

CANADA / JUDGMENT

Didyuk v. Redlick

2022 BCSC 776

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 776 Didyuk v. Redlick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Didyuk v. Redlick,

2022 BCSC 776

Date: 20220511

Docket: M1810669

Registry: Vancouver

Between:

Vasyl Bogdanovy Didyuk

Plaintiff

And

Jessica Christine Redlick

Defendant

and

Docket: M1810670

Registry: Vancouver

Between:

Vasyl Bogdanovy Didyuk

Plaintiff

And

Alexander Stuart Greer

Defendant

and

Docket: M204067

Registry: Vancouver

Between:

Vasyl Bogdanovy Didyuk

Plaintiff

And

Mike Oliver Mangaoang and John Doe

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page on May 26, 2022

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Plaintiff:

M.D.C. Fahey

Counsel for the Defendants:

J. Noble

K.M. Green

Place and Date of Trial:

Vancouver, B.C.

September 20-24, 27-29 and

October 1, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2022

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I. Introduction

- [1] On February 16, 2017, November 21, 2017, and August 20, 2018, the plaintiff, Vasyl Didyuk, was involved in three separate motor vehicle accidents in which the vehicle he was driving was rear-ended. The defendants have admitted liability for each of the accidents.
- [2] Mr. Didyuk claims to have suffered physical, psychological and other injuries as a result of the accidents. He says that he is unlikely to recover from those injuries. Mr. Didyuk seeks compensation including non-pecuniary damages, damages for loss of past and future earning capacity, damages for loss of housekeeping capacity, and special damages.
- [3] The defendants do not dispute that Mr. Didyuk was injured in the accidents or that he has suffered, and continues to suffer, losses and damages as a result. However, they argue that with a change in the treatment for his psychological condition, Mr. Didyuk's prognosis for recovery is much more optimistic than he suggests. They argue that any damages assessment should take into account that likely recovery.

II. Background

A. Pre-accident background

- [4] Mr. Didyuk was born and raised in the Ukraine. He was active in his young adulthood, playing soccer and running.
- [5] In 1993, he married his wife, Oksana and their first daughter was born later that year. Their second daughter was born in 1997. In 2007, Mr. Didyuk immigrated with his family to Canada in the hopes of providing a better life for his family.
- [6] After he moved to Canada, Mr. Didyuk continued playing soccer, which he did once every two weeks. He also enjoyed running on weekends and evenings and hiking with his wife. A friend who gave evidence on his behalf testified that Mr. Didyuk attended the gym and took care of himself physically. Mr. Didyuk is an involved father. Prior to his daughters' departure for university, he spent time with them and attended his younger daughter's soccer games.
- [7] Mr. Didyuk's social life was centred around his church, which included weekly services and post-service social gatherings. The service was conducted half in English and half in Ukrainian and allowed Mr. Didyuk to spend time with people who shared his background. He was described by his wife and friends as a kind, energetic, hard-working, happy man who, although quiet, enjoyed the social time he had at the church.
- [8] At home, Mr. Didyuk and his wife shared household chores on a 50-50 basis. He was responsible for maintaining their garden and backyard.
- [9] Mr. Didyuk was able to perform all his recreational, social, and household activities with no limitations or pain.

B. Education and work history

- [10] After completing high school in the Ukraine, Mr. Didyuk attended university, starting in nuclear physics but then transferring to the business program. He obtained the Canadian equivalent of a Bachelor's degree in economics after the birth of his first daughter in 1993. He obtained a Master's degree in business and economics in 2004 after the birth of his second daughter.
- [11] Soon after immigrating to Canada, Mr. Didyuk picked up the first job he could as a line cook at an IHOP restaurant, and at the same time took English classes and accounting courses, thinking that he might want to go into business. He soon learned that a sedentary job was not a good fit for him and started to look for employment in a more dynamic environment.
- [12] In 2008, Mr. Didyuk started working full-time as a security guard officer for Paladin. In that role, he was responsible for patrolling, checking and securing the buildings, and monitoring security videos.
- [13] In 2013, while still working at Paladin, Mr. Didyuk began work as a building manager for PosAbilities, a non-profit organization that assists people with developmental disabilities. He learned of building management through his friend, Gregory Barabakh who worked in that field. With PosAbilities, Mr. Didyuk managed a four-storey apartment complex with 35

apartment units and five townhouses. As building manager, he managed the tenants, dealt with tenant issues and, as the main part of the job, performed maintenance including plumbing, electrical, drywalling, painting, cleaning, and carpentry.

- [14] He worked on a contract basis and was paid a fixed sum for his services. Although he had to be available for emergencies, the job allowed him to work flexible hours and to be his own boss, two features that particularly appealed to Mr. Didyuk. While managing the building for PosAbilities, he also kept his job at Paladin.
- [15] Using the strategy employed by Mr. Barabakh, it was Mr. Didyuk's intention to gradually build a portfolio of five or six buildings to manage on a contract basis. In 2015, he started looking for buildings, but was not able to pick up a new building until October of that year, when he found a building management position for a 58-unit building owned by the Aquilini group. However, that position was an employed position for which he was on payroll.
- [16] At the time of the first accident in February 2017, Mr. Didyuk was working at all three jobs, putting in more than full-time hours.

C. The accidents and post-accidents

1. MVA #1 - February 16, 2017

Accident particulars

- [17] In the first accident, Mr. Didyuk had stopped on Lougheed Highway yielding to the traffic coming from his left before he could turn right onto Gilmore Avenue, when he was hit from behind by a vehicle driven by the defendant, Jessica Redlick. She did not see her speedometer, but estimated her speed as 20 - 30 kilometres per hour. Ms. Redlick did not report the accident to ICBC nor did she have the damage to her vehicle repaired.
- [18] Mr. Didyuk did not have the damage to his vehicle repaired until he decided to sell the car. The total damage was less than \$1,500.

Injuries and treatment

- [19] Immediately following the first accident, Mr. Didyuk became disoriented, had problems breathing, and felt pain in his back, neck and back of the head. However, he was able to continue on to Home Depot, which was his destination before the accident occurred, after which he went home. He was feeling dizzy and disoriented and went straight to bed but was unable to sleep, he says, due to a bad headache and his dizziness.
- [20] Mr. Didyuk did not seek immediate medical attention. However, over the next two weeks, his headaches become more persistent, he was having problems sleeping, he was in pain, and his range of motion decreased. He attended his family physician, Dr. Rozaliya Kim, after two weeks.

- [21] On Dr. Kim's recommendation, Mr. Didyuk started physiotherapy and massage therapy and attended at a concussion clinic, which provided the same treatment as the physiotherapist. He found the physiotherapy to be the most helpful and attended up to three times a week and performed the recommended exercises at home. He also started psychology and counselling sessions.
- [22] Prior to the second accident, Mr. Didyuk's pain had subsided, his range of motion was good and his headaches were, at most, intermittent. The dizziness, which had gradually decreased, was no longer an issue.

Work

- [23] Mr. Didyuk did not take time off work immediately after the first accident in February 2017. However, after a few weeks he had to stop working for PosAbilities and was only able to perform modified or light building management at the Aquilini property. He also had to stop his work as a security guard after a few weeks as he was not able to tolerate prolonged walking due to pain and dizziness.
- [24] In July 2017, he felt some improvement and attempted to work all three jobs but was unable to do so for more than a month because of worsening pain, headaches, depressed mood and exhaustion. He lost his contract at PosAbilities after telling them he needed medical leave. That left him with two jobs, although he had not yet returned to his work with Paladin.
2. MVA #2 - November 21, 2017

Accident particulars

- [25] In the second accident, Mr. Didyuk was stopped at a red light on Broadway Street. . The defendant, Alexander Greer, was stopped in the vehicle behind him. When the light turned green, Mr. Greer moved forward and rear-ended Mr. Didyuk's vehicle. There was very minimal damage to both vehicles.

