

CANADA / JUDGMENT

Krupinski v. Randle

2024 BCSC 523

COURT

Supreme Court of British Columbia

DECIDED

2 April 2024

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2024 BCSC 523 Krupinski v. Randle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Krupinski v. Randle,

2024 BCSC 523

Date: 20240402

Docket: M133322

Registry: Vancouver

Between:

Zbigniew Stanislaw (Stan) Krupinski

Plaintiff

And:

Debbie Randle

Defendant

Corrected Judgment: The text of the judgment was corrected at paras. 12, 406, headings II. D. 4, and II. F. on April 10, 2024 and paras. 31(f), 32(b), and 343 on June 13, 2024.

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

Acting on his own behalf:

Z.S. Krupinski

Counsel for the Defendant:

T. Tsang

M. Monroy

Place and Dates of Hearing:

Vancouver, B.C.

June 5-9, 12-16, 2023

August 29-30, 2023

September 20-21, 2023

Place and Date of Judgment:

Vancouver, B.C.

April 2, 2024

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I. INTRODUCTION

- [1] This action arises from a motor vehicle accident ("MVA" or "accident") on June 7, 2011. Liability is admitted by the defendant, Debbie Randle, who rear-ended the vehicle driven by the plaintiff, Zbigniew Stanislaw (Stan) Krupinski. The accident occurred near the intersection of Southeast Marine Drive and Southeast Marine Way in Vancouver, BC.
- [2] The plaintiff was 63 years old at the time of the accident, and he is now 76 years old. The plaintiff is an IT consultant. His last contract was with Arrow Transportation Inc. ("Arrow") as a project manager. That contract concluded one week before the accident in 2011, and the plaintiff has not worked since then.
- [3] The medical expert evidence is consistent that Mr. Krupinski suffered from a strain of his cervical spine, or soft tissue injury. His primary accident-related symptoms were headache and neck pain which have now become chronic. It is in issue whether his depression and other medical conditions and symptoms were caused by the accident.
- [4] The defendant submits that the symptoms experienced by Mr. Krupinski and the effects of those symptoms are attributable to other circumstances and events in his life rather than to the accident.

- [5] The plaintiff seeks compensation under the following heads of damages:
- (a) non-pecuniary damages;
 - (b) loss of income-earning capacity;
 - (c) cost of future care;
 - (d) in-trust award;
 - (e) loss of homemaking capacity;
 - (f) special damages; and
 - (g) expenses related to previous plaintiff counsel.
- [6] Mr. Krupinski also seeks special costs. All costs issues will be dealt with after these Reasons are received by the parties.
- [7] The total amount sought by Mr. Krupinski is \$1,287,819.34. The defence submits that the total award for damages should be \$30,592.
- [8] The primary issues for the Court are:
- (a) Has the plaintiff established that the accident caused or contributed to his injuries?
 - (b) Is the plaintiff's failure to find work after the end of his contract with Arrow attributable to the accident?

II. EVIDENCE

- [9] I will set out the relevant evidence below, and expand on it in some areas where more detail is required. Due to the fact that the plaintiff represented himself at trial, and presented lengthy and complete evidence and submissions, I have included more of the proceedings from the trial than would otherwise be the case. In addition, in two thorough written submissions the plaintiff summarised his testimony and the evidence of the other witnesses, although some of the written submissions contain references to facts not in evidence at the trial.
- [10] However, although the entirety of the large body of evidence led in the trial has been considered, it is not the function of the trial court to repeat or refer to all of the evidence in the Reasons for Judgment.

A. Overview

- [11] The time between the accident and the trial was twelve years, partly as a result of the plaintiff becoming self-represented in 2017. The evidence of the expert witnesses was gathered in anticipation of an earlier trial which was set for February, 2017. None of the expert reports were updated for this trial date, and there are no new reports filed.

[12] Within those twelve years, the plaintiff's circumstances lend themselves to being viewed in three time periods: June 7, 2011, the accident, to February 2012, the date of the first and successful prolotherapy treatment; summer 2012 when the headaches returned and neck pain commenced to 2015-2016 when various expert reports note that the plaintiff's symptoms of headache and neck pain have lessened; and 2015-2016 to the trial date in 2023.

B. Witnesses

[13] Mr. Krupinski represented himself and testified on his own behalf. Due to his hearing challenges, the court's hearing assistance devices were utilised. I am satisfied that that system provided him with the ability to hear and participate fully in the proceedings throughout.

[14] In addition to Mr. Krupinski and his wife, Leigh Krupinski, the following witnesses and expert reports formed the evidence at trial:

Assessment Date(s)

Plaintiff Experts

June 13, 2011

Initial MVA Visit

Dr. Stanley Sunshine, General Practitioner

Expert Report dated October 15, 2013

Trial Attendance: GP was unable to attend trial

Dr. Sunshine was not called as an expert witness by either party

Dec. 27, 2011 - Sept. 19, 2016

Dr. Earl Hardin, Psychiatrist

Expert Report dated September 26, 2016

Addendum Report dated November 14, 2016

Trial Attendance: Expert not able to attend trial (health issues)

Feb. 27, 2015

Dr. Gordon Robinson, Neurologist

Expert Report dated April 20, 2015

In Expert File: Consult report to Dr. Sunshine dated June 7, 2014

Trial Attendance: Thursday, June 8, 2023 (Day 4)

Feb. 3-4, 9, 2016

Richard M. Carlin, Vocational Assessor

Expert Report dated March 28, 2016

Trial Attendance: Friday, June 09, 2023 (Day 5)

July 22, 2016

Dr. Zohar Waisman, Psychiatrist

Expert Report dated October 11, 2016

Addendum Report dated October 28, 2016

Trial Attendance: Monday, June 12, 2023 (Day 6)

October 18, 2016

Dr. Sun, Rheumatology

Expert Report dated October 18, 2016

Trial Attendance: Thursday, June 8, 2023 (Day 4)

No assessment

Darren Benning, Economist

Expert Report dated Nov. 15, 2016

Trial Attendance: Monday, June 12, 2023 (Day 6)

Assessment Date(s)

Defence Experts

Jan. 28, 2015

Dr. Dommissie, Orthopaedic Surgeon

Expert Report dated February 13, 2015

Addendum Reports: December 18, 2016

Trial Attendance: Friday, June 16, 2023 (Day 10)

June 16, 2015

Dr. O'Shaughnessy, Forensic Psychiatrist

Expert Report dated April 20, 2015

Addendum Reports: January 24, 2017 and February 27, 2017

Trial Attendance: Friday, June 16, 2023 (Day 10)

C. The Accident

[15] In this section I will review the evidence, make findings of fact, and refer to the applicable law.

[16] The accident occurred in the morning of June 7, 2011. It was a rear-end collision between two vehicles at the intersection of Southeast Marine Drive and Marine Way in Vancouver, BC. Mr. Krupinski was on his way to Arrow to pick up his last cheque.

1. Material Damage

[17] Mr. Krupinski was driving a gray 2004 Audi A4 Quattro with automatic transmission.

[18] Ms. Randle was driving a red 2008 Chevrolet Aveo with a four-speed automatic transmission.

[19] On June 13, 2011, an ICBC estimator inspected Mr. Krupinski's Audi for material damage. The total estimate on that date for the material damage was \$166.88.

[20] On August 8, 2011, an ICBC estimator inspected Ms. Randle's Aveo. The total corrected estimate for the material damage was \$1,460.65.

2. The Parties' Evidence

[21] Mr. Krupinski testified that he was driving on Southeast Marine Drive and stopped at a red light at the intersection of Southeast Marine Way; he noticed Ms. Randle's vehicle stopped behind him at the red light. He testified that he intended to turn right at the intersection, to go west on Marine Way.

[22] As he began his turn, Mr. Krupinski saw another car speeding in the curb lane. He accordingly stopped his turn, and Ms. Randle rear-ended his vehicle. He was surprised by the impact, describing in his testimony that it "vaporized" his coffee inside his vehicle.

[23] Mr. Krupinski exited his vehicle to examine the damage and speak with Ms. Randle. He testified that the damage appeared superficial and not serious. After he exchanged information with Ms. Randle, Mr. Krupinski continued his drive to Mitchell Island, where he picked up his severance cheque at Arrow.

[24] Mr. Krupinski then called his wife who asked that he go to Joyce Medical Clinic. He testified that they found no injuries that required medical treatment.

[25] On cross-examination, Mr. Krupinski admitted both vehicles suffered minor damage as a result of the accident. Mr. Krupinski testified that he chose not to repair his vehicle, after consulting with an auto shop, because it was not worth repairing. He later purchased the Audi from the leasing company when the lease expired.

- [26] Mr. Krupinski also testified that he discovered hidden damage to his Audi at some later time, which he attributed to the accident. This hidden damage included a damaged roof trim, broken electrical wires, failing windows, and a broken steel roof clip just above the window.
- [27] On cross-examination, Mr. Krupinski could not say when he noticed the hidden damage, or whether he reported it to ICBC. He did not produce any documents, reports, or invoices to establish the alleged hidden damage to the Audi. He also did not retain any expert, through his former counsel or while he was self-represented, to provide opinion evidence that there was hidden damage to his vehicle.
- [28] Ms. Randle recalled the accident somewhat differently than Mr. Krupinski. She testified that the traffic light at the intersection was yellow, and she saw Mr. Krupinski's vehicle stopped. Ms. Randle recalled she was driving slowly, preparing to turn right, and then she turned her head and rear-ended Mr. Krupinski's vehicle. She described the impact as being not like a crash, but more of a bump.
- [29] Ms. Randle testified that no one called for an emergency vehicle, and no one stopped because it was not a major accident so people went around them. She was at the accident scene for less than five minutes, and recalled that Mr. Krupinski was annoyed that the accident caused his coffee to spill.
- [30] The parties differ in their interpretations of the severity of the accident.
- [31] The defendant submits that the parties' evidence and the material damage to the vehicles supports the finding that the accident was very minor, in particular:
- (a) Ms. Randle was not travelling at a high speed just before the impact; she was driving slowing to prepare for a right-hand turn at the intersection.
 - (b) Neither party called for help at the scene of the accident.
 - (c) Mr. Krupinski continued with his planned trip to Mitchell Island after exchanging information with Ms. Randle.
 - (d) Ms. Randle described Mr. Krupinski's demeanor at the scene as annoyance over his spilled coffee, rather than exhibiting confusion, nervousness, fear, or shock.
 - (e) The damage to Mr. Krupinski's vehicle is limited to the rear bumper, consisting of two holes created by Ms. Randle's front licence plate.
 - (f) The repair to the front bumper of Ms. Randle's Aveo cost \$1,460.65, including taxes.
 - (g) Mr. Krupinski chose not to repair what appears to be cosmetic damage to his vehicle.
 - (h) Mr. Krupinski purchased the Audi when his lease ended.
- [32] Mr. Krupinski submits that the accident was more severe than described by Ms. Randle and involved significant force, because:

- (a) Although the damage to both vehicles only appeared minor at the time of the accident, Mr. Krupinski later discovered hidden damage to his vehicle.
- (b) The \$1,460.65 in damage to Ms. Randle's vehicle suggests the accident was more than a "bump."
- (c) Mr. Krupinski's coffee did not spill, but rather was vaporized completely throughout the complete interior of his vehicle.
- (d) ICBC examiners reported that the accident was not a low velocity impact accident.

3. Findings of Fact on the Severity of the Accident

- [33] I find that the accident involved minor force, relying on the nature and extent of the vehicle damage and the evidence of the parties regarding the collision. However, the force of impact is not determinative but rather is a factor to be considered when assessing the extent of the plaintiff's damages.

4. Law - Minor collisions

- [34] In *Ahmadi v. West*, 2014 BCSC 2050, Justice Fitzpatrick stated as follows with respect to the relationship between the extent of the impact and the determination of injuries caused by the accident:
- [35] The defence does not suggest that a minor impact inevitably leads to the conclusion that no injuries occurred. The authorities are to the effect that evidence of the damage caused and the impact generally can be one of many factors considered by the court in the determination of what injuries, if any, were caused by the accident. In *Miller v. Darwel*, 2005 BCSC 759, the court stated:
- [9] On appeal, the claimant argues that the trial judge erred in considering the force of the impact of the collision on the issue of liability. In support of this position the claimant relies upon the case of *Gordon v. Palmer* (1993), 1993 CanLII 1318 (BC SC), 78 B.C.L.R. (2d) 236 (B.C.S.C.) in which Thackray J. (as he then was) said at para. 4:

I do not subscribe to the view that if there is no motor vehicle damage then there is no injury. This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has [no] application in court. It is not a legal principle of which I am aware and I have never heard it endorsed as a medical principle.

- [10] As other judges who have considered this passage have already said, these words should not be taken to mean that the extent of damage in a collision is irrelevant to causation. It is some evidence of impact, which is not logically unrelated to injury.
- [11] I agree with Taylor, J. in *Yeh v. Ford Credit Canada Ltd.*, [1996] B.C.J. No. 1400 (B.C.S.C.), when he said at para. 7:

Such evidence is therefore relevant with respect to what injuries resulted from the impact and to the issue of the credibility of the plaintiff who asserts such injuries, by reason of the fact that such injuries often do not have objective symptoms. Such evidence may, depending upon the extent of the property damage, either contradict or corroborate evidence of personal injury.

See also *Lubick v. Mei*, 2008 BCSC 555 at paras. 5-6; *Dao v. Vance*, 2008 BCSC 1092 at paras. 18-19.

[36] I agree that the extent of this collision is minor and that this is a factor to be considered when assessing Ms. Ahmadi's claims of injury.

[35] The minor nature of the collision is but one factor to be considered when assessing Mr. Krupinski's injury claim. All of the evidence from the lay witnesses, medical witnesses and expert witnesses must be considered in arriving at a determination of the causation and the extent of the plaintiff's injuries.

D. Evidence Regarding the Plaintiff

1. Pre-Accident

[36] In her testimony Ms. Leigh Krupinski described her life with her husband before the accident as "quite idyllic". They met on a Christian dating website and Mr. Krupinski wrote a poem for her on their first date. Their wedding in 2008, when she was 50 years old, was the best day of her life. After their marriage, she sold her business and it was lovely to be at home to have dinner ready for her husband when he came home from work.

[37] The social life enjoyed by Mr. and Mrs. Krupinski was rich and full with a social circle at church, travel, and dancing which they loved as well as golf which was Mr. Krupinski's favourite pastime. They took long walks with their dog and it did not really matter if they got lost. It was pretty much all Mrs. Krupinski ever dreamed of.

[38] Mrs. Krupinski described life after the accident, and still, as a nightmare. Everything changed. Instead of having dinner together, Mr. Krupinski would be in the bedroom with his hands over his eyes pressing his temples. There was no more laughter in the house. Their happy intimate life became, and continues to be, non-existent. Financially, out of necessity to keep them afloat, she took out her RRSPs. She went to work as a truck driver in Babine Lake near Smithers to earn money to keep them afloat. Mr. Krupinski went to the Food Bank which she knew was very humiliating for him.

[39] Mr. Krupinski described to her not being able to stand the headache pain, and struggling with the nausea. He said that it felt like a vice in his temples and an ice pick in his neck. She observed him go from being a high-powered executive needing two white shirts per day, to not getting out of bed.

[40] Mrs. Krupinski kept a pain journal which was ruled admissible only for a limited purpose. From her memory she described their past and present situations. Now, there is a slight improvement in the pain as a result of CHANGEpain treatments and pain management courses. Their social life though has all but ended due to not being able to keep commitments with friends due to Mr. Krupinski not feeling well enough to go out. He does not do much around the house and she finds it difficult to keep up.

[41] In cross-examination, Mrs. Krupinski was asked about Mr. Krupinski's other stressors, such as the mold in the house first noted by Dr. Sunshine in 2010, the inability to obtain a reference from Arrow, the computer hacking, his heart attack in 2018, the two instances of damage to their vehicle, the Human Rights complaint, and a dispute over MSP payments. She responded that nothing did damage to him and them like the accident. Mr. Krupinski processes things differently and feeds on challenges.

[42] Mrs. Krupinski was also asked in cross-examination about her attendances at Mr. Krupinski's medical appointments from 2019 to 2023. I will refer to that evidence below in the section addressing credibility.

2. Employment History and Opportunities

[43] One of the major issues to be decided is the impact of the accident on Mr. Krupinski's ability to find employment. He is very proud of his work history, especially of his ten years at Xerox in Ontario and his four years of putting in long hours at Arrow in Vancouver.

[44] Mr. Krupinski obtained a Bachelor of Arts from the University of Western Ontario with a major in computer science in 1968. He has a certificate for Client Server Computing from the California Institute of Technology (Caltec). His work history was exclusively in Ontario from the time of his graduation until 2002. He worked for Xerox Canada from 1971 to 1981.

[45] Since 1981, Mr. Krupinski has contracted to provide IT project management services through his federally incorporated company, Huntingdon York Consultants Inc. ("Huntingdon York"). Mr. Krupinski is the president and only shareholder of Huntingdon York.

[46] Tragically, Mr. Krupinski's son died by suicide in 2001, which interrupted Mr. Krupinski's IT career. Mr. Krupinski was hospitalized for a period following his son's death, and he stopped working in Ontario.

[47] In 2002, Mr. Krupinski moved to British Columbia and lived with his parents in North Vancouver. Around that time, Mr. Krupinski was also in the process of finalizing his divorce from his first wife.

[48] Between 2002 and 2006, Mr. Krupinski's income came exclusively from social assistance payments and short-term labour employment where he earned minimum wage.

- [49] Mr. Krupinski testified that he found the job market in British Columbia for IT project management to be very different than Ontario; he found the IT field in British Columbia to be smaller and more insular. The limited contact he had when he was working in Ontario with people working in the IT field in British Columbia proved unhelpful in securing him a job in British Columbia. In Toronto, companies would advertise for open positions and review candidates' experience, whereas, in British Columbia, Mr. Krupinski found that consulting companies dominated the IT job market. Networking through these consulting companies was necessary to secure employment opportunities.
- [50] Overall, Mr. Krupinski found securing a job in British Columbia in his field to be extremely challenging. He later hired a job coach who was a retired BMO executive. This job coach helped Mr. Krupinski make connections that eventually resulted in Huntingdon York signing on January 25, 2007 a sub-contractor services agreement with Robert Half Management Resources ("Robert Half"), which in turn subcontracted Mr. Krupinski as a project manager to Arrow Transportation Systems Inc.
- [51] Mr. Krupinski testified that he began job hunting in 2009, before his contract with Arrow was planned to end. He did not adduce any evidence to establish his job search, such as job postings, emails, or other correspondence. Mr. Krupinski's job search did not produce an offer from another company.
- [52] While he was sub-contracted with Arrow, Mr. Krupinski's supervisor was Paul Wates, Arrow's Chief Financial Officer ("CFO"), and Mr. Krupinski gave Mr. Wates weekly update reports. Mr. Wates retired from Arrow in March 2011. Mr. Krupinski did not call Mr. Wates as a witness at trial.
- [53] Mr. Krupinski worked for Arrow as a project manager for over four years, billing his services through Robert Half. Under that arrangement, Arrow paid Robert Half \$98 per hour, and Robert Half paid Mr. Krupinski \$50 per hour, until July 2008, when Robert Half increased Mr. Krupinski's pay to \$55 per hour. Mr. Krupinski's evidence was that he never billed Arrow for overtime although he worked long hours, ten to twelve hours per day for seven days per week for four and a half years.
- [54] In March 2011, Robert Half terminated its subcontractor services agreement with Mr. Krupinski and Huntingdon York. In April 2011, Mr. Krupinski contracted directly with Arrow for \$85 per hour in hopes that this contract would result in more work from Arrow. Mr. Wates had retired by that time, and Archie Campbell had taken over as Arrow's CFO.
- [55] Mr. Krupinski contracted directly with Arrow hoping for future management projects, but Arrow terminated the contract with Mr. Krupinski on May 31, 2011, one week before the accident. Mr. Krupinski received three months of severance pay pursuant to his contract with Arrow, and he was on his way to collect it when the accident occurred.

