

CANADA / JUDGMENT

Conarroe v. Tallack

2020 BCSC 626

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Supreme Court of British Columbia

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2020 BCSC 626 Conarroe v. Tallack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Conarroe v. Tallack,

2020 BCSC 626

Date: 20200423

Docket: M169155

Registry: Vancouver

Between:

Joseph Sean Michael Conarroe

Plaintiff

And

Phillip Anthony Tallack

Defendants

- and -

Docket: M186748

Registry: Vancouver

Between:

Joseph Sean Michael Conarroe

Plaintiff

And

Hujun Xiao, Shaojing Sun, Nikolay Radoslavov,
and Solution Financial Inc.

Defendants

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

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January 13-17, 20-24, 27-31, 2020;

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INTRODUCTION

- [1] The plaintiff, Mr. Conarro, claims for damages arising from two motor vehicle accidents. The first accident occurred on January 7, 2015, on Highway 1 near Miner's Bluff Road, west of Chase, BC, and involved the defendant Mr. Tallack (the "2015 Accident"). The second accident occurred on May 11, 2018 in Coquitlam, BC, (the "2018 Accident") and involved the defendant Mr. Xiao driving a vehicle owned by Shaojing Sun, and leased by Solution Financial Inc. (the "Xiao defendants"). At a case planning conference in August 2019, this Court ordered that the actions relating to each accident be heard together.
- [2] Liability is admitted with respect to the 2018 Accident by the Xiao defendants but was not admitted by the original defendants in the 2015 Accident, including Mr. Tallack, the Province of British Columbia (the "Province"), and its road maintenance contractor, JPW Road & Bridge Inc. ("JPW").
- [3] A few weeks before trial, Mr. Conarro settled with the Province and JPW, which was accomplished by way of a BC Ferries type settlement and the entry of consent dismissal orders (see *B.C. Ferries Corporation v. T&N, plc* (1996), 16 B.C.L.R. (3d) 115 (C.A.)). The consent dismissal orders dismissed the claims against the Province and JPW on their merits, and also dismissed the 3rd party notices issued by these defendants against all other defendants in both actions on their merits. The style of cause was not amended accordingly at that time, but I make that order here.
- [4] I must therefore consider a number of issues, including:
- Whether Mr. Tallack was negligent with respect to the 2015 Accident;
 - Whether Mr. Conarro was contributorily negligent with respect to the 2015 Accident;
 - What injuries Mr. Conarro sustained as a result of the accidents, and whether one or both of the accidents were the cause of the injuries that he sustained;
 - Whether some or all of these injuries are divisible for the purposes of damages;
 - If some or all of these injuries were indivisible and more than one defendant is liable (or the plaintiff himself was contributorily negligent in the 2015 Accident), how to apportion that liability; and

- f) Finally, the quantification of the plaintiff's damages for each head of damages claimed, including a consideration of whether Mr. Conarroe failed to mitigate his damages.
- [5] I will start by setting out my findings of fact with respect to both accidents and Mr. Conarroe's pre and post accident condition in relation to each.

FACTUAL FINDINGS

Mr. Conarroe's Condition Before the 2015 Accident

- [6] At the time of the 2015 Accident, Mr. Conarroe was 49 years old. He had spent most of his working life driving heavy trucks, with the last 17-18 years as a concrete truck driver, first for Kask Brothers, and then (after Kask Brothers was bought by Lafarge) for Lafarge.
- [7] At the time of the 2015 Accident, Mr. Conarroe had a relatively high seniority level in his union, which gave him significant job security, early access to the jobs available each day, and greater opportunities for overtime.
- [8] As a worker, I am satisfied on Mr. Conarroe's own evidence, as well as the evidence of his co-workers, that he was a dedicated and detail-oriented driver. While he did not work as much overtime as his two co-workers who gave evidence, he would often work an optional overtime Saturday shift, and he took on additional responsibilities including closing duties at his plant. He took pride in the cleanliness of his truck, which he was responsible for inspecting each morning and cleaning after each load and at the end of the day. I find that he took great pride in his work and continues to see that work as providing a meaningful contribution to the world.
- [9] I am also satisfied that prior to the accidents, Mr. Conarroe was a generous, social, and outgoing person who considered his fellow drivers and their families to be a part of his family. While he was described as having some anxious and obsessive traits psychiatrically, this did not stop him from engaging in conversations with strangers and joining in social activity at his own and at other worksites. He regularly hosted barbeques for friends and family. He loved to cook. He struck up a conversation at a worksite with a traffic controller, got her number, and was soon in a close and loving relationship that has now weathered a number of family crises and two motor vehicle accidents.
- [10] Mr. Conarroe and his partner, Ms. Ivanova, have now been together for eight years. The evidence establishes that, before the 2015 Accident, they regularly took long walks, rode bikes, and went swimming together.
- [11] Physically, Mr. Conarroe had some history of back pain and Post Traumatic Stress Disorder ("PTSD") prior to the 2015 Accident. He candidly admitted that he had ongoing back pain at the time of the 2015 Accident as a result of moving a freezer in early 2013, and from his Crohn's disease, which has been in remission for a number of years. He also took some time off work, suffering from PTSD in 2010 after striking a cyclist in his work truck.

- [12] There is also some indication of potential undiagnosed previous concussion injuries in his medical history.
- [13] However, I find that all of these injuries were either recovering or fully recovered at the time of the 2015 Accident. While these prior injuries may have left him more vulnerable to the effects of subsequent injuries, this is not a case where he would likely have suffered ongoing injury without some further trauma. It is also clear that Mr. Conarrore was able to, and did, work through a certain level of back and neck pain prior to the 2015 Accident, for which none of the defendants are liable.

The Accidents

The 2015 Accident

- [14] Mr. Conarrore and Mr. Tallack each provided evidence as to what happened in the immediate moments before and during the 2015 Accident.
- [15] Mr. Conarrore made numerous statements, both sworn and unsworn, as to the events leading up to the 2015 Accident. With respect to his sworn statements alone, he was impeached five times in cross-examination, and contradicted himself in his trial evidence more than a few times on material events. Often this would occur when Mr. Conarrore was presented with contradicting evidence or even when he was simply asked whether he had a direct recollection with respect to his evidence. Even in impeachment, Mr. Conarrore was not evasive or defensive. He was generally generous to his questioners and conceded inconsistencies in his evidence without antagonism or undue explanation.
- [16] The expert evidence establishes that Mr. Conarrore suffered a mild traumatic brain injury ("MTBI") in the 2015 Accident and that his recollection of those events is "fragmented." It is apparent that he has attempted, when speaking to medical examiners, in examinations for discovery, and in court, to reconstruct what likely happened based on fragments of memories, which themselves are not reliable. In court, Mr. Conarrore admitted to these inconsistencies, saying his brain would, and still does, get "jumbled" after the 2015 Accident.
- [17] I find Mr. Conarrore's testimony as to the events leading up to and during the 2015 Accident to be unreliable. I have not relied upon it unless it is uncontentious and uncontradicted, or supported by some other more reliable evidence.
- [18] Aside from Mr. Conarrore's 2015 Accident-related memory lapses, Mr. Conarrore's willingness to state, as fact, information that he does not know but only supposes to be true poses problems for other contentious aspects of his testimony. As a witness, Mr. Conarrore was articulate, clear, and direct. However, while I find that Mr. Conarrore was not attempting to deceive the Court or his questioners during examinations for discovery, much of his evidence on contentious issues is less reliable because of his memory lapses and his willingness to provide answers (often helpful to his own case) based on reconstruction after the fact rather than direct knowledge or a clear recollection.

- [19] Mr. Tallack's evidence, on the other hand, was more consistent. Mr. Tallack gave his evidence carefully and demonstrated a good recollection on most aspects of the moments leading up to and after the 2015 Accident. He acknowledged at trial and in cross-examination where his evidence was based on reconstruction as opposed to direct observation (such as what part of his vehicle hit Mr. Conarro's vehicle). He displayed some caution in his answers, but that caution also tends to support his reliability.
- [20] Having reviewed all of the evidence, I largely agree with Mr. Tallack's submissions as to what the trial evidence established regarding the 2015 Accident as follows:
- a) The 2015 Accident occurred in the early afternoon of January 7, 2015, as Miner's Bluff Road merges onto Highway 1.
 - b) At this point, Highway 1 is a four-lane divided highway that runs east-west, with an additional merge lane at its centre between the eastbound and westbound lanes.
 - c) The westbound lanes consist of a right (or "slow") lane and left (or "fast") lane.
 - d) The speed limit at this part of the highway was 100 kilometres per hour.
 - e) Mr. Conarro was driving a black Mazda 3 (the "Mazda") and Mr. Tallack was driving a blue Jeep Wrangler (the "Jeep"). Both were westbound.
 - f) A road closure on Highway 1 west of Revelstoke, BC meant that both Mr. Conarro and Mr. Tallack had stopped in Revelstoke before continuing their westward journeys on January 7, 2015.
 - g) Neither Mr. Conarro nor Mr. Tallack stated any concerns about road conditions after they passed Salmon Arm, BC and as they approached the location of the 2015 Accident.
 - h) Prior to the 2015 Accident, Mr. Conarro was behind Mr. Tallack's Jeep, which was in turn behind a semi-trailer in the slow lane. Mr. Conarro changed lanes from the slow lane to the fast lane and overtook the Jeep shortly before the 2015 Accident occurred.
 - i) At some point after passing Mr. Tallack's Jeep, Mr. Conarro encountered an accumulation of snow in the left lane.
 - j) Mr. Conarro lost control of his Mazda, causing the Mazda to rotate on the highway.
 - k) The Mazda and Jeep collided, damaging both vehicles.
 - l) The Jeep's final resting position was off the highway on the right shoulder.
 - m) The Mazda's final position was on the left side of the westbound lanes, in the area of the painted median dividing the left lane from the Miner's Bluff Road merge lane.
- [21] In addition, I make the following findings based on all of the evidence, including the evidence of Mr. Tallack and Constable Brett, a police officer who attended at the accident scene shortly afterward, and the photographic and engineering evidence that I accept:

- a) Although both the parties testified that the road conditions were "good" and "clear," I accept Constable Brett's testimony and the photographic evidence that, while cleared, the highway was still wet with a light amount of slush on the cleared road and significant snow banks at the side of the road.
- b) Mr. Tallack had been going 100 kilometres per hour on the Highway 1, but had slowed to approximately 90 kilometres per hour behind the semi-trailer. Mr. Tallack testified that he was not observing the "two-second rule" with the semi-trailer, but was instead ensuring that he could see the driver's mirror. At 90 kilometres per hour, Mr. Tallack was travelling 25 metres per second, and a two second separation would have been 50 metres.
- c) Mr. Tallack was looking for an opportunity to pass the semi-trailer and observed Mr. Conarro's Mazda and then a second vehicle, a small truck or SUV, pull into the left lane and pass his Jeep. Mr. Tallack testified that both these vehicles had passed him before he was blinded by snow.
- d) I find that Mr. Conarro was driving faster than Mr. Tallack at this point. I reject his evidence that he was only traveling 70 kilometres per hour. I also find that he was not exceeding the 100 km/hour speed limit. There was allegation at trial that either driver was speeding or driving too fast for the conditions.
- e) The patch of snow that Mr. Conarro encountered in the left lane was 8-10 inches deep in places and extended for approximately 300 metres on the left side of the left lane of the highway.
- f) I accept Constable Brett's description and photographs of this patch of snow. I also accept the Constable's evidence at trial that this patch posed an unsigned and "unexpected hazard" to anyone in the left lane of travel. I find that this thick patch of snow on the road was difficult to see given the slushy conditions of the road generally and it was inconsistent with what a motorist would have expected to encounter.
- g) This is supported by Mr. Conarro's evidence that he did not see the patch of snow until just before he hit it. More importantly, it was also supported by Mr. Tallack's evidence that he also did not see that snow until after the 2015 Accident, which would have included the time that he was looking to move into the left lane to pass the semi-trailer just before the 2015 Accident.
- h) I find on the basis of the engineering evidence that when Mr. Conarro's vehicle hit the snow patch, it created an asymmetrical drag on his left wheel and put him into a counter-clockwise spin.
- i) I find that when Mr. Conarro's vehicle spun, it threw snow up and away from his vehicle, giving rise to a plume of snow that blinded Mr. Tallack. I accept Mr. Tallack's evidence that as a result of this plume of snow he could not see the road in front of him, the Mazda, the SUV, or the semi-trailer. He could not even see the road lines around him.

- j) Mr. Tallack could not remember and was unable to say how long the plume of snow lasted or how long it continued to block his view. In cross-examination, he acknowledged that he could not say how many seconds passed between being blinded by the plume of snow, seeing the Mazda, and taking evasive action but allowed it could have been up to or more than 15 seconds. I find that it was likely at least 5 seconds on all the evidence.
- k) In response to being blinded by the snow, Mr. Tallack took his foot off the gas of his Jeep. He agreed that in his Jeep, with its automatic transmission, this would have slowed him down slightly but not to any significant degree.
- l) Mr. Tallack did not brake, steer, or seek to pull his Jeep over at that point.
- m) When the plume of snow stopped and he was able to see again, Mr. Conarro's Mazda was suddenly visible to Mr. Tallack and was in his path. He could not say or remember if the Mazda was still or moving, nor could he recall where in the road it was located.
- n) Upon seeing the Mazda in his path, Mr. Tallack checked to see if the right shoulder of the road was clear, and, upon determining that it was, he turned his Jeep to the right.
- o) I find that the left front corner of Mr. Tallack's Jeep hit the centre rear of Mr. Conarro's Mazda at an angle of approximately 45 degrees. Although this angle is not precise, according to Mr. Lawrence, an engineering expert in collision dynamics whose evidence I accept on this point, it was an angled collision.
- p) After the impact, Mr. Conarro's Mazda rotated counter-clockwise another approximate 250-300 degrees after impact before coming to a final rest partially in the left lane and partially over a painted median on the left side of the road.
- q) At this point, the Mazda had traversed most of the 300-metre length of snow in the left lane shown in the photographic evidence. Based on this evidence, I find the Mazda likely had travelled close to 250 metres in total from the point it encountered the snow, through the point of impact, and then to its final resting position. Although the engineering evidence is not entirely clear on this point, I find that the evidence establishes that the Mazda travelled a shorter distance through this snow patch after the collision than it had travelled before the collision. While it is not possible to pinpoint the exact location of the impact, it most likely occurred when Mr. Conarro's vehicle had moved well into the 300-metre patch of snow.
- r) The highway had begun to curve gently to the right at this location. As a result of this curve and Mr. Tallack's inability to see the lane lines, it is possible that Mr. Tallack had started to move into the left lane. However, I find that it is more likely that the rear end of Mr. Conarro's vehicle had extended into the right lane during its rotation.
- s) I reject Mr. Conarro's evidence that he was entirely in the left lane at the time of impact with Mr. Tallack's Jeep. As he stated in direct examination and admitted in cross, Mr. Conarro did not know where his car was located at that moment of the collision. I also find that Mr. Conarro has not established that he was entirely in the left lane prior to impact.

- t) I also reject Mr. Conarrore's opening submission that he was stopped for a full seven to nine seconds prior to the impact, and that he saw Mr. Tallack looking down at his phone or something else in his hands immediately prior to the impact. Mr. Conarrore agreed that he had no clear memory of either of these things at trial, and they do not accord with the evidence.
- u) While I accept that Mr. Conarrore may have a memory of his vehicle coming to a rest before impact, and in particular a sense of both relief and fear at that point, even that aspect of Mr. Conarrore's memory cannot be relied upon alone. However, this evidence is supported by other evidence.
- v) I find that Mr. Conarrore's vehicle had likely stopped rotating long enough to stop spraying snow into the right lane to allow Mr. Tallack to see the Mazda in front of him one to two seconds before impact and to take evasive maneuvers. That timing is based on Mr. Tallack's evidence and the expert evidence with respect to reaction time.

[22] With respect to the engineering evidence, I find:

- a) The engineering evidence does not assist with a determination of the parties' relative speeds. Mr. Lawrence readily admits that his calculation of closing speed is not precise because he was relying on photographic evidence to estimate crush, and his calculations are based on an aligned rear-end collision not an angled collision.
- b) Mr. McNabb's evidence of a "moderate speed" difference of 50-60 kilometres per hour is equally unhelpful given the acknowledged limitations he himself described in this respect, and his significant reliance upon hearsay evidence not established at trial to reach his conclusions.

[23] Overall, I find that there are too many variables relied upon by the experts that are not established in evidence, including the angle of the impact and the reliance on photographs and generic data, to allow me to rely on either expert's estimate of relative speed.

[24] Mr. Conarrore's Mazda sustained significant damage and was written off. The primary damage was to the rear of the Mazda. When Mr. Conarrore saw the vehicle at the tow yard later, he took pictures showing a smashed driver-side window, but I am satisfied from the police photographs on scene that this window was not damaged. He was taken by ambulance to the Kamloops, BC hospital.

[25] Mr. Conarrore's evidence as to his condition immediately after the 2015 Accident was largely uncontroverted. He believes he passed out at the side of the road and has only fragmented memories of what occurred after the 2015 Accident and up until he was admitted to the hospital by the ambulance crew that attended. He recalls having a goose egg on his head, a sore neck, headaches, dizziness, blackouts, and severe nausea. He was discharged to a hotel across the street from the Kamloops hospital due, apparently, to a lack of space, but he was unable to cross the street or check himself in without assistance. He spent the night throwing up, and then, inadvisably, drove himself home to Maple Ridge, BC the following

day in a rented car, frequently stopping to throw up next to the highway.

The 2018 Accident

- [26] The Xiao defendants admitted liability for the 2018 Accident, which involved Mr. Xiao rear-ending a car that was occupied by Mr. Conarroe and his brother-in-law, Mr. Radoslavov.
- [27] Mr. Conarroe was working full-time, but had taken a few weeks vacation while his in-laws were visiting from Bulgaria in May 2018. Mr. Conarroe had loaned his brother-in-law the family Honda Civic to drive during his visit to Canada, and Mr. Conarroe was a passenger in the front seat. They were waiting to merge onto David Avenue from Pipeline Road in Coquitlam, BC at a yield sign when they were rear-ended by Mr. Xiao in a Land Rover owned and leased by the other Xiao defedants.
- [28] I only have Mr. Conarroe's evidence of the 2018 Accident, as neither Mr. Xiao nor Mr. Radoslavov testified.
- [29] I should note that Mr. Radoslavov is also a defendant in this proceeding and that counsel for the Xiao defendants in this action is also counsel for Mr. Radoslavov. However, at trial, there was no suggestion that Mr. Radaslavov was negligent, and both the evidence and argument at trial were directed exclusively towards the extent of Mr. Xiao's negligence as the driver of the rear-ending vehicle. I understand Mr. Radoslavov continues to live in Bulgaria, and has had no direct involvement in this trial. In the absence of any argument or evidence relating to his potential negligence, I dismiss the claim against him.
- [30] Mr. Conarroe testified that the impact came without warning. He was looking to his left watching for oncoming traffic in the lane that his vehicle was about to merge into. The Honda Civic was pushed forward as a result of the impact. The damage resulted in the Honda Civic being written off.
- [31] Although the evidence was not clear as to how far Mr. Conarroe's vehicle was pushed forward, it was put to him in cross-examination that it was approximately eight feet. He disagreed and said that it was more than that. I conclude that the impact was sufficient to push Mr. Conarroe's vehicle forward a significant amount, which is not controverted.
- [32] Emergency vehicles attended at the 2018 Accident, and Mr. Conarroe received assistance from the fire department first responders. However, after 90 minutes the paramedics had not arrived, and Mr. Conarroe managed the approximate one kilometre walk home from the accident location with the support of Mr. Radoslavov.

- [33] In his evidence, he described intense and immediate pain, including difficulty getting out of the vehicle and standing afterwards. He described feeling nauseated, with "excruciating" pain in both of his shoulders and his back. He took opioid pain medication that he still had from the 2015 Accident, but still had difficulty sleeping. Nevertheless, he kept his weekend plans to travel to Parksville, BC with his wife's family. He did not see a doctor until a few days later, after they cut the vacation short by a few days and returned home.
- [34] Mr. Conarrore described the ongoing pain after the 2018 Accident as less than that of the 2015 Accident, but more enduring.

