

CANADA / JUDGMENT

Kirwan v. Roberts

2020 BCSC 1689

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Supreme Court of British Columbia

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2020 BCSC 1689 Kirwan v. Roberts

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kirwan v. Roberts,

2020 BCSC 1689

Date: 20201109

Docket: M188118

Registry: Vancouver

Between:

Graeme Anthony Kirwan

Plaintiff

And

Stephen Roberts (Lessee), Sheri Roberts (Lessee) and Honda Canada Financing Inc. (Lessor).

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for Plaintiff:

G.S. Hoff

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Counsel for Defendant:

E. Haupt

S. Christopher

Place and Date of Trial:

Vancouver, B.C.

August 24-28, 2020

September 1-4, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 9, 2020

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- [1] This claim arises out of a motor vehicle accident that occurred on September 12, 2016, when the plaintiff, Mr. Kirwan, was struck by a vehicle driven by one of the defendants, Mr. Roberts (the "Accident"). The Accident occurred when Mr. Kirwan was walking in a pedestrian crosswalk. Liability for the Accident is admitted.
- [2] The plaintiff seeks damages under a number of heads of loss. In particular, he advances a relatively significant loss of future capacity claim. The defendant called no expert or lay witnesses. Nevertheless, the factual determinations that the Court is required to make to address the plaintiff's claims are significantly complicated by various factors. This includes several marked disparities in the plaintiff's evidence. It is the resolution or reconciliation of these disparities that are among the most important issues in this case.

The Accident

- [3] The Accident occurred at approximately 5:30 a.m. as Mr. Kirwan was on his way to work. He was walking across the intersection of Nanaimo Street and Grandview Highway. Mr. Kirwan was approaching the middle of the intersection when he was struck. The defendant was turning left onto Nanaimo Street when his vehicle struck Mr. Kirwan.
- [4] A significant portion of the defendant's examination for discovery transcript was read into evidence at trial. It is clear from that evidence that Mr. Kirwan was struck forcefully. The defendant never saw Mr. Kirwan before the Accident occurred and he said he was likely driving "slightly faster" than 10 to 15 kilometers per hour when the impact occurred.
- [5] Mr. Kirwan said that he was first struck at his knees and that he then went onto the hood of the defendant's vehicle. The defendant said the first time he saw Mr. Kirwan was when "his face was literally in [the defendant's] windshield after impact". The windshield was broken by the force of the impact.

- [6] Mr. Kirwan does not appear to have lost consciousness as he spoke to the defendant immediately after he was struck. This conclusion is consistent with the records from the emergency room that Mr. Kirwan was taken to. Nevertheless, Mr. Kirwan's memory of the Accident, and the next several hours thereafter, is patchy. An ambulance and the police were called. Mr. Kirwan was taken to Vancouver General Hospital. Hospital staff performed various tests, x-rays, and scans and Mr. Kirwan was released later that afternoon. He was driven home by his then girlfriend, and now wife, Ms. Velis and another roommate.

Mr. Kirwan's Pre-Accident Condition

- [7] Mr. Kirwan was born in Ireland. He was raised in a happy and supportive environment and he is close to his family. His father appears to have overseen his athletic development while his mother ensured that he succeeded academically. Both appear to have succeeded. Mr. Kirwan was a very good athlete. He enjoyed and competed in a number of sports but he excelled at soccer. He consistently played on various school and local teams. Some of these local teams performed at a high level and would periodically compete internationally. Some of his teammates became professional players. Mr. Kirwan was also chosen to play on various select teams.
- [8] Mr. Kirwan said that sports were "huge" in Ireland. It was "life" and it was "what we loved to do". In addition to his soccer endeavours, Mr. Kirwan was otherwise physically active. Prior to the Accident, he ran some 10 kilometer races, he competed in obstacle or endurance races, and he enjoyed the outdoors. His father, who testified, said he was "as strong as an ox".
- [9] Mr. Kirwan also did well academically. In high school he was in an honours program that was geared to having its students go to university. He did go to university and he graduated, with honours, and with a Business and Arts degree. Mr. Kirwan said he was "mathematically and finance-oriented".
- [10] Apart from school and sports, Mr. Kirwan was otherwise active. He was well-liked and he had a wide range of friends. He was described by his close friend, Mr. Keenan, who also gave evidence, as the "life of the party". He enjoyed concerts and films. He participated in various volunteer activities. Still further, he started to work, on a part-time basis, when he was 15 years old and he continued to work, primarily on weekends, while he was in university.
- [11] After graduating, Mr. Kirwan held a number of jobs. He appears to have done well at work. With each position that he held, as well as between the three different companies he worked for from 2009 to 2015, there is something of a pattern of increasing responsibility. Mr. Kirwan said that he was interested in banking and financial products. Aspects of some of the positions he held engaged these interests.

- [12] In July 2015, Mr. Kirwan and Mr. Keenan moved to Vancouver. Mr. Kirwan said he came to Vancouver for the weather, the opportunity for recreation and sports, and because he had heard "the earnings were good". He initially intended to only come for a few years and expected to possibly return to Ireland.
- [13] Mr. Kirwan quickly made friends and secured a job, as a customer sales representative, at a company called Clearly Contacts ("Clearly"). He was one of the top performing representatives in his group. Clearly did some humanitarian work and Mr. Kirwan also became involved in these endeavours. He moved into an apartment, on Nanaimo Street, where he and Ms. Velis live today (the "Nanaimo Apartment").
- [14] He met Ms. Velis while at Clearly. They started to date in February, 2016, and married in June of this year. Ms. Velis is also an athletic person. She participates in CrossFit training, has run some marathons, and she too enjoys the outdoors.
- [15] Between February 2016 and the Accident, Mr. Kirwan and Ms. Velis hiked, kayaked, and explored different parts of the Province. Mr. Kirwan also spent time with other friends, joined a local soccer team, played some tennis, and he and Mr. Keenan went to concerts, films, and pubs.
- [16] Mr. Kirwan said that he had no physical or mood-related difficulties prior to the Accident and there is no evidence otherwise. Accordingly, Mr. Kirwan's history prior to the Accident, speaks to a healthy, active, bright, social, positive, industrious, and high-functioning individual.

Credibility and Reliability

- [17] Credibility and reliability are different things. This was concisely explained in *R. v. H.C.*, 2009 ONCA 56 where Justice Watt, for the Court, said at para. 41:
- [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
- i. observe;
 - ii. recall; and
 - iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

- [18] The means of testing credibility was explained and developed in *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 10-11.

- [19] Counsel for the defendant argued that there are some concerns with the plaintiff's credibility and reliability. I agree that there are significant concerns with the reliability of the plaintiff's evidence and with the evidence in his case generally. Let me make clear, at the outset, that my concerns are not based on minor variations in the plaintiff's evidence, in the clinical records I was taken to, or in the histories the plaintiff provided to various experts: see *Edmondson v. Payer*, 2011 BCSC 118 at paras. 31-32 and 34; and *Carvalho v. Angotti*, 2007 BCSC 1760 at paras. 15-17.
- [20] My concerns are more significant and fundamental. They are also pervasive. Several examples, aspects of which I will return to, will suffice.
- [21] Mr. Kirwan says that headaches are one of the difficulties that prevent him from working full time. There is no record of Mr. Kirwan complaining of headaches until he saw Dr. Krassioukov, a physiatrist, in June 2019. When he saw Dr. Krassioukov, he said that he "still had occasional headaches", though he did not have one that day. When he met with Dr. MacInnes, a pain specialist who he saw in October 2019 and April 2020, he said he had headaches "on most days".
- [22] When he saw Dr. Cameron, a neurologist, in April 2020, he told Dr. Cameron that he had experienced headaches every day since 2016. This assertion, in combination with other things that Mr. Kirwan said, was a foundation for Dr. Cameron's conclusion that Mr. Kirwan now suffers from various significant cognitive difficulties.
- [23] Mr. Kirwan told Dr. Anderson, a psychiatrist he saw in December 2019, that he had headaches that were "still occurring daily". He said, however, that his headaches were milder than they had been.
- [24] When he saw Mr. Pakulak, who performed a functional capacity evaluation of the plaintiff in March 2020, Mr. Kirwan said that he had occasional headaches, which occurred once every two weeks. He also had no headache pain at either the start or at the end of the day that he saw Mr. Pakulak.
- [25] At trial, Mr. Kirwan said that his headaches had initially been occasional but they were now more frequent and severe. Based on the whole of this evidence, it is difficult to determine if Mr. Kirwan's headaches were, or are, "occasional" or "constant", and whether those headaches are improving or becoming more severe.
- [26] Mr. Kirwan also reported significant difficulty walking. His father and Ms. Velis both said that he consistently limped when he walked. Ms. Velis, in particular, said that though the plaintiff had good days and bad days, in relation to his ability to walk, he always limped. Mr. Keenan said that Mr. Kirwan now walked more slowly when they walked together but he did not report a limp.
- [27] Dr. Krassioukov, when he examined Mr. Kirwan, said that Mr. Kirwan's gait was normal. Dr. MacInnes also reported that Mr. Kirwan's gait was normal, though he said that Mr. Kirwan walked slowly. Mr. Pakulak, who observed Mr. Kirwan over the course of a full day, and who

tested his walking tolerance in several ways, concluded that Mr. Kirwan's ability to walk half a kilometer was within the average range for males and that "there was no reported increase in symptoms with walking and his gait remained normal and even throughout the treadmill walk". Mr. Pakulak also had the plaintiff repeat a speed walking test three times over the course of the day. Mr. Kirwan's results were within the average range in the first two of the tests and slightly below the average range on the third test. Still further, Mr. Pakulak had the plaintiff perform a timed stair climbing exercise on three occasions over the day. His results were, again, average at the outset of testing and declined over the course of testing. These conclusions help put Mr. Kirwan's difficulties when walking, in context.

