches as well as anxiety and depression. She developed a Somatic Symptom Disorder as a result of the motor vehicle collision.

The discovery of aneurisms and learning of their potential consequences caused a marked exacerbation in [her] psychological conditions including extreme anxiety and fixation on the possibility of her dying and leaving her children without a mother.

[Her] fixation and anxiety around the aneurisms was manifestation of her Somatic Symptom Disorder, for which the psychological consequences of the collision made a material contribution.

The psychological conditions brought on by the collision and knowledge of the aneurisms combined to form an indivisible injury.

There is no suggestion of medical negligence, and hence the chain of causation remains intact, and the defendants are responsible for the damages arising from the consequences of the stroke.

Fault for the Collision

- [7] The defendants deny liability for the collision. The evidence on how the MVA occurred comes from several sources: examination for discovery evidence of the two drivers; the testimony of Kyle Burnett, a passenger in the pickup truck in which the plaintiff was riding; and the testimony of Chris Barry, who was driving on the highway that day and observed the collision.
- [8] The plaintiff's case included the discovery evidence of the defendant driver who acknowledged that he changed lanes from left to right and did not see the Locke vehicle - which was plainly there to be seen. The driver of the Locke vehicle, the plaintiff's son Cody

Locke, was called as a witness. He claimed a very limited recall of the MVA, but he gave quite precise evidence when he testified on discovery in his own action for damages against the same defendants. He adopted material passages from this discovery as past recollection recorded, and this evidence accords with the defendant driver's account: the defendants' vehicle suddenly merged from the adjacent left lane and collided with the Locke vehicle. Indeed, this is what Kyle Burnett, the plaintiff's younger son, saw from his excellent vantage point in the back seat of the Locke vehicle.

- [9] Chris Barry testified to a sudden lane change by a vehicle into a pickup truck, but he recalled the truck as being in the lane to the left of the vehicle that changed lanes. I do not doubt Mr. Barry's honesty, but I am satisfied that the passage of time has corrupted his memory about the relative position of the two vehicles involved in the collision as testified to by the other witnesses.
- [10] I find the defendants' vehicle suddenly changed lanes while beside the Locke vehicle, and I conclude the defendant driver is entirely at fault for the collision. The defendant owner is vicariously liable for the defendant driver's negligence.

Fundamental Causation and Damage Assessment Principles

- [11] In order to succeed in a negligence claim, the evidence must establish both causation in fact and causation in law. The principles were summarized in *Nelson (City) v. Marchi*, 2021 SCC 41:
- [96] It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; *A.M. Linden et al.*, *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.
- [97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; *Klar and Jefferies*, at p. 565).

- [12] The "but for" test is the appropriate method to determine factual causation in the case at bar. In Chief Justice McLachlin's majority judgment in *Clements v. Clements*, 2012 SCC 32, it was made clear that one of the preconditions to the use of the less onerous "material contribution" test is the presence of two or more tortfeasors (para. 46). The absence of a second tortfeasor in our case means that Ms. Locke must establish that her strokes would not have occurred but for the defendant driver's negligence.
- [13] When assessing the evidence, *Clements* instructs trial judges to take a "robust and pragmatic approach" to causation, and scientific proof is not required (para. 46). While the approach must be robust and pragmatic, the "but for" test does not impose liability for what amounts to a "butterfly effect." To establish causation in fact, there must be a "substantial connection between the injury and the defendant's conduct": *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 23, citing *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327. See also *Farrant v. Laktin*, 2011 BCCA 336 at para. 11.
- [14] This concept of a "substantial connection" reflects a recognition that every injury has multiple necessary factual causes, and that not every cause necessary for the harm to occur is sufficient to trigger liability. In *Chambers v. Goertz*, 2009 BCCA 358 at paras. 20-21, K. Smith J.A. made this point with reference to an example:

... For example, in this case, the accident would not have occurred but for the taxi company dispatcher's sending Mr. Ahmad to respond to Ms. McDonald's call, but no one would suggest that the dispatcher should be found liable for what happened. Therefore the law takes cognizance only of those causes that play a significant role in bringing about the outcome.

This concept has been expressed in different ways. As I have noted, in *Athey v. Leonati*, the Court said at para. 15 that "causation is established where the defendant's negligence 'materially contributed' to the occurrence of the injury", and that a "material contribution" is one that "falls outside the de minimis range". To similar effect the Court said, in *Snell v. Farrell*, at 327, that proof of causation requires "a substantial connection between the injury and the defendant's conduct". . . .

- [15] Proof of a "substantial connection" between the injury and the defendant's conduct is necessary to establish causation in fact, but it is also relevant to the causation in law analysis in the sense that it would seem impossible to establish that an actual injury was reasonably foreseeable without such a connection. However, the question of legal causation requires discrete analysis. It is a remoteness inquiry which asks whether the harm suffered is sufficiently related to the wrongful conduct to hold the defendant fairly liable: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 12. This passage from *Mustapha* is particularly instructive:
- [13] Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore

clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound* (No. 2) as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan[t] . . . and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643).

[Emphasis in original.]

[16] In *Blackwater v. Plint*, 2005 SCC 58 at para. 78, Chief Justice McLachlin addresses the relationship between the causation analysis and the rules of assessing damages:

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

[17] The plaintiff contends that the psychological effects of the MVA injuries and the psychological effects of discovery of the aneurysms are indivisible. The question of divisibility is relevant at both the causation and assessment of damages stages of analysis: *Moore v. Kyba*, 2012 BCCA 361 at para. 37. At the causation stage, the characterization of an injury as divisible or indivisible is relevant in determining what the defendant is liable for: *Athey*, at paras. 24-25; *Moore*, at para. 37. And, subject to the rules of damage assessment, if a defendant's act is a cause of an indivisible injury, then the defendant is liable for the damages even if there are other tortious or non-tortious causes of the injury: *Athey*, at para. 19; *Blackwater*, at para. 78; *Bradley v. Groves*, 2010 BCCA 361 at para. 24; *Chappell v. Loyie*, 2016 BCSC 1722 at paras. 8-9.

[18] Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated such that division is neither possible nor appropriate: *Bradley*, at para. 20; *Athey* at paras. 22-25. In *Bradley*, at para. 37, the Court said:

It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[19] A complication that arises in this case is that there are, on the one hand, multiple injuries arising from the December 2015 MVA, and, on the other, multiple injuries arising from discovery of the aneurysms in November 2016 and the outcome of the October 2017 medical

procedure. The plaintiff suffered a neck injury and a closed head injury with cognitive and psychological effects in the MVA, and these injuries and their effects (such as headaches and job loss) led to further psychological consequences. The discovery of the aneurysms resulted in much anxiety. The aneurysm treatment procedure triggered strokes that caused significant physical disability as well as some cognitive impairment, and these injuries and their lifestyle effects led to psychological consequences.

