

CANADA / JUDGMENT

Dahlke v. Davidson

2023 BCSC 1884

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1884 Dahlke v. Davidson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dahlke v. Davidson,

2023 BCSC 1884

Date: 20231026

Docket: M187116

Registry: Vancouver

Between:

Kelby John Dahlke

Plaintiff

And

Heather Davidson

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraph 92 on October 31, 2023.

Before: The Honourable Justice Stephens

Reasons for Judgment

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A. Auja

Place and Dates of Trial:

Vancouver, B.C.

May 15-19, and May 23, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 26, 2023

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OVERVIEW

- [1] A little over six years ago, in the early evening of July 2017, the plaintiff's vehicle was hit by the defendant's vehicle when he was leaving a parallel parking spot on Centre Street in White Rock, British Columbia (the "Accident").

- [2] The plaintiff, Kelby Dahlke, was 29 years old at the time of the Accident and worked as a foreman in a construction company. He had some migraines before the Accident, but after the Accident, they got worse and then later dissipated back to pre-Accident baseline. He also experienced pain in his back and shoulder. He now works at about 70% capacity as compared to the worker he was before the Accident.
- [3] Liability is denied.
- [4] The plaintiff contends that liability should be divided 75% (defendant) - 25% (plaintiff), and his total claim for damages on this basis is approximately \$400,000. The defendant contends the plaintiff was 100% at fault for this Accident and also denies that the plaintiff has suffered any loss of earning capacity. The defendant contends the plaintiff's claim for damages should be assessed in the range of approximately \$32,000 to \$47,000 (subject to apportionment).
- [5] These are my reasons on liability and quantum.
- [6] For the reasons that follow, I apportion 60% liability to the plaintiff and 40% to the defendant, and I award the plaintiff damages of \$159,270.76.

BACKGROUND

The Plaintiff's Pre-Accident Circumstances

- [7] The plaintiff had a turbulent childhood growing up in Alberta, but in high school, he was taken in by his aunt in the Lower Mainland of British Columbia and cared for into his young adulthood years, living with his cousins.
- [8] The plaintiff was a hard worker and excelled as a framer in house construction. He started as a carpenter and was later promoted to foreman of a roofing company, where he was employed at the time of the Accident. At the time of the Accident, the plaintiff was working on a particularly challenging residential construction project, where he had significant responsibility, working extra hours.
- [9] Prior to the Accident, the plaintiff was physically active, playing hockey, jogging, and, at times, hiking with his friends. He had no difficulty with substance abuse.

The Plaintiff's Pre-Existing Medical Conditions

- [10] The plaintiff was a physically strong person, but did experience occasional migraines (two to four a year) which, when they occurred, could be debilitating and interfere with his work.
- [11] He had some injuries from sports but nothing of a serious nature.

The Accident

- [12] On Saturday, July 15, 2017, the plaintiff had gone to White Rock to watch a bike race.

- [13] He parked facing southbound adjacent to the curb on Centre Street between Pacific Avenue and Royal Avenue, closer to Royal Avenue.
- [14] Centre Street has curbside parking on the southbound side of the street, and there is also room for southbound through lane traffic.
- [15] When the plaintiff returned to his car to leave, he found that he was boxed in by vehicles in the front and back, and attempted to exit his parking spot in a reverse parallel park fashion. When I say "reverse parallel park fashion," I mean that he started to leave on the same path a driver would parallel park to go in, but in reverse so as to drive out forward to leave the parking spot. Since he was boxed in to the spot, his exit path required him to exit at an acute angle of approximately 45 degrees.
- [16] The Accident occurred on the plaintiff's exit from the parking spot into the southbound through lane on Centre Street. He was effectively T-boned by the defendant's vehicle while his vehicle was at a 45-degree angle, 60-80% into the road, when the defendant (with her children in the backseat) was travelling southbound on Centre Street, adjacent to the parked cars.
- [17] No airbags were deployed in the plaintiff's vehicle, but emergency vehicles were called. The defendant attended the hospital.
- [18] RCMP Constable Tam happened to be in the vicinity at the time. He had observed the Accident from down the street on Centre Street at Pacific Avenue and attended at the Accident scene. I find his evidence both credible and reliable. I deal with his evidence below.
- [19] How the Accident actually occurred is disputed between the parties. I deal with it below.

The Plaintiff's Post-Accident Circumstances

- [20] The plaintiff was sore after the Accident and went home and went to bed.
- [21] He went to work the following Monday on July 17, 2017, working 8.5 hours that day.
- [22] He also attended the doctor on July 17, 2017.
- [23] In the months following the Accident, the plaintiff's pre-existing migraines worsened. He experienced one event in the fall of 2017 at a grocery store when he collapsed and went to the hospital. His migraines worsened but have now dissipated and returned to baseline. At the time of the trial, he had recently experienced a migraine, but had not had one for about six months before that.
- [24] After the Accident, he experienced back, shoulder, and shoulder blade pain. His shoulder pain has now dissipated, but his shoulder blade pain flares up when he has a migraine. The worst pain now is in his lower back: if he has a vigorous day performing physical labour, he feels it in his back.

- [25] The plaintiff began drinking to excess for a period of time after the Accident from mid-2018, mixing with muscle relaxants, to try to cope with his pain. He no longer does so. Contrary to one of the assumptions in Dr. Armstrong's report, I find that the plaintiff did not, and does not, misuse benzodiazepines.
- [26] The plaintiff has engaged in physiotherapy treatments since the Accident, initially without improvement, but since 2019, he has worked with a different physiotherapist which has helped his pain significantly. He had what he described as a "breakthrough" in his physiotherapy-assisted recovery in about 2020, which has significantly improved his general fitness and pain management. For example, he began running again.
- [27] The plaintiff had a second minor car accident in September 2017 when he swerved to avoid a truck and hit the median of the road. I find this incident did not cause or contribute to the injuries from the Accident.
- [28] I find that the plaintiff is stoic. He is independent and modest; and he sets high standards for his own work performance and leadership to those working under him. He has worked through the pain following the Accident. The plaintiff strongly desires to make his own way in life, not quit, and not let others down. He was, and remains, determined to work through and persevere, something which was confirmed by the evidence of Steve Lindberg and other witnesses at trial.
- [29] In 2018, the plaintiff started a new business with a friend in tiling, but that did not work out, and he returned to framing as a foreman six months later.
- [30] In October 2022, he again switched jobs, this time from framing to landscaping, where his job comprised of significant physical labour.
- [31] Mr. Lindberg and others with whom the plaintiff worked testified at trial about the plaintiff's work level pre- and post-accident. The plaintiff performs stretches before starting work, and he is diligent in his physiotherapy exercises to mitigate risk of pain. Yet, I find that the plaintiff works at about 70% physical capacity in his work as compared to prior to the accident. Even so, he remains a good framer and a capable and valuable worker. One of his former co-workers, Rylie Fletcher, testified that the plaintiff is among the best foreman-framers he has seen.

