

---

CANADA / JUDGMENT

## Yang v. Duralia

2020 BCSC 806

---

COURT

Supreme Court of British Columbia

DECIDED

29 May 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

---

2020 BCSC 806 Yang v. Duralia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yang v. Duralia,

2020 BCSC 806

Date: 20200529

Docket: M168723

Registry: Vancouver

Between:

Anna Yang

Plaintiff

And

Joseph Duralia

Defendant

Before: The Honourable Mr. Justice Crabtree

Reasons for Judgment

Counsel for the Plaintiff:

A. Osadchyy

B.E. Black

Counsel for the Defendant:

S.M. Vorbrodt

H.K. Dosanjh

M. Zacharias, Articled Student

Place and Dates of Trial/Hearing:

Vancouver, B.C.

June 24-28, 2019

July 2-5, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 29, 2020

## INTRODUCTION

- [1] The plaintiff, Anna Yang, was injured in a motor vehicle accident on November 7, 2014. She was operating a 2000 Honda Accord (the "Honda") westbound on the 264th Street on-ramp proceeding toward Highway 1, in Aldergrove, B.C., when she struck a concrete barrier located in her lane of travel. The barrier was knocked into the lane by the 2002 Subaru Impreza (the "Subaru"), operated by the defendant, Mr. Duralia, who was travelling westbound on Highway 1. The plaintiff commenced this action against the defendant, the owner and driver of the Subaru, seeking damages for the injuries she sustained in the accident.
- [2] The defendant denies liability for the accident. The defendant concedes that the plaintiff was injured in the accident and suffered physical injuries as a result; but disagrees with the plaintiff about the nature, extent, and seriousness of the injuries she claims were caused by the accident.
- [3] The defendant alleges that the plaintiff suffered from pre-existing conditions and has failed to mitigate her damages.

## THE FIRST COLLISION ("MVA 1")

- [4] The court heard evidence that two motor vehicle accidents occurred approximately 10 minutes apart on November 7, 2014, in the city of Aldergrove, near the 264th Street overpass and Highway 1.

- [5] MVA 1 involved the defendant as he was proceeding in his motor vehicle westbound on Highway 1, just past the 264th Street overpass. The defendant's vehicle struck and drove over a coyote, while travelling in the fast lane. The defendant testified the coyote appeared without warning. Following the impact, the Subaru spun out of control and struck a portion of the concrete barrier separating Highway 1 and the on-ramp lane, on the north side of the highway.
- [6] As a result of the impact, one of the concrete barriers was pushed into the on-ramp lane, such that the barrier came to rest perpendicular to and blocking a significant portion of the westbound on-ramp lane. A second concrete barrier, also became dislodged and was pushed out of place; however, the second barrier did not obstruct the path of travel of those driving in the on-ramp lane.
- [7] The defendant's liability for MVA 1 was not raised by the plaintiff. The defendant denies any responsibility or liability for MVA 1. The plaintiff bears the burden of establishing that the defendant was negligent in striking the coyote.
- [8] The defendant testified that he was travelling at the posted rate of speed, in the fast lane on Highway 1. He testified it was dark out, traffic was light and the roadway was wet.
- [9] The defendant estimated that as he was proceeding along the highway he could see approximately 100 feet ahead of his vehicle's position.
- [10] There were no warnings posted at or near this particular location advising motorists to be aware of animals. The coyote appeared and came into contact with the Subaru before the defendant had time to react or take evasive action. On impact, the defendant braked, spun out of control and collided with the concrete barrier.
- [11] In considering all of the circumstances of the events leading up to MVA 1 and, in particular, the defendant's operation of the Subaru, I find there was no negligence on the part of the defendant in regard to MVA 1.

## THE SECOND COLLISION ("MVA 2")

- [12] Approximately 10 minutes after MVA 1 occurred, the plaintiff, operating the Honda, was proceeding westbound in the on-ramp lane, intending to merge onto Highway 1. The Honda struck the concrete barrier blocking the on-ramp lane, causing injuries to the plaintiff.
- [13] The plaintiff submits that MVA 2 occurred as a result of the negligence of the defendant. It is submitted that the defendant had a duty to warn oncoming motorists of the displaced concrete barrier, once he became aware the barrier was substantially blocking the on-ramp lane. The defendant denies liability, arguing that the duty to warn does not arise in this circumstance, as the concrete barrier did not present a hazard.

## EVIDENCE ON LIABILITY

## The Defendant

- [14] The defendant described the impact with the concrete barrier as significant, rendering the Subaru inoperable. The vehicle was subsequently written off by the Insurance Corporation of British Columbia ("ICBC"). The Subaru came to rest a short distance beyond the displaced concrete barriers, partially blocking both the slow lane and the shoulder of Highway 1. The Subaru's lights, including the hazard lights, were inoperable. The defendant testified that there was nothing in his vehicle which could be used to warn other motorists. In other words, there was no flashlight, reflective signs or cones.
- [15] Following MVA 1, the defendant observed traffic on Highway 1 was backing up for a long way and proceeding slowly. He also noticed that, after MVA 1 and before MVA 2, vehicles travelling westbound in the off-ramp lane were able to drive around the barrier on the right side and carry on westbound, towards Highway 1.
- [16] The defendant further testified that as he was being checked out by first responders, he heard someone say: "Lookout, she is going to crash". He then heard the sound of a motor vehicle impacting with the concrete barrier.
- [17] In considering the defendant's testimony, he does not have a clear recollection of the events following the collision. His recollection was affected by the impact of the collision and the many events that were taking place immediately thereafter. I find he was mistaken in his testimony that MVA 2 occurred while he was receiving treatment from the first responder.

## The Plaintiff

- [18] On November 6, 2014, in the late afternoon, the plaintiff had travelled to her sister's friend's residence in Aldergrove, to attend a birthday party. She borrowed a vehicle from a friend to make the trip. She was operating the Honda, which she had operated on occasion, prior to the accident. She arrived at the party at approximately 5:00 p.m.
- [19] Following her arrival, the plaintiff participated in preparing food, singing, and socializing with those in attendance. She testified she had taken her antidepressant medication before dinner and that she had fallen asleep on the couch at the residence, at approximately 11:00 p.m. She woke up in the early morning hours and decided to return home at that point; in part, so she could return the vehicle to her friend. She believed it was approximately 4:00 a.m., on November 7, 2014, when she set out to travel back to Vancouver.
- [20] The plaintiff testified she drove over the 264th Street overpass, took the roundabout and proceeded westbound in the on-ramp lane. She described the traffic as light and that it was dark out. She observed the "Visit Fort Langley" sign to the right of the on-ramp and described that there were two or three large lights illuminating the sign. She also stated that the lights faced east and, rather than illuminating the on-ramp, the lights were shining in her eyes.

- [21] While travelling in the on-ramp lane, the plaintiff estimated her speed to be 30-50 km/h. She described that suddenly and without warning, she observed, approximately two to three car lengths in front of her, a concrete barrier blocking her lane of travel.
- [22] The plaintiff testified that there were no vehicles in the immediate area; no first responders, warning signs, or lights were observable.
- [23] The plaintiff testified she wanted to take evasive action to avoid the concrete barrier but did not know what to do. She felt scared, applied the vehicle's brakes and closed her eyes. In her view, there was no other course of action available to her. The plaintiff had no recollection of what happened after she closed her eyes, immediately prior to the Honda's impact with the concrete barrier.

### Victor Aguilar

- [24] Mr. Aguilar was driving along to 264th Street and entered the on-ramp lane, intending to merge onto Highway 1. He estimated his speed of travel to be between 60-70 km/h, when he first saw the barrier ahead of him. Upon seeing the barrier, he described that he applied the brakes, breaking harder than normal but not so hard that the brakes squealed or the car slid. He brought the vehicle to a stop, two metres in front of the concrete barrier. Following this, he put his flashing or hazard lights on and got out of the vehicle.
- [25] Mr. Aguilar remained at the scene for approximately 2-5 minutes. He described the conditions as dark and dry.
- [26] Mr. Aguilar did not notice much traffic on the roadway. After he had stopped, he was approached by a person, who borrowed his cell phone. It was his understanding that the person called 911 to inform emergency services about the first motor vehicle accident. After the call was made, Mr. Aguilar left. He drove around the barrier on the right side. In going around the barrier, he drove on the paved portion of the shoulder and the gravel area that extended beyond the pavement. In doing so, he described how he was able to negotiate his Toyota Echo vehicle around the barrier, without driving on the grass portion.

### Unidentified Motorist

- [27] The defendant testified that an unidentified woman driving a minivan also pulled up to the concrete barrier, after Mr. Aguilar had left the scene. He indicated that she put her hazard lights on. This vehicle left when the first responders arrived on scene.

## Ryan Elias

- [28] Mr. Elias was a passenger in a vehicle operated by his brother. The two were travelling together on their way to work, westbound on Highway 1, approaching the 264th Street overpass. At that point, Mr. Elias observed a motor vehicle in front of them on the highway lose control and collide with the concrete barrier separating the highway and the on-ramp lane. This occurred at approximately 5:00 a.m. Mr. Elias described the roadway condition as dry.
- [29] Mr. Elias testified that his brother pulled over to the north side of the westbound lane of Highway 1, near the overpass. At that point, they were situated some distance behind the Subaru. Mr. Elias's brother then activated the vehicle's hazard lights.
- [30] Mr. Elias did not have a cell phone. He testified that he borrowed one from a woman in her mid 30s, who had stopped in her vehicle at the scene. He called 911. Mr. Elias noted the vehicle he borrowed the cell phone from had put the hazard lights on. The vehicle, which was described as a small SUV, left the scene before the second accident occurred.
- [31] Mr. Elias remained on the scene with his brother for approximately 15 minutes. He testified that he witnessed the second accident. He had observed the plaintiff's vehicle, which he described as "going slow", then "bump" into the concrete barrier. He did not hear the squealing of tires before impact. Mr. Elias described that he nearly got hit by the Honda, prior to the impact. Mr. Elias testified that at the time of MVA 2, the first fire truck had already arrived on the scene and was parked underneath the overpass.
- [32] Mr. Elias confirmed the content of the 911 call he made on that morning. It was established that the call was made from Mr. Aguilar's phone, not from the phone provided by the woman at the scene, as Mr. Elias had described.
- [33] Mr. Elias's recall of events of MVA 2 is somewhat at odds with other evidence at trial, including that of Captain Simpson, the 911 recording and the incident report.