Injuries and treatment

- [26] Mr. Didyuk experienced a headache and pain in the neck and back of the head immediately after the second accident. He drove home and did not call for any medical attention.
- [27] He saw Dr. Kim a day or two later. On her recommendation, Mr. Didyuk took time off work and continued with physiotherapy and massage therapy, both of which were helpful. In addition, he started attending sessions of vestibular rehabilitation for dizziness.
- [28] From November 2017 to January 2018, Mr. Didyuk continued to report ongoing neck and upper back pain as well as headaches, but with some improvement. He had ongoing issues with poor concentration and reported that his mood was not good. After an attempt to go back to work in January 2018, he reported worsening of his mood. Dr. Kim records that the mental health assessment conducted in February showed "severe anxiety and depression",

leading her to refer Mr. Didyuk to a psychiatrist. He had his first appointment with the psychiatrist in April 2018.

- [29] After reporting some improvement in his ongoing physical symptoms, Mr. Didyuk began kinesiology and active rehabilitation, and had completed 103 sessions to July 2021.
- [30] By August 2018, the frequency of headaches had decreased and he was not experiencing dizziness. However, he still had problems with decreased concentration, low mood and frequent panic attacks.

Work

- [31] After the second accident, Mr. Didyuk was not able to work until January 2018, when he resumed part-time work at Aquilini, working eight hours a week. However, his dizziness had increased and he described his headaches, sleep and mood as "terrible". He had to stop that part-time work after two weeks.
- [32] Given the gradual improvement in his condition after the second accident, Mr. Didyuk had planned to return to work at least on a part-time basis.
3. MVA # 3 - August 20, 2018

Accident particulars

- [33] In the third accident, Mr. Didyuk was slowing down to come to a stop for a red light in bumper-to-bumper traffic in Burnaby. Before Mr. Didyuk could come to a complete stop, the defendant, Mike Mangaoang, rear-ended him. Mr. Mangaoang estimated that his speed was below five kilometres per hour. Given the little damage to Mr. Mangaoang's vehicle, he did not make a claim to his insurer, nor did he have the vehicle repaired.

Injuries and treatment

- [34] Mr. Didyuk testified that he had a very fragmented memory of this accident, but recalls hitting the back of his head as a result of the impact. He also recalls getting out of the car, feeling like he was about to fall, lying down in the car and the ambulance, and someone talking to him and screaming at the other driver. He was taken by ambulance to the hospital, where he stayed for a couple of hours.
- [35] Immediately after the third accident, Mr. Didyuk felt nauseated and all of the same symptoms he had before, including headaches, dizziness, neck and head pain, and difficulty sleeping, were multiplied. In addition, he had ringing in his head and ear.
- [36] He saw Dr. Kim in the day or two after the accident and continued with physiotherapy, massage therapy and chiropractic sessions. He also continued to see his treating psychiatrist, who he continues to see every three to four months.

- [37] In the period between the third accident and trial, Mr. Didyuk continued to complain, to varying frequency and intensity, of various symptoms including depressed mood, anxiety with panic attacks, headaches, light sensitivity, dizziness, episodes of blurry vision, ringing in his ears, insomnia, decreased concentration and poor memory, and neck and back pain. In addition, he has lost a significant amount of weight, and feels very weak as a result.

Work

- [38] After the third accident in August 2018, Mr. Didyuk was unable to work at all until September 2019. At that time, he returned to work at the Aquilini property, working four hours a day; five days a week with light duties. He was only able to work for one month because of worsening pain, headaches, dizziness, cognitive complaints, and psychological issues.
- [39] The medical records indicate that Mr. Didyuk made another attempt to return to work as a building manager in February 2020, but no position was available for him at that time. He resumed work as a building manager on a part-time basis with light duties in June 2020 and was only able to work for four weeks. He had to quit this role due to worsening of his chronic conditions.
- [40] Mr. Didyuk had not resumed employment by the date of trial.

Home and social life

- [41] Mr. Didyuk, his wife, Mr. Barabakh, and Andriy Kit, another friend of Mr. Didyuk's, gave evidence that things changed for Mr. Didyuk after the accidents. All described physical changes, noting that Mr. Didyuk now appears weak and less strong than before and that he does not move as well as he did.
- [42] Mr. Didyuk no longer plays soccer or runs, and doubts that he will be able to do so in the future, and he stopped attending church prior to the COVID-19 restrictions. Ms. Didyuk testified that he paces around the house, unable even to watch television given his sensitivity to light and sound. Both Mr. Didyuk and Ms. Didyuk attribute his low mood to his realization that he cannot support his family financially.

III. Injuries

A. Physical injuries

1. Medical evidence

Dr. Rozaliya Kim

- [43] Dr. Kim has been Mr. Didyuk's family physician since August 2012. She saw Mr. Didyuk after each of the accidents and prepared a report, dated October 22, 2020, setting out her opinion with respect to the injuries suffered in the accidents.

- [44] She opines that as of October 2022, more than five and a half years after the first accident, Mr. Didyuk continued to suffer from chronic musculoskeletal pain involving his neck and upper back. She describes those symptoms as "chronic and significant" and that they vary in intensity, with periods of exacerbation and improvement. Dr. Kim notes that those symptoms became worse and chronic after repeated whiplash injuries during the second and third accidents.
- [45] Dr. Kim also describes episodes of tingling in Mr. Didyuk's fingers which, by October 2020, had improved and were by then intermittent and less frequent.
- [46] Dr. Kim is of the opinion that Mr. Didyuk will benefit from regular massage and physiotherapy sessions to manage the ongoing chronic musculoskeletal pain and referred him to an orthopaedic surgeon for assessment of possible trigger injections for his neck and back pain.
- [47] Her global prognosis for both physical and psychological injuries is as follows:

Mr. Didyuk's symptoms have lasted for more than three years. His symptoms are persistent and severe, and have a significant effect on his functional abilities. Despite multiple different treatments, Mr. Didyuk is still not able to return to his pre-accident level of physical and mental health. Due to ongoing persistent and significant symptoms, he is not able to work. Taking into consideration all of the above, the prognosis is guarded.

Dr. Zeeshan Waseem

- [48] Dr. Zeeshan Waseem is a physiatrist (physical medicine and rehabilitation) whose practice includes the assessment and treatment of patients with neurological and musculoskeletal injuries and chronic pain. Dr. Waseem prepared a report dated November 21, 2019 on behalf of Mr. Didyuk.
- [49] Regarding his physical injuries, Dr. Waseem opines that Mr. Didyuk suffered "sprain/strain soft tissue injuries of the cervical and thoracic spine" as a result of the first accident, and that he reinjured his cervical and thoracic spine as result of the second and third accidents, thereby "permanently aggravating his underlying physical condition". He concludes that:

These injuries have resulted in chronic myofascial pain of the cervical and thoracic spines and chronic post-traumatic headaches with migraine features.