EXPERT EVIDENCE

The Plaintiff's Expert Witnesses

Nicholas Altieri - Functional Capacity

- [32] Nicholas Altieri was qualified to give opinion evidence as an occupational therapist capable of providing opinion evidence in regard to functional capacity and cost of future care. He opined that Mr. Dahlke has functional limitations that negatively impact his ability to work as a carpenter foreman. I accept his evidence.

[33] Mr. Altieri opined that the plaintiff is "not suited to Heavy strength work or physically laborious jobs or home tasks (i.e. moving heavy boxes, moving furniture)" and "will be required to limit his participation in more physically demanding activities such as scrambling (intense hiking), running/jogging long distances, and ice/hockey to avoid symptom aggravation and maintain his work participation."

[34] He opined:

Mr. Dahlke does not meet the full individual physical demands of his job as a Carpenter and Foreman. While he meets the sedentary supervisory/Foreman duties of his jobs, he does not meet the full range of repetitive Heavy strength demands associated with his job. He specifically is not suited to the repetitive lifting from low levels, or awkward lifting such as when lifting sheets of plywood to build roofs, requiring a combination of stooping and outer range reaching. He also is not suited to the sustained low level (moderate to extreme degree) stooping required when working framing (floors, roofs or walls). There is also evidence that the constant standing and walking required, combined with the postural demands contribute to symptom aggravation, symptom flare ups and results in deterioration of his work tolerances.

[35] Mr. Altieri further opined that: "It is my opinion, based on the results of testing, that labor intensive jobs including working as a Carpenter, exceed Mr. Dahlke's current functional abilities, and will continue to involve some degree of symptoms aggravation, symptoms flare ups requiring time off from work, and requiring him to continue to limit avocational activity to better manage his symptoms and maintain his work participation." Accordingly, he opined that Mr. Dahlke "is better suited to work that requires reaching between waist and chest level with Light-Medium strength demands, only occasional short periods of stooping activity and limiting his exposure to low level activity, including lifting from the floor, in order [to] better manage his symptoms."

[36] The defendant submitted that since Mr. Altieri made some mistakes in his report - e.g., he made a typo in the date of a doctor visit and used another name in the report instead of the plaintiff's name - his report should be given no weight. I reject that submission. Mr. Altieri's typos were unfortunate, but I did not find that the errors undermined the confidence the Court ought to have in his opinions. To the contrary, I found Mr. Altieri to be a knowledgeable expert witness and his report to be of assistance.

Dr. John B. Armstrong - Chronic Pain

[37] Dr. John B. Armstrong was qualified to give opinion evidence about complex chronic pain and capable of providing opinion evidence in the diagnosis, prognosis, and management of injuries following trauma.

[38] Dr. Armstrong opined that the plaintiff experiences:

- a) A chronic axial/para-axial myofascial (soft tissue) disorder;

- b) Sacroiliac joint dysfunction, SPR [Spinopelvic ring] instability and subluxation, SPRD [Spinopelvic ring distortion], and the malalignment syndrome;
- c) Adjustment Disorder with mixed anxiety and depressed mood (DSM-5: F43.23);
- d) Somatic Symptom Disorder (DSM-5: F45.1) with predominant pain, persistent and moderately severe;
- e) Polysubstance Use Disorder; and
- f) A complex chronic pain disorder.

[39] I find that Dr. Armstrong's opinion of the plaintiff experiencing a Polysubstance Use Disorder was based on an incorrect assumption and do not accept this portion of his expert report, and I accordingly give it less weight. I do place some weight on his other diagnoses, although since he did not have Vancouver Coastal Health physiotherapy records starting in 2020 (and after the plaintiff's physiotherapy breakthrough), I give somewhat less weight to his opinion as to the plaintiff's current physical state.

[40] Dr. Armstrong opined that the Accident likely caused the plaintiff's disorders, although he was not expressly qualified to provide opinion evidence on the matter of causation. I do not rely on his opinion in this regard.

[41] He further opined that: "For the foreseeable future, absent the success of the additional care I have recommended, it is certain (100% chance) Mr. Dahlke will continue to experience diminished physical capacity, owing to his myofascial disorder, SPRD, malalignment syndrome, and paraspinal, hip girdle, pelvic floor and core weakness, problems that are all related to his underlying chronic sacroiliac joint instability and malalignment syndrome." He opined that "the prognosis for achieving a reduced pain state is extremely guarded" and "his outlook for further recovery remains very guarded."

[42] The defendant contends that Dr. Armstrong is an advocate and his report should be given no weight. I reject that submission. Dr. Armstrong did reference three previous court decisions in his report in which he says he gave evidence, which I did not find to be of assistance when considering his opinion. However, neither his report nor his evidence rendered his expert evidence of no value on the ground he was an advocate. I also find that Dr. Armstrong relied on certain assumptions which were not proven in evidence, and this, I find, did diminish the weight of his evidence, but does not wholly detract from its evidentiary value.

The Defendant's Expert Witness

Dr. Julian de Ciutiis - Physical Medicine and Rehabilitation

[43] Dr. Julian de Ciutiis was called as a witness for the defence. He was qualified to give opinion evidence as an expert in physical medicine and rehabilitation, with the ability to diagnose, provide prognoses, opine on causation, and make recommendations with respect to injuries.

[44] He opined that the following injuries were attributable to the Accident:

- Post-traumatic myofascial neck pain.
- Right shoulder pain in keeping with imaging confirmed subacromial bursitis - fully resolved.
- Mechanical lower back pain with the 'pain generator' (in medical terms, the nociceptive contributor) being unclear in this case. This diagnostic challenge is very common in clinical practice.
- Driving-related anxiety - mainly resolved.
- Right periscapular pain, myofascial with trigger point appreciated in the trapezial and levator scapulae musculature.
- Initial worsening of pre-existing migrainous-type headaches. Should a neurologist render an opinion on this matter, I would defer to that physician.
- Earlier post-accident depression, since resolved.

[45] He opined that the plaintiff experiences the following which are not attributable to the Accident:

- Ongoing features of anxiety and depression, which complicate and worsen Mr. Dahlke's overall pain report.
- Query resolving right ulnar nerve compression.
- Mild acromioclavicular joint degenerative changes.

[46] As to causation, Dr. de Ciutiis opined that "Absent the subject accident, he probably would not have experienced mechanical low back pain in the time period in which he did. He may have, however, given his physically demanding job, experienced [an] element of back pain at some point."

[47] He stated that "Mr. Dahlke's mechanical lower back pain is probably secondary to the subject accident," and by "secondary," he meant causally related.

