

CANADA / JUDGMENT

## Matanagh v. Lanctot

2025 BCSC 638

### COURT

Supreme Court of British Columbia

### DECIDED

4 April 2025

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2025 BCSC 638 Matanagh v. Lanctot

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Matanagh v. Lanctot,

2025 BCSC 638

Date: 20250404

Docket: M203137

Registry: Vancouver

Between:

Masoud Esmaili Matanagh

Plaintiff

And

Brian Nolan Lanctot and Curtis Adam Miller

Defendants

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:

T. Dennis

Counsel for Defendants:

S.B. Stewart

## Place and Dates of Trial:

Vancouver, B.C.

June 17-21, 2024

June 24-26, 2024

September 24, 2024

## Place and Date of Judgment:

Vancouver, B.C.

April 4, 2025

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## I. Overview

- [1] The Plaintiff, Masoud Esmaili Matanagh, was involved in a motor vehicle collision which occurred on October 24, 2018 (the "2018 MVC" or the "Collision"). Liability for the Collision has been admitted on behalf of the Defendants, Brian Nolan Lanctot and Curtis Adam Miller.
- [2] The central issue before me is the quantum of the Plaintiff's damages that are attributable to the Collision. Answering this question turns largely on the reliability of the Plaintiff's evidence and the medical opinions that, in turn, depend on the accuracy of the statements the Plaintiff made to healthcare professionals.
- [3] The Plaintiff submits that the Collision has caused him life-altering physical and psychological injuries, including suicidal ideation. He seeks damages exceeding \$2.4 million for his non-pecuniary losses, loss of housekeeping capacity, costs of future care, and special damages. A substantial portion of these damages are for future care costs. As the plaintiff was disabled from employment for many years prior to the Collision, no amount is sought for loss of earning capacity.
- [4] The Defendants say that the Plaintiff only sustained minor soft tissue injuries because of the Collision, and that these fully resolved well before this trial. They submit that any ongoing symptomology is due to Mr. Esmaili Matanagh's pre-existing condition (physical and psychological) and post-Collision injuries, for which the Defendants should not be held liable. They submit that any damages award should not exceed \$100,000.
- [5] For the reasons that follow, I largely agree with the position of the Defendants.

## II. Issues

- [6] Liability has been admitted, and the Plaintiff has abandoned his claims for past and future loss of earning capacity. Therefore, the following issues remain for my determination:
  - a) What injuries were caused or aggravated by the Collision?
  - b) What quantum of non-pecuniary damages is payable for the compensable injuries?
  - c) Is the Plaintiff entitled to an award for loss of housekeeping capacity? If so, how much?
  - d) Is the Plaintiff entitled to an award for costs of future care? If so, how much?
  - e) What award is the Plaintiff entitled to for his pecuniary loss (i.e. special damages)?
- [7] I will begin with an overview of the guiding principles for assessing the credibility and reliability of the witnesses' testimony.

### III. Credibility and Reliability

- [8] Credibility and reliability are related but distinct concepts. Reliability concerns the accuracy of the testimony of a witness. It engages consideration of the ability of a witness to accurately observe, recall, and recount the events in issue. Credibility centers on the honesty of the witness. It involves an assessment of the trustworthiness of their evidence, based on their veracity and sincerity, as well as the accuracy of the evidence provided: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd* [2012] S.C.C.A. No. 392.
- [9] A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case - a credible witness may still give unreliable evidence. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are recounting, but nevertheless be mistaken in their recollection: *R. v. H.C.*, 2009 ONCA 56 at para. 41.
- [10] In *Gichuru v. Smith*, 2013 BCSC 895 at para. 129, *aff'd* 2014 BCCA 414, 2014 leave to appeal SCC *ref'd* 2014 Carswell BC 4023, the court noted that demeanour is a factor that a court can consider in assessing a witness' credibility. However, trial judges are cautioned against making credibility assessments based on demeanour alone: *R. v. N.S.*, 2012 SCC 72 at paras. 99-107. This is because the manner in which a witness testifies is a notoriously unreliable measure of credibility. A witness' physical health, personality, cultural and social upbringing, and comfort level with testifying in a courtroom setting, are but some of the things that may affect their demeanour, thereby making it difficult to interpret.
- [11] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at p. 357 and *Bradshaw* at para. 186. These factors include: whether the witness modified their testimony; whether their testimony is in harmony with independent evidence; and whether the testimony seems unreasonable, impossible, or unlikely. I have applied those principles here.
- [12] When considering entries regarding medical visits, the court should not place undue weight or emphasis on them. These entries reflect a summary of what the author of the records understood the patient to be telling them - they do not record all of what may have been conveyed during the visits. As noted by Justice Smith in *Edmondson v. Payer*, 2011 BCSC 118, *aff'd* 2012 BCCA 114:
- [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