- [50] Dr. Waseem has opined that Mr. Didyuk's chronic pain and headaches had an impact on his work function. He opines:

Mr. Didyuk's chronic pain and headaches and reduced functional tolerances prevent him from meeting the physical demands of his pre-accident employment as a building manager and security guard. He is better suited to working in an environment where his injuries can be accommodated such that he is able to alternate positions as needed, not be required to sit, stand or walk for prolonged periods and avoid moderate to heavy lifting/carrying.

[51] Given several factors, including the persistent and worsening nature of Mr. Didyuk's symptoms for over two years despite "appropriate conservative measures and medical attention", Dr. Waseem's prognosis for a full symptomatic recovery is "poor". He opines:

While some further improvement with the outlined treatment recommendations is possible, he will continue to experience pain. His physical condition would be considered chronic and unremitting and, therefore, permanent.

2. Findings and conclusions

[52] The medical evidence of physical injury is uncontroverted. I accept that Mr. Didyuk suffered chronic soft tissue injuries to his neck and upper and mid-back and that those injuries will require regular massage and physiotherapy to manage.

[53] I find that he will permanently suffer from the associated pain which has, and will continue to have, a "significant effect on his functional abilities". His prognosis for a full recovery is "poor" and, at best, "guarded".

[54] Notwithstanding Drs. Kim and Waseem's prognosis, the defendants have asserted that with improvement in Mr. Didyuk's psychological condition, his physical injuries may also improve. There is no evidence to support that assertion.

[55] While Dr. Waseem reported that Mr. Didyuk noted that his pain and mood are interrelated, Dr. Waseem did not himself express any opinion on the interrelated nature of those symptoms, nor did he comment on the effect of any improvement in Mr. Didyuk's psychological condition on his physical injuries.

[56] Notably, Dr. Smith recommends "vigorous exercise" as a "potent" treatment for symptoms of depression, anxiety, pain and insomnia. He does not comment on the potential opposite effect, that is the effect of improvement in his depression and anxiety on Mr. Didyuk's physical pain. Given Dr. Smith's expertise, it may be that he is not able to provide that opinion.

[57] With the evidence that is before me, I cannot conclude that an improvement of Mr. Didyuk's psychological condition will result in any significant improvement of his physical injuries.

B. Headaches

1. Medical evidence

Dr. Waseem

[58] In addition to physical injuries, Dr. Waseem notes that Mr. Didyuk has complained of dizziness and cognitive complaints, as well as headaches. Dr. Waseem opines that the injuries sustained in the accidents resulted in "chronic post-traumatic headaches with migraine features". He does not provide a prognosis for the headaches.

Dr. Timothy McDowell

- [59] Dr. McDowell is a neurologist who prepared a report dated March 10, 2021 on behalf of the defendants. Dr. McDowell reports that Mr. Didyuk developed headaches that started after the first accident and were exacerbated after the second and third accidents. He concludes the headaches, which he describes as "consistent with a migraine phenotype", are "likely posttraumatic headache attributable to concussion, and exacerbated by two whiplash injuries".
- [60] Noting that Mr. Didyuk has appropriately been tried on migraine preventative medications, Dr. McDowell reports, "I suspect he will have ongoing disability from a headache perspective moving forward." However, he was unable to comment with certainty how much of Mr. Didyuk's disability is related to his mental health and how much is related to his headaches.

2. Findings and conclusions

- [61] As is the case with the physical injuries, the medical evidence regarding headaches is uncontroverted. I accept that Mr. Didyuk has suffered, and continues to suffer, from migraine type headaches and that the headaches will persist indefinitely.

C. Concussion / dizziness / cognitive issues / light sensitivity / tinnitus**1. Medical evidence****Dr. Kim**

- [62] Noting that Mr. Didyuk presented with symptoms consistent with a concussion, it appears that Dr. Kim views Mr. Didyuk as having sustained a concussion in the first accident, the effects of which were aggravated by the subsequent accidents. Given her account of Mr. Didyuk's self-report, it is implicit in her opinion that he also suffered a separate concussion in the third accident.

Dr. Derryck H. Smith

- [63] Dr. Derryck H. Smith is a psychiatrist who prepared a report dated May 27, 2021 on behalf of the defendants. Dr. Smith notes that there is nothing about the symptoms often associated with "post-concussion syndrome" that are unique to concussion. As he reports, those same symptoms are found in "normal individuals and individuals with a wide variety of other disorders". In other words, the existence of those symptoms are not an indication that a person has suffered a concussion.
- [64] He notes that there is a broad overlap between the symptoms of concussion, on one hand, and whiplash associated disorder and vestibular trauma syndrome on the other hand. Examples of the overlapping symptoms include headaches, neck pain, nausea, dizziness, sensitivity to light and noise, and various cognitive difficulties. He also reports, however,

that neurocognitive symptoms associated with mild-traumatic brain injury (concussion) tend to resolve within days to weeks after the injury, with complete resolution by three months.

[65] Dr. Smith explains that, following a brain injury, both objective and subjective data exist. He cites a 2021 article which recommends that objective signs, such as an observable loss of consciousness, be given more weight than subjective complaints when diagnosing a concussion.

[66] In this case, the only evidence of loss of consciousness is Mr. Didyuk's own self-report. There being no contemporaneous objective evidence of an observable loss of consciousness, Dr. Smith opines that Mr. Didyuk did not sustain any type of concussion or brain injury from any of the accidents. He is of the opinion that Mr. Didyuk's symptoms can "more easily be accounted for by the whiplash-type injuries to his neck and back".

Dr. Alexander Levin

[67] Dr. Levin is a psychiatrist who prepared three reports on behalf of Mr. Didyuk: one of which, dated July 10, 2021, was prepared in response to Dr. Smith's report. Dr. Levin does not provide any opinion as to a possible concussion. However, referring to the medical literature referred to by Dr. Smith, he rejects the assertion that subjective evidence of loss of consciousness should be discounted in diagnosing concussion as "clearly contrary to current scientific research".

Dr. Waseem

[68] Based on Mr. Didyuk's reports of impact to his head, transient loss of consciousness and a temporary altered level of consciousness, Dr. Waseem opines that Mr. Didyuk sustained a mild traumatic brain injury in the first and third accidents. He does not provide any opinion regarding the effects of those concussions nor does he provide any prognosis specific to the concussion.

Dr. McDowell

[69] Based on a self-report of a brief loss of consciousness, disorientation and dizziness after the first accident, Dr. McDowell concludes that Mr. Didyuk likely had a concussion.

[70] Although Mr. Didyuk complained of headaches and dizziness after the second accident, he denied a loss of consciousness. In light of those symptoms, Dr. McDowell concluded that although it was "certainly a possibility" that Mr. Didyuk suffered a concussion in the second accident, it was more likely to have been "predominantly a whiplash injury with a headache and associated dizziness".

[71] Dr. McDowell was less definitive in respect of the third accident. He states:

the history that [Mr. Didyuk] provides of a brief loss of consciousness and significant amnesia is consistent with a concussion/mild traumatic brain injury. While there is no known minimum transmitted force threshold to cause a concussion, and we know that individuals with concussion in the past are more prone to subsequent concussion, I still cannot reasonably reconcile the contemporary records with [Mr. Didyuk's] account. If the paramedics and emergency records are correct then I suspect he likely had more of a whiplash injury and a migraine headache was triggered rather than a concussion.

[72] On cross-examination, Dr. McDowell conceded that if Mr. Didyuk did, in fact, sustain a loss of consciousness in the third accident, he would agree that Mr. Didyuk suffered a concussion in that accident as well.