[48] In Dr. de Ciutiis' opinion, "the subject accident probably caused an initial worsening of Mr. Dahlke's migrainous-type headaches." Recognizing he is not a psychiatrist, he further opined that:

the accident has clearly adversely affected Mr. Dahlke's emotional well-being, particularly early on. His mood is currently at his pre-morbid baseline. It is well known that pain, anxiety, and depression are all mutually perpetuating and exacerbating, which probably applies to this case.

[49] As to prognosis, Dr. de Ciutiis opined that "a complete recovery from the subject accident is of low probability." He is of the view that: "He will be able to work at his current job, full time, in the foreseeable future recognizing there is a fair chance that a lengthy work shift will aggravate Mr. Dahlke's symptoms." This opinion is consistent with Mr. Dahlke's evidence that he can still do hard physical labour but feels pain and discomfort after a hard day's work.

[50] Dr. de Ciutiis states that his "conclusions are based on reasonable medical certainty."

[51] I find Dr. de Ciutiis to be a knowledgeable and impressive witness. I find his evidence to be consistent with the plaintiff's testimony as to his pain symptoms and experiences. I rely on his evidence in my findings in these Reasons.

POSITIONS OF THE PARTIES

The Plaintiff's Position

[52] The plaintiff says the defendant is 75% responsible for this Accident. He contends that he has suffered approximately \$525,000 in damages and he should be awarded 75% of this amount, in the order of approximately \$400,000. He does not claim for past loss of earning capacity, but does claim for future loss of earning capacity which he values at 20% of his potential future earning capacity until retirement.

The Defendant's Position

[53] The defendant denies any liability for the Accident, contending the plaintiff was 100% at fault. If the defendant is liable, however, the portion of her responsibility should not exceed 10%, and she says that a fair and reasonable compensation to the plaintiff for injuries he sustained in the Accident is between \$32,000 and \$47,000 (subject to apportionment). Among other things, the defendant contends that "it is unlikely that a future event will occur that could lead to a loss of capacity [of the plaintiff]."

ISSUES

[54] The issues in this case are:

1. Is the defendant liable for the Accident that occurred on July 15, 2017, and, if so, what apportionment of fault or responsibility is appropriate?
2. Did the defendant's negligence in the Accident cause the plaintiff's injuries (and, if so, which ones)?
3. If so, what is the quantum of damages payable for:
 - (a) Non-pecuniary damages;
 - (b) Loss of future earning capacity;

- (c) Cost of future care;
- (d) Home maintenance; and
- (e) Special damages?

DISCUSSION AND ANALYSIS

Credibility

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

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

The Plaintiff

[56] The plaintiff was a forthright witness who was direct in his answers, but his memory, especially for dates of events, was not good. He acknowledged in his testimony that he is not good with exact dates. He answered several questions with the caveat that he was not sure. His memory was sometimes hazy. I find he is an honest witness, but his evidence as to certain events lacks reliability.

[57] The defendant relied on alleged inconsistencies between the plaintiff's testimony and certain of his medical records, and also relied on the plaintiff's medical records more generally to make arguments defending any liability and causation for the plaintiff's injuries. But, I do not place much weight on these records, since medical records are not always reliable evidence of the existence, or non-existence, of injuries: *Edmondson v. Payer*, 2011 BCSC 118 at paras. 34-37, aff'd 2012 BCCA 114.

- [58] However, the plaintiff testified that the police officer at the scene did not ask him about his driver's side mirror, which is contrary to Constable Tam's evidence that he did. I find Constable Tam to be a credible and reliable witness and accept his evidence on this point. That the plaintiff did not recall having a discussion with Constable Tam after the Accident about the driver's side mirror, when I find it took place, detracts from the reliability of the plaintiff's testimony.
- [59] Nevertheless, I find that the plaintiff is a stoic and forthright individual. I further find that the pain he has experienced after the Accident has affected him significantly, and he has been attentive to the type and nature of his pain. I find his description of the nature and extent of his pain and discomfort after the Accident to be credible.

The Defendant

- [60] I find the defendant's evidence unreliable. The defendant was defensive and at times evasive in her answers on cross-examination. She commonly conflated confident views about what she actually recalled at the time of the Accident with her inference of what would have probably happened at the time in certain respects. She said several times in her testimony that she was a careful driver and had "roadstar" status, both in direct response to questions but also gratuitously. However, the defendant's views of her own driving ability and her roadstar status do not assist me in determining what happened on the day of the Accident. Several of her answers on discovery were different from her evidence at trial. In general, the defendant purported to have a good recollection of the relevant events, when I find she did not.
- [61] In addition, the defendant endorsed a photograph of the plaintiff's vehicle after the Accident (still shots from a video she took, marked as Exhibit 14, Tab 3) as being taken about a few minutes after the Accident when the plaintiff's vehicle had not been moved from the position of the Accident. However, I find that the position of the plaintiff's vehicle shown in this Exhibit 14, Tab 3 photo was, in fact, taken after the plaintiff's vehicle had been moved and was in a different position in the southbound through lane of the Centre Street, particularly when compared with another photo (Exhibit 14, Tab 4, L4-3) which I find accurately shows the acute 45-degree angle of the plaintiff's vehicle immediately after the accident when still in contact with the defendant's vehicle. That the defendant testified about what I find to be an incorrect description of what was shown in the photograph at Exhibit 14, Tab 3 detracts from her credibility.
- [62] I find that both the plaintiff and defendant were trying to give correct evidence at trial, and they were both honest witnesses. However, both lacked reliability on material aspects of their evidence. As a consequence, I have considered other independent evidence with respect to what happened on the day of the Accident.

Collateral Witnesses

- [63] Several other witnesses also testified: friends and co-workers of the plaintiff, and the plaintiff's aunt. I find all of them credible.
- [64] Constable Tam of the RCMP, a witness to the accident, also testified. I find his evidence to be credible. He was dispassionate, measured, careful, and precise in his answers. He has experience observing accident scenes and observing events. I find him to be a reliable and credible witness at trial and place significant weight on his testimony.

The Accident on Centre Street

- [65] The parties do not have the same account of how this Accident occurred. There are two competing versions of events.
- [66] The defendant says the plaintiff lurched from a straight parked position on a 45-degree angle into her path on the road and hit her car, with no time for her to react. Her position is that she has no legal responsibility for the accident.
- [67] The plaintiff, by contrast, says he manoeuvred his car out into the road at a 45-degree angle, was stationed there partly in the road completing his exit from the parking spot and visible to oncoming traffic. He contends that the defendant simply hit him, not paying due care for hazards on the road. He accepts some portion of liability but contends it should be 75%-25% (defendant-plaintiff).