Mr. Conarrore's Condition after the Accidents

- [35] Following the 2015 Accident, the plaintiff remained off work until September 2016, when he returned to work full time. He worked full-time (including overtime) until the 2018 Accident. He has remained off work since that time.
- [36] Mr. Conarrore's position at trial was that he was disabled from work after the 2015 Accident, but after intensive recovery efforts through a specialized program, his recovery was close to complete by the time he returned to work in September 2016. After his return to work, the physical nature of his work exacerbated his physical injuries. He remained symptomatic while operating his concrete truck through 2017 and up to the 2018 Accident on May 11, 2018, but he carried on working long hours until the 2018 Accident. Furthermore, on days he was not working, and during his vacation in the fall of 2017, he was largely asymptomatic and able to enjoy life, including his previous recreational activities.
- [37] Mr. Conarrore says that the 2018 Accident, while a less significant collision, took him from being almost entirely recovered to a place of permanent disability. While the physical exacerbation of his pain was one factor in this, he says the larger factor was the psychological effect the 2018 Accident had on him, together with the exacerbation of his dizziness and balance issues.
- [38] The defendant Mr. Tallack agrees with Mr. Conarrore in this regard and says that Mr. Conarrore was essentially recovered from the 2015 Accident by the time he was involved in the 2018 Accident.
- [39] The Xiao defendants disagree with Mr. Conarrore and Mr. Tallack's position and say that the evidence establishes that Mr. Conarrore's baseline condition at the time of the 2018 Accident was still symptomatic as a result of the 2015 Accident. Furthermore, Mr. Xiao says that by the time of the trial, almost two years after the 2018 Accident, Mr. Conarrore had largely returned to his pre-2018 Accident baseline condition.
- [40] A key question, then, is to what extent Mr. Conarrore had recovered from the 2015 Accident before the 2018 Accident occurred. I must also consider whether Mr. Conarrore had returned to that pre-2018 Accident baseline condition by the time of trial or whether he was suffering some greater disability at the time of trial than he was at the time of the 2018 Accident.

- [41] Because of the three-year period between the two accidents, I am in the unique position of having some expert evidence as to Mr. Conarro's condition before the 2018 Accident occurred. On all of the evidence, I am able to make the following findings as to Mr. Conarro's condition immediately after the 2015 Accident, prior to the 2018 Accident, and after the 2018 Accident, as well as his potential for further recovery:

Post-2015 Accident Condition

- [42] Mr. Conarro spent the first several months after the 2015 Accident at his home in Maple Ridge, BC, where he continued to suffer nausea, fainting episodes, headaches, sleeplessness and fatigue, light and noise sensitivity, difficulty reading, balance problems, loss of appetite, cognitive problems, irritability, numbness and tingling, panic, and anxiety. He also had increased back and neck pain. He was unable to drive and nervous to cook. His wife remained in Calgary, AB, where she was caring for her adult daughter, and his son came to stay with him and take care of him.
- [43] In April 2015, he relocated to Calgary, where his wife was able to take care of him, and he was enrolled in a comprehensive publicly-funded rehabilitation program, which included occupational therapy, physical therapy, and psychological counselling. He also received additional physiotherapy and massage therapy through a spine clinic.
- [44] For a little over a year, Mr. Conarro was restricted in his ability to walk, drive, read, and descend stairs due to his vertigo. He had memory problems and light sensitivity. He was short and impatient with himself and his loved ones. He ceased to be the loving partner he had been.
- [45] His clinicians in Calgary assisted him with strategies to assist him to function within his limitations and to gradually ameliorate those limitations. His mood also improved with the prospect of his physical and cognitive improvements. By mid-June 2016, his neck and low back pain was only intermittent, and his mid back pain had improved. By the end of August 2016, he was going weeks without any neck pain, and his back pain was largely resolved. He was capable of riding a bike for an hour a day and swimming once a week. He was lifting heavier weights without aggravation of his pain and was moving toward an unsupervised exercise program. His general practitioner cleared him to drive in June 2016 and cleared him to return to work by the end of August 2016.
- [46] In September 2016, Mr. Conarro and his wife returned to BC, and Mr. Conarro returned to work full-time as a concrete truck driver for Lafarge. From the fall of 2016 to May 2018 he was working six days a week, including overtime, and functioning well at work. In 2017, he earned \$102,972, his highest earning year in his life.

- [47] With his return to work, however, Mr. Conarroe also had a return of his neck and back pain. He blamed this, in part, on the fact that the truck he was driving was an older model with poor suspension. He believed that his symptoms would have been less had he been issued a newer truck, but he persevered with the older one. He experienced significant relief to his symptoms when he was not working, and in particular while on a vacation in Bulgaria in the fall of 2017.
- [48] When being interviewed or assessed by doctors in relation to his injury claim in early 2018, he continued to report back, neck, and left shoulder pain. He also reported misgivings about how much longer he would be able to work given his current work truck and his pain, both to the medical experts who assessed him and to his wife.
- [49] On the evidence before me, including numerous expert reports, I find that Mr. Conarroe suffered from the following injuries as a result of the 2015 Accident:
- a) An MTBI in the form of a labyrinthine concussion giving rise to nausea, tinnitus and other symptoms that had largely resolved by August 2016;
 - b) A longer term vestibular issue caused by an abnormality of the inner ear arising from his concussion known as visual vestibular mismatch ("VVM"). As a result of his VVM, Mr. Conarroe experienced visually induced dizziness when there was a mismatch between his observation of movement around him and his own sense of acceleration and deceleration. Mr. Conarroe's VVM had improved by August 2016, but he was still experiencing periodic dizziness in April 2018;
 - c) Cognitive difficulties with short term memory and concentration;
 - d) Headaches, fatigue, and sleeplessness;
 - e) Decreased sensation and numbness in left thigh;
 - f) A lack of appetite and drive, irritability, and some symptoms of anxiety and depression; and
 - g) Chronic pain in his neck and back and range of motion limitations in his left shoulder, which persisted at a low level beyond September 2016, particularly when he was working.

Pre-2018 Accident Baseline Condition

- [50] Overall, by the time of the 2018 Accident, Mr. Conarroe had recovered significantly from his MTBI, but he still had ongoing dizziness and nausea in relation to motion around him (VVM), particularly as a passenger in a vehicle but even, on occasion, when driving. His chronic neck and back pain persisted at a lower level than in 2015. He continued to have cognitive deficiencies in memory and concentration, which the experts generally agree was primarily caused by his chronic pain and sleeplessness rather than his brain injury by May 2018.

- [51] His other conditions had significantly improved to the point that he had regained much of his pre-2015 Accident ability to work and participate in recreational activities. Emotionally, he was not the same social and outgoing person or as affectionate as he had been before the 2015 Accident, but some balance had been restored to his relationships and his recreational life.
- [52] Although Mr. Conarro was maintaining a lifestyle that was similar to his pre-2015 Accident lifestyle by the time of the 2018 Accident, he was doing so with an elevated level of chronic pain, which was aggravated by his work. He was already expressing concern as to how much longer he would be able to work, particularly if he was not provided with a better truck, and he continued to show signs of depression and anxiety.
- [53] Overall, up to the date of the 2018 Accident, he had experienced significant improvement but no full resolution to his 2015 Accident injuries. Importantly, he had the psychological ability to manage his pain and other limitations through his work day and his daily life.

Post-2018 Accident Condition

Physical, Vestibular and Cognitive Injuries

- [54] The expert evidence establishes that the 2018 Accident exacerbated or reactivated a number of the physical and cognitive symptoms that Mr. Conarro experienced in the months after the 2015 Accident. The evidence also establishes that many, but not all, of these injuries had resolved back to something close to Mr. Conarro's pre-2018 Accident condition by the time of trial.
- [55] Like many of his physical symptoms, Mr. Conarro's cognitive difficulties increased after the 2018 Accident but had generally recovered to their pre-2018 Accident condition by mid to late 2019. The opinion of the experts is that these symptoms were not the result of a further brain injury but, rather, continued to be related to chronic pain and fatigue arising from his constellation of injuries.
- [56] Dr. Longridge is a specialist in otolaryngology, more commonly known as an Ear Nose and Throat or "ENT" doctor, who ran the "Dizzy Clinic" at Vancouver General Hospital for many years. He interviewed Mr. Conarro just before the 2018 Accident. He sent Mr. Conarro for a series of tests, which Mr. Conarro completed shortly after the 2018 Accident. Dr. Longridge also ordered similar tests approximately a year later, in 2019. The 2019 tests showed a marked improvement of milder symptoms over 2018, but the persistence of his VVM.
- [57] While it is not possible to be certain what vestibular symptoms detected by these tests were caused by the 2015 Accident as opposed to the 2018 Accident, Dr. Longridge opined that Mr. Conarro's improvement on his 2019 test may be because there was an ongoing gradual improvement from his 2015 injury, or, if there was a re-injury to his inner ear in 2018, that injury had recovered to a level closer to his pre-2018 Accident condition by July 15, 2019. In

2019, it was still significant enough that Dr. Longridge thought it wise that Mr. Conarroce cease to drive commercial vehicles.

- [58] The only unique physical injury of which there was no evidence before the 2018 Accident and which remained unresolved as of the time of trial is a paralabral tear in Mr. Conarroce's right shoulder that was detected by way of an MRI in November 2018. Dr. Regan, an expert in orthopaedic surgery with a specialization in shoulder injuries, reviewed this MRI. He connected this tear to the 2018 Accident on the basis that Mr. Conarroce did not have a history of right shoulder pain prior to the 2018 Accident, and said he felt shoulder pain either at scene or within 24 to 48 hours after the 2018 Accident. Dr. Regan considers that this tear, in particular, would prevent Mr. Conarroce from conducting the heavy reaching, climbing, and pulling work required of a concrete truck operator, even if he had surgery.
- [59] While the Xiao defendants accept that this tear is present and serious, they question whether it resulted from the 2018 Accident or whether it alone would disable Mr. Conarroce from working.
- [60] With respect to timing, the Xiao defendants rely on Dr. Regan's evidence that any such tear would be immediately and noticeably painful if it happened at once rather than as a result of repeated stress. However, there is little to no contemporaneous medical record of Mr. Conarroce reporting his right shoulder as a source of pain after the 2018 Accident. His contemporaneous medical reports focused on his neck and back pain and contained no mention of shoulder pain. Finally, one of Mr. Conarroce's work colleagues and fellow drivers, Mr. MacDonald, testified that he has suffered similar shoulder tears himself, and he confirmed both that he was able to do his job without surgery.
- [61] While I agree that Mr. Conarroce's evidence is not always reliable, and the absence of a contemporaneous medical report of right shoulder pain is problematic in this regard, on the whole of the evidence, I accept Dr. Regan's opinion that this pain may have been masked or less worthy of comment to his medical practitioners immediately after the 2018 Accident. Mr. Conarroce did report immediate shoulder pain to Dr. Regan, and in his direct testimony.
- [62] In any event, I find that Mr. Conarroce's right shoulder tear, on its own, would likely not have stopped Mr. Conarroce from pursuing his work as a concrete truck driver. Dr. Regan recommends a surgical repair that would assist in, if not allow for, a full recovery of range of motion. It is clear that Mr. Conarroce loves and values his work, and although it is physically demanding, I find that he, like Mr. MacDonald, would likely have found a way to overcome this limitation as he did with his pre-existing back pain and his post-2015 Accident pain were it not for his additional psychiatric injuries.

