

CANADA / JUDGMENT

Chaudhry v. John Doe

2017 BCSC 1895

COURT

Supreme Court of British Columbia

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2017 BCSC 1895 Chaudhry v. John Doe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chaudhry v. John Doe,

2017 BCSC 1895

Date: 20171025

Docket: M120831

Registry: Vancouver

Between:

Basharat Ali Chaudhry

Plaintiff

And

John Doe, Insurance Corporation of British Columbia and Rosalinda Tabunar

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 158 and 174 on October 27, 2017.

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

April 24-28, May 1-4, 8-9

& May 11, 2017

Place and Date of Judgment:

Vancouver, B.C.

October 25, 2017

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- [1] The plaintiff seeks damages for personal injuries that he suffered from a hit-and-run accident that happened on August 29, 2010. The driver was never located and the vehicle in which he or she was driving was stolen. The action is brought pursuant to s. 24 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, which designates ICBC as the nominal defendant. Liability is not contested.
- [2] The plaintiff claims damages under all heads of damage. The defendant contests whether the plaintiff has established that all his injuries were caused by the accident. It also questions the extent and long-term consequences of the injuries. In addition, the defendant claims the plaintiff failed to mitigate his losses.

I. FACTS

- [3] Overall, I found the plaintiff to be a credible witness. I found his testimony, for the most part, to be internally consistent and mostly consistent with the other evidence presented. No expert expressed a concern that the plaintiff was malingering.

- [4] There is little dispute about the material facts of the case. There are some instances where the reliability of the plaintiff's evidence requires greater scrutiny; I address those later in this Judgment. Accordingly, unless specifically indicated otherwise, the summary of facts below constitutes my factual findings.

A. Life before the Accident

- [5] The plaintiff, Basharat Chaudhry, and his family live in Richmond. He was about 50 years old at trial and immigrated to Canada with his wife and oldest daughter from Pakistan in June 2002. The family immigrated in order to enhance educational opportunities for their children. They also wanted to live in a peaceful country. Mr. Chaudhry commenced his application for immigration in 2000 and was accepted to immigrate as a skilled worker in 2002.
- [6] In Pakistan, he completed his post-secondary education in English. He obtained his Bachelor of Science in March 1991, and a Master's Degree in Science in 1994. The evidence established the Canadian equivalent to his Pakistani degrees would be a BSc. His education included two years of practical training in Islamabad. He worked in the oil industry for about two years, and then after receiving some additional training, he worked as a data acquisition officer for about two years. After that, he moved to Abu Dhabi where he worked for about six months.
- [7] He married his wife, Abida Parveen, in October 1999 and the couple's first child was born in 2001. They had three more children after moving to Canada. Both Mr. Chaudhry and Ms. Parveen became Canadian citizens.
1. Canadian Work History
- [8] Mr. Chaudhry immigrated first to Toronto and, although he searched for a job, he did not find work immediately. He then moved to Richmond where one of his distant relatives lived, but he did not intend to settle his family in B.C. at that time. Instead, he looked for work in Calgary, but was unsuccessful; he would have needed to upgrade his qualifications to work in the Alberta oil and gas industry. He then returned to Toronto and started his own business running a convenience store. His wife and children joined him in Toronto from Pakistan, but they returned to Pakistan after a few months as the long hours he worked at the store prevented him from spending enough time with his family, especially his young children. After about a year and a half, Mr. Chaudhry decided to sell the store and move to Richmond with his family. Mr. Chaudhry claims that he did not realize any profit from the sale of the business; he testified he merely broke even.
- [9] When arriving in Richmond in 2004, he took a course at the Justice Institute to become a security guard. He worked as a security guard for about six weeks. He then completed a taxi driver course, again at the Justice Institute. He started working for Richmond Taxi full-time in February 2005. He generally worked five to six days a week, for eight to ten hours per day. For the first two years, he drove the night shift, which meant he generally worked between

the hours of 4:00 p.m. to 4:00 a.m. However, he wanted to spend more time with his family, so he switched to the day shift.

- [10] He still found it difficult to devote enough time to his family, so he decided to drive a taxi part-time and pursue a real estate license. He drove a taxi for about three or four days a week and switched from paying a monthly lease rate for the taxi to paying a daily lease rate. He took a one-year course at the Sauder School for Business at UBC and got his real estate license on December 5, 2008.
- [11] He worked at Sutton Realty for about a year and then found employment with Homeland Realty. Before the motor vehicle accident, he had successfully completed three real estate deals and was working on three or four others. His plan was to grow his real estate business to a point where he would get involved developing townhouses. He wanted to develop a team for pursuing that. He expressed confidence in that plan because he had developed a large group of friends in the Pakistani community, and he advertised in three local newspapers. He printed business cards, which he handed out to people at the airport and at the mosque he attended. He would invite wealthy people from his social circle to a restaurant to dine with his friends as a way of building connections.

2. Family Life

- [12] Mr. Chaudhry's family life was busy and happy prior to the accident. The family often picnicked in local parks and played sports together. Mr. Chaudhry was physically active and particularly enjoyed playing badminton and volleyball. Mr. Chaudhry and his family also took short trips to Whistler, Victoria, Nanaimo, and Harrison Hot Springs. They often had barbecues with three or four families.
- [13] Harpreet Sandhu is a close friend of Ms. Parveen. Her family often got together with Mr. Chaudhry's family about a couple of times a month before the accident. Mohammad Aziz was employed as a taxi driver at the same time as Mr. Chaudhry. He saw Mr. Chaudhry almost every day prior to the accident. In addition, his family socialized with Mr. Chaudhry's family, often with other families. The families would get together for dinner about once every month or two. Both Ms. Sandhu and Mr. Aziz described Mr. Chaudhry as happy, very social and physically active before the accident.
- [14] Mr. Chaudhry stayed fit. He had a gym pass at the Cambie Community Centre where he lifted weights and ran on a treadmill. The Chaudhry family also had a treadmill at home. He attended mosque regularly. The mosque had a gym where he would often play badminton with his family. He was an active member of the Canada Pakistan Cultural Association and attended many meetings. The family attended events such as the celebration of Eid, Canada Day or Pakistan Day. Ms. Parveen estimates her husband attended meetings or events up to eight to ten times a year before the accident.

[15] Mr. Chaudhry engaged in house work including buying groceries, sweeping, and meal preparation. Ms. Sandhu recalled how much he enjoyed preparing desserts for family get-togethers. He sometimes picked up her children along with his from school. He helped around the house as much as he could because he wanted to support his wife. He helped the children with their homework.

3. Prior Conditions

[16] Mr. Chaudhry was involved in a motor vehicle accident in 2005 and could not work for about two months. He fully recovered from that accident and returned to work. He also had a bout of hepatitis C in about 2008, which caused him to feel sluggish. He was treated for the condition and he fully recovered within three or four weeks.

[17] Mr. Chaudhry had impaired hearing before the accident. The defendant submits Mr. Chaudhry is minimizing, to an unreasonable degree, the extent of his hearing loss prior to the 2010 accident. The defendant also submits the 2010 accident did not cause any deterioration in his hearing loss; I analyze that issue later in this Judgment.

[18] Mr. Chaudhry admitted that he suffered some amount of hearing loss from the 2005 accident, but he said it was mild and it did not impact his functioning. However, in 2008, Ms. Parveen noticed that he was not responding to her when she called to him from a different room in the house. By chance, she saw an advertisement in the newspaper for a free hearing test. She booked an appointment for him, which he attended on December 11, 2008.

[19] Helga Rode is the audiologist who conducted Mr. Chaudhry's hearing test on December 11, 2008 and she testified at trial. She had no specific memory of Mr. Chaudhry, but she was able to explain the report that was generated, which was sent to Mr. Chaudhry's family doctor (at that time, Dr. Satnam Gandham).

[20] In the "Summary" section of the report, Ms. Rode commented that Mr. Chaudhry had "moderate to moderately severe sensorineural hearing loss". She also checked boxes on the report, which stated that, "Ontological evaluation should be considered (referral to ENT specialist)" and "Client would benefit from hearing aid". She also wrote:

The implications of this significant bilateral hearing loss were discussed with Mr. Chaudhry, as well as some compensatory strategies. In view of his hearing loss, further [ontological] consultation is recommended and Mr. Chaudhry was advised to contact Dr. Gandham to this regard.

Mr. Chaudhry could benefit from hearing aids in both ears and this was discussed with him briefly. He may contact this clinic to proceed with a hearing aid trial, should he wish to do so, pending the [ontological]/medical follow up.

[21] Mr. Chaudhry denied that his pre-accident hearing loss negatively affected his social life or his work. He said it required him to pay more attention in the midst of other noise. For instance, he found he had to focus more when talking to someone in a room where the TV

was on, or if a car window was open while he was driving. However, the defendant pointed out that the summary on the report stated that, "[f]riends and family have complained about his not hearing them" and that Mr. Chaudhry "finds it difficult to hear on the telephone". Ms. Rode testified she would have obtained that information from Mr. Chaudhry. However, the summary also stated that he was managing well as a taxi cab driver, which is consistent with his testimony. Also, Ms. Sandhu and Mr. Aziz testified they did not notice any problems with Mr. Chaudhry's hearing prior to the accident.

