

CANADA / JUDGMENT

Bideshi v. McCandless

2020 BCSC 1853

COURT

Supreme Court of British Columbia

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2020 BCSC 1853 Bideshi v. McCandless

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bideshi v. McCandless,

2020 BCSC 1853

Date: 20201127

Docket: S33080

Registry: Chilliwack

Between:

Robert Hugh Bideshi

Plaintiff

And

Matthew Allan McCandless

Defendant

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.

January 6-10,13, 14, 2020

February 14, 2020

Place and Date of Judgment:

Chilliwack, B.C.

November 27, 2020

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I. Introduction

[1] The plaintiff was injured in a motor vehicle accident on March 18, 2016. The defendant's vehicle struck the back of the plaintiff's vehicle while the plaintiff and several others in front of him were stopped to allow a trailer to be manoeuvred into a driveway.

[2] Liability has been admitted for the accident.

- [3] The plaintiff claims to have suffered physical and psychological injuries as a result of the accident, including headaches and injuries to his neck, right shoulder, right arm, right hand, lower back, and right hip.
- [4] At the time of the accident, the plaintiff was 35 years old and self-employed as a registered massage therapist, working out of a subleased treatment room in a chiropractic clinic. Following the accident, he entered into his own lease and began operating as Active Motion Therapeutics ("Active Motion"). The plaintiff has worked full-time, without interruption, since the accident, and his invoicing for services has increased each year.
- [5] The plaintiff suffered an injury while weight-lifting five or so years prior to the accident. His evidence is that notwithstanding his prior injury, at the time of the accident he was healthy and outgoing, with no limitations on his ability to perform his work duties or to engage in sports and recreational activities.
- [6] The defendant accepts that the plaintiff suffered some soft tissue injuries in the accident, but says he has understated the impact of his earlier injury and overstated the impact of those from the accident. The defendant says the plaintiff has not proven any psychological injury or, alternatively, has not proven any psychological injury caused by the accident.
- [7] The defendant accepts that the plaintiff diligently sought treatment for his physical injuries, but says that if the plaintiff sustained any psychological injuries in the accident, he failed to act to mitigate those injuries. The defendant also argues that if the plaintiff has any past earnings loss, the plaintiff failed to take steps to increase profitability and mitigate that loss.

II. issues

- [8] The plaintiff seeks damages for:
 - a) pain, suffering, loss of enjoyment of life and loss of amenities,
 - b) past loss of earning capacity,
 - c) future loss of earning capacity,
 - d) future cost of care, including loss of housekeeping capacity; and
 - e) special damages.
- [9] The parties' positions on damages are markedly disparate. The plaintiff seeks damages in the \$900,000 range. The defendant submits the appropriate range is \$77,000-152,000.

III. facts

A. Prior to the Accident

- [10] The plaintiff was 39 years old at the time of trial. He and his wife, Elizabeth, have two children: a daughter aged 17 and a son aged 7.

- [11] The plaintiff attended high school in Chilliwack and then the University College of the Fraser Valley ("UCFV") between 1999 and 2002. While at UCFV, he focused on biology and kinesiology but did not complete a degree.
- [12] In 2004, the plaintiff started at the West Coast School of Massage Therapy. He graduated in 2006 and obtained a professional certification in February 2007.
- [13] The plaintiff has always operated as a sole proprietorship, working out of subleased treatment rooms. For about 30 months following graduation, he worked out of various clinics in the Greater Vancouver area. In 2009, he returned to Chilliwack. Between 2010 and 2015, he worked out of the Vedder Village Chiropractic and Massage Clinic. In 2015, he subleased a treatment room at Serenity Chiropractic ("Serenity") and began working from there.
- [14] Serenity is owned and operated by a high school friend of the plaintiffs. Serenity's lease was set to expire in April 2016. In anticipation of the expiry, the friend and the plaintiff began looking for a new space where they planned to continue to work together. The plan was that Serenity would lease space for itself, and the plaintiff would again sublease a treatment room from Serenity.
- [15] The friend was unable to find a suitable space in a timely fashion. She was not overly concerned as she had maternity leave in any event. However, the plaintiff needed a space to continue to work, so at the end of February 2016, he started looking for a place to lease on his own. In mid-March, he viewed the space where Active Motion now operates. Shortly after the accident, he took a five-year lease. The space is approximately 400 square feet and accommodates a single treatment room.
- [16] The plaintiff's lay witnesses uniformly testified that the plaintiff was happy, outgoing, and sociable prior to the accident. However, two of those witnesses see the plaintiff primarily in his professional capacity.
- [17] The plaintiff was an involved parent prior to the accident, and had a loving relationship with his family. He and his wife both described their marriage as a close and romantic one.
- [18] The plaintiff testified he golfed several times a year with two different groups of friends as well as with his father-in-law. One of the friend groups also went on an annual golf weekend trip. He jogged, went for long walks, played pick-up two-pitch baseball games, and was going to the gym several times a week where he focused on weight-lifting. He has weight-lifted from one to two times a week up to four times a week over various periods of his pre-accident life.
- [19] He said he would tweak his earlier weight-lifting injury again about once or twice a year, but that it was easily redressed by massage therapy. He describes the prior weight-lifting injury as causing intermittent back pain and tingling in the front of his hands and into his wrists. He denies that either symptom impaired his function.

[20] The plaintiff's main hobby is carving, working mostly with decorative foam pumpkins, but also with real pumpkins and wood. He says he would spend about three weekends carving each month, spending 3-10 hours each weekend. He indicated that it would take him 3-5 hours to carve a foam pumpkin. For the most part, foam pumpkin carving involves the use of a small handheld high-speed drill.

[21] He said he would socialize once or twice a week before the accident.

B. The Accident

[22] The plaintiff says almost immediately after the accident he began to experience constant pain on the right side of his neck and in his right shoulder, triggering a radiating pain down his right arm. Within a few days of the accident, his right arm was constantly weak and the most he could lift with his right hand was a cup of coffee. He says he began to experience low back pain very shortly after the accident.

[23] Following the accident, the plaintiff continued his drive to Vancouver and attended a Star Wars convention. He says on his drive back home, pain was radiating from his left sacroiliac joint over to the right joint, down his right hip, and on through to his glute and leg. He began to have daily headaches almost immediately after the accident, with the pain predominately on the right side of the back of his head and going down into his neck. He says he developed severe sleeping problems almost immediately, getting only three to four hours of sleep a night.

[24] The plaintiff went to see his family doctor, Dr. Kroeze, for the first time 11 days after the accident. The plaintiff says it was the first appointment Dr. Kroeze had available and that he doesn't like to go to walk-in clinics.

C. After the Accident

1. Physical Injuries

[25] The plaintiff testified that he now experiences neck and right shoulder pain daily, and burning down his right arm on an almost constant basis, often with spasms and with the symptoms worsening throughout the day as he fatigues.

[26] The plaintiff says the weakness in his right arm has significantly improved from where it was right after the accident, but that he continues to experience weakness and finds it difficult to hold items, such as cups and cutlery, in his right hand. Over time the numbness and tingling present in his right arm and hand decreased, and he describes it now as a general constant ache.

