IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Blenkarn v. Mills ,*
2016 BCSC 1976

Date: 20161028
Docket: M121001
Registry: Vancouver

Between:

Annette Blenkarn

Plaintiff

And

Elwood Mills, Darlene Bork, Jill Adrian, Jennifer Hicks and Laura Lopez

Defendants

- and -

Docket: M153383
Registry: Vancouver

Between:

Annette Blenkarn

Plaintiff

And

Ling Jie Huang and Wen An Tang

Defendants

- and -

Docket: M153336
Registry: Vancouver

Between:

Annette Blenkarn

Plaintiff

And

Aruna Marjorie Simpson

Defendant

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff:	M. Chandler K.J. McLaren
Counsel for the Defendants:	C.P. Collins M. Howard
Place and Date of Trial:	Vancouver, B.C. April 18-22, 25-29, and May 2-6, 2016
Place and Date of Judgment:	Vancouver, B.C. October 28, 2016

Introduction

[1] These reasons for judgment arise from three actions tried at the same time. The actions allege the plaintiff was injured in five motor vehicle accidents.

[2] In action number M121001, the plaintiff alleges she suffered injuries caused by the negligent driving of the defendant Elwood Mills on March 4, 2010 (the "First Accident"). Liability is denied. In the same action the plaintiff alleges she suffered injuries caused by the negligent driving of the defendant Jill Adrian on April 26, 2010 (the "Second Accident"). Liability is admitted. In the same action the plaintiff alleges injuries caused by the negligent driving of the defendant Laura Lopez on September 8, 2010 (the "Third Accident"). Liability is admitted.

[3] In action number M153383, the plaintiff alleges she suffered injuries caused by the negligent driving of the defendant Ling Jie Huang on March 14, 2014 (the "Fourth Accident"). Liability is admitted.

[4] In action number M153336, the plaintiff alleges she suffered injuries caused by the negligent driving of the defendant Aruna Marjorie Simpson on November 10, 2014 (the "Fifth Accident"). Liability is admitted.

[5] The Second, Third and Fourth Accidents were low velocity rear end collisions. The Fifth Accident resulted from the defendant Simpson's failure to stop at a stop sign. Her vehicle struck the plaintiff's vehicle on the driver's side.

[6] The issue of liability for the First Accident is central to the overall assessment of damages. The parties agree the injuries suffered by the plaintiff in all five accidents are indivisible within the meaning of that word found in *Athey v. Leonati*, [1996] 3 S.C.R. 458. *Athey* also emphasizes that:

> 32. … The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the

> difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.
>
> [Emphasis in original.]

Thus, if the plaintiff is unable to demonstrate that her injuries from the First Accident were caused by the negligent driving of the defendant Mr. Mills, she is not entitled to an award of damages to compensate her for those injuries.

Liability for the First Accident

The Plaintiff's Evidence

[7] The First Accident occurred near Abbotsford where the eastbound Mount Lehman onramp connects with Highway 1. At about 10:00 pm on March 4, 2010, Ms. Blenkarn was driving alone in a vehicle at that location. The road surface was dry, the sun had set and it was dark. Ms. Blenkarn saw a green van ahead of her travelling on the onramp and moving at a speed less than the posted limit of 60 km/h. She also saw three other vehicles that were about to merge onto Highway 1. They were ahead of the green van. The merging vehicles appeared to be travelling slowly and waiting for traffic to clear on Highway 1. Ms. Blenkarn saw those vehicles merge onto the highway leaving only the green van ahead of Ms. Blenkarn's vehicle on the onramp. Ms. Blenkarn maintained what she considered to be a safe distance of about five seconds driving time between her vehicle and the green van.