Psychiatric Injury

- [63] I find that the evidence as a whole establishes that the most disabling aspect of the 2018 Accident was its psychological impact on Mr. Conarroce: the reoccurrence and aggravation of his physical symptoms from the 2015 Accident led him to despair of his eventual recovery,

and his psychological symptoms grew into a fully fledged psychiatric disorder. The plaintiff was diagnosed with various psychiatric disorders meeting the criteria of the Diagnostic and Statistical Manual of Mental Disorders, fifth edition ("DSM-V"). The plaintiff's psychiatry expert, Dr. Anderson, diagnosed the plaintiff with both moderately severe major depressive disorder and generalized anxiety disorder. The defendants' psychiatry expert, Dr. Neelakant, opined that Mr. Conarrore had a previously undiagnosed history of PTSD, and he experienced a relapse of that PTSD as a result of the 2018 Accident.

- [64] I do not consider it necessary for me to determine whether Mr. Conarrore is currently suffering from depression and generalized anxiety disorder or PTSD. Both diagnoses are based on a similar constellation of symptoms. Neither was present at a diagnostic level prior to the 2018 Accident. To the extent that there is some difference in the prospects for treatment and recovery, I will address that below.
- [65] Regardless of its classification, it is both diagnostic and symptomatic of this psychiatric injury that Mr. Conarrore ceased to work. Although there is a circularity to this diagnosis, I am satisfied that Mr. Conarrore was disabled from continuing his work as a concrete truck driver after the 2018 Accident largely as a result of his psychiatric injury. Indeed, this is not truly contested by the defendants. Rather, the defendants' arguments are primarily directed toward which accident was the more disabling one in this regard.
- [66] In terms of whether this injury was caused by the 2018 Accident alone, both Drs. Anderson and Neelakant opine (albeit for different reasons) that Mr. Conarrore's current psychiatric condition temporally arose after the 2018 Accident, but is a result of a combination of both accidents, rather than only one of them.
- [67] Finally, I find that it is this psychiatric injury that remained the most disabling aspect of Mr. Conarrore's constellation of mental, physical, vestibular, and cognitive injuries at the time of trial.

Potential for Recovery

- [68] Mr. Conarrore has a well-established ability to work through pain. He did this in relation to previous low level back pain and more intense bouts of Crohn's disease-related pain prior to the 2015 Accident.
- [69] Although it took him 20 months to recover from the 2015 Accident, he worked hard and, with substantial support from his clinicians and his partner, got himself back to a condition in which he could return to work. Once back at work, he worked more hours than he ever had before despite an elevated level of pain associated with that work. He derived not only income but a strong sense of social contribution from his work. His identity and sense of self-worth is closely tied to his work, and his co-workers and their families are part of his community and family. He has not yet given up his union card, and I find that he would return to that work if he believed he could do so safely.

- [70] As I stated above, the most disabling injury he currently suffers from is the psychiatric injury that has drained his previous determination and resilience to return to that work. Although his chronic physical pain also contributes to his psychiatric symptoms and his overall level of function, I find that it is primarily his psychiatric injuries, and to a lesser extent his VVM, that are his primary limiting conditions.
- [71] Mr. Conarrore says that in respect to all of his injuries he is now close to two years post-accident and has reached his maximum recovery from the 2018 Accident. The Xiao defendants say that this prognosis is premature and that Drs. Anderson and Neelakant would not have proposed extensive treatment regimens in 2019 if they were likely to be futile.
- [72] Dr. Anderson notes a number of improvements to Mr. Conarrore's cognitive abilities between 2018 and 2019. He also opines that Mr. Conarrore "will likely have ongoing cognitive difficulties, including reduced short-term memory functioning, as long as he has significant physical and/or emotional symptoms." However, Dr. Anderson does not rule out improvements to all of these functions, albeit the recovery of one aspect of his injuries relies on recovery of the other aspects. Ultimately, Dr. Anderson says that although further treatment will help, Mr. Conarrore's prognosis is "guarded" for a full recovery because of the constellation of his injuries: physical, psychological, cognitive, and vestibular.
- [73] In cross-examination, Dr. Neelakant also indicated something less than a fair prognosis due, in part, to the co-morbidity of Mr. Conarrore's injuries. However, Dr. Neelakant opines that with the detailed treatment plan he provides, which involves antidepressant therapy, cognitive behavioral therapy, and the use of his continuous positive airway pressure ("CPAP") machine, Mr. Conarrore "has a good chance of recovery from his psychiatric injuries to his baseline anxiety, avoidance behaviors and obsessive traits." He acknowledges that it would take between six months and a year for Mr. Conarrore to respond to treatment, because of the need to address his underlying pain symptoms, and two to five additional years of treatment after that.
- [74] While the multi-factorial nature of his injuries and the way they play upon and reinforce one another is a negative prognosticating factor, I am not convinced that Mr. Conarrore will not see further recovery.
- [75] He is still in his recovery process, and he has done it before. Addressing his chronic pain and treating his psychiatric injuries are the keys to improving cognitive ability, and treatment of both injuries together have yet to have been attempted for any significant length of time since the 2018 Accident.
- [76] The more difficult question is whether the room that Mr. Conarrore has for improvement will be sufficient to allow Mr. Conarrore to return to work, either as a concrete truck driver or in some other capacity.

- [77] Before me were three expert reports specifically related to Mr. Conarro's ability to function at home and in the workplace:
- a) The report of Mr. Gander, an occupational therapist called by Mr. Conarro;
 - b) The report of Ms. Wong, an occupational therapist called by the defendants; and
 - c) The report of Mr. Lawless, a vocational consultant called by Mr. Conarro.
- [78] In his aptitude and vocational testing set out in Mr. Lawless' report, Mr. Conarro scored well against the general population. Although his cognitive function has been impaired from his pre-2015 Accident levels, Mr. Lawless' testing suggests that Mr. Conarro still has relatively strong cognitive abilities and aptitude to participate in the workforce.
- [79] However, Mr. Lawless relies on assumptions based on portions of other medical reports (without the benefit of cross-examination) to come to the conclusion that Mr. Conarro is "competitively unemployable" in anything but "bottom of the barrel" work that he would not enjoy, and he is not a candidate for retraining due to being in his early 50s. I find that Mr. Lawless' level of pessimism as to Mr. Conarro's work prospects relies on factual assumptions (when articulated at all) that are not supported by his own testing, or the medical and lay evidence at trial.
- [80] The report prepared by Ms. Wong is unfortunately also of limited use. Her key conclusion that Mr. Conarro's effort during her testing was not representative of a full effort was based on a fundamental error in her calculations of his heart rate that, when corrected in cross-examination, indicated the opposite was the case. This was not my only concern with this report or its conclusions.
- [81] That Mr. Conarro applied best efforts during testing was not only ultimately borne out by Ms. Wong's testing when corrected, but also by Mr. Gander's functional capacity testing of Mr. Conarro. He found Mr. Conarro applied high effort physically and cognitively and worked to overcome problems and barriers to his performance rather than give up. Of the reports addressing Mr. Conarro's functional abilities prior to trial, I find Mr. Gander's report to be the most comprehensive, supported, and balanced, and I put more weight upon his opinions.
- [82] Mr. Gander's testing of Mr. Conarro's functional abilities as of September 2019 indicate that he had a sitting tolerance of two hours (with some stretching and adjustments) and a standing tolerance of one hour. He has a functional level of body mobility but has some limitations in his ability to bend and reach, with his left arm and shoulder being more limited than his right. Although symptomatic, he is able to complete light overhead activities where he can self-moderate the quantity and frequency of lifting. His balance is poor, and certain motions, including jostling, bouncing, and repetitive lifting, make him dizzy. Cognitively, his executive function remains effective, though his memory has some limitations. His difficulty with complex tasks is primarily exacerbated by movement that provokes his light-headed symptoms. He is also limited to some extent by his anxiety about

re-injuring himself.

- [83] Mr. Conarro's mental injuries, pain and dizziness inhibit his ability to enjoy his previous recreational activities. These symptoms also remain a concern for his ability to work as a concrete truck driver.
- [84] Mr. Conarro's work as a concrete truck driver is classified as one that requires medium strength and frequent reaching, and the evidence at trial establishes that the job is a physically demanding one. A video played in court, and reviewed by Mr. Gander, shows a wide variety of physical demands, including bending and kneeling, lifting, carrying, reaching, balancing on one leg, and ladder climbing. Although the video showed multiple tasks being performed in short succession, not all of which would be performed daily or even weekly, I find that it was sufficiently representative of the types of physical activity that concrete workers engage in to be relied upon by Mr. Gander for his purposes.
- [85] Mr. Gander concludes that these physical requirements would preclude Mr. Conarro from performing "the full scope of his physical duties safely, effectively, and dependably" and that he would continue to experience back pain if he continued to drive a heavy vehicle with poor suspension. Mr. Gander is also "not confident that Mr. Conarro is able to dependably drive a commercial vehicle whilst effectively tolerating distractions and other stimuli" as a result of his cognitive and vestibular limitations.
- [86] Mr. Gander concludes that Mr. Conarro's injuries restrict his ability to safely perform the full demands of his work as a concrete truck operator. In terms of other work, Mr. Gander concludes that he was functionally limited to part time work in September 2019 and that, in his current condition, he would be less dependable in a traditional "nine to five" job. He needs the flexibility to take breaks from sitting and other activities in order to better manage his physical pain symptoms. His emotional functioning (as a result, I find, of his depression and/or PTSD) makes him a less reliable and productive employee.
- [87] Overall, Mr. Gander opines that Mr. Conarro's potential to return to the workforce will depend on his response to treatment and, in particular, how his dizziness symptoms resolve. He concludes that Mr. Conarro's efforts are best directed at recovery and rehabilitation in the near term to maximize his relatively strong underlying functional strengths.
- [88] While I find that the evidence establishes that Mr. Conarro was not able to return to his work as a concrete truck driver at the time of trial, I do not consider that the evidence establishes that Mr. Conarro will not be employable in the future with the benefit of further treatment and therapies. Indeed, I do not consider that Mr. Gander's report rules out the possibility that Mr. Conarro may still return to the work that he loves with appropriate accommodations (such as a truck with modern suspension) provided that his VVM continues to abate. He has overcome a similar level of pain and vertiginous symptoms before, and he has not yet undertaken a similar recovery regimen to the one he undertook after the 2015 Accident, or benefitted from the psychiatric therapies recommended at trial.

