

CANADA / JUDGMENT

Latreille v. Downey

2020 BCSC 976

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 976 Latreille v. Downey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Latreille v. Downey,

2020 BCSC 976

Date: 20200630

Docket: M150034

Registry: Victoria

Between:

Alain Latreille

Plaintiff

And:

Lisa Catherine Downey

Defendant

- And -

Docket: M182324

Victoria Registry

Between:

Alain Latreille

Plaintiff

And:

Ian Francis Davies

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Plaintiff:

A. Wrona and S. Sidhu

Counsel for the Defendant:

D. B. Ryneveld, Q.C.

and T. R. Fraser

Place and Date of Hearing:

Victoria, B.C.

January 20-24, 27-30, 2020

Place and Date of Judgment:

Victoria, B.C.

June 30, 2020

Introduction

- [1] The plaintiff's claims arise from two motor vehicle accidents, one on September 1, 2014 (the "first" or "2014 accident") and the second on February 11, 2018 (the "second" or "2018 accident"). Those claims include claims for resulting chronic pain, sleep disturbance, fatigue and mood disorder, leaving him permanently disabled and unable to work. The two actions were tried together. Liability has been admitted in both.
- [2] At issue are causation and damages suffered by the plaintiff as a result of the two accidents. The defendants accept the plaintiff suffered soft tissue injuries in the accidents but not that the plaintiff cannot work due to psychological issues. The defendants submit the plaintiff's obesity and resulting sleep apnea are the cause of his psychological issues. The defendants contend as well that the plaintiff has failed to mitigate his damages by following the recommendations of his medical practitioners.

Background

- [3] The plaintiff was born on April 18, 1964. He was 50 years of age at the time of the 2014 accident, 53 years of age at the time of the 2018 accident and 55 at the date of trial.

- [4] After graduating from high school in Montreal, Quebec, he joined the Canadian Navy. He began as a Naval Weapons Technician. He moved to Victoria in 1982. He left the Navy in 1987 with the rank of Leading Seaman. He then worked for approximately two and one-half years with the Commissionaires Corps. In 1990 he began working as a janitor for the City of Victoria (the "City"), then after six months transferred to the building maintenance department working as a maintenance worker and looking after communications. He remained in that position until 1995 and during that time completed an engineering course offered by the City.
- [5] In 1995 the City recruited him to work in the IT department as a Computer Support Technician. By taking on-the-job training and courses, he acquired the skills to work in that field. He provided IT support at various City buildings which included installing software and hardware at various sites, assisting City employees and infrastructure development. In 2013 he became the union shop steward. He also obtained a Level 2 Occupational First Aid certificate, became a building warden in 2012 and sat on the City health and safety committee beginning in 2011.
- [6] His career plan was to remain with the City until he turned 65 and to work towards pay level 14, the highest level he could achieve.
- [7] In addition to working full-time with the City in the early 2000's, he worked as a jailer. At the time he had intended to enter policing as a career, however it would have required relocating and he did not believe that was in the best interests of his son as he and his son's mother were separated and hence his son could not move with him. He worked as well as a security guard and first aid attendant at Save-On-Foods Memorial Centre between 2010 and 2012.
- [8] He began volunteering as an auxiliary constable with the RCMP in 2005. This involved traffic control, neighbourhood watch, boat patrol and coastal watches, riding along with RCMP members on patrol and ATV rides into the bush searching for drugs. The work was physically demanding and he was required to be as fit as a regular member as well as being able to defend himself and to help RCMP members as required. He was the coordinator for the Sooke Cops for Cancer fundraiser.

Plaintiff's Pre-Accident Condition

- [9] Before the first accident he went almost daily to the Crystal Pool or Esquimalt Recreation Centre where he would do cardio and lift weights. He also enjoyed going for walks, golfing, bicycling and socializing. He cycled to and from work when residing in Esquimalt and went on long weekend rides. He spent time with his spouse, son and two stepdaughters. He helped maintain their duplex and did the heavier household tasks. He regularly cooked dinner. He was part of a group that met to smoke cigars and play poker.

- [10] He was diagnosed with testicular cancer in September 2010 resulting in the removal of his left testicle in 2011. He received testosterone treatment. He was tested for sleep apnea around the time of his cancer treatment but testified he was not found to have sleep apnea and no treatment was necessary.
- [11] Before the accidents in issue, the plaintiff was involved in four motor vehicle collisions in 1995, 1998, 2005 and 2010. He testified the accidents caused injuries to his right shoulder but that he also suffered neck and back injuries as a result of some of them. He stated the symptoms of the first three accidents resolved in each case within six months. The 2010 collision caused right shoulder pain which affected his sleep and mood. He missed work as a result of that accident but did not recall how much time he took off. He said he recovered from the 2010 injuries by March of 2013 when he had a third injection from Dr. Vincent, a Pain Specialist. He testified he had no ongoing back or neck symptoms from March 2013 onward and no further treatments before the 2014 accident.
- [12] He is described by Dr. Down, his family physician since 1998, as an anxious person. He was obese before the 2014 accident and remains obese. Before the accident Dr. Down had repeatedly recommended weight loss, exercise and diet. Mr. Latreille's weight has been a long-term issue. He also suffered from hypogonadism and fatigue after his 2011 cancer.

The 2014 Accident

- [13] The first accident occurred on September 1, 2014, a weekday, at approximately 10:00 a.m. The plaintiff had the day off and was travelling east on Johnson Street in Victoria in his wife's vehicle. He was on his way to Cattle Point Beach to meet with his cigar group. He stopped as traffic had stopped for a pedestrian to cross. He testified he heard a noise and then he was moved forward and back by what he described as a "great force" as his vehicle was struck from behind by the vehicle driven by the defendant, Ms. Downey.
- [14] The plaintiff's vehicle had a bike rack at the back that stuck out about seven inches. The rack went through Ms. Downey's vehicle's grill and hit the radiator causing it to lose its coolant. Mr. Latreille said he was surprised there was not much damage to his vehicle given the force of the collision. Ms. Downey testified that she did not feel much of an impact, just a bang. She said the plaintiff was very polite and showed no signs of being in any distress. The cost of repairs to her vehicle were \$7,607.35 which she described as a shocking amount.
- [15] The parties exchanged contact information. The plaintiff remained at the scene for about 10 minutes and then proceeded to Cattle Point Beach. He began to experience stiffness in his neck and back shortly after arriving and left early. He continued to experience that stiffness as well as headaches once home.
- [16] Because of these symptoms, he saw Dr. Down a couple of days later. He complained of low back and neck pain and difficulty sleeping. He was told to keep active, take Tylenol and Advil, attend physiotherapy and continue working. Massage was recommended.

- [17] He testified that over time he became fatigued through the day instead of just in the evening and that he was tense and on edge and experienced anxiety while driving. He stated he would look back, became sweaty and suffer from chest tightness. He was worried about being in another motor vehicle accident. While his wife started driving more, this also made him anxious.
- [18] He began physiotherapy, massage and active rehabilitation treatment at Victoria Exercise Rehabilitation Centre ("VERC"). The massage aggravated his pain so he stopped it. He found physiotherapy did not help. He attended on a chiropractor in 2014, also with little or no benefit. When he could not see Dr. Down in November 2014, he went to a walk-in clinic because of his lower back pain. An X-ray identified degenerative disc disease in his back and neck.
- [19] Every two to four weeks to the end of 2014 he continued to see Dr. Down for neck and back pain as well as issues with sleep disturbance, fatigue and low mood. He was prescribed pain medications. He was referred for psychological treatment and to the Helmcken Pain Clinic. He stated that between the accident date and the end of 2014 his symptoms slowly worsened. He was in pain, his sleep was bad, he was exhausted, withdrawn and not able to engage in the activities that he used to do. He said he was trying to cope by taking it one day at a time. He was waking up at least four times per night due to neck and back pain.
- [20] Medications that he used in 2014 following the first accident were Naproxen, Flexeril and Tramacet. He stopped taking them as he did not like taking drugs and they made him feel drowsy. He was also using topical creams for pain.
- [21] He continued to work. His claim for past wage loss from the accident to March 2017 when he ceased working is \$1,030.68.
- [22] From January 2015 to March of that year, he attended counselling with Ellen Connell, a Registered Clinical Counsellor, for pain management, driving anxiety and low mood. He stopped attending as he did not think it was helping, although he stated he tested the tools she had given him on his own.
- [23] In March 2015 he began seeing Dr. Vincent again at the Helmcken Pain Clinic because Dr. Vincent's injection in March of 2013 had resolved his neck and shoulder pain from the 2010 accident. He said his pain was at level 7 out of 10 but that injections from Dr. Vincent reduced the pain to about a 4. He tried golfing but only played three holes and suffered pain for days after. Similarly, bike riding exacerbated his pain. Household chores likewise increased his pain. He attended the pain clinic every two to three months and, on each visit, received six to seven trigger point injections.

- [24] His neck pain improved by 2016 but his back pain did not. His sleep issues left him physically and mentally exhausted. Dr. Down prescribed Ativan for sleep but after four months he stopped using it as it left him groggy. He continued to experience chest tightness and panic when driving. Dr. Down ordered an ECG and stress test. Neither showed any problems.
- [25] He testified he no longer wished to be around people, became withdrawn, easy to anger and felt sad. He continued to feel mentally and physically fatigued. His employer agreed he would not have to lift heavy items or go under desks for his work, as he was required to do before the accident. He noticed he was starting to make mistakes at work and to either miss meetings or show up late.
- [26] He did not go on a family trip to South Korea as he did not feel he could handle the long airplane ride or the sight-seeing.
- [27] He testified that in the summer of 2016 he was overwhelmed at work and was exhausted. He had difficulty keeping up with the work load and felt he was just surviving. After work he would return home and go to bed.
- [28] Towards the end of 2016 Dr. Down recommended testosterone and hormone tests. They were negative. Dr. Down also told him again to adopt a better diet and to lose weight. His weight has fluctuated - both before and after the first accident. He has a history of chronic obesity and difficulty losing weight. Dr. Down testified the plaintiff has always been obese since he met him in 1998. On direct the plaintiff stated that according to his physicians he should be 165 pounds as he is 5'8" tall.
- [29] Dr. Solomons noted that in 2012, after the 2010 accident, Dr. Sovio, an orthopedic surgeon, prepared an Independent Medical Examination ("IME") report for then defendants' counsel noting the plaintiff weighed 202 pounds and had a BMI of 37.2. Seven months before the 2014 accident he weighed 246 pounds. By 2019 his weight had increased to 270 pounds. At trial he testified he weighed 240 pounds. He said there has been no change in his sleep pattern or pain levels or his energy levels, after either gaining or losing weight.
- [30] In March 2017 he returned to Ms. Connell for further counselling as he was not sleeping well due to pain, his anxiety level was high and his energy levels very low and he felt things were snowballing. He testified Dr. Down recommended he take three months off work. Dr. Down prescribed the antidepressant Citalopram. The Citalopram was started at 10 mg but according to the plaintiff this did nothing. The dosage was then upped to 20 mg but even this did not provide a benefit. The dosage was increased again to 40 mg but again did not, according to the plaintiff, provide significant improvement to his mood or fatigue.
- [31] He went on disability in March 2017. He used his banked sick time and vacation time while he was off work. He testified he spent a lot of time in bed. He continued to experience the same symptoms into the summer of 2017. Dr. Down made a referral to a Community Psychiatrist. The plaintiff called for an appointment on three different occasions to see

when he would be able to see a psychiatrist but was told that the wait times would be roughly one year. He last followed up for an appointment in early 2019 and was told he had been bumped down the list and the wait remained a year. As a result, he has not seen a psychiatrist for treatment. He did not seek a referral to any other psychiatrist either in Victoria or elsewhere.

- [32] He had ceased RCMP auxiliary work shortly after the first accident. He was advised in September 2017 he would have to resign from his position with the RCMP due to his inability to perform his duties. The plaintiff became very emotional when discussing this loss. He said it hurt him immensely because he had worked hard to obtain the position, it made him feel like he was part of a family, and gave him an opportunity to give back to the community.
- [33] Shortly before the 2018 accident, his treatment regime consisted of seeing Dr. Down, attending VERC, seeing his counsellor Ms. Connell and attending on Dr. Vincent for injections.
- [34] His said his neck was not bothering him much at that time. His back continued to be a 3 out of 10 on the pain scale. His mood was low. His sleep was the same. His energy was low and dependent on activity levels. He could not focus and was feeling overwhelmed as a result of the fatigue. His driving anxiety was not that bad. He testified he was using Ativan for visits to the dentist as he became anxious at those, as well as taking medications for his anxiety, depression and pain.

The 2018 Accident

- [35] On February 11, 2018 the plaintiff was the front seat passenger as his wife drove. He was wearing his seatbelt. His wife stopped at the intersection of Kelly Road and Veterans Memorial Parkway in Langford, B.C., and they were rear-ended by the defendant Mr. Davies. The plaintiff said the impact was not as severe as the first accident. He does not believe the vehicle moved. There was only minor damage to their vehicle. In this instance the defendant's vehicle hit their trailer hitch.
- [36] A few days later he reported to Dr. Down that his neck and low back pain had worsened which he described as 2 out of 10 for his neck and 5-6 for his back and that he required more sleep. He was advised to attend the gym and physiotherapy. He testified the worsened neck and back pain lasted for a few months and then returned to the level they were before the second accident.
- [37] In March of 2018 he took a trip to Cuba with members of his cigar group. He took pain medication for the flight. Due to fatigue while there he did not participate in all activities with his friends.
- [38] Also, in 2018 he purchased a Honda Shadow 750 motorcycle, which he described as a "midsized" bike. He stopped riding it after he had an accident and broke his elbow.

- [39] In October 2018 he was referred for sleep apnea testing by Dr. Down. That testing revealed he had sleep apnea so he purchased a CPAP (Continuous Positive Airway Pressure) machine and started using it. He told Dr. Solomons that the CPAP machine did not benefit him or change his sleep, fatigue, or pain. On direct he testified it did not improve his sleep nor was his sleep refreshing. However, Dr. Down's notes state that the plaintiff told him in December 2018 that after using the CPAP machine for a month, he felt a bit more refreshed and less sleepy in the morning. On cross-examination the plaintiff said he might have said that because it might have been true on that day. He stated because the machine required that he sleep on his back, it increased his back pain and that his energy was the same whether or not he used the CPAP machine. He used it for four to five months and then had to have parts replaced. He complained it made his throat sore. He stated at trial he had used it a "couple of weeks" ago. He did not say he uses it regularly. He has not been able to see his former sleep apnea specialist Dr. Lundy as he has ceased practice. He has not sought a referral to another specialist.
- [40] On February 11, 2019 the plaintiff's disability insurer sent him a letter confirming their earlier request that he participate in a program to assist him in returning to work and his subsequent refusal. On January 29, 2019 they understood in a conversation with him that he agreed to participate in a return-to-work plan. He then met with Dr. Down and on February 6, 2019 Dr. Down provided a note stating the plaintiff remained "medically unfit to return to work/remains medically unfit for participation in a graduated RTW program as suggested by his LTD." The response of his disability insurer was to terminate his disability benefits on February 11, 2019 for his refusal to undertake the proposed return-to-work program. He filed a grievance with his union but that was not successful.
- [41] As he felt he was not able to work and had no other source of income, he elected to receive his pension early and retired as of April 18, 2019.

Lay Witnesses

- [42] The plaintiff called a number of lay witnesses consisting of his common law spouse, friends and his former work supervisor. They generally provided evidence consistent with his.

Kimberly Astrid Au

- [43] Ms. Au is the common law spouse of the plaintiff. They have been together since 2007. They reside in Langford with her twin daughters and the plaintiff's son. Before the 2014 accident she described the plaintiff as very friendly, open and the "life of the party," someone with a great sense of humour, active, hardworking, intelligent and witty.

- [44] She described the plaintiff's involvement with the RCMP and fundraising, how on weekends they would bike together as a family, regularly entertained friends and hosted parties including a Christmas dinner for the RCMP. She recalled that in 2011, when they lived in Sooke, the plaintiff received the Sooke Citizen of the Year award. When they resided in Esquimalt, prior to the first accident, they biked to work together. She said their relationship as a family was "very close." They golfed together and shared household chores.
- [45] She confirmed the plaintiff always worked full-time until he went off work in March 2017.
- [46] She noted that after the cancer diagnosis and treatment, he was a bit more tired but a sound sleeper. She said things changed dramatically after the first accident as he developed issues with his sleep, was up frequently at night and suffered from back pain. They stopped biking to work and he would return home after work exhausted.
- [47] She said that more of the household chores now fall to her as he cannot vacuum, load and unload the dishwasher, lift and carry things or take out the garbage. They no longer golf. When he was forced to retire from the RCMP auxiliary program, she said he was very emotional and cried.
- [48] After the 2014 accident and into 2015 she said he became irritated and frustrated, was withdrawn, no longer participated in family activities such as playing games and was significantly fatigued. She described it as severe and that by 2016 he was on the verge of "crashing". She said their level of intimacy has declined since 2014 and is now non-existent.
- [49] She has taken over the family finances as the plaintiff would forget to pay bills. Their social life has decreased and she now goes alone. They do not drive for any length of time because of his discomfort. She testified that by the end of 2016 he was exhausted and is now a "shell of a man". Given his early retirement and reduced income, she anticipates having to work longer than planned in order to meet their retirement savings goals.

Maurice Connor

- [50] Mr. Connor is a realtor in Victoria. He has a degree in Kinesiology and a Master's in Science from the University of Victoria. He is the former owner of VERC which he started in 1993. He continues to be a part-owner. He volunteered as an auxiliary constable with the RCMP from 2003 to 2019.
- [51] He met the plaintiff when the plaintiff joined the RCMP auxiliary program in 2004. They worked shifts together a couple of times per month but did not really see each other outside of these shifts.

