

CANADA / JUDGMENT

Gylytiuk v. Krause

2021 BCSC 2056

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Supreme Court of British Columbia

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2021 BCSC 2056 Gylytiuk v. Krause

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gylytiuk v. Krause,

2021 BCSC 2056

Date: 20211021

Docket: 55691

Registry: Vernon

Between:

Brian Nicholas Gylytiuk

Plaintiff

And

Julia Johanna Krause and Roy Krause

Defendants

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

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Place and Date of Trial:

Kelowna, B.C.

March 24-26, March 29-31

and April 1, 2021

Place and Date of Judgment:

Vernon, B.C.

October 21, 2021

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Introduction

- [1] This action concerns a motor vehicle accident that occurred on April 26, 2017 (the "2017 Accident"). On that date, the plaintiff, Brian Nicholas Gylytiuk, was riding his motorcycle eastbound on Enterprise Way in the City of Kelowna, British Columbia. The plaintiff was following behind the defendant, Julia Johanna Krause, who was driving an Acura RSX owned by the defendant, Roy Krause. The plaintiff's motorcycle and the defendant's Acura collided when the defendant, Ms. Krause, made a U-turn in front of the plaintiff.
- [2] The plaintiff alleges that the defendants are entirely responsible for causing the 2017 Accident. The defendants concede that they bear some responsibility for the collision, but allege that the plaintiff is partly responsible.
- [3] The plaintiff claims that as a result of the 2017 Accident he sustained new injuries and aggravated injuries he had sustained in a previous motor vehicle accident that occurred in Alberta on February 14, 2014 (the "2014 Accident").
- [4] As a result of the 2017 Accident, the plaintiff claims the following damages:
 - a) non-pecuniary loss;
 - b) past earnings loss;
 - c) loss of future earning capacity;
 - d) cost of future care;
 - e) loss of housekeeping capacity; and
 - f) special damages.
- [5] The defendants claim that the plaintiff's injuries are not significant. The defendants are prepared to recognize an award for non-pecuniary damages, cost of future care, and special damages, but at a much lower amount than the plaintiff claims. However, the defendants do not recognize any claims for the loss of past or future earnings.

Background

- [6] The plaintiff is 65 years of age. He lives with his spouse, Irina Toker. The plaintiff met Ms. Toker in 2010. They have been living together since 2011.
- [7] The plaintiff's experience and history with riding motorcycles is significant. He has been riding motorcycles since 2002 and riding has become one of his passions. He owns three motorcycles in Kelowna and one in Edmonton, Alberta.

- [8] Prior to the 2017 Accident, the plaintiff had never been involved in an accident while riding his motorcycle. He is aware that safety is a significant concern while on a motorcycle in that, unlike riding in a car, a motorcycle has no protection.

Liability

- [9] On April 26, 2017, the plaintiff was riding his Harley Davidson motorcycle. He was originally travelling north on Harvey Avenue in the City of Kelowna. He turned left onto Dilworth Drive and then merged to the right onto Enterprise Way on a yield sign.
- [10] The weather was sunny and dry. The road conditions were clear. The area of Dilworth Drive and Enterprise Way is a business district. There are no residential properties in the vicinity. All of the buildings in this area are commercial buildings.
- [11] The plaintiff testified that once on Enterprise Way he was initially travelling at 10 to 15 kilometres per hour and then he accelerated to 30 or 40 kilometres per hour in second gear.
- [12] The plaintiff testified that after merging onto Enterprise Way he saw a Honda two or three car-lengths in front of him. He was looking straight ahead at the Honda in front of him and paying attention to the traffic ahead.
- [13] The plaintiff's description of the vehicle in front of him on Enterprise Way as a Honda is contrary to the evidence of the defendant who testified that she was driving an Acura RSX. I have concluded that the plaintiff is mistaken about the make of the defendants' vehicle since the defendant is more likely to know the make and model of the vehicle she was driving at the time of the collision. Throughout these reasons, I will refer to the defendants' vehicle as an Acura, despite the plaintiff calling it a Honda in his testimony.
- [14] The plaintiff testified that, without warning, the Acura made a sharp turn to the right and then a U-turn to the left. The plaintiff says that he saw no brake lights or signal lights on the Acura before it made this abrupt turn. He had no time to brake and no time to go around the vehicle. As a result, the plaintiff's motorcycle struck the Acura in the area of its back tire. The plaintiff testified that at the time of the collision, the Acura was perpendicular to the roadway.
- [15] According to the plaintiff, the windshield of his motorcycle struck him across his chest as a result of the collision. He felt a sharp pain in his chest area as a result of being struck by the windshield.
- [16] The plaintiff cannot recall whether he fell off the motorcycle or if the motorcycle fell over. The plaintiff assumes that he fell off his motorcycle because he had damage to the front left shoulder of his leather jacket and damage to his helmet. However, the damage to the motorcycle was on the right side of the bike and the plaintiff has no memory of picking his motorcycle up.

- [17] The defendant, Ms. Krause, testified that on April 26, 2017, she was on her way home from work. She left the downtown area of Kelowna on Harvey Avenue. The defendant's intention was to turn left off of Harvey Avenue onto Dilworth Drive and proceed straight through the intersection at Dilworth Drive and Enterprise Way. However, when she turned left off Harvey Avenue onto Dilworth Drive, the traffic conditions were such that she ended up in the right turn lane on Dilworth. The defendant wanted to move from the right turn lane into the lane proceeding straight through the intersection, but was unable to do so due to the traffic on Dilworth. Therefore, the defendant continued in the right turn lane and merged onto Enterprise Way.
- [18] Since it had been the defendant's intention to proceed straight through the intersection on Dilworth Drive, she decided to make a U-turn on Enterprise Way. The defendant looked for an opening in oncoming traffic to do a quick U-turn to get back to Dilworth Drive.
- [19] Shortly after entering Enterprise Way, the defendant saw an opening in the oncoming traffic. She testified that she applied her brakes and turned on her left turn signal before she started into her U-turn. The defendant denies pulling her vehicle to the right before making the U-turn. She testified that her Acura was small enough that it did not need a lot of space to complete the U-turn and that it could be done in one motion.
- [20] The defendant testified that in the middle of the turn she heard a "thump". She finished her U-turn and pulled over to the side of the road to see what had caused the sound. When the defendant stopped her vehicle and looked to her left she saw a person on a motorcycle, still in the upright position, taking slow steps backwards. This was the first time that she saw the plaintiff's motorcycle. She did not see the motorcycle travelling behind her before she completed her U-turn.
- [21] The parties returned to Dilworth Drive and pulled into the parking lot of a commercial business.
- [22] The defendant testified that when the plaintiff pulled into the parking lot he was angry. She recalls that the plaintiff was concerned that she was going to sue him and that the plaintiff called her a "stupid woman driver". The defendant testified that when she assured the plaintiff that she would not sue him, the plaintiff asked her to sign a letter stating the accident was all her fault.
- [23] The plaintiff denies that he was angry, but admits that he may have been upset after the accident. He further denies calling her a "stupid woman driver" and denies that he expressed any concern about the defendant suing him.

[24] However, while the parties were in the parking lot, the plaintiff wrote a statement for the defendant to sign. The statement purports to be an admission by the defendant that she was entirely at fault for the collision. The plaintiff testified that he took the statement because he had previously received advice from friends to do so in this situation. The defendant signed the statement in order to convince the plaintiff that she was not going to sue him and to end an uncomfortable confrontation.

[25] The statement signed by the defendant is not determinative of the issue of liability for this collision. The defendant signed the statement in the heat of the moment without reasonable time to consider her position. Further, the issue of liability requires a legal analysis which the defendant was not equipped to make.