- [28] Apart from such physical difficulties, and there are other examples, Mr. Kirwan's evidence and the evidence of the lay witnesses he called, is otherwise significantly inconsistent with both what he told various medical and other experts and with their conclusions. Once again, there are several examples of this.
- [29] Mr. Kirwan is apparently a fastidious person. Mr. Keenan described him as a "neat freak". Mr. Kirwan, his wife, and Ms. Mendy, his former roommate, gave a significant amount of evidence concerning Mr. Kirwan's ability to do housekeeping and cleaning before and after the Accident.
- [30] Mr. Kirwan said, as did his wife and Ms. Mendy, that prior to the Accident, he did virtually all of the cleaning in the Nanaimo Apartment. This extended to the bathroom, the kitchen and its counter, vacuuming, and his laundry. He also did the cooking. After the Accident, Mr. Kirwan and these other witnesses reported that he did very little, if anything, in the way of cleaning. Mr. Kirwan said that his contribution was "minimal" and that his wife ultimately did "everything". Mr. Kirwan has, however, apparently continued to do the cooking for his wife and himself. He said that he also washes the dishes but that he had bought disposable trays and other items to facilitate this task. This body of evidence speaks to a significant level of disability.
- [31] Mr. Kirwan told Dr. Krassioukov that he had reduced his home-based activities by approximately 40%. This appeared to extend to his cooking. He said that he was doing all such activities either "very slowly" or not at all, based on his pain. He told Dr. MacInnes that he was able to mop, sweep, and vacuum, though he relied on Ms. Velis to clean the tubs and lower cupboards.
- [32] Mr. Kirwan told Mr. Pakulak that he was able to do household chores except for more demanding tasks such as cleaning the bathroom and bathtub. Mr. Pakulak ultimately concluded that Mr. Kirwan demonstrated the ability to complete most aspects of household cleaning chores, provided that he was able to pace himself for more demanding chores. He said that Mr. Kirwan had some limited capacity for chores that were more physically demanding. Importantly, he concluded that Mr. Kirwan would not require assistance with homemaking chores as long as he lived in an apartment.

- [33] In his closing submissions, counsel for Mr. Kirwan did not advance any claim for a loss of housekeeping capacity or for any future care items even though these items were addressed and advanced in the expert report of Ms. Neil, an occupational therapist and certified life care planner. Counsel said that he was not advancing this claim because Ms. Velis had said that she and Mr. Kirwan, in a sense, traded responsibilities--he did the cooking and she did the cleaning. Bluntly, however, based on the evidence of Mr. Pakulak, and the other expert evidence, there were more basic difficulties with this aspect of Mr. Kirwan's claim.
- [34] Mr. Kirwan also regularly reported to various experts that he suffered from significant difficulties with his concentration and memory. He told these experts that he was required to keep a notebook and a calendar so that he would not forget things. He told them he now made lists and put reminders on his phone. He told Dr. Anderson that he had to "document everything", that "customers reminded [him] of things", and that he had "to check [his] notes". Various expert reports, for example those of Drs. Anderson and MacInnes, expressly addressed these cognitive difficulties and made various explicit recommendations to address them.
- [35] One expert report, however, filed by a psychologist Dr. van der Berg, provided various results for the different forms of testing that Mr. Kirwan underwent. Dr. van der Berg reported, for example, that Mr. Kirwan's short-term working memory placed him in the 99th percentile of the population while his cognitive efficiency placed him in the 91st percentile.
- [36] At trial, Mr. Kirwan gave virtually no evidence of any cognitive difficulties. He did make a passing reference to no longer reading despite formerly having been an avid reader. Similarly, none of Mr. Kirwan's father, wife, work colleagues, or Mr. Keenan gave any evidence of such cognitive difficulties. Mr. Kirwan's counsel, in his closing submissions, similarly made virtually no reference to Mr. Kirwan suffering from any cognitive difficulty.
- [37] Apart from giving rise to questions of reliability, such disparities also undermined some aspects of the expert reports that were filed. For example, Dr. Anderson opined that one aspect of the limitations that Mr. Kirwan faced in his ability to work full time was the nature and extent of, inter alia, his cognitive difficulties. Dr. Anderson suggested that Mr. Kirwan would not be able to return to university and that he would have to find a work environment that was not "cognitively demanding". These conclusions, which I will return to later, are materially inconsistent with the conclusions of Dr. van der Berg, who actually tested Mr. Kirwan's cognitive skill set.
- [38] It will be apparent from the foregoing examples that the inconsistencies in the evidence of the plaintiff, lay witnesses, and various experts on a variety of issues and discrete claims are significant. I do not attribute these disparities or inconsistencies to a lack of candour or honesty. I consider that the lay witnesses I heard from endeavoured to be forthright, and that the various expert witnesses sought to assist the Court. I do consider, however, that Mr. Kirwan's evidence, in particular, was often unreliable. The same is true of the evidence of Ms. Velis, albeit to a lesser extent. This lack of reliability necessarily complicates the various

findings of fact that underlie Mr. Kirwan's claims.

Mr. Kirwan's Injuries

I. Physical Injuries

a) General

- [39] Mr. Kirwan suffered various physical injuries in the Accident. Some of those injuries have resolved. On the other hand, Mr. Kirwan has developed additional physical and mood related difficulties since that time.
- [40] Mr. Kirwan required some sutures to his right eyebrow. He had some other scrapes on his face and forehead, as well as on his legs and knees. He now has some mild scarring on his eyebrow and knee.
- [41] His left wrist was placed in a cast at the hospital on the day of the Accident and he was given a referral to a surgeon. He had surgery on that wrist on October 7, 2016. He then undertook occupational therapy. His cast was removed in January 2017 and he continued his therapy for a time. He continues to do some directed exercises but accepts that the issues arising from his wrist fracture have resolved.
- [42] Mr. Kirwan reported that early on he had a few episodes of significant chest pain. On one occasion, he wondered if he was having a heart attack. He said at trial that eventually, and at the present time, this pain has devolved to a pain in the area of his sternum that primarily occurs when he coughs or sneezes. Nevertheless, when he saw Dr. Krassioukov in June 2019, he rated the pain from this injury on that day as a five out of ten. He also told Dr. Krassioukov that he had not noticed "any significant changes" in his chest pain from the time of the Accident to the date of his examination three years later.
- [43] Mr. Kirwan said, and I accept, that for several weeks after the Accident, he had severe pain in his knees, shoulders, upper back and neck, as well as in his left arm and wrist.
- [44] Mr. Kirwan also said that he had pain in his lower legs, ankles, and feet. He said that the pain in his knees "waterfalls" to his ankles, the soles of his feet, and his toes. The evidence that relates to this latter set of difficulties is not as clear. These injuries or complaints are not addressed in the clinical records of the physicians at the walk-in clinic that he attended after the Accident, in the records of the physiotherapist that he saw from early January 2017 to June 2017, or, in many instances, in the records of the various independent medical experts that he began to see in mid-2019.
- [45] It is relevant, and I will return to this issue in various contexts later, that Mr. Kirwan did not see a single physician or care provider, such as a physiotherapist or chiropractor, in connection with his Accident-related injuries or difficulties between June 2017 and June 29, 2019. After June 2019, he did not see a care provider, other than the various independent medical experts, until February 2020, when he began to see his current family doctor. Accordingly, Mr. Kirwan's condition in this intervening time turns, in large part, on his

evidence, and on the evidence of the various lay witnesses he called.

b) Shoulder

[46] Mr. Kirwan said that for the first month after the Accident he had "horrible" left shoulder pain and that this injury continued to be quite painful for 4 to 5 months thereafter. After his wrist surgery, and after the cast on his wrist was removed, he began to receive physiotherapy for his shoulder pain. He did so from January 2017 until June 2017. He accepted that this physiotherapy assisted with his shoulder pain and that within a year of the Accident he had little or no shoulder pain. He further accepted his shoulder pain is now resolved.

c) Upper Back and Lower Neck

[47] Mr. Kirwan's ongoing upper back and lower neck pain are important because they are likely the most significant reason that Mr. Kirwan is, potentially, limited in his ability to work on a full-time basis. Mr. Kirwan testified in his direct evidence that, for perhaps a month after the Accident, these areas were quite sore. He initially suffered from a kind of throbbing. Mr. Kirwan said the throbbing has now subsided but that he remained stiff. In order to turn his upper back he is required to move his whole body.