- [20] In *Athey*, the disc herniation was a single and indivisible injury, but in the course of his reasons for the Court, Justice Major addressed the approach to be taken in a case where some injuries have tortious causes and some have non-tortious causes:
- [24] The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): *Fleming*, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: *Fleming*, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.
- [25] In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

[Emphasis added.]

- [21] The references in this passage from *Athey* are to *Fleming*, *The Law of Torts*, 8th ed. At pp. 201-202, *Fleming* acknowledges there are cases where "some elements of the injury may be separable, but not all: for example, where several identifiable fractures sustained in a chain collision lead to psychosomatic complications, or separate publications of a libel in different journals with a distinct reading public combine in causing the plaintiff anguish and humiliation." (The latter example is *Dingle v. Associated Newspapers Ltd.*, [1961] 2 Q.B. 162 (C.A.))
- [22] It seems the divisibility inquiry is not focused solely on the source injury. In *Fleming*'s example of a chain collision, the downstream psychological effects of the fractures, the source injury, are part of the inquiry. That is, an injury may lead to other injury, harm, or damage which may in turn lead to still other injury, harm, or damage. These various harms are divisible only to the extent that it is feasible to separate and apportion them to different causes.
- [23] The Court of Appeal's judgment in *Bradley v. Groves* referred at length to the concurring judgment of K. Smith J.A. in *B.P.B. v. M.M.B.*, 2009 BCCA 365, leave to appeal ref'd [2010] S.C.C.A. No. 90. In *B.P.B.*, the plaintiff sued one of two persons who assaulted her on

separate occasions. The trial judge found that the separate assaults caused different physical injuries, but that both assaults contributed to her indivisible psychological illness and disability (para. 79). In these circumstances, Justice Smith referred to and adopted Lord Justice Devlin's discussion of indivisibility in *Dingle v. Associated Newspapers Ltd.*:

- [75] In *Dingle*, the question was whether damages for libel should be reduced because, as the defendant argued, the defamatory matter had previously been published in a privileged report of a Parliamentary committee and the plaintiff's reputation had already been damaged by the privileged publication. The Court of Appeal rejected this argument and held the defendant liable to the full extent of the plaintiff's damaged reputation. Lord Justice Devlin observed that this conclusion exemplified "a fundamental principle in the law of damage", which he described as follows, at 188 - 89:

Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly.

These are elementary principles and readily recognisable as such in the law of damage for physical injury.

- [76] These remarks are, in my view, entirely consistent with what the Supreme Court of Canada has said in *Athey* and in other cases that bear on these issues. I adopt them as a lucid exposition of the legal principles applicable in the case at bar.
- [24] To the same effect, in *Jenkins v. Casey*, 2022 BCCA 64 at para. 75, leave to appeal to SCC ref'd [2022] S.C.C.A. 297, the Court of Appeal adopted this statement as a correct expression of a principle of causation: "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." (Emphasis added.)

- [25] When it comes to assessing damages, defendants are obliged to pay compensatory damages such that the plaintiff is returned to her "original position." If the strokes are not proved to be causally related to the defendant driver's negligence, then the strokes take on the conceptual status of an unrelated intervening event. In *T.W.N.A. v. Canada* (Ministry of Indian Affairs), 2003 BCCA 670 at para. 36, K. Smith J.A. explained that unrelated intervening events affect the plaintiff's "original position" in the same way as pre-existing conditions, and he referred to the discussion of independent intervening events in *Athey*, wherein Major J. wrote:
- [31] The respondents also sought to draw an analogy with cases where an unrelated event, such as a disease or non-tortious accident, occurs after the plaintiff is injured. One such case was *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752 (H.L.), in which the defendant negligently caused the plaintiff to suffer a back injury. Before the trial took place, it was discovered that the plaintiff had a condition, completely unrelated to the accident, which would have proved totally disabling in a few years. Damages were reduced accordingly. In *Penner v. Mitchell* (1978), 89 D.L.R. (3d) 343 (Alta. C.A.), damages for loss of income for 13 months were reduced because the plaintiff had a heart condition, unrelated to the accident, which would have caused her to miss three months of work in any event.
- [32] To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.
- [33] In the present case, there was a finding of fact that the accident caused or contributed to the disc herniation. The disc herniation was not an independent intervening event. The disc herniation was a product of the accidents, so it does not affect the assessment of the plaintiff's "original position" and thereby reduce the net loss experienced by the plaintiff.
- [Emphasis in original.]
- [26] In the *Jobling* case referred to in this passage from *Athey*, the defendant was liable for the accident that injured the plaintiff's back. This injury impaired his capacity to work. However, he was subsequently rendered totally unfit for work because of a spinal disease that was unconnected to the accident. The plaintiff failed to recover for earnings lost beyond the onset of debilitating effects of the intervening disease.

- [27] In the Penner case, the plaintiff was off work for 13 months after being injured in an accident resulting from the defendant's negligence. During this period of disability, complications from a heart condition set in. But for the accident, she would have missed three months work because of the heart condition. The rationale offered by Prowse J.A. for reducing the damages award to exclude the period of disability referable to the heart condition is persuasive. It amounts to this: account is taken of possibilities of future non-culpable events (i.e., contingencies) when assessing damages, so it follows that full account must be taken of an unrelated event that happens to occur before trial rather than afterward (p. 346). The Penner case was referred to with approval by our Court of Appeal in *Larwill v. Lanham*, 2003 BCCA 629, leave to appeal ref'd [2004] S.C.C.A. No. 23.
- [28] Cases that have applied Jobling or Penner are also instructive. The Jobling case was applied in *Teitelbaum v. Sinopoli*, [1993] O.J. No. 461 (Gen. Div.). The plaintiff was injured in two MVAs. After the second MVA, the plaintiff was diagnosed with thyroid cancer, which was successfully treated by surgery. Thereafter, a spinal tumour was discovered during an examination conducted by an expert for the defendants. The plaintiff attempted to establish a causal connection between the first MVA and the incapacitating spinal tumour. She did not succeed, and the judge held that the plaintiff's claim for future income loss was "obliterated" by the very serious effects of the intervening events (paras. 21-22).
- [29] In *Parsons v. Guymmer* (1993), 101 D.L.R. (4th) 279 (Ont. C.A.), the plaintiff suffered a debilitating stroke four months after being injured in an MVA. The stroke was not caused by the MVA. In the course of its decision, the Court quoted from and applied the reasoning in Penner.
- [30] Recent cases have followed the same approach. In *Akeelah v. Clow*, 2018 ONSC 3410, the plaintiff suffered a totally disabling stroke two years after an MVA. But for the unrelated stroke, the judge would have assessed future loss of earning capacity at \$200,000 (para. 328). Citing *Athey*, *Jobling*, *Penner*, *Teitelbaum*, and *Parsons*, the judge held that plaintiff's claim for loss of earning capacity was "effectively obliterated" by the subsequent unrelated stroke (para. 340).
- [31] In *Schweitzer v. Li*, 2021 BCSC 52, the plaintiff suffered neck and back injuries in an MVA that kept him from returning to his work as a labourer. However, he suffered intermittent hip pain that developed over a year after the MVA, and it was found causally unrelated to the MVA. Justice MacDonald found that if the MVA had not occurred the intermittent hip pain would have caused him to take time off from work but only when his pain was severe. Following *Athey*, *Penner*, and *T.W.N.A.*, MacDonald J. reduced his loss of capacity awards from the date of onset of his hip problem by 30% "to reflect the effect of this intervening event" (para. 81).
- [32] In oral argument, counsel for the plaintiff referred me to *Dudek v. Li*, 2000 BCCA 321. The plaintiff claimed damages for neck, back, and cognitive problems arising from an MVA. Five months later, he was injured when he fell from a motorcycle. The plaintiff adduced evidence

