

CANADA / JUDGMENT

## Smith v. Hsu

2020 BCSC 523

### COURT

Supreme Court of British Columbia

### DECIDED

3 April 2020

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2020 BCSC 523 Smith v. Hsu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Hsu,

2020 BCSC 523

Date: 20200403

Docket: M159033

Registry: Vancouver

Between:

Sarah Elizabeth Windsor Smith

Plaintiff

And

Yu Yi Hsu

Defendant

And

BMW GRP Financial Serv CD

Div. of BMW Canada Inc.

Defendant

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

November 25-29, 2019

December 3-6 and 12, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 3, 2020

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## Introduction

- [1] On January 2, 2014, Sarah Smith was driving a friend to go shopping in Burnaby. She came to a stop at a red light. A few seconds later, she felt a jolt from behind. After initial confusion about the cause of the jolt, she realized that her vehicle had been rear-ended.
- [2] The defendant Dr. Yu Yi Hsu came to a stop behind the plaintiff's vehicle. She became distracted, and her foot lifted off the brake pedal. Her vehicle ran into the rear of the plaintiff's vehicle. There was little or no damage to either vehicle.
- [3] Although liability was not formally admitted, this is a trial to assess damages.
- [4] The plaintiff alleges that this accident caused her to suffer a traumatic brain injury, chronic pain, chronic headaches, depression, and anxiety. She says that she has been partially disabled since the accident and that she became totally disabled in the summer of 2019. She seeks damages in excess of \$1,200,000 for pain and suffering, past income loss, future loss of earning capacity, cost of future care, and special damages.
- [5] The defence accepts that the accident caused soft tissue injuries to the plaintiff's neck and upper back, aggravation of pre-existing migraines, and a mood disorder. However, the defendants say that the plaintiff had substantial recovery within a year after the accident. The defence concedes that the plaintiff has ongoing symptoms and may suffer a loss of capacity to earn income in the future. They say that any such loss is limited.

## The Plaintiff

### The Plaintiff before the Accident

- [6] The plaintiff was born in 1978. She was 35 years old when the accident occurred. She is now 41 years old.

- [7] She grew up in a military family in the USA. She moved several times during her childhood. Her mother described her as a good student, graduating in the top 10% of her class. She graduated high school six months early.
- [8] Upon graduation, she decided to join a dance troupe that travelled to high schools throughout the USA. Members of the troupe volunteered for up to one year. The performances brought attention to social issues through dance. While in that troupe, she met her future husband, Tobin Smith, a student from Duncan, BC. The two started courting as he was about to depart the troupe and return home.
- [9] The relationship continued, and the couple married in 1997 at the age of 18. Thereafter, the plaintiff moved to Vancouver Island. She was not able to work due to her immigration status. When the immigration issue resolved, her first jobs were as a barista and baker.
- [10] The couple then decided to move to Vancouver to pursue education. The plaintiff took an esthetics course and completed it. Her marks put her at the top of her class. She started working as an esthetician at a spa in Vancouver. She showed commitment and hard work. She also provided management services to the owners. She earned as much as \$51,000 in a year. She hoped to work toward becoming a part owner of the spa, but the owners did not share that vision. As a result, the plaintiff cut back on her management duties, resulting in a decrease in her income.
- [11] During the period from 2002 to 2008, the plaintiff's husband went to film school and pursued filmmaking. By their account, the plaintiff's income supported the couple during those years. In 2008, Mr. Smith started a portrait photography business called PhoTobin. Also in 2008, the couple had their first child. Following maternity leave, the plaintiff returned to her esthetician position at the spa. They had their second child in 2010.
- [12] When the plaintiff came off maternity leave in September 2011, the couple made a decision that she would join the PhoTobin business. She would run the business side. At that point, the business was three years old.
- [13] The plaintiff was involved in the business for two full years before the date of the accident. She and her husband testified that she did the majority of the work within the business. She was responsible for marketing, bookings, hair and make-up, and the sales meetings that followed portrait sessions.
- [14] According to both the plaintiff and her husband, the couple was involved with working in the business on a more than full-time basis. However, they acknowledged that they scheduled portrait sessions around their children's activities. I discuss the business and its revenue below, under the heading "Loss of Capacity".
- [15] All of the witnesses described the plaintiff as an organized and accomplished woman before the accident. There is no dispute that she was an excellent mother.

- [16] In terms of the plaintiff's pre-accident health, she suffered from migraine headaches, approximately once or twice per year. She also had some anxiety.
- [17] For the purpose of this litigation, the plaintiff was examined by Dr. Jeanette Smith, a psychiatrist, in 2016 and 2019. Dr. Smith's first report notes that the plaintiff underwent a period of stress or anxiety at the end of 2012 regarding the photography business. She was tearful and could not sleep. The business was struggling because the couple had exhausted their circle of contacts. However, according to Dr. Smith's report, the plaintiff said that she forced herself to "do the things she was afraid of doing". Her anxiety levels normalized through 2013.

#### Assessment of the Plaintiff's Testimony

- [18] For the reasons set out below, I approach the plaintiff's testimony and her complaints with caution.
- [19] One of the plaintiff's independent medical examiners Dr. Hawkeswood described the plaintiff as "catastrophizing" the accident and its effects. He also found that she had a "high degree of perceived disability." I find that Dr. Hawkeswood's descriptions are apt. This is an issue of self-perception that leads to concerns of credibility and reliability.
- [20] The plaintiff's propensity to catastrophize her condition makes my assessment of her damages difficult. Her self-perception and presentation influenced the experience and, thus, the testimony of her family and friends. Although Dr. Hsu is liable for the damages caused by this accident, the plaintiff is not entitled to higher damages on the basis that she perceives herself to be disabled. These circumstances make the opinions of experts, and a critical examination of their reports, even more important than usual. In the reasons below, I set out my analysis of the medical opinions and my findings.
- [21] During her testimony, both in direct and cross-examination, the plaintiff tended to give long answers that drifted off topic. In cross-examination, she had difficulty giving straightforward answers to questions. That tendency was especially evident when faced with a record that appeared inconsistent with her version of events or a document that suggested her symptoms were less than severe. In her first report, Dr. Smith accurately described the tendency as follows, "She did appear to go into a great deal of extraneous detail but it was possible to re-direct her quite easily."
- [22] The main force of the defence argument relates to the credibility and reliability of the evidence tendered by the plaintiff. The defendants cite the decision of Chief Justice McEachern, as he then was, in *Price v. Kostryba*, [1982] CarswellBC 415 (S.C.), quoting his own reasons from *Butler v. Blaylock et al.* decided October 7, 1980 (Vancouver Registry B781505):

"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."

- [23] In my assessment of credibility and reliability below, I have considered all of the factors described in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.) and *Bradshaw v. Stenner*, 2010 BCSC 1398. Due to the circumstances of this case, I have paid particular attention to the reasonableness of the testimony and its harmony with the documentary evidence.
- [24] Based on that assessment, I find that the plaintiff has tended to exaggerate the impact of this accident on her life and work. I set out below my finding that the accident did not cause the plaintiff to suffer a traumatic brain injury or concussion. The plaintiff, in my opinion, sought out and latched onto that diagnosis. In addition, she blames the accident for many problems in her life, including the apparent failure of the family business, behavioural problems of her children, and even the health problems suffered by her husband. However, those issues appear to have arisen independent of her injuries.
- [25] Further, I find that the plaintiff sought out treating practitioners who provided passive temporary relief. She attended hundreds of passive treatments while eschewing her doctors' recommendations for activity and exercise. This is discussed in more detail under the heading "Mitigation".
- [26] While the plaintiff has suffered from some degree of chronic pain and associated mood disorder, I do not find that those problems have been as severe as the plaintiff described them. Put another way, the plaintiff has tended to catastrophize the effects of the accident. In my discussion below, I have identified the elements of the claim that I do not accept and focussed on the elements that I do accept to assess the damages.

### **The Accident - Liability and Force of Impact**

- [27] Liability for the accident is formally denied. However, the defendants made no argument regarding liability. I find that the defendant Dr. Hsu was negligent in causing the accident.
- [28] The plaintiff and Dr. Hsu were travelling eastbound on 12th Avenue. They both stopped for the traffic light at the intersection with Kingsway. The plaintiff was driving a Honda Fit. Dr. Hsu was driving a BMW X1. The plaintiff says that she had stopped for about 20 seconds before she felt the impact from behind.
- [29] The plaintiff described the impact in a written statement as "a big jolt". At trial, she described it as a "huge whack". The plaintiff did not say whether the force of the impact pushed her vehicle forward.