[73] Dr. McDowell was not able to link any concussions to Mr. Didyuk's cognitive complaints, chronic dizziness or visual disturbances. He attributed those symptoms to a number of factors including Mr. Didyuk's underlying anxiety, chronic headaches and his "multiple psychiatric medications". Dr. McDowell was of the view that if those conditions resolved or dramatically improved, it was not likely that Mr. Didyuk would suffer further disability.

2. Findings and conclusions

[74] Although Dr. Kim appears to equate various symptoms with a concussion, it is unclear whether she makes a "formal" diagnosis of concussion. To the extent that she does, she appears, at least in part, to rely on the report of Dr. Toth, a neurologist to whom she had referred Mr. Didyuk. That report was not before the court, nor did Dr. Toth give evidence. For that reason, and given her expertise, I do not accept Dr. Kim's diagnosis.

[75] Dr. Kim's report is helpful, however, in that it confirms Mr. Didyuk's reports of symptoms including pain to the neck and back, headaches, ringing in the ears, light sensitivity, dizziness, decreased concentration and poor memory, depressed mood and panic attacks over the period commencing with the first accident.

[76] Regarding diagnosis, I have considered the reports of Drs. McDowell, Waseem, Levin and Smith. Of the four, Dr. McDowell is the best qualified in this area.

[77] Unlike Dr. Smith, both Drs. McDowell and Waseem based their concussion diagnosis on Mr. Didyuk's self-report of a loss of consciousness. Dr. McDowell's conclusion that Mr. Didyuk did not suffer a concussion in the third accident was not premised on the fact that there was no third-party confirmation of a loss of consciousness. That conclusion was based on there being no contemporaneous report of a loss of consciousness at all. He refers specifically to the paramedic and emergency records that did not indicate any loss of consciousness.

[78] Drs. McDowell and Waseem's reliance on Mr. Didyuk's self-report is consistent with Dr. Levin's view that a concussion diagnosis is not dependent solely on objective third party evidence and belies Dr. Smith's discounting of Mr. Didyuk's self-report.

- [79] I accept that Mr. Didyuk suffered a concussion in the first accident. Based on Dr. McDowell's opinion, I do not accept that he did in the second or third accidents.
- [80] However, whether attributable to a concussion or not, there is no dispute on the evidence regarding the existence of Mr. Didyuk's ongoing symptoms of ringing in the ears, light sensitivity, dizziness, decreased concentration, and poor memory, or that those symptoms are attributable to the accidents or, more precisely, to injuries sustained in the accidents. I accept that, in addition to the concussion suffered in the first accident, Mr. Didyuk continues to suffer from all of those symptoms.
- [81] As was the case for the physical symptoms, the defendants have also asserted that with improvement in Mr. Didyuk's psychological condition, these symptoms may also improve. Indeed, there appears to be some consensus among the experts that the symptoms are woven together. Dr. McDowell opines that a change to Mr. Didyuk's psychiatric medications and improvement in his anxiety and headaches will result in improvement in his cognitive issues, dizziness, and visual disturbances. He is of the view that Mr. Didyuk's disability may be caused as much by his mental health issues as by his headaches.
- [82] Given the interrelated nature of the psychological condition with the headaches, dizziness, cognitive issues, and visual disturbances, I am satisfied that improvement in the psychological issues will also result in improvement of those issues as well.

D. Psychological injuries

1. Medical Evidence

Dr. Kim

- [83] Dr. Kim summarizes Mr. Didyuk's psychological symptoms as "depression and anxiety with panic attacks", the symptoms of which are "persistent and severe, causing frequent panic attacks and affecting his ability to work and communicate with people". She notes that prior to the accidents, she had not seen Mr. Didyuk for any of those symptoms.

Dr. Levin

- [84] In addition to the response report referred to above, Dr. Levin prepared two other reports on behalf of Mr. Didyuk: a first report dated April 19, 2021 and an addendum report dated July 21, 2021.

Dr. Levin's first report - April 19, 2021

- [85] In the first report, Dr. Levin diagnosed Mr. Didyuk as having developed a "major depressive disorder with anxious distress, which was moderate in severity". He was of the view that "the severity and quality of Mr. Didyuk's current depressive/anxiety symptomology, and reported cognitive difficulties, reached disabling proportions".

[86] He cited the cumulative effect of the accidents and related physical injuries, "superimposed on the side-effects of his psychopharmacological regimen", as factors in the symptomology. He also noted that Mr. Didyuk presented with an "underlying obsessive-compulsive personality structure" which may have affected his ability to recover from his injuries. He wrote:

Prior to the subjects MVAs, Mr. Didyuk's perfectionism, high standard for himself and others, as well as his need to be in control of his environment, represented an asset for his educational and occupational success. However, following the subject MVAs, Mr. Didyuk's obsessive-compulsive personality traits became a burden and negatively affected his ability to recover (physically and psychologically). In that, while taking numerous psychotropic medications, Mr. Didyuk appeared to be more sensitive to side-effects and reported ongoing complaints of cognitive difficulties, low energy level anhedonia, and amotivation.

[87] Of the factors cited, Dr. Levin appears to focus on the effect of the psychopharmacological regimen that had been prescribed by Mr. Didyuk's treating psychiatrist. As Dr. Levin noted, in response to an initial diagnosis of "major depressive disorder, moderate, with anxious distress", the treating psychiatrist prescribed "an escalation of different psychiatric medications for more than two years", despite Mr. Didyuk's reports of worsening symptoms. In response to the worsening symptoms, the treating psychiatrist's response was to keep increasing dosages of those drugs.

[88] In Dr. Levin's view, both the higher dosages of those drugs and the combination of the drugs used caused Mr. Didyuk's psychological conditions to worsen and suggested the presence of an "iatrogenic psychiatric condition", that is, a condition caused by the treatment itself.

[89] Dr. Levin is of the view that Mr. Didyuk requires a change of his antidepressant agent and that he would benefit from a different psychopharmacological regimen which, he suggests, would "most likely" result in no further worsening of his anxiety and would address his insomnia. Given the lack of progress in treatment with his treating psychiatrist, Dr. Levin also opines that Mr. Didyuk would benefit from further psychiatric evaluations in a mood disorder clinic at the University of British Columbia.

[90] Dr. Levin did not provide any prognosis for Mr. Didyuk's psychological injuries in the first report.

Dr. Levin's addendum report - July 21, 2021

[91] The stated purpose of the addendum report was to "correct [his] oversight and address Mr. Didyuk's psychiatric prognosis missed in the [first] report". However, it does more than provide a prognosis.

[92] In the addendum report, Dr. Levin re-addresses the causes of the ongoing psychological condition. He restates his observation of Mr. Didyuk's "clinically significant perfectionistic personality traits", stating:

As the result of his accident-related injuries and his sense of loss of control Mr. Didyuk's obsessive-compulsive personality traits became more prominent and further complicated his recovery process; diminished his response to psychotropic medications and made his prognosis guarded.

[93] Dr. Levin also re-addresses his initial diagnosis, opining that:

Given [the] duration and severity of Mr. Didyuk's depressive symptomology it is most likely that as a result of [the] recurrent accidents and repeated aggravation of his injuries, Mr. Didyuk's Major Depressive Episode transformed into Persistent Depressive Disorder

[94] Referring to the DSM-V, he states the latter diagnosis is "indicative of a chronic debilitating psychiatric condition with a poor prognosis for recovery".