[26] Section 168 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] provides:

168 Except as provided by the bylaws of a municipality or the laws of a treaty first nation, the Nisga'a Nation or a Nisga'a Village, a driver must not turn a vehicle so as to proceed in the opposite direction

- (a) unless the driver can do so without interfering with other traffic, or,
- (b) when he or she is driving
 - (i) on a curve,
 - (ii) on an approach to or near the crest of a grade where the vehicle cannot be seen by the driver of another vehicle approaching from either direction within 150 m,
 - (iii) at a place where a sign prohibits making a U-turn,
 - (iv) at an intersection where a traffic control signal has been erected, or
- (v) in a business district, except at an intersection where no traffic control signal has been erected.

[27] Section 168 of the MVA prohibits the U-turn made by the defendant on Enterprise Way. I am satisfied that the U-turn made by the defendant could not be made without interfering with other traffic. I am also satisfied that the defendant made her U-turn in a business district, as defined by the MVA, at a location other than an intersection. Accordingly, the manoeuvre made by the defendant was contrary to the MVA.

[28] Drivers owe a duty of care to other drivers they may encounter on the road. The standard of care to which drivers are held is that of the reasonable motor vehicle driver. The reasonable motor vehicle driver obeys the rules of the road as set out in the MVA.

[29] The plaintiff was entitled to assume that Ms. Krause would drive in accordance with the MVA. In this case, Ms. Krause's U-turn contrary to the provisions of the MVA constitutes a breach of the standard of care of the reasonable motor vehicle driver. By falling below this standard of care, Ms. Krause's U-turn amounts to negligence.

- [30] Having determined that the defendant was negligent, I must now determine whether there should be any apportionment of negligence as between the plaintiff and the defendant.
- [31] The plaintiff submits that the 2017 Accident was entirely the fault of the defendant. The defendant concedes that she bears some responsibility for the collision, but submits that the plaintiff is 25% responsible for the accident.
- [32] In support of his position, the plaintiff relies on *Dickie Estate v. Dickie*, [1991] B.C.J. No. 3263 (C.A.); *Zarifeh v. Narcisse*, 2006 BCSC 969; *Ferguson v. Yang*, 2013 BCSC 332; *Faust v. See*, 2018 BCSC 1085; and *Longford v. Tempesta*, 2015 BCSC 309. The facts in the cases relied upon by the plaintiff are distinguishable from this case. The plaintiff's authorities involve either a motorist who was in the process of overtaking a vehicle that had pulled over, or a motorist who was travelling in the opposite direction when an oncoming vehicle suddenly made a U-turn in front of that motorist.
- [33] In the case at hand, the plaintiff was travelling behind the defendant. He should have been travelling at a rate of speed and with sufficient space between his motorcycle and the defendants' vehicle that would have allowed him to react to the unexpected actions of the defendant, such as a sudden stop or an illegal U-turn.
- [34] While a motorist is not required to anticipate every potential risk or unexpected action of other motorists, the driver of a trailing vehicle is expected to leave sufficient time and space to react to even unexpected events. As stated by Justice Baker, although in different factual circumstances, in *Pryndik v. Manju*, 2001 BCSC 502 at para. 21:
- [21] The operator of a motor vehicle, following other vehicles, should keep his vehicle under sufficient control at all times to be able to deal with an emergency such as the sudden stopping of a vehicle in the line of vehicles ahead and the telescope effect that results, as each successive driver attempts to bring his or her vehicle to a halt.
- [35] In this case, the plaintiff admits that by the time he realized that the defendant was making a U-turn in front of him, he had no time to brake and no time to take any other defensive action. In these circumstances, it is my view that the plaintiff was either following too closely behind the defendant or travelling at a rate of speed that did not allow him sufficient time to take defensive action.
- [36] On this basis, I find that the plaintiff is partially responsible for the collision.
- [37] In determining the plaintiff's level of contribution, it is necessary to resolve the conflict in the evidence with respect to whether the defendant applied her brakes and signalled her intention to turn. If I accept the defendant's evidence that she applied her brakes and signalled prior to making her U-turn, the defendant's contribution to liability will decrease and the plaintiff's contribution will increase.

- [38] The plaintiff's evidence is generally not reliable for reasons I will provide later in this judgment. In addition, the plaintiff's memory of the accident is incomplete. He does not recall whether he fell off his motorcycle or whether the motorcycle fell over. This should have been a significant event in the collision that I would expect the plaintiff to recall. Therefore, I am prepared to accept the defendant's evidence that she applied her brakes and signalled her intention to turn before commencing her U-turn.
- [39] In these circumstances I find that the plaintiff is 25% responsible for the 2017 Accident. Accordingly, I apportion liability for the 2017 Accident 75% to the defendants and 25% to the plaintiff.

Pre-Existing Condition

- [40] At the time of the 2017 Accident, the plaintiff was still feeling the effects of injuries he sustained in the 2014 Accident. In the 2014 Accident, the plaintiff was t-boned by another motorist while proceeding through a green light at an intersection.
- [41] As a result of the 2014 Accident, the plaintiff sustained a concussion which resulted in a temporary loss of consciousness. He also sustained injuries to his neck, back, and left arm.
- [42] The injuries sustained by the plaintiff in the 2014 Accident caused symptoms of headaches, dizziness, mood changes, and irritability. He also suffered from disrupted sleep and problems with memory.
- [43] The plaintiff's injuries from the 2014 Accident were treated with physiotherapy, chiropractic treatment, and acupuncture. The plaintiff testified that six months before the 2017 Accident, he continued to receive physiotherapy treatments once every two weeks.
- [44] The plaintiff testified that by the time of the 2017 Accident, his injuries and symptoms from the 2014 Accident had significantly improved. The plaintiff testified that by 2016 he was experiencing headaches only a few times per month and those headaches were of low intensity. He also testified that by 2016 he continued to have only the odd bout of stiffness or soreness in his neck.
- [45] The plaintiff testified that leading up to the 2017 Accident he continued to have problems with concentration, memory, and comprehension. However, those symptoms did not diminish his level of functioning at work.
- [46] After the 2014 Accident, the plaintiff continued to work as a salesperson for Bolt Security Systems ("Bolt"). At that time, the plaintiff and his two brothers owned Bolt. Robert Gylytiuk, the plaintiff's twin brother, was the President of the company. The plaintiff's role in the company was to look after the design and sale of security systems.

[47] When the Gylytiuk brothers sold Bolt in July 2016, the plaintiff assisted with the sale process. According to Robert Gylytiuk, the sale of Bolt was a complicated transaction. Robert Gylytiuk testified that the plaintiff was involved in reviewing the offer from the purchaser and in assessing the customer base and inventory so that the company could be valued. Robert Gylytiuk confirmed that the plaintiff performed his responsibilities in the sale process without difficulty.

[48] The plaintiff testified that before the 2017 Accident:

- a) his mood changes and irritability were not as much of a problem;
- b) his left arm pain had disappeared, but he continued to experience numbness in the left arm;
- c) he had no symptoms in his right arm; and
- d) his sleep disruption had not resolved but had improved significantly.

[49] The plaintiff says that by 2016 he had returned to most of his previous activities. In particular, he had returned to:

- a) riding his motorcycle without any difficulties;
- b) snowmobiling for five or six hours at a time with only slight discomfort;
- c) riding his quad vehicle in the summer of 2016;
- d) walking three or four times per week for 20 to 30 minutes at a time without pain;
- e) playing golf in the summer of 2016; and
- f) most of his yard maintenance activities.

Injuries from the 2017 Accident

[50] At the scene of the 2017 Accident, the plaintiff experienced pain in his upper chest area from where he hit the windshield of his motorcycle. He felt nausea, and was lightheaded and dizzy. However, the plaintiff was able to drive his motorcycle home.