## Captain Simpson

- [34] Captain Simpson was a captain at the Aldergrove Fire Department and was in charge of the "Quint" fire truck, on November 7, 2014. Capt. Simpson and his vehicle were the first responders to arrive on scene. One of his responsibilities was to complete the incident report, which included recording the arrival and departure of the first responders.
- [35] Captain Simpson testified that MVA 1 was first reported at 5:10:43 a.m. Capt. Simpson's crew and a second fire truck, were dispatched at 5:11:22 a.m. and he arrived on scene at 5:19:47 a.m. The second fire unit and crew arrived at 5:33:43 a.m. He also noted that the ambulance arrived at 5:24:55 a.m. and the police arrived at approximately at 5:36 a.m.

- [36] Captain Simpson testified the Quint fire truck pulled in behind the concrete barrier. On arrival, Capt. Simpson observed the Honda in front of the barrier. At that point, all the traffic located in the on-ramp lane behind the fire truck was stopped and diverted. The fire truck was equipped with a spotlight, which was used to illuminate the scene.
- [37] As the first responder on the scene, Capt. Simpson and his crew attended to and inquired about the well-being of the defendant and the plaintiff. He described there being some artificial lighting which provided some illumination in the area.

## CREDIBILITY AND RELIABILITY OF THE WITNESSES

- [38] Counsel, in the course of their submissions, each raised or called into question the weight to be attached to various aspects of the testimony provided at trial.
- [39] Assessing the testimony of witnesses, determining what evidence to accept and the weight to be attached to such testimony, involves the assessment of both a witness's reliability and credibility.
- [40] Reliability is focused on the accuracy of a witness's evidence, while credibility has to do with whether the witness is telling the truth. Credibility involves the consideration whether the evidence is honestly given. Each involves an assessment of the witness's testimony, in the context of the evidence adduced at trial and in the consideration of various factors.
- [41] The distinction between reliability and credibility was explained in *R. v. H.C.*, 2009 ONCA 56, by Watt J.A. at para. 41:
- [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
- i. observe;
  - ii. recall; and
  - iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

- [42] The starting point for a discussion of credibility often begins with a reference to *Faryna v. Chorny*, [1951] B.C.J. No. 152 (C.A.) where the Court noted that the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case. At paras. 9-10, the Court commented:

- [9] But the validity of evidence does not depend in the final analysis on the circumstance that it remains contradicted or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; and cf. *Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138 at pp. 141-2.
- [10] If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295.
- [43] In *Bradshaw v. Stenner*, 2010 BCSC 1398 [Stenner], aff'd 2012 BCCA 296, Madam Justice Dillon at paras. 186-187 provided a useful summary of the principles that govern the court's approach to assessing the testimony of a witness:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments* (1986) Ltd. v. *Cornwall Developments Ltd.* (1993), 12 Alta.

L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[44] The following comments from *R. v. Langlet*, 2013 BCSC 2274 (at para. 31) are also of assistance:

[31] I note that the consistency of a witness's testimony is an important factor in an analysis of the credibility of a witness, both internally and externally. Can the witness provide the same account at different times? Can the witness provide consistent answers as he or she is asked questions about portions of their testimony or particular aspects of it? Similarly, is a witness's testimony externally consistent? Do aspects of the witness's testimony correspond with testimony of other witnesses (absent evidence of collusion) or other real evidence? Is the account provided by the witness a plausible one? Does it accord with common sense?

[45] In summary, the assessment of a witness's credibility and reliability must include a critical assessment of the witness's evidence in the context of the evidence as a whole. This involves an assessment of whether the witness's evidence is at odds with other evidence in the case, and whether the testimony is implausible or improbable, having regard to the surrounding circumstances. The real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities, which a practical and informed person would readily recognize as reasonable in that place and in those conditions. A trier of fact must also bear in mind that an apparently honest, confident or convincing witness may not necessarily be an accurate witness.

#### CREDIBILITY ASSESSMENT

[46] The plaintiff's claim rests to a large degree, on her account of how the accident occurred, the injuries suffered and their impact.

[47] The plaintiff was a poor historian in describing the events leading up to the Honda's collision with the concrete barrier; and in particularizing the details of her pre- and post-accident condition and the continuing effect the injuries have had on her health and well-being.

[48] The plaintiff acknowledged that she has serious memory issues. This was highlighted in different ways during her testimony:

- a) she was unable to identify the motor vehicle she borrowed and was operating on the night of the accident. When a photograph of the Honda was put to her during her examination in chief, she was unable to identify it;
- b) she had difficulty recalling details of her employment prior to going on medical disability;
- c) in cross-examination, she had difficulty recalling responses that she provided during her examination for discovery, and in her evidence in chief; and
- d) her account of the events from the time she woke up on the couch, to the time the motor vehicle accident occurred at approximately 5:30 a.m., leaves 1-1½ hours unaccounted for. She was unable to offer any detail or explanation as to what transpired during that period.

[49] The plaintiff's testimony was externally inconsistent. For example:

- a) she testified there were no problems with respect to her mood or health, prior to the accident. Medical records from her psychiatrist document that prior to the accident she suffered from: ongoing headaches from time to time, fatigue and dizziness, as well as a lack of sleep;
- b) the medical records indicate that she had injury to and pain associated with her back, in 2012 and 2014; and
- c) her description of the relationship with her sister and her education history is at odds with her sister's evidence.

[50] The plaintiff refused to admit items or events that were non-controversial, including her refusal to acknowledge there was a paved portion of the shoulder to the right of the white line, in the on-ramp lane.

[51] The plaintiff's evidence, as to how far the vehicle headlights illuminated the roadway in front of the Honda, was unrealistic and at odds with the testimony of Mr. Aguilar and the defendant.

[52] The plaintiff minimized her pre-accident psychiatric condition, despite being under the care of a psychiatrist for over 15 years, unable to work and receiving a medical disability.

[53] The plaintiff was inconsistent and inaccurate in her evidence why she did not pursue the recommended physiotherapy treatment, or fill the prescriptions for pain medication. She testified that this was due to the lack of financial resources; yet, at that same time, she spent money on acupuncture and traditional Chinese herbal medicines.

[54] The plaintiff was inconsistent in describing the pain experienced post-accident with the clinical records of her family physician. The plaintiff's testimony that her depressive disorder worsened is inconsistent with the clinical records of her treating psychiatrist.

[55] The plaintiff was unresponsive to questions put to her in cross-examination whether she sought assistance from ICBC for pain medication.

[56] The plaintiff was unresponsive to questions about contact particulars for her friends and children.

[57] I have carefully considered the plaintiff's testimony within the credibility/reliability framework identified above. I find the plaintiff to be a credible witness, to the extent that she was endeavouring to do her best when giving her evidence at trial. I am not satisfied that she was attempting to mislead the court. However, I have reservations as to the reliability of her testimony. For the reasons expressed below, I am unable to place much weight on her testimony.

**LIABILITY**

- [58] In order to establish the defendant was negligent, the plaintiff must demonstrate that the defendant owed her a duty of care and that the defendant's actions breached the standard of care.
- [59] In *Ziemer v. Wheeler*, 2014 BCSC 2049 [Ziemer], Madam Justice Watchuk described the "duty to warn" in the following terms at para. 119:
- [119] As stated above, the driver of a motor vehicle owes a duty of care to other users of the highway, and that driver will be at fault if he does not exercise the reasonable care, skill or self-possession that are required in the circumstances. In circumstances where a driver's management of his vehicle exposes other users of the highway to unnecessary risk of harm, that driver may be subject to a duty to warn other motorists of a potential hazard. To be effective, a warning must be near the danger it warns of and must perform the function of warning while the condition or danger exists (*Dagneault v. Hatton* (1995) 59 B.C.A.C. 55 at paras. 42-51). The standard for assessing reasonableness when discharging this duty to warn is objective (*Fajardo* at paras. 37-40).
- [60] The defendant submits that the duty to warn does not arise where a warning is not required, or the duty was fulfilled by others.
- [61] The first accident took place at approximately 5:00 a.m. It was observed by Mr. Elias and his brother, who, after seeing the Subaru crash into the concrete barrier, pulled their vehicle over to the westbound shoulder of Highway 1, some distance behind the dislodged barrier and activated their hazard lights.
- [62] Mr. Elias approached Mr. Aguilar, who, by that point, had stopped about 2 metres in front of the concrete barrier. Mr. Elias borrowed Mr. Aguilar's cell phone and called 911 at 5:08:31 a.m. Mr. Elias was on the phone until 5:12:21 a.m. Mr. Aguilar, upon stopping in front of the concrete barrier, activated his hazard warning lights, which remained on while he was in the stationary position. Following the completion of the 911 call, Mr. Aguilar left to continue on his way to work.
- [63] Following Mr. Aguilar's departure, a second vehicle operated by an identified motorist, stopped in front of the concrete barrier in the on-ramp lane, at which point she placed her hazard lights on. There was some confusion as to whether the person was operating a minivan or a small SUV. It is clear that this vehicle left the scene prior to MVA 2.
- [64] I find the first fire truck to arrive on the scene was the vehicle operated by Capt. Simpson and he arrived following MVA 2.
- [65] Traffic on Highway 1 was described as "pre-rush hour". It was beginning to back up, due to the blocking of the slow lane following MVA 1. Prior to the arrival of the first fire truck, I also find vehicles continued to make their way into the westbound on-ramp lane and navigate around the displaced concrete barrier, prior to merging onto Highway 1.

## DISCUSSION

- [66] The duty to warn arose at the point the hazard was created, following the Honda's impact with the concrete barrier, which caused one section of the concrete barrier to become dislodged such that it blocked a significant portion of the on-ramp lane. It was dark out and while there was artificial lighting provided in the area, it did not fully illuminate the area. Even so, two vehicles travelling westbound along the on-ramp, prior to MVA 2, had sufficient time to stop their vehicles, without colliding with the barrier. One of the vehicles was travelling at a higher rate of speed than the vehicle operated by the plaintiff. Other vehicles travelling the same roadway prior to the accident were also able to navigate around the barrier and continue westbound to Highway 1.
- [67] That said, the two drivers who stopped in front of the concrete barriers (Mr. Aguilar and the unidentified motorist) activated their emergency flashers when they stopped, suggesting that a reasonable driver would take steps to warn approaching motorists.
- [68] In the minutes leading up to MVA 2, the duty to warn was fulfilled by those who stopped at the scene. However, Mr. Aguilar's vehicle and the unidentified motorist's vehicle had departed the scene prior to the collision, and no other warning was posted until the arrival of the emergency vehicles. The Elias vehicle had its flashers on; however, the vehicle was too far back to provide an effective warning of the hazard created by the concrete barrier. While the duty to warn can be fulfilled by others, this did not occur in the circumstances.
- [69] In the circumstances, I find the defendant had a duty to warn motorists approaching the scene, which he failed to do.

