
CANADA / JUDGMENT

Jafferi v. Hardcastle

2018 BCSC 486

COURT

Supreme Court of British Columbia

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2018 BCSC 486 Jafferi v. Hardcastle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jafferi v. Hardcastle,

2018 BCSC 486

Date: 20180326

Docket: M151320

Registry: Vancouver

Between:

Syed Hassan Jafferi

Plaintiff

And

Kelsey Hardcastle

Defendant

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:

J.M. Green

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Place and Dates of Trial:

Vancouver, B.C.

October 10-13, 16-18, 24 and 25, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 26, 2018

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- [1] The plaintiff, Mr. Jafferi, claims damages arising from a rear end collision that occurred on May 24, 2013 (the "Accident"). The defendant admits liability for the Accident. Accordingly, the issues are the amounts of damages to be awarded.
- [2] The plaintiff claims damages for a number of injuries that he says were caused by the Accident. In addition, he claims he is now partially disabled from working at his business and he claims a substantial amount in lost income since the Accident and into the future.

- [3] The defendant says the plaintiff's damages should reflect the fact he was suffering from a pre-existing injury. The defendant denies that Mr. Jafferi has suffered any lost income as a result of the Accident.

Issues

- [4] The issues before the Court are as follows:
- a) credibility of the plaintiff's evidence;
 - b) whether the Accident caused the plaintiff's injuries;
 - c) quantum of non-pecuniary damages;
 - d) damages for loss of past income;
 - e) damages for loss of future earning capacity;
 - f) the cost of future care;
 - g) loss of housekeeping capacity;
 - h) special damages; and
 - i) an in-trust claim for Ms. Zaidi.

The Accident

- [5] On May 24, 2013, Mr. Jafferi was on his way to a hospital to visit his mother. He was stopped at a stop sign at the intersection of 104th Street and Highway #10 in Delta, BC, intending to turn left, when the defendant's vehicle struck his vehicle in the rear.
- [6] The Accident was caused as a result of the defendant taking her foot off the brake when she was in the process of changing a CD in her car. The Accident was a minor one, causing little damage to either vehicle.
- [7] The plaintiff testified that when his vehicle was struck, he had his head turned sideways, looking in the direction he intended to turn, and "suddenly felt a jolt". Immediately after the impact, he testified that he felt a "small pain" in his upper back and left shoulder, which spread to his upper left arm and then to pins and needles in his left forearm and numbness in his fingers.

Personal Circumstances of Mr. Jafferi Before the Accident

- [8] Mr. Jafferi was born on September 20, 1959 in Pakistan. He was 59 years old at the time of trial.

- [9] Mr. Jafferi completed high school and went on to obtain his Bachelor of Science degree in electrical engineering. He worked in a position where he assisted in designing a data communication network. He was then promoted to work at the company's computer centre. He met his wife, Ms. Zaidi, who was in medical school at that time, and they married in 1991. Their first son, Ali, was born in 1995.
- [10] Mr. Jafferi and Ms. Zaidi decided to immigrate to Canada to find a better future and to enable Mr. Jafferi to advance his career in the telecommunications industry. They moved to Canada in 1997. Their second son, Zohair, was born in 1998.
- [11] In Canada, Mr. Jafferi initially found work doing odd jobs. He then obtained a job with Nortel in 2001 working on their fibre optic system. He was laid off from Nortel when the company ran into financial difficulty. On the recommendation of his supervisor, he obtained a one year position with another company but was again laid off. He testified it was a "bad time" in the telecommunications industry. He applied to many companies for a position but for a time was unsuccessful in being offered any other position than an entry level job.
- [12] Mr. Jafferi went on to hold contract positions with a number of different telecommunications companies on a project-based term basis.
- [13] Mr. Jafferi then decided to set up an unincorporated business for himself, Maxon Digital Services ("Maxon"). He started Maxon as a sole proprietorship in 1998, shortly after moving to Canada, when he found it difficult to obtain steady work. In 2003, he started using Maxon to sell cell phones and to repair computers.
- [14] From about 2004 onward, he and his wife were involved together in using Maxon as a vehicle to sell promotional items to their customers. She was responsible for telemarketing and he for meeting clients and prospective clients, delivering product, and bookkeeping.
- [15] This arrangement continued until about 2008, when they decided Ms. Zaidi would spend more time with their children on school and extra-curricular activities, and Mr. Jafferi would look after Maxon's business.

Mr. Jafferi's Health Prior to the Accident

- [16] The evidence supports a conclusion that Mr. Jafferi was in good health prior to the Accident. He had no difficulty doing the work necessary to carry on his business, including picking up various items from suppliers, imprinting logos on t-shirts and other promotional products, and driving or delivering (sometimes heavy) parcels of merchandise to his customers.
- [17] He regularly played tennis with his children and friends some time prior to the Accident, although he agreed in cross-examination he had not played frequently after his mother came to stay with him in 2011, because of her health issues and because his children were "very busy". He agreed he had not played "much tennis at all" prior to the Accident.

- [18] His medical records show he had a pre-existing degenerative disc condition; however, it was not symptomatic at the time of the Accident.

Mr. Jafferi's Health Following the Accident

- [19] As described, Mr. Jafferi considered the collision to be a minor one, and thought the feeling in his shoulder would disappear. Rather than disappear, Mr. Jafferi testified that over the next month, the pain in his shoulder gradually spread and the symptoms intensified in his upper left arm and neck. His lower left arm had pins and needles and three fingers on his left hand were numb. His wife insisted he go to the doctor, which he did. He finally saw his family doctor, Dr. Riffat Nagra, on June 25, 2013. She prescribed medication but it did not relieve the pain.
- [20] Mr. Jafferi testified that he has had unremitting sleep problems since his symptoms escalated, and has had trouble getting to sleep and staying asleep. He starts his day later as he is tired in the morning, and needs to take breaks during the day to nap. As will be discussed, Mr. Jafferi received injections for neck pain from Dr. Nagaria, which helped relieve the pain temporarily, and this cycle continued until February 2017, when he had neck surgery. After the surgery, Mr. Jafferi testified that his arm pain improved to just tingling and numbness, and the shooting pain had been reduced, but he continues to experience neck and shoulder pain.

Plaintiff's Lay Evidence

Syed Gazala Zaidi

- [21] Ms. Syed Gazala Zaidi, Mr. Jafferi's wife, testified as to her and her husband's decision to come to Canada and the difficulty he had initially in finding sustainable work; their decision to start Maxon after Nortel laid him off; their struggles between 2002 and 2004; the gradual building of their Maxon business; and her involvement in the business until 2008, when she turned to devoting her time to their children's education and extracurricular activities, and also to look after Mr. Jafferi's mother who was staying with them, while Mr. Jafferi looked after Maxon's business affairs. She testified that she looked into attending medical school but decided to wait until their children were older.
- [22] Ms. Zaidi described family life before the Accident as lively and active, with much family time and with Mr. Jafferi's brothers playing table tennis and tennis.
- [23] She testified that Ali did Maxon's bookkeeping in 2011, and when Ali was busy with school matters, Mr. Jafferi would do the bookkeeping.
- [24] Ms. Zaidi described Mr. Jafferi as having a "very patient personality", and as being "polite", courteous and a "very private person". She said in the evening after the Accident occurred, Mr. Jafferi told her about the Accident and that he had stiffness in his neck and pain in his shoulders and his left arm. She said they both thought the pain would pass, but that over the

next month, the pain increased and he developed tingling in his left forearm and numbness in the three fingers of his left hand. Ms. Zaidi told him to go see his doctor. She testified that when he drove and closed the car door he would cry out, and that he would be in pain when he lifted weight or sat at the computer.

- [25] Ms. Zaidi testified that during the summer of 2013, their son Ali helped the plaintiff drive to customers' places of business, load and unload the truck they used, and work on the computer in the evening, doing Maxon business entries. She said in the fall of 2013, when Ali returned to school, she took over driving Mr. Jafferi to some customers and doing Maxon's computer entries.
- [26] Ms. Zaidi testified that Mr. Jafferi had good days and bad days. She said he had many customers who had businesses throughout the lower mainland and that the longest Mr. Jafferi could drive was 20 minutes, after which he would be in a great deal of pain, so she would take over driving, and would load or unload Maxon merchandise when they arrived at the customers' locations. She said he drove very slowly on the road, which she thought was the result of pain or lack of sleep, and that other drivers would honk at him for going so slowly.
- [27] Ms. Zaidi testified that before the Accident, Mr. Jafferi would get up to pray at 5:30 - 6:00 am, and then start working. After the Accident, she said he got up at around 11:00 am, and that he could not make meetings with clients who wanted to meet earlier.
- [28] Ms. Zaidi testified that virtually all of the household chores were now done by her since the Accident, and that Mr. Jafferi was unable to assist her with many household chores as he was unable to lift heavy weight. She testified that they bought a self-propelled lawn mower. When the start push button stopped working, she had to use the starter cord, as Mr. Jafferi could not pull the cord. She also had to empty the grass clippings bag as he could not lift it.
- [29] Ms. Zaidi testified that she had been employed as a casual mental health worker since 2004. She was high on the seniority list, which gave her the opportunity to take extra shifts. She said her employer wanted her to work more hours. It had been her plan to apply for a part time and then a full time position. In 2014, she declined a full time position because she did not know her husband's prognosis and felt she should be available for him. She testified that before the Accident, it had been her plan to take examinations to enable her to practice medicine in Canada. She put these plans on hold after the Accident, when Mr. Jafferi's condition worsened.
- [30] Following Mr. Jafferi's surgery in February 2017, he was unable to drive for two months. Ms. Zaidi testified that she drove "everywhere" to help him fulfill customer orders. She also did all the bookkeeping for Maxon and all the housekeeping chores. After the two months, she continued to accompany him when he drove to suppliers or to clients. She helped load and unload boxes of product. She said he now takes smaller boxes that do not weigh as much but he needs to make more trips. She assists him to drive if he gets tired. She continues to do all bookkeeping, make all entries, write all cheques, and perform account reconciliations.