[8] As the green van moved along the onramp it began to gain speed. Ms. Blenkarn also accelerated her vehicle to keep pace with the green van. Ms. Blenkarn was not certain of the speed to which her vehicle accelerated, but in cross-examination she made a "guess" that it might have accelerated to about 100 km/h. She had not looked at her speedometer. As Ms. Blenkarn's vehicle approached the merge point between the ramp and the highway she conducted what she called a "partial shoulder check" to her left for vehicles approaching from behind her travelling in the right-hand lane of Highway 1. As she began to perform her shoulder check, she saw the green van had merged onto the right-hand lane of Highway 1. As her head was turned partially to her left, she detected in her

peripheral vision an unexpected movement in front of her. She then saw that the green van was back on the onramp and had come to a stop. Ms. Blenkarn had not seen the green van move from the right-hand lane of the highway back onto the onramp, nor had she seen its brake lights come on. She immediately applied her brakes and attempted to steer her vehicle to the right in a vain attempt to avoid a collision. Ms. Blenkarn's vehicle struck the rear of the green van and immediately went into a spin during which Ms. Blenkarn struck her head several times on portions of the interior of her vehicle, which came to rest in the right-hand eastbound slow lane of Highway 1 facing oncoming traffic.

[9] Following the collision Ms. Blenkarn remained in her vehicle. Other drivers approached her vehicle and gave her assistance. Mr. Mills, who had been driving the green van, did not speak with her. A policeman arrived and spoke with her. An ambulance was called and Ms. Blenkarn was taken to hospital. At the hospital Ms. Blenkarn recalled that she was briefly interviewed by the police.

The Evidence of the Defendant Mr. Mills

[10] On the evening of March 4, 2010, Mr. Mills took the Mount Lehman onramp to Highway 1. He saw vehicles on the onramp well ahead of him. He recalled the area was well lit. He slowed down as he saw vehicles ahead of him apparently waiting to merge into the traffic. Mr. Mills stopped his vehicle behind the merging traffic and shortly thereafter his vehicle was struck from behind. He drove his vehicle off the travelled portion of the ramp to the right. The police arrived to whom he spoke. He saw other persons attending to the plaintiff, who was in her vehicle. He did not speak with her. An ambulance arrived and the plaintiff was taken from the accident scene.

The Evidence of Constable Small

[11] Constable Stephen Small was the policeman who attended the accident. He arrived shortly before 10:00 pm. He had not seen the accident itself. He took no photographs of the accident scene. Constable Small spoke to both drivers and created a "synopsis", which he dictated at the time. The synopsis reads:

> 10-03-04 @ 21:57 BLENKARN driving a loaner car BC plate: 223DLE rear ended MILLS in his grn Ford '03 van BC plate: 461MGP while they were each mergeing into traffic from Mt Lehman on-ramp East bound in Abbotsford. Both drivers said they were surprised by vehicles ahead of them slowing/stopping on the on-ramp. BLENKARN received a cut to her head. Quiring Towed, BCAS and Abby Fire Dept also attended. BLENKARN transported to MSA Hospital in Abby by BCAS. Copies of MV6020 provided to both drivers.

[12] Constable Small did not charge either driver with any driving offence. If the plaintiff had told Constable Small about the erratic behaviour of the green van he would have made a note of it.

Findings About Liability for the First Accident

[13] The burden is on the plaintiff as the following driver to demonstrate that she was not at fault for the First Accident: see *Cue v. Breitkreuz*, 2010 BCSC 617.

[14] At a speed of 100 km/h the plaintiff's vehicle was travelling somewhat more than 27 metres each second. If, as the plaintiff testified, she left a gap of about five seconds driving time between her vehicle and the green van, her vehicle would have travelled at least 135 metres in five seconds. If the plaintiff had taken her attention away from the green van for even two seconds to perform a shoulder check she would have had three seconds to apply her brakes while travelling initially at about 100 km/h and have had time to come to a stop in time to avoid a collision. I find that she did not allow herself adequate time. Her failure to see, virtually immediately, that the green van had slowed or stopped, including her failure to see its brake lights had been illuminated, was a failure to take reasonable care in all the circumstances.

[15] Nothing in Mr. Mills' evidence caused me to lose confidence in the accuracy of his recollections of his driving prior to the collision. I can find no fault in his driving.

[16] I am reinforced in my belief that the accident was caused by Ms. Blenkarn's inattention by the contemporaneous note of Constable Small of what the plaintiff told him about the accident, which note says nothing about erratic driving by Mr. Mills.

[17] Action number M121001 must be dismissed.

