

PSYCHIATRIC AND NEUROPSYCHOLOGICAL EVIDENCE IN CIVIL LITIGATION

PAPER 3.1

The Plaintiff with Psychiatric/Psychological Issues: Thin Skull/Crumbling Skull, Mitigation, and the Consequent Assessment of Damages

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These materials were prepared by Albert Roos, QC, and Jessie I. Meikle-Kähs (writing-only), both of Sugden McFee Roos LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, January 2017.

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I. Introduction

This paper provides an overview of the legal framework with respect to psychiatric/psychological injury in personal injury actions. In particular, we discuss the concepts of the “thin skull” and “crumbling skull” plaintiff where the plaintiff’s pre-existing injury or vulnerability is psychological and/or psychiatric. We explore the role of mitigation in such cases and the manner by which the court assesses damages. Discussion of recent cases informs the theoretical framework.

II. Thin Skull & Crumbling Skull

A. General Principles

It is trite law that a defendant in a personal injury action takes the plaintiff as he or she is. In some cases, the injured plaintiff may have a pre-existing weakness or a hidden vulnerability, which is triggered by the defendant’s negligence, causing damages that are more severe than one would expect. In these cases, the plaintiff is more seriously injured than the average person due to their pre-existing susceptibility. This is known as a “thin skull” plaintiff.¹

¹ *Vintila v. Kirkwood*, 2016 BCSC 930 at paras. 33-34

In other cases, the injured plaintiff may have a pre-existing condition that has either already manifested or would manifest in any event regardless of the tortious act. Here, the defendant is only liable for aggravation of the pre-existing condition, but not for the debilitating effects of the pre-existing condition, which the plaintiff would have experienced in any event. This is known as the “crumbling skull” plaintiff.² There is no requirement that the pre-existing condition be already manifest and disabling at the time of the tortious injury.³

A defendant need only return the injured plaintiff to the original position that he or she would have been “but for” the negligence of the defendant. There is no requirement to return the plaintiff to a better condition than his or her original position.⁴ For this reason, a plaintiff will attempt to characterize him or herself as a “thin skull” plaintiff; whereas, a defendant will argue that the same plaintiff is a “crumbling skull” plaintiff whose original position would have worsened regardless of the defendant’s act. The question that the court must consider in these situations is whether a plaintiff’s pre-existing weakness or vulnerability would have manifested even without the defendant’s negligent act.

B. Psychiatric/Psychological Injury—Evidentiary Issues

The “thin skull” and “crumbling skull” principles apply as equally to psychiatric/psychological injuries as they do to physical injuries. In some older cases, the “thin skull” plaintiff is referred to as having an “egg shell personality”, but the legal framework is the same.⁵ A genetic vulnerability to an addiction disorder, such as alcohol abuse, falls within the “thin skull” principle as a pre-existing susceptibility to injury.⁶

Shongu v. Jing is a recent British Columbia case where the court had to determine whether the plaintiff, who suffered from severe psychiatric injuries, was a thin skull plaintiff or a crumbling skull plaintiff.⁷ In this case, Mr. Justice Sewell provides helpful criticism of the expert opinion evidence and the manner that the experts were cross-examined.

In *Shongu*, the plaintiff had had quite a traumatic life having witnessed the death of several of his family members during the civil war in his homeland of the Democratic Republic of Congo. The plaintiff came to Canada as a refugee in 2005 and required psychiatric hospitalization for PTSD in 2006. He continued to receive psychiatric treatment on an outpatient basis until 2007. The subject accident occurred in 2012. Subsequent to the accident, the plaintiff suffered from chronic pain and a relapse of PTSD that would likely never resolve.