- [31] Ms. Zaidi described her husband as having aged since the Accident; that he was not the same person he was prior to the Accident, that his sleep had deteriorated, and that the injuries from the Accident had "been really hard on him". She testified that she was fearful for him when he was on the road on his own.
- [32] In cross-examination, she agreed that Mr. Jafferi had taken medication for osteoarthritis before the Accident, but said he was not taking medication at the time of the Accident.
- [33] She agreed that Maxon had hired outside telemarketers, mostly new immigrants to Canada, but that in 2012 Maxon was not looking to hire telemarketers, as Mr. Jafferi's mother was here and they did not have time to train anyone.
- [34] Ms. Zaidi was cross-examined on a number of expenses charged to Maxon including a home mortgage, personal vehicles and telephone expenses. Ms. Zaidi testified that she and her husband were always careful to separate out that portion which was used for business expenses in charging expenses to Maxon. She testified that she had no particular knowledge of certain expense items put to her but said she understood that however the accounts were kept, their accountant prepared the tax returns according to what was legally permissible.

Ali Jafferi

- [35] Mr. Jafferi's oldest son testified that he graduated from high school in the spring of 2013. He received the Governor General Medal and a scholarship, which included his tuition to attend the Sauder School of Business at the University of British Columbia ("UBC").
- [36] Ali started working for his father with Maxon when he was in grade 11, assisting in making bookkeeping entries. He testified that he would work several hours every two weeks. He spent the rest of his time focusing on school and being with friends. He said he had planned to take the summer of 2013 off and perhaps take a trip with friends before attending UBC in the fall.
- [37] Ali's plans didn't work out as he expected. Following the Accident, he helped drive his father to appointments with clients or to pick up or drop off merchandise. He testified that a lot of the drives were one to one-and-a-half hour long. Some took the entire day. Ali testified that he drove most of the time, but that his father did drive for short distances. He testified that during the summer, and thereafter, he became concerned and uneasy about his father's driving. He felt that his father's mind was not always focused on the road.
- [38] Ali testified that many of the boxes were heavy, and that he did the lifting. If a box was too heavy for him to carry, his father would ask the customer to help Ali lift it into the car.
- [39] Ali testified that his father could not sit at the computer desk for long periods of time and that he therefore took over some of the bookkeeping duties. It took five to six hours for him to input invoices from vendors, invoices to customers, and receipts relating to credit card reconciliations.

- [40] Ali continued assisting his father during the winter break and again, during the summer of 2014, before he returned to school. During the school year, he came home on weekends and between semesters to work on Maxon's bookkeeping and to drive his father to appointments and make deliveries to customers. In June 2015, Ali took employment with a start-up company, earning a salary of \$75,000.
- [41] Ali testified that prior to the Accident, his father was cheerful and optimistic. They talked about how to grow Maxon's business. Before the Accident, they had "two major bonding activities" which were watching movies and tennis. He acknowledged that they had not played much tennis while he was in high school, but did in the summer months. He testified that after the Accident, his father thought his injuries would be short term; however, his condition deteriorated and his attitude became a "lot more stressed". He said his father would come home from work and sleep. He observed his father have shooting pain in his arm, which would happen in the morning or after driving. He said his father would hold his arm and sit and not do anything strenuous for the next hour or so. Ali said his bedroom is above the office and sometimes he would hear his father working at 1:00 am "slowly clicking on the key board"; that in the morning he looked haggard; and that "he looks a lot older than you would think he is". He testified that his father always seems worried about the business.

Zohair Jafferi

- [42] Zohair Jafferi, the plaintiff's youngest son, is 19 years old and is studying kinesiology, after graduating from North Delta Secondary school in 2016. Like his brother, he is an excellent student, having achieved a 98% grade point average in his final high school year.
- [43] He recalled playing tennis, darts and soccer with his father and older brother and going out for family picnics. He recalled his father being "a calm, laid back, happy guy" who worked long hours at the family business.
- [44] In the fall of 2013, Zohair began helping with Maxon's business. In about June 2014, he obtained his learner's license, and began working a significant amount with his father, driving him places and helping with bookkeeping and printing logos onto t-shirts. Zohair testified that his father's driving was getting worse; his father had trouble moving his arms, and his driving was "horrendous"; he drove quite slow; his shoulder troubled him while making turns with the vehicle; and he "seemed lost a little bit". He recalled that his father could not lift heavy loads and that if he did, he would grab his shoulder in pain. Zohair testified that he recalled helping his father load and unload trucks and doing the heavy lifting. He recalled driving his father to customers after school in Surrey, Burnaby, Langley and Vancouver, and in the evening, occasionally, to customers' houses or stores.

- [45] Zohair said he got his "N" licence in June 2015 and started to help more, picking up merchandise and delivering it to clients instead of his father doing the work. Zohair testified that he learned how to deal with customers and make sure they were happy and that his mother did a lot of the bookkeeping. In the summer of 2015, he said he worked a lot of hours and was on standby waiting for deliveries.
- [46] In the summers of 2016 and 2017, Zohair worked in Winnipeg for a door to door sales company selling light heat security control systems. He earned a substantial salary through commissions, significantly more than he could earn working for his father at Maxon. In 2016, he worked in Winnipeg from the end of June to early September, and in 2017, from the beginning of May to mid-September. Since his return in mid-September, he has been working for Maxon, assisting his father. He has been working from 11:00 am to 5:00 pm, and often has several appointments in the evening. He looks after sales without his father's assistance.
- [47] Zohair testified that his father "does as well as always" when he sells - that he is really good at building rapport with customers, but that he seems more laboured and would rather send Zohair to deal with customers; however, Maxon can't afford to do this. It is Zohair's view that Maxon should hire a full time sales representative to keep the business growing.

Plaintiff's Medical Evidence

1. Treating Physicians

Dr. Riffat Nagra

- [48] Dr. Nagra is Mr. Jaffer's family physician who testified at the trial by video. She has been his family physician since 1997. Her clinical records indicate Mr. Jaffer saw her for complaints relating to the Accident on June 25, 2013. He was complaining of pain in his left shoulder, tingling in his left arm and numbness in his left hand. She testified that she had not treated him for complaints to these areas of his body before. Dr. Nagra ordered X-rays of Mr. Jaffer's neck, which showed he had a degenerative condition at C4-5 and 6-7. She increased his medication to try to numb the nerves.
- [49] Mr. Jaffer saw Dr. Nagra again on August 1, 2013, when he was complaining of pain in his left neck and that he could not sleep at night because of discomfort moving his neck. She referred him to Dr. Nagaria, a neurologist, for treatment.
- [50] Mr. Jaffer attended Dr. Nagra again on November 27, 2013, with complaints of pain in his left shoulder and that he was not able to sleep on his side. She ordered another X-ray and an ultrasound. When she received the results, Dr. Nagra referred Mr. Jaffer to Dr. Telfer, a specialist in shoulder arthroscopy and general orthopaedic surgery. Dr. Telfer indicated in a letter of January 29, 2014 to Dr. Nagra that the X-rays of Mr. Jaffer's shoulder and the ultrasound results were normal.

- [51] In cross-examination, Dr. Nagra agreed that most clients involved in motor vehicle accidents reported their most acute symptoms within a week or two of the accident, but that the timing of when they reported their symptoms depended on a number of factors. She agreed that Mr. Jafferri did not complain of neck pain on his first visit to her after the Accident.
- [52] Dr. Nagra authored a narrative report on June 23, 2017, summarizing her treatments of the plaintiff since the Accident. In it, she noted that during a visit on November 1, 2013, Mr. Jafferri reported that he was seeing a chiropractor. Mr. Jafferri's chiropractic treatments are discussed further below.
- [53] Dr. Nagra's report notes that Mr. Jafferri had multiple surgeries in 2017: neck surgery in February 2017, eye surgery for an optic nerve, and jaw surgery in March 2017. She writes that "all these condition[s] are not related" to the Accident. However, as will be discussed, the neck surgery was related to the plaintiff's injuries.
- [54] The report also indicates that at Mr. Jafferri's most recent visit on June 13, 2017, he was "happy with his left shoulder and had normal range of movement now", but said his right should still hurt. She did a neck examination which showed he had "some restricted movements on right lateral rotation." With respect to the relationship between the Accident and Mr. Jafferri's injuries, Dr. Nagra specifically noted that she was "not an expert to comment" on whether the negative changes occurred before the Accident, but "his symptoms definitely got worse after [the Accident]". She noted, however, that it was "hard to explain" because "he has multiple other problems".
- [55] Dr. Nagra was not qualified as an expert, and her narrative report is not an expert report. For this reason, and because the report does not appear to be based on a full understanding of Mr. Jafferri's post-Accident treatment, I place little weight on those parts of her report which speculate as to the cause of Mr. Jafferri's injuries and discuss "multiple other health problems".