- [52] Mr. Connor was aware that the plaintiff had been involved in an accident in 2010. He testified that he recalled the plaintiff having quite a bit of discomfort and pain in his neck and shoulder regions after 2010 but that he improved gradually over the years. Mr. Connor would see the plaintiff during the auxiliary shifts that they worked together but because the plaintiff attended VERC and because of Mr. Connor's background in kinesiology, he would also help the plaintiff from time to time with his workouts.
- [53] Mr. Connor testified that the plaintiff did get better and was back to full duties as an auxiliary constable prior to the 2014 accident.
- [54] He described auxiliary constable work as a physically demanding position that consisted of riding along with RCMP members, doing ATV shifts on logging roads, traffic and scene security duty, sitting and standing for lengthy periods of time and wearing a heavy police uniform that included everything but a firearm. The shifts were generally 10 hours in duration. Mr. Connor testified that the plaintiff and he worked such shifts in the year before the 2014 accident and that the plaintiff had no limitations.
- [55] Mr. Connor could not recall how he learned about the 2014 accident as he and the plaintiff just associated casually at that point and Mr. Connor was transitioning into his realtor career and away from VERC. He recalls reconnecting with the plaintiff to get him out of the house and into the gym and at the same time it would motivate him to attend as well. He believes this occurred in 2017. From the time they reconnected to the present day they try to go to the gym daily in the mornings and then for coffee after.
- [56] His evidence was that the plaintiff's exercise level was low when they first started. It involved a slow walk on the treadmill with no incline for a short duration, light weights and exercises with few repetitions. Mr. Connor stated that the plaintiff is a positive person and does not like to display any signs that he is not happy and so Mr. Connor would watch for the plaintiff's physical movements for evidence of difficulty and discomfort which he is trained to spot as a kinesiologist. He observed the plaintiff having issues getting up from a sitting position and moving slowly and almost having a limp. If the plaintiff did too much, he could see it on his face. He described the plaintiff as someone who wants to get better and will do more to get better. He stated that he told the plaintiff that if he overdid things, he might get too sore and later not want to work out at all.
- [57] Mr. Connor testified that the plaintiff's mood was lower in comparison to the "Al [he] knew before". He noticed the plaintiff having word finding issues. He observed him becoming easily fatigued and needing regular breaks and that he could not sustain things for long periods of time. Even when having a coffee, he would need to get up and move around.
- [58] He testified that the plaintiff's energy levels were significantly lower in comparison to his pre-accident behavior. He noted that the plaintiff has now improved to the point that he can go to the gym on his own.

- [59] The time they spend together outside of the gym is minimal. They went to a low intensity introductory yoga class and he observed that the plaintiff was not looking well the next day. The plaintiff has provided him with some help on a car he is working on but the help was minimal and much less than the level of help he provided in the past.
- [60] Mr. Connor stated that the plaintiff still fatigues easily and still has issues with word finding. His ability to do things for any length of time remains low. His levels of intensity are not what they were prior to the 2014 accident. He can go on the treadmill at a walking pace. When he has tried jogging or pushing himself on weights, he has told Mr. Connor he is in pain the next day.
- [61] He testified that when the plaintiff had to stop the auxiliary constable work, it really hurt him. He has observed the plaintiff see other active members and become saddened.
- [62] The biggest changes he has noted in the plaintiff are low mood, fatigue and decreased ability to do things for sustained periods of time.

Sheldon Seigel

- [63] Mr. Seigel, a retired lawyer, testified on behalf of the plaintiff. He did not recall exactly when they met, but indicated that it was some months after the 2014 accident. They met when he joined the cigar club the plaintiff belonged to. The group typically met at a local shop to talk and smoke cigars. He went three times per month on average and occasionally ran into the plaintiff. Over time, Mr. Seigel joined some of the other members for a monthly poker night starting one to two years ago. On occasion, the group meets for special events.
- [64] He learned the plaintiff was recovering from a motor vehicle collision. He does not recall how he learned about it, but he observed the plaintiff looked uncomfortable. For example, he got up and sat down in an uncomfortable looking manner and did not sit or stand like others in the group. He described the plaintiff as manipulating his body to get comfortable.
- [65] He recalled the plaintiff was involved in a subsequent collision, but not the date. He said the plaintiff appeared worse for approximately six weeks and then returned to his prior baseline condition.
- [66] Mr. Seigel observed it took an emotional toll on the plaintiff when he was unable to work. He described the plaintiff as proud of his work with the City. He also described the plaintiff's "man cave," with photos of him and fellow RCMP officers, his riding in Cops for Cancer, service awards and a large hand painted thank-you poster from a young boy.
- [67] Mr. Seigel travelled to Cuba with the plaintiff and other cigar club members. They stayed at an all-inclusive resort near the beach. In the mornings, they met at a nearby cigar shop rooftop. Then the group would go on formal or informal tours and to the beach and cigar shops. One day, they hired a driver and a van to see Havana. On the trip, he observed the plaintiff experienced limitations. The plaintiff declined to go on walks with Mr. Seigel. Other times, he was left behind on the rooftop when others went on scheduled or unscheduled

tours. Mr. Seigel recalls the group planned to walk two blocks on the beach to another cigar shop but the plaintiff required a taxi. He indicated that the plaintiff shared a room with another member in his early to mid-70s, and the two of them lounged by the pool and were less physically active.

Michelle Sue

- [68] Ms. Sue was the plaintiff's City of Victoria supervisor from 2003 to August 2015. In August 2015, she accepted a temporary assignment and moved to a different work location. In April 2017, she returned to her previous work location. Until August 2015, she worked with the plaintiff daily.
- [69] In the years prior to the 2014 accident, she described the plaintiff as always upbeat, jovial, the "life of the party", outgoing, and quick with a joke and a smile. She observed he had friends all over the City and was a person that got along with everyone. When she assigned him a task, she did not worry whether it would be completed; she knew it would be done and trusted him.
- [70] In his technical support role, he assisted City staff. Staff would submit requests via telephone, email or in-person. Tasks included setting up printers and phones, assisting with cell phones, installing hardware and software. In addition, the plaintiff assisted the infrastructure staff with tasks such as mounting servers. He worked in the office and travelled to off-site locations, including three fire halls. She estimated he spent approximately 40% of his time in the office and 60% in the field.
- [71] She described the work as physical for many tasks. For example, if a computer ceased working, he had to swap it with a new one. There were lots of staff moves to other locations requiring setting up the technology which could require moving furniture to get to the electrical outlets and ports.
- [72] Ms. Sue supervised the plaintiff after the first accident until August 2015. She observed there were days he was in pain. She could tell by the look in his eyes and his countenance was different. She described it was like there was a weight on him. She observed he was not as bright and upbeat as usual. For example, when he stood or sat, he shifted uncomfortably. She said that the plaintiff kept more to himself. She recalls the plaintiff indicating he took pain medications but she did not think they were working as well as they should because he still appeared to be in pain.
- [73] Ms. Sue noted the plaintiff brought a rubber seat cushion to work to sit on.
- [74] Ms. Sue confirmed the plaintiff requested accommodations to his duties within a couple of months of the 2014 accident. This stood out to her because he was hardworking and had not previously requested any accommodations. He asked to do more phone work because he had difficulty lifting computers and monitors. She said that the plaintiff approached her and as his supervisor she recognized her duty to accommodate him as best as she could.

- [75] Ms. Sue recalls the plaintiff missed work for appointments. She observed the plaintiff had less energy and stopped going out after work or going to lunch with fellow workers. In terms of his work, she said he tried to keep up but was struggling. This continued until August 2015 when she moved to another work location.
- [76] After August 2015, she continued to see the plaintiff weekly. They typically had coffee on Wednesdays and lunch with another colleague on Fridays. When they met for coffee, she said his tone was different and he appeared tired. She noted he was not as bright and happy. She also recalled he was not as quick to joke or make quips and remarks.
- [77] She said the Friday lunches continued for a time and then the plaintiff started to miss them. By late 2016 it was usually just her and a colleague at the lunch as the plaintiff did not join them. Presently, Ms. Sue sees the plaintiff occasionally. They email to arrange lunch but then the plaintiff often cancels.
- [78] Regarding advancement, Ms. Sue indicated that three other people work in the same role as the plaintiff at the help desk. The other employees earn a higher salary because they have higher qualifications. She discussed with the plaintiff that if he upgraded his qualifications, then she would recommend that he be re-classified to a higher position and pay grade.
- [79] On cross-examination, Ms. Sue confirmed the plaintiff was at a level 12 pay grade when he left the City. She indicated the next level was level 14. She said he was a "legacy" hire. He did not have many computer certificates. In comparison, more recent hires had more training. This occurred because the City wanted to hire new staff with more skills, such as in computer networking. As a result of the increased training qualifications, the new positions were classified at a higher level than the plaintiff's pay grade. Regardless, she considered his skill level adequate and was content to keep him working. She indicated that she did not recall exactly when she began to accommodate the plaintiff, but suggested it was one month after the 2014 accident. The plaintiff continued to work in an accommodated position until he went off work in March 2017.

Credibility and Reliability

- [80] The evidence of Ms. Au, Mr. Connor, Mr. Seigel and Ms. Sue was consistent both between them and with respect to the evidence of Mr. Latreille. No significant challenge was made to their credibility although as defendants' counsel noted, Ms. Sue had been led on some of her evidence respecting the plaintiff commenting on his pain levels and fatigue. As a result, less weight is accorded to those observations.
- [81] The plaintiff, through counsel, acknowledges that his credibility is central. Defendants' counsel characterized the plaintiff's evidence as "fairly straight-forward". They did not challenge his credibility. It was internally consistent and was not significantly undermined in cross-examination. His evidence was in many respects consistent with and corroborated by his lay witnesses' evidence although given their reliance on what he told them and what they observed when around him, that is not surprising. That said, his subjective reports

must be considered in the context of the evidence as a whole including the medical evidence.

Plaintiff's Expert Evidence

[82] A number of experts provided reports and testified on behalf of the plaintiff and the defendants.

Dr. Hugh Down

[83] Dr. Down testified as an expert in Family Medicine. He has practiced in Family Medicine since 1996 after completing his residency at Queen's University in 1996 and obtaining his medical degree from the University of British Columbia ("UBC") in 1994. He has had a family medicine practice in Victoria since 1998. He has also been the plaintiff's family doctor since 1998.

[84] Dr. Down has seen the plaintiff many times since the 2014 accident. He stated that the plaintiff is an anxious person and was an anxious individual before the 2014 accident. He has known the plaintiff as his patient for 22 years, a factor that gives him the advantage of a continuing relationship and the knowledge and insight that comes with that.

[85] He prepared two medical legal reports in this case. In his first report dated October 30, 2017 he stated:

In summary, Mr. Latreille suffered a soft tissue injury of his neck and back regions subsequent to a motor vehicle accident on September 1, 2014. He also suffered from anxiety relating to the event, and through his struggles, this progressively evolved into a major depression particularly in 2017. I believe that his motor vehicle accident is the direct cause of his soft tissue-related symptoms. I also believe that his motor vehicle accident was a factor in the development of his major depression.

His ongoing vocational disability relates to his ongoing depression, and his general disability relates to his present mental state as well as his ongoing soft tissue-related symptoms. At home, his activities of daily living remain okay, but are easily exacerbated if he overdoes it. He continues to avoid sports such as golfing and cycling due to pain exacerbation. He continues to remain off his auxiliary duties with the RCMP, and he remains off work due to his mental state.

His long-term prognosis is guarded. If we were simply dealing with a soft tissue injury of his back, I would predict a continued slow resolution of symptoms over time. Having said that, it has already been a few years, and he has ongoing persistent symptoms and requiring ongoing active treatment with Dr. Vincent, and a host of other manual therapy modalities. It would seem reasonable, therefore, to assume that these symptoms are likely to continue well into the future. Unfortunately, Mr. Latreille has also developed depression and anxiety. His long-term prognosis regarding this is therefore guarded.

I have no doubt that the motor vehicle accident of September 1, 2014 has contributed significantly to his present mental state. It is not the sole contributing factor, affecting his mental and psychological problems. His previous cancer surgery, resulting hypogonadism and fatigue as well as significant obesity and deconditionism have also been contributing factors. These pre-existing conditions also make him more vulnerable to injury and more difficult to recovery [sic] from a motor vehicle accident. Also, it is difficult to predict long-term because I feel we have not fully treated him regarding his mental state. He has an ongoing pending referral for psychiatric assessment and treatment. Unfortunately, in Victoria, these referrals take an exceedingly long time to be processed. I am hopeful that, with appropriate specialist assessment and treatment, he will continue to gain further improvement. However, I am unable to comment further in this regard until he has at least been fully assessed and treated by psychiatry.

[86] These opinions remained unchanged in his September 27, 2019 report in which he stated:

At the time of my October 19, 2017 medical-legal report, Mr. Latreille's mental state was his most significant motor vehicle accident-related problem. As previously stated, he had marked anxiety relating to the September 1, 2014 MVA, and subsequent to the accident drifted into a state of chronic low mood. Due to increasing problems with anxiety and depression, and his inability to cope with life stressors, he was taken off work in March 2017. It was my estimation at the time that his current anxiety and depression were 50 percent attributable to his motor vehicle accident .

It is my opinion that Mr. Latreille's February 11, 2018 motor vehicle accident aggravated his anxiety and depression. He remains unfit for employment due to his present mental state. His long-term prognosis for this is guarded to poor. It has now been some years and his symptoms have persisted despite therapy. However, he is still awaiting formal psychiatric evaluation and treatment, and it is my hope that this will provide further benefit and improvement for him. He should continue with ongoing pharmacotherapy and professional counselling on a regular basis as we await evaluation by a psychiatrist.

In my previous medical-legal report dated October 19, 2017, I stated that his current depression and anxiety were 50 percent attributable to his motor vehicle accident. My opinion at this time is unchanged. Mr. Latreille has other medical issues related to obstructive sleep apnea, on nasal CPAP, significant obesity, and also hypogonadism that also contributes to his mental state ongoing.

[87] In direct examination, he testified respecting the plaintiff's diagnosis of cancer in 2010 and his previous motor vehicle accidents and that the plaintiff returned to full-time work after each of these events. He said that the plaintiff had always been obese since he first met him but that this never stopped him from working prior to the 2014 accident.

[88] In cross-examination, when asked if fatigue was a general symptom of low testosterone, Dr. Down stated that the specific symptom of low testosterone was low libido but that fatigue was not a highly specific symptom. He stated that if his symptoms such as fatigue were due to low testosterone, then testosterone therapy should have improved those symptoms. In re-

direct, Dr. Down agreed with the statement he wrote in his consultation request to Psychiatrist Dr. Emes that recent levels suggested adequate dosing of testosterone and that this was unlikely a cause of his fatigue.

- [89] Regarding the plaintiff's decision to cease working, it was put to Dr. Down that it was the plaintiff's decision to go off work and not his, to which Dr. Down responded that he did not recall who suggested time should be taken off from work but it was not unusual for him to take a patient off work and it was part of his plan to take the plaintiff off work in order to focus on his mental health. He said he will often take people off work when symptoms are not going in the right direction and that it would be unusual for a patient to say he needs to be off work. He believed the plaintiff was taking time off due to his mental state. His physical issues were not the reason for recommending he take a period of time off work, although his physical state was probably a contributor to his mental state.
- [90] In cross-examination Dr. Down also stated that in his opinion the 2014 accident was the catalyst that led to Mr. Latreille's mental health diagnoses. He was vulnerable due to the other factors noted in his reports. As he put it, Mr. Latreille had "pre-disposing risks". When asked in cross-examination what percentage of the plaintiff's mental state was due to the 2014 accident, it was his opinion that 50% of his mental state was due to the 2014 accident and the other 50% due to his pre-existing issues, however he noted that 50% estimate was a bit arbitrary and a guess.
- [91] His records reveal regular advice to the plaintiff over the years to exercise, lose weight and diet and that the plaintiff was not successfully losing weight, dieting nor at times exercising due to a lack of motivation.

Dr. Lynne MacKean

- [92] Dr. MacKean testified as an expert in physical medicine and rehabilitation (physiatry). She has practiced privately as a Physiatrist since 1996. She has been a Clinical Assistant Professor at UBC's Faculty of Medicine since 2006. She explained that Physiatry is the specialty focusing on rehabilitation medicine. While this is a broad area, encompassing neurological injuries and pediatric injuries (inter alia), Dr. MacKean has focused on the treatment and rehabilitation of musculoskeletal ailments. Dr. MacKean maintains a clinical practice in addition to her medico-legal work. She has testified in the Supreme Court of British Columbia previously and was qualified without objection in this case.
- [93] Dr. MacKean assessed the plaintiff on three occasions and wrote three reports.
- [94] In her first report dated March 14, 2016, Dr. MacKean noted the plaintiff presented as "pleasant, cooperative, and straightforward throughout the interview and examination process with no evidence of exaggerated pain behavior". She stated that the plaintiff had told her that he had been involved in four previous motor vehicle accidents in 1995, 1998, 2006 and 2010 and that his symptoms following the 1995, 1998 and 2006 accidents resolved within six months. With respect to the 2010 accident, the plaintiff advised her that he developed

neck pain and right shoulder pain but that these symptoms resolved following a series of injections with Dr. Vincent, the last occurring in March 2013.