The plaintiff argued that he was well before the accident with only minor symptoms of PTSD brought about by having to describe the trauma that he had witnessed in his homeland to a social worker in order to apply for subsidized housing. He argued that these symptoms had largely resolved

2 *Athey v. Leonati*, 1996 CanLII 183 (SCC) at para. 35

3 *Krause v. Gill et al*, 2006 BCSC 1459 at para. 39

4 *Vintila, supra* at para. 33

5 *Yoshikawa v. Yu*, 1996 CanLII 3104 (BCCA) at para. 19

6 *Zawadzki v. Calimoso*, 2011 BCSC 45 at paras. 117-118

7 *Shongu v. Jing*, 2016 BCSC 901

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by the date of the accident. The defendants argued that the plaintiff was on a “downward spiral” before the accident and his psychiatric collapse would have occurred regardless of the accident.⁸

The court closely examined the plaintiff’s pre-accident psychiatric condition in order to determine the state of his pre-accident mental health. The defendants based their argument on the plaintiff’s medical records and the expert opinion of a psychiatrist who assessed the plaintiff on behalf of the defence. That psychiatrist opined that the plaintiff suffered from schizophrenia and PTSD and those conditions were unrelated to the accident.⁹

The court noted that counsel for the defendant cross-examined the plaintiff’s treating physician by putting selected extracts from his medical notes to him where the doctor had queried whether the plaintiff was suffering from schizophrenia as a differential diagnosis. Counsel would then attempt to get the physician to confirm that he would not have misstated his opinion in his notes. The court noted that this cross-examination was not put in any particular context and that it was not of any great assistance in assessing the doctor’s evidence.¹⁰

Sewell J. discussed his concerns with the defendant’s expert psychiatric opinion, which likely have broader application to other cases. First, the opinion was not responsive to the theory of the plaintiff’s case or to the opinions expressed by the plaintiff’s experts. The consensus of those opinions was that chronic pain caused by physical injuries incurred in the accident had aggravated the plaintiff’s PTSD symptoms. Indeed, the defendant’s expert opinion did not even address the effect of chronic pain on the plaintiff’s psychiatric condition.

Second, the court noted that the psychiatrist was not the plaintiff’s treating physician and had only met him on one occasion at a time when he was suffering from cognitive difficulties. In practice of course, a defendant’s expert is extremely unlikely to be the plaintiff’s treating physician. However, had the expert interviewed the plaintiff on more than one occasion this may have diminished the court’s concerns.

Third, Sewell J. found that the defence psychiatrist had also based his opinion on a fact not founded in the evidence. Specifically, he had concluded that the plaintiff’s doctors had diagnosed schizophrenia, when they had not done so.¹¹ In the result, the court preferred the plaintiff’s evidence over the defendant’s and concluded that the plaintiff’s disability was the result of a combination of his pre-existing psychiatric vulnerability, chronic pain from his physical injuries and the effect of medications he took to control his symptoms. The court found that the defendant was liable for the full extent of the plaintiff’s damages.¹²

In *Moritz v. Schmidt*, the plaintiff had suffered from mental health issues from a young age.¹³ She suffered physical injuries in the subject motor vehicle accident, which she argued made her psychiatric condition worse. Specifically, she argued that she had increased panic attacks, anxiety, depression and suicidal ideation due to the pain and stress caused by her physical injuries.¹⁴ The

8 *Shongu, supra* at para. 70

9 *Shongu, supra* at paras. 71-75

10 *Shongu, supra* at para. 98

11 *Shongu, supra* at paras. 116-128

12 *Shongu, supra* at paras. 131-133

13 *Moritz v. Schmidt*, 2013 BCSC 668

14 *Moritz, supra* at para. 60

defendants argued that the accident did not compound the plaintiff's pre-existing psychiatric disability and that the plaintiff was psychologically disabled before and after the accident.

Madam Justice Gropper preferred the expert opinions that supported the plaintiff's position for several reasons. The plaintiff's general practitioner opined that there was no relation between the accident and the plaintiff's psychiatric complaints. However, Gropper J. noted that the doctor did not refer to any examination or observation that she undertook in respect of that conclusion. Moreover, it was evident that the doctor had not asked the plaintiff how she was feeling or whether she had suffered any change in her psychiatric function after the accident. Conversely, the psychiatrist who performed an independent medical examination at the request of the plaintiff's counsel undertook a full psychiatric examination that included an extensive interview, a mental status evaluation and a DSM IV diagnosis. She had also made treatment recommendations and reviewed the medical documentation.¹⁵