## STANDARD OF CARE

- [70] The standard of care is outlined by the Supreme Court of Canada in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28, as follows:
- [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
- [71] The defendant submits that he was in shock and dazed, as a result of MVA 1. In *Fajardo v. Horianopoulos*, 2006 BCSC 147, the court stated the duty is for the defendant to take reasonable steps and the standard is an objective one. In other words, whether the defendant was in shock or dazed, he remained under the duty to take such reasonable steps as was required in the circumstances.

- [72] I also note the defendant's condition did not prevent him from having the presence of mind to take a photograph of the remains of the coyote, as proof of the cause of the collision.
- [73] The defendant asks what else he could have done in the circumstances. There was no evidence his vehicle's emergency flashers were operational. The vehicle was located some distance away from the concrete barrier. The defendant had no flares, florescent sign, cones, flashlight, or other devices to set out to warn approaching motorists, once Mr. Aguilar and the unidentified motorist had departed the scene.
- [74] The defendant could have sought out the assistance of other motorists, requesting that they remain in front of the barrier with their vehicle hazard lights on. The defendant could have positioned himself ahead of the concrete barrier, off the travelled portion of the roadway, and drawn attention to the obstruction ahead by use of waving his arms or an object. None of these options were explored by the defendant.
- [75] In my view, he could have recognized the hazard and taken steps to warn others. The failure of the defendant to take any steps, or seek the assistance of others in the circumstances, is a breach of the standard of care required of the defendant in the circumstances.

## CAUSATION

- [76] A defendant shall not be found negligent in the duty to warn other motorists of a hazard, if the accident would have occurred regardless of the defendant taking reasonable steps to warn oncoming traffic.
- [77] To establish causation, the plaintiff must prove that the failure to take reasonable steps to warn other motorists caused, or contributed to, the plaintiff's loss.
- [78] In *Skinner v. Fu*, 2010 BCCA 321 [Skinner], Garson J.A. described the legal requirement this way, at para. 16:
- [16] I now turn to the legal test to establish causation. In *Resurice Corp. v. Hanke*, [2007] 1 S.C.R. 333, 2007 SCC 7, the Supreme Court of Canada reaffirmed that the default test to establish causation in a negligence analysis remains the "but for" test. The question is whether, but for the defendant's breach of the standard of care, would the plaintiff have suffered damage? At para. 21 of *Resurice*, the Chief Justice said:

First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

- [79] Garson J.A. further notes at para. 21 of *Skinner*, the breach "need only be a cause and not the sole cause". In other words, there maybe one or more causes which contribute to the injury.

- [80] The defendant submits that in light of the following circumstances, the accident would have occurred regardless:
- a) the plaintiff did not see the Subaru on Highway 1, located a short distance beyond the displaced barrier;
  - b) the defendant did not see the build up of traffic on Highway 1, or the Elias vehicle pulled over with its hazard lights engaged;
  - c) the light from the "Visit Fort Langley" sign shone in the plaintiff's eyes, causing a distraction;
  - d) the plaintiff was unaware of the defendant, or Mr. Elias, standing near the on-ramp lane, as she proceeded westbound;
  - e) other vehicles were able to successfully stop, without colliding into the concrete barrier;
  - f) other vehicles were able to successfully navigate around the concrete barrier, when it was pushed into the on-ramp lane; and
  - g) the plaintiff did not see the barrier until she was only 2-3 car lengths away from it.
- [81] The foregoing factors do not preclude the fact the plaintiff's attention could have been drawn to a warning light or some other means to signify a potential hazard lay ahead, they are factors suggesting that the plaintiff was not keeping a proper lookout.
- [82] The plaintiff testified that had she observed hazard lights or other warning signs, she would have slowed down. I accept this is a possibility. I find that the defendant's failure to warn was a contributing cause to the accident.

## **APPORTIONMENT OF FAULT OR CONTRIBUTORY NEGLIGENCE**

- [83] In the event a defendant creates a hazard to other motorists, those motorists must exercise reasonable care to avoid the hazard. In such circumstances, where the motorist should have or did become aware of the hazard, he or she had a duty to avoid the hazard where a reasonably careful and skilful driver would have done so.
- [84] The plaintiff submits that the defendant should be apportioned 100% of the fault of MVA 2; or in the alternative, a significant portion should be attributed to him. Conversely, the defendant submits that the plaintiff was 100% contributorily negligent in causing MVA 2.
- [85] In Ziemer, Watchuk J., when discussing the elements of contributory negligence, stated the following at para. 107:
- [107] Even if a defendant has created a hazard to other drivers, other drivers must exercise reasonable care to avoid that hazard. A driver has failed to exercise reasonable care in circumstances where that driver became or should have become aware of the hazard and had in fact a sufficient opportunity to avoid the accident and where a reasonably careful and skilful driver would have availed himself of that opportunity (Walker v. Brownlee, [1952] 2 D.L.R. 450 (S.C.C.) at p. 461). The onus is on the party alleging that a driver failed to

exercise reasonable care to prove on the balance of probabilities that that driver did not meet the required standard of care (*Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.) at p. 279, *aff'd* [1971] S.C.R. 669).

- [86] The onus is on the defendant to establish contributory negligence. This was described in *Kosugi v. Krueger* (Litigation Guardian of), 2007 BCSC 278 at para. 32 by Madam Justice Gerow, in the following terms:
- [32] A driver is required to drive his vehicle in a manner which permits him to keep the vehicle under proper control when meeting the ordinary exigencies of traffic. The onus is on the defendants to establish, on a balance of probabilities, that Ms. Kosugi could, by exercise of reasonable care, have avoided a collision with the ATV. This onus can be discharged only by reliable evidence of time, distance, speed, and the point at which the ATV was visible to the plaintiff. When a person or persons who have negligently created such a danger attempt to argue that the plaintiff should be apportioned the blame by means, or partly by means, of mathematical calculations, the premises on which the calculation are based must not be vague. The evidence must be specific and accurate. Any doubts should be resolved in favour of the plaintiff. *Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.).
- [87] The plaintiff submits there is a lack of reliable evidence to support the defendant's assertion that she was in whole, or in part, responsible for MVA 2.
- [88] In assessing what is reasonable, context is important. In *Gill Estate v. Canadian Pacific Ltd.*, [1973] S.C.R. 654 the Court stated: "It is trite law that faced with a sudden emergency for the creation of which the driver is not responsible he cannot be held to a standard of conduct which one sitting in the calmness of courtroom later might determine was the best course." This principle was reiterated in *Mayne v. Mayne*, 2013 BCSC 391 at para. 28 as follows:
- [28] ... Where a person is faced with an emergency and is forced to react quickly to a situation created by the negligence of another person, he is not held to the same standard of care as a person in a non-emergency situation. ...
- [89] In *Schneider v. Steure*, [1992] B.C.J. No. 491 (S.C.) [*Schneider*], the defendant's vehicle struck a moose attempting to cross the highway, causing the vehicle's windshield to shatter. The defendant did not stop at the scene but subsequently informed the RCMP of what occurred. Shortly after the collision, the plaintiff was travelling in the opposite direction and noticed the moose carcass on the roadway. The plaintiff swerved to the right, in an effort to avoid the carcass and drive around it. The plaintiff was unsuccessful in doing so and struck the moose carcass.
- [90] In determining whether the plaintiff was contributorily negligent in *Schneider*, the court relied on evidence that a police officer was travelling in the area at a relatively high speed and had no difficulty in observing the moose carcass on the road and bring the vehicle to a safe stop in front of it.

- [91] In her attempt to manoeuvre around to the left, the plaintiff contravened the statutory requirement to pass on the left. In *Schneider*, the court apportioned liability 40% to the plaintiff and 60% to the defendant.
- [92] In the circumstances at bar, I find the plaintiff negligent in failing to observe the concrete barrier earlier than she did, so that she could have taken steps in an effort to avoid the collision. The plaintiff acknowledged that she was travelling approximately 20-30 km/h. Mr. Elias also estimated the plaintiff's vehicle to be travelling very slowly. The plaintiff testified the Honda's headlights only illuminated 2-3 car lengths ahead of the vehicle. I do not accept her evidence on this point. She testified that the Honda was in good working order when she set out on the trip. Independent witnesses confirmed that the headlights of their vehicles illuminated the roadway ahead approximately 3 times the distance provided by the plaintiff.
- [93] I find the plaintiff ought to have observed the concrete barrier at an earlier point in time than she did; and in failing to do so, the plaintiff was not keeping a proper lookout.
- [94] The plaintiff admitted when she first saw the barrier she panicked. She hit her brakes and closed her eyes. The brakes were not applied in a fashion such that they skidded or squealed, suggesting that the brakes were not applied with sufficient force.
- [95] Mr. Aguilar was able to bring his vehicle to a stop in front of the barrier, despite travelling at a higher rate of speed than the Honda.
- [96] Had the plaintiff been keeping a proper lookout, could she have brought the vehicle to a stop in front of the barrier, or attempted evasive action and driven around it? Other motorists travelling the roadway that morning, in similar conditions, noticed the barrier and were able to stop or proceed around it on the right, and continue to the highway.
- [97] In these circumstances, the plaintiff's failure to keep a proper lookout led, in part, to the collision with the barrier. In *Schneider*, fault was apportioned 60% to the defendant and 40% to the plaintiff. In these circumstances, I find that fault should be apportioned equally to the parties: 50% to the defendant and 50% to the plaintiff, given the opportunities available to the plaintiff to avoid the accident.

## ASSESSMENT OF DAMAGES

### The Plaintiff

- [98] The plaintiff is currently 59 years of age. She was born in Vietnam and moved to China at age 10. She testified she completed the equivalent of grade 5 or 6, but was unable to complete her studies due the death of her father and having to help support the family.