[48] The difficulty is that, when he sits at work, he often uses a keyboard. As the day goes on, he gets stiffer. He expressly said that he suffers more from "stiffness" than "pain". Conversely, he told Dr. MacInnes that he rated the aching in his neck and upper back as a six out of ten, and that this pain remained constant. It is noteworthy that this was the highest average pain rating Mr. Kirwan assigned to any of his injuries. He also told Dr. Krassioukov that, on the day he saw him, the pain in his upper back and neck was a five out of ten. It is relevant that both Drs. Krassioukov and MacInnes reported that Mr. Kirwan had full range of motion in his neck, though they also reported that he had some pain and discomfort in the upper trapezius and upper thoracic muscles, in addition to some pain on palpation. Conversely, Mr. Kirwan said at trial that he never had a full range of motion in his neck.

[49] Both Drs. Krassioukov and MacInnes considered that Mr. Kirwan's neck and upper back difficulties were caused by the Accident and had become chronic. I accept those conclusions.

[50] Mr. Pakulak addressed the impact of Mr. Kirwan's neck and upper back difficulties on his ability to work. I briefly raise his conclusions at this point because they help put the severity of these difficulties in context. Mr. Pakulak opined that Mr. Kirwan was "slightly restricted" in his ability to perform horizontal reaching activities on a frequent basis. This conclusion was based on a series of tests, undertaken at different intervals over the day, some of which included typing exercises and simulated bookkeeping exercises. Mr. Pakulak considered that it was this particular restriction that is likely most relevant to Mr. Kirwan's ability to work full time.

[51] Mr. Kirwan recently began to again receive chiropractic and physiotherapy treatments for his neck and upper back. He also began to take some medications that have been prescribed for him for other difficulties. Thus far, he has not enjoyed any benefit from these treatments.

d) Headaches

[52] I have identified the inconsistencies that exist in relation to Mr. Kirwan's headache pain. Mr. Kirwan also gave evidence of feeling light headed or dizzy on occasion, and of briefly "passing out" a few times. He repeated this to a number of the experts he saw. Based on the whole of this evidence, I accept and find that Mr. Kirwan does have occasional headaches, that he is periodically dizzy or lightheaded, and that he has briefly passed out on a few occasions.

e) Knees

[53] Mr. Kirwan reported significant ongoing pain in both knees from the time of the Accident. Mr. Kirwan obtained physiotherapy treatments for his knees from January to June 2017. He denied having told his physiotherapist some of the things that are attributed to him in the clinical notes of his physiotherapist. This issue was further addressed in the submissions of counsel. I do not consider that I need to directly address the legal issues raised by counsel because I do not consider that they materially advance the issue before me.

[54] Mr. Kirwan accepted that his physiotherapy treatments yielded some positive results. He accepted that he chose not to apply for further physiotherapy treatments at the end of June 2017. This too suggests that Mr. Kirwan believed he had enjoyed some improvement with respect to these difficulties. Mr. Kirwan was originally housebound and largely immobile with his knee pain and he required a cane or crutches. He is now generally able to walk reasonably significant distances. This change necessarily means that this condition, or difficulty, has improved. I note parenthetically, however, that he told Dr. Krassioukov that he has not noticed any significant changes in the severity of his knee pain from 2016 to the date of his examination, over three years later.

[55] On the other hand, it is clear that Mr. Kirwan does continue to struggle with some significant difficulties that are the product of the injury to his knees. Some aspects of these difficulties are straightforward, others are much less clear.

[56] It is clear that Mr. Kirwan has not been able, and is presently unable, to participate in any sort of athletic endeavour that requires vigorous movement or running. He has not played soccer or tennis since the Accident. He regularly walks but he has some difficulty if the surface he walks on is uneven. He has some difficulty walking up stairs or on an upward incline and still greater difficulty descending stairs or inclines. These impediments make his going on any kind of hike, that is the least bit demanding, unrealistic.

- [57] Aspects of these various difficulties are supported by the testing and report of Mr. Pakulak. Mr. Kirwan also has some difficulty in squatting and bending. Again, these reported difficulties are consistent with most of the expert evidence and, in particular, with the report of Mr. Pakulak.
- [58] The assessment of his mobility, and in particular his ability to walk, is complicated by some of the disparities in the evidence that I identified earlier. Mr. Kirwan said that on most days he and his wife would, if the weather was good, go for a 45-minute walk around a nearby lake. Ms. Velis said that they would regularly walk from their home to a restaurant on Commercial Drive. She said that this is approximately a three kilometer walk in each direction.
- [59] A further body of evidence is relevant. Mr. Kirwan and his wife are avid travellers. The following chart, prepared by counsel for Mr. Kirwan, depicts the trips that he has taken, either for work or for pleasure, since 2017:

Chronology of Post-Accident Trips

Dates

Destination

Duration

September 12, 2016

The Subject Accident

July 2017

Dublin, Ireland

6 weeks

December 2017

New York, New York

4 days

May 2018

Kuala Lumpur, Malaysia

14 days

November 2018

England/Scotland

7 days

November/ December 2018

Iceland

4-5 days

December 2018 to January 2019

Dublin, Ireland; Barcelona, Spain & Rome, Italy

3 weeks total

April 2019

Honolulu, Hawaii

5 days

April 2019

Edmonton, Alberta

2 days

July 2019

Seoul, South Korea

6 days

October 2019

Toronto, Canada

3 days

November 2019

Mexico City, Mexico

4 days

November 2019

Las Vegas, Nevada

3 days

December 2019

Bali, Indonesia

7 days including 3 days of travel

February 2020

Maui, Hawaii

4-5 days

March 2020

The UK (England, Scotland) & Dublin, Ireland

8 days total (3 days in the UK, 3 days in Ireland) including 2 days of travel

July 2020

Dublin, Ireland; Malta

2 weeks total (3 days in Malta)

[60] Mr. Kirwan's evidence disclosed that he went on additional trips, for example to Toronto, Niagara Falls, and Seattle, that are not included in this chart.

[61] Aspects of this chart were further developed during the evidence of Mr. Kirwan and his wife, and provide useful context for the severity of Mr. Kirwan's injuries. Thus, for example, in relation to the December 2018 trip to Ireland, Ms. Velis explained that to get to Ireland she and Mr. Kirwan had first flown to Chicago. After they had spent a few days in Ireland, they flew to Barcelona for a few days. They then flew to the south of Spain, where Mr. Kirwan's parents have a home, for a few days before flying back to Ireland. A few days later, they flew to Rome for a few days before, again, returning to Ireland. Thereafter, they returned to Vancouver via Chicago. They apparently took nine separate flights over this three-week period.

[62] Ms. Velis further explained that when she and Mr. Kirwan travelled, they were somewhat limited in their ability to sightsee. Specifically, they would often go out in the morning, return to where they were staying early in the afternoon, and Mr. Kirwan would then rest. They would then go out again in the evening. They would also sometimes sit down and have a coffee, while they were sightseeing.

[63] As it relates to the trip to New York in December 2017, Ms. Velis said they were accompanied by two of her friends. On the first day in New York they walked all day, though Mr. Kirwan's pace slowed as the day went on and he walked more slowly than the others in the group. The next day, they all walked from where they were staying in Manhattan to the Brooklyn Bridge. Mr. Kirwan, again, walked more slowly than the others, but Ms. Velis agreed that the distance they walked may have been 10 kilometers or more. They also went out for dinner that evening, though they took a cab to get there. The following day, Mr. Kirwan walked with the group for the morning but then chose, because he was tired, to go to the library for the afternoon while Ms. Velis and the others went shopping.

[64] Mr. Kirwan said that on other trips, for example, to Malaysia or Hawaii, he and his wife would spend most of their time by the pool.

f) Legs, Ankles, and Feet

- [65] Mr. Kirwan said the he has pain to this day in his knees, ankles, the soles of his feet, and his toes from the Accident. This pain was said to be relatively constant. This is not apparent in the records of the clinic he attended or in the records of its physiotherapist, whom he saw for six months. He did not repeat these difficulties to Dr. Krassioukov, or to Mr. Pakulak, though he did mention them to Dr. MacInnes. He also testified that he had no difficulty with his lower legs before he went to Ireland in July 2017, almost a year after the Accident.
- [66] Perhaps the most curious and difficult to understand aspect of this case is Mr. Kirwan's complaint that he also periodically has extreme pain in his lower legs, ankles, and feet. I understand this to be different from the other leg, ankle, foot, and toe pain he complained of. This pain, he says, has been nearly debilitating at times. On at least two occasions, for up to 12 weeks, Mr. Kirwan was largely homebound with these problems. One such period was from September to November 2017 and the other from February to May 2018. Mr. Kirwan said that he has also experienced such pain on other occasions, but for shorter periods of time. Mr. Kirwan said that during the September to November 2017 episode, for example, he was only able to leave the house on three or four occasions.
- [67] His difficulties with these physical limitations is supported by the evidence of both his wife, Ms. Velis, and his former roommate, Ms. Mendy. They both said that Mr. Kirwan was largely limited to sitting on the couch and that he would spend significant periods of time with his feet in a bucket of ice. Ms. Velis went further. She said Mr. Kirwan's feet would get so swollen he could not put on his running shoes. Mr. Kirwan said, however, that these incidents were not attended by any swelling. They were simply very painful. Ms. Velis also said that when he tried to walk, his feet actually dragged on the ground. He was often unable to walk or leave the house. If they went to get groceries, Mr. Kirwan would have to lean on the grocery cart to support himself.
- [68] There are several reasons why I say this evidence is difficult to understand. First, Mr. Kirwan never sought any assistance, of any kind, for these difficulties. He gave various reasons for this. He said he did not have medical coverage in Canada and he did not want to incur more debt. Later, he said he did not yet have a family doctor and he did not have confidence in the medical clinic that he went to.
- [69] And yet, his parents helped him financially in other respects. He was living with Ms. Velis, who was employed throughout. He also did not pursue the matter when he returned to Ireland, from time to time, and where he had medical coverage. Still further, he received coverage under the British Columbia Medical Services Plan in October 2018.
- [70] Mr. Kirwan is an intelligent and high-functioning individual. In circumstances where he says he was effectively debilitated for months at a time, his failure to seek any assistance of any kind is nearly incomprehensible.

