

CANADA / JUDGMENT

Akhtarkhavari v. Griffith

2020 BCSC 740

COURT

Supreme Court of British Columbia

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2020 BCSC 740 Akhtarkhavari v. Griffith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Akhtarkhavari v. Griffith,

2020 BCSC 740

Date: 20200513

Docket: M141330

Registry: Vancouver

Between:

Vargha Akhtarkhavari

Plaintiff

And

Gilchrist Griffith and Wilson Gilliland Craig

Defendants

- and -

Docket: M167491

Registry: Vancouver

Between:

Vargha Akhtarkhavari

Plaintiff

And

Michael John Milliard

Defendant

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

November 18-21, 25-29, 2019,

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Place and Date of Judgment:

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May 13, 2020

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OVERVIEW

- [1] The plaintiff, Vargha Akhtarkhavari, was involved in two motor vehicle accidents. The plaintiff's vehicle was struck from behind in both accidents. The first accident occurred in 2012 and the second in 2016. Liability is not in issue since the defendants admit liability for both accidents.
- [2] The plaintiff claims in negligence for loss and damage. More specifically, he claims that the following were caused by the accident:
- a) injuries to his neck, shoulders, upper back and lower back;
 - b) headaches;
 - c) sleep disruption; and
 - d) mental health problems.
- [3] The plaintiff has a history as a successful realtor. Following the first accident, the plaintiff developed pain in his neck, shoulder and back. He felt nauseous and he developed a headache that has never fully gone away.

- [4] The plaintiff felt that any recovery he experienced before the second accident was entirely reversed by the second accident. Following the second accident, his headaches, neck pain and psychological health worsened. He was eventually diagnosed with psychiatric disorders including a moderately severe major depressive disorder associated with his reaction to chronic pain.
- [5] As a result of the first accident, the plaintiff reduced his work hours because of the negative effect of the injuries, mainly due to increased headache and neck pain. In the years following the first accident, the plaintiff's commission income increased. Following the second accident, his commission income eventually began to decline. In terms of the plaintiff's ranking amongst the other realtors working at his office, his commission ranking dropped to 9th place by 2018.

ISSUES

- [6] The issues that I must determine are:
- a) Did the plaintiff suffer loss and damage caused by the first and second accidents?
 - b) If the plaintiff suffered loss and damage caused by the first and second accidents, what amount of pecuniary, non-pecuniary and special damages should be awarded?
 - c) Did plaintiff fail to mitigate his damages?

THE FACTS

Prior to the Accidents

- [7] The plaintiff is currently 47 years old and unmarried. He has resided in the basement suite of a home owned by his sister and mother for nearly a decade. His relatives live in the upstairs unit of the home.
- [8] The plaintiff was born in Iran. When the plaintiff was 10 years old, he immigrated to Canada with the rest of his immediate family except for his older brother, who lives in Australia.
- [9] After graduating from high school in Canada, he attended college for a couple of years. He took business courses but he did not graduate from the program. He admits he attended college mainly for the social aspect and he was not strong academically. According to his sister, the plaintiff has many friends from his high school and college years.
- [10] The plaintiff is a social person. He is adept at making personal connections with his clients. Some of his client relationships have turned into friendships over the years.

- [11] The plaintiff has always been highly motivated with respect to work and earning money. During high school he worked at a one-hour photo lab. At one point, he decided he would like to pursue a career as an optician. He approached the owner of a small optical store and offered to work as an unpaid apprentice. That experience eventually led to a full-time job and later, to a successful career in management at a national chain.
- [12] The plaintiff said that being a realtor was his "dream job". He started selling real estate in 1999 when he was 25 years old.
- [13] During his first couple of years in the real estate business, the plaintiff worked for another brokerage. In 2001 he joined a RE/MAX brokerage where he remains today. The geographic focus of the plaintiff's real estate business is in Coquitlam, Port Coquitlam and Burnaby, although he has done business in other parts of the Lower Mainland as well.
- [14] By all accounts, the plaintiff is well suited for his career as a realtor. He loves the lifestyle and the flexible, social nature of a realtor's work. He said he likes the fact that it is not just a desk job.
- [15] Earlier in his real estate career, the plaintiff pursued promotional and advertising opportunities very enthusiastically. For example, he saturated the neighbourhoods near his office with flyers and other promotional material. One witness recalled that the plaintiff placed advertising on virtually every bus stop in the Westwood Plateau neighbourhood of Coquitlam. That area was described as having high-end and expensive homes. The plaintiff's efforts paid off with many sales in this area.
- [16] The plaintiff built up a stable, lucrative, client base that he has managed to maintain throughout his career. He excelled at developing client relationships. The plaintiff devoted lots of time to socializing, touring properties, meeting other realtors, clients and prospective clients. He described most of his business as coming from people he knew such as friends, family and past client referrals.
- [17] Leisure physical activity does not appear to have figured prominently into the plaintiff's pre-accident life. Although the plaintiff attended work-related golf tournaments, these were infrequent industry events. The plaintiff also participated in cycling, but this activity appears to be limited to his participation in a one-time fundraising road trip to Seattle. He owns a bicycle, treadmill and "shaker" exercise machine, but there was insufficient evidence to establish that he regularly used any of this equipment prior to the accidents.
- [18] The plaintiff did regularly attend social events consisting of dining out, parties and industry award ceremonies. He socialized extensively with clients and friends. He views all of these activities as part of his job and key to his success as a realtor.

- [19] The plaintiff's pre-accident life was not entirely problem free. His father passed away in November of 2013 following an illness. He got married in 2005 and he described his ex-wife as physically abusive. Their relationship ended in a divorce in January of 2011, and the plaintiff moved to his sister's basement where he lives today. The plaintiff declared bankruptcy in June of 2010. He said the bankruptcy was caused by income tax and credit card debts, plus the cost of building a new house with his ex-wife.
- [20] By mid-2011, the plaintiff started dating someone. Shortly after that relationship began, his girlfriend was diagnosed with cancer. The plaintiff said he was very involved helping his girlfriend out during her illness. They dated on and off but their relationship had ended by late 2018.

The First Accident

- [21] Around noon on December 18, 2012, the plaintiff was driving his vehicle westbound on Hastings Street. While stopped at a red light at the intersection of Hastings and Willingdon, the plaintiff was struck from behind by the defendant, Mr. Griffith. Mr. Griffith was driving an unloaded dump truck. According to the vehicle registration information, the approximate net weight of the unloaded dump truck was 11,300 kilograms. The plaintiff was driving an Acura four-door sedan. After the accident, the plaintiff and Mr. Griffith were able to pull their vehicles over to exchange information.
- [22] Mr. Griffith said that before the accident, he was fully stopped directly behind the plaintiff's vehicle. The truck was in low gear and his foot slipped off of the clutch. This caused the truck to roll forward. He estimated the truck rolled forward at approximately 4km per hour and that it traveled one car length before it hit the plaintiff's vehicle.
- [23] Photographs taken immediately after the accident show the dump truck attached to the rear of the plaintiff's Acura. Photographs taken after the vehicles were detached show obvious impacts to the Acura's tail lights, trunk and bumper. There was a horizontal gash near the middle of the Acura's bumper and the trunk was hanging ajar.

After the First Accident

- [24] Following the accident, the plaintiff cancelled his plans for the rest of the day he drove the Acura home. The plaintiff said immediately after the accident his head started to hurt and that it was "worse than a headache". He felt pain in his back, shoulder and his chest. He said he felt "a little bit" of neck pain and shoulder pain.
- [25] As the day wore on, the plaintiff said that his pain worsened and he felt dizzy and groggy. He said that he developed pain in his neck, shoulder, back and sternum. He also experienced numbness in his face and on the back of his arms. Later that day, he said he developed nausea and slurred speech so he visited a walk-in medical clinic. The doctor at the clinic prescribed Tylenol.