- [22] I agree with the defendant that the fact that Mr. Chaudhry's wife had to urge him to get a hearing test, as well as the results of that testing, are more consistent with Mr. Chaudhry having had something greater than "mild" hearing loss. When shown those scores during cross-examination, Dr. Longridge characterized the hearing deficiency as "significant" and agreed with Ms. Rode's summary that his pure tone hearing loss was "moderate to moderately severe". Dr. Bell described those results in his report as indicating hearing "well below social adequacy" (p. 5).
- [23] It is difficult in that context to understand how that would not affect his functioning, particularly as a taxi driver. However, Dr. Longridge did testify that even people with worse hearing than Mr. Chaudhry's "managed to devise methods whereby they function". In his view, it is possible that Mr. Chaudhry developed excellent coping skills to assist him, and those may have given him confidence in functioning at his job. This is consistent with Dr. Bell's view that it is highly likely Mr. Chaudhry had learned "good compensation skills" (p. 10).
- [24] I find Mr. Chaudhry to be credible, but I am troubled by the medical and audiology evidence about his pre-accident hearing loss. The objective results on the 2008 report, and Dr. Bell and Dr. Longridge's commentary on those results, clearly indicate that he had moderate to moderately severe impairment of his hearing before the accident. I also find his wife's persuading him to get his hearing tested to be indicative of something more than mild hearing loss. Accordingly, I find that Mr. Chaudhry's hearing loss was moderate to moderately severe rather than mild before the accident. However, the evidence is consistent that Mr. Chaudhry had developed coping skills such that his perception of the impact on his functioning and social life may not have matched the degree of his hearing impairment.

B. The Accident

- [25] Mr. Chaudhry picked up some passengers from the Silver City Cinema in Richmond on August 29, 2010. Close to midnight, he came to the intersection of Blundell Road and Sidaway Road (the "Intersection"), which has a four-way stop. He stopped and scanned the Intersection. He recalled seeing a vehicle to his right, which had the right of way. Then, with no forewarning, a vehicle hit Mr. Chaudhry's taxi from behind. The impact was sudden and had enough force to push Mr. Chaudhry's vehicle through to the other side of the Intersection.

- [26] Paul Michaels was the driver of the vehicle that Mr. Chaudhry saw to the right at the four-way stop. He is semi-retired, but worked for many years as a community psychiatric care counsellor and a crisis program worker. In that capacity, he had extensive experience providing first aid and dealing with people in acute trauma or stress. He also had significant experience as a first responder. He volunteered for North Shore Rescue and worked on a ski patrol.
- [27] Mr. Michaels was familiar with the Intersection because it was on the route to the house in which he lived at that time. He had a reasonably clear memory of the accident. He was driving home and remembers it was past sunset and therefore dark. He was travelling southbound on Sidaway Road approaching the Intersection. He stopped at the four-way stop and had engaged his turn signal. He saw Mr. Chaudhry's vehicle stopped to his left. They arrived at the Intersection at about the same time, so Mr. Michaels was ready to proceed because he had the right-of-way. He made eye contact with the driver (Mr. Chaudhry), who waved him on.
- [28] As Mr. Michaels initiated his turn and started to move forward, he heard a very loud bang. He saw Mr. Chaudhry's vehicle, which had been stopped to his left, suddenly pushed all the way through the Intersection in front of him. Mr. Michaels immediately braked and steered right to avoid colliding with anything that might come flying off the vehicles.
- [29] The vehicle that hit Mr. Chaudhry's taxi did not have its headlights on. It made no sound consistent with the driver's braking. It hit Mr. Chaudhry's vehicle, stopped for only a second, swerved to the left and drove off at a very fast speed. Mr. Michaels said the impact was "pretty violent" with pieces of the vehicles flying off.
- [30] After Mr. Michaels moved his vehicle over and turned it off, he went to the taxi to check on the driver and passengers. He did a primary survey of the driver and a scene assessment. Mr. Michaels noted that Mr. Chaudhry had his seatbelt on and that the airbag did not deploy.
- [31] Mr. Chaudhry was not initially alert and could not respond quickly to questions. At first, Mr. Chaudhry was not oriented as to his name, his location or what had happened. Mr. Chaudhry was simply saying "my head" and reaching back to touch the back of his head with his left hand, a gesture that Mr. Michaels interpreted to mean something was wrong. Mr. Chaudhry was grimacing, doing his best to manage pain. Mr. Chaudhry looked scared and was possibly in shock.
- [32] Mr. Michaels did not notice any bleeding but something inside the van had become dislodged from the roof, possibly the roof lining. Because of that and the extent of the damage, he was concerned that there could be people with spinal injuries. He proceeded on that assumption and asked nobody to move from the vehicle. Mr. Michaels ensured that everyone was talking, breathing and conscious. He heard someone crying, indicating someone may be injured. He called 911.

- [33] Mr. Michaels stayed at the scene for about 15 minutes after the first responders arrived in order to talk to the constable and relay his observations.
- [34] Mr. Chaudhry's recollection of the accident is consistent with Mr. Michaels' description. Mr. Chaudhry said that he was not "very conscious" right after the impact; he felt like there was lightning in his head. He was not sure how long he stayed in that state. He believed he hit the steering wheel with the right side of his head and that he had swelling and possibly some blood there. He described himself as being dazed. He was aware that the car that hit the taxi had driven away, but he could not see the driver or note anything about the colour of the vehicle.
- [35] Mr. Chaudhry cooperated with the first responders, was put in the ambulance and taken to Richmond Hospital. He was there for about two to two and a half hours and recalled they may have taken x-rays and given him some pain killers. He was very upset, feeling scared and nervous because he had pain in his back and the muscles in his neck were hurting.

C. After the Accident

- [36] For the first few weeks after the accident, Mr. Chaudhry suffered daily pain in his neck and lower back. He had severe headaches that he described as intense daily pain. His pain worsened with movement. He also experienced dizziness, and he had difficulty sleeping. He testified that about two to three weeks after the accident he noticed a constant "ringing" sound in his ears. Mr. Chaudhry has tinnitus. He described it as an intense pain in his head that can sound like a fan being left on, an airplane or a waterfall. He did try driving but found he would get very dizzy and could not focus on the road.
- [37] About four months after the accident, he admitted that his neck pain was somewhat better, although he experienced pain every day but with decreased intensity. The same was true of his back, but he noticed that if he stepped on uneven ground the pain could flare up.
- [38] His main complaint was headaches. They got worse by the end of 2010. He had continual pain in his head, which worsened if he vibrated or witnessed motion. This was sometimes triggered simply by watching moving traffic, or if he got up suddenly from a seated position. He described the pain as sometimes feeling as if something was sparking in his head. He said his dizziness became more severe.
- [39] He tried to return to his real estate business, but he found it too difficult to sit at the computer. His social activity decreased tremendously. He testified he constantly had disturbed sleep and admitted he felt very frustrated and depressed. It was at about this time his mood began to deteriorate. He was easily irritated and often felt frustrated. He was prescribed and took medication for anxiety and depression.

- [40] Over the course of 2011, Mr. Chaudhry's back and neck pain lessened. In fact, his back was not painful unless he was picking up something heavy. His headaches were continuous and got worse with movement, shaking or vibration. He found sleep provided him with relief so he spent most of his time in his room and he slept quite a bit. The tinnitus got worse during this time period.
- [41] By the end of 2011, his dizziness was about the same. He described sometimes feeling that he was about to be thrown off the bed when he was lying down. Moving his head or seeing movement would induce dizziness.
- [42] Mr. Chaudhry's neck and back pain continued to improve in 2012, but he still complained of dizziness, headaches and tinnitus, which he described as being very bad. He was anxious and felt very guilty that his wife became the breadwinner and was doing all housework and childcare responsibilities. He was ashamed about this.
- [43] In 2013, he switched to a new family doctor because his wife could no longer drive him to his appointments because of her work schedule. He chose a doctor closer to their home. During this time, he attempted to increase his physical activity by trying to use the treadmill, but he had to hang onto both railings in order to remain steady. He had more success on a stationary bicycle. He tried playing badminton and volleyball with his children, but movement of his head caused problems so he stopped. His social activities were greatly diminished; in the five or six years since the accident, he has only attended three or four events at the Canada Pakistan Cultural Association.
- [44] Mr. Chaudhry feels incapable of driving. He tried once or twice, but did not feel safe. He has not driven since the accident. He does not think he will ever be able to drive again.
- [45] By 2015, he attended his family physician less frequently because his complaints and problems remained the same and he came to believe there was no recommendation or advice that could help him. His condition has changed little in the last few years.
- [46] By the time of the trial, his neck and back were mostly resolved, but his dizziness, headaches, insomnia and tinnitus had not resolved. He also continues to experience stress, anxiety and depression very frequently.

1. Mental State

- [47] Both Drs. Bell and Longridge were concerned about the possibility that Mr. Chaudhry was suffering from a mental illness. Dr. Longridge was concerned enough to contact Mr. Chaudhry's family doctor because Mr. Chaudhry admitted thinking about suicide. There is no evidence he suffered any mental health issues prior to the accident. His mental health after the accident is revealed from his interactions with family and friends, as well as through expert evidence.