- [30] The defendant Dr. Hsu testified that she came to a stop about one car-length behind the plaintiff's vehicle. She then leaned over to pick up a water bottle that had rolled into the foot-well on the passenger side of the vehicle. While leaning over, her foot slipped off the brake, and her vehicle moved forward until it struck the rear bumper of the plaintiff's vehicle. Dr. Hsu described the impact as a "bump". She was still leaning into the passenger foot-well when the impact occurred. She did not strike anything inside the vehicle.
- [31] In cross-examination, counsel for the plaintiff suggested to Dr. Hsu that when it slipped off the brake, her foot hit the gas pedal and accelerated her vehicle. Dr. Hsu did not accept that suggestion.
- [32] The impact between the vehicles left an imprint of Dr. Hsu's licence plate and a bolt-sized hole in the plaintiff's rear bumper cover. The cost to repair the plaintiff's vehicle was \$782.48, including refinishing the bumper cover. There was no evidence of any damage to any part of the structure of the plaintiff's vehicle apart from the bumper cover.
- [33] There was no physical damage to Dr. Hsu's vehicle apart from a possible crack in the licence plate holder. In the week after the accident, Dr. Hsu noticed that a parking sensor on the front bumper was not working. She took the vehicle to a dealership where it was inspected, including the removal of the wheel well.
- [34] When the technician inspected the vehicle, no damage was noted. The sensor was replaced under warranty at a cost of \$308.
- [35] Dr. Hsu testified that she reported the accident to the dealership, but the service advisor made no notation of it. In argument, plaintiff's counsel submits that I should make a credibility finding against Dr. Hsu. She argues that I should not accept Dr. Hsu's evidence because she testified that she told the dealership about the accident, but that statement was not recorded in the intake notes.
- [36] In my opinion, the intake notes are essentially the clinical records of Dr. Hsu's vehicle. That a particular fact is not noted on the document does not mean that she did not report it.
- [37] The plaintiff argues that I should find that Dr. Hsu's description of the accident is not credible and that I should draw the inference that her foot did hit the gas pedal. Thus, the plaintiff argues, the accident occurred at a higher speed than would have been achieved by the vehicle simply idling from a stop.
- [38] I decline to make that finding. I find that Dr. Hsu provided a credible description of the accident. She did not accept the suggestion that her foot could have pushed the accelerator. The damage to the vehicles was consistent with a lower-speed impact. There is no logical connection between any statement Dr. Hsu may have made at the dealership and whether her foot touched the accelerator.

- [39] I find as a fact that Dr. Hsu came to a stop about a car-length behind the plaintiff's vehicle. When she leaned over to pick up a water bottle from the floor, her foot slipped off the brake pedal. It did not hit the gas pedal. Hence, I find that the impact between the two vehicles was caused by the Dr. Hsu's vehicle idling forward from a stop for a distance of approximately one car length.
- [40] Both parties called engineering evidence. The purpose of the engineering reports was to establish the probable speed at impact, the speed change of the plaintiff's vehicle, and the forces applied to her head based on those calculations. The defendants sought to prove that this low-speed accident could not cause the traumatic brain injury alleged by the plaintiff. The engineers took different approaches to calculating the probable, and highest possible, speed of Dr. Hsu's vehicle.
- [41] The defendants' engineer, Oien Bates, used studies of stopped vehicles where the brake was released. The speed of those vehicles was recorded at various distances.
- [42] Based on those studies, and using a distance of one car-length, Mr. Bates calculated the speed of Dr. Hsu's vehicle at between 3.2 and 7.7 km per hour. Because the BMW was heavier than the plaintiff's vehicle, the plaintiff's vehicle would have undergone a speed change of between 4.8 and 11.6 km per hour. Based on those calculations, Mr. Bates calculated the linear and rotational forces that would have been applied to the plaintiff's head in the accident. He opined that, given those forces, "It is very unlikely that Ms. Smith could have suffered a concussion from the subject accident."
- [43] In response, the plaintiff tendered two expert reports, one reconstructing the accident and the other discussing the bio-mechanical forces applied. The upshot of those reports was that the impact speed could have been higher than that calculated by Mr. Bates. However, there was substantial agreement between the speed calculations between Mr. Bates and the plaintiff's engineers.
- [44] The plaintiff's biomechanical engineer reviewed research of sports injuries wherein they studied linear and rotational forces applied to individuals and the resulting injuries. Based on those studies, the plaintiff's biomechanical engineer opined that there was a 5% chance that a person could suffer a concussion if he or she was subjected to the types of linear or rotational forces calculated by the plaintiff's reconstruction engineer.
- [45] Hence, both the plaintiff's and the defendants' engineers concluded that a concussion could have occurred in this accident, but such an injury was not likely.
- [46] The trouble with this type of evidence, or course, is that it does not matter whether a certain type of injury is probable, possible, or unlikely in a certain type of accident. A certain type of injury may be unlikely, but if it is "possible", then the fact that it would not occur in 99 people out of 100 is not probative for the trier of fact. The only question is whether this plaintiff falls into the minority of people who did suffer that injury in this type of accident.

- [47] Hence, I find the engineering evidence does not assist me in determining the issue of whether the plaintiff did suffer a concussion in this accident. However, both the plaintiff's and the defendants' engineers opined that it is unlikely that a person would suffer a concussion in this type of accident. That opinion is one of the factors that I consider below.

### **The Injuries and the Plaintiff after the Accident**

- [48] The plaintiff's injuries did not follow a course that would normally be experienced or expected in an acute injury to the body or the brain.

### **The First Ten Days**

- [49] In the seconds after the accident, the plaintiff signalled and turned off 12th Avenue into a parking lot. She motioned to Dr. Hsu to follow her. The plaintiff and Dr. Hsu exchanged information and inspected the damage to the vehicles. The plaintiff and her passenger took pictures of the vehicles. Because of the minor nature of the accident, they did not call for emergency vehicles.
- [50] Following the discussion with Dr. Hsu, the plaintiff and her passenger continued with their shopping trip. The plaintiff drove first to a store in Burnaby and then to a second store. While shopping the plaintiff received a call from Dr. Hsu to clarify some details of her identification. She also phoned her husband to report that she had been in an accident. She told him not to worry because it was minor.
- [51] At the second store, the plaintiff told her passenger that she thought they should return home. They were both feeling a bit achy. The plaintiff drove home and took some Advil. She had a headache and pain in her neck down to her mid-back. She took a hot bath and went to bed to rest.
- [52] The plaintiff discussed the accident with her husband. Later that day, she spoke to her mother on the phone. Her mother testified that, in her opinion, the plaintiff was not making sense. The plaintiff's mother and husband encouraged the plaintiff to go to an emergency department. She took a taxi to Vancouver General Hospital. There was a substantial waiting period at the emergency department. A friend picked her up and took her to Mount Saint Joseph's Hospital where that friend works as a nurse.
- [53] An emergency room physician examined the plaintiff and advised her that she was fine. He encouraged her to go out and conduct her normal activities. At trial, the plaintiff described herself during this period as being "loopy, detached, dizzy, slightly nauseated." She testified that, while waiting to be examined in the emergency department, she had difficulty reading the texts on her phone.
- [54] The plaintiff received a ride home from her friend. She then reported the accident to ICBC and went to bed.

- [55] According to the plaintiff's husband, after she returned from the emergency, she was glossy-eyed. He testified that her eyes were "vibrating" when she returned home. The plaintiff argues that was an indication of a condition called "nystagmus". However, that was not a symptom noted by any of her doctors in the initial visits.
- [56] The plaintiff documented her activities in a typed statement dated January 3, 2014. From this statement, we know exactly what she did on the day of the accident. The typed statement describes all of her activities and indicates that she had full recall of the prior day's events. Of note, the plaintiff wrote about her ride home from emergency department that her friend "was very surprised that I wasn't diagnosed with a concussion". This statement, written the day after the accident, indicates that, based on the input of friends and family, the plaintiff was thinking that she suffered a concussion. The plaintiff's friend, who is a nurse, testified that she was somewhat surprised that the emergency doctor had not conducted the standard neurological examination. She did not say that she was surprised at the "no concussion" diagnosis.
- [57] The input of her friends and family is discussed in the report of the plaintiff's independent medical examination ("IME") psychiatrist, Dr. Smith. She wrote, in her January 16, 2016 report at page 10, that the plaintiff had a number of symptoms including headache, impaired sleep, medications and depression:

The resulting compromised cognitive function together with severe headache was interpreted by Ms. Smith and others such as her parents and husband as evidence of a significant brain injury. This label in itself was very upsetting and anxiety provoking for Ms. Smith but the anxiety was further fuelled by well-intentioned advice from her family.

- [58] I note this paragraph because it is clear that, as of January 3, 2014, no medical practitioner had diagnosed the plaintiff with a concussion. However, her typed statement makes it clear that she already believed that she had suffered one. This is not a case where a patient reacted negatively to a diagnosis received from a doctor and thus suffered iatrogenic, or medically caused, problems. The plaintiff does not allege that she suffered from a somatic symptom disorder caused by the accident. The plaintiff believed that she suffered a concussion before she had been diagnosed with one.
- [59] During the first week after the accident, the plaintiff conducted her life relatively normally. She drove her son to an acting audition. She went to a walk-in clinic and complained of a cough. She did not appear to mention any injuries or acute physical conditions on that visit, and no treatment or medication was recommended. On the business front, she exchanged emails with clients and associates. Her emails were detailed and lengthy, not simple responses to inquiries. In one of the emails, she advised a client, on January 7, that she could not schedule a meeting with him on January 8 because that day was "jam-packed" with appointments. These emails are inconsistent with the plaintiff's alleged level of disability after the accident.