- [26] A few days after the first accident, the plaintiff said his pain level was quite high so he saw his general practitioner, Dr. Toews, who ordered x-rays of the plaintiff's chest and neck. The plaintiff was prescribed Tylenol 3.
- [27] The plaintiff said that December is typically a slow season for realtors. He rested at home over the next couple of weeks. He tried to continue with his work as much as he could but his concentration was off due to constant pain. Prior to the accident, he said he worked 50-60 hours per week, but following the accident he had to reduce his hours to 30-40 hours per week. He had to work through the pain he was experiencing.
- [28] On January 2, 2013, the plaintiff underwent x-rays. A subsequent CT scan of his neck confirmed that there was no fracture. By this time the plaintiff says he was in pain "all the time". He was getting very limited sleep because the pain in his neck and shoulders kept him awake.
- [29] By May or June of 2013, the plaintiff's general practitioner prescribed Tramadol and referred him to a massage therapist. The plaintiff found the seven sessions of massage therapy he attended after the accident unhelpful. In 2014, he was referred for chiropractic and physiotherapy treatment.
- [30] By late 2015, following a vacation in Australia, the plaintiff said he felt 70% normal. He said homes were selling fast around that time, so he didn't have to market aggressively.
- [31] In the period before the second accident, he said he still had headaches and pain in his mid to upper back, shoulders and neck. The plaintiff said the intensity of his headaches fluctuated depending on what he was doing, whether showing homes or working at his desk. By 2016, he was still working 30-40 hours per week.

The Second Accident

- [32] On April 1, 2016, at about 5:45 p.m., the plaintiff was stopped at a red light in the right-hand lane waiting to make a right turn at an intersection. The plaintiff was struck from behind by the defendant, Mr. Milliard. Mr. Milliard was driving a Hyundai vehicle and the plaintiff was driving his Acura.
- [33] Mr. Milliard testified that he was waiting at the red light directly behind the plaintiff. He intended to make a right-hand turn after the plaintiff. Mr. Milliard said that the plaintiff started to move forward as if to turn right. Mr. Milliard took his foot off the brake to begin following the plaintiff but the plaintiff "slammed" on his brakes. Mr. Milliard was unable to stop in time and his vehicle made contact with the rear bumper of the plaintiff's Acura.
- [34] Photos were taken at the accident scene. They show a small, extremely faint, scuff or mark on the driver's side of the Acura's rear bumper. The photograph of Mr. Milliard's front bumper shows a mark or crack near the top passenger side of the licence plate holder. There is no dispute that the vehicle damage caused by the second accident was very minor.

- [35] The plaintiff says that following the second accident he cancelled his dinner plans and he drove himself home. He also cancelled appointments and a dinner scheduled for the next day.
- [36] The plaintiff says that immediately after the second accident, he felt that his headache, shoulder, upper back and neck pain came back with full force. He said that he initially experienced lower back pain, but that resolved over the next couple of weeks. He had numbness on his face and the top of his head, but that also went away. He stayed home in bed the following day because of the pain he was experiencing.

The Plaintiff's Current Condition

- [37] The plaintiff currently complains of chronic pain in his neck, upper back and shoulder and debilitating headaches. He also complains that he cannot sleep and that he has trouble concentrating. The plaintiff says his condition was set back by the second collision and he realized sometime in 2017 that he would never fully recover or live pain-free.
- [38] The plaintiff has now developed mental health problems. According to expert evidence, he suffers from persistent somatic symptom disorder with predominant pain, moderately severe generalized anxiety disorder, and moderately severe major depressive disorder.
- [39] The plaintiff is receiving significant professional care for his symptoms. He has experienced some improvement in the management of his post-traumatic headaches through a combination of drug therapies, including injection therapies. The plaintiff testified that his headaches are now 70%-75% improved.
- [40] In approximately November of 2018, the plaintiff started attending psychological counselling for his mental health problems. He testified that he is following his counsellor's advice and he is finding this treatment helpful.
- [41] Based on his counsellor's advice, the plaintiff recently started telling people about his physical and mental health problems. He has also started re-engaging in social activities. For example, with encouragement from his counsellor, the plaintiff successfully hosted a large group of his clients at a hockey game.

The Non-Expert Witnesses

- [42] Several non-expert witnesses testified as to the impact of the accidents on the plaintiff, including on his work and social life.
- [43] Ms. Giti Akhtarkhavari, the plaintiff's older sister, described the plaintiff as a very sociable person who likes to be with people. She also said the plaintiff likes to travel.

- [44] She said that on a typical day before the first accident, she would not see the plaintiff until later in the evening when he came home from work. After the accidents, Ms. Akhtarkhavari said the plaintiff stays home more often. Sometimes he stays in his pajamas all day. She said the plaintiff complains of headaches and he asks her to turn down the lights when he comes upstairs to eat. Ms. Akhtarkhavari said that she assists the plaintiff to change his bed linens but he takes care of his own bathroom.
- [45] Ms. Brittany Dick testified that she originally got to know the plaintiff while they worked together as realtors. They became friends. She described socializing with the plaintiff while eating out, attending work events and hockey games. Following the accidents, Ms. Dick testified that the plaintiff's headaches made it impossible for him to get out of bed for days. She noticed that the plaintiff started attending the office and open houses much less frequently. She said the plaintiff started avoiding going out to socialize and while they were on a trip to Las Vegas, he left social events early, or he skipped them.
- [46] Ms. Chelsea Borsoi testified that she met the plaintiff in 2015 when he was selling her parents' home. Between 2016 and 2017, she got to know the plaintiff well because he assisted her parents with purchasing investment properties. She described the plaintiff as happy, outgoing and friendly. Ms. Borsoi spent many hours with the plaintiff while attending property showings and eating out. She now regards the plaintiff as one of her best friends.
- [47] Ms. Borsoi said that the plaintiff initially told her that he suffered from headaches. He did not tell her about his injuries or the accidents until later in their friendship. She recalled that one day the plaintiff was experiencing a bad headache during an open house. To assist him, she took potential buyers downstairs to show them the parking garage.
- [48] Ms. Borsoi said that the plaintiff often gets short tempered and that he seems depressed and anxious. She attributes all of this to the pain from his injuries.
- [49] Mr. Jeremy Kyle testified that he met the plaintiff in 2010. At that time, Mr. Kyle had just started working as a realtor at the RE/MAX All Points Realty office. Mr. Kyle said that the plaintiff was a mentor and over time, he has become a close friend.
- [50] Mr. Kyle described the plaintiff as an "exceptional" realtor with tremendous drive, many repeat clients and referrals. Mr. Kyle did not notice much difference in the plaintiff until after the second accident, at which time he noticed the plaintiff started coming to the office less often.
- [51] Mr. Kyle and the plaintiff back each other up when they go away on vacations. Mr. Kyle recalled the plaintiff having a panic attack at some point in the last year when Mr. Kyle asked the plaintiff to assist him during a vacation. He said that this reaction was very unusual and he attributed it to the plaintiff's depression.