- [56] Mr. Krupinski did not file corporate income tax returns from 2007 to 2012, and therefore much of Huntingdon York's financial information was not in evidence. Mr. Krupinski's explanation was that his company had no retained earnings after paying his salary.
- [57] Mr. Krupinski testified that he could not recall events, including his actions, from the date of the accident until February 2012. However, the evidence indicates that the plaintiff was engaged in a job search and contractual dispute in the months following his contract termination and has some memory of that time period.
- [58] Mr. Krupinski relies on an email dated July 19, 2011 from Bill Brown to Donna Lynn, both Altec employees. He submits that this correspondence constituted a job offer at Altec, because he had previously worked with Mr. Brown, and Mr. Brown recommended him for a job. The defendant says that the limited email exchange reflects preliminary discussions only, not a job offer.
- [59] Mr. Krupinski also relies on a series of emails from August 30, 2011 to September 12, 2011 between himself and Trish Braydon and Kathleen Debusschere of Mercer Bradley Inc.
- [60] Ms. Braydon previously worked for Robert Half, but subsequently went to work at Mercer Bradley Inc. Mr. Krupinski approached Ms. Braydon to seek out new clients. In an email dated September 7, 2011, Mr. Krupinski provided Ms. Braydon with Mr. Wates as his employment reference. Ms. Debusschere, who worked with Ms. Braydon, emailed Mr. Krupinski on September 12, 2011 asking for Mr. Wates's phone number or email address, as Mr. Wates had retired from Arrow. Ms. Braydon emailed Mr. Krupinski on September 15, 2011 to inform him that Bradley Mercer Inc. was working on contacting his references.
- [61] Mr. Krupinski testified that Arrow's new CFO, Mr. Campbell, refused to allow Mr. Wates to provide a reference for Mr. Krupinski. Evidence indicates that, approximately a year later, in August or September 2011, Arrow could not provide a reference for Mr. Krupinski as a result of a settlement agreement signed by Arrow and Mr. Krupinski.
- [62] The other evidence regarding job searches was a list of emails starting in June 3, 2007 to show the jobs Mr. Krupinski has applied for. While the date, subject line, and sender are listed, the content of these emails was not in evidence.
- [63] Mr. Krupinski told Mr. Carlin that Merit was one company he was actively negotiating with at the time of the accident. The word "Merit" appears in two emails dated Sept 19, 2010, seven months before the accident, but there were no further emails from Merit in evidence.

3. Medical History Prior to the Accident

- [64] Mr. Krupinski has an extensive medical history prior to the accident. There is an issue regarding the effect of his pre-existing and ongoing and subsequent health issues on his ability to work.

- [65] Mr. Krupinski prepared a summary titled "Injuries and Symptoms for Stan Krupinski" at the request of the Court. In it, he notes his symptoms prior to the accident as follows: "Pre-MVA - lung problems since pneumonia 40 years ago. - sleep apnea - I stop breathing 200 times per hour - use CPAP and anti-depressants to help me fall asleep - ongoing 40 years."
- [66] Mr. Krupinski described his sleep issues and his use of a CPAP as having commenced in his thirties. He still wakes up because of sleep apnea, despite consistent use of his CPAP machine. His sleep apnea was re-investigated in British Columbia, where it was noted that he stopped breathing 200 times per hour. Mr. Krupinski has taken Zopiclone for many years as a sleep aid. A PharmaNet printout shows Mr. Krupinski's prescriptions for Zopiclone dating back to August 25, 2009.
- [67] Mr. Krupinski described the effect of his poor sleep quality. He has been feeling consistently tired and waking up in the morning exhausted because he did not obtain restorative sleep. He testified that he has been waking up tired every single morning since he was in my early thirties.
- [68] As Mr. Krupinski did not recall the dates or timing of some of his medical history, for reference, I will also refer to the medical and expert evidence and documents put to Mr. Krupinski in cross-examination. In this regard, the defence put the consult report of Dr. Alnoor Abdulla from North Shore Cardiology Clinic to Dr. Sabrina Class (GP) dated April 1, 2005 to Mr. Krupinski in cross-examination. The consult report notes that Mr. Krupinski, at that time, had dealt with health issues including atypical chest discomfort, hypertension, and sleep apnea. Mr. Krupinski was reported to have quit smoking in 2005.
- [69] Dr. C. Frank Ryan's June 9, 2009 consult report to Dr. Sunshine was reviewed with Mr. Krupinski on cross-examination. Dr. Sunshine referred Mr. Krupinski to Dr. Ryan, whose consult report notes:

He was diagnosed as having severe obstructive sleep apnea in Toronto 15 years ago. He used CPAP therapy for 15 years but abandoned it upon moving to British Columbia. Recently, however, his sleep quality has deteriorated, and he has significant daytime hypersomnolence. He goes to bed at 10:00 p.m., has occasional difficulty falling asleep, and awakens every 3 hours or so to visit the bathroom on account of his prostatism. In the morning, he wakens at 7:30 a.m. feeling exhausted. He uses Zopiclone as a hypnotic. He scores 11/24 on the Epworth Sleepiness Scale indicating significant hypersomnolence.

In summary, Mr. Krupinski has a previous diagnosis of severe obstructive sleep apnea that was successfully treated for many years with CPAP therapy. He had a uvulopalatopharyngoplasty which is unlikely to have resolved his sleep apnea problems. His current symptoms suggest recurrence. I have scheduled a polysomnogram. I have advised him to quit cigarette smoking completely and to lose some weight.

- [70] When asked about his smoking on cross-examination, Mr. Krupinski testified that he stopped smoked cigarettes a long time ago, and switched to smoking cigars because they do not contain chemicals. However, Dr. Sunshine noted in his medical-legal report that, on the visit of June 28, 2012, "[h]e was still smoking two to three cigarettes per day. Prior chest x-ray had shown bronchitis/ bronchiectasis. Advair, a respiratory inhaler, was prescribed."
- [71] Mr. Krupinski experienced other medical issues including with his cardiovascular system prior to the accident. Mr. Krupinski testified that he was diagnosed with pneumonia twice, and has had chest pain for many years. He also has a history of high blood pressure, for which he took medication before the accident. He was also taking Flomax for his urinary function.
- [72] Mr. Krupinski was questioned about Dr. Ryan's advice to quit smoking completely and to lose weight. He did not recall Dr. Ryan's advice, but accepted it was likely accurate. Mr. Krupinski agreed that he had respiratory issues for many years when he was asked about further testing for chronic pulmonary obstructive disease (COPD). He also agreed that he had respiratory issues during his time working for Arrow.
- [73] A clinical entry dated February 18, 2010 from Dr. Sunshine's records was put to Mr. Krupinski on cross-examination. He recalled that he coughed a lot when he saw Dr. Sunshine, and agreed that Dr. Sunshine knew of his long working hours. Mr. Krupinski did not recall other things that Dr. Sunshine noted in the clinical entry, including later arguments with his wife, and his depression. Dr. Sunshine also noted things that Mr. Krupinski thought arose much later, including his prescription for sertraline and "mold at house".

4. The Accident Until 2015-2016

- [74] In his direct evidence at trial, Mr. Krupinski alleged that he sustained the following injuries in the accident:
- (a) headaches;
 - (b) nausea;
 - (c) injuries to the back;
 - (d) injuries to the neck;
 - (e) a memory gap;
 - (f) fatigue;
 - (g) insomnia; and
 - (h) depression.

[75] In the "Injuries and Symptoms" document prepared by Mr. Krupinski at the Court's request, he provided the following summary and some portions of the expert reports. While it was of assistance, I note that there are inconsistencies in that document.

[76] With regard to the expert reports, Mr. Krupinski's experts were not all provided all the relevant records. Mr. Krupinski's inconsistent reports to his experts also undermine the reliability of their reports. Thus, I will review those reports in some detail and from various perspectives.

45 minutes post accident

- nausea, headache, chest pain, back pain, pain at back of right arm - reported at Joyce Medical Clinic.
- ICBC report filed
- no injuries that required immediate medical attention found
- I believe that injuries were transient and would eventually pass; I was wrong

August - September 2011

I passed out twice and suspected that I had a medical problem resulting from the accident.

October 2011

I searched out Dr. Brown for prolotherapy treatments to relieve my headache pain.

February 2012

The prolotherapy treatments worked. I was pain free until approximately May 2012 when significant headache pain returned and the neck pain began.

I attempted another prolotherapy session with Dr. Brown but it did not work and the pain in my neck and head got much worse

[77] The evidence regarding the injuries alleged is summarised below.

(a) Events on June 7, 2011

[78] After the accident, Mr. Krupinski drove to Mitchell Island to pick up his severance cheque from Arrow.

[79] At Joyce Medical Clinic on the same day, Mr. Krupinski filled out a motor vehicle accident report wherein he noted experiencing "headaches, nausea, chest pain, pain on back of right arm, lower back pain" which started roughly 60 to 90 minutes after the accident.

(b) Medical Visits from June 2011 to February 2012 and Memory Gap

- [80] Mr. Krupinski testified to an approximately eight-month gap in his memory, from June 2011 to February 2012. The months immediately following the accident would be a crucial time period for assessing the nature of Mr. Krupinski's injuries.
- [81] Dr. Sunshine was Mr. Krupinski's long-time family doctor, both before and after the accident, until he retired from medical practice around 2019.
- [82] Mr. Krupinski visited Dr. Sunshine after the accident on June 13, 2011, and he did not report any right arm pain as he said that the pain had resolved.
- [83] Dr. Sunshine provided a medical-legal report dated October 15, 2013. To the extent that Mr. Krupinski's memory gap prevented him from recalling details during that crucial period, or when his oral evidence was inconsistent with the clinical records during that period, Mr. Krupinski's self-reporting of his symptoms, as recorded by his family doctor and reflected in his medical-legal report, is accepted as reflecting the nature and intensity of his injuries.
- [84] Mr. Krupinski visited Dr. Sunshine 21 times between June 13, 2011 and August 20, 2013.
- [85] The report that was prepared by Dr. Sunshine at the request of Mr. Krupinski's former counsel was served by the defendant on the plaintiff pursuant to Rule 11-6 of the Rules of Court.
- [86] Dr. Sunshine described Mr. Krupinski's initial symptoms as follows:

Initial Symptoms

Initial symptoms consisted of low back pain, headache, nausea and shooting pain on the inner side of his left thigh.

The low back pain, headache, nausea and shooting pains had the onset approximately one hour after the impact. The low back pain was described to gradually improve.

At the time of the examination on June 13th, 2011 he reported that the headache persisted. Nausea seemed to be intimately associated with the presence of headache.

(c) Headaches and Fainting

- [87] It is uncontested that Mr. Krupinski sustained headaches and nausea as a result of the accident. However, the severity and duration of Mr. Krupinski's headaches are in issue.
- [88] Dr. Sunshine's medical-legal report outlined Mr. Krupinski's complaints of headache as follows:

- June 13, 2011

- o No direct blow to the head
- o no loss of consciousness
- o headaches persisted

- o nausea seemed to be intimately associated with headaches
- o post accident headaches present all the time and is located on both sides of the frontal area of the skull (in and around the forehead) and no associated visual symptoms
- o Tylenol was prescribed. The patient on previous occasions for headaches had used Aspirin or the occasional 222. d
- July 26, 2011
 - o Headaches daily, dominant in the morning.
 - o However intensity appeared to have eased
 - o Nausea was associated with headaches but no vomiting
 - o He did not describe visual or migraine symptoms
 - o Referral was made for the plaintiff to see Dr. Woolfenden (neurologist)
- September 13, 2011
 - o Headaches occur every day on both sides of the frontal area of the forehead.
 - o On two occasions he used 222 and on two occasions Tylenol with successful amelioration of symptoms.
- October 20, 2011
 - o Headaches were described an intermittent and remaining in the frontal area. The headaches had a tendency to come and go.
- November 9, 2011
 - o Headaches would occur one to two times a day lasting hours
 - o May or may be associated with nausea
 - o He was tested on number subtraction, counting backwards and simple puzzles. His performance seemed to be satisfactory
- December 3, 2011
 - o Dr. Woolfenden consultation pending. Gabapentin was being used.
- January 5, 2012
 - o Had an episode of syncopal at midnight on January 4 witnessed by his wife
 - o The plaintiff had blood pressure of 180/95 on January 3
 - o [Dr. Sunshine] suspect it was vasovagal as it occurred after lying on his back watching TV and he got up.

[89] This evidence indicates that Mr. Krupinski was sometimes able to alleviate his headaches by taking Tylenol and 222.

[90] There is no medical evidence indicating that Mr. Krupinski's fainting episode on January 4, 2012 was related to the accident. Dr. Sunshine noted that he suspected the episode was related to Mr. Krupinski's blood pressure and standing up after lying down.

[91] Mr. Krupinski confirmed at trial that his issue with passing out has resolved.

(d) Symptoms - 2012

[92] Mr. Krupinski testified that his headaches and nausea were gone and he was relatively symptom free by February 2012 as a result of prolotherapy treatments. His headaches and nausea returned in approximately June, or the summer, of 2012, and were worse than before. He also experienced for the first time severe neck pain.

[93] Mr. Krupinski's evidence about the recurrence of his headaches and nausea and the onset of neck pain a year after the accident does not align with Dr. Sunshine's timeline of Mr. Krupinski's symptoms in the October 5, 2013 medical-legal report:

Office Visit March 30, 2012: He felt there was gradual improvement in his status and would continue seeing the naturopath every two weeks. Although Mr. Krupinski did not feel like his old self, he considered himself a lot more functional and was working at the computer.

Office Visit September 20, 2012: With respect to the accident, under the auspices of his naturopathic physician he was referred for prolotherapy. Prolotherapy involved the identification of tender points in the neck which were injected. To this, Mr. Krupinski attributes significant improvement. He credits the prolotherapy to his ability to be able to discontinue his analgesics.

When seen in follow up on April 12th, 2012 Dr. Woolfenden stated that the headaches had significantly improved. He noted that the patient was taking occasional Tylenol No. 1 less than once per week. The Celebrex that Dr. Woolfenden had prescribed initially on February 9, 2011 had been used for a period of approximately two weeks subsequent to that appointment."

My chart records and investigations do not demonstrate evidence of complaints on a chronic basis with respect to headaches or musculoskeletal symptomatology.

(e) Neck Pain

[94] In his July 29, 2015 medical-legal report, Dr. O'Shaughnessy sets out a useful chronology, and notes that during the lengthy interview he conducted of Mr. Krupinski on June 16, 2015, Mr. Krupinski reported the following symptoms arising from the accident:

Neck Pain:

16. Mr. Krupinski tells me the neck pain started much later and estimates it occurred some six months following the accident when he started doing prolotherapy. He actually coincides the return of the headaches with the onset of his neck pain after that five-month period where he was headache-free. He reports that his neck has worsened over the course of time and by the time I saw him he had daily neck pain.

[95] Dr. Sunshine's October 15, 2013 medical-legal report first notes Mr. Krupinski's neck in the context of an office visit on February 17, 2012: "He continued to receive naturopathic treatment including neck adjustments." In the office visit of March 30, 2012, he says: "The naturopath was providing neck laser, neck manipulation and needle punctures and brain testing."

(f) Back Pain

[96] Dr. O'Shaughnessy also notes in his report that, during his interview of Mr. Krupinski, he reported the following symptoms arising from the accident:

9. As a result of the accident he states he has had back pain in the lumbar region as well as headaches with nausea.

Dr. Sunshine's October 15, 2013 report notes at page 14:

With respect to musculoskeletal disorder, Mr. Krupinski stated that issues that were initially present included headache, nausea, pain along the inner thighs and low back. At his subsequent visits he documented that the low back symptoms were transient and there was no further discussion or complaining with respect to pain in the inner thigh.

[97] The low back pain has resolved.

(g) Concussion

[98] Dr. Sunshine notes in the October 15, 2013 medical-legal report:

It is of note that there was no direct trauma to his head as a result of a low impact rear-end collision.

[99] Dr. O'Shaughnessy notes in the July 29, 2015 medical-legal report:

12. Notes on June 26, 2011 take a history of the symptoms and Dr. Sunshine noted there was no evidence of any loss of consciousness or direct blow to the head.

[100] Mr. Krupinski agreed on cross-examination that Dr. Robinson's consult report dated June 7, 2014 recorded that Mr. Krupinski did not hit his head in the accident.

[101] It was put to Mr. Krupinski that he reported to Dr. Robinson that he did not lose consciousness. Mr. Krupinski replied: "I described the same thing I described to you. I don't remember losing consciousness. I remember looking to the left and then some time later, to the front. I can't explain the gap."

[102] As Dr. O'Shaughnessy notes in the July 29, 2015 medical-legal report:

Report of Dr. Woolfenden February 9, 2012:

16. Dr. Woolfenden saw him in consultation for complaints of headaches. He obtained a similar history and he, too, did not think there was evidence of any concussion in the accident. He noted his headaches were worsening with time and associated with some neck pain. His wife also reported poor memory with declining concentration skills.

[103] On cross-examination, Dr. Robinson commented on certain medications in Mr. Krupinski's PharmaNet printout. Dr. Robinson said that Zopiclone is a sedative for insomnia, recommended only for short-term use of four to six weeks. Some patients using Zopiclone may experience drowsiness, memory loss, and/or impaired focus.

[104] However, Dr. Hardin opined that Mr. Krupinski had had a mild traumatic brain injury.

(h) Headaches and Nausea

[105] Dr. O'Shaughnessy notes Mr. Krupinski's complaints of headaches and nausea in the medical-legal report:

11. The first visit post-accident was on June 13th where Dr. Sunshine records the same history. He was complaining of headaches with nausea and low back pain. Thereafter notes document ongoing headaches with nausea.

[106] Regarding those symptoms, and the CT and MRI scans, Dr. Sunshine provided the following opinion:

His persisting symptoms appeared to be those related to headache, posterior neck symptoms and nausea. As a result of these symptoms he experienced difficulty in functioning. It is of note that there was no direct trauma to his head as a result of a low impact rear-end collision.

I would consider the CT scan of the head as aforementioned above and appended to this report as well as the MRI of the head as aforementioned above and appended to this report to be non-contributory in terms of physical findings. Specifically there is no radiologic abnormality of pertinence to the MVA of June 2011.

My chart records and investigations do not demonstrate evidence of complaints on a chronic basis with respect to headaches or musculoskeletal symptomatology.

Throughout this period of time Mr. Krupinski has had high-risk medical issues with respect to his cardiovascular system. The abnormal shadows demonstrated in the brain in the enclosed MRI report are considered to be vascular abnormalities associated with arteriosclerotic vascular disorder of the brain. The hypertension and respiratory problems cannot be related to the MVA. Nevertheless the chronic recurrent episodes of nasal congestion, the background history of migraine, hypertension and previous headaches that he described initially may have some degree of pertinence to the MVA; however he is careful to differentiate between prior headaches and their description and those headaches that emerged directly after the MVA. Therefore

predicated upon the patient's history I have reason to believe that the headache syndrome subsequent to the MVA is relatable to the accident. It is of note that the analgesia overuse syndrome as noted by Dr. Woolfenden appeared to initiate directly after the MVA and hence although the overuse syndrome of medications arose subsequent to the MVA and therefore can be considered factorial in the production of the post traumatic headache syndrome.

Hence it is my opinion that arising out of the MVA of June 7th, 2011 that Mr. Krupinski suffered the following medical issues:

1. Post-traumatic headache of a protracted nature and associated
2. Post-traumatic neck pain of a musculoskeletal nature, probably associated with trauma of the vertebral spine which was previously affected by hyperostosis syndrome.

As a result of time, therapy and medical support system, Mr. Krupinski has gradually come to resolution of these symptoms. The period of time has been substantial but satisfactory amelioration of the symptoms has since occurred.

I do not anticipate further residua arising out of the sequelae of the MVA of June 7th, 2011.

[Emphasis added]

[107] However, the symptoms continued. Mr. Krupinski reported headaches to the doctors who assessed him.

[108] Dr. O'Shaughnessy states in his July 29, 2015 medical-legal report that Mr. Krupinski reported the following symptoms arising from the accident:

10. Mr. Krupinski is a longstanding patient of Dr. Sunshine who did his follow-up. Initially he did not think he had any major problems but as time went on he noted that his headaches worsened. His back pain improved
11. Mr. Krupinski tells me that by the fall of 2011 he experienced headaches primarily in the frontal region occurring daily and lasting most of the day. By his account, the pain was relatively low grade with occasional spikes. He would awaken with a headache three days a week
- ...
13. Over the course of time he had a number of treatments for his headache, including physical therapy, prolotherapy, and medications. He tells me the prolotherapy helped to some extent and indeed reports that the headaches stopped for a total of five months. They then returned and have been fairly constant subsequently.
14. By the time I saw him, he reported his headaches to occur most days at a low grade intensity. About half the time he experiences nausea depending on the severity of the headaches. Rarely he will vomit if the nausea is severe

15. He denies more typical migraine type symptoms such as photophobia although states he has become "jumpy with noise".

[109] Dr. O'Shaughnessy also refers to records of the neurologist Dr. Woolfenden and a report dated February 9, 2012:

Report of Dr. Woolfenden February 9, 2012:

16. Dr. Woolfenden saw him in consultation for complaints of headaches. He obtained a similar history and he, too, did not think there was evidence of any concussion in the accident. He noted his headaches were worsening with time and associated with some neck pain. His wife also reported poor memory with declining concentration skills.
17. On examination, he had a normal neurological evaluation. Dr. Woolfenden was concerned that his headaches may be related to analgesic overuse and recommended tapering Tylenol medications and discontinuing sertraline and starting Effexor for his headaches and mood.
18. Follow-up on April 12, 2012 indicates that his headaches were reported to be better.

