

CANADA / JUDGMENT

Grewal v. Saggu

2025 BCSC 755

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Supreme Court of British Columbia

DECIDED

24 April 2025

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2025 BCSC 755 Grewal v. Saggu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grewal v. Saggu,

2025 BCSC 755

Date: 20250424

Docket: M188976

Registry: Vancouver

Between:

Hardeep Grewal

Plaintiff

And

Navneet Kaur Saggu and Manjit Kaur Saggu

Defendants

Before: The Honourable Justice Girn

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

Vancouver, B.C.

November 27-30, 2023

December 1, 2023

February 9, 2024

May 27, 2024 and

September 27, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 24, 2025

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- [1] The plaintiff, Hardeep Grewal, claims for damages arising from a motor vehicle accident that occurred on September 20, 2016 ("the Accident"). The defendants have admitted liability for the Accident.
- [2] Mr. Grewal seeks non-pecuniary damages, past and future loss of earning capacity, loss of housekeeping capacity, cost of future care, and special damages.

- [3] The defendants concede that Mr. Grewal sustained injuries but argue that the injuries have not affected his life as much as he alleges. They argue that the life he planned to have is not much different than what he has now. They also contend that his current function is better than he alleges, and that the quantum of damages must account for his failure to mitigate his losses.
- [4] The main issues to be resolved are the quantum of damages to which Mr. Grewal is entitled from the defendants as a result of the Accident and whether Mr. Grewal mitigated his losses.
- [5] For the reasons that follow, I have concluded that Mr. Grewal suffered losses sustained from the Accident. However, I am not satisfied that Mr. Grewal is entitled to the amount he seeks.

BACKGROUND

- [6] Mr. Grewal is currently 32 years old. He lives in Surrey with his mother, siblings, and wife, who he married in 2019. He does not have any children. Since March 2022, Mr. Grewal has been working as a mortgage agent with IMI Financial Services ("IMI") in Langley, British Columbia. Prior to this and since the Accident, Mr. Grewal also worked at Yellow Pages, RBC Insurance, Shaw Communications and Frame One, a web-based software company. He also runs a side business selling products on Amazon. Mr. Grewal estimates that in his best year, he earned \$30,000 from the side business.

Prior to the Accident

- [7] Mr. Grewal was physically fit and healthy prior to the Accident. I accept that he had no symptoms of depression, anxiety, or any other psychiatric conditions. Mr. Grewal was a social person who enjoyed going out to bars and clubs with his friends. Prior to the Accident Mr. Grewal enjoyed travelling with his friends and family to various places in North America as well as Europe and India.
- [8] Mr. Grewal testified and it was corroborated by factual witnesses that he was very active prior to the Accident. He regularly played basketball, hockey, and football and attended the gym on a daily basis. Mr. Grewal is a car enthusiast who enjoyed working with and improving cars and riding his motorcycle.
- [9] In terms of employment, Mr. Grewal testified that he has been employed since he was 15 years old. Prior to the Accident, Mr. Grewal testified that he rarely took sick days or missed work.
- [10] Prior to the Accident Mr. Grewal lived with his parents (and continues to do so) and regularly assisted around the house with physically laborious work including cleaning the gutters, shoveling snow, pressure washing and mowing the lawn. He testified that his brother helped him with some of these chores.

- [11] Mr. Grewal has previously been involved in two minor accidents. He did not put forward an injury claim for either of these accidents.

The Accident

- [12] As I have noted, liability is admitted by the defendants. Mr. Grewal testified that he was driving eastbound on Highway 10, preparing to turn left (north) on 180th Street in Surrey. The defendants' vehicle pulled out of a driveway on the righthand side. Mr. Grewal swerved left to attempt to avoid a collision, but the defendant's vehicle hit the passenger door. On impact, the left side of his body and the left side of his head collided with the pillar inside his car. The Court was not provided with any estimates of the damage to Mr. Grewal's vehicle or the defendant's vehicle.
- [13] Emergency services were not called to the scene, and Mr. Grewal was able to drive home. Mr. Grewal testified that he did not experience any immediate pain and did not receive any medical treatment immediately after the Accident.

Mr. Grewal's Injuries

- [14] Mr. Grewal says that he sustained the following injuries from the Accident:

- chronic back pain, injury to the L4-5 disc;
- radiculitis at L4 and L5;
- depression; and
- somatic symptom disorder

Mr. Grewal's Post-Accident Circumstances and Treatment

Medical Visits, Symptoms, and Treatment

- [15] As I have noted, Mr. Grewal did not receive any medical treatment at the scene of the Accident nor did he visit his family physician shortly thereafter.
- [16] Mr. Grewal testified that he began to suffer pain on the left-side of his mid to lower back and shooting pain down the left side of his thigh to his kneecap. He also testified that he had left shoulder blade pain. By the second week, he continued to have pain in his lower back, especially if he was sitting in front of a computer at work for eight or more hours. By the third week, he experienced throbbing and burning sensations, including stiffness, in his mid and lower back.
- [17] Mr. Grewal first visited his family physician, Dr. Rai, in late October 2016, some five weeks post-Accident and was referred to seek chiropractic treatment and follow up in two to three weeks. Mr. Grewal agreed that he did not do so.

- [18] Mr. Grewal testified that two to three months after the Accident, he began to experience intense back spasms that would bring him to his knees and cause him to be bedridden for two to three days. He testified that the back spasms have been consistent since their onset and require him to miss work on a regular basis. These flareups also prevent Mr. Grewal from being able to perform household duties and even self care. Mr. Grewal testified that following a back spasm flare up, he attends chiropractic treatment or physiotherapy once he is well enough to move.
- [19] Mr. Grewal testified that approximately six months post-Accident, he began to experience sharp shooting pain down his left leg that caused him to drag his leg. The pain is a result of performing physical activities such as going for long walks, playing sports or going for a ride on his motorcycle.
- [20] Despite the onset of this new pain and the ongoing debilitating spasms, Mr. Grewal agreed that his next visit to Dr. Rai was not until June 2017, some eight months after his first visit. Mr. Grewal told Dr. Rai that the chiropractic treatment only provided transient benefit and was told to seek physiotherapy treatment.
- [21] I note that Mr. Grewal testified that he has seen Dr. Rai every two to three months since the Accident. The clinical records of Dr. Rai do not reflect this.
- [22] Mr. Grewal's next visit to Dr. Rai was in September 2017, at which point he reported that the physiotherapy was not helping him. There is an issue with Mr. Grewal's evidence on this point. While he reported positive benefits from physiotherapy, the clinical records of his physiotherapist, Mr. Sohi, indicate that Mr. Grewal had not yet commenced physiotherapy treatment. Mr. Grewal testified that the back spasms were more frequent, but his symptoms largely remained the same and plateaued. Mr. Grewal agreed that he told Dr. Rai that he was doing salt therapy. I note that Mr. Grewal did not produce any records or invoices in regards to the salt therapy.
- [23] At his next visit to Dr. Rai in August 2018, Mr. Grewal agreed that he told Dr. Rai that he was not able to make his appointments due to a busy work schedule and that he was attending chiropractic treatment to address the flare ups. However, in cross examination, Mr. Grewal agreed that at this point he had only seen his chiropractor, Dr. Penner, twice since the Accident - May 1, 2018 and August 7, 2018. Dr. Rai's clinical records do not contain any reference to Mr. Grewal's back spasms, which forced him to be bedridden for days at a time, nor do they indicate that Mr. Grewal reported the frequency of these back spasms.
- [24] Despite Dr. Rai recommending that Mr. Grewal increase the frequency of the chiropractic treatments, Mr. Grewal only attended three sessions in August 2018 with no other sessions until January 2019.

- [25] In terms of other accidents, Mr. Grewal testified that in 2019 he had an altercation with a bouncer at a nightclub which resulted in him being held in a headlock for roughly 10 minutes. He testified that he experienced neck stiffness for a couple days following this incident. He reported to Dr. Rai that due to the incident he had been having a lot of pain but that it eventually resolved. In 2021, Mr. Grewal rolled his ankle and was off work for approximately four days.
- [26] In terms of treatment since the Accident in 2016 and up to the trial, Mr. Grewal testified that he has attended roughly 50 chiropractic therapy sessions, between 25-30 physiotherapy sessions, and a handful of massage therapy sessions. He testified that all of these passive therapies provide temporary relief. He has gone for approximately 30 salt therapy sessions, which he testified helps with his back pain.
- [27] Mr. Grewal was referred to a pain specialist, Dr. Jaworski, and first saw him in June 2020. His next appointment was in April 2021. Mr. Grewal agreed that he told Dr. Jaworski that his pain was mostly a sensation of stiffness. Dr. Jaworski's notes also are devoid of any mention of Mr. Grewal being bedridden for multiple days due the back spasms. In cross examination, Mr. Grewal agreed that during his visit with Dr. Jaworski on April 25, 2022, he said he was attending the gym five days a week and that his sleep was fine. Having gained a significant amount of weight after the Accident, Mr. Grewal was told to lose weight and follow up in six weeks, which Mr. Grewal agreed he did not.

Employment

- [28] Since March 2022, Mr. Grewal has been employed at IMI Financial as a mortgage broker. He is only licenced as a mortgage broker in Ontario. Work is distributed through leads. IMI Financial pays for the leads and they are given to brokers in the office. Mortgage brokers at IMI Financial are commission-based.
- [29] As a mortgage broker, Mr. Grewal works a desk job. He completes his work from a sitting position at his desk in front of a computer. He testified that the layout of the office does not allow him to have a sit stand desk.
- [30] He testified that he misses roughly 25% of workdays per month on account of the back spasms.

Mental Health

- [31] Mr. Grewal testified that by 2018, his mental health began to deteriorate. This was aggravated after the death of his father. Mr. Grewal testified that his mood has been affected by the Accident. He is easily frustrated and is much less patient, fun, and happy since the Accident. In cross examination, Mr. Grewal agreed that up until October 2019, he had not spoken to Dr. Rai about his mood being affected by the Accident. He stated that he was someone who kept things to himself.

- [32] In October 2019, Mr. Grewal received a prescription for Diclofenac. This is the only time he received any medication for his symptoms. He takes Advil or Tylenol when the pain is really bad. Mr. Grewal was prescribed anti-depressants but did not take them. He stated that he "is not a pills guy" and has seen the impact that anti-depressants have had on his friends.