- [60] Also during the first week, the plaintiff set about cleaning out and re-organizing the couple's home office. Her husband looked after the kids while the plaintiff worked in the basement office. She removed substantial piles of documents from the office but did not accomplish much more than that. Other witnesses testified about the piles of documents on the main floor of the home. The plaintiff's husband testified that she did not get much accomplished during that week.
- [61] The plaintiff went to a walk-in clinic on January 10. The clinical record of that visit indicates that she reported that her brain "hasn't worked right since accident." She was struggling with speech. It took effort to think thoughts. She had constant headache at a level of 4/10. She reported that she was seeing a chiropractor, and those treatments had improved her physical symptoms. She reported that she had full recall of the events before and after the accident. At that visit, the doctor diagnosed her as having suffered whiplash and a concussion.
- [62] On Sunday, January 12, 2014, the plaintiff wrote back to the same client and indicated that she spent the weekend in the dark, on brain rest, after receiving the concussion diagnosis the prior Friday. She also indicated that she would be contacting a lawyer because the accident had had "major repercussions".

### After the First Ten Days

- [63] As noted, the plaintiff alleges that she suffered a traumatic brain injury, whiplash disorder that developed into chronic pain, increased migraines, depression, and an anxiety disorder. As discussed in more detail below, she says that her cognitive problems, mood issues, and chronic pain have "waxed and waned" since late 2014.
- [64] The trial of this action occurred almost six years after the accident. Not surprisingly, the plaintiff had difficulty describing the course of her symptoms during the first year, or any particular year, after the accident. However, she recalls that after the diagnosis of concussion, she retreated into her room to obtain the "brain rest" that the doctors recommended. A number of clinical records were put to the plaintiff to attempt to establish the level of her symptoms at various points in time.
- [65] Over the first few months, the plaintiff continued to complain of neck pain and headaches. She also developed depressive symptoms. Due to anxiety, she ceased driving and has not returned to it. She felt that her reaction time was not fast enough to be safe behind the wheel. This step was obviously a change from the first week after the accident when she was driving. No medical practitioner has ever recommended that she stop driving.
- [66] The plaintiff's mother and mother-in-law testified that they noticed changes in the plaintiff. She seemed less organized.

- [67] The plaintiff and her husband testified that as the plaintiff's depressive symptoms evolved, she became less patient with their children. They also testified that, within the business, she was operating at a fraction of her pre-accident efficiency.
- [68] Mr. Smith testified that he noted a significant change in the plaintiff after the accident. She went from being a happy and energetic member of the family to being a "mad mommy". She retreated from family activities. He became protective. In cross-examination, counsel for the defendants suggested to Mr. Smith that the notes of treating practitioners indicated that the plaintiff had achieved substantial improvements. His perception was that any improvement was due to his own efforts to protect the plaintiff from triggers and annoyances.
- [69] A friend, Anisa Motahed, described the plaintiff before the accident as a bubbly wonderful person. Ms. Motahed still babysits for the plaintiff and her husband. She described the plaintiff after the accident as withdrawn. She rarely returns Ms. Motahed's texts.
- [70] As of the trial, the plaintiff continues to complain of chronic pain and symptoms of anxiety and depression. She says that during the years after the accident, her involvement with her family and the portrait business were significantly reduced.
- [71] As set out in the introduction, I have found that the plaintiff tends to overstate the impact of the accident on her life and to catastrophize her condition. In my opinion the perception of her family and friends has been influenced by the plaintiff's tendencies. However, the contemporary records tend to disclose a different narrative than the plaintiff and her family described at trial. Those records include her typed statement and the emails in the week after the accident. They also include clinical records, consultation reports and the business records.
- [72] Several clinical records were put to the plaintiff in cross-examination. The clinical records of various practitioners, describing appointments in 2014, tend to show significant improvement, albeit with ongoing symptoms. The plaintiff did not deny that she had made the comments recorded in the clinical notes. She testified that, in context, she was merely reporting that she was better than she had been immediately after the accident. I noted above the evidence of the plaintiff's condition in the week after the accident.
- [73] The plaintiff returned to the doctor on January 16, 2014, indicating that her headaches were then constant at a level between 2-6/10. Testing on that date indicated that all ranges of motion in her neck, back, and shoulders were normal.
- [74] On February 17, 2014, the clinical note indicates that she had improved. She "felt more normal. However, normal is not normal." She had ongoing complaints of word-finding problems and hearing music in her head. She could work on the computer or hold a conversation, but for limited periods. The doctor referred her to the GF Strong Concussion Clinic. She attended at that clinic for almost a year.

- [75] The plaintiff commenced an active rehabilitation program in November through December 2014. She also started seeing a counsellor during that period and started taking Amitriptyline to assist with sleep. She took over-the-counter painkillers as needed.
- [76] The clinical records of GF Strong Concussion Clinic were tendered in evidence, and the plaintiff was cross-examined on them. Those records chronicle her pain, and cognitive and mood complaints through 2014 and into early 2015.
- [77] The GF Strong status report of December 3, 2014, indicates that the plaintiff reported that her cognition had improved. She reported that she was able to go grocery shopping on her own whereas, a month earlier, she was not able to mail a letter. I note that the inability to mail a letter would suggest a substantial problem with cognitive and physical functioning. That level of symptoms did not exist in the first week after the accident, and could not be explained by the presence of a mild soft tissue injuries and a very mild head injury.
- [78] The doctor at the concussion clinic indicated that the plaintiff was doing "extremely well" as of December 3, 2014. The plaintiff reported that she was working with a personal trainer and could tolerate moderate exercise for up to 30 minutes. She reported that she had a few days when she felt "near normal". The doctor also noted some ongoing symptoms. She remained on Amitriptyline to help her sleep. The doctor recommended Gabapentin for headache relief. Importantly, the doctor recommended increased physical activity.
- [79] The GF Strong status report of February 3, 2015, indicates that the plaintiff reported continued improvement over the prior two months. She continued to have headaches, but her physical pain had reduced. She continued in counselling. These records are inconsistent with the plaintiff's own descriptions of her functioning and injuries.
- [80] The defendants cross-examined the plaintiff about the information in the GF Strong entries (above). The plaintiff responded that during all of her visits, she tried to remain positive. She also stated that any improvement noted in the records was relative to her condition of the prior visit. She did not deny that she had reported those things to her treating practitioners.
- [81] On the basis of the descriptions of the plaintiff's reports of her symptoms contained in the clinical notes in the first year after the accident, the defendants argue that she had substantial recovery within that period.
- [82] For a reason that is unclear, the plaintiff's condition appeared to decline in 2015. The plaintiff continued seeing her psychologist until the late summer of 2015. During that period, the plaintiff's depression worsened to the point where she had some suicidal ideation. While the plaintiff described her condition as waxing and waning, it is clear that the general trend was a worsening of her condition in 2015. There was no reasonable explanation for the decline in her condition in 2015 or any other year that relates to the subject accident.

- [83] It is clear from the medical records and reports that the treating practitioners advised the plaintiff to stay active. Further, it is evident that she benefitted from the exercise program she undertook in late 2014. Despite those facts, after the active rehabilitation program completed, she relied primarily on passive treatments. She testified that she was in too much pain to undertake exercise.
- [84] The claim for special damages is discussed in more detail below. The plaintiff attended 123 massage treatments between January 2014 and September 2019. In addition, the plaintiff attended more than 241 chiropractic treatments with Dr. Chen-See between August 2017 and October 2019. The plaintiff usually saw Dr. Chen-See three times per week during this period.
- [85] When Dr. Chen-See was asked why she did not recommend that the plaintiff pursue an exercise program, she responded that she would only recommend an exercise program after the plaintiff's pain reduced to a level where she could tolerate exercise. On this reasoning, Dr. Chen-See treated her patient 241 times with no apparent lasting benefit. To the contrary, the plaintiff claims that her condition deteriorated during the course of those treatments to the point that she became totally disabled by her pain in the summer of 2019.
- [86] The plaintiff called Dr. Parhar to testify. He became the plaintiff's family doctor in March 2018. He testified about his treatment of the plaintiff. He did not provide a medical-legal report, and his opinion was not sought.
- [87] Although Dr. Parhar did not provide an expert opinion, the plaintiff does rely on his advice regarding her continued use of chiropractic treatments. The plaintiff points to the fact that Dr. Parhar knew that she was seeing the chiropractor three times per week, and either encouraged her, or did not dissuade her, from continuing that treatment.
- [88] I put little weight on Dr. Parhar's advice to the plaintiff regarding the continuation of her chiropractic treatments. To be frank, his clinical records appear designed to be presented as evidence at trial, rather than indicating any particular treatment plan. His notes regularly referenced an injury to the lumbar spine, despite the fact that the plaintiff has never complained of (or alleged) an injury to that area. It is unclear to me which parts of the records he completed, and which parts the patient input by herself.
- [89] Whatever the plaintiff's complaints may have been, they were not sufficiently serious that Dr. Parhar considered making a referral to a specialist.
- [90] Further, on many occasions, Dr. Parhar recorded that the plaintiff was working more than 12 hours per week. The clinical records suggest that Dr. Parhar recorded that information based on a history taken from Ms. Smith. However, the plaintiff testified that she provided the information on a "drop down" menu when she attended his office. She said it was the "12 hour" option was the closest one available when she was choosing from that menu. This discrepancy was not resolved in the evidence. As discussed below, the plaintiff denies that she was working 12 hours per week. This is another point where the documentary evidence

does not accord with her testimony.