[89] I should also note that Mr. Conarrore impressed on the stand as thoughtful, detail oriented, articulate, and highly personable. He was not evasive, defensive or argumentative, even in challenging circumstances. Even if driving a concrete truck is not in his future, I am confident that he has the qualities to secure some other gainful employment and, with further psychiatric assistance, the ability to persevere in that employment.

LIABILITY

[90] Having stated my relevant findings of fact above, I turn now to the first legal issue before me: liability for the 2015 Accident.

[91] Mr. Conarrore pleads that Mr. Tallack was entirely liable for the 2015 Accident. Mr. Tallack pleads that Mr. Conarrore was liable or at least contributorily liable for the 2015 Accident and that he was not liable. Mr. Tallack also sought to argue contribution and apportionment against the Province and JPW. I will deal with each allegation in turn.

Negligence of Mr. Tallack

[92] I find Mr. Tallack did act negligently, and his negligence was a cause of the 2015 Accident.

[93] However, the facts upon which I find that Mr. Tallack was negligent are not those initially argued by Mr. Conarrore in his opening statement to the Court. In his opening, Mr. Conarrore alleged that his vehicle had ceased to rotate and that he was visible and stationary in the left lane of the highway for 7-9 seconds before Mr. Tallack's Jeep hit his Mazda. He anticipated in his opening that the evidence would establish that Mr. Tallack had been looking down and not paying attention to the road before rear-ending Mr. Conarrore at speed in the left passing lane of the highway.

[94] These allegations were not made out at trial, even in Mr. Conarrore's direct evidence. There is no reliable evidence that Mr. Conarrore was stopped for any length of time after his loss of control, that Mr. Tallack deliberately moved into the left passing lane, or that Mr. Tallack had his head down at the time of or prior to the 2015 Accident or was not paying attention to the road.

[95] I accept, on all the evidence, that Mr. Tallack had not deliberately changed lanes into the left lane, that he was paying attention to the road, and that by the time Mr. Conarrore's vehicle was visible to him, he had only moments, perhaps one to two seconds, to evade Mr. Conarrore's Mazda.

[96] There is also no evidence that Mr. Tallack was speeding, or that his rate of speed was inappropriate for the conditions.

[97] I accept that by the time Mr. Conarrore's Mazda was visible to him, Mr. Tallack likely had insufficient time to avoid the collision and that he took reasonable actions by braking and steering to the right shoulder to attempt to avoid the collision.

- [98] My concern with Mr. Tallack's conduct, and where I find it fell short of what a reasonable person in his circumstances would and should have done in light of his duty of care to others on the road, was in his failure to attempt to significantly slow his Jeep when he was initially blinded by snow and unable to see the vehicles around him, or even the lines on the highway.
- [99] On Mr. Tallack's own evidence, he was not observing the two-second rule with respect to the semi-truck in front of him. When he was blinded by the curtain of snow, not only had Mr. Conarro's Mazda already passed him in the left lane, but another vehicle had started to pass him.
- [100] Also on his own evidence, Mr. Tallack was driving at highway speeds at this time: 90 kilometres per hour. For the time that he was blinded by the curtain of snow, he did nothing more than remove his foot from the gas pedal, acknowledging that this did little to slow his vehicle.
- [101] I have found that the plume of snow observed by Mr. Tallack most likely came from Mr. Conarro losing control of his vehicle when his left wheel suddenly and unexpectedly encountered a 300-metre-long patch of deep snow and slush located on the left half of the left lane of the highway. I have also found on the facts before me at trial that Mr. Conarro's vehicle travelled a total of approximately 250 metres into this 300-metre length of snow before coming to rest, the majority of this distance being covered before impact.
- [102] This means that Mr. Tallack must have seen the curtain of snow, and been largely blinded by it, for most of the distance of 125 metres or more.
- [103] On Mr. Tallack's own evidence, there were a number of seconds, likely more than five seconds based on his rate of travel and the distance he covered, in which he was blinded and traveling at highway speeds and did not brake or seek to pull his Jeep off the road. Also on Mr. Tallack's evidence, there was some additional initial distance between himself and Mr. Conarro's vehicle when it started to throw up snow, given that the Mazda was already well ahead of his vehicle in the left lane.
- [104] By the time Mr. Conarro's Mazda was immediately in front of him, his attempt to brake and move to the shoulder were too late to avoid the impact. However, even then, on Mr. Tallack's own evidence, it was a near miss. Had Mr. Tallack braked a few seconds sooner, I find that he would have been able to avoid the 2015 Accident altogether.
- [105] I find that Mr. Tallack's decision not to brake or pull to the side of the road, but rather to maintain highway speeds for five seconds or more (only effecting a slight reduction in his speed by removing his foot from the gas) while his vision was entirely obstructed, fell below the standard of care expected of a motorist.

Negligence of Mr. Conarro

- [106] Mr. Tallack says Mr. Conarro was negligent and caused the collision by passing when it was unsafe to pass. He says Mr. Conarro should have seen the snow in the left lane prior to pulling into that lane to pass, and his failure to do so was a breach of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 and a breach of his standard of care.
- [107] Mr. Tallack alleges that Mr. Conarro deliberately chose to pass him while there was snow and slush to be seen in the adjacent passing lane and that he was traveling through the snow and slush close to Mr. Tallack for some distance before he lost control of his vehicle, ploughing snow into Mr. Tallack's field of vision and abruptly entering Mr. Tallack's lane of travel.
- [108] Had I found that the evidence at trial supported this version of events, I may have found Mr. Conarro at fault. To the extent that Mr. Tallack relied on Mr. Conarro's statements in his examination for discovery to support his theory, this may give rise to a remedy in costs. However, Mr. Conarro did not adopt his discovery evidence at trial, and indeed, that evidence was put to him in cross by Mr. Tallack as untrue, and Mr. Conarro agreed.
- [109] I have found that the reliable evidence at trial establishes that when Mr. Conarro pulled into the left lane there was no patch of snow impeding the passing lane or making it unsafe to pass. Mr. Conarro had passed Mr. Tallack, and another vehicle was doing the same, before the 300-metre-long patch of snow was visible on the left side of passing lane. The evidence further establishes that Mr. Conarro lost control as a result of the immediate effect that the snow and slush had on one side of his vehicle and not the other. I have also found that the snow and slush covered portion of road was not apparent to motorists due to the overall slushy condition of the road, and Mr. Conarro did not see it until he was unable to avoid it.
- [110] I have accepted Mr. Tallack's evidence that he did not see the snow and slush in the left lane until after the collision, despite the fact that he himself was preparing to move into that lane immediately prior to his vision being obstructed. Finally, I accept Constable Brett's evidence that the snow and slush posed a sudden hazard on the road.
- [111] On the basis of all of this evidence, I find that Mr. Conarro was not negligent when he lost control of his vehicle in the left lane as a result of the presence of an unanticipated and difficult to see obstruction in his lane of travel in the form of a patch of accumulated snow and slush.

Negligence of Province and Highway Contractor

- [112] In his original pleadings, Mr. Conarro also sued the Province and JPW for negligent design and maintenance of the highway giving rise to the sudden and unexpected patch of snow and slush in the left lane of the highway.

- [113] Mr. Tallack did not third party either of these defendants, but he did plead apportionment of liability on the basis of the plaintiff's particulars of negligence against them.
- [114] However, Mr. Tallack did not file any expert evidence in relation to this claim in apportionment within the time frames for doing so, and his counsel ultimately signed consent dismissal orders of Mr. Conarrore's claims in negligence against these defendants a short time before trial.
- [115] The issue of whether Mr. Tallack could still argue apportionment of liability as against these previous defendants was argued before me during the trial. In my oral reasons of January 24, 2020, [Conarrore v. Tallack, 2020 BCSC 310] I concluded that Mr. Tallack was barred from relying on expert evidence to seek the apportionment of liability against either of these defendants for two main reasons:
- a) There was no expert evidence filed or relied upon by Mr. Tallack within the time required for such evidence to be filed, or at other relevant times, that was capable of establishing the existence of a duty of care or the standard of care owed by either of these defendants to the plaintiff, and to allow late reliance on these reports would be unfair and prejudicial to many; and
 - b) Mr. Tallack consented to court orders dismissing Mr. Conarrore's claims in negligence against these defendants on their merits, leaving no duties of care in negligence owed to the plaintiff to apportion.
- [116] As a result, there was no evidence at trial that either the Province, by way of negligent design, or JPW, by way of negligent maintenance of the highway, owed a duty of care to Mr. Conarrore, or breached their standard of care.
- [117] In addition, although the highway conditions were undoubtedly a factor in Mr. Conarrore's injuries, the issue of whether there was a duty of care owed by either the Province or JPW to Mr. Conarrore, or of a breach of the standard of care of either of them, has been conclusively determined in the negative by consent.
- [118] At the conclusion of the trial, in response to my request for submissions from the parties as to whether the BC Ferries settlement affected the joint and several liability of the remaining defendants, I received submissions from the Xiao defendants raising new arguments that the consent dismissal order should not preclude apportionment of damages to JPW and the Province. This issue was conclusively determined in my mid-trial ruling after a full day of argument that the Xiao defendants took no position on, and were excused from, at their request. Any concerns regarding the consent dismissal orders should have been raised then.
- [119] In any event, the consent dismissal orders in this case were expressly stated to be on the merits of the allegations of negligence against JPW and the Province, and were signed by all counsel that had provided JPW and the Province notice of their participation on the record.