- [99] The plaintiff lived in China with her family until 1989, when she immigrated to Canada with her husband, initially settling in Toronto. After a number of years, the plaintiff and her husband divorced. She moved to Vancouver, where she has lived since 1999. She has two adult children, who reside in Ontario. She has limited contact with her daughter and no contact with her son.
- [100] The plaintiff's mother, sister and two of her brothers live in B.C.
- [101] The plaintiff worked as a seamstress for a number of years, following her arrival to Canada and since moving to Vancouver. The plaintiff had not worked for a number of years, prior to the accident.
- [102] The plaintiff has been under the care of Dr. Liang for approximately 20 years, since moving to Vancouver. The plaintiff suffered from post-partum depression, and was subsequently diagnosed and treated for depression. Her condition is ongoing. She has been unable to work as a result of her illness for approximately 15 years and is receipt of the federal government disability benefit.
- [103] The plaintiff's regular routine prior to the accident was to consult with Dr. Liang, approximately every 4-6 weeks. Dr. Liang has been treating her exclusively for depression and related symptoms, for which she is prescribed anti-depressant and sleeping medications.
- [104] The plaintiff has been under the care of Dr. Lim, a family physician, since moving to Vancouver. In 2012, the plaintiff complained of back pain; at which point, Dr. Lim diagnosed a moderate rotoscoliosis and degenerative disc disease. She also reported that the plaintiff sprained her back in the summer of 2014, while doing laundry, which resolved after a short period of time. The plaintiff has arthritis of the cervical and lumbar spine, which is reportedly normal for a person of her age.
- [105] As a result of the impact of the collision, the airbag deployed in the Honda. At the scene, the plaintiff was observed outside of the vehicle by Capt. Simpson. The plaintiff complained of neck pain, and Capt. Simpson arranged for a manual e-spine which involved immobilizing her neck manually (held in place by one of the attending fire crew), until the paramedics arrived.
- [106] The plaintiff was transported by ambulance and subsequently admitted to the Emergency Department of the Abbotsford Regional Hospital ("ARH"), at approximately 6:00 a.m. She underwent a number of investigative procedures and an assessment by medical staff on duty that morning. The plaintiff has no recollection of the events from the point immediately prior to the impact until speaking to a doctor following her admission to the Emergency Department at ARH.
- [107] The plaintiff reported the following injuries from MVA 2, including:
- 1) numbness all over;

- 2) bruising;
- 3) headaches;
- 4) neck pain;
- 5) shoulder pain;
- 6) memory loss; and
- 7) chest pain and pain across her abdomen, attributed to the seatbelt.

[108] The plaintiff was released from ARH approximately two hours later, at 8:00 a.m., and made her way home. On discharge from the hospital, the initial report of the attending doctor was that she suffered soft tissue injury. The plaintiff was directed to follow-up with her family physician.

[109] The plaintiff consulted her family physician, Dr. Lim, on November 13, 2014, for an initial consultation and assessment. At that time, the plaintiff itemized the areas where she was experiencing pain. In particular, she informed Dr. Lim she had neck and back pain, as well as pain over her buttocks. The doctor's initial diagnosis was soft tissue injury. The doctor noted that the plaintiff was wearing footwear with 2-inch heels, without any difficulty. She was prescribed anti-inflammatory medication and told to return in 7 days.

[110] On November 27, 2014, the plaintiff reported suffering from headaches, neck and shoulder pain. She was prescribed Tylenol 3, four times per day. On December 4, 2014, she reported headaches and difficulty sleeping, as well as neck and back pain. She described a left-hand side pain. The plaintiff re-attended two days later, when it was reported the pain was decreasing, but she described a pulling from her neck to the top of her head. She was provided with pain medication and told by Dr. Lim to attend physiotherapy.

[111] On December 30, 2014, the plaintiff reported she was doing better. The doctor provided her with more pain medication, and a prescription for Tylenol 3.

[112] At the last consultation, on January 14, 2015, the plaintiff was unable to raise her right arm. No injury was observed. On examination, she had full range of motion. Her right shoulder was not tender or swollen. The doctor told the plaintiff that she must attend physiotherapy. Dr. Lim did not see the plaintiff after January 2015 in connection with the injuries suffered in the accident, until the plaintiff was called to the doctor's office to assist in the completion of a CL19 form for ICBC. This took place in November 2017.

[113] After the November 2017 consultation, the plaintiff did not consult her family physician relating the accident injuries until June 2019, when she saw the doctor shortly before the trial. At the consultation, the plaintiff reported to Dr. Lim a list of complaints that she continued to experience as a result of the accident.

- [114] The plaintiff continued consultations with Dr. Liang, her psychiatrist, on a near monthly basis, through to the summer of 2019. The clinical records set out brief details of how the plaintiff was progressing and the medications she was prescribed.
- [115] The plaintiff testified she continues to suffer the effects of the injuries to the present day; and there had been no change or improvements over the past 4½ years since the accident, except for the numbness, which occurs more sporadically and the bruising which has resolved.
- [116] The plaintiff described she continued to suffer the effects of the injuries suffered by her in MVA 2, in the following terms:
- 1) she is in constant pain;
  - 2) she continues to feel pins and needles, which cause more pain when trying to sleep;
  - 3) she experiences numbness in her shoulder, radiating to her arms, which can occur 3-4 times per week;
  - 4) she experiences neck pain, which sometimes comes on with the shoulder pain. At other times, the pain is localized to her neck, originates in the base of the skull and radiates upward;
  - 5) she suffers from headaches, which are different than before the accident and occur 3-5 times per week;
  - 6) she experiences difficulty sleeping and suffers from nightmares; and
  - 7) she has difficulty controlling her emotions, and problems with both her memory and concentration.
- [117] While the plaintiff was not working at the time of MVA 2, she described that she was able to look after her own needs and enjoyed an active social network, where she was engaged in socializing with friends and family, dancing, and going for hikes and walks. These activities have been significantly restricted since MVA 2. Her visits with her mother have been reduced, as a result of the injuries suffered and because she is limited in what she can do with her mother. Her mother suffered a stroke several years ago which has incapacitated her, leaving her unable to look after herself without assistance. Her mother lives and is cared for by the plaintiff's sister.
- [118] Prior to the accident, the plaintiff played an active role in her mother's care, but this involvement has been significantly reduced due to the injuries suffered in MVA 2.
- [119] The plaintiff spent her time, prior to MVA 2, crocheting and embroidering landscapes. She produced two photographs which demonstrated her skill and artistic abilities in this regard. She reports that she has not been able to produce similar works since MVA 2.

- [120] The plaintiff called two witnesses who offered their observations of the impact of the injuries and their ongoing affect upon the plaintiff.
- [121] Ms. Jin Yang, the plaintiff's sister, offered observations as to the impact the injuries have had on the plaintiff's lifestyle. Ms. Jin Yang described the relationship with her sister, as distant. They do not share a great deal of personal information. For example, she did not know of the plaintiff's mental health issues prior to MVA 2, stating that she only learned of these issues recently. She had limited knowledge of her sister's social activities or hobbies. Their social interactions primarily consist of time spent together when the plaintiff comes to visit her and family social gatherings. She described the family gatherings are less frequent since MVA 2, having been reduced from once per month to several times a year.
- [122] More recently, their interaction has primarily centred on the time the plaintiff visits her mother, who lives with Ms. Jin Yang. The mother suffered a stroke about two years ago and is incapacitated. She lives with Ms. Jin Yang and is cared for by her and the family. On occasion, the plaintiff comes to visit the mother at her sister's home. Ms. Jin Yang notes her sister no longer cooks for her mother, something she used to do for her.
- [123] Ms. Jin Yang described that during some of the visits, the plaintiff becomes irritable and visibly upset. When she does, the visits are cut short and the plaintiff leaves.
- [124] Ms. Jin Yang described the plaintiff's mood as different compared to the pre-accident period, but she did not provide specific examples of the change. She did not note any recent impact on the plaintiff's physical activities and was not aware of the plaintiff complaining of pain.
- [125] Mr. Cu Lam described he has been a friend of the plaintiff for over 20 years, but and had seen her on a regular basis until 6-12 months prior to the accident. Mr. Cu Lam has not seen the plaintiff as frequently, following MVA 2. He thought she was less happy now than before MVA 2, and not as open. He noted that they no longer played tennis and while they continued with their occasional walks, they occurred less frequently and were for shorter periods of time.

## MEDICAL EVIDENCE

- [126] Dr. Lim and Dr. Liang were not called upon to provide an opinion of the plaintiff's injuries, diagnosis, or prognosis. The clinical records of both her treating doctors were introduced at trial and Dr. Lim was called to explain her records of the consultations with the plaintiff.
- [127] The court has had the benefit of the medical-legal opinions of Dr. Chawla and Dr. Kiraly, both of whom assessed the plaintiff. They provided reports of their findings and opinions as to the plaintiff's prognosis, the future impact of the injuries, and the proposed course of treatment.
- [128] Dr. Chawla and Dr. Kiraly both testified at trial.

**Dr. Lim**

- [129] The plaintiff's pre-accident medical history comes primarily from the clinical records of Dr. Lim and Dr. Liang, which cover the two-year period leading up to MVA 2. The plaintiff complained of back pain to Dr. Lim in 2012 and to Dr. Liang, in 2014. The 2012 complaint was related to rotoscoliosis, while the 2014 complaint related to a back sprain, which occurred when doing laundry. Both complaints had resolved in terms of pain and function, prior to the accident.
- [130] The plaintiff consulted Dr. Lim on seven occasions following the accident through to January 14, 2014, for injuries suffered in the accident.
- [131] The plaintiff continued to see her family physician after that for other health concerns, but did not report any issues related to the injuries arising out of the accident until November 27, 2017, when she was called to the office for a consultation to complete a CL19 form for ICBC.
- [132] During her testimony, Dr. Lim explained her routine in the preparation of the CL19 form is to go through the questions with the patient and record the responses. In doing so, the doctor goes from head to toe with the patient, identifying any physical complaints. The information is then recorded on the form and forwarded to ICBC. Dr. Lim diagnosed soft tissue injury to the neck and back, describing it as "neck and back sprain". No difficulty was reported by the plaintiff as to the range of motion of her neck or back, except at the end of the range. The plaintiff also complained of some discomfort.
- [133] On physical examination of the plaintiff, the doctor noted some palpatory tenderness and pain/limitation of cervical, lumbar and thoracic spine, all to be normal.
- [134] The doctor's next consultation with the plaintiff was on June 20, 2019, in anticipation of the doctor being called at the trial. Dr. Lim's office arranged for the patient to attend, in order that she consult with the plaintiff in advance of the trial. On this occasion, the patient set out a long list of complaints she suffered from since the accident. She explained that as a result of the accident, she continued to suffer from: headaches of varying lengths of time up to 24 hours, 3 or 4 times per week; neck pain from half-an-hour to 24-hours a day, 4 to 5 times per week; daily back pain; feeling dizzy, on and off; and constant pain. She discussed how she was frustrated and upset over the fact she was becoming forgetful. On examination, Dr. Lim reported there were no restrictions with the range of motion of her neck or shoulders.