2. Family Life

- [48] Following the accident, there was a dramatic change in Mr. Chaudhry's relationship and interaction with his family. His wife started working at the end of 2012, getting a full-time job towards the end of that year. Previously she was a homemaker. However, after the accident, she became both the breadwinner and homemaker. She does almost all of the housework; Mr. Chaudhry tries to help out, but he is not able to do very much. This strained their marriage and they began sleeping in separate bedrooms.
- [49] The children would get upset or scared because Mr. Chaudhry was often very irritable and he would shout at them when there was too much noise. He has tried to help the children with homework, but found that he could not concentrate enough to do so. He also got frustrated or irritable easily and the children did not like working with him. He was particularly worried by the dramatic change in his relationship with his third daughter, with whom he was very close before the accident. She would sit outside of his door crying, wanting him to come out. He felt guilty that he could not bring himself to play with her and would stay in his room with the door locked.
- [50] His older two children had a very difficult time with the changed family dynamics. Ms. Sandhu commented that her impression was his two oldest children do not really have a relationship with their father anymore. Both Mr. Chaudhry and his wife confirmed this.
- [51] Mr. Chaudhry believed there has been some improvement within the family once his wife and children got accustomed to his condition and gained some understanding what he was dealing with.

3. Work and Social Life

- [52] Other than a few months' work in Pakistan, Mr. Chaudhry has not earned income since the accident. The circumstances of his working in Pakistan are unusual. In early 2011, his parents received a letter from his former employer offering Mr. Chaudhry his former job. This was related to the government having to reinstate employees who had been illegally laid off years earlier. Mr. Chaudhry had received the same information from his employer the year before the accident, but did not consider returning because he was just starting his foray into the real estate business. However, in February 2011, he was worried about the financial stress on the family; he felt he had no other option and he decided to take the opportunity to try and earn income in Pakistan. Ms. Parveen testified that she encouraged him to take that job hoping the change would improve his condition.
- [53] He returned to Pakistan for about two months. He was given training for seismological work including surveying and vibration analysis. The training was in the classroom. He found it taxing and he missed many classes. He found it difficult to wake up in the morning and when he did attend class, his symptoms worsened. He decided to return to Canada.
- [54] However, his employer sent a letter to his parents indicating that Mr. Chaudhry had received pay, but had been absent without permission. Disciplinary action was threatened. He decided to return to Pakistan because of the financial stress, but this time his family

accompanied him. Ms. Parveen testified they wanted to take the chance that he could do the work but she noted that he was not doing well physically or mentally. Mr. Chaudhry was sent to work in the field and he found that work very difficult. Travelling in the hilly terrain exacerbated his dizziness, headaches and tinnitus. He also found computer work challenging. His mood worsened. In July 2011, he and his wife agreed that she would work to support the family and they would return to Canada.

- [55] Mr. Aziz testified that he heard from others about Mr. Chaudhry's accident but did not see him for about three years. Previously he would see him at mosque on Fridays, but noticed Mr. Chaudhry had not attended for a few years. Mr. Aziz contacted Mr. Chaudhry and offered to drive him to mosque on Fridays, which he still does.
- [56] Mr. Aziz said whenever he has driven Mr. Chaudhry in the car, Mr. Chaudhry seemed scared. For example, Mr. Chaudhry has asked Mr. Aziz to stay in the right lane because he gets more scared if there is a lane of traffic on his side. Mr. Aziz also testified that he will call Mr. Chaudhry before picking him up because when he does not do so, Mr. Chaudhry will forget.
- [57] Mr. Aziz does not socialize with Mr. Chaudhry as much; he says Mr. Chaudhry has difficulty hearing, focussing and concentrating and so they do not visit as much as they used to. He has been driving Mr. Chaudhry to mosque for about four years and that is the only contact they have together. He has seen no improvement in his symptoms.
- [58] The first time Ms. Sandhu recalled seeing Mr. Chaudhry after the accident was at one of his kids' birthday parties. She noted that he behaved oddly. For example, he was cautious as he walked, holding onto things for support. Her impression was he was in pain. She also noted he could not respond to questions without them being repeated, and he became disturbed, frustrated and easily irritated, especially if it was noisy. He could not sit through an entire visit. While she noted improvement in his ability to walk, she has noted no other improvements. She noted his relationship with his older kids remains strained.

4. Expert Psychiatric Evidence

- [59] Two expert psychiatrists testified. Both were credible and reliable and their opinions differed little. Dr. Kyle Burns was Mr. Chaudhry's treating psychiatrist for about one and a half years, conducting about 41 clinical sessions. He prepared an expert report dated November 21, 2016. The defendant relies on Dr. Riley, who conducted an independent medical examination and prepared a report dated January 16, 2017.
- [60] In his report, Dr. Burns diagnoses Mr. Chaudhry with post-traumatic stress disorder (PTSD), somatic symptom disorder with predominant pain that is persistent and severe and major depressive disorder with anxious distress. He characterized these injuries as significant because Mr. Chaudhry suffers severe impairment in multiple aspects of his life. Dr. Burns' opinion is that the psychological injuries have disabled Mr. Chaudhry, and Dr. Burns has "little doubt that Mr. Chaudhry's disability is the result of the injuries sustained in the

accident" (p. 11).

- [61] Dr. Riley also diagnosed Mr. Chaudhry with major depressive disorder and somatic symptom disorder, but opined there was insufficient data to support a diagnosis of PTSD. In part, that conclusion was based on Dr. Riley's assessment that the accident was not life threatening or serious enough to lead to a diagnosis of PTSD; but, it was also based on the absence in Mr. Chaudhry's description of symptoms of "traumatic" symptomology.
- [62] He conceded, however, that Dr. Burns had an advantage in assessing Mr. Chaudhry because of the amount of time Dr. Burns treated Mr. Chaudhry. Specifically, Dr. Riley had no reason to disagree with the identification of PTSD symptoms in Dr. Burns' report[1]. Dr. Riley's assessment was that Mr. Chaudhry did not exaggerate his condition; Mr. Chaudhry was sincere.
- [63] Importantly, Dr. Riley also agreed that treatment of clinical symptoms consistent with PTSD is recommended even if a person does not fit the definition of PTSD. Dr. Riley agreed that the lack of diagnoses under the Diagnostic and Statistical Manual of Mental Disorders (DSM) did not make a "material difference" to Mr. Chaudhry's prognosis or the impact the symptoms were having on his life.
- [64] Dr. Riley stated that he was unable to conclude that Mr. Chaudhry's depressive disorder and somatic symptom disorder would have occurred in the absence of the accident.
- [65] With regard to prognosis, Dr. Burns wrote at p. 10:

Unfortunately Mr. Chaudhry's symptoms have persisted since the time of the accident with little meaningful improvement in his function. He has a constellation of problems that include headache, tinnitus, insomnia, dizziness in addition to PTSD, Somatic Symptom Disorder and Depression. The persistence of symptoms over 6 years makes prognosis for full recovery extremely unlikely. ...

- [66] Dr. Riley opined that "prognosis is impacted by negative and positive factors, and the complexity of Mr. Chaudhry's case prevents me from offering a succinct summary of his prognosis with respect to his injuries" (p. 14). However, during cross-examination, Dr. Riley agreed that in Mr. Chaudhry's case, the negative factors outweighed the positive factors (no history of psychiatric injuries, and some positive response to treatment) with regard to his prognosis. He also opined that "without a robust treatment intervention that combines treatment with psychiatric medication along with psychological treatment", it is unlikely he will experience significant improvement in his mental condition and functioning (p. 14). He acknowledged that any lack of engagement by Mr. Chaudhry must be seen in light of a number of factors, particularly the fact that a hallmark symptom of depression is lack of motivation.

[67] There is no doubt that the accident caused Mr. Chaudhry to suffer depression, anxiety and symptoms of post-traumatic stress disorder. These have had a dramatically negative impact on all areas of his life. I find his prognosis for improvement is poor.

II. ISSUES

[68] The plaintiff's position is that an award of about \$1,145,000 adequately compensates him for the losses he has suffered from the accident. The defendant submits about \$562,000 is appropriate. They agree special damages amount to \$6,510.94 and I make that award.

[69] With regard to the other heads of damages, the parties' positions on the appropriate amounts are:

Head of Damage

Plaintiff

Defendant

Non-pecuniary

\$212,500.00

\$100,000.00

Loss of earning capacity

(Past)

\$210,943.74

\$110,000.00

Loss of earning capacity

(Future)

\$625,000.00

\$300,000.00

Cost of future care

\$90,000.00

\$45,000.00

[70] In addition to amount of damages, the parties disagree on the following specific issues:

- a) Did the accident cause Mr. Chaudhry's deteriorated hearing, dizziness and tinnitus?
- b) Did the accident cause Mr. Chaudhry to suffer a concussion and/or headaches?

c) Was there a real and substantial probability that Mr. Chaudhry would have made a living from his real estate business?

d) Did Mr. Chaudhry fail to mitigate his losses?

[71] I will address these issues before turning to an assessment of the appropriate amount to award in damages.

A. Did the accident cause Mr. Chaudhry's deteriorated hearing, dizziness and tinnitus?

[72] The defendant says Mr. Chaudhry's testimony is not reliable about the extent and nature of his pre-accident hearing loss. I have discussed above that issue, and find that Mr. Chaudhry's hearing loss was greater than he described it pre-accident; I find it was moderate to moderately severe and not mild. However, I also find that he was coping well with his hearing loss prior to the accident.