Other Activities

- [33] The injuries Mr. Grewal sustained from the Accident have affected his ability to engage in the physical activities he did prior to the Accident. In the summer of 2017, Mr. Grewal tried playing ball hockey, contactless football, and basketball. He found he had to stop because of the increased pain down the leg and back pain, and often experienced back spasms the following day. His visits to the gym also decreased in frequency.
- [34] Despite suffering from consistent back and leg pain, Mr. Grewal purchased a motorcycle in 2021, which he has only ridden six or seven times due to the onset of pain in his back and leg. Mr. Grewal last rode his bike in May or June of 2023 and has no plans for future road trips. As well, Mr. Grewal spends much less time working on cars.
- [35] Although Mr. Grewal's love of travel has been impacted as well, he has still been able to travel to India twice since the Accident, as well as take trips to Europe and Southeast Asia. However, Mr. Grewal testified that he often ends up bedridden for days due to back spasms.
- [36] Mr. Grewal got married in 2019. Mr. Grewal testified that he arranged accommodations at his Sikh wedding to account for his injuries. At one point he sat on a chair when he would normally be expected to sit cross-legged on the floor. I note, that while the Mr. Grewal could have provided photographs to illustrate this, he did not do so and the evidence of wife, Ms. Basra, on this was not consistent. As such, I give no weight to this part of Mr. Grewal's evidence.
- [37] At the time of trial, Mr. Grewal testified that his back pain, which occasionally radiates up into his left shoulder and down his left leg, and the back spasms have remained relatively constant since the year following the Accident.

Factual Witnesses

Amrita Basra

- [38] Ms. Basra met Mr. Grewal in 2015 and they married in August 2019. Ms. Basra works as a care aide. Ms. Basra was able to speak to Mr. Grewal's pre-Accident and post-Accident activities. She testified that prior to the Accident Mr. Grewal was physically active - they would often go hiking, bike riding and for long walks.

- [39] While Ms. Basra testified that Mr. Grewal's back spasms occur roughly once per month, she did not provide any details of when they initially began. However, she stated that when the back spasms occur she and her mother-in-law are required to bring food to him, assist him to get to the washroom and help him dress.
- [40] Ms. Basra testified that at their wedding, Mr. Grewal required assistance getting up and down off the floor and remained standing at a time when it is customary for the groom to remain seated. In his testimony, Mr. Grewal stated that he had to sit on a chair during the ceremony. I note this inconsistency in their testimony.
- [41] Ms. Basra also testified that while they still go for walks, they are much shorter. However, she also testified that during their honeymoon in 2023, she and Mr. Grewal did a fair bit of walking in Thailand followed by a day of rest the next day in order for him to recover. As well, Ms. Basra testified that for approximately four days of their honeymoon, Mr. Grewal was bedridden. Ms. Basra also testified that she and Mr. Grewal continue to travel regularly despite his symptoms.
- [42] Ms. Basra testified that Mr. Grewal's personality has changed. She noted that he has developed a bad temper and now has a hard time dealing with emotions and has pushed people and friends away.
- [43] Ms. Basra confirmed Mr. Grewal's desire to work in the real estate field, that he has an Amazon business and has always been interested in earning passive income. I note, although they have been a couple since 2015, Ms. Basra provided very little information about how the Accident has affected Mr. Grewal's ability to work and his medical treatments, noting that she did not interfere with his treatments.

Amardeep Bhangoo

- [44] Mr. Bhangoo has known Mr. Grewal since 2013 when they worked together at the Brick and formed a friendship.
- [45] Prior to the Accident, Mr. Bhangoo and Mr. Grewal met up to play several sports together three to four times per week. Mr. Bhangoo and Mr. Grewal also worked on cars together.
- [46] Since the Accident, Mr. Grewal has only played basketball with Mr. Bhangoo once or twice. Mr. Bhangoo testified that on those occasions, Mr. Grewal could only play for 10 to 15 minutes.
- [47] Mr. Bhangoo and Mr. Grewal worked together at Shaw Communications and now work together at IMI Financial. Mr. Bhangoo, in addition to working at IMI Financial, also works with his family business building homes. As a result, Mr. Bhangoo is not always at IMI Financial every day during business hours. On the days Mr. Bhangoo works with his family business, he cannot say whether Mr. Grewal is at work at IMI Financial or at home. He also is unable to say with certainty where Mr. Grewal is when he is not at IMI Financial. Specifically, Mr. Bhangoo cannot say if on the days Mr. Grewal misses work at IMI Financial,

he is at home experiencing back spasms.

- [48] Mr. Bhangoo confirmed leads at IMI Financial are distributed to mortgage brokers who are physically in the office but that certain tasks can be done at home, including speaking to clients.

Mike Zayas-Duran

- [49] Mr. Zayas-Duran is the operations manager at IMI Financial. He corroborated the evidence that leads are distributed in the office to mortgage brokers which requires them to be physically present in the office. If Mr. Grewal is not in the office, he misses out on receiving these leads.
- [50] Mr. Zayas-Duran testified that he was aware of the Accident when Mr. Grewal was hired by IMI Financial and that it could affect his attendance and performance at work. Mr. Zayas-Duran estimates that Mr. Grewal misses two to three days of work per week. He also confirmed that the current set up in the office does not allow for a sit stand desk to be swapped out.
- [51] In cross examination, Mr. Zayas-Duran testified that when Mr. Grewal began working at IMI Financial, he did not ask for accommodations. He testified that there was an expectation that brokers are expected to be in the office on a regular basis, but that IMI Financial was prepared to allow Mr. Grewal some time off.
- [52] Mr. Zayas-Duran did not keep track of how much work Mr. Grewal actually missed as a result of his injuries or how many leads he actually missed. Mr. Zayas-Duran testified that it is too hard to track what Mr. Grewal had missed out on while away from work due to his injuries. He was aware that Mr. Grewal also had a side business with Amazon.
- [53] In terms of accommodations, Mr. Zayas-Duran conceded that it would be possible to give the leads to someone working at home, assuming the cloud software was operating on the computer set up at home. As well, in cross-examination Mr. Zayas-Duran acknowledged that they could accommodate Mr. Grewal in obtaining a sit stand desk if it was required but does not recall Mr. Grewal ever having that conversation with him.

Rajan Sohi

- [54] Mr. Sohi is a physiotherapist at Synergy Rehabilitation ("Synergy"). He first treated Mr. Grewal in March 2019. Mr. Grewal initially attended seven sessions over six weeks but then did not return to see Mr. Sohi until March 2023, when Mr. Grewal advised Mr. Sohi that he hurt his back by lifting heavy weights.

- [55] Mr. Sohi recalled his discussion with Mr. Grewal that he should attend four to five sessions followed by an active rehabilitation plan of 18 sessions over nine weeks. He confirmed that he discussed his treatment recommendations with Mr. Grewal on March 24, 2023, but that Mr. Grewal did not attend the recommended sessions and attended irregularly. Mr. Sohi's clinical records indicate that Mr. Grewal attended Synergy approximately eight times through early June 2023, but has not since attended.
- [56] Mr. Sohi recalled Mr. Grewal mentioning back spasms and that he had a 50% impairment with respect to the flexion, extension, right lateral flexion, and left lateral flexion in his lumbar spine. Similarly, Mr. Grewal also had a 50% impairment with respect to the movement in his lumbar spine. Mr. Sohi confirmed that these were objective findings and that they remained relatively stable throughout Mr. Sohi's treatment of Mr. Grewal right until the last visit, as noted in the clinical records.

CAUSATION

- [57] The plaintiff is required to establish on a balance of probabilities that the defendant's negligence caused or materially contributed to her injuries. Each case must be determined on its own facts.
- [58] In *Jenkins v. Casey*, 2022 BCCA 64 at para. 75, leave to appeal to SCC ref'd, 40203 (9 February 2023), the Court of Appeal noted that the trial judge correctly summarized the general principles of causation:
- a) If the defendant's negligence is one cause of an injury, or if it exacerbates or aggravates an existing condition, then the defendant is liable for causing the resulting injury: at para. 115, citing *Athey* [(1996), 140 DLR (4th) 235, 1996 CanLII 183 (S.C.C.)] at para. 47.
 - b) The primary test for causation asks: "but for the defendant's negligence, would the plaintiff have suffered the injury?": at para. 116, citing *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
 - c) Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person: at para. 117, citing *Athey* at para. 34.
 - d) The general principles of causation in law apply to psychological injury just as they apply to physical injury: at paras. 119-120, citing *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.); *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 74.
- [59] Mr. Grewal submits that the Accident caused him to experience chronic lower back pain, resulting intermittent shoulder and leg pain, and he has major depressive disorder and chronic somatic symptom disorder.

- [60] The defendants acknowledge that the Accident caused soft tissue injuries, primarily to Mr. Grewal's lower back. However, they submit that the evidence supports the view that Mr. Grewal did not experience serious injuries to his spine or his mental health and that his life was not seriously impacted by his symptoms. They point to the fact that Mr. Grewal's work and household duties were largely unaffected, and he continues to pursue other interests, continues to travel, and that his social life remains largely unaffected.
- [61] The defendants point to Mr. Grewal's counsel's submission that one of the key issues in this case is the alleged spasms in his lower back. The defendants submit that the evidence, on a balance of probabilities, establishes that Mr. Grewal's current complaints of debilitating back spasms and pain shooting down his leg, if they actually occur regularly, are not causally connected to the Accident. The defendants rely on the fact that Mr. Grewal failed to report these debilitating back spasms, or the fact that he was missing work on account of them, to any medical professional, be it his treating physician or a retained expert.

Expert Evidence on Causation

- [62] A number of expert witnesses were qualified to provide opinion evidence at trial. A summary of their evidence follows.
- [63] Mr. Grewal called the following experts:
- a) Dr. Gurpreet Palak - physiatrist
 - b) Dr. Paul Devlin - psychiatrist
- [64] The defendants called one expert, Dr. Simon Horlick, an orthopaedic surgeon.