The Medical Evidence

- [52] Dr. Mark Adrian, a medical doctor specializing in physical medicine and rehabilitation, initially assessed the plaintiff in September of 2015 as a result of a referral from the plaintiff's general practitioner. He noted the plaintiff experienced pain symptoms affecting his head, neck, shoulder and upper back, as well as persistent regularly occurring and physically limiting headaches.
- [53] The plaintiff also apparently reported to Dr. Adrian that he had psychological symptoms, specifically mild depression. Following the assessment, Dr. Adrian diagnosed the plaintiff with chronic mechanical neck and upper thoracic spinal pain and cervicogenic headaches.
- [54] In his report dated February 10, 2016, which predates the second accident, Dr. Adrian opined that the plaintiff suffered physical forces to the tissues of his neck and upper back during the accident that resulted in the injuries he diagnosed. Dr. Adrian felt that the plaintiff's prognosis for further improvement was poor and he noted that the plaintiff's neck and upper back were vulnerable to injury in the future. He opined that the plaintiff was permanently partially disabled due to injuries suffered in the accident. He noted that without the ability to modify the plaintiff's work demands, such as taking breaks from sitting, the plaintiff might not be able to work as a realtor.
- [55] On February 4, 2019, Dr. Adrian assessed the plaintiff again. The plaintiff indicated that he developed psychological symptoms following the accident and Dr. Adrian noted that the plaintiff experiences ongoing pain and symptoms which are more intense since the second accident. He concludes that the plaintiff's mechanical neck and upper mid-back pain symptoms, as well as left shoulder pain, are causally related to the accidents. His prognosis was unchanged.
- [56] Dr. Gordon Robinson, a medical doctor with a specialty in neurology and headache disorders, initially assessed the plaintiff on January 5, 2016, which was before the second accident occurred. He assessed the plaintiff again on April 15, 2019. Dr. Robinson noted that the plaintiff reported that he suffers with a constant headache of mild to moderate severity, as well as constant discomfort in his neck, shoulder and upper back. Dr. Robinson is of the opinion that the plaintiff sustained soft-tissue injuries to his neck and upper back in the accidents. The plaintiff developed chronic post-traumatic headaches related to soft-tissue injury to the neck.
- [57] Dr. Robinson suggested treatments and medications that could benefit the plaintiff. He opined that the plaintiff's headaches were unlikely to worsen but they may continue for 3-5 years. After his second assessment of the plaintiff, Dr. Robinson concluded that a "multi-disciplinary approach to pain management may be helpful" but he stated that his optimism is tempered by the reality that the plaintiff had tried most therapies offered.

- [58] Dr. Robinson noted an aggravation in the plaintiff's symptoms following the second accident and he concluded his prognosis for improvement was poor and that he would continue to have headaches indefinitely, which would limit the plaintiff's ability to function. Dr. Robinson concluded that the most promising avenue for improvement was in the area of psychological treatment.
- [59] Dr. Alister Prout, a medical doctor and neurologist, initially examined the plaintiff on October 7, 2015. Dr. Prout assessed the plaintiff again on May 21, 2019. After reviewing the medical records, Dr. Prout concluded that the plaintiff did not suffer a traumatic brain injury, nor did he suffer an external head injury in the accidents. Dr. Prout states that the plaintiff suffered a soft tissue whiplash-type injury to the back and neck and cervicogenic headaches secondary to the soft-tissue upper back and neck injuries.
- [60] After the second accident, the plaintiff suffered a flare-up of symptoms related to his original injuries. Dr. Prout concludes the plaintiff has been left with persistent symptoms related to a headache disorder. Dr. Prout is also of the opinion that the headache disorder is attributable to the effects of the first accident. His diagnosis is post-traumatic and cervicogenic headaches, persistent neck and upper trapezius discomfort, and muscular tightness attributable to soft-tissue injuries sustained in the first accident. In his updated medical legal report, Dr. Prout notes improvements in the plaintiff's headaches and he recommends specific additional medications and SPECT scanning of his facet joints that might benefit the plaintiff.
- [61] Dr. Prout also notes that during the second assessment, the plaintiff reported increased difficulties with emotional and psychological symptoms. Dr. Prout notes that the plaintiff did not reveal these symptoms to his family, his general practitioner or his treating neurologist and that the symptoms have not been treated to any degree. With ongoing active treatment of his psychological problems, pain symptoms and headache disorder, Dr. Prout states that he expects improvement in the plaintiff's ability to work.
- [62] Dr. Prout states that the plaintiff has received sub-optimal treatment for his injuries to date and he recommends various medications and treatments. Dr. Prout concludes that the plaintiff is not currently disabled with respect to his ability to continue working as a realtor, although he acknowledges the plaintiff has had intermittent periods of decreased productivity associated with headache symptoms.
- [63] Dr. Anderson, a medical doctor and psychiatrist, assessed the plaintiff on November 16, 2018. Dr. Anderson noted that he detected no malingering on the plaintiff's part during the assessment that would indicate that the plaintiff was consciously exaggerating or feigning his symptoms. In his opinion, the plaintiff's physical and emotional factors are likely interacting to create his pain condition. He noted that the plaintiff has obsessive and perfectionist personality traits and he ruminates anxiously about his physical symptoms. The plaintiff scored (on a self assessment) at the 98th percentile for chronic pain patients on the "pain catastrophizing scale".

- [64] Dr. Anderson diagnosed the plaintiff with: (1) moderately severe generalized anxiety disorder; (2) persistent somatic symptom disorder with predominant pain of moderate severity; and (3) moderately severe major depressive disorder. Dr. Anderson opines that both conditions have developed over time since the second accident occurred. He opines that these difficulties are likely primarily due to the accidents. It appears this aspect of Dr. Anderson's opinion is based on the plaintiff coping well with past stressors (such as bankruptcy and divorce) and avoiding any significant emotional difficulties following the first accident.
- [65] Dr. Anderson recommends cognitive behavioral therapy to treat the plaintiff's chronic pain anxiety and depression. His long-term prognosis for the plaintiff is guarded and while he opines that treatment might reduce psychiatric symptoms, he concludes that treatment is unlikely to return the plaintiff to his premorbid level of emotional or vocational functioning.
- [66] Dr. Kulwant Riar, a medical doctor and psychiatrist, assessed the plaintiff on July 8, 2019 and he provided a medical report dated August 23, 2019 plus an addendum report dated October 4, 2019. Dr. Riar concludes that the plaintiff suffered musculoligamentous strains as a result of the first accident and the second accident likely aggravated his previous pain.
- [67] Dr. Riar's diagnoses are: (1) moderate severity somatic symptom disorder where pain in the prominent feature; and (2) adjustment disorder producing a combination of depressive, anxiety, obsessive-compulsive and behavior symptoms. Dr. Riar states that the somatic symptom disorder was caused by the first accident, but it was aggravated by other life stressors and the plaintiff's personality profile. His adjustment disorder started sometime in early 2017, and has continued since that time.
- [68] While the stress of the accidents have contributed to the plaintiff's adjustment disorder symptoms, Dr. Riar's opinion is that the onset of symptoms are too far removed from the date of the accidents to say they are the cause. In his opinion, the cause of the adjustment disorder symptoms are likely brought on by other life stressors.
- [69] Dr. Riar's short-term prognosis is guarded but with recommended medication and therapeutic interventions, he opines that the plaintiff's functioning can be improved. In his addendum report, Dr. Riar states that the plaintiff has had inadequate or sub-optimal psychiatric treatment. He states that with treatment and management of his stressors, the plaintiff's psychiatric disorders will remit.
- [70] In cross-examination, Dr. Riar agreed that pain was the primary stressor that led the plaintiff to develop somatic symptom disorder. With respect to Dr. Anderson's diagnosis of major depressive disorder, Dr. Riar agreed the plaintiff exhibited the symptoms required to meet the diagnostic criteria for that disorder. He also conceded that according to the DSM-V, a diagnosis of adjustment disorder could not be made if the patient met the criteria for another disorder. Finally, Dr. Riar agreed that the prognosis for adjustment disorder was more favourable than for major depressive disorder.