[110] Dr. Robinson testified that Mr. Krupinski's headaches were not migraine headaches.

(i) Fatigue and Insomnia

[111] The defendant submits that Mr. Krupinski's fatigue and insomnia were not caused by the accident, but rather a life long condition predating the accident and which was expected to persist into the future. I agree.

[112] Dr. O'Shaughnessy noted in the July 29, 2015 medical-legal report:

31. On direct enquiry, he tells me that he generally retires anywhere from 12:30 to 1:00 a.m. and falls asleep with medications in about one hour. He sleeps through the night although will occasionally wake up with a headache and generally arises at 7:30 feeling somewhat tired. He complains of fatigue most of the day and has to push himself to carry on.
32. Appetite and weight have been quite stable although at times are affected by headache with nausea. He tells me his interest in socializing is diminished but attributes this to a combination of headaches and his financial situation. Overall, his interests are preserved but he states he is frustrated at not being able to pursue them primarily because of his financial situation and headaches. He is an avid golfer and states the interest is there but the ability has declined. He still enjoys certain activities; e.g. once a month he goes to the Legion for poker night that he can play without money. He is able to enjoy time with his wife as well as his dog. He can enjoy watching movies although has difficulties concentrating and also enjoys going for walks in Central Park with his dog or travelling to Kelowna to see his wife's family.
- [113] As described above, Mr. Krupinski recalled waking up tired every morning, since he was in his early thirties.

[114] Dr. Sunshine noted in the October 15, 2013 medical-legal report Mr. Krupinski's various other health conditions that may cause or contribute to his persistent fatigue:

Office Visit June 28, 2012: Mr. Krupinski continued to see Dr. Rosenfeld at the clinic. He was attending him for chest congestion and sore throat. He had been treated with two different antibiotics. He was still smoking two to three cigarettes per day. Prior chest x-ray had shown bronchitis/ bronchiectasis. Advair, a respiratory inhaler, was prescribed.

Office Visit September 20, 2012: With respect to his chronic sore throat, congestion, rhinorrhea (runny nose) and minimal cough in the morning it was discovered that there was mould in his residence wall and efforts were now being made to remove the mold in his co-op residence.

(j) Anxiety

[115] Dr. O'Shaughnessy recounts in his medical-legal report that Mr. Krupinski's records do not reflect any reported psychological or cognitive symptoms:

13. Dr. Sunshine's records do not contain any psychological symptoms or complaints or cognitive difficulties.

Medical Legal Report of Dr. Sunshine October 15, 2013:

14. This parallels his clinical notes. He did not record any psychiatric symptoms or complaints.
34. On direct enquiry, he denies any major anxiety symptoms save for his concerns regarding his financial status and his abilities to find employment. By his account, however, these worries are not extreme and he is able to stop himself with simple positive thinking. He enjoys the ability to relax and often uses techniques he had learned in the past, including Reiki, energy transfers, and deep breathing.

(k) Depression

[116] Dr. O'Shaughnessy noted in the July 29, 2015 medical-legal report that Mr. Krupinski may well have had pre-existing major depressive disorder, which he did not report as having worsened after the accident:

15. Pulling this information together, I would conclude that he may well have had a pre-existing Major Depressive Disorder that was well managed with medications and for the most part has been in remission for some years. He did not appear to have any recurrence of actual symptoms of depression following discontinuation of anti-depressant medications in 2012. The depression is not related to the accident and clearly pre-existed the accident. He denies any worsening of symptoms post accident nor is there any indication in the records of Drs. Sunshine or Hardin that he suffered any worsening symptoms. He did not experienced any other mental disorders directly caused by the accident. I do not think the accident caused any psychiatric difficulties nor did it worsen his pre-existing problems.

[Emphasis added.]

[117] Dr. Sunshine noted the following in his medical-legal report dated October 15, 2013:

Office Visit January 13, 2012:

Mr. Krupinski did not feel that the consequences of the MVA were psychologic.

(l) Subsequent Falls, Injuries, Emergency Visits

[118] Dr. Sunshine listed in his October 5, 2013 medical-legal report that Mr. Krupinski experienced a variety of other medical conditions after the accident:

- Sept 13, 2011 - reported diarrhea for three days and a cold with runny nose over the last month
- October 8, 2011 - emergency room visit to Vancouver General Hospital. Page five of the report notes: "He stated that he had trouble breathing, experienced nausea and headache and was grey. ...He noted that he had a possible drop in his blood pressure in the ER."
- December 3, 2011 - upper respiratory infection, Flovent inhaler provided by Dr. Rosenfeld at Care Clinic
- January 4, 2012 - syncopal episode - the plaintiff fainted and Mr. Krupinski was "out for seconds"
- June 28, 2012 - saw Dr. Rosenfeld for chest congestion and sore throat, treated with two antibiotics, still smoking two to three cigarettes per day, chest x-ray showed bronchitis/bronchiectasis, possible new respiratory infection superimposed on chronic respiratory condition
- September 20, 2012 - chronic sore throat, congestion, rhinorrhea (runny nose), cough - mold in co-op residence
- October 29, 2012 - recurrent sinus type symptoms
- December 14, 2012 - attended clinic at Joyce and Kingsway for chest pain and sinusitis, prescribed antibiotic on November 24, 2012, last cigarette use was two years ago and only using cigars
- January 29, 2013 - cold with congestion for four days, using inhaler Advair, antibiotic prescribed
- March 4, 2013 - prescribed antibiotic at Care Point Clinic at Joyce and Kingsway, left lower lung crepitations - history of known scar tissue in lung region
- June 26, 2013 - referred to sinus specialist for multiple episodes of unrelenting nasal congestion, frontomaxillary regions of discomfort
- July 24, 2013 - occasional episodes of shortness of breath, three days prior to visit felt sharp pain in chest and pain similar to someone sitting on his chest, referred to cardiologist Dr. Mizgala

[119] Mr. Krupinski had the syncopal episode in January 2012. He testified that he began losing consciousness in September 2011; this occurred five times after the accident.

[120] On June 13, 2013 Mr. Krupinski had a fall in Kelowna after he had spent a number of hours gambling and drinking at a casino. He denies that it was related to alcohol consumption. Another of these incidents in January 2014 led to Mr. Krupinski breaking his wrist.

[121] Mr. Krupinski did not identify any medical opinion relating these incidents to the accident.

(m) CHANGEpain Clinic Treatments

[122] Mr. Krupinski's evidence is that since 2016 he received and continues to receive specialized pain management treatments at the CHANGEpain clinic. He has had ultrasound guided injections every three weeks. They have provided relief for a few days and sometimes for a few weeks. Ultrasound treatments provided temporary relief from one week to three weeks. He says he has had three pain blocking operations sponsored by CHANGEpain.

[123] Mr. Krupinski discussed Botox treatment with Dr. Robinson but he could not afford to pursue Botox treatments. He had steroid injections with Dr. Robinson but these provided no lasting effects.

5. Other Stressors

[124] Mr. Krupinski testified in chief and in cross-examination about other stressors in his life since the accident. The defence submits that some or all of these other stressors are the cause of symptoms which are related to his inability to locate employment.

[125] Mr. Krupinski testified that the Canada Revenue Agency ("CRA") audited him in 2009. He explained that the CRA reviewed his business records, which passed the audit without any issues.

[126] Mr. Krupinski also testified that he worked 10 to 12 hours per day at Arrow, because he did not have sufficient support. He cited this as the reason why he did not prepare an annual report. He testified that he took as his salary all the profit from Huntingdon York at the end of each year.

[127] As a result of a dispute with Arrow over work hours and lack of support, a lawsuit was filed by Arrow after the termination of the contract in 2011. In 2012, it was settled with a term that prevented Arrow from providing Mr. Krupinski with a work reference. In addition, Mr. Krupinski testified that Archie Campbell of Arrow refused to allow Paul Wates, the previous supervisor, to write a reference letter that he promised he would write. In the result, whether it was because Arrow would not or could not provide a reference, Mr. Krupinski did not have a reference from Arrow, his only employer in British Columbia and his first job since 2001.

[128] As noted by Dr. Sunshine, Mr. Krupinski had concerns about the effects of mold in his home in 2010. His lung problems became worse in 2017 because of the mold infestation. This led to a conflict with the board of co-operative housing, and a dispute filed with the Human Right Tribunal.

[129] In chief, Mr. Krupinski described two incidents of sabotage to his vehicle. The first was after he wrote to the CEO of ICBC in 2017 to raise an issue of hacking of his computer by the People's Republic of China (PRC) in 2016. Shortly thereafter, someone removed four of the five bolts from the rear driver's side rear wheel. The wheel fell off on Highway #1 but luckily no-one was injured. Then after he discovered in 2019 that his computer was again being hacked by the PRC and information was being forwarded by the hackers to defence counsel, he filed a report with the Law Society of British Columbia in 2020. Soon after his complaint the couplings on both driveshafts were slashed to drain the lubricant. Fortunately, a mechanic noticed it before there was an accident.

[130] In 2018 Mr. Krupinski had a heart attack.

[131] Also, in 2018, Mr. Krupinski had a dispute with the Ministry of Health about Medical Service Plan payments.

[132] Mr. Krupinski made six hospital emergency visits in 2020 due to respiratory ailments.

[133] In 2020 and 2021 Mr. Krupinski was having a dispute with his wife regarding his alcohol consumption.

E. Expert Witnesses

[134] Mr. Krupinski is relying upon these medical-legal opinions:

- Neurologist Dr. Robinson's June 7, 2014 and April 20, 2015 reports;
- Psychiatrist Dr. Waisman's October 11, 2016 report and October 28 2016 Addendum;
- Psychiatrist Dr. Hardin's September 26, 2016 report and November 14, 2016 Addendum report; and
- Rheumatologist Dr. Sun's October 18, 2016 report.

[135] Mr. Krupinski decided not to rely on the report of dentist Dr. Ara Elmanjian dated November 3, 2016 when it was ruled that he could not treat Dr. Elmanjian as an adverse witness until the witness testifies. Mr. Krupinski withdrew his claim for dental treatments and repairs totalling \$17,920.30.

1. Dr. Sunshine

[136] Dr. Stanley Sunshine's treatment of Mr. Krupinski, and his medical-legal report, were discussed above under the heading "The Accident Until 2015".

[137] Dr. Sunshine provided his opinion that the accident caused Mr. Krupinski to experience headaches and neck pain. In his October 15, 2023 medical-legal report, Dr. Sunshine noted that Mr. Krupinski's symptoms had resolved approximately two years after the accident. Dr. Sunshine was not a witness at the trial.

[138] Dr. Sunshine also noted in his October 15, 2013 report that on January 13, 2012, Mr. Krupinski reported to Dr. Sunshine that he "did not feel that the consequences of the MVA were psychologic."

[139] Mr. Krupinski submits that the report of Dr. Sunshine is not reliable. Although he attempted to obtain an updated medical-legal report from Dr. Sunshine, none was provided to him.

2. Dr. Hardin

[140] Dr. Earl D. Hardin is Mr. Krupinski's treating psychiatrist. He did not attend the trial for health reasons. The defence sought but were therefore unable to cross-examine Dr. Hardin.

[141] Dr. Hardin wrote a medical-legal report for Mr. Krupinski in connection with the accident, dated September 26, 2016; and an addendum report dated November 14, 2016, in which Dr. Hardin defers to Dr. Waisman's express opinion.

[142] Dr. Hardin's September 26, 2016 report noted that he reviewed the following:

- (a) Dr. Robinson's April 20, 2015 report;
- (b) Dr. O'Shaughnessy's July 29, 2016 report;
- (c) Mr. Carlin's March 28, 2016 report; and
- (d) Mrs. Krupinski's diaries from July and early August 2016.

[143] Dr. Hardin's letter of instruction from Mr. Krupinski's previous counsel is not before the Court. However, based on Dr. Hardin's lack of reference to them in his report, it appears that Dr. Hardin did not receive or review or provide an update with regard to the following:

- (a) Dr. Sunshine's clinical records or his October 15, 2013 medical-legal report;
- (b) Dr. O'Shaughnessy's later addendum reports dated January 25, 2017 and February 27, 2017; or
- (c) Dr. Dommissé's reports dated February 13, 2015 and his later December 18, 2016.

[144] Dr. Hardin noted he had 44 visits with Mr. Krupinski between December 27, 2011 and September 19, 2016. Their visits were monthly during the first three years of treatment, and then less frequent during the last two years.

[145] Dr. Hardin's opinion as to whether the accident caused Mr. Krupinski's ongoing symptoms was as follows:

Indeed, it is obvious that a whole range of symptoms were caused by the accident. They have persisted in some form and have prevented him from using his skills a competent computer program designer and project manager. Reiterating, the accident occurred just at a time when he had established himself and his competency in British Columbia. He is obviously not capable of any other kind of work, as well." and Mild Neurocognitive Disorder from traumatic brain injury with cognitive deficits more severe in the initial six months but with persisting features.

3. Dr. Robinson

[146] Dr. Gordon Robinson is a neurologist. He provided Mr. Krupinski a medical-legal opinion dated April 20, 2015 and testified at the trial.

[147] Dr. Robinson provided an index in his report, listing the records he received and reviewed. This index listed only Dr. Sunshine and Dr. Hardin's clinical records for Mr. Krupinski. Thus, it appears that Dr. Robinson did not receive or review Dr. Sunshine, Dr. Hardin, Dr. Waisman, Dr. Sun, Dr. Dommissie, or Dr. O'Shaughnessy's medical-legal reports.

[148] Dr. Robinson was of the opinion that the accident caused Mr. Krupinski to sustain a soft tissue injury to his neck, and that Mr. Krupinski suffered no damage to his nervous system.

[149] Dr. Robinson testified that he agreed with neurologist Dr. Woolfenden that the MRI of Mr. Krupinski's brain was consistent with Mr. Krupinski's history of hypertension.

[150] Following his interview of Mr. Krupinski, Dr. Robinson noted in his report that "although unusual, [Mr. Krupinski] does not recall neck pain following the trauma".

[151] Dr. Robinson explained this statement at trial:

Well, the mechanism of injury - this was a rear-end collision which is the commonest motor vehicle accident resulting in physical injury in North America, and I've seen countless numbers of people with headache related [inaudible] for the vast majority, not 100%, have associated neck pain. Neck pain is often the pre-eminent complaint driving the headaches, although in many people I see, it is headache that is the primary complaint. So when you ask them, they do have neck pain and stiffness, and they have some restriction of movement - it's unusual.

[152] In his report, Dr. Robinson referred to a confounding period of improvement that Mr. Krupinski experienced, writing "it is not clear why there was improvement as he was subjected to more than one treatment at the same time."

[153] Dr. Robinson testified on this point:

My understanding was that in and around the time that Dr. Woolfenden had suggested Mr. Krupinski that the daily use of codeine analgesics can be problematic in worsening his headaches and he should stop - that same time he was seeing a naturopath and then going to a treatment known as prolotherapy. At this time there appears to be considerable improvement in his headaches.

So it begs the question - Why? It's unusual there's the natural history of things getting better, there's the potential of improvement by stopping daily codeine analgesics, it would have been possible, and there's the effect of this treatment prolotherapy, which is done in different ways, I don't profess to be an expert, but I see lots of patients give it a try, and it's basically injecting different liquids, usually saline or dextrose and saline - sugar water into the region of muscle and tendon where the discomfort is, and you know, some people report improvement.

Is that based on the actual treatment? Is it based on placebo effect? It's never been studied, we don't know, I suspect there is a large measure of placebo effect in such a treatment.

[154] On cross-examination, Dr. Robinson said that his report was "frozen in time", such that the treatments he recommended were valid as of the date of the report.

4. Dr. Waisman

[155] Dr. Zohar Waisman is a psychiatrist who produced two expert medical-legal reports for Mr. Krupinski, one dated October 11, 2016, and an addendum dated October 28, 2016. He testified at the trial.

[156] Dr. Waisman's October 11, 2016 report has a cover page displaying the title "catastrophic determination", which he testified was in error.

[157] Dr. Waisman lists in his medical-legal report the records he received and reviewed as part of his psychiatric assessment, and he does not reference Dr. Sunshine's medical-legal report. He references Dr. Sunshine's records only in respect of "a history of sleep difficulties" and use of a CPAP machine.

[158] Certain aspects of Dr. Waisman's assessment methodology were unclear. For instance, Dr. Waisman did not recall how he approached asking questions with Mr. Krupinski. Additionally, Dr. Waisman was asked on cross-examination about nightmares he noted in his report that Mr. Krupinski was experiencing. He replied that he did not ask Mr. Krupinski when his nightmares started, and he instead assumed that Mr. Krupinski had experienced them since the accident.

[159] Although Dr. Waisman did not know exactly when Mr. Krupinski's contract with Arrow ended, he understood that after it ended, Mr. Krupinski was interviewing for three different positions that he did not get. This information does not accord with the evidence at trial.

[160] Dr. Waisman recalled reviewing Dr. Woolfenden's notation of Mr. Krupinski's observation that Mr. Krupinski had low mood. Dr. Waisman was of the opinion that the accident triggered his pre-existing psychological symptoms.

Diagnosis. Major Depressive Episode, moderate to severe, and a somatic symptom disorder with predominant pain."

Whether the accident was the cause of those injuries.

The subject accident directly led to the development of a somatic symptom disorder with predominant pain. Mr. Krupinski has a pre-accident history of emotional vulnerability to the effects of future trauma. The subject accident shattered his defences and led to a spiralling downward in his level of functioning." The impairments caused by those injuries.

Mr. Krupinski's impaired functions are considered important, as his cognitive functioning has also likely been compromised; this includes his ability to concentrate, attend and focus, recall, organize and multitask, and ability to judge, make decision and respond timely and effectively, which would affect his ability to persevere at work. As well, his difficulty coping with pain and stress, frequent fatigue, reduced stamina, diminished drive, loss of confidence and mood lability, as well as his heightened anxiety, would restrict his ability to participate in his employment.

If not for the subject accident, on a balance of probabilities, Mr. Krupinski could well have worked full-time well unto the normal age of retirement, likely longer given his strong work ethic. From a rehabilitation, psychological and employability perspective, the clinical picture, based upon the available records and current observations, reflects a man who has suffered significant compromise of his competitive employability due to his myriad of symptoms and their interactive effects on daily life function." The prognosis is poor."

[161] Dr. Waisman recommended that Mr. Krupinski pursue medication and psychotherapy as treatment for his anxiety, although he did not know if Mr. Krupinski had previously tried cognitive behavioural therapy.

[162] Dr. Waisman was aware that Mr. Krupinski was prescribed sertraline, an anti-depressant, in February 2010. On re-examination, Dr. Waisman agreed that Mr. Krupinski may have been prescribed sertraline for his sleep issues.

[163] Dr. Waisman also commented in his medical-legal report on Mr. Krupinski's reliability, opining that Mr. Krupinski appeared to be a reliable person.

5. Dr. Sun

[164] Dr. Muxin Sun is an internal medicine, rheumatology, and pain medicine physician. Dr. Sunshine referred Mr. Krupinski to CHANGEpain clinic, where Dr. Sun practices. Dr. Sun primarily treats chronic pain, autoimmune conditions, and diseases of the joints, ligaments, and muscles. Dr. Sun provided Mr. Krupinski a medical-legal opinion dated October 18, 2016 and he testified at the trial.

[165] Appendix II of the report sets out Mr. Krupinski's medical history after the accident. In this section, Dr. Sun took care to clearly note which information he received directly from Mr. Krupinski during his interview--any information outside brackets was obtained directly from Mr. Krupinski. In Appendix II, Dr. Sun also referred to and summarized the other experts' reports.

[166] In Appendix II, Dr. Sun noted that Mr. Krupinski felt neck pain within one hour of the accident. Mr. Krupinski's evidence that his neck pain came on later was put to Dr. Sun, who replied that patients can experience shock after an accident such that it is difficult to remember. Dr. Sun's evidence was that it typically takes several days after an accident before a patient's full range of symptoms present, and pain can arise two to three weeks after an accident, or even later.

[167] Dr. Sun noted in his report that he only reviewed the following reports before completing his medical-legal report dated October 18, 2016:

- (a) Dr. Robinson (neurologist), dated April 20, 2015;
- (b) Dr. Earl Hardin (psychiatrist), dated September 26, 2016;
- (c) Dr. Zohar Waisman (psychiatrist), dated October 11, 2016; and
- (d) Mr. Richard Carlin (vocational consultant), dated March 28, 2016.