Dr. Gurpreet Palak - physiatrist

- [65] Dr. Palak was qualified as an expert in the field of physical medicine and rehabilitation and pain medicine. He initially assessed Mr. Grewal on March 3, 2020, and then again on July 11, 2023, and drafted corresponding medical-legal reports. Mr. Grewal is not relying on the 2020 Report for its opinion but rather relies on Dr. Palak's report dated August 11, 2023 (the "Second Report").
- [66] In his Second Report, Dr. Palak wrote that at the time of his initial 2020 assessment, he diagnosed Mr. Grewal with:
- 1. Lumbar spine strain/sprain
 - 2. Lumbar facet-mediated pain
 - 3. Mild thoracic spine sprain/strain
 - 4. Tightness of the iliotibial band
 - 5. Possible irritation of the left L5 nerve root versus L5-S1 discogenic pain

6. Sacroiliac joint complex pain syndrome
7. Moderate anxiety and depression symptoms
8. Pain catastrophizing
9. Moderate degree of sleep disturbance

- [67] Dr. Palak opined that these injuries were a result of the Accident. Dr. Palak noted that based on the imaging findings, Mr. Grewal was found to have a disc injury at L4-5 as well as possible impingement of the L4 and L5 nerve roots. Dr. Palak opined that this is likely the result of the Accident.
- [68] The defendants contend that I ought to disregard this part of Dr. Palak's evidence because, in his 2020 opinion, Dr. Palak opined: "left L5 nerve root irritation and the L5 S-1 discogenic pain/injury is not related to the motor vehicle collision given the temporal onset of leg symptoms in relation to the date of the motor vehicle collision". This inconsistency was put to Dr. Palak, and in my view, he did not provide a satisfactory explanation. I note that Dr. Palak was referred to the MRI and CT scans which stated that there was no nerve impingement and that there was no stenosis. Surprisingly, Dr. Palak admitted that he had not reviewed the MRI or CT imaging.
- [69] Dr. Palak noted that there has been some improvement in the mood symptoms and pain behaviours, but no improvement in sleep and that "the presence of ongoing physical pain, mood symptoms, and poor sleep can lead to a feed forward cycle of symptom amplification and the development of chronic pain, as per the fear avoidance model".
- [70] Finally, Dr. Palak stated that Mr. Grewal's continued participation in active therapies and persistence with work are positive prognostic factors for chronic pain and functional recovery post injury. He opined that given the duration of time since the Accident, these acute injuries have become chronic in nature.
- [71] Dr. Palak recommended that Mr. Grewal follow a multimodal treatment regime for the ongoing management of his chronic pain symptoms such as passive therapies including physiotherapy, fire cupping and chiropractic treatments, active therapy including re-engaging with a kinesiologist, community based self-management to better manage his pain symptoms, psychological management, pharmacological management, an ergonomic assessment, dietician assessment, imaging, EMG assessment, and assessment by an interventional pain physician for injection therapies. Dr. Palak also made similar recommendations in his 2020 but had not included all of these recommendations.

[72] Dr. Palak opined that the likelihood of spontaneous resolution of Mr. Grewal's symptoms is low, in part due to their chronicity. Dr. Palak stated that given Mr. Grewal has not undergone optimal management of his chronic pain symptoms to date, further improvements in symptom management may be made if the recommended treatment is undertaken. However, Dr. Palak also opined that he does not anticipate Mr. Grewal will fully return to his pre-injury state.

Dr. Paul Devlin - psychiatrist

[73] Dr. Paul Devlin was qualified as an expert in the field of psychiatry. He assessed Mr. Grewal on August 15, 2023 and provided a report dated September 22, 2023.

[74] Dr. Devlin diagnosed Mr. Grewal with major depression and with chronic somatic symptom disorder. In arriving at this diagnosis, he opined:

In consideration of depression, I have considered a number of subtypes and believe that the entity that best describes this case involves major depression secondary to a major underlying cause, which in this case is chronic pain.

[75] Dr. Devlin noted that Mr. Grewal was high functioning and physically fit prior to the Accident but is now functioning at a significantly lower level and his self esteem is markedly diminished. Dr. Devlin noted that Mr. Grewal is experiencing "learned helplessness and is deeply entrenched in depression with a realization that he may not return to a career as he anticipated or expected".

[76] Dr. Devlin noted that Mr. Grewal's "pain, although variable, is frequently of a moderate intensity and can be even more severe on occasion".

[77] Dr. Devlin made various treatment recommendations, including pharmacological treatment, assessment by and training with a kinesiologist, cognitive behavioural therapy, and attendance at a pain clinic. Specifically, Dr. Devlin recommended the cognitive behavioural therapy be for 20 to 30 sessions over the next two years at a cost of \$200 to \$225 per hour.

[78] In terms of prognosis, Dr. Devlin opined that his prognosis for Mr. Grewal going forward is poor, in part due to the longstanding nature of Mr. Grewal's symptoms.

[79] Dr. Devlin wrote that he reviewed Mr. Grewal's medical records including pharmanet printouts from September 20, 2013 to January 11, 2021 and agreed in cross examination that the printouts reflected almost no prescriptions for pain relievers, muscle relaxants or anti-depressant medication. As well, while Dr. Devlin agreed that Mr. Grewal's family physician's records from 2013 to 2023 contained no reference to the plaintiff reporting any emotional or psychological issues, Dr. Devlin's response was that family physicians usually omit this type of complaint.

- [80] The defendants submit that the Court should give Dr. Devlin's evidence very little weight for a number of reasons. They point to Dr. Devlin's misinterpretation of Mr. Grewal's early pain questionnaire ratings. Dr. Devlin initially testified to the ratings being moderate to severe, but on cross-examination he agreed that they were more accurately described as mild to low moderate. The defendants also point to the only test administered by Dr. Devlin, the Beck Depression Inventory, had a score that indicated moderate depression.
- [81] The defendants also argue that Dr. Devlin's opinion is of very little use to this Court because he appeared to be advocating for Mr. Grewal. Experts are required to be independent, objective and impartial. This was explained by Mr. Justice Vickers in *William et al v. British Columbia et al*, 2005 BCSC 131 at para. 31:

It is essential that a person called to give expert evidence be independent and impartial. Such a person is called to assist the court in areas that require expertise. The court must be able to rely on the opinions expressed as those of the expert and no one else. Those opinions cannot be influenced by the adversarial demands of the litigation nor by the demands of counsel retaining the expert: *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617.

- [82] In cross examination, Dr. Devlin confirmed that he has drafted two previous reports in unrelated cases, *Rickards v. Turre*, 2023 BCSC 439 and *McWilliams v. Hardy*, 2023 BCSC 1259, whereby he used similar language and made nearly identical diagnoses and treatment recommendations.
- [83] For example, in *McWilliams*, Dr. Devlin wrote an almost identical opinion regarding Ms. McWilliams' depression, writing that the depression has caused her to suffer from "learned helplessness entrenched in depression with the realization that she may never have a reasonable career or be able to experience life as she would've expected to know it": at para. 76.
- [84] Dr. Devlin defended this practice, noting that many more examples could be found. I find Dr. Devlin's practice in this regard to be concerning, and his response in cross examination to be cavalier.
- [85] The defendants submit that Dr. Devlin was not acting as an independent expert aiding the Court. Instead, he drafted a boiler-plate opinion that was almost entirely inconsistent with the evidence. I agree with the defendant's position. Dr. Devlin diagnosed Mr. Grewal with major depression and with chronic somatic symptom disorder. However, as noted above, the evidence does not support this. In all of the circumstances, I give Dr. Devlin's opinion very little weight.

Dr. Simon Horlick - Orthopedic Surgeon

- [86] Dr. Horlick was qualified as an expert in the field of orthopaedic surgery. He assessed Mr. Grewal on May 17, 2023, and provided two reports: May 17, 2023 (the "May Report") and October 5, 2023 (the "October Report").

- [87] In the May report, Dr. Horlick wrote that Mr. Grewal informed him that he continues to have intermittent low back pain and that his chief complaint is the lumbar spine. Mr. Grewal also told Dr. Horlick that he has intermittent back pain in the mid thoracic spine region, he described as an ache that is intermittent that occasionally goes to the side and that it improves with stretching and range of motion. I note that Mr. Grewal did not mention any episodes of debilitating back spasms.
- [88] In the May Report, Dr. Horlick opined that his physical examination of Mr. Grewal "is devoid of any measures of physical impairment". However, Dr. Horlick did identify trigger points in the right and left paralumbar musculature region. His diagnosis would be consistent with residual myofascial pathology and some generalized deconditioning. Dr. Horlick opined that the Accident was responsible for Mr. Grewal's injuries to the lower thoracic and lumbar spine region.
- [89] Dr. Horlick recommended Mr. Grewal undergo intramuscular stimulation treatment ("IMS") for a three month protocol for his injuries in conjunction with massage therapy, followed by treatment with a kinesiologist for 6-12 visits. Dr. Horlick opined that nothing else is medically necessary. Dr. Horlick also opined that given his diagnosis is myofascial in origin it will not result in progressive impairment or disability and that Mr. Grewal will recover over the course of time, through musculoskeletal conditioning and with treatments as recommended.
- [90] Dr. Horlick's October Report was in response to Dr. Palak's Second Report of August 2023, which was written after Dr. Horlick's May Report. Dr. Horlick agreed with Dr. Palak's diagnosis of lumbar spine and mild thoracic spine sprain/strain.
- [91] However, based on Mr. Grewal's history and physical examination he disagreed with Dr. Palak's diagnosis that Mr. Grewal had significant lumbar facet-mediated pain, tightness of the iliotibial band or irritation of the left L5 nerve root or LS-St discogenic pain. This was based on a thorough review of his history and physical examination and in particular the imaging studies that were not supportive of significant disruption to the discs in the lumbar spine resulting in a mass effect on the lumbar spine nerve roots.
- [92] Dr. Horlick also conducted nerve impingement testing, which was negative. On this issue, I prefer the evidence of Dr. Horlick over Dr. Palak.
- [93] Dr. Horlick also disagreed with Dr. Palak's opinion with respect to predicting permanence of pain based on its duration. Dr. Horlick opined that "[u]sing the duration of pain to predict the permanence of pain is factually incorrect. Establishing the correct diagnosis, initiating the appropriate treatments, and having the patient being compliant with said treatments is incumbent on making a determination about permanence of symptoms".
- [94] In cross examination, Dr. Horlick agreed that he was aware Mr. Grewal has back spasms, but he stated he did not explore the impacts of the spasms on Mr. Grewal's function and ability to work. Mr. Grewal argues that Dr. Horlick was under the mistaken impression that Mr.