- [71] Second, Mr. Kirwan did not raise the specific difficulties with some of the medical experts he saw and, in particular, with the very experts who would best be able to address these problems. Mr. Kirwan did, however, describe these particular difficulties, with some specificity, to Dr. Anderson, a psychiatrist, saying that he had had four episodes of extreme leg and foot pain lasting up to 12 weeks.
- [72] He did not, however, report these difficulties to Dr. Krassioukov. He did mention a difficulty with his right ankle joint and foot, which Dr. Krassioukov ascribed, based on an x-ray, to a possible fracture in the joint of his right ankle. He told Dr. Krassioukov that this pain developed after the Accident and that he had not noticed significant changes in this pain since that time. The difficulties that Mr. Kirwan complained of in Court, however, extended, in both legs, from his knees down to his ankles and into his feet, and was episodic in nature.
- [73] When Mr. Kirwan met with Dr. MacInnes, he complained of pain in both knees that he said radiated both upwards to his quadriceps and downward to his calves and, on the right side, down to his feet. At trial, he said this pain did not radiate upwards from his knees but only downwards. Mr. Kirwan also told Dr. MacInnes that he had a "constant aching" in his feet, particularly when going down stairs or when walking on a gradient. Again, this is different from the difficulties Mr. Kirwan described at trial, which are episodic in nature.
- [74] Mr. Kirwan also told Dr. MacInnes, in passing, that he had been unable to leave the house for "several weeks" because of difficulties with his "knees, lower legs, ankles and feet". These comments are in Dr. MacInnes' handwritten notes of his interview with Mr. Kirwan. In those same notes, and in relation to these concerns, Dr. MacInnes questions whether Mr. Kirwan might suffer from plantar fasciitis. In any event, these concerns and comments were not significant enough to make their way into Dr. MacInnes' report and he did not address the cause of these difficulties, how they might be treated, or what the prognosis for them might be.
- [75] Mr. Kirwan told Dr. Cameron, a neurologist, that he had ongoing pain down the left side of his body, "including his lower extremity". He told Ms. Neil he had pain in his knees and right ankle.
- [76] Accordingly, the Court is left at the end of trial with no qualified expert addressing, in any way, the cause of, or prognosis for, what Mr. Kirwan says has been the most severe, though not the most enduring, of his injuries. It is also not clear whether this pain is intermittent or constant, above and below his knees or just below his knees, in his right ankle or in both ankles, and in both feet or in his left leg.

g) Chronic Pain

- [77] Both Drs. Krassioukov and MacInnes said that the pain associated with Mr. Kirwan's soft tissue injuries had become chronic in nature. I accept those conclusions.

II. Mood Related Difficulties

[78] There was some evidence that Mr. Kirwan has, since the Accident, had some mood and other related changes or difficulties.

a) Social Withdrawal

[79] Prior to the Accident, Mr. Kirwan was a very socially active person. He made friends easily and he often went out with his friends. Mr. Keenan said that Mr. Kirwan was popular, friendly, and that he laughed easily prior to the Accident. Both Ms. Velis and Ms. Mendy gave similar evidence.

[80] There has been some change in these attributes, or behaviours, since the Accident. I do not, however, consider that these changes are acute or that they are, in the main, mood related. I start, again, with the fact that Mr. Kirwan described various difficulties to various experts that he did not address in his evidence at trial. For example, he told Dr. Cameron that he felt "overwhelmed in crowds". He gave no such evidence at trial.

[81] Mr. Kirwan, as I have said, happily went to New York with Ms. Velis and her friends. He has repeatedly visited his family and friends in Ireland. Some of those trips were to attend the weddings of friends or to organize a reception for his own recent wedding to Ms. Velis. Ms. Velis also said that Mr. Kirwan was happy when they were in Ireland because he was able to see his friends. Mr. Kirwan and Mr. Keenan both gave evidence of the types of things Mr. Kirwan would do with his friends when they were in Ireland, though Mr. Keenan described how he now endeavours to avoid any activity that he believes might cause Mr. Kirwan difficulty. Ms. Davie, a work colleague, described the plaintiff as a "very social guy" in the office who talked to everyone. She did say, however, that more recently Mr. Kirwan was more reserved, more subdued, and that he was on his own more often. On account of COVID-19, Mr. Kirwan now often works from his home and it was not clear whether Ms. Davie's comments were limited to this most recent period of time or to an earlier time in the office, as well.

[82] I accept that Mr. Kirwan's physical limitations, and his pain symptoms, limit his ability to interact with his friends. Much of Mr. Kirwan's past interaction with his friends was physical or athletic in nature and many of these activities are no longer available to him. There was also evidence of his not going to social events or, on occasion, of his leaving such events early on account of his physical difficulties. I also accept, as Ms. Velis said, that Mr. Kirwan no longer puts any effort into making new friends.

b) Sleep

[83] A number of the expert reports referred to Mr. Kirwan having significant difficulties with his sleep. Mr. Kirwan did not give any direct evidence of his having any difficulty with his sleep. Ms. Velis did say that Mr. Kirwan "tosses and turns a lot" when he sleeps and that this will wake her. She also said that she sometimes feels him get out of their bed to go to another room. Both said that he now snores and is often tired. The fact that Mr. Kirwan often appears to be tired is supported by the evidence of other lay witnesses. I accept that Mr.

Kirwan's sleep patterns have been disrupted by the Accident.

c) Sexual Activity

[84] Both Mr. Kirwan and his wife testified that they are physically intimate less frequently than they were prior to the Accident. This is on account of both Mr. Kirwan having a diminished libido and his having some physical pain when they are intimate. I accept their evidence.

d) Cognitive Difficulties

[85] Mr. Kirwan gave almost no evidence concerning any cognitive difficulties with memory, concentration, or with any similar issue. This issue is, however, relevant to Mr. Kirwan's future loss of capacity claim. The report of Dr. van der Berg confirms, based on various forms of cognitive testing, that Mr. Kirwan is a highly intelligent individual. Of the dozen different tests that Mr. Kirwan was given he was above the 60th percentile of the population in every case. In half of those tests he was above the 90th percentile. This aligns with his academic record, my own perceptions of Mr. Kirwan, and with the success he has enjoyed in the workplace--a matter I will return to.

e) Weight Gain

[86] Mr. Kirwan is 5 foot 10 or 11 inches tall and, prior to the Accident, he weighed approximately 210 pounds. Mr. Keenan confirmed that, though Mr. Kirwan was always active and athletic, he was naturally thickset. Mr. Kirwan said the same thing. After the Accident, Mr. Kirwan gained approximately 70 pounds. He thereafter lost approximately 20 pounds. Mr. Kirwan attributed this weight gain to his inability to engage in his pre-Accident level of activity while his appetite remained constant. Mr. Kirwan rarely consumes alcohol.

f) Irritability

[87] There was some evidence from Mr. Kirwan and Ms. Velis that Mr. Kirwan, who is mild-mannered, has sometimes been brusque, irritated, or "grumpy" with Ms. Velis. I accept that evidence. Again, this does not appear to be severe or frequent. Mr. Keenan, when he was describing the plaintiff's mood, said that he did not seem angry. There is also no evidence from Mr. Kirwan's other friends or work colleagues that he is more easily irritated than he formerly had been. Indeed, Ms. Davie described Mr. Kirwan as a gentle, easy-going, level-headed, and unexcitable individual.

g) Mild Traumatic Brain Injury

[88] Each of Drs. Krassioukov, Cameron, and Anderson concluded that Mr. Kirwan "most likely" or "likely" suffered a mild traumatic brain injury in the Accident. That conclusion is based on Mr. Kirwan's suffering from a number of conditions that I have identified and that normally accompany this diagnosis. I accept their conclusions.

h) Depression and Anxiety

- [89] These difficulties were addressed in both the lay and expert evidence and, in particular, in the evidence of Dr. Anderson. Dr. Anderson concluded that Mr. Kirwan likely suffered from an adjustment disorder with mixed anxiety and depressed mood. He said that Mr. Kirwan is at risk of developing a major depressive disorder. He said that Mr. Kirwan's depressive symptoms overlap with his anxiety and pain symptoms. He further concluded that the long-term prognosis for Mr. Kirwan, from a psychiatric point of view, was guarded. This was on account of the fact that the longer psychiatric symptoms last, the less likely they are to remit with treatment. It is noteworthy that Mr. Kirwan has not, to date, ever received any counselling. This is notwithstanding the fact that Dr. Anderson recommended such counselling in December, 2019, and that Mr. Kirwan and Ms. Velis have been aware of his anxiety and low mood for some time.
- [90] Mr. Kirwan's anxiety is directed in part to his concern with his health and physical limitations. He is also quite anxious when crossing streets and he has not driven a car, other than in Ireland, since the Accident. Various witnesses said that Mr. Kirwan is visibly anxious when he is a passenger in their vehicles. Again, I accept this evidence.
- [91] The evidence of the various lay witnesses was somewhat inconsistent as it related to Mr. Kirwan's depressed mood. For example, his father did not perceive any such depressed mood. Conversely, Mr. Keenan said that Mr. Kirwan was generally more subdued and that he was "not the same joyful person" that he had previously been. Ms. Velis also said that Mr. Kirwan had previously liked to joke, that he had been happy and that he had been positive. She said that he was "no longer the same man", that he was more pessimistic, and that his smile had been "wiped away". The evidence of these latter witnesses is consistent with the conclusions that were expressed by Dr. Anderson and I accept these conclusions.