Findings About the Accident

- [68] Considering all the evidence, I conclude the Accident happened this way, and I make the following findings.
- [69] The accident occurred at about 7:40 p.m. It was still light - dusk. Visibility was good.
- [70] The plaintiff's car was boxed into his parking spot when he returned to leave. His car was a standard transmission.
- [71] He manoeuvred his car at a 45-degree angle to the left, edging it out, in order to leave the parking spot in a reverse parallel park style.
- [72] Centre Street had through traffic. It was a busy night; there were some road closures in the area.
- [73] Two vehicles travelling southbound on Centre Street stopped to give the plaintiff an opportunity to get out of his parking spot. He waved them both on.
- [74] The plaintiff's car was thus visible to southbound through traffic; he had his blinker on, and the two other vehicles saw him.
- [75] The plaintiff checked his rear-view mirror and shoulder checked, and positioned his car at 45 degrees in order to exit the parking spot.

- [76] He then lurched out left into the southbound through lane. Constable Tam testified that he saw the plaintiff's car leave the spot and enter the southbound traffic lane quicker than a car would normally exit a parking spot, and I find this is so.
- [77] At the moment the plaintiff lurched out into the southbound through lane, the defendant was driving southbound on Centre Street, travelling adjacent to parked cars on her right.
- [78] The defendant was distracted when the plaintiff lurched out into Centre Street. The plaintiff took obvious steps to leave a parking spot and enter the through lane, but the defendant did not initially notice him. I find that it is more likely than not the defendant was distracted momentarily while driving.
- [79] When the plaintiff lurched out into the road at a 45-degree angle, 60-80% out into the road across the defendant's path, he then stopped. He looked left over his shoulder and saw the defendant coming at him and could tell she was distracted. He then braced for impact.
- [80] The defendant did not react immediately after the plaintiff entered the through lane. She reacted late, then braked hard - but too late to avoid impact.
- [81] All this happened just as Constable Tam had executed a right-hand turn from Pacific Avenue onto Centre Street, was proceeding southbound down Centre Street behind the defendant. He was scanning to his left, patrolling the area, and, in his right peripheral vision he witnessed the accident. He saw, in his peripheral view, the plaintiff's car lurch out and heard the crunch of metal when impact occurred.
- [82] When the defendant hit the plaintiff, her front passenger bumper collided with the plaintiff's driver's side door at bumper level akin to a T-bone fashion (there was no contact between the defendant's car's front bumper and the plaintiff's driver's side front bumper).
- [83] The defendant T-boned the plaintiff's vehicle, with the plaintiff being at a 45- degree angle to the defendant's vehicle. The 45-degree angle of the plaintiff's exit from the moment of impact is evidenced by the photograph at Exhibit 14, Tab 4, L4-3, which I rely on in part in my findings.
- [84] The defendant was distressed, having two children in the car. She took immediate steps to remove her children from the car and place them in the care of emergency workers who had attended the scene. Doing so was an understandable and appropriate step in the circumstances.
- [85] The plaintiff remained conscious but stunned by the force of the collision which had occurred on the driver's side, and which had significantly damaged his driver's side door. He remained in the car until Constable Tam approached his vehicle to question him.

Did the Plaintiff Have a Driver's Side Mirror at the Time of the Accident?

- [86] Constable Tam performed a search of the Accident scene to determine if there was any obvious cause of the Accident.

- [87] After the Accident, there was no driver's side reflective mirror in the associated housing for the plaintiff's driver's side mirror.
- [88] I find that the plaintiff was without an operable driver's side mirror on his vehicle before the Accident occurred.
- [89] Constable Tam was on the scene immediately and performed a search for the plaintiff's driver's side mirror after the Accident and could not find it on the ground or in the area. The driver's side mirror housing was not damaged in the collision. Constable Tam's evidence is consistent with the defendant's evidence that she could not see any driver's side mirror (or broken glass) on the ground after the Accident.
- [90] I find Constable Tam's evidence credible. The plaintiff said his driver's side mirror was in place before the Accident. But the evidence is equally balanced on this point. I find that, on the evidence before me, the plaintiff has not proven on a balance of probabilities that he had a driver's side mirror in place at the time of the Accident.

The Defendant's Position that the Plaintiff Entered Her Lane and Hit Her

- [91] The defendant contended, both in submissions and in her testimony, that instead of her hitting the plaintiff's vehicle, the plaintiff had entered her lane and hit her vehicle. She described the accident in a manner akin to a situation where two cars are travelling parallel at a similar speed down a street, and one car executes an unexpected lane change into the adjacent lane, cutting off the adjacent car and hitting it.
- [92] However, I find that did not happen. The plaintiff moved from a parked, stopped, position, from a parking spot on the side of the road and entered an adjacent through lane to leave a parking spot. I do not find it plausible that the plaintiff accelerated so quickly from a completely stopped position in a parking spot that he then struck the defendant while she was travelling by. The plaintiff was visible, and he had shoulder checked. Two other vehicles had seen him trying to leave the spot. He exited his parking spot hastily, but he did so with sufficient time for the defendant, if she was keeping a lookout for parked cars which may be leaving, to brake to avoid impact. She was not looking out diligently and was distracted, and she braked late; the collision ensued.
- [93] In making these findings, I have placed weight on the photographic evidence of the Accident scene and placed significant weight on the independent testimony of Constable Tam, who witnessed the Accident and gave evidence at trial, which I find is good evidence of what transpired. I also rely on circumstantial evidence to determine how the Accident occurred -- *Davis v. Jeyaratnam*, 2022 BCCA 273 at paras. 61-63 - including the 45-degree angle of the plaintiff's car at the time of the collision, and the fact that two other drivers on Centre Street had been able to see the plaintiff in the process of exiting his parking spot.

[94] The defendant contended that the Court should draw inferences from the paint scrape markings and car damage shown on certain post-Accident photos to find that the plaintiff's car was still moving at the time of impact with her car. The defendant contended that this photographic evidence proves that the plaintiff hit her, not the opposite. However, I decline to use the photographs in this way to draw this inference. To do so would be to use the photos to seek to prove too much. There was no expert evidence tendered as to the inferences if any to draw about paint scrapes associated with the damage. The inference the defendant asks the Court to make is one that, in my view, goes further than would be appropriate to reconstruct this Accident.

Findings Regarding the Plaintiff's Accident-Related Injuries

[95] I accept the evidence of Dr. de Ciutiis and find that, as a result of the accident, the plaintiff experienced:

- Post-traumatic myofascial neck pain;
- Right shoulder pain in keeping with imaging confirmed subacromial bursitis;
- Mechanical lower back pain;
- Driving-related anxiety - mainly resolved;
- Right periscapular pain, myofascial with trigger point appreciated in the trapezial and levator scapulae musculature;
- Initial worsening of pre-existing migrainous-type headaches; and
- Post-accident depression, since resolved.

[96] Dr. de Ciutiis' evidence is not inconsistent with Dr. Armstrong's evidence in material respects as to the plaintiff's physical injuries. I rely on Dr. Armstrong's evidence to the extent of finding that the plaintiff experienced sacroiliac joint dysfunction as a result of the Accident.