[51] In the evening of April 26, 2017, the plaintiff began to experience more widespread soreness over his entire body. He felt burning in his neck area and developed a major headache. As a result of the pain, the plaintiff took three to four Tylenol tablets that evening.

[52] The plaintiff's evidence is that his physical symptoms did not improve with time but got worse. Since the 2017 Accident the plaintiff developed the following symptoms:

- a) throbbing headaches which were worse, both in frequency and intensity, than the headaches he experienced prior to the 2017 Accident;
- b) more frequent neck pain and a burning sensation in the lower part of his neck around the collarbone which lasted two to three years;

- c) swelling and pain in the left Achilles Tendon which arose within six months of the accident and resolved within eight months;
- d) swelling and pain in the right Achilles Tendon which arose after the left Achilles Tendon resolved and lasted for six months;
- e) pain and numbness in the left arm which was not severe and resolved in six months to one year;
- f) by August 2017, tingling in the right thumb and index finger which caused difficulty in holding a pen;
- g) by the summer of 2018, the tingling in the right thumb and index finger progressed to pain from the right shoulder to the right hand; and
- h) progression of the pain in the right arm to a constant sharp pain from the shoulder to the hand which led to neck surgery in December 2019.

[53] As of the trial date, the plaintiff's physical symptoms are:

- a) the right arm symptoms were not resolved by surgery and the severity of the symptoms have increased to a constant pain from the shoulder to the fingers and spasms in the right forearm;
- b) constant pain in the neck every day and every night with spasms from time to time; and
- c) pain in the left arm which appears to be following the same pattern as the development of pain in the right arm.

[54] In addition to the physical symptoms, the plaintiff described the following additional difficulties from his 2017 Accident injuries:

- a) The plaintiff cannot sleep on his back due to discomfort. He falls asleep right away for about two hours, but then awakens and cannot fall back asleep. His sleep disturbance has become significant enough that his spouse began sleeping in a different room approximately two years ago.
- b) The plaintiff has problems with memory, concentration, and focus. He acknowledged that some of these problems have existed since the 2014 Accident. However, he claims that they have become significantly worse since the 2017 Accident.
- c) The plaintiff is more irritable than before the 2017 Accident and becomes angry more often, which has affected his relationship with his spouse.

[55] The medical evidence establishes that the 2017 Accident had a role in causing the plaintiff's current symptoms of headaches, neck pain, and bilateral arm pain.

[56] The plaintiff's physiatrist, Dr. McKee, gave his opinion that the 2017 Accident resulted in:

- a) an aggravation of the plaintiff's cervical injuries from the 2014 Accident including multilevel cervical facet joint injury; and
 - b) cervical nerve root impingement at the C6 nerve root.
- [57] The plaintiff's neurosurgery expert, Dr. Sahjpaul, gave his opinion that the plaintiff sustained the following injuries:
- a) an aggravation of his headaches;
 - b) an aggravation of his neck pain which is probably myofascial and mechanical in nature;
 - c) nerve root impingement syndrome at C5/C6 and potentially C6/C7;
 - d) anterior chest pain; and
 - e) left shoulder pain.
- [58] The defence tendered the opinion of its own neurosurgeon, Dr. Heran, which is contrary to the opinion of Dr. Sahjpaul with respect to the cause of the nerve root impingement at C5/C6. I will address these two opposing opinions later in these reasons.
- [59] Dr. Sahjpaul also diagnosed a probable concussion, but that diagnosis was based upon symptoms that were noted in a document dated February 7, 2017, from the Lifemark Health Centre. Dr. Sahjpaul mistakenly assumed that this document was made after the 2017 Accident. Therefore, I am not prepared to accept that the plaintiff sustained a concussion in the 2017 Accident.
- [60] There is no medical evidence linking the plaintiff's Achilles Tendon pain to the 2017 Accident. Therefore, I am not prepared to find that the pain in the plaintiff's Achilles Tendons was caused by the 2017 Accident.
- [61] There is also no medical evidence to establish that the plaintiff's memory and concentration problems originated from the 2017 Accident. The evidence is that the plaintiff's memory and concentration issues from the 2014 Accident continued to cause the plaintiff problems until the 2017 Accident. I am prepared to accept that significant and long-lasting pain can detrimentally affect one's memory and concentration, but I cannot accept that those problems in the plaintiff are as significantly increased as he claims they are.

Credibility and Reliability

- [62] The plaintiff's symptoms following both the 2014 Accident and the 2017 Accident are similar. Both accidents resulted in subjective physical, psychological, and cognitive symptoms that the plaintiff attributes to the injuries he sustained in the accidents.
- [63] Because the injuries from the 2014 Accident were the subject of a claim in Alberta which the plaintiff settled, it is necessary to differentiate between the residual symptoms from the 2014 Accident and the new or aggravated symptoms arising from the 2017 Accident.

- [64] The parties presented no medical reports or other expert evidence related to the plaintiff's injuries from the 2014 Accident. Therefore, I must rely upon the evidence of the plaintiff and his witnesses to decide which of the plaintiff's current symptoms are attributable to the 2017 Accident. In these circumstances, I must assess the credibility and reliability of the plaintiff and his witnesses.
- [65] Credibility and reliability are not the same thing. The Ontario Court of Appeal in *R. v. C. (H.)*, 2009 ONCA 56, held at para. 41 that credibility has to do with the veracity of the witness, while reliability relates to the accuracy of the witness' testimony.
- [66] Assessing the reliability of a witness' testimony engages a consideration of the witness' ability to accurately observe, recall, and recount the events in question.
- [67] An assessment of the credibility of a witness involves an analysis of the following factors:
- a) internal consistency;
 - b) external consistency;
 - c) consistency over time;
 - d) corroboration;
 - e) independence; and
 - f) prior inconsistent statements.
- [68] I have concluded that the plaintiff is not a credible witness. He is prone to overstating or understating his evidence depending upon which would better serve his position at any given time. He has made statements about his medical condition before the 2017 Accident that are inconsistent with the statements he made to the experts in this case and inconsistent with his testimony at trial.
- [69] With respect to his recovery from the 2014 Accident, the plaintiff's evidence is that before the 2017 Accident, his dizziness and his concussion symptoms were minor and he felt they were improving. However, the plaintiff admitted that on February 7, 2017, he completed a post-concussion symptoms questionnaire for the Lifemark Health Centre. In that questionnaire, the plaintiff indicated that his concussion symptoms continued to be a "severe problem". Specifically those symptoms included headaches, noise sensitivity, light sensitivity, sleep disturbance, fatigue, irritability, depression, forgetfulness, poor memory, and poor concentration. In the same questionnaire, the plaintiff indicated that difficulties with dizziness or unsteadiness significantly restricted his participation in social activities, caused difficulty in doing strenuous housework or yard work, caused problems with concentration, placed stress on his relationships with family members and friends, caused depression, and created problems with his job.

[70] The plaintiff also testified that he had memory problems after the 2014 Accident, but felt that they were subsiding in the period of time leading up to the 2017 Accident. However, in the summer of 2016, the plaintiff noted on four separate occasions in his daily calendar that he discussed his memory problems with his work colleagues. On three of those occasions, the plaintiff's notes indicate that he asked his colleagues to be patient with him.

[71] On October 5, 2020, Dr. McKee, a physical medicine and rehabilitation specialist, assessed the plaintiff. Dr. McKee presented a report dated December 15, 2020, in which he states as follows on page 3:

Mr. Gylytiuk was in a motor vehicle accident in 2014 and reported that prior to the motor vehicle accident on April 26, 2017 he continued to have pain through the left side of his neck and upper shoulder, along with headaches. He stated that he had improved 90 to 95% prior to the motor vehicle accident on April 26, 2017 and denied having any activity limitations prior to the index accident.