**Dr. Liang**

[135] Dr. Liang is a psychiatrist, practising in Vancouver, B.C. He has been the plaintiff's treating psychiatrist for 20 years. The clinical records of Dr. Liang are brief, containing limited details of the patient's self-reports, assessments and treatments prescribed. The doctor noted that the plaintiff experienced headaches, dizziness and difficulty sleeping over the course of the 2-year period prior to and following the accident. She suffered migraine headaches that date back to the beginning of 2013.

[136] On a number of occasions both before and following the accident, Dr. Liang would record a brief account of how the plaintiff was feeling. Following the accident, between February 2015 and March 13, 2017, the following notes were recorded:

- 1) in February 2015-feeling same, not much problem, stable;
- 2) in May 2015-feels better;
- 3) in July 2016-feels okay, no problem;
- 4) in November 2015-feels a little better;
- 5) in December 2015-feels not bad happy to be alone;
- 6) in December 2016-lately feels better, sleeps better, sleeps deeper; and
- 7) in March 2017-feels somewhat better.

**Dr. Chawla**

[137] Dr. Chawla is certified as a specialist in Physical Medicine and Rehabilitation with a sub speciality in Pain Medicine. He has been licensed to practise in British Columbia, since 2017. The doctor was qualified to provide opinion evidence in his areas of expertise on the diagnosis, assessment, treatment and prognosis of the plaintiff's physical injuries, including any rehabilitation treatment that may be required in the future.

[138] The plaintiff met with Dr. Chawla for an independent medical evaluation on one occasion, on January 29, 2019, accompanied by a Cantonese interpreter. The doctor was provided with the plaintiff's medical history in advance on that date. The plaintiff was interviewed as to the events surrounding the collision on November 7, 2014, the history of the injuries suffered, and their ongoing effects. A number of tests were also administered to provide a fulsome picture of the plaintiff's current condition.

[139] Dr. Chawla diagnosed the plaintiff with:

- 1) chronic widespread pain and central sensitization;
- 2) concussion and post-concussion cognitive impairment; and
- 3) chronic depression and anxiety disorder.

- [140] Dr. Chawla focused on the first two diagnoses; and deferred causation, prognosis and future treatment to a psychiatrist with respect to the third. In terms of the plaintiff's chronic pain, in his view, the plaintiff did not suffer symptoms prior to the accident; the chronic pain has progressively worsened since the accident, and her current pain and sensitization are likely as a result of the accident.
- [141] In Dr. Chawla's view, the plaintiff met the diagnostic criteria for concussion and post-concussion cognitive impairment. The doctor did note it is difficult to state whether her cognitive impairment is solely a result of concussion-related/mild traumatic brain injury-related symptoms, or as a secondary effect of the chronic depression. Dr. Chawla acknowledges that it is "extremely challenging to attribute the causation to any one specific condition" and concludes, in his opinion, concussion and chronic pain are more likely than not a direct result of the injuries sustained in MVA 2.
- [142] Dr. Chawla opined that in this particular case, treatment is made more difficult given the complex nature of the plaintiff's medical condition, given the overlap of physical pain, cognitive impairment, and mood disorder.
- [143] In regard to the chronic pain, Dr. Chawla is of the view that with treatment some improvement can be expected. However, the pain very rarely completely resolves. As to her cognitive impairment, given that the symptoms have persisted for over four years, the impairment is unlikely to resolve and she will have ongoing difficulties which may worsen over time.
- [144] The plaintiff's overall prognosis because of her mood disorder, chronic pain and cognitive impairment, is interdependent and considered poor. With treatment, some improvement is possible; however, it is unlikely that she will have complete resolution of the diagnosed injuries.
- [145] Dr. Chawla recommended that with the incorporation of a multidisciplinary pain management approach, including: involvement of a cognitive behaviour therapy, neuropsychology, cognitive adjustment strategies, symptomatic pain management and increasing social support, some of her symptoms may improve.
- [146] Dr. Chawla also recommended that assistance in home care such as: laundry, cleaning and cooking may assist; as would an alarm system, to assist in the event of a fall.

## Dr. Kiraly

- [147] The plaintiff was also seen for an independent medical evaluation on March 22, 2019, by Dr. Kiraly. Dr. Kiraly is a psychiatrist, who practises in British Columbia and Ontario. He was retained to provide an independent medical/psychiatric evaluation.

- [148] Dr. Kiraly diagnosed the plaintiff with major depression, post-traumatic stress disorder, mixed chronic pain syndrome and post-concussion syndrome. He is of the opinion that there is a causal connection between the accident and the plaintiff's psychiatric complaints following the accident. The prognosis is considered to be poor because of the chronicity and because of the co-existence of all the plaintiff's symptoms and diagnoses.
- [149] Dr. Kiraly recommends a number of treatments for the plaintiff, such as adjunctive therapies, including: exercise, mediation, or mindfulness exercises tailored to her needs.

## THE PLAINTIFF'S CONDITION

- [150] The plaintiff submits that as a result of the motor vehicle accident, she suffered a number of injuries which she continues to suffer the impact of. These injuries include: soft tissue injury to her shoulders, chest, back and hip; chronic pain, diminished cognitive function, and an aggravation of her pre-existing depression.
- [151] The nature and extent of the injuries claimed by the plaintiff, is disputed by the defendant.
- [152] There is no dispute that the plaintiff suffered general bruising and pain immediately following the accident, as well as soft tissue injury to her neck, shoulders and back. The plaintiff testified to these injuries and Dr. Lim documented the treatment of these injuries and also a diagnosis of soft tissue injury in the fall of 2017, as set out in the CL19 form.
- [153] The contested issue pertains to the plaintiff's complaints of ongoing pain, cognitive decline and the aggravation of a pre-existing condition that has become more severe following the accident.
- [154] In the analysis that follows, I bear in mind that the expert opinions must be examined in the context of the plaintiff's testimony as to her physical, mental, and emotional state; and the rejection of some or all of her evidence may affect the weight to be given to such opinions (*Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50).
- [155] As discussed earlier, the plaintiff was not a good historian and her evidence can only be described as vague, confused, and confusing. She was led thorough portions of her evidence in chief, due to her inability to recall details.
- [156] The plaintiff's concerns, as reported to Dr. Chawla, are in sharp contrast to the concerns reported to the family physician, from whom she sought and obtained treatment in the eight weeks following the accident.
- [157] The plaintiff did not return to discuss the impact arising from the injuries, except when she was requested to do so in November 2017, to assist in the completion of the CL19 form; and in 2019, several weeks before the trial. In other words, the plaintiff did not return to consult Dr. Lim relating to the injuries on her own initiative, since January 2015. During this period, the plaintiff continued to consult her doctor for other matters but did not raise the injuries relating to the accident.

- [158] During the completion of the CL19, Dr. Lim discussed her procedure in completing the form. Both the doctor and the plaintiff went through the form together, discussing each question. After which, the doctor filled out that part of the form and then confirmed what was recorded. The doctor made no note of any additional complaints, despite the plaintiff's testimony that she was in constant pain since the accident.
- [159] Between 2017 and the IME in early 2019, the plaintiff attended consultations with Dr. Lim for other matters. No reference was made to any ongoing complaints during those visits.
- [160] Several weeks before trial, when arrangements were made for the plaintiff to attend at the doctor's office, the plaintiff reported a number of complaints to Dr. Lim which had persisted since the motor vehicle accident. Many of these complaints were not previously disclosed when the plaintiff was treated by Dr. Lim.
- [161] A similar divergence in reporting is found in comparing the plaintiff's physical complaints to the clinical records of Dr. Liang. The plaintiff reported a number of her complaints during her regular consultations, prior to the accident. While at trial, she testified that she was "doing fine" before the collision.
- [162] The plaintiff's earlier complaints included: dizziness; fatigue; headaches, for prolonged periods of time; and an inability to sleep.
- [163] The plaintiff reported that she considered the conditions had worsened after the accident. This does not accord with her self-reports to Dr. Liang, as to how she was doing, as noted in paras. 135 - 136.
- [164] In addition, the observations of Ms. Jin Yang and Mr. Cu Lam do not align with the plaintiff's reports provided to Dr. Chawla and Dr. Kiraly at their medical examinations, or her testimony at trial.
- [165] It would appear that the plaintiff and her sister, Ms. Jin Yang, do not share a close relationship. For example, the sister was unaware that the plaintiff had a significant depressive condition, until her attendance at the trial. This lack of a close relationship prevents Ms. Jin Yang from providing detailed observations of the changes in the plaintiff's mood or physical condition. However, Ms. Jin Yang provided some observations with respect to the impact of the injuries sustained by her sister in MVA 2.
- [166] It is known from her evidence that the plaintiff did not show up as frequently at her sister's residence to visit with her mother. That said, the plaintiff reported to her family physician in June 2019, just before the trial, that she visited her mother 2-3 times per week. The plaintiff was her mother's favourite. She had been very upset over her mother's demented state and her inability to recognize her; a state that arose after the motor vehicle accident. This frustrates the plaintiff; and according to her sister, the plaintiff has become, at times, more irritable. When she does, this results in the visits being cut short and the plaintiff leaving.