at trial "to show that the March 1992 accident caused, or somehow contributed to, the Motorcycle Accident" and claimed that the defendant was responsible for all his injuries (para. 10). The trial judge instructed the jury that if they found the plaintiff was acting unreasonably when he fell from the motorcycle, then the chain of causation was broken and the defendant's responsibility was limited to the plaintiff's injuries up to the time of the intervening incident. Writing for the Court, Justice Braidwood concluded that the trial judge erred in giving this instruction; even if the causal chain was broken, "[t]he tortfeasor is still fully liable for the injuries suffered in the first accident that persist beyond the time of the second accident" (para. 16).

- [33] Justice Braidwood referred to two cases in which a further injury arose because of the disability caused by the first injury: *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.*, [1969] 3 All E.R. 1621 (H.L.), and *Goldhawke v. Harder* (1976), 74 D.L.R. (3d) 721 (B.C.S.C.). In *McKew*, the plaintiff was injured such that his left leg would unexpectedly collapse. He fractured his ankle shortly after when his leg gave way going down some steep steps without using the handrail. The House of Lords held that he acted unreasonably, breaking the chain of causation. In *Goldhawke*, the plaintiff's left leg was casted after an MVA. To equalize the length of his legs, he wore a high-heel shoe on his right foot. He also used crutches to aid his mobility. One night, when at a nightclub with friends, the high-heel on his shoe caught on one of the five stairs at the nightclub's exit, causing him to fall forward and reinjure his legs. The plaintiff had been instructed to exercise, and he had practiced descending stairs on crutches. In these circumstances, the judge found the plaintiff had not acted unreasonably, and the MVA defendant was liable for all of the damages including those suffered in the fall.
- [34] I do not read *Dudek* as being at odds with the *Jobling-Penner-Athey-T.W.N.A.* line of cases. It was a very different case. It was focused on the question of the relationship between the plaintiff's conduct and an alleged intervening event. I accept the *Dudek* reasons have application to the case at bar to this extent: they stand as a reminder that when assessing damages caused by the defendant driver, I must take account of any injuries which are not eclipsed by any unrelated intervening events in order to ensure that the plaintiff is returned as fully as possible to her original position.
- [35] In a related argument, the plaintiff relies on a line of cases that establish that if an injured person acts reasonably in seeking out treatment from a qualified professional, and they suffer further loss because of that treatment, the defendant is responsible for this further loss: *Mercer v. Gray*, [1941] O.R. 127 (C.A.); *Watson v. Grant* (1970), 72 W.W.R. 665 (B.C.S.C.); *Brooks v. Habib*, 2019 BCSC 1398. If a causal connection between the defendant driver's negligence and the medical treatment that went awry is proved in the case at bar, the defendants are liable to pay the losses from the medical treatment. However, I agree with the defendants' submission that the principles explained in these cases do not make a defendant liable for damages resulting from medical treatment that is not causally connected to the MVA.

Evidence Bearing on Causation

- [36] I heard non-expert evidence relevant to the causation issue from the plaintiff, her spouse Danny Graham, her younger son Kyle Burnett, her best friend Christina Tinney, an employer Robert Plamondon, and her neurosurgeon Dr. John Sinclair (who was called to give fact evidence). Medical opinion evidence on causation was included in the reports of a neurologist Dr. Andrew Woolfenden, a neurosurgeon Dr. Navraj Heran, a neuroradiologist Dr. William Siu, and psychiatrists Dr. Zoran Waisman and Dr. Andriy Kolchak. Of these expert witnesses, Dr. Kolchak was the only one who was cross-examined.
- [37] The plaintiff's evidence was cogent, and responsive to the questions put to her. She testified that she struck her head on the window and its frame, and was stunned. She did not seek out medical attention that evening, and flew out to Ottawa the next day. She had a headache and "was still kind of in a daze." Her neck hurt and she had a bad headache, but she returned to her work as a care aide at the home of Robert and Lynwen Plamondon. She testified that they had two dogs that barked a lot and this hurt her head. When she stood up after bending over to pick up things from the ground, her head hurt and she was dizzy and nauseous. She saw her general physician about her headaches in late February 2016, and was prescribed some medicine and physiotherapy.
- [38] On 14 April 2016, her work with the Plamondons came to an end. Mr. Plamondon testified that his wife was disabled and the plaintiff was the patient support worker who looked after her. She helped Ms. Plamondon with her medications and dressing, and did work around the house including cleaning and gardening. Mr. Plamondon described the plaintiff as an excellent worker before the MVA. After the MVA, he did not notice any changes right away. But, as time went on, he could see she was struggling to perform her job duties. For example, if his wife had to be helped into the bath, it was difficult for the plaintiff such that Mr. Plamondon often had to help. She struggled to clean the floors and windows. She was also forgetful and would get upset and frustrated, whereas before the MVA she was bright and alert. He saw the plaintiff holding her head, which he inferred was because of headache. He concluded that the plaintiff was not up to doing all that was required of her.
- [39] Later in April 2016, the plaintiff saw Dr. Lalonde. He is a sports medicine doctor who the plaintiff understood to have some expertise regarding concussions. Dr. Lalonde suggested she stay off work. Ms. Locke was emotional when testifying about stopping work, and what that meant to her in terms of her inability to contribute to the household income. She testified that after she went off work she tried to continue to do some household work such as laundry and cleaning, and she helped with shopping and making dinner. Kyle Burnett relocated from British Columbia to Ontario in February 2016, and moved in with his mother and Mr. Graham. He did the vacuuming because the sound of the vacuum hurt her head.
- [40] The plaintiff described continuing bad headaches and being depressed all the time. She described witnessing an accident that occurred near Canmore, when she was driving truck many years ago. She testified that it may have happened when she was 20 or 21 years old.

The aftermath was horrific, and for a time thereafter she had visions of the male victim of that MVA; she testified that these visions returned after she went off work in 2016. In late September 2016, she began to see a psychologist, Dr. Dan Taylor. He counseled her and gave her exercises to help with her anxiety and depression.