[72] The statements made by the plaintiff to Dr. McKee are in direct contrast to the questionnaire completed by the plaintiff on February 7, 2017, in which the plaintiff indicated that his dizziness and unsteadiness were causing difficulties with many aspects of his daily activities.

[73] The conclusion that I reach from the significant inconsistencies in the plaintiff's evidence is that either the plaintiff was overstating his symptoms in the February 7, 2017, questionnaire or understating the residual symptoms from the 2014 Accident in his evidence in this action. Whichever is the case, it causes me to have serious concerns about the credibility of the plaintiff.

[74] The plaintiff tried to explain these inconsistencies by suggesting that he could have been relating his overall experience when completing the questionnaire. However, this explanation is not reasonable in the context of the language used in the questionnaire. The instructions printed on the questionnaire used present tense wording as did each of the questions asked in the questionnaire. I do not accept the plaintiff's explanation for the inconsistencies.

[75] On cross-examination, defence counsel challenged the plaintiff's credibility with various excerpts from the plaintiff's clinical records. In most instances, the plaintiff either could not recall or denied the content of the clinical records presented to him.

[76] While the defence used the plaintiff's clinical records on cross-examination, they have called no evidence to establish the truth or accuracy of the comments made in the clinical records. Therefore, the defence cannot rely upon those clinical records to establish the truth of their contents.

[77] Based on the foregoing analysis, I find that that the plaintiff's evidence taken on its own is not credible. Therefore, his evidence alone cannot be relied upon to make findings of fact.

- [78] Fortunately for the plaintiff, the evidence of other witnesses support or corroborate many of his assertions of fact. However, I have some concern about the reliability of members of the plaintiff's family because they give evidence that is inconsistent with the plaintiff's responses in the Lifemark questionnaire of February 7, 2017.
- [79] The responses in the questionnaire indicate significant problems with respect to headaches, fatigue, irritability, and memory. However, the plaintiff's family members testified that those deficits were not evident to them in the months leading up to the 2017 Accident. Rather than concluding that these family witnesses are not credible or that their relationship with the plaintiff has coloured their testimony, I conclude that their evidence is consistent with the plaintiff overstating his symptoms in the Lifemark questionnaire

Treatment

Passive Therapies

- [80] Following the 2017 Accident, the plaintiff received chiropractic, physiotherapy, and massage therapy treatments. In the initial period after the accident, the plaintiff received chiropractic and physiotherapy treatments once per week. The plaintiff eventually reduced those treatments to once every two weeks with the weekly treatments alternating between chiropractic and physiotherapy.
- [81] Before the 2017 Accident, the plaintiff had treatments with a physiotherapist every couple of weeks to treat the injuries he sustained in the 2014 Accident.
- [82] Between October 13, 2017, and June 19, 2018, the plaintiff received 12 acupuncture sessions for his injuries.
- [83] With respect to the plaintiff's ongoing treatment, he continues to receive physiotherapy treatments once every two weeks for his neck, back, and right arm and shoulder. The physiotherapy treatments do not remove the pain, but decrease the symptoms temporarily.
- [84] The plaintiff also undertakes chiropractic treatment once every couple of weeks. He describes this as a maintenance program which allows him to feel better.
- [85] Massage is undertaken by the plaintiff now once every three weeks. He has purchased a massage machine in order to seek the relief of massage at home. He also receives massage at home from his spouse, who is trained as a massage therapist.

Neck Surgery

- [86] On December 5, 2019, a neurosurgeon, Dr. Yavin, performed a discectomy and fusion on the plaintiff's neck at C5/C6. Dr. Yavin performed the surgery to address the plaintiff's symptoms in his right arm and hand. However, the plaintiff claims that the surgery resulted in no change in his right-sided symptoms.

[87] There is no medical report tendered from Dr. Yavin. However, the plaintiff has produced a medical report from a neurosurgeon, Dr. Sahjpaul, dated December 16, 2020. Dr. Sahjpaul prepared his report after a single assessment of the plaintiff on October 16, 2020, and a review of documentation provided to him by plaintiff's counsel.

[88] With respect to the surgical intervention, Dr. Sahjpaul sets out the following in his report:

Right arm symptoms consistent with cervical radiculopathy, i.e. nerve root impingement syndrome due to C5-6 disc osteophyte complex which itself is pre-existing but [rendered] symptomatic by the subject MVA. There may be an element of right C7 radiculopathy. Although the onset of bona fide, recognizable nerve issues in the right arm, i.e. numbness, tingling pain, etc. is delayed in nature, there is documentation to indicate that the symptoms were initially intermittent, and then became more prominent. The chiropractic records from Christian Brix do indicate that Mr. Gylytiuk had short bouts of right arm numbness, which were initially intermittent after the MVA, and then became more of a predominant issue. Christian Brix indicates that these occurred around June 2017, in addition to being associated with other symptoms. In my opinion and experience, symptoms such as numbness, tingling, pain, etc., are all consistent with nerve root compression or irritation symptomatology. Hence, more likely than not, it is my opinion that Mr. Gylytiuk's right arm symptoms, which ultimately required surgical intervention, were probably due to the subject MVA.

[89] The defence presents a contrary opinion about the causation of the plaintiff's right-sided symptoms and the surgical intervention undertaken. The defence relies upon a medical report dated December 14, 2020, prepared by Dr. Heran. Dr. Heran prepared this report after a single assessment of the plaintiff on December 14, 2020, and a review of medical records provided to him by defence counsel.

[90] Dr. Heran's conclusion is that the plaintiff's right arm symptoms are not the result of the 2017 Accident. Rather, Dr. Heran's opinion is that these symptoms most likely result from causes unrelated to the 2017 Accident, including degenerative changes in the plaintiff's neck. Dr. Heran presents his opinion in the following terms:

His onset of right arm radiating pain was markedly delayed from the initial accident, arising in the summer of 2018, and abrupt in nature, supportive of a separate source of symptom development from a causative factor perspective. Therefore, had the subject accident not occurred, he likely would have had similar problems arising in the long-term anyways, the timing of which would have likely been very similar. It is impossible to know for certain. It is unlikely though, given the extent of degenerative changes in his neck and the clinical course that he has followed, that he would not have been rendered symptomatic as such.

[91] On cross-examination of Dr. Sahjpaul, it became clear that Dr. Sahjpaul did not have the plaintiff's complete medical history. In particular, Dr. Sahjpaul was lacking much of the medical information related to the plaintiff's injuries from the 2014 Accident.