[168] It appears that he did not receive or review Dr. Dommissie, Dr. O'Shaughnessy, or Dr. Sunshine's records or reports. He also seemingly did not receive Dr. Hardin's addendum report, in which he defers to Dr. Waisman's opinion, or Dr. Waisman's addendum report.

6. Dr. O'Shaughnessy

[169] The defence called forensic psychiatrist, Dr. Roy O'Shaughnessy, as an expert witness. Dr. O'Shaughnessy has practiced psychiatry in Canada since 1980, and has completed training and exams to provide expert evidence in the area of forensic psychiatry.

[170] Mr. Krupinski submits that the evidence of Dr. O'Shaughnessy contains a number of errors and omissions including the date of the Arrow lawsuit, the colour of the traffic light before the accident, the history of diagnoses of depression, and the historical use of anti-depressants for help with sleep. He also says that the evidence of this expert witness is biased in favour of the defence.

[171] Dr. O'Shaughnessy described his psychiatric examination of Mr. Krupinski on June 16, 2015. He took 20 pages of handwritten notes during this examination.

[172] During that examination Dr. O'Shaughnessy conducted a Montreal Cognitive Assessment ("MOCA") of Mr. Krupinski. This is a screening instrument in neurology and psychiatry which tests vision, recall, and concentration. Mr. Krupinski scored 28 out of 30, within the accepted normal range for results, and Dr. O'Shaughnessy did not detect any psychological symptoms in Mr. Krupinski during this assessment. Mr. Krupinski disputes that Dr. O'Shaughnessy did the MOCA assessment.

[173] Dr. O'Shaughnessy testified that Mr. Krupinski did not present or report any depressive symptoms during the June 16 interview, although he expressed his concerns about his unemployment and lack of funds. He considered Mr. Krupinski's sleep, appetite, behaviour, and self-reported symptoms.

[174] Dr. O'Shaughnessy noted that Mr. Krupinski had pre-existing major depressive disorder which was well-managed with medications and was in remission. Dr. O'Shaughnessy was of the opinion that the accident did not cause Mr. Krupinski to experience any psychiatric issues, nor did it exacerbate his pre-existing psychiatric condition.

[175] Dr. O'Shaughnessy testified on the probability of recurrence in patients with major depressive disorder:

A couple of things - so it's clear he had a more serious depression 2001-ish for a period of time. It required a brief hospitalization and was on some medication for some time, he thought he discontinued those around 2002. serious depression. When you have a depression of that magnitude, you've got about a 50% chance of recurrence in the rest of your lifetime. It is evident in 2010 that he had a diagnosis having the recurrence of the depression on that presumption.

[176] Dr. O'Shaughnessy noted that, before the accident, Dr. Sunshine diagnosed Mr. Krupinski with depression, but did not record the symptoms of depression. Mr. Krupinski submits that Dr. Sunshine did not diagnose depression prior to the accident. Appendix A to the July 29, 2015 report states:

26. Mr. Krupinski had a history of depression dating back to the 1980s which he attributed to the stresses of his job where he was a manager for Xerox. He states he tried a number of antidepressants, with some benefit, and continued taking medications until approximately 2002 primarily because he thought they helped him sleep. He believes he discontinued all antidepressants in 2002 and had none prescribed in the years prior to the car accident. He believes that although he took antidepressants more recently he thinks these started post accident. During my discussions with him we went over the PharmaNet print-out which demonstrates he had been placed on antidepressants in 2010. Mr. Krupinski believed that at the time he was experiencing significant work stress as a project manager doing electronic record procedures and human resources where he worked some 60 hours per week. He states that at the time what he thought would be an 18-month project turned out to last four years primarily because the employer did not have sufficient staff to complete the project.
27. On direct enquiry, Mr. Krupinski was unable to recall any of the symptoms that he experienced that in turn led his doctors to think him depressed and recommend antidepressant medications. It was clear he was a very poor historian in describing his own emotional experiences and symptoms.

29. When asked whether he had any symptoms since August 2012, his reply was, "Not really". When challenged as to why he was continuing to see Dr. Hardin, however, he simply responded that Dr. Hardin was helping him to find work and encouraging him and he found this valuable.
30. Mr. Krupinski denies any actual psychiatric symptoms since the accident. He does, however, note that he is quite stressed regarding his financial situation which is somewhat dire. He dates this back at least to 2002 when he divorced from his wife. In addition, he suffered a tragic loss when his son died by suicide in 2001. Subsequently he was out of work for a year primarily because he was distraught and possibly depressed with the son's loss, resulting in major financial losses, especially after he discovered his wife had accumulated a large debt during the course of their relationship. As a result he states he was basically financially destitute and had insufficient monies for pension. He has very low income and needs to continue working. He has not been able to secure any contracts since the last contract completed just prior to the accident.
- [177] Dr. O'Shaughnessy also provided evidence about Mr. Krupinski's alleged loss of consciousness, amnesia and alleged memory loss. In the Appendix, Dr. O'Shaughnessy noted:
7. No fire, police, or ambulance attended the scene. By his account, the damage to the vehicle was very slight. He did, however, describe feeling "stunned" with impact and there is a brief amnesia measured in a few seconds' duration just at the time of impact. He had the presence of mind to subsequently proceed to his planned activity to pick up a cheque from a client some 40 minutes away. He then drove back home.

Psychological Symptoms Post Accident:

28. Mr. Krupinski tells me that again he experienced difficulties with recall of the events clearly but did not perceive himself to have any changes in his emotions post accident. As he kept putting it, "Six months of my life just went somewhere." He has little memory of that time frame. On questioning, however, it is clear that he does have relatively good memory, e.g. trying to find employment etc. He also recalls the details of other litigation with his former employer, Arrow Transportation, who had contracted him to do the project management at the time of the accident. As it turned out, Arrow actually sued Mr. Krupinski over the dispute regarding his fees and the time length of the project. They reached an out-of-court settlement in August 2012.
- [178] On cross-examination, Dr. O'Shaughnessy clarified that it was unlikely that Mr. Krupinski lost consciousness in the accident. In his July 29, 2015 medical-legal report, Dr. O'Shaughnessy stated:

Summary and Opinion:

7. Zbigniew Krupinski is a 67-year-old man who presents following a motor vehicle accident on June 7, 2011. At the time, he was involved in a collision in an intersection at Marine Way and Marine Drive resulting in some scrapes on his car. I take it from him that there was not a major force or blow nor did he affirm any direct blow to the head, loss of consciousness, or impairment in memory. He did feel somewhat stunned with impact but this would have been only for a few seconds in duration after which he was able to exit, inspect damages, exchange information, and proceed on his planned trip. Later that day he started noticing complaints of headaches and low back pain. The low back pain resolved with time but he has had persistent complaints of headaches and has seen different neurologists, including Drs. Robinson and Woolfenden, for his complaints.

[179] Dr. O'Shaughnessy also commented on Mr. Krupinski's inability to recall and describe his own symptoms and medical history:

9. Psychiatrically, he has somewhat of a difficult history to understand fully. In part this is because Mr. Krupinski is quite frankly a very poor historian when it comes to describing his own emotional experiences or recognizing symptoms of emotional difficulties. Further, he is a terrible historian in the sense of not being able to recall medications he has received, how long he has taken them, or their impact as well as having difficulty in general in sequencing events over time. He readily acknowledges that his memory and concentration are poor and appear to be getting worse with time which understandably concerns him. On my examination, however, he showed normal functioning on the MoCA, a cognitive screening instrument. He may be aware of more subtle cognitive decline than can be determined in a screening instrument.

[180] On cross-examination, Mr. Krupinski suggested to Dr. O'Shaughnessy that Mr. Krupinski was prescribed sertraline for sleep, rather than for depression. Dr. O'Shaughnessy explained that Mr. Krupinski had been prescribed zopiclone for sleep, and that sertraline is not prescribed for sleep. On re-direct examination, Dr. O'Shaughnessy confirmed that Mr. Krupinski took sertraline for depression. Dr. O'Shaughnessy indicated similarly in his July 29, 2015 medical legal report:

12. Mr. Krupinski did not think he was experiencing any psychiatric symptoms pre accident although the records document he in fact started on an antidepressant (sertraline) pre accident. He could not recall the details of the symptoms he was experiencing nor are these recorded in any of the medical records I reviewed under Appendix B. In retrospect, he believes it may have been related to the fact that he was experiencing significant pressure with Arrow but he could not be more precise. The records note that he continued taking sertraline through to 2012, at which point the PharmaNet print-out ends. I am assuming he stopped taking them at that point.

13. Mr. Krupinski tells me he did not perceive himself as having any psychological problems post accident nor did he see any worsening of his depression or other psychiatric symptoms. On direct enquiry, he denied any symptoms suggestive of Post-Traumatic Stress Disorder

such as intrusive memories, flashbacks, nightmares, driving fears, avoidance, etc. He denied any other anxiety symptoms save for his concerns regarding his financial situation and his future. There was no evidence of any panic attacks, phobias, or social anxieties. He denied any symptoms of depression apart from the fact that he was feeling somewhat demoralized regarding his limitations and abilities to work and support himself. He did not perceive himself as depressed.

7. Dr. Dommisse

[181] Dr. Iain G. Dommisse, an orthopaedic surgeon, testified as an expert witness for the defence. Mr. Krupinski did not dispute Dr. Dommisse's qualifications.

[182] Dr. Dommisse assessed Mr. Krupinski on January 28, 2015, and provided a medical-legal report. In that report, Dr. Dommisse opined as follows on Mr. Krupinski's reported symptoms, diagnosis, and prognosis:

OPINION:

In answer to your specific questions:

4. The history of the accident and the patient's complaints as related to you;

Mr. Krupinski stated that his vehicle was rear-ended.

Mr. Krupinski complains of neck and headache symptoms.

6. Your diagnosis of the patient's injuries and the causal connection between the accident and those injuries;

In my opinion Mr. Krupinski sustained a Grade II strain of his cervical spine as a result of his accident.

8. Your prognosis with respect to the patient's injuries.

In my opinion the prognosis for Mr. Krupinski is fair with respect to his injuries.

[183] Dr. Dommisse recommended Mr. Krupinski receive physiotherapy to treat his symptom flare-ups. Ms. Randle accepts the quantum of special damages Mr. Krupinski claims for physiotherapy treatments: \$592.00

8. Richard Carlin

[184] Mr. Richard Carlin is a vocational consultant, qualified to provide expert evidence in vocational rehabilitation, with experience in career coaching. He provided a report dated March 28, 2016 as an expert for Mr. Krupinski.

[185] In cross-examination, Mr. Carlin was taken to the following section of his report:

He reported that as his contract with Arrow was ending, he was actively engaged in negotiating his next contract. It is my understanding that he was having discussions with Robert Half International, Epicor Software Corporation, and a consulting company in Merritt, British Columbia.

[186] However, the evidence of Mr. Krupinski was that his job search around the time of the accident would not have involved Robert Half, since Robert Half had just released him from his contract as a sub-contractor.

[187] Mr. Carlin was not aware that Mr. Krupinski's contract with Arrow ended before the accident. On cross-examination, Mr. Carlin testified that he assumed Mr. Krupinski was still under contract with Arrow at the time of the accident. Mr. Carlin's evidence was that this did not change his opinion regarding Mr. Krupinski's employability.

[188] Mr. Carlin testified that Mr. Krupinski explained to him that it is challenging to enter the IT consulting market in Vancouver, and provided his opinion that time out of the work force in general would be disadvantageous.

[189] Mr. Carlin testified that references are a significant factor affecting employability in a close-knit industry such as IT consulting. It would therefore be difficult to seek new employment without a client reference.

[190] On cross examination, Mr. Carlin said that he was unaware of Mr. Krupinski and Arrow's contractual dispute which prevented Arrow from providing Mr. Krupinski a reference. Mr. Carlin also stated on cross-examination, in respect of Mr. Krupinski's potential client references, "I thought he did other consulting work with Robert Half. If he did not, I guess that would be it".

9. Darren Benning

[191] Darren Benning, an economist, authored a report dated November 15, 2016 and testified as an expert for Mr. Krupinski. Mr. Benning provided past and future loss of income calculations in his report.

[192] Mr. Benning listed the following background information in his report:

Background

PETA Consultants has been supplied with the following background information, all of which is assumed to be complete and accurate for the purposes of this report:

- o Zbigniew Krupinski was born on June 23, 1947.
- o Mr. Krupinski has a Bachelor's degree in Computer Science from the
- o University of Western Ontario, and a Certificate in Client/Server
- o Computing from the California Institute of Technology.

o At the time of the accident, Mr. Krupinski was working as an independent contractor, earning \$85.00 per hour.

o Mr. Krupinski has not returned to work after the accident.

o We have not been provided with Mr. Krupinski's income tax returns.

o The trial for this matter is scheduled to commence on February 14, 2017.

[193] The utility of Mr. Benning's evidence is limited. Mr. Benning's report indicates that he believed Mr. Krupinski was working at the time of the accident, and did not return to work after the accident.

[194] Mr. Benning also did not receive other relevant information. He was not informed of Mr. Krupinski and Arrow's dispute, which prevented Arrow from giving Mr. Krupinski a reference. Mr. Benning also did not receive Mr. Krupinski's income tax returns or any additional corporate information. Mr. Benning was unaware of Mr. Krupinski's corporation, Huntingdon York.

[195] Mr. Benning inputted \$95,000 per year as Mr. Krupinski's without accident annual income. This does not account for business expenses that Mr. Krupinski would necessarily shoulder as a contractor, which would be deducted from the gross income. There is no evidence of Mr. Krupinski's business expenses before the Court. As a result, the \$95,000 figure is not helpful in assessing Mr. Krupinski's income loss between the accident and the date of trial.

[196] Mr. Benning noted that his table of future income loss multipliers applicable to Mr. Krupinski is no longer valid, because the "future loss" from 2018 to 2023 is now past loss. Mr. Benning testified that the survival rate would change and there would be additional deductions.

F. Defence Fact Witnesses - Post 2015-2016

[197] The medical fact witnesses called by the defence were of assistance in understanding the symptoms experienced by Mr. Krupinski in the years following the experts' medical-legal reports.

1. Dr. Wolak

[198] Dr. Wolak is the general practitioner who took over as the family physician of Mr. Krupinski when Dr. Sunshine retired in 2019. In addition to the alleged injuries and symptoms from the accident, Dr. Wolak's clinical records note the following for Mr. Krupinski's Medical Profile:

- Ischemic heart disease
- Copd (with emphysema, chronic bronchitis)
- Disorders of lipid metabolism

- Essential hypertension
- Obstructive chronic bronchitis
- Obstructive sleep apnea (adult and pediatric)
- Old myocardial infarction (angioplasty x 1 stent)

The Lifestyle comments note regular, moderate consumption of alcohol and 2-3 cigars a week. Social History notes the plaintiff as "retired".

[199] Dr. Wolak's clinical records also contained the following:

- April 15, 2018 - Coronary Stent - Burnaby Hospital / heart attack
- March 3, 2021 - Vancouver General Hospital CT of sinus (comparison with September 14, 2013 CT of sinus at Saint Paul's Hospital).
- May 12, 2021 - Dr. Amin Kanani, Infectious Diseases, Internal Medicine consult report - mold issues in home and concerns about effects on health
- July 19, 2021 - Eye Physician and Surgeon Dr. Noa Mallek consult report - Impression and Plan: Mild Cataracts - conservative management
- Sept 1, 2021 - VGH - moved out to Langley in July - shortness of breath and chest pain major concern
- Sept 23, 2021 - Langley Memorial Hospital for chest pain
- March 9, 2022 - Langley Memorial Hospital Emergency/Ambulatory Clinical Record - chief complaint: chest pain, cardiac feature

[200] Dr. Wolak testified evidence that, during their February 3, 2020 appointment, she discussed with Mr. Krupinski his zopiclone use. She specifically told him that she recommended he taper off the medication, because it is not meant to be used on a long-term, daily basis. She noted that best practice from sleep experts for insomnia treatment is Cognitive Behavioural Therapy.

[201] Dr. D'Oyley, who testified after Dr. Wolak, explained Dr. Wolak's reference to "BEERS criteria" in a clinical entry dated July 8, 2020. According to Dr. D'Oyley, the BEERS criteria refer to a list of potentially harmful medications for individuals over the age of 65. Zopiclone is amongst the listed medications, as it poses a risk of sedation, falls, confusion, and dependency.

[202] Dr. Wolak's clinical records also reflect Mr. Krupinski's ongoing concern that mold has caused his difficulty breathing, and his insistence on obtaining an antifungal for his symptoms. Dr. Wolak's October 29, 2020 clinical entry noted that Mr. Krupinski wished to see Dr. Reynolds for a second opinion regarding mold allergy.

- [203] Dr. Wolak explained that she referred Mr. Krupinski to an infectious diseases doctor, Dr. Jan Hajek. Her July 27, 2021 clinical entry noted "re-refer to ID regarding his concerns as he does not believe me".
- [204] Dr. Wolak testified on the meaning of activities of daily living ("ADL") and instrumental activities of daily living ("IADL"). ADL are more elementary activities, such as bathing and using the washroom which Mr. Krupinski can do. IADL are more complex, planning related activities, such as managing one's finances, grocery shopping, and managing one's medications. Mrs. Krupinski has assumed responsibility for managing the family finances.
- [205] On cross-examination, Dr. Wolak confirmed that she did not treat Mr. Krupinski's accident-related injuries. Her testimony was that she noted that Mr. Krupinski was attending CHANGEpain clinic to treat his headaches and neck pain.

2. Dr. D'Oyley

- [206] Dr. Heather D'Oyley is a psychiatrist who works with the Cambie Older Adult Mental Health Team.
- [207] Dr. D'Oyley's December 1, 2020 psychiatric assessment notes that Mrs. Krupinski was present during the majority of Dr. D'Oyley's interview with Mr. Krupinski, although Mrs. Krupinski left the room for the final 20 minutes of the interview.
- [208] At trial, Dr. D'Oyley was unable to confirm whether Mr. or Mrs. Krupinski provided the following information, as recorded in her assessment notes: "he has found that there has been an escalation in his daily usage of alcohol from 1-2 drinks on weekends to 4-5 glasses of wine daily for most days of the week." Dr. D'Oyley testified that she understood Mr. Krupinski's alcohol use had escalated in the year preceding her December 1, 2020 assessment.
- [209] Dr. D'Oyley noted in her psychiatric assessment various stressors present in Mr. Krupinski's life:

He states that he was last feeling psychiatrically well approximately 1 year ago. He outlines a considerable number of stressors that have occurred over this 1 year. Specifically, he indicates that he has been feeling physically unwell, requiring approximately 6 emergency room visits for respiratory ailments that have been attributed to mould within his home. He indicates that while he and his wife have removed carpets from the master bedroom in an effort to mitigate the mould issue, that there have been some disagreements on how to handle this with his landlord. As a result, he indicates that he has applied to the BC Human Rights Tribunal for execution of this issue, but that full mitigation has not been possible at this time. Additionally, the patient had a significant motor vehicle accident in 2011 that has resulted in chronic pain Issues and a variety of other health concerns. He tells us today that the litigation with ICBC has been contentious. He tells me that ICBC has hired computer hacker? to steal email between himself and his lawyers. He indicated that he was able to accrue evidence of the hacks and trace some of the hacks back to IP addresses in China. He indicates that he wrote a letter with this evidence to the attorney general

of BC and in the week after he sent the letter, 4-5 bolts of his tires were removed, causing him to be involved in a motor vehicle mishap from which he was fortunately uninjured but where the wheel of his car detached fully. He indicates that he became aware of the hacking in approximately 2016 and that the incident with the car tires occurred in approximately 2017. He and his wife further indicate that the current status of the ICBC claim is uncertain as they have not been able to secure a medicolegal report from the former family physician, Dr. Sunshine, who I understand is now retired.

The patient tells me that although has not noted any further suspicious activity on his emails, that thereafter his wife's emails were also hacked and that, again, he was able to accumulate evidence including IP addresses of the hacking events. He indicates that the issues with Leigh's emails occurred in approximately 2018. Since that time, he indicates that he is certainly more vigilant and has put in place a motion sensor light within his home. Otherwise, he indicates that he has not appreciably changed his daytime routine. He does sometimes notice events that have been suspicious. For example, he states that this week the automatic locking mechanism of the car's key fob used by his wife was not working correctly. It is the patient's understanding that this occurs when there has been a breach of the car security system in the past, and he wonders whether the car's locking mechanisms have been tampered with as the key fob has not worked numerous times during the week.

Finally, his other major stressor is ongoing challenges with the Medical services Plan of BC.

[210] Dr. D'Oyley also noted in her December 1, 2020 psychiatric assessment that they discussed an incident where Mr. Krupinski locked his wife out of the house.