- [41] After the results of the 3 November 2016 CT scan of her head were made known to her - and in particular the fact that she had aneurysms - she said that it was "all I would think about, non-stop." She was scared "the aneurysms would blow my head and I would leave my boys alone without a mother." She continued to be followed by her general physician, and to see Dr. Taylor for counseling.
- [42] Ms. Locke was referred for a consultation with Dr. Yu, who she saw in April 2017. The plaintiff testified that Dr. Yu suggested regular monitoring of the aneurysms. She was told that the aneurysms were stable.
- [43] On 15 May 2017, Ms. Locke was assessed by Dr. Daniela Iancu, an interventional neuroradiologist. The clinical note indicates that Ms. Locke looked anxious, and that she wanted the aneurysms to be treated as soon as possible as her quality of life has decreased due to the fear of rupture. The plaintiff testified that when she saw Dr. Iancu she was still very nervous about the aneurysms and continued to be afraid they would "blow up and the boys wouldn't have a mom anymore." The plaintiff recalls Dr. Iancu's advice that her options were to monitor the aneurysms or undergo a difficult surgery; the clinical note indicates that Ms. Locke was told that her case would be discussed "in the aneurysm round" and she would be provided with the group's recommendations. The plaintiff said that after meeting with Dr. Iancu, she went online to learn as much as she could about the surgery.
- [44] An endovascular case conference was held on 5 June 2017, and the plaintiff saw Dr. Sinclair for a neurosurgical consultation on 12 July 2017. He explained to her the rationale for proceeding with surgical treatment and the rationale of further observation, the other option. Dr. Sinclair's chart note indicates that the surgery "was explained in detail with its associated risks including infection, hemorrhage, seizures, 5-10% risk of permanent neurologic injury resulting in weakness, numbness, paralysis of the face and/or extremities, speech dysfunction, visual dysfunction, cognitive impairment and death." He also explained additional risks of the microsurgical clipping procedure which included small risks of "subtotal clipping" requiring further treatment and cardiopulmonary dysfunction associated with general anaesthesia and the surgery.
- [45] Ms. Locke testified that she told Dr. Sinclair of her fears about leaving the aneurysms, and that she "needed them out." Her impression was that Dr. Sinclair was not enthusiastic about the surgery, and she recalls that he told her about the risks of the surgical option, including stroke, but she wanted the aneurysms dealt with. She testified that she wanted to "go back to being a person again and be me, as I was." She testified that she quit smoking because Dr. Sinclair would not do the surgery unless she quit.

- [46] Ms. Locke's common law husband Danny Graham testified that she was not herself after the MVA. When they got home from the Ottawa airport on the day after the MVA, she went and sat on the couch. She went to work in the days following but was "taking Advil like candy." He cooked supper but many nights she would not eat. He had not ever seen her like this before. After working, she used to come home and do some cleaning and cooking. Instead, she went to bed. They used to go on car and boat rides, but that stopped.
- [47] After she left work in April 2016, Mr. Graham testified that she just moped around the house. When he got home, supper was not ready. She loved working; she never missed a day and took many extra shifts. Mr. Graham said that losing the job she loved "was like taking her life away from her." He says she spent a lot of time on the floor, crying. After the aneurysms were detected, he said that the worry "was driving her crazy."
- [48] As mentioned earlier, Kyle Burnett moved in with his mother and Mr. Graham in February 2016. He had last seen his mother on the evening of the MVA, and he testified that it was "like a big switch had been flipped." She was not her usual outgoing self. She did not want to go fishing, and it was dull and quiet around the house. He was not allowed to have people over because it would be too loud. Playing his radio in his vehicle bothered his mother. At some point she began researching on the computer about the operation she was contemplating. She was nervous about it, but excited about "getting fixed."
- [49] Christina Tinney has been the plaintiff's best friend for nearly 30 years, and they remain very close. Ms. Tinney lives on Vancouver Island, but they stay in contact nearly every day. The plaintiff was at her house for tea when she travelled to the Island for Christmas in 2015. In the period of time after the MVA and before the strokes, Ms. Tinney noticed that when they were speaking by video the plaintiff would "always have her head down" and Ms. Tinney asked her if she was okay.
- [50] I turn to the expert opinion evidence bearing on the causation issue. Dr. Siu is a radiologist with subspecialties in neuroradiology and interventional radiology. He reviewed relevant clinical charts and radiology studies at the request of counsel for the defendants.
- [51] A CT head scan was performed on 23 February 2016, i.e. two months after the MVA. No abnormalities were reported. The CT scan of the head and the CT angiogram of the neck conducted on 3 November 2016 identified a minimal irregularity in an artery in the plaintiff's neck and two small aneurysms in her head - one in the left internal carotid termination artery, the other in the right middle cerebral artery. Multiple follow-up MRI and CT scans between 17 November 2016 and 18 September 2017 revealed no changes in appearance of the aneurysms or the artery irregularity in her neck.
- [52] A CT head scan was carried out on 25 September 2017, immediately after the left orbitofrontal craniotomy surgery performed by Dr. Sinclair. It showed four clips at the left carotid artery termination, and no brain infarct or hemorrhage. A CT scan of 2 October 2017 also showed no brain infarct or hemorrhage.

- [53] A cerebral angiogram and intra-arterial thrombectomy were performed at Ottawa Hospital on 4 October 2017. The images showed three occlusive clots, which grew in size despite efforts made to treat them. A vessel perforation occurred. A follow-up MRI brain scan that same day demonstrated subarachnoid hemorrhage and acute infarcts in the bilateral frontal, bilateral parietal, right temporal, and left occipital lobes.
- [54] A series of CT scans from the day following the strokes to 8 April 2018 showed the bilateral cerebral infarcts as they evolved to full maturity with secondary loss of brain volume and dilation of the ventricles. The subarachnoid hemorrhage, and some hydrocephalus and mild subfalcine herniation that developed in the day following the strokes, showed continual improvement and by 19 December 2017 had fully resolved.
- [55] Dr. Siu's evidence is that the irregularity in the artery segment in the plaintiff's neck was not a vertebral artery dissection and was not caused by the MVA. The irregularity is most likely due to a common "minimal redundancy of the vessel which [allows for] head and neck movement." His evidence is that the two intracranial aneurysms were congenital in nature - they arose due to "congenital focal weaknesses within the walls of the arteries where the aneurysms developed" and were not caused by the MVA.
- [56] Dr. Siu opines that the blood clots arose during the angiogram procedure conducted on 4 October 2017, causing bilateral hemispheric strokes which in turn caused neurological and cognitive deficits; "[t]he MVA played no role in the causation of these strokes." In context, I interpret this causation opinion as saying that from a medical perspective the blood clots that caused the strokes did not arise from the MVA head injury.
- [57] Dr. Heran is a neurosurgeon who prepared a report at the request of the plaintiff. He explains that the surgery-related risks in the order of a 5% to 10% chance of neurological injury are substantial in comparison to the very small risk of rupture of untreated aneurysms of this size, although about 60% of patients die if rupture occurs and only one-third of rupture survivors return to normal life.
- [58] Dr. Heran indicates that conservative management is the favoured approach in this situation, with serial follow-up imaging. That said, he speaks of a small percentage of patients who have anxiety after diagnosis of intracranial aneurysms to the extent that it diminishes their quality of life. When these patients' disabling preoccupation with the aneurysms cannot be allayed, surgical treatment is recognized as a valid option:

These patients are preoccupied with their intracranial aneurysms and treatment for these is the only way to get them to overcome this anxiety. This is typical of patients who have had previous traumatic events such as a family member with an intracranial aneurysm having ruptured or themselves having had an aneurysm in the past remotely or in the setting of other traumatic life events such as motor vehicle accidents or work-related injuries. These psychological factors have a tendency to diminish the quality of life in such individuals. In order to overcome psychological preoccupation it is a valid reason for proceeding with surgical management.