[95] Regarding prognosis, he states:

In my clinical opinion, Mr. Didyuk was tried on an adequate dose of different psychiatric medications with modest response. It is most likely that his depressive disorder became treatment resistant and will require a long-term use of different antidepressants and atypical neuroleptics. However, such treatment will result in Mr. Didyuk experiencing side effects and impairments in his functioning.

Dr. Smith

[96] Dr. Smith diagnoses Mr. Didyuk with the following psychological injuries: major depressive disorder with anxious distress, post-traumatic stress disorder and insomnia disorder.

[97] He opines that Mr. Didyuk has developed "refractory depression", which he explained on cross-examination to mean that the depression was not getting better.

[98] Noting that Mr. Didyuk has been experiencing depression for almost four years and has remained consistently depressed despite trials of various medications, Dr. Smith states: "Whatever the benefits are of Mr. Didyuk's current psychiatry treatment program, it simply is not working". He attributes Mr. Didyuk's ongoing psychiatric issues directly to his treatment which he concluded has "not been ideal". Dr. Smith was less diplomatic in his oral evidence, stating that the treatment to date had been "very much substandard".

[99] Dr. Smith makes several treatment recommendations, including that Mr. Didyuk needs to be trialled on a different regime of medication, the specifics of which he sets out in the report. He also recommends that Mr. Didyuk attend his treating psychiatrist more frequently and refers Mr. Didyuk to a "PhD-level psychologist" for cognitive behavioural therapy and to a sleep clinic.

[100] Dr. Smith's prognosis is positive. He states:

I am confident with full implementation of my treatment recommendations that there will be significant improvement in Mr. Didyuk's symptoms and functioning [within] six months.

[101] If Mr. Didyuk does not respond to his recommended treatment plan, Dr. Smith suggests electroconvulsive therapy and esketamine or repetitive transcranial magnetic stimulation ("rTMS") as alternative methods of treating depression.

2. Findings and conclusion on psychiatric injuries

Diagnosis

[102] It is undisputed that Mr. Didyuk suffered psychological injury as a result of the accidents. Both psychiatrists agree that Mr. Didyuk has suffered from a depressive disorder with anxious distress. In addition, Dr. Smith adds post-traumatic stress disorder and insomnia disorder to his diagnoses. Dr. Levin does not contradict or dispute those additional diagnoses.

[103] I accept that Mr. Didyuk suffered all of these psychological injuries as a result of the accidents.

Prognosis

[104] The experts' opinions regarding prognosis differ significantly. As noted, Dr. Levin's prognosis, set out in his addendum report, is poor. Dr. Smith, on the other hand, is much more optimistic. He opines that a change in treatment will result in a significant improvement in Mr. Didyuk's symptoms and functioning within six months.

[105] For the reasons I have set out below, I give little weight to Dr. Levin's addendum report. However, I do not accept, as the defendants argue, that Mr. Didyuk will recover from his injuries in six months.

[106] Regarding Dr. Levin's addendum report, it is significant that when he prepared it, with the exception of Dr. Smith's report, Dr. Levin did not have any new information that he did not have when he prepared the first report. He did not see Mr. Didyuk a second time, nor was he provided with any new clinical information.

[107] Despite not having any new information, not only did Dr. Levin change his diagnosis, from "major depressive disorder with anxious distress" to "persistent depressive disorder", he also changed at least two opinions, both of which appear to inform his prognosis.

[108] First, Dr. Levin resiles from his initial view regarding the suitability of the pharmacological treatment prescribed by Mr. Didyuk's treating psychiatrist. In the first report, he concludes that the treatment plan prescribed by the treating psychiatrist worsened Mr. Didyuk's issues and that the drug regime needed to be changed. He confirmed that position on cross-examination. In the addendum report, he describes the dosages as "adequate", with no further discussion.

- [109] Second, Dr. Levin makes a corresponding change to his opinion regarding the reason that Mr. Didyuk's condition is not improving. In the first report, he said the lack of improvement was due, in part, to the poor treatment plan administered by Mr. Didyuk's treating psychiatrist. In his addendum report, he opines that "it is most likely that [Mr. Didyuk's] depressive disorder became treatment resistant".
- [110] Both of those changes in opinion appear to inform Dr. Levin's relatively dire prognosis: if the continuing psychiatric condition was caused by an inadequate pharmacological regime (as he opines in the first report), it follows that a change in that regime could result in an improvement in the psychological condition. Finding that his treatment plan has been "adequate", attributing Mr. Didyuk's continuing psychological condition to being "treatment resistant", and re-iterating Mr. Didyuk's obsessive-compulsive personality (as Dr. Levin does in the addendum report), makes any recovery less likely.
- [111] Again, other than the three months between the reports and the receipt of Dr. Smith's report, there were no other changes or new information on which the revisions were based. Without any additional information, it is difficult, if not impossible, to discern the medical basis for the change in Dr. Levin's opinion.
- [112] The same is true of the change in diagnosis.
- [113] In the addendum report, Dr. Levin attributes his change in the diagnosis to the "duration and severity of Mr. [Didyuk]'s depressive symptomology" [added emphasis]. On cross-examination, he explained the change in the diagnosis was "simply time" - he was of the view that two years of consistent depression was enough to warrant the diagnosis of "persistent", rather than "major" depressive disorder, the former diagnosis having a more pessimistic outcome.
- [114] However, when the timing of the reports is considered, both relative to the third accident and relative to each other, that explanation does not hold up to scrutiny. The first report was prepared over two and a half years after the third accident. Dr. Levin does not explain why he not diagnose "persistent depressive disorder" in the first report even though two years had passed by the time that it was prepared. Nor does he explain why the relatively short three month period between the first report and the addendum report would justify the change in diagnosis.
- [115] The lack of any discernible basis for the changes leads me to conclude that the addendum report was intended to support a prognosis that favoured Mr. Didyuk's position in the litigation. Put more bluntly, Dr. Levin appears to be acting as an advocate for Mr. Didyuk. That advocacy undermines the reliability of his addendum report.
- [116] For those reasons, I give little, if any, weight to Dr. Levin's addendum report.
- [117] However, that is not to say that I accept that Dr. Smith's optimistic prognosis will mean that Mr. Didyuk will recover from his injuries in six months. I do not, for several reasons.

- [118] First, Dr. Levin has opined on Mr. Didyuk's underlying obsessive-compulsive personality traits and their negative effect on his ability to recover from the psychological issues. Dr. Smith does not mention those traits or their possible effects, even to contradict Dr. Levin's assessment. He simply takes no account of their effect on Mr. Didyuk's recovery.
- [119] Second, Dr. Levin's optimistic prognosis assumes that Mr. Didyuk will respond positively to a change in medications. However, even by his own evidence, that will not necessarily be the case. On cross-examination, Dr. Smith conceded that it is not possible to predict how a person will respond to a particular medication until it is tried. In fact, he includes recommendations (electroconvulsive therapy and esketamine or rTMS) as alternatives to his recommended treatment plan, presumably to account for the possibility that even a new pharmacological regime may not work.
- [120] On the bases of the above, I am satisfied that there is a real and substantial possibility that, with a change in his pharmacological regime, Mr. Didyuk's psychological condition will improve. However, Dr. Smith does not provide any indication as to the level of recovery he anticipates can be achieved with "significant improvement" in six months. In particular, Dr. Smith does not equate "significant improvement" with full recovery or functional capacity. Without that evidence, I am unable to conclude that, even with "significant improvement", Mr. Didyuk will return to his pre-accident baseline in six months.