- [13] Thus, where there is a conflict between the medical records and the plaintiff's evidence, it is important to consider the subject matter, surrounding circumstances, and other reliable evidence in resolving the conflict.
- [14] It is also important to take stock of the "human tendency to reconsider, review and summarize history in light of new information": *Burke-Pietramala v. Samad*, 2004 BCSC 470 at para. 104. Where a number of years have passed since the collision (as in here), and the plaintiff has been treated by numerous healthcare professionals leading up to the trial, it is natural to have some variation between the plaintiff's testimony and the entries in the medical records or histories recorded in the expert reports.
- [15] If the plaintiff's account of their change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.
- [16] I turn now to concerns about the reliability of the Plaintiff's evidence.
- [17] It is not possible for me to address every single inconsistency raised by Defendants' counsel in these Reasons. Nor is it necessary to do so. In the interests of expediency, I have classified concerns raised about Mr. Esmaili Matanagh's evidence into two broad categories: those related to minor or peripheral matters, and those related to material matters.
- [18] Inconsistencies on immaterial matters include those caused by confusion due to the Plaintiff's limited understanding of English, or unclear/poorly phrased questions that were put to the Plaintiff by counsel. The presence of these types of inconsistencies does not impact my view of Mr. Esmaili Matanagh's credibility or reliability as a witness.
- [19] However, there were also many inconsistencies on material matters which are not easily overlooked and which impact my view of how much weight I can place on Mr. Esmaili Matanagh's evidence in relation to a particular issue. The presence of these inconsistencies supports my conclusion that Mr. Esmaili Matanagh is not a reliable witness or historian. Some of these inconsistencies also raise serious concerns about his credibility.
- [20] I pause here to note that while the Defendants submit that the Plaintiff's evidence is not reliable, they have not asked me to expressly find that the Plaintiff lacks credibility. As the Defendants' Counsel correctly noted, I do not need to find that Mr. Esmaili Matanagh lacks credibility in order to discount his evidence or put less weight on it. Whether Mr. Esmaili Matanagh was being dishonest, was simply confused or had innocent lapses of memory, the end result is the same - such a finding makes his evidence unreliable and impacts how much weight I can place on it.

- [21] Having said that, there are parts of Mr. Esmaili Matanagh's testimony which require some comment on his credibility. Where that is the case, I have borne in mind that Mr. Esmaili Matanagh's experience of pain and depression could have impacted his memory, and that his language limitations could have also interfered with his ability to clearly articulate his point. I have thus avoided making negative findings on his credibility unless they are necessary or the evidence inevitably gives rise to them.
- [22] One such example is Mr. Esmaili Matanagh's evidence regarding the events in the two years prior to the Collision. It was evident that Mr. Esmaili Matanagh was not being forthright with the Court about these events. When Mr. Esmail was asked about the collision which occurred around February 2017, he claimed not to recall it, though it is apparent from the medical records that the 2017 Collision had a significant impact on his pain experience and should have been memorable. When asked about his low back pain following the 2017 Collision, Mr. Esmaili Matanagh was very vague and gave non-responsive or tangential answers, and his evidence was often hard to follow. He stated that he could not recall seeing the neurosurgeon, Dr. Heran, or being scheduled for back surgery in May 2018, for what Dr. Soltani described as "severe backache". It was not until repeated questioning and clinical record entries being put to him that Mr. Esmaili Matanagh tangentially acknowledged that the back surgery may have been scheduled. It was evident during this questioning that Mr. Esmaili Matanagh was not being forthright with the Court.
- [23] In this case, the number and nature of the inconsistencies in the Plaintiff's evidence gives me little confidence that the answers he gave to the Court and the information he provided to the healthcare professionals was reliable. In the case of expert opinions which rely on the accuracy of the statements made by Mr. Esmaili Matanagh to the experts, my concerns have affected the amount of weight I have placed on a particular opinion.
- [24] Accordingly, I have looked to other corroborating evidence before placing weight on Mr. Esmaili Matanagh's testimony regarding his medical history, the cause and extent of his injuries, the course of his recovery, the impact of the injuries on his activities of daily living, and his damages. I will address these concerns as they arise.