Dr. Mohammed Nagaria

- [56] Dr. Nagaria is a neurologist who treated Mr. Jafferri for neck pain on referral from Dr. Nagra. Dr. Nagaria treated Mr. Jafferri with physiotherapy, medications and injections. The medications, which consisted of anti-inflammatory muscle relaxants and pain medications, were not successful in reducing the pain, so Dr. Nagaria tried treating Mr. Jafferri with physiotherapy, first by injecting a local anesthetic into his neck muscles. He did spinal injections of lidocaine to reduce pain on August 1, 2015, September 1, 2015, November 12, 2015, May 30, 2016 and January 12, 2017. Mr. Jafferri had a further spinal injection during the course of the trial.
- [57] In August 2014, Dr. Nagaria referred Mr. Jafferri to Dr. Heran for nerve blocks, and to determine if he was a candidate for surgical intervention.

[58] In cross-examination, Dr. Nagaria said the injections were mostly in the neck area and that the pain in Mr. Jafferi's fingers radiated from his neck. He said the MRI he ordered confirmed that the pain was the result of a nerve root compression.

Dr. Navraj Heran

[59] Dr. Heran is Mr. Jafferi's treating neurosurgeon, and testified at trial. Dr. Heran saw Mr. Jafferi on August 13, 2015, and then for surgery on February 2, 2017, when he performed a cervical discectomy at C4-5 and a spinal fusion surgery at C5-6. The surgery involved the removal of damaged discs to relieve spinal cord or nerve root compression and alleviate corresponding pain, weakness, numbness and tingling.

[60] Dr. Heran assessed Mr. Jafferi after the surgery on April 6, 2017, and after observing that there was no radiation of pain down his arms or neck pain, he concluded that the surgery had been a success.

2. Medical Experts

Dr. Zeeshan Waseem

[61] Dr. Waseem, a physiatrist and specialist in physical medicine and rehabilitation, saw the plaintiff at the request of his counsel for an opinion on the causation of Mr. Jafferi's injuries, his ability to function at his job, and his prognosis for recovery.

[62] Dr. Waseem examined Mr. Jafferi on May 8, 2017, and issued a medical legal report dated May 24, 2017. He gave evidence at trial.

[63] Dr. Waseem reviewed Mr. Jafferi's history and his medical records. His diagnosis was that Mr. Jafferi had initially sustained a sprain/strain soft tissue injury of his left shoulder resulting in subacromial bursitis and left C-6 cervical radiculopathy, which required cervical spine decompression surgery. He found that the left shoulder strain had resolved following injections, but that the left C-6 radiculopathy had resulted in chronic pain of the left upper extremity and chronic post-operative mechanical neck pain. Further, he found that as a result of overuse of his right arm, Mr. Jafferi had chronic right shoulder pain secondary to bursitis and rotator cuff pathology.

[64] Dr. Waseem attributed the plaintiff's injuries to the Accident. He wrote:

On the balance of probabilities, the presenting physical complaints are attributable to the subject accident. There is no reported or documented history of similar complaints pre-dating the subject accident. The onset of left upper extremity symptoms is reported and documented to be within a reasonable time frame of the accident. Mr. Jafferi underwent cervical spine decompression surgery as a result of the accident and post-operatively developed neck pain. The onset of right shoulder [pain] was delayed, however took time to develop as Mr. Jafferi was overcompensating with the right upper extremity due to left upper extremity pain. The injuries are biologically plausible given the described mechanism of injury. The symptoms have persisted

unabated since. There is no evidence of a subsequent event or injury to more plausibly explain the current physical presentation.

[65] As to his prognosis, he wrote:

The prognosis for a full symptomatic recovery is poor given the long-standing nature of his symptoms that have persisted for almost 4 years post-accident despite appropriate conservative measures, injection therapy, pharmacological intervention and surgery. There does not appear to be any further recourse at the present time and future treatment is intended only for symptom management as it will likely not be curative. His physical condition would be considered chronic and unremitting and, therefore, permanent.

[66] Dr. Waseem also considered that Mr. Jafferi was at an increased risk of developing arthritis in his cervical spine as the levels below and above the levels involved in the decompression surgery would "take on increasingly more movement and stress", that this "would be expected to occur over the next 5-10 years", and should it occur, "he will likely develop deepening pain, more loss of normal range of motion of the cervical spine and further compromised functional abilities." In such a case, he opined that it would be "medically reasonable to provide Mr. Jafferi external assistance for personal care services and housekeeping." He opined that "depending on [Mr. Jafferi's] tolerance to pain and/or the degree of his physical limitations, further reducing work hours or seeking retirement altogether would be medically supported."

[67] Dr. Waseem recommended the following future treatments:

My recommendations for future treatments include (note I am unable to comment on the cost of any such future treatment):

- For symptom management, it will be important for Mr. Jafferi to have intermittent access, at a frequency of 1-2 times per month, to massage therapy on an indefinite basis as this has proven beneficial in the past
- Participation in movement based classes in senior's yoga or Tai Chi to build confidence with moving the body and extremities
- Provision of low-tech home exercise equipment consisting of a stability ball, exercise mat, light free weights and resistance bands with two to three educational sessions by an appropriately trained and experienced regulated health professional designed to encourage the adoption of a self-directed home exercise program
- Continued use of analgesics as per his current rate of utilization
- Application of topical capsaicin 8% or lidocaine 5% to the left arm for the treatment of neuropathic pain
- Trial of Pregabalin up to a therapeutic dose of 300 mg daily for the management of left arm neuropathic pain

- Addition of Duloxetine 30-90 mg daily to the above as adjunctive pharmacotherapy for neuropathic pain management and, failing that, Venlafaxine at a therapeutic dose of 150 mg daily
- Management of the right shoulder under the guidance of his treating orthopedic surgeon
- Cervical spine injections as needed and recommended by his treating physician(s)

[68] In cross-examination, Dr. Waseem said Mr. Jafferi told him he had played tennis three times a month up to the date of the Accident; he did not tell him he had decreased the amount of tennis he played. He agreed that Mr. Jafferi told him the Accident was a minor rear end collision. He agreed the fact that Mr. Jafferi had not reported pain in his neck until two weeks following the Accident "could affect" his conclusions about causation, but thought two weeks was a reasonable time for symptoms to appear.

[69] Dr. Waseem agreed that the degenerative changes in Mr. Jafferi's neck predated the Accident but said this is common for his age group and that such changes were "not always symptomatic" and can become symptomatic without trauma. He agreed that persons with an underlying condition such as Mr. Jafferi's, who do heavy lifting (such as boxes), could bring on symptoms. He agreed that if Mr. Jafferi had left arm pain prior to the Accident, this could affect the certainty of his conclusion that his symptoms were caused by the Accident

[70] Dr. Waseem said Mr. Jafferi told him he had attended 20-30 physiotherapy sessions and was surprised to learn he had only two sessions. He also said it was his understanding from Mr. Jafferi that his wife and children had no involvement in Maxon. He said it was his understanding from Mr. Jafferi that he was able to maintain the same number of clients in his business but was not able to expand his business as a result of his injuries.

[71] Dr. Waseem also agreed that there was no contra-indication that going forward Mr. Jafferi could not attend client meetings, perform computer work or deliver product.

Dr. Donald Cameron

[72] Dr. Cameron, a neurologist, was retained by the plaintiff to conduct an independent medical examination and to provide a medical legal report. He examined Mr. Jafferi on April 7, 2015 and June 1, 2017, produced a report dated July 12, 2017, and testified at trial.

[73] Dr. Cameron opined that Mr. Jafferi suffered musculoskeletal injuries involving the left side of his neck and his left shoulder, a traumatic herniated disc at the C5-6 level and possibly at the C3-4 level, and an irritation of the ulnar sensory nerve fibres and cutaneous nerve branches as a result of an aggravation of the muscle spasm in the left neck and left shoulder post operatively.

[74] As to Mr. Jafferi's prognosis, Dr. Cameron opined:

Mr. Jafferi has been rendered completely disabled for a period of one week following the accident and then subsequently again at eight weeks following the required surgery under the care of Dr. Heran. He has otherwise been rendered partially disabled chronically because of physical limitations[,] as his job aggravates his pain and discomfort[,] still present following the accident of May 24, 2013.

It is probable that Mr. Jafferi will remain permanently partially disabled because of his chronic pain present as a result of the soft tissue, musculoskeletal injuries, and the traumatic herniated disc at the C5-6 level that he suffered at the time of this accident.