Conclusion on Liability

[120] In conclusion, I find that Mr. Tallack was negligent, and his negligence was a cause of the 2015 Accident. While there were other causes, none were as a result of negligent conduct. As a result, only Mr. Tallack is liable in negligence with respect to the 2015 Accident.

[121] Mr. Xiao has conceded liability with respect to the 2018 Accident.

CAUSATION AND DIVISIBILITY OF INJURIES

[122] In my findings of fact above, I have set out the physical, cognitive, vestibular, and psychiatric injuries that Mr. Conarrore has suffered from and is currently suffering from. While Mr. Conarrore had a low level of back pain prior to the 2015 Accident, I have considered only those injuries that I find were caused by one or both of the accidents.

[123] The defendants' primary causation arguments before me related to the disagreement between the defendants as to which of them is primarily responsible for Mr. Conarrore's current state of disability. They each say that the injuries are divisible and can be primarily attributed to the other.

[124] Mr. Tallack argues that Mr. Conarrore had entirely recovered back to his baseline of some low level back pain and anxiety before the 2018 Accident occurred, and that Mr. Xiao's negligence is therefore the cause of Mr. Conarrore's current disabilities. Mr. Tallack therefore says that if he is liable at all (and I have found that he is), his negligence was only the cause of Mr. Conarrore's injuries up to Mr. Conarrore's successful return to work in September 2016: a period of about 20 months.

[125] The Xiao defendants argue that, while Mr. Conarrore was working before the 2018 Accident, he was not actually fit to work safely and should not have been working. They say that within a year or so of the 2018 Accident, Mr. Conarrore was back to his pre-2018 Accident physical, cognitive, and vestibular baseline. He says that Mr. Conarrore will likely return to his pre-2018 Accident psychiatric baseline in another six months to a year.

[126] Mr. Conarrore largely agrees with Mr. Tallack, arguing that at least his psychiatric injuries are divisible and that the 2018 Accident caused his current state of unemployment by causing him further physical and psychiatric injuries.

[127] I now turn to the question of the divisibility of Mr. Conarrore's injuries.

Divisibility of Injuries

- [128] The court order joining these two actions for trial does not specifically address divisibility or indivisibility as between the actions themselves. Nevertheless, it appears that the prospect of indivisible damages was a consideration in the joining of the hearing of the actions, and all of the parties proceeded in this trial on the basis that at least some of the injuries may be found to be indivisible as between the two accidents and actions. I therefore proceed on that basis.
- [129] Where there are multiple causes of a plaintiff's injuries, the court must determine whether the injuries are divisible or indivisible. Generally speaking, divisible injuries are injuries capable of being separated out and having their damages assessed independently, whereas indivisible injuries cannot be separated into their constituent causes: *Bradley v. Groves*, 2010 BCCA 361 at para 20.
- [130] The question of divisibility is related to the question of causation. If an injury is divisible, the defendant is only responsible for the portion of the injury he or she caused. If an injury is indivisible, each defendant is jointly liable for all of the injury (*Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 24 and 25).
- [131] Whether injuries are divisible or indivisible is a question of fact. If the trier of fact can determine the extent to which each defendant caused or contributed to the plaintiff's injuries on the available evidence, the injuries are divisible.
- [132] The principle of divisibility can apply most obviously to injuries to different parts of the body. Divisibility may also be possible where injuries are to the same part of the body where the evidence is sufficient to establish distinct causes of each aspect of the injury: *Khudabux v. McClary*, 2018 BCCA 234 at para. 34; *Deol v. Sheikh*, 2016 BCSC 2404 at para. 19; *Fleming v. McAllister*, 2017 BCSC 753. It can also be possible in relation to sequential injuries, where the evidence is sufficient to establish a baseline: *Uppal v. Judge*, 2016 BCSC 642 at para. 86; *Dunne v. Sharma*, 2014 BCSC 1106 at para. 99. Finally, even where a physical injury is indivisible, specific heads of damages may still be divisible where the evidence permits such a division: *Scoates v. Dermott*, 2012 BCSC 485 at paras. 164-169; *Rajan v. Hudon*, 2014 BCSC 1678; *Lakatos v. Lakatos*, 2017 BCSC 1990.
- [133] I am in the unhappy position of having all three parties arguing that Mr. Conarro's injuries are divisible as between the defendants, and not being able to agree with any of them.
- [134] Clearly, the pecuniary damages sustained by Mr. Conarro as a result of the 2015 Accident and before the 2018 Accident are only attributable to the 2015 Accident.
- [135] Beyond that, I am unable to find the necessary facts on the evidence before me to find that any other category of damages or injury is divisible. This is because the primary sources of Mr. Conarro's disability at the time of trial was his psychiatric injuries (as they interact with his chronic pain) and, to a lesser extent, his ongoing vestibular injuries. I find that it is not possible on the evidence to attribute Mr. Conarro's current state of disability

exclusively to one or the other of these injuries, or one or the other of these current injuries exclusively to one of the accidents.

- [136] With respect to Mr. Conarro's VVM, I find that he had been experiencing improvements since the 2015 Accident, but that the 2018 Accident most likely caused a setback to this improvement. While there has been further improvement since, the evidence does not allow me to apportion as between the accidents a sole cause of his VVM symptoms at the time of trial.
- [137] The difficulties with the psychiatric injuries are more significant, with both psychiatrists giving evidence finding that Mr. Conarro's current injuries were caused by both accidents.
- [138] Despite Dr. Neelakant's opinion that Mr. Conarro's current diagnosis of PTSD was caused by the 2018 Accident, it is clear from his opinion that the 2015 Accident was necessary to the 2018 relapse of that injury and its ongoing severity.
- [139] Mr. Anderson opines that, before the 2018 Accident, Mr. Conarro only had depressive and anxious symptoms but not a DSM-V diagnosis of major depression or generalized anxiety disorder. However, he also opines that Mr. Conarro's psychiatric injuries are tied to his initial and ongoing experience of pain both after the 2015 Accident and after the 2018 Accident.
- [140] Overall, I find that it is not possible to say which accident was causative of Mr. Conarro's current mental injury, and I find that both accidents likely contributed to it.
- [141] In addition, the medical experts also gave evidence that the plaintiff's physical, psychological, and cognitive symptoms are interrelated, such that the aggravation or improvement of one of these conditions has a corresponding effect on the other categories of symptoms. The plaintiff's condition has been referred to throughout this case, including by the plaintiff's counsel, as a "constellation" of symptoms. I find that it is not possible to pinpoint which aspects of the constellation were more or less active at a particular point in time, or to crystallize that constellation at the precise point in time before the 2018 Accident.
- [142] I therefore find that Mr. Conarro's injuries are indivisible between the 2015 Accident and the 2018 Accident. Mr. Tallack and the Xiao defendants are jointly and severally liable for the pecuniary and non-pecuniary damages resulting from these indivisible injuries, with the exception of Mr. Conarro's income loss and special damages between the 2015 Accident and the 2018 Accident.

The Effect of the BC Ferries Settlement

- [143] At the end of closing submissions, I requested further clarification of the effect of the BC Ferries settlement on the joint and several liability of the remaining defendants. I received those submissions in written form from each of the parties.

- [144] I am satisfied, upon reviewing these submissions, that liability remains joint between the remaining defendants following the BC Ferries settlement. However, the undisclosed amount of that settlement must be deducted from the plaintiff's damage award. The fact that the negligence claims against the settling defendants has been dismissed by consent order, does not change the requirement to deduct the settlement funds received: *Henry v. British Columbia (Attorney General)*, 2017 BCCA 420, at paragraph 38.
- [145] In this case, the settlement funds were paid in relation to the 2015 Accident involving Mr. Tallack, and Mr. Tallack is solely responsible for a subset of Mr. Conarroe's pecuniary losses (up to the time of the 2018 Accident). I direct that the settlement funds received by Mr. Conarroe are first to be deducted from the past loss of earnings and special damages owed by Mr. Tallack alone for the period between the 2015 and 2018 Accidents. If the settlement funds exceed this amount, they shall be deducted from the remaining global damages amount prior to apportionment between the remaining defendants.

APPORTIONMENT OF THE PLAINTIFF'S DAMAGES

- [146] Under s. 4 of the Negligence Act, R.S.B.C. 1996 c. 333, if a damage or loss was caused by the fault of two or more persons, the court must determine the degree to which each person is at fault.
- [147] Apportionment under s. 1 of the Negligence Act is based on comparative blameworthiness as opposed to an assessment of relative degrees of causation (*Bradley v. Bath*, 2010 BCCA 10). In this context, comparative blameworthiness refers to the extent of the departure from the expected standard of care applicable to each party in that party's circumstances. The BC Court of Appeal in *Cempel v. Harrison Hot Springs Hotel Ltd.*, 43 B.C.L.R. (3d) 219 (C.A.) held at para. 19:

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

[Emphasis in original.]

- [148] In assessing the respective fault and blameworthiness of the parties as contemplated in *Cempel*, courts are to evaluate the extent or degree to which each party departed from the standard of care each party owed under the circumstances. In *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at para. 46, Finch J.A. (as he then was) described the range of blameworthiness, as follows:

Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[149] Mr. Conarrore and Mr. Tallack both say that Mr. Tallack's negligence was a result of a momentary lapse of care in an exigent and difficult circumstance and is therefore less blameworthy than Mr. Xiao's rear-ending of the vehicle in which Mr. Conarrore was a passenger in 2018.

[150] Mr. Xiao says a momentary lapse is a momentary lapse, and there is no evidence that his conduct was any more blameworthy than that of Mr. Tallack in that respect. He points to the small amount of evidence adduced with respect to the 2018 Accident overall.

[151] Mr. Xiao did not testify, so I am not aware of the circumstances of his particular lapse of attention. I draw no general adverse inference in this regard, other than that Mr. Xiao's evidence likely would not have improved upon his concession of liability. However, even if I assume (which I do) that his lapse of attention was no more blameworthy than most rear-end accidents, I have evidence that Mr. Tallack's lapse was less blameworthy than most.

[152] Mr. Tallack's failure to brake was in difficult and unforeseen circumstances and came without warning. While I have found that his conduct fell below the standard of care of a driver even in those conditions, I find that this conduct reflects a lesser degree of fault than is ordinarily the case in rear end collisions.