The Pleadings of Injury From The Five Accidents

[18] Paragraph 8 of the notice of civil claim in action number M121001 alleges that:

> 8. As a result of the First Accident, the plaintiff sustained the following physical injuries:
>
> a. injuries to the head;
> b. concussion;
> c. injuries to the neck;
> d. injuries to the shoulders;
> e. injuries to back;
> f. injuries to chest;
> g. cuts and bruises to leg;
> h. numbness in fingers and face;
> i. difficulty talking;
> j. headaches;
> k. nausea;
> l. dizziness;
> m. vertigo;
> n. fatigue;
> o. loss of memory;
> p. lack of concentration;
> q. anxiety; and
> r. depression.

[19] Paragraph 10 in that notice of civil claim alleges that the Second Accident aggravated "the injuries sustained in the First Accident".

[20] Paragraph 12 in that notice of civil claim alleges that the Third Accident aggravated "injuries sustained in the First Accident and Second Accident"

[21] Paragraph 6 of the notice of civil claim in action number M153383, alleges that in the Fourth Accident the plaintiff sustained the following injuries:

> 6. As a consequence of the collision referred to in Paragraph 5 herein, and the negligence and/or breach of statutory duty of the Defendants, as

> referred to in Part 3 herein, the Plaintiff has sustained personal injuries, the particulars of which include but are not limited to:
>
> (a) headaches;
>
> (b) musculo-ligamentous injury to the cervical region of the spine with pain distribution bilaterally into the shoulder musculature;
>
> (c) musculo-ligamentous injury to the thoracic region of the spine;
>
> (d) musculo-ligamentous injury to the lumbar region of the spine; and
>
> (e) such further and other injuries as counsel or the medical records may disclose.

[22] Paragraph 5 of the notice of civil claim in action number M153336, alleges that in the Fifth Accident the plaintiff sustained the following injuries:

> 5. As a consequence of the collision referred to in Paragraph 4 herein, and the negligence and/or breach of statutory duty of the Defendant, as referred to in Part 3 herein, the Plaintiff has sustained personal injuries, the particulars of which include but are not limited to:
>
> (a) concussion with headaches, dizziness, vertigo and nausea;
>
> (b) photophobia;
>
> (c) tinnitus;
>
> (d) musculo-ligamentous injury to the cervical region of the spine with pain distribution bilaterally into the shoulder musculature;
>
> (e) musculo-ligamentous injury to the thoracic region of the spine;
>
> (f) musculo-ligamentous injury to the lumbar region of the spine with sciatica pain symptoms;
>
> (g) balance difficulties;
>
> (h) cognitive difficulties;
>
> (i) low mood; and
>
> (j) such further injuries and other injuries as counsel or medical records may disclose.

Apportionment of Liability for Damages

[23] The parties agree the plaintiff suffered indivisible injuries in the five accidents. Apportionment of those injuries among the five accidents is difficult but in *Blackwater v. Plint*, 2005 SCC 58, the Supreme Court of Canada, while acknowledging the difficulty, held that it must be done because “the law is that the plaintiff is entitled only to be compensated for loss caused by the actionable wrong”.

[24] The parties make differing submissions about how apportionment is to be accomplished.

[25] The plaintiff submits that if she is found at fault for the First Accident, the appropriate method of apportionment is for the court to make a global assessment of damages for all injuries and then reduce the amount of damages by one-fifth to account for the non-tortious First Accident.

[26] The defendants submit the primary source of injuries from the First Accident and thus the major portion of the damage assessment should be apportioned to the plaintiff as if she was “the first tortfeasor”.

[27] I do not find the defendants’ approach to apportionment helpful. I agree with the plaintiff that there ought to be a global assessment of damages for the indivisible injuries from all five accidents and thereafter a deduction made for the First Accident. Nevertheless, simply reducing the assessment by one-fifth does not take into account the ruling in *Blackwater*, namely that each of the tortuously caused injuries must be apportioned.