[97] The plaintiff's pain now is mostly in his lower back, other than recurrent shoulder blade pain when he has a migraine coming on.

Liability and Apportionment for the Accident

[98] Causation is established where a plaintiff demonstrates on a balance of probabilities that the defendant caused or contributed to their injury. As explained in *Chappell v. Loyie*, 2016 BCSC 1722 at paras. 4-5:

Causation is established where the plaintiff proves on a balance of probabilities that the defendant caused or contributed to his injury. This general "but for" test is set out in *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 SCR 458 and confirmed in *Resurface Corp. v. Hanke*, 2007 SCC 7. This test does not require scientific precision; causation is a question of fact that may best be answered by applying ordinary common sense: *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2

SCR 311 at 328. Moreover, the plaintiff does not have to establish that the defendant's negligence was the sole cause of the injury. At para. 17 of *Athey*, the court stated:

There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

Therefore, even where there are other potential non-tortious causes of an injury, such as degenerative changes, the defendant will still be found liable if the plaintiff can prove that the accident caused or contributed to the injury. The contribution must be material, in the sense that there is a substantial connection between the accident and the injury, beyond a *de minimus* range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.

[Emphasis in original.]

[99] The parties relied on s. 144 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 ("MVA"), which they contend applied to the other:

Careless driving prohibited

144 (1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
 - (b) without reasonable consideration for other persons using the highway, or
 - (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
- (2) A person who contravenes subsection (1) (a) or (b) is liable on conviction to a fine of not less than \$100 and, subject to this minimum fine, section 4 of the Offence Act applies.

[100] The Court of Appeal has confirmed that s. 144 is relevant to a breach of the standard of care in *Helgason v. Rondeau*, 2023 BCCA 339 at para. 23:

Although the MVA is not exhaustive of the duty of care owed to other motorists, generally a breach of the provisions of the MVA will constitute a breach of the standard of care expected of a driver: *Ormiston Insurance Corporation of British Columbia*, 2014 BCCA 276 at para. 14, leave to appeal ref'd, 36067 (15 February 2015); *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 18, 21. Relevant to this appeal are ss. 158 and 162 of the MVA, which I have already excerpted, and s. 144

[101] The defendant further relied on ss. 169, 170, and 171 of the MVA. Section 169 provides:

Starting vehicle

169 A person must not move a vehicle that is stopped, standing or parked unless the movement can be made with reasonable safety and he or she first gives the appropriate signal under section 171 or 172.

- [102] In addition to the provisions of the MVA, every driver owes a common law duty of care to other drivers. The provisions of the MVA do not displace this common law duty of care: *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 18-21.
- [103] Further, drivers are entitled to expect other drivers to obey the rules of the road; that is, they are not required to anticipate another driver's negligent manoeuvre: *Prosegger v. Comer*, 2021 BCSC 2172 at para. 60, citing *Ali v. Fineblit*, 2015 BCSC 1494 at para. 20.
- [104] As to the apportionment of liability, I was referred to ss. 1 and 2 of the Negligence Act, R.S.B.C. 1996, c. 333:

Apportionment of liability for damages

- 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

Awarding of damages

2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:

- (a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;
- (b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;
- (c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;
- (d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess.

[Emphasis added.]

- [105] *Pruett v. Robert*, 2023 BCSC 49 at para. 106 describes the process of apportioning liability:

In determining contributory negligence, the court is not to assess the extent to which the loss may be said to have been caused by the conduct of each. Rather, the task is to assess the respective blameworthiness of the parties. Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at paras. 45-46; *Bradley [v. Bath]*, 2010 BCCA 10] at para. 24. If the court is unable to determine the degrees of fault, liability must be apportioned equally: *Negligence Act*, s. 1(2).

See also *Matkin v. Hogg*, 2015 BCSC 560 at paras. 65-67.

[106] I find that the Accident was caused by the fault of both parties. The plaintiff lurched awkwardly and abruptly at a 45-degree angle out into the southbound lane from his parking spot, relying on a shoulder check and without a functioning driver's side mirror (his rear-view mirror did not assist him in seeing oncoming traffic in the southbound lane since he was positioned at a 45-degree angle to the curb).

[107] However, the defendant was distracted and reacted late to the plaintiff's entry to the southbound lane.

[108] I find that the plaintiff's action moving his vehicle in order to exit from the parked position could have been made with reasonable safety and he did give a signal, and he did not contravene s.169 of the MVA.

[109] However, both parties drove without due care and attention, contrary to s. 144 of the MVA. The defendant's distracted state caused or contributed to the accident occurring. But for her negligence, the Accident also would not have occurred.

[110] However, I do not apportion liability equally; instead, I apportion it 60% to the plaintiff. I find the plaintiff is more at fault because he lurched awkwardly from his curbside parking spot: Constable Tam described him moving out more quickly than he would normally see a vehicle leave a parallel parking spot, and I find this is so. And in addition, the plaintiff was without a driver's side mirror.

[111] In answer to issues 1 and 2 stated above, I find the defendant's negligence was a cause of the plaintiff's injuries, and I apportion liability for the Accident at 60% to the plaintiff and 40% to the defendant. I find that the plaintiff's injuries were not caused by another accident or the plaintiff's lifestyle.

Assessment of Damages

[112] In assessing damages, my task is to place the plaintiff in the position they would have been in if the defendant had not been negligent--no better or worse: *Jenkins v. Casey*, 2022 BCCA 64 at para. 26, leave to appeal to SCC ref'd, 40203 (9 February, 2023), citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 32-35, 1996 CanLII 183. I will first set out the principles informing damage quantification, as laid out in the 2021 trilogy of cases. Then, I assess non-pecuniary damages, loss of earning capacity, and cost of future care.

2021 Trilogy Principles: Hypothetical Future Events

[113] Where quantification of losses from an accident involves a hypothetical future event or events, this Court's analysis is governed by the principles established in a trilogy of cases that were decided in 2021: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The trilogy consolidates earlier principles and is foundational for a proper analysis of quantification of personal injury losses: *Brown v. Ponton*, 2022 BCSC 2248 at para. 71.

[114] In personal injury cases, a court is confronted not simply with what has happened in the past but must also assess a plaintiff's "without-accident" future prospects. The court is necessarily faced with an assessment of loss where the damages analysis is attended by hypothetical events.

[115] The organizing principle of damage quantification is to put the plaintiff in the same financial condition they would have been in had the accident not occurred. The Court's central task is to compare the likely future of the plaintiff's working life if the accident had not occurred with their likely future working life after the accident: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 33, citing *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. The degree of impairment to the plaintiff's earning capacity thus depends on the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue: *Gregory* at para. 32.