#### IV. Facts

- [25] Most of the basic facts regarding pre-Collision events and the Collision itself, are admitted by the Defendants through their detailed Reply to Notice to Admit. Other facts are taken from the evidence elicited at trial.
- [26] Where there is a dispute on the facts, I have addressed it as it arises.

#### A. Pre-Collision Events

- [27] Mr. Esmaili Matanagh is married with two children, aged 23 and 28. He was 59 years old at the time of trial and in receipt of a permanent disability pension.

- [28] Mr. Esmaili Matanagh was born and raised in Iran. As a young person, Mr. Esmaili Matanagh enjoyed reading and sports. His life was thrown into turmoil following the 1979 Revolution. Mr. Esmaili Matanagh is a member of the Baha'i faith. He and his family were persecuted due to their religious beliefs. Mr. Esmaili Matanagh was kicked off his sports teams for refusing to change his faith, and violently beaten by his teacher at the age of 14. Mr. Esmaili Matanagh did not complete university as he was compelled to undertake mandatory military service for approximately 3 years, which was against his religious beliefs. Upon release from the military, Mr. Esmaili Matanagh worked in the construction industry doing various jobs including electrical.
- [29] Mr. Esmaili Matanagh married Bahereh Shabgardi in 1993. A few years later, he was arrested and beaten by the moral police for not having his marriage certificate with him when he was out with his wife. Following this, he and Ms. Shabgardi made plans to leave Iran. They fled to Turkey around 1997, and ended up in a refugee camp. They eventually applied for and were granted permission to come to Canada. Mr. Esmaili Matanagh and Ms. Shabgardi emigrated to Canada in May 1998, with their son Kasra who was born in 1996. Their daughter Kimia was born in Canada in 2001.[1]
- [30] Mr. Esmaili Matanagh worked at various jobs following his arrival in British Columbia, including making and delivering pizza, working in a care home, working in construction, and doing electrical field work.
- [31] Mr. Esmaili Matanagh suffered a significant work injury in 2004, when a piece of plywood fell on his head while he was on a scaffold (the "2004 Work Injury"). He suffered neck fractures, amongst other injuries. He required several rounds of surgery, but eventually returned to work.
- [32] The Plaintiff's second work injury occurred in 2007 (the "2007 Work Injury"). This time, Mr. Esmaili Matanagh fractured a bone after falling from a ladder that had collapsed.
- [33] As part of his vocational rehabilitation, WorkSafe B.C. ("WCB") provided the Plaintiff with electrical training at BCIT. It is unclear from the evidence whether the retraining occurred after the first or second work injury.
- [34] Mr. Esmaili Matanagh stopped working around 2013 or 2014. He has not returned to work since.
- [35] Around 2014, Mr. Esmaili Matanagh was involved in a motor vehicle accident where the vehicle that he was travelling in was rear ended by a garbage truck ("2014 MVC"). The Plaintiff's Notice to Admit incorrectly referred to this accident as occurring in 2016.[2] However, Mr. Esmaili Matanagh and his wife (who was also involved in the 2014 MVC) both testified that this collision was in 2014.