Grewal was working full time without interruption or impairment. He was not aware that Mr. Grewal misses roughly one week of work per month due to his Accident-related injuries. Given this, Mr. Grewal submits that little weight should be given to Dr. Horlick's opinion in the May Report that Mr. Grewal "certainly has no medically supportable vocational, avocational or recreational disability at this time".

- [95] I disagree. Given that Mr. Grewal was missing approximately a week per month from the back spasms and central to his claim for damages, he ought to have raised this with Dr. Horlick but did not do so.

ASSESSMENT AND FINDINGS

Credibility and Reliability

- [96] Credibility and reliability are two different, but related, considerations. Credibility focuses on a witness's honesty or sincerity, while reliability is concerned with the accuracy of the witness's testimony, with consideration of the witness's ability to accurately observe, recall, and recount events in issue: *R. v. Kruk*, 2024 SCC 7 at para. 146; *Ford v. Lin*, 2022 BCCA 179 at para. 104; *R. v. H.C.*, 2009 ONCA 56 at para. 41.
- [97] In *R. v. S.S.M.*, 2024 BCCA 417, this province's Court of Appeal, guided by the principles in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013), outlined the approach to assessing credibility and reliability:
- [67] The assessment of both credibility and reliability is context-specific and multi-factorial. Factors that inform the assessment include: the opportunity and capacity of the witness to observe or perceive the events; the ability to remember those events; whether, or the extent to which, a witness can resist being influenced by an interest in a particular outcome when recalling those events; inconsistency in the witness's evidence at trial or between prior accounts; whether the witness's evidence harmonizes with, or is contradicted by, other reliable evidence; whether the evidence seems unlikely, unreasonable, or improbable in light of the probabilities affecting the case; and the witness' demeanour, meaning the way they presented while testifying: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186.
- [98] Where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the Court must be exceedingly careful in assessing credibility: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.); *McGlue v. Girvan*, 2024 BCCA 208 at paras. 47-49.
- [99] In this regard, the comments of Justice G.C. Weatherill in *Henry v. Fontaine*, 2022 BCSC 930 are most helpful:

- [54] As is generally the case in personal injury actions, the most important witness is plaintiff himself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.
- [55] A plaintiff who accurately describes his symptoms and circumstances before and after the collision, without minimizing or embellishing them, can reasonably anticipate that the court will find his evidence to have been credible and reliable.

Mr. Grewal's credibility and reliability

- [100] Mr. Grewal testified over a number of days and was cross examined at length.
- [101] Mr. Grewal's counsel submits that he was a credible witness and that his evidence relating to his work was corroborated by his employer, Mr. Zayas-Duran. He also points to the factual witnesses, Ms. Basra and Mr. Bhangoo, who were able to corroborate his evidence regarding the impact of his injury and pain and its effects on his personal life. Finally, Mr. Grewal submits that his credibility was not successfully challenged or impugned on cross-examination.
- [102] The defendants on the other hand argue that Mr. Grewal's evidence is neither reliable nor credible. They urge the Court to view Mr. Grewal's evidence with extreme caution. The defendants point to the timing of his symptoms and treatment being at odds and inconsistent with the medical evidence.
- [103] While I accept that Mr. Grewal suffered soft tissue injuries as a result of the Accident, there are two areas of Mr. Grewal's evidence that undermine his credibility: the first concerns treatment for his injuries; the second, and more serious, concern is the extent of his injuries, specifically his evidence in regards to the back spasms (flare ups) that resulted in him being bedridden for a number of days each month and the effects of the injuries on his personal and professional life.
- [104] On the first point, I have concerns with certain aspects of Mr. Grewal's evidence as it relates to the various treatments he has received since the Accident. I will specifically reference the evidence that I do not accept or not accept fully in the course of these reasons. Where I have done that, it is on the basis of my concern over the credibility or reliability of the evidence on its face, in light of other evidence, or where I find it is not consistent with the "preponderance of probabilities": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at p. 357 (B.C.C.A.).
- [105] I agree with the defendants that Mr. Grewal's evidence with respect to the reporting of his injuries and the treatments he undertook is inconsistent when comparing his testimony with what he informed the various medical practitioners and experts. One such example is Mr. Grewal's testimony that he has consistently received chiropractic treatments since roughly three weeks after the Accident. He stated he has attended 50 sessions of chiropractic therapy since the Accident. The clinical records reveal that as of January 1, 2017, Mr. Grewal only attended eight sessions with Dr. Penner. His next visit was a year

later in May 2018 and then again in August 2018. He last saw Dr. Penner in December 2019. Mr. Grewal testified that he also attended chiropractic treatments while on vacation. I note that Mr. Grewal did not produce any receipts or other evidence in support.

- [106] This evidence is also inconsistent with what Mr. Grewal reported to Dr. Palak in 2020, that after the Accident he attended about 6 months of chiropractic sessions (once every two weeks). In cross-examination, Mr. Grewal agreed that he had only seen Dr. Penner twice since January 2017.
- [107] On the second point, Mr. Grewal's inconsistent reporting of and extent of his injuries is concerning. Key to Mr. Grewal's claim is his evidence regarding his debilitating back spasms. Mr. Grewal testified that the back spasms have caused him to be bedridden for days began about two months after the Accident and that they occurred every four to six weeks and continued at the time of trial. He testified that before he married Ms. Basra, his sister or mother would help in dressing and going to the washroom during these episodes. Neither his sister or mother testified in this regard. Ms. Basra testified that after they married she would help him when he was bedridden. However, she could not speak to how often this occurred. The back spasms were serious enough that Mr. Grewal testified he missed approximately 25% of time at work due to being bedridden.
- [108] The difficulty with Mr. Grewal's evidence is that despite the debilitating nature of these spasms, he did not report them to Dr. Rai, his family physician, or any other treatment providers including Dr. Jaworski, Dr. Penner or Mr. Sohi. In cross examination, Mr. Grewal agreed that in January 2017, he told Dr. Penner that his back pain fluctuated but overall was definitely getting better.
- [109] It is also concerning that Mr. Grewal failed to report these to his own experts, Dr. Palak, with whom he met on two separate occasions, and Dr. Devlin. He also did not report this to Dr. Horlick. In fact, Mr. Grewal reported to Dr. Horlick that he had been working as a mortgage broker for approximately 1.5 years on a full-time basis without lost time or absenteeism.
- [110] I do not accept Mr. Grewal's explanation that he did not mention the back spasms to the treatment providers or his family physician because he was not able to see them during the flare ups and would only see them after he was able to move around. Given his evidence of how debilitating these back spasms were and the impact they were having on his personal and professional life, I find it implausible that they would not be mentioned to any of the medical professionals he was visiting to treat the Accident-related injuries. In all of the circumstances, this leads me to conclude on a balance of probabilities that while Mr. Grewal may be experiencing debilitating back spasms, they were not caused by the Accident.
- [111] With respect to his leg symptoms, Mr. Grewal's evidence is also inconsistent with what he reported to the medical experts. Mr. Grewal testified that he started to experience pain shooting down his left leg approximately six months after the Accident. During the 2020

examination, Mr. Grewal reported to Dr. Palak that this pain commenced about a year before (meaning 2019). In his examination for discovery, he also stated that the leg symptoms began sometime in 2019. In May 2023, Mr. Grewal reported to Dr. Horlick that he had developed low back pain that extended along the lateral aspect of his left thigh approximately 1-1.5 years prior.

- [112] Finally, I find some aspects of Mr. Grewal's evidence with respect to the impact of his injuries on his professional and personal life to be less than credible. I must reiterate that I do not doubt that Mr. Grewal sustained injuries from the Accident. However, his evidence is not consistent when compared to what he reported to his treatment providers. For example, in cross examination, Mr. Grewal admitted that in January 2017, he told Dr. Penner that he was able to walk up to a kilometer, his sleep was unaffected, and his social life was normal.
- [113] Given that Mr. Grewal testified that he missed approximately 25% of work due to the spasms, it is incredible that he did not report missing time from work to any of the treatment providers, including his family physician, Dr. Rai, or any of the medical experts. Finally, I have concerns about Mr. Grewal's evidence that he is not able to obtain accommodations at work. Mr. Zayas-Duran's evidence does not support Mr. Grewal's evidence. Specifically, regarding not being able to have a sit stand desk at work, I find the evidence of Mr. Grewal less than credible and inconsistent with what he reported to Dr. Palak. In 2023, Mr. Grewal reported to Dr. Palak that his work has allowed him to use a sit stand desk at his expense but that he does not have the finances available to fund it.
- [114] Based on the concerns I have regarding Mr. Grewal's evidence, I place limited weight on the portions of his testimony which are not corroborated by the medical experts.

Findings Regarding Mr. Grewal's Accident-Related Injuries and Impact

- [115] It is not disputed, and I find, that Mr. Grewal sustained soft tissue injuries in the Accident resulting in chronic lower back pain. However, the above difficulties in Mr. Grewal's evidence require the Court to question and discount Mr. Grewal's account of the extent and effect of these injuries, as set out in the damages section below.
- [116] On a balance of probabilities, I find that the evidence does not establish that the debilitating back spasms and shooting leg pain that Mr. Grewal complains of are causally connected to the Accident.
- [117] I also find that the evidence does not support that Mr. Grewal suffers from major depression and with chronic somatic symptom disorder. That said, I find that Mr. Grewal likely suffers from mild to moderate depression symptoms due to his chronic back pain.
- [118] While I find that his personal and professional life has been impacted as a result of the injuries he sustained from the Accident, I am not satisfied it is to the degree Mr. Grewal claims.

ASSESSMENT OF DAMAGES

- [119] It is trite law that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, insofar as this can be achieved by a monetary award: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 167, citing *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962-63.
- [120] This principle is accomplished by awarding damages for pecuniary loss in the amount reasonably required to permit a standard of living and day to day functionality that, to the extent possible, approximates what the plaintiff would have experienced but for the wrong they were subjected to. Non-pecuniary damages are assessed to compensate for pain, suffering, and loss of enjoyment of life both prior to trial and into the future on the assumption that the expenses to reasonably address the injuries will not erode the non-pecuniary damages.