[75] Dr. Cameron concluded that Mr. Jafferi was "still improving" following his neck surgery and recommended he "undergo a supervised rehabilitation program to maximize his recovery". He also opined that Mr. Jafferi's "chronic left sided neck pain and chronic pain radiating to the left upper extremity is probably not going to improve to a significant degree in the future."

[76] In cross-examination, Dr. Cameron disagreed with defence counsel's suggestion that it would be "unusual" for a patient not to go to his family doctor for over a month after the Accident. He responded that "some people are very stoic: [having the view that] I'm going to continue with how I was doing before I'm going to be better tomorrow; I'll be out of this next week", and it happens "quite often" that people delay in seeing their family physician.

[77] Dr. Cameron also said in cross-examination, when it was suggested there was no way of knowing whether Mr. Jafferi's degenerative condition would have become symptomatic even without the Accident, that:

80 percent of the population over 40 have these changes on scans and x-rays, and most of us don't have pain so [Mr. Jafferi] may have gone through the rest of his life, like the majority of the population, without pain or some pain at times.

[78] Dr. Cameron was not aware of Dr. Gronkjaer's note of a complaint made by Mr. Jafferi on October 30, 2013:

L arm

[Pain] - in biceps and forearm, burning in forearm, tingling in fingertips.

Began [approximately] 3 [months] ago driving lots;

Then [approximately] 2 [weeks] after starting got rear-ended mildly/lightly - seemed to aggravate [pain]

Over past 3 months [pain] getting worse - notices [pain] daily - is mild if not moving, as soon as he moves [pain increases to] 8-9/10.

Neck [pain] over the past month - mild.

- [79] Dr. Cameron testified that he could not understand the entry as it appeared inconsistent with the other records he had reviewed.

Dr. Tamir Ailon

- [80] Dr. Ailon is a neurosurgeon who saw Mr. Jafferi for an independent medical examination at the request of the plaintiff's counsel. He examined Mr. Jafferi on June 2, 2017, and issued his report on June 5, 2017. Dr. Ailon testified at the trial, and was qualified to give opinions in relation to neurosurgery and disorders affecting the spine.

- [81] It was Dr. Ailon's opinion that Mr. Jafferi suffered post-traumatic neck pain, bilateral C6 cervical radiculopathies, pre-existing bilateral C5-6 foraminal stenosis, left shoulder subacromial bursitis, which had resolved, and right shoulder pain. In his opinion the Accident caused these injuries. He opined:

Mr. Jafferi has had an excellent outcome thus far from his cervical spine surgery with substantial reduction in bilateral arm pain. His neck pain, however, persists and he has noted increased stiffness/reduced range of motion. This is expected, since fusion of the mid-cervical spine reduces range in motion by approximately 10% per operated level. Cervical fusion is generally not an effective treatment for mechanical neck pain and therefore Mr. Jafferi's ongoing neck pain is not surprising. I think Mr. Jafferi would benefit from physiotherapy to maintain cervical range of motion and isometric exercises to strengthen the neck stabilizers. This will likely result in improvement - but not complete relief - of neck pain and increased range of motion. Mr. Jafferi will probably have some neck pain indefinitely and will definitely have some degree of restriction in his range of motion.

- [82] It was his view that "but for" the Accident, Mr. Jafferi's foraminal stenosis at C5-6 would not have become symptomatic or "if it did become symptomatic", he "would expect this to occur much later in life as a result of gradual age-associated degeneration."

- [83] With regard to Mr. Jafferi's residual arm pain, Dr. Ailon thought it could "represent a neuropathic component which would be expected to persist indefinitely." He was of the opinion that Mr. Jafferi's right shoulder pain "likely represents pathology intrinsic to the shoulder itself and may be related to overuse in the period from the MVA until Mr. Jafferi's surgery." He was of the opinion that Mr. Jafferi's neck pain would last indefinitely and that there was a 25.5% risk of symptomatic adjacent segment disease, which would require further fusion surgery, over the next ten years.

- [84] Dr. Ailon suggested it would be prudent for Mr. Jafferi to be reassessed by a psychiatrist, as the depressive symptoms arising from pain had been alleviated by his surgery.

[85] In cross-examination, when it was suggested to Dr. Ailon that the correlation between symptoms and trauma could be difficult, Dr. Ailon testified that in this case the correlation "looks to be quite convincing". He also disagreed that there was a correlation between the velocity of the collision and the injury sustained, noting that any correlation was "surprisingly" low.

Dr. John Pullyblank

[86] Dr. Pullyblank is a vocational psychologist who saw Mr. Jafferi in May and June 2015, and again in May 2017, for the purpose of conducting a psychological assessment. He produced two psychological opinion reports dated August 19, 2015 and July 17, 2017, and testified at the trial.

[87] Dr. Pullyblank concluded that Mr. Jafferi suffered from emotional distress and a major depressive disorder at the mild to moderate level (DSM-5), as well as anxiety, and that he continued to suffer from barriers to effective functioning as an entrepreneur (or generally as a worker) because of injuries sustained in the Accident. He identified the following impairments:

- The continued perception of significant pain levels, localized more into his right arm now.
- Reduced physical capacity for work tasks, including more sedentary aspects such as driving, keyboarding, and sitting, as well as reduced effective working hours.
- Reduced sleep quality, likely to adversely affect cognitive efficiency, emotional functioning, and pain perception.
- Depression and anxiety, likely to also adversely affect cognitive functioning, sleep, social functioning, and pain perception.
- Interaction of the above barriers to potentially worsen Mr. Jafferi's experience of disability (i.e., the "downward spiral" of functioning well known with chronic pain).
- Reduced working capacity and cognitive efficiency as a worker resulting in errors and omissions in serving clients that in turn puts Mr. Jafferi at risk of losing business, or at least at risk of not building his company.

[88] Dr. Pullyblank recommended that Mr. Jafferi continue with psychological treatment.

[89] In cross-examination, Dr. Pullyblank agreed that six days before he attended for his May 2017 assessment, Mr. Jafferi had dental surgery and presented with jaw pain and two black eyes. Dr. Pullyblank confirmed that the dental surgery could be a confounding factor in his assessment that day, and that his depression seemed to be clearer and more intense than in 2015.

[90] Dr. Pullyblank also confirmed that he understood Mr. Jafferi operated Maxon without the assistance of his family or subcontractors.

3. Occupational Therapist - Cost of Future Care Report

Ms. Jennifer Lane

- [91] Ms. Lane, an occupational therapist, prepared a report dated July 17, 2017, and testified as to the cost of the recommendations from various physicians for the cost of future care claimed by Mr. Jafferi.
- [92] The defendant does not take issue with the amounts contained in Ms. Lane's report for the various items. The defendant says the issue is whether the recommendations are necessary and reasonable.

Defendant's Medical Evidence

Dr. William Yu

- [93] Dr. Yu, an orthopedic surgeon, conducted an independent examination of Mr. Jafferi on June 28, 2017, at the request of the defendant, and prepared an expert opinion report dated June 30, 2017. Dr. Yu gave evidence at trial.
- [94] Dr. Yu diagnosed Mr. Jafferi with osteoarthritis of the neck or spondylosis with a possible pinched nerve, and an impingement syndrome in his shoulders (subacromial bursa and rotator cuff injury). As to causation, he opined:
- [Degenerative spondylosis] is due to wear and tear, changes of the neck associated with aging and frequently occurs spontaneously without any history of trauma. ... Review of the medical records showed there was no indication Mr. Jafferi had any pre-existing neck problems before the accident of May 24, 2013. It is however doubtful that the accident of May 24, 2013 was responsible for his cervical spondylosis or osteoarthritis of the neck with pinched nerve as well as his symptoms in both his left and right shoulders.
- [95] It was Dr. Yu's opinion that Mr. Jafferi would gradually increase his physical activities with time and a graduated exercise program.
- [96] In cross-examination, Dr. Yu agreed it was possible, but he did not think it was probable, that the Accident caused Mr. Jafferi's injuries. Dr. Yu did not agree that Mr. Jafferi's right shoulder pain was the result of overcompensation, as did Drs. Waseem, Ailon and Cameron.
- [97] Dr. Yu appeared to question the necessity or appropriateness of the discectomy and spinal fusion, contrary to the opinions of neurosurgeon Drs. Heran and Ailon.
- [98] In cross-examination, Dr. Yu agreed that his opinion on causation of Mr. Jafferi's injuries was influenced by the entries in the clinical records of Drs. Gronkjaer and Nagra, indicating a pre-Accident onset of radicular symptoms, and the fact that Mr. Jafferi did not complain of neck pain immediately after the Accident.

Dr. Mitchell Spivak

[99] Dr. Spivak, a psychiatrist, conducted an independent psychiatric examination of Mr. Jafferi on behalf of the defendant on June 22, 2017, and prepared a medical legal report on the same day. Dr. Spivak gave evidence at the trial. He concluded:

[Mr. Jafferi] describes an emotional response to not being able to live up to his own self expectations and describes himself as episodically feeling "ashamed". He did not describe any neuro-vegetative symptoms suggestive of depression.