- [27] He says his pain and spasms are aggravated by working as a massage therapist, and that physiotherapy and massage therapy provide him only short-term relief. The plaintiff tried trigger point injections. The first set caused a three-day flare-up, but then provided three days of relief. The second set provided four to five days of relief. The plaintiff indicated that he does not intend to try more injections, given that massage therapy and physiotherapy provide almost the same amount of short-term relief.
- [28] He has not found anything that provides long-term relief. He says the tremor he developed in his right hand after the accident has become more prevalent, and he now has tremors in that hand on an almost constant basis.
- [29] He says his lower back pain was constant for most of the first 12 months after the accident, but is now intermittent and activity-dependent. He has low back pain once or twice a week, but notes that once triggered, the pain may last the day. He testified that he can readily distinguish between the back pain caused by his weight-lifting injury and the radiating pain he has experienced since the accident.
- [30] He says his right hip pain was constant for the first 12 months, but is now activity-dependent and occurs once or twice a week. His headaches are also down to once or twice a week, but may last the day. He treats his headaches with Tylenol or Advil and a heating pad as necessary.
- [31] The plaintiff says his sleep has improved from where it was right after the accident, but he continues to have sleep problems. He finds it difficult to stay asleep due to pain in his right shoulder and due to his anxiety. When he wakes, he will lay on the floor and do breathing exercises, take a walk, or sit on the sofa and use a massager on his neck and shoulders.

2. Social and Recreational Activities

- [32] The plaintiff continues to carve, but with modified positioning and posture. He needs to break for a stretch every 45 minutes or so when carving. He now carves fewer weekends each month, and says it takes closer to five hours to complete a pumpkin now, whereas it used to take around three.
- [33] The plaintiff began regularly attending the gym again in March of 2018. He used to be able to bench press up to 325 lbs., but can now only manage 185. He can bicep curl 25-40 lbs. on his left side, but only 25 with effort on the right. He has not returned to jogging but has returned to his walking. The plaintiff's current workout involves completing 150 arm swings holding a 50 lb. kettlebell weight. He currently engages in a fitness activity four to five times a week.
- [34] The plaintiff says he tried playing golf in 2018, but found he was unable to play an entire round and so skipped holes or dropped a ball. He hasn't tried again since 2018, but has gone out with his friends and just driven a golf cart.
- [35] The plaintiff used to hike about 15 times a year. It took him a year and a half to return to hiking after the accident, and it took up until 2019 to return to his previous frequency.

- [36] The plaintiff says his social life has been substantially impacted. He says loud venues bother him and his pain will cause him to want to leave early. He and his wife describe themselves as "last in and first to go" when attending social events now and say they socialize far less, mainly attending only "big" events like weddings and special birthdays. The plaintiff testified that he is exhausted at the end of the workday and wants to go home and play video games or lay down on the sofa.
- [37] The plaintiff and his wife testified that their vacation time now centres around finding places they can go and things they can do that will not cause the plaintiff pain or make him tired or irritable.
- [38] The plaintiff says he has difficulty with heavy household activities, such as vacuuming, moving the furniture and shoveling snow. At some point following the accident, the family started paying someone to come for two hours every two weeks and attend to the heavier housekeeping and maintenance tasks. The plaintiff described the decision to hire someone as one made when the opportunity presented itself. The family had previously paid someone to do more casual housecleaning, but had ceased doing so prior to the accident.
- [39] The plaintiff says he has modified how he shaves and brushes his teeth to prevent his right arm from shaking or becoming fatigued.

3. Psychological Injuries

- [40] The plaintiff says since the accident he has been depressed, experienced weight gain (subsequently lost again), and suffered sexual dysfunction and feelings of isolation. He is more emotional and now cries, even in front of others, which he never did before. He describes his energy level, patience, and ability to tolerate stress as significantly decreased. The plaintiff denies any anger or frustration issues prior to the accident. His wife testified that she started observing changes in his mood about six months after the accident.
- [41] The plaintiff's personal friends called as lay witnesses describe him as short-tempered, down, and having "hit or miss" moods. The clients who testified describe him as less sociable than he was prior to the accident.
- [42] The plaintiff and his wife both describe him as an extremely anxious driver now, although he continues to drive. The plaintiff testified that uncertainty about his future career and other issues also cause him anxiety. He claims the anxiety and mood changes became apparent to him after he saw Dr. Sangha in October 2018 for an independent medical examination and realized he was unlikely to fully recover.

4. Ms. Jane Katz

[43] Ms. Katz is a professional counsellor with a counselling group in Chilliwack. The plaintiff saw her for approximately four sessions starting in June 2016. He was not referred by his family physician. He testified that he started seeing her because of his anxiety, grumpiness, and anger arising from the accident. He says she taught him some coping techniques and then he stopped seeing her. He testified both that he would have continued to see her but for the expense, and that he felt he had learned the coping techniques he required.

[44] The plaintiff never submitted a claim for Ms. Katz's treatment costs to ICBC. Ms. Katz was not called as a witness, and her counselling records were neither provided to the plaintiff's experts for review nor put into evidence.

5. Dr. Hutcheon

[45] The plaintiff says he got extremely angry with his wife in early 2019. In front of the children, he slammed his hand down on the counter, causing his wife to retreat away from him. In response, Mrs. Bideshi threatened to take the children and move in with her parents while he figured his issues out. The incident led the plaintiff to commence counselling with Dr. Hutcheon, a psychologist, in April of 2019.

[46] The plaintiff identified Dr. Hutcheon as a desirable treatment provider and then asked Dr. Kroeze to make him a referral. The plaintiff says Dr. Hutcheon has helped him better manage his feelings, but that he still has outbursts.

[47] None of Dr. Hutcheon's counselling records were provided to Dr. Mok to review for his report and none were put into evidence at trial. Dr. Hutcheon was not called as a witness.

6. Dr. Jan Kroeze

[48] Dr. Kroeze has been the plaintiff's family physician since prior to the accident.

[49] The first notation of reported anxiety in Dr. Kroeze's medical records was entered in February 2019.

[50] Dr. Kroeze gave the plaintiff a prescription for amitriptyline shortly after the accident. The plaintiff says the prescription was given to him in response to his complaints of anxiety.

[51] Dr. Kroeze's medical records were disclosed, but he was not called to testify and did not provide a report.

7. Work

[52] While the plaintiff initially suggested otherwise, on cross-examination he agreed that he currently averages the same amount of clients per day as he did prior to the accident, and also continues to have occasional days when he takes more than average, as was the case pre-accident. This is also the same client workload that he resumed immediately following the accident.

- [53] The plaintiff says he has modified the way he performs massage, and that over the course of the day performing massages aggravates his injuries. He says that after a few hours of work, the shaking in his right arm and hand will begin to increase and his right armpit will spasm randomly. This causes him to pause and shake out his right hand and arm. He also uses his right palm, forearm, elbow, and upper arm more than he did before in order to minimize demand on his right hand. The tremors can also make it difficult to type and write, and he has started using a voice dictation program for his client notes and files.
- [54] Kyla Lounsbury saw the plaintiff frequently for massage therapy following a 2009 spinal injury, but now only requires maintenance treatment. She testified that treating her injury requires a high level of hand dexterity and noted a decline in the plaintiff's treatment in that regard following the accident. She said she considered changing massage therapists, but preferred to be loyal.
- [55] Another patient, Forbes Cavanaugh, testified that he has noted that the plaintiff uses his right arm and elbow more, and his right hand less, as compared to before the accident. He said that the plaintiff no longer demonstrated exercises for him as before, including kettlebell use.
- [56] Melissa Klebe, who is both a patient and close friend of the plaintiff, testified that the plaintiff had radically altered his massage style in early 2019.

[57] The plaintiff's gross billings have increased each year:

2015 (Serenity)

\$100,956

2016 (Active Motion)

\$101,875

2017 (Active Motion)

\$111,838

2018 (Active Motion)

\$113,985

D. Medical Experts

1. Dr. Harpreet Sangha

- [58] Dr. Sangha is a physiatrist. He interviewed and examined the plaintiff on October 23, 2018, and provided a report dated November 3, 2018.