- [91] The plaintiff testified that before the accident, she would get a migraine headache once or perhaps twice per year. After the accident, she was getting regular migraines, sometimes multiple times per week. She claims that her headaches remained constant (although varying in intensity) through to the date of trial. She also testified that she had continuous chronic headaches. Her evidence on that point was contradicted by the history contained in Dr. Cameron's report dated December 31, 2018. That report is discussed below.
- [92] The status of the plaintiff's condition in 2019 and at the time of trial is at issue. The plaintiff says that her condition worsened in 2019 to the point that she had to quit working in the family portrait business in August 2019. The documentary evidence does not support that alleged worsening of her condition.
- [93] The plaintiff completed a self-assessment of her depression in early 2019 wherein she rated her depression at "39/40", indicating very severe depression. At the time she completed that self-assessment, she was taking anti-depressant medications. It is fair to infer that she was clinically depressed at that point in time. Within weeks of completing that form, she commenced weaning herself off her anti-depressants and did so within a couple of months "with no ill effects" (according to Dr. Smith). By July 2019, Dr. Smith diagnosed her to be not clinically depressed. The evidence is clear and uncontroverted that her depression, as of July 2019, was in partial remission.
- [94] Thus, the documentary and medical evidence indicates that the plaintiff's overall condition actually improved in the first half of 2019.
- [95] Contrary to this evidence, the plaintiff alleges that her condition declined in 2019 leading up to August 2019, at which point she advised her husband that her health would no longer allow her to continue working in their photography business. This is another example of the plaintiff's allegation regarding her condition not harmonizing with the other evidence.

## Diagnosis/Medical Evidence

- [96] The plaintiff saw a number of doctors who conducted IMEs. The plaintiff tendered reports from four doctors. The defendants tendered one report, although the plaintiff saw three doctors for defence IMEs.
- [97] The defendants rely on the opinion of Dr. Apel, a physiatrist, who saw the plaintiff in 2019. Dr. Apel opines that there is nothing physically wrong with the plaintiff. She opines that the plaintiff did not suffer a traumatic brain injury. Dr. Apel also provided an opinion regarding Ms. Smith's psychological condition. While it is possible that there is some value in that opinion, I prefer the opinion of Dr. Jeanette Smith, the plaintiff's psychiatrist for the reasons set out below.

- [98] The reports tendered by the plaintiff spanned the years 2016-2019. The first report was prepared more than two years after the accident. I described above the evidence suggesting that the plaintiff's symptoms improved over the first year and then waxed and waned. Despite that evidence, the trend of the plaintiff's expert reports became more pessimistic over time.
- [99] The plaintiff's experts did not reach a consensus on whether the plaintiff suffered a traumatic brain injury nor whether she continues to suffer symptoms related to any such brain injury.

### **Dr. Jeanette Smith**

- [100] Dr. Jeanette Smith was qualified as a forensic psychiatrist. In that capacity, she was qualified to review the history and clinical records, and diagnose conditions that existed during periods before the date of her consultation. Her first report was dated January 16, 2016.
- [101] I find Dr. Smith's testimony to be fair and balanced. She did not attempt to expand or overstate her opinions. She made appropriate concessions in cross-examination. She critically analyzed the plaintiff's complaints and formed an independent opinion. That opinion accords with the preponderance of evidence in this case.
- [102] Dr. Smith took a complete history from the plaintiff. Based on the records and the history, she opines that the plaintiff did not suffer any traumatic brain injury in the accident. In her report, Dr. Smith qualified her opinion, stating that she would defer to another specialty on that issue. However, at trial, she testified that she was required to investigate the concussion issue in order to determine the basis of the plaintiff's ongoing problems. Dr. Smith testified that if the plaintiff had suffered a concussion, then her ongoing cognitive and mood complaints could be referenced to that brain injury. Conversely, if there was no brain injury, then that cause could be eliminated. Hence, the determination of whether there was a concussion was a significant determination for Dr. Smith's overall opinion.
- [103] According to the history provided to Dr. Smith, the plaintiff displayed full recall of pre- and post-accident events. She continued driving for the week after the accident. Only after she was diagnosed with a concussion did she stop driving. The plaintiff felt her reflexes and decision-making abilities were too slow. The plaintiff also told Dr. Smith that her symptoms had worsened over time, with the worst period being from February through April 2014. Dr. Smith testified that those portions of the history were inconsistent with the diagnosis of a brain injury.

- [104] Based on all of the information, Dr. Smith formed the opinion that the plaintiff did not suffer a traumatic brain injury in the accident. Dr. Smith provided this opinion in January 2016. The plaintiff did not receive a different opinion for almost two years. (She received the opinion of Dr. Cameron, a neurologist, in December 2017.) There is no indication that the plaintiff's view of whether she suffered a concussion changed after she received Dr. Smith's report.
- [105] Turning to the psychological diagnosis, Dr. Smith's opinion is that the plaintiff had suffered a major depression, but it was in partial remission as of January 2016. The plaintiff also developed a phobia of driving. She opines that the accident caused those two conditions.
- [106] Dr. Smith saw the plaintiff again and prepared a second report dated July 7, 2019. Again, as of that date, the plaintiff did not meet the diagnostic criteria for a major depression. She was, again, in partial remission. However, Dr. Smith found the plaintiff to be "fragile".
- [107] Dr. Smith acknowledged that the plaintiff was facing many stressors, and her psychological condition was multifactorial. However, she found that the cause of the plaintiff's mood problem was the accident. In cross-examination, she stated that nobody could know how the plaintiff would have reacted to the unrelated stressors without the accident. However, she did not resile from her opinion on the causation of the psychological problems. (As noted, the defendants did not present any qualified expert evidence to counter Dr. Smith's opinion.)
- [108] Dr. Smith's diagnosis in the summer of 2019 puts three other pieces of evidence into context. First, as noted above, this diagnosis establishes that the plaintiff's mood had improved during the first half of 2019 (see paras. 92-94, above).
- [109] Second, despite the fact that she was not clinically depressed as of July 2019, the plaintiff advised her husband in August 2019 that she could no longer continue working in their photography business. The plaintiff alleges that she became totally disabled in August 2019. Dr. Smith's opinion does not support that claim.
- [110] Third, as discussed below, Dr. Hawkeswood provided a second opinion in August 2019. That opinion is more pessimistic than his earlier opinion. That change makes no sense when placed in the context that the plaintiff's condition had improved over the first half of 2019.
- [111] Dr. Smith did opine that, looking forward, the combination of chronic pain and fluctuating depression had likely significantly impaired her ability to work in the photography business.
- [112] Dr. Smith's prognosis was that the plaintiff has struggled for five years with fluctuating mood disorder and chronic pain. She has poor stress tolerance. The prognosis for full remission and return to former level of functioning is very guarded.
- [113] Dr. Smith recommended future treatment consisting of psychological counselling and anti-depressants.

**Dr. Sara Simpson**

- [114] The plaintiff saw Dr. Sara Simpson, a neuro-ophthalmologist, for an IME in April 2017. Dr. Simpson did not finalize her report until April 25, 2018.
- [115] Based on the history provided by the plaintiff, Dr. Simpson diagnosed a concussion. As part of that history, the plaintiff reported, or Dr. Simpson understood, that "she was immediately disoriented on account of the accident and throughout the rest of the evening." As discussed above, I have found that the plaintiff may have been momentarily confused about the cause of the "jolt" to the back of her vehicle, but she was not "disoriented" after the accident.
- [116] The plaintiff also described to Dr. Simpson that she had patchy recall of the period after the accident. That statement was part of the foundation of Dr. Simpson's opinion. However, as I have found above, the statement typed by the plaintiff on the day after the accident indicates that she had full recollection of events. Further, the plaintiff told Dr. Smith in 2016 that she had full recall of events before and after the accident.
- [117] Hence, the basis for Dr. Simpson's opinion regarding the existence of a concussion is incorrect. I do not accept her finding that the plaintiff suffered a concussion.
- [118] Dr. Simpson also recorded, as part of Ms. Smith's history, that prior to the accident, she could "cull" the photos for two photoshoots in one day. Since the accident, she has only been able to "complete 1 shoot over a 6 month period." It is unclear whether that was the statement provided by Ms. Smith at the time, or Dr. Simpson misunderstood that information. However, it is clearly not a correct description of the plaintiff's abilities and functioning after the accident. To the extent that it may have influenced Dr. Simpson's opinion, it was not an accurate description of the plaintiff's functional and cognitive abilities after the accident.
- [119] Although she found that the plaintiff suffered a concussion, Dr. Simpson did not opine that any of Ms. Smith's ongoing cognitive issues were related to any post-concussion syndrome. Dr. Simpson wrote that any prognosis for the plaintiff's cognitive complaints would have to tease out which complaints were related to her mood disorder versus those related to the sequelae of a brain injury. Dr. Simpson noted that such a determination would require a psychiatric assessment or a neuropsychological assessment. The plaintiff did not tender any evidence of a neuropsychological assessment. The only psychiatric opinion was that of Dr. Smith, discussed above.

- [120] I do not find Dr. Simpson's report to be of assistance.

**Dr. Donald Cameron**

- [121] Dr. Donald Cameron, a neurologist, provided a report dated December 31, 2018. He saw the plaintiff almost four years after the accident.

[122] Dr. Cameron opines that the plaintiff suffered a mild traumatic brain injury and that she developed symptoms of post-traumatic brain injury syndrome. He also opines that her current cognitive symptoms are mainly due to her pain and depression and not to any brain injury.