[28] The impact of an at-fault accident in cases of indivisible injury and multiple consecutive tortfeasors was discussed in *Demidas v. Poinen*, 2012 BCSC 416:

> [50] Counsel for the plaintiff approached the fifth "at-fault" accident as a question of contributory negligence which would reduce the non-pecuniary award to some extent. When questioned about this by the court, he could provide no cases to support such an approach. Counsel for the defendant said this was not a matter of contributory negligence but did not have an alternative approach.
>
> [51] The effect of the at-fault accident on the overall damage award is not a matter of contributory negligence, although the effect on the overall result may be similar. It is a matter of ensuring that the defendants are responsible only for the loss and damage they caused to the plaintiff.
>
> [52] None of the cases cited to me by the plaintiff deal with sequential accidents, and none have at-fault accidents in the midst of accidents for which the plaintiff can claim damages. In MacGillivray, *supra*, the provincial court judge applied *Long v. Thiessen* (1968), 65 W.W.R. 577 (B.C. C.A.) and assessed damages separately for each of three accidents. Where the effects of the injuries are not divisible, as here, that approach is not appropriate as between tortfeasors (*Bradley v. Groves*, 2010 BCCA 361 (B.C. C.A.)). On the other hand, the defendants are not responsible for the injuries Mr. Demidas caused to himself, so the effects of that accident have to be accounted for.

> …
>
> [56] While this is not a situation where damage is divisible and capable of individual apportionment, nevertheless the loss and damage caused by the accident for which Mr. Demidas is at fault must be considered and removed from the overall award so that the defendants are not held responsible for that amount.
>
> [57] This is an imperfect exercise, dealing with intangibles and hypotheticals. Although each accident was fairly minor, the recurrence of accidents contributed to Mr. Demidas' ongoing symptoms. …

[29] As in *Demidas*, this case requires that the accident for which Ms. Blenkarn is at fault (the First Accident) must be considered, and then removed from the overall amount of global damages. I am also alive to the imperfect nature of the exercise, and also its necessity.

[30] This approach is not without precedent; in *Andrews v. Mainster,* 2014 BCSC 541, the court was faced with a plaintiff with pre-existing injuries and symptoms and saw fit to reduce the non-pecuniary damages award by 50% in the circumstances; in *Hooiveld v. Van Biert* (1993), 87 B.C.L.R. (2d) 160 (C.A.), the plaintiff suffered from pre-existing back problems and the global damage award was reduced by 25% to apportion between the back condition, and the aggravation and exacerbation of that condition caused by the accident.

The Evidence Relevant to the Assessment of Damages

[31] The plaintiff was in a motor vehicle accident in June 2009, which caused neck pain. She testified she had recovered from that accident before the First Accident (March 4, 2010) and I accept that is correct.

[32] At the time of the First Accident Ms. Blenkarn was 29 years old. She grew up in British Columbia and at the age of 9 became interested in sports car racing. Her father had been a race car driver. She had a measure of success while racing with various small cars such as go carts and later larger vehicles. She continued to race into her high school years and later. Her experience in the car racing world led to the establishment of a small decal and graphics business called BME. The decals were to be applied to motor vehicles. BME continued beyond the First Accident.

[33] In 1997 Ms. Blenkarn had experienced a high-speed accident while racing. Her vehicle apparently struck a concrete wall. She testified that although the collision caused her to experience retrograde amnesia for a period of 2 to 4 days surrounding that accident, she had recovered from its effects within a few months, including recovering from the retrograde amnesia. Dr. Gordon Robinson, a neurologist who interviewed and examined the plaintiff at the request of her counsel, testified that recovering from such amnesia is most unusual.

[34] Ms. Blenkarn graduated from high school in 1998 with average marks. She then enrolled in Kwantlen College in a marketing program, which by the time of the First Accident she had not completed. She has no further formal education.

[35] The plaintiff hoped to pursue her race car driving ambitions which she did not entirely abandon until the First Accident. To pursue those ambitions would have required a financial sponsor which did not materialize.

[36] Following another racing accident in 2004, which caused a concussion, Ms. Blenkarn's pursuit of car racing waned. By that time she was suffering from exhaustion and insomnia. The plaintiff carried on with her BME business and began to work part-time with H & R Collision in marketing. Her income from BME in the years before the First Accident was meagre. Her best year prior to the First Accident was 2008 when she reported a net business income of $1,400. In her best earning year after the First Accident her business income was $10,000. Thereafter, her income from business trailed off to about $3,200-$3,500. The latter was in 2014.