III. A Further Complicating Factor

- [92] I have said that Mr. Kirwan did not seek or obtain any medical advice or therapeutic assistance, of any kind, from June 2017 to June 29, 2019, when he went to a medical clinic on a single occasion. Mr. Kirwan did say that he has continued to do various home based exercises. He first met with his new family doctor, Dr. Parhar, in early February 2020. Dr. Parhar then began to provide Mr. Kirwan with various referrals for treatment and to other caregivers. Mr. Kirwan began to obtain some chiropractic and physiotherapy treatments but these treatments were interrupted by some of the work and holiday trips that Mr. Kirwan took, that I have referred to earlier, as well as by COVID-19.
- [93] Consequently, Mr. Kirwan has not begun to undertake many of the various forms of physical therapy, exercise, counselling, assistance with nutrition, and other recommendations that have been made to him. This includes recommendations that were made by Dr. Krassioukov in August 2019 and by Dr. Anderson in December 2019. The reports of both of these physicians observe that the longer Mr. Kirwan's difficulties go untreated, the more entrenched they are likely to become. Mr. Kirwan's failure to seek and obtain assistance is all the more noteworthy because Mr. Kirwan has been working on a part-time basis since

June 2019, and he has had ample time to pursue different forms of assistance. The fact that Mr. Kirwan may, or may not, have reviewed various expert reports at the time is not relevant. He should have been sufficiently interested in his physical and mental health to seek treatment.

- [94] The defendant does not argue that Mr. Kirwan's inattention constitutes a failure to mitigate. This inattention does however impede the assessment of Mr. Kirwan's prognosis. Thus, while the prognosis for his various physical and psychological difficulties is said to be guarded in many cases, the recommendations that are made on his behalf are generally believed to have some prospect or possibility of improving his various conditions. They also have a real prospect of improving his durability and teaching him skills to help him address his difficulties. There are, again, numerous examples of this.
- [95] Both Drs. Krassioukov and MacInnes recommended that Mr. Kirwan work with a nutritionist to help him lose weight. Mr. Kirwan's extra weight affects his self-image and likely places strain or stress on his knees. Mr. Kirwan has not done this.
- [96] Both Drs. Krassioukov and MacInnes recommended that Mr. Kirwan undertake a land and water-based rehabilitation program. A water-based program would decrease the stress on his knees and back. He has not done so.
- [97] Both Drs. Krassioukov and MacInnes recommended that Mr. Kirwan be assessed for obstructive sleep apnea, which is a treatable disorder. Treatment might address the sleep disruption and fatigue Mr. Kirwan complains of. He has not sought such assessment or treatment.
- [98] Drs. Krassioukov and van der Berg, as well as Ms. Neil, all recommended that Mr. Kirwan undertake an ergonomic assessment of his work place. He has not done so. Finally, each of Drs. MacInnes, Anderson, and van der Berg, and Ms. Neil, recommended he obtain counselling. He has not yet done so.
- [99] These, and other similar recommendations, are important for several reasons. First, it is well understood that Mr. Kirwan's various difficulties are significantly interrelated. Dr. MacInnes said that there is a "well accepted interplay between mood, pain, anxiety, and sleep". He said, for example, that improvements in pain can improve sleep.
- [100] Second, among Mr. Kirwan's difficulties are certain conditions that may well be fully treatable or that may improve significantly. This includes his sleep disturbance. It also includes, based on Dr. Cameron's evidence, his headaches. Dr. Cameron said that headache patterns for most people who get Botox treatments, which I will elaborate further upon, will improve.

[101] Third, and in a similar vein, it may be that various treatments will result in some improvement in the state of particular conditions. Thus, Dr. Cameron considered that various recommendations might give rise to "improvement" but not "resolution" of some of Mr. Kirwan's difficulties. Dr. Krassioukov also considered that Mr. Kirwan's difficulties might, in various respects, improve though he thought it unlikely there would be "significant improvement".

Non-Pecuniary Losses

[102] In the seminal case of *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, at para. 46, Justice Kirkpatrick set out an "inexhaustive list of common factors" to be considered when assessing a plaintiff's non-pecuniary damages. The amount of an award for non-pecuniary damages does not depend on the seriousness of a plaintiff's injuries alone. It is intended, instead, to ameliorate the condition, pain, and suffering of a victim considering his or her particular situation. Accordingly, awards are intended to meet the specific circumstances of the individual plaintiff.

[103] In this case, Mr. Kirwan suffered, for a period of time after the Accident, from numerous severe difficulties. Some of those difficulties have resolved with time and most have improved. Nevertheless, he continues to struggle with a range of physical and mood-related difficulties. He suffers from chronic pain in his knees, upper back, and neck. He suffers from disrupted sleep and from periodic headaches. He struggles with some level of anxiety and depression.

[104] These difficulties have impacted on him in various ways and to varying degrees. The most significant of his difficulties is his inability to engage in a wide range of physical, athletic, and recreational activities that he previously enjoyed. This inability has impacted him more severely than many people his age because he was formerly an unusually athletic and active individual. His athletic and recreational activities were a source of significant pleasure. His athletic and outdoor pursuits were also a cornerstone of his interactions with his friends, and he is now less social than he formerly was. Many of the very things that gave him the most pleasure are no longer available to him, nor are they likely to be, in any significant way, in the future. Furthermore, his wife is athletic and active, and he is limited in his ability to participate in a wide range of activities with her. Still further, the Accident has otherwise affected his relationship with his wife. They are less intimate than they were and he is sometimes less patient with her.

[105] There is also some prospect that the Accident will limit his ability to pursue the career that he had hoped for. An award of non-pecuniary damages can also extend to a plaintiff's loss of pleasure in their daily employment. He was also formerly an avid reader and he no longer reads for pleasure.

- [106] Having said this, it is important to put these various conditions and circumstances into context. Mr. Kirwan is well respected at work and he has, since the Accident, been promoted several times. He continues to be close to his friends and his family. There is some reason to believe that Mr. Kirwan's symptoms, or at least some of them, may improve. Furthermore, though most of his existing conditions are unlikely to fully resolve, some may do so.
- [107] It may also be that he can re-channel his passions and activities. He told Ms. Neil that he presently uses a stationary bicycle four times a week, for up to a half hour, for his exercises. He may be able to use a bicycle for recreational purposes. Similarly, his father said that when they went to Malaysia, Mr. Kirwan went swimming. Once again, he may be able to take up swimming for recreational purposes, particularly when he has been told that pool-based exercises may assist him. Still further, it is clear that he can walk reasonably significant distances. This ability may also improve with further active rehabilitation and, potentially, some weight loss. He is able to travel, and he and his wife are fond of doing so, though I accept that the range of activities he can participate in is, again, limited. He and his wife regularly go to restaurants. Any improvement in the status of his physical difficulties, and to some degree his mood, is likely to enable him to socialize to a greater extent.
- [108] Counsel for Mr. Kirwan argues that, on account of the plaintiff's non-pecuniary losses, an award of \$180,000 would be appropriate in these circumstances. He relied on various cases in support of such an award. In my view, these cases reflect circumstances in which the injuries to the plaintiffs in question were markedly more severe.
- [109] In *Fletcher v. Biu*, 2020 BCSC 1304, a 33-year-old Irish plaintiff had ongoing chronic pain and mental health difficulties four years after her accident. Prior to that accident she was early in her career and she excelled at it. She was an active and accomplished athlete. She was social and bright. After her accident, she struggled significantly with chronic neck and back pain, headaches, impaired sleep and fatigue. She had also struggled with a major depressive disorder, Post-Traumatic Stress Disorder and a General Anxiety Disorder. She moved back to Ireland, lived with her family, and took a step backwards professionally to work in an accommodated setting. Importantly, the plaintiff also suffered from a "profound, progressive, traumatic spinal injury" (para. 66). The experts testified that this condition would degenerate at an accelerated pace over time, further limiting her function. The experts further stated that there was a greater than 50% prospect of a relapse of her major depressive and post-traumatic symptoms. The Court awarded the plaintiff \$200,000.00 for her non-pecuniary losses, emphasizing "the severity, permanence, and progressive nature of her life-altering spinal injuries and the substantial corresponding likelihood of a relapse in her mental health symptoms over time" (para. 70).