Gropper J. also accepted the plaintiff's psychiatric expert opinion over the defendant's psychiatric expert opinion. She noted several problems with the opinion of the defendant's psychiatrist including: he placed significant weight on the general practitioner's opinion, despite his own opportunity to examine the plaintiff with the benefit of his psychiatric training; he ignored the opinion of the plaintiff's psychiatrist despite the thorough exam she conducted; he did not turn his mind to whether the plaintiff's physical injuries might have affected her psychiatric functioning; he emphasized pre-accident events without explanation, and he based his opinion on incorrect facts.¹⁶

In the result, Gropper J. found that the accident caused the plaintiff's physical injuries and chronic pain and worsened her psychiatric illness for a one year period. However, the plaintiff would face a formidable challenge in the future due to her pre-existing psychiatric illness.

III. Mitigation

A. General Principles

The burden to prove that a plaintiff could have and should have mitigated his or her loss is on the defendant on a balance of probabilities. In order to prove a failure to mitigate, the defendant must show that: (a) the plaintiff acted unreasonably in eschewing recommended treatment, and (b) the extent, if any, to which the plaintiff's damages would have been reduced had he or she acted reasonably.¹⁷ In the seminal decision of *Janiak v. Ippolito*, the Supreme Court of Canada held that the test of reasonableness in the first part of the mitigation test is as an objective one.¹⁸ However, more recently, the BC Court of Appeal has described the test as a "subjective/objective" test. The court must consider whether the reasonable plaintiff, having all of the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment.¹⁹

At the second part of the test, the defendant must show that the plaintiff's damages *would* have been reduced had he or she acted reasonably and followed recommended treatment. It is

15 *Moritz, supra* at paras. 67-68

16 *Mortiz, supra* at paras. 69-72

17 *Chiu v. Chiu*, 2002 BCCA 618 at para. 57

18 *Janiak v. Ippolito*, 1985 CanLII 62 (SCC) at para. 24

19 *Gregory v. ICBC*, 2011 BCCA 144 at para. 56

insufficient to show that the plaintiff's damages *could* have been reduced. There should be a medical opinion as to the consequences of the plaintiff's failure to follow the recommended treatment and the extent that his or her damages *would* have been reduced.²⁰

Recently in *Liu v. Bipinchandra*, the court held that the legal question of whether a plaintiff would have benefited from a medical treatment is determined on a subjective basis. The defendant does not need to lead direct evidence that the particular plaintiff would have benefitted from a specific treatment. Rather, it is open to the defendant to show that this part of the mitigation test is met indirectly. For instance, if most people would be assisted by a particular treatment, the court can infer that it is probable that the particular plaintiff would also have benefited from that treatment.²¹ The defence, however, must lead the indirect evidence from which the court can draw an inference. In *Liu*, the indirect evidence was that two-thirds of people who had the same form of headache as the plaintiff would benefit from Botox treatments. Therefore, it was probable that the plaintiff would also benefit from those treatments.²²

Failure to mitigate is a positive allegation that should be pleaded and argued at trial. However, the Court of Appeal has held that it is not detrimental if it is not pleaded if the issue is raised in cross-examination of the plaintiff without objection and it is argued before the trial judge.²³ The important point is that the issue must be developed at trial to allow for the development of the findings of fact necessary to determine the issue.²⁴ Accordingly, plaintiff's counsel should review pleadings and object to any cross-examination with respect to mitigation when the issue has not been pleaded. Conversely, defence counsel should ensure that the issue is properly pleaded and argued at trial.

B. Psychiatric/Psychological Issues

In some cases, a pre-existing psychiatric/psychological condition may prevent the plaintiff from mitigating his or her damages. In *Janiak*, the Supreme Court of Canada held that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to a pre-existing psychological condition, are not capable of making a rational decision. In the latter case, the plaintiff will not be required to bear the cost of an unreasonable decision regarding medical treatment.²⁵ In the former case, the normal test for mitigation applies.