- [36] Around February 2017, the Plaintiff was involved in a second motor vehicle accident. This time, he lost control of his vehicle and hit the side of the road (the "2017 MVC"). Mr. Esmaili Matanagh did not recall this particular collision at trial, but he agreed to the accuracy of a clinical entry from his doctor who treated him for the injuries he sustained in the 2017 MVC.
- [37] Mr. Esmaili Matanagh was receiving long-term disability benefits at the time of the 2017 MVC. The 2017 MVC caused injury, including aggravation of Mr. Esmaili Matanagh's previous neck and back injuries.
- [38] The 2018 MVC, which is the subject of these Reasons, occurred on October 24, 2018.

## B. Collision

- [39] On October 24, 2018, Mr. Esmaili Matanagh was the owner and driver of a red 2014 Dodge Grand Caravan, bearing the license plate number BV5 89B (the "Plaintiff Vehicle"). The Plaintiff's wife, Ms. Shabgard, was a front seat passenger in the Plaintiff Vehicle.
- [40] On October 24, 2018, the Defendant, Curtis Adam Miller, was the owner and driver of a silver 2008 Chrysler Town & Country, bearing the license plate number DE8 24E (the "Miller Vehicle").
- [41] On October 24, 2018, the Defendant, Brian Nolan Lanctot, was the owner and driver of a grey 2009 Kia Rondo, bearing the license plate number BL5 92M (the "Lanctot Vehicle").
- [42] On October 24, 2018, around 6:00 a.m., the Plaintiff Vehicle was travelling westbound on the Mary Hill Bypass, in Port Coquitlam, British Columbia, when the Plaintiff Vehicle was involved in a collision with the Miller Vehicle and Lanctot Vehicle.
- [43] At the time, the Miller Vehicle was travelling westbound on the Mary Hill Bypass, directly behind the Plaintiff Vehicle, and the Lanctot Vehicle was travelling westbound on the Mary Hill Bypass, directly behind the Miller Vehicle.
- [44] At the time of the Collision, the Plaintiff Vehicle was at a complete stop, and the Plaintiff had his seatbelt fastened. It was dark outside.
- [45] The Collision occurred due to the negligence of the Defendants Miller and Lanctot.
- [46] As a result of the Collision, the Parties' vehicles sustained the following damages:
- a) The Plaintiff Vehicle sustained at least \$1,680.56 (gross) in damages to the rear-end of the vehicle.
  - b) The Miller Vehicle sustained at least \$6,302.62 (gross) in damages, to the front and rear-end of the vehicle.
  - c) The Lanctot Vehicle sustained at least \$9,000.85 (gross) in damages to the front-end of the vehicle. The airbags in the Lanctot Vehicle deployed due to the force of the Collision
- [47] Following the Collision, no emergency services attended the scene.