- [167] Of note, Ms. Jin Yang made no observations to suggest that during the visits the plaintiff appeared in any physical pain or discomfort.
- [168] Mr. Cu Lam, though a family connection, had known the plaintiff for 20 years. However, it was only during the 6-12 months prior to the accident that he spent time socializing with her. It appears that he continues to lend out his vehicle to the plaintiff with the same frequency that he did before the accident, despite Dr. Chawla's comment over her reluctance to drive.
- [169] In the period before the accident, Mr. Cu Lam and the plaintiff met about 1-2 times per month, during which time they walked, played tennis, or socialized. After the accident, there was a small reduction in the duration of their walks together, but not the frequency. They no longer play tennis; although, it is unclear with what frequency they played tennis in the months prior to the accident.
- [170] Of note, Mr. Cu Lam observed the plaintiff to be in some discomfort in her lower back when walking. However, he did not specify when this occurred (whether it was more recently, or at a time closer to when the accident had taken place).
- [171] Dr. Chawla was of the view that as a result of the accident, the plaintiff developed chronic widespread pain with central sensitization; and concussion with post-concussion cognitive impairment. Dr. Chawla's opinion is of limited assistance for the following reasons:
- 1) the assessment was based on the self-reports of the plaintiff; whose testimony I am unable to place much weight on, for the reasons explained earlier;
  - 2) the plaintiff's reports of constant pain, with little improvement over the past 4½ years, are completely opposite to the complaints reported to the family physician. Dr. Lim's practice is to record any complaints stated by a patient during the consultation. The plaintiff was seen eight times over a two-month period following the accident; following this, no further complaints relating to the injuries suffered in the accident were reported by the plaintiff (except when preparing the CL19), until the consultation in June 2019;
  - 3) Dr. Chawla was unaware when he completed the assessment that the plaintiff had previously injured her back in 2014. When this was put to him during his testimony, he relied on Dr. Lim's clinical records to support his view that this was a one-time incident and there was no pattern or chronic aspect to the injury. In contrast, Dr. Chawla reviewed Dr. Lim's post-accident clinical records but offered no explanation to reconcile the plaintiff's lack of reporting any concerns between January 2015 and her complaints during her attendance at the IME, in 2019;
  - 4) due to the limited clinical records of Dr. Liang and lack of further background, it was difficult to establish the magnitude of the plaintiff's pre-accident depression. Dr. Chawla agreed that the plaintiff suffered from significant depression, for in excess of 15 years prior to the accident and was reliant on serious psychiatric medications during this period; and

- 5) Dr. Chawla agreed to the possibility that the plaintiff's cognitive condition was pre-existing, caused by the depression.

[172] I accept that the circumstances in this case are very difficult to assess. As noted by Dr. Chawla, beginning at line 303 of his opinion:

It is very difficult to state whether her cognitive impairment is solely a result of concussion-related/mild traumatic brain injury related symptoms, or a secondary effect of the chronic depression that worsened after the motor vehicle accident or as a result of her chronic pain. All three of these diagnoses can result in cognitive impairment and it is extremely challenging to attribute the causation to any one specific condition.

In my opinion, concussion and chronic pain are more likely than not a direct result of the injuries sustained in the motor vehicle accident.

[173] Dr. Chawla found that the plaintiff suffered cognitive impairment, based on concussion and post-concussion effect, following the accident. The doctor's opinion was based in part on the following factors:

- 1) The plaintiff was in a high-velocity impact accident. This was based on the circumstances that the airbag deployed, the vehicle struck a concrete barrier, and the vehicle was travelling at an estimated speed of 70 km/h. There is no evidence the vehicle was travelling at that rate of speed. It was estimated to be travelling between 20 and 30 km/h. There is no evidence that the plaintiff struck her head on impact. The doctor emphasised the fact that the plaintiff was placed on a spinal board. However, the evidence establishes this was done as a precautionary measure because the plaintiff complained of a sore neck, when observed at the scene by the first responders.
- 2) In addition, at the ARH Emergency Department, the plaintiff was the subject of a full medical workup. This process did not identify any concerns over a possible concussion. Dr. Peters noted:

She complains of some right lower hip pain. No abdominal pain. No neck pain. She is awake, alert, orientated. GCS 15/15. Pupils reactive to light and accommodation. No C-spine, T-spine or L-spine tenderness was elicited. Her chest was clear. Cardiovascular exam S1, S2, no additional heart sounds or murmurs noted. Abdomen was soft. No tenderness, guarding. FAST was done, unremarkable. Pelvis was stable. Lower extremity and upper extremity unremarkable. Full range of motion of all limbs were noted. There is no acute deformities, no swelling or ecchymosis.

C-spine x-rays and pelvis were unremarkable. There was some tenderness on the paralumbar region on examination, and slightly restricted forward flexion, but no limitations in neck range of motion. On re-examination, she was able to mobilize.

The plaintiff was subsequently discharged and told to follow-up with her GP, with no other specific discharge instructions.

- [174] Dr. Chawla further opines that the plaintiff suffered significant cognitive impairment because her functioning declined. The bases for this assessment were the observations made of the plaintiff during the interview with the doctor, including his observation of her difficulty in recalling events, reduction and difficulty in driving, reduced contact with her mother, and that she stopped doing her laundry.
- [175] The doctor did not take into account that the plaintiff continued to borrow Mr. Cu Lam's vehicle with similar frequency following the accident. He did not appear to consider that the plaintiff drove in the snow, from Surrey to Vancouver to attend a consultation with her psychiatrist, two years before attending the IME.
- [176] The plaintiff continues to do laundry and interact with her mother but not as frequently, or in the same manner, as she previously did. That said, her mother suffered a stroke after the accident. She no longer recognizes her daughter and is completely dependent on the plaintiff's sister for her care. These factors were not taken into account in formulating the opinion.
- [177] Dr. Chawla acknowledged that he was not aware of the plaintiff's cognitive function prior to the accident; and as a result, he was in a difficult position to comment on her pre-accident status and how it may have changed over time, other than the self-reports provided by the plaintiff.
- [178] Similarly, Dr. Chawla acknowledged that the plaintiff has serious psychological issues that existed prior to the accident and testified that it worsened after the accident. Dr. Chawla does not have an accurate baseline from which to assess how this may have changed over time other than relying on the reports of the plaintiff. The plaintiff indicated there were, in her view, some changes that occurred. She stated she was dizzy, had headaches that got worse, and suffered from lack of sleep. Comparing her comments to Dr. Liang's records does not suggest a material change. She reported that her mood was more depressed; again, the clinical records do not support this assertion.
- [179] For the forgoing reasons I find Dr. Chawla's opinion as to the diagnosis and prognosis of the plaintiff's ongoing medical concerns to be of limited assistance.
- [180] Dr. Kiraly's opinion is based, to a significant degree, on the self-reports of the plaintiff, who was a poor historian and whose evidence I found to be unreliable.
- [181] A number of the underlying assumptions relied upon by the doctor were not established, including: the plaintiff was travelling at approximately 70 km/h and struck the concrete barrier with quite a large force.
- [182] The plaintiff's pre- and post-accident condition, as described in Dr. Liang's clinical records, do not support a significant change in the plaintiff's condition post-accident. The clinical records indicate that many of the symptoms complained of, including those of: dizziness, headaches, lack of sleep and depressed mood, were also expressed prior to the accident. Dr. Kiraly stated the accident was the most precipitating factor for her depression worsening;

and further stated, her functioning substantially worsened vocationally, avocationally, socially and in the family.

- [183] The post-accident evidence, including testimony of lay witnesses of their interaction with the plaintiff, showed small changes in their pre- and post-social interactions with the plaintiff.
- [184] A review of Dr. Liang's clinical records, both prior to and following the accident, do not support a worsening of the plaintiff's depressed mood.
- [185] Dr. Kiraly relies upon a diagnosis of Dr. Chawla for chronic pain syndrome and central sensitization, anxiety, and post-traumatic stress disorder. Dr. Chawla's report is also based on the self-reports of the plaintiff.
- [186] Pains noted by Dr. Kiraly, in the plaintiff's neck, shoulders, back, chest, and groin areas, during the independent medical examination in 2019, were not noted when the plaintiff was examined by the family doctor in November 2017.
- [187] I find Dr. Kiraly's opinion to be of limited assistance for the forging reasons.

## ADVERSE INFERENCE

- [188] The defendant submits this is an occasion where the court should draw an adverse inference based on the failure to call or file reports from Dr. Lim and Dr. Liang. Dr. Lim was the plaintiff's family physician, for a number of years prior to the accident. Dr. Liang was her treating psychiatrist, for approximately 15 years prior to the accident. It is reasonable to conclude that both doctors could have testified about their personal knowledge concerning the plaintiff's pre-accident history and the development of symptoms following MVA 2. Dr. Lim and Dr. Liang could have provided opinions concerning the diagnosis, treatment and ongoing effect of the plaintiff's injuries and opined on their long-term effect.
- [189] The plaintiff called Dr. Lim, as part of her case, for the purpose of reviewing and explaining notations on her clinical records.
- [190] Dr. Liang's clinical records were admitted and while the doctor was on the plaintiff's witness list, he was not called at the trial. The court was advised that Dr. Liang went to Hong Kong and was unavailable. I am further advised attempts were made to set up a video conference link but that was not successful. The defendant wrote to plaintiff's counsel seeking information two weeks prior to the trial but received no reply.
- [191] In this case, there is significant disagreement concerning the diagnosis, cause and duration of the injuries suffered by the plaintiff. The doctors' clinical records were before the court but their use is limited. Dr. Liang's clinical records are further limited, in that the notations made during each consultation are relatively brief.

[192] The principle underlying adverse inferences was discussed by the authors of *The Law of Evidence in Canada*, 5th ed. (Toronto: Butterworths, 2018) at para. 6.471, pp. 406-407:

6.471 In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[193] In *Mohamud v. Yu*, 2016 BCSC 1138 at para. 37, Fisher J., as she then was, made it clear that the question of whether an adverse inference is appropriate is highly fact specific:

[37] I take from this that today, courts must be careful to consider the explanation for not calling a treating doctor and the nature of the evidence that could be provided by that doctor, particularly given the prior disclosure of his or her clinical notes, all in the context of the evidence before the court and the circumstances of the trial.

[194] A significant element in the determination of the plaintiff's injuries and ongoing effects centres upon her pre-existing depression. It is acknowledged that the plaintiff has lived with a major depressive disorder for over 20 years; incapacitating her to the point where she has been on disability and unable to work for 10 years.

[195] Both Dr. Chawla and Dr. Kiraly discussed the overlay or co-existence of this disorder with cognitive decline and chronic pain diagnosis, as well as a substantial worsening of the depressive disorder following the accident.

[196] Despite the views of Dr. Chawla and Dr. Kiraly, the court does not have the benefit of the views of her treating psychiatrist and her family physician, both of whom have been engaged for a number of years in the ongoing treatment of the plaintiff.