Collateral from Dr. Parmer's office dated September 1 indicates that there was an incident where he locked his wife out of the house, feeling that she was trying to hurt him. On one note I saw that he tried to barricade the door, on that occasion, with a chair. The patient was minimizing of this incident, saying that it was "a joke". When asked about the precipitant, he indicated that he and his wife had been arguing and that he was trying to get away from her. Unfortunately, I did not have the opportunity to speak with Leigh directly about this incident.

3. Dr. Ward

[211] Dr. David Ward is also a psychiatrist who also works with the Cambie Older Adult Mental Health Team.

[212] Mr. Krupinski met with Dr. Ward on four occasions: on December 14, 2020, January 18, 2021, March 30, 2021, and June 8, 2021. Dr. Ward's consult reports were part of Dr. Wolak's clinical records for Mr. Krupinski.

[213] Dr. Ward's first meeting with Mr. Krupinski is reflected in a psychiatric assessment dated December 14, 2020, during which a social worker and Mrs. Krupinski were also present. Dr. D'Oyley recommended that Mr. Krupinski attend for diagnostic assessment and ongoing treatment by the Cambie Older Adult Mental Health Team.

[214] Dr. Ward noted in that consult report that Mr. Krupinski was consuming alcohol "almost certainly" to excess at the time of the assessment.

[215] Dr. Ward also addressed Mr. Krupinski's reliability. He noted in the December 14, 2020 consult report that Mr. Krupinski provided information that contradicted his own reporting to Dr. D'Oyley: "Unfortunately at times the history that Stan gave us at least somewhat contradicted the history he gave Dr. D'Oyley."

[216] Dr. Ward stated in that consult report that Mr. and Mrs. Krupinski disagreed about the nature and timing of Mr. Krupinski's symptoms:

Both he and his wife disagree to some extent as I said above about his depression. Generally Stan's wife Leigh indicated that she feels he is underestimating the extent of his depression.

His mental health issues are harder to delineate.

He and his wife disagree about this to some extent but they both seem to agree that he has been depressed to some extent "for 40 years". His wife indicates that since his accident in 2011 his mood has been worsening and she feels that he is chronically depressed. In addition, it sounds as if he has had significant issues with anxiety although I am not as clear if these are chronic.

He Indicates that he has been much worse starting approximately a year ago. It is very difficult to understand what factors may have Impacted this. I am also not entirely clear when in 2019 he feels he was still reasonably stable psychiatrically.

When asked him about this specifically, he indicates that there were a number of issues that came together that made it more difficult for him to cope emotionally although he does not entirely agree that he has been consistently depressed. He indicates that a long-standing disagreement with his landlord regarding mold in his apartment which has been very stressful for him but this is not new as he 1st became concerned about this in 2018. His family doctor retired in late 2019 and his previous private outpatient psychiatrist retired around the same time. Initially he did not feel that these were particularly stressful for him but when we discussed these retirements further he indicated that they were relevant and significant, in particular, he and his wife tell us that they are awaiting a medicolegal assessment done by his previous family doctor who has now retired and both the couple agree that the fact that this document has not been provided to them Is very stressful.

This gentleman was seen at AAC at Vancouver General Hospital in May of this year. He believes he referred himself as he was looking for psychiatric assistance. At that time, he was diagnosed with "mild depression" and a suggestion was made that he increase his sertraline from 50 mg to 75 mg. Unfortunately this did not happen he thinks in part as there was some confusion about who would do the prescribing for this medication.

Subsequently, he has been followed by the Geriatric Medicine Clinic at Vancouver General Hospital who have been concerned about his mood, his level of anxiety and at times about the some possibility of paranoia. In addition, it has become clear that he is drinking more than he should. He indicates that this started in earnest approximately six months ago. He says that he is now drinking approximately 2-3 glasses of wine per night and that is very helpful in terms of his sleep."

[217] Dr. Ward commented on Mr. Krupinski's narrative style, writing in the consult report that "[hi]s thought form was circumstantial but never disorganized".

[218] Dr. Ward also noted Mr. Krupinski's preoccupation with the impact of mold on his health: He is very preoccupied with the potential impact that mold is having on him. He initially indicated for example that this is his primary issue and I had some difficulty with refocusing him so that he would discuss his psychiatric issues which he appeared to understand superficially were the purpose of this visit. For example, he showed me an agar plate that he had brought with him in which he is culturing some of his skin cells to prove that there is mold on them.

[219] Dr. Ward was unable to independently recollect much of the details he recorded in the consult report, but he testified that his records would accurately reflect Mr. Krupinski's reporting during the visits.

[220] Dr. Ward listed in his December 14, 2020 consult report Mr. Krupinski's current medications: Candesartan, Sertraline, Mehra, Atorvastatin, Amiodipine, Combivent, Spiriva, Symbicort, Trazadone. Zopiclone was discontinued in 2019.

[221] Dr. Ward conducted a MOCA of Mr. Krupinski, noting that Mr. Krupinski did "relatively well" by scoring 28 out of 30, losing points only for delayed recall. Dr. Ward ended his mental status observations by noting:

His insight and judgment are chronically somewhat questionable. I suspect when he is intoxicated they are significantly worse.

[222] Dr. Ward testified regarding his consult report dated March 30, 2021. At this reassessment visit a psychiatric nurse also attended, and Mrs. Krupinski sat in on the latter part of the interview. He could not recall any specific discussion with Mr. Krupinski regarding his sleep habits, but he usually recommends that patients remain out of bed during the daytime. Dr. Ward noted the following in the consult report:

We discussed Stan's computer use. I was under the impression previously that he would stay in bed all day and sleep or doze but in fact it sounds as if when he stays in bed he is on the computer much of the time. He says he engages in a number of activities including playing games and watching movies but that he is continuing to do a great deal of research on a number of his preoccupations.

[223] Dr. Ward testified regarding his consult report dated June 8, 2021, which referenced an incident wherein someone deliberately damaged a component of Mr. Krupinski's car. Dr. Ward agreed that Dr. Krupinski experienced nightmares arising from that incident.

[224] Dr. Ward's June 8, 2021 assessment involved separate interviews of Mr. and Mrs. Krupinski because of "their somewhat conflicting versions of events".

[225] Dr. Ward noted in his June 8, 2021 consult report that he observed a discrepancy in respect of Mr. Krupinski's alcohol use:

As per usual, his history does not entirely agree with his wife's although they are closer in agreement than I have seen previously. The major discrepancy is probably relating to the amount of alcohol he is consuming although they both agree that this has decreased.

[226] Dr. Ward recorded in the June 8, 2021 consult report that Mr. and Mrs. Krupinski are in agreement in respect of their beliefs about mold and government institutions:

Stan is a 73-year-old man with a very complex psychiatric history who appears to have quite significant depression that presents somewhat atypically and which is improving with increasing doses of sertraline. In addition, he has a number of unusual beliefs about ICBC amongst other entities which may be held to a delusional extent although I would note that his wife appears to agree with him about most if not all of these beliefs and certainly supports his concern about the mold infestation in their home.

In addition, Stan has a number of fairly significant medical issues and continues to consume alcohol although in decreasing amounts.

Overall, in terms of his mood and his sleep which are our targets at the team currently they appear to be improving.

III. FINDINGS OF FACT

A. Credibility

[227] Before engaging in fact finding, the Court must assess the credibility and reliability of the evidence adduced, including the trustworthiness of the witnesses' testimony.

[228] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, Justice Dickson (as she then was) laid out the factors for assessing the reliability of oral evidence:

[8] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his

recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanor of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont. H.C.); Faryna v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Faryna]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

- [9] Where, as here, a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury the court must be exceedingly careful in examining the evidence and assessing credibility: Price v. Kostryba (1982), 70 B.C.L.R. 397
- [10] The typical starting point in a credibility assessment is to presume truthfulness: Halteren. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.
- [229] The Court must be alive to the subjectivity of a plaintiff's complaints of soft tissue injury when assessing damages. In Buttar v. Brennan, 2012 BCSC 531, Justice Abrioux (as he then was) synthesized the caselaw as follows:
- [24] In a case such as this where there are little, if any, objective findings except some minor degenerative changes in the neck, back and knee, the following should be taken into account by the trier of fact:
- the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages Price v. Kostryba (1982), 70 B.C.L.R. 397 at 397 (S.C.);
 - the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery (Price at 399);

- an injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury (Price at 399);
- the doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room Edmondson v. Payer, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114;
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries Fan (Guardian ad litem of) v. Chana, 2009 BCSC 1127 at para. 73;
- in a case of this kind care must be taken in reaching conclusions about injury alleged to have continued long past the expected resolution. The task of the court is to assess the assertion in light of the surrounding circumstances including the medical evidence. The question is whether that evidence supported the plaintiff's assertion and, if not, whether a sound explanation for discounting it was given Tai v. De Busscher, 2007 BCCA 371 at para. 41.

[25] In light of the above, an assessment of the plaintiff's credibility is critical:

The test must reasonably subject his story to an examination of its consistency with the probabilities which surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Faryna v. Chorny, [1952] 2 D.L.R. 354 at 357.

[230] Thus, the trier of fact may accept all, some, or none of a witness' evidence: Currie v. Taylor, 2014 BCCA 51 at para. 33.

1. Mr. Krupinski

[231] Mr. and Mrs. Krupinski both testified at trial. Their evidence was inconsistent with evidence from other witnesses and with documentary evidence before the Court.

[232] Unfortunately, I cannot find Mr. Krupinski to be a credible witness. I say "unfortunately" in recognition of his diligence and hard work in pursuing his claim. He described to the court the stress of representing himself, and I acknowledge his effort.

- [233] However, Mr. Krupinski strongly believes that the accident is the cause of his inability to find work, and thus his dire financial situation, to the exclusion of extensive medical evidence of other medical and stress related causes.
- [234] Most importantly, Mr. Krupinski does not acknowledge the importance and effect of the lack of having a reference from Arrow although he made many submissions regarding the cause of the lack of a reference. His employment situation, although of utmost importance to him, did not accurately take into account events other than the accident.
- [235] Mr. Krupinski has strong beliefs about many issues - for example the court process (as illustrated in his claim for special costs), mold, and the PRC hacking of his computer. The three doctors who were fact witnesses testified regarding his commitment to these beliefs.
- [236] I find that these beliefs interfered with his ability to understand and accurately recount the events of the last twelve years. As Drs. Ward and O'Shaughnessy observed as well, he is a poor historian generally. In the absence of corroborating evidence, I also do not find him to be a reliable witness.
- [237] With regard to his ability to deal with stress, Mr. Krupinski testified about his history of dealing with major stressors such as the death of his son and of representing himself in this court case. He does not, however, appear to accept the medical evidence regarding his history with the numerous other stressors and medical issues.
- [238] In the result, while I accept some of Mr. Krupinski's evidence, where his evidence differs from the evidence as a whole, I will rely on the evidence which I do accept.

2. Mrs. Krupinski

- [239] Mrs. Leigh Krupinski is the only lay witness that Mr. Krupinski called at trial.
- [240] Mr. and Mrs. Krupinski married in 2008. Before they married, Mrs. Krupinski ran a successful esthetic laser business which she sold in 2006. She now works as a bookkeeper.
- [241] While I accept her evidence regarding their happy life prior to the accident, I treat Mrs. Krupinski's evidence with skepticism. There were numerous points where her evidence was inconsistent with Mr. Krupinski's evidence.
- [242] On cross examination, Mrs. Krupinski did not recall reporting to Dr. Ward that Mr. Krupinski "spends much of his day in bed in part due to energy, in part due to boredom" and "when he's able to get out of bed and has a goal his emotional state improves".
- [243] Mrs. Krupinski testified that Mr. Krupinski's functioning is extremely limited because of his symptoms, but the evidence shows they have taken multiple road trips.

- [244] Mrs. Krupinski downplayed both Mr. Krupinski's increased alcohol use in recent years and her concern, which was documented in evidence before the Court. When counsel put to her the topic of her husband's psychiatry appointments with Dr. Ward, which Mrs. Krupinski attended, she could not recall the nature or content of those sessions.
- [245] Dr. D'Oyley's clinical records note that Mr. and Mrs. Krupinski disagreed over Mr. Krupinski taking his car keys with the intention to purchase more alcohol when he ran out. On cross-examination, Mrs. Krupinski denied that this was a point of contention and characterized the clinical notation as a serious misinterpretation.
- [246] Mrs. Krupinski also minimised throughout that Mr. Krupinski had significant health issues unrelated to the accident, including his respiratory illness, heart attack, and hearing loss.
- [247] Mrs. Krupinski testified that she kept a headache diary, but said her husband was unaware that she was doing this. Mr. Krupinski later testified that Mrs. Krupinski had asked him to make entries in the diary when she was away.
- [248] Mrs. Krupinski had expressed her agreement with her husband's conspiratorial beliefs about government institutions. Their computers were hacked, and nuts came off their vehicle. She agrees with Mr. Krupinski that these were deliberate acts of sabotage by foreign government agents.

B. The Plaintiff's Injuries

- [249] I accept that the plaintiff has suffered injuries as a result of the accident. The issues to be resolved are the duration and extent and severity of the injuries.
- [250] Determining the duration, extent and severity of the accident-related injuries is more complex due to inconsistent diagnoses, inconsistent self-reports, and the long period of time over which other events and medical circumstances arose or progressed. As Dr. O'Shaughnessy noted, Mr. Krupinski has a history that is psychiatrically difficult to understand.
- [251] The diagnoses of Drs. Sunshine (as to initial injuries but not duration), Dommissé and Robinson are accepted. Dr. Sunshine opined that the following medical issues arose from the accident: 1. Post-traumatic headache of a protracted nature and associated; 2. Post-traumatic neck pain of a musculoskeletal nature, probably associated with trauma of the vertebral spine which was previously affected by hyperostosis syndrome. Dr. Robinson stated that the plaintiff sustained a soft tissue injury to his neck as a result of the accident. He diagnosed chronic posttraumatic headache related to neck injury sustained in the accident. Dr. Dommissé diagnosed a Grade II strain of his cervical spine as a result of his accident.

- [252] Six days after the accident the plaintiff told Dr. Sunshine that his initial symptoms, which had an onset approximately one hour after the impact, consisted of low back pain, headache, nausea and shooting pain on the inner side of his left thigh. The low back pain gradually improved, and the headache with accompanying nausea persisted. Subsequently the thigh pain resolved.
- [253] On the day of the accident when the plaintiff attended the Joyce Medical Clinic he also reported right arm pain. This pain was not included in the report to Dr. Sunshine, and has since resolved. Similarly, the report to the Clinic of chest pain after the accident was not provided to Dr. Sunshine and, as a symptom of the accident, has not been pursued. The plaintiff's other medical conditions include chest pain unrelated to the accident.
- [254] The plaintiff's headaches commenced within hours of the accident and have been the most serious persisting symptom of the injuries resulting from the accident. The notes and report of Dr. Sunshine include the plaintiff's contemporaneous reports of the headache, and his other medical symptoms, to his family doctor. Thus, I place greater weight on them than on reports given in other circumstances later in time.
- [255] It is accepted that the plaintiff does not have a history of similar headaches. In other words, headaches are not a pre-existing condition. Dr. Sunshine reviewed his notes for two years prior to the MVA and did not note any pertinent headache, neck pain, or back pain other than occasional flare-ups of low back discomfort since age 18. Mr. Krupinski had had four prior concussions with transient loss of consciousness.
- [256] Dr. Sunshine's noted that the headaches were present all the time after the accident, and that their intensity appeared to have eased the next month in July when they were occurring on a daily basis. Nausea without vomiting accompanied them. An opinion from Dr. Woolfenden, a neurologist, was requested. In September 2011, it was noted that the headaches were daily but he was trouble-free at night.
- [257] The daily headaches interfered with his ability to focus and sustain activity, and he could not think. Dr. Sunshine noted that Mr. Krupinski had used a C-PAP machine for sleep apnea for 30 years, and that sleep apnea is often associated with mental dullness when untreated.
- [258] Dr. Woolfenden recommended in February, 2012 that Mr. Krupinski discontinue the use of all codeine-containing analgesic pain medications, which advice was followed by Mr. Krupinski (This was related to a potential diagnosis of medication overuse headache also known as rebound headache.) In March, 2012 Mr. Krupinski told Dr. Sunshine that he had been going for regular appointments with a naturopath at Ocean Park for brain reconditioning and feedback. Mr. Krupinski reported that although he did not feel like his old self, he considered himself a lot more functional and was working at the computer.
- [259] Dr. Sunshine noted that Mr. Krupinski had reported to Dr. Woolfenden in April, 2012 that his headaches had significantly improved. He was taking only the occasional Tylenol less than once per week.

- [260] In September 2012 Mr. Krupinski told Dr. Sunshine that he had had prolotherapy at the recommendation of his naturopathic physician. It resulted in significant improvement, and he credited the prolotherapy with his ability to discontinue analgesics. The dates of the prolotherapy and subsequent relief are not clear. Although the report to Dr. Sunshine was in September, Mr. Krupinski testified it was in February which is also the time he discontinued analgesic pain medication.
- [261] In mid-2012 Mr. Krupinski says he experienced the onset of neck pain symptoms. Dr. Robinson stated that it was unusual that the onset of neck pain is delayed, but that it is consistent with his diagnosis of a neck injury sustained in the accident. I accept that the neck pain experienced by Mr. Krupinski was related to the accident, and that its onset coincided with the recurrence of the accident-related headaches when the beneficial effect of the prolotherapy subsided after approximately four to six months of relief from pain. Repeat prolotherapy did not assist. There is also evidence in Drs. Sunshine and Sun's notes that the neck pain was earlier.
- [262] On an office visit to Dr. Sunshine in June, 2013 Mr. Krupinski complained of recurrent neck pain and headaches. He continued to see the naturopath monthly, but the benefits of the prolotherapy had subsided. In July, 2013 he described ongoing low-grade pain at the back of the neck plus headaches. In this time frame he was also dealing with significant sinus issues and some chest pain, and was referred to a cardiologist. On the last visit before the writing of his report, Dr. Sunshine noted only a discussion regarding the sinus concerns and elevated blood pressure.
- [263] Dr. Sunshine also noted that the results of the CT scan and of the MRI obtained privately were not related to the accident.
- [264] Regarding Mr. Krupinski's fainting in January, 2012, Dr. Sunshine and Dr. Woolfenden were of the view that it was vaso vagal, or a result of standing up after laying down. There is no indication that it was attributed to the accident.
- [265] At the date of the writing of his report, October 15, 2013, Dr. Sunshine stated: "As a result of time, therapy and medical support system, Mr. K has gradually come to resolution of these symptoms. The period of time has been substantial but satisfactory amelioration of the symptoms has since occurred. I do not anticipate further residua arising out of the sequelae of the MVA of June 7th, 2011."
- [266] After Dr. Sunshine opined in October, 2013 that Mr. Krupinski's symptoms had resolved, Mr. Krupinski reported continuing symptoms to other doctors. When he saw Dr. Robinson, a specialist in headache and neurology disorders, in February, 2015, Mr. Krupinski reported daily bifrontal headaches of a moderate to severe intensity, with nausea when severe. He said he may stay most of the day in bed, and is frustrated and occasionally depressed over his continued pain. He did not believe that his headaches had improved. He described having difficulty with mental focus, only able to get things done on occasional good days when the headaches are tolerable.

- [267] In accepting, as I do, that Mr. Krupinski's headache, nausea and neck pain continued after the October 2013 report of Dr. Sunshine, I am, after considering all the evidence, not relying on that part of Dr. Sunshine's report that the symptoms had resolved.
- [268] It was Dr. Robinson's opinion that unless Mr. Krupinski responded to the Botox treatments suggested, it is probable that he will continue to have posttraumatic headache impacting his life indefinitely. Because botox treatments are not covered by the medical plan in British Columbia, Mr. Krupinski has not been able to afford these treatments.
- [269] Mr. Krupinski testified, twelve years post-accident, that he continues to have headaches. He describes his current symptoms and injuries as being chronic pain in the neck, front of head, jaw, and lower back; nausea; and cognitive problems including depression, short term memory, inability to focus and being mentally unable to do things. With regard to the jaw pain, I note that Mr. Krupinski did not pursue his claim regarding injuries for which he was treated by a dentist whose reports were not entered or relied upon. There has been no medical evidence cited with regard to the continuation of any low back pain.
- [270] Treatments for the headaches and neck pain are continuing. Mr. Krupinski has attended the CHANGEpain Clinic regularly since 2016 and finds it to be of assistance providing temporary relief. During the trial when he was unable to keep his regular appointments he noted that his pain increased. He also continues to have treatments with an osteopath, chiropractor, acupuncturist and naturopath.
- [271] I find that the accident caused the plaintiff's headache, associated nausea, and neck pain. With regard to the duration of this pain, the most recent expert report is dated in 2017, and none of the expert witnesses had examined Mr. Krupinski since writing their reports.
- [272] Dr. Sun, whose report was dated October 18, 2016 is the director of the ultrasound guided interventional program at the CHANGEpain clinic. His diagnosis at that time was that Mr. Krupinski had chronic myofascial pain in his neck, and constant headaches, which are a direct result of the MVA which caused a whiplash-type acceleration-deceleration injury. He testified that he had no updated records. I note that it would have been helpful if, at a minimum, an assessment had been performed during one of Mr. Krupinski's visits to the clinic for treatment but the plaintiff did not arrange any follow-up assessment or diagnosis. However, it is necessary to make findings on the evidence before the court.
- [273] The prognosis of Dr. Sun was poor in that chronic pain would continue, although Dr. Sun was hopeful that a combination of his upcoming treatments would provide some decrease in pain. But even with some improvement, Mr. Krupinski would remain significantly disabled by his ongoing pain. However, there is no evidence that Mr. Krupinski has started an active rehabilitation program as recommended by Dr. Sun, which echoes the recommendation of Dr. Robinson that Mr. Krupinski should be as physically active as possible.