- [59] The plaintiff reported a pain rating of 4-5/10 with regard to his neck, back and right extremity referral pain, 5/10 with regard to headaches, and 4/10 with regard to his lower back. The plaintiff told Dr. Sangha that he was not taking any prescription medication and that he had not used any medication at all over the nine months leading up to the examination.
- [60] Dr. Sangha's report notes that the plaintiff told him that housekeeping and home maintenance were now "more difficult" than before, he had modified his way of doing certain tasks and that he finds outdoor tasks, such as snow removal, hard on his shoulders.
- [61] Dr. Sangha opines that the plaintiff suffered the following injuries in the accident:
- a) cervical strain resulting in right C7 sensory radiculopathy (based on subjective examination findings), likely with some component of functional overlay due to anxiety;
 - b) mid to lower back right cervical facet syndrome and superimposed myofascial impairment;
 - c) lumbar strain resulting in right lumbar facet syndrome; and
 - d) disordered sleep.
- [62] He offered the view that the plaintiff had reached maximum medical recovery and would be left with "persistent symptomology into the long-term" with intermittent flare-ups.
- [63] He recommended:
- a) Nortriptyline or Lyrica and/or Cymbalta;
 - b) a C7 nerve root block as treatment (and which might confirm the presence of a C7 sensory radiculopathy);
 - c) an in-home assessment "to identify barriers as well as provide education, assistive devices and coping strategies", noting that the plaintiff "continues to complete activities in and around the home" but "does have some problems";
 - d) a psychological assessment; and
 - e) treatments such as physiotherapy, chiropractic and massage therapy only during intermittent flare-ups.
- [64] With regard to function, Dr. Sangha indicated that the plaintiff has difficulty with: (1) activities that strain the back and neck, including repetitive or sustained postures; and (2) repetitive use of the right upper extremity. He stressed the importance of the plaintiff using proper body mechanics on a go-forward basis.
- [65] Dr. Sangha also offers the opinion that the plaintiff is at a competitive disadvantage based on the difficulties the plaintiff reported in performing his work. Dr. Sangha indicates that the plaintiff "would actually like to work more hours but simply cannot due to his injuries."

[66] The report indicates that the plaintiff told Dr. Sangha that there had been no change or improvement in his headaches since the accident.

[67] Dr. Sangha confirmed that he did not perform a psychological assessment and stated it would be beyond his expertise to do so.

2. Dr. Hiram Mok - Psychiatrist

[68] Dr. Mok is a psychiatrist. He met and evaluated the plaintiff on June 12, 2019, and provided a report bearing the same date.

[69] The plaintiff's scores on the various standardized clinical tests given to him by Dr. Mok indicate mild impairment overall. For example, his disability scale rating (which is a self-assessment) was 5/10 for work (moderate impairment); 2/10 for social (mild impairment); and 3/10 for home and family responsibilities (mild impairment). He assessed himself as being less productive by reason of his symptoms two out of every seven days.

[70] Dr. Mok diagnosed the plaintiff with the following:

- a) somatic symptom disorder - moderate;
- b) specific phobia - driving and traffic; and
- c) major depressive disorder - mild.

[71] Dr. Mok recommended ongoing psychiatrist treatment, a novel antidepressant with triple efficacy such as Cymbalta, and a minimum of ten concurrent sessions of cognitive-behavioural therapy with a psychologist for pain management and driving anxiety. He considered the plaintiff's prognosis for recovery as guarded.

IV. Analysis - Causation and injury

A. The Law

[72] 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, provided it is more than a de minimus contribution. 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.

[73] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury?: *Clements v Clements*, 2012 SCC 32 at paras. 7-13. The "but for" test recognizes that compensation for negligent conduct should only be payable where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[74] Causation must be established on a balance of probabilities before damages are assessed. As Chief Justice McLachlin, stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [Athey v. Leonati].

[75] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in but for the defendant's negligence - no better and no worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule): *Athey v. Leonati* at paras. 32-35.

B. Credibility

[76] The defendant called no witnesses, although he did have the plaintiff examined by a psychiatrist. The defendant seeks to make his case largely on credibility and burden of proof.

[77] He asserts that the plaintiff (and his wife) have significantly overstated the plaintiff's injuries and understated his abilities, including in providing information to the plaintiff's experts, which information is accepted and relied upon in the plaintiff's expert reports.

[78] The defendant also asserts that Dr. Sangha and Dr. Mok both improperly advocated on behalf of the plaintiff.

[79] The factors to be considered when assessing credibility were summarized by Justice Dillon 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. 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. 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.

[Citations omitted.]

[80] 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 an expert opinion rests may be undermined and the opinion may be given less weight: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15 and 49-50.

[81] The defendant submits that the plaintiff's evidence on direct is inconsistent with various other statements he has made, including in his examinations for discovery (October 19, 2018, and December 30, 2019) and to his own experts. The defendant argues that the inconsistencies demonstrate that the plaintiff's subjective reporting should be considered suspect: The defendant relies, in particular, on the reasons of Chief Justice McEachern (as he then was) in *Price v. Kostryba*, [1982] CarswellBC 415 (S.C.).

C. Assessment

1. The Plaintiff

[82] I agree that the plaintiff's evidence is problematic. Multiple inconsistencies and contradictions, lack of forthrightness, selective recall and significant exaggeration characterize his testimony and erode my confidence in his truthfulness. The following are examples.

a) Pain and Impairment

[83] The plaintiff testified that within days of the accident his right side was too weak to lift a cup of coffee, he had intense radiating pain from his right shoulder down the arm, and he developed numbness, then tremors, and then spasms, in his right arm and hand. He testified he had daily headaches that were throbbing and all-encompassing. The described symptoms would obviously have had potentially dire consequences for his ability to work and, furthermore, arrived at a time when he was thinking of signing a five-year lease and taking on the financial responsibility of operating his own clinic. Yet, the plaintiff did not see a physician until 11 days after the accident and after signing the lease and committing to arrangements to open Active Motion. He did not miss any of his appointments at Serenity. On opening Active Motion, he maintained his prior workload without missing a beat,. In the circumstances, I cannot accept that the plaintiff's post-accident condition was as he has portrayed it.

[84] At his first examination for discovery in October 2018, the plaintiff stated that he was unable to lift a full jug of milk. On cross-examination at trial, he agreed that he was, at that time: using a chainsaw to do carving; swinging a 50 lb. kettlebell weight 150 times as part of his workouts; and doing military and bench presses at the gym. The plaintiff testified that lifting a jug involves a pulling, as opposed to a pushing, motion. Even if that is a valid distinction, his stand-alone statements regarding coffee cups and milk jugs deliberately paint a misleading picture.

[85] The plaintiff's claim that brushing his teeth and shaving are made difficult by the tremors in his right hand is inconsistent with his use of his right hand in carving, including use of electric tools and drills and guiding a chainsaw. Carving is obviously precision work. Further, while the chainsaw is small (no more than 6 lbs) and the plaintiff is a large man, a chainsaw of any size is unlikely to be used absent confidence both hands could be relied upon if needed. As the plaintiff said, he would not use a chainsaw "if I thought it was a

problem".