[92] Dr. Sahjpaul was confronted with records that suggested that the plaintiff:

- a) had complaints of neurological symptoms exclusively in the left arm and hand after the 2017 Accident until August 2018 when they migrated to the right side; and
 - b) had complaints of neurological symptoms in both his right and left arms immediately after the 2014 Accident.
- [93] Dr. Sahjpaul testified that these records do not change his opinion that the 2017 Accident caused the plaintiff's right-sided symptoms which eventually required surgery. Dr. Sahjpaul explained that:
- a) it is not unusual for patients to experience pain in one arm and then eventually develop pain in the other arm or to experience pain in both arms from the beginning. According to Dr. Sahjpaul, this is because the common factor is the origin of the pain at the C5/C6 level of the spine; and
 - b) while there may have been bilateral neurological symptoms shortly after the 2014 Accident, there was a definite aggravation or worsening of the plaintiff's presentation which progressed to symptoms in his right arm and ultimately to surgery on his neck.
- [94] I am prepared to accept Dr. Sahjpaul's explanation. He has the necessary experience and expertise to comment on the migration of pain from one arm to the other. His conclusion that there was an aggravation of the plaintiff's arm symptoms is supported by the evidence in that there is little or no indication that the plaintiff experienced ongoing right or left arm symptoms in the year leading up to the 2017 Accident.
- [95] Dr. Sahjpaul testified during cross-examination that the 2017 Accident accelerated the process beyond what would otherwise have happened with any predictability. I interpret this testimony as Dr. Sahjpaul saying that, absent the 2017 Accident, the onset of the plaintiff's right arm symptoms and the need for neck surgery could not be predicted. Therefore, I find that the 2017 Accident played a role in causing the plaintiff's right arm symptoms and the need for his neck surgery.
- [96] In re-examination of Dr. Sahjpaul, plaintiff's counsel sought to ask Dr. Sahjpaul the following question:

In your opinion, would Mr. Glytyiuk have required the surgery that he underwent in December 2019 absent the April 2017 accident?

Counsel for the defence objected to the question. In my view, the question is not a proper question for re-examination for two reasons:

- a) The cause of the plaintiff's right arm symptoms and the surgical intervention were addressed by Dr. Sahjpaul in his reports of December 16, 2020, and February 3, 2021. Therefore, this question ought to have been canvassed in those reports and is not the proper subject of re-examination.

- b) The records put to Dr. Sahjpaul were in the plaintiff's control and ought to have been provided to the doctor before he prepared his reports. The question on re-examination seeks to elicit additional opinion evidence outside the previous reports submitted by the plaintiff.
- [97] Therefore, I have not considered Dr. Sahjpaul's response to this question in my analysis of whether the plaintiff's neck surgery was the result of the 2017 Accident.
- [98] I am not persuaded by Dr. Heran's evidence that the 2017 Accident played no role in causing the plaintiff's right-sided symptoms or his eventual neck surgery. Dr. Heran formed his opinion on the assumption that the onset of right arm pain was markedly delayed from the 2017 Accident in that it arose abruptly in the summer of 2018.
- [99] On cross-examination, Dr. Heran agreed that if the right arm symptoms arose in the summer of 2017 that would not be a marked delay in the onset of symptoms. Similarly, Dr. Heran agreed that if the right arm symptoms progressively worsened over time, that would not be an abrupt onset of symptoms.
- [100] Dr. Heran's assumptions are not supported by the evidence of independent witnesses who testified for the plaintiff. Ryan Roy, the plaintiff's work supervisor at the time of the 2017 Accident, testified that in June or July of 2017, he noticed that the plaintiff was dropping his pen and then complaining about his right hand and fingers. Irina Toker, the plaintiff's spouse, testified that in the summer of 2017 the plaintiff had occasional tingling in his right arm and numbness in his fingers. She further testified that the plaintiff's difficulties in his right hand never went away and became constant in 2018.
- [101] Further, Dr. Heran has assumed the role of an advocate for the defence. He acknowledged in his report of December 14, 2020, that the plaintiff told him that starting in June or July of 2017, he had numbness in his right thumb and pain radiating down his right arm which worsened over time. However, Dr. Heran ignored this information because he deemed it to be incredible or unreliable when compared to the clinical records which made no mention of right arm pain.
- [102] On cross-examination, Dr. Heran explained that "if it is not documented in multiple practitioners' records and the focus is on other areas, it either doesn't exist or it's not that significant to the person at that time." Had Dr. Heran considered the information he received from the plaintiff, he likely would have arrived at a different conclusion. It is not for the expert to assess the credibility or reliability of the person they are assessing.

Medications

- [103] The plaintiff takes little, if any, medication. He takes herbal medication to help with his sleep. He takes the occasional extra-strength Tylenol for pain, although he takes that very rarely.

Causation and Divisible or Indivisible Injuries

Causation

- [104] The evidence in this case establishes that the plaintiff's injuries from the 2014 Accident, the degenerative changes in his neck referred to by Dr. Heran, and the injuries he sustained as a result of the 2017 Accident all had a role in placing the plaintiff in his current condition. These circumstances raise the issue of whether the 2017 Accident caused the plaintiff's current condition.
- [105] The parties also raised the issue of whether the plaintiff's injuries are divisible or indivisible.
- [106] Causation is established when the plaintiff proves, on a balance of probabilities, that the defendant caused or contributed to his injuries (*Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13). The general rule established in *Athey* and confirmed in *Hanke v. Resurface Corp.*, 2007 SCC 7 is that the test for causation requires the plaintiff to establish that the injury would not have occurred but for the negligence of the defendant.
- [107] It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injuries. As explained in *Athey* at para.17:
- [17] It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. As long as a defendant is part of the cause of an injury, the defendant is liable, even though his [or her] act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
- [108] The but for test does not require scientific precision. Causation is a question of fact that may be answered by applying ordinary common sense. In *Athey* at para. 16, the Court held:
- [16] Causation need not be determined by scientific precision; it is 'essentially a practical question of fact which can best be answered by ordinary common sense'.
- [109] In this case, the timing of the onset of symptoms in relationship to the 2017 Accident and the level of the plaintiff's recovery from the 2014 Accident establish a substantial connection between the plaintiff's injuries and the 2017 Accident. In other words, the defendant's conduct had a part in causing the plaintiff's injuries. Therefore, I find that the plaintiff's injuries would not have occurred but for the 2017 Accident.

Divisible or Indivisible Injuries

[110] Where there are multiple causes of an injury, the court may need to determine if the injuries are divisible or indivisible. Divisible injuries are those that can be separated so that their damages can be assessed independently. Indivisible injuries are those that cannot be separated.

[111] The parties addressed whether the injuries sustained by the plaintiff from the 2014 Accident and the 2017 Accident were divisible or indivisible. However, in the context of this case I find that it is not necessary to decide this question because:

- a) There is only one tortfeasor before the court in this action so I need not apportion damages between separate tortfeasors; and
- b) In assessing damages, Athey compels me to restore the plaintiff to his original position as it was immediately before the 2017 Accident.

In these circumstances, whether the injuries are divisible or indivisible is of no consequence to the issues I must decide in this case.

Damages: General Principles

[112] In assessing damages where the plaintiff has a pre-existing condition that materially contributes to the injury, there are three key principles set out in Athey at para. 35:

1. The plaintiff is only to be restored to the plaintiff's pre-accident position;
2. The defendant is not required to compensate a plaintiff for any effects arising from the pre-existing condition; and
3. If there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendants' negligence, the overall award may be reduced to account for the risk.

Non-Pecuniary Damages

[113] The plaintiff is entitled to be restored to his pre-accident position. Therefore, in order to assess the plaintiff's non-pecuniary damages arising from the 2017 Accident, I must determine the plaintiff's condition just prior to April 26, 2017.

[114] As I stated earlier in my assessment of the plaintiff's credibility, I cannot rely upon the plaintiff's evidence with respect to his condition. Neither party in this action has tendered medical opinions with any diagnosis, prognosis, or effect on function related to the plaintiff's injuries from the 2014 Accident. Therefore, I assess the plaintiff's condition as of April 26, 2017, by reference to the evidence of the plaintiff's family, his co-workers and, to the extent that it is reliable, the evidence of the plaintiff himself.