[73] Mr. Chaudhry described two different types of dizziness he experienced. In the first few weeks after the accident for about one year, he experienced a spinning sensation when lying down, as if he would get thrown off the bed. He perceived the ceiling to be rotating. That dizziness did improve over time. He also experienced dizziness whenever he was around moving objects, and that sensation has stayed with him.

[74] The defendant relies on expert evidence to submit the accident did not cause Mr. Chaudhry to experience symptoms of dizziness and tinnitus, and did not deteriorate his pre-existing hearing loss. Accordingly, the defendant's position is that an award for non-pecuniary damages must not be based on Mr. Chaudhry's complaints or other evidence relating to those particular symptoms.

[75] There was no dispute that the plaintiff bears the burden of establishing on a balance of probabilities that "but for" the accident, his injuries would not have occurred: *Resurface Corp. v. Hanke*, 2007 SCC 7 at para. 23. The plaintiff must prove there is a "substantial connection between the injury and the defendant's conduct".

1. Expert Evidence

[76] The plaintiff relies on the opinion of Dr. Neil Longridge who wrote two expert reports dated February 22, 2012 and November 22, 2016. The defendant relies on the opinion of Dr. Desmond Bell whose expert report is dated March 20, 2013. Both doctors were qualified as experts in otology (medical and surgical treatment of ear diseases) and both opined on Mr. Chaudhry's hearing impairment, dizziness and tinnitus.

[77] Dr. Bell opined that the accident did not cause a traumatic injury to the plaintiff's auditory or vestibular system. In his opinion, the tinnitus and any impairment of his hearing were related to Mr. Chaudhry's pre-existing hearing loss. Dr. Bell opined that Mr. Chaudhry's dizziness was caused by benign positional vertigo and was unrelated to the accident. Dr. Longridge came to the opposite conclusion and opined that "absent any other satisfactory explanation" Mr. Chaudhry's "onset of hearing complaints subsequent to the accident and

their absence prior to the accident" probably means they were caused by the accident (p. 9).

- [78] The doctors agreed that there was minimal change in Mr. Chaudhry's impaired ability to hear pure tones; the hearing test results taken after the accident differ little from the results recorded by Ms. Rodes. However, Dr. Longridge explained that is only one aspect of possible hearing damage. In his experience, hearing changes following trauma often affect the ability to hear background noise satisfactorily and that, "this reflects damage to the hearing system at a more sophisticated level than the rather simple pure tone audiometric measurements done" (p. 9).
- [79] Both doctors agreed it is difficult to assess the severity of tinnitus because there is no known way to measure its sound or volume. Dr. Longridge explained the condition is individualistic in that "[s]ome patients with tinnitus are extremely bothered by it and cannot function at all" and "[i]t stops them sleeping or it stops them functioning and doing any effective work because it intrudes into their concentration continuously" (p. 12). However, others can "think about it and know it is there but can completely ignore it without difficulty" (p. 12). The only treatment is to expose the person to other more pleasant sounds in the hope it will block out or distract from the tinnitus.
- [80] Mr. Chaudhry was consistent in his testimony (and in his description of symptoms to both Dr. Longridge and Dr. Bell) that he first noticed the tinnitus within weeks of the accident. However, Dr. Bell preferred to rely on the family doctor's first clinical note about tinnitus, which was four months' post-accident. Dr. Bell concluded that time gap "is too long for the two to be related" (p. 10). He also emphasized the absence of a notation about tinnitus on the ambulance crew report. Dr. Bell then referred to Mr. Chaudhry's pre-accident hearing loss and opined that, "... hearing loss and tinnitus go hand in hand and we know the hearing loss was present prior to the accident it would make logical sense that the tinnitus was also present prior to the accident" (p. 10).
- [81] With regard to the lack of clinical notation that Mr. Chaudhry reported or had symptoms consistent with tinnitus prior to the accident, Dr. Bell explained that, "[s]ometimes a dramatic and significant change in lifestyle (i.e. hospitalization) will make patients 'become aware' of tinnitus for the first time even though it was not there before admission" and that "[e]nsuing anxiety and worry can aggravate the symptom disproportionately" (p. 11). I note that Ms. Rode's report included the comment that Mr. Chaudhry did not report any dizziness or tinnitus. She testified she was certain she would have specifically asked him about both conditions, as was her practice.
- [82] Dr. Bell relied on the lack of any clinical notation of tinnitus for four months post-accident to conclude the tinnitus could not be related to the motor vehicle accident. Yet, he discounted the significance of the lack of any clinical notation or subjective report of tinnitus pre-accident. He justified this by explaining that people can have tinnitus and not be aware of it. That logic is problematic. The accident could have caused the tinnitus, but Mr. Chaudhry might not have been aware of it for four months. More importantly, if Dr. Bell was

correct about tinnitus pre-existing the accident, he did not identify any "dramatic and significant change in lifestyle" that occurred four months after the accident to trigger the tinnitus to become symptomatic.

- [83] There are some inconsistencies in Dr. Bell's report about Mr. Chaudhry's pre-accident hearing loss. In his report (at p. 3), Dr. Bell wrote that Mr. Chaudhry admitted "mild hearing loss" after the 2005 accident, which Mr. Chaudhry described to Dr. Bell as damaging his hearing to some extent. Dr. Bell confirmed during cross-examination that was an accurate record of what Mr. Chaudhry said. However, under "Discussion", Dr. Bell wrote that he was surprised that, "Mr. Chaudhry denied having had hearing loss prior to the accident" (p. 9); under "Opinion", he stated Mr. Chaudhry's pre-accident hearing loss was "quite severe, below social adequacy and was well documented prior to the motor vehicle accident despite [Mr. Chaudhry's] denial of its existence" (my emphasis) (p. 10). I was not satisfied that Dr. Bell adequately explained these contradictions in his report during his testimony. This raises the possibility that his opinion may not be reliable because of inconsistent consideration of Mr. Chaudhry's history.
- [84] The most significant difference between the two doctors' opinions was whether the accident caused damage to Mr. Chaudhry's vestibular (balance) system. They both agreed that objective testing revealed damage to Mr. Chaudhry's vestibular system. In Dr. Bell's opinion, the testing that demonstrated a "reduced caloric response on the left" (a finding consistent with Dr. Longridge's testing) is "confirmation that, at some point in his life, he sustained some damage to the left vestibular system" possibly secondary to infection, vascular insufficiency or trauma (p. 8). He opined it did not arise from the accident because Dr. Bell would have "expected dizziness, vertigo, possible nausea and vomiting to have been immediate symptoms at the time of injury" (p. 8). Dr. Bell emphasized the notation in the ambulance crew report that Mr. Chaudhry was "walking around". In his opinion, that would be virtually impossible if the collision had damaged his vestibular system to the degree that was observed in the testing (p. 10). Dr. Bell also based his conclusion, in part, on his impression that the "accident did not appear to be severe" because the air bag did not deploy (p. 8).
- [85] Dr. Bell did not have the benefit of the information provided by Mr. Michaels that Mr. Chaudhry's vehicle was hit from behind hard enough that it was pushed from a stationery position through to the other side of intersection, and that Mr. Chaudhry was disorientated. Dr. Bell confirmed in cross-examination that if Mr. Michaels' information was accurate, the accident was more severe than he thought, and it could have been severe enough to cause injury to the inner ear. He maintained, however, that it was unlikely the accident could have caused the degree of injury that Mr. Chaudhry had in his inner ear.

- [86] With regard to Mr. Chaudhry's symptoms of dizziness, Dr. Bell found those to be more consistent with benign positional vertigo than trauma to the vestibular system. Benign positional vertigo resolves on its own and Mr. Chaudhry confirmed the dizziness, which he described as "spinning", did disappear over time.
- [87] However, Mr. Chaudhry testified that he still experienced different symptoms of dizziness. Dr. Bell attributed those symptoms as normal physiological reactions of feeling like you may be moving when you are stationary as an object beside you moves. Dr. Bell was unaware that Mr. Chaudhry had stopped driving because of his symptoms, and that Mr. Chaudhry experienced difficulty even as a passenger in a car. Dr. Bell agreed those behaviours were consistent with someone experiencing problems beyond normal physiological responses to movement around them.
- [88] Contrary to Dr. Bell, Dr. Longridge concluded Mr. Chaudhry's "dizziness" was not the normal physiological response to movement. Mr. Chaudhry's experiences of becoming dizzy in busy places (malls, stores) was consistent with a disorder called visually induced dizziness which Dr. Longridge explained in his report at p.11:

Visually Induced Dizziness refers to a condition where the patient develops symptoms which are distressing and bothersome. Anyone who has been sitting at a traffic light on an incline and suddenly notices that they are falling back down the incline and rapidly slams their foot on the brake has experienced a situation where a car next to them is in fact moving slowly forward and they misinterpret this and think they are going backwards. This is visual vestibular mismatch situation. The individual has had an awareness of visual information misinterpreted into the feeling that they are moving. The condition of visual vestibular mismatch which is abnormal or pathological is of similar distressing symptoms induced by a situation where normal people do not get symptoms. Where there is a lot of movement around the individual this causes confusion, distress and dizzy symptoms. Particular situations where this occurs are ones with a lot of movement. Characteristically rippling water and also the standard situation of a lot of movement in a supermarket or shopping mall produces awareness of dizziness. Dislike of elevators and escalators, which caused dizziness is common. Busy television programs, such as car chases and hockey games cause dizziness. Scrolling a computer causes dizziness. The bright light in these circumstances is frequently complained of. ...