- [95] Regarding the 2014 accident, she noted that the plaintiff experienced neck and back pain in the mid to lower back following the accident and that at the time that she saw him his most persistent pain was in the lumbar region.
- [96] Dr. MacKean diagnosed the plaintiff with Grade 2 soft tissue injuries involving the cervical spine and lumbar spine. She recommended that he continue to receive injections from Dr. Vincent and to follow up with VERC and continue with the exercises they taught him. At that time, Dr. MacKean felt that there was still an opportunity for continued improvement over the next one to two years.
- [97] Dr. MacKean opined that these diagnoses resulted from the 2014 accident. She also felt that some of his lower back pain could be related to facet joint osteoarthritis.
- [98] In March of 2016 it was her opinion that the neck and back injuries would not prevent the plaintiff from working in his job position with the City of Victoria but that he needed to be careful not to lift or carry heavy equipment such as monitors and printers.
- [99] With respect to his weight, she wrote:

I also think that if he can continue to lose weight that will also help with management of his ongoing low back pain. I do see a lot of patients in my practice who are obese and they have difficulty losing weight after being involved in an accident. Even if he does lose weight his low back pain will probably not resolve completely but it may help to reduce his low back pain.

- [100] Dr. MacKean assessed the plaintiff again on June 13, 2017 and prepared a report that same day. She summarized her previous report and again stated that losing weight would not resolve his low back pain completely but that it might decrease its severity. Dr. MacKean noted that the plaintiff reported that he had not noticed any significant change since she last assessed him in March 2016 but he would notice a decrease in his lower back pain from a 6 - 8/10 to 3 - 4/10 for a few months following injections but that if he did a lot of bending or if he tried to do heavier lifting, his low back pain symptoms would increase. She noted that he stated he was not sleeping well due to back pain.
- [101] Dr. MacKean reviewed a bone scan done on August 10, 2016. She concluded that because it did not show any significant inflammation involving the facet joints, she did not think the facet joint osteoarthritis was a significant factor respecting his ongoing chronic low back pain symptoms.
- [102] Dr. MacKean's opinion with respect to diagnosis and causation remained unchanged. At that time, she opined that the plaintiff had reached the point of maximal medical improvement as it had been over two and one-half years since the accident. Dr. MacKean suggested that he continue to follow up with Dr. Vincent and to continue with a regular exercise program and walking as tolerated and reduce his weight.

- [103] She noted that the plaintiff was off work because of problems with depression and anxiety and that she would not give an opinion on these issues as they were outside her expertise. Dr. MacKean re-affirmed her opinion that Mr. Latreille could continue working with the City of Victoria with his neck and back injuries but had to be careful not to do heavier lifting or carrying activities and that if he had to recertify as a first aid attendant, he would probably have aggravation of his neck and back pain symptoms when performing CPR for more than a few minutes.
- [104] Dr. MacKean assessed the plaintiff for a third time on June 13, 2019. Dr. MacKean noted that the plaintiff had been involved in another motor vehicle accident on February 11, 2018 that resulted in aggravation of his neck and back pain symptoms for three to four months. At the time of that assessment, the plaintiff was reporting neck pain at 2/10 and low back pain at levels of 3 - 5/10. His low back symptoms would decrease with injections and increase when he was doing a lot of bending, standing, sitting. He had not noticed any significant improvement with regards to the low back pain symptoms.
- [105] She again concluded that the plaintiff had Grade 2 soft tissue injuries involving the cervical and lumbar spine caused by the accident. She opined that he was at the point of maximal medical improvement as it had been over four and one-half years since the accident. She recommended that he continue to follow up at VERC, to continue seeing Dr. Khattab (who he began seeing at the Helmcken Pain Clinic after Dr. Vincent retired), to see a psychiatrist and to continue counselling sessions with Ms. Connell.
- [106] Under cross-examination, Dr. MacKean was asked about the expected recovery time for soft tissue injuries sustained in an accident. She was taken to Dr. Sovio's report (an IME relied on by the defendants in which Dr. Sovio opined that he did not feel that there would be any long-term issues as a result of the 2014 accident. Dr. MacKean stated that Dr. Sovio had seen the plaintiff early on (October 9, 2015) and that she also expected to see improvement as she stated in her March 2016 report that there was still an opportunity for continued improvement over the next one to two years. She testified that the normal course was for people to improve or recover within six months but that not everyone does. She referenced a study from the University of Washington that primarily dealt with neck injuries but also low back injuries that found that 20% to 30% of individuals developed ongoing chronic pain from soft tissue injuries. She said that two people could be involved in the same motor vehicle accident, with one developing chronic pain for years and the other having no symptoms, and that there was no real explanation as to why this occurs. Each individual is different.
- [107] She testified that the expected improvement did not occur for the plaintiff.

- [108] Dr. MacKean was also asked about the significance of the four previous motor vehicle accidents that the plaintiff had been involved in as well as the imaging that identified degenerative disc disease and facet joint osteoarthritis. Dr. MacKean testified that if an individual was experiencing no pain but then began to experience pain following trauma, she would attribute the symptoms to the trauma. She acknowledged that the previous accidents may have made him more susceptible.
- [109] She stated that she would consider this to be a new injury but that if the individual's symptoms were not healing, other factors like previous accidents and osteoarthritis could be contributing to ongoing pain saying such factors can make the individual vulnerable. She opined that degenerative disc disease was different than osteoarthritis and very likely was not contributing to the plaintiff's ongoing pain.
- [110] When asked about the plaintiff's weight and the role it plays, Dr. MacKean agreed that being overweight could contribute to ongoing pain but that it was not a significant contributing factor. She testified that a reduction in weight can lead to a reduction in low back pain but that this was not always the case. She used the example of a 250-pound woman with back pain that lost approximately 120 pounds yet continued to have the same levels of back pain.
- [111] She remained of the view that his physical condition did not prevent him from working nor did it support early retirement noting that his employer's willingness to accommodate him would enable him to work.
- [112] She testified that why some recover from their injuries and others do not there is no answer other than there is a pre-existing vulnerability and, in some cases, people perceive pain differently while some are simply made of "sterner stuff".

Dr. Mark Atkins

- [113] Dr. Mark Atkins testified as an expert in the field of Psychiatry. His qualifications were not objected to by the defendants. He completed his residency training in Psychiatry at UBC in 2002. Since that time, he has practiced as a clinician focusing on the psychiatric treatment of adults. He has practiced in a variety of settings including hospitals, long term care facilities, and in the community.
- [114] Dr. Atkins saw the plaintiff on three occasions and prepared four medical legal reports.

August 9, 2017 Report

- [115] Dr. Atkins first assessed the plaintiff on July 17, 2017. In his report dated August 9, 2017, Dr. Atkins noted that the plaintiff reported to him that he had some anxiety issues in the past but they were resolved and he was functioning at 100% both mentally and physically before the 2014 accident.

[116] Dr. Atkins states the plaintiff told him that the vehicle that hit him was significantly damaged and that an hour after the impact he experienced a headache and "felt sick" as well as complaining of tightness in his neck and right shoulder. Dr. Atkins reviewed the psychological symptoms reported to him by the plaintiff and stated:

In the time that has spanned since the accident occurred, Mr. Latreille notes that he has only improved to 35% of his pre-accident mental health baseline. His main symptoms of concern at the present time include fatigue, reduced motivation, and significant anxiety.

At the time of my evaluation, current symptoms were reviewed and an inventory of stressors was compiled. Mr. Latreille's current stressors are as follows:

Dealing with the physical issues related to the accident in question;

Dealing with the mental health issues related to the accident in question;

Dealing with the litigation;

Financial issues;

Loss of job; and

Issues pertaining to social isolation.

Losses were reviewed at the time of the evaluation and are as follows:

Loss of job;

Financial losses;

Reduced scope and range of social and recreational activities; and

Loss of sense of self.

[117] Dr. Atkins' diagnosis was:

Major Depressive Disorder, in partial remission;

Anxiety Disorder Not Otherwise Specified with features of generalized anxiety and driving-related anxiety, also in partial remission.

[118] Dr. Atkins stated that while anxiety and mood disorders are generally treatable, the plaintiff's case was complicated by "loss, stress and physical pain" making his treatment more difficult and that his prognosis was therefore significantly poorer than it would be if he suffered from an individual condition without co-morbidity.

[119] Dr. Atkins opined that the plaintiff had a notable general disability due to his mood and anxiety disorders that significantly affected his recreational, social and household activities.

[120] Regarding vocational disability, he wrote:

This gentleman struggled to return to the workforce and remained there for approximately two and a half years prior to going on disability approximately three months ago. Whether this significant vocational disability will materially change in the future is unknown at the present time

[121] Dr. Atkins opined that prognosis was guarded. He recommended a referral to a Community Psychiatrist.

September 2, 2019 Report

[122] Dr. Atkins assessed the plaintiff for the second time on September 2, 2019. The plaintiff reported suffering from ongoing volatility and frustration; irritability and being quick to anger; fatigue; pain; cognitive difficulties; diminished interest levels; restless sleep; and feeling tense, stressed, wound up and on edge on a daily basis. He also reported numerous limitations including an inability to return to work, engage in previous activities he enjoyed such as cycling, golfing and participating in the auxiliary RCMP, and an inability to participate in family activities and in heavy household tasks and yard and garden work.

[123] Dr. Atkins' diagnoses remained unchanged from his previous report. He wrote that despite treatment with two antidepressant agents and ongoing counselling with Ms. Connell, his status with regard to Major Depressive Disorder was either unchanged or possibly slightly worse. He wrote that while the plaintiff's driving anxiety had improved, he was still plagued with ongoing generalized anxiety symptoms.

[124] Dr. Atkins opined that these diagnoses had a marked impact on the plaintiff's quality of life, including recreational, social and household activities, and that the impact of these two psychiatric diagnoses on his general disability will likely persist into the future on an indefinite basis.

[125] Dr. Atkins also opined that the plaintiff was significantly vocationally disabled and that his vocational disability is not expected to improve in the foreseeable future. He again recommended referral to a Community Psychiatrist.

[126] He concluded:

Final prognosis is poor. This gentleman has two psychiatric diagnoses and has been ill now for a number of years. This is despite receiving standard of care treatment. At this stage, he will likely be symptomatic on an ongoing or indefinite basis and there remains the risk that he will experience further decompensation and may require acute hospitalization. While he is not suicidal at the present time, the fact that he carries a significant Major Depressive Illness raises a concern that he may be suicidal in the future should he experience a decompensation. This gentleman's psychiatric injuries are expected to continue to adversely affect him socially, vocationally, and recreationally on an ongoing basis. His current functional status, on account of his mental health issues, is also expected to be poor on an ongoing or indefinite basis.

November 12, 2019 Report

- [127] Dr. Atkins prepared a third report dated November 12, 2019 after meeting with the plaintiff on November 5, 2019. Dr. Atkins concluded that the plaintiff's mental health symptoms and functional incapacitation were due to the 2014 accident and not the 2018 accident.
- [128] Under cross-examination, he could not confirm without reviewing his file if he was aware the plaintiff had been involved in four accidents before the 2014 accident. He agreed that if someone had multiple accidents, it would not be surprising if they were hyper vigilant. He also acknowledged that the reference by Dr. Down to depression does not mean the same thing to a psychiatrist. Dr. Atkins said that terms such as anxiety and depression are commonly used but that if they are not impacting an individual's function, he is not that concerned and would not classify these as disorders, although he will give prior notations of these terms the appropriate clinical weight. The major and overriding factor to classify symptoms as a disorder is functional decline. Dr. Atkins testified that he considered how involved the plaintiff was in terms of work, volunteerism, social and recreational activity and household responsibility immediately prior to the 2014 accident and that he therefore did not consider him to be suffering from a mental health disorder at that time.
- [129] Dr. Atkins also stated that non-restorative sleep was common for individuals that had been involved in motor vehicle accidents. When asked whether excessive weight could impact one's psychological state, Dr. Atkins stated that he could not say there was a correlation.
- [130] Dr. Atkins was questioned about the medications, Citalopram and Bupropion, that the plaintiff was prescribed by his family doctor. Dr. Atkins testified that both were anti-depressants and that Citalopram was prescribed for patients with anxiety or depression diagnoses while Bupropion was prescribed more for a diagnosis of depression. Dr. Atkins had no concern with these medications being prescribed and used by the plaintiff. It was put to Dr. Atkins that if the plaintiff was not responding to these medications that this indicated the plaintiff did not have the diagnoses of depression and anxiety. Dr. Atkins disagreed with this assertion and stated that it was common to see patients with these diagnoses not respond to medications and several different medications often need to be employed over time but some people just do not respond. Dr. Atkins stated he was confident with his diagnoses.
- [131] Dr. Atkins was also asked about vocational disability and whether it was due to the 2014 accident, given that the plaintiff had worked a further two and one-half years. Dr. Atkins stated that it was his understanding that the plaintiff was having issues immediately after the accident and was trying to hang on. He stated that it can take a long time for these illnesses to manifest. He testified that the cumulative body of symptoms add up, reserve capacities to cope erode, and eventually an individual becomes overwhelmed. It becomes harder and harder to manage the symptoms and previous responsibilities. The patient has to expend more and more effort to keep everything afloat and eventually runs out of steam. Other losses in quality of life and the realization that things are not improving also worsens

mood. There was no other factor he could point to as the cause of these diagnoses.

- [132] Dr. Atkins testified that he would not prescribe Ativan for sleep and would not prescribe it to treat long-term anxiety.

Ms. Claudia Walker

- [133] Ms. Walker, an occupational therapist, prepared a Cognitive/Behavioural Functional Capacity Evaluation ("FCE") dated October 2, 2019. As an occupational therapist for 33 years, Ms. Walker's work includes private practice, hospital practice, teaching, medical-legal work for a variety of clients, and case management.
- [134] The FCE evaluates the physical, cognitive and behavioural implications of a medical condition. It includes standardized assessment, using performance-based tests and observation of physical, cognitive and behavioural function. Opinions are based on standardized test scores, clinical interview, and behaviours observed during the assessment. Pre-injury occupation is analyzed based on the typically required cognitive skills. Then the test evaluates the plaintiff's current cognitive and emotional abilities and compares those to the ability level required in his pre-injury employment. Performance is compared to that standard and opinions are drawn regarding capacity to return to the workforce.
- [135] Ms. Walker noted that an FCE is not diagnostic "in that it does not identify the cause of any disrupted behavior" but relies on the opinions of medical experts for that. She was provided with the expert reports of Dr. Atkins and Dr. MacKean. She did not have Dr. Solomons' report.
- [136] During testing, the plaintiff displayed competitive test behaviours, consistent performance and high engagement levels on all tests. The plaintiff's subjective report of his abilities and limitations was consistent with the assessment results and findings. The Awareness Questionnaire consists of forms completed by the plaintiff, his wife and the clinician. On each form, the abilities to perform various tasks after the injury as compared to before the injury are rated on a five-point scale ranging from "much worse" to "much better". The plaintiff and Ms. Au's scores were within two points, indicating, according to Ms. Walker, excellent awareness into his limitations and strengths and that the plaintiff is a reliable historian.
- [137] On the standardized tests, the plaintiff was slow, partially completed tasks and showed difficulties identifying errors and generating solutions. This included the Minnesota Manual Dexterity Test with a 1 percentile score. On the Weekly Calendar Test, errors arose from inaccurate performance and poor attention to detail and he displayed excessive checking/rechecking of entries. On the Rivermead Behavioural Test, he scored in the 18th percentile, indicating behavioural impairment. He exhibited weakness in delayed recall, facial recognition, and spatial memory. Ms. Walker attributed this to fatigue and reduced concentration.

[138] Regarding Mr. Latreille's capacity to return to work, Ms. Walker opined:

Mr. Latreille does not currently demonstrate the cognitive or behavioural capacity to return to his previous employment as a Computer User Support Specialist. His performance on the standardized testing consistently reflected substantive difficulty with attention to detail as well as error identification and correction. This assessment and the provided medical documents indicate that his limitations do not arise from deconditioning but from psychiatric injury. In my opinion he is unable to return to this work and would not likely benefit from a graded return to work. I consider Mr. Latreille to be currently unemployable.

[139] Ms. Walker's opinion was not shaken on cross-examination nor did the defendants call evidence responding to her conclusions and recommendations respecting future care costs.

[140] Ms. Walker's Cost of Future Care Report will be addressed later in these reasons.

Mr. John Lawless

[141] John Lawless, a vocational consultant, prepared a report dated October 11, 2019. He interviewed the plaintiff, administered a vocational test battery and reviewed the medical records. In the vocational testing, the plaintiff performed lower than expected based on his work experience.

[142] Mr. Lawless opined that if the plaintiff is "restricted from his prior sedentary and modestly skilled work with a supportive employer, there probably won't be any better alternatives for him elsewhere in the workforce". He opined that retraining is not feasible and the plaintiff's "physical, emotional and cognitive difficulties do not suit him for formal education, and neither does his age or disinclination for education".

[143] He further stated that if the plaintiff were to do any work, the only possibility would be a marginal service job (unskilled, sedentary, part-time, and minimum wage). But he indicated that he found it hard to envision even that given the plaintiff's current condition. Mr. Lawless considered the plaintiff's prolonged absence from the workforce a "very negative prognosticator". Based on research, disabled individuals are less attached to the workforce, especially if they are 55 years of age or older. In addition, he noted that the plaintiff's psychiatric diagnoses are "worrisome" because these are some of the most disabling conditions according to the World Health Organization. Further, that the probability of return to work after injury diminishes sharply after six months off and after 24 months, the chances for a return to "employment in any capacity approaches nil".