His response to his perceived physical impairments is within normal limits. There does not appear to be evidence of him suffering from a frank psychiatric disorder. Consideration was given to the diagnosis of an Adjustment Disorder, wherein an individual is diagnosed with a disruption of mood state due to an atypical response to a stressor. It was not my impression that Mr. Jafferi's response was outside of normal limits, and appears to be typical of what one would expect given his perceived physical impairments.

[100] Dr. Spivak did identify that Mr. Jafferi suffered from ongoing sleep problems arising from chronic neuropathic pain. He opined that Mr. Jafferi would "potentially benefit" from a hypnotic agent to assist with his sleep, and that he could "theoretically" benefit from a trial of a "psychotropic agent". He left further recommendations "around neuropathic pain management" to "appropriate assessors."

Dr. Laura Gronkjaer, Chiropractor

[101] Mr. Jafferi saw Dr. Gronkjaer for six to seven chiropractic treatments in October and November 2013. She testified as to the note set out in para. 78 above. She said the note was important as she was uncertain about the cause of Mr. Jafferi's symptoms. She testified that "there was nothing clear to me why he was having this pain". She also noted that at the time Mr. Jafferi saw her, he told her he was working 40 hours a week.

[102] In cross-examination, Dr. Gronkjaer agreed that she had a busy practice and saw many patients. She did not recognize Mr. Jafferi (she "couldn't put a face to him") and could not recall treating him. She agreed his wife could have filed out the information on the intake form. She agreed that the timing referred to in her intake note may have reflected a misunderstanding between herself and Mr. Jafferi or Ms. Zaidi.

Economic Evidence**Mr. Azim Dahya, CPA**

[103] The defendant called Mr. Dahya, Mr. Jafferi's accountant, as a witness. Mr. Dahya has been doing Mr. Jafferi's tax returns for a number of years. He said Mr. Jafferi did Maxon's bookkeeping and this information was used to compile family member tax returns. Mr. Jafferi usually provided him with the percentage income allocation to the various family members. Mr. Dahya agreed that various items of expense, including automobiles and

home office use, were deducted from Maxon's income expenses (and hence from the income allocated to each family member who had an allocated interest in Maxon's business).

Curtis Peever, Economist

[104] Mr. Peever provided three reports at the request of the plaintiff: two cost of future care reports, which calculate the cost of items from Ms. Lane's report, and a past and future loss of income report based on certain assumptions. The assumptions included that absent the Accident, Mr. Jafferi "could have" received a 95% share of the net income of Maxon based on his labour, regardless of his percentage ownership of the company; and that due to a reduction in his work capacity since the Accident, Mr. Jafferi's labour now represents a 30% to 50% share of the net income. The report also assumes Mr. Jafferi will retire at age 70.

Ron Tidball, CPA

[105] Mr. Tidball provided a report at the request of the defendant, which confirmed that in order to income split in an unincorporated business, the wages paid must be reasonable in the circumstances.

The Plaintiff's Physical Complaints at the Time of Trial

[106] Since the Accident, Mr. Jafferi has suffered pain in his upper back, shoulders and neck, which initially was minor and which he thought would gradually resolve. The pain did not resolve, but rather got worse, and was associated with pins and needles and tingling in his forearm and numbness in three fingers of his hand, such that his wife, a doctor, advised him to attend his family doctor for an assessment and treatment. He had difficulty driving, handling heavy packages and doing necessary computer work for his home business. His pain gave him problems sleeping. He ultimately had neck surgery in February 2017, to relieve the pain. The neck surgery did not alleviate all of his pain. His neck pain has worsened and his shoulder pain remains. At the time of trial he is receiving injections for pain and he experiences sleep problems.

Credibility of the Plaintiff

[107] The defendant argues that the court must view Mr. Jafferi's evidence "cautiously" because he filed false income statements concerning Maxon; over-reported his wife's and sons' contributions to Maxon in reporting his tax information; "deliberately misstated his wife's financial circumstances to financial institutions in order to obtain greater credit"; and reported false information to ICBC regarding the principal operator of his wife's vehicle. The defendant says that given the plaintiff's inconsistencies and "deliberate misreporting to both governmental and financial institutions", his evidence regarding the reporting of the timing of his injuries and his family's pre and post-Accident contribution to Maxon should be viewed cautiously.

- [108] The defendant cites the often cited comments of Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para 186; *Mather v. MacDonald*, 2016 BCSC 948 [Mather], at para. 18; and *Le v. Milburn*, [1987] B.C.J. No. 2690. The defendant further cites a series of cases where the courts have found that filing false or misleading income tax returns may impact the credibility and reliability of a plaintiff: *Kelly v. Dick*, [1989] B.C.J. No. 1491 (C.A.); and *Mather*.
- [109] Mr. Jafferi has proven to be a hard-working family man. When he found difficulty finding work in his field of electrical engineering, he started his own business, initially repairing and selling cell phones, and ultimately built that business into a substantial home business. The business has grown due primarily to Mr. Jafferi's skills in attracting customers through personal contact and hard work. He has used contractors, but in recent years has not been able to hire contractors to work on a commission basis. My sense from the evidence is that Mr. Jafferi cares for his customers and has high quality control standards.
- [110] As set out above, Mr. Jafferi's wife and two sons were called to testify. Each were cross-examined as to their respective contributions to Maxon before and after the Accident. Each described the difficulty their father had in driving a vehicle for any length of time, having to help him lift heavy boxes and, at times, sitting at the computer to make entries he was unable to make because of the pain in his shoulders and arm, and numbness in his fingers. Each gave evidence as to his energy level and personality change. Notwithstanding searching cross-examinations, each of their evidence was consistent and not successfully challenged in cross-examination. In my view, the evidence of Mr. Jafferi and his two sons supports rather than detracts from Mr. Jafferi's credibility, and corroborates the full extent of his injuries.
- [111] The defendant argues that Mr. Jafferi has been dishonest with the Canada Revenue Agency ("CRA") in the filing of his tax returns and an inference should be drawn such that his evidence as to his injuries and the cause of them should be viewed as not credible and unreliable.
- [112] Mr. Jafferi says he followed the advice of his accountant. I found the evidence of Mr. Dahya on this issue to be diffuse. He was, in my view, hesitant and vague when asked questions about the source of his instructions. While I think it is clear from the evidence that Mr. Jafferi has used Maxon as a tax saving device, I also think it more likely than not that in doing so he followed the advice of Mr. Dahya. Mr. Jafferi has spread the income of Maxon between family members in a manner that does not represent that family member's contribution to Maxon, and he was subject to a reassessment of its income tax in 2012, but not an audit. While I accept that dishonesty with the tax authorities may have a general impact on the credibility of a witness, I conclude in this case that Mr. Jafferi has not misrepresented his injuries. In this regard, I agree with the comments of Justice Fitch (as he then was) in *Wong v. Hemmings*, 2012 BCSC 907, at paras. 104-106:

- [104] The impact a failure to report income has on the credibility of a witness like the plaintiff is a case-specific inquiry. That inquiry must take account of factors that are more encompassing and more subtle than the failure to report income in isolation. A witness who has acted dishonestly in the past is not necessarily a dishonest witness. In some cases, particularly when combined with other factors, the persistent failure of a witness to declare all sources of income on their tax return will result in an adverse finding with respect to the credibility of that witness: see *Rhodes v. Biggar*, 2010 BCSC 762 at paras. 59-63; *Vardabasso v. Sundholm-Millar*, [1994] B.C.J. No. 408 at paras. 38-46.
- [105] In the case at bar, I am unable to find that plaintiff's admittedly dishonest conduct in the preparation of her tax returns adversely affects on her credibility on the central issues before me. I would note, in this regard, that virtually all of the plaintiff's evidence relevant to the heads of damage that are at issue in this case is independently and objectively supported by other evidence which I accept. Even on the contentious issue of future wage loss, Dr. Anton, who has had the most extensive and ongoing contact with the plaintiff, recommends, in light of her current medical condition and the likelihood that she will continue to have pain exacerbated by her work as a server, that she consider retraining to do some type of work that does not involve repetitive loads on her left shoulder. A similar view was expressed by Dr. Regan both before and after the arthroscopic surgery.
- [106] To discount the plaintiff's evidence in these circumstances would be to punish her for misconduct that is not directly before me. It forms no part of my role to do so. In all the circumstances of this case, it would be unfair to the plaintiff, and would lead to an unjust result, to make an adverse credibility finding in relation to her as a consequence of her dishonesty in the preparation of her tax returns.
- [113] Understandably, the defendant places much emphasis on the patient profile completed by Dr. Gronkjaer in October 2013. If I am to accept the notes she made as accurate, much of the plaintiff's claim must fail on the basis that he will have failed to establish that it was the Accident which caused his injuries.
- [114] I do not accept that the notes are accurate. In particular, I do not accept as accurate that the pain in Mr. Jafferi's left biceps and forearm and tingling in his fingertips commenced before the Accident. This note is the only medical record which describes his pain beginning before the Accident. It is contrary to the evidence of both Mr. Jafferi and his wife.
- [115] It will be recalled that immediately following the Accident, Mr. Jafferi testified that he felt a "small" pain in his upper back and shoulders. Like many people, he thought it would go away. It did not. Rather, it intensified until his wife, a trained physician, told him to go and see Dr. Nagra. Dr. Nagra's note when she saw Mr. Jafferi on June 25, 2013, reads:

Chief Complaint: Pain in left shoulder 2 weeks

Subjective: Pain in left shoulder 2 weeks for which he was taking off and on Tylenol with moderate relief. He sustained a jerk in a car accident, after which he is C/O numbness in hand and fingers.