b) Anxiety Report and Treatment

- [86] At his October 2018, examination for discovery, the plaintiff did not say he suffered any anxiety or depression. He said only that he had suffered "grumpiness" following the accident. On cross-examination at trial, the plaintiff said that at discovery he had been thinking of injuries only in physical terms. While that might occur in a casual conversation, it is not credible in the context of an examination for discovery pursuant to a notice of civil claim that alleges psychological injury. In any event, that explanation is inconsistent with his report of "grumpiness". The plaintiff also suggested that he was not thinking in terms like anxiety and depression at that time, as he had yet to see a psychologist. However, the discovery was after the plaintiff's sessions with Ms. Katz. It is implausible to suppose the plaintiff engaged in treatment sessions with a professional counsellor to develop coping skills without any discussion of mental health issues. Further, in his own evidence, he said he went to see Ms. Katz because of anxiety and anger, as well as "grumpiness".
- [87] The plaintiff testified that Dr. Kroeze prescribed him amitriptyline for anxiety not too long after the accident. He testified that he had only recently (i.e., since his December 2019 discovery) recalled that he had told Dr. Kroeze about his anxiety and that Dr. Kroeze had prescribed him amitriptyline to treat it.
- [88] Dr. Kroeze's medical records regarding the amitriptyline prescription make no mention of anxiety. While physicians are not expected to make a note regarding everything said during an appointment, this is not simply a question of an unrecorded patient statement. A prescription was made. I consider it highly unlikely that a doctor would prescribe a medication to treat a mental health issue without, at bare minimum, noting the existence of a symptom or condition providing medical justification for the prescription.
- [89] Second, Dr. Kroeze was not called to give evidence regarding the medical basis for the amitriptyline prescription (see below regarding adverse inferences). Third, Dr. Mok - the plaintiff's psychiatric expert - testified that the amitriptyline dosage prescribed by Dr. Kroeze was appropriate for treating pain and inappropriate for treating anxiety. I do not accept the plaintiff's testimony that he just recently recalled having reported anxiety to Dr. Kroeze and that the amitriptyline was prescribed medication for that purpose. It is both too improbable and too convenient. I consider it far more likely that the plaintiff recently discovered that amitriptyline is sometimes prescribed for anxiety.

c) Workload Post-Accident

- [90] The plaintiff's testimony in direct indicated that he could not work as much as he did pre-accident. The plaintiff also told Dr. Sangha that he was not able to work as much as he would like. However, on cross-examination, the plaintiff conceded that his client load has been consistent before and after the accident, that he has continued to work five days a week, that there continues to be days when he sees more than the average number of patients, and that

he took extended lunch breaks prior to the accident as well as after. At one point when being cross-examined about his post-accident workload, the plaintiff replied that he had "never said that he had refused work", but only that he caps off his days when he can. When asked about the fact that he saw an above number average of patients on March 26, 2016 (eight days after the accident), the plaintiff also agreed that he hadn't cancelled any patient appointments and then sullenly added: "I didn't say I was disabled, I said I had to compromise a lot." I find the plaintiff made a deliberate attempt to falsely portray himself as working fewer hours because of the accident.

d) Career Plans

[91] Notably, the plaintiff even gave conflicting evidence about his career path to massage therapy. He testified at length about how he had committed to pursuing massage therapy in his mid-teens and had never wavered: it was his dream job. The theme of denial of a dream was a focus in his closing argument. However, when discussing his time at UCFV, later in his direct testimony, the plaintiff said that he had wanted to pursue kinesiology at that point, but was dissuaded by the amount of school required. The plaintiff also filed an expert vocational report by John Lawless. In that report, Mr. Lawless expressly notes that the plaintiff told him that he was 23 years old when he decided to become a massage therapist.

[92] Looking at the body of evidence as a whole, I am satisfied these examples form part of a broadly consistent pattern. I am satisfied the plaintiff has generally succumbed to the influence of interest and that his statements - to the court, to his expert witnesses and to other witnesses - warrant close scrutiny: *Afework v. Correa*, 2019 BCSC 1672 at paras. 9-11; *Bergeron v Malloy*, 2020 BCSC 963 at paras. 12-13.

2. Mrs. Bideshi

[93] I have concluded that Mrs. Bideshi's evidence also warrants close scrutiny. She was a reluctant and resistant witness on cross-examination. On numerous occasions, she failed to provide direct answers to straightforward questions, insisting instead on being slowly dragged towards concession through a series of repeated questions. I am satisfied that her primary goal in testifying was to bolster the plaintiff's case to the extent possible.

3. Other Lay Witnesses

[94] Melissa Klebe testified as both a personal friend and client of the plaintiff. Ms. Klebe's evidence regarding the changes in the plaintiff's massage technique was inconsistent not only with the other client witnesses, but also with the plaintiff's own evidence. I am not prepared to place any reliance on it.

[95] Forbes Cavanaugh began seeing the plaintiff for massage therapy in 2015 and now goes on a monthly basis. I accept Mr. Cavanaugh's evidence regarding the difference in the plaintiff's massage therapy services pre-and post-accident.

- [96] Kyla Lounsbury is also a long-standing client of the plaintiff. I also accept Ms. Lounsbury's evidence regarding differences in the plaintiff's massage therapy services pre-and post-accident.
4. Dr. Sangha
- [97] The defendant argues that Dr. Sangha acted as an advocate for the plaintiff. I am not persuaded he did.
- [98] The defendant relies primarily on the fact that Dr. Sangha failed to note a material part of Dr. Kroeze's CL19 medical report regarding the plaintiff's prior injury in his own report. That put him in the embarrassing position of attempting to explain the omission, and then opining on whether proper consideration would have altered his opinion.
- [99] I agree that Dr. Sangha's claim that the portion in question was omitted because it was illegible does not withstand scrutiny; it is, in fact, very easy to read. On the other hand, it makes little sense for Dr. Sangha to deliberately omit part of the CL19 in order to support the plaintiff's case. He could simply have explained why that part did not affect his opinion, as he readily did on cross-examination. I conclude that Dr. Sangha simply failed to read the entire CL19 report and the omission was unintentional. That said, it does reflect poorly on the thoroughness of Dr. Sangha's report.
- [100] I also accept Dr. Sangha's testimony that a complete review of the CL19 report would not have altered the opinion set out in his report. Notably, with regard to several other relevant matters put to him for consideration in cross-examination, Dr. Sangha conceded that he would need additional information to say whether those matters would or would not have impacted his opinion.
- [101] The report says on its face that it is dependent on the truthfulness of the plaintiff's reporting. Further, the proffered C7 radiculopathy diagnosis is expressly stated to be based solely on the plaintiff's subjective reporting and subject to confirmation by a nerve root block. I agree with the defendant that Dr. Sangha basically accepted the plaintiff's subjective reports of pain and impairment at face value for purposes of his report. In particular, he accepted the plaintiff's assertions that performing massage therapy causes him "severe pain" and that he would like to work more hours than he does "but simply cannot due to his injuries".
- [102] Dr. Sangha testified that he had considered, in addition to the plaintiff's subjective reports, whether the plaintiff's reports were consistent with his own objective observations. Consistency with objective observation is a relatively minimal safeguard for assessing report accuracy. While such inconsistency may detect wholly feigned symptoms or identify truly outlandish reactions, consistency is not a check against exaggeration or hyperbole. That fact was demonstrated here by Dr. Sangha's surprise at the plaintiff's kettlebell workout regime. When it was put to Dr. Sangha on cross-examination, he indicated that he would have anticipated that such an activity would cause the plaintiff pain severe enough to

dissuade him from engaging in it.

[103] Dr. Sangha indicated that he would have made further inquiries about the plaintiff's kettlebell use, had he been made aware of it. His position on the plaintiff's use of a chainsaw was similar - had he known, he would have had to make further inquiries before he could determine whether it impacted his opinion. He said the same again when shown a pre-accident medical record in which the plaintiff appears to have circled his neck as an area of concern. Dr. Sangha did not say the additional pieces of information put to him would change his opinion - but he agreed there were relevant lines of inquiry arising from them and that he was equally unable to say they would not change his opinion. The fact that these matters were not disclosed to Dr. Sangha and he had no opportunity to gain the additional information necessary to properly consider them is a significant qualification on Dr. Sangha's report.