[123] The defence argues that I should not accept Dr. Cameron's opinion regarding the existence of a mild traumatic head injury. They point to Dr. Cameron's record of the plaintiff's description of her recollection of events as follows:

She recalls the initial part of the impact. She was confused after the accident. She has snapshot recall of the events of the scene of the accident after the impact. She has snapshot recall of the ride to the emergency department at Mount St. Joseph's Hospital, on the day of the accident. She has no recall of riding home after she left the scene of the accident.

[124] Based on that description, Dr. Cameron stated that, in his opinion, "Ms. Smith was in a period of posttraumatic amnesia for probably several hours after the accident."

[125] The defence argues, and I accept, that Dr. Cameron's description of the plaintiff's recollection of the day of the accident is simply incorrect. He testified that the plaintiff had lost segments of her memory for periods of time or events after the accident. He testified that it was notable that the plaintiff was unable to recall segments of the events of that day. He would expect that there would have been a general decrease in her recollections of the entire day.

[126] Dr. Cameron's account of the plaintiff's recollections does not accord with the evidence. If the plaintiff gave that impression to Dr. Cameron, then it was doubly concerning, because it would indicate that she misled an expert retained to provide a report in this action. However, I find it is more probable that Dr. Cameron arrived at that finding by selecting and interpreting pieces of the history in order to reach a finding that the plaintiff suffered a brain injury.

[127] Dr. Cameron saw the plaintiff almost four years after the accident. One would expect a person's memory to decline over that period. Ironically, the plaintiff's testimony at trial demonstrated a better recollection of the events of the day of the accident than other witnesses. For example, in her testimony at trial, the woman who was the plaintiff's passenger in the accident forgot that they had visited two stores before returning to the plaintiff's residence. The plaintiff's mother and husband have both forgotten segments of the events of that day. Ironically, they displayed the type of segmental memory loss that Dr. Cameron identified as being suggestive of a traumatic brain injury. On the whole, the plaintiff's recollection of January 2, 2014, is better than the other witnesses who were with her that day.

- [128] I do not accept Dr. Cameron's opinion regarding the possibility of a brain injury. His opinion is premised upon the plaintiff having snapshot recollection after the accident. He found that she had post-traumatic amnesia for a period of several hours after the accident. It was clear from her testimony in chief, her reports to prior physicians, and her statement written on January 3, 2014, that she had fluid memory after the accident.
- [129] The defence also argues that Dr. Cameron's demeanor during his testimony was indicative of an expert who was acting as an advocate and not attempting to assist the court. I agree.
- [130] Counsel put a number of basic propositions to Dr. Cameron in cross-examination. On almost every occasion, he deflected the question and used the opportunity to provide further information that, he felt, assisted the plaintiff's claim. He continued to conduct himself in that manner after I indicated to him on two occasions that he was not answering the questions that counsel was asking. My impression was that he was advocating for the plaintiff and not attempting to assist the court with honest and unbiased answers to questions.
- [131] Dr. Cameron's report also discussed the plaintiff's ongoing headaches. He indicates that, as of November 2017, those headaches were intermittent, but could be quite severe. The plaintiff denies describing her headaches as "intermittent" to Dr. Cameron. Dr. Cameron opines that the headaches were, in part, related to the mild traumatic head injury. It follows from my finding above that I do not accept his opinion regarding the cause of any of the plaintiff's headaches.
- [132] It follows that I do not accept Dr. Cameron's prognosis for Ms. Smith's future recovery.
- [133] I do not find his report to be of assistance, and I do not accept his opinion. Given that finding, I do not need to reconsider my decision to admit his report into evidence (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 45).

#### Dr. Hawkeswood

- [134] Dr. Hawkeswood is a physiatrist who provided two reports, dated January 25, 2018, and August 8, 2019.
- [135] The most notable thing about Dr. Hawkeswood's two reports is that he changed his opinion on three major issues between the two reports. First, his opinion changed regarding the existence of a traumatic brain injury. Second, his prognosis for the plaintiff's ongoing condition changed dramatically. Finally, his future treatment recommendations changed completely.
- [136] For the reasons set out below, I find that Dr. Hawkeswood's first report is a more accurate description of the plaintiff's injuries, condition, and prognosis.
- [137] In his first report, dated January 25, 2018, Dr. Hawkeswood opined that the accident caused chronic pain in the plaintiff's neck and inter-scapular area. It increased the frequency of her migraine headaches. It triggered her pre-existing anxiety and caused driving anxiety.

He also diagnosed psychological problems, including catastrophization and fear avoidance behaviour. He found that she was deconditioned. He found that her sleep problems had largely resolved. He felt that any cognitive symptoms could be explained as an indirect complication of pain, sleep disruption, deconditioning, anxiety, and mood problems.

- [138] Dr. Hawkeswood recommended future treatment, including an independent exercise plan program. He did not recommend regular "allied health modalities" (meaning massage, physiotherapy, or chiropractic treatments), although they could be used intermittently to support an exercise program as pain levels fluctuated. He was against the idea of chiropractic and massage therapy, writing that chiropractic treatments and lidocaine injections promote passive reliance on health care providers.
- [139] In his first report, Dr. Hawkeswood provided a prognosis and opinion regarding future vocational impact. He felt that she could still improve with exercise and treatment of her mood. Specifically, he thought that her work in her business would be "likely still mildly restricted." However, with some time dedicated to rehabilitation, "she should be able to resume her pre-morbid level of work involvement." He estimated a period of rehabilitation from "months up to a couple of years." He also thought that she would be independent in self-care and household activities.
- [140] Based on his examination and history taken four years after the accident, Dr. Hawkeswood opined that the plaintiff should be able to resume her pre-morbid level of work involvement.
- [141] As noted above, he found that it was possible, but not probable, that the plaintiff suffered a concussion in the accident. That opinion followed Dr. Cameron's report dated December 31, 2017. At the time Dr. Hawkeswood wrote this opinion, he was in possession of all the post-accident clinical records.
- [142] The plaintiff saw Dr. Hawkeswood again in August 2019. His second report, dated August 23, 2019, was written approximately six weeks after Dr. Smith's second report wherein she found the plaintiff's depression to be in partial remission.
- [143] In his second report, without reviewing any new medical information, Dr. Hawkeswood changed his opinion regarding the plaintiff suffering a concussion in the accident from "possible" to "probable". I put no weight on his changed opinion. He came to the first opinion four years post-accident. In the intervening twenty months, nothing changed except that she had some improvement in her headaches and her depression.
- [144] Despite changing his opinion on the occurrence of a concussion, Dr. Hawkeswood did not believe that any of the plaintiff's ongoing cognitive impairment was caused by that injury. Instead, any problems were due to pain, sleep disruption, anxiety, and depression.
- [145] In his second report, Dr. Hawkeswood found that the plaintiff "has a high degree of perceived disability." He also found that she catastrophizes.

- [146] The biggest change in Dr. Hawkeswood's second report came in the area of vocational prognosis. He repeated his prior assessment, but changed his opinion regarding her ability to work. He suggested that she avoid work in the immediate future. He also revised his opinion to say that a return to regular full-time employment is unrealistic because of multiple barriers, and he specifically opined that her psychiatric issues are likely disabling. This opinion does not accord with Dr. Smith's psychiatric evaluation six weeks earlier.
- [147] Dr. Hawkeswood then wrote that he believes the plaintiff is totally disabled and will need five to eight years before she can work on a regular part-time basis.
- [148] I do not accept that opinion for the reasons set out below.
- [149] First, he stated in his report that her self-perceived disability is high. He then failed to factor that self-perception into his assessment of her ability to work.
- [150] Second, I reviewed above the evidence regarding the progress of her condition. The evidence establishes that the plaintiff's condition had improved over the 20 months between his two reports. She was not clinically depressed. She was not on antidepressants. The only thing that had changed was that the plaintiff informed Dr. Hawkeswood that she was leaving the couple's photography studio business. Given that her overall condition had improved, I cannot accept his opinion that she became totally disabled in the interim. Nor can I accept that her vocational prognosis worsened.
- [151] Regarding future care, Dr. Hawkeswood's second report changes course and recommends a maximum of one to two appointments (allied health) per month. He suggests that Botox injections might assist. He opines that the plaintiff could still improve her condition with independent exercise. Again, there is no explanation from Dr. Hawkeswood as to the change in his opinion regarding these "allied health" modalities. In his first report, he recommended against them. In his second report, he recommends them. I do not accept the future care recommendations in his second report. This issue is discussed in more detail under the heading "Future Care".
- [152] For the reasons set out above, I reject Dr. Hawkeswood's second report and prefer the opinions set out in his initial report.

## Adverse Inference

- [153] The plaintiff argues that I should draw an adverse inference from the fact that the defendants arranged for the plaintiff to see three specialists for IMEs, but only produced a report from one specialist. The defendants did not adduce reports from a psychiatrist and a neurologist. The plaintiff relies upon the recent Court of Appeal decision in *Singh v. Reddy*, 2019 BCCA 79.