- [115] The plaintiff's younger brother, Gary Gylytiuk, testified that he regularly participated in activities with the plaintiff before the 2014 Accident. Those activities included street biking, dirt biking, snowmobiling and riding their all terrain vehicles (quadding).
- [116] Gary Gylytiuk testified that these activities were interrupted for the plaintiff after the 2014 Accident. However, Gary Gylytiuk recalled that by 2016 the plaintiff had returned to riding his street bike, quadding, and snowmobiling. Gary Gylytiuk described the period between July 2016 and January 2017 as the best time with his brother. He described his participation in activities with his brother as incredible because he had his old brother back.
- [117] Gary Gylytiuk recalled no changes in the plaintiff's memory or his personality after the 2014 Accident but since the 2017 Accident he has seen a steady decline in the plaintiff's focus and his mood. Gary Gylytiuk says that he needs to explain himself to the plaintiff repeatedly and has observed that the plaintiff now becomes upset quickly and is agitated more easily.
- [118] Gary Gylytiuk has not snowmobiled with his brother since the 2017 Accident. They went quadding together once or twice in 2019, but Gary Gylytiuk could see that the plaintiff had difficulty turning and controlling the all terrain vehicle. Similarly, Gary Gylytiuk observed that, since the 2017 Accident, the plaintiff has had difficulty cornering on his street bike when they have ridden together.
- [119] Gary Gylytiuk also testified that he has heard the plaintiff complain about losing sensation and having sharp pains in his right hand.
- [120] The plaintiff's twin brother, Robert Gylytiuk, worked with the plaintiff at Bolt, their family business. Robert Gylytiuk recalled the 2014 Accident and testified that he observed a change in the plaintiff after that accident. He described the plaintiff after the 2014 Accident as being more sluggish, having less energy, and being less excited with his work than he used to be. He saw that the plaintiff was in pain and felt that the plaintiff was less focused at work.
- [121] According to Robert Gylytiuk, the plaintiff's condition seemed to improve throughout 2015. In 2015 and 2016, Robert Gylytiuk observed an improvement in the plaintiff's energy, his focus, and his concentration. Robert Gylytiuk testified that by 2016, the plaintiff's energy levels, focus, and concentration were back to his pre-2014 Accident levels.
- [122] Robert Gylytiuk saw no difficulties with respect to the plaintiff's memory, focus, and concentration in 2016. He also confirmed that by 2016, the plaintiff was participating in golf and snowmobiling again without any complaints of pain.
- [123] After the 2017 Accident, Robert Gylytiuk described the plaintiff as hurting, frustrated, and agitated. He says that the plaintiff now complains of pain, is not focused, is short tempered, and is easily agitated to the degree that he can no longer talk to the plaintiff.

- [124] Robert Gylytiuk was a co-owner of a development property in St. Albert with the plaintiff. They worked on the development for three to four years. However, since 2017, Robert Gylytiuk has not involved the plaintiff in the development because the plaintiff does not comprehend what needs to be done on the project.
- [125] The plaintiff was also involved with another partner in a property development in West Kelowna. After the 2017 Accident, Robert Gylytiuk became involved in the project because the plaintiff was not able to stay on track with his partner.
- [126] Irina Toker is the plaintiff's spouse. They met in 2009 and began living together in 2011. At that time, they enjoyed walking, hiking, biking, snowmobiling, and golfing together. Ms. Toker described the plaintiff as generally a healthy person when they first met.
- [127] Ms. Toker testified that when the plaintiff was involved in the 2014 Accident he began experiencing difficulties in his neck. The plaintiff complained of numbness in his shoulder and arm on the left side. He complained of many headaches and dizziness. Ms. Toker recalled the plaintiff being irritable, impatient, and suffering from glitches in his memory. He also had difficulty sleeping for more than four hours.
- [128] After the 2014 Accident, Ms. Toker's activities with the plaintiff stopped until they recommenced in 2016. Ms. Toker testified that in 2016 the plaintiff returned to quadding, snowshoeing, going on walks, and hiking.
- [129] Ms. Toker confirmed that the plaintiff stopped doing yard work after the 2014 Accident, but had started to help with the yard work again in 2016.
- [130] According to Ms. Toker, by 2016, the plaintiff was getting better sleep at night and his mood and memory had improved. She described the plaintiff as being back to his normal self by 2016.
- [131] Ms. Toker testified that after the 2017 Accident, the plaintiff complained of pain in his neck and numbness in his right arm. She described him as being irritable and having a hard time focusing. She constantly had to remind him of the things she had asked him to do.
- [132] According to Ms. Toker, in 2018 the plaintiff's condition worsened. She testified that they now have stickers throughout the house to remind the plaintiff of matters he must attend to.
- [133] The plaintiff's sleep has been so disturbed that Ms. Toker stopped sharing a bedroom with the plaintiff in 2018.
- [134] Following the 2017 Accident, the plaintiff stopped participating in most of the activities he did with Ms. Toker including yard work. However, Ms. Toker also testified that the plaintiff is working more hours now than he did before the 2017 Accident.
- [135] Daniel Forrest has been a friend of the plaintiff since 2003 or 2004. Mr. Forrest and the plaintiff are both avid bikers and travel frequently together on their motorcycles.

- [136] Mr. Forrest testified that he was aware that the plaintiff was involved in the 2014 Accident. However, he and the plaintiff took a trip on their motorcycles in 2016 during which Mr. Forrest observed no difficulty with the plaintiff riding his motorcycle.
- [137] In 2018, Mr. Forrest and the plaintiff drove their motorcycles down the Oregon Coast. During this trip, Mr. Forrest observed the plaintiff riding the clutch and having trouble coordinating the use of his hands on the throttle and the clutch. The plaintiff explained to Mr. Forrest that he was having trouble using his right hand because of pain and numbness down his right arm.
- [138] The plaintiff and Mr. Forrest also took a motorcycle trip in 2020. During this trip, Mr. Forrest observed that the plaintiff was riding very slowly and falling behind frequently.
- [139] Ryan Roy is employed by Telus. Before working at Telus, he was a manager at Graydon Security Systems. Mr. Roy hired the plaintiff in February 2017 as a salesperson. Mr. Roy did not observe the plaintiff having any difficulties at work prior to the 2017 Accident. Mr. Roy testified that he never noticed the plaintiff struggle with pain or with concentration prior to the 2017 Accident. The plaintiff was able to bring in sales and do the paperwork without any noticeable difficulty.
- [140] However, in June or July 2017, Mr. Roy noticed the plaintiff dropping his pen and then complaining about his fingers and pain in his right hand.
- [141] The difficulties with pain seemed to increase with time and, by September or October 2017, Mr. Roy noticed that the plaintiff came into the office grumpy from time to time and that he was "snapping" at people. Mr. Roy recalls that when he told the plaintiff to go home, the plaintiff immediately changed his conduct.
- [142] Mr. Roy also observed that in the last year the plaintiff sought advice on the design of the more complex systems. Mr. Roy testified that the plaintiff cannot seem to grasp the systems any longer. Mr. Roy did not notice any prior problems with the plaintiff designing security systems.
- [143] Based on the evidence of the plaintiff's witnesses, I find that the level of the plaintiff's recovery from the injuries he sustained in the 2014 Accident was better than he reported to his chiropractor prior to April 26, 2017. While the evidence of the plaintiff's family members could suggest that the plaintiff was completely recovered from his 2014 injuries by the time of the 2017 Accident, I am not prepared to take their evidence that far.
- [144] I cannot completely ignore the plaintiff's description of his condition made to his health care professionals before the 2017 Accident. In particular, the clinical records contain statements made by the plaintiff indicating that he continued to have pain, discomfort, and functional difficulties from the 2014 Accident as of April 26, 2017.

[145] In my view, as of the 2017 Accident, the plaintiff continued to suffer from the residual effects of the 2014 Accident. In particular, he continued to experience difficulty in his neck and left arm, as well as problems with memory, focus, and concentration. Those difficulties and problems continued to affect his activities at work and in his recreational pursuits. However, they were not so severe that they prevented him from participating in those activities.