[71] All of the medical professionals agree that the accidents caused the plaintiff's physical injuries. Both psychiatrists agree that the accidents caused the plaintiff to develop at least one psychiatric condition. Dr. Riar's diagnosis of, and prognosis for, the plaintiff's psychiatric conditions was the most optimistic. However, I have concluded that Dr. Anderson's evidence offers a more accurate picture of the plaintiff's current psychiatric condition. That is because of Dr. Riar's evidence in cross-examination where, for example, he conceded that adjustment disorder should not be diagnosed if the patient meets the criteria for another disorder.

CREDIBILITY AND RELIABILITY OF EVIDENCE

[72] The defendants challenged the plaintiff's credibility, essentially on the basis that despite all of his subjective complaints regarding debilitating pain, the plaintiff managed to work and increase his income in the years following the accidents.

[73] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as follows:

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.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Faryna]; *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 (*Faryna* at para. 356).

[74] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.

[75] It was evident during the plaintiff's testimony that he is prone to describing his experiences, especially physical ones, with intensity. The plaintiff's friends and colleagues described him as a gregarious person. Dr. Anderson, a psychiatrist, assessed the plaintiff as having obsessive and perfectionist personality traits.

- [76] I agree that the plaintiff was somewhat selective about events that he acknowledged as being stressors in his life. He probably minimized the stressful events that he experienced in the past, for example, during his divorce and bankruptcy.
- [77] However, the plaintiff's propensity to focus on his physical and mental symptoms obsessively, coupled with the fact that his perception of his pain may be disproportionate, does not, in my view, mean that his evidence should be disbelieved or that he lacks credibility. Overall, I found the plaintiff to be a credible and forthright witness.

CAUSATION

The Law

- [78] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimis. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [79] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [80] Causation must be established on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [81] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse: *Athey v. Leonati* at para. 32.

Positions of the Parties

- [82] The plaintiff alleges that the defendants' negligence caused the plaintiff's injury and loss, including loss of income earning capacity.
- [83] The defendants' position is that the plaintiff has not established that the accidents caused any loss of earning capacity nor any psychological injuries. They say the evidence of wage loss falls short of establishing that there was a loss or, if there was a loss, that it was caused by the accidents. The defendants also submit that the late onset of the plaintiff's psychological symptoms lacks a temporal relationship with the accidents.
- [84] I will deal with the question of whether the plaintiff actually suffered past loss of income earning capacity later in these reasons. On the issue of causation for past loss of earning capacity and psychological injuries, I will address these in order below.

- [85] The plaintiff said that following the injuries sustained in the first accident, he had to reduce the number of hours he worked. The plaintiff said that market conditions and a stable client base allowed him to maintain and even increase his income up until 2017. Following the second accident, the plaintiff said that his recovery was set back completely, he was exhausted from dealing with the injuries, and his commission income was on the decline.
- [86] While it is true that much of the evidence concerning the plaintiff's pain comes from his self-reporting, his injuries are well documented in the medical evidence. The preponderance of medical evidence supports not only the existence, but the severity, of the plaintiff's physical and psychological injuries and that they were caused by the accidents.
- [87] I have concluded that, but for the accidents and the injuries sustained in them the loss would not have occurred. In other words, if there was any loss of earning capacity, I am satisfied the accidents are the cause of that loss. Again, I will address whether the plaintiff actually suffered a past loss of income later in these reasons.

Psychological Symptoms

- [88] The general principles which apply in relation to causation in law will apply to psychological injury as they apply to physical injury: *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 at para. 13 (C.A.).
- [89] The defendants submit that the evidence supports that the plaintiff's psychological issues began to appear in early 2017, and they were caused by normal life stressors and not the accidents. That position is supported by Dr. Riar.
- [90] While it is odd the plaintiff did not raise complaints regarding depression or low mood with his general practitioner, friends and family earlier, that does not displace my overall agreement with Dr. Anderson that the plaintiff was unlikely to have developed his current constellation of psychiatric symptoms if he had not been injured in the accidents. Therefore, I am satisfied that the plaintiff has established that the psychiatric conditions diagnosed by Dr. Anderson were caused by the injuries sustained in the accidents.

MITIGATION

- [91] The defendants allege that the plaintiff failed to mitigate the loss caused by his injuries because he failed to seek out and obtain timely treatment. For example, the plaintiff delayed reporting his psychological symptoms to his general practitioner, and he did not receive treatment from a psychologist until 2018.
- [92] The plaintiff is obliged to take all reasonable measures to reduce his damages, including undergoing treatment to alleviate or cure his injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

- [93] If the plaintiff proves the defendants are liable for his injuries, the defendants must prove that the plaintiff acted unreasonably, and that reasonable conduct would have reduced or eliminated the plaintiff's loss. Determining whether the plaintiff acted reasonably is a factual question that involves consideration of all the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.
- [94] The defendants have the onus of establishing that the plaintiff acted unreasonably by failing to attend recommended treatments for his injuries and also proving the amount by which the plaintiff's losses would have been reduced had he attended these recommended treatments: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
- [95] It is insufficient to show that the plaintiff was a difficult patient or that he failed to pursue all possible treatments; rather, the defendants must show the plaintiff should have reasonably pursued a particular treatment and that the particular treatment would have reduced the loss: *Myatt v. Holicza*, 2000 BCSC 1149 at para. 96.
- [96] The defendants are critical of the fact that the plaintiff did not immediately seek out and undertake treatments following the accidents. For example, while he immediately sought out medications to treat his injuries, he delayed engaging in certain treatments such as physiotherapy.
- [97] The defendants also submit that the plaintiff delayed in seeking out therapies such as facet joint injections to his neck, admission to a chronic pain clinic and psychological counselling. Dr. Prout concluded that the plaintiff received sub-optimal treatment for his headaches and psychological problems. However, based on Dr. Prout's recommendation, the plaintiff actively pursued a new medication that improved the plaintiff's condition.
- [98] While the treatment the plaintiff received may have been sub-optimal, and while the therapies he received tended towards passive therapies (such as chiropractic and massage), I do not fault the plaintiff for this. Except perhaps for his mental health symptoms, the plaintiff sought extensive professional assistance for his symptoms. He took the medications prescribed and he at least tried the therapies recommended to him. While the plaintiff could potentially have organized treatments such as physiotherapy and massage therapy sooner, there were no great or unreasonable delays.
- [99] The one exception is the plaintiff's delay in seeking assistance for his psychological symptoms. While apparently experiencing symptoms, the plaintiff did not mention them to his general practitioner until sometime in 2017. He did not actually start psychological counselling until November of 2018. The plaintiff has reported finding this counselling helpful. However, I do not find that the defendants have shown the plaintiff was unreasonable in failing to report, seeking out or engaging in, treatment for his psychological symptoms. The evidence shows that he took medications prior to counselling that could assist with depression.

[100] In light of all of the evidence, I have concluded that the defendants have not established that the plaintiff acted unreasonably by failing to engage in certain therapies at all, or at an earlier date. The defendants have also failed to establish that potential therapies, such as facet joint injections, would have reduced the plaintiff's loss, and by how much: Chiu, at para. 57. As a result, I do not agree that the plaintiff failed to mitigate his losses.

DAMAGES

Non-Pecuniary Damages

[101] Non-pecuniary damages are awarded to compensate for pain, suffering, loss of enjoyment of life and loss of amenities. The award is to be driven by the unique facts of each case: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[102] To assess non-pecuniary damages, I must consider the loss suffered having regard to the non-exhaustive list of factors as set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd, [2006] S.C.C.A. No. 100.