- [59] Dr. Waisman is a psychiatrist retained by the plaintiff. He examined her in April 2019, and reviewed various clinical charts. He placed heavy reliance on a psychologist's progress report written on 2 June 2017 (i.e., about 17 months post-MVA, and four months before her strokes), and on a psychiatrist's summary prepared on 13 July 2018 (about eight months after her strokes). Dr. Waisman concludes that Ms. Locke was not suffering from any significant emotional problems at the time of the MVA, but she had a history of "likely PTSD" that led to "further vulnerability to emotional trauma." He concludes that the MVA led to the development of a somatic symptom disorder with predominant pain, persistent and severe. In his opinion, the MVA made a "material contribution to Ms. Locke's current mental disorders and related mental impairments" and also led to an exacerbation of a history of PTSD. He defers comment on her cognitive disorder to a neurologist.
- [60] Dr. Waisman was asked for his opinion about whether there is a causal relationship between the MVA and the 4 October 2017 procedure. He wrote: "The synergistic effects of PTSD, major depressive disorder, and somatic symptom disorder as a result of the accident led to a heightened state of vulnerability and suggestibility when faced with the prospects of surgery and dealing with the medical complications that ensued in the surgical procedure." He reports that because of the MVA "she was already unable to return to any form of employment." He regards the aneurysms and complications as further exacerbating her condition, but concludes that in their absence she was already suffering from severe emotional problems.
- [61] The defendants retained Dr. Kolchak. This psychiatrist interviewed the plaintiff by video on 14 October 2021, and reviewed the relevant clinical and expert reports. Dr. Kolchak reports that Ms. Locke presented as bright and cheerful. Her cognition appeared intact, and she was able to engage and sustain concentration and attention for their more than three-hour interview. She was initially tearful, but he detected no anxiety or despondency and no abnormalities of thought process or thought content.
- [62] Dr. Kolchak concludes that the plaintiff did not have any psychiatric conditions in the period leading up to the MVA. The incident she witnessed in the 1990s had an initial psychological impact on her, but it did not persist. He concludes that it is "conceivable" that she suffered some depressive symptoms following the 2015 MVA, but from his reading of the records they were due to concerns about headaches and being surveilled by an insurance company. In any event, Dr. Kolchak concludes that her symptoms were well controlled within a few months.
- [63] Dr. Kolchak opines that the plaintiff appears to have developed some depressive symptoms after her strokes including occasional sadness and feelings of worthlessness and hopelessness. On the other hand, she concentrates well and enjoys reading, has a good appetite and sleeps well, and has good energy. He defers to other specialists respecting concussion, but from a psychiatric perspective any head injury she sustained in the MVA was not severe enough to cause prolonged problems. After her strokes, she likely developed an adjustment disorder with depressed mood; she has some symptoms of depression, but

they do not affect her functioning and her prognosis is good.

- [64] Dr. Kolchak was asked in an instruction letter from counsel to comment on the effect of the CT scan reports of aneurysms and the vertebral artery irregularity. He concludes that the records show she was anxious about her health after receiving this information, with a significant increase in this anxiety about one week before her September 2017 surgery. However, he does not think this anxiety was outside the norm of what persons in her situation would likely experience prior to a surgical procedure. He opines that but for the MVA, she would have experienced anxiety about the aneurysms and proceeded with the surgery. He notes that the records from Ottawa Hospital show that she was able to make rational decisions and provide informed consent.
- [65] Both parties made the report of the neurologist Dr. Woolfenden part of their case. He reviewed the records and evaluated the plaintiff by video conference on 13 September 2022. He agrees with Dr. Siu that the aneurysms were congenital in nature and not the result of trauma; he also agrees that it was unlikely that the plaintiff suffered an MVA-related vertebral artery dissection.
- [66] Dr. Woolfenden concludes that the MVA caused a mild traumatic brain injury ("MTBI") alongside a cervical-spine strain. She fully recovered from the neck strain. The neck injury likely contributed to her headaches early on, but the principal cause of the headaches in the period up to the strokes was the MTBI. The early-on symptoms of dizziness and imbalance, visual difficulties, and cognitive complaints were probably due in part to the MTBI, but some of these issues were likely also the result of psychological difficulties and poor sleep.
- [67] Dr. Woolfenden explains that an MTBI has physical, cognitive, and psychological components. When he assessed Ms. Locke in September 2022, she had no physical symptoms attributable to the MTBI: no headache, visual disturbance, or dizziness. He opines that she had a good cognitive outcome from the MTBI; her present cognitive problems are likely the result of the multiple strokes suffered during the 4 October 2017 procedure. In short, there is no indication of permanent problems from the MTBI, and ongoing disabilities are not the result of the MVA. He detected some ongoing psychological issues, but he deferred diagnosis and causation questions to psychiatric experts.
- [68] In the instruction letter from counsel, Dr. Woolfenden was asked about the impact of the plaintiff's condition on the decision-making process related to the aneurysm surgery. He observes that many clinicians would approach small aneurysms like this conservatively with periodic observation via imaging. Decision-making tools used in this case indicated a close call, with one of those tools, the DELPHI score, "very borderline" in favour of treatment of the left-side aneurysm. In his opinion there is no indication in the history he was given or the records he reviewed that any cognitive impairment was sufficiently severe to negatively impact her decision-making about treatment. Dr. Woolfenden describes her degree of anxiety after learning of the aneurysms and the remote risk of rupture as "heightened." However, he disagrees with Dr. Waisman's suggestion that the MVA led to a heightened state

of vulnerability when faced with the prospect of surgery.