- [154] The plaintiff acknowledges that the decision in Singh relates to the failure of a party to call a lay witness as opposed to an expert. I note the statement of general principles in Singh includes the following:
- [25] There is no rule that a party must call a witness who is unlikely to help in proving one's case. The nature of an adversarial system is that every litigant is expected to put before the court only what evidence counsel believes will be probative of his or her position. There may be many reasons why counsel decides not to call a witness and it is generally not the business of the court to ascertain those reasons.
- [155] I note that the decision of whether to draw an adverse inference is discretionary. I also note that the defendants in this case bear no onus of proof on causation or diagnosis. That onus lies on the plaintiff. Drawing an adverse inference on those issues, against the defendants, would be akin to requiring the defendants to prove that a certain diagnosis or causation finding was not established.
- [156] Further, the drawing of an adverse inference, in this case, could lead to an absurdity. I have rejected the second, but not the first, report of Dr. Hawkeswood. I have set out above my reasons for rejecting the opinions of two neurologists, Dr. Simpson and Dr. Cameron. Were I to draw an adverse inference from the fact that the defendants did not call their neurologist, it is unclear what adverse inference I should draw. Clearly, I cannot draw the inference that the defendants' neurologist would have agreed with the plaintiff's neurologists, whose opinions I have rejected.
- [157] I have accepted, in large part, the opinion of Dr. Smith. I am not sure that an adverse inference would assist the plaintiff in relation to a psychiatric opinion.
- [158] I decline to draw an adverse inference from the defendants' failure to present evidence from their neurologist and psychiatrist.

### Summary of Findings Regarding the Plaintiff's Injuries

- [159] Having considered all of the evidence discussed above, I make the following findings regarding the injuries suffered by the plaintiff in the subject accident:
- a) She suffered a moderate whiplash injury that has developed into a chronic pain condition. That pain improved over the first year after the accident and has waxed and waned since the beginning of 2015.
  - b) She suffered an increase in the number of migraine headaches that she suffered before the accident. Those headaches were constant at first, but eventually became intermittent.

- c) The chronic pain caused her to develop major depressive disorder. Her depression was treated and went into partial remission by early 2015. It then waxed and waned over time. Although she required a further period of antidepressant medications in 2018, she was able to wean herself off those medications in early 2019 with no ill effects. As of mid-2019, her depression was in partial remission.
- d) She did not suffer a traumatic brain injury.
- e) She developed a driving anxiety, although she was never advised to stop driving by any practitioner.

[160] With respect to my finding that the plaintiff did not suffer a traumatic brain injury, in addition to the other considerations, I note that none of the plaintiff's IME doctors were in possession of the engineering reports when making their diagnosis. As noted, the engineers for both plaintiff and defence found that the prospect of the plaintiff suffering a concussion in the subject accident was very unlikely unlikely.

[161] In terms of the impact of the injuries, I note that many things in the plaintiff's life remain the same before and after the accident. She continues to be married to a committed husband. They are raising their two children. Until recently, they operated their photography business.

[162] I also formed the impression that the plaintiff and her husband tended to blame the accident for health and behavioural issues occurring in other members of the family. Unfortunately, Mr. Smith has developed an autoimmune condition that may disable him from working. Because of that disease, his doctors advised him to avoid stress. The plaintiff's version of that diagnosis is that the stress resulting from her injuries caused her husband's autoimmune disorder. That is not a reasonable interpretation of any version of the evidence. However, it does indicate the plaintiff's propensity to blame the accident for unrelated issues.

[163] The overall impression from the evidence is that the plaintiff achieved significant recovery from the symptoms that beset her in the months after the accident. She continues to have ongoing symptoms, but those symptoms do not have the significant effect that the plaintiff alleged in this trial. The accident caused her to have some degree of unresolved depression and some degree of ongoing chronic pain.

#### Assessment of Damages

##### Non-Pecuniary Damages

[164] There is a relative agreement between the positions of the parties on the assessment of non-pecuniary damages.

[165] The plaintiff submits that the range of damages is \$125,000-\$175,000. Counsel suggested that if I find that the plaintiff did not suffer a traumatic brain injury, then the lower end of that range would be appropriate.

[166] Defence counsel submits that the appropriate award is \$120,000.

[167] I award \$120,000.

## Mitigation

[168] The defendants argue that the plaintiff's non-pecuniary damages should be reduced by 10% on the basis that she failed to mitigate her losses by participating, or continuing to participate, in an active rehabilitation program.

[169] A plaintiff has an obligation to take steps to minimize her or his loss. The onus on the defendant is to establish that plaintiff acted unreasonably in not pursuing the recommended treatment and that, if that treatment had been pursued, the extent to which the damages would have been reduced: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

[170] In *Gill v. Lai*, 2019 BCCA 103 at para. 26, the court held that the trial judge is entitled to look at the personal circumstances of a plaintiff to determine whether the course of action taken was reasonable. The subjective component of the test permits the court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, but to look at the individual's personal circumstances and ability to follow that advice. Further, the objective component of the test entitles the court to look at what a reasonable person in that plaintiff's circumstances would do.

[171] In this case, as noted, the plaintiff had significant improvement by December 2014 with her active rehabilitation program. Thereafter, her condition oscillated, but it did not appear to be as good as it was in early 2015.

[172] The clinical records of the plaintiff's family physicians, Dr. Parhar and Dr. Bohorquez, as well as her counsellor, Dr. Sharir, indicate that they regularly recommended that the plaintiff exercise. Further, as noted, Dr. Hawkeswood's first report recommended ongoing exercise.

[173] I agree with Dr. Apel about the treaters to whom the plaintiff has gravitated. She opted for treatments providing short term benefit, and those led her down a path toward being deconditioned. She did not exercise although every medical doctor recommended it.

[174] The defendants submit that, contrary to that medical advice, the plaintiff did not exercise and, instead, relied on the passive massage and chiropractic treatments.

[175] In response, the plaintiff notes that her chiropractor, Dr. Chen-See, did not encourage her to exercise. The plaintiff points to her advice as part of the mixed messaging that she was receiving from her treaters regarding exercise.

- [176] However, I have significant difficulty with the plaintiff's reliance on her chiropractor and with her chiropractor's overall treatment plan. Dr. Chen-See testified that she did not recommend that the plaintiff engage in an exercise program because the plaintiff's pain levels were too high. Dr. Chen-See wanted to continue treatments to bring the pain level down. As noted above, despite the large number of appointments with Dr. Chen-See between August 2017 and October 2019, the plaintiff claims that her condition did not improve to a point where Dr. Chen-See could recommend exercise. I also note that, during certain months, the plaintiff also agreed to pay Dr. Chen-See for her "Premium Package" at the rate of \$500 per month. That "package" included counselling services.
- [177] I have noted, above, the other evidence indicating that there was improvement in her overall condition in 2019. However, according to the plaintiff, she went from being employable to being unemployable during the period that Dr. Chen-See was treating her. I also note that over the course of the visits, Dr. Chen-See and the plaintiff became friendly. Dr. Chen-See and her family became clients of PhoTobin, and those photos were included on the business' website. I find the close relationship between Dr. Chen-See and the plaintiff to be troubling in the context of the hundreds of treatments, and the claim for special damages and future care costs.
- [178] The plaintiff was paying Dr. Chen-See (without any reimbursement by any health benefit provider) until Dr. Chen-See agreed to delay recovery to the resolution of the plaintiff's personal injury claim. In this regard, I assess that the plaintiff had the financial capacity to involve herself in a more active rehabilitation program, but chose to see Dr. Chen-See instead. I find that the plaintiff, in her particular circumstances, could have pursued more active rehabilitation. I also find that a reasonable person would have done the active rehabilitation.
- [179] I find that there is sufficient evidence that, if the plaintiff had continued with her exercise program, her condition would have remained at the level it reached by early 2015 when she completed her active rehabilitation program. The evidence indicates that she had had substantial recovery by that time.
- [180] The defendants argue that I should reduce the plaintiff's non-pecuniary damages by 10% to reflect this failure to mitigate. I accept the defendants' argument on that issue. The non-pecuniary damages will be reduced by 10% to \$108,000.

## Loss of Capacity

- [181] The plaintiff claims that, due to her injuries, she has suffered a decrease in her earning capacity. She says that she has suffered a loss in the past and that she will continue to suffer a loss into the future. In part, she bases her claims for past and future loss of capacity on her work history as an esthetician. A review of the plaintiff's employment history is necessary.