Recently in *Khudabux v. McClary*,²⁶ a motor vehicle accident case, the court considered the issue of mitigation where the plaintiff suffers from pre-existing cognitive impairments, chronic pain and depression. In this case, the plaintiff failed to follow medical recommendations to undergo physiotherapy and active rehabilitation because she found it too painful. The defence argued that the plaintiff's conduct was unreasonable, but conceded that the plaintiff's pre-existing conditions prevented her from seeing the potential benefits of treatment. The court applied a subjective test for

20 *Chiu, supra* at para. 65

21 *Liu v. Bipinchandra*, 2016 BCSC 283 at para. 102

22 *Liu, supra* at para. 104

23 *Philip v. Smith*, 1996 CarswellBC 1913 (CA) at para. 32

24 *Hosking v. Mahoney*, 2010 BCCA 465 at para. 34

25 *Janiak, supra* at para. 32

26 *Khudabux v. McClary*, 2016 BCSC 1886

mitigation on the basis of the plaintiff's pre-existing conditions. The court held that the defendants had to take the plaintiff as they found her and it would not judge her failure to mitigate, "solely on a fictitious objective standard of reasonableness".²⁷

With respect, the court's approach in *Khudabux* was not entirely correct on this issue, although the end result was likely the same. The court should first consider the threshold issue of whether the plaintiff is incapable of making a rational decision due to a pre-existing psychological condition. If the plaintiff does not have capacity, then the subjective/objective test for mitigation is not applied. The court does not need to then consider a subjective mitigation test. This was addressed in *Janiak* where Wilson J. discussed the difference between the American and Canadian approach to mitigation. Wilson J. noted that in the United States courts tended to consider, "a great number of personal attributes falling short of constitutional incapacity". However, the analysis in Canada is, ". . . on the capacity of the plaintiff to make a reasonable choice". Where the plaintiff does not suffer from a constitutional incapacity to act reasonably, the defendant should not bear the burden of his or her unreasonable behaviour.²⁸

Where a plaintiff's failure to mitigate stems from a condition that the defendant caused, at least in part, the plaintiff will not be penalized for the failure to mitigate. This issue arose in *Wagner v. Newbery*, where the court found that the plaintiff's lack of diligence in following treatment recommendations may have been part of her depressive symptoms. The defendants had not shown that it was not a consequence of the depression and had therefore not proven failure to mitigate.²⁹

C. Evidentiary Issues

In *Mortiz*, discussed above, the defendants failed to prove mitigation on the second part of the mitigation test.³⁰ The court found that the accident caused the plaintiff's physical injury, chronic pain and a worsening of her psychiatric illness. However, her psychiatric illness would cause her a formidable challenge in the future, regardless of the accident.³¹

The defendants in *Mortiz* argued that the plaintiff had failed to mitigate her damages. They relied on the plaintiff's expert psychiatric report in which the psychiatrist opined that the plaintiff's physical injuries had been highly influenced by her psychiatric illness. The defendants argued that the plaintiff's psychiatric illness was treatable, yet she had not sought counselling and had declined medication for that illness. They further argued the plaintiff had not followed rehabilitation suggestions made by a psychiatrist including counselling and active rehabilitation.³²

The court held that the defendants had not proven that the plaintiff had acted unreasonably and that reasonable conduct would have reduced or eliminated her loss. Importantly, the court pointed out that the defendants' position with respect to mitigation contradicted their primary position in the litigation that the plaintiff did not suffer any worsening of her psychiatric condition in the accident. Moreover, the defendants failed to adduce evidence to show that counselling or medication *would*

27 *Khudabux, supra* at para. 154

28 *Janiak, supra* at para. 26, emphasis in original.