[116] Dr. Nagra's notation is consistent with the left shoulder pain developing after the Accident and with Mr. Jafferri's description of the progression of his injuries. Dr. Gronkjaer's notation was made a number of months afterwards. In view of the timing of the entries and the admission of Dr. Gronkjaer that her entry could be in error, I find that Mr. Jafferri commenced having complaints of shoulder and arm pain after and not prior to the Accident. There is no evidence that Mr. Jafferri complained to Dr. Nagra of arm or shoulder pain at any time prior to the Accident.

Should an Adverse Inference Be Drawn?

[117] The defendant argues that an adverse inference should be drawn because the plaintiff failed to tender expert opinion reports from Drs. Heran or Nagaria, Mr. Jafferri's treating neurosurgeon and neurologist, and that the court should draw an inference that had he done so, these physicians would "not have supported the attribution of all of the Plaintiff's post-accident physical symptoms to the Accident".

[118] The defendant relies on *Andrews v. Mainster*, 2014 BCSC 541 [Andrews] and *Buksh v. Miles*, 2008 BCCA 318 [Buksh], at paras. 30, 31 and 35. In *Andrews*, at paras. 175-176, the court noted that "an adverse inference cannot be fairly drawn except from the failure to call witnesses whose testimony would be superior to the evidence already adduced in respect of the fact to be proved", and summarized the factors from *Buksh* for determining "whether the trier of fact can reasonably draw an inference that the witness not called by a party would have given evidence detrimental to that party's case":

- (a) the evidence before the court;
- (b) the explanations offered for not calling the witness;
- (c) the nature of the evidence that could be provided by the witness;
- (d) the extent of disclosure of the physicians' clinical notes; and
- (e) the circumstances of the trial,

[119] The court, of course, is not privy to the reasons why the plaintiff did not choose to seek expert opinions from Drs. Nagaria or Heran. Both physicians testified at trial. Rather, the plaintiff tendered opinions from Drs. Cameron, Ailon and Waseem. The latter were cross-examined rigorously by defence counsel. The defendant called Dr. Yu, an orthopedic surgeon, as its prime witness. The defendant had the option to retain an expert neurologist or neurosurgeon of its own to challenge the opinions of the experts called by the plaintiff. It chose not to do so. Under these circumstances, I am not prepared to draw an adverse

inference against the plaintiff.

Were the Plaintiff's Injuries Caused by the Accident?

[120] The law is clear that a plaintiff must establish that their injuries and any consequent loss were caused by the Accident: *Mothe v. Silva*, 2015 BCSC 140 [Mothe], at para. 98, where Justice Ross stated:

[98] In cases of negligence the plaintiff must establish causation for both injury and loss. As Mr. Justice Voith noted in *Brewster v. Li*, 2013 BCSC 774 at para. 78:

[78] The plaintiff must establish causation for both injury and loss. If a defendant did not cause an injury, (s)he is not liable for the losses flowing from that injury. Even if a defendant did cause an injury, (s)he is not liable for any losses or damages that were not caused by the injury. In *Blackwater v. Plint*, 2001 BCSC 997 at para. 364, 93 B.C.L.R. (3d) 228 [Blackwater BCSC], Chief Justice Brenner, as he then was, adopted the following dichotomy between "injury" and "loss":

"injury" refers to the initial physical or mental impairment of the plaintiff's person as a result of the [defendant's act], while "loss" refers to the pecuniary or non-pecuniary consequences of that impairment.

[121] In *Andrews*, at para. 189, Justice Pearlman noted:

[189] In determining causation, I also bear in mind that caution is required before drawing any inference that because one event follows another in time, the first event is the cause of the second: *White v. Stonestreet*, 2006 BCSC 801 at paras. 70-74.

[122] The plaintiff must prove on a balance of probabilities that "but for" the Accident, the injuries would not have occurred, which requires a substantial connection between the injuries and the defendant's conduct: *Andrews*, at paras. 181-183.

[123] The defendant says Mr. Jafferi "did not think he sustained any injury from the Accident for months following the Accident". The defendant relies on the evidence that Mr. Jafferi did not attend his family physician until June 25, 2013, and when he did, his complaints were of left shoulder pain, which he told Dr. Nagra he had had for two weeks. He did not complain of neck pain. The defendant says Drs. Waseem, Ailon and Cameron based their diagnoses on Mr. Jafferi self-reporting to them that his neck pain started after the Accident. Again, the defendant places emphasis on Dr. Gronkjaer's clinical note of October 30, 2013, wherein she wrote that the plaintiff's left bicep pain, burning in the left forearm and tingling in his fingertips started two weeks before the Accident. I have rejected the evidence of Dr. Gronkjaer as unreliable for the reasons already stated.

[124] The defendant argues (and I accept as a general proposition) that the further from the date of an Accident a symptom occurs, the less likely such symptom is caused by the Accident. There is generally a temporal relationship between the two.

- [125] I do not accept that the fact Mr. Jafferri did not report his injuries to Dr. Nagra until almost one month after the Accident is strong evidence of lack of causation. To repeat, Mr. Jafferri initially felt the pain immediately after the Accident, and thought it would go away. The impact had been a mild one. He assumed he would recover without intervention. He did not know he had a degenerative stenosis in his cervical spine; he had not been bothered by it before. He was stoic and, like many people, suffered through, hoping he would improve. Dr. Cameron wasn't surprised that Mr. Jafferri didn't see Dr. Nagra until some time after the Accident. He said "many people" are stoic, thinking they will recover without medical intervention.
- [126] I find on the evidence that it is more probable than not that the Accident caused the injuries sustained by Mr. Jafferri. I accept the evidence of Drs. Cameron, Ailon and Waseem as to Mr. Jafferri's injuries and the probable cause thereof.
- [127] I now turn to the assessment of damages.

Non-Pecuniary Damages

- [128] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities: Andrews, at para. 220. The assessment of these damages is a fact-specific inquiry, using comparable cases as a rough guide to determine what is fair to all parties in the circumstances: *Trites v. Penner*, 2010 BCSC 882, at paras. 188-189.
- [129] In *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] at para. 46, the Court of Appeal set out a non-exhaustive list of factors that the court is to take into account in assessing this head of loss:
- (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 (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54 [at paras. 54-55]).

- [130] Counsel for the plaintiff seeks non-pecuniary damages in the amount of \$170,000 based on the fact that Mr. Jafferi sustained a significant back and shoulder injury, his poor prognosis for recovery, and that he will likely need further surgery in the near future. The plaintiff also says Mr. Jafferi has depression as a result of the Accident, and his work and personal life have suffered. The plaintiff relies on *Chow v. Goodman*, 2016 BCSC 1486 (where \$165,000 was awarded), and *Sirak v. Noonward*, 2015 BCSC 274 [Sirak] (where \$160,000 was awarded).
- [131] The defendant submits that should the court accept that Mr. Jafferi's "complaints" were caused by the Accident, he should be awarded between \$40,000 and \$90,000 in non-pecuniary damages. The defendant relies on *Mothe; Park v. Abd El Malak*, 2015 BCSC 223 [Park]; *Gormick v. Amenta*, 2013 BCSC 1128 [Gormick]; and *Chenier v. Szili*, 2015 BCSC 675.
- [132] In both *Park* and *Gormick*, the plaintiffs suffered from pre-existing asymptomatic neurological conditions and the awards for non-pecuniary damages were reduced because the court, based on the medical evidence at trial, concluded that at some point in their lives, they would have become symptomatic regardless of the accident.
- [133] Dr. Cameron opined that Mr. Jafferi will likely remain "permanently partially disabled" because of chronic pain resulting from soft tissue injuries, musculoskeletal injuries and the traumatic herniated disc at the C5-6 levels arising from the Accident. Dr. Ailon opined that Mr. Jafferi will likely continue to have neck pain and a restriction in his range of motion. He also considered that there was a 25% risk he could develop "adjacent segment degeneration" ("ASD") which would require further cervical spine surgery. Dr. Waseem opined that Mr. Jafferi was at risk of developing accelerated arthritis of the cervical spine, which could be expected to develop over the next five to ten years and, if it did, he would experience "deepening pain, more loss of normal range of motion of the cervical spine and further compromised functional abilities."
- [134] In applying the principles outlined in *Stapley*, I have taken into account a number of factors: that Mr. Jafferi was a healthy and active person prior to the Accident, and that he fully participated in family life, in family social activities, and in his family business. The evidence established that he was an active, vibrant person. A large part of his life was focused on building Maxon's business. The injuries caused by the Accident have resulted in his decreased ability to function as he did before the Accident (problems with lifting heavy boxes, fatigue, driving longer distances for business purposes), ongoing pain, a spinal fusion, an altered mood caused by pain, and the possibility of a future operation. I have also taken into account the possibility that the pre-existing degenerative changes to Mr. Jafferi's neck could have become symptomatic absent the Accident. However, I find that on a balance of probabilities, it is unlikely he would have experienced his neck symptoms but for the Accident.
- [135] In my view, the authorities cited support an award of \$150,000 in non-pecuniary damages.