[144] Mr. Lawless concluded that the plaintiff is unemployable. There was no work he could see the plaintiff performing given his physical, emotional, and cognitive difficulties. At age 55 and given his prolonged work force absence, it was probable that the plaintiff would remain unemployable.

- [145] Under cross-examination, Mr. Lawless did not change his opinion. He indicated that if there are conflicting medical opinions and they rule each other out, then he would rely on his test scores. While the plaintiff's physical condition may not limit his ability to work, his age, experience, and absence from the work force do limit him. Even without a psychiatric diagnosis, he indicated the odds were against the plaintiff working.
- [146] When cross-examined on the conflicting medical reports, Mr. Lawless indicated the trend of those reports informed his opinion. He noted the trajectory of medical opinions as initially Dr. Sovio indicated he could work, then Dr. MacKean noted he could work with difficulty, and then Dr. Atkins and Dr. Down indicated he could not work.
- [147] Mr. Lawless confirmed that of all the medical records provided to him, only Dr. Atkins and Dr. Down opined the plaintiff was not able to work because of the 2014 accident. He was not provided with Dr. Solomons' report and refused to allow for the possibility that his opinion on the plaintiff's ability to work might have changed had he received it instead of Dr. Atkins' report. I place less weight on Mr. Lawless' opinion that the plaintiff is unemployable as a result, particularly given my findings on Dr. Atkins' report and that of Dr. Solomons as I will discuss below.

Mr. Robert Wickson

- [148] Mr. Wickson, an economist, prepared reports to assist the Court in assessing Loss of Earnings and Cost of Future Care. I will discuss these reports in more detail below.

Defence Evidence

- [149] I have previously referred to the evidence of Ms. Downey.
- [150] The defendants relied on two experts, Dr. Sovio, an orthopedic surgeon and Dr. Solomons, a psychiatrist.

Dr. Olli Sovio

- [151] Dr. Sovio, an orthopedic surgeon, performed an independent medical examination ("IME") respecting the plaintiff on October 9, 2015 and issued his report dated the same day. In 2010 he prepared a report concerning the plaintiff and the 2010 accident.
- [152] In the 2015 IME, the plaintiff reported to Dr. Sovio that his neck and lower back became stiff about two or three hours after the accident, he attended a walk-in clinic and they recommended physiotherapy and chiropractic treatment. He reported that helped to some degree and that he stopped the chiropractic treatment a month before because it was not providing any additional benefit. He complained of some discomfort in his lower back and lower part of the cervical spine.
- [153] Dr. Sovio observed the plaintiff was overweight and looked somewhat physically deconditioned. He reported:

This gentleman was involved in a motor vehicle accident September 1, 2014. It would appear that in this accident the patient suffered some soft tissue injury which affected his neck and his low back.

On today's physical examination I did not find any significant abnormality as far as the neck was concerned. He had some mild stiffness still that he was complaining of but I do not feel that there is any significant issue ongoing as far as the neck is concerned and I do not feel that any further investigation or treatment is indicated in regards to the neck from the formal standpoint.

The patient also complains of some low back pain with stiffness. The patient has been noted to have degenerative disc disease. He is physically deconditioned and overweight. He needs to lose weight and address his physical deconditioning and improve his core strength as this will likely help him get rid of his symptomatology.

He has no evidence of any neurological abnormality in the upper or lower extremities suggesting that the problems are related to soft tissue type discomfort. I do not feel that any long term issues will come as a result of this accident in question and I do not feel that the patient needs to limit himself to any significant degree as far as his activities are concerned.

I would suggest that perhaps an increase in his aerobic activity might allow him to lose weight and improve his physical fitness and this certainly will be helpful. I do not feel that any further investigation is indicated. I would not recommend continuation of any further trigger point injections either.

[154] He opined that the plaintiff suffered soft tissue injuries and that they do not get worse as time goes on nor would he expect the plaintiff's injuries to worsen. He was also of the opinion the plaintiff should increase his activities and that no restrictions be placed on them or on his work. In his view vigorous exercise builds muscle strength and helps with an individual's mood as well. He said if the plaintiff were his patient, he would recommend he lose weight as it puts more pressure on joints and if an individual's muscles were weak, they would fatigue sooner. It was his opinion that exercise and core strengthening along with weight loss are the keys to lower back treatment. He said there was no structural injury, no neurological issues or disk herniation.

[155] On cross-examination he agreed that chronic pain can lead to depression, can affect sleep and that poor sleep can affect mood.

[156] The plaintiff challenges Dr. Sovio's evidence in a number of respects. He notes that his is the only expert report obtained by the defendants addressing the plaintiff's physical injuries and that it is dated October 9, 2015. Dr. Sovio did not see the plaintiff after that. He agreed that the records he reviewed for his opinion only followed the 2014 accident by a few months and that the last record he reviewed was dated January 9, 2015.

[157] The plaintiff also submits that when considering orthopedic and physiatrist reports, the court must bear in mind their respective expertise in soft tissue injury claims: *Khudabux v. McClary* 2016 BCSC 1886 at paras. 90-92, *aff'd* 2018 BCCA 234.

[158] The plaintiff submits in this instance the evidence of Dr. Sovio was contradicted by that of Dr. Atkins and Dr. MacKean, both of whom have assessed the plaintiff three times since the 2014 accident and as recently as 2019. While Dr. MacKean stated in her March 2016 assessment of the plaintiff she expected to see improvement, in her subsequent assessments she found that did not occur. The evidence of Dr. Down also contradicts Dr. Sovio's evidence. In addition, the evidence of the plaintiff and the lay witnesses is contrary to Dr. Sovio's prediction.

Dr. Kevin Solomons

[159] Dr. Solomons is a psychiatrist. He conducted an IME of the plaintiff on July 31, 2019. His report is dated September 3, 2019.

[160] In his report Dr. Solomons reviewed the plaintiff's medical records in detail noting that before the first accident in 2014 he had suffered from, *inter alia*, "hypogonadism, with 'no energy, etc.'" as well as chronic obesity. The plaintiff informed him that over time, after the first accident, he eventually was unable to work because of "pain, mood, anxiety and fatigue."

[161] Dr. Solomons noted the first reference to driving anxiety in the plaintiff's records was 22 months after the accident. He noted as well that Dr. Down's records indicated that in August 2016 the plaintiff "states mood okay, denies [increased] stress, etc." Further that the first reference to pain affecting his sleep was recorded by Dr. Down more than two years after the accident. He commented as well it was not until March 15, 2017 that the first reference to depression arose in Dr. Down's records:

57. On March 15, 2017, two and one-half years after the accident, Dr. Down saw him for depression, this being the first reference to depression in his records, and he wrote:

"Ongoing fatigue - low testosterone and adjustment of meds. However, ongoing fatigue, low mood, sadness, lack of motivation and interest, hypersomnolence, appetite okay, not exercising - can't motivate self, ongoing back pain, emotionally labile, often angry. Feels chronic back STI also affecting him negatively. Denies home or work stressors, feels overwhelmed."

58. He noted that Mr. Latreille's affect was flat and that his thoughts were negative, and he documented his impression that he was depressed and that he had hypersomnolence. He prescribed Celexa and recommended counselling and that he take two months off work because "... he feels unable to cope and work efficiency very low." Dr. Down further recommended that he use the time for counselling.

59. At the next assessment on April 21, 2017, Mr. Latreille reported no more daytime somnolence, although he remained very fatigued and was waking frequently during the night. His mood was unchanged, and he was seeing a psychologist twice weekly. On examination, his mood seemed "okay," and Dr. Down increased the Celexa. In the next entry of May 18, 2017, he was noted to be "trying to remain more active - aggravating his back some what [sic]." His fatigue continued, he was waking most nights and having difficulty falling back to sleep, and he remained very tired by the end of most days, with reduced motivation. Dr. Down wrote "...does feel happier, more socialization and spending more time with family."
60. In June 2017, Mr. Latreille reported persisting fatigue during the day, no motivation or interest and feeling down and easily frustrated and angered. His testosterone level was normal at that time. Dr. Down added Wellbutrin and referred him to a psychiatrist. In early July 2017, he wrote "feels persistent anxiety esp [especially] driving etc. relates back to post MVA." On July 25, 2017, he still felt low and reported "... occasional forgetfulness, mood up and down, easily angered, anxiety still an issue no improvement." Dr. Down wrote that he was still not fit to return to work. On August 28, 2017, his mental state was unchanged. On September 22, 2017, he reported nightmares for the first time since the accident. He also reported being "a bit forgetful" and that he still felt unable to work "due to mental state at present." Dr. Down documented nothing about his anxiety while in a car or about arguing with his wife in the car as the reason for him not working.

[162] Dr. Solomons was in receipt of Dr. Atkins' IME report of August 9, 2017. He disagreed with Dr. Atkins' diagnoses and stated:

He did not provide an explanation for his diagnoses of major depressive disorder and anxiety disorder not otherwise specified. He did not explain how Mr. Latreille's account of not having "spells of prolonged low moods" was compatible with the diagnosis of major depressive disorder, and he provided no information as to why his putative anxiety symptoms did not meet diagnostic criteria for any specific anxiety disorder.

[163] Dr. Solomons expressed the opinion that:

- None of these symptoms is indicative of a psychiatric illness or disorder, specifically not a phobic or any other anxiety disorder, and in my opinion these symptoms have no bearing on his fitness for or ability to work;
- [The plaintiff] did not develop a major depressive disorder and specifically did not develop a major depressive disorder in response to the 2014 accident;
- Dr. Down putting [the plaintiff] off work was not medically warranted and insofar as this led to concerns about his and his family's financial security and future, and considering the impact this may have had on his sense of purpose and self-worth, this likely instigated and aggravated his concerns rather than alleviated them;

- The plaintiff's primary and pervasive symptom of fatigue is due to obstructive sleep apnea. The plaintiff is pre-disposed to obstructive sleep apnea given his obesity and the outward appearance of his neck. His sleep apnea was neither caused nor aggravated by the accidents;

- Neither of these accidents caused Mr. Latreille any psychiatric problems or impairments and there has been no psychiatric impediment to him continuing working.

[164] On direct he stated that the plaintiff's obesity and his large neck structure were possibly correlated with obstructive sleep apnea causing waking at night, little deep or slow REM sleep leading to fatigue, irritability, poor concentration and mood instability.

[165] He also stated that the first appearance of anxiety two years after an event is not indicative of clinically significant anxiety. With respect to depression he explained that psychiatrists must distinguish between what is pathological and what is merely a mood state. If pathological, then they must understand the characteristics of such an altered mood state in order to figure out its diagnostic category. A major depression is a pathological definition. He stated the lack of effectiveness of drugs used to treat Mr. Latreille indicated it was not depression. He was also of the opinion that, given the plaintiff had been working for two and one-half years before evidencing the symptoms, they in fact were not disabling as he functioned for those years.

[166] In cross-examination he was first taken through his ICBC billings, the accuracy of which he said he had no reason to doubt. He had worked as a staff psychiatrist at UBC and Vancouver General Hospital until 2009 and as of 2006 had a small private practice originally half-time and then full-time after leaving UBC. He stopped accepting new patient referrals in 2017. He stated that when he began doing IME's, he did them for both plaintiff and defence counsel but the pattern changed to almost exclusively for defence counsel for the past 12 years.

[167] It is not disputed that in the last ten years his primary source of income has been ICBC defence work and that his billings to ICBC during that time totalled \$7,953,982.00 or 95% of his total earnings.

[168] He confirmed in doing IME's he would only meet with the individual once. In this instance he met with Mr. Latreille on July 31, 2019, almost five years after the accident. He acknowledged treating physicians such as Dr. Down would over time gather information that assisted them in understanding their patients.

[169] It was put to him that his diagnoses differed from that of Dr. Atkins, Dr. Down and the counsellor seen by the plaintiff. He stated that it was a matter of diagnosis and in his opinion sleep apnea accounted for the plaintiff's symptoms and that he was offering a well-founded alternative diagnosis. In his view the others were wrong in their diagnoses. He was of the opinion Dr. Down in 2017 erred in diagnosing the plaintiff with depression when it was actually symptoms due to sleep apnea. He also was of the opinion that it was unwise for the plaintiff to have ceased working as such did not help but rather worsened his

symptoms.

Position of the Plaintiff

[170] The plaintiff submits there is little doubt that he would not have sustained the injuries and symptoms he now has but for the accident in 2014. That is, other factors such as alleged pre-accident fatigue, anxiety, prior accidents and injuries, obesity and sleep apnea are not the cause of his current condition and decision to cease working.

[171] Plaintiff's counsel submits Dr. Solomons' report should be given no weight because ICBC defence work is his primary source of income, he attributes the plaintiff's post-accident fatigue and low energy to sleep apnea but the evidence does not support that conclusion, he was missing updated medical records from Dr. Down after September 2017 and he lacked information concerning the effect of pain on the plaintiff's sleep and sleep apnea treatment. They also submit he does not normally see chronic pain patients. Finally, that the court should prefer Dr. Down's evidence regarding the mental health diagnoses and the role of sleep apnea.

[172] The plaintiff seeks damages as follows:

Damages

Amount

Non-pecuniary damages:

\$150,000.00

Past loss of earning capacity:

\$173,222.17 - \$179,248.17

Loss of future earning capacity:

\$606,600.00 - \$690,477.00

Cost of future care:

\$83,049.00 - \$113,533.00

Special Damages:

\$ 15,177.68

Total:

\$1,028,049.00 - \$1,148,436.00

Position of the Defendants

[173] The defendants accept the plaintiff suffered mild to moderate soft tissue injuries to his neck and lower back as a result of the 2014 accident with short-term aggravation from the 2018 accident. They also accept that his lower back soft tissue injury and to a lesser extent his neck remained chronic at the date of trial, some six years and four months after the 2014 accident.

[174] The defendants state the issues for resolution are the extent of the injuries the plaintiff suffered as a result of the 2014 accident as exacerbated for a few months by the 2018 accident and whether his decision to leave his employment was medically warranted. That is, issues of causation and the extent of his damages.

[175] Specifically, the defendants submit that the plaintiff's psychiatric symptoms of fatigue, reactive mood and difficulty concentrating are the result of factors unrelated to the motor vehicle accidents as well as due to:

- his failure to make reasonable efforts to lose weight despite repeated medical advice to do so both before and after the 2014 accident leading to sleep apnea and related sleep disturbance;
- his deciding to leave his employment when not medically warranted and this action then contributed to the decline in his mental state; and
- his low testosterone levels and hypogonadism contributed to his fatigue.

[176] In the alternative, the defendants submit that if Dr. Atkins' diagnosis is preferred to that of Dr. Solomons, then the award should be reduced to reflect the measurable risk at trial that:

- the plaintiff's longstanding obesity, deconditioning and poor health choices would have led to the development of sleep apnea and sleep difficulties contributing to his psychiatric state absent the accident; and
- the plaintiff's previous cancer surgery resulting in low testosterone, hypogonadism and fatigue would have caused the plaintiff increased fatigue and low mood and contributed to his psychiatric state absent the accident.

[177] The defendants submit the court should order:

- Non-pecuniary damages: \$75,000;
- Future care costs: \$49,659;
- Special damages: \$10,737.68;
- No award for past wage loss, future wage loss or loss of future earning capacity, but if such are awarded, they be reduced by at least 50% because of pre-existing conditions;
- A further reduction of 20% for failure to mitigate.

Causation

Law on Causation

[178] The plaintiff must establish on a balance of probabilities that the defendant's negligence either caused or materially contributed to the plaintiff's injury. The primary test for causation, the "but for" test, asks would the plaintiff have suffered the injury but for the defendant's negligence. A defendant is not liable for injuries not caused by his or her negligence. A defendant's negligence does not have to be the sole cause of the injury as long as it is part of the cause beyond de minimis. Causation need not be determined by scientific precision but rather is "a practical question of fact which can best be answered by ordinary common sense": *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17. The "but for" test recognizes there must be a substantial connection between the defendant's conduct and the injury: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[179] The court in *Athey* also noted at para. 20:

the essential purpose of tort law is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

[180] In *Gilbert v. Bottle*, 2011 BCSC 1389, the court considered whether, given the plaintiff's pre-existing condition, there was a substantial connection between the accident and the plaintiff's "compromised physical, mental and emotional state and associated loss". Justice Dickson (as she then was) considered the application of the principles in *Athey* where psychological injuries are in issue:

[61] Where, as in this case, the plaintiff has suffered several sources of trauma that fuse to create problems, untangling the different sources of damage and loss is extremely challenging. If the defendant's negligence is a cause of the damage, however, the plaintiff is entitled to compensation for the loss. As discussed below, the defendant must take the plaintiff as she is found which may include an already damaged condition that affects the extent of the loss actually suffered (the "thin skull rule"). On the other hand, the defendant need not compensate the plaintiff for the debilitating effects of other concurrent or subsequent wrongful acts or contributory negligence that would have occurred in any event (the "crumbling skull rule"): *Blackwater*, paras. 79-81.

[62] In some cases, causation is asserted based primarily on a temporal relationship between the negligent conduct and the damage in question. In *White v. Stonestreet*, 2006 BCSC 801, Ehrcke J. commented on the need for close scrutiny of the evidence in cases of this kind. At paras. 74 and 75 he stated:

74. The inference from a temporal sequence to a causal connection, however, is not always reliable. In fact, this form of reasoning so often results in false conclusions that logicians have given it a Latin name. It is sometimes referred to as the fallacy of *post hoc ergo propter hoc*: "after this therefore because of this".