IV. What damages, if any, is Mr. Didyuk entitled to?

A. Non-pecuniary damages

Legal Framework

- [121] As outlined by Madam Justice Kirkpatrick in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, [Stapley] at paras. 45-46, in assessing non-pecuniary damages, courts must consider the effect of the injuries on the plaintiff's particular circumstances, taking into account factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle.

Analysis

- [122] It is not disputed that the injuries arising from these three accidents are indivisible. I will assess non-pecuniary damages on a global basis.
- [123] Although the case law assists in establishing the range of non-pecuniary damages, what is appropriate in each case turns on the unique circumstances. As noted in *Stapley* at para. 45, "[a]n appreciation of the individual's loss is the key".

- [124] In this case, Mr. Didyuk has suffered significant physical and psychological injuries, as well as headaches, dizziness, ringing in his ears, light sensitivity, decreased concentration, poor memory and insomnia. The effect of those injuries has been profound and far-reaching, affecting all areas of his life including at home, his social and recreational life, and at work.
- [125] Mr. Didyuk has been deprived of his enjoyment of life. He is unable to partake in any physical activity. His overall level of function is diminished to the point where he does very little all day, unable even to watch television. He is tired, lacks motivation, is depressed, anxious and in constant pain. To date, his injuries have rendered him unable to work and provide for his family, from which he had previously derived a sense of self-worth. All of the above is in stark contrast to his condition prior to the accident.
- [126] In assessing this head of damages, I have considered that with a change in his medication, Mr. Didyuk's psychological symptoms may improve. That improvement will likely result in an improvement of the other non-physical injuries, although his physical injuries will be permanent.
- [127] For the most part, the cases referred to by both counsel to guide the assessment of non-pecuniary damages involve plaintiffs who have suffered from soft tissue and other injuries similar to those suffered by Mr. Didyuk. All suffered significant psychological injuries including depression and anxiety, however with varying degrees of possible recovery.
- [128] Consistent with his position regarding prognosis, all of the cases which Mr. Didyuk relies on involve plaintiffs who had little to no prospect of improvement in their psychological condition. Most were unlikely to ever return to work. They are: *Cheng v. Mangal*, 2021 BCSC 954; *Fletcher v. Biu*, 2020 BCSC 1304; *Gill v. Apeldoorn*, 2019 BCSC 798; *Tan v. Mintzler and Miller*, 2016 BCSC 1183; and *Moges v. Sanderson*, 2020 BCSC 1511. In those cases, the Court awarded non-pecuniary damages of between \$200,000 to \$225,000.
- [129] The defendants rely on *Kowalski v. Chepil*, 2021 BCSC 1585; *Han v. Ha*, 2020 BCSC 1136; and *Conroy v. Rodin*, 2021 BCSC 861, in which the Court awarded non-pecuniary damages of between \$150,000 to \$190,000. Like the cases relied on by Mr. Didyuk, the plaintiffs in those cases also suffered from physical and other injuries as well significant psychological injuries, in some cases beyond those suffered by Mr. Didyuk. However, while none had a fully positive prognosis, all had some limited prospect for improvement.
- [130] In my view, the cases relied on by the defendants more closely align with Mr. Didyuk's situation. I assess non-pecuniary damages at \$175,000.

B. Loss of earning capacity

1. Past loss of earning capacity

Legal Framework

- [131] Compensation for past loss of earning capacity is determined based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 S.C.C. 53 (CanLII) at para. 49.
- [132] An award for that past wage loss is limited to the person's net income loss: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98.
- [133] The burden of proof of actual past events is a balance of probabilities. However, an assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. They will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

Analysis

- [134] The defendants concede that given the injuries sustained in the accidents, Mr. Didyuk was not able to work any more than he did prior to trial.
- [135] In 2016, prior to the first accident, Mr. Didyuk earned T4 income of \$75,583 (\$27,041 from Paladin and \$48,542 from Aquilini) and had a three year average net business income of \$15,330 from his contract work as a building manager for PosAbilities. Those earnings total \$90,913.
- [136] Mr. Didyuk relies on the written estimate of past income loss prepared by Darren Benning, an economist. Mr. Benning was not called to give oral evidence at trial. In estimating past wage loss, Mr. Benning assumed that, had the accidents not occurred, Mr. Didyuk would have continued to earn an annual income of approximately \$91,000, or a total of approximately \$428,733 from the date of the first accident to trial. Deducting the \$70,056 that Mr. Didyuk did earn in that period results in a gross income loss of \$358,677, or \$272,879 net.
- [137] The defendants accept that Mr. Didyuk was not able to work more than he did after the first accident. However, they argue that had he continued to work, he would have pursued his contract work, for which he could make deductions to decrease his net income, over his employment at Paladin, which does not allow for any reductions of net income. In that case, his without-accident net income would have been lower. A lower without-accident net income would result in a lower past wage loss.

- [138] The defendants' argument is supported by the fact that Mr. Didyuk was actively seeking to add to the portfolio of buildings that he managed on a contract basis. In my view, Mr. Didyuk's demonstrated work ethic, drive and determination make the possibility that he would have been able to do so real and substantial. In that case, Mr. Benning's estimate of past loss may be overstated.
- [139] On the other hand, two factors suggest that Mr. Benning's estimate may be understated. Firstly, it assumes that Mr. Didyuk's without-accident employment income would not have increased. In fact, his income from Aquilini increased slightly, by \$1,505, between 2016 and 2017. A continued upward trend to 2021 would serve to increase his past loss.
- [140] Secondly, and more significantly, Mr. Benning bases his estimate of without-accident self-employment on an income of \$15,330, that amount being a three year average. In fact, Mr. Didyuk's net self-employment income increased each year, going from \$9,964 in 2013 to \$18,762 in 2016. There is no reason to suggest that those increases would not have continued had the accident not occurred. I accept that, in those ways, Mr. Benning's estimate of past wage loss is understated.
- [141] On balance, the potential overestimate of past wage loss (as argued by the defendants) and the understatement of that loss (as argued by Mr. Didyuk) balance each other out, so as to make Mr. Benning's estimate of past wage loss appropriate.
- [142] I award Mr. Didyuk past wage loss of \$272,879, rounded to \$273,000.
2. Future loss of earning capacity

Legal Framework

- [143] It has long been established that to prove entitlement for a loss of earning capacity, a plaintiff must demonstrate both (a) an impairment to their earning capacity, and (b) that there is a real and substantial possibility, and not mere speculation, that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 [Perren] at paras. 11, 31-32; *Smith v. Moshrefzadeh*, 2012 BCSC 1458 at para. 80.
- [144] In *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 [Rab], and *Lo v. Vos*, 2021 BCCA 421, [Lo] the Court of Appeal clarified the approach to assessing claims for loss of future earning capacity by setting out a three step analysis. In *Rattan v. Li*, 2022 BCSC 648 at para. 148, Justice Horsman summarized that analysis as follows:
- (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?;
 - (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?; and,
 - (3) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[145] As the final step of the analysis, the court must consider whether the award of damages is "reasonable and fair": Lo, at para. 117.

The parties' positions

[146] Based on the medical prognosis of Drs. Kim, Waseem and Levin, Mr. Didyuk argues that there is no possibility of him returning to the work force in the future.