[104] Finally, I agree with the defendant that the opinion on work function set out in Dr. Sangha's report is of very little weight. Dr. Sangha states that he was not provided with "a specific physical demands analysis," but that "as [he] understand[s] them" the job demands for massage therapy are "fairly strenuous". That is an entirely inadequate basis on which to opine that the plaintiff - someone who missed no time in carrying on with full-time work after the accident and has maintained successful professional practice since - has compromised abilities and is at a competitive disadvantage. No functional capacity assessment or work capacity evaluation was done regarding the plaintiff's ability to meet his job demands, either before, as part of, or after Dr. Sangha's report.

5. Dr. Mok

[105] The defendant also argues that Dr. Mok acted as an advocate. Here, the defendant has a valid point.

[106] An expert witness is entitled to defend their opinion on its merits. An expert may be permitted a degree of umbrage in responding to criticisms of their report. Dr. Mok strode far beyond those lines. He did not appear objective. He refused to make reasonable and clearly warranted concessions on cross-examination. Most troubling, he refused to respond meaningfully to questions posed to him on cross-examination, at one point obliging the court to direct him to that he was obliged to answer. A refusal to answer legitimate questions is patently inconsistent with the expert's duty to provide fair, objective and non-partisan assistance to the court: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 at paras. 2 and 26-32. I would not go so far as to find Dr. Mok's report inadmissible on that basis alone, but makes me reluctant to put much weight on it.

[107] Turning to the report itself, the plaintiff's scores on the diagnostic questionnaires done for Dr. Mok's report indicate mild symptoms. However, Dr. Mok concluded, based on his interview with the plaintiff, that the plaintiff had "under-amplified" his questionnaire responses. That view is at odds with my own finding that the plaintiff tends to exaggerate

his symptoms. I further note that the plaintiff agreed on cross-examination that he goes through lengthy periods of time without any depression symptoms, and the fact that Dr. Mok's Somatic Symptom Disorder diagnosis is based in significant part on Dr. Sangha's report regarding functionality and pain levels, which I have rejected.

[108] Considering all of those factors, as well as the nature of Dr. Mok's testimony, I decline to accept any of Dr. Mok's diagnoses, including specific phobia (driving) disorder.

[109] I do accept that the plaintiff is a more nervous driver now than he was before, and that this is causally related to the accident. However, he is able to, and does, drive regularly to work and to other places, including driving in order to participate in voluntary activities (e.g., driving up to Whistler).

[110] To the extent the plaintiff suggested so in his testimony, I also reject the assertion that the plaintiff suffers from generalized anxiety disorder.

6. Adverse Inferences

[111] Both parties seek adverse inferences.

[112] The defendant argues that an adverse inference should be drawn from the plaintiff's failure to call any treating physicians as witnesses: i.e., Dr. Kroeze and Dr. Hutcheon. I assume Ms. Katz is included in the objection as well, although it was clarified during the evidence that she is a professional counsellor rather than a psychologist, and thus a treatment provider rather than a treating physician.

[113] The factors to be considered in determining whether to draw an adverse inference for the failure to call a physician or treatment provider in the context of modern personal injury litigation were outlined (albeit in the context of jury instructions) in *Buksh v. Miles*, 2008 BCCA 318:

[34] Taking the admonition of Mr. Justice Davey to the extreme in today's patchwork of medical services raises the likelihood of increased litigation costs attendant upon more medical reports from physicians or additional attendances of physicians at court, with little added to the trial process but time and expense, and nothing added to the knowledge of counsel. Perhaps the idea that an adverse inference may be sought, on the authority of *Barker*, for the reason that every walk-in clinic physician was not called fits within the description of "punctilio" that is no longer to bind us, referred to by Mr. Justice Dickson in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, in a different context.

[35] In this environment, and bearing in mind the position of a lawyer bound to be truthful to the court, it seems to me there is a threshold question that must be addressed before the instruction on adverse inferences is given to the jury: whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the circumstances of the trial (e.g., an initial agreement

to introduce clinical records that work contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side) a juror could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case. Where, as here, the trial started on the basis that all records should be before the jury, and ended with a request for an instruction on adverse inferences, and when both counsel have explained the failure to call the witness or witnesses by referring to their own assessment of the utility or need for the evidence, the answer to the threshold question I have stated is not self-evidently affirmative. In this case, in my view, the judge herself should have heard the explanations, considered the degree of disclosure of that witness's files and the extent of contact between the party and the physician, received submissions and determined whether a reasonable juror could draw the inference sought before giving the instruction to the jury for its consideration in its fact finding role. If not, the instruction had no place in her charge to the jury.

[Emphasis added.]

- [114] Dr. Kroeze's clinical records were disclosed and provided to the expert witnesses for review. Some were in evidence before the court by agreement of the parties. The defendant had the option of seeking to interview Dr. Kroeze after reviewing his records and the option of calling him as a witness. Subject to the paragraph below, an adverse inference is not appropriate in the circumstances: *Beggs v. Stone*, 2014 BCSC 2120 at paras. 22 and 23.
- [115] Dr. Kroeze's records make no mention of anxiety prior to 2019. The plaintiff's last-minute assertion that Dr. Kroeze prescribed him amitriptyline in response to his reported anxiety has no basis in the medical records disclosed. The plaintiff was aware that the defendant took the position that there was no evidentiary connection between the accident and the plaintiff's claimed anxiety. Notwithstanding, the plaintiff did not call Dr. Kroeze to give evidence regarding the basis for the amitriptyline prescription. In the circumstances, I consider it appropriate to infer that Dr. Kroeze's testimony about the basis for the prescription would not have been helpful to the plaintiff's case.
- [116] The circumstances of the decisions not to call Dr. Hutcheon or Ms. Katz as witnesses are very different from those regarding Dr. Kroeze. The defendant has disputed the existence of psychological injuries and/or causation from the outset. In particular, with regard to causation, the defendant asserted that the plaintiff reported no psychological injuries prior to his October 2018 consultation with Dr. Sangha, and that anxiety was first reported to Dr. Kroeze by the plaintiff in February 2019.
- [117] The plaintiff asserts that he saw both Ms. Katz (March 2016 through October 2016) and Dr. Hutcheon (April 2019 - ongoing) regarding psychological issues arising out of the accident. Neither Dr. Hutcheon nor Ms. Katz's treatment records were provided to Dr. Mok for review, and neither was put before the court by agreement. No explanation was offered for why Ms. Katz and Dr. Hutcheon were not called to give evidence regarding the alleged injuries and causation. Interestingly, Mrs. Bideshi testified that notwithstanding her close and loving

relationship with the plaintiff, he never told her why he went to see Ms. Katz. In my view, the circumstances warrant an inference that the evidence of Ms. Katz and Dr. Hutcheon would not have advanced the plaintiff's claims that he suffered a psychological injury caused by the accident.

- [118] Finally, the plaintiff asks me to draw an adverse inference against the defendant because the plaintiff attended a medical examination with a physiatrist of the defendant's choosing, yet the defendant did not file an expert report rebutting Dr. Sangha's. The defendant has no onus of proof on the matter of injury. Here, the defendant plainly chose, as its litigation strategy, to assert that the plaintiff was unable to prove anything beyond mild soft tissue injuries (which the defendant had conceded at the outset). I am not satisfied that an adverse inference is warranted in the circumstances: *Ranahan v. Oceguela*, 2019 BCSC 228 at paras. 125-26.