75. In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?
- [63] Cases involving psychological injuries may require particularly close scrutiny from a causation perspective. As Newbury J.A. noted in *Sandegren v. Hardy* (1999), 67 B.C.L.R. (3d) 123, claims of debilitating pain that persists long past a reasonable recovery period are notoriously difficult for trial judges to assess. Nevertheless, as a matter of law, psychological and physical injuries are indistinguishable. If the defendant's negligence caused psychological injury to the plaintiff that injury is fully compensable, even if the plaintiff's pre-existing psychological state rendered her unusually vulnerable.
- [64] In *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318, Lambert J.A. summarised the principles to be applied in assessing claims of psychological injury. At paras. 12 and 13, he stated:
12. It is important to understand what is established and what is not established by the decision in *Maslen v. Rubenstein*. I propose to set out a number of principles extracted from the reasons of Mr. Justice Taylor, for the Court, in the *Maslen* case. The first point is a preliminary point and appears in *Maslen* at p. 133 under the heading "(a) The Background":
1. The plaintiff must establish that the pain, discomfort or weakness is "real" in the sense that the victim genuinely experiences it.

The remaining ten points are drawn from the part of the reasons headed "(b) The Basic Principles" at pp. 134 to 137:

2. The plaintiff must establish that his or her psychological problems have their cause in the defendant's unlawful act.
3. The plaintiff's psychological problems do not have their cause in the defendant's unlawful act if they arise from a desire on the plaintiff's part for such things as care, sympathy, relaxation or compensation.
4. The plaintiff's psychological problems do not have their cause in the defendant's unlawful wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or "will-power".
5. If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish to end, their existence or continuation must be said to have a subjective, or internal, cause. (NOTE: I consider that this proposition must deal with the conscious mind, otherwise it seems to me to beg the question; see my first observation, later in this Part of these reasons.)

6. If a court could not say whether the plaintiff really desired to be free of the psychological problems, the plaintiff would not have established his or her case on the critical issue of causation.
7. Any question of mitigation, or failure to mitigate, arises only after causation has been established.
8. It is not sufficient to ask whether a psychological condition such as "chronic, benign pain syndrome" is "compensable". Such a psychological condition may be compensable or it may not. The identification of the symptoms as "chronic benign pain syndrome" does not resolve the questions of legal liability or the question of assessment of damages.
9. It is unlikely that medical practitioners can answer, as matters of expert opinion, the ultimate questions on which these cases often turn.
10. Mr. Justice Spencer, at trial in the Maslen case, put the overall test quite correctly in these words:

[C]hronic benign pain syndrome will attract damages ... where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault.

11. There must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.
13. I am sure Mr. Justice Taylor did not consider that the "basic" principles which he set out exhausted all the possibilities for the application of principle to the difficult problems in these cases. The general principles which apply in relation to causation in law will apply to psychological injury as they apply to physical injury.

[181] The Supreme Court of Canada in *Blackwater v. Plint*, 2005 SCC 58, distinguished between causation as the source of loss and the rules of damages assessment. Once causation is established, the rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway (at para. 78).

[182] In *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.), the Court of Appeal addressed the correct approach to assessing damages involving the "thin skull" principle where psychological injuries are suffered:

- [19] One of the most important principles, for the purposes of this case, is the principle that, for the purposes of assessing damages, a tortfeasor must take the person injured by the tort in the actual condition of that person at that time. This has been called the "thin skull" principle. In its application to psychological problems it has been called the "egg shell personality" application of the principle. In my opinion there is no basis for giving a more restrictive application to this principle in cases where psychological injuries are suffered than would be given in cases where only physical injuries are suffered. A predisposition to suffer psychological injury in circumstances such as those brought about in a particular case by a defendant's wrongful act does not relieve the defendant of the liability to compensate the plaintiff for the injuries represented by those psychological symptoms. Such relief could only occur, as I have said, if the psychological symptoms would have occurred in any event, even without the defendant's wrongful act, through an application of the cause-in-fact test. Examples of the application of the "thin skull" principle to the award of damages for psychological symptoms in circumstances where there was an existing predisposition include *Enge v. Trerise* (1960), 26 D.L.R. (2d) 529 (B.C.C.A.), *Cotic v. Gray* (1981), 17 C.C.L.T. 138 (Ont.C.A.), *Elloway v. Boomars* (1968), 69 D.L.R. (2d) 605 (B.C.S.C.), and *Marconato v. Franklin*, [1974] 6 W.W.R. 676 (B.C.S.C.).
- [183] Given the pre-existing factors at issue here, I refer as well to para. 32 where Lambert J.A. stated:
- [32] It seems to me that there are two different types of psychological symptoms that may be covered by the principles that are here being discussed. There are those where the psychological symptoms have their origin entirely in the defendant's wrongful act. Clearly they are compensable. And there are those psychological symptoms where the defendant's wrongful act triggers a pre-existing psychological condition so that both the defendant's wrongful act and the pre-existing condition are causes-in-fact of the psychological injury. In the latter cases the psychological injury will be compensable on the basis of a pre-existing thin skull, except only in cases where the psychological problem is so dominant as a pre-existing condition and the injuries sustained in the accident are so trivial that the accident can no longer be said to be a sufficient cause in law to support an award of damages on the basis of proximate cause.
- [184] As noted, the defendants submit the plaintiff's pre-existing issues either were the sole cause of his psychological issues or, in the alternative, that if the 2014 accident was causally related, there was at least a 50% probability that such pre-existing matters would have led to his current condition, that is, the "crumbling skull" rule applies.
- [185] The Court summarized the "crumbling skull" concept in *Athey* as follows:
- [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating

effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

- [186] In *Cheema v. Khan*, 2017 BCSC 974, Hinkson C.J., after quoting the above paragraph from *Athey*, addressed the principles to apply when assessing damages for a plaintiff with pre-existing conditions:
- [9] In *Abbott v. Gerges*, 2014 BCSC 1329, Madam Justice Warren succinctly summarized the treatment of a pre-existing condition in the context of injuries:
- [55] The fundamental principle in assessing tort damages is that the quantum should be that which is required to place the plaintiff in her original position; that is, the position she would have been in absent the defendants' negligence: *Athey*, at para. 32. This requires a determination of the plaintiff's position after the negligence and an assessment of what the original position would have been. The difference between these positions represents the quantum of the defendants' liability: *Athey*, at para. 32.
- [56] The defendants need not put the plaintiff in a position better than her original one and should not compensate the plaintiff for any damages she would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58, at para. 78. In determining the plaintiff's original position, it may be necessary to reflect any debilitating effects of a pre-existing condition, or a measurable risk that such a condition would have detrimentally affected the plaintiff in the future regardless of the defendant's negligence. This is the crumbling skull rule and, where applicable, it results in the damages award being reduced to reflect risks inherent in the plaintiff's pre-accident condition: *Athey*, at para. 35.
- [57] As explained in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, at para. 48, a measurable risk need not be proved on a balance of probabilities:

Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

- [187] As noted in *Gordon v. Ahn*, 2017 BCCA 221, when conducting this type of analysis:
- [33] The use of the phrase "crumbling skull" to describe a plaintiff's condition is, in any event, rarely helpful. As Major J. explained in *Athey*, there are no special rules or analyses that apply to claims made by plaintiffs who, before becoming victims of a tort, are affected by conditions that may deteriorate in the future. Damages are always to be assessed by

reference to the situation that the plaintiff would be in but for the wrongdoing. Describing a plaintiff as coming within the "crumbling skull doctrine" does not eliminate the need for a complete analysis of the pain and suffering caused by the accident.

- [36] A proper analysis of the issue would have required the judge to consider the degree to which Ms. Gordon's psychological and emotional health was damaged by the accident. Such an analysis would have required a detailed consideration of her pre-accident and post-accident mental health, as well as an assessment of the likelihood that a deterioration would have occurred even in the absence of an accident (see *Laidlaw v. Couturier*, 2010 BCCA 59).
- [188] The Supreme Court of Canada in *Saadati v. Moorhead*, 2017 SCC 28, addressed the application of the common law of negligence to the issue of psychological injuries and proof of such a claim. At trial the plaintiff was awarded damages for mental injury not based on expert evidence but on the "testimony of lay witnesses to the effect that, after the appellant's involvement in an automobile accident caused by the respondents, his personality had changed" (at para. 1).
- [189] After reviewing the evolution of the common law's approach to negligently caused mental harm, the court stated:
- [34] The view that a recognizable psychiatric illness requirement is necessary to prevent indeterminate liability, advanced before us by the respondents and the Insurance Bureau of Canada, is similarly untenable...
- [36] It follows that requiring claimants who allege one form of personal injury (mental) to prove that their condition meets the threshold of "recognizable psychiatric illness", while not imposing a corresponding requirement upon claimants alleging another form of personal injury (physical) to show that their condition carries a certain classificatory label, is inconsistent with prior statements of this Court, among others. It accords unequal -- that is, less -- protection to victims of mental injury. And it does so for no principled reason (Beever, at p. 410). I would not endorse it.
- [38] To be clear, however: while relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry. While, for the reasons I have given, the lack of a diagnosis cannot on its own be dispositive, it is something that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury.

Discussion of Causation

- [190] Causation is a difficult issue in this case, given the plaintiff's medical history, the nature of the accidents, his physical injuries and his post-accident psychological complaints and his decision some two and a half years after the accident to retire despite having worked through that period.
- [191] While the defendants led evidence on the minor nature of the two motor vehicle accidents and the minimal damage to the plaintiff's vehicle in 2014 and no damage in 2018, they did not raise an argument of low velocity impact. Instead the accident evidence was simply part of the factual background to the injuries.
- [192] As noted earlier, where the parties differ is the relationship of the plaintiff's symptoms of fatigue, reactive mood, depression and difficulty concentrating, to the motor vehicle accidents. The plaintiff states they were caused by the 2014 accident. The defendants, relying on the opinion of Dr. Solomons, submit the plaintiff's psychiatric issues are the result of factors unrelated to the motor vehicle accident. However, in the alternative the defendants submit that if the opinion of Dr. Atkins is accepted over that of Dr. Solomons, then any award should be reduced to reflect the risk that, absent the accident, the plaintiff's obesity, deconditioning and poor health choices would have led to sleep apnea and sleep difficulties contributing to his psychiatric state. They submit as well that his previous cancer has caused fatigue and low mood and contributed to his present fatigue and low mood and would have done so absent the accident.

Expert Evidence

- [193] In his 2017 report, Dr. Atkins diagnosed the plaintiff with:
- Major Depressive Disorder, in partial remission;
 - Anxiety Disorder Not Otherwise Specified with features of generalized anxiety and driving-related anxiety, also in partial remission.
- [194] When he re-evaluated the plaintiff in September 2019, he reiterated his 2017 diagnoses and found Mr. Latreille to be "significantly vocationally disabled" and that was "not expected to improve in the foreseeable future".
- [195] Dr. Atkins' report was based substantially on the subjective complaints of the plaintiff, including the plaintiff's description of his pre-accident state that he was "100% mentally and physically". The latter is not in my view an accurate characterization of Mr. Latreille's pre-accident state in light of his previous medical history and the evidence of Dr. Down.
- [196] As noted earlier, Dr. Solomons disagreed with both the diagnosis and the reasons for Mr. Latreille's symptoms. Dr. Solomons accepted what the plaintiff was telling him was what the plaintiff believed. For example, he noted: "He continues to believe that he is unable to work because of 'pain, mood, anxiety and fatigue'". There is no suggestion in his report that the plaintiff was being deliberately untruthful, with Dr. Solomons noting only that during the

interview he did not see any signs of fatigue and that the plaintiff sat comfortably and did not show any signs of pain or pain behavior.

- [197] Dr. Solomons, when addressing Dr. Atkins' report, criticized it for a lack of detail supporting his opinion. In his view Dr. Atkins "did not provide an explanation for his diagnoses of major depressive disorder and anxiety disorder not otherwise specified". He noted as well a lack of references in Dr. Down's records to emotional or psychiatric issues or difficulties until almost two years after the accident. He was of the opinion that none of the symptoms either related to him or in the records provided indicated a psychiatric illness or disorder. He stated that the category of unspecified anxiety disorder referenced by Dr. Atkins was one used where there is insufficient information available to make a more specific diagnosis such as in an emergency room setting, yet Dr. Atkins did not lack such information. Dr. Solomons concluded the plaintiff did not develop an anxiety disorder, nor major depressive disorder, nor any psychiatric illness of any kind as a result of the accident.
- [198] Dr. Solomons explained that the account the plaintiff relied on for a diagnosis of depression did not meet the required diagnostic criteria. He was of the opinion that a delay of two and one-half years after the first accident before reporting mood symptoms made it "highly unlikely that whatever mood symptoms he experienced at that time were causally related to the accident".
- [199] He also provided his opinion that the plaintiff was predisposed to obstructive sleep apnea given his obesity and appearance of his neck and that sleep apnea was the cause of his pervasive fatigue.
- [200] I do not give Dr. Atkins' report significant weight on the issue of causation, given his lack of assessment of Mr. Latreille's pre-accident condition, his acceptance of Mr. Latreille's subjective evidence and the lack of details supporting his conclusion on causation. His reports also did not set out in any detail the factual basis for his finding that the accidents caused the plaintiff's depression. It is unclear how he reached his diagnoses or what criteria he based them on. In addition, his conclusion as to the plaintiff's driving-related anxiety is contradicted by the evidence of the plaintiff's post-accident driving and his purchase of a motorcycle, the latter being something that neither he nor Dr. Solomons were aware of. His reports are substantially conclusory although I appreciate, he brought his expertise to his conclusions.
- [201] However, I do accept Dr. Atkins' opinion that the stressors that Mr. Latreille currently suffers from include dealing with the litigation, financial issues, the loss of his job and social isolation as such factors are consistent with the evidence of the lay witnesses and Mr. Latreille.
- [202] On the other hand, Dr. Solomons' report consists of a detailed factual assessment and explanation of the basis for his opinion. He carefully considered the plaintiff's personal and medical history. He set out the requirements for a diagnosis of an anxiety disorder and major depressive disorder and explained why the plaintiff did not fit the criteria for either

condition. He addressed the efficacy, or apparent lack thereof, of the psychiatric medication the plaintiff had been taking. He also considered whether other conditions such as sleep apnea could account for the plaintiff's symptoms.

- [203] Given the content of his report and his evidence, I decline to reject it on the grounds of his employment history with ICBC doing IME examinations and reports.
- [204] Of some concern is that Dr. Solomons did not have updated records as the records he had from Dr. Down ended in September 2017 and Ms. Connell in April 2018. In addition, he was not aware of the evidence of third parties regarding their observations of the plaintiff's post-accident issues.
- [205] He attributes Mr. Latreille's post-2014 accident fatigue and low energy solely to sleep apnea. He did not ask the plaintiff if using the CPAP machine affected his physical pain stating in cross-examination the CPAP machine does not cause pain. The plaintiff's evidence is that using the machine increased his low back pain because it required that he sleep on his back rather than his preferred side position.
- [206] Dr. Solomons commented that Mr. Latreille's obesity and neck size and sleep apnea are the source of his difficulties. Dr. Solomons was qualified as a psychiatrist but he was not qualified to give expert opinion on sleep apnea, although I accept considering other causes for a patient's symptoms would be part of a psychiatrist's diagnostic process. No objection was taken to his consideration of sleep apnea and the connection between obesity and sleep apnea was in any event acknowledged by the plaintiff as something he had been told by other physicians.
- [207] I am left then with two contrary psychiatric reports. I do not accept Dr. Atkins' diagnoses of "Major Depressive Disorder, in partial remission" or "Anxiety Disorder Not Otherwise Specified also in partial remission". I do accept the evidence of Dr. Solomons that the plaintiff is not suffering from defined depression or anxiety disorders.
- [208] As a result, as described in Saadati I turn to the evidence as a whole to determine what, if any, psychological injury the plaintiff has suffered.
- [209] The plaintiff's general practitioner Dr. Down has had the advantage of lengthy and ongoing physician/patient relationship both before and after the 2014 and 2018 accidents. His opinion and evidence must be considered in that context. He was forthcoming in his evidence. There is no suggestion as sometimes arises that he was an advocate for his patient. He noted the plaintiff has always been anxious and that pre-existing factors were such that in his opinion 50% of the plaintiff's current problems arose from the 2014 accident.
- [210] In his reports Dr. Down traced the history of the plaintiff's post-accident attendances. Initially the plaintiff complained of neck, shoulder and back pain and that the pain interfered with his sleep. By November of 2014 he reported some improvement in his neck and upper back and was most bothered by his mid-back pain. In January 2015 he was

referred to Dr. Vincent whose injections helped and by March of 2015 he was thinking of returning to cycling. In September of 2015 he complained of stiffness and pain in his back to Dr. Down and in February 2016 noted he had lost 20 lbs.

[211] It was not until October 2016 that the plaintiff complained of pain affecting his sleep and not until March 15, 2017 that mood and depression issues were first reported to Dr. Down. In cross-examination he stated that sleep apnea can cause symptoms like low mood.

[212] Dr. Down addressed what portion of the plaintiff's current depression and anxiety were attributable to the 2014 MVA and to what extent his cancer surgery resulting in hypogonadism and fatigue, his obesity and his deconditioning contributed to his current state. I repeat what Dr. Down said in his October 20, 2017 report:

I have no doubt that the motor vehicle accident of September 1, 2014 has contributed significantly to his present mental state. It is not the sole contributing factor, affecting his ongoing mental and psychological problems. His previous cancer surgery, resulting hypogonadism and fatigue as well as significant obesity and deconditionism have also been contributing factors. These pre-existing conditions also make him more vulnerable to injury and more difficult to recovery [sic] from a motor vehicle accident...