[197] In my view, as the plaintiff's treating psychiatrist for a number of years, Dr. Liang's opinion could have assisted the court in opining on both her pre-accident condition, as well as the post-accident impact.

[198] In this case, there was no evidence as to why Dr. Liang's opinion was not available to the court. I accept the defendant could have taken steps to obtain an opinion from Dr. Liang. I accept that there were some limited efforts made to have the doctor appear by video to have him attend to review and highlight his clinical records, once it was discovered he had travelled to Hong Kong. I also take into account evidence that could be expected from treating physicians in considering whether to draw an adverse inference.

[199] In the circumstances of this case, I infer that the opinion evidence from Dr. Liang or Dr. Lim were not tendered, as neither would support the plaintiff's case.

## CAUSATION

[200] The central issue in this case is whether the plaintiff's current ongoing physical and psychological symptoms were caused by the accident or, in part, are an aggravation of a pre-existing condition.

[201] It is well-established that the onus is on the plaintiff to prove on a balance of probabilities that the defendant's negligence caused or contributed to the injury complained of. A recent summary of the current law of causation is set out in *Kondor v. Shea*, 2014 BCSC 2146, where the court stated as follows at paras. 58-60:

[58] In the present case, it is clear there is a tortious cause for Ms. Kondor's continuing symptoms. However, there is also a non-tortious cause, being Ms. Kondor's pre-existing psychological condition. In *Raikou*, Skolrood J. explained the proper approach to assessing the contribution of pre-existing conditions at para. 62:

[62] Where, as here, a plaintiff has pre-existing conditions, the court must consider the relationship of those conditions to the current complaints. A defendant tortfeasor is liable for all injuries caused by the tort even if those injuries are more severe than might otherwise be the case due to the pre-existing condition (the "thin skull rule"). However, the defendant is liable only for the injuries actually caused by the accident and not for any effects of the pre-existing condition that the plaintiff would have experienced in any event (the "crumbling skull rule"). Put another way, the defendant is liable for the additional damage but not the pre-existing damage (*Athey*, at paras. 34-35).

[59] In *Zacharias v. Leys*, 2005 BCCA 560, *Esson J.A.* commented on the difficulty in applying the crumbling skull rule where there is a chance the plaintiff would have suffered the resulting harm in any event, at para. 16:

[16] The crumbling skull rule is difficult to apply when there is a chance, but not a certainty, that the plaintiff would have suffered the harm but for the defendants' conduct. Major J. addressed this issue in *Athey* when he wrote, at paragraph 35, that damages should be adjusted only when there is a "measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence." Such a risk of harm need not be proved on a balance of probabilities, which is the appropriate standard for determining past events but not future ones. Future or hypothetical events should simply be given weight according to the probability of their occurrence. At paragraph 27, Major J. wrote that "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk." In the same paragraph, he went on to say that a future event should be taken into account as long as it is a "real and substantial possibility and not mere speculation."

- [60] Justice Esson went on to explain that it is appropriate even in a "thin skull" case to reduce the plaintiff's damages where there is a proven measurable risk that he or she would have relapsed in any event. However, it is not necessary to establish that a pre-existing condition is already manifest and disabling before it can be taken into account: Zacharias, at para. 18.
- [202] In conclusion, I accept the plaintiff suffered soft tissue injuries arising from MVA 2, which gave rise to some initial pain and bruising immediately following the motor vehicle accident including neck, shoulder, chest and back pain. The plaintiff continues to suffer from soft tissue injuries primarily to her neck and back.
- [203] I accept that the plaintiff's pre-existing medical health issue, the depressive disorder, was aggravated for a period of time, which further complicated her recovery.
- [204] I do not accept the opinions of Dr. Chawla and Dr. Kiraly, for the reasons previously expressed. I find the effects of the injuries suffered by the plaintiff arising from MVA 2 to have been largely resolved, within a period of three years following the accident.

## POSITION OF THE PARTIES

- [205] The plaintiff submits that the appropriate range for non-pecuniary damages is \$110,000-\$180,000. The cases relied upon by the plaintiff are awards for plaintiffs with ongoing chronic pain and/or post-concussive symptomology, coupled with a pre-existing depressive disorder. The awards in those cases reflect the permanence and ongoing nature of some of the injuries which the plaintiffs continue to suffer from.
- [206] It is submitted the plaintiff suffered a number of soft tissue injuries as a result of MVA 2, which have resulted in a number of ongoing medical issues impacting both her physical and mental well-being. Her pain has not improved a great deal since the accident and she continues to experience headaches, which can occur 4-5 times per week and often last all day. In addition, her ongoing symptoms include: stiffness in her neck and shoulders; and numbness and pain in her back and hips. She also experiences pain in her chest.
- [207] It is further submitted the plaintiff's depression has worsened; and she is now experiencing severe anxiety, memory and concentration issues. Her mood has worsened, she tends to more easily lose her temper and become frustrated. She has ongoing sleep problems, which have worsened. She experiences auditory hallucinations and, on occasion, hears voices. The plaintiff submits that her symptoms, as detailed, are ongoing and impact, in a significant way, her home life and activities. It is further submitted that the difficulties experienced are permanent and there is the further concern that they will increase in severity over time.
- [208] The defendant's position is that the plaintiff suffered soft tissue injuries which are described as relatively minor; and that the extent of her pre-existing depression may have been aggravated somewhat, but that is difficult to quantify due to the treating psychiatrist not being called to testify. Given her pre-existing condition and based on the injuries

identified as resulting from the motor vehicle accident, the defendant submits that a non-pecuniary award in the range of \$35,000 is appropriate in the circumstances, together with a small award for cost of future care and those special damages which are verifiable.

#### NON-PECUNIARY DAMAGES

- [209] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities.
- [210] In *Rezaei v. Piedade*, 2012 BCSC 1782, Justice Voith summarized the factors to be considered when assessing non-pecuniary damages:
- [69] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, 263 D.L.R. (4th) 19, Justice Kirkpatrick identified the following non-exhaustive considerations that are relevant to an award of non-pecuniary damages: the age of the plaintiff; the nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's degree of stoicism. The object is to provide the injured person with reasonable solace for his or her misfortune - thus, an appreciation of the individual's loss is central.
- [211] The object of an award of non-pecuniary damages is to provide the injured person with reasonable solace for his or her misfortune; thus, an appreciation of the individual's loss is central.
- [212] The assessment of damages is influenced by an individual's personal experiences in dealing with his or her injuries and their attenuating consequences. In undertaking such an assessment, the amount of the award should be fair and reasonable. Fairness is measured, in part, against amounts awarded in comparable cases. However, a review of similar cases serves only as a rough guide to an assessment in any given case.
- [213] Assessing injuries that depend on subjective reports of pain was discussed in *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.) by McEachern C.J.S.C., as he then was (recently quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In referring to an earlier decision, McEachern C.J.S.C. said at paras. 5-7:
- [5] In *Butler v. Blaylock*, [1981] B.C.J. No. 31, decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:
- [6] I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

- [7] 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.
- [214] The plaintiff claims that all negative aspects of her life that she currently experiences are as a direct result of the injuries suffered in MVA 2. She claims that her social activities, particularly dancing and engaging with friends, has been severely impacted. While she was engaged in this activity on an ongoing basis, approximately twice per month prior to the accident, there was no evidence of any effort to reconnect with this group to resume such activities. She acknowledged during cross-examination that she did not have the means to contact these individuals.
- [215] The plaintiff described how it was difficult to return to crocheting, particularly because of the difficulties associated with the layout and design of these pieces. It is not clear whether the plaintiff can take on the physical aspects of this work, as she appears not to have made efforts to return to these activities.
- [216] The most significant impact, in her view, was the reduced interaction with her mother, in a way which allowed her to contribute to her mother's care. While there is some conflicting evidence as to the frequency of the plaintiff's visits with her mother it does appear she does not see her mother as often and the visits are for shorter periods of time. In part, this is due to the plaintiff's becoming upset over her mother's current condition and the plaintiff's inability to assist and provide care as she did, previously. This, in turn, leads the plaintiff to become irritable and frustrated. However, there are other forces at play with respect to the plaintiff's relationship with her mother that are unconnected to the accident.
- [217] The doctor notes that the plaintiff's depressive condition causes her to be upset over her mother's current welfare, given her incapacitated state. The plaintiff says she no longer cooks for her mother; yet in cross-examination, she agreed that she still can and does continue to cook for herself. No details were provided by the plaintiff, as to what prevented her from continuing to assist with this aspect of her mother's care. In my view, the reduced involvement with her sister is part of the evolving family dynamic and her sister being called upon to provide full-time care for the mother. The mother's condition has caused a restructuring of the relationship between the sisters, as opposed to something that can be attributable to the motor vehicle accident.
- [218] The plaintiff describes a lifestyle at home which is not markedly different than prior to the accident, with the several exceptions noted earlier. She continues to go for walks, although she states that they are not quite as long as they were previously. She engages with her friend, Mr. Cu Lam, on occasion. At home, she does laundry and cleaning, but takes somewhat longer to do so than she would have previously. She testified that bathing is not an issue and she continues to cook, but perhaps relies on takeout meals more frequently

than she did previously.

- [219] The plaintiff claims non-pecuniary damages in the range of \$110,000 to \$180,000. The court was referred to the following authorities, as comparable to the circumstances experienced by the plaintiff: *Chavez-Salinas v. Tower*, 2017 BCSC 2068 (\$180,000); *Cornish v. Khunkhun*, 2015 BCSC 52 (\$160,000); *Kim v. Khaw*, 2014 BCSC 2221 (\$130,000); *Eccleston v. Dresen*, 2009 BCSC 332 (\$120,000); *Chevalier v. Gray*, 2018 BCSC 1833 (\$105,000); *Morgan v. Scott*, 2012 BCSC 1237 (\$100,000); and *Kondor v. Shea*, 2014 BCSC 2146 (\$110,000).
- [220] The defence submits that an appropriate award for non-pecuniary damages is in the range of \$35,000 which is keeping with the award in *Ahmadi v. West*, 2014 BCSC 2050 [Ahmadi]. Ms. Ahmadi suffered soft tissue injuries which compounded a pre-existing pain to her neck, shoulders and back. The accident related injuries were resolved in about 2½ years.
- [221] While the cases provided are instructive, they can only serve as a rough guide, as each case depends on the facts unique to that case and the person who has suffered injuries as a result of the accident. Broadly speaking, the cases relied upon by the plaintiff focus on awards where the injuries resulting from the accidents have resulted in post-accident symptoms and conditions in greater severity and duration than those suffered by the plaintiff. I do not disagree that in the event the diagnosis and prognosis of the plaintiff's injuries by Dr. Chawla and Dr. Kiraly were accepted, that damages would fall within the range outlined by plaintiff's counsel. However, this is not the case.
- [222] That being said, I also accept the proposition that the non-pecuniary loss of an already disabled person can have significant impact on the aggrieved person's enjoyment of life: *Agar v. Morgan*, 2003 BCSC 630, para. 229.
- [223] In my view, the appropriate award is somewhere between the authorities relied upon by the defendant and the low end of the range of authorities relied upon by the plaintiff. I arrive at this conclusion on the basis that the impact of the injuries upon the plaintiff is greater than those outlined in *Ahmadi*, but less severe than the authorities cited by the plaintiff. In particular, the awards in the plaintiff's cited authorities incorporate damages for a degree of permanent, ongoing disability. The plaintiff has not established that she suffers from ongoing and permanent disability.
- [224] Having reviewed the authorities, considered in the context of my conclusions on the severity and duration of the plaintiff's injuries suffered in MVA 2, I conclude an award of \$70,000 for non-pecuniary damages is fair in the circumstances.