- [48] Although the Defendants have admitted liability for the 2018 MVC, they have denied the specific mechanics of how the Collision occurred. On that point, I accept the uncontroverted evidence of Ms. Shabgardi that there were two separate impacts to the Plaintiff Vehicle. According to Ms. Shabgardi, the first impact happened without notice. She felt the first impact, after which she heard a braking sound, and then felt a second impact.
- [49] Mr. Esmaili Matanagh's evidence was inconsistent as to whether he felt two impacts or one. At trial, he testified to experiencing only one impact before he heard the sound of brakes. However, he allowed during his cross-examination that there could have been two impacts, and later replied, "I would say two". Mr. Esmaili Matanagh was examined for discovery on January 8, 2024 (the "Discovery"). Mr. Esmaili Matanagh's Discovery evidence was put to him, where he stated that he only felt one impact. Mr. Esmaili Matanagh explained that he did not understand the meaning of the word "impact" when he answered the question during his Discovery, and insisted that he felt the vehicle hitting his car twice. I do not find this answer credible. It is clear from the surrounding exchange during the Discovery that Mr. Esmaili Matanagh understood what was being asked when he gave his answer that "I just remember once". In my view, it is probable that Mr. Esmaili Matanagh only felt one impact, but stated that he felt two because this was consistent with his after acquired knowledge that there had been a three-car collision.
- [50] The fact that Ms. Shabgardi recalls two impacts while Mr. Esmaili Matanagh only experienced one, can be explained by the close temporal connection between the two impacts, the minor nature of the second impact, and the fact that Mr. Esmaili Matanagh's attention was focussed on his wife right after the first impact.
- [51] Turning back to the Collision, I find that while the Plaintiff Vehicle was stopped due to traffic, the Miller Vehicle hit it from behind without warning, causing the first impact. The impact caused the Plaintiff Vehicle to be pushed forward about a foot (most likely because Mr. Esmaili Matanagh's foot came off the brake). The first impact was immediately followed by screeching of tires, which was heard by both Mr. Esmaili Matanagh and his wife, and a second, much less significant, impact. I infer from the evidence that this second impact was caused when the Lanctot Vehicle rear-ended the Miller Vehicle, and pushed it forward into the Plaintiff Vehicle. I note here that when the second impact occurred, the Plaintiff Vehicle was already about one foot ahead of the Miller Vehicle, such that any contact between the Miller Vehicle and the Plaintiff Vehicle from the second impact was likely not substantial.
- [52] My conclusion that the first impact was more significant than the first, is supported by the uncontroverted evidence of Ms. Shabgardi as to the force of impact. She testified that she hit her head against the seat hard enough to break her hairclip. Consistent with this, Mr. Esmaili Matanagh testified that the impact was "very hard".

[53] To this point, I reject the Defendants' suggestion that the minimal damage to the Plaintiff Vehicle suggests that both the impacts (and resulting injuries) were minor. Although the damage to the vehicles is a relevant consideration, it is but one factor to consider when determining the force of impact. It is well established that a person can be subjected to significant force and experience significant injuries, even if there is minimal damage to their vehicle: *Gordon v. Palmer*, 78 B.C.L.R. (2d) 236 at para. 4, 1993 CanLII 1218 (B.C.S.C.).

### C. Post-Collision Events and Treatment

- [54] Mr. Esmaili Matanagh testified that following the impact, he immediately experienced nausea, a bad headache, dizziness, and some vomiting. In the hours following the Collision, he stated his symptoms worsened, and he also began to experience pain in his neck. He saw his family doctor, Dr. Soltani, on October 24, 2018. Dr. Soltani noted complaints of headaches, neck pain, pain in both shoulders, and lower back pain. There is no reference to complaints of nausea, dizziness, and vomiting.
- [55] Mr. Esmaili Matanagh's trial evidence also does not accord with the information he provided to the experts. The only symptom he consistently reported to the experts was nausea. Dr. Kei noted that the Plaintiff felt "some nausea" and was feeling "a little bit confused", but denied having any significant pain. Dr. Smith noted that Mr. Esmaili Matanagh felt dizzy and nauseated after hitting his head on the headrest. Dr. Muhlstock testified that the only immediate symptom reported to him was nausea.
- [56] Mr. Esmaili Matanagh also provided inconsistent statements about other events at the scene of the Collision. These include: (a) whether he hit his head on the back of the seat after impact; (b) whether he got out of the car; (c) whether he exchanged information with the other drivers; (d) what he did immediately afterwards; and (e) the severity of his symptoms following the Collision.
- [57] On the first issue, Mr. Esmaili Matanagh testified that the force of the impact caused his head to hit the back of the car seat. However, it is unclear whether that was his actual memory, or what he assumed occurred based on what he witnessed happening to his wife. To that end, Mr. Esmaili Matanagh testified as follows:

By the way, I saw my wife splash from the seat to the windshield, and I was freaked out that moment. I thought my wife is gone. Then she came back and hit herself to the seat, and probably that happened to me. [3]

- [58] Mr. Esmaili Matanagh testified that after seeing his wife's body move towards the windshield and back, he felt nausea and a bad headache.
- [59] When he spoke to Dr. Kei and Dr. Muhlstock, the Plaintiff denied that he hit his head or struck his body on the interior of the vehicle. When discussing this with Dr. Smith, Mr. Esmaili Matanagh first denied hitting his head, but later said that he did hit his head on the headrest.