[213] And in his September 27, 2019 report:

In my previous medical-legal report dated October 19, 2017, I stated that his current depression and anxiety were 50 percent attributable to his motor vehicle accident. My opinion at this time is unchanged. Mr. Latreille has other medical issues related to obstructive sleep apnea, on nasal CPAP, significant obesity, and also hypogonadism that also contributes to his mental state ongoing.

Lay Evidence

[214] Prior to the accident the plaintiff worked, volunteered, served as an auxiliary RCMP member and socialized. When being investigated for symptoms that eventually led to his cancer diagnosis in 2011, he was tested for sleep apnea with negative results. After his cancer treatment he felt fatigued at the end of the work day. It was significant enough that he still complained of fatigue to his urologist two weeks prior to the 2014 accident.

[215] Despite that however, the evidence of his family, friends and employer is that prior to the 2014 accident he remained involved, active and enjoying life and his work. His pre-accident health issues, obesity, diet and stressors have not been shown to rise to a level that his lifestyle was significantly affected. What has been established is that after the 2014 accident things changed, although his mental health issues did not appear immediately.

- [216] He testified that following the 2014 accident he would wake up often due to back pain. His sleep pattern was not good and his sleep was not refreshing. His fatigue remained throughout the day. The pain and poor sleep continued, leading to physical and mental fatigue and his stopping work as an RCMP auxiliary, golfing, and bicycling. Those changes were not immediate. He ceased work as an RCMP auxiliary shortly after the 2014 accident although he was not required to resign until 2017.
- [217] He had never sought accommodations at work until after the 2014 accident.
- [218] Over time the pain, fatigue and limitations impacted his mood. He testified all of his energy went to getting through shifts at work. He would go to bed when he came home after work and avoided his children and partner. He was struggling with low energy levels, poor sleep, pain, anxiety and low mood. With more activity, his fatigue would worsen. He reached a point where he no longer felt capable of working and initially went on disability in 2017, and then subsequently retired in 2019.

Conclusion on Causation

- [219] As noted earlier, it is not in dispute that the plaintiff suffered mild to moderate neck and back injuries as a result of the 2014 accident and that such were exacerbated by the 2018 accident. While he has not recovered as expected, I accept the evidence of Dr. Down, Dr. Sovio and Dr. MacKean that weight loss and exercise would have likely resulted in a better level of recovery than has occurred.
- [220] There was no expert report from a specialist in sleep disorders nor an expert to assist with the cause of any sleep apnea the plaintiff has and its extent. In evidence were the test results containing the conclusion that the plaintiff suffered from "moderate obstructive sleep apnea . poor sleep efficiency this particular night because of back pain".
- [221] The plaintiff submits that each of his symptoms of pain, poor sleep, fatigue, depression and anxiety arose as a result of the accident in 2014. The issue then is, has the plaintiff proven on the balance of probabilities that but for the accidents he would not suffer from the injuries in issue?
- [222] I am satisfied that at the time of the 2014 accident the plaintiff was functioning reasonably well. He was employed, volunteering as an auxiliary constable with the RCMP and able to participate in recreational and social activities.
- [223] There is no question that his soft tissue injuries were caused primarily by the 2014 accident and temporarily aggravated by the 2018 accident. I conclude the plaintiff's soft tissue injuries, particularly his back, have become chronic. This also is not in dispute.
- [224] Regarding his psychological issues, I am satisfied there is a substantial connection between his current mental health and the injuries suffered in the accidents.

- [225] I conclude that his present disability, consisting of his psychological state and his chronic pain, arise from a combination of his pre-accident condition and the injuries suffered in the accidents. That is, it is more likely than not that the injuries he suffered in the accidents have a substantial connection to his post-accident condition beyond the de minimis level.
- [226] The defendants therefore are responsible for the damages suffered by the plaintiff subject to an adjustment for contingencies.
- [227] I am satisfied the plaintiff has suffered low mood, withdrawal (socially, recreationally and vocationally) and fatigue (both mental and physical) since the accidents and that he is less functional than he was before the 2014 accident. I find that he has suffered some compensable mental injury although it is not serious enough to constitute a psychiatric diagnosis of depression or anxiety disorder.
- [228] I am also satisfied that Mr. Latreille had significant pre-existing health difficulties as explained by Dr. Down. While Dr. Down's 50% attribution of Mr. Latreille's current condition to his pre-existing health issues was an estimate, it was clear on his evidence that such were a significant component.
- [229] While his initial post-accident headaches resolved within a year and his arm and hand numbness earlier than that and his anxiety has substantially resolved itself as has his neck pain, he continues to suffer back pain. The evidence of Dr. Down, the plaintiff and his lay witnesses establish a gradual post-accident deterioration in his emotional state. The change in who he was pre-accident to who he now is and how he now functions given the pattern of decline post-accident has been established.
- [230] His long-term prognosis is currently poor given his age and present psychological condition particularly without formal psychiatric evaluation and treatment which Dr. Down noted he hoped would provide further benefit and improvement.

Non-Pecuniary Damages Assessment

- [231] The plaintiff seeks non-pecuniary damages of \$150,000. The defendants submit non-pecuniary damages of \$75,000 are appropriate if no psychological injury was caused by the accidents and in the alternative, if causation of psychological injuries is proven, any damages awarded should be reduced due to pre-existing and ongoing disabilities that would have affected the plaintiff without the accidents. In addition, they submit any damages should be reduced by the plaintiff's alleged failure to mitigate.
- [232] The principles to be applied when assessing non-pecuniary damages were summarized in *Smith v. Moshrefzadeh*, 2012 BCSC 1458, as follows:
- [69] Non-pecuniary damages are intended to compensate a plaintiff's pain, suffering and loss of enjoyment of life. The award should compensate a plaintiff for those damages he or she has suffered up to the date of the trial and for those he or she will suffer in the future. The essential principle arising from the authorities is that an award for non-pecuniary damages

must be fair and reasonable to both parties and should be measured by the adverse impact of the particular injuries on the individual plaintiff: Hmaied (Litigation Guardian of) v. Wilkinson, 2010 BCSC 1074 at para. 55. While fairness is assessed by reference to awards made in comparable cases, it is impossible to develop a "tariff"; each case is decided on its own unique facts: Lindal v. Lindal, [1981] 2 S.C.R. 629 at 637; Kuskis v. Hon Tin, 2008 BCSC 862 at para. 136; and Drodge at para. 134.

- [70] In Stapley v. Hejslet, 2006 BCCA 34 at para. 46, leave to appeal to SCC refused [2006] S.C.C.A. No. 100, the B.C. Court of Appeal enumerated the factors to be considered in awarding non-pecuniary damages. The non-exhaustive list includes: the age of the plaintiff; the nature of the injury; the severity and duration of pain; the degree of disability; the impairment of family, marital, and social relationships; and loss of lifestyle.
- [71] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: Dilello v. Montgomery, 2005 BCCA 56 at para. 25.
- [233] Recognizing that an assessment of non-pecuniary damages turns on the facts of each case, the parties each submit authorities they say assist in establishing the appropriate range for non-pecuniary damages in this instance.

Authorities Relied on by the Plaintiff

- [234] The plaintiff relies on the following cases addressing claims for chronic pain and mood disorder diagnoses.
- [235] In Verjee v. Dunbrak, 2019 BCSC 1696, the plaintiff, 59-years-old at the time of the accident, suffered chronic soft tissue injuries that subsequently led to her developing psychological symptoms including depression and somatic symptom disorder. She became withdrawn and anxious, avoiding many of the things that previously animated her. She was awarded \$150,000 in non-pecuniary damages.
- [236] In Mattson v. Spady, 2019 BCSC 1144, the plaintiff, 30-years-old at the time of the accident, developed chronic pain involving her neck, shoulder, scapula and headaches. Prognosis for a full recovery was guarded although further treatment could possibly provide some improvement. Before the accident she led an "extremely active lifestyle" as an "avid and serious runner" who participated in marathons, team sports, and outdoor activities. Her condition resulted in reduced work hours, nominal participation in extracurricular activities and inability to attend to her home responsibilities. Her ability to care for her infant children was also impacted. Her injuries were described as "unrelenting and unremitting" and the court noted the "impact of her injuries on the life she knew has been devastating" (at para. 46). She was awarded \$150,000 in non-pecuniary damages.

[237] In *Zwinge v. Neylan*, 2017 BCSC 1861, the plaintiff, 46-years-old at the time of the accident, was injured in a substantial head-on collision which caused long-lasting soft tissue injuries and spine facet-joint syndrome. His pain had disabled him from working in any capacity, and his quality of life was significantly reduced. He developed depression as a result of his inability to work and to play with his children. His anxiety and physical condition had prevented him from driving and made routine activities of daily life difficult. While there was some prospect for improvement and recovery with recommended treatment, his prognosis was guarded. Not all of the plaintiff's difficulties were as a result of the accident. He had been suffering from an active substance use disorder at the time of the accident and since the accident he had suffered from pneumonia, pancreatitis, and diabetes, all of which would have occurred regardless of the accident. His recovery had been more difficult than expected, primarily due in part to the overlay of both psychiatric and psychological conditions, and the accident materially contributed to these conditions. Before the accident, he worked as a drywaller which was very physically demanding, but as a result of his injuries and ongoing symptoms it was unlikely he would ever be able to return to that work. Despite not being able to return to work, the plaintiff had been able to live independently and care for himself. He was awarded \$150,000 in non-pecuniary damages.

Authorities Relied on by the Defendants

[238] In *Abraha v. Suri*, 2019 BCSC 1855, the 48-year-old plaintiff was diagnosed as suffering from soft tissue injuries to her neck, shoulder area, and lower back. She had sleep issues related to her pain and stress and developed symptoms of anxiety and depression. Prior to the collision the plaintiff was in good health physically, mentally, and emotionally. After the collision she was left with ongoing intermittent pain, depression, anxiety, emotional suffering, and impairments of family, marital and social relationships. The prognosis for her recovery was guarded. Her physical symptoms plateaued three years post-collision, and she continued to have lower back pain that was exacerbated by extended periods of sitting, standing, or walking. Non-pecuniary damages of \$70,000 were awarded.

[239] *Tsai v. Murdoch*, 2019 BCSC 179, the 50-year-old plaintiff working in information technology suffered injuries as a result of a motor vehicle collision in which both vehicles were declared a total loss. Following the collision, the plaintiff did not think that she was injured but later complained of pain in her neck, upper back, left shoulder, chest, left arm, and lower back. Due to the plaintiff's driving anxiety, she was eventually referred to a counsellor and took the bus for a long period of time. The plaintiff's nightmares happened less frequently over time but continued to interrupt her sleep. Prior to the collision she was an optimistic, happy person who had a sense of adventure, loved being active and driving. As a result of her injuries the plaintiff complained of ongoing pain and limitation and ongoing anxiety. A non-pecuniary award of \$68,000 was made.

- [240] In *Liu v. Zhang*, 2019 BCSC 778, the 56-year-old plaintiff suffered injuries when her vehicle was struck from behind, including pain to her neck and back, headaches, and difficulty sleeping. She also suffered symptoms of driving anxiety and depression. The plaintiff was diagnosed as suffering soft tissue injuries and was referred to therapy and psychological counselling. She continued to complain of back pain, occasional neck pain and headaches, as well as some dizziness and fatigue. Her symptoms improved over time and with treatment but did not resolve. The plaintiff's injuries were also found to impact her mood and she suffered ongoing emotional difficulties. There was optimism that further improvement was likely with more physical activity and exercise. She was awarded \$60,000 in non-pecuniary damages.
- [241] In *Fleming v. McAllister*, 2017 BCSC 521, the 56-year-old plaintiff suffered soft tissue injuries as a result of three motor vehicle accidents. In the first accident the plaintiff suffered injuries to his neck, mid-back, and lower back. He was not fully recovered by the time of the second accident which aggravated his lower back pain, caused additional pain to his neck and shoulder, and caused pain in his hips and waist. In the third accident the plaintiff injured his knee. At trial the plaintiff's primary ongoing complaint was of chronic lower back pain with occasional spasms. Non-pecuniary damages of \$70,000 were awarded.
- [242] In *Mandra v. Lu*, 2014 BCSC 2199, the 53-year-old plaintiff suffered injuries as a result of a motor vehicle accident. The plaintiff said he felt stress and shock immediately after the accident. The court held that the plaintiff went from being a happy, healthy, and hardworking man to one who was left living in chronic pain. The plaintiff continued to suffer ongoing pain in his back, neck, and legs and headaches. The pain was chronic and severe. The plaintiff became nervous, forgetful, miserable, and depressed. There was no prognosis for improvement, except potentially in relation to his lumbar pain. His injuries were severe enough to disable him from his previous work as a millwright and render him only marginally employable in lighter occupations. A non-pecuniary award of \$75,000 was made.
- [243] In *Zhao v. Yu*, 2014 BCSC 1915, the plaintiff was diagnosed as having suffered soft tissue injuries to his neck, shoulder area, mid-back, and lower back with related headaches. His shoulder and mid-back pain had resolved by trial, but it was found that he suffered from ongoing pain in his neck and lower back that interrupted his sleep and caused non-restorative sleep and mood difficulties. Certain physical activities or prolonged sitting aggravated his lower back pain. He was likely to experience improvement if he followed recommendations and became more physically active and fit. A non-pecuniary damages award of \$70,000 was given.
- [244] In *Jiwani v. Borodi*, 2014 BCSC 1164, the 47-year-old plaintiff suffered injuries as a result of four motor vehicle accidents within a 27-month period. He suffered soft tissue injuries to his neck and back in the first three accidents and no injuries in the fourth. The first accident was the main cause of his injuries, the subsequent ones causing some minor exacerbation. The plaintiff's neck pain resolved approximately six months after the first

accident. While his back pain did improve, it persisted and had not resolved by trial. It was found that this pain impacted his mood, ability to sleep, and to some degree impacted his disposition and in turn his relationship with his family and friends. A non-pecuniary award of \$65,000 was made.

- [245] In *Wong v. Robillo*, 2013 BCSC 1104, the plaintiff suffered neck and back injuries. At trial the then 58-year-old plaintiff's neck was significantly better with no restriction in range of motion and for the most part no focal area of discomfort. His main area of complaint was his low back. The pain was intermittent and was exacerbated by repetitive bending of the spine or prolonged sitting for more than half an hour. He was able to return to stationary bicycle riding after the accident to improve his overall fitness. Although he was able to carry out most household chores, it caused discomfort. The Court found that the plaintiff had improved but that he had to live with chronic intermittent pain, anxiety, and uncertainty for three years leading up to trial. He was awarded non-pecuniary damages of \$50,000.
- [246] In *Niessen v. Sepulveda and Miller*, 2008 BCSC 1567, the plaintiff, 24-years-old at trial, was injured in two motor vehicle accidents. She suffered mild to moderate soft tissue injuries diagnosed as being a musculoligamentous strain of her cervical spine and lumbar spine. The plaintiff was prone to ongoing muscular discomfort in her neck and lower back in the future and it was held to be unlikely that her symptoms would resolve altogether. It was held that the plaintiff was able to continue to pursue her career as a medical lab assistant but would likely miss work occasionally and may periodically require home assistance if she raised a family which was a probability. The plaintiff suffered from anxiety, including driving anxiety after the two motor vehicle accidents, but the court concluded most of her anxiety was attributable to a separate, unrelated accident involving a pedestrian. The non-pecuniary award was \$55,000.
- [247] In *Iliopoulous v. Abbinante*, 2008 BCSC 336, the 45-year-old plaintiff was injured in two motor vehicle accidents. She suffered significant soft tissue injuries that remained unresolved four years after the initial accident. The second accident was relatively minor and caused short-lived aggravation of her injuries from the first accident. The plaintiff continued to suffer from chronic radiating pain from her right hip to her lower back which significantly impacted her work, recreational activities and general enjoyment of life. The medical evidence supported the chronicity of her symptoms and her poor prospects for substantial improvement in the future. The non-pecuniary award was \$50,000.
- [248] As noted by the defendants, the present value of such awards are to be relied on when applied to the case at bar.

Discussion of Non-Pecuniary Damages

- [249] It is not disputed the plaintiff suffered mild to moderate soft tissue injuries to his neck and lower back as a result of the 2014 accident. Nor is it in issue that the 2018 accident only exacerbated the injuries he suffered in the 2014 accident for a few months.
- [250] In my view the degree of such injuries however is not as significant as the plaintiff believes them to be. The extent of the limitations he testified to are contradicted by the video surveillance taken on December 10, 2019 and described by defendants' counsel (as confirmed by the plaintiff) as showing he drove to Westshore Mall, shopped for clothing, went to the McDonald's drive through and then to the Universal Supplements store. He then visited a friend followed by driving to the grocery store and then home. He had no difficulty getting the groceries out of the back seat nor walking up a short flight of stairs unassisted by the handrail. He explained he did not feel any restrictions that day as he had not gone to the gym. In 2018 the plaintiff purchased and drove a 750 cc Honda motorcycle apparently without difficulty. These activities are not consistent with his description of his physical limitations nor vehicle related anxiety.
- [251] None of the physical injuries rendered him unable to work particularly given his employer's willingness to accommodate any limitations as required by his collective agreement.
- [252] While he suffers from chronic pain and will continue to do so, it is now inextricably intertwined with his emotional state along with his pre-existing physical issues.
- [253] The plaintiff suffered from anxiety, chronic obesity, deconditioning, hypogonadism, low testosterone levels and fatigue prior to the 2014 accident. I accept the evidence of Dr. Down that part of his current medical state is caused by the 2014 accident and that a significant portion arises from his pre-existing condition and would have detrimentally affected him in the future. I accept Dr. Down's evidence on this issue because his lengthy doctor/patient relationship with the plaintiff gives him a perspective both pre- and post-accident and additional insight into the plaintiff and his condition.
- [254] I am satisfied his vehicle anxiety was not significant because he continued to drive and to travel as a passenger and in any event, such lessened in 2017 and 2018. His purchase and use of a motorcycle is telling, given the clear vulnerability of a motorcycle rider compared to travel in a motor vehicle. Such information was apparently not provided to Dr. Atkins as he offered no opinion on it. Nor was it provided to Dr. Solomons, however it is consistent with his opinion that the plaintiff does not suffer from an anxiety disorder. I am also satisfied his anxiety about vehicles and traffic did not rise to a level of a diagnosed anxiety disorder and accept Dr. Solomons' opinion on that issue and reject that of Dr. Atkins.