[110] In *Kallstrom v. Yip*, 2016 BCSC 829, the 44-year-old plaintiff suffered disabling neck and back pain, headaches, and depression. She was awarded \$180,000 on account of her non-pecuniary losses. It was the severity of these injuries that is significant. Justice Kent, at para. 380, said:

Ms. Kallstrom has been converted from a happy, successful, active young single mother with a wide circle of friends into someone who suffers relentless pain and depression, is physically inactive, and has gained considerable weight, has experienced a profound loss of self-esteem, has few friends beyond family, has been rejected by her son and who, as a result of all these things at least in part, has attempted suicide on at least three occasions. Ms. Kallstrom's dream of developing in her thirties a long term successful career, getting married and having several more children will never be realized. Her prospects for long-term happiness are poor.

[111] The defendants, on the other hand, suggested that an award in the range of \$115,000 to \$125,000 would, in all the circumstances, be appropriate. They relied on a number of authorities in support of such an award.

[112] For example, in *Evans v. Keill*, 2018 BCSC 1651, a 34-year-old grocery store produce manager suffered soft tissue injuries to her mid back, upper back, neck, and shoulder. She developed chronic pain in her neck and upper back. That pain was exacerbated by lifting and by different postures, many of which she required for her work. She had headaches and migraines. Her pain symptoms had gradually improved by about 60%, but then plateaued and were described as "permanent and not likely to improve" (para. 167). Furthermore, before the accident, the plaintiff's mood was good and she enjoyed being both physically active and social. For example, she had hiked several times a week. She had attempted to continue to resume hiking by doing occasional short and easy hikes on level terrain. She had enjoyed her career but her injuries rendered her unable to do her job and she was demoted. She attempted alternate employment and, on account of her pain, struggled at that work. Finally, as a result of her injuries, she developed two major depressive episodes and a somatic symptom disorder. She withdrew socially from her friends, attempted suicide twice, and drank excessively. Though her life was very different from its pre-accident state, she had, after a significant and challenging struggle, returned to a place where she was happy. The Court awarded the plaintiff non-pecuniary damages of \$110,000. I consider Ms. Evans' circumstances, though clearly different in specific respects, to be generally comparable to those of Mr. Kirwan.

[113] In *Lanthier v. Ritchey*, 2019 BCSC 2022, the plaintiff, a labourer, suffered for a period of time from pain in his chest, shoulders, and pelvis. These injuries affected his ability to sleep and caused him to suffer from anxiety and depression. The Court was satisfied, however, that these injuries had eventually healed to the point where they no longer had a noticeable impact on his life. He continued to suffer from some pain in his lower back, though this injury had also healed to a significant extent. He did have significant ongoing difficulty with his right knee. He had had two surgeries to this knee that had not resolved the situation and he suffered from chronic pain. He was likely going to have to retrain for a different career

and have some ongoing symptoms that would give him difficulties at that new work. The plaintiff was awarded \$120,000 on account of his non-pecuniary losses. I consider Mr. Lanthier's circumstances to be generally less serious than those of Mr. Kirwan.

[114] Based on these authorities, and the other authorities that I was provided, and on the considerations I have described, I would assess Mr. Kirwan's non-pecuniary losses at \$135,000.00.

The Plaintiff's Past Wage Loss Claim

[115] An award for past loss of earning capacity is based on what a plaintiff would have, not could have, earned but for the injury they sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[116] The burden of proving actual past events is on a balance of probabilities. An assessment of loss of both past and future earning capacity often involves a consideration of hypothetical events. A plaintiff is not required to prove such hypothetical events on a balance of probabilities. Instead, hypothetical possibilities will be considered if they are real and substantial and not merely speculative: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[117] In order to address Mr. Kirwan's past wage loss claim it is necessary to develop a brief chronology:

- i. Mr. Kirwan was injured on September 12, 2016. He had been working at Clearly earning \$14 per hour and working 40 hours per week.
- ii. He received both unemployment insurance, some payments from ICBC, and long term disability from Clearly's insurance carrier. He was cleared to return to work, in relation to his wrist, by the orthopedic surgeon who oversaw his surgery and, on March 21, 2017, by the general practitioner at a medical clinic that he had been seeing. Mr. Kirwan did not feel he was ready to return to work and, for various reasons, he resigned from Clearly.
- iii. He appears not to have appreciated the timelines associated with his visa and did not realize he would not be permitted to continue working past the end of July 2017. He secured employment at Premium Liquid Labs Inc. ("Premium") from April 2017 until late July 2017, at which time his visa expired. Premium is a company that manufactures, sells, and distributes the liquid required for vaping.
- iv. Mr. Kirwan returned to Ireland for six weeks and he then returned to Canada, in late August 2017. He said that he had his first bout of leg pain from September to November 2017. He applied for and received permanent residency in February 2018. He said that he had his second bout of severe leg pain from February 2018 until May 2018. In May 2018, he went to Malaysia for two weeks with his family and Ms. Velis.

- v. He returned to work at Premium, on a full-time basis, on July 10, 2018, and he earned \$24 per hour. His salary was raised in September to \$25 per hour and he received a further raise to \$30 per hour in June 2019. He was also promoted twice in this period of time. He continued to work on a full-time basis until June 2019. At that time, he, and most of the employees at Premium, had a falling out with their employer. He did not then work for approximately two or three weeks.
- vi. When Mr. Kirwan returned to work at Premium, in June 2019, he did so on a part-time basis. He has generally worked three days a week since that time.

[118] The past wage loss claim that is advanced on behalf of Mr. Kirwan is unreasonably aggressive in various respects. It suggests that given the time required to obtain permanent residency, Mr. Kirwan would likely have been unable to earn income in Canada for approximately six months during the 2017 tax year. The reality is that there was nothing that prevented Mr. Kirwan from applying for permanent resident status when he realized that he would be unable to continue to work in Canada. He appears to have understood this by April 2017. He did not, however, apply for permanent residency for at least four or five months thereafter, and he did not receive permanent resident status until February 2018. There is no evidence that suggests that any part of this application process was delayed by the Accident. It is also unlikely that Mr. Kirwan would have found employment immediately upon him becoming a permanent resident. He likely would have had to have that status in hand before he could begin to apply for employment, at least for many employers, and it would have taken him some reasonable period of time to then secure employment. Accordingly, I consider that Mr. Kirwan not having his permanent resident status caused him to be unable to work for a period of nine months--that being from mid-July 2017 to mid-April 2018.

[119] The claim that is advanced on behalf of Mr. Kirwan also posits that because Mr. Kirwan secured employment in 2017 at \$20 per hour, and because he received a raise in 2018 to \$25 per hour, and a further raise in 2019 to \$30 per hour, it would be reasonable to assume that he would, but for the Accident, have secured those raises at the beginning of each year, and that he would have enjoyed that new wage for the balance of each of those years. Still further, it is argued that because Mr. Kirwan worked at Premium for 45 to 50 hours per week, from mid-2018 to mid-2019, it should be assumed that he would, but for the Accident, have worked similar hours from 2017 through to the date of the trial. These various assumptions, in combination, yield a gross past loss of earning capacity claim of \$105,000.00.

[120] These various assumptions suffer from multiple difficulties. First, Mr. Kirwan would, on account of his immigration status, have had to discontinue whatever employment he then held in July 2017. It is not clear when, but for the Accident, he would have left Clearly. It is also not at all clear what form of serious employment he would have been able to obtain had he told a prospective employer that he would only be able to work for several months before he had to leave. Mr. Kirwan said that he considered the people who hired him at

Premium very flexible because they knew he would only be with them for a short time.

- [121] Second, though I accept that there is a substantial possibility that Mr. Kirwan's employment trajectory would, but for the Accident, have been different, I do not accept that fixing specific notional incomes at specific notional points in time is realistic.
- [122] Third, extrapolating from Mr. Kirwan's experience at Premium also has difficulties. Mr. Kirwan chose to be paid as an independent contractor at Premium, rather than as an employee. Accordingly, he was paid on an hourly basis. This is not, however, how many employers pay their employees. Mr. Kirwan testified that he had, shortly before the Accident, applied for a position at a bank. If, for example, Mr. Kirwan had secured that position, or another similar position, he likely would have been paid a fixed salary.
- [123] Next, Mr. Kirwan's claim presupposes that his decision to work three days a week, from June 2019 to the date of the trial, was reasonable. I will address this issue further when I consider Mr. Kirwan's future loss of capacity claim, but there is significant evidence that suggests he is capable of more than this. Furthermore, the evidence suggests that Mr. Kirwan has often, in real terms, been working the equivalent of a conventional four-day week.
- [124] Finally, Mr. Kirwan testified that he understood and expected that, in his twenties, he would spend time "getting a feel for what he was good at" and that he would spend his thirties establishing "a good foundation". Furthermore, Dr. van der Berg has opined that Mr. Kirwan's intellectual capacity and aptitudes exceeded what his job at Clearly required. He has further opined that, at some point, Mr. Kirwan would likely have become frustrated and bored with his job and he would have sought a career in financial sales. However, because "Mr. Kirwan lacked Canadian experience [he] likely would have started in an entry-level position e.g. as a bank teller (\$17.00/hr with a range of \$13.85 to \$23.39/hr) while he completed the appropriate courses and licensing exams to work as a full-time financial sales representative".
- [125] Had Mr. Kirwan pursued the career choices that he had originally envisioned, and that Dr. van der Berg describes and attaches dollar values to, it is not clear that he would have suffered any past wage loss on account of the Accident.
- [126] Ultimately, many claims for past wage loss, or loss of capacity, are in the nature of an assessment. The relatively formulaic and mathematical exercise that is advocated on behalf of the plaintiff is not, in all of the circumstances, appropriate. This is particularly so based on some of the assumptions that are made. On account of the various considerations I have described, I consider that an award of \$40,000 fairly compensates Mr. Kirwan for this aspect of his claim. Counsel advised me that they would address the tax consequences of this award.