[146] Kirkpatrick J.A. described the underlying purpose for an award of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal* (No. 2), *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders, Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis added.]

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and

- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54 (B.C.C.A.).
- [147] In this case, neither party presented engineering evidence to establish the impact forces in the collision. The parties described a collision in which the forces of the impact may not have been severe. However, the award for non-pecuniary damages should not depend entirely upon the severity of the collision.
- [148] The assessment of non-pecuniary damages requires a consideration of the condition of the plaintiff and their particular situation. In this case, the plaintiff suffered from a pre-existing condition which made him more susceptible to further injury. The 2017 Accident caused an aggravation of his pre-existing condition. While the plaintiff's current symptoms are similar to those that he experienced following the 2014 Accident, the symptoms after the 2017 Accident have been longer lasting and more debilitating.
- [149] The aggravation of the plaintiff's condition has caused him emotional difficulties and difficulties in his relationships. It has impacted his lifestyle in the sense that he cannot enjoy the activities in which he participated in the past.
- [150] The injuries from the 2017 Accident led to symptoms of pain in the plaintiff's right arm. The progression of right arm pain led to neck surgery at the C5/C6 level in December 2019. The surgery did not resolve the plaintiff's right arm pain. Since the surgery, the plaintiff has developed similar pain in the left arm. The neurosurgeons who testified in this case suggest that further neck surgery at C6/C7 may be warranted following more investigation.
- [151] The defendants acknowledge that the 2017 Accident likely exacerbated the plaintiff's 2014 injuries for a period of time. However, the defendants submit that the plaintiff has returned to his pre-accident condition. Further, the defendants submit that the neck surgery undertaken by the plaintiff was not the result of any exacerbation of the plaintiff's condition so it should not be considered as a factor in the assessment of damages.
- [152] The defendants rely upon *Janda v. MacKenzie*, 2018 BCSC 168; *Saidy v. Louzado*, 2019 BCSC 281 and *Liu v. Conn*, 2020 BCSC 1195. Based on these authorities, the defendants submit that an appropriate award for non-pecuniary damages in this case is \$45,000. The defence submits that an assessment of \$45,000 should be made before any reduction for contributory negligence and should include compensation for the plaintiff's loss of housekeeping capacity.
- [153] The plaintiff relies on *Hedman v. Keykhosrowkiany*, 2020 BCSC 1974 and *Carver v. Or*, 2017 BCSC 1496 as authority for his submission that \$135,000 is the appropriate assessment for non-pecuniary damages.

[154] In my view, the defendants' position significantly undervalues the assessment of non-pecuniary damages because it does not consider any aggravation of the plaintiff's pre-existing condition to be significant. On the other hand, the plaintiff's assessment of non-pecuniary damages overestimates the level of the plaintiff's recovery from his 2014 injuries and overstates the aggravation to the plaintiff's pre-existing condition.

[155] In my view, an appropriate assessment for non-pecuniary damages in this case is \$100,000.

Past Earnings Loss

[156] After the 2017 Accident, the plaintiff carried on working full time. The plaintiff testified that he may have missed a day, or perhaps two days of work, but after that he continued to work in his sales position.

[157] The past earnings loss claimed by the plaintiff relates to the six weeks of work that he missed following his neck surgery on December 5, 2019. I have already found that the 2017 Accident caused the need for neck surgery. Therefore, the earnings lost by the plaintiff as a result of the surgery are properly compensable.

[158] The earnings that the plaintiff lost in this six-week period cannot be precisely determined because most of the plaintiff's earnings in 2018 and 2019 were from commissions generated from his sales.

[159] It is reasonable to conclude that if the plaintiff did not work for six weeks he would not initiate or complete any sales in that time. As a result, it is likely that the plaintiff sustained a loss of income as a result of his inability to work for six weeks after December 5, 2019.

[160] There is no evidence of any specific sales that the plaintiff missed during the six-week period. There is no specific evidence of what income he lost. The best indicator of the plaintiff's income during this time is his actual earnings in 2019. It is reasonable to assume that his average weekly income for 2019 would approximate the commissions that he lost in the six-week period that he was off work.

[161] The plaintiff's total income from employment in 2019 was \$159,372. The weekly average for 2019 is \$3,065 per week. The total loss for six weeks is \$18,390 in gross employment income. The amount paid by the plaintiff for income tax in 2019 was 27.5%. Discounting the gross income loss for taxes of 27.5% results in a net loss of \$13,333.

[162] Therefore, I find that the plaintiff's net past earnings loss is \$13,333. This amount includes the agreed upon subrogated amount of \$3,116.25 received by the plaintiff from his disability insurers.

Loss of Future Earning Capacity

- [163] The assessment of a claim for loss of future earning capacity is a two-step process. The first step requires the plaintiff to establish that there is a real and substantial possibility that his injuries will result in a future loss of earnings. If the plaintiff satisfies the first step in the analysis, then the plaintiff must quantify the loss. In *Perren v. Lalari*, 2010 BCCA 140, Justice Garson described the two-step process at para. 32:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
- [164] The first question that I must determine is whether there is a real and substantial possibility that the plaintiff will sustain a future loss of earnings due to his injuries from the 2017 Accident. In this case, the plaintiff returned to his pre-accident employment. Since the accident, he has continued to fulfil his pre-accident employment duties with Telus. However, a return to pre-accident employment does not determine this issue. As stated by Garson J.A. in *Perren* at para. 32:
- [32] A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*
- [165] There are factors in this case that could support the position that the plaintiff has failed to establish that there is a real and substantial possibility that the 2017 Accident will result in a future loss of earnings. Those factors are:
- a) there is evidence from the defence medical expert that the plaintiff's current condition is not related to the 2017 Accident;
 - b) the plaintiff persevered through the injuries he sustained in the 2014 Accident and continued to work full-time;
 - c) the plaintiff missed only a day or two of work following the 2017 Accident and has continued to work full-time since that accident, except for the time he took off to recover from surgery; and

- d) the plaintiff is passionate about sales and is driven to sell and generate income so much so that he works through pain and discomfort and works longer hours to achieve his employment goals. Therefore, it is unlikely that the plaintiff will allow his injuries to compromise his earnings.

[166] In addition to the factors above, there is no medical opinion that the plaintiff will be unable to carry out his employment-related duties into the future. The medical evidence suggests that he is capable of performing his sales work, but that he may have difficulty with writing, typing, and driving. Dr. McKee writes in his report of December 15, 2020:

There is real possibility that his symptoms will compromise his ability to carry out employment related activities now and into the future. Although he reported that he is able to do his sales work, he does have difficulty with this work, including his ability to concentrate, to write and type on the computer and drive, which he has to do a lot of with his work. It was also noted that he had significantly reduced range of motion of his neck and if this continues to decrease, at some point there [may be] restrictions on his ability to drive, which is a necessity with regard to his work.

[167] The plaintiff's occupational therapist, Wendi Wright, states in her report of December 22, 2020, that the plaintiff meets the criteria for the physical demands related to his job as a salesperson. The restrictions identified by Ms. Wright with respect to the plaintiff's work are:

- a) driving beyond one hour without a break;
- b) doing paperwork which he is able to hand-off to others; and
- c) having memory issues for which he uses compensatory strategies, such as notes and reminders on his telephone.