- [89] Mr. Chaudhry experienced dizziness in some of the situations described in that description. Dr. Longridge stated that the absence of this phenomenon prior to the accident, and with no other satisfactory explanation, means the accident is probably the cause of Mr. Chaudhry's dizziness.
- [90] I note that both doctors were careful to distinguish between different types of "dizziness" because they are associated with different conditions. Dr. Longridge conceded that everyone has difficulty providing a precise explanation of dizziness. Because of the importance of understanding what type of dizziness Mr. Chaudhry experienced, in my view, there needed to be very careful investigation of his symptoms.

[91] Dr. Bell's description of Mr. Chaudhry's report of dizziness was less detailed than in both Dr. Longridge's report and the plaintiff's testimony. As noted above, Dr. Bell's report was inconsistent regarding what Mr. Chaudhry said about his previous hearing loss. In my view, both factors raise a possibility that Mr. Chaudhry's facility for English compromised the information Dr. Bell obtained. In his report, Dr. Bell concluded that Mr. Chaudhry spoke "reasonable English" and that "the interpreter was only helpful on a few occasions" (p. 2). I am concerned Dr. Bell misjudged Mr. Chaudhry's proficiency with English.

[92] By contrast, Dr. Longridge noted some difficulty communicating with Mr. Chaudhry without an interpreter, which he described in his report at p. 4:

Half way through [the first interview without interpreter] I obtained a Pocket Talker to try and optimize his hearing as clearly he appeared to be struggling to hear what was being said. ...he continued to fail to answer questions appropriately and accurately. At home he talks [Punjabi] with his wife but talks English with his children. For this reason, I recommended that reassessment with a professional [Punjabi] interpreter was advisable to see whether this will make it easier to clarify the questions I am asking as I felt that there was a certain unreliability in the information I obtained.

[93] Dr. Longridge completed his interview months later with the assistance of an interpreter.

[94] Mr. Chaudhry testified through the use of an interpreter during the trial and it was my observation that she enhanced his ability to accurately understand and answer questions put to him. However, even with her assistance, he sometimes struggled. Also, as can happen with witnesses whose first (or second or third) language is not English, Mr. Chaudhry occasionally spoke in English, or sometimes mixed in English words with his Punjabi answers. I observed during these incidences that while his understanding of English was "reasonable", his facility with it was rudimentary.

[95] It is surprising that Dr. Bell was unconcerned by Mr. Chaudhry's obvious struggles both hearing and communicating adequately in English. Instead, it appears that Dr. Bell interpreted any inconsistency or vagueness in Mr. Chaudhry's answers as support for his dismissal significantly discounting the symptomology Mr. Chaudhry reported.

[96] Regrettably, native English speakers can fail to appreciate the degree to which nuances in language (such as descriptions of different types of dizziness) may not easily translate from one language to another. When a diagnosis depends upon subtle differences in the meaning of a word (dizziness), it is incumbent upon the professional to be exceedingly careful to ensure a patient whose first language is different than the one the professional is speaking, thoroughly understands what he or she is being asked to describe. I add that such care is not restricted to people whose first language is not English; anytime it becomes obvious a person's style of communication produces some uncertainty, extra steps should be taken to ensure that person fully and thoroughly understands the questions being asked. That is nothing more than fulfilling an obligation to treat each client, patient, witness or anyone with respect and courtesy. I have concerns that Dr. Bell did not exercise that care towards

Mr. Chaudhry.

- [97] Dr. Bell found "minimal" abnormalities in his clinical testing of Mr. Chaudhry's balance. He noted that certain responses on the "sensory organisation tests" were "difficult to explain in someone who has good balance on clinical testing" (p. 9). He attributed the anomalous results to the ability of a person to influence the test results, thus making them less accurate measures. In other words, he concluded Mr. Chaudhry was exaggerating his imbalance during part of the testing.
- [98] Dr. Longridge did the same testing, with similar results, but did not find evidence of exaggeration. He described the tests as providing objective data. The tests involve the patient standing and trying to maintain a bipedal stance in six increasingly difficult conditions of balance. Sensors measure the amount of sway, which are compared to standard criteria for normality and abnormality. In his view, the standardized data to which you can compare the patient's results gave the test objectivity. In the second aspect of the test (maintaining bipedal stance while standing on a platform that is subjected to increasingly difficult forward and backward thrusts), Mr. Chaudhry's test results revealed no evidence of exaggeration or malingering.
- [99] However, Dr. Longridge did further testing that he said buttressed his conclusion of the accident probably causing vestibular damage. The computerized dynamic post urography results were abnormal, which is consistent with "disturbance of the balance system" (p. 10). Additionally, in his second report, Dr. Longridge performed a newer test unavailable at the time of his first report. Mr. Chaudhry's results were abnormal, which buttressed the conclusions from his first report about Mr. Chaudhry's balance.

2. Conclusion

- [100] I place greater weight on Dr. Longridge's opinion than Dr. Bell's. As discussed earlier, Dr. Bell's opinion was based on facts inconsistent with my findings and other evidence about the severity of the accident, and the timing of Mr. Chaudhry's complaints. I also found the logic underlying portions of his opinion to be flawed as described earlier in this Judgment. I also conclude that Dr. Bell was not sufficiently attentive to Mr. Chaudhry's style and language of communication. Dr. Longridge's interview, testing and analysis of Mr. Chaudhry was more careful and thorough making his opinion more reliable.
- [101] I conclude that the accident damaged Mr. Chaudhry's vestibular system in his left ear, resulting in significant balance issues, tinnitus, and symptoms of dizziness. This constellation of symptoms exacerbated his perception of his hearing loss even though his "pure tone" hearing ability remained the same.

B. Did the accident cause Mr. Chaudhry to suffer a concussion and/or headaches?

- [102] Two experts in neurology testified at trial. Dr. Gurwant Singh wrote a report dated June 7, 2016, and Dr. Rehan Dost wrote a report dated January 30, 2017. Dr. Singh examined Mr. Chaudhry twice in 2011 and once in 2016. Dr. Dost examined the plaintiff once in January 2017.
- [103] The doctors disagreed whether Mr. Chaudhry suffered a concussion or mild traumatic brain injury (MTBI). However, neither counsel submitted that a finding that Mr. Chaudhry had (or did not have) a MTBI was a material fact to my assessment of damages. The difference in the doctor's opinions centred on whether the diagnosis of concussion or MTBI required the patient to experience a loss of consciousness and whether there were signs Mr. Chaudhry did lose consciousness or had a period of amnesia and/or disorientation.
- [104] Neither doctor had the benefit of information from Mr. Michaels, whose evidence I found to be highly credible and reliable. His evidence is that Mr. Chaudhry did not immediately know who he was, where he was or what happened, which are consistent with symptoms of disorientation and lack of awareness. Dr. Dost relied on the ambulance crew report which did not record Mr. Chaudhry's having confusion, loss of consciousness, amnesia or disorientation; Dr. Dost commented Mr. Chaudhry "knew who he was, where he was and when he was" (p. 5). Therefore, Dr. Dost's opinion was largely based on an erroneous assumption about the nature and degree of Mr. Chaudhry's mental awareness immediately after impact. This minimises the weight I can place on his opinion.
- [105] Regardless of their disagreement about whether Mr. Chaudhry suffered a concussion, however, both neurologists agreed Mr. Chaudhry suffered from chronic headaches caused by the accident. They also agree that the chronicity of the headaches has been aggravated by Mr. Chaudhry's psychiatric conditions and insomnia.
- [106] Dr. Dost opined Mr. Chaudhry's headaches had not been optimally treated, and he recommended a course of treatment (trying medication and if that fails, Botox injections). However, Dr. Dost did not provide his prognosis stating that, "determining impairment or disability from a subjective report of headache is a difficult proposition" because it "ultimately depends upon on [sic] the credibility of the individual, which is beyond the scope of my expertise to comment on" (p. 7). I note despite that observation, Dr. Dost felt qualified to discredit Mr. Chaudhry's initial report that he lost consciousness.
- [107] I am surprised by Dr. Dost's reluctance to comment on prognosis. He was given documentation that he obviously believed was sufficient for him to provide a diagnosis. Given that his diagnosis also depended on his "assessment" of Mr. Chaudhry's subjective reports, it is difficult to see what impediment there was to arrive at a prognosis. By contrast, Dr. Singh concluded the headaches, as aggravated by insomnia and depression, have disabled Mr. Chaudhry and his prognosis is guarded.

[108] I place greater weight on Dr. Singh's expert opinions. In my view, his conclusions are based on facts or assumptions closer to the factual findings I have made than Dr. Dost's. I find, consistent with both doctors' opinions, that the accident caused Mr. Chaudhry's severe headaches. I also find his prognosis is poor.

C. Was there a real and substantial possibility that but for the accident Mr. Chaudhry could have had a successful career in real estate?