Future Loss of Capacity

- [127] The legal framework for the assessment of a future loss of capacity claim was succinctly described by Justice Douglas in *Fletcher*:
- [94] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not the application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232 at para. 19.
- [95] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. To the extent possible, the plaintiff should be put in the position she would have been in but for the injuries caused by the defendant's negligence: *Lines* at para. 185. The court's essential task is to compare the plaintiff's likely future working life with and without the Accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [96] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both are correct. The "earnings approach" is generally more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. When the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12. The earnings approach involves a form of math-oriented methodology such as: i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [128] Mr. Kirwan's future loss of capacity claim is based on various assumptions. It assumes that Mr. Kirwan would, but for the Accident, have worked to the age of 67. It relies on the future income loss multipliers that were established in the expert evidence of Mr. Benning. In particular, it was argued on Mr. Kirwan's behalf that because Mr. Kirwan is a determined and hard-working person, who was not likely to voluntarily leave the workforce, it is the "actuarial multipliers", rather than the "economic multipliers" in Mr. Benning's report, that should be relied on.
- [129] Actuarial multipliers only address a contingency for premature death while economic multipliers make allowance for various negative labour market contingencies. This includes contingencies for non-participation such as, unemployment, part-time work, and part-year work. Non-participation also, however, includes such factors as temporary absences to care for a family member, or to pursue other interests, such as travel or education. It includes involuntary withdrawal for reasons such as illness and disability. There is a difference of approximately 22% between the results that are generated using

actuarial multipliers and economic multipliers, respectively. The submissions advanced on behalf of Mr. Kirwan, insofar as they pertain to there being no need to make an allowance for negative labour market contingencies, are unrealistic. Many individuals are, over the course of a career, likely to encounter such contingencies.

- [130] One indicator of Mr. Kirwan's pre-Accident earning potential was derived from census data pertaining to British Columbian males with a Bachelor's degree. This information generated an average salary of \$97,000 per year, for individuals between the ages of 34 and 67.
- [131] Another indicator of Mr. Kirwan's pre-Accident earning potential is found in Dr. van der Berg's report. Following the statement that I referred to in para. 124 of these Reasons for Judgement, Dr. van der Berg said: "It is possible that after a period of five to ten years and with additional bank training he could have advanced to a position of an assistant bank manager and eventually bank manager (\$44.71/hr with the range of \$25.64 to \$72.12/hr). This occupation aligns with his intellectual abilities, interests and work history in supervision and management, and would have been a natural progression for him." The midpoint figure of \$44.71/hr generates an annual income of approximately \$90,000.00. It is, however, noteworthy that, based on Dr. van der Berg's evidence, Mr. Kirwan might not earn this salary for a number of years.
- [132] Counsel for Mr. Kirwan also pointed to the salaries of two individuals who had earlier worked at Premium, who had been involved in sales and who had earned incomes of \$125,000 and \$200,000. These positions had, however, apparently required almost constant travel--something that Mr. Kirwan would not now be physically capable of. It was Ms. Davie, Premium's Human Resources Manager, who gave evidence of what the individuals did at the company. She accepted, however, that she had not seen the resumes of the more senior of these individuals and that she did not know anything about his education or work history.
- [133] Based on these numerical guideposts, actuarial multipliers, and the underlying core assumption that Mr. Kirwan will only be able to work three days a week for the balance of his career, counsel for Mr. Kirwan advanced a future loss of capacity claim in the amount of \$1,200,000.
- [134] In assessing this claim, numerous further considerations are relevant. It is important to recognize how well Mr. Kirwan has done professionally since the Accident. Premium has approximate 60 employees. Over the course of the two years that he has worked there, Mr. Kirwan has been promoted twice. He is now the second most senior person in the organization and, when the CEO of the company is not present, he is charged with overall responsibility for its affairs. Both Ms. Davie and Ms. Sindon, who are employed at Premium, described Mr. Kirwan and his role in the company. He is well liked and respected. He is the individual within the organization that people go to with their difficulties. He is the individual who receives instructions from Premium's CEO, apparently

a somewhat difficult individual, and who delegates those instructions to others within the company. He is involved in, and oversees, the company's sales, operations, and office activities.

- [135] These various positive attributes suggest that without the Accident many forms of employment would have been open to Mr. Kirwan. These same attributes, and the success he has enjoyed notwithstanding the Accident, also speak well of the opportunities that potentially remain open to him.
- [136] It is also relevant that Premium employees are required to both sign in and sign out from work and that the company maintains time records for each employee. Accordingly, it is possible to see how many hours per week Mr. Kirwan worked when he worked on a full-time basis, and how many hours per week he now works. Mr. Kirwan was paid for each hour that he worked, though a half-hour per day, for lunch, was automatically deducted. Those records, which are based on two week periods of time, reveal that there were many such two week periods where Mr. Kirwan worked more than 50 hours per week. This is after the automatic half-hour deduction. The records also disclose exactly how many hours per day an employee is at work. Furthermore, Mr. Kirwan said that it took him approximately an hour and a half or two hours a day to commute to, and from, work. What this means, and what the records reveal, is that Mr. Kirwan often worked 10 or 11 hours per day. With his commute, he was regularly away from home for 12 hours per day or longer. He did this for almost a full year. It is not surprising, with his physical difficulties, that this was unsustainable. Indeed, it may not be sustainable for many healthy individuals.
- [137] Since he began to work on a part-time basis, he has generally worked on Monday, Tuesday, and Wednesday of each week. Since the start of the COVID-19 pandemic, he has generally worked from home. It is also relevant that Premium has moved its location so that his commute time is, or will be, reduced by almost half. His timesheets reveal there are some two week periods of time where he has worked, after the daily half-hour deduction, approximately 50 hours. This translates, based on a three-day work week, to a little more than eight hours per day. There are also numerous weeks where he has worked approximately 60 hours in a two week period. He told Ms. Neil that he was now working 60 to 65 hours in each two week period. When he does this, he tends to work approximately 10 hours per day. There are, however, some weeks where he works four or even five days in the week, albeit for fewer hours each day.
- [138] The reason that this is important is because 60 hours every two weeks, or 30 hours per week, effectively translates to four days per week where Mr. Kirwan would be working a seven-and-a-half-hour day. This, in turn, is relevant because many full-time positions are based on the expectation that an employee is at work 40 hours per week but is paid on the basis of a seven-and-a-half-hour day. On this basis there have been many weeks where, on a conventional basis, Mr. Kirwan has been working a four-day week rather than a three-day week. This, pre-COVID, did not include his commute.

- [139] There are other reasons that the core assumption that Mr. Kirwan can only work three days per week is suspect. Drs. Krassioukov and MacInnes opined that Mr. Kirwan could likely only work on a part-time basis in the future. Neither, however, indicated what exactly that meant. Thus, Dr. Krassioukov opined that Mr. Kirwan's likelihood of "maintaining full time employment" was guarded. On the other hand, Dr. van der Berg considered it likely that Mr. Kirwan would, after the additional treatments that had been recommended to him "likely be able to increase his hours to four days a week and a select range of jobs. Considering his medical prognosis for ongoing symptoms and pain flare ups [Dr. van der Berg remained] guarded that he would be able to durably maintain full-time (five days a week) employment although ultimately this would depend on his level of improvement".
- [140] Dr. Anderson similarly thought that Mr. Kirwan might be able to increase his workload to four days a week and that it was "possible" that he might be able to work five days a week, or on a full-time basis. Dr. Anderson considered, however, that if Mr. Kirwan worked on a full-time basis he might suffer because of his inability to cope with full-time employment and family obligations.
- [141] A further level of complexity flows from the fact that a number of the medical experts based their opinions that Mr. Kirwan would be limited to working on a part-time basis on various erroneous assumptions or understandings. A clear example of this is Dr. Anderson, whose report repeatedly refers to the serious cognitive difficulties that Mr. Kirwan reported to him and who clearly believed that this significantly limited Mr. Kirwan's ability to work on more than a part-time basis. Some experts, including Dr. Anderson, similarly relied on Mr. Kirwan's report that he was not able to sit or stand for extended periods or, indeed, to walk for any distance. The report of Mr. Pakulak, however, concluded that Mr. Kirwan was able to sit on a "constant" basis and that he was able to both stand and walk on an "occasional" basis. The word "occasional" is intended to communicate that Mr. Kirwan can undertake these activities for up to one-third of a working day. Based on Mr. Kirwan's description of his work day, where he sits, stands, and walks at different times during most days, these conclusions suggest that his ability to stand or walk does not meaningfully limit his ability to work. I emphasise that in most jobs that Mr. Kirwan would want, or be suited for, he would not likely be required to stand or walk for more than one-third of most working days.
- [142] Other experts, Drs. Anderson and Cameron being examples, understood from Mr. Kirwan that he was limited to working three days a week on account of both his injuries and the need to attend medical appointments as a result of his injuries. This latter assertion was clearly inaccurate. Other than the odd independent medical examination, Mr. Kirwan did not begin to attend therapeutic treatments to address his physical difficulties until after February 2020.
- [143] I also consider that there are numerous additional reasons for some level of optimism. First, I have said that Mr. Kirwan, for all practical purposes, neither sought nor obtained any therapies or treatments from June 2017 until February 2020. I have also said that Mr.