[147] Mr. Didyuk bases his calculation for loss of future earnings on an annual income of \$91,000, being his income in the year prior to the first accident, and on the assumption that he has no residual work capacity. As set out by Mr. Benning, the present value of a \$91,000 income stream to age 70 is \$1,076,348. Noting that negative market contingencies are built into Mr. Benning's calculation, Mr. Didyuk claims \$1,080,000 for future loss of earning capacity.

[148] The defendants do not dispute that, to date, Mr. Didyuk has had no residual work capacity due to the injuries sustained in the accidents. However, based on Dr. Smith's opinion, they argue that his continuing incapacity was caused or exacerbated by the pharmacological regime prescribed by his treating psychiatrist. Now that a different treatment plan has been identified, they say that it would be unfair to have to compensate Mr. Didyuk based on the inadequate treatment plan.

[149] Based on a six month recovery from the psychological injuries, they argue that Mr. Didyuk's loss of future earning capacity is limited to half a year's earnings, or \$45,000. In any event, they reject the suggestion that he will never return to work. Even if it takes longer than six months to recover, or if he is limited to working part-time, they argue that Mr. Didyuk has residual work capacity.

Analysis

[150] The first question in assessing loss of future earning capacity is an evidentiary one: does the evidence disclose a potential future event that could lead to a loss of capacity? The Court of Appeal cites chronic injury as an example of evidence that can satisfy this step of the analysis: Rab at para. 47.

[151] As the defendants have conceded, the medical evidence establishes that, to the date of trial, the physical, psychological, and other injuries sustained in the accidents have impaired Mr. Didyuk's functional capacity to work. While the defendants assert that Mr. Didyuk will recover from the psychological injuries, they concede it will take at least six months for that to happen. There is no suggestion that Mr. Didyuk can earn an income in that time. There is no doubt of the chronic nature of Mr. Didyuk's physical injuries.

[152] The persistent nature of Mr. Didyuk's physical injuries, as well as the ongoing, even if resolvable, nature of the psychological injuries are sufficient to satisfy this first step in the analysis.

- [153] The next step is to consider whether there is a real and substantial possibility that the future event, that is, the ongoing psychological and physical injuries, will cause a pecuniary loss. As evidenced by Mr. Didyuk's loss of income prior to trial, there is no question that it will.
- [154] The real issue in dispute is how to assess the future loss, having regard to the relative likelihood of the occurrence of that loss.
- [155] There are two possible approaches: the "earnings approach" as described in *Pallos v. Insurance Co. of British Columbia*, [1995] 3 WWR 728, 100 B.C.L.R. (2d) 260 (C.A.) and the "capital approach" as described in *Brown v. Golaiy*, [1986] BCWLD 349, 26 B.C.L.R. (3d) 353 (S.C.).
- [156] The earnings approach will generally be more useful when the loss is easily measurable, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate the plaintiff's future earning capacity: *Perren* at para. 32; *Hosseinzadeh v. Leung*, 2014 BCSC 2260 at para. 126. By contrast, where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.
- [157] Given that Mr. Didyuk has a past earnings history, the parties agree that it is appropriate to use the earnings approach as the starting point for the assessment. I agree.
- [158] In *Kim v. Baldonero*, 2022 BCSC 167 at para. 87, Justice Horsman set out the central task of the court in assessing future loss as follows:

An award for future loss of earning capacity represents compensation for a pecuniary loss. While the award is an assessment of damages, not a calculation, the award nevertheless involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156-157 [*Dornan*].

- [159] I start this analysis with an assessment of Mr. Didyuk's likely without-accident income. As noted, in the year prior to the accident Mr. Didyuk earned an annual gross income of approximately \$91,000, comprised of approximately \$15,000 of self-employment earnings and approximately \$76,000 of employment income. However, it was not Mr. Didyuk's intention to continue with his employment work, but to transition to self-employment doing contract work as a building manager, much as Mr. Barabakh does.
- [160] However, regardless of how Mr. Didyuk earned income - by employment or on a contract basis - the parties agree that Mr. Didyuk's without-accident annual earnings would have been approximately \$91,000.
- [161] The more difficult issue is the assessment of Mr. Didyuk's likely with-accident income.

- [162] As set out above, Dr. Smith does not provide any indication as to the level of functional recovery he anticipates can be achieved with "significant improvement" to Mr. Didyuk's psychological condition. Notably, he does not equate "significant improvement" with full functional capacity. Without that evidence, I am unable to conclude that Mr. Didyuk will have the capacity to earn 100 per cent of his pre-accident income in the six months in which his psychological condition may improve.
- [163] Two other factors lead to the same conclusion. First, as noted, the psychological issues are not the only issues that limit Mr. Didyuk's functionality. While I have concluded that improvement in his psychological condition will likely result in improvement in his non-physical injuries, there is no evidence of a similar correlation with his physical injuries. I conclude that the physical injuries, even if improved, will continue to limit Mr. Didyuk's work capacity.
- [164] Second, it will take some time to find work. From the time Mr. Didyuk started actively trying to build his portfolio in 2015 to February 2017, he was only able to find one additional building to manage, and then not on a contract basis. He is now constrained by the residual incapacity caused by his ongoing injuries. His ability to find appropriate work that can accommodate that residual incapacity will be made more difficult as a result.
- [165] I do accept, as the defendants argue, that it is not necessary for Mr. Didyuk to return to his pre-accident baseline in order to be able to return to work. Mr. Barabakh described how building management can be done on a part-time basis, even with some physical limitations. In fact, it is Mr. Barabakh's intention to continue managing one or two buildings into his 70s, even after his "retirement" to Hawaii.
- [166] Furthermore, notwithstanding his prognosis for Mr. Didyuk's physical capacity, Dr. Waseem testified that Mr. Didyuk nonetheless has residual employability if he is able to find work that could accommodate him. The fact that Dr. Waseem suggested a vocation assessment to determine possible alternate employment opportunities indicates that he does not consider Mr. Didyuk to be wholly unable to work.
- [167] In my view, while Mr. Didyuk's physical impairment will likely preclude him from working as a building manager or security guard to the same degree that he did prior to the accidents, alternative employment opportunities may be available to him.
- [168] I conclude that with a change in his medication, Mr. Didyuk will have residual work capacity and he will be able to return to some work, but on less than a full-time basis as follows:
- a) It will take approximately one year to change Mr. Didyuk's medication and achieve the improvement in psychological condition that is required to gain some work capacity. Mr. Didyuk should be fully compensated for his lost capacity for that period. Using the present value economic multipliers provided by Mr. Benning, the present value of one year's \$91,000 income is \$76,350;

- b) After improvement in the psychological condition, it will take a further two years to improve Mr. Didyuk's physical, cognitive, and other symptoms and to find suitable work, as building manager, security guard, or otherwise. He should be compensated three-quarters of his without-accident income (\$68,250) for those two years. Using the present value economic multipliers provided by Mr. Benning, the present value of that amount is \$164,871; and
- c) Finally, when Mr. Didyuk does return to work, his ongoing physical and other impairments, even if improved, will preclude him from working on a full-time basis. Mr. Didyuk should be awarded one-half of his estimated without-accident income (\$45,500) each year until age 70 to compensate him for his diminished capacity to work even after he receives proper treatment. Using the present value economic multipliers provided by Mr. Benning, the present value of that amount is \$426,108.

[169] That does not conclude the analysis. Since the course of future events is unknown, as a final step in assessing future earning capacity, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab* at para. 29.