- [255] Dr. Down referred Mr. Latreille to a psychiatrist in July of 2017. He was originally waitlisted for a year but it has now been over two and a half years and he has yet to receive such assistance. Dr. Down was hopeful that with psychiatric help he would gain further improvement. Apparently obtaining psychiatric treatment in the Victoria area is problematic. No evidence was led respecting alternatives outside the Victoria area, whether on the Island or the Mainland.
- [256] As I have found, Mr. Latreille's pre-existing obesity, anxiety and fatigue are, along with the accident injuries, "causes-in-fact" of his current psychological difficulties. His injuries are therefore compensable.
- [257] I do not accept that the plaintiff is not physically capable of working. Nor do I accept that he cannot function physically on a day-to-day basis. His chronic pain does not in my view significantly impair his day-to-day life. While his back-pain limits heavier tasks and can be affected by certain activities, it is in my view not as serious as the plaintiff appears to perceive it. His mental health mood issue appeared after the accident, however overall his mental health issues have multiple causes including his obesity, sleep apnea, hypogonadism, mental and physical fatigue, the latter being repeated matters of complaint to his medical practitioners. His decision to cease working has contributed to his declining mental health.
- [258] I do accept that the plaintiff has suffered low mood, fatigue, and withdrawal from his social, recreational, and vocational activities. He continues to suffer chronic pain from his soft tissue injuries which is unlikely to resolve. He has stopped participating in activities he once enjoyed, particularly his auxiliary work with the RCMP. His relationships with his spouse, his family and his friends have been negatively impacted by his injuries.
- [259] The authorities relied on by the defendants do not reflect the mental health problems of the plaintiff, while the authorities of the plaintiff involve more significant physical and mental injuries caused by the accidents. Given the circumstances of the plaintiff, including his pre-existing conditions, I award \$90,000 to the plaintiff for his pain and suffering and loss of past and future enjoyment of life.

Loss of Earning Capacity

- [260] The plaintiff seeks damages arising from his loss of employment, including past wage loss and loss of future earning capacity. The plaintiff submits his decision to go on disability and then to retire was based on the advice of his family doctor, Dr. Down.
- [261] The defendants oppose any award arising from the plaintiff's decision to leave his employment saying it was not medically warranted and in fact the decision has contributed to his present condition.
- [262] The legal principles respecting loss of earning capacity were summarized in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) 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;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37;
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[263] In *A.J.G. v. Mann*, 2020 BCSC 180, Baird J. noted:

[47] The plaintiff must first establish, on a balance of probabilities, that the injuries sustained in the accident impaired her ability to earn income; that is, there must be a causal connection. Once she has done this, the hypothetical pecuniary loss must be assessed on the basis of relative likelihood: *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36-37; *Athey* at para. 27.

[48] An award for loss of earning capacity, whether past or future, requires an assessment that considers the overall fairness and reasonableness of the award, taking into account all positive and negative contingencies. Mathematical, statistical, or economic evidence may be of assistance where available; however, it is not a calculation according to a particular formula: *Abbott v. Gerges*, 2014 BCSC 1329 at para. 165; *Schenker v. Scott*, 2014 BCCA 203 at paras. 50, 53.

[264] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, the Court noted:

- [33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry
- [265] A claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity, that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [266] The plaintiff's claim for past loss of earning capacity relates to three time periods. The first is the time he missed from work shortly after the 2014 accident, followed by the time he went on disability between March 15, 2017 and July 11, 2017 and finally, the period from July 12, 2017 until the valuation date of January 20, 2020.
- [267] It is not in issue that the plaintiff missed some days off work after the 2014 accident totalling \$1,030.68 in lost income. He then went on disability on March 15, 2017 and remained on disability until July 11, 2017. For this period, he claims \$18,287.92 after tax for income loss plus \$1,333.94 for non-taxable non-wage benefits and an after-tax loss of bi-weekly First Aid Allowance of \$469.63 for a total of \$20,091.49.
- [268] Between July 12, 2017 and the valuation date the plaintiff did not return to work. During that period the collective agreement provided for annual wage increases. The economist, Mr. Wickson, calculated the wage loss for that period at \$152,100.00, a figure that includes the value of all benefits and the First Aid Allowance.
- [269] I do not accept the plaintiff would have been promoted to pay grade 14 on January 1, 2019 for the reasons given by his supervisor.
- [270] With respect to the future loss of earning capacity claim, the "earnings" and "capital asset" approaches were summarized by Kent J. in *Hoy v. Williams*, 2014 BCSC 234:
- [157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v.*

Galbraith, 2013 BCCA 305 at paras. 53 & 56.

[271] The plaintiff submits that the earnings approach is more appropriate because:

- The plaintiff had an established work history at the time of the 2014 accident;
- His position with the City was secure and not subject to economic fluctuations;
- He had a consistent work history, did not take significant periods of time off work in the past nor did he have health or personal issues which would have caused him to take time off work;
- He planned to work until retirement;
- The loss is measurable as he is not employable and will not be returning to work.

[272] In this instance the plaintiff's future earnings can be measured as his income is determinable over time given his position with the City. He has a consistent work history and held a secure position with the City. There was no evidence that the plaintiff had at any time planned to leave his position with the City to pursue some other line of work. It is more likely than not he would have remained in that position until he retired.

[273] Mr. Wickson calculated the present value of Mr. Latreille's absent-accident potential future earnings to age 65 at approximately \$606,000 on the assumption the plaintiff would have remained at pay grade 12.

[274] The defendants took issue with a number of assumptions and calculations made by Mr. Wickson regarding the probability of disability and the incorrect assumption that the plaintiff did not receive benefits while on long-term disability from July 12, 2017 to February 11, 2019.

[275] The defendants note that Mr. Wickson, in making a deduction for disability, assumed that the plaintiff's probability of suffering from a disability or limitation was below average. He acknowledged in cross-examination that if he assumed the plaintiff's probability of suffering from disability in the future was equal to the average, then a higher percentage deduction would be used.

[276] Mr. Wickson used little information specific to the plaintiff in estimating the appropriate deduction for disability as well as the average impact of disability on earnings. He relied on Statistics Canada's 2012 "Canadian Survey on Disability" ("CSD") which gives information regarding the probability an individual will have "limitations at work" and information about how much such an individual will suffer relative to a person without such limitations. He acknowledged that use of the CSD was problematic as the survey relates to a wide group of individuals of varying abilities whose disabilities cover a very broad spectrum of severity. The defendants submit as a result Mr. Wickson's disability assumption resulted in inflated estimates of future wage loss.

- [277] The defendants rely on the decision of Warren J. in *McColm v. Street*, 2017 BCSC 1831, where she held that the portions of the economist's report that relied on CSD data were objectionable due to the overly broad nature of the survey and its resulting inability to assist the court on an individual case basis. Mr. Wickson acknowledged the survey's weaknesses arising from its broad nature but testified that it was used so the court would be aware that disability can have an impact.
- [278] I exclude the portions of his report relying on CSD averages in assessing the future wage loss as they are not relevant and lack probative value.
- [279] Simply calculating the plaintiff's income loss on the basis he has ceased working due to the accident and is no longer employable is not appropriate. Compensation for future wage loss is a matter of assessment. It must be fair and reasonable. There are contingencies to be accounted for arising from the plaintiff's pre-existing circumstances and his decision to stop working.
- [280] The first contingency is that there is in my view a real possibility that Mr. Latreille would have suffered psychological repercussions from his obesity and sleep apnea given the significance of the resulting fatigue on his capacity to work. His pre-accident inability to exercise and diet sufficiently to reduce his obesity remain an issue.
- [281] The plaintiff's decision to not attempt his disability insurer's return-to-work program was based on his view of his abilities as related to and accepted by Dr. Down. The memorandum Dr. Down provided to the plaintiff's insurer did not set out any detail respecting the plaintiff's inability to work. The plaintiff did not even attempt the return-to-work program, a decision he made and then sought the support of his doctor.
- [282] The plaintiff's explanation for retiring permanently on medical advice is not correct, as that was not the issue related to Dr. Down or upon which Dr. Down provided his note. The plaintiff advised Dr. Down he was not able to return to work and Dr. Down provided the note referred to. It is clear that Dr. Down did not recommend retirement nor did the plaintiff suggest it. Rather he took it upon himself to make that decision.
- [283] Dr. Atkins noted the various stressors related to him by the plaintiff. Three of them, financial issues, job loss and social isolation, relate to the plaintiff's choice to stop working. As Dr. Solomons stated:

putting him off work was not medically warranted, and insofar as this led to concerns about his and his family's financial security and future, and considering the impact this may have had on his sense of purpose and self-worth, this likely instigated and aggravated his concerns rather than alleviated them. Mr. Latreille made it clear to me that since he stopped working he has not experienced any improvement in his mood state or in any other symptoms.

- [284] Mr. Latreille's choice to cease working has, in my view, had a negative effect on him without the benefit of any improvement in his condition. He now appears to be unemployable, although if he receives psychiatric treatment, Dr. Down held out some hope his condition could improve.
- [285] In addition, Mr. Lawless noted that an extended absence from the work force negatively affects an individual's employability. As the plaintiff made the choice to retire without medical advice that he do so, he contributed to that negative effect.
- [286] Turning first to the claim for past loss of income, the loss of \$1,030.68 in income for time missed shortly after the 2014 accident is not in issue. The claim for past loss thereafter arises after March 15, 2017, two and one-half years after the first accident. As noted in the authorities above, a claim for past loss of income is actually a claim for loss of earning capacity and must be assessed on the basis of relative likelihood with consideration of all positive and negative contingencies.
- [287] I conclude for the reasons given that the claimed impact of the injuries to the plaintiff on his past income-earning capacity from March 15, 2017 and his future income-earning capacity must be reduced by the significant contingency that his capacity to work would have been affected by his pre-existing health issues without the accidents. In addition, with respect to his future income-earning capacity, given his later decision to cease employment is a negative contingency which results from his being off work. He is not to be placed in a better position than he would have been but for the accidents.
- [288] With respect to past income loss, I conclude an award of \$86,000 is appropriate which includes the \$1,030.68 for time missed in 2014.
- [289] With respect to his loss of future earning capacity, I conclude an award of \$275,000 is appropriate and assess it at that amount.

Special Damages

- [290] The test for awarding special damages is that of reasonableness: *Harris v. Zabar*, 2010 BCSC 97 at para. 110.
- [291] The plaintiff claims for various invoices respecting treatments and medications totalling \$15,177.68 in special damages, submitting they were prescribed or recommended by medical professionals and hence were reasonably incurred. The defendants submit such an award should be for \$10,737.68 submitting the difference of \$4,440.00 is not recoverable as it relates to the accounts for counselling related to the psychiatric symptoms of fatigue, reactive mood and difficulty concentrating which they say are not related to the accidents.
- [292] In my view an award of \$15,177.68 for the treatments and medications is appropriate as I have found the psychiatric symptoms are causally related to the accidents, hence are recoverable.

Cost of Future Care

[293] The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the injured person to the position he would have been in had the accident not occurred: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 315 at para. 29. In *Gao v. Dietrich*, 2018 BCCA 372, the Court of Appeal stated:

[68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

[69] 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. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

[294] In *Smith v. Moshrefzadeh*, *supra*, the court said this about assessing cost of future care:

[122] The assessment of this pecuniary claim is to be based on what is reasonably necessary on the medical evidence to sustain and promote the plaintiff's mental and physical health. In assessing what is reasonably necessary to promote the plaintiff's health, the court should consider whether the plaintiff would likely use the items or services in the future.

[123] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise. Since the assessment necessarily entails the prediction of future events, adjustments must be made for contingencies. The extent, if any, to which a cost of future care award should be adjusted for contingencies depends upon the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required. The assessment must take into account the prospect of any improvement in the plaintiff's condition or, conversely, the prospect that additional care will be required.

[Citations omitted.]

[295] An award must be moderate and fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 242.

- [296] While awards must have medical justification, a physician does not have to specifically endorse each of the recommended items. In Gregory the court explained:
- [39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: Aberdeen at paras. 43, 63.
- [297] The plaintiff seeks future care costs for medications, psychological intervention, an occupational therapy reactivation program and physical rehabilitation. The plaintiff submits the claimed items are medically justified, reasonable and likely to be incurred.

Present Value of Future Care

- [298] The defendants take issue with the annual continuing factor (the single period factor) relied on by Mr. Wickson to calculate the present value of future care costs. Specifically, that Mr. Wickson in calculating the plaintiff's whole life factor as being 20.603 related to the cumulative factor of the plaintiff at January 20, 2074 when the plaintiff would be 109.8 years of age. The defendants note that the average life expectancy for a B.C. male born on April 18, 1964 is 83 years old. Mr. Wickson testified that using that life expectancy, the present-day value of a cost continuing for the life of the plaintiff would be equal to 18.576 times the annual cost. The defendants submit that any award for future care costs should use the cumulative factor of 18.576, not 20.603.
- [299] Mr. Wickson explained relying on 83 years was incorrect as expenses are not cut off at that age as it is possible to live beyond that. In *Monych v. Beacon Community Services Society*, 2009 BCSC 562, Gerow J. stated:
- [82] In determining what discount should be made for a shortened life expectancy, I have concluded that I should be optimistic and not pessimistic based on the authorities: *Dennis v. Gairdner* (2002), 5 B.C.L.R. (4th) 275 (S.C.); *Arce v. Simon Fraser Health Regions*, 2003 BCSC 998.
- [300] In this case, the parties did not tender any evidence as to Mr. Latreille's life expectancy. Taking an optimistic approach and absent evidence to the contrary, I agree with Mr. Wickson that it is possible the plaintiff will live beyond 83 years. I accept that the cumulative factor to be applied, where appropriate, is 20.603 for that reason. I note that factor is applicable only to continuous use of medications in any event.

Recommended Treatments

- [301] As discussed above, Ms. Walker completed an FCE and provided a Cost of Future Care Opinion.

[302] She recommended intensive counselling with a clinical psychologist "to address his low mood and to support him to overcome his chronic pain experience" and that he "may be experiencing trauma related symptoms as well as anxiety which is influencing his pain perception". She stated:

This recommendation is based upon Dr. Atkins' diagnoses/prognosis, Mr. Latreille's presentation during testing, his self report, collateral information, the results of the FCE and my clinical experience

[303] In cross-examination she noted that it appears the plaintiff's life has shrunk socially and recreationally and that he is at home a lot more compared to before and that this contributes to poor mental and physical health. She agreed that weight loss would improve his physical and emotional state. She acknowledged had she had the report and opinion of Dr. Solomons instead of Dr. Atkins' report it was possible her assessment could have changed.

[304] She testified that it was important the plaintiff not become reliant on services which had the potential of reinforcing his disabled status. That is, it is important that he reengage with society and not receive services that might prevent him from having a sense of achievement. Also in her report she stated the plaintiff had reported to her that prior to the 2014 accident his spouse and their daughters were primarily responsible for household cleaning and that his wife did the laundry.

Medications

[305] The medications costed by Ms. Walker are Robaxacet, Naproxyn, Citalopram, and Bupropion [Wellbutrin], all of which were recommended by Dr. Down.

[306] Ms. Walker agreed that if Citalopram and Bupropion were no longer effective and that was the medical opinion, then they would no longer be needed.

Psychological Intervention

[307] The plaintiff relies on the recommendations of both Dr. Atkins and Dr. MacKean that counselling continue. Ms. Walker recommends counselling as well with a clinical psychologist consisting of 24 sessions in the first year and then 8 to 12 sessions annually thereafter.

[308] The defendants submit that the psychological difficulties of the plaintiff are not related to the accidents, hence no award for counselling is to be made.

[309] Given my conclusion that the accidents have contributed to Mr. Latreille's psychological difficulties and his lack of success in obtaining psychiatric assistance, I accept the recommendation for counselling although subject to a deduction arising from his pre-existing conditions.

Occupational Therapy Reactivation Program

[310] Occupational therapy was recommended by Ms. Walker to enable the plaintiff to regain some independence in activities of daily living and to resume social and recreational pursuits. She recommended an occupational therapist oversee the program and a rehabilitation assistant implement it.

[311] As the plaintiff's back pain remains chronic, such treatment is appropriate.

Physical Rehabilitation (Massage Therapy)

[312] Despite the plaintiff having previously stopped massage therapy due to it causing increased pain, Ms. Walker recommended that he should continue to receive it. She suggested he try different massage therapists to find one that did not cause pain. Given the plaintiff's decision to cease the massage therapy recommended by his physician, the defendants submit that if this request is considered, the plaintiff's failure to pursue such treatment is a failure to mitigate. Given the plaintiff's pattern of discontinuing recommended treatments, I am not satisfied any amount for massage therapy should be ordered.