29 *Wagner v. Newbery*, 2015 BCSC 894 at para. 232

30 *Mortiz v. Schmitz*, 2013 BCSC 668

31 *Mortiz, supra* at paras. 73-76

32 *Mortiz, supra* at paras. 77-78

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have reduced the plaintiff's psychiatric illness. The defendants also failed to provide evidence that the recommended active rehabilitation was available to the plaintiff from a financial perspective.³³

The role of mitigation becomes more difficult for the court to determine where the plaintiff suffers from one or more psychiatric or psychological conditions. An example of this difficulty is illustrated in *Zawadzki v. Calimoso*.³⁴ In this case, the plaintiff suffered a serious elbow injury in the motor vehicle accident at issue. He also suffered from lower back pain and headaches. He became depressed and began to suffer from anxiety and his sleep deteriorated. Unfortunately, the plaintiff was allergic to a number of medications including most painkillers and muscle relaxants. In order to deal with his pain, the plaintiff began to self-medicate by drinking alcohol. The court found that the plaintiff, whose parents were both alcoholics, had a genetic predisposition to alcohol abuse, which fell squarely within the thin skull doctrine.³⁵

The court found that the plaintiff was very diligent in attempting to mitigate the physical consequences of the accident in that he attended physiotherapy, underwent elbow surgeries, used an elbow brace and continued to stretch daily. However, the plaintiff had done "nothing or almost nothing to address" his other problems. He failed to take any active steps to address his alcohol addiction and had not sought professional assistance for his sleep and mood disorders.³⁶

There were recommendations by the experts at trial that the plaintiff try antidepressant medications and behavioural therapy. There were also suggestions that the plaintiff look into different pain medications that he was not allergic to in addition to medications to assist him with sleep. The court noted that it was not enough to simply point to the plaintiff's failure to seek assistance, it was necessary to determine what this meant and what benefit might reasonably ensue from any assistance.³⁷

The court noted that the expert medical reports largely did not address the prospect of success of the recommendations particularly where there was comorbidity. The court's discussion of its difficulty with the expert evidence is worth setting out:

[158] Dr. Smith indicated that certain treatments are effective in about two thirds of the people who suffer from depression or anxiety. There was, however, no discussion of how successful these treatments are for people who also have addiction issues and who suffer from chronic pain and a sleep disorder. By virtue of the fact that alcohol exacerbates depression, one would expect that these figures would be decreased.

[159] Similarly, Dr. Smith gave evidence that there are medications which can be given to alcohol addicts, who have unsuccessfully exhausted conventional rehabilitation treatments, which are successful in about 50% of patients. There was once again no discussion of how this success rate is affected in people whose parents were alcoholics and who are thus more susceptible to alcohol abuse, or who concurrently suffer from multiple other underlying problems associated with depression and anxiety as well as with pain and sleep, or who have serious allergies to various kinds of medication.

33 *Mortiz, supra* at para. 81. There is no discussion in the case as to whether the plaintiff attempted to have ICBC pay for the active rehabilitation program under Part 7 of the *Insurance (Vehicle) Regulation*.

34 *Zawadzki v. Calimoso*, 2011 BCSC 45

35 *Zawadzki, supra* at para. 117

36 *Zawadzki, supra* at para. 154

37 *Zawadzki, supra* at para. 156

[160] Still further, there was no discussion of whether it was viable to concurrently take various medications for sleep, for pain, for anxiety and depression and for an alcohol addiction particularly when one is already an addict. Dr. Teal, for example, said that the pain medication, oxycodone, which Mr. Zawadzki may have no allergy to, is frequently used by drug addicts.

Despite these difficulties with the expert evidence, the court accepted that if the plaintiff had sought professional assistance for his various difficulties, he would have likely had some benefit. The court did not accept that the plaintiff's physical, psychological and cognitive problems would have resolved, but the court did accept that his problems would have improved to an uncertain extent.³⁸ The court took this into account in its assessment of damages, which is discussed below.

D. Failure to Follow Psychiatric Treatment

There are several recent cases considering whether a plaintiff's failure to take anti-depressant medication constitutes a failure to mitigate. These cases are fact dependant. For example, in *McKenzie v. Lloyd*, the plaintiff's doctor prescribed anti-depressants and provided him with a large quantity of samples because the plaintiff could not afford the medication. The plaintiff tried the medication, but he did not like the way that it made him feel and he did not want to incur the costs. There was evidence from the plaintiff's treating psychologist that many patients do not experience improvement to their depressive symptoms from medication. The court concluded that given that the plaintiff tried the medications and felt that they did not work, he had followed the advice of his medical practitioners.³⁹