[170] In this instance, I have assumed that with a new pharmacological regime, Mr. Didyuk's psychological injuries will improve, although not in six months and not to full functional capacity. However, as Dr. Smith concedes, there is no guarantee that this will be the case. Mr. Didyuk's pre-existing obsessive-compulsive personality, the possibility that he may be "treatment resistant", or the fact that a new regime simply may not work, may preclude any recovery at all. In that case, the assessment of damages under this head may be too low and favours an upward contingency adjustment.

[171] Mr. Benning's present value multipliers account for general negative labour market contingencies in including labour force non-participation (including for voluntary retirement, illness or disability), unemployment, part-time work, and part-year work. There is no need to account for those general contingencies.

[172] Balancing those contingencies, I am satisfied that it is appropriate to apply an upward contingency adjustment. On the basis of the above, in my view, a reasonable and fair assessment of Mr. Didyuk's future loss of earning capacity is \$700,000. I award that amount.

C. Loss of housekeeping capacity

Background facts and relevant evidence

[173] Mr. Didyuk testified that, prior to the accident, he and his wife evenly divided the household chores such as cooking and doing the dishes, each doing what was needed. The exception was cleaning, which Ms. Didyuk would do with Mr. Didyuk's assistance. Mr. Didyuk was primarily responsible for buying most groceries and for maintaining their garden and backyard. Mr. Didyuk estimated that before the accident he and his wife spent approximately two to three hours each per week attending to household chores.

- [174] Ms. Didyuk described Mr. Didyuk as being "very supportive" at home and confirmed his evidence regarding the distribution of chores.
- [175] In the aftermath of each of the accidents, Mr. Didyuk was not able to attend to chores but was progressively able to do more after the first and second accidents. That progress ended with the third accident, after which he was limited to light work such as making a sandwich, rinsing plates, wiping the counter, sweeping, and some shopping. He reported to Dr. Kim that he has difficulty performing household chores like cleaning, vacuuming and carrying heavy groceries. He is no longer able to attend to any outdoor work such as cutting the lawn or snow removal, all of which his wife now does.

Legal Framework

- [176] It is well established that a plaintiff whose ability to perform housekeeping services is diminished, in part or in whole, ought to be compensated for that loss: *McTavish v. MacGillivray et al.*, 2000 BCCA 164 at para. 63, *Huddart J.A.*; *Kim v. Lin*, 2018 BCCA 77 [Kim] at paras. 33 - 34.
- [177] It is also well established that gratuitous housekeeping services provided by family members will not preclude an award for the loss of housekeeping capacity: *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28.
- [178] Where an award is warranted, loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited in, but not unable to do, household tasks or where only a "minor adjustment of duties within the family" is required: *Crimeni v. Chandra*, 2015 BCCA 131 at para. 45. On the other hand, where a plaintiff has suffered a true loss of capacity, that loss may be compensated by a pecuniary damages award. A pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *Kim* at paras. 33 - 34.
- [179] Whichever approach is taken, the award must be reasonable, that is "tied to actual loss of capacity which justifies the award in the first place": *Kim* at para. 34.

The parties' positions

- [180] The plaintiff advances both a past and future claim for loss of housekeeping capacity, on the basis that he has not been able to return to the majority of the indoor chores and all of the outdoor chores that he performed before the accidents. He now relies on his wife, who is also working two jobs, to attend to those chores.
- [181] In order to quantify his loss, Mr. Didyuk relies on the statutory minimum wage rate in British Columbia which is \$15.20 per hour. Multiplying that rate by Mr. Didyuk's low estimate of two hours of chores per week yields an annual value of \$1,580, or approximately \$5,560, over the three years and seven months from the date of the first accident to trial.

- [182] Mr. Didyuk bases his claim for future loss of housekeeping capacity on that same annual rate (\$1,580 per year) and on the premise that his injuries are permanent and that he will not regain any functional capacity at home. Applying the future cost of care multiplier to that annual rate yields a present value of \$37,923 for annual losses extended over Mr. Didyuk's remaining life expectancy.
- [183] Using those combined numbers as a "rough guide", Mr. Didyuk seeks an award of \$30,000.
- [184] Based on their position that Mr. Didyuk's condition will improve, the defendants argue that there should be no award for future loss of housekeeping capacity. They argue that, to the extent that Mr. Didyuk has suffered a loss of capacity, he can be adequately compensated by the award of non-pecuniary damages.

Analysis

- [185] I accept that, prior to the accident, Mr. Didyuk contributed to the indoor household chores on a fifty-fifty basis with his wife and completed 100 per cent of the outdoor work. I also accept that he was limited in his ability to perform those chores between the first and third accidents, and almost wholly prevented from performing them between the third accident and trial.
- [186] Since the third accident, despite having two jobs, Ms. Didyuk has had to assume the full workload around the home, including 100 per cent of the outdoor work which was previously Mr. Didyuk's domain. In my view, this is not a case in which only a "minor adjustment of duties within the family" was required to ensure that the house work was completed. On that basis, it is appropriate to award a pecuniary amount for Mr. Didyuk's loss of homemaking capacity.
- [187] To assess his past loss, that is between the first accident and trial, I note that Mr. Didyuk's functionality did progress after each of the first and second accidents. As such, although he did have diminished capacity, he was not wholly prevented from performing household tasks for that whole period.
- [188] Given that Mr. Didyuk did have some capacity, his assessment of \$5,560 for past loss of capacity is too high. I acknowledge that an award for loss of capacity is generally assessed rather than precisely calculated: *Liu v. Bains*, 2016 BCCA 374. However, using Mr. Didyuk's calculations as a rough guide, in my view, an award of \$4,000 is a fair and reasonable assessment of his past loss of capacity.
- [189] Mr. Didyuk's future loss is less certain. I accept that Mr. Didyuk is currently unable to assist in any homemaking chores. However, I am not satisfied that his situation will not improve.

[190] I have concluded that with a change in his medication, his psychological condition may improve which, in turn, will result in an improvement in his overall condition and functionality. However, for reasons set out in respect of Mr. Didyuk's loss of future earning capacity, I cannot conclude that any such improvement will result in full resumption of his household responsibilities.

[191] Taking all of the above into account, including Mr. Didyuk's "rough calculation" of the quantum of his future loss, in my view, a fair and reasonable award for the future loss of housekeeping capacity is \$16,000.

[192] I award a total of \$20,000 for loss of housekeeping capacity, comprised of my assessment of past loss of \$4,000 and future loss of \$16,000.

D. Special damages

[193] Mr. Didyuk has led evidence of expenses totalling \$31,362 incurred for counseling, an optometrist, a chiropractor, vestibular rehabilitations, physiotherapy, massage therapy, kinesiology, prescriptions, and other medication, all of which I accept are referable to the accidents. The defendants accept the claims for special damages.

[194] I award \$31,362 as special damages.

V. Summary

[195] To summarize, I award damages as follows:

Non-pecuniary damages:

\$175,000

Past loss of earning capacity:

\$273,000

Future loss of earning capacity:

\$700,000

Loss of housekeeping capacity

\$20,000

Special damages

\$31,362

Total award:

\$1,199,362

VI. Costs

[196] During the hearing of this trial, on Mr. Didyuk's application, I rejected an expert's report that the defendants sought to rely on as inadmissible. On receipt of those reasons, the parties made submissions on costs, including in respect of Mr. Didyuk's application for special costs of the trial. That costs application has yet to be determined.

[197] Pending the outcome of that application, and subject to hearing matters of which I am not aware, Mr. Didyuk is entitled to costs at Scale B.

"Ahmad, J."

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