- [274] With regard to duration, I accept the evidence of Dr. Sun and Dr. Robinson regarding the indefinite duration of Mr. Krupinski's posttraumatic headache. The evidence of the plaintiff is that twelve years after the accident he is still experiencing headaches is accepted. On the totality of the evidence I find that the headache and neck pain is managed by the CHANGEpain treatments and that the intensity is reduced or ameliorated. As Dr. Dommissie and Dr. O'Shaughnessy stated in 2015, I conclude that the headache and neck symptoms have remained somewhat improved at present. Comparatively few of his visits to Dr. Wolak been regarding accident-related symptoms.
- [275] I turn to other symptoms experienced by Mr. Krupinski as described and discussed by him and in the expert evidence. With regard to depression, Dr. Sun noted in October 2016 that Mr. Krupinski meets the criteria for moderately severe depression. The doctor does not attribute the depression to the accident.
- [276] Dr. Hardin, his treating psychiatrist whose reports were filed but who did not testify, provided the psychiatric diagnoses of: Somatic Symptom Disorder with predominant pain, persistent, with considerable frustration that he is not achieving any notable or lasting relief from his symptoms; and, Mild Neurocognitive Disorder from traumatic brain injury with cognitive deficits more severe in the initial six months but with persisting features.
- [277] Mr. Krupinski saw Dr. Hardin forty-four times in the five years between 2011 and 2016 both by himself and with his wife for counselling. Dr. Hardin describes Mr. Krupinski as giving accounts of his distress and limitations, and his resignation to his incapacity. His opinion is that that a whole range of symptoms were caused by the accident and have persisted in some form preventing Mr. Krupinski from using his skills as a competent computer program designer and project manager. The accident occurred just at a time when Mr. Krupinski had established himself and his competency in British Columbia. Dr. Hardin anticipates that he will continue to be called on for supportive psychotherapy and marriage counselling.
- [278] Unfortunately, some of the facts relied upon by Dr. Hardin are not in evidence at the trial. Although Mr. Krupinski told the doctor that he had three employment interviews scheduled at the time of the accident, and he subsequently missed them, that is not in evidence. The information provided to the doctor that he was expecting an excellent reference from an executive of the company he worked for; the evidence is that no reference would be provided.
- [279] With regard to the opinion that Mr. Krupinski suffered a traumatic brain injury, I rely on the reports of Dr. Sunshine based on his appointments with Mr. Krupinski contemporaneous with the accident, and of Dr. Robinson.

Mr. Krupinski was very straightforward and forthcoming in describing the events of the accident. He stated there was no direct blow to his head. He also stated that there was no loss of consciousness. The impact caused his coffee which I believe was sitting in a coffee holder to spill all over the inside of the car. That is to say that the impact was sufficiently substantial to cause the coffee to spray onto the windows on the inside, the dash and the driver.

[280] Dr. Robinson stated in his report:

He did not hit his head or lose awareness at the time of the accident. He recalls that he felt "stunned" but does have intact memory immediately following the collision. He had a coffee cup in the vehicle and the force of the collision had sprayed coffee "everywhere" including over him.

[281] Mr. Krupinski testified that he did not hit his head and he does not remember losing consciousness, although he fairly observed that he does not know how one remembers losing consciousness.

[282] On the evidence as a whole, it is not established that Mr. Krupinski suffered a traumatic brain injury as a result of the accident.

[283] Dr. O'Shaughnessy authored three reports and testified at the trial on behalf of the defence. I found his evidence to be thorough and helpful in arriving at an increased understanding of the history of the plaintiff's pre-existing depression. Throughout his reports he noted that Mr. Krupinski was a poor historian and that his reports of prior depression and medication were inconsistent, and that Mr. Krupinski was experiencing significant problems with his memory.

[284] In the first report dated July 29, 2015, Dr. O'Shaughnessy described Mr. Krupinski's past stresses and periods of depression after his son's death and his divorce in 2001 and 2002. After his move to B.C. he struggled financially. The doctor assumed from the medical records that Mr. Krupinski had had clinically significant levels of depression pre-accident causing his physicians to recommend antidepressant medications. Mr. Krupinski reported that he did not perceive himself as having any psychological problems post accident nor did he see any worsening of his depression or other psychiatric symptoms. He denied any symptoms suggestive of Post Traumatic Stress Disorder, or any other anxiety symptoms except concerns regarding his financial situation and his future.

[285] It was the opinion of Dr. O'Shaughnessy that the accident did not cause any psychiatric difficulties nor did it worsen his pre-existing problems. Noting that he is receiving supporting therapy every three months (with Dr. Hardin), the opinion was that he does not now nor will he likely in the future require any treatment specifically for injuries sustained in the car accident.

[286] Dr. O'Shaughnessy also noted that although Mr. Krupinski denies a memory of the eight months post-accident, he was able to elicit memories of that time period. I attribute this ability of Dr. O'Shaughnessy to his extensive experience as a forensic psychiatrist.

- [287] In his second report, after having reviewed Dr. Hardin's report, Dr. O'Shaughnessy noted that Dr. Hardin does not describe any actual psychiatric symptoms, nor did he diagnose a Clinical Depression or Major Depressive Disorder. With regard to the Mild Neurocognitive Disorder diagnosed by Dr. Hardin, he notes that to meet the criteria there must be evidence of an actual brain injury such as a concussive injury and of a cognitive impairment - of which there is none.
- [288] Dr. O'Shaughnessy was also asked to comment on the report of Dr. Waisman, a psychiatrist who examined Mr. Krupinski at the request of his then lawyer.
- [289] Dr. Waisman described a history of depression dating back to the 1980s. In the assessment on July 22, 2016 Mr. Krupinski described his mood as severely depressed. His thought process had pervasive themes of depression and anxiety. He reported symptoms of depression, hopelessness, anhedonia, insomnia, isolation, lack of energy and hypervigilance. At that time, Mr. Krupinski was taking medication which included sertraline for depression.
- [290] Dr. Waisman diagnosed Mr. Krupinski as having a Major Depressive Episode, moderate to severe, and a somatic symptom disorder with predominant pain. He discussed thoroughly the effects of chronic pain and the exacerbation of pain as a result of sleep disorders. In his opinion, Mr. Krupinski has a pre-accident history of emotional vulnerability to the effects of future trauma. The subject accident shattered his defenses and led to a spiraling downward in his level of functioning. He stated that Mr. Krupinski has suffered and lost much as a result of the accident.
- [291] Although Dr. Waisman described Mr. Krupinski as a good historian, in contrast to the description of Dr. O'Shaughnessy, there is no indication in his reports that Mr. Krupinski informed him of the many other stressors present in his life. Specifically, in cross-examination Dr. Waisman responded that he was not aware of the difficulties in the consulting job market of being without a reference letter from a previous employer. As has often been noted by this court, when a medical opinion relies on a plaintiff's self-report, the weight of the opinion is affected by the veracity and accuracy of the self-report. Dr. Ward also described Mr. Krupinski as a poor historian some years later.
- [292] I note that Mr. Krupinski reported to Dr. Waisman a considerably different mental and emotional state than he reported to Dr. O'Shaughnessy. It appears that he did not inform either doctor of the entirety of the circumstances of his life which created the considerable pressure he was experiencing. However, Dr. Waisman attributed all of the effect to the accident, noting for example that: "His anxiety and stress regarding his injury and ongoing pain and weakness, and fear of re-injury, have compromised his ability to engage in activities freely." On the evidence in this trial, the significant anxiety and stress of Mr. Krupinski was also as a result of many other factors including the mold in his home first experienced in 2010. In not disclosing his complete life circumstances to Dr. Waisman, the doctor could not adequately opine on the effect of only one of many stressors absent

knowledge of the other stressors.

[293] In the result I prefer and rely upon the opinion of Dr. O'Shaughnessy that the accident did not cause any psychiatric difficulties or worsen pre-existing problems. This opinion is also consistent with Mr. Krupinski's statements to Dr. Sunshine and to Dr. O'Shaughnessy that he did not think that the accident had caused or worsened any psychiatric symptoms.

[294] However, I note that Mr. Krupinski met with Dr. Waisman about 18 months after his lengthy interview with Dr. O'Shaughnessy. I accept that Mr. Krupinski was in a worsened mental state at the later time. Indeed, subsequent medical evidence indicates a progression of the worsening.

[295] I also note that in the third report of February 27, 2017, Dr. O'Shaughnessy stated that he did not think any symptoms of cognitive impairment are related to the accident, and that Mr. Krupinski had indicated that his difficulties were worsening over time. Dr. O'Shaughnessy stated: "Given his other health difficulties, he may simply be experiencing a gradual decline in cognitive functioning and this should be monitored via Dr. Sunshine."

IV. OTHER STRESSORS

[296] The following events were put to Mr. Krupinski on cross-examination:

- 2011 Contractual dispute with Arrow
- 2011/2012 Lack of a reference from Arrow
- 2016 water leak in co-operative housing unit
- 2016/2017 opposing his counsel from withdrawing as counsel
- 2016 computer hacking and letter writing campaign
- 2017 rear wheel fell off during a drive
- 2018 heart attack
- 2018 dispute with the board of co-operative housing in relation to mold in his housing unit, dispute filed with the Human Rights Tribunal against the board of co-op housing
- 2018 dispute with Ministry of Health about Medical Service Plan payments
- 2020 mechanic discovers an issue with his vehicle drive shaft
- 2020 six hospital emergency visits due to respiratory ailments
- 2020-2021 - conflict with wife due to excessive drinking of alcohol

[297] Many of the same potential stressors were raised with Leigh Krupinski during her cross-examination. Mr. and Mrs. Krupinski both downplayed the stress arising from these events. Their testimony conflicts with what is reflected in the clinical records of Dr. Ward and Dr. D'Oyley.

V. NON PECUNIARY DAMAGES

- [298] Non-pecuniary damages reflect non-tangible losses, and provide compensation for a plaintiff's loss of enjoyment and expectation of life, and for pain and suffering: *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 at 262. In assessing non-pecuniary damages, the overarching principle is that the plaintiff is entitled to be put in the position they would have been, absent the defendant's negligence, to the extent this can be done with money.
- [299] Courts have long recognized, however, that "there is no medium of exchange for happiness" and putting a monetary value on non-pecuniary losses suffered is impossible. Thus, the assessment of non-pecuniary damages is more a "philosophical and policy exercise" than a "legal or logical one": *Andrews* at para. 261.
- [300] The recent decision of Brongers J. in *Hewitt v. Tang*, 2023 BCSC 580 outlines the general principles applicable to assessment of damages for non-pecuniary damages:
- [43] The legal principles applicable to assessing non-pecuniary damages designed to compensate a plaintiff for the pain and suffering and loss of enjoyment of life caused by a defendant tortfeasor are well established and not in dispute. The plaintiff bears the burden to show that there is a substantial connection between the accident caused by the defendant and the plaintiff's injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28-30. If causation is established, the court will then consider a number of factors when determining an appropriate quantum for non pecuniary damages. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, a non exhaustive list of these factors was set out. It includes:
- a) age of plaintiff;
 - b) nature of the injury;
 - c) severity and duration of the pain;
 - d) disability;
 - e) emotional suffering;
 - 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 penalize the plaintiff).
- [301] The plaintiff relies on three cases, two of which have granted an award of non-pecuniary damages in the amount of \$180,000, and one in which the award was \$100,000.

- [302] In *Sebaa v. Ricci*, 2015 BCSC 1492, the plaintiff, now 38, 33 at the time of the accident, characterized her life as one of constant daily pain and seriously debilitating anxiety and depression, which had not abated since the accident. She had fluctuating but always presents daily pain in her neck, left shoulder, left hand, right knee and right foot; and excruciating headache, and pain-disturbed sleep. She granted that she has good days and bad days, but found pain always present, sometimes for several days. She had become socially isolated.
- [303] The court considered the accepted evidence in this case; prognoses that are pessimistic, the unlikelihood she will ever fully recover; but also the realistic possibility that her symptoms and functioning may improve compared to where she is now; and considering awards in previous cases, the plaintiff was awarded \$180,000 for non-pecuniary damages.
- [304] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, immediately following the accident, the plaintiff felt pain and stiffness in various areas. His physical injuries included soft-tissue injuries to his neck, lower and mid back, bruising on his chest, left arm, pain in both shoulders, arms and elbows, as well as tailbone and abdominal pain. He had suffered a concussion. He had headaches, dizziness, and nausea. The plaintiff's ongoing physical difficulties, in the form of neck, shoulder, back, and right elbow pain, were caused by the accident as were the ongoing headaches, dizziness, and nausea that the plaintiff struggled with.
- [305] Mr. Pololos did not suffer from any pre-existing physical or psychological difficulties. The plaintiff's chronic pain condition was caused by the accident, as were his sleep disorder and various psychological disorders.
- [306] The accident had fundamentally transformed Mr. Pololos. He lives with a considerable amount of pain. He is significantly isolated. His relationship with his family, including with his son, has deteriorated. He has few friends. He participates in virtually no activities that are positive or that give him pleasure. His life has little content. In the result, Mr. Pololos's non-pecuniary losses were assessed at \$180,000.
- [307] In *Tsalamandris v. MacDonald*, 2011 BCSC 1138 the Plaintiff was in two car accidents when she was in her early forties. She excelled in school and was on a successful projection in her career and started a company before she had children. She was found to have minor pre-accident pain that was found to not impair her prior to the accidents. She had ongoing chronic pain and depression. The court found that there was a substantial possibility that after the accident and after her children were born, she would have returned to the paid work-force full time, but it would be limited to the fact that she was now a 48-year-old woman who had been out of the paid workforce for 8 years. The court awarded \$100,000 for non-pecuniary damages.
- [308] The defendant relies on the following three decisions in support of a non-pecuniary damage award in the range of \$30,000 to \$55,000.

- [309] The defendant first cites *Ford v. Lin*, 2021 BCSC 456. The plaintiff, who was 64 years old at trial, sustained aggravation of her pre-existing neck, upper back and shoulder pain, and headaches in a February 2016 car accident. By March 2017, her symptoms were more akin to what she had reported prior to the car accident. She continued to work as a bookkeeper following the accident, not losing any clients or work while simultaneously being primary caregiver to her aging father, until she substantially scaled down her work in September 2017. The court stated at para. 147 that "all of the evidence taken together is indicative of Ms. Ford having made a personal choice to scale back her work activities, not because of her injuries, but because she planned to have a more relaxed lifestyle, particularly one that allowed her to return to her recreational activities".
- [310] The court awarded damages as follows to the plaintiff: \$30,000 for non-pecuniary; \$3,151 for past loss of earning capacity, \$0 for future loss of earning capacity, \$0 for loss of housekeeping capacity, \$0 for cost of future care, and \$1,934 for special damages.
- [311] In the second case, *Lin v. Koszmider*, 2023 BCSC 752, the plaintiff, who was 48 years old at the time of the accident and 55 years old at trial, worked as a truck driver. The car accident happened on November 1, 2017. The plaintiff's contract with Saputo was terminated by Saputo, also on November 1, 2017, and his last day at Saputo was January 30, 2019, which lead to an ongoing dispute between the plaintiff and the employer.
- [312] The court accepted the plaintiff's evidence that he had significant frailties prior to the car accident - both left-sided chest pain and bilateral knee pain. The accident exacerbated his knee pain, and caused an injury to his chest that was not present prior to the accident, but these injuries resolved within months following the accident. Further, he suffered neck and back injuries as a result of the accident, but fully recovered from those injuries within a year.
- [313] At issue in this trial was the plaintiff's claim of mental or psychiatric injury as a result of the accident. The court found that the plaintiff was predisposed to psychiatric symptoms from events in his life, including the accident, and that therefore the crumbling skull categorization applied. The court found that the plaintiff's employment dismissal was warranted due to his performance both before and after the accident and therefore the court reduced the timeframe in which his loss included mental or psychiatric symptoms. Since the plaintiff's employment was terminated, the plaintiff attempted to start another business, but did not see it through. As a result, the court was satisfied that his psychological condition was such that he was unable to gain employment.
- [314] The court awarded damages as follows: \$35,000 for non-pecuniary damages, \$0 for past income loss, \$0 for loss of future income-earning capacity, \$6,240 for loss of housekeeping capacity as an in-trust award for wife and daughters, and \$745 for special damages.
- [315] In the third defence case, *Newman v. Johal*, 2021 BCSC 65, the plaintiff, who was 70 years old at trial, was retired when she was a passenger in a vehicle that was rear-ended in July 2015. She was diagnosed with soft tissue injuries to neck and low back with a guarded

prognosis, given her history of degenerative disc disease which was diagnosed in 2013. She was also diagnosed with trochanteric bursitis five months prior to the accident. The plaintiff was then diagnosed with a Morton's neuroma in her left foot at the end of 2015, which was accepted as being a result of altered gait secondary to injuries from the car accident.

- [316] The court found that the plaintiff's degenerative conditions would have continued and likely increased, even in the absence of the car accident. The court awarded non-pecuniary damages in the amount of \$55,000, stating it would have awarded \$65,000 in the absence of the pre-existing conditions. An award of \$25,000 was made for past loss of housekeeping capacity. Cost of future care was limited to future housekeeping expenses in the amount of \$20,000, and \$5,451.47 was ordered for special damages, for a total damage award of \$105,451.47.
- [317] The assessment of non-pecuniary damages is necessarily influenced by the plaintiff's personal experiences in dealing with their injuries and the consequences of those injuries. I have found above that as a result of the accident Mr. Krupinski, who was 64 years old, suffered ongoing headaches and neck pain. His low back pain resolved. In the expert reports written in 2015 and 2016 he was diagnosed with chronic pain, and at the time of trial in 2023 he continued to experience headaches and neck pain, although at a reduced level of intensity and frequency.
- [318] Mr. Krupinski had the most severe consequences from his injuries in the eight months after the accident, a period of which he says he has little memory, because the accident interrupted his job search at a crucial time. He had recently finished work at Arrow and jobs in his IT field were limited. His efforts to connect with potential employers were left incomplete after the accident, and the gap in timing due to the headaches caused by the accident was detrimental to obtaining a new position. It was the loss of opportunity to follow through with employment possibilities that had the most effect on Mr. Krupinski. However, in relation to finding a new job, there were many other factors involved including the absence of a reference from Arrow and the nature of the IT job market in Vancouver.
- [319] In the second time period between 2012 when the headaches returned and the neck pain commenced, and 2015, he attended numerous treatments which had an ameliorating effect, and reduced both the frequency and intensity of the headaches and neck pain. His wife testified regarding the effect of the pain on her husband and the changes that resulted from his pain. Although I do not accept her evidence that all of the changes in her husband were the result of the accident, I do agree with Dr. Waisman that he was emotionally vulnerable.
- [320] In the years since 2016, there is little medical evidence about the injuries. Mr. Krupinski testified that he still experiences headaches and neck pain, and the that continued treatments at CHANGEpain since 2016 assist him to manage the pain. Thus, I find that the duration of the more serious pain was five years, and thereafter he continues to suffer from

chronic pain. In addition to these accident-related injuries, Mr. Krupinski has other unrelated medical conditions that affect his quality of life, such as the sleep apnea and depression.

- [321] Overall, I do not find the defendant's cases to be in a range appropriate to the circumstances in this case. Mr. Krupinski's injuries are of longer duration and were initially of more intensity. It is unusual to have evidence from a plaintiff regarding ongoing chronic pain twelve years post-accident. The plaintiff's cases reflect awards for injuries which include psychological conditions such as depression or causation. Although Mr. Krupinski has suffered from depression, I have found that it was not caused by the accident.
- [322] In my view, on the totality of the evidence and applying the Stapley factors, an award of \$90,000 for non-pecuniary damages is appropriate. In this amount, as discussed below, is recognized \$5,000 for loss of housekeeping capacity. There is no reduction, as sought by the defendant, for pre-existing injuries.