Past Loss of Earnings

- [136] The legal basis for an award for past loss of earning capacity was set out by Pearlman J. in Andrews, at paras. 230-233:
- [230] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: Rowe v. Bobell Express Ltd., 2005 BCCA 141; M.B. v. British Columbia, 2003 SCC 53.
- [231] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: Hudniuk v. Warkentin, 2003 BCSC 62; Lines v. Gordon, 2009 BCCA 106.
- [232] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: Athey v. Leonati at para. 27.
- [233] On a claim for past loss of earning capacity, the plaintiff must first establish on a balance of probabilities that the injuries she sustained caused an impairment of her earning capacity. Then, in determining what might have happened in the past to enable the plaintiff to earn income, but for the accident, the court must decide if the event was a real and substantial possibility, and then determine the likelihood of it occurring: Smith v. Knudsen, 2004 BCCA 613 at paras. 28, 29, 36 and 37.
- [137] The plaintiff seeks damages in the amount of approximately \$150,000 for past loss of earning capacity. The plaintiff says the value of such loss can be measured based on the value of the contribution Mr. Jaffer's wife and two sons have made to Maxon's business since the Accident, which was not required before the Accident. The plaintiff says collectively they have added 40 hours a week to Maxon's business, which was not required prior to the Accident, and proposes that "a modest \$20 per hour" be attached to such hours. Alternatively, the plaintiff says the court may value Mr. Jaffer's lost capacity at between 50% and 70% of Maxon's net income, based on Mr. Peever's report. In either case, the plaintiff says the loss would amount to \$150,000.
- [138] The defendant says the plaintiff has not proved he lost income as a result of the Accident, and makes reference to Maxon's annual earnings subsequent to the Accident.
- [139] Maxon's net income and gross sales (as shown on Mr. Jaffer's income tax returns) before taking out sums paid to family members and deducting household expenses (rent), family motor vehicle expenses, and capital cost allowance for the five years before the Accident were:

Year

Net income

Gross sales

2008

\$101,507

\$365,360

2009

\$74,827

\$284,500

2010

\$100,389

\$320,896

2011

\$109,063

\$335,200

2012

\$76,373

\$257,308

[140] Maxon's comparable net income and gross sales figures in the year of the Accident and following are:

Year

Net income

Gross sales

2013

\$78,155

\$260,558

2014

\$80,778

\$281,734

2015

\$88,291

\$307,994

2016

\$85,146

\$308,557

[141] The net income figures between 2008 and 2013 must be viewed from the perspective that in 2008, a substantial amount (\$37,000) was spent on subcontractors. The amount was gradually reduced in succeeding years with the thought that family members would replace the use of subcontractors. Starting just before the Accident, Mr. Jafferi said he tried to find subcontractors but could not, as no one was prepared to work on commission-only remuneration.

[142] From the above figures there are two conclusions I draw. The first is that Maxon's gross sales fluctuate annually. In some years the fluctuation is quite significant. I cannot draw the conclusion that Maxon was reaching new highs in sales annually prior to the Accident. On average, gross sales have hovered around the \$300,000 level, except for the year of the Accident, although even in that year, they exceeded gross sales in the year before the Accident.

[143] The other issue that complicates any calculation of past and future income loss is that Maxon's financial reporting to the CRA characterized Maxon as a family business with various shares or percentages allocated to Mr. Jafferi and his wife and two sons. From 2008 to 2010, Mr. Jafferi and Ms. Zaidi each owned 50% of the business. Thereafter, Ali owned 20% for several years, which in 2014 became 33%, and then in 2015 and the following years became 5%. Zohair commenced with a 30% interest in 2015, which he retains. However, while the net income of Maxon was divided for tax purposes between family members (each filed an income tax return reporting income according to their percentage interest), no family member drew net income to that amount. Both Ali and Zohair testified that they took allowances from Maxon. Mr. Jafferi and his family benefited from the arrangement because they could split expenses and income between them and reduce their income tax payable.

[144] The adjustment given to Ali raising his interest in the income of Maxon from 20% to 33% in 2014, and the 33% interest given to Zohair in 2015, may have reflected Mr. Jafferi's view of the contribution of his sons in those years to help him maintain Maxon's business. Through the allocation of increased interests, Mr. Jafferi benefitted by again spreading income from Maxon and paying less income tax.

- [145] In my view, it is telling that the plaintiff has adduced no evidence of any actual loss of business in the year of the Accident or subsequent up to the date of the trial. There is no evidence that any customer has ceased doing business with him or has threatened to do so as a result of the plaintiff being unable to service them due to his injuries, or indeed that any portion of his business is at risk. In fact, Maxon's gross sales have increased in each year after the Accident. Based on the history of Maxon's sales, notwithstanding Mr. Jaffer's injuries, I simply see no past wage loss as a consequence of the Accident.
- [146] Based on the evidence, I do not accept Mr. Peever's assumptions that Maxon's business would have grown by 2.5% or 5% a year but for the Accident. Such a projection is contrary to Maxon's sales history and is unrealistic.
- [147] Given the evidence that it became difficult for Maxon to hire subcontractors to assist with the business, it may well be that the assistance of Mr. Jaffer's family members would have been required regardless of the Accident. While it is true that Mr. Jaffer's wife and sons contributed work hours to the business, and perhaps were not remunerated fully for their contribution, there is no way to quantify their contribution as wage loss, especially given the tax benefits that the arrangement provided to Mr. Jaffer and his family.
- [148] In *Gendron v. Moffat*, 2010 BCSC 1231, Justice Cole rejected a claim for past loss of income because the plaintiff's net income had increased since the accident. The court noted that while *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, holds that past loss of income is "a claim for the loss of the value of the work that the plaintiff would have performed but for the injury", and "[e]vidence of the value of the work may take many forms and the loss may be framed and measured in different ways", the Court of Appeal in that case was dealing with a situation where the plaintiff had suffered a "real loss of a flow of income": see paras. 47-48.
- [149] Accordingly, I am unable to award Mr. Jaffer any amount for past wage loss.

Loss of Earning Capacity

- [150] Mr. Jaffer claims lost earning capacity into the future.

Loss of Future Earning Capacity

- [151] I must start this analysis with a statement of several legal principles which apply to a claim for loss of future earning capacity. The underlying principle set out by the Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, at para. 32 is that "[a] plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss" (emphasis added). A future or hypothetical possibility of an income loss will be taken into account as long as it is a "real and substantial possibility and not mere speculation": *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 27.

[152] If a plaintiff is successful in proving a real and substantial possibility of income loss, then a plaintiff may prove such loss of earning capacity using either a loss of earnings approach or a capital loss approach, depending on the facts of the case. The former approach is generally used when the loss is more measureable, and the latter approach when earning loss is not so easily measureable.

[153] The capital loss approach takes into account a number of considerations, including whether a plaintiff:

- has been rendered less capable overall from earning income from all types of employment;
- is less marketable or attractive as an employee to potential purchasers;
- has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured; and
- is less valuable to herself as a person capable of earning income in a competitive labour market.

See *Brown v. Gola*y (1985), 26 B.C.L.R. (3d) 353 (S.C.), at para. 8.

[154] As noted recently by Justice Sewell in *Chong v. Nguyen*, 2017 BCSC 1564, at paras. 100-101, in assessing damages for lost earning capacity, whether past or future, the court must consider hypothetical events that need not be proven on a balance of probabilities. This was enunciated in *Grewal v. Naumann*, 2017 BCCA 158, at paras. 48-49. All possibilities and probabilities, chances, opportunities and risks must be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen: *Rosvold v. Dunlop*, 2001 BCCA 1, at para. 9.

[155] There are a number of probabilities and possibilities which I think will probably affect Mr. Jafferi in the future. He is still suffering pain and will likely continue to suffer pain arising from the neck discectomy operation. I accept that he has difficulty driving, especially for long distances, and this will affect his ability to deliver product to clients.

[156] Dr. Ailon opined that Mr. Jafferi's neck pain would last indefinitely and that there is a 25.5% risk of symptomatic ADS, which would require further fusion surgery, over the next ten years. I conclude that this is a real and substantial possibility, which would affect Mr. Jafferi's work capacity, and may necessitate his early retirement.

[157] The plaintiff says, based on the evidence of Zohair, that it would likely cost \$50,000 to \$60,000 per year for Maxon to hire someone to replace the duties Mr. Jafferi no longer performs, and it is doubtful that Zohair would be content earning \$20 an hour full-time for his father, when he could earn more working somewhere else. Another contingency the plaintiff relies on is the possibility that Ms. Zaidi will decide to quit working for Maxon, given her other career aspirations, which could lead to a failure of the business. The plaintiff relies on Sirak, where the court awarded \$550,000 for future earning loss to a 65-year-old plaintiff whose earning capacity was permanently impaired.