D. Conclusion

- [119] I am satisfied that the plaintiff suffered soft tissue injuries in the accident. I accept that the general nature of those injuries are as described by Dr. Sangha. I do not accept that these injuries have the degree of impact on the plaintiff that he claims, either in terms of pain or functional impairment.
- [120] The actual impact of those injuries is further addressed below.
- [121] I find the plaintiff has failed to establish that he suffers any psychological injuries caused by the accident. As above, I accept that the plaintiff suffers mild situational anxiety in some circumstances when driving, but do not accept that it constitutes a specific phobia disorder.
- [122] I am satisfied that while the plaintiff did not disclose his prior injury on his intake form, he at least mentioned the prior injury to Dr. Sangha during his interview. As it was not disclosed on the form and there is no evidence as to what he said in the interview, Dr. Sangha's opinion regarding the role of the prior injury is of little value. However, there is, in fact, no positive evidence that prior injury is a factor for Dr. Sangha to rebut. The plaintiff denies that the prior injury plays any role in regard to his injuries from the accident or his complained of symptoms. Knocking down Dr. Sangha's evidence on the point does not suffice to discharge the defendant's evidentiary burden: *Eiermann v. Watts*, 2004 BCSC 98 at para. 69. However, the prior injury and its yearly flare-ups and treatments are relevant as a future contingency and to the cost of future care.

V. Analysis: Damages

A. Past Loss of Earning Capacity

- [123] 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; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

- [124] The burden of proof of actual past events is a balance of probabilities: *Gao v. Dietrich*, 2018 BCCA 372 at para. 39.
- [125] The plaintiff has failed to establish an evidentiary foundation for a past loss claim. He missed no days of work; he was not delayed in opening Active Motion; his workload at Active Motion has been from the outset in keeping with his workload pre-accident; and, Active Motion's invoicing has steadily increased each year it has been in operation.
- [126] The assessment of hypothetical events requires a real and substantial possibility, not mere speculation: *Athey v. Leonati* at para. 27. The court determines the measure of damages by assessing the likelihood of the event: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.
- [127] The plaintiff asserts that he would have increased his workload after opening Active Motion or might have offered services additional to massage therapy. Nothing in the evidence takes those possibilities beyond the realm of speculation.
- [128] The plaintiff has suffered no past loss of earning capacity.

B. Loss of Future Earning Capacity

- [129] The relevant legal principles were concisely summarized by Justice Warren in *Bhandal v. Charlebois*, 2015 BCSC 2315:
- [150] To establish a claim for future loss of income earning capacity, a plaintiff must first prove a real and substantial possibility of a future event leading to a loss of income, as opposed to a speculative loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The onus on the plaintiff is not heavy but must nonetheless be met: *Kim v. Morier*, 2014 BCCA 63 at para. 7.
- [151] If the plaintiff discharges that burden, then the loss must be assessed, taking into account all realistic positive and negative contingencies. The assessment may employ what has been referred to as an "earnings approach" or a "capital asset approach": *Schenker v. Scott*, 2014 BCCA 203 at paras. 50-51; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53; and *Perren* at para. 32.
- [152] The earnings approach is generally appropriate where the loss is more easily measurable, such as where the plaintiff has some earnings history and where the court can reasonably estimate what his/her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43; and *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [153] The capital asset approach, which is typically used in cases where the loss is not as easily measurable, involves consideration of a number of factors including whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage

of all job opportunities that might otherwise have been open, and is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8; and *Morgan* at paras. 53 and 56. As stated recently by Justice Schultes in *Litt v. Guo*, 2015 BCSC 2207 at para. 388:

[These factors] must be addressed in the context of the facts of the case, and the trial judge must make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact on the plaintiff's ability to earn income: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 (C.A.) at para. 24. In other words, while the capital asset approach is not the mathematical calculation, the trial judge must still make findings of fact on which to base the assessment: *Morgan* at para. 54.

[130] A plaintiff is not required to prove hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility, but mere speculation is not sufficient: *Athey v. Leonati* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[131] As indicated above, I reject the portion of Dr. Sangha's report where he accepts and restates the plaintiff's reports that he is working despite "severe pain" and wants to work more hours but "cannot due to his injuries". I note that Dr. Sangha did not recommend that the plaintiff cease working or even work less than he has been as a massage therapist. Rather, he recommends the use of proper body positioning techniques in the future.

[132] I reject the plaintiff's testimony that he needs to cease working as a massage therapist as a result of his injuries and must train for a new career. The plaintiff has worked as a massage therapist - without pause and to the same extent as he did pre-accident - since the accident occurred. He did so even during the 12 month period following the accident, during which, on his own evidence, he was far more symptomatic than he is at present. Active Motion is a successful business.

[133] However, the plaintiff's injuries do have had some impact on his delivery of massage services. I accept that the plaintiff needs to intermittently pause and shake his right arm out, and that this becomes more frequent as the workday progresses. I accept Mr. Cavanaugh's evidence that while the plaintiff continues to use his right hand, he now makes frequent use of his right elbow and forearm as well. I accept the evidence of Ms. Lounsbury and Mr. Cavanaugh, both long-term clients, that the plaintiff's dexterity with his right hand for purposes of massage is somewhat less than it was pre-accident.

[134] Mr. Cavanaugh testified that the plaintiff no longer demonstrates exercises for him, including recommended kettlebell exercises. While this may be true, I reject it as evidence of impaired ability. The plaintiff makes regular use of a heavy kettlebell in his personal workouts. If he can do 150 kettlebell exercises in the gym, the claim that he cannot demonstrate the same for patients, either as an adjunct to his massage therapy or as an additional service at Active Motion, rings hollow.

- [135] Mr. Cavanaugh and Ms. Lounsbury do continue to see the plaintiff. Active Motion's financial success and the plaintiff's testimony indicate Active Motion suffers no lack of clientele. On the evidence, Active Motion is, in fact, building up a brand. The plaintiff has raised the price of Active Motion's services since opening without any drop-off in clientele. The evidence suggests there is a ready market for the massage therapy services the plaintiff is presently providing.
- [136] The plaintiff testified that he was just about to embark on an entrepreneurial arc with the end-goal of owning and operating a multi-disciplinary clinic and making a profit from every associate working there. He and his counsel have portrayed Action Motion as a business juggernaut stunted at inception by the accident. I am not satisfied that this is at all the case.
- [137] Over the almost 10 year period following his certification, the plaintiff has subleased treatment rooms from clinics, operating in the shelter of someone else's overhead and marketing costs. He eventually landed at Serenity, the clinic of a high school friend. As Serenity's clinic lease was expiring on April 1, 2016, his friend began looking for a new space to lease for Serenity. He accompanied her because he intended to continue to sublease from her in the new Serenity space. When his friend failed to find a satisfactory space for Serenity and the time of expiry of the existing lease was closing in, the plaintiff began to look for a space to lease himself.
- [138] Prior to the accident, he was looking at a space with room for a single treatment room and a five-year term lease. He signed that lease shortly after the accident. He opened Active Motion without any formal business plan. He says he spoke with Anita Wilson - a registered massage therapist who owns and operates a number of clinics - but not until after Active Motion was open and operating.
- [139] The facts hardly suggest an extant entrepreneurial undertaking that was interrupted by the accident. On the contrary, they demonstrate that the plaintiff wanted to continue to sublease from Serenity as before, but was, in the end, obliged to take a lease of his own by circumstances outside of his control. I am not satisfied that the plaintiff had any intention of owning and operating a multi-disciplinary clinic prior to the accident, let alone that he had a real and substantial possibility of succeeding if he had.
- [140] Having now opened Active Motion as a result of the events described above, the plaintiff may continue to lease his own space after his current lease expires (as opposed to returning to subleasing). It is also possible that he might, when the current lease expires, opt to take on a larger clinic space and sublease to an associate. To the extent that expanding Active Motion and taking on one or more leasing associates was a real and substantial possibility before the accident, it remains one now.
- [141] In the end, I am satisfied that the plaintiff, although able to successfully perform massage therapy services, has somewhat less dexterity with his right hand than he did pre-accident, has needed to modify his massage style somewhat to make lighter use of his right hand, and

his symptoms are more significant toward the end of the work day. On that basis, I find that the plaintiff is more likely to cut back on his "hands-on" hours as he ages than he would have been but for the accident: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41. Given the nature of his symptoms, working shorter days is more probable than early retirement on the latter point.