VI. LOSS OF INCOME

A. The Law - Past Wage Loss

- [323] The legal principles are also summarized in the recent case of Hewitt by Mr. Justice Brongers:
- [63] The legal principles that apply to the calculation of damages in relation to an injured plaintiff's past loss of income from the time of the accident to the time of trial are also well established. Such calculations are challenging because they necessarily involve a consideration of hypothetical events in order to answer a speculative question, namely, what income would the plaintiff have earned but for the injuries that resulted from the accident? The burden of proof to demonstrate these hypothetical events lies on the plaintiff, but the standard of proof is the real and substantial possibility threshold rather than the more onerous balance of probabilities standard: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48 and 49; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21; *Perren v. Lalari*, 2010 BCCA 140 at para. 30; and *Rousta v. MacKay*, 2018 BCCA 29 at para. 17.
- [64] Furthermore, it should also be noted that s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 provides that a plaintiff is entitled to recover damages for income loss suffered after the accident and prior to the date of trial, but not more than the net income loss they suffered in that period as a result of the accident.

B. Personal Income of the Plaintiff

- [324] In order to assess past wage loss it is necessary to determine pre-accident income.

[325] Mr. Krupinski's income from 2007 to 2011 was \$26,980 (2007), \$32,000 (2008), \$28,000 (2009), \$28,500 (2010) and \$24,000 (2011). The average gross income is \$27,896.00 (\$139,480.00 divided by 5 years) before deduction of taxes and benefits. The following information regarding his personal income is taken from the filed income tax returns:

Year

Income

Source

2006 (divorced)

\$7,800

total income

\$3,826 - total earnings (T4)

· \$2,913.65 - T4 employment income from Western Inventory Service Ltd.

· \$913.19 - T4 employment income EP Canada Limited Partnership

\$3,974.46 - social assistance payments

2007 (divorced)

\$26,980

total income

\$26,470.63 - taxable dividends -> Huntingdon York Consultants Inc. (actual dividends \$21,176.50 / dividend tax credit for dividends \$3,529.42)

\$510.00 - social assistance payments

2008 (married)

\$32,000

total income

\$32,000 - total earnings (T4) -> Employer: Huntingdon York Consultants Inc.

2009 (married)

\$28,000

total income

\$28,000 - total earnings (T4) -> Employer: Huntingdon York Consultants Inc.

2010 (married)

\$28,500

total income

\$28,500 - total earnings (T4) -> Employer: Huntingdon York Consultants Inc.

2011 (married)

\$24,000

Net income

And total income

\$24,000 - total earnings (T4) -> Employer: Huntingdon York Consultants Inc.

2012 (married)

\$18,517

total income

\$10,000 - total earnings (T4) -> Employer: Huntingdon York Consultants Inc.

\$3,269.88 - Old age security pension

\$4,709.04 - CPP/QPP benefits

\$539 - net federal supplements

2013 (married)

\$17,852

total income

\$6,579.06 - Old age security pension

\$9,587.64 - CPP/QPP benefits

\$1,416 - net federal supplements

2014 (married)

\$17,226

total income

\$6,676.59 - Old age security pension

\$9,673.92 - CPP/QPP benefits

\$877 - net federal supplements

- [326] Given the income earned by Mr. Krupinski's company, Huntington York, from the contract with Arrow, and in the absence of disclosure of the corporate income statements, it is entirely unclear how the personal income was determined. However, I accept the income tax returns as accurate and find his personal income to be as declared.
- [327] The question of whether Mr. Krupinski has violated the Income Tax Act by not filing corporate income tax returns for Huntingdon York is not before this Court. Mr. Krupinski resisted providing corporate income and expense information. It is unclear if some of the records were lost in the PRC hacking incidents he described. However, without corporate income information, which should include annual financial statements, there is no evidence concerning Mr. Krupinski's business expenses. Assessment of his income earning capacity is, as a result, considerably more difficult.
- [328] Regarding his corporate income, as stated above, in January 2007 Mr. Krupinski, through his company, became a subcontractor pursuant to a contract between Robert Half and Arrow. Arrow agreed to pay Robert Half who would pay Huntington York for the IT services of Mr. Krupinski. The rates of pay were: Arrow to Robert Half - \$98 per hour; Robert Half to Huntington York - \$50 per hour until July 2008 when it was raised to \$55 per hour. In April 2011 Arrow began to pay directly to Huntington York the amount of \$85 per hour which continued for two months until the termination of the contract on May 31, 2011. Three months severance was paid thereafter.

[329] On the evidence, my calculations of the gross amounts paid to Huntington York are:

Year

Description

Amount

2007:

11 months (45 weeks assuming 2 weeks vacation) of 40 hours per week at \$50 per hour

\$90,000

2008:

25 weeks of 40 hours per week at \$50 per hour

\$50,000

2008:

25 weeks of 40 hours per week at \$55 per hour

\$55,000

2009:

50 weeks of 40 hours per week at \$55 per hour

\$110,000

2010:

50 weeks of 40 hours per week at \$55 per hour

\$110,000

2011:

3 months of 40 hours per week at \$55 per hour

\$28,600

2011:

2 months of 40 hour per week at \$85 per hour

\$29,500

2011:

3 months severance pay at \$85 per hour

\$44,000

2011

TOTAL:

\$102,300

[330] Although the plaintiff's apparent practice of retaining earnings in his corporation and paying dividends to himself is completely permissible, without further information regarding his corporate expenses and their relationship to this gross income, it is difficult to assess the income earning capacity of Mr. Krupinski. I must therefore proceed on an assumption that the filed personal income tax returns accurately reflect the income earned by Mr. Krupinski, and thus his income earning capacity in the years from 2007 to 2011. I will take the highest reported income earning year of 2008 and \$32,000 as being the basis for my assessment.

C. Defendant's Submissions

[331] The defendant submits that the claim of the plaintiff for past loss of earning capacity should be dismissed for the following reasons.

[332] At the time of the accident, the plaintiff's employment had already been terminated by Arrow. The accident did not contribute to the plaintiff's loss of the job from Arrow. The question is whether the accident prevented the plaintiff from finding a new contract as an IT consultant.

[333] Mr. Krupinski's was actively seeking work in the months post-accident. His communications between July and September 2011 with Mr. Brown and Ms. Braydon are critical evidence for assessing his claim for loss of income from the accident to the date of trial. Mr. Krupinski in his capacity as an IT consultant had prior contact with both Mr. Brown and Ms. Braydon, before the end of his contract with Arrow. It is understandable that Mr. Krupinski began his job search by reaching out to people he knew in the IT field. In those communications regarding possible jobs he was signalling his ability to work.

[334] Mr. Krupinski did not call either Mr. Brown or Ms. Braydon as witnesses to testify on his behalf. There is no evidence before the Court to suggest that Mr. Brown and Ms. Braydon, or the companies they work for, knew about the accident, or that the accident influenced their decision not to further consider or pursue Mr. Krupinski as a candidate. The accident is not established as a cause that this correspondence did not lead to a job offer. I do accept that his job search was slowed down, not prevented, by his symptoms and headaches.

[335] The defendant submits that several negative factors unrelated to the accident resulted in Mr. Krupinski's inability to find a new job:

- As commented by Mr. Carlin, the plaintiff is at retirement age (63 years 9 months old) when he was terminated from Arrow. The age factor would make him less attractive as a candidate in the IT consultant field.
- Mr. Krupinski gave evidence that the IT consulting sector is tight-knitted, small and sources of jobs are large controlled by IT consultant firms rather than the individual companies.
- It would appear that IT consulting firms such as Robert Half are making significant profit out of IT consultants like Mr. Krupinski as sub-contractors. In this case, the fee split between Robert Half and Mr. Krupinski was 43% v. 57% for every hour charged to Arrow. IT consulting firms stand to profit from providing excellent candidates to companies.
- Networking, connections and word of mouth referral would be the norm in this industry with respect to job opportunities. In this case, Trish Braydon changed jobs from Robert Half to a different firm Mercer Bradley. It would not be difficult for Mercer Bradley to investigate Mr. Krupinski's relationship with Arrow.
- Mr. Krupinski is under the mistaken impression that his law suit with Arrow is "sealed". This is incorrect. Any potential employer or human resource management firm can look into a candidate's litigation history through publicly available sources such as Court Services Online. The law suit would give a potential employer pause.
- The lack of a reference from Arrow is detrimental to Mr. Krupinski in finding a new contract in his chosen profession.

[336] Further, the defendant submits, Mr. Krupinski's pre-existing health issues are significant negative contingencies that, absent the accident, would likely have prevented him from working into his seventies.

[337] I agree with the defendant regarding the other negative factors and the negative contingencies with the exception that I do not find Mr. Krupinski's age to be more than a minor factor.

D. Mr. Carlin's Report

[338] Mr. Krupinski relies on Mr. Carlin's report. I note, as stated above, that Mr. Carlin did not have all the relevant information regarding Arrow and the 2011 job search. In addition, Mr. Carlin's report is also his opinion as at February 2016.

E. Discussion - Past Wage Loss

[339] My finding regarding past wage loss is that the other stressors and his deteriorating physical and mental health generally would have negated Mr. Krupinski's capacity to earn income absent the accident. As to timing, I put this toward the middle to end of 2016. Although the CHANGEpain treatments assisted the accident-related symptoms, the effect of the other stressors and other health issues from that time forward overtook the effect of the chronic pain and became the cause of lost income earning capacity.

[340] This is the time, October 2016, that Drs. Waisman and Sun report Mr. Krupinski's depression. Dr. Wolak reports few interactions regarding chronic pain, and many visits regarding other issues such as his heart and respiratory system. Dr. Ward describes extensively Mr. Krupinski's deteriorating mental health, including his pre-occupation with mold and possible paranoia.

[341] In this case there is medical evidence to support the existence and the effects of the other stressors and health issues faced by Mr. Krupinski. It is found most recently in the evidence of Mr. Krupinski's self-reports to Drs. Ward, Wolak and D'Oyley.

[342] Therefore, notwithstanding the certainty of Mr. and Mrs. Krupinski that the accident is the only cause of his loss of capacity to earn income, past and future, that is not the finding that I make on the totality of the evidence.

[343] I find that if he was able to obtain employment, he would have been able to continue working for five years at the most. That is until 2016 when he would have been 69 years old. Over those years, the negative contingencies would have increased, and I attribute an average negative contingency of 35%. That will be applied to his earnings, as discussed above, of \$32,000 per year for 5 years which is a total of \$160,000. With the negative contingency of 35%, the gross amount of past wage loss awarded is \$104,000.

F. The Law - Future Loss of Earning Capacity

[344] The legal principles are summarized in Hewitt:

[74] The principles applicable to the assessment of future loss of earning capacity damages are similar to those in relation to past loss of income, although the exercise involves the added complication of requiring an examination of two hypothetical futures: one in which a plaintiff is assumed to be living with the aftermath of the injuries caused by a defendant, and another in which a plaintiff is assumed to be living as if these injuries had never been sustained. As stated by our Court of Appeal in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32:

An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8.

[75] The Court of Appeal prescribed a three-step test for assessing future loss of earning capacity in a trilogy of cases decided in 2021 indexed as: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The questions to be asked at these three steps were summarized in *Rab* at para. 47 as follows:

- 1) Is there a potential future event that could lead to a loss of earning capacity?
- 2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
- 3) If there is a such a possibility, what is its value?

[76] Valuation of the loss can be done using either the "earnings approach" or the "capital asset approach": *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.) at para. 7; *Perren* at paras. 11-12. The earnings approach involves a calculation of the present value of a plaintiff's annual loss of income over the remaining years of employment, and is more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48. The capital asset approach involves consideration of a person's lost ability to work in a certain position in their field of work as the loss of an income earning asset, and is more appropriate where the loss is less easily measurable: *Park v. Targonski*, 2017 BCCA 134 at para. 123. Under either approach, the plaintiff must prove that there is a real and substantial possibility of various future events leading to an income loss (*Perren* at para. 33), and that damages are assessed, not calculated (*Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18).

[345] The court in *Gao v. Dietrich*, 2018 BCCA 372 at paras. 36 and 66 held that if the evidence establishes only a speculative loss, rather than a real and substantial possibility of a loss, it is an error to grant an award for loss of earning capacity.

G. Defendant's Submissions

[346] The defendant submits that the claim of the plaintiff for future loss of earning capacity should be dismissed.

- [347] The plaintiff relies on the expert report of Darren Benning. Mr. Benning's report with respect to future earnings is now out-of-date and inapplicable.
- [348] Mr. Krupinski is currently 76 years old and he is in poor health.
- [349] On the basis of the evidence of the defence experts, the defendant asks the court to find that there is no impairment of the plaintiff's income earning capacity. A real and substantial possibility of a future loss of income has not been established by the plaintiff.
- [350] The defendant submits that given the serious credibility and reliability concerns related to the plaintiff's testimony, the court has no basis for making any award under the head of damages for loss of income-earning capacity.

H. Analysis - Future Income Earning Capacity

- [351] Mr. Krupinski relies on Mr. Benning's report and says that his average paid worked hours per year pre-MVA were 1772 not counting over time or unpaid hours. He says that he could continue to work at the pace and would have but for the accident. He says that whether he could or could not find a job is not relevant; he was unable to work.
- [352] However, the report of Mr. Benning is not of assistance. It is the finding of the court regarding capacity that is determinative, and then if capacity is found an expert can assist to quantify the loss of future earnings or future wage loss.
- [353] As I have found above, after 2016 the accident no longer was the cause of the impairment of Mr. Krupinski's capacity to earn income. As such there is no future event as referenced in the case law, most recently Rab and the related cases. In other words, absent the accident, he would not have been employable.
- [354] The claim for future wage loss is therefore dismissed.

VII. COST OF FUTURE CARE

A. General Principles

- [355] The judgment of Madam Justice Adair in the case of *Golkar-Karimabadi v. Bush*, 2021 BCSC 990 sets out the general principles for awards for the cost of future care:
- [107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the

plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[108] In addition, while health and happiness are intertwined, the award is not intended to account for the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable: *Warick v. Diwell*, 2018 BCCA 53, at para. 24.

[356] The test for assessing future care costs is whether the costs are reasonable and whether the items are medically necessary.

B. The Plaintiff's Claim for Future Care

[357] The plaintiff's claim for the cost of future care includes the following:

Item

Amount

Amount

Total

Rehabilitation Program

\$6,535.00

\$0.00

\$6,535.00

Barefoot Osteopathy

5 years / 86 visits @ \$140 with \$500 credit per year

\$12,133.00

\$2,500.00

\$9,633.00

Dr. Posen, Naturopath

5 years / 86 visits @ \$200 with \$0 credit per year

\$17,200.00

\$0.00

\$17,200.00

Dr. Berkman

CHANGEpain 5 years / 86 visits @ \$0 [MSP]

FUTURE MEDICAL SUBTOTAL:

\$39,168.00

\$2,500.00

\$36,668.00

C. Analysis

1. Plaintiff's Experts - Future Treatment Recommendations

[358] Dr. Robinson provided some recommendations for headache treatments including Botox, and sub-occipital injections under image guidance. The plaintiff did not make a claim for future treatments with Botox and he did not provide evidence that he wished to try this type of treatment. During trial, the plaintiff did provide evidence that he was receiving injections for his headaches. No amounts are claimed for future care treatments with injections for headache pain as they are covered by the medical care plan of the province.

[359] Dr. Robinson's consult report dated June 07, 2014 to Dr. Sunshine provided the following opinion:

This man has chronic post-traumatic headache related to injury sustained in a motor vehicle accident nearly 3 years ago. I do not believe that there is [sic] been damage to his nervous system.

His MR imaging abnormalities probably reflect long-standing hypertension.

I doubt that there is any physical therapy that would be helpful particularly since he has tried most of the mainstream approaches. He should be encouraged to be as physically active as possible .

[360] Dr. Robinson testified that he did not recommend treatment with a naturopath as the strategies of naturopaths are not based on medical evidence. Naturopaths often recommend lifestyle changes. Their investigations and treatments are often without rationale.

[361] In the report of Dr. Sun, future treatment recommendations are at page six of his report and include treatments that could be provided through the CHANGEpain clinic: trigger point injections, nerve blocks, an introductory movement program, sleep training and relaxation training. The plaintiff did not provide any evidence with regard to the cost for future treatment recommendations made by Dr. Sun related to medication, nutrition consultation, or supplements (magnesium and palmitoylethanolamide (PEA)). The plaintiff did not testify that he was interested in pursuing treatment options in Dr. Sun's report that were not available through the CHANGEpain clinic. Mr. Krupinski's evidence was that treatments at CHANGEpain were covered through the medical services of British Columbia.

[362] In the report of Dr. Waisman, treatment recommendations were for cognitive behavioural therapy, pharmacotherapeutic management, and active therapy.

[363] Dr. Hardin was the plaintiff's treating psychiatrist and he prepared a report dated September 26, 2016. The plaintiff relies upon the medical-legal report of Dr. Hardin. Dr. Hardin did not testify at trial. Future treatment recommendations at page seven of the medical legal report recommended "supportive psychotherapy and marriage counselling."

2. Defence Experts - Future Treatment Recommendations

[364] The medical-legal reports of Dr. Sunshine, Dr. Dommissie and Dr. O'Shaughnessy do not recommend a rehabilitation program for the plaintiff nor do they recommend treatments with an osteopath or a naturopath.

[365] Dr. Sunshine's medical-legal report provides an opinion on the resolution of Mr. Krupinski's symptoms from the accident. The general practitioner does not provide any future treatment recommendations:

I do not anticipate further residual arising out of the sequelae of the MVA of June 7th, 2011.

[366] Orthopaedic surgeon Dr. Dommissie testified that he does not recommend prolotherapy as it is expensive and it results in lots of scarring. He described this treatment as an injection of a concentrated solution of salts and sugar to help reduce pain.

[367] Dr. Dommissie provided his opinion on future treatment recommendations for the plaintiff's complaints related to the accident at page 11 of his MLR:

7. Your opinion and recommendations regarding past, current or future treatment and the effect of these on the Plaintiffs injuries;

Mr. Krupinski did have prolotherapy injections for his cervical spine which were of benefit for only 6 months. Repeat prolotherapy injections were not of any value.

Mr. Krupinski's current therapy for stretches and posture are probably appropriate, should be instructed on independent range of motion and strengthening exercises for his cervical spine and adjacent muscles and also for his thoracolumbar spine with trunk, core and abdominal muscles. In my opinion, Mr. Krupinski will require 6-8 weeks of such therapy. These exercises as instructed, should then be maintained independently.

3. Rehabilitation Program

[368] The plaintiff is claiming \$6,535 for a rehabilitation program in the future. No evidence was provided at trial in support of the \$6,535 amount claimed for a rehabilitation program. Dr. D'Oyley was concerned that Mr. Krupinski is sedentary but did not make any recommendations.

[369] The defence relies upon the expert report of the general practitioner Dr. Sunshine who opined that the plaintiff had recovered from his accident-related injuries. The defence expert Dr. Dommissie does not recommend a rehabilitation program for the plaintiff.

[370] The plaintiff's rheumatologist Dr. Sun did recommend an active rehabilitation program in his October 18, 2016 medical-legal report. However, there is no evidence that Mr. Krupinski participated in an active rehabilitation program as recommended. Dr. Sun does not provide the cost of such a program and neither does Dr. Waisman. Dr. Waisman says active therapy is best directed by Mr. Krupinski's treating physician.

[371] Although there is no evidence of cost, I accept the amount claimed for a program I find to be medically necessary.

D. Barefoot Osteopathy

[372] The plaintiff is claiming 86 visits over 5 years at \$140 per visit. The amounts range from \$9,633.00 to \$12,133.00. There is no medical referral from any of the plaintiff's experts for treatments at Barefoot Osteopathy. There are no clinical records provided for this treatment provider.

[373] I find that future care treatments from an osteopath are not reasonable nor are they medically necessary.

E. Dr. Posen, Naturopath

[374] The plaintiff is claiming 86 visits over 5 years at \$200 per visit, in the total amount of \$17,200.00. There were no medical referrals in evidence from the plaintiff's general practitioner Dr. Sunshine for ongoing treatments with a naturopath.

[375] The plaintiff's expert neurologist Dr. Robinson did not recommend treatments with a naturopath. He testified: "I don't recommend treatments with naturopaths, period." He explained: "Many of their strategies and diagnoses and investigations are based on a belief system rather than on actual medical evidence. I don't really want to go too far afield on this one but, you know, their diagnostic acumen is poor and their investigations and their treatments are without evidence basis and often without medical rationale."