Duty to Mitigate

- [121] A plaintiff is required to take reasonable steps to reduce their damages, including by taking recommended treatment. Whether a plaintiff acted reasonably is a question of fact: *Gilbert v. Bottle*, 2011 BCSC 1389 at paras. 201-202. Mere delay in seeking recommended treatment is not necessarily unreasonable: *Sunner v. Lee*, 2023 BCSC 988 at para. 149.
- [122] A reduction in damages is appropriate where the defendant is able to satisfy the two-part test set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. Justice Fitch summarized the test in *Pearson v. Savage*, 2020 BCCA 133:
- [75] Where a plaintiff has not pursued a course of recommended medical treatment, the defendant must prove that the plaintiff acted unreasonably in eschewing the recommended treatment, and the extent, if any, to which the plaintiff's damages would have been reduced had he or she acted reasonably: *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
- [123] In *Huag v. Funk*, 2023 BCCA 110 at paras. 72-76, the Court of Appeal confirmed that the defendant bears the onus to satisfy both parts of the Chiu test on a balance of probabilities: see also *Chand v. Aujla*, 2023 BCSC 1473 at para 80. Specifically on the second stage of the test, the defendant must prove on a balance of probabilities that the plaintiff's injuries would have been reduced to some degree had they acted reasonably. Only after the defendant has established this will the court go on to assess the reduction of the damages based on the extent to which the injuries would have been avoided: *Huag* at para. 61; *Padgham v. Ram*, 2025 BCCA 100 at para. 13.
- [124] It is a subjective/objective test which asks what a reasonable person in the position of the plaintiff would do: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56; *Gill v. Lai*, 2019 BCCA 103 at para. 22.

- [125] In Gill, the Court of Appeal outlined what a trial judge may consider in both the subjective and objective steps of the test:
- [26] In my view, under the subjective/objective test for the reasonableness of mitigation efforts, the trial judge was entitled to look to the respondent's personal circumstances to determine whether the course of action she took was reasonable. The subjective component of that test does allow a court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, and to look to their personal circumstances and ability to follow that advice. Further, the objective component of the test entitles the judge to look to what a reasonable person in that plaintiff's circumstances would do. As stated above, where a trier of fact applies the correct test, this Court must defer to their determination on this question of fact.
- [126] Our Court of Appeal recently noted in Padgham that, as a general proposition, there is a difference between, on the one hand, medical experts or physicians retained to provide a medical-legal report, and on the other, the plaintiff's own treating physician. However, this distinction does not preclude consideration of recommendations by medical experts other than the plaintiff's treating physician in assessing reasonableness: at para. 19. The ultimate question remains whether it was unreasonable for a plaintiff to eschew recommended treatment that would likely have improved their condition. The trier of fact can and ought to weigh the evidence available on this point.
- [127] In analyzing the reasonableness of the plaintiff's actions, "it is appropriate to consider his financial limitations": Noori v. Hughes, 2018 BCSC 965 at para. 101; see also Brown v. Raffan, 2013 BCSC 114 at paras. 121-126.
- [128] Mr. Grewal submits that after the Accident he has attended chiropractic therapy, physiotherapy, acupuncture, and cupping. He also submits he has undergone multiple scans, including a CT scan and an MRI scan at the request of his doctors, to try to ascertain the cause of his chronic back pain. He testified that he met with his family physician regularly and was referred to see a treating physiatrist, Dr. Jaworski. He submits that he followed through with all the recommendations made by the various treatment providers.
- [129] Mr. Grewal submits that to consider the duty to mitigate, the defendants would have to argue that Mr. Grewal failed to avoid at least some of those injuries by not attending more recommended treatment sessions.
- [130] Mr. Grewal points to the defendants' own expert, Dr. Horlick, who recommended that Mr. Grewal attend IMS therapy, massage therapy, and active rehabilitation. Dr. Horlick specifically stated, "aside from these treatments, nothing else is medically necessary". Dr. Horlick also noted that IMS therapy does not always work to decrease a person's pain. As well, Mr. Grewal argues that there is no indication that IMS therapy or active rehabilitation was recommended to him by his treating practitioners.

- [131] Mr. Grewal submits that the defendants did not lead any evidence that a different course of therapy would have resulted in a different outcome or better prognosis and therefore the defendants have not discharged their burden of proof to show that Mr. Grewal failed to mitigate his damages by not attending further therapy.
- [132] The defendants submit that Mr. Grewal has failed to follow the reasonable medical advice and directives of his experts and medical treatment providers. They point to a trend of Mr. Grewal failing to follow the advice of his family physician, treatment providers and experts, and of misstating the number of treatment sessions attended.
- [133] The defendants further submit that this is not a case where the plaintiff could not afford to attend treatments or acquire medications. They point to the fact that Mr. Grewal was able to spend money on travel and to purchase a new motorcycle.
- [134] With respect to the recommendations of his family physician, in August 2018, Dr. Rai recommended that Mr. Grewal increase the frequency of chiropractic treatments to manage his symptoms. After that, Mr. Grewal attended three sessions and then failed to attend again until January 2019.
- [135] There is also the referral by Dr. Rai to Dr. Jaworski, a pain specialist. Mr. Grewal first met with Dr. Jaworski in June 2020 and had four subsequent appointments. After his April 2022 appointment, Mr. Grewal did not follow up with Dr. Jaworski as recommended. Dr. Jaworski recommended that Mr. Grewal attend an assessment with a psychologist/psychiatrist, which Mr. Grewal did not do.
- [136] The defendants point to the evidence of the experts who all opined that it would be beneficial for Mr. Grewal to follow the treatments recommended by them.
- [137] For example, in his 2020 report, Mr. Grewal told Dr. Palak that after 6 months of chiropractic treatment after the Accident, he continued to attend sporadically on an "as required" basis. This was in addition to physiotherapy commenced in 2019. Dr. Palak made a number of recommendations, including that Mr. Grewal undergo regular treatment such as chiropractic therapy, acupuncture and active rehabilitation therapy with a physiotherapist/kinesiologist. Dr. Palak also recommended that Mr. Grewal be assessed by a psychologist for his anxiety, depression and pain catastrophizing symptoms. He also recommended pharmacological management, ergonomic assessment, dietician assessment, EMG assessment and interventional therapy.
- [138] Dr. Palak noted that "given that Mr. Grewal has not undergone optimal management of his pain symptoms to date, further improvements in his symptom management will likely occur if the recommended treatment is undertaken".

- [139] The clinical records indicate that Mr. Grewal last received chiropractic treatment in December 2019. He did not attend for any further chiropractic treatments. As for physiotherapy, after his initial attendances in March 2019 for seven sessions over six weeks, Mr. Grewal did not return until March 2023, when he reported that he hurt his back from lifting heavy weights. He also did not undertake any psychological assessments as recommended by Dr. Palak.
- [140] After his assessment of Mr. Grewal in July 2023, Dr. Palak made almost the exact same recommendations he made in March 2020. In the 2023 report, while Dr. Palak opined that the likelihood of spontaneous resolution of his chronic pain symptoms is low, "given that Mr. Grewal has not undergone optimal management of his chronic pain symptoms to date, further improvements in his symptom management may be made if the recommended treatment is undertaken". Dr. Palak did note that he did not anticipate a full return to Mr. Grewal's pre-injury state.
- [141] Mr. Grewal acknowledged that he did not follow these recommendations. He testified that he did not receive the reports and therefore was not aware of the treatment recommendations made by Dr. Palak. The defendants submit that Mr. Grewal should not escape his obligation to mitigate his damages by claiming that he never received the reports containing the treatment recommendations. I note that Dr. Palak testified that he typically advises the examinee that his recommendations would be set out in the report provided to counsel. Mr. Grewal acknowledged that he did not attempt to obtain Dr. Palak's reports in either 2020 or 2023.
- [142] Dr. Horlick made recommendations after he met with Mr. Grewal in May 2023, specifically relating to IMS therapy and working with a kinesiologist, which Mr. Grewal also did not pursue. As noted previously, Mr. Grewal recalled Dr. Horlick recommending IMS therapy but stated that Mr. Sohi recommended against it. As I noted earlier, that was not the evidence of Mr. Sohi.
- [143] I do note that some of the recommendations made by Dr. Palak and Dr. Horlick also align with that of his treating physicians, Dr. Rai, who recommended in August 2018 that Mr. Grewal increase the frequency of chiropractic treatments. They also align with Dr. Jaworski's recommendation to attend a psychological assessment. As well, I note that Mr. Sohi's treatment plan also included sessions with a kinesiologist, which Mr. Grewal failed to do.
- [144] I am reminded by Justice Crerar's comments in *Padgham v. Ram*, 2024 BCSC 72:
- [62] To return to first principles of mitigation, it is a failure to mitigate where "the plaintiff could have avoided all or a portion of h[er] loss: Haug at para 56. Specifically, such losses could be avoided where it would have been reasonable to follow a "recommended treatment": Haug at para 56.

- [145] Mr. Grewal says that the injuries have had a profound impact on his life. Surely, he must be expected to exercise reasonable due diligence through the timely exploration of treatments that hold promise of resolving his pain complaints and limits on personal and professional functionality.
- [146] Applying the principles articulated in Haug and Padgham, I am of the view that Mr. Grewal could have avoided all or a portion of his loss by pursuing some or all of the medical treatments recommended to him by doctors and experts including his own expert, Dr. Palak. Dr. Palak, while not Mr. Grewal's treating physician, was nonetheless a medical expert he was seeing specifically for the assessment and prognosis of his injuries. Mr. Grewal knew there would be a report prepared that included Dr. Palak's recommendations. These recommendations were specifically tailored to how Mr. Grewal could improve his condition and reduce his pain. I find that Mr. Grewal had an obligation to follow these recommendations. I also find that the reasonableness of the recommendations, and the unreasonableness of Mr. Grewal's inaction, is heightened by the fact that Dr. Palak's recommendations were echoed by the other experts and medical practitioners, including Mr. Grewal's treating physician.
- [147] Accordingly, I find that the defendants have proven on a balance of probabilities that Mr. Grewal's injuries would have been reduced to some degree had he acted reasonably.
- [148] The question then is what the appropriate reduction of the damages is in this case. In my view, a reduction of 25% is appropriate in the circumstances.