Similarly, in *Hollyer v. Gaston*, the plaintiff's doctor had recommended anti-depressants on numerous occasions and she had declined to take them because she had experienced negative side effects when she had tried other medications. The evidence did not establish that the plaintiff would have received substantial benefit that would have reduced her damages if she had taken anti-depressants. At best, the evidence was that the plaintiff might have some improvement if she took anti-depressants. This was insufficient to meet the test for failure to mitigate.⁴⁰

Conversely, in *Liu v. Bipinchandra*, the plaintiff did not attempt to take psychiatric medication for depression and anxiety nor engage in cognitive/behavioral psychotherapy despite medical advice to do so. The court found that the plaintiff remained largely untreated, in almost every respect and that she would have improved considerably had she followed medical advice.⁴¹ Notably, plaintiff's counsel accepted that the plaintiff's failure to mitigate her losses was a significant issue.⁴²

38 *Zawadzski, supra* at para. 162

39 *McKenzie v. Lloyd*, 2016 BCSC 1745 at paras. 196-199

40 *Hollyer v Gaston*, 2016 BCSC 1401 at paras. 150-155

41 *Liu v. Bipinchandra*, 2016 BCSC 283 at paras. 106-108

42 *Liu, supra* at para. 66

IV. Assessing damages

The court's task in assessing damages is a subtle exercise that involves a consideration of contingencies and probabilities. There is a wide range of results available to the court in discounting an award unlike its determination of causation, which is an "all or nothing" exercise.⁴³

A. Pre-Existing Psychiatric/ Psychological Condition

In assessing damages where the plaintiff suffers from a pre-existing condition, which was likely to have affected the plaintiff regardless of the defendant's act, the court must take the condition into account. The court must consider the risk established by the evidence that the pre-existing condition would have detrimentally affected the plaintiff in the future in any event.⁴⁴ Such a risk does not need to be proven on a balance of probabilities, which is the standard that applies to past events. Rather, because it is a future or hypothetical event, the court must consider the probability of the risk occurring and adjust the award accordingly.⁴⁵ The court must also consider whether and to what extent the plaintiff's pre-existing condition was exacerbated by the defendant's act.⁴⁶ The question is what award is appropriate to reflect the difference between the plaintiff's original state (including the risk of relapse) and the plaintiff's state at trial.⁴⁷

In *Moritz*, discussed above, the court concluded that the plaintiff's psychiatric conditions would play a part in her future income loss regardless of the accident and that aspect of her loss was not to be borne by the defendants. To account for this factor, the court attached a 20% negative contingency to the award of loss of capacity.⁴⁸ The court also found that the plaintiff would have missed some past time from work due to her psychiatric condition and therefore reduced her past loss of income award by 10%.⁴⁹

In *Jokhadar v. Debhodaei*, the court did not set out a percentage reduction in the damages award, but instead took the plaintiff's pre-existing condition into account in making the award at the outset. Here the plaintiff suffered from bipolar disorder that she had suffered from for many years. She was a classic "crumbling skull" plaintiff. The court held that the plaintiff's bipolar disorder likely would have affected her whether or not the motor vehicle accident had occurred. However, the accident triggered, in part, a worsening of her illness.⁵⁰ In assessing damages, the court noted that the defendants had to establish that there was a measurable risk that the plaintiff's bipolar illness would have detrimentally affected her in the future, regardless of their negligence.⁵¹

The court held that the proper approach was to describe the probable course of the plaintiff's bipolar disorder had the accident not occurred and then compare that position with the plaintiff's

43 *York v. Johnston*, 1997 CanLII 4043 (BCCA) at para. 6

44 *Jokhadar v. Debhodaei*, 2010 BCSC 1643 at para. 111

45 *Zacharias v. Leys*, 2005 BCCA 560 at para. 16

46 *Jokhadar, supra* at para. 145

47 *York, supra* at para. 6

48 *Moritz, supra* at para.105

49 *Moritz, supra* at para. 99

50 *Jokhadar, supra* at para. 137

51 *Jokhadar, supra* at para. 110

position at trial and the future that she faced. In this case, the court found that the plaintiff suffered from a significant bipolar affective disorder that required monitoring and medication prior to the accident, but that the accident significantly exacerbated that disorder to the point that she became significantly disabled for a period of time.⁵²