[103] I am mindful of the fact that much of the plaintiff's evidence depends upon on his own self reporting of his pain and symptoms rather than objective evidence of continuing injury. This calls for me to apply an exceedingly careful approach to the evidence in this case: *Karim v. Li*, 2015 BCSC 498 at para. 89.

[104] The assessment of non-pecuniary damages is necessarily influenced by the plaintiff's personal experiences in dealing with his injuries and the consequences of those injuries, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[105] In this case, I am particularly mindful of the evidence concerning the severity and duration of the plaintiff's pain and emotional suffering. The plaintiff says he has experienced pain that he perceives as constant and severe since the date of the first accident nearly eight years ago. He has also developed psychological issues as a result of his injuries and chronic pain that negatively impact his quality of life. His personality type may have made him vulnerable to the severity of his emotional issues, but that is not his fault.

[106] Prior to the first accident, the plaintiff said he worked and socialized for long periods. The plaintiff was nearly 40 years old at the time of the first accident and 13 years into his career as a realtor. The plaintiff identifies closely with being a realtor and he clearly takes great satisfaction from his career and his success.

- [107] The plaintiff says that since the accidents, he is unable to work the same hours or socialize in the way he used to. He now avoids social events and he has trouble concentrating. He suffers from low energy and low mood. He is preoccupied by his symptoms and pain. The plaintiff's sister and his friends confirmed that the plaintiff has pulled back from his usual working and socializing patterns. They also confirm that the plaintiff appears to be suffering from physical pain from headaches and from depression.
- [108] The medical evidence suggests that the plaintiff's pain and symptoms will likely continue. While some of the medical professionals believed his pain and symptoms might become more manageable with optimal treatment, they offered little hope of significant recovery.
- [109] I am satisfied based on the evidence presented that the plaintiff has significantly reduced his social and work activities, especially since the second accident. However, I am not convinced that the plaintiff engaged in regular physical activity, such as sporting activities or exercise, prior to the accidents or that the accidents caused the loss of physical activity.
- [110] As Dr. Prout noted in his medical report, while the plaintiff was in good health, he was not particularly physically active and he was over his ideal body weight, even prior to the accidents. The plaintiff's pre-accident physical activity was limited to attending an occasional golf tournament or a charitable bicycling trip. There is insufficient evidence to demonstrate that the plaintiff has suffered any significant loss of physical activity as a result of the accidents.
- [111] The plaintiff testified that he enjoys travelling. Despite the accidents, the plaintiff has continued to travel for enjoyment. However, there is evidence that his activities and enjoyment while travelling have been reduced as a result of his injuries. For example, the plaintiff travelled to Las Vegas, but Ms. Dick confirmed that he avoided social events on that trip.
- [112] Overall, I am satisfied that there is sufficient evidence to show that the plaintiff has suffered a clear diminishment in his lifestyle. Since the accidents, especially following the second accident, the plaintiff started avoiding going out with friends and clients. He started avoiding crowds and interacting with people. This is a significant loss of lifestyle that I am satisfied was caused by the accidents.
- [113] The plaintiff is now following professional advice to improve his mental health. His counsellor is encouraging him to engage in more social activities, such as hosting events for his clients. The plaintiff, by his own account, is making progress in this area.
- [114] Similarly, the plaintiff appears to be making progress at work. His commission earnings for the first half of 2019 indicate that his earnings are improving in comparison to 2017 and 2018.

- [115] The plaintiff suggests that cases such as *Sebaa v. Ricci*, 2015 BCSC 1492 and *Myers v. Gallo*, 2017 BCSC 2291, where the plaintiffs received non-pecuniary damages of \$180,000 and \$175,000, respectively, offer useful comparators to the present case.
- [116] In my view, neither of these cases are useful comparators. The accidents and injuries sustained are distinguishable partly because the plaintiffs in *Sebaa* and *Myers* suffered post-traumatic stress injuries resulting from the accidents. In *Sebaa*, the plaintiff was injured in a heavy head-on motor vehicle accident. Her injuries included ailments caused by the trauma of seeing her husband's injured condition at the accident scene. In *Myers*, the plaintiff was driving a group of children when she was injured as a result of the defendant side swiping her vehicle in an act of road rage.
- [117] The defendant submits that cases such as *Middleton v. Morcke and Lee*, 2007 BCSC 804, *Badyal v. Sidhu*, 2006 BCSC 1877, and *Pichugin v. Stoian*, 2014 BCSC 928 are useful comparators to the present case. In each of these cases, the plaintiffs suffered soft-tissue injuries and psychological injuries, such as depression, resulting from the accident that were likely to persist indefinitely. The plaintiffs in these cases received general damages awards between \$36,000 and \$75,000. However, these cases are distinguishable. For example, the plaintiffs in these cases largely experienced better recoveries and less impact to their lifestyles and activities than the plaintiff in the present case.
- [118] The plaintiff's injuries fall somewhere in the middle of the comparators offered by the plaintiff and defendants. *Bansi v. Pye*, 2012 BCSC 556 provides an appropriate comparator for the physical injuries suffered by the plaintiff. In *Bansi*, the 37 year old plaintiff suffered soft-tissue injuries to his neck and back in two accidents that had not resolved some four years after and which the court agreed were chronic. The plaintiff in *Bansi* received an award of \$75,000 for non-pecuniary damages. However, in the present case, the plaintiff's injuries include significant psychological disorders in addition to his physical injuries.
- [119] I am left in no doubt by the evidence that the plaintiff's injuries have diminished his quality of life significantly. Therefore, after considering the comparator cases, as well as the underlying purpose of non-pecuniary damages and factors set out in *Stapley* (at para. 45), I have concluded that \$130,000 is an appropriate award of general damages in the circumstances of this case.

Loss of Past and Future Earning Capacity

- [120] The plaintiff has claimed for loss of past earning capacity and loss of future earning capacity. Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

- [121] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *X. v. Y.*, 2011 BCSC 944 at para. 187.
- [122] An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati* at para. 27; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14.
- [123] To decide the plaintiff's claim for loss of future earning capacity, I must address two main issues: 1) has his earning capacity been impaired by his injuries; and, if yes, 2) what compensation should he be awarded for the resulting financial harm that will accrue to him over time? I must base the assessment of the plaintiff's loss on the evidence, and not by applying a purely mathematical calculation. The appropriate means of assessment varies depending on the circumstances of the case: *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pett v. Pett*, 2009 BCCA 232 at para. 8.
- [124] The plaintiff has a history of earning substantial commission income as a realtor. For many years, he ranked amongst the top earning realtors at the RE/MAX All Points Realty office.
- [125] Prior to the accidents, the plaintiff testified that he worked 50-60 hours per week. He said that he had a strong desire to work and he spent lots of time marketing and socializing for work.
- [126] Following the first accident, the plaintiff said that the pain in his neck, shoulder and back, and especially from headaches, forced him to cut back on work and socializing. He reduced his hours to 30-40 hours a week so that he could stay home more. The plaintiff also adjusted his schedule to take a day off during the week when he had a headache.
- [127] Following the second accident the plaintiff's symptoms worsened. He began avoiding going into the office. He avoided attending social events with clients and friends. He reported feeling self-conscious when he did go out to socialize. Ms. Dick, Ms. Borsoi and Mr. Kyle confirmed that following the second accident, the plaintiff started attending the office less frequently and that it was difficult to draw him out of his home, even to go out for lunch.

The Plaintiff's Position

- [128] Despite the plaintiff's injuries and his reduced working hours, his income continued to increase after each accident until 2017. The plaintiff submits that he should not be penalized for being stoic and for having delayed the onset of income loss.