Domestic Services

[313] With respect to a claim for housekeeping damages, Ms. Walker recommended compensation for the plaintiff's inability to return to heavier domestic responsibilities due to his neck and back injuries such as vacuuming, mopping and cleaning bathrooms. Ms. Walker stated the plaintiff required paid services to complete certain heavier tasks that he was previously responsible for:

Item

Unit Cost

Frequency

Annual Cost

House Cleaning

\$25-\$30/hr

3 hrs/week for one year; 3 hrs/4 weeks thereafter to age 85

\$3,900 to \$5,460 for year one; thereafter \$975 to \$1,365/year

Home Maintenance

\$60/hr

12 hrs/year to age 75

\$720/year

Yard Maintenance

\$40/hr

6 hrs/year to age 75

\$240/year

- [314] The defendants oppose any such award on the basis that in the past the counsellor, Ms. Connell, had recommended such assistance but Dr. Down had disagreed and countered the recommendation as it was contrary to the objective of Mr. Latreille being active. The defendants also note that Ms. Walker's recommendation for household cleaning is inconsistent with her evidence that the plaintiff should avoid services that prevent him from achieving a sense of achievement and should be disregarded.
- [315] Before the accident the plaintiff did household maintenance, cleaned and waxed floors, dealt with the garbage and recycling and helped with cooking. His step-daughters assisted with cleaning and dinner as well. Outside he said he did yard work including gardening and lawns. After the accident he testified he still did home chores but had their daughters assist with the laundry, floor cleaning, recycling and garbage and that when they moved to Langford, they hired movers for the heavy boxes and furniture whereas in the past he would have done that himself.
- [316] He stated he tried sanding and staining the outside deck but could only do it for 10-15 minutes at a time and then had to rest for an hour or two so he had his son finish it. He tried to fix a leaky sink faucet but suffered back pain for two to three days afterwards.
- [317] The plaintiff refers to *Simmavong v. Haddock* 2012 BCSC 473 at paras. 137-145, where housekeeping damages were awarded to the plaintiff despite the fact her family assisted with the increased housework after the collision. The court accepted the plaintiff's evidence that her injuries made it difficult for her to perform household tasks. The court noted that the assessment must take into account what the plaintiff's circumstances would have been had she not been injured in the accident.
- [318] With respect to the specific household task of heavy seasonal cleaning, the plaintiff relies on *Demarzo v. Michaud*, 2010 BCSC 255 paras. 59-67. Due to her injuries, the plaintiff, a landscaper by trade, was unable to maintain the landscaping at her family home as she had in the past, leaving the grounds in a "sorry state". The court made an award for the cost of future grounds maintenance to be encompassed with the plaintiff's general award for loss of homemaking capacity. The court also found she was entitled to assistance with heavy seasonal cleaning for tasks that aggravated her back injury, including cleaning floors and bathrooms.

- [319] While I accept that some heavier household tasks continue to be difficult for Mr. Latreille and a source of pain, in my view certain of the household tasks can be, as they have been, carried out by his spouse. This may result in a reallocation of some of the tasks in their relationship, but that is not unreasonable. Nor am I satisfied that Mr. Latreille's limitations are as significant as he states as noted earlier.
- [320] In addition, Dr. Down has not changed his advice regarding the need for the plaintiff to remain active nor that his physical symptoms did not stop him from working. As well he advised and continues to advise that being active and losing weight will over time likely improve the plaintiff's physical condition and abilities.
- [321] I make no award for house cleaning. I accept that for some yard work and home maintenance Mr. Latreille will require assistance.
- [322] Given certain of the future costs such as psychological intervention would have been required because of the plaintiff's pre-existing conditions and the above reductions, I assess future care costs at \$50,000.

Mitigation

- [323] The defendants submit the plaintiff has failed to mitigate. The law on mitigation was recently summarized by the Court of Appeal in *Pearson v. Savage*, 2020 BCCA 133:
- [74] Mitigation limits recovery based on the unreasonable failure of an injured party to take steps to limit the loss: *Graham v. Rogers*, 2001 BCCA 432 at para. 35, leave to appeal ref'd [2001] S.C.C.A. No. 467. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant argues that the plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on the issue.
- [75] Where a plaintiff has not pursued a course of recommended medical treatment, the defendant must prove that the plaintiff acted unreasonably in eschewing the recommended treatment, and the extent, if any, to which the plaintiff's damages would have been reduced had he or she acted reasonably: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
- [76] The test set out in *Janiak* is objective. If a plaintiff had capacity to make decisions about treatment that ought to have been pursued, and the advice to pursue a particular form of treatment was sound, the question is what would be expected of a reasonable person in the circumstances considering the plaintiff's medical condition at the material time: *Cassells v. Ladolcetta*, 2012 BCCA 27 at para. 26. If, through no fault of her own, the plaintiff did not have the capacity to make the decision, the issue of mitigation does not arise.

- [77] Determining what is "reasonable" to mitigate a loss involves both a question of fact and law: *The Owners, Strata Plan K855 v. Big White Mountain Mart Ltd.*, 2017 BCCA 438 at para. 66. A defendant is not entitled to complain of a failure to mitigate that is caused, or materially contributed to, by the defendant's own actions: *2438667 Manitoba Ltd. et al. v. Husky Oil Limited et al.*, 2007 MBCA 7 at 18, cited with approval in *The Owners, Strata Plan K855*.
- [324] As noted by the Court of Appeal in *Rhodes v. Surrey (City)*, 2018 BCCA 281, para. 66, the fact that a treatment might afford some relief is not sufficient to justify a reduction of an award.
- [325] Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert* at para. 202. The court is entitled to look at the plaintiff's personal circumstances when considering the reasonableness of their actions: *Gill v. Lai*, 2019 BCCA 103 para. 27.
- [326] The defendants submit the plaintiff failed to mitigate his injuries by failing to make reasonable effort to reduce his weight. The evidence of Drs. Down, MacKean and Sovio was that the plaintiff's obesity has had a role in exacerbating and prolonging his injuries. Dr. Down confirmed that the plaintiff's obesity has been a long-standing issue from before the 2014 accident.
- [327] The plaintiff acknowledged he was aware of his weight issue and these recommendations but at the same time testified he did not consider himself to be obese. He agreed however that is not what the doctors have told him. He acknowledged as well that in 2013 he told Dr. Michaels, his oncologist, that he was having difficulty losing weight and had some anxiety. He confirmed as well that doctors have told him that he has excessive weight and that it may account for sleep apnea and fatigue. He suggested that the weight loss did not help his symptoms, but has never lost enough weight to render him not obese or to the satisfaction of his healthcare providers.
- [328] The evidence of Mr. O'Connor is that he and the plaintiff attend the gym together. The plaintiff has shown that he is capable of being active and working out. On one hand, it appears the exercise he is doing is not good enough, as he is still obese and deconditioned. On the other hand, he is making some effort to work out, and in fairness it may be that the intensity with which he can exercise is negatively impacted by his injuries. Further, he testified that he has been lifting weights since he was 17, so he does have a history of exercising.
- [329] He acknowledged that he has made bad decisions in his food choices. He testified that on the trip to Cuba he was "unaware" that he was on a diet at that time. In my view, the diet issue is more problematic as he is aware of the recommendations that he improve his diet to aid in his weight loss and has not established any reason why he has not or could not follow these recommendations.

[330] The plaintiff submits he has made reasonable efforts to lose weight and has done his best despite his pain, fatigue and low motivation. He further submits his efforts have been sincere and reasonable. He argues that he has succeeded in losing weight both before and after the 2014 accident with no improvement in his symptoms. He refers to *Delgigilo v. British Columbia (Public Safety and Solicitor General)*, 2012 BCSC 480, where the failure to mitigate on account of weight was addressed:

[87] Once the plaintiff establishes that the defendant is liable for his injuries, the burden shifts to the defendant. In order to prove that the plaintiff did not meet his duty to mitigate, the defence must prove that he acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202. *Gilbert* continues at para. 203:

A relevant circumstance in cases such as this is the plaintiff's personality and condition before and after the accident. The law does not require a plaintiff to do that which cannot be controlled, nor does it require perfection in the pursuit of rehabilitation. In addition, the defendant must take the victim as found, which may affect what is to be reasonably expected. For example, a person who has struggled with life-long obesity may not be expected to lose substantial weight to discharge the duty to mitigate, even though weight loss would assist recovery. What the law requires is that the plaintiff makes contextually reasonable and sincere efforts to limit his or her damages and loss [citations omitted].

[Emphasis added.]

[88] The evidence is clear that Mr. Del Giglio has struggled with lifelong obesity. He has attempted to lose weight in accordance with his doctor's advice and has been somewhat successful. The plaintiff asserts that with assistance, including physiotherapy, kinesiology, the healthy heart program, a dietician and a gym membership he will likely lose weight and build his core strength.

[89] I find that Mr. Del Giglio has made "contextually reasonable and sincere efforts" to lose weight, but would benefit considerably from professional assistance. I disagree with the defendants that his damages should be reduced to reflect his reflected failure to mitigate. The defendants have not proven a failure to mitigate.

[331] In *Humphrey v. Rancier Estate*, [1985] B.C.J. No. 835 (S.C.), the court discussed the same issue:

The question is whether the plaintiff has taken reasonable steps to minimize her loss. The court must assess whether this test has been met by looking at all the circumstances of the case. Here we have an obese lady before the accident - someone who had been obese all her adult life. Her brother and sister are both obese. She appears, as her counsel put it, to be a weak woman in the sense that she has not had very good success at controlling her smoking or her eating on a consistent basis in the past despite medical advice and despite her clear efforts. She has tried to lose weight and has succeeded to an extent, at least temporarily. She is still trying, she says.

Of equal importance to the principle that the plaintiff must act reasonably in minimizing her loss and her damages, is another principle, namely that the defendant takes his victim as he finds him or her. In the circumstances in this case, given the plaintiff's pre-accident history of obesity, given her particular personality, given her honest efforts from time to time to lose weight and to keep it off, I am not satisfied that it can be said that the plaintiff has acted unreasonably and has failed to mitigate her damages, with the result that her damages should be lessened because she has not lost weight.

[332] A similar discussion is found in *Abbott v. Gerges*, 2014 BCSC 1329:

- [145] In *Robinson v. Anderson*, 2009 BCSC 1450, it was held that the plaintiff's failure to lose weight and increase her fitness level amounted to a failure to mitigate in circumstances where her injuries were not permanent, the likelihood was high that she would enjoy substantial or even complete recovery within a short time if she took steps to improve her fitness level, and there was no basis for concluding that the plaintiff was unable to heed the advice to lose weight and become more physically fit.
- [146] In contrast, where a plaintiff has a pre-accident history of obesity and makes honest but ultimately unsuccessful efforts to lose weight, courts have refused to find that the plaintiff has acted unreasonably in not losing weight: *Humphrey v. Rancier Estate*, [1985] B.C.J. No. 835 (S.C.); *Hunt v. Ugre*, 2012 BCSC 1704.
- [147] It is uncontroverted that Ms. Abbott has a very long-standing history of obesity. She testified she was walking for exercise before the car accident, but exercise tended to aggravate her symptoms after the accident. She also testified she modified her diet and reduced her portion sizes in an effort to lose weight after the car accident. She was not successful in her efforts. I am not persuaded that Ms. Abbott, with her particular history and injuries, acted unreasonably in failing to lose weight and improve her fitness level. Further, I do not think it can be said that she "eschew[ed] the recommended treatment". She made efforts to follow the recommendations but did not succeed.
- [333] The defendants refer to a number of cases that address reduction of a damage award due to a failure to mitigate relating to weight, exercise, deconditioning and mental state.
- [334] In *Antoniali v. Massey*, 2008 BCSC 1085, the court found the plaintiff failed to follow a recommended exercise program and that had she done so she would have significantly reduced the disability she suffered from, that a reasonable person would have followed the program and that there was a substantial likelihood that the effects of her injuries would have been lessened had she done so. The court reduced the plaintiff's pre-trial damages by 15% and her post-trial damages by 50% to reflect her failure to mitigate.
- [335] In *Peacock v. Battel*, 2013 BCSC 958, the plaintiff operated a seasonal fishing resort doing the physical work herself. She was injured in two motor vehicle accidents. She was described as "energetic, hardworking and cheerful before the accidents, but thereafter suffering from both physical difficulties and low mood". Despite medication significantly

improving her condition, she refused to continue their use "for no good reason." The court found that a program of exercise would assist the plaintiff in overcoming some of her physical limitations and fixed the non-pecuniary damages taking that into account. The court also reduced the overall award by 20% for the failure of the plaintiff to follow medical advice, specifically her stopping taking medication that had been shown to be effective.

[336] In *McCulloch v. Isaac*, 2013 BCSC 1319, the court found that physiotherapy would have "ameliorated the plaintiff's symptoms and accelerated her recovery" and that the plaintiff failed to follow medical advice. The court found the plaintiff's failure to mitigate "likely prolonged her symptoms and deprived her of the higher level of function over an extended period" and accordingly reduced her non-pecuniary damages by 10%.

[337] In *Gibbs v. Skemp*, [1998] B.C.J. No. 680 (S.C.), the plaintiff suffered from chronic pain as a result of a motor vehicle accident. The medical advice was that she be active and exercise. The court found that she should have been physically active to a much greater degree than she was. She was found to be deconditioned and had adopted a "disabled lifestyle". Non-pecuniary damages were reduced by 10% because of her failure to mitigate.

[338] In *Rahimi v. Ma*, 2014 BCSC 710, Voith J. noted the obligation on a plaintiff to seek medical assistance or advice:

[44] In Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1996) at p. 862, the author states "Personal injury victims cannot sit back after the accident and allow their losses to accumulate. They must take all reasonable steps to avoid those losses".

[45] In *Sevinski v. Vance*, 2011 BCSC 892, I said:

[68] Instead, the proper starting point is the obligation of an injured plaintiff to seek appropriate medical assistance. The failure to seek such assistance cannot and does not displace or diminish the plaintiff's obligation to mitigate his or her loss. Thus, in *Jamie Cassels and Elizabeth Adjin-Tettey, Remedies: The Law of Damages*, 2nd ed. (Toronto: Irwin Law, 2008) at 389, the authors state:

Plaintiffs who are tortiously injured have an obligation to take reasonable steps to mitigate their injuries and cannot collect damages for losses that could be avoided. Mitigation in the circumstances ordinarily requires the plaintiff to seek appropriate medical treatment...

[69] Similarly, in *S.M. Waddams, The Law of Damages*, looseleaf (Aurora, Ont: Thomson Reuters, 1991) at 15.260 the author states:

In personal injury cases, the plaintiff is obligated to submit to reasonable medical treatment and to seek and follow medical advice where appropriate.

...

- [83] In summary, I find the plaintiff's failure to raise her difficulties at an early stage and/or on an ongoing basis with appropriate medical advisers, her failure to obtain guidance or advice on the treatment of those difficulties, and her failure to engage actively and diligently in a course of physical or rehabilitative treatment, together constitute a failure to mitigate her losses.
- [46] In *Papineau v. Dorman*, 2008 BCSC 1443, where a plaintiff failed to obtain medical advice for eight months after an accident, Brown J. said:
- [247] Mr. Papineau's failure to seek medical help for eight months is another mitigation issue. Against this has to be weighed the serious challenges people face trying to find a family physician, especially when moving to a new city. At the same time, Mr. Papineau never even made his way to a walk-in clinic, despite urgings to do so. Injured people are entitled to make reasonable decisions about their own bodies and about when and where they seek medical advice; but when they wait an unreasonably long time without reasonable explanation, a defendant may have legitimate grounds for complaining that the plaintiff has failed to mitigate.
- [47] In *Papineau*, this early failure to seek medical assistance was overshadowed by the plaintiff's failure to follow the advice he was subsequently given.
- [48] The positive obligation to seek assistance, as with all aspects of mitigation, need only be reasonable. Whether a plaintiff has acted reasonably will be a function of many circumstances. Some plaintiffs may reside in remote locations where medical assistance is not easily accessed. Some plaintiffs may suffer from depression or an addiction issue that affects their functionality and their ability to seek assistance; see, for example, *Penner v. Silk*, 2009 BCSC 1682 at para. 50, var'd on other grounds (sub nom *Penner v. Insurance Corporation of British Columbia*) 2011 BCCA 135. Some plaintiffs' injuries may be sufficiently modest that a failure to seek assistance is readily understood.
- [339] In my view there is a pattern to the plaintiff's approach to treatment and his obligation to mitigate. His attendance on massage and physiotherapy and weight loss has been similar. According to him the massage caused pain, the physiotherapy did not help and weight loss did not make any difference. He did not discontinue the massage and physiotherapy on medical advice and with respect to weight loss, he did not continue with it long enough to lose sufficient weight to make a difference.
- [340] The evidence is he did not and does not consider himself obese although well aware the majority of his medical practitioners' reference that is the case and a cause for concern. His efforts to diet likewise have not been shown to be significant and he does not place the need to diet sufficiently high on his list of priorities.

[341] I am therefore satisfied that the plaintiff has acted unreasonably in eschewing the weight loss recommended by his medical practitioners. That said, the evidence does not establish the extent, if any, to which his damages would have been reduced had he acted reasonably in this regard. The test as articulated in Pearson therefore has not been satisfied. I conclude the defendants have not established a failure to mitigate.

Summary

[342] I therefore award:

Non-pecuniary Damages

\$ 90,000.00

Past Income Loss

\$ 86,000.00

Future Income Earning Capacity

\$ 275,000.00

Special Damages

\$ 15,177.68

Cost of Future Care

\$ 50,000.00

TOTAL

\$516,177.68

Costs

[343] Subject to any matters of which I am not aware, the plaintiff is entitled to his costs.

"The Honourable Mr. Justice Punnett"

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