Non-Pecuniary Damages

- [149] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The plaintiff is to be placed back into the position they would have been in, but for the injuries and losses caused by this accident; no better or worse: *Murphy v. Snippa*, 2024 BCCA 30 at para. 53; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [150] The award should be fair to all parties, and fairness requires reviewing comparable cases. However, each case must be assessed on its own unique set of circumstances: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [151] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined a non-exhaustive list of factors to consider in assessing non-pecuniary damages:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;

- (e) emotional suffering; and
- (f) loss or impairment of life;
- ...
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism

[152] Mr. Grewal seeks non-pecuniary damages in the amount of \$165,000. The defendants submit that the award should be \$50,000 to \$60,000.

[153] Mr. Grewal submits that he led a full life prior to the Accident. He was relatively young and beginning to pursue a career in sales. Mr. Grewal was active in various sports and contributed to various household and yard work tasks. Mr. Grewal enjoyed working on cars and riding his motorcycle.

[154] Mr. Grewal referred to the following cases, updated for inflation when necessary:

- Lal v. Singh 2021 BCSC 2378 (\$165,000);
- Easton v. Wolovets, 2015 BCSC 210 (\$125,000);
- Slater v. Gorden, 2017 BCSC 2265 (\$135,000);
- Chand v. Aujla, 2023 BCSC 1473 (\$175,000);
- Johnstone v. Canada (Attorney General), 2006 BCSC 1867 (\$110,000 - roughly \$134,680 in 2024 dollars);
- Martin v. Frederickson, 2021 BCSC 1424 (\$120,000);
- Tench v. Van Bugnum, 2019 BCSC 1877 (\$120,000 - roughly \$141,680 in 2024 dollars);
- Teunissen v. Hulstra, 2017 BCSC 1569 (\$110,000 - roughly \$134,680 in 2024 dollars)

[155] The defendants submit that Mr. Grewal suffered an uncomplicated low back strain that is nowhere near as impactful on him as he would suggest and would have resolved had he followed the reasonable treatment recommendations that he received. The defendants deny that Mr. Grewal experiences consistent debilitating back spasms but, if so, denies that they are related to the Accident. The defendants submit that any of the current restrictions (if any) Mr. Grewal faces are not caused by the Accident. Additionally, the defendants submit that Mr. Grewal's past or present issues with alcohol or cannabis are not due to the Accident, nor are his alleged mood issues.

[156] The defendants referred to the following cases:

- Connolly v. Cowie, 2012 BCSC 242 (\$50,000);
- Jansson v. Malone, 2021 BCSC 585 (\$55,000);
- Randhawa v. Chiang, 2014 BCSC 631 (\$40,000);
- Haskett v. Frame, 2021 BCSC 1151 (\$60,000);
- Callow v. Van Hoek-Patterson, 2023 BCCA 92 (\$55,000).

[157] I am satisfied that Mr. Grewal's soft tissue injuries were caused by the Accident and that they have affected his enjoyment of life. I also find that he has suffered pain as a result of the Accident and will continue to do so in the future.

[158] I find that the post-Accident level of pain, from injuries which I accept were caused by the Accident, are not nearly as impactful as Mr. Grewal attested. I also find that had Mr. Grewal undertaken the treatments that were recommended, he would have better resolution of his pain. That said, I also accept that it is unlikely he will experience a complete resolution of his pain symptoms. In fact, he reported to Dr. Palak in August 2023 that he had been improving and he was at least 70% of his pre-Accident self.

[159] I accept that as a result of pain caused by his Accident-related injuries, Mr. Grewal finds it more difficult to exercise, resulting in some weight gain, which he has been able to lose. I also accept that his ability to participate in recreational sports has been negatively impacted by the injuries he sustained in the Accident.

[160] He continues to travel frequently after the Accident, albeit, in pain at times.

[161] In respect of the impact of the Accident on his mood, I accept that the Accident has had a negative effect on Mr. Grewal in this respect given his chronic back pain and his inability to do certain activities. However, I do not accept that this emotional suffering has resulted in as severe a change in his quality of life as he contends.

[162] In my view, the range of damages in the cases proposed by the defendants are too low. On the other hand, my view is that the upper end of the cases proposed by Mr. Grewal is too high, as it involves plaintiffs with substantially more serious injuries, more severe prognoses and greater career impacts than Mr. Grewal.

[163] While the case authorities are helpful as a guide, each case must be assessed on its own facts. I have set out Mr. Grewal's injuries above. Mr. Grewal's submission is based on him being diagnosed with major depression and chronic back pain which is so severe that it leaves him bedridden approximately once per month. Given my conclusion with respect to Dr. Devlin's opinion and with respect to the severity of Mr. Grewal's injury, I am not satisfied that Mr. Grewal's pain and suffering is as severe as he claims. That said, I am satisfied that he suffers from symptoms that have had an impact on his ability to do certain activities and will continue in the future. Having considered Mr. Grewal's age, the nature of the injuries, the severity of his symptoms, I find that an appropriate award of non-pecuniary damages in

this case to be \$90,000. This amount is reduced by 25% for Mr. Grewal's failure to mitigate. The award therefore for non-pecuniary damages is \$67,500.

Loss of Earning Capacity

- [164] Claims for past and future loss of earning capacity are subject to many of the same legal principles. Both involve claims for the loss of the value of the work the plaintiff was or will be unable to perform because of the injuries and symptoms caused by the accidents: *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45; *Tootakhil v. Richmond Cabs Ltd.* 2024 BCSC 1860 at para. 201.
- [165] A plaintiff is required to demonstrate that the injuries and symptoms caused by the accident(s) have impaired their capacity to earn income, resulting in a past or future pecuniary loss. While actual past events must be proven on a balance of probabilities, hypothetical events including what would have happened in the past had the accident not occurred, and what would have and will occur in the future, will be considered where there is a real and substantial possibility they would occur. A hypothetical event is then given weight according to its relative likelihood and compensation is awarded based on an estimation of the chance the event would have occurred or will occur: *Yung v. Matheson*, 2023 BCCA 447 at para. 23; *Grewal v. Naumann*, 2017 BCCA 158, at para. 44-48.
- [166] Evidence of a speculative loss, rather than a real and substantial possibility of loss, however, is not sufficient to establish an award for loss of earning capacity: *Gao v. Dietrich*, 2018 BCCA 372 at para. 66.

Past Loss of Income

- [167] A plaintiff is entitled to the loss of the value of work that a plaintiff would have - not could have - performed but for the injuries sustained as a result of the defendant's conduct: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 29; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49..
- [168] A plaintiff may only recover damages for their past net income loss: Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, s. 98.
- [169] Projecting what a plaintiff would have earned in the past had they not been injured is a hypothetical exercise. Establishing a real and substantial possibility means that any hypothetical loss must be shown to be realistic considering the plaintiff's likely circumstances without the injury. The plaintiff's claim must have an evidentiary foundation: *Gao* at paras. 34, 36.
- [170] If the plaintiff establishes a real and substantial possibility, the Court must then assess the relative likelihood of the hypothetical event and adjust the damages accordingly: *Gao* at para. 37.

- [171] A fair and reasonable award is an assessment rather than a purely mathematical calculation: Grewal para. 54.
- [172] The parties disagree on whether Mr. Grewal is entitled to damages for past loss of earning capacity.
- [173] Mr. Grewal only seeks compensation for past loss of income from his current position at IMI Financial as of March 2022. He submits that but for the Accident, he would be missing less work and therefore able to obtain more leads and more sales. Mr. Grewal submits that his ability to earn income is an asset which has been impaired. Mr. Grewal submits that \$18,650 is fair compensation for his past loss of earning capacity.
- [174] The defendants argue that Mr. Grewal has not established a past loss of earning capacity on the facts or the law. The defendants argue that Mr. Grewal has not established why, after six years of work in a variety of environments, he is suddenly missing time from work at IMI Financial.
- [175] At the time of the Accident, Mr. Grewal was working at Yellow Pages as a sales representative. Post Accident, he also worked at RBC Insurance, Shaw Communications and Frame One before he began his current position at IMI Financial. He did not miss any work while working for the various employers prior to IMI Financial. As a result, Mr. Grewal has properly conceded that he is only making a claim for loss of income earning capacity, both past and future, as of March 2022, when he began working at IMI Financial.
- [176] Mr. Grewal's compensation as a mortgage broker is entirely commission-based. He testified that he needs to be in the office to get leads from IMI Financial. He gave evidence that he misses multiple days of work per month due to his back pain; specifically, he misses roughly 25% of workdays.
- [177] Mr. Grewal's counsel summarized the past loss of income calculation as follows:
- Mr. Grewal earned a total of \$42,095.75 from IMI Financial in 2022 and a total of \$27,845.95 up to the date of the trial of the within action in 2023. This is a total of \$69,941.70 earned in his position as mortgage agent up to the commencement of the trial.
- Assuming that this is 75% of what his "without accident" earnings would be given that he misses 25% of workdays due to his injuries, his "without accident" earnings would be roughly \$93,255.
- Therefore, his past wage loss from IMI Financial alone can be quantified as \$23,313.90 gross or \$18,650.40 net (assuming losing roughly 20% to taxes).
- [178] The defendants submit that this claim has not been made out because it is implausible that Mr. Grewal would be unable to meet the duties of a mortgage agent given his post-Accident work history. The defendants point to the evidence of Mr. Zayas-Duran to support their argument that Mr. Grewal had the ability to receive accommodations and work remotely.