- [142] The plaintiff filed the expert actuarial report of Darren Benning and the expert vocational report of Mr. Lawless. Messrs. Benning and Lawless were also cross-examined at trial.
- [143] The portion of Mr. Lawless's report that deals with the plaintiff's career prospects but for the accident are based on the assumption that the plaintiff would become the owner of a successful multi-disciplinary clinic. This assumption was not borne out on the evidence. To the extent the plaintiff might take on a larger space and associates when the Action Motion lease expires, the same pre-accident possibility continues to exist.
- [144] The portion of Mr. Lawless's report that deals with the plaintiff's post-accident earning prospects are founded on the Mok and Sangha reports and the assumption that the plaintiff cannot continue to work as a massage therapist. Mr. Lawless's opinion lacks a satisfactory factual foundation in this respect as well. It is unnecessary to deal with the Lawless report any further.
- [145] Mr. Benning, an economist, provided a report addressing the plaintiff's future income but for the accident, and positing future income loss under various scenarios as well as calculations for lump-sum present values.
- [146] Mr. Benning's report assumes the plaintiff would retire at age 70 or, in the alternative, at age 65. The defendant challenged Mr. Benning's decision not to use the lower retirement age established by data specific to massage therapists. Mr. Benning testified that, in his opinion, the field specific data was inappropriate in the circumstances given its reflection of the field's historical domination by females with a reduced level of workforce attachment. Instead, Mr. Benning used statistics for British Columbia males with a college diploma or a Bachelor's degree (excluding law).
- [147] I accept Mr. Benning's evidence that the field specific statistics reflect historical factors that do not correspond with the plaintiff's individual degree of workforce attachment. This is the flip-side of an argument the court has relied upon to decline to apply historical gender-specific data to female plaintiffs: *Gill v. Lai*, 2019 BCCA 103 at paras. 52-56; *Jamal v. Kemery-Higgins*, 2017 BCSC 213 at paras. 96-99.
- [148] The plaintiff is the primary earner in his household. The family includes a young child, and the plaintiff has demonstrated a personal attachment to the workforce to date on the evidence.
- [149] I accept that, but for the accident, there was a real and substantial likelihood that the plaintiff would have worked full-time until retirement at age 65. Post-accident, I find there is a real and substantial probability that the plaintiff will scale back his "hands-on" hours of

massage therapy prior to retiring. However, that possibility is partly countered by the real and substantial possibility that Active Motion might take on associates under a new lease and the plaintiff would have reduced his "hands-on" hours in any event. The prior injury and the potential impact of carpal tunnel syndrome are also contingencies here in terms of reducing "hands-on" massage time in later years.

- [150] While I am satisfied that the plaintiff does not have the same level of right-hand dexterity he had prior to the accident, neither evidence nor any calculation to assign a monetary value to that diminishment has been put before me. Decreased dexterity does not equate to a disability or impairment. However, common sense suggests a higher level of dexterity had at least the potential to be exploited as a business asset and its lessening should at least be acknowledged in an award of damages.
- [151] Mr. Benning's Table 2 sets out future income assuming the plaintiff continues to work as a self-employed registered massage therapist through retirement. It applies labour market contingencies and survival contingencies and calculates the present lump-sum value of income on an annual basis. Accepting Mr. Benning's Table 2 calculations, the present value of the total amount the plaintiff would earn between ages 63-65 is \$87,386 (25,365 + 29,094 + 32,927).
- [152] The assessment of damages is not a mathematical calculation but rather an assessment of what is appropriate taking into account contingencies: *Rosvold v. Dunlop*, 2001 BCCA 1 at para 18. As such, taking into account the countervailing contingencies as well as the plaintiff's decreased dexterity, I conclude that a fair award for loss of future earning capacity in all the circumstances is \$90,000.

C. Costs of Future Case

- [153] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position he would have been in but for the accident. The award should reflect 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.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [154] The test for determining the appropriate award under the heading of cost of future care is objective and must be based on 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. Where a plaintiff has not used or sought a particular item or service in the past, it may be difficult to justify a claim with respect to that item or service: *Warick v. Diwell*, 2018 BCCA 53 at para. 55.

[155] 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.

[156] Dr. Sangha recommended:

- Nortriptyline or Lyrica and/or Cymbalta;
- a C7 nerve root block (as treatment and because it "might" confirm the presence of a C7 sensory radiculopathy); and
- treatments such as physiotherapy, chiropractic and massage therapy only during intermittent flare-ups.

1. Passive Treatments

[157] Dr. Sangha's recommendations reflect a concern about the plaintiff's overuse of passive treatments:

It is at such times [exacerbations and flare-ups] that treatment such as physiotherapy, chiropractic and massage will be reasonable. Mr. Bideshi should attempt to use these types of interventions only at times when flare-ups significantly impact on function so as to avoid any type of dependency.

[Emphasis added.]

[158] In argument, the plaintiff sought an award of \$62,000 to provide for massage therapy every two weeks and physiotherapy every two to three weeks through to age 65. That is said to reflect his existing use. However, his existing use includes massage therapy for annual flare-ups of his prior injury. Further, as I read it, Dr. Sangha's recommendation is intended to discourage continuance of the existing pattern and level of use. If the plaintiff went to massage therapy six times a year and to physiotherapy six times a year, the present value amount would be \$22,500. However, the plaintiff would be likely to attend massage therapy between two and four times a year for his prior injury in any event. I find that \$20,000 is an appropriate award.

2. Medications

[159] The plaintiff's evidence demonstrates he is reluctant to take prescription drugs and/or is disinclined to tolerate any negative side-effects. I consider it very unlikely he will adopt a different approach in the future. His evidence indicates that he has rarely taken over-the-counter medication since 2018. The plaintiff seeks an award of \$2500 for recommended medications. Considering the contingencies and likelihood of the plaintiff's actual use of the medications, I find \$1,250 to be an appropriate reward.

3. Vocational Counselling

[160] I reject the plaintiff's claim with respect to vocational counselling. As above, I am not satisfied that the plaintiff has either need or intent to change careers.

4. Driving Anxiety

[161] The plaintiff experiences mild or moderate anxiety when driving. While I do not accept that this amounts to a phobia or disorder, I am satisfied it does impact him and does result from the accident. I award the plaintiff \$400, which will enable the plaintiff to have several sessions with Dr. Hutcheon dealing specifically with driving.

[162] Accordingly, the total award under cost of future care is \$21,650.

D. Loss of Future Housekeeping Capacity

[163] The plaintiff has made a claim based on the fact that Dr. Sangha recommended an in-home assessment. The plaintiff claims both a future care award for housekeeping services and a direction to pay for an in-home assessment.

[164] This is a misconceived request. Dr. Sangha's report reads:

Mr. Bideshi continue to complete activities in and around the home. He does have problems and notes as an example that his wife had to hire a housekeeper. An in-home assessment would be reasonable to identify barriers as well as provide education, assistance devices and coping strategies.

[165] Nothing in the above justifies an award for housekeeping as a future care cost. If anything, the thrust of Dr. Sangha's comments are that the plaintiff can perform household activities but might benefit from recommendations for modifications.

[166] Dr. Sangha's recommendation that an assessment be undertaken does not provide a basis for claiming housekeeping costs. It is for the plaintiff to establish, on the evidence, that housekeeping services are justified as a future cost of care. I find the plaintiff has not. In particular, the fact that the family has been paying someone to provide bi-weekly cleaning services, that fact is not evidence that the service is justified. Notably, the family has hired a cleaning service in the past as well.

[167] To the extent that the plaintiff remains able to complete activities around the home, but finds them more difficult than before or to take longer than before, that is a matter to be addressed in non-pecuniary damages.