[60] On the second issue, Mr. Esmaili Matanagh denied getting out of the car while at the Collision scene, saying that his wife got out as he was feeling very bad due to his nausea and headache. However, during his cross-examination, he stated that he got out of his car at the accident scene in order to vomit because he was feeling nauseous. Ms. Shabgardi's testimony supported this second version of events.

[61] On the third issue, the Plaintiff denied at trial that he exchanged information with the other drivers while at the Collision scene. This appears contrary to his Discovery evidence, where the following exchange occurred:

56 Q. And then you got out and you spoke with the drivers of the other vehicles?

A. Exactly, yeah. We spoke, and we got - - exchanged the - - you know, the driver's licence number and names and, you know, information, which is common. Then, you know, rechecked everyone was okay or nothing really bad happened someone. Yeah.

[62] Mr. Esmaili Matanagh explained this discrepancy by stating that by "we" he meant that his wife communicated with the other drivers while he sat on the side of the road due to nausea. This is also how he explained the statements he made to Dr. Kei and Dr. Smith, who both noted that Mr. Esmaili Matanagh reported getting out of his car and exchanging information with the other drivers. Ms. Shabgardi testified that she exchanged driver information with the other drivers and also took pictures of the vehicles; though it is unclear from her account whether the Plaintiff accompanied her for this task or remained near the car.

[63] On the fourth issue, Mr. Esmaili Matanagh stated for the first time during his cross-examination that after leaving the scene of the Collision, he drove the car to a nearby plaza where he vomited a "little bit". He testified that he and his wife remained in the plaza parking lot for 15-30 minutes while he dealt with his nausea. They then drove to his home which was about five minutes away from the scene of the Collision. During his Discovery, Mr. Esmaili Matanagh did not mention stopping at the shopping plaza or having vomited. Instead, he stated that they went directly home. Mr. Esmaili Matanagh also admitted telling Dr. Kei that he drove his wife to work after the Collision, before returning home. He denied however that he actually drove her to work, and could not explain why Dr. Kei noted this. Ms. Shabgardi testified that because Mr. Esmaili Matanagh was feeling dizzy and nauseous, and she could not drive due to her own health issues, they drove to the closest plaza. Mr. Esmaili Matanagh put water on his face and she saw him vomiting "a little bit". After a short respite they returned home.

[64] I pause here to note that in relation to the second, third, and fourth issues, Mr. Esmaili Matanagh's revised testimony was remarkably consistent with that of his wife. I am left with the strong impression that the Plaintiff and his wife discussed the events prior to testifying at this trial, and that his evidence was consciously or unconsciously coordinated to be consistent with that of his wife.

[65] I turn to the fifth concern regarding the nature and severity of the symptoms Mr. Esmaili Matanagh experienced after the Collision.

[66] Mr. Esmaili Matanagh's trial testimony regarding the severity of his symptoms following the Collision is contradicted by his Discovery evidence that the pain "wasn't that much". Mr. Esmaili Matanagh provided the following evidence during his Discovery:

89 Q. All right. So you then went to see Dr. Soltani, and do you recall what, if anything, she said about your condition and your well being?

A. She checked me out and she reported to the ICBC. She just filled out the ICBC form and she checked my condition, and then we - you know, didn't say anything special because, by that time, it wasn't that much. You know, didn't get any - only the pain in my shoulder, neck, my back pain, because I already had pain, so I was, I mean, a little bit increased, my pain level. So she just checked me out. And she, by that time, as much as I remember, nothing really special she did.

[67] When asked about this during his cross-examination, Mr. Esmaili Matanagh agreed that this answer was true. He explained that he only told Dr. Soltani about the dizziness as that was the only new symptom he was experiencing, and Dr. Soltani was already aware of his pre-existing injuries and pain. However, there is no evidence of Dr. Soltani noting complaints of dizziness from Mr. Esmaili Matanagh in the days following the MVC.