- [179] The defendants submit their position is underscored by the evidence that Mr. Grewal has a side Amazon business, aspired to be a real estate agent and can work for dozens, if not hundreds, of alternative mortgage brokers in his area. As well, the defendants argue that the experts unanimously opined that Mr. Grewal is capable of working full time.
- [180] I agree with the defendants that Mr. Grewal's claim for loss of earning capacity from March 2022 to time of trial is not made out. I make this determination for the following reasons.
- [181] Mr. Grewal worked at multiple similar jobs after the Accident. With the exception of a few days of time taken off while working at Yellow Pages, Mr. Grewal did not take time off work due to his injuries. He has not established why, after six years of work in a variety of similar jobs, he is now missing work while working at IMI Financial.
- [182] More importantly, there is limited expert evidence regarding a reduction in Mr. Grewal's capacity to work as a mortgage broker after the Accident. None of the experts who testified at trial suggested that Mr. Grewal was unable to work full time as a mortgage broker after the Accident.
- [183] Mr. Grewal told Dr. Horlick that he worked as a mortgage broker full time without interruption or impairment. As I have noted earlier, given that Mr. Grewal's missing work on a regular basis due to debilitating back spasms is central to his claim for damages, he ought to have raised this with Dr. Horlick. He did not do so. Mr. Grewal also told Dr. Horlick that he has ergonomic accommodation in his office space and has the ability to move around.
- [184] Similar information was conveyed to Dr. Palak a few months later in August 2023. Mr. Grewal told Dr. Palak that although sitting aggravates his pain symptoms, he has been allowed to use a sit stand desk at his own expense but he does not have the finances available to fund it. There was no indication to either of these experts that his pain symptoms are such that he has missed work on a consistent basis.
- [185] I do note, however, that in his examination by Dr. Palak in 2020, Mr. Grewal mentioned that he missed a few days of work because of pain while working at Yellow Pages. Mr. Grewal's reporting at that time was that his greatest difficulty with work was tolerating sitting in a comfortable seated position for long periods of time and that he typically needs to stand up every 30 minutes to walk around and stretch. Once again, there were no reports of having to miss work due to debilitating back spasms, which Mr. Grewal testified began a few months after the Accident.
- [186] During his examination by Dr. Devlin, Mr. Grewal stated that his "career in the mortgage company is building, but he is as yet earning a fairly average salary". However, Mr. Grewal gave no indication that he was consistently missing work for extended periods of time due to his injuries he sustained from the Accident.

- [187] Finally, Dr. Jaworski's clinical notes indicate that in June 2020, Mr. Grewal informed Dr. Jaworski that "he didn't have any time off work on account of his pains".
- [188] Firstly, I acknowledge that Mr. Grewal testified that he misses a significant amount of work, 25% of workdays per month, on account of his recurring back spasms. However, I have found that the back spasms were not caused by the Accident. Secondly, while Mr. Bhangoo and Mr. Zayas-Duran corroborated the fact that Mr. Grewal misses work, they cannot confirm that he misses work due to back spasms or on account of some other reason. The only other witness other than Mr. Grewal who provided evidence relating to the back spasms was Ms. Basra. However, as stated previously, I found Ms. Basra's evidence provided little insight as to how Mr. Grewal's pain and symptoms impacted his ability to work. This leaves Mr. Grewal's evidence, which I have found to have significant credibility and reliability issues. I cannot discount the fact that Mr. Grewal is able to maintain a side business, had work from home accommodations available to him, and has never missed a significant amount of work prior to working at IMI Financial six years post-Accident.
- [189] I agree with the defendants that Mr. Grewal has not established a past loss of earning capacity on the facts or the law.
- [190] In summary, Mr. Grewal has not provided sufficient evidence at trial that as a result of his Accident-related symptoms he lost income while working at IMI Financial. I am not satisfied, on a balance of probabilities, that Mr. Grewal has proven that he is entitled to damages for past loss of income earning capacity.

Future Loss of Earning Capacity

- [191] Assessing a parties' loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future post-accident. This assessment will depend on the type and severity of the plaintiff's injuries, and the nature of the anticipated employment in issue, but should not be a mathematical exercise: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.
- [192] There is a tripartite analytical framework which governs the assessment of damages for loss of future earning capacity: *Rab v. Prescott*, 2021 BCCA 345 at para. 47; *Sharma v. Sagoo*, 2024 BCCA 319 at paras. 62-63., I have found Justice Burke's summary of the three steps in *Choi v. Ottahal*, 2022 BCSC 237 at para. 182, most helpful and will reproduce it below:
- a) First, does the evidence disclose a potential future event that could result in a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues which may affect their ability to maintain gainful employment or remuneration.

- b) Second, does the evidence demonstrate that there is a real and substantial possibility that this potential loss of capacity will cause pecuniary loss? Having established that the plaintiff may suffer from long-term health issues which could affect their earning potential at the first stage, the trial judge must assess the likelihood that the plaintiff's loss of capacity will affect their ability to earn income.
- c) Third, having established that there is a real and substantial likelihood that the plaintiff will suffer from ongoing loss of capacity, and that this loss of capacity will result in a loss of income, the trial judge must assess this possible future loss. It is at this stage that the trial judge should consider the basis for compensation (i.e., capital versus earnings approach), contingencies, and the relative likelihood of the loss occurring. The damages award should be reduced based on the relative likelihood that the potential future would not occur.
- [193] The Court must also ensure that the award is fair and reasonable. While the assessment must be based on evidence, it is a matter of judgment, not a mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [194] Mr. Grewal seeks an award to compensate him for the loss of earning capacity which he will suffer due to the Accident related injuries. Mr. Grewal relies on the comments of Justice Frankel in *Morlan v. Barrett*, 2012 BCCA 66 at para. 41 regarding the impacts of chronic pain on a person's ability to earn income, and notes that substantial awards of future earning capacity are still made even where there has not been much of a past loss of earnings.
- [195] Mr. Grewal points to the evidence of Dr. Palak, which I accept, that Mr. Grewal has had ongoing persistent pain symptoms since 2016 and the likelihood of spontaneous resolution of chronic pain symptoms is low. But Dr. Palak also noted that if Mr. Grewal undertakes the recommended treatment, further improvements in his symptom management may be made.
- [196] Mr. Grewal also points to the evidence of Dr. Devlin who opined that chronic pain that is ongoing beyond two years is permanent.
- [197] While I accept that Mr. Grewal has tried various therapies, including chiropractic therapy, massage therapy, and physiotherapy, they have been inconsistent and sporadic. I have also found that Mr. Grewal failed to follow other recommended treatments including counselling and active therapy such as training with a kinesiologist.
- [198] Mr. Grewal submits that the evidence establishes that he suffers from chronic pain and depression and relies on the fact that his back injury renders him bedridden and unable to attend his workplace. If Mr. Grewal does not attend the office, he is not able to obtain leads or close deals.
- [199] Mr. Grewal's submissions with respect to the first step from Rab explicitly rely on the fact that he will miss work because he is bedridden from the back spasms. He says that he squarely meets all four criteria.

- a) Mr. Grewal has been rendered less capable overall from earning income from all types of employment. He would not be able to perform a physically demanding job.
- b) Mr. Grewal is less marketable or attractive as an employee to potential employers. All other things being equal, an employee who must miss work because he is bedridden is less attractive to an employer than an employee with no physical limitations.
- c) Mr. Grewal has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured. Prior to the Accident Mr. Grewal rarely missed a day of work or called in sick. Now, he often misses work when his back injury flares up. He loses out on the opportunity to obtain and pursue leads to close sales as a mortgage broker.
- d) Mr. Grewal is less valuable to himself as a person capable of earning income in a competitive labour market. He is not able to work as much as he would like. This is especially impactful when his income is entirely commission based.

[200] Given my findings above that Mr. Grewal's debilitating back spasms were not caused by the Accident, I am unable to agree that the evidence discloses a potential future event that could lead to a loss of capacity.

[201] Although Mr. Grewal suffers from chronic back pain which is caused by the Accident this does not satisfy the first step in the Rab analysis. As set out by the Court of Appeal in *Davies v. Penner*, 2023 BCCA 300:

[44] the fact that a claimant experiences chronic pain does not, on its own, satisfy the first step in the Rab analysis. There is no "common sense" inference that can be drawn from the mere existence of chronic pain. It is only possible for a judge to draw an inference based on all of the medical and lay evidence about the nature and extent of a claimant's injuries, the claimant's circumstances, and the impact that work has on their ability to function.

[202] The evidence at trial establishes Mr. Grewal has not been rendered less capable overall from earning income from all types of employment and is not less marketable or attractive as an employee. The defendants point to Mr. Grewal's evidence regarding his successful employment since the Accident in his chosen areas of interest. Mr. Grewal was working at Yellow Pages at the time of the Accident. He then moved to RBC Insurance. In October 2019, Mr. Grewal began working at Shaw Communications until he was laid off due to the pandemic. After that he worked at Frame One for an unspecified period. In 2021, Mr. Grewal took the real estate course but was not successful. Though he intends to pursue this in the future. In March 2022, Mr. Grewal after obtaining his Ontario mortgage broker licence began working at IMI Financial. During the years following the Accident, Mr. Grewal income increased each year, with the exception of 2021:

2016

\$35,345

2017

\$91,223

2018

\$78,635

2019

\$40,395

2020

\$67,757

2021

\$23,887

2022

\$42,095

[203] The defendants submit that Mr. Grewal has not proven that he misses productive time from work.

[204] With respect to Mr. Grewal's prognosis, despite some differences in diagnosis, none of the medical experts who testified at trial considered Mr. Grewal incapable of continuing to work as a mortgage broker going forward, or at risk of not being able to do so to the extent he is now, as a result of his Accident-related symptoms. I also note that Mr. Grewal also continues to engage in his Amazon side business.

[205] In my view, Mr. Grewal's evidence does not establish a future event which could lead to a loss of capacity, which is fatal to his claim for damages for loss of future income earning capacity.

[206] Even if I was to find that Mr. Grewal had shown a real and substantial probability of a future event resulting in a loss of capacity to work as a mortgage broker I would not find that he has proven, with admissible evidence, that there is a real and substantial possibility that this would result in a reduction in the amount of mortgage transactions he could complete.

[207] I come to this conclusion for a number of reasons. Firstly, Mr. Grewal testified that he still intends to work as a real estate agent in the future. As well, although he can become licenced as a mortgage broker in B.C., he has not done so.

[208] Mr. Grewal has failed to establish that missing leads as a result of missing work has resulted in any specific loss or income or that it will result in a loss of income in the future. Mr. Zayas-Duran testified that IMI Financial will accommodate those in need by providing the sales leads accordingly, as well as providing Mr. Grewal with work-from-home

accommodations and assistance in obtaining a sit stand desk. Finally, Mr. Zayas-Duran's evidence suggests that there are hundreds of mortgage brokerages in B.C. who have flexible attendance and lead policies.