- [182] Prior to working with her husband in the photography business, the plaintiff qualified as an esthetician in 2000. She worked in that occupation until the birth of their second child in 2010. During a stretch of years before the birth of their first child (2008), she earned an average of approximately \$44,000 per year. The plaintiff argues that that figure was substantially above the average income for estheticians. She tendered an economist report substantiating that position.
- [183] While working as an esthetician at a spa in Vancouver, the plaintiff showed commitment and hard work. She provided management services to her employers, two women who owned the spa. Her highest annual income was \$51,000. She testified that she hoped to work toward becoming a part owner in the spa, but the owners did not share her vision. As a result, the plaintiff cut back on her management duties with a resulting decrease in her income.
- [184] The plaintiff's income was further affected by the arrival of her children, born in 2008 and 2010. During her maternity leave after their second child, she and her husband decided that she would join his photography business. She started there in August 2011. According to their evidence, she told her husband that she wanted him to find a niche and improve his photography work product. She would focus on the other aspects of the business.
- [185] The plaintiff started in the photography business in August 2011. She left the business in the summer of 2019. Mr. Smith testified that the plaintiff left the business because the pain was too much for her. Since August 2019, she has only been involved in two or three portrait sessions.
- [186] While involved in the business, the plaintiff ran the business side while her husband took the photos. She and Mr. Smith marketed the business together. The plaintiff was responsible for booking photoshoots, doing hair and make-up, culling the photos to find the best shots, and conducting the sales meeting with the clients. Mr. Smith testified that, before the accident, the plaintiff was responsible for approximately 75% of the work within the business.
- [187] Starting in 2012, the business sought to pursue a niche market in a form of "glamour" photography. That niche focussed primarily on female clients. That effort met with moderate success. Since that time, the business attempted to rebrand itself on more than one occasion.
- [188] In 2018, they changed the name from PhoTobin, which was a play on Mr. Smith's name, to "Mr. and Mrs. Smith Photography". The plaintiff and her husband say that they were attempting to find ways of pursuing the business wherein the plaintiff was less involved. It is unclear how changing the focus from Tobin Smith to "Mr. and Mrs. Smith" indicated an accommodation of the plaintiff's health.

- [189] In 2019, in a further attempt to change the focus of the business, the plaintiff and her husband commenced an offshoot business called "Rapid Fire Portraits". The concept was that clients could get professional photographs taken quickly and relatively inexpensively. The couple brought in a friend who was going to work with them in that part of the business. However, that friend decided to pursue another employment opportunity, and the venture did not proceed.
- [190] As noted above, the Smiths say that their photography business is "on hiatus". They testified that after the plaintiff departed the business in mid-2019, the business was not viable. However, the evidence disclosed that Mr. Smith developed significant health problems of his own in the first half of 2019. I find that Mr. Smith's health problems, and not the plaintiff's, led to the business not being viable in the latter part of 2019.
- [191] The plaintiff and her husband testified that before the accident, the plaintiff was working in the business on more than a full-time basis. Although they concede that they booked work around their children's schedules, they say that they had substantially more photoshoots per month before the accident than after the accident.
- [192] They both testified that, after the accident, they had to limit the number of sessions to accommodate the need for the plaintiff to recover from the exertion of a photoshoot. They acknowledge that the income of the business did not substantially change but argue that they increased the selling price of their portraits and sold more photos to each client. Further, they say that the "systems" that the plaintiff had established before the accident allowed the business to continue despite her reduced involvement.

### **Past Loss of Capacity to Earn Income**

- [193] For the purpose of calculating the claim for past loss of capacity, the plaintiff breaks the years since the accident into two periods.
- [194] First, the plaintiff submits that if she had been at full capacity during the years 2014 and 2015, then the business would have earned more money. The plaintiff testified that, based on her own assessment, she was working at less than 20% of her pre-accident capacity during those years. She argues that she lost gross income of \$70,000 during those two years. That figure represents half of the loss, she says, suffered by the business.
- [195] Second, the plaintiff argues that if the photography business had not been successful, then she would have left the business and pursued her prior occupation as an esthetician after the end of 2015. Hence, the plaintiff submits, she would have earned income in excess of \$50,000 from 2016 to the date of trial. She says that she would have earned approximately \$190,000 over that period. After deducting the plaintiff's actual income from the photography business (approximately \$70,000), the resulting loss for those four years is \$120,000.
- [196] On this basis, the plaintiff claims \$190,000 as her gross past income loss.

- [197] The defendants say that the evidence does not disclose any past income loss suffered by the plaintiff. Alternatively, they argue that the plaintiff suffered a nominal loss.
- [198] First, as discussed above, one of the major roles that the plaintiff had in the business was doing the "hair and make-up" for clients. The evidence of Mr. Smith was that, in the six years since the accident, they retained another hair and make-up person on 10-15 occasions. The plaintiff attended all but two of those portrait sessions. There is no documentary evidence of the amounts paid to the replacement workers. The defence notes that 10-15 sessions over six years represents approximately two occasions per year. The defence submits that this evidence does not suggest any significant reduction in the plaintiff's involvement.
- [199] Second, the defendants countered the plaintiff's allegation that the business booked in substantially fewer photoshoots per month after the accident. At the defendants' request, the plaintiff produced lists of clients for the years of 2013 through 2019. The client lists show the total number of clients per year. The yearly lists indicate that the number of clients increased from 2013 (the year before the accident) to 2014 (the year after the accident). The number of clients remained consistent through 2015 and then dropped slightly in 2016 and again in 2017.
- [200] The defendants submit that the client figures contradict the plaintiff's testimony that the business was booking more sessions before the accident. To the contrary, there was an increase in photoshoots after the accident. I note that, when presented with the client list for 2013, Mr. Smith testified that he could think of approximately nine additional clients from that year that were not listed. It is unclear why he did not provide those names when compiling the list, or at any point before his cross-examination. It is notable that he testified about additional clients he could recall from 2013, but none from the years after the accident.
- [201] The yearly client list and the tax documents establish that the business increased the number of portrait sessions, by approximately half, in the year immediately following the accident. The gross and net income also increased. That evidence does not suggest that the business lost any revenue. It directly contradicts the plaintiff's evidence that the Smiths reduced the number of portrait sessions they were conducting to compensate for the plaintiff's health. The business then stayed at that level, or close to it, until 2019.
- [202] Third, the defendants argue that, if anything, it was the problems with Tobin Smith's health that had a negative impact on the business. He suffered from significant back problems in 2016 and more recently, he was diagnosed with an autoimmune condition in 2019. As noted above, as of late 2019, the business was "on hiatus", and neither Mr. nor Mrs. Smith was working in the business. Although he testified that his wife's health had a greater negative impact on the business, I find that his testimony is not realistic in that regard. Clearly, the decline in his health in 2019 provides a more reasonable explanation for any reduction in business earnings in 2019. It is unlikely that the health of the plaintiff, who was injured in

2014, would begin to cause a downturn in 2019.

- [203] Fourth, the defendants argue that the plaintiff's description of her work activities attempted to convey the narrative that she was barely working within the business. However, during her visits with Dr. Parhar, she indicated that she was working more than 12 hours per week. In the history she provided to Dr. Simpson, she stated that she was working "full-time" which was 10-15 hours per week. The defendants submit that I cannot accept the plaintiff's evidence on the amount she was contributing to the couple's business because her own prior statements are inconsistent with that claim.
- [204] Finally, the defence argues that there is no evidence that the plaintiff would have exited the business if it did not provide income equivalent to her earnings before the arrival of her children. I accept that argument. The plaintiff and her husband were clear in their evidence that they viewed this business as a team operation. They gave conflicting evidence about the goal of the business. At various times, they suggested that they were in business for themselves so that their incomes would be unlimited. At other times, they testified that money was not the most important thing to them. They acknowledged booking sessions around their children's schedules.
- [205] In assessing past loss of capacity in this case, the court is considering hypothetical events. The test is whether there is a real and substantial possibility that a loss occurred. A loss based on mere speculation is not sufficient. I am attempting to construct what the plaintiff would have earned, not what she could have earned.
- [206] The plaintiff's submissions acknowledge that the photography business was relatively new and that no earnings projection can be extrapolated from the prior earnings. It is implicit in the plaintiff's position that new businesses can fail, or fail to prosper, for any number of reasons. In this case, as noted, the business initially improved after the accident and then levelled off.
- [207] The tax records indicate that the plaintiff and her husband divided the income from the business equally except that Mr. Smith claimed more deductions. As a result, the gross and net income of the business is a good gauge of the health of the business.
- [208] I accept the defendants' argument that the tax records do not indicate that the couple suffered any reduction in business or income. In 2013, the gross business income was \$63,656. In 2014 (the year immediately following the accident), the gross business income increased to \$81,816. It increased again in 2015 to \$91,863. From 2016 to 2018, the gross income was between \$85,000 and \$91,000. These yearly incomes do not display any trend indicating that the business was suffering due to the plaintiff's health.
- [209] I also accept the defendants' argument that there is no evidence that the plaintiff would have exited the business if it was not producing a certain level of income. That argument on behalf of the plaintiff constitutes pure speculation.

[210] As noted above, the defence argues that if the plaintiff suffered a loss of capacity to earn income in the past, it was nominal. It follows from my findings of fact above that if the plaintiff's capacity to earn income was reduced, it did not result in any loss to the business. The claim for past loss of capacity is speculative. There is no real and substantial possibility that she would have earned more income if the accident had not occurred. I, therefore, decline to make an award for past loss of capacity.

### Future Loss of Capacity

[211] The plaintiff claims that her ability to earn income in the future has been reduced. In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Justice Voith succinctly summarized the legal principles applicable to this head of damage:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[212] It is clear, from the medical evidence I have accepted, that the plaintiff continues to be affected by mood problems and chronic pain. The evidence of Dr. Smith establishes that as of July 2019, the plaintiff was not clinically depressed, but was "fragile".