[109] The defendant's position is that damages for income loss should be based on the plaintiff's income as a taxi driver and not as a real estate agent. The defendant also argues that the plaintiff has some residual capacity to earn income. The plaintiff submits he has proven a real and substantial possibility that he would have earned income from real estate, and any award for damages must take that into account. The plaintiff also disagrees that he has residual employability.

[110] The legal test for assessing damages for lost income was recently clarified by the Court of Appeal: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49:

In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these 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 and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[111] Thus, the burden of proof for the plaintiff to prove all elements of loss of potential to earn income (pre-trial and post-trial) is to show a "real and substantial possibility", but something more than mere speculation.

1. His Pre-accident Future in Real Estate

[112] The plaintiff submits he has established a real and substantial possibility that he would have been successful in his real estate business and his future wage loss should be based on that assumption. The defendant submits the evidence is not that strong. I agree. The defendant relies on the evidence of an expert in vocational assessment (Pieter van den Berg). Mr. van den Berg was guarded about Mr. Chaudhry's ability to succeed in real estate before the accident, focussing on what he saw to be Mr. Chaudhry's limited English proficiency and literacy. Even Mr. Lawless, the vocational expert retained by the plaintiff, was equivocal; he stated that he "cannot say if Mr. Chaudhry would have succeeded as a Realtor" (p. 8).

- [113] Mr. Chaudhry had only pursued real estate part time before the accident, and for less than a year. It is difficult to have confidence that there was a substantial and real possibility he would have continued with the venture, much less succeeded to a degree that he would stop driving a taxi.
- [114] During his testimony, Mr. Lawless agreed Mr. Chaudhry demonstrated some modest initial success, and that he may have gained an advantage with his cultural ties. The plaintiff emphasized those cultural factors. Mr. Chaudhry submits he would have marketed himself to members of the Pakistani community. That was his strategy in handing out business cards in his taxi and advertising in community newspapers. The plaintiff submitted that, "[g]iven the diversity of the population in British Columbia, the median income [for real estate agents] no doubt takes into account the numerous realtors in this province who, like the plaintiff, speak English as a second language, many of whom likely tend to gravitate toward clientele who speak their native language and are still successful".
- [115] There is no evidence upon which I can accept that submission as fact. Nor am I satisfied that I can take judicial notice of any of the assumed facts in that proposition. The experts confirmed the median income they referred to reflected the median income of real estate agents across British Columbia, not just in the Lower Mainland. The issue with English is not just that Mr. Chaudhry speaks English as a second language, but that his proficiency at doing so is not high. I have no way of knowing if that is the case for successful real estate agents across British Columbia who speak English as a second language (the number or proportion of which is not in evidence). Lastly, as Mr. van den Berg confirmed, there is no standard definition of "success" as a real estate agent, nor available statistics differentiating between those who work full or part time.
- [116] Mr. van den Berg stated it typically takes about five years to establish a realtor's business and that while doing so, there is no guarantee of a steady pay cheque. The defendant says because Mr. Chaudhry was the sole breadwinner for the family, it would have been unlikely he could have withstood the unpredictability of income from establishing a real estate business. In my mind that would have been a major obstacle for Mr. Chaudhry.
- [117] Mr. Chaudhry stated he wanted to pursue real estate to make more money and have more time for his family. That was also his motivation to stop driving a taxi. Those two goals may have been contradictory because real estate is very competitive and a time-consuming profession. It is reasonable to assume the more time one devotes to it, the more income one can earn, which would have made it difficult for Mr. Chaudhry to spend more time with his family. Mr. Chaudhry stopped his convenience store business because the time commitment required to make it profitable did not allow him to spend enough time with his family. It is likely he may have run into the same problem with the real estate business. I am not persuaded he could have withstood many years of unpredictable income before returning to taxi driving, or perhaps pursuing something else.
- [118] In written submissions, the defendant submitted at para. 127:

Most striking about this case is that, Mr. Chaudhry did not call single person in the real estate sales community to testify on his behalf. There was no mentor, no realtor estate sales manager from the companies he worked for, no fellow realtor who participated in the presentation he referred to, no friend or acquaintances to testify about his marketing talent or business referrals to him. There was also no one from his cultural or religious community to testify as to his visibility in the local Pakistani Community. ...

[119] I agree with the defendant that the lack of this evidence is telling.

[120] Overall, I am not satisfied that the evidence proves a real and substantial possibility that Mr. Chaudhry would have been successful as a real estate agent. Instead, I agree that the best evidence to base his future income loss on is taxi driving. As the defendant notes, Mr. Chaudhry's most stable work since coming to Canada has been taxi driving.

2. Residual Employability

[121] The defendant submits that Mr. Chaudhry does retain some residual capacity for employment in the event he can successfully treat his chronic headaches and psychiatric symptoms, although it concedes it would be minimal (\$3,000 to \$5,000 annual income). The evidence does not support that position.

[122] In my view, the two vocational experts' opinions differed little.

[123] One difference was that Mr. van den Berg subjected Mr. Chaudhry to intelligence, math and English fluency tests. Mr. Lawless did not because of Mr. Chaudhry's reported problems with focus and concentration, but also because of Mr. Chaudhry's educational achievements. Mr. Lawless reasoned that Mr. Chaudhry clearly had higher than average intelligence before the accident demonstrated by his academic achievement, but his symptoms might deflate test results and Mr. Lawless did not believe he could get helpful information. In my view, this represents a weakness in Mr. Lawless' opinion. He was asked to assess Mr. Chaudhry's current employability. If it was true Mr. Chaudhry's problems with focus and concentration affected test results, I would have thought that is useful information in assessing his employability. Furthermore, without test results, Mr. Lawless did not have a lot of objective data.

[124] However, that concern is of little consequence because both experts agreed to a large degree about Mr. Chaudhry's prospects for employability. Both agreed Mr. Chaudhry is essentially unemployable. In his report, Mr. van den Berg wrote that Mr. Chaudhry retained some capacity for employment, but only if he experienced significant medical improvement. During his testimony, however, he agreed that Mr. Chaudhry does not have capacity to be hired or sustain employment in his current condition and that he would defer to medical experts on the chances his health would improve. I have concluded Mr. Chaudhry's prognosis is poor.

[125] I conclude Mr. Chaudhry has no prospect of residual employment.

D. Did Mr. Chaudhry fail to mitigate his losses?

[126] The defendant bears the onus of proof to establish that the plaintiff failed to mitigate his losses. The parties agreed that the test includes three factors:

- a) A qualified medical expert has made a recommendation for a particular form of treatment;
- b) The plaintiff failed or refused to undertake that treatment, although it was available; and,
- c) That failure or refusal was unreasonable, and there is "some likelihood" that he would have obtained "substantial benefit" from it without exposing the plaintiff to significant risk.

Turner v. Coblenz, 2008 BCSC 1801; Janiah v. Ippolito [1985] 1 S.C.R. 146; Chiu (guardian ad litem of) v. Chiu 2002 BCCA 618 at para. 57; Middleton v. Morcke 2007 BCSC 804 at para. 37.

[127] Reasonability is based on a subjective/objective test in the sense that two questions are asked: would a reasonable patient in the same situation as the plaintiff and having the same information, have undertaken the recommendation; and, to what extent that treatment would have reduced the plaintiff's losses (Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 56).

[128] The defendant argues Mr. Chaudhry failed to mitigate his losses in three ways: (i) stopping psychiatric treatment between 2013 and 2015; (ii) not attending vestibular physiotherapy; and, (iii) failing to wear hearing aids.

1. Psychiatric Treatment

[129] The defendant points out that Dr. Burns noticed some improvement in Mr. Chaudhry's depression from psychotherapy. It also says Dr. Burns did not "discharge" Mr. Chaudhry from his care. However, Dr. Abou-Gareeb confirmed she attempted to have Mr. Chaudhry return to Dr. Burns' care, but was unable to secure an appointment. Dr. Burns admitted he ran a very busy practice. Moreover, Dr. Burns' goal was to give patients tools they can use to learn to cope with their conditions. He testified that he felt he had done as much as he could to assist Mr. Chaudhry. I do not agree that the evidence established either that Dr. Burns recommended Mr. Chaudhry continue therapy, or that Mr. Chaudhry was unwilling or refused to do so.

[130] The defendant also argued that Mr. Chaudhry did not stay current with medication. It points out Mr. Chaudhry admitted to receiving some benefit from Sertraline in 2012. The plaintiff argues Mr. Chaudhry suffered side effects from the medication, which is why he stopped taking it. More importantly, both psychiatrists agreed that the psychiatric conditions Mr. Chaudhry exhibited can interfere with a person's ability to follow through with treatment.

[131] I am not satisfied that the evidence proves Mr. Chaudhry refused or was unwilling to try medication prescribed to him. He stopped when the side effects outweighed the benefits received. That is reasonable. Dr. Abou-Gareeb stated it was common in her practice that

patients stopped anti-depressant medication because of side effects. It is true Mr. Chaudhry did stop seeing his doctors regularly for a period of time because he felt the visits were futile, because he did not experience significant improvement. I am not persuaded that was unreasonable, or amounted to a refusal to follow treatment.

- [132] Mr. Chaudhry has seen numerous doctors since the accident and has tried a variety of treatments. None of those professionals felt he was uncooperative or resistant to their recommendations. In my view, a gap in his treatment for psychiatric conditions does not amount to a failure to mitigate.