[116] At law, a hypothetical event may be taken into consideration if there is a "real and substantial possibility" of an event occurring and not "mere speculation": *Grewal v. Naumann*, 2017 BCCA 158 at para. 48, *Goepel J.* dissenting but not on this point. A real and substantial possibility is a risk that is "measurable": *Dornan* at paras. 63-64; *Rab* at paras. 27-28. This standard of proof is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative: *Ploskon-Ciesla* at para. 15, citing *Gao v. Dietrich*, 2018 BCCA 372 at para. 34. A "measurable" risk is one where there is evidence: *Dornan* at paras. 64, 79.

- [117] Hypothetical events can be relevant to assessing contingency deductions: Dornan at paras. 62-64. A contingency deduction can be applicable to non-pecuniary damages, loss of future earning capacity, or past loss of income: Dornan at paras. 143-145, 174-178. Hypothetical events are also relevant to assessing the existence and quantum of past or future loss of earning capacity, as I address further below: Rab at para. 28.
- [118] A proper analysis of a hypothetical event, as set out in Dornan, proceeds this way: first, what happened to the plaintiff in the past? This is assessed on a balance of probabilities standard: para. 94. Second, the court must consider what might happen to the plaintiff in the future. The trial judge must consider the possibility of an event occurring only if there is a "real and substantial possibility" (not mere speculation): paras. 63, 94. In doing so, the court can consider evidence of past facts proven on a balance of probabilities, as well as common sense: paras. 94, 105, 122. Finally, if the hypothetical event has a real and substantial possibility of occurring, the court must consider the relative likelihood of that possibility: paras. 64, 95, 105.
- [119] The court must be mindful that the existence of a specific contingency must be proven based on sufficient evidence "capable of supporting the conclusion that the occurrence of the contingency is a real and substantial possibility, as opposed to a speculative possibility": Lo at paras. 51-52, 74-75, 77-79; see also Rab at para. 50 (evidence not capable of establishing a measurable risk of a major depressive disorder occurring in the future even without an accident). As I stated in Pascuas v. Leung, 2022 BCSC 1469, "[i]t is not enough to say that because something happened once it could happen again; in the absence of a measurable risk arising on the evidence, that is a matter of speculation": para. 64.

Non-Pecuniary Damages

Legal Framework

- [120] As summarized by Justice Horsman (as she then was) in Kim v. Baldonero, 2022 BCSC 167:
- [79] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those he will likely suffer in the future: Tisalona v. Easton, 2017 BCCA 272 at para. 39 [Tisalona].
- [80] In Stapley v. Hejslet, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100 [Stapley], the Court of Appeal listed common factors influencing an award of non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. Generally, stoicism should not penalize the plaintiff.

[81] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured in part against awards made in comparable cases. However, other cases only serve as a rough guide as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The amount of the award does not depend only on the seriousness of the injury, but rather also on the loss in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.

[Emphasis added.]

Discussion

[121] The plaintiff seeks \$160,000 in non-pecuniary damages, relying on *Enns v. Corbett*, 2020 BCSC 1680; *Slater v. Gorden*, 2017 BCSC 2265; *Palani v. Lin*, 2021 BCSC 59; *Gill v. Borutski*, 2021 BCSC 554; and *Anderson v. Steffen*, 2021 BCSC 2248.

[122] The defendant submits that an appropriate award for non-pecuniary damages ranges between \$32,000 to \$47,000, subject to apportionment. She relies on *Harle v. Williams*, 2020 BCSC 1684; *McBurney v. Levesque*, 2019 BCSC 1897; and *Erwin v. Buhler*, 2017 BCSC 362. The defendant says that the plaintiff's injuries are less severe than in these cases. She submits that the Accident caused minor and short-lasting discomfort to the plaintiff's left cervical spine, left shoulder, and left low back areas, as well as a temporary increase in frequency of his pre-existing migraines. In closing submissions, the defendant also referred the Court to *Brown*

[123] I have found the plaintiff credible as to the description of his pain. I find his evidence to be reliable in this regard. With reference to the *Stapley v. Hejslet*, 2006 BCCA 34, factors set out at para. 46, I find that:

- (a) The plaintiff was 35 years old at the time of the trial;
- (b) The plaintiff suffers from lower back and intermittent right shoulder pain as a result of the Accident;
- (c) The plaintiff experienced aggravated symptoms of migraines caused by the accident, although they have subsided;
- (d) The plaintiff's condition is unlikely to improve in a significant way in the future;
- (e) The plaintiff experienced post-accident depression that has since subsided;
- (f) The plaintiff has been able to continue to work but at a reduced level, which is at about 70% of his pre-Accident level; The plaintiff experiences discomfort after a hard day's work; and
- (g) The plaintiff has suffered, and will likely continue to suffer, a diminished enjoyment of his life, including in his work and recreational activity.

- [124] I find the cases relied on by the plaintiff and defendant to not be of assistance to the plaintiff's situation.
- [125] However, based on my consideration of the Stapley factors, I find Brown is a helpful case in assessing the plaintiff's non-pecuniary damages. There are similarities between Brown and this case: in Brown, the plaintiff was injured in an accident and suffered chronic pain as a result, which interfered with his ability to perform his work as a gutter installer and diminished his enjoyment of life and work, which was a source of pleasure for him: paras. 81-82.
- [126] Here, the plaintiff is younger than the plaintiff in Brown, but both cases involve a plaintiff experiencing lasting pain that reduces their ability to perform and enjoy their work. Although the extent of Mr. Dahlke's pain is less severe than the plaintiff's in Brown, having regard to the similarities of this case, I find that Brown is analogous to the plaintiff's circumstances in terms of the type and nature of injuries suffered. Following Brown (where an award of \$115,000 was assessed for non-pecuniary damages), I consider that \$110,000 (including for loss of housekeeping capacity) is a fair and reasonable award of non-pecuniary damages to the plaintiff in the circumstances of this case.
- [127] Applying a negative contingency risk of 15% (discussed below), this results in an amount of \$93,500 after the deduction (\$110,000 x 0.85).

Future Loss of Housekeeping Capacity

- [128] The principles to be considered when valuing loss of housekeeping capacity are set out in *Kim v. Lin*, 2018 BCCA 77 [Kim CA]. Loss of housekeeping capacity may be considered as a pecuniary or non-pecuniary loss: Kim CA at para. 30; *Ker v. Sidhu*, 2023 BCCA 158 at para. 23. The court retains ultimate discretion to address housekeeping claims under either type of award, but, in general, a non-pecuniary damages award is more appropriate when there is a loss of amenities or increased pain and suffering: Kim CA at para. 33. Conversely, when a plaintiff has enlisted paid or unpaid housekeeping services, a pecuniary award is appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101.
- [129] In the present case, the plaintiff can still "perform usual and necessary household work, but with some difficulty or frustration in doing so": *McKee v. Hicks*, 2023 BCCA 109 at para. 112. I find that including loss of housekeeping in the non-pecuniary award is appropriate in the circumstances.