[68] In the weeks and months following the Collision, Mr. Esmaili Matanagh testified to ongoing symptoms of dizziness, neck pain, severe low back pain, and constant and severe headaches which interfered with his sleep. He also experienced ringing in his ears. During cross-examination Mr. Esmaili Matanagh stated he could not say if the ringing in his ears was due to the Collision. He explained that he had experienced tinnitus in the past when he was injured from playing soccer or had some other "bad accidents" but it was of short duration. Mr. Esmaili Matanagh agreed with his Discovery evidence that the tinnitus was not that serious of a concern for him.

[69] Mr. Esmaili Matanagh saw a chiropractor and physiotherapist for treatment for his Collision-related injuries. He had 24 sessions with a chiropractor between October 31, 2018, to August 31, 2019, and saw a physiotherapist on 14 occasions from November 21, 2018, to March 25, 2019. Aside from a single physiotherapy session on October 5, 2020, Mr. Esmaili Matanagh did not attend for any further treatments until February 2022, when he attended for massage therapy twice. He also completed 65 physiotherapy sessions from July 2022 to May 2024.

[70] In late 2019, Mr. Esmaili Matanagh suffered three falls which caused him injury (the "2019 Falls"). Mr. Esmaili Matanagh attributes all of these falls to dizziness, which he says is attributable to the Collision. The first fall was on October 5, 2019, when Mr. Esmaili Matanagh fell from a ladder and fractured his left ankle (the "October 5 Fall"). Mr. Esmaili Matanagh spent four days in hospital. On October 9, 2019, Mr. Esmaili Matanagh was on his crutches, when he fell once again (the "October 9 Fall"). This time, he hit his head and sustained a loss of consciousness, headaches, and head and neck pain. On December 20,

2019, Mr. Esmaili Matanagh fell for a third time, while still on crutches (the "December Fall"). He re-injured his left ankle during this incident.

- [71] In between, on November 15, 2019, Mr. Esmaili Matanagh suffered a significant thrombosis resulting in a hemidiaphragm paralysis and a deep vein thrombosis to his leg, because of which he was hospitalized for several days (the "DVT"). His DVT and pulmonary embolism did not resolve until July 2020 and September 2020, respectively.

## V. Injuries

- [72] At the time of the Collision, Mr. Esmaili Matanagh was permanently disabled from working due to his pre-existing injuries. He was experiencing pain in his neck and back, and depression. These injuries were longstanding and actively being treated. He was taking OxyNeo and Gabapentin for his pain, and Effexor for his mood issues. In addition, Mr. Esmaili Matanagh was contemplating getting private surgery for low back and leg pain which had increased substantially following his 2017 MVC. However, Mr. Esmaili Matanagh testified that prior to the Collision, his physical and psychological condition had improved, and he was in the process of eliminating his reliance on narcotics.
- [73] Mr. Esmaili Matanagh claims that the Collision caused new injuries to his neck, upper back, and lower back, as well as re-aggravating his pre-existing pain in the neck and back. He submits that these injuries are long lasting and have caused him significant and chronic pain and restriction, including an altered gait. These symptoms include headaches, dizziness, tinnitus, and difficulties with sleep. According to Mr. Esmaili Matanagh, the dizziness led to him falling and suffering further injuries in the 2019 Falls. The increased pain from the injuries meant that he was unable to reduce his dependency on narcotics. Rather, his opioid use increased. This caused him additional side effects which have impacted his health and quality of life.
- [74] In addition, Mr. Esmaili Matanagh says that the Collision caused him psychological injuries including worsening of his depression, anxiety, irritability, post-traumatic stress disorder, difficulties with memory, and suicidal ideation. He says that these have had a profound impact on his life, and continue to impair him in all aspects of daily living. During his cross-examination, Mr. Esmaili Matanagh agreed that the psychological injuries were more significant for him than the physical injuries.
- [75] While the Defendants have admitted liability, they are only responsible for compensating Mr. Esmaili Matanagh for injuries caused by the Collision. Thus, the question is not just what injuries the plaintiff currently suffers or has ever suffered, but whether the evidence establishes a causal link between those injuries and the Collision.