[209] As a result, I award no amount for loss of future income earning capacity.

Cost of Future Care

[210] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Justice Adair summarized the principles that apply to the assessment of future cost of care claims:

[107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

See also *Donaldson v. Grayson*, 2023 BCSC 1675 at para. 461; *Ishii v. Thompson*, 2024 BCSC 1095 at para. 471.

[211] The purpose of an award for cost of future care is to restore the injured party to the position they would have been in, but for the accident. Assessing future care costs is not a precise accounting exercise, rather, it is a matter of prediction: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *MacFarlane v. Gustafson*, 2024 BCCA 400 at para. 29. A common sense approach must be taken: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13; *Tommy v. 7-Eleven Canada, Inc.*, 2024 BCSC 1558 at para. 93.

[212] Mr. Grewal seeks compensation for the costs he will incur as a result of the Accident-related injuries. Mr. Grewal submits that all of the experts have recommended that he will require future physical therapy/active rehabilitation as well counselling.

[213] Mr. Grewal refers to the following recommendations of experts:

- a) Dr. Devlin recommended a trial of antidepressant medication for Mr. Grewal.
- b) Dr. Devlin recommended that Mr. Grewal undergo 20-30 sessions of cognitive behavioural therapy over two years. The total cost is in the range of \$4000 - \$6750.
- c) Dr. Devlin recommended attendance at a private pain clinic at a cost of \$20,000 - \$25,000.

- d) Both Dr. Palak and Dr. Horlick recommended assessment and training from a kinesiologist. While Dr. Palak did not specify duration, Dr. Horlick suggested that Mr. Grewal work with a kinesiologist for six to 12 visits so he can be educated to do the work independently.
- e) Dr. Horlick recommended that Mr. Grewal undergo IMS with a physiotherapist once a week for one month followed by once every two weeks for another two months as well as massage therapy every two weeks while receiving IMS treatment.

[214] In total Mr. Grewal claims \$35,000 for compensation for the cost of future care.

[215] The defendants takes the position that the Court ought to be cautious in making an award under this head of damages. Their concerns relate to Mr. Grewal's consistent failure to abide by recommendations of his treatment providers and experts. The defendants submit that Mr. Grewal's past conduct implies that he has no intention of pursuing the treatment recommendations in the future and that would simply be a windfall for him.

[216] The defendants point to the fact that Mr. Grewal made no effort to obtain the reports prepared by Dr. Palak (including the one from 2020) and Dr. Devlin. As well, Mr. Grewal testified that he recalled Dr. Horlick recommending IMS treatments but that he did not follow up based on the advice of Mr. Sohi. This explanation was contradicted by Mr. Sohi who denied making such a statement to Mr. Grewal.

[217] In my view, the defendant's objections to Mr. Grewal's cost of future care claim are well-founded, to a certain degree. They do not account for the fact that Mr. Grewal testified that he would undertake the various therapies and treatments as recommended by the experts. While I acknowledge that Mr. Grewal does not have a good track record of following recommendations, there is evidence that he followed, at least sporadically, some of the recommendations. Specifically, though his attendance was inconsistent, Mr. Grewal attended physiotherapy and a chiropractor since the Accident, as recommended by his physician.

[218] In regards to anti-depressant medication, I decline to make an award for this. Mr. Grewal testified that he was previously prescribed anti-depressants and did not take them because he is not a "pills guys" and observed the negative effects of it on his friends.

[219] Given that Mr. Grewal has yet to seek any psychological treatments, I am satisfied that cognitive behavioral therapy as recommended by Dr. Devlin is both medically necessary and likely to be incurred. I find on the evidence that there are lingering psychological effects associated with the Accident that reasonably require care, or may require care in the foreseeable future. Balancing all the relevant factors, I would assess the amount at \$5,000 for this treatment.

[220] With respect to a referral to a pain clinic, I do not believe it is medically necessary that it be privately funded. Dr. Devlin writes favorably about the pain clinic at the Jim Pattison Outpatient Care and Surgery Centre, which is public.

[221] With respect to the recommendations regarding a kinesiologist, neither Dr. Palak nor Dr. Horlick provided an estimate on the costs of these sessions or for IMS and massage therapy sessions. Given that assessment of future care costs is not a precise accounting exercise, rather, it is a matter of prediction and in applying a common sense approach, I award \$1,500 towards sessions with a kinesiologist, \$1,000 towards IMS treatments with a trained physiotherapist and \$1,000 towards massage therapy. Accordingly, the total assessed award for future cost of care is \$8,500, which in my view is reasonably fair to both Mr. Grewal and the defendants.

Loss of Housekeeping Capacity

[222] In *Kim v. Lin*, 2018 BCCA 77 at para. 31, the Court of Appeal explained that the loss of housekeeping ability is a loss of capacity, first and foremost.

[223] In *Prasad v. Ross-Smith*, 2023 BCSC 513, Justice Basran provided a helpful summary of the principles which apply to loss of housekeeping capacity:

[129] The principles applicable to the loss of housekeeping capacity are:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
- A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of housekeeping capacity is provided by the work being performed by others, even if done gratuitously.
- Evidence of a plaintiff's incapacity resulting in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for, supports a separate award of pecuniary damages.
- "[] pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities."

See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at paras. 28-34; *Riley v. Ritsco*, 2018 BCCA 366 at para. 98; *McKee v. Hicks*, 2023 BCCA 109 at para. 112.

- [224] In *Kim*, the Court further explained the difference between a true loss of capacity and the cost of replacing those tasks the plaintiff is no longer able to perform:
- [31] This distinction is consistent with this Court's decision in *O'Connell v. Yung*, 2012 BCCA 57, where Kirkpatrick J.A. clarified that loss of housekeeping capacity was just that, a loss of capacity, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a Plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [Emphasis added].
- [225] The assessment of loss of housekeeping capacity depends on the circumstances of each case; it is a fact-driven analysis: *Peters v. Taylor*, 2023 BCCA 391 at para. 24.
- [226] Mr. Grewal submits that his ability to perform housekeeping tasks has been impaired and he should receive compensation for this damaged capacity for the past and future.
- [227] Mr. Grewal testified that he has to take breaks when vacuuming the stairs or cleaning carpets, as it strains his back when bending over or lifting. It takes him longer to do the tasks and he is in pain while doing them.
- [228] Mr. Grewal points to Dr. Palak's opinion that prolonged sitting, driving, standing, and repetitive or heavy bending, lifting, and carrying will aggravate Mr. Grewal's injuries. Mr. Grewal submits that \$20,000 would be a fair and reasonable award for loss of housekeeping capacity (both past and future).
- [229] However, the defendants point out that Mr. Grewal did not testify that he may require assistance in the future and none of the experts opinion supports this either.
- [230] The defendants contend that no amount should be awarded for a separate housekeeping capacity because Mr. Grewal is able to do all of his normal household tasks without assistance from others save and except heavy duty work, which he initially shared with his brother.
- [231] During Mr. Grewal's examination for discovery from 2022, he said his ability to do household activities is largely unaffected by his injuries. He admitted that he never contributed to cooking and cleaning before the Accident. He testified that for some heavier tasks in his house, he paces himself but is able to complete them.

[232] Mr. Grewal also advised Dr. Horlick that he is able to assist with some domestic duties and assists with yard work along with his brother. As well, during the August 2023 assessment, Mr. Grewal advised Dr. Palak that "his housekeeping chores are shared with his family and the outdoor home maintenance chores are shared with his brother".

[233] In my view, the evidence does not establish that Mr. Grewal's Accident related injuries and symptoms have resulted in a situation where he is unable to perform his current housekeeping duties. Rather, I find he performs such duties with pain or with the assistance of family. Accordingly, I do not find that it appropriate to award any damages under this head. Mr. Grewal has been compensated for any pain he experiences performing household duties in the award I have made for non-pecuniary damages.

Special Damages

[234] Justice Fleming in *Dhillon v. Singer*, 2017 BCSC 414 stated:

[200] Claims for special damages are subject to a standard of reasonableness in the context of the injuries suffered: *Redl v. Sellin*, 2013 BCSC 581 at para. 55. Medical justification for a treatment related expense aimed at promoting the plaintiff's physical or mental well-being is a factor in determining whether it is reasonable. Subjective factors can also be considered, including whether the plaintiff believes the treatments were medically necessary. With respect to cost, the courts have been prepared to allow claims for expenses at the level of optimum care, although plaintiffs are not entitled to recovery for the cost of any procedure they believe will make them feel better.

See also *Searle v. Xie*, 2023 BCSC 1716 at para. 154.

[235] Mr. Grewal seeks special damages in the amount of \$3,837.29 for treatments at Synergy Rehab (\$510), Cloverdale Chiropractic (\$690), and Green Leaf Clinic (\$130). He also seeks reimbursement for a new mattress and adjustable base. This amount comes to \$2,507.29. He submits that he incurred these expenses to treat his injuries sustained from the Accident.

[236] The defendants do not dispute the treatment expenses. However, they submit that there is no medical justification for the mattress and adjustable base. Mr. Grewal testified that his family physician recommended that he purchase this to address his back pain.

[237] The defendants point out that the mattress and adjustable bed were part of a larger purchase of bedroom furniture that were made on or about November 10, 2016, and that Mr. Grewal had only seen his family physician once at that point in time after the Accident. As well, none of the medical experts made recommendations for a new mattress and adjustable base.

[238] I agree with the defendants on this point. The special damages award will only comprise of the treatments Mr. Grewal received, which is \$1,330. This amount is reduced by 25% for failure to mitigate. The award for special damages is therefore \$997.50

CONCLUSION & ORDERS

[239] I award the following damages:

Non-pecuniary damages

\$ 67,500.00

Past Income Loss

\$ 0

Loss of Future Earning Capacity

\$ 0

Cost of Future Care

\$ 8,500.00

Special Damages

\$ 997.50

TOTAL DAMAGES

\$ 77,000.00 (rounded)

[240] Mr. Grewal seeks prejudgment court order interest on his past income loss and special damages. Mr. Grewal is entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[241] Unless there are circumstances of which I am unaware, Mr. Grewal is entitled to his costs and disbursements at Scale B.

"Girn J."

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Prepared on 27 October 2026 · Esheria