Future Loss of Earning Capacity

Legal Framework

- [130] An award for future loss of earning capacity represents compensation for a future loss. The award is an assessment, not a mathematical calculation (Steinlauf v. Deol, 2022 BCCA 96 at para. 55, citing Gregory at para. 32), and while not amenable to precise calculation, the court is obliged to make the best estimate it can (Dunn v. Heise, 2022 BCCA 242 at para. 33).
- [131] The three-step approach for considering claims for loss of future earning capacity is set out in Rab:
- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in Brown [v. Golajy, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (B.C.S.C.)). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in Dornan at paras. 93-95.
- [Emphasis added.]
- See also Steinlauf at paras. 52-55.
- [132] With respect to steps two and three specifically, the assessment of a future or hypothetical possibility of an event giving rise to future loss proceeds by first asking whether there is a real and substantial possibility of an event occurring leading to a future loss: Rab at paras. 29, 33; Steinlauf at para. 53. If so, the court must assess the likelihood of that event, then quantify the loss by way of an earnings approach or a capital asset approach: Rab at paras. 28, 31; Ploskon-Ciesla at para. 16.
- [133] With respect to quantification of the "value of the future loss" at the third step, the analysis requires a comparison of "the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened": Steinlauf at para. 71, citing Gregory at para. 32; Dornan at paras. 156-157. This has also been described as comparing the "without-accident" earning potential of the plaintiff and what the plaintiff was likely to earn as a result of the accident (being mindful that it is not the loss of earnings but the loss of earning capacity for which compensation must be made): Steinlauf at paras. 55-56, citing Gregory at para. 32, Andrews v. Grand & Toy Alberta Ltd, [1978] 2 S.C.R. 229 at 251, 1978 CanLII 1.
- [134] The Court of Appeal in Ploskon-Ciesla identified the two methods of valuation under the third step:

- [16] As touched upon above, depending on the circumstances, the third and final step--valuation--may involve either the "earnings approach" or the "capital asset approach": Perren [v. Lalari, 2010 BCCA 140] at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
- [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: Brown [v. Golaiy] at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.
- [135] As a final step in the damages assessment process, the court must determine whether the damage award is fair and reasonable: Lo at para. 117.

Discussion

Step One: Event(s) Giving Rise to an Impairment of Capacity

- [136] The following factors, articulated in Rab at para. 35, citing Brown v. Golaiy at para. 8; Ploskon-Ciesla at para. 13, assist in this part of the analysis:
1. Is the plaintiff less capable overall from engaging in all types of employment;
 2. Is the plaintiff less marketable or attractive as an employee;
 3. Has the plaintiff lost the opportunity to take advantage of all job opportunities; and
 4. Is the plaintiff less valuable to herself as a person capable of earning money in a competitive labour market?
- [137] These factors provide no formula but simply comprise a means to determine whether there has been an impairment of a capital asset, which can be helpful in assessing the value of the lost asset: Rab at para. 36; Ploskon-Ciesla at para. 12.
- [138] I find that the plaintiff meets criteria (1), (3), and (4) above. He has been rendered less capable of engaging in all types of work given the pain he suffers and will continue to suffer. Because of the back pain he experiences, he has lost the opportunity to take advantage of all job opportunities, given the diminishment of his productivity; he is less likely to be promoted in his work as a result of the accident; and he is less valuable to himself as a person capable of earning money in a competitive labour market. In my view, there has been an impairment of the plaintiff's capital asset, namely, his ability to earn income.

Step Two: Real and Substantial Risk of a Pecuniary Loss

[139] Turning to step two, I further find that there is a real and substantial possibility that the plaintiff's pain symptoms will continue and result in a reduction in his earning capacity.

[140] In summary, following the Rab approach, I find as follows:

- (a) Step 1. There is a potential future event--ongoing back and shoulder pain--which could lead to a loss of capacity. Put another way, I find the potential future event is a loss of capacity as articulated in Rab at para. 48.
- (b) Step 2. On the evidence, there is a real and substantial possibility that this future event will cause a pecuniary loss to the plaintiff.

[141] Having found a reasonable and substantial possibility of a lack of capacity leading to an income loss, I must undertake an analysis of the quantification and relative likelihood of the loss occurring. There is no claim for past loss of earning capacity, and so I address only future loss of earning capacity.

Step Three: Future Loss of Earning Capacity - Quantification/Relative Likelihood

[142] A capital asset approach to quantifying future earning capacity lends itself to cases where (as here) there is no clear loss of income, such as where the plaintiff's earnings at the time of the accident is the same as their earnings at the time of the trial, but their injuries from the accident expose the plaintiff to future problems: Rab at paras. 30, 34; Ploskon-Ciesla at para. 17.

[143] In cases using the capital asset approach, such as where the plaintiff continues to earn income at or near pre-accident levels, the loss of capacity in the future may be valued using various methods: Kim at para. 91; Rab at para. 72; Pallos v. Insurance Co. of British Columbia, 100 B.C.L.R. (2d) 260 at para. 43, 1995 CanLII 2871; Mackie v. Gruber, 2010 BCCA 464 at paras. 18--19.

[144] I adopt the plaintiff's proposed methodology of valuing the plaintiff's loss at 20% of the plaintiff's future earning capacity up to retirement at the same income level as present. The plaintiff is currently working at 70% of his pre-Accident working capacity, and I find that a reduction of earning capacity of 20% is a fair reflection of his loss of earning capacity, reflecting his loss of physical capacity including the real and substantial possibility that he will not be promoted in his work as a result of the Accident. I find that this is satisfactory evidence and methodology for me to assess the plaintiff's loss of future earning capacity on a capital-asset basis: McKee at paras. 82--83, 91.

[145] Assuming an age 65 retirement age, the plaintiff has 30 years left of earning capacity, which yields a present value multiplier of 24.0158 (at an interest rate of 1.5%). Applying this multiplier to his current income level of approximately \$70,000 per year yields \$1,681,106.

[146] 20% of \$1,681,106 yields \$336,221 ($\$1,681,106 \times 0.2$) as the value of future loss of earning capacity (without applying contingencies, discussed below).

Negative Contingencies

[147] However, when valuing the plaintiff's pecuniary loss, "it [is] still necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies": Ploskon-Ciesla at para. 11.

[148] While I find that the plaintiff suffered significant injuries, there remains the issue as to whether a negative contingency should apply and, if so, what percentage. This is what Rab instructs:

[29] Some claims for loss of future earning capacity are less challenging than others. In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies.

[Emphasis added.]

[149] I find that, without the Accident, the plaintiff would have continued working in the construction industry, but the question is whether his pre-existing medical circumstances and the physical nature of his pre-accident lifestyle would have caused him to experience a loss of earning capacity even without the Accident. I find that the answer to that question is yes.