- [69] I accept the opinion evidence of Dr. Siu that neither the vertebral dissection nor the intracranial aneurysms are related to the MVA. I accept Dr. Heran's evidence that a debilitating preoccupation with aneurysms is recognized as a valid reason for surgical treatment, and that there are persons - including those who have been in accidents - that are more likely than others to experience this type of anxiety. I accept Dr. Woolfenden's opinion that the plaintiff suffered an MTBI in the MVA. However, I also accept his opinion that cognitive impairment did not impact on her decision-making about treatment.
- [70] These are not contentious findings. The contentious issue when it comes to the medical evidence is whether there is expert opinion evidence that supports the plaintiff's theory that she developed a somatic symptom disorder as a result of the MVA, that discovery of the aneurysms markedly exacerbated this psychological condition, and that her extreme anxiety and fixation on the possibility of aneurysm rupture and death was a manifestation of the somatic symptom disorder.
- [71] Dr. Waisman's evidence is at the core of this causation theory. Dr. Kolchak expresses strong contrary opinions. Dr. Woolfenden made a point of deferring to psychiatrists on psychological issues such as anxiety. He did, however, venture an opinion contrary to the plaintiff's theory that her psychological condition post-MVA set the stage for the onset of her preoccupying anxiety after learning of the aneurysms, which in turn led to a course of medical treatment that caused the strokes.
- [72] The causation issue in this case requires an assessment of the plaintiff's emotional condition, including the source of her anxiety, in two critical periods: after the December 2015 MVA but before discovery of the aneurysms in November 2016, and after discovery of the aneurysms but before the October 2017 medical treatment that triggered her strokes. Dr. Waisman, Dr. Kolchack, and Dr. Woolfenden were put in the challenging position of trying to draw conclusions on the critical issues in this case without the advantage of seeing the plaintiff during these critical periods. Indeed, by the time each of these experts were able to take a history from the plaintiff, she was suffering the cognitive consequences of her strokes.
- [73] There were doctors and psychologists that assessed the plaintiff before discovery of the aneurysms, and others that assessed her after they were discovered and before the medical treatment. Dr. Aggarwal, her general physician, followed her throughout the two periods. Opinion evidence was not led from these doctors or psychologists. I draw no adverse inference from the absence of opinion evidence from these sources. I appreciate that their clinical charts were available for use by these other experts brought in years later to try to understand the nuances of the plaintiff's emotional condition during the relevant periods. And, I appreciate that these experts retained to give evidence may rely on opinions expressed by other consultants, even where those other opinions are not in evidence as admissible expert opinions. However, the value of a psychiatrist's opinion may be affected

by its reliance on second-hand source material: R. v. Abbey, [1982] 2 S.C.R. 24 at 43; Mazur v. Lucas, 2010 BCCA 473 at para. 40.

- [74] I conclude that there is essentially an absence of expert opinion evidence about the plaintiff's depression and anxiety, and sources of these psychological conditions, in relation to the period before her strokes. I have no hesitation in accepting Dr. Woolfenden's opinions related to issues of MTBI, headaches, vertebral dissections, and strokes. However, to the extent that this well-qualified neurologist expresses opinions on psychological issues, his evidence carries significantly less weight.
- [75] Dr. Woolfenden expressly defers to psychiatrists on psychological issues. However, I do not attach significant weight to the opinions of either psychiatrist regarding the plaintiff's psychological condition in the time periods critical to the causation issue, i.e. before her strokes. In Dr. Waisman's case, I find that his opinions rest on an unsteady foundation of questionable facts and assumptions. In Dr. Kolchak's case, errors he made in recounting important facts underlying his opinions have shaken my confidence in his conclusions.
- [76] In his report, Dr. Waisman quotes the contents of two clinical reports at considerable length: a progress report by Dr. Taylor, a clinical psychologist, dated 2 June 2017, and a report by Dr. Marshall, a physiatrist at the Ottawa Hospital Rehabilitation Centre, dated 13 July 2018. Each of these two reports contains opinions, but neither Dr. Taylor nor Dr. Marshall were called upon to prepare expert opinion reports. In the section of his report "Description of Injuries," Dr. Waisman repeats the same quotations from the Taylor and Marshall reports - it is evident that he places heavy reliance on their recitation of facts and their opinions.
- [77] Dr. Taylor apparently concludes that Ms. Locke was experiencing a "posttraumatic stress disorder with agoraphobic tendencies," "chronic pain disorder exacerbated by psychological factors and general medical condition," and "major depressive disorder, single episode, moderate with psychotic features."
- [78] The excerpt from Dr. Marshall's report relates all of the physical and cognitive effects of the plaintiff's strokes back to the MVA. In the course of his explanation for his conclusion that she has "catastrophic impairment as a complication of the [December 2015] motor vehicle collision," Dr. Marshall refers to the radiology that purportedly demonstrated a vertebral dissection and aneurysms, and expresses his opinion that the onset of her symptoms of headache, dizziness, and blurry vision immediately following the collision support his conclusion that these aneurysms were the cause of her dizziness and blurry vision. These conclusions are at odds with the conclusions of Dr. Siu and Dr. Woolfenden, whose evidence I accept.

- [79] After reciting the findings of Dr. Taylor and Dr. Marshall, Dr. Waisman sets out the diagnostic criteria for somatic symptom disorder and major depressive disorder. He concludes that the plaintiff meets the diagnostic criteria for each. With reference to somatic symptom disorder, Dr. Waisman concludes that the MVA "directly led" to the development of this chronic pain disorder, and exacerbated "a history of PTSD."
- [80] His opinion is that Ms. Locke was already experiencing a severe emotional impairment from the MVA "that may have been further exacerbated" by the "complications related to aneurysms and a bleed to the brain." He goes on to say that the MVA "has led to vulnerability in her coping mechanisms with further adversity such as having to make difficult choices regarding complex surgery."
- [81] Dr. Waisman reports that she continues to suffer impairment to her mental and psychological functions from the MVA. She does not have the memory or organizational skills she had before the MVA, and suffers from bouts of depression exacerbated by an inability to return to her pre-MVA condition. Later in his report, Dr. Waisman indicates that due to the MVA, "she was already unable to return to any form of employment," and the aneurysms and surgical complications aggravated her serious emotional problems.
- [82] Perhaps because he was influenced by Dr. Marshall's opinion on the close causative connection between the MVA and the strokes, Dr. Waisman does not provide analysis on the extent of the plaintiff's emotional problems at the various critical stages. He seems to have essentially adopted the psychologist's opinions about PTSD and a pain disorder - opinions formulated at a time after the plaintiff became aware of her aneurysms.
- [83] With respect, I think Dr. Waisman has leapt to his conclusions that the plaintiff was suffering "severe emotional impairment" such that she was "already unable to return to any form of employment" before her strokes, and that the strokes should be viewed as exacerbating her psychological condition. These conclusions are not supported by a cogent analysis. What was the source and what was the nature, extent, and effect of the plaintiff's psychological troubles during the months before she learned of the aneurysms, compared and contrasted with the period after she became aware of the aneurysms? These are key causation questions, and I find Dr. Waisman's report, relying as it does on inaccurate facts and opinions relayed by Dr. Marshall, is of little assistance to me in coming to grips with them. I agree with counsel for the defendants' criticism of Dr. Waisman's opinions as essentially bare conclusions without adequate or any analysis.
- [84] Dr. Kolchak's report contains opinions that bear on the causation issue, and they were framed in the report as responses to questions put by counsel for the defendant. Dr. Kolchak was produced for cross-examination, and it was made apparent that Dr. Kolchak's report had seriously confused the timeline regarding the plaintiff's symptoms of depression. Much of what Dr. Kolchak related as occurring in 2017 in fact occurred in 2016 - and in the result, the reasoning in the report for his conclusions on depression (or absence of depression) in the post-MVA period make little sense. These are serious errors bearing on a subject at the core

of this case. In the witness box, he was slow to acknowledge these mistakes in the preparation of his report. I was left without confidence in the soundness of Dr. Kolchak's opinions, and in consequence I do not attach weight to the opinions in his report.