- [129] The plaintiff submits that he continued earning substantial commission income following the accidents despite suffering from debilitating pain and psychological symptoms. The plaintiff submits that his income actually increased up until 2017 due to favourable market conditions. His loyal client base also allowed him to coast along in the years following the accidents despite working at a reduced capacity.
- [130] To establish past loss of earning capacity and loss of future earning capacity, the plaintiff relies on a functional assessment of his working capacity performed by Mr. Paul Pakulak and the opinion of Mr. Matthews, a chartered professional accountant.
- [131] Mr. Pakulak, an occupational therapist, initially assessed the plaintiff on December 9, 2015. After the second accident, Mr. Pakulak assessed the plaintiff again on March 20, 2019. Mr. Pakulak concluded that the plaintiff demonstrated the functional strength capacity for "modified medium strength tasks". He is limited in prolonged and repetitive overhead work and below waist level work. He is also limited in prolonged and repetitive positioning of the neck and shoulders for work in front of the body, prolonged intensive sitting and standing. Mr. Pakulak concluded the plaintiff could perform part-time light to modified medium work but he was incapable of full-time work.
- [132] Mr. Matthews provided a report analysing the plaintiff's loss of earning capacity. He has specialized training and extensive experience in the area of forensic and investigative accounting, including in quantification of economic losses.
- [133] Mr. Matthews considered the fact that the plaintiff's income increased year over year from 2012 to 2016. In 2016, the year in which the second accident occurred, the available evidence shows that the plaintiff had his best-ever year in terms of gross commission earnings. As a result, Mr. Matthews identified zero past loss of income for 2012 to 2016.
- [134] However, for 2017 up to the first half of 2019, Mr. Matthews did identify a loss. He considered the potential loss in low and high range scenarios. To calculate the ranges, Mr. Matthews used a methodology that assumes income based on the plaintiff's historical ranking amongst other top realtors who worked at the RE/MAX All Points office.
- [135] Based on information provided by RE/MAX All Points, Mr. Matthews averaged the plaintiff's commission ranking for the years 2009 to 2016 at 2.5. This meant the plaintiff was consistently ranked as either the 2nd or 3rd top commission earner in the office in those years. The plaintiff ranked higher, at 1.5, for the years 2013 to 2016.
- [136] Mr. Matthews identified a net loss of income loss for 2017, 2018 and the first half of 2019, in the low range of \$137,000. In doing so, he assumed the plaintiff would have earned gross commission equal to the midpoint between the commission figures actually earned by the 2nd and 3rd ranked realtors at the plaintiff's office.

- [137] For the high range scenario of \$183,000 (net of taxes), Mr. Matthews assumed that the plaintiff would have earned gross commissions equal to the midpoint between the commission figures actually earned by the 1st and 2nd ranked realtors at his office.
- [138] Mr. Matthews provided an analysis of future loss of earning capacity using his low and high range scenarios, plus the 1.5% discount rate and mortality factors for males in British Columbia, of the average annual past loss of income, before taxes. Mr. Matthews assumed an annual loss from the date of the trial to retirement at age 65 of either \$82,000 (low range) or \$112,000 (high range) for which he calculated a present value of annual loss of either \$1,312,000 or \$1,793.00, respectively. Assuming an annual loss to retirement at age 70, he calculated a present value of annual loss of either \$1,572,000 or \$2,148,000, respectively.
- [139] In cross-examination, Mr. Matthews agreed that he relied on the ranking and income information provided by RE/MAX All Points. He agreed he had no specific information concerning the composition of the business done by the other realtors, such as the nature of their clients or the sales underlying their commission figures. Mr. Matthews did not provide any analysis on the effect, if any, of market conditions on the rankings or the commissions earned by the plaintiff or the other realtors.
- [140] Ms. Gayle Kossaber testified about the plaintiff's work as a realtor at the RE/MAX All Points Realty office. Ms. Kossaber is an owner and managing broker of RE/MAX All Points Realty. She has known the plaintiff since 2001.
- [141] Ms. Kossaber reviewed the brokerage records to supply information about the commission rankings. For 2009 to 2018 and the first half of 2019, she provided a list of the top five commissions earned by the realtors at RE/MAX All Points Realty. She also supplied information to show where the plaintiff ranked during those years.
- [142] By way of examples, Ms. Kossaber provided commission information for 2009 and 2017, as follows:

Ranking #

2009

2017

1

\$595,057

\$453,513

2

\$358,195 [plaintiff]

\$366,769

3

\$294,136

\$357,037

4

\$273,343

\$356,531

5

\$243,884

\$356,171

...

9

\$268,534 [plaintiff]

[143] In 2009, approximately 70 realtors worked at RE/MAX All Points Realty. Since then, an additional 16 or 17 realtors have joined. In 2014, two new realtors joined who turned out to be top performers.

[144] The other top performing realtors are not identified by name, nor is it possible to tell how many units were sold or the composition of their sales. Ms. Kossaber testified that the top performers tended to be the same people year after year. She also stated that in order to rank as a top performer, a realtor was required to work hard and put in lots of hours. She said a top realtor might have a good year where, for example, they worked with a developer to exclusively market units in a new development.

[145] Ms. Kossaber stated that she began to notice a negative impact on the plaintiff's commission performance following the second accident. About eight months prior to the trial, the plaintiff told her about his injuries from the accidents.

[146] I found Ms. Kossaber to be a forthright and credible witness. She answered questions put to her in a straightforward and unbiased manner.

[147] The defendants are not alleging that the ranking information supplied by Ms. Kossaber is inaccurate. Rather, they point to the limitations in that information. For example, there is no way to know the identity of the other top realtors, whether their identities changed year to year, or the composition of their sales and clientele. The ranking information supplied by Ms. Kossaber does little to advance my understanding of why the plaintiff earned more or less annual commission in any given year in comparison to the other realtors.

[148] I agree that the ranking information supplied by Ms. Kossaber suffers from some important limitations. It lacks details that could have been useful. Such details might have assisted me to assess the true comparability of the plaintiff to the other top performing realtors. In short, I have concluded that the evidence regarding ranking at the RE/MAX All Points office is of limited value in assessing the plaintiff's past or future loss of earning capacity.

The Defendants' Position

[149] The defendants submit that the plaintiff's earnings demonstrate that he suffered no past loss of earning capacity and that he has failed to prove that he will suffer future loss of earning capacity.

[150] The defendants relied on two expert reports that responded to Mr. Matthews' report. The defendants' first responding report was prepared by Mr. Mark Szekely. Mr. Szekely is an economist with a specialty in forensic economics. Mr. Szekely's extensive experience includes working as a consultant estimating economic damages in personal injury cases.

[151] Mr. Szekely's main point of response to Mr. Matthews' loss of income projection is that it is unlikely to reliably estimate the plaintiff's loss. That is due to Mr. Matthews' critical assumption that the plaintiff would have generated commissions each year at a level equal to the midpoint between the gross commissions of either the 2nd or 3rd ranked agent or the 1st and 2nd ranked agent. The problem, according to Mr. Szekely, is that Mr. Matthews' methodology focusses on "sample outliers". In cross-examination, he did agree that top performers are, by definition, outliers.

[152] In Mr. Szekely's opinion, a preferable approach for projecting the plaintiff's commissions and losses is to determine the plaintiff's historical commissions and adjust them for changing economic conditions in the broader Greater Vancouver real estate marketplace.