- [213] However, as noted above, I find that I must be careful in assessing the expert opinions because the plaintiff has a high degree of perceived disability.
- [214] The plaintiff bases her argument for future loss of capacity on her claim that she is, at present, totally disabled. Further, she says that when she returns to work, she will suffer a permanent partial disability. The plaintiff argues that her earnings history as an esthetician in the period before her children were born indicates that she had the capacity to earn significantly more than an average esthetician.
- [215] Relying on the second report of Dr. Hawkeswood, the plaintiff divides her claim for future loss of capacity into two periods. First, she notes that Dr. Hawkeswood opined that she would not be able to return to any form of work for the next five to eight years. Using her earnings as an esthetician (before children), applying contingencies, and using the period of eight years of total disability, the plaintiff calculates the first period of the future loss at approximately \$411,000. That figure represents slightly more than \$50,000 per year in earnings, which is double the average esthetician's earnings.
- [216] At that point, the plaintiff would be 49 years old.
- [217] Thereafter, the plaintiff says that she will be able to return to work. However, she will only be able to work at 50% of her (pre-children) capacity. Again, she argues that her pre-accident capacity was double the average. She calculates the future loss between the age of 49 and 70 at \$347,807.
- [218] Based on those combined calculations, the plaintiff claims the amount of \$759,639 for future loss of earning capacity.
- [219] The defendants acknowledge that the plaintiff's ongoing condition will cause her to have some reduced capacity to earn income in the future. However, they argue that the reduction in her capacity will be limited.
- [220] First, the defendants argue that I should not accept the second opinion of Dr. Hawkeswood. They say that there is no explanation for the "flip flop" from his first to his second report regarding her ability to work. As discussed above, I do not accept Dr. Hawkeswood's second opinion.
- [221] The defendants further argue that the plaintiff's emotional state when she left work in mid-2019 was affected by several unrelated issues. They submit that any loss occasioned by the unrelated factors is not compensable. I do not accept the defendants' argument on this point. There is no evidence that, absent the accident, the plaintiff's ability to work would have been limited by those external events. Dr. Smith opines that the plaintiff was more vulnerable to ordinary stressors.
- [222] The defendants submit that any future loss of capacity award should be in range of \$40,000.
- [223] Dr. Smith wrote at page 6 of her second report (July 7, 2019):

It is therefore my opinion that the combination of chronic pain and fluctuating levels of depression and anxiety have likely significantly impaired Ms. Smith's ability to function in the family's photography business

I would also add that this combination of chronic pain, depression and anxiety will have rendered Ms. Smith less resilient in the face of stress and therefore more readily overwhelmed and fatigued when attempting to deal with day-to-day stressor [sic] both in the workplace and at home.

[224] I note that in July 2019, Dr. Smith did not believe that the plaintiff was totally disabled from working. She was not clinically depressed. She was not taking any anti-depressants. Hence, the plaintiff's departure from the business in August 2019 cannot be explained by the injuries suffered in the accident.

[225] I also note, in his first report, Dr. Hawkeswood opined that he expected that she would be "mildly restricted" because episodes of increased pain would "detract from her productivity". He wrote at page 5 of his first record:

Looking ahead, it is my opinion that she should be able to resume her pre-morbid level of work involvement with further time for rehabilitation, although not in the immediate future.

Beforehand, she needs further time for recovery in combination with the above treatment plan; I estimate that this will require a time span ranging months up to a couple of years. No long-term disability is anticipated.

[226] Thus, his opinion in 2018 was that there would be minimal loss in the near future and none in the long term.

[227] In my opinion, the correct assessment lies somewhere between Dr. Smith's second opinion and Dr. Hawkeswood's first opinion.

[228] Based on the testimony of the plaintiff and her husband, the future of the photography business is in doubt. Hence, the plaintiff may have to look for work outside of that environment.

[229] I make the following findings with respect to the plaintiff's future work capacity:

- a) If the photography business is forced to close, it is not due to the injuries the plaintiff suffered in the accident.
- b) Given her current situation, being married with two young children, it is unlikely that she will choose an occupation that requires retraining or extended schooling.
- c) As a result, it is likely that, if the photography business does close, she will return to work as an esthetician or in a related field.

- d) Although she exhibited the ability to earn an income substantially higher than the average esthetician did, those earnings occurred when the plaintiff was in her 20s and before she had children.
  - e) Absent the accident, if the plaintiff were forced to return to the workforce (outside of the couple's business), her earnings would have been similar to the average earnings of an esthetician.
  - f) Based on Dr. Smith's second report and Dr. Hawkeswood's first report, I find that the plaintiff's ability to work as an esthetician has been reduced.
  - g) The plaintiff's economist prepared a report setting out the average earnings of estheticians. She provided a table calculating the projected income of the average esthetician who is the same age as the plaintiff, from the trial date to age 65. Applying labour market contingencies involving risks and choices, the plaintiff's economist estimates the remaining career earnings would be \$353,497.
- [230] Given those finding, I must assess the amount of the reduction in the plaintiff's capacity caused by the accident. If the couple manages to operate the photography studio, then I do not believe that there will be any significant reduction in her earning capacity. However, if she moves back to working as an esthetician, it is likely that she will be limited in her ability to work.
- [231] Considering all of the available evidence, I assess the loss of future earning capacity at \$100,000. That figure constitutes a reduction somewhere between 25% and 30% of the plaintiff's ability to work as an esthetician. As discussed above, it is not a certainty, nor even a probability, that the plaintiff will move back into that type of work and suffer a loss. I am assessing the future possibilities, and I consider that award to be fair in the circumstances.

#### Cost of Care

- [232] The parties agree on the legal principles to be applied, but not on the application of those principles.
- [233] The plaintiff seeks an award in the range of \$131,470-\$157,575.
- [234] The defence submits that the award under this head of damage should be in the range of \$3,000-\$5,000.
- [235] The legal principles underlying an award under this head of damage have been well settled for many years. The test is an objective one based on medical evidence. There must be a medical justification for the awarded treatment, and the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [236] The vast majority of the future care sought in the plaintiff's submissions consist of the following:

- a) One to two massage or chiropractic treatments per month, for life. The cost associated with these treatments is \$45,000-\$70,745. The medical basis of these treatments is Dr. Hawkeswood's second report.
- b) Botox injections, every three months, at a cost of \$800 per injection, for life. The medical basis of this treatment comes from Dr. Bohorquez, the plaintiff's family physician. The plaintiff also relies on the second report of Dr. Hawkeswood.

[237] I find that the plaintiff has not satisfied the burden of establishing that these treatments, at this frequency, are medically necessary. I make that finding because the plaintiff's experts whose evidence I have accepted did not make these recommendations.

[238] In his first report, which I have accepted, Dr. Hawkeswood wrote:

Ongoing regular access to allied health modalities is probably not indicated. I have no objection to intermittent access as she continues with her rehabilitation course.

While I recognize Ms. Smith reports subjective symptom improvement with various chiropractic treatments and lidocaine injections, this approach promotes passive reliance on health care providers ("externalization"). Instead, an activity-based rehabilitation program and pain education would be reasonable.

[239] Dr. Hawkeswood amended his opinion in his second report and suggested a reduction of her treatments to "one or two appointments per month". However, there is no explanation for the polar shift in his recommendation. A mode of treatment that he eschewed in 2018 became a significant part of the plan in 2019. That simply makes no sense. I reject Dr. Hawkeswood's second opinion and his recommendation for future treatment in his second report.

[240] I make no award for future chiropractic, massage, or Botox injection treatments.

[241] At present, the plaintiff is not on antidepressant medications. The plaintiff's counsel invites me to make a finding that any future need for such medications is caused by the accident. She will make a claim for such expenses under Part 7 of the Insurance (Vehicle) Regulation. I make that finding.

[242] The plaintiff also seeks the cost of driving lessons. I have noted above that no doctor has suggested or recommended that the plaintiff cease driving. She drove in the week after the accident. I make no award for driving lessons.

[243] Dr. Smith recommends that psychological treatment should form the cornerstone of the plaintiff's treatment to deal with pain, anxiety, and depression. Dr. Smith recommends 18 months of treatments, one to two treatments per month. I award \$5,000 toward that treatment plan.

[244] In addition, it is clear that an exercise program would be of benefit to the plaintiff. I award the amount of \$1,500 for some training in that area and a gym membership so that she can pursue exercise on her own.

[245] Having considered all of the items put forward by the plaintiff, I award \$6,500 to provide for psychological treatments and an active rehabilitation program. If the plaintiff requires further antidepressant medication, that should be covered under no-fault benefits.

### Special Damages

[246] The plaintiff seeks a special damage award of \$36,021.36.

[247] Of that total amount, more than \$29,000 is comprised of massage treatments and chiropractic treatments, plus the mileage to attend those treatments.

[248] I have set out above my concerns with the plaintiff's continued attendance with Dr. Chen-See.

[249] Despite my concerns, the defendants do not dispute the plaintiff's claim for special damages.

[250] Special damages are assessed at \$36,021.36.

### Summary

[251] In summary, I find that the defendant Dr. Hsu was negligent in causing the accident on January 2, 2014. I further find that the plaintiff was injured in that accident.

[252] I assess damages in the following amounts:

- a) Non-Pecuniary Damages: \$120,000 reduced by 10% to \$108,000
- b) Past Loss of Capacity \$ 0
- c) Future Loss of Capacity \$100,000
- d) Future Care \$6,500
- e) Special Damages \$36,021.36

Total \$250,521.36

[253] The plaintiff is entitled to interest on the Special Damages.

[254] Unless there are matters or settlement offers of which I am not aware, the plaintiff has been awarded damages and is entitled to her costs.

"A. Ross J."

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