Kirwan has only recently started to undertake some of the various therapies and recommendations that have been made to him. There are other recommendations, such as counselling, that he has yet to start. The various expert reports suggest that this is a substantial possibility that Mr. Kirwan may enjoy some benefit, in respect of at least some of his difficulties, from these therapies. Certainly, and at a minimum, they appear to expect that his durability will improve.

- [144] Second, Mr. Kirwan is a bright young man. His cognitive test scores indicate that he is capable of many things. Dr. van der Berg believed it likely that Mr. Kirwan would go back to university. Further education may well allow Mr. Kirwan to find employment that allows him to either work more than he presently does or to be paid more for that work.
- [145] Third, Mr. Kirwan's success at Premium reveals that Mr. Kirwan is personable. His colleagues trust and respect him. He has demonstrated significant leadership and organizational skills. These various attributes are also likely to improve his prospects in the marketplace.
- [146] Next, Mr. Pakulak considered that Mr. Kirwan's most significant physical difficulty or limitation, having regard to his intended types of employment, arose from his having to have his arms extended as he was sitting at a desk, for example, while typing on his keyboard. Mr. Kirwan has not, either at work or at home, had an ergonomic expert review his work setting to see what improvements might be made. These recommendations are contained in several of the expert reports before the Court. I consider that there is a substantial possibility that with ergonomic seating, a stand up desk, voice-activated software, or other similar tools, Mr. Kirwan's ability to work, without engaging or triggering his difficulties, would be enhanced.
- [147] Finally, I also consider that there is a substantial possibility that Mr. Kirwan may be able to find employment, as is presently the case with Premium, where he can work from home for at least some of the time. This would allow him to avoid commuting and would shorten his workday.
- [148] I accept that aspects of Mr. Kirwan's ability to work on a full-time basis are diminished. I accept that he may have 'flare-ups' of his symptoms in the future. I also accept, as Dr. van der Berg suggested, that there is some prospect he may now retire earlier than he would have. I accept, as Dr. MacInnes stated, that as Mr. Kirwan ages, he will likely face greater difficulty with the management of his pain symptoms.
- [149] I do not, however, consider that Mr. Kirwan's employment prospects or his desirability in the marketplace are diminished to the extent that it is argued. Mr. Kirwan was never going to rely on his physical skills to earn a livelihood. Instead he was always going to primarily rely on his intelligence, his ease with people, and his work ethic. These positive attributes remain intact.

- [150] The report of Mr. Benning indicates, for example, that an ongoing income loss of \$10,000 per year, using economic multipliers, and assuming that Mr. Kirwan would have worked to the age of 67, yields a present value for this future income loss stream of just under \$200,000. If one assumes that Mr. Kirwan would, but for the Accident, have earned an average salary of \$100,000 per year, and that he is now able to work four days per week rather than five, Mr. Benning's calculations would yield a loss of approximately \$400,000.
- [151] Though these figures are premised on precise calculations, rather than an assessment of Mr. Kirwan's losses, I consider them useful. For example, I have said that I consider that there is a substantial possibility both that Mr. Kirwan may, with additional education and therapy, be able to work more than four days a week, though he may not be able to work to the age of 67. Based on the considerations that I have identified, and the evidence as a whole, I consider that an amount of \$375,000 fairly compensates Mr. Kirwan for his future loss of capacity claim.

Future Cost of Care

- [152] The test for determining the appropriate award for a cost of future care claim is an objective one. There must be a medical basis for the claim that is being advanced and the claims must be reasonable: *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (B.C.S.C.) at para. 199; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. While the claim being advanced must relate to a plaintiff's medical needs, the evidence given of a specific care item need not necessarily be provided by a medical doctor: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 38. Furthermore, the care item being advanced must be for a form of care that a plaintiff would not, in any event, have incurred. Still further, there must be a substantial possibility that a plaintiff will make use of the proposed form of care.
- [153] A number of the specific care items included in the expert report of Ms. Neil were not relied on or advanced by counsel for Mr. Kirwan's final submissions. Each of the remaining items is supported by one or more of the expert reports. The future cost of each care item identified by Ms. Neil was then calculated in Mr. Benning's report. It is worth noting, though the difference is not significant, that these various expenses are calculated past the age of 100. Mr. Benning accepted that using the calculations that were based on an individual living to the age of 83 was reasonable.
- [154] I do not consider the following care item is warranted:
- i. Neuropsychological testing. Such testing was referred to in a number of the expert reports because Mr. Kirwan reported significant cognitive difficulties. He has, however, already been tested, reasonably extensively, by Dr. van der Berg. Furthermore, if no serious submission is being advanced on behalf of Mr. Kirwan on account of any cognitive difficulties, there is no apparent need for such testing.

[155] I consider that aspects, or some portions, of the following care items are warranted:

- i. Occupational therapy. One aspect of this care item apparently includes occupational therapy case management for Mr. Kirwan. This is to assist him with implementing the various care items that have been recommended to him without "overwhelming him". Mr. Kirwan successfully oversees the activities of 60 employees and a midsize business. I do not consider that coordinating or scheduling the various treatments that he will be attending is likely to "overwhelm" him.

On the other hand, a portion of this expense is apparently directed to an ergonomic assessment and workstation set up for Mr. Kirwan. The need for this expense is supported by the evidence. The cost of this item is not broken out and I have attached a cost of \$1,000 to it.

- ii. Community Centre Pass. Mr. Kirwan is an athletic person. Many athletic people, at some point, join a community centre to keep fit. I consider there is a substantial possibility that Mr. Kirwan would, quite apart from the Accident, have incurred some part of these costs. I would award Mr. Kirwan approximately one half of the amount being claimed on a present value basis. This yields a figure of \$6,000.

- iii. Botox Treatments. These expenses are potentially required to assist with Mr. Kirwan's headaches. I understand that this expense is not covered by MSP or Ms. Velis' extended health benefits. Mr. Kirwan has said that he would avail himself of such treatments. It is not clear, however, whether the treatments will be effective and some contingency has to be applied on account of this. Furthermore, Dr. Cameron testified that most people will require such treatments for about a year and a half. A smaller number will require the treatments indefinitely. I have awarded Mr. Kirwan \$10,000 for these treatments.

- iv. Psychological counselling. Various experts have recommended different forms of counselling for Mr. Kirwan. Such counselling is clearly appropriate. The costs for counselling that are advanced on behalf of Mr. Kirwan, however, contemplate ongoing counselling, in the range of 8 to 12 sessions yearly, for the balance of Mr. Kirwan's life. I do not consider that Mr. Kirwan would continue with counselling, on an ongoing basis, for such an extended time. I have, accordingly, reduced the amount being sought by approximately half and would award Mr. Kirwan an amount of \$30,000.00.

[156] I consider that the following care items are generally supported by the evidence and are appropriate:

- i. Ongoing physiotherapy. The cost of such treatment for the next two years is \$3,500.
- ii. A private chronic pain clinic. Such clinics are available on a public basis. The waiting times at public clinics are, however, extended. The sooner that Mr. Kirwan receives the benefit of such coordinated assistance, the better. I also do not consider that Mr. Kirwan's family doctor can, by way of various referrals, achieve the same potential benefits for him. The cost of attending at a private clinic is \$15,000.

iii. Kinesiology. A number of experts recommended that Mr. Kirwan participate in an active rehabilitation program and that he continue to receive up to eight sessions per year on an ongoing basis. This seems prudent. Some or many of Mr. Kirwan's difficulties are likely to be with him for life. Maintaining his physical fitness and controlling his weight will be important and may assist in allowing him to be active and productive into the future. The cost of such treatments is approximately \$20,000.

[157] The sum of these various care items, and the amount that I would award Mr. Kirwan on account of them, is \$85,500.

[158] Special Damages. Counsel agreed that the value of Mr. Kirwan's special damages is \$2,850.

Summary

[159] I have awarded Mr. Kirwan the following amounts on account of the following heads of loss:

Non-Pecuniary Losses

\$135,000.00

Past Wage Loss

\$40,000.00

Future Capacity Loss

\$375,000.00

Cost of Future Care

\$85,500.00

Special Damages

\$2,850.00

TOTAL

\$638,350.00

[160] I consider that the global amount of \$638,350 that I have awarded Mr. Kirwan fully and fairly compensates him for his losses.

"Voith, J."

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