[153] Using data on total residential sales and average sale prices sourced from the BC Real Estate Association for the Greater Vancouver Area, Mr. Szekely compared the plaintiff's earned commissions to his estimate of the average earned commissions for all Greater Vancouver realtors. He determined that the plaintiff earned 3.5 times more commission than the average realtor from 2009 to 2016. Applying this differential, Mr. Szekely calculated that for 2017, 2018 and the first six months of 2019, the plaintiff's loss of earnings was \$69,370. This is approximately \$27,748 per year.

[154] Mr. Szekely also provided an analysis with examples for determining the plaintiff's future loss of income using both actuarial multipliers, excluding labour market contingencies, and economic multipliers including labour market contingencies. His estimate, using actuarial multipliers and excluding labour market contingencies, of the multiplier to age 65 is \$16,072. Mr. Szekely's projection, using economic multipliers and assuming labour market contingencies for a male with a post-secondary, non-university certificate, of the multiplier is \$13,087.

- [155] In my view, the actuarial multiplier, excluding labour market contingencies identified by Mr. Szekely, is most appropriate in the circumstances of this case. The criteria for applying an actuarial multiplier appears appropriate because it reflects a period extending no later than the expected age of retirement, which I have concluded is age 65. It is also appropriate because the income stream under consideration has, in my view, already accounted for any applicable under-employment because the plaintiff's income stream since 2012 already includes his reduced working hours.
- [156] The defendants submitted another expert report to respond to Mr. Matthews' report prepared by Mr. Stephen Graff. Mr. Graff is a chartered professional accountant with specialized experience and certification in financial and investigative forensic accounting. Mr. Graff did not suggest that Mr. Matthews' methodology was invalid. Rather, Mr. Graff suggested that Mr. Matthews relies on "perfect world" data which needed to be clarified.
- [157] According to Mr. Graff, Mr. Matthews' methodology assumes that the plaintiff's reduced ranking in 2017 onwards is due to the accidents when that reduced ranking could be due to other factors such as his clients or the marketplace. Mr. Graff notes that the 2.5 year period used by Mr. Matthews (i.e., January 2017 to June 2019) as the reference period for his methodology involves considerable market volatility and Mr. Matthews assumes, without explanation, that the plaintiff would continue to rank in the top three realtors at RE/MAX All Points despite this market volatility.
- [158] Mr. Graff notes that in the last number of years, the Lower Mainland real estate market has maintained relatively stable average prices and a significant decrease in the number of sales, especially at the higher end of home sales. These market conditions might impact realtors differently depending on the nature of the realtor's particular pattern of sales.
- [159] Mr. Graff also disagrees with calculating the plaintiff's loss to age 65 or 70, because that fails to address that the average retirement age of a person in Canada is 63.8 years as of 2018. Mr. Graff faults Mr. Matthews' report for failing to consider any standard labour market contingencies in his calculations.
- [160] Mr. Graff analysed the plaintiff's historical rankings and commission data, including the numbers of units the plaintiff sold and the commissions earned per sale. For 2017, the year following the second motor vehicle accident, the number of units sold by the plaintiff was 30, a four-unit reduction from 2016. However, 30 units sold in 2017 was not out of line with the average number sold by the plaintiff (i.e. 31.63 units on average) since 2010.
- [161] Overall, Mr. Graff observed that the plaintiff's historical performance (i.e., the percentage of change year-over-year) is similar to that of the general Greater Vancouver real estate market. Mr. Graff noted that the plaintiff out-performed the general market in 2019.
- [162] Mr. Graff provided an alternative estimate of projected commissions had the accidents not occurred that compared the market changes to the plaintiff's actual performance. Using this methodology, Mr. Graff calculated the plaintiff's past loss of income to be \$40,688.

- [163] In offering a methodology and calculation for future loss of income, Mr. Graff notes the difficulty associated with recent market downturns, the unpredictability of future markets, factors unique to a particular realtor's business and the difficulty of separating the effect of the plaintiff's injuries from overall market conditions. In light of these challenges, Mr. Graff opines that past performance, more specifically calculating future loss based on the past loss, is a reasonable method. He illustrates that methodology and calculation in two scenarios.
- [164] In the first scenario, Mr. Graff assumes a mortality adjusted and labour market adjusted annual loss of \$22,604 (based on the averages of the 2017 to 2019 years stated in Mr. Matthews' report) to arrive at a present value of future loss of income to age 65 of \$361,825 (when adjusted for mortality) and \$288,858 (when adjusted for labour market conditions). In the second scenario, Mr. Graff assumes an annual loss of \$46,187 (based on the loss of income for 2017) to arrive at a present value of future loss of income to age 65 of \$739,315 (when adjusted for mortality) and \$590,223 (when adjusted for labour market conditions).
- [165] Mr. Richard Carlin, a vocational rehabilitation consultant, conducted a vocational assessment of the plaintiff. Mr. Carlin interviewed the plaintiff twice in February of 2016 and February of 2019 and he prepared a written report of his assessment on August 5, 2019. Mr. Carlin's vocational opinion is that it is probable that the plaintiff would have continued actively working as a realtor, and as one of the top ranking commission earners, into the foreseeable future in the absence of the accidents. Mr. Carlin also concluded that it was more probable than not that the injuries sustained in the accidents have significantly impaired his ability to function as a realtor compared with his pre-accident capabilities. Mr. Carlin's opinion is that the plaintiff will need to work on a part-time basis and in an environment that allows him to take breaks to sustain a productive work pace.
- [166] Ms. Shannon Smith, an occupational therapist, reviewed and provided a response to Mr. Pakulak's reports. She notes that she did meet or assess the plaintiff herself. Ms. Smith also notes that some of the reaching limitations observed by Mr. Pakulak are not routine physical demands for a realtor.
- [167] Regarding Mr. Pakulak's conclusion that the plaintiff is likely precluded from being capable of sustaining full time work and limited to part time work in 2019, Ms. Smith questions the basis for this opinion and she states in her report that:

Restricting an individual to part-time work based on a limitation in a single area of function is unusual, particularly if ergonomic supports are easily accommodated and given that realtors are self-employed and have the autonomy to schedule day/tasks in a manner best suited to symptom management needs.

- [168] In considering which of the two possible approaches to use to assess loss of future earning capacity, i.e. the "earnings approach" described in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), and the "capital asset approach" from *Brown*, I have concluded the earnings approach is the most useful in the present case. I have

reached that conclusion because the loss is easily measurable due to the clear data available regarding the plaintiff's earnings over time, including for the years following the accidents: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [169] The earnings approach involves a form of math-oriented methodology and may include postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [170] Regarding past loss of earning capacity, the evidence establishes, and all of the experts agree, that starting in 2017, the plaintiff's income began to decline. After reviewing the evidence, I have concluded that the plaintiff suffered a loss of past earning capacity.
- [171] While I do not accept Mr. Matthews' main assumption that the plaintiff would have earned commissions for every year equal to the mid-point between either the first and second, or second and third ranked realtor in the Re/Max All Points Realty office, for reasons that I have already explained, I do accept that the plaintiff usually earned high levels of commission income.
- [172] I am concerned about comparing the plaintiff to a small group of realtors from his office, without knowing additional relevant details. More specifically, I am concerned that this approach is inappropriate for assessing the plaintiff's past or future loss of earning capacity.
- [173] I prefer assessing the plaintiff's loss of income earning capacity in a broader context. I also prefer an approach that takes into account some additional contingencies beyond the contingencies considered by the experts. These contingencies include the plaintiff's character and his drive to sell real estate. In my view, these are positive contingencies that make it more likely than not that but for the accident, the plaintiff would have continued to achieve high levels of commission income throughout his career as a realtor.
- [174] I find that there is a real and substantial possibility that but for the accidents, the plaintiff would have continued to outperform the market generally. Taking the evidence and all of the contingencies into account, I have reached an assessment of \$84,000 as the net amount of the plaintiff's past loss of income earning capacity.
- [175] I must now consider the possibility that the plaintiff will suffer a future loss of earning capacity.
- [176] Based on the professional functional evaluations, the plaintiff's own evidence, and the evidence of the other witnesses, I am satisfied that is a reasonable possibility the plaintiff will continue to work as a realtor, but at a reduced capacity, up to age 65.
- [177] I have also concluded that there is a real and substantial possibility that the plaintiff will incur a loss of future earning capacity due to the injuries he suffered in the accidents. In the first half of 2019, the evidence showed the plaintiff's income was improving and that he was continuing to outperform realtors in the market generally. This is consistent with my

assessment of the plaintiff as someone with a strong drive to work as a realtor. After considering the evidence and the additional positive contingencies referred to above, I have assessed the plaintiff's future net loss of earning capacity at \$34,000 per year. To be clear, this is an "after tax" assessment of his annual loss.