- [158] The defendant says the plaintiff's income has continued to rise since the Accident and there is no evidence that it will not continue to do so. The defendant's position is that the plaintiff will not suffer any loss of future earning capacity, but if the court finds that he has, the capital asset approach is appropriate and an award of \$25,000 to \$50,000 would be appropriate.
- [159] I have already held that I do not accept Mr. Peever's evidence that Maxon would have grown by 2.5% or 5% but for the Accident. That contingency does not factor into my analysis. Further, while Mr. Jafferi's work capacity is impaired, likely for the rest of his career, he is still able to work, albeit not at the level he functioned at prior to the Accident.
- [160] Based on the real and substantial possibilities that Mr. Jafferi will require major surgery in the next ten years; that he will need to retire early; that his neck pain will continue to impair his capacity to work as he did prior to the Accident; that he will need to hire assistance to keep his business afloat; that Mr. Jafferi's personal contact with his clients will lessen over time and client retention may be a problem, I conclude that a reasonable award in this case for loss of future earning capacity is \$400,000.

Cost of Future Care

- [161] In *Liu v. Bipinchandra*, 2016 BCSC 283, Justice Voith reviewed the principles underlying an award for costs of future care at para. 158:
- [158] A plaintiff is entitled to compensation for the costs of their future care based on what is reasonably necessary to restore that plaintiff to his or her pre-accident condition to the extent that is possible. The test for determining an appropriate award under this head of loss is an objective one based on medical evidence. An award for the costs of future care must be supported by medical evidence that justifies the claims being made, or the costs being sought. In addition, those costs must be reasonable; *Milina* at 84.
- [162] Mr. Jafferi relies on the Ms. Lane's cost of care report, which estimated the present value of Mr. Jafferi's future care costs as ranging from \$206,590 to \$316,636. As noted, the defendant does not take issue with the specific amounts but maintains that the question is whether the recommendations are reasonably necessary on the medical evidence.
- [163] Ms. Lane's report, which has excluded costs for items covered by MSP, contains the following cost estimates, some of which contain specific time periods and others which are "to be determined" ("TBD"):
1. Medical Needs and Allied Health Services, including Advil 2-4 times a day until age 80 (\$226.30-\$452.60 a year); Pregabalin 2 times a day from age 57-TBD (\$1,233.70 fixed cost); and Duloxetine once a day TBD (\$766.50-\$2,299.50 fixed cost);

2. Health Services, including physiotherapy 6-12 times a year for symptom management TBD (\$460.02-\$920.04 per year); occupational therapy once (\$314.25-419 fixed cost); one-time equipment allowance for a chair and document holder (\$625); 4-5 occupational therapy sessions a year TBD (\$838-1047.50 fixed cost); cognitive behavioural therapy for 2 years (\$2,400 fixed cost); 12-24 psychology sessions for two years (\$2,400-\$4,800 fixed cost); massage therapy 1-2 times a month until age 80 (\$1,356-2,712 a year);
3. Services, including Tai Chi or Senior's yoga, through an annual seniors membership (\$23.75-\$66.25 a year); 2-3 kinesiology treatments for one year (\$137-206.25), then two to three sessions a year ongoing (same price per year); equipment for home exercises, including a stability ball and an exercise mat (\$132.16 fixed cost); personal care services 4 hours a week from age 65-80 (\$6,169.28 a year); and housekeeping services 2-4 hours a week from age 65-80 (\$3084.50-\$6,169.28 a year).

[164] I will deal with the housekeeping services below.

[165] The bulk of these cost recommendations appear reasonably necessary based on the medical evidence presented and tested at trial. I allow the Medical Needs costs at the mid-point range, and the Health Services amounts at the mid-point range. The senior's membership, kinesiology treatments and home exercise equipment expenses are reasonable at the mid-point range. However, in my view the need for the personal care services is not established on the evidence and is excessive, and I disallow that claim.

[166] Based on the costs outlined in Ms. Lane's report and my findings, I award \$250,000 to cover Mr. Jafferi's cost of future care.

Loss of Housekeeping Capacity

[167] As noted by Justice Fisher (as she then was) in *Chappell v. Loyie*, 2016 BCSC 1722 [Chappell], at para. 254:

[254] A claim for loss of housekeeping capacity is for the loss of the value of work that a plaintiff would have performed, but which because of his injuries, he can no longer perform. The basis for such a claim is the loss of the ability to work in a manner that would have been valuable to himself and to others. Because it is the loss of a capacity (an asset) that is compensated, such an award does not depend on whether replacement housekeeping costs are actually incurred. An award may be quantified by assessing the cost to replace the plaintiff's services, but damages are typically modest, and care must be taken not to compensate for more than can reasonably be said to have been lost: *Kroeker v. Jansen* (1995), 4 BCLR (3d) 178, leave to appeal to SCC refused (1995), [1995] S.C.C.A. No. 263, 11 BCLR (3d) xxviii; *McTavish v. MacGillivray et al.*, 2000 BCCA 164. The same principle applies to past and future claims of this nature.

- [168] The plaintiff seeks \$50,000 as compensation for loss of housekeeping capacity, relying on Chappell, where the court awarded \$50,000 to a plaintiff who had lost the capacity to perform mostly outdoor yard work; and Cumpf v. Barbuta, 2014 BCSC 1898, where the court awarded \$75,000 to a 49-year-old plaintiff suffering from chronic lumbar pain and headaches.
- [169] The defendant submits that the only household tasks which Mr. Jafferi claims to have difficulty with since the Accident is with starting his lawnmower and grocery shopping, and that any loss of housekeeping capacity should be considered in the general damages assessment and not as a separate head of damage, as was done in Pavan v. Guolo, 2016 BCSC 324 [Pavan], at paras. 47-49. The plaintiff says Mr. Jafferi also testified that he struggled with tasks such as unloading the dishwasher and using a ladder for cleaning gutters.
- [170] I note that in Pavan, the court found that the plaintiff continued "to perform all [household] tasks" (emphasis added): see para. 48.
- [171] Ms. Lane, in preparing her report, completed a functional capacity examination of Mr. Jafferi, and observed that: (1) Mr. Jafferi sometimes assisted with housekeeping prior to the Accident and is unable to do so at this time; (2) maintaining the lawn and garden requires a significant amount of work, and Mr. Jafferi requires Ms. Zaidi's assistance to start the lawnmower so he doesn't aggravate his pain; (3) Mr. Jafferi finds it much harder to maintain the interior and exterior of the house to the point that a handyman was hired for gutters; and (4) Ms. Zaidi completes shopping now, which Mr. Jafferi did before the Accident.
- [172] The in-trust claim below deals with loss of housekeeping capacity from the time of the Accident to the date of trial. The question is how much should be awarded for future loss of housekeeping capacity. Ms. Lane's report costs housekeeping services of 2-4 hours a week from age 65-80 at \$3084.50-\$6,169.28 a year.
- [173] In my view, Mr. Jafferi has suffered a loss of housekeeping capacity that his wife has had to compensate for, but the loss is a relatively minor one and does not warrant a \$50,000 award. I award \$10,000 for this item.

Special Damages

- [174] The defendant's position on the special damages claim is that if the court finds that that Mr. Jafferi's injuries were caused by the Accident, it does not take issue with the amount claimed of \$3,198 for treatment of his injuries. Accordingly, given my findings on causation, I allow this award.

In-Trust Claim

[175] Mr. Jafferi claims a nominal in-trust award for Ms. Zaidi in the amount of \$8,000, based on her taking on more than her share of the burden since Mr. Jafferi was injured by assuming grocery duties, helping him start the lawnmower and moving his elderly mother around in her wheelchair. The plaintiff relies on *Resendiz v. D'Alessandro*, 2017 BCSC 1274, at paras. 168-168, where Justice Steeves awarded \$7,500 in roughly similar circumstances to the support provided by Ms. Zaidi to Mr. Jafferi since the Accident.

[176] The defendant says in-trust claims are only appropriate in cases involving care provided to seriously injured plaintiffs or for support services beyond those normally to be expected in a marital relationship to adjust for minimal debilitating injuries, relying on *Star v. Ellis*, 2008 BCCA 164, at para. 18.

[177] I accept that Ms. Zaid has taken on extra housekeeping and errands as a result of Mr. Jafferi's injuries, and find that the sum of \$5,000 is a reasonable award in this case to compensate for the extra burden from the time of the Accident to the time of trial.

Conclusion

[178] In summary, I have awarded Mr. Jafferi the following:

- a) \$150,000 in non-pecuniary damages;
- b) \$400,000 for loss of future earning capacity;
- c) \$250,000 for cost of future care;
- d) \$10,000 for loss of housekeeping capacity;
- e) \$3,198 in special damages; and
- f) \$5,000 as an in-trust award for Ms. Zaidi.

TOTAL: \$818,198

Costs and Other Matters

[179] The plaintiff has requested the opportunity to make submissions in relation to a management fee, tax gross-up, prejudgment interest, and costs and disbursements. The parties have the right to make written submissions on these matters within 15 days of the publication of this decision.

"Greyell J."

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