## **COST OF FUTURE CARE**

- [225] An injured party is entitled to compensation for the cost of future care based on what is reasonably necessary to restore the person to their pre-accident condition, to the extent that is possible.

- [226] The test for determining a claim for the cost of future care is set out in *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.). The award is based on what is reasonably necessary to put the person in the position that he or she would have been in, if the injury had not been sustained. Where restoration to the pre-accident condition is not possible, then a damage award to sustain or improve the health of the injured party is in order.
- [227] A recent overview of the applicable principles was provided by Madam Justice Adair in *Turner v. Dionne*, 2017 BCSC 1905 at paras. 347-348:
- [347] In order for a plaintiff to successfully advance a cost of future care claim, it is not necessary that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional. See *Gignac*, at para. 31 (citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, at para. 39). Since damages for cost of future care are a matter of prediction, they cannot be measured exactly: see *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.
- [348] Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Shongu*, at para. 210 (citing *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20 and *O'Connell v. Yung*, 2012 BCCA 57, at para. 68). In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135, the court observed (at para. 13) that "a little common sense should inform claims under this head, however much they may be recommended by experts in the field."
- [228] The plaintiff submits that an award of \$125,000-\$150,000 is supportable, based on the opinions expressed by Dr. Chawla and Dr. Liang. The defendant submits there is a lack of evidence to support a claim for cost of future care, other than for the sum of \$5,000 to address pain medications and psychiatry.
- [229] Based on the findings, the basis for future care costs provided by Dr. Chawla and Dr. Kiraly have not been established, in light of the fact that plaintiff had largely returned to her pre-accident state within three years.
- [230] Dr. Lim, the family doctor, was of the view that no additional treatment was required. As a result, there is no basis on which to conclude that future care costs are medically justified on the basis asserted by Dr. Chawla, other than for the provision of pain medication and a course of physiotherapy, which was previously recommended but not pursued to this point in time. I fix the cost of future care at the sum of \$7,500.

## LOSS OF HOUSEKEEPING CAPACITY

- [231] In *O'Connell (Litigation guardian of) v. Yung*, 2012 BCCA 57 at para. 67, Kirkpatrick J.A. stated the following with respect to the nature of the claim for housekeeping capacity:

[67] As noted by Madam Justice Huddart in *McTavish*, at para. 16, the case was concerned with the development of principled restraints on claims for loss of housekeeping capacity. One of the principles approved in *Kroeker* came from *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 407, [1991] 6 W.W.R. 408 (Sask. C.A.), in which it was said that it is not necessary for a plaintiff to prove that someone will be employed to do the work in the future to be entitled to an award for loss of housekeeping capacity. As I understand the principle, it is the loss of a capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* at para. 22). Determining the amount of a reasonable cost of future care award entails a unique set of considerations, as Professor Cooper-Stephenson explains at 416:

It is clear that both the need and the opportunity for the expenditure of moneys is relevant to the assessment. Therefore, if the plaintiff's medical condition may require care of a less expensive nature -- such as institutional care -- then the award for future cost of care should reflect that possibility. Equally, it would seem, if the evidence is not conclusive that more expensive care will be available, or that the plaintiff will find such care to be physically and emotionally satisfactory, then the award should reflect those possibilities; the reduced award will then reflect the best estimate of what will be reasonably necessary to provide optimum care. In this sense, the court is bound to look to the actual spending potential of the plaintiff.

[232] In *Kim v. Lin*, 2018 BCCA 77 [Kim], the Court clarified this area of recovery stating at paras. 50-52:

[50] The appellants also say that the judge erred in law by including services provided by family, in particular Mr. Soh, gratuitously to Ms. Kim in his award for loss of housekeeping services. It is said that in the give and take of a modern marriage such services by one's spouse are expected and are not compensable.

[51] I do not read the reasons of the judge as evidencing any such error. He discussed these services at paras. 192-194 of his reasons in the context of the alternative of advancing a substantial in trust claim for services provided prior to trial. By definition an "in trust" claim of this sort is in respect of services over and above what would be expected from the family relationship: *Bystedt v. Hay*, 2001 BCSC 1735 at paras. 180-181. And on this point it is clear that the judge was very much alive to the fact that Mr. Soh's ability to assist in housekeeping chores was significantly affected by his disability.

[52] Finally, the appellants argue that the fact that Ms. Kim has not incurred any out-of-pocket expenses for housekeeping services should justify caution in granting such a large award, and indeed they submit that in such situations loss of housekeeping capacity should only be addressed by a non-pecuniary award. Yet, as was held in *Liu*, "it has been well established in

this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members": at para. 25. Huddart J.A. explained the reasons behind this approach in *McTavish*:

- [63] As we have seen, it is now well established that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss. It is equally well established that the loss of housekeeping capacity is the plaintiff's and not that of her family. When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic capacity. [Emphasis added in *Kim*.]
- [233] The plaintiff claims under this head of damage the sum of \$25,000-\$30,000 on the basis of her diminished capacity since the accident and for the difficulties she will experience in the future, in this regard. The defendant submits that the plaintiff is capable of performing housekeeping functions, but that to do so is more difficult for her and suggests an award of \$5,000.
- [234] The plaintiff's difficulty for housekeeping was slightly elevated due to MVA 2. While still able to perform housekeeping services, the plaintiff's difficulty in doing so was somewhat elevated due the injuries suffered. I recognize that caution must be exercised in assessing an award for this loss. I assess the amount to be awarded under this element of damage to be \$7,500.

## MANAGEMENT FEES

- [235] Since 1978, the law recognizes as a discrete head of damage, an amount to assist in the investment of funds amounts awarded, as compensation for future losses. Accordingly, a sum of money can be awarded to cover the cost of a financial manager's fees and related expenses, in order to manage the funds awarded to compensate the injured party for future losses.
- [236] The plaintiff submits, given her ongoing physical, psychological, emotional and cognitive difficulties, as well as her limited education and experience, that she is entitled to an award to assist with the cost of financial planning. An award of \$25,000 is suggested as reasonable in the circumstances. The defendant submits, in view of the submissions connected to the other heads of damage, an award for management fees is not appropriate in this case. In addition, the defendant points out that a claim under this head of damage was not pled.

[237] Management fees are awarded in cases where an award includes specific amounts for costs of future care, future loss of income, earning capacity, cost of housekeeping care, and other amounts for which the court awards present lump sum amounts for future losses. An award for management fees is not automatic, but rather a case must be made for it. In this case, an award for future losses is not of a sufficient amount to consider the award of management fees, as a separate element of the damage award.

## SPECIAL DAMAGES

[238] An injured person is entitled to recover the reasonable out-of-pocket expenses that he or she incurred as a result of the accident. The plaintiff claims the total of \$825 in special expenses, comprised of the following:

a)

Acupuncture treatments (3 at \$35 per session)

\$105

b)

Massage therapy treatments (3 at \$30 per session)

\$90

c)

Herbal medicine

\$300

d)

Tylenol 3 (2 prescriptions)

\$50

e)

Tylenol and Advil

\$280

Total:

\$825

[239] No receipts were provided by the plaintiff. The claim for herbal medicine lacks specificity and was not prescribed by a health care provider.

[240] The special expense claim is fixed at \$525.

## FAILURE TO MITIGATE

- [241] The defendant submits the plaintiff failed to mitigate her loss by following the direction of Dr. Lim to undergo physiotherapy.
- [242] The plaintiff used what funds she had available on alternate options, including traditional Chinese medicine and did not approach ICBC to assist with medications or physiotherapy.
- [243] The plaintiff submits that a lack of funds prevented her from pursuing various treatments.
- [244] I am not persuaded that the plaintiff's award should be reduced due to a failure to mitigate her loss is warranted. Prior to the accident, the plaintiff had reduced contact and interaction with individuals due to her existing health condition. Her reluctance to engage and to interact carried forward and contributed to her reticence to actively engage in seeking out funding for treatment. In light of this and the degree to which rehabilitation was prescribed by her family doctor, I am not satisfied that a failure to mitigate has been established.

## SUMMARY

- [245] In summary, the court finds the defendant 50% responsible for MVA 2; and the plaintiff, 50% contributory negligent. I find that the plaintiff is entitled to damages in the following amounts, before adjusting for contributory negligence:

a)

Non-Pecuniary Damages:

\$70,000

b)

Future Care Costs:

\$7,500

c)

Loss of Housekeeping Capacity:

\$7,500

d)

Special Damages:

\$525

Total:

\$85,525

[246] I am satisfied that this global amount fairly compensates the plaintiff for her losses.

[247] In the event that the parties are unable to agree as to costs, they are at liberty to make written submissions on the issues. Unless the matter needs to be heard, the plaintiff shall have 30 days following the release of these reasons to file written submissions and provide a copy to the defendant, who shall have 21 days to respond. Thereafter, the plaintiff shall have 7 days to reply.

"T.J. Crabtree J."

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**        <https://www.bccourts.ca/jdb-txt/sc/20/08/2020BCSC0806.htm>

**CASE PAGE**                <https://chat.esheria.ai/case-law/canada/yang-v-duralia-2020>

Prepared on 26 October 2026 · Esheria