E. Non-Pecuniary Damages

[168] Non-pecuniary damages are awarded as compensation for pain, suffering, loss of enjoyment of life and loss of amenities. The amount awarded should be fair to all parties, with fairness being measured against the awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case will ultimately depend on its unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[169] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal provided an outline of factors for consideration in assessing non-pecuniary damages (at para. 46):

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[170] I am unable to accept much of the plaintiff's evidence regarding his loss of enjoyment of life or impairment of relationships with his wife, children, or friends.

[171] The plaintiff has testified that his relationship with his daughter has changed and that they are not as close as they were before. However, the daughter was about 13 at the time of the accident and about 17 at the time of trial, a somewhat volatile period of growth for most children whatever the circumstances. I am not satisfied that the changes in their relationship can all be attributed to effects of the accident, although I do accept that the plaintiff has been expressing anger and unhappiness as a result of his current situation.

[172] The plaintiff and his wife have both testified to difficulties in their relationship. I am also unable on the evidence to say these flow from the accident, especially given the absence of any records or testimony from Ms. Katz or Dr. Hutcheon regarding the plaintiff's reasons for seeking counselling and therapy. I do, however, as with the daughter, accept that Mrs. Bideshi has been impacted by the plaintiff's anger and unhappiness.

[173] The defendant put a considerable amount of evidence from social media into evidence. As this Court has noted before, such evidence is problematic in that it shows only a moment in time and because social media portrayals tend to reflect their owners as they wish to be seen for any number of purposes: *Juelfs v. McCue*, 2019 BCSC 1195 at para. 38. In my view, there is only one among the many social media postings before me that is genuinely inconsistent with the plaintiff's evidence at court. In that posting, the plaintiff is, in real time, inviting people to come and join him at a bar in Las Vegas. The picture posted is

unremarkable, however, the posted message is evidence of a desire to socialize that is inconsistent with the plaintiff's testimony that he is now generally antisocial and resistant to going out with friends. The invitation is, on the other hand, consistent with the fact the plaintiff did go on trips and outings.

- [174] The testimony of the plaintiff and his wife suggests the plaintiff routinely comes home from work and collapses on the couch or retreats to the basement. However, other evidence indicates that the plaintiff engages in physical activities four to five times a week and also participates in one or more social events each week.
- [175] The plaintiff was back to carving pumpkins a month after the accident, even though he was busy opening Active Motion and even though the year after the accident was his most symptomatic period. He carved a real pumpkin for his wife's office that October, and the next summer started using a chainsaw in his carving. The plaintiff says carving now takes him longer and takes a toll on him, but he is clearly able to do it notwithstanding the surety of hand required.
- [176] The plaintiff has had to modify his massage therapy technique and the way he performs some household activities. He has adopted a modified stance for carving and takes breaks, as a result of which it takes him somewhat longer to complete a carving than before the accident. Finally, I accept that the plaintiff has historically preferred challenging and robust recreational and fitness activities, and that while he can still engage in almost all of those activities, he is not doing so to the same degree or to the same level.
- [177] He now hikes and walks as he did prior to the accident. He attends the gym regularly and while not back to the heavy weights he used to lift, still works with very significant weights. He continues to cook. As reported to Dr. Sangha, he continues to perform household duties with modifications, including even shoveling, although if he extends himself he will be sore. The plaintiff suffers intermittent headaches and pain, but rarely to a degree that leads him to take over-the-counter medication. He has ongoing sleep issues.
- [178] The defendant submits that the facts support a range of non-pecuniary damages between \$60,000 and \$75,000, while the plaintiff seeks \$150,000 to \$170,000.
- [179] Given my findings on the evidence, the non-pecuniary award cases cited by counsel for the plaintiff are distinguishable: *Manoharan v. Kaur*, 2016 BCSC 692 (\$170,000); *Mattson v. Spady*, 2019 BCSC 1144 (\$150,000); *Broomfield v. Lof*, 2019 BCSC 1155 (\$130,000); and *Hollyer v. Gaston*, 2016 BCSC 1401 (\$125,000). In all of these cases, the plaintiff suffered psychological injuries (major depressive disorder or somatic symptom disorder).
- [180] The defendant relies on *Bissonnette v. Horn*, 2012 BCSC 518 (\$50,000); *Yip v. Saran*, 2014 BCSC 1283 (\$55,000); *Dosangh v. Xie*, 2017 BCSC 1937 (\$70,000); *Jawanda v. Samra*, 2013 BCSC 138 (\$75,000) [none of these values are updated to reflect 2020 numbers].

- [181] None of the cases cited by the parties fit well on the facts as I have found them. However, in *Hollyer*, Justice G.P. Weatherill references the facts of the case in *Hu v. Tan*, 2016 BCSC 908, and the award given there:
- [193] The plaintiff seeks a general damages award of \$90,000. In support, she relies on *Hu v. Tan*, 2016 BCSC 908, where \$90,000 was awarded in a case involving similar injuries to a 38 year old female with a similar job. Despite various forms of therapy Ms. Hu undertook, she continued to have ongoing symptoms and difficulties. Ms. Hu was diagnosed with soft tissue injuries and ongoing debilitating headaches and had difficulty performing her usual household chores, had changes in mood and was easily angered. She no longer vacuumed her home, did laundry or heavy cleaning. She relied on her mother to look after her two young children. Ms. Hu enjoyed her work as an accounting administrator and planned to work to retirement age. Her ongoing symptoms resulted in a reduction of her overall enjoyment in life. The medical experts in *Hu* were of the view that she suffered from myofascial pain, anxiety, and insomnia.
- [182] I am satisfied *Hu* is a valid comparator. Ms. Hu was of a similar age (38), with a similar diagnosis (myofascial pain, anxiety and insomnia), similar symptoms (soft tissue injuries and headaches) and a guarded prognosis. Ms. Hu was never disabled by her injuries and she persisted in her work, with other activities and in travelling, notwithstanding that she suffered some pain in doing so. Her short temper and unhappiness impacted her family members. She was able to parent, but unable to do so in the manner she had before. Ms. Hu's non-pecuniary damages were assessed at \$90,000. Updated to a 2020 value, that amounts to \$95,855.93.

F. Special Damages

- [183] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident.
- [184] Special damages of \$12,252.72 are agreed upon between the parties.
- [185] There is a further claim for an additional \$1470 with regard to monies required to be repaid to insurers. The defendant's position at the time of trial was that the \$1470 would be accepted if satisfactory proof of payment back was forthcoming.
- [186] The awarded amount for special damages is \$12,252.72.

VI. Summary

- [187] The damages awarded under the various heads are as follows:

Non-pecuniary:

95,855.93

Past loss of earning capacity:

0

Future loss of earning capacity:

90,000

Cost of future care:

21,650

Loss of housekeeping capacity:

0

Special damages:

12,252.72

TOTAL:

219,758.65\$

VII. Tax, Interest, Additional special damages & costs

[188] I leave it to the parties to consider the results in this judgment and address any tax and interest implications.

[189] Either party is at liberty to apply for a determination in the event of a continuing dispute regarding the additional \$1470 claimed in special costs.

[190] In the event the parties are unable to reach an agreement on any of all of the above matters, they are at liberty to make further submissions, with the plaintiff providing written submissions to the court within 28 days of this judgment, and the defendant responding within 21 days thereafter.

[191] Absent any further submissions from the parties respecting costs, costs will follow the event and be awarded to the plaintiff to be assessed under Scale B of Appendix B to the Supreme Court Civil Rules.

[192] Should either party seek a different disposition of costs, that party is at liberty to make written submissions within 28 days of this judgment. The other party may respond within 21 days thereafter.

"Tucker J."

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