[376] The plaintiff's expert rheumatologist did not recommend therapies with naturopaths like prolotherapy. Dr. Sun noted that some naturopaths focus on nutrition and some on active therapies. His recommendation was in relation to lifestyle changes. Dr. Sun's evidence was that CHANGEpain clinic had training classes with classes that would meet once a week over a 10-12 week course. He felt Mr. Krupinski could use help with moving his muscles and strengthening so sessions twice a week were recommended which would then progress to home exercises. Dr. Sun noted that CHANGEpain also had sleep hygiene classes.

[377] The plaintiff's expert rheumatologist recommended only nutrition advice from a naturopath but not any other prolotherapy treatments. Nutrition advice can be provided by a general practitioner, with potential referral to a dietitian through MSP.

[378] I therefore find that future care treatments from a naturopath are not reasonable nor are they medically necessary.

F. Dr. Berkman, CHANGEpain

[379] The plaintiff's position is that he will require 86 visits over the next five years but that these visits are covered by the Province's medical coverage for residents of British Columbia. These treatments are medically necessary but do not require a monetary award.

G. Botox Treatments

[380] Dr. Robinson recommended Botox treatments to assist with Mr. Krupinski's headaches. No claim was made of the cost of those treatments. However, since Mr. Krupinski was self-represented, he is permitted to apply to the court within 30 days to include the cost of Botox treatment in the award for future care. Any application should include evidence regarding the cost of such treatments.

VIII. IN-TRUST AWARD

A. General Principles

[381] The judgment of Madam Justice Burke in the case of *Popove v. Attisha*, 2019 BCSC 1587 provides an overview of the general principles to be applied when an in-trust award for damages is claimed:

[57] Claims for household duties and other services rendered by immediate family members are allowable where the plaintiff demonstrates the need for such services as a consequence of the injuries sustained. The plaintiff must satisfy the Court, on a balance of probabilities, that the family member providing the services suffered a direct pecuniary loss (because of the time and effort put into those services) or that the family member's efforts replaced housekeeping expenses that would have otherwise have been incurred: *Star v. Ellis*, 2008 BCCA 164 at para. 17.

[58] The law of in-trust claims is governed by the principles set out in *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735 (B.C. S.C.) at para. 180, aff'd 2004 BCCA 124, where the Court identified the following relevant factors:

[180]

- a. the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- b. if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- c. the maximum value of such services is the cost of obtaining the services outside the family;

- d. where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e. quantification should reflect the true and reasonable value of the services performed taking into account the time, quality, and nature of those services; and,
- f. the family members providing the services need not forgo other income and there need not be payment for the services rendered.

[59] Cases in which awards have been made for in-trust services involve care provided to seriously injured plaintiffs or support services beyond what might normally be expected in a familial relationship. In assessing the appropriateness of an in-trust claim, standard compassion and care of relatives are not to be compensated. The compensation is for the extra services provided by the family member at a reasonable cost.

[382] The defendant submits that the plaintiff did not lead any evidence in support of an in-trust award for damages:

- The plaintiff did not demonstrate a need for any services or household duties performed by his wife Leigh Krupinski.
- Leigh Krupinski spends part of the week residing at the co-operative in Vancouver while Mr. Krupinski resides in Langley.
- Mr. Krupinski's current family doctor Dr. Anna Wolak has noted in her clinical records that he is independent with activities of daily living (ADLs).
- There was no evidence provided to the court with regard to any direct pecuniary loss suffered by Leigh Krupinski or any other family members.
- There was no evidence provided that Leigh Krupinski's efforts replaced housekeeping expenses.

[383] I agree with the defendant that Mr. Krupinski has not provided any evidence to support an in-trust award for damages.

IX. LOSS OF HOME MAKING CAPACITY PAST AND FUTURE

[384] The decision of Hewitt has a useful summary of the legal principles applicable to a claim for loss of housekeeping capacity:

Legal Principles

[114] A helpful summary of the law regarding loss of housekeeping capacity claims in personal injury litigation can be found in *Ali v. Stacey*, 2020 BCSC 465. In this decision, Justice Gomery distilled the legal principles established by our Court of Appeal in *Kim v. Lin*, 2018 BCCA 77 and *Riley v. Ritsco*, 2018 BCCA 366:

[67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; Kim at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; Riley at para. 101.
- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; Kim at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; Kim at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; Riley at para. 102.

[115] It should also be noted that because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred: O'Connell v. Yung, 2012 BCCA 57 at para. 67.

A. Analysis

[385] The plaintiff led minimal evidence in support of this claim. The defence submission is that no award ought to be made under this head of damages.

[386] The plaintiff is able to do most household tasks. There are currently no medical restrictions on the plaintiff with respect to his ability to do household chores. The plaintiff is independent with respect to his activities of daily living and his instrumental activities of daily living.

[387] Although the evidence falls short of supporting a claim for loss of housekeeping capacity, Mr. Krupinski in his written submissions provided more information regarding the household tasks he was unable to perform. As a self-represented plaintiff, I will accept for the limited purpose of increasing the non-pecuniary damages, this information which was not in evidence.

[388] I will therefore include in the non-pecuniary damages the additional amount of \$5000 to recognise a loss of some housekeeping capacity when the headache pain was the most intense.

X. SPECIAL DAMAGES

A. General Principles

[389] The judgment of Mr. Justice Saunders in the case of *Redl v. Sellin*, 2013 BCSC 581 provides an overview of the principles which are applicable in these circumstances when determining special damages:

[55] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see *Juraski v. Beek*, 2011 BCSC 982; *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 BCLR (2d) 33 (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness. I accept the argument expressed through Dr. Frobbs, that a patient may be in the best position to assess her or his subjective need for palliative therapy. I also accept the plaintiff's counsel's argument that in the circumstances of any particular case, it may be possible for a plaintiff to establish that reasonable care equates with a very high standard of care. In the words of Prof. K. Cooper-Stephenson in *Personal Injury Damages in Canada*, (2d ed., 1996) at p. 166:

Even prior to the Supreme Court's endorsement of the restitution principle [in *Andrews v. Grand & Toy Alberta Ltd.* and *Arnold v. Teno*], in the area of special damages the courts had been prepared to allow optimum care, and damages were awarded for expenses of a character that stretched far beyond the resources of even an affluent Canadian.

That being said, and while Dr. Frobbs's paradigm of the patient becoming their own physician may have at least a superficial appeal, plaintiffs are not given carte blanche to undertake any and all therapies which they believe will make them feel good.

[56] In the present case, Ms. Redl undertook an extraordinarily wide variety of therapies, some without advice, and some less conventional than others. She did so at considerable expense. It is probable, in my view, that she undertook this course of action in part through a desire to recover quickly and in part on the basis of her positive past experience, pre-accident, with massage therapy and chiropractic. However, her firm beliefs notwithstanding, there is no medical evidence that the therapies she undertook accelerated her return to work or have otherwise improved her physical condition. With regard to the palliative effect of the therapies, Ms. Redl did not experiment with trying one modality at a time. She did not experiment with lengthening the time between appointments. There is no evidence that the palliative effect of these therapies was any greater than what may have resulted from the use of over-the-counter medications. Ultimately, the evidence does not persuade me on a balance of probabilities that Ms. Redl's physical or mental well-being is or could reasonably have been expected to be any greater as a result of undertaking these frequent therapies, than it would be if she had stuck to her pre-accident pattern of weekly or bi-weekly massage and monthly chiropractic treatments.

B. Treatments Claimed

[390] The defendant submits that there is no medical justification for the claims for out-of-pocket expenses incurred at Barefoot Osteopathy, CMI Medical, Cougar Mountain, and naturopaths Dr. Brown and Dr. Posen. The expenses incurred are not reasonable.

1. Physiotherapy

[391] The defendant submits that the reasonable out-of-pocket expenses that the plaintiff has incurred to date for injuries suffered in the accident supported by the evidence is:

- Metrotown Orthopedic & Sports Physiotherapy Clinic

Oct. 20, 2014 - claim for \$38.00

- Pinnacle Physio - 16 visits in 2014 and 2015

The plaintiff is claiming \$560.00.

[392] I agree that the physiotherapy expenses are reasonable and \$598 is allowed.

2. Barefoot Osteopathy

[393] The plaintiff is claiming \$5,009.50 for 45 treatments between 2018 and 2022. There is no medical referral from any of the plaintiff's doctors or specialists for Barefoot Osteopathy. There are no clinical records provided for this treatment provider. Only invoices are provided for treatments on the dates noted below. The plaintiff did not provide evidence of the specific treatments provided at Barefoot Osteopathy. The experts called by the plaintiff and by the defendants did not recommend treatments with an osteopath.

[394] There was no medical referral from family doctor Dr. Sunshine to support the plaintiff's attendance at Barefoot Osteopathy for any accident-related symptoms or injuries. Mr. Krupinski transitioned to general practitioner, Dr. Anna Wolak, on October 29, 2019. Dr. Wolak did not refer Mr. Krupinski for treatments with an osteopath.

[395] Mr. Krupinski says the no medical referral is required as the services of osteopaths, chiropractors and acupuncturists have their services covered by MSP.

[396] Applying the law regarding special damages, I find that absent a medical justification for this expense, it is not reasonable. This expense is therefore not allowed.

3. CHANGEpain Clinic - Kinesiology

[397] The plaintiff is claiming \$681.90. The plaintiff's evidence is that treatments at CHANGEpain would be covered by the Provincial medical plan for B.C. Residents.

[398] There are no clinical records provided for the three visits claimed. The plaintiff's experts did not explain the medical justification for Radiofrequency Lesioning. The invoices are:

- For the amount of \$78.00 dated January 28, 2021 is for "Kinesiology Private 1-on-1" and practitioner Amy Kiara Ruth is noted; and
- For the amount of \$300.00 dated January 14, 2022 is for "Radiofrequency Lesioning (Equipment Upgrade Fee)" and practitioner Dr. Alan Berkman is noted; and
- For the amount of \$300.00 dated June 1, 2022 is for "Radiofrequency Lesioning (Equipment Upgrade Fee)" and practitioner Dr. Brenda Lau is noted.

[399] The defence objects to inclusion of these payments as special expenses. However, with the notable success of the CHANGEpain treatments and the evidence of Dr. Sun who explained the clinic, this amount of \$681.90 is allowed.

4. CMI Medical - Private MRI

[400] The plaintiff is claiming \$3,184.35. The plaintiff's evidence during trial is that the imaging was arranged by his previous lawyer. The expense incurred was not a referral from a doctor or specialist and the defence says there was no medical justification for the MRI. Page 13 of Dr. Sunshine's October 15, 2013 medical-legal report notes that the plaintiff had a CT Head Scan at VGH in October 2011:

CT Head Scan @VGH, October 7, 2011

No acute Intracranial pathology was demonstrated. This report is submitted as an appendage to this letter.

Emergency Room visit VGH, October 8, 2011

As noted above Mr. Krupinski attended the ER on October 8th, 2011. The time seen by the ER physician was one minute after midnight. It was on this occasion that Mr. Krupinski brought to the ER's awareness his history lot headaches and nausea. The consultation in the ER led to the CT scan noted above. A copy of the report: is best read as legible as it presents, it appears that no physical findings of relevance were noted to the presenting complaint. The final diagnosis stated that the patient may have had post-concussion syndrome. This report is appended to this medical-legal letter.

[401] Correspondence regarding the MRI from Canadian Medical Imaging is addressed to the plaintiff's previous lawyer at Slater Vecchio:

- Letter dated November 17, 2011 invoice notes: "The amount payable with respect to the scan will be \$1,245.00 plus an additional amount of 10% per annum (collectively the "Amount").
- Telecopier Cover Sheet dated November 29, 2016 notes: "Further to your request, we confirm that the total amount owing (as of November 29, 2016 with respect to the MRI scan performed on Zbigniew Krupinski on November 8, 2011 will be \$1,875.35 (\$995.00 - cost of the Trauma Brain SWI MR scan, and \$630.35 - interest on charges on the MR Brain scan from November 8, 2011 to November 29, 2016.

- [402] It is unclear how the plaintiff arrived at the amount of \$3,184.35 claimed for the MRI. There may be an error in the Telecopier Cover Sheet total as the amount should be \$1,625.35 rather than the total of the amounts of \$1,245.00 and \$1,875.35 to arrive at a total of \$3,120.35. Or it may be that the increased amount is a result of accrued interest.
- [403] Dr. Sunshine's October 15, 2013 medical-legal report notes at page 6:
- Mr. Krupinski reported that he had received an 18-page information pamphlet on concussion which was provided to him by his lawyer. His lawyer also offered to pay for an MRI.
- Office Visit November 9, 2011: Private MRI was undertaken November 8th. Copes were sent to both myself and to Mr. Krupinski's lawyer.
- [404] The defence relies upon the case of *Lewis v. Rubboli*, 2018 BCSC 17. The judgement of Madam Justice Adair reviews the authorities on private MRIs claimed as special damages. In the result, the plaintiff did not recover this cost.
- [135] On the other hand, Mr. Hauer submits that the cost of this private MRI is not recoverable, in the absence of evidence that Mr. Lewis had a medical (as opposed to litigation) need for the MRI to be performed more quickly than the public health care system could deliver. In support of his position, Mr. Hauer cites: *Scelsa v. Taylor*, 2016 BCSC 1122; *Owen v. Peljhan*, 2017 BCSC 423; and *Cooknell v. Quinn*, 2013 BCSC 1653.
- [136] In disallowing the cost of a private MRI as an item of special damage in *Scelsa*, N. Brown J. said, at para. 237:
- [237] The defendants have agreed to pay special damages of \$6,002.60, excluding only \$800 claimed for a private MRI, [and certain other expenses]. The plaintiff failed to show an urgent need to obtain a private MRI when a publically funded option was available: *Cooknell v. Quinn*, 2013 BCSC 1653. . . .
- [137] In *Cooknell*, Master Bouck (sitting as a Registrar) disallowed the cost of a private MRI as a disbursement on an assessment of costs. Based on the evidence before Master Bouck, the MRI had been requested by plaintiff's counsel to investigate the evidentiary basis for a brain injury, and to corroborate opinions stated in a medical-legal report. Master Bouck wrote, at paras. 22, and 38-39:
- [22] On June 24, 2010, the MRI was obtained privately at the cost of \$875. The evidence does not address any urgency in obtaining this MRI. Dr. Smith suggested the same investigation in his later medical legal report. The evidence does not say that a publicly funded MRI could not be obtained.
- . . .
- [38] Dealing firstly with the MRI disbursement, the facts of this case are somewhat analogous to those described by then Registrar Blok in *Phelan v. Newcombe*.

[39] Although Dr. Smith did recommend an MRI in this case (it is not clear exactly when), there is no explanation offered for proceeding to a private clinic when a publicly funded scan was available -- or at least no evidence to suggest that such a process was unavailable. As the MRI charge is disallowed on this basis, I do not need to consider whether such an investigation was necessary or proper.

[138] The cost of a private MRI was also disallowed by Gaul J. in Owen, who said, at paras. 110 and 112:

[110] A plaintiff is entitled to be compensated for the reasonable out-of-pocket expenses they have incurred on account of their accident-related injuries. In Ms. Owen's case, she . . . also seeks compensation for [certain items] and a privately funded magnetic resonance imaging ("MRI") that was done on her cervical spine.

. . .

[112] In my view, a good portion of the expenses claimed by Ms. Owen justifiably fall within the special damages category. However I agree with the defendant that some of the expenses are not justified. For example, there is insufficient evidence of why Ms. Owen needed to obtain a privately funded MRI, as opposed to having one conducted using the public health care system. . . .

. . .

[140] I do not criticize Mr. Lewis for proceeding to have the MRI done privately. However, there is no evidence that there was any medical necessity or urgency to do so (indeed, Dr. Van Zyl's evidence appears to indicate there was none). I agree with Mr. Hauer that the evidence is insufficient to justify recovery of the cost.

[405] Mr. Krupinski submits that the MRI was referred to by his doctors, and there would have been a two-year wait for a publicly funded MRI scan.

[406] On the basis of Lewis and the fact that there was no medical justification for a private MRI, this expense is not reasonable and is not allowed.

5. Cougar Mountain

[407] Mr. Krupinski testified that he accompanied his mother-in-law to Cougar Mountain for her treatments. As he was told by participants that people have recovered from cancer by attending this program, Mr. Krupinski spent two weeks at Cougar Mountain Therapy in 2015 at significant expense believing that it could be a miracle cure. His description of the treatment was unclear, and he was unsure of the qualification or training of the therapist at Cougar Mountain. He said that treatments with a physiotherapist after his stay at Cougar Mountain eradicated the benefit he received from treatments at Cougar Mountain and for that reason they were not long-lasting.

[408] The plaintiff is claiming \$8,501.00. There is no medical referral from any of the plaintiff's doctors or specialists for this two-week attendance at Cougar Mountain. There are no clinical records provided for this treatment provider, but only invoices are for treatments between: June 24, 2015 and July 6, 2015. Treatment providers from Cougar Mountain were not called as witnesses to testify at trial.

[409] In the absence of any evidence regarding the specific nature of the treatments or medical justification, this amount is not allowed.

6. Dr. Brown of Ocean Park, Natural Therapist

[410] The plaintiff is claiming \$1,184.77. There is no medical referral from any of the plaintiff's doctors or specialists for visits with Dr. Brown who is a naturopath. Invoices are provided for 38 treatments in 2012 and 2013.

[411] There was no medical referral from his family doctor, Dr. Sunshine, to support the plaintiff's treatments with a naturopath for any accident-related symptoms or injuries.

[412] The plaintiff's medical expert, Dr. Robinson, did not recommended attendance with a naturopath for any accident-related symptoms or injuries. The plaintiff's medical expert, Dr. Sun, commented that naturopaths are consulted for "lifestyle changes".

[413] Mr. Krupinski testified that the sessions with Dr. Brown were extremely painful but the treatments had no effect.

[414] In the absence of any medical justification, these treatments are not allowed as a special expense.

7. Dr. Posen - Naturopath

[415] The plaintiff is claiming \$1,189.00 for four visits in 2022 and 2023. There is no medical referral from any of the plaintiff's doctors or specialists for visits with Dr. Posen or a naturopath.

[416] There was no medical referral from the plaintiff's family doctors, Dr. Sunshine or Dr. Wolak, to support the plaintiff's attendance at Integrative Naturopathic with Dr. Posen.

[417] The plaintiff's medical expert, Dr. Robinson, did not recommended attendance with a naturopath for any accident-related symptoms or injuries. Dr. Sun, the plaintiff's expert rheumatologist from CHANGEpain clinic, commented that a naturopath may be suitable for "lifestyle changes".

[418] Mr. Krupinski's evidence was that the osteopathy treatments and naturopathic treatments seemed to help but the results were only temporary.

[419] Mr. Krupinski says the no medical referral is required as the services of naturopaths, osteopaths, chiropractors and acupuncturists have their services covered by MSP. In British Columbia medial referrals are only required if you want to see a specialist. He notes that Dr. Posen has three of those designations.

[420] Similarly to the other naturopath visit expenses, this expense is not allowed.

8. Dr. Sunshine - Plaintiff's General Practitioner

[421] The plaintiff is claiming \$3,500.00. He explains in his Factum:

The failure of my lawyer to obtain a current medical report from my family doctor, Dr. Sunshine, put me in the awkward position of having to pay Dr. Sunshine \$3,500.00 for a current medical report.

[422] Former plaintiff counsel from Slater Vecchio had paid Dr. Sunshine \$2,400 for the medical-legal report dated October 15, 2013. There was only one report obtained from Dr. Sunshine.

[423] This amount is not allowed as a special expense. It can be reviewed when costs are assessed.

XI. CONCLUSION

[424] Mr. Krupinski is therefore awarded damages as follows:

Item

Amount

Non-pecuniary damages:

\$90,000.00

Past loss of earning capacity:

\$104,000.00

Future loss of earning capacity:

NIL

Cost of future care:

\$6,534.00

In-Trust claim:

NIL

Loss of homemaking capacity:

NIL

Special damages:

\$1,279.90

Legal fees owed to former lawyer:

To be assessed after trial judgment is rendered by further submissions on costs

TOTAL DAMAGES

\$201,813.00

[425] I am satisfied that the overall award of damages is fair and reasonable.

[426] Mr. Krupinski is entitled to his costs on Scale B. If there are matters of which I am unaware and if either party seeks to make submissions on costs, they should contact Supreme Court Scheduling within 30 days of the date of these Reasons to appear before me for this purpose.

[427] If Mr. Krupinski wishes to pursue his claim for special costs, it will also be dealt with at the time of determining costs generally. As stated above, he has liberty to apply within 30 days to include a claim for Botox treatments as part of the cost of future care.

"The Honourable Madam Justice Watchuk"

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