[150] Indeed, I find that there is a real and substantial possibility that, even without the Accident, he may have suffered a workplace injury due to the physical nature of the framing industry. The plaintiff did have a fall off a ladder in 2019 which resulted in an injury to his ribs, shoulder, and arm; and he fell while working at a job in Barriere in 2021 and tweaked his back. I may consider past events when considering if a contingency is appropriate: Dornan at para. 94.

[151] In addition, and relatedly, I find that there is a real and substantial possibility that the plaintiff would have experienced migraines which disrupted his work productivity even without the Accident. He did have migraines before the Accident. Furthermore, just as the injuries from his Accident exacerbated his migraines, so too could a without-Accident workplace injury have led to the without-Accident exacerbation of migraines.

[152] I find that these risks are not speculative, but there is evidence in the record such that I find them real and substantial.

- [153] Considering these risks, on the evidence before me, I find that the contingency risk is 15%. (I also find 15% is an appropriate contingency for the plaintiff's claim for non-pecuniary damages.)
- [154] I decline to find the existence of any positive contingencies, as argued for by the plaintiff. I find the existence of the proposed positive contingency for the possibility that the plaintiff's symptoms will get worse in future to be "speculative" within the meaning of the caselaw.
- [155] Applying a 15% deduction ($\$336,221 \times 0.85$), this results in an amount of \$285,787.85.

Step Four: Fairness and Reasonableness

- [156] I consider the award of \$285,787.85 fair and reasonable. The plaintiff was injured in an Accident and has, as a result, persistent back pain and recurrent shoulder pain. There is no claim for past loss of earning capacity for the approximately six years from the date of the accident to the date of the trial. The plaintiff works at about 70% of his previous capacity in construction and now also landscaping. His mental health deteriorated after the Accident but has improved. He is stoic and capable, and he perseveres and has had a breakthrough in 2020 in his physical health with the assistance of physiotherapy.
- [157] I find that, having regard to past events, and taking into account the potential future risks, uncertainties, and hypothetical events, an award of \$285,787.85 (for future loss) is fair and reasonable to compensate the plaintiff for the loss of future earning capacity.

Cost of Future Care

- [158] The principles for an award of cost of future care are set out in *Kallstrom v. Yip*, 2016 BCSC 829 at para. 429:
- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
 - the focus is on the injuries of the innocent party Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
 - the test for determining the appropriate award is an objective one based on medical evidence;
 - there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
 - the concept of "medical justification" is not the same, or as narrow as, "medically necessary";
 - admissible evidence from medical professionals can be taken into account to determine future care needs;
 - however, specific items of future care need not be expressly approved by medical experts It is sufficient that the whole of the evidence supports the award for specific items;

- still, particularly in non-catastrophic cases, a little common sense should inform the analysis, despite however much particular items might be recommended by experts in the field; the court should have regard for whether any particular expense will actually be incurred and an allowance can be made for any contingency, any real and substantial possibility, that the cost may not in fact be incurred;
- in motor vehicle cases, given the distinction between mandatory and discretionary benefits under s. 88 of Part 7 of the Insurance (Vehicle) Regulation, BC Reg. 447/83 and the requirement of mandatory deductions under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, it is desirable for the trial court, where possible, to assign specific amounts for each future care item claimed;
- properly considered, homemaking costs are awarded for loss of capacity and are distinct from future cost of care claims; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See also *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244; and *Wishart v. Mirhadi*, 2023 BCSC 627 at para. 117.

[159] The plaintiff advances for cost of future care with reference to recommendations in Mr. Altieri's report in the total amount of \$40,000.

[160] The defendant opposed the plaintiff's claim for cost of future care on the basis that Mr. Altieri's report should be given little weight. Among other things, the defendant contended that Mr. Altieri's report "points to [a] cursory review of records, with little regard for accuracy." I have already rejected the defendant's submissions including that the typos in Mr. Altieri's report undermines it.

[161] Instead, I find Mr. Altieri's report to be of assistance to my determination of cost of future care, and I place weight on, and accept, the recommendations in his report.

[162] However, I find that the claimed gym facility expenses, given the plaintiff's pre-Accident active lifestyle, would have been incurred even without the Accident, and decline to award this claim.

[163] I further apply a contingency 66.66% deduction (from a mathematical perspective, allowing this expense for 10 of the 30 years of his working life) for the claimed "Treatments for Management of Symptom Flare-ups" to account for the real and substantial possibility that this expense will not be incurred: Ker at para. 66. I do so since the plaintiff had a breakthrough in 2020 with his physiotherapy and find that it is unlikely he will require treatments every year for the remainder of his working life as claimed in this item, and the treatments will be less frequent than annually.

[164] I also do not allow for the cost of housekeeping assistance, which I have included in the non-pecuniary damages award.

[165] The other claimed items I am satisfied are appropriate and should be awarded at the lower end of the range.

[166] I allow cost of future care as claimed as set out in this table:

Description of Item	Future Care Cost Claimed
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Claimed Cost

% Contingency Applied

Amount Awarded

1.

Treatment with a Kinesiologist

\$2,090.00-\$2,470.00

\$2,090

2.

Treatments for Management of Symptom Flare-ups

\$960.00-\$1,800.00 (Yearly, while the plaintiff continues working at his job)

66.66%

\$9,600

3.

Occupational Therapy

\$1,666.00-\$2,261.00

\$1,666

4.

Psychological Counselling

\$1,300.00-\$2,225.00

\$1,300

5.

Vocational Assessment

\$2,200.00

\$2,200

6.

Membership to Gym Facility

\$441.00 until age 64; \$330.75 age 65+ (Yearly, while the plaintiff continues working at his current job)

\$0

TOTAL AWARDED

\$16,856

CONCLUSION AND ORDERS

[167] In summary, I award the plaintiff damages of \$159,270.76 , calculated as follows:

Non-Pecuniary Damages

\$93,500

Future Loss of Earnings

\$285,787.85

Cost of Future Care

\$16,856

Special Damages (as agreed)

\$2,033.06

SUBTOTAL (before apportionment)

\$398,176.91

TOTAL(60-40% apportionment of liability (plaintiff-defendant))

\$159,270.76

[168] My award is subject to any tax adjustments in respect of cost of future care, and for future loss of earnings capacity, if applicable. The parties have liberty to return to me within 30 days of the date of this Judgment for a decision on these points if an agreement cannot be reached.

[169] As the successful party, the plaintiff is presumptively entitled to costs from the defendant, at Scale B. If either the plaintiff or the defendant seeks an alternative costs order, they have leave within 30 days of the date of this judgment to request a further hearing from me on the issue of costs.

"Stephens J."

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Prepared on 27 October 2026 · Esheria