2. Vestibular Physiotherapy

- [133] The defendant submits Mr. Chaudhry failed to attend vestibular physiotherapy recommended by Dr. Wong (an ENT) in March 2014. Dr. Abou-Gareeb referred Mr. Choudhry to Dr. Wong, who in turn referred Mr. Chaudhry to Dr. Longridge (Dr. Longridge does not take referrals from general physicians). Dr. Wong recommended vestibular physiotherapy, but Dr. Abou-Gareeb cannot recall if she discussed that recommendation with Mr. Chaudhry. Mr. Chaudhry said he did not know what vestibular physiotherapy was, and that no one had explained it to him.

- [134] Even if I were to find that vestibular physiotherapy was a recommendation made by a specialist that Mr. Chaudhry unreasonably refused to follow (I do not make that finding), there was no evidence that it is likely that therapy would have decreased his dizziness symptoms. In fact, Mr. Chaudhry suffers from injury to his balance system, which Dr. Longridge opined to be long-lasting and permanent because it has gone on longer than two years. Dr. Longridge also expressed some skepticism about the efficaciousness of the treatment. The defendant has not persuaded me that Mr. Chaudhry failed to mitigate losses by not attending vestibular physiotherapy.

3. Hearing Aids

- [135] The defendant submits Mr. Chaudhry did not use hearing aids, despite a "consensus among professionals who assessed and treated" him that he needed to obtain them both to maximize his hearing function and to reduce his tinnitus (p. 29). The defendant submits Mr. Chaudhry "ignored the advice". With respect, the defendant has overstated the situation with regard to what Mr. Chaudhry was told about hearing aids.

- [136] The defendant submits both Drs. Bell and Longridge recommended hearing aids. Dr. Bell's recommendation is contained in his March 20, 2013 expert report, but presumably (and counsel did not inform me otherwise) that was not given to Mr. Chaudhry's counsel until 84 days before trial. There was no evidence that prior to preparing his report, Dr. Bell told Mr. Chaudhry he should get hearing aids. Mr. Chaudhry can hardly be faulted for failing to follow a recommendation of which he was unaware of less than three months before trial.

- [137] Dr. Longridge's recommendation for hearing aids is contained in his second report dated November 22, 2016. He conceded it was an oversight not to mention that recommendation in the first report because it was so obvious that Mr. Chaudhry suffered from hearing loss. But as both he and Dr. Bell opined, Mr. Chaudhry had developed excellent compensatory skills to address his hearing loss, which explains why he reported the hearing impairment did not negatively impact his functioning.
- [138] In his second report, Dr. Longridge stated that Mr. Chaudhry should be assessed for hearing aids both to maximize his hearing function and to see whether it could assist him with his tinnitus. As he clarified during his testimony, that treatment requires tinnitus instrumentation only available in specialized hearing aids. Those specialized hearing aids are only one element of Tinnitus Retraining Therapy (TRT). The other element of TRT is a series of therapy and counselling sessions that assist a patient to learn to cope with, or ignore, the tinnitus sounds.
- [139] The defendant submits Dr. Longridge testified there is a "50/50 chance that hearing aids will correct his tinnitus" (my emphasis). During cross-examination, Dr. Longridge confirmed that hearing aids alone can improve tinnitus in about half of patients. He testified that TRT could achieve better results. That is why in his second report he recommended Mr. Chaudhry be assessed for suitability for both hearing aids and TRT.
- [140] However, neither the 50/50 statistic nor his estimation of possible improved odds from TRT are contained in his reports. The only comment in Dr. Longridge's second report about the possible efficacy of TRT is that "in some people's hands, [it] has been effective in assisting with tinnitus" and that there are "some large [case studies] indicating that this therapy is effective" (p. 5-6). Furthermore, he was "not sure" if he discussed tinnitus retraining with Mr. Chaudhry. In my view, this does not establish that Mr. Chaudhry ignored a recommendation to get hearing aids to correct his tinnitus.
- [141] It is also important to note that both Dr. Bell and Dr. Longridge commented on the likelihood that Mr. Chaudhry's symptoms were negatively impacted by psychological conditions. That has been confirmed by the expert psychiatric evidence. As Dr. Abou-Gareeb stated, Mr. Chaudhry's poor hearing was only one of several complaints he was dealing with simultaneously. She did not recall "pushing" him to get hearing aids given the complexity of his related symptoms.
- [142] I am not persuaded that it was made clear to Mr. Chaudhry that the hearing aids and TRT may help improve both his hearing function and tinnitus. In those circumstances, a failure to mitigate does not arise.

4. Conclusion

- [143] I do not find Mr. Chaudhry failed to mitigate any of his losses.

III. ASSESSMENT OF DAMAGES

[144] I rely on my preceding factual findings and conclusions on disputed issues to assess damages.

A. Non-pecuniary Damages

[145] The basic principles for assessing non-pecuniary damages are so well known that I do not need to repeat them here except to refer to the leading cases: *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Stepley v. Hejslet*, 2006 BCCA 34.

[146] The main dispute between the parties on the amount of non-pecuniary damages is whether I should reduce the amount on the basis that Mr. Chaudhry had moderate to moderately severe hearing loss prior to the accident. The defendant submits, based on *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2012 BCCA 331 and *Zacharias v. Leys*, 2005 BCCA 560, there is authority to reduce awards, including a non-pecuniary award, when there is a measurable risk that a pre-existing condition would have detrimentally affected the plaintiff.

[147] This is not a case appropriate for such a deduction. While the evidence is consistent that the type of hearing loss Mr. Chaudhry had before the accident was a progressive one, testing revealed his pure tone hearing loss differed little in almost nine years. More importantly, both experts agreed Mr. Chaudhry had developed excellent coping skills such that the impact on his life was not commensurate with the degree of his hearing loss. Therefore, I do not find that was a measurable risk that his pre-existing hearing loss would have had the same impact without the accident.

[148] The parties referred to eight cases about non-pecuniary damages. As always, those cases provide some guidance, but the assessment of damages must consider particular circumstances of Mr. Chaudhry. Two of the cases the defendant referred me to are unhelpful because of the complicated psychiatric issues of those plaintiffs. Furthermore, in both cases, the court found that some element of the plaintiff's psychiatric injuries was divisible from injuries caused by the accident: *Zhang v. Law*, 2009 BCSC 991 and *A.E. (Litigation Guardian of) v. D.W.J.*, 2008 BCSC 1318. Similarly, the impact of the plaintiff's head injury in *Chowdry v. Burnaby*, 2008 BCSC 1337 was severe; he was rendered almost catatonic for six months. I do not find that case helpful.

[149] Four of the cases referred to me by the parties are helpful because of the similarities to Mr. Chaudhry's conditions:

- a) *Murphy v. Jagerhofer*, 2009 BCSC 335 - the case was unusual in that the parties agreed to have damages assessed based on affidavit evidence at a summary trial. The plaintiff's injuries were soft-tissue, neck and back pain, some hearing loss, headaches, tinnitus, dizziness and jaw pain. He also suffered anxiety, depression and PTSD. He was awarded \$100,000.

- b) Young v. Anderson, 2008 BCSC 1306 - the plaintiff was 51 on the day of the accident and his main complaints were tinnitus, imbalance, dizziness (visual vestibular mismatch); severe depression (at one point he was suicidal), sleep problems, fatigue and anxiety. He suffered an MTBI. He had difficulty multi-tasking and was easily confused. However, he also had history of chronic neck pain for 10-11 years pre-accident. He was virtually unemployable. The court awarded \$200,000.
 - c) Adamson v. Charity, 2007 BCSC 671 - the plaintiff was 48 at trial and suffered from chronic pain in his upper neck and left shoulder, severe headaches, major depressive disorder. He had an MTBI and pre-existing hearing loss, which was aggravated by the accident. The court awarded \$200,000.
 - d) Mayer v. Umabao, 2016 BCSC 506 - the plaintiff was 69 at the time of the accident. He suffered thumb pain as well as neck, back and shoulder pain, all of which had improved somewhat by trial. He had problems with dizziness, balance, sleep and suffered some memory and concentration problems. The court awarded \$175,000.
- [150] Mr. Chaudhry's neck and back pain have largely resolved, but he continues to suffer chronic headaches, tinnitus, dizziness, sleep problems, fatigue, anxiety, depression and symptoms akin to PTSD. Given all considerations and relevant case law, I assess non-pecuniary damages of \$185,000.

B. Damages for Loss of Earning Potential

- [151] The parties disagree about how Mr. Chaudhry's wage loss should be measured. The plaintiff submits Mr. Chaudhry's income for the first eight months of 2010 is the best predictor of his post-accident income because it represents his working part-time as a cab driver and part-time as a realtor. The plaintiff says the following calculations provide the best estimate of his annual income for 2010: his net income for 2010 was \$18,422.50, comprised of \$13,071.50 for taxi driving (this figure includes adjustments for undeclared tips and capital cost allowance) and \$5,351 in real estate income. Dividing that by eight, the plaintiff arrived at a monthly income of about \$2,300, which results in projected earnings for 2010 of just over \$27,600.
- [152] The defendant submits wage losses should be based on the average of Mr. Chaudhry's income for the years 2006 to 2009, but not 2010. The defendant says that figure, just over \$13,000, is more accurate. The defendant agrees "soft costs" for expenses and capital cost allowance can be added at a rate of \$2,000 per year, coming up with an annual income of \$15,850.
- [153] I see no reasonable basis upon which I should exclude Mr. Chaudhry's actual earnings from 2010 from the assessment. Even if I project 2010 earnings on the bases of taxi income only [$\$13,071.50 \div 8 \times 12 = \$19,607.25$] it results in a figure higher than the defendant's figure.