[153] Overall, I apportion 40% of Mr. Conarrore's indivisible damages to Mr. Tallack and 60% to the Xiao defendants.

QUANTIFICATION OF DAMAGES

Non-Pecuniary Damages

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

[155] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] 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).

[156] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[157] Mr. Conarroe must be placed in the position that he would have been in if not for the defendants' negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for another person. However, the defendants need not compensate the plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced anyway: *Athey* at paras. 32-35.

[158] With respect to mood disorders, the Supreme Court of Canada in *Saadati v. Moorhead*, 2017 SCC 28 at paras. 34-36, has clarified that the legal test for a compensable mental injury is no different than for finding a physical injury in that there is no need for proof of a specific diagnosis. It is sufficient that a mental or psychological harm or injury that was caused by the accident is established on the evidence. In this case, Mr. Conarroe has been diagnosed by two qualified psychiatrists with a DSM-V psychiatric injury of moderate severity: either major depressive disorder and generalized anxiety disorder together, or a diagnosis of PTSD that incorporates Mr. Conarroe's depressive and anxious symptomology. Both are serious and debilitating.

[159] Finally, a plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. The defence has the burden of proof on the issue of mitigation. This involves proving two elements: first, that the plaintiff acted unreasonably in not taking the steps that the defendants say ought to have been taken, and second, that the plaintiff's loss would in fact have been eliminated or reduced had the step been taken: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

Parties' Positions

- [160] Mr. Conarroe is seeking a non-pecuniary damages award of \$200,000.
- [161] The plaintiff has provided a series of cases for non-pecuniary damages for chronic pain that involve a diagnosis of depression and/or PTSD and a mild traumatic brain injury with awards in the range of \$200,000-\$250,000. These include *Felix v. Hearne*, 2011 BCSC 1236, where the court awarded \$200,000 in non-pecuniary damages to a plaintiff who was 44 years old at the time of the accident and who suffered from physical pain, PTSD, and depression that impaired her recreational activities, work and her relationships.
- [162] The same award was made in *Chowdhry v. Burnaby (City of)*, 2008 BCSC 1337, for non-pecuniary damages in relation to a plaintiff in his 60s who experienced similar injuries to Mr. Conarroe, including a mild traumatic brain injury.
- [163] In *Scoates*, this Court awarded \$250,000 to a plaintiff in his 30s whose career as an ambulance paramedic was also central to his identity and self-worth. He was left with permanent physical disabilities and chronic pain and was unable to return to his career. He also suffered an MTBI and continuing cognitive symptoms that were not specifically caused by the MTBI, but had a similar ongoing effect.
- [164] The defendants accept that the evidence in this trial establishes that Mr. Conarroe continues to suffer from physical and mental injuries caused by at least one of the accidents. They say, however, that not all of Mr. Conarroe's physical pain and psychiatric difficulties can be laid at the feet of the defendants given his pre-existing conditions. They also each seek to limit the non-pecuniary damages that are awardable against them to only the impact related to the specific accident they were involved in, each arguing that the impact of their accident was shorter term and that the other was primarily responsible for the longer term impact on Mr. Conarroe.
- [165] In this context, Mr. Tallack argues that the appropriate range for non-pecuniary damages that involved an MTBI but that resolved after approximately three years is \$70,000. The Xiao defendants argue that their divisible non-pecuniary damages relate only to an approximate one-year increase in symptoms over Mr. Conarroe's already significant 2015 Accident baseline and suggest an amount of \$50,000.

Determination

- [166] Given my finding that the non-pecuniary damages suffered by Mr. Conarroe in both accidents arise from indivisible injuries that have an ongoing impact on Mr. Conarroe's relationships, work life, recreation, and identity, the defendants' precedents are of less assistance.

- [167] I find on all the evidence that Mr. Conarro's injuries arising from both accidents have resulted in shoulder injuries, chronic pain and headaches, vestibular injuries affecting his balance and dizziness when moving in relation to other objects, one or more moderately severe psychiatric disorders, and some decrease in his cognitive abilities related to his chronic pain and psychiatric injuries. These have now been fairly long standing, but there is still some hope for improvement.
- [168] In addition, Mr. Conarro has suffered some injuries that have resolved since one or both of the accidents, including an MTBI.
- [169] These injuries have affected key relationships and sources of joy and meaning in his life, including his ability to work at his job and his relationship with his wife.
- [170] While the authorities cited by the parties are of assistance in establishing a range of damages, every case must, of course, be decided on its facts.
- [171] Generally, I consider that the plaintiff's cases are more similar to the severity of the mental injury and physical pain that Mr. Conarro has experienced as a result of the accidents. The impact on his mental health has been severe, and the accidents have negatively impacted key relationships in his life and his ability to work in a career that is important to his identity and self-worth. However, some reduction is appropriate to address his pre-existing pain and some pre-existing anxiety and PTSD symptomology, and my findings that Mr. Conarro continues to have some improvement and there is hope still for even further improvement.
- [172] I award Mr. Conarro \$180,000 in non-pecuniary damages.

Failure to Mitigate

- [173] I have also considered whether any amounts should be deducted from this award on the basis of a failure to mitigate, and I have found that they should not be.
- [174] Mr. Tallack says that Mr. Conarro failed to mitigate his losses by returning to work more than full time when a partial return to work was recommended in 2016.
- [175] While that is true, I am not convinced that his doing so has increased Mr. Conarro's losses. Overall, I am satisfied that Mr. Conarro's return to work at more than full time, even though it led to a resurgence of some symptoms, had the effect of substantially mitigating his overall losses to Mr. Tallack's advantage.
- [176] The Xiao defendants argue that Mr. Conarro failed to mitigate his losses after the 2018 Accident by delaying his participation in treatments, primarily recommended psychiatric treatments, that were recommended in the fall of 2019.

- [177] I am satisfied that Mr. Conarroe has begun cognitive behavioural therapy and is taking some anti-depressant medication. It was only a few months between those recommendations being made and the time of trial, and there will likely be a need for Mr. Conarroe to seek some clarification as to the two sets of psychiatric recommendations he has received and to move forward with those treatments.
- [178] However, while I do not consider that to be a mitigating factor, I do consider that the fact that these recommendations have been made and have yet to be fully implemented in his life provides for a greater degree of optimism than would otherwise be the case. I include this factor in my awards for damages.
- [179] The other area where the Xiao defendants argue that Mr. Conarroe has failed to mitigate is in relation to exploring accommodation or alternative employment opportunities, either within Lafarge or elsewhere. This argument relates primarily to Mr. Conarroe's claims for loss of future earning capacity, and that is where I will consider it.

Past Loss of Earning Capacity

- [20] 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: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [21] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, the plaintiff is entitled to recover damages for only his past net income loss. In exercising this discretion, I must keep in mind that the plaintiff is to be put back in the position he would have been in had the accident not occurred: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 185-186.
- [180] Mr. Conarroe need not establish earnings loss on a balance of probabilities--since what would have happened between the dates of the accidents and prior to the trial is essentially hypothetical, as are predictions regarding future losses. As stated in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

- [22] A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; and *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

Parties' Positions

- [181] Mr. Conarroe initially claimed \$350,000 for net past loss of earning wages with respect to both accidents up to the date of trial.

[182] The defendants say that this calculation is based on the earnings of co-workers who have typically earned substantially more each year than Mr. Conarro. As Mr. Conarro's position is a union one, the hourly rate and base expectations are the same for himself and all of his co-workers, but the evidence establishes that there are significant opportunities for overtime pay and rates. The defendants say that Mr. Conarro has historically not worked the same amount of overtime as these co-workers, and therefore their wages between 2015 and 2019 are not appropriate comparators.

Determination

[183] The evidence establishes that Mr. Conarro earned approximately \$100,000 in 2017, which was the only year since the 2015 Accident that he worked full time. He had never made more. I find that this \$100,000 amount is the best evidence of Mr. Conarro's earning capacity in the five years since the 2015 Accident and trial.

[184] The plaintiff says this figure is arguably low in that he earned this amount while still suffering from pain and in a truck that exacerbated that pain. That indicates that the substantially higher earnings of his co-workers who were lower on the seniority ladder than him in those years might have been a better indicator of his earning capacity in the absence of the accidents.

[185] I find that the \$100,000 figure is consistent with Mr. Conarro's relative earnings in relation to these two co-workers in previous years. While all make the same hourly wage pursuant to their collective agreement, the difference appears to be in the number of overtime hours that they take. I find that Mr. Conarro also has a history of occasional absences from work that would have depressed his previous earnings below these co-workers, and that history was based on pre-existing conditions that likely would have continued to result in lower earnings than theirs.

[186] Mr. Conarro has helpfully provided a chart of his past wage losses assuming without accident earnings of \$100,000 per year as follows:

Year

Without Accident earnings

Actual Gross Earnings

Estimated Gross Loss

Without Accident Employer

Pension Contributions

Actual Employer Pension Contributions

Estimated Pension Loss

+

Income Taxes

at 27%

-

EI

Premiums

-

Annual Net Loss Including Pension

2015

\$100,000

\$2,828

\$97,172

\$10,000

\$160

\$9,840

\$26,236.44

\$861

\$79,914.56

2016

\$100,000

\$33,047

\$66,953

\$10,000

\$3052

\$6,948

\$18,077.31

\$309

\$55,514.69

2017

\$100,000

\$102,972

0

\$10,000

\$9930

\$70

0

\$119

0

2018

\$100,000

\$42,241

\$57,759

\$10,000

\$3600

\$6,400

\$15,594.93

\$135

\$48,429.07

2019

\$100,000

\$693

\$99,307

\$10,000

Nil

\$10,000

\$26,812.89

\$847

\$81,647.11

2020

\$100,000

nil

\$356

Nil

Nil

Nil

0

0

\$356

\$265,861.43

[187] The income tax deduction, pension earnings, and other factors shown on this table are all non-controversial and supported by the evidence.

[188] On this basis I find that Mr. Conarroe's past loss of earnings due solely to the 2015 Accident is \$135,430 based on the net loss of earnings in 2015 and 2016 (\$79,915 + \$55,515). Mr. Tallack is solely responsible for this loss.