Analysis of Causation, Divisibility, and Original Position

- [85] I think it is common ground that the "but-for" test cannot be met by the mere fact that the chain of events was altered by the MVA, i.e. on the basis that but for the MVA-related headaches, the plaintiff would not have had the CT scan that revealed the aneurysms, and so would not have had the surgery and post-surgical procedure that caused the strokes. The required "substantial connection" between the defendant's conduct and the strokes is absent.
- [86] The plaintiff does not put her "but for" causation argument on such a skeletal basis. She submits that the substantial connection is that the MVA injuries and their consequences altered her psychological condition which made her prone to being so anxious after discovery of the aneurysms that surgery became a viable option. She submits that the Court ought to draw the inference that but for these changes brought about by the MVA, she would likely have not been a candidate for surgery or would not have been in such a vulnerable state so she would likely have chosen conservative treatment. And, she argues, if she had taken the conservative path she nearly certainly would not have suffered the debilitating losses that followed the surgical course of treatment.
- [87] I find that the plaintiff was physically and mentally healthy in the time leading up to the MVA. My impression is that the intrusive thoughts of the events she witnessed in the 1990s were very infrequent before the 2015 MVA, and fairly infrequent afterward. I find the evidence does not establish PTSD on a balance of probabilities. I do not accept the theory that the plaintiff suffered a re-activated PTSD or that it is a material consideration in the causation analysis.
- [88] The MVA caused an MTBI and a neck strain. The symptoms of each condition persisted such that she lost her work as a care aide. The neck strain likely cleared up within six months or so after the MVA, but her headaches persisted. I accept the evidence of Dr. Woolfenden that the plaintiff fully recovered from the physical and cognitive effects of her MTBI at some point in time before she suffered the strokes in October 2017. She had continuing headaches that led to the requisition for the CT scan in November 2016 that revealed the aneurysms - I accept Dr. Woolfenden's opinion that the principal cause of these headaches was the MTBI, with some of the headaches likely being attributable to her psychological and sleep problems.

- [89] The plaintiff's mood was likely affected by the MTBI in the months after the MVA, but I find her mood substantially worsened after she was out of work beginning in April 2016 and did not improve in the months leading up to the November 2016 discovery of the aneurysms. After she became aware of the aneurysms, it is clear from her evidence, from Mr. Graham's evidence, and from Mr. Burnett's evidence that the plaintiff was fixated on the possibility of rupture of these aneurysms, and very anxious.
- [90] The lynchpin issue in the "but for" analysis is whether, but for the emotional condition the plaintiff was in as a result of the MVA and the resulting loss of her job, she would have undergone the aneurysm surgery and related treatment. There are two inter-related considerations arising out of the hypothesis that, but for the MVA, her anxiety about the chance of rupture of the aneurysms would have been materially less than what it was. The first is the possibility that with less anxiety the plaintiff may have made a more clear-headed choice, i.e. the monitoring rather than the surgical option. The second is the possibility that with less anxiety the surgical option would not have been medically indicated and would not have been presented as a viable option by her medical consultants - the evidence is clear that her disabling anxiety was factored into the medical equation about whether to offer surgery as an option.
- [91] I interpret Dr. Heran's evidence as suggesting that persons who have had previous traumatic events are typically among the small percentage of patients who are psychologically preoccupied with their intracranial aneurysms to the extent that their quality of life is significantly diminished. I accept that the fact that the plaintiff had been in an MVA a year before she learned of the aneurysms is relevant, but my assessment of the facts must focus on whether this trauma played a role in this case.
- [92] Dr. Waisman postulates that the "synergistic effects" of her post-MVA psychological disorders led to a "heightened state of vulnerability and suggestibility when faced with the prospects of surgery." I wonder if the reference to "suggestibility" is a typographical error. Perhaps Dr. Waisman meant "susceptibility," which would be closely aligned with his opinion about her vulnerability. I do not think that "suggestibility" enters into the question - this was not a situation where Ms. Locke's medical advisors were trying to persuade her to undergo surgery. In fact, the tenor of Ms. Locke's evidence is that her doctors preferred a conservative approach. If Dr. Waisman concluded on his review of the records that the plaintiff's medical advisors were advocating for surgical treatment, he is mistaken.
- [93] For the reasons I have given, I do not attach weight to Dr. Waisman's opinions about the plaintiff's psychological condition during the period of time relevant to the causation question, including this "vulnerability" opinion. I remind myself at this juncture that scientific evidence of causation can be helpful, but it is not required. I must approach this causation-in-fact question in a "robust common sense fashion," and I recognize that causation may be established by inference: Clements, at paras. 9-11. As Griffin J.A. observed during her analysis of a causation-in-fact issue in *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 120, "it will be a rare case where determining causation does

not require some inference-drawing." That said, any such inferences "must be based on proven facts and cannot be simply guesswork or conjecture": *Engman v. Canfield*, 2023 BCCA 56 at para. 94; *Borgfjord v. Boizard*, 2016 BCCA 317 at paras. 55, 67.