[168] While the evidence does not support a finding that the plaintiff's injuries will prevent him from continuing to work full time, I am prepared to accept that there is a real and substantial possibility that the plaintiff's injuries will result in a future loss of earnings for the following reasons:

- a) Both the plaintiff's neurosurgeon and the defence neurosurgeon agree that the plaintiff may be experiencing symptoms from another level of the cervical spine which may require further neck surgery and time off work for recovery.
- b) Both Dr. McKee and Wendi Wright confirm that the plaintiff will have difficulties and limitations with respect to his work. While those difficulties and limitations may not affect his ability to make sales, it is reasonable to conclude that those difficulties will affect his productivity in the workplace by reducing the number of sales he can complete in any given period of time.

- [169] Having decided that there is a real and substantial possibility of a future loss of earning capacity, I must quantify that loss.
- [170] The loss of future earning capacity may be quantified by using the "earnings approach" or the "capital asset approach". It is my view that the "capital asset approach" is not applicable in this case. The "capital asset approach" considers the loss of the plaintiff's value in the job market. The factors considered in the "capital asset approach" do not apply to the plaintiff because it is unlikely that the plaintiff will need to seek out alternate employment. Accordingly, the "earnings approach" to assessing loss of future earning capacity is more appropriate in this case.
- [171] The plaintiff submits that his loss of future earning capacity should be assessed at \$500,000, which is twice the plaintiff's 2020 gross earnings. In my view, assessment of the plaintiff's loss of future earning capacity at the level suggested by the plaintiff would be overstating his loss because:
- a) the plaintiff's personality will drive him to achieve his earnings potential;
 - b) the plaintiff has never demonstrated, in the years since the 2017 Accident, any reduction in employment income but has achieved a steady and dramatic increase since the accident;
 - c) the plaintiff is not incapable of performing well at his job as a result of his injuries even though he may have some difficulties and limitations;
 - d) The loss in the future will consist of his inability to make as many sales in a given period of time as he may have been able to make absent his injuries; and
 - e) Wendi Wright did not administer cognitive testing, but her observations of the plaintiff's cognitive function did not reveal any obvious attention or memory deficits.
- [172] The plaintiff presented evidence that his difficulties with memory and concentration caused him to step back from being involved in property development projects both on his own and with partners. The evidence is that the plaintiff has either been excluded from these projects by his brother, Robert Gylytiuk, or he has brought his brother into the projects to represent his interests. However, the plaintiff presented no evidence with respect to potential income loss that may arise from these projects due to his injuries. The plaintiff also made no submissions with respect to whether, or how, this factor may impact the future loss of earning capacity.
- [173] The plaintiff's evidence is that he intends to work for another ten years until he reaches the age of 75.

- [174] After considering all of the factors outlined above, I conclude that the injuries sustained by the plaintiff in the 2017 Accident will reduce his future work productivity. However, the reduction in productivity is not likely to be substantial. In my view, assessing the plaintiff's loss of future earning capacity based on a 10% loss of productivity for ten years is reasonable.
- [175] The plaintiff's income for 2020 was \$240,000. A 10% loss of productivity based on the plaintiff's 2020 income produces a loss of \$24,000 per year.
- [176] The present value of a loss of \$24,000 per year for ten years is \$222,000. In this case, it is appropriate to adjust this figure downwards for the following contingencies:
- a) that the plaintiff will not work to age 75;
 - b) that other factors, not related to his injuries, may cause his income to be reduced; and
 - c) that his pre-existing condition and his age may have caused the plaintiff to voluntarily reduce his workload even without the 2017 Accident.
- [177] Accounting for these contingencies, I have concluded that the sum of \$150,000 is the appropriate assessment of the plaintiff's future loss of earning capacity.
- [178] I have not lost sight of the potential that the plaintiff's drive to succeed at work may cause the plaintiff additional pain, discomfort, and compromise of his lifestyle outside of work. However, those factors have been considered and compensated in the non-pecuniary damages award.

Loss of Housekeeping Capacity

- [179] The plaintiff claims the sum of \$5,000 for his loss of housekeeping capacity. The plaintiff claims that since the 2017 Accident his ability to maintain his property has been diminished. The loss is based upon the evidence that the plaintiff and Ms. Toker now hire others to do yard maintenance that the plaintiff previously did himself.
- [180] The plaintiff claims seasonal yard maintenance costs and annual snow removal costs as part of his future care claim. In my view, an award for loss of housekeeping capacity on the basis submitted by the plaintiff in this case is a duplication of the claims made for cost of future care.
- [181] Therefore, the plaintiff's claim for loss of housekeeping capacity is denied.

Future Care Costs

- [182] The physiatrist, Dr. McKee, recommends an "extensive course of physiotherapy" with a physiotherapist who performs intramuscular stimulation and who uses a TENS machine.

- [183] The plaintiff was assessed by an occupational therapist, Wendi Wright, who reports that typically, active therapy, rather than passive therapies such as physiotherapy, is best for the treatment of chronic pain. However, she defers to the opinion of Dr. McKee that an extensive passive therapy treatment block is necessary to manage the plaintiff's pain in the long-term.
- [184] In addition, Ms. Wright suggests that it is reasonable to assume that the plaintiff will require passive treatments for painful flare-ups and for treatment following any potential future neck surgery.
- [185] Ms. Wright recommends the assistance of a kinesiologist to establish an active therapy program and an occupational therapist to provide an ergonomic assessment of a home office. She also recommends psychological counselling to address psychological factors that may be impacting the plaintiff's experience of pain and his recovery.
- [186] With respect to services, Ms. Wright recommends seasonal yard maintenance assistance and annual snow removal assistance.
- [187] Based upon the medical evidence and the evidence from the plaintiff's witnesses, I am prepared to accept that the recommendations made by Ms. Wright are medically necessary.
- [188] The defence did not argue that Ms. Wright's recommendations were not medically necessary. The defence argued that the award for future care costs should be limited to \$5,000. The defence's position was that:
- a) the costs associated with future neck surgery was not their responsibility because the 2017 Accident did not cause the neck injury; and
 - b) the costs associated with home maintenance should be excluded from future care and included in the non-pecuniary damages.
- [189] I am not prepared to accept the defendants' argument on the future care award. I have already found that the 2017 Accident played a role in causing the plaintiff's neck injury and I have not considered the loss of home maintenance capacity in the non-pecuniary damages award.
- [190] In order to account for the various negative contingencies that may impact upon the future care costs, I limit the future care costs to the lower end of the range suggested by Ms. Wright. The present value of the future care costs at the low end of the range is \$27,309.

Special Damages

[191] The plaintiff presents receipts for special damages totalling \$8,799.90. He acknowledges that he would have incurred some of those costs even if the 2017 Accident had not occurred. Therefore, he discounts the special damages claim to \$6,000 to account for those costs that are not associated with the 2017 Accident. However, the plaintiff then increased his special damages by \$1,649 for the cost of purchasing a snowblower. Ultimately, the plaintiff's special damages claim is \$8,000.

[192] The defendants submit that the special damages award should be \$4,000 without any detailed analysis.

[193] I am not prepared to compensate the plaintiff for the cost of purchasing a snowblower because I have already included snow removal costs in the award for future care costs. Compensating for the cost of a snowblower would be a duplication.

[194] Therefore, I assess special damages at \$6,000.

Summary of Damages

[195] A summary of the assessment of damages is as follows:

Non-Pecuniary Damages

\$100,000

Past Loss of Earnings

\$13,333

Loss of Future Earning Capacity

\$150,000

Loss of Housekeeping Capacity

\$0

Future Care Costs

\$27,309

Special Damages

\$6,000

TOTAL:

\$296,642

[196] The damages assessed above must be reduced by 25% for the plaintiff's contributory negligence. Therefore, the total damages award is \$222,481.50.

Costs

[197] The parties have leave to make submissions on the issue of costs if they cannot agree. The parties will make the arrangements to address the issue of costs within 30 days following the release of these reasons.

"D.K. Hori J."

HORI J.

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