In *Brewster v. Li*, the plaintiff suffered from long-standing psychological problems including depression and alcoholism.⁵³ The court concluded that these conditions were not caused by the accident and that they would have surfaced in any event. Thus, there was a measureable risk or a realistic chance that the plaintiff would have suffered from these conditions. The court found that it was appropriate to reduce the plaintiff's non-pecuniary damages by 15% to reflect the likelihood that the plaintiff would have suffered from depression in any event.⁵⁴ The court then determined that an additional adjustment ought to be made to account for the plaintiff's excessive drinking and the impact that her drinking had on her condition and recovery. The court reduced the award by a further 15% essentially finding that her drinking was a failure to mitigate.⁵⁵ This is somewhat of an odd finding insofar as the plaintiff's alcoholism was a pre-existing condition. Therefore, the court should have logically treated it in the same manner as her depression; although the end result is likely the same.

B. Failure to Mitigate

Where failure to mitigate has been made out, the court must make an estimate as to what the chances are that a particular thing will or would have happened and reflect those chances in the amount of damages which it awards.⁵⁶

In considering the effect of the plaintiff's failure to mitigate on the plaintiff's damages, the court may consider each head of damage separately, although there is no requirement to do so.⁵⁷ This was the approach taken in *Zawadzki*. As discussed above, in this case, the court found that the plaintiff had failed to take any steps to mitigate his depression, sleep disorder, and alcohol problem. The court further found that the plaintiff's severe alcohol addiction exacerbated some of his existing psychological difficulties and likely intensified his depression and anxiety and worsened his cognitive impairment. Taking all of these factors into consideration, the court held that a 20% reduction in the non-pecuniary damage award was appropriate.⁵⁸

With respect to the plaintiff's past wage loss, the court considered three periods of time and determined whether a deduction for failure to mitigate was appropriate with respect to each period. The court did not reduce the wage loss award for the first two years after the accident, but reduced the award by 15% for the subsequent three years. It then reduced the award for the year of the trial by 50%.⁵⁹ The court then considered the plaintiff's future loss of capacity claim and concluded that

52 *Jokhadar, supra* at para. 145

53 *Brewster v. Li*, 2013 BCSC 774

54 *Brewster, supra* at para. 124

55 *Brewster, supra* at paras. 125-127

56 *Janiak, supra* at para. 42

57 *Penner v. Silk*, 2009 BCSC 1682 at para. 52, varied only as to the future care award 2011 BCCA 135.

58 *Zawadzki, supra* at para. 174

59 *Zawadzki, supra* at paras. 186 to 191

it should be reduced by 20% for failure to mitigate.⁶⁰ No reduction was made to the award for future costs or special damages.

In *Liu*, where the court found that the plaintiff had failed to mitigate as addressed above, the court considered the failure to mitigate separately with respect to each head of damage. The court reduced the plaintiff's non-pecuniary, past wage loss, future loss of capacity damages and future care costs each by 40%.⁶¹ The court also refused to award the plaintiff any amount for future psychological treatment because there was no evidence with regard to how many treatments the plaintiff would require. But more importantly, given that the plaintiff had refused psychological treatment, it was not likely that she would use any award for psychological assistance.⁶²

V. Conclusion

When the plaintiff in a personal injury action suffers from a pre-existing psychological or psychiatric condition, counsel must be alive to the manner that condition affects the plaintiff's personal injury claim. Counsel should ensure that any expert reports tendered address how and to what extent a plaintiff's pre-existing condition impacts on the plaintiff's recovery, mitigation efforts, and the assessment of damages. It is evident from a review of recent case law in British Columbia that these issues are commonly litigated and counsel ought to be prepared to do so.

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60 *Zawadzki, supra* at para. 208

61 *Liu, supra* at paras. 117, 139, 157 and 161

62 *Liu, supra* at paras. 162-163