- [154] The defendant submits the plaintiff failed to adduce sufficient evidence to justify adding undeclared tips to his net income, or, that if I find he did adduce sufficient evidence, the amount should be modest. In *Iannone v. Hoogenraad* (B.C.C.A), [1992] B.C.J. No. 682, the Court of Appeal confirms that income not declared on tax returns can be recoverable. In *Wong v. Hemmings*, 2012 BCSC 907, the court states the focus should be on whether the plaintiff has confirmatory evidence to establish that the amount claimed would have been earned.
- [155] Mr. Chaudhry typically worked five or six shifts a week and earned about \$40 in cash tips for each shift. Based on 50 weeks per year, the annual amount would be \$10,000 to \$12,000. I agree with the defendant that the amount must be reduced for the year 2010 because he was only working part-time as a taxi driver. However, I am also mindful that I should avoid an overly mathematical approach to assessing loss of future earning capacity: *Hay v. Hoffman*, 1999 BCCA 26.
- [156] Taking all factors into consideration, and remembering that I am doing an assessment rather than a calculation, I find his annual gross income as a taxi driver would have been approximately \$20,000. I deduct an amount for the income he earned in 2011 in Pakistan.
- [157] The plaintiff provided expert evidence on multipliers appropriate for this case that were not challenged by the defendant. If Mr. Chaudhry worked to age 70, the multiplier is 16.3475, and for age 65 it is 12.889.
- [158] Based on all the evidence, I find Mr. Chaudhry is entitled to \$550,000 in damages for loss of earning potential, both past and future. That figure has taken into account both negative and positive contingencies and an adjustment for tax liabilities.

C. Cost of Future Care

- [159] The test for damages for cost of future care is not in dispute. The expenses must be legitimate, reasonable and medically justified [(*Milinia v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.)), although every expense does not have to be specifically supported by a medical doctor's opinion. I must be satisfied that there is "some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional": *Gregory v. ICBC*, 2011 BCCA 144 at para. 39.
- [160] The plaintiff relies on the expert report of Miriam Lam who was qualified as an expert in occupational therapy. Her report dated February 28, 2017 was admitted into evidence. The report was based on her site visit at Mr. Chaudhry's home on February 23, 2017. It is notable that she observed Mr. Chaudhry getting fatigued over the course of the two and a half hours, holding his head in his hands about every 15-20 minutes, which Ms. Lam interpreted as indicating he was in considerable discomfort. She also took many breaks during her interview to accommodate his comfort, which prolonged the interview. She said his energy and capacity for communication decreased as the interview progressed. Ms. Lam testified

Mr. Chaudhry was one of the lowest functioning clients she had seen in some time. In her report, Ms. Lam observed that Mr. Chaudhry was having difficulty at all levels. Her recommendations were designed to address his "chronic headache pain, vestibular pathology, post-traumatic stress disorder, post mild concussive symptomatology, and anxiety/depression" (p. 20).

- [161] During cross-examination, Ms. Lam was asked whether the fatigue and communication problems she observed in Mr. Chaudhry could be explained primarily by his hearing impairment, but she did not agree. She pointed out that she observed other behaviour (holding his head and intolerance to sitting for long times) which was inconsistent with his problems being attributable only to hearing impairment. She also confirmed that she had experience with clients who are hard of hearing and, in her clinical judgment, there were other factors at play, including Mr. Chaudhry's reports of headaches, the sensation of "sparking" in his head, fatigue and confusion.
- [162] The plaintiff put into evidence an expert report from an economist, Sergiy Pivnenko. His evidence was unchallenged. Mr. Pivnenko produced cost of future care tables based on Ms. Lam's report. Taking the low end of her cost estimates, the net present value is \$141,049; the net present value of the high end of her estimates is \$181,098. The plaintiff concedes there is some duplication and submits an appropriate award should be about 50% of Ms. Lam's high cost estimate; he seeks \$90,000 for cost of future care. The plaintiff did not explain how he arrived at that discount. The defendant submits the appropriate amount is \$45,000.
- [163] As I explain in the following paragraphs, I agree with some, but not all, of the defendant's submissions on services that are either not justified, duplicative or recommended on a too frequent basis.
- [164] In her report, Ms. Lam recommended an interdisciplinary pain program for Mr. Chaudhry and the defendant agrees that is appropriate. However, the defendant submits other costs included in Ms. Lam's report would duplicate the pain clinic's service so adjustments are appropriate. I do agree there is duplication in Ms. Lam's recommendations. In addition to the interdisciplinary pain clinic, she recommended amounts for lifetime physiotherapy and/or massage therapy, occupational therapy assessment and case management, kinesiologist services, acupuncture for pain, psychological counselling, psychiatrist services, cognitive behavioural therapy and vestibular therapy.
- [165] I agree with the defendant that there is no link between Mr. Chaudhry's conditions and any professional's opinion for acupuncture and I do not include that in my assessment of future care damages.
- [166] I also agree that an amount for occupational therapy is unnecessary given Ms. Lam's report provided that assessment. I am also not persuaded there was evidence to justify amounts for all of kinesiology, occupational therapy, physiotherapy and massage therapy, especially given the award will include attendance at a pain management clinic. The defendant

accepts that even with attendance at a pain clinic, some additional amount for continuing therapies to address pain is appropriate. However, it submits there is no evidence justifying a lifetime of service and that an amount for five years is sufficient.

- [167] I have found Mr. Chaudhry's headaches to be chronic and likely permanent. Accordingly, an amount for long-term physiotherapy and/or massage therapy is appropriate. Even if there is some overlap of these services and those provided at the interdisciplinary clinic (although I heard no specific evidence to confirm that), the clinic is a one-time experience. I do not find that to be duplicative.
- [168] Tinnitus retraining therapy is a specific recommendation of Dr. Longridge so it is compensable.
- [169] Mr. Chaudhry's mental health may benefit from further psychiatric counselling, but no compensation is awarded for that since those services are covered by the province's medical services plan (although it is appropriate to provide reimbursement to attend those appointments). However, I agree that psychologist services are medically justified given the chronicity of his anxiety, depression and post-traumatic stress symptomatology. Typically, psychiatrists can diagnose and identify appropriate therapies and/or medication whereas psychologists are more involved in providing therapy. Mr. Chaudhry's prognosis is poor so long-term therapy is justified and the award should reflect that.
- [170] The defendant accepts maid services are justified, but submits Ms. Lam's estimate for an amount to cover his lifetime is unreasonable. The defendant submits the award should reflect maid services for only three to five years. I agree a lifetime amount may not be appropriate on the basis that Mr. Chaudhry's children are most likely to leave home and start their own families at some point, decreasing the amount of maid services needed for a typical household. However, in my view, something greater than three to five years is justified. While Ms. Parveen has taken over almost all the housekeeping duties since the accident, it is not reasonable to assume any partner can or should do so indefinitely. Moreover, given the circumstances of this family that would not be fair. Ms. Parveen has lupus and is on the wait list for a kidney transplant. In my view, Ms. Lam's estimate should be reduced by between $\frac{1}{3}$ and $\frac{1}{2}$.
- [171] Ms. Lam also made recommendations for a small number of specific items that were reasonable and not disputed by the defendant, including pharmacological therapy, heat/cold packs, heated blanket, bath tub grab bars, vocational resources and compensation for fuel to and from appointments.
- [172] While I appreciate assessing the cost of future care is not meant to be a mathematical calculation, it must still be based on the evidence presented. I am not prepared to simply "ballpark" a figure on the basis of counsel's submissions. Instead, I rely on Mr. Pivnenko's tables. I have eliminated amounts calculated by Ms. Lam for kinesiology, occupational therapy, case management, acupuncture and vocational resources. I reduce the amount for maid services, physiotherapy and massage therapy. I rely on the tables to adjust the amount

for the decreased frequency. Performing those calculations for both tables (for high estimate and low estimate), results in figures only about \$1,000 apart.

[173] Taking into account all of these considerations, I find an appropriate amount to award for cost of future care is \$62,000.

IV. CONCLUSION

[174] I make the following awards:

Non-pecuniary Damages:

\$185,000.00

Damages for Loss of Earning Potential:

\$550,000.00

Cost of Future Care:

Special Damages

\$ 62,000.00

\$ 6,510.94

Total:

\$803,510.94

V. COSTS

[175] If the parties cannot agree on costs, they may seek a brief hearing before me to address that so long as they contact the registry no later than 30 days from the date of this judgment.

"Sharma J."

[1] At the bottom of p. 8 of his report, Dr. Burns wrote that "Mr. Chaudhry continues to experience intrusive symptoms related to the trauma, avoid cues from the trauma, has negative cognitions associated with the trauma and a heightened reactivity to the trauma"; Dr. Burns garnered these symptoms from his clinical interview, self-reporting measures and documentation.

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