[37] Ms. Blenkarn experienced severe financial stresses before the First Accident. Along with her father she had incorporated a company called Dark Horse Transport but it failed. Along with her parents she had purchased a home in the Fraser Valley for $325,000. The mortgage went into default and foreclosure proceedings followed. Ms. Blenkarn had an overdraft facility of about $10,000 with Vancouver City Savings, which she found difficulty managing. She also had a car loan. The car was written off in an accident leaving Ms. Blenkarn with a further substantial debt. In November 2010, the plaintiff became a bankrupt.

[38] The Second, Third and Fourth Accidents were minor and their physical effects on the plaintiff were largely insignificant. They had emotional effects, which I will discuss later in these reasons.

[39] Dr. Richard Yenson, who at the time of trial was a retired family practitioner, saw the plaintiff after the First Accident. Dr. Yenson gave evidence about various factual matters arising from his clinical records. The plaintiff did not seek to qualify him to give opinion evidence.

[40] Dr. Yenson testified that the plaintiff:

> .. complained of fatigue and generalized weakness, dizziness and nausea especially on exertion and of impaired cognition, namely short term difficulty and poor concentration. She had difficulty with her speech, especially finding words, and she felt her personality had changed as she was experiencing anger outbursts, something which was unusual for her.

[41] Dr. Yenson referred to a “Concussion Syndrome” but because he did not testify as an expert witness, that is an opinion which I am not entitled to accept. I do accept she struck her head several times during the First Accident.

[42] Dr. Yenson saw the plaintiff on May 5, 2010, following the Second Accident and she reported a flare-up of headaches and nausea and that she was experiencing mood swings.

[43] There is no evidence the plaintiff suffered a head injury in either the Second, Third or Fourth Accidents. She alleges a concussion from the Fifth Accident. I do not have evidence to support that allegation.

[44] In about the late summer of 2013, the plaintiff received a gift of $200,000 from a family friend. Ms. Blenkarn had a business called “Bewitched” through which she gave start-up business advice. When she received the $200,000 gift, she began to spend money lavishly including a promotion of Bewitched at a “launch party” at the Vancouver Club. Many were invited. They were thought by the plaintiff to be potential joint venture partners. Some were apparently favourably impressed but

none invested. There is no evidence that Bewitched provided the plaintiff with an income of any significance and eventually the plaintiff exhausted the $200,000.

[45] In late 2014, the plaintiff decided to move to Swift Current, Saskatchewan where her parents lived. She was offered a job with a local newspaper, but declined to take it up. The plaintiff had met Marshall Perry online in late 2014 and began to live with him in Swift Current.

[46] At the time of the trial Ms. Blenkarn remained in Swift Current with Mr. Perry. She has no gainful employment. She complains of continuing headaches, which appear to be her principal current health complaint.

[47] Ms. Blenkarn medicates with marihuana, which has not been prescribed by a physician. The headaches originated with the First Accident and I am not able to conclude on the whole of the medical evidence that the Second, Third or Fourth Accidents aggravated them, except perhaps very briefly. The Fifth Accident greatly aggravated the headaches which had been initiated by the First Accident. Dr. Robinson reports that the plaintiff told him the Fourth Accident had caused back pain “for 3 to 5 days” and that she had no other difficulties following that accident. The Fifth Accident of November 10, 2014, caused a reoccurrence of sharp back pain.

[48] At the time of the trial the plaintiff was taking over-the-counter analgesics for frequent headaches and when they were severe was taking Tylenol #3.

[49] Dr. Robinson testified that the plaintiff appeared to have good recent and remote memory. He found no evidence of any brain injury. He diagnosed “chronic posttraumatic headache related to soft tissue injury in her head and neck. These injuries were initially sustained in the March 4, 2010 collision with aggravation occurring with subsequent trauma particularly the November 10, 2014 accident”.

[50] Dr. Robinson opined that the plaintiff was disabled from full-time work at the time he examined her in May 2015, but would probably be able “to return to part-

time activities in her business venture [Bewitched] within the next 6 to 12 months". Dr. Robinson is not confident the headaches will resolve entirely.

[51] Baljit Rayat and Karen McGregor, attended the "launch" of Bewitched in 2013 at the Vancouver Club. Both were favourably impressed with the plaintiff, but neither knew much of the plaintiff's background nor her business ventures. I did not find their evidence helpful except to the extent that they both found the plaintiff at the time of the Bewitched launch to be energetic and apparently healthy.