[189] On the basis of this base salary, Mr. Conarroe's loss of earnings between the 2018 Accident and trial is \$130,432, based on his net loss of earning in 2018, 2019 and 2020. This amount is indivisible and shall be apportioned in accordance with the respective degrees of fault I have found between the two defendants.

Diminishment of Future Earning Capacity

[190] A claim for loss of future earning capacity raises two key questions: (i) has the plaintiff's earning capacity been impaired by his injuries; and, if so, (ii) what compensation should be awarded for the resulting financial harm that will accrue overtime?

[191] The assessment of loss must be based on the evidence and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); and *Pett v. Pett*, 2009 BCCA 232. The plaintiff must establish that there is a real and substantial possibility of an income loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [192] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [193] Insofar as possible, Mr. Conarro should be put in the position he would have been in but for the injuries caused by the defendants' negligence: Lines at para. 185. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
- [194] There are two possible approaches to assess loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: Perren at para. 32. Where the loss is not measurable in a pecuniary way, the capital asset approach is more appropriate: Perren at para. 12.
- [195] The earnings approach involves a form of math-oriented methodology such as (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or (ii) awarding the plaintiff's entire annual income for a year or two: Pallos; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [196] The capital asset approach involves considering factors such as (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: Brown; *Gilbert* at para. 233; and *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56.
- [197] Though the capital asset approach is not a "mathematical calculation", the court must still set out the factual basis of the award: *Morgan* at para. 56.
- [198] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158,

2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79...

Parties' Positions

[199] Overall, Mr. Conarrore says that a fair award for his diminished future earning capacity is \$1,122,200. This loss is based on the following assumptions:

- a) That Mr. Conarrore's 2017 year when he was back at work and working more than full time but still experiencing some pain, low mood, anxiety, and vestibular difficulties is the best indicator of his ongoing earning capacity;
- b) That Mr. Conarrore will not be able to return to his previous, or any, employment; and
- c) That Mr. Conarrore would not have retired until at least age 67 were it not for the accidents.

[200] Mr. Conarrore says his losses should be awarded on the earnings approach rather than the capital asset approach because his losses are ascertainable.

[201] Those calculations, he says, should be based on the present value calculations prepared by the economist, Mr. Turnbull, which do not include negative labour market contingencies. He says such negative contingencies should not apply because the evidence establishes that Mr. Conarrore had 20 years seniority in a union position for a company with long term major contracts for institutional and government clients and more work than it has workers.

[202] He says that any negative labour market contingencies, even if they did apply, should be weighed against potential positive labour market contingencies, including increased hourly wages, the prospect of more work and more overtime.

[203] The defendants both argue that Mr. Conarrore has residual capacity to work that he has not exhausted or even explored. This goes to mitigation, but also to the possibility that he has residual capacity to work, even now, or at least after the six months to a year estimated by Dr. Neelakant for his psychiatric and physical symptoms to begin to respond to recommended treatments.

[204] They point to job descriptions and positions within Lafarge that he is apparently qualified for or close to being qualified for, such as safety positions or dispatch positions. While most dispatch positions are not union positions, and the safety officer positions are not unionized positions, Mr. Conarrore is not constrained from working outside of the union.

[205] The defendants also say that Mr. Conarrore could also seek other positions in the construction industry, or in other areas altogether.

- [206] If the present value tables are to be applied, the defendants say that labour market contingencies could be considered in accordance with the economist report of Mr. Szekely.

Determination

- [207] For the reasons stated above, I accept the \$100,000 figure as the most indicative of Mr. Conarro's pre-2018 Accident annual earning capacity. I also accept it as an appropriate basis for Mr. Conarro's loss of future earning capacity.
- [208] I am also satisfied that that figure already includes a number of negative contingencies that I have found are appropriate for Mr. Conarro, and it excludes a number of positive contingencies that might also have applied, including the potential for increases in his hours and wages as has been experienced by some of his co-workers.
- [209] I am satisfied that it is not appropriate to factor in additional labour market contingencies as described in Mr. Szekely's report. Mr. Conarro, with his high seniority union position of many years, is not as exposed to negative market contingencies as many other high school diploma holders are. I consider that the \$100,000 annual salary already takes into account Mr. Conarro's slightly lower participation rate in the labour market than some of his co-workers. I am also satisfied that as a union member with high seniority in an industry that currently has more hours of work than it has regular hours of employment, Mr. Conarro's earning position as a full time worker would have been secure for the next 10-15 years.
- [210] However, I am not convinced that Mr. Conarro has no future earning capacity in any form. Nor am I convinced that he would have worked beyond the vesting of his pension at 65.
- [211] With respect to his retirement age, I am convinced that Mr. Conarro loved his job and identifies still as a concrete truck driver. I am also convinced that there are others, including Mr. MacDonald, who are able to work past 65 despite physical limitations (including torn rotator cuffs).
- [212] However, Mr. Conarro's participation in the work force is less extensive than Mr. MacDonald's. Mr. Conarro also has underlying back pain and other characteristics that make him more cautious and I find less likely to work beyond the full vesting of his pension. I therefore set his most likely retirement date, absent the accidents, at 65.
- [213] In addition, Mr. Conarro impressed as a man who can work through pain (when not debilitated by depression and anxiety or PTSD). He was also articulate, personable, detail oriented, and determined. He has many characteristics that would recommend him to employers in construction and beyond.
- [214] Despite various medical reports that concluded that he is not currently competitively employable, I am not convinced that this condition is permanent or that Mr. Conarro is facing a competitive work placement situation. His own evidence is that the construction industry, and Lafarge's business in particular, is booming. With Mr. Conarro's aptitudes as recorded in Mr. Lawless' report, his functional abilities described in Mr. Gander's report,

his history of leadership, and his knowledge of safety and other aspects of concrete construction, I find that he has many attributes that would make him attractive to employers in this industry.

- [215] What is preventing him now, and will likely continue to prevent him, from participating is less his physical limitations and more his mental injuries, which include most significantly his depression (either as part of PTSD or as major depression), his VVM, and the cognitive deficits that he suffers as a result of the combination of his anxiety and depression and his chronic pain.
- [216] I find that he is most likely to remain disabled from work for another year, during which time he will have the opportunity to pursue recovery at a pain clinic (which I consider all parties will benefit from his participating in), cognitive behavioural therapy, and the further medication and other recommendations of the psychiatrists.
- [217] After a year, I find that his capacity to work will no longer be negligible. At that point, I find the capital asset approach to be the better one to determine his losses, and I would set this at a 50% loss overall for the ten years remaining to the date of his most likely retirement.
- [218] Using Mr. Turnbull's tables as a general guide, which include what I consider the appropriate discount figures, I award Mr. Conarro \$550,000 for his future loss of earning capacity.

Cost of Future Care

- [219] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-2015 Accident condition insofar as that is possible. When full restoration cannot be achieved, courts must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [31] The test for determining the appropriate award is an objective one. 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* at 84; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [220] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be able to be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74;

O'Connell v. Yung, 2012 BCCA 57 at paras. 55, 60 and 68-70.

- [221] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: Gilbert at para. 253.
- [222] 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.
- [223] Mr. Conarroee seeks \$50,000 for the costs of his future care. That figure is based on the calculations of Mr. Gander, who has investigated and set out the costs of the various treatments and recommendations of the medical experts in this trial, and the report of Mr. Turnbull that provides the present value of those costs in his report.
- [224] Mr. Tallack accepts those recommendations and those costs as appropriate. Mr. Xiao accepts these calculations with the exception of the cost of the private pain clinic, and the cannabidiol ("CBD") oil. These two items together make up more than half of Mr. Conarroee's proposed cost of future care award.
- [225] While I acknowledge that the private pain clinic is more expensive than what is available should Mr. Conarroee continue to wait for the public treatment, his window for obtaining the type of recovery he had in 2016 is closing as he approaches the two-year anniversary of the 2018 Accident. I therefore consider that this is an appropriate expense. Mr. Conarroee's ability to recover further is, in part, the basis for my other more limited damages awards.
- [226] With respect to the CBD oil, I understand that Mr. Conarroee uses this oil as part of his symptom management, but it is not prescribed, and there is no medical evidence to support its use in Mr. Conarroee's case. While expert evidence may not always be required for products where there is other evidence as to its effect or usefulness, I have insufficient evidence to support its necessity in this case, particularly given its total cost of over \$14,000. This is a substantial item in the overall cost of future care and is not justified on the evidence.
- [227] I award Mr. Conarroee \$36,000 for his cost of future care.

Special Damages

- [228] The defendants do not dispute Mr. Conarroee's special damages as at July 31, 2019 of \$15,350. Mr. Xiao says that he should only be responsible for those special costs incurred after the 2018 Accident, and I agree.

[229] Mr. Conarro's incurred \$2,843 in special damages prior to the 2018 Accident for which Mr. Tallack is solely responsible. The remainder \$12,507 shall be apportioned 40/60 in accordance with these reasons.

CONCLUSION

[230] In summary, I make the following awards:

- a) Non-Pecuniary Damages: \$180,000
- b) Past wage loss: \$265,862
- c) Future Earning Capacity: \$550,000
- d) Cost of Future Care: \$36,000
- e) Special Damages: \$15,350

Total: \$1,047,212

[231] Mr. Tallack is solely responsible for \$135,430 of Mr. Conarro's past wage loss and \$2,843 of the special costs award, from which the settlement amounts Mr. Conarro received from the BC Ferries settlement must be deducted. If the settlement amount exceeds these divisible damages, then the remaining settlement amount shall be deducted from the total indivisible award prior to apportionment.

[232] The indivisible losses shall then be apportioned, with Mr. Tallack paying 40% of that award, and the Xiao defendants responsible for 60%.

COSTS

[233] Generally, Mr. Conarro has been successful in both actions and would ordinarily be entitled to his costs. However, there were numerous instances where I found that Mr. Conarro's evidence in examination for discovery was untrue (often by his own admission). In addition, his allegations at the outset of trial as to the basis upon which Mr. Tallack was liable for the 2015 Accident were not made out. Both of these circumstances may have unnecessarily increased the cost of this litigation. Finally, there may be formal offers or other circumstances of which I am not aware.

[234] If the parties are able to settle costs as between them, then I encourage them to do so.

[235] However, I am prepared to hear submissions on costs if the parties are unable to agree. In that event, within 30 days of the release of these reasons the parties should file a request to appear before me for this purpose.

"Marzari J."

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