- [94] I acknowledge the possibility that the MVA and resulting loss of her job upset the plaintiff's emotional equilibrium to the extent that it altered the course of her aneurysm treatment. However, having considered in a robust way the totality of the evidence including inferences that might properly be drawn, I remain a considerable distance from being persuaded on a balance of probabilities. To put the same conclusion in different words, I find that it is more likely than not that the prospect of rupture of untreated aneurysms would have produced debilitating anxiety in the plaintiff even if she had not suffered the MVA injuries, and that she would have been offered surgery as an option and elected to take up this option in any event of the MVA injuries and their effects.
- [95] I reject the plaintiff's theory that the alteration of her emotional state by the MVA resulted in the decision to undergo surgical treatment. On the "but for" analysis, this leaves the bare (albeit undeniable) fact that if the defendant had not changed lanes without looking, the plaintiff would not have had the headaches that led to the CT scan, which in turn led to the discovery of the congenital aneurysms that led to the angiogram that caused the strokes. However, because of the absence of a substantial connection between the defendant driver's breach of the standard of care and the plaintiff's losses flowing from the strokes, the strokes must be treated as an independent intervening non-tortious event.
- [96] If the plaintiff had succeeded in proving causation in fact insofar as the strokes and their effects are concerned, she would also have to clear the causation in law hurdle. Determining whether there is causation in law is a remoteness inquiry. In particular, the question would be whether this specific injury (i.e., the strokes resulting from an effort to eliminate the risk of rupture of congenital aneurysms coincidentally uncovered by the CT scan) was reasonably foreseeable. Was it a real risk that would have occurred to the mind of the reasonable person in the defendant driver's position or would the possibility have been discarded as far-fetched? I incline to the view that the strokes and their effects were not reasonably foreseeable, but my conclusions on the causation in fact issue make the causation in law issue moot.
- [97] I turn to the question of whether the psychological effects on the plaintiff of the discovery of the aneurysms are indivisible from the psychological injuries related to the MVA. Citing *Bradley*, she submits that separating these psychological injuries is neither possible nor appropriate. The absence of helpful expert opinion evidence on this subject makes this a challenging issue. However, I think it is feasible to separate these psychological injuries. They had different sources and manifested in different ways. Before discovery of the aneurysms, I find the plaintiff's mood was depressed. She was frustrated by her continuing headaches, and deeply saddened by the loss of her job and other effects of the MVA injuries on her lifestyle. The discovery of the aneurysms had a distinct and different effect. The plaintiff became anxious and preoccupied with worry about rupture of the aneurysms and

how this would affect her boys.

- [98] Because of my conclusions on the "but for" analysis, and this divisibility finding, I conclude that the defendants are not liable to compensate the plaintiff for damages related to discovery of the aneurysms or the unfortunate results of their treatment. (If I am wrong on the question of the divisibility of the anxiety caused by the discovery of the aneurysms in November 2016, the impact on the damages assessment is slight because of the looming and overwhelming impact of the October 2017 strokes on the plaintiff's original position.)

Damages Assessment

- [99] Certain facts and findings must be kept firmly in mind during the damages assessment. First, I accept Dr. Woolfenden's opinion that the plaintiff has had a good cognitive outcome from the MTBI and her ongoing cognitive issues are the likely result of the multiple strokes suffered in October 2017. Second, the plaintiff recovered from her neck injury within about six months, and had overcome the physical and cognitive effects of the MTBI by October 2017. Third, she did suffer from depression in the months after the MVA, which I find worsened substantially in April 2016 when she was no longer able to work. Fourth, the non-tortious intervening events of learning of the aneurysms in November 2016 and the outcome of the medical procedure in October 2017 form part of the plaintiff's original position - these intervening events affect the damages assessment. In fact, the great harm that resulted from the October 2017 procedure entirely obliterates some heads of damages.

Non-Pecuniary Damages

- [100] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal ref'd [2006] S.C.C.A. No. 100. The factors to be considered include Ms. Locke's age, the nature of her injuries, the severity and duration of her pain, disability, emotional suffering, the impairment of her physical and mental abilities, the impairment of her family and social relationships, and loss of lifestyle. Stoicism should not reduce a non-pecuniary damages award.
- [101] The plaintiff submits that in the absence of a causal relationship between the MVA and her strokes, \$235,000 is an appropriate award for non-pecuniary damages having regard to her MTBI, psychological injuries, neck pain and headaches. The defendants cite cases supporting their argument that an award in the range of \$90,000 to \$120,000 is in order.
- [102] The cases cited by the plaintiff to support her position do not account for the fact that the plaintiff's "original position" is so significantly comprised by the post-MVA non-tortious unrelated events - i.e., learning of the aneurysms and especially the strokes that occurred during the aneurysm treatment. I conclude that the defendants' position on non-pecuniary damages is a fair and realistic reflection of the significant injuries suffered by the plaintiff and the substantial effect of these injuries on her work and family life, and her enjoyment

of life more generally, in the period of time up to when she suffered the strokes. I assess non-pecuniary damages at \$100,000.

- [103] If I had found the anxiety produced by the discovery of the aneurysms to be indivisible from the psychological injuries that resulted from the MVA, I would have assessed non-pecuniary damages at \$110,000.

Past Loss of Earning Capacity

- [104] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as "past loss of income" is actually a claim for past loss of earning capacity -- i.e., "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury."
- [105] In the case at bar, an assessment of the earnings the plaintiff would have received in her established work as a personal care aide is an appropriate method to measure the past loss of earning capacity. I assess the past loss of capacity on the basis of the defendants' acknowledgement of a period of loss from the day after her MVA to the day before the plaintiff suffered her debilitating strokes, i.e. from 26 December 2015 to 3 October 2017, a period of approximately 21 months. (I think the defendants' position, which amounts to a concession, is supported by the weight of the evidence. The effects of the discovery of the aneurysms is part of the plaintiff's original position, and she might have been disabled from work from the anxiety that resulted from learning of the aneurysms in November 2016 without the MVA. But, without headaches and her very low mood in the months after losing her job, I think it likely that the plaintiff would have been able to carry on with her work between November 2016 and when she suffered the strokes in October 2017.)
- [106] The plaintiff's income in 2015 was \$26,227, and I use this figure as a basis for the assessment. Over 21 months, but for the MVA, her earnings would have been approximately \$46,000. Her actual post-MVA earnings were just over \$9000. Her past loss of earning capacity is \$37,000 in gross terms. The net loss is the rounded sum of \$32,000, after deducting 13% for income tax in accordance with the evidence of Peter Sheldon, the plaintiff's economist.

Special Damages

- [107] Adjudication of the quantum of special damages is deferred, by agreement of the parties, to accommodate a mid-trial amendment to the notice of civil claim that allows the plaintiff to pursue reimbursement for costs paid by the Ontario Hospital Insurance Program. I presume these reasons for judgment will make plain the limits of the special damages payable by the defendants; if the parties cannot reach agreement on special damages, they have leave to lead further evidence and make argument.

Claims for Family Members' Services

[108] The plaintiff's spouse and younger son faithfully provided a significant amount of care services after the October 2017 strokes. However, the defendants are not liable to compensate for the value of these services as a consequence of the finding that the results of the strokes form part of the plaintiff's original position.

Future Losses - Loss of Earning Capacity and Cost of Future Care

[109] The strokes have left the plaintiff without earning capacity. And, all claims for cost of future care relate to care needs arising from the strokes which form part of the plaintiff's original position. Accordingly, the damages award cannot include the claimed future losses.

Summary

[110] The motor vehicle collision was entirely the fault of the defendant driver, and the defendants are liable to pay for the damages proved to have been caused by the breach of the standard of care including non-pecuniary damages of \$100,000, damages for past loss of earning capacity of \$32,000, and special damages to be agreed upon or assessed. The plaintiff is also entitled to court order interest on her damages for past loss of earning capacity and her special damages.

[111] The parties have liberty to apply on costs and otherwise.

"Thompson J."

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