[52] David Miller owns several Fix Auto franchises, one of which is in Abbotsford, British Columbia. Initially it was known as H & R Collision, but later joined the Fix Auto Group. Prior to the First Accident Mr. Miller had hired the plaintiff on a casual part-time basis to assist with the marketing of his franchises. He was initially favourably impressed with her work, but knew nothing of her serious financial difficulties. He understood Ms. Blenkarn was winding down the BME business. If the First Accident had not happened the plaintiff would probably have continued with her employment with Fix Auto, but as Mr. Miller testified, following that event "we decided she should move on".

[53] Dr. Michelle Langill, a neuropsychologist, provided opinion evidence. Defence counsel objected to Dr. Langill opining on whether the plaintiff had experienced mild traumatic brain injury in any of the accidents and it was agreed that Dr. Langill was not qualified to give that evidence.

[54] Dr. Langill was not aware of the plaintiff's marihuana use. Nor was Dr. Langill advised of the plaintiff's serious financial setbacks that had their origins before the First Accident. Dr. Langill diagnosed a major depressive disorder, an anxiety disorder, a panic disorder and posttraumatic stress disorder.

[55] Dr. Pamela Squire is a family physician with a specialty in the management of complex pain. She concluded that the plaintiff's headaches were cervicogenic in nature and originated with the First Accident. They gradually subsided with very brief setbacks following the Second, Third, and Fourth Accidents and "but for the [Fifth

Accident] it is more likely than not that she would have remained headache free". The Fifth Accident caused the airbags in Ms. Blenkarn's vehicle to activate and in Dr. Squire's opinion she suffered a "lumbo pelvic" injury. It had improved at the time of Dr. Squire's evaluation on November 10, 2015, but had not completely resolved.

[56] In Dr. Squire's opinion:

> Ms. Blenkarn has made almost a complete recovery from her soft tissue injuries and I do not anticipate that they will prevent her from working or performing any of her usual recreational activities.

[57] Dr. Squire commented on the plaintiff's posttraumatic stress disorder as follows:

> Ms. Blenkarn has made some progress with regards to her anxiety and depression in the last 6 months. She has been able to resume driving in Swift Current. Her PTSD symptoms are gradually abating. I would consider her prognosis for full recovery somewhat guarded given the duration and severity of her mood disorders however, she appears to be somewhat resilient. If she can continue to live in a supportive, stable environment with limited external stressors and experiences a gradual improvement in her headaches and cognitive impairment, I anticipate it is possible for her to make a full recovery.

[58] In Dr. Squire's opinion, the headaches have "had sub-optimal treatment" and the plaintiff's "prognosis could improve following more aggressive treatment".

[59] Marshall Perry testified that he lives with Ms. Blenkarn in Swift Current. They met online in December 2014, and she later came to Swift Current to live with her parents and moved in with him in March 2015. She has told him about her headaches, which she has described to Mr. Perry as limiting the time which she can work watching a computer screen. There was some ambivalence about this evidence. The plaintiff's capacity to work using a computer is somewhat greater than that to which Mr. Perry testified. Both the plaintiff and Mr. Perry have engaged in substantial renovations to their home. The plaintiff's contribution to the physical labour has been modest at most. Mr. Perry testified that her ability to perform household chores is limited. He observed that her physical capacities are gradually improving.

[60] Dr. Jeanne LeBlanc, a clinical neuropsychologist, was asked by the plaintiff's counsel to provide a:

> *… diagnosis and prognosis in relation to the injuries sustained in the motor vehicle accidents, including the significance of each motor vehicle accident to the injuries suffered by the Plaintiff.*

Her opinion is that:

> Ms. Blenkarn's current neuropsychological test scores indicate that she meets diagnostic criteria for the following, per the DSM-5: (1) Somatic Symptom Disorder; (2) Unspecified Trauma- and Stressor-Related Disorder; and (3) Major Depressive Disorder, in partial remissions (Rule out Persistent Depressive Disorder, with Intermittent Major Depressive episodes, with current episodes). Neuropsychological data does not support a diagnosis of Mild neurocognitive Disorder.
>
> In respect of Ms. Blenkarn's psychological status, it is difficult to fully ascertain which MVA is responsible for what aspect of her current emotional functioning. It is clear from medical records that she experienced a number of somatic symptoms after MVA2, (March 2010) which negatively impacted her functioning at work. Nonetheless, there is no clear assessment of her mood at that time, and cannot be determined if she was demonstrating excessive thoughts, feelings or behaviours related to her injuries. There is no indication of mood swings after MVA 2 (Dr. Yenson, May 6, 2010), and she evidenced a moderate level of anxiety with sadness (Fraser Health Concussion Clinic), which suggests the beginning of her experiencing depression and possibly trauma related anxiety. This appears to have continued after MVA 3 (September 2010) - likely aggravated by psychosocial stressors such as a death in her family and financial stressors.

[61] Dr. LeBlanc was asked:

> *… whether or not there will be any permanent disability, and if not, residual employability on a modified or reduced time basis.*

Her opinion is that:

> Without additional psychological/psychiatric treatment, it is likely that Ms. Blenkarn will continue to experience psychological impairment. It is important to keep in mind that people with chronic psychiatric illness are able to participate in meaningful employment, with appropriate supports and with functionally focused psychological therapies. Furthermore, participation in vocational opportunities is associated with improved psychological functioning. Thus her psychological status does not fully disable her, vocationally - and with appropriate treatment, would likely be a minor issue. It is difficult to fully determine length of disability or employability without having evidence of her responsiveness to appropriate psychological intervention.

> From a neurocognitive perspective, there is no objective evidence of disability or limitations in capability to participate in employment or other meaningful life activities. However, she also reports a significant level of fatigue and chronic pain. I defer comment to specialists in these areas for determination of level of disability for these issues.

[62] Dr. Alan Richardson, an orthopedic specialist, saw the plaintiff at the request of the defendants on November 13, 2015 and prepared a report. He opines that her injuries from car racing accidents prior to the First Accident may have prolonged her recovery from that accident. He also observed that people who have numerous injuries in a succession of accidents tend to exhibit symptoms from relatively minor events.

[63] At the time the plaintiff saw Dr. Richardson she reported her “neck pain is resolved” but he found “muscle tension in the neck and upper back”.

Findings Concerning the Plaintiff's Injuries and Damages

[64] The plaintiff has had numerous distressing events in her life. Before the First Accident she had suffered injuries in car racing accidents. She had been involved with her father in a business which failed and a home that she owned with their parents had gone into foreclosure. In 2010 she had not only experienced the injuries from the First Accident, but in addition her financial difficulties took her into bankruptcy later that year. Ms. Blenkarn received a gift of $200,000, which she largely used up in an unsuccessful effort to launch her business called Bewitched.

[65] I conclude that the combined effect of these events, along with the injuries from the First Accident and the loss of her job from Fix Auto after that accident have caused considerable anxiety and depression.

[66] Added to all these distressing events the plaintiff has experienced five motor vehicle accidents alleged in the pleadings with consequent injuries. The First and Fifth Accident caused the most serious injuries. The Second, Third and Fourth of those accidents were insignificant in their physical effects, but added to her depressed mood and anxiety at least to a modest extent. The Fifth Accident caused a recurrence of back pain and headaches. I find these physical symptoms from the

Fifth Accident had been initiated by the First Accident and their effects were magnified by the plaintiff's earlier injuries.

Non-Pecuniary General Damages

[67] On review of recent authorities addressing non-pecuniary general damages I assess that head of damages from all five accidents at $80,000.

Income Loss to the Date of Trial

[68] I conclude the plaintiff has not had the capacity to earn a substantial income. The First Accident ended her Fix Auto employment. A certificate of earnings from that employer shows the plaintiff worked 49 weeks in the 12 months prior to the First Accident during which time her gross earnings were $11,934.

[69] I heard evidence that the plaintiff expected to receive a promotion within Fix Auto. I am not persuaded that was likely to happen. I believe her prospects of significant advancement were slight. By the time of her "launch" of Bewitched the plaintiff appeared to be well. She had largely recovered of the effects of the First Accident. The disappointing outcome of that launch was not the consequence of her injuries from any of the accidents.