[178] As I found that the actuarial multiplier, excluding labour market conditions, of \$16,072 is appropriate to apply in these circumstances, I arrive at \$546,448 [1] as the plaintiff's net future loss of earning capacity up to age 65.

COST OF FUTURE CARE

[179] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30.

[180] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina v. Bartsch* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[181] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[182] Based on his review of the medical records and reports, Mr. Pakulak recommended that I consider funding for the plaintiff to attend: a chronic pain management program; kinesiology and chiropractic sessions; ergonomic assessment; occupational therapy sessions; cognitive behavioural therapy; and a gym. Mr. Pakulak also recommended that I consider funding the plaintiff for housekeeping, ergonomic equipment and medications, including Botox injections.

[183] Ms. Smith, who prepared a report in response to Mr. Pakulak, generally agreed with Mr. Pakulak's future care recommendations, however, she noted that certain medical information regarding cognitive behavioral therapy and Botox was not available to Mr. Pakulak which might vary treatment duration. Ms. Smith also noted that Mr. Pakulak's recommendation for housekeeping funding did not take into account the fact that the plaintiff hired a housecleaner prior to the accidents and he presents with physical capacity to perform routine housekeeping chores.

- [184] Ms. Diana Cameron, a vocational rehabilitation consultant and registered clinical counsellor, reviewed and provided a response to a report by Mr. Richard Carlin, a vocational rehabilitation consultant who conducted a vocational assessment on behalf of the defendants. Ms. Cameron is clear to state she has not met nor assessed the plaintiff. She has assumed that the plaintiff intends to continue as a realtor at RE/MAX for the foreseeable future.
- [185] Ms. Cameron notes a number of deficiencies in Mr. Carlin's report, such as his failure to explain if, or how, he considered the impact of well-known changes in the real estate market to conclude that the plaintiff would have continued (but for the second accident) to be a top realtor at RE/MAX. Ms. Cameron notes that Mr. Carlin does not appear to have considered the plaintiff's significant post-accident vocational accomplishments such as generating numerous sales and large commissions despite his limitations and reduced hours.
- [186] Mr. Darren Benning, an economist, prepared a report analysing the future cost of care multipliers that is based on Mr. Pakulak's future care recommendations. Mr. Benning assumes normal life expectancy and premature death is the only contingency provided for in his report.
- [187] The plaintiff submits that the total cost of future care is \$374,145. The defendant submits that the total cost of future care is somewhere between \$0 and \$20,000.
- [188] Counsel for the plaintiff has analyzed the costs recommended by Mr. Pakulak and submitted present values of those costs based on the present value multipliers supplied by Mr. Benning. As I understand it, working with the present values supplied by Mr. Benning, counsel for the plaintiff has proposed a number of adjustments to the claim for the cost of future care that further reduce the amounts in Mr. Pakulak's recommendations.
- [189] For example, the plaintiff has reduced amounts sought for medications based on evidence that some of the medications are not to be used indefinitely. Certain medications, such as Aimovig, are acknowledged to be for trial purposes only. The defendants submit that it is reasonable to allow the plaintiff a limited period of coverage for some of the medications to allow time for transition.
- [190] Overall, the evidence supports that the plaintiff's current medication regime is beneficial. I note that the amounts sought have been reduced to acknowledge that certain medications, such as Aimovig and Botox, may be time-limited.
- [191] The plaintiff and his sister employed a housecleaner in the past. The plaintiff was never involved in yard or maintenance work at his sister's home. Ms. Akhtarkhavari said she provides very limited help to the plaintiff. The evidence convinces me that the plaintiff has suffered minimal loss of capacity to perform housekeeping functions and I would therefore reduce the award for the future cost of homemaking to \$4,000.

[192] I would also exclude the cost of kinesiology sessions (\$1,519) and recreation passes (i.e. adult pass of \$5,713 and senior pass of \$4,393) because the evidence establishes that the plaintiff already owns exercise equipment that he does not use. I have also excluded the recreation passes because the evidence establishes that the plaintiff's pre-accident life did not involve much physical activity. The plaintiff testified that he discontinued physiotherapy because it makes his head ache. I am not satisfied on the evidence that the previously rejected activities, such as physiotherapy, will be accepted in the future: O'Connell v. Yung, 2012 BCCA 57 at para. 60.

[193] I have concluded that, except for the amounts claimed for kinesiology and recreation passes, and the reduction of the amount claimed for housekeeping, the modified future care amounts claimed by the plaintiff are supported by the evidence and generally reasonable in the circumstances. I am therefore awarding \$346,520 for cost of future care, broken down as follows:

Chronic pain management program:

\$13,549

Chiropractic sessions:

\$10,000

Occupational therapist ergonomic assessment:

\$653

Occupational therapy sessions:

\$1,741

Botox injections:

\$50,000

Homemaking:

\$4,000

Ergonomic task chair:

\$3,631

Metonia (metoclopramide):

\$6,262

Aventyl (nortriptyline):

\$6,994

Duloxetine (Cymbalta):

\$10,680

Imitrex:

\$39,010

Aimovig:

\$200,000

SPECIAL DAMAGES

[194] The plaintiff is entitled to recover the reasonable out-of-pocket expenses he incurred as a result of an accident: X. v. Y. at para. 281.

[195] The plaintiff claims \$30,000 as special damages. The defendants submit that some of the out-of-pocket expenses claimed, such as for counselling services incurred by the plaintiff in 2018 and 2019, were not incurred as a result of the accidents.

[196] I have concluded the out-of-pocket expenses claimed of \$29,920.07 rounded up to \$30,000 were incurred as a result of the accidents and that they are reasonable. I therefore award the plaintiff special damages of \$30,000.

SUMMARY

[197] In summary, damages are awarded as follows:

Non-pecuniary damages:

\$130,000

Past loss of income earning capacity (net):

\$ 84,000

Future loss of income earning capacity (net):

\$546,448

Cost of future care:

\$346,520

Special damages:

\$ 30,000

Tax gross up:

To be assessed

[198] The future care award granted to the plaintiff entitles him to an income tax gross up to account for taxes paid on the lump sum award. I grant the parties liberty to apply if they are unable to agree on the calculation and the parties also have liberty to apply if any issues arise as to the application of the Court Order Interest Act, R.S.B.C. 1996, c. 79 to any of the heads of damage.

[199] In addition, either party is at liberty to apply if there are errors in the calculations in this judgment.

COSTS

[200] Unless there are matters that I am unaware of that counsel may wish to address before me, the plaintiff is entitled to costs.

"E. McDonald J."

[1] Calculated as follows: $(\$34,000 \div \$1,000) \times \$16,072 = \$546,448$.

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