[70] She had a slight income from BME and a slight income from consulting fees through Bewitched.

[71] The plaintiff's net income was reported for tax purposes in 2010 as $3,789; as a loss from Bewitched in 2011 of $3,460; as $10,010.50 in 2012; as $3,188.46 in 2013, and as $18,250 in 2014. She does not appear to have reported income for 2015.

[72] If the plaintiff had not had the Fifth Accident she would likely have earned an income in 2015 and thereafter to the time of trial. I am unable to determine with any precision what it would have been. I assess it at $20,000. I do not assess any income loss from the Second, Third and Fourth Accidents.

Loss of Income Earning Capacity in the Future

[73] I believe the injuries from the First, Second, Third, and Fourth Accidents have not caused a diminution in the plaintiff's capacity to earn income in the future. The Fifth Accident has caused a diminution in her earning capacity in the future. I accept that but for that accident the plaintiff would now be employed earning a modest income. I believe that her headaches in particular have diminished her capacity to earn an income, but I also believe that with more aggressive treatment they can be overcome. I believe it will take about five years for the headaches to subside to the point where they no longer interfere with her capacity to be employed. I assess the present value of the loss of future earning capacity at $100,000.

Special Damages

[74] The plaintiff claims $9,092.75 for special damages. The justification for some of them is slight, but I am not prepared to conduct a minute accounting of various receipts to arrive at a precise sum of money. I award $8,000 for special damages.

Apportionment of Damages

[75] Section 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333, requires me to determine the degree to which each person was at fault for the purposes of contribution and indemnity, though each defendant is jointly and severally liable to Ms. Blenkarn:

> 4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
>
> (2) Except as provided in section 5 if 2 or more persons are found at fault
>
> (a) they are jointly and severally liable to the person suffering the damage or loss, and
>
> (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

[76] In *Cempel v. Harrison Hot Springs Hotel Ltd.* (1998), 43 B.C.L.R. (3d) 219 (C.A.) (approved in that same court most recently in *Pirie v. Skantz,* 2016 BCCA 70), the court held:

> 19 ... The *Negligence Act* requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

[77] In *Aberdeen v. Township of Langley*, 2007 BCSC 993, Mr. Justice Groves addressed the process of apportionment at paras. 54-78, identifying the relevant factors for assessing departure from the standard of care at paras. 62-63:

> [62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in *Heller v. Martens*, *supra*, at ¶ 34 as follows:
>
> 1. The nature of the duty owed by the tortfeasor to the injured person…
> 2. The number of acts of fault or negligence committed by a person at fault…
> 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault…
> 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy… Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis…
> 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy…
>
> [Authorities omitted.]
>
> See also *Vigoren v. Nystuen*, *supra*, at ¶ 90 (summarizing these same factors).
>
> [63] Many of the above-noted factors are discussed in Chiefetz, *Apportionment of Fault in Tort*, *supra*, at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:
>
> 6. the gravity of the risk created;
> 7. the extent of the opportunity to avoid or prevent the accident or the damage;
> 8. whether the conduct in question was deliberate, or unusual or unexpected; and

> 9. the knowledge one person had or should have had of the conduct of another person at fault.

[78] Applying these factors, a picture emerges of the nature of the accidents in relationship to each other and the relative fault or blameworthiness of each of the defendants. The Second, Third and Fourth Accidents were relatively minor in nature, involving low speeds. The blameworthiness in failing to stop at a stop sign in the Fifth Accident is of a different order. That departure from the standard of care should attract a greater proportion of the fault for the indivisible harm.

[79] In line with *Demidas* and *Andrews*, I attribute the plaintiff's overall loss and damage one-third to the pre-existing injuries from the First Accident. The remaining two-thirds will be apportioned one-quarter to the Second, Third and Fourth Accidents, and three-quarters to the Fifth Accident.

Summary of Damage Award

[80]

Non-pecuniary damages	$ 80,000
Income loss to the date of trial	$ 20,000
Loss of capacity to earn income in the future	$100,000
Special damages	$ 8,000
Total	$208,000
Deducted for the first accident	($ 67,000)
Total damage award	$141,000

[81] Unless there are matters of which I am unaware the plaintiff is entitled to her costs.

"Affleck J."