- [76] The primary test for establishing causation is the "but for" test, which asks, "but for the defendants' negligence, would the plaintiff have suffered the injury?": *Chu v. Brammer*, 2025 BCSC 561 at para. 144; *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22. In other words, if Mr. Esmaili Matanagh suffers from injuries that would have developed even if the Collision had never occurred, then the Defendants are not liable for those injuries.
- [77] At the same time, tortfeasors must take their victims as they find them: *Chu* at para. 145; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 473; 1996 CanLII 183. If a plaintiff has pre-existing injuries, then the defendant is liable for any additional damage caused by their negligence, but not for the pre-existing damage: *Athey* at 473.
- [78] Sometimes, a plaintiff will have a pre-existing condition that could have gotten worse even if the accident had never happened. In these situations, the court should consider whether there is a "measurable risk" that the plaintiff's pre-existing condition would have affected the plaintiff regardless of the defendant's actions: *Murphy v. Snippa*, 2024 BCCA 30 at para. 55, citing *Dornan v. Silva*, 2021 BCCA 228 at para. 45; and *Athey* at paras. 35-36. If the evidence establishes a measurable risk exists, then the court may adjust the overall damages to reflect this: *Murphy* at para. 55.
- [79] Therefore, in assessing the testimony and expert reports before me, the question is whether the evidence establishes, on a balance of probabilities, that Mr. Esmaili Matanagh suffered physical or psychological injuries that would not have occurred, but for the 2018 MVC. Evidence that is unreliable may not meet this burden of proof.
- [80] Mr. Esmaili Matanagh was assessed by the following experts who opined on the nature and cause of Mr. Esmaili Matanagh's physical and psychological injuries:
- a) Dr. Lawrence Kei, physiatrist, who assessed the Plaintiff on June 26, 2023, and prepared a Medical Legal Report dated September 21, 2023 ("Kei MLR");
  - b) Dr. Derryck Smith, psychiatrist, who assessed the Plaintiff on January 10, 2024, and prepared a Medical Legal Report dated February 1, 2024 ("Smith MLR"); and
  - c) Dr. Joshua Muhlstock, physiatrist, who assessed the Plaintiff on February 15, 2024, and prepared a Medical Legal Report dated March 25, 2024 ("Muhlstock MLR"); and
- [81] In addition, Mr. Esmaili Matanagh was assessed by Ms. Jennifer Lane, occupational therapist ("OT"), on March 7, 2024. Following the assessment, Ms. Lane prepared a Functional Capacity Evaluation and Cost of Future Care Report dated March 21, 2024 (the "Lane Report").
- [82] All of the experts, except Dr. Muhlstock, were retained by the Plaintiff.

#### A. Physical Injuries

- [83] I turn first to the physical injuries which Mr. Esmaili Matanagh sustained as a result of the Collision.

[84] Dr. Kei provided the following diagnosis of Mr. Esmaili Matanagh's injuries:

- a) cervical spine sprain-strain injury (whiplash) resulting in an aggravation of pre-existing chronic neck pain;
- b) thoracic spine sprain-strain injury resulting in an aggravation of pre-existing chronic upper back pain;
- c) lumbar spine sprain-strain injury resulting in an aggravation of pre-existing chronic lumbar spine pain and central sensitization.

[85] Dr. Kei stated that central sensitization occurs when "the body's nervous system intensifies nerve signals, causing a person to have more intense sensory experiences than usual which can result in pain that does not correlate with specific structural injury". [4]

[86] According to Dr. Kei, central sensitization often develops in people with chronic pain, because they "have a lowered threshold to experience an amplification of pain". He opined that:

Mr. Esmaili Matanagh likely had pre-existing central sensitization of the lumbar spine. In particular, he had severe back pain with difficulty sitting and in my opinion the findings in his lumbar spine MRI did not correlate with the severity of his symptoms.[5]

[87] Thus, according to Dr. Kei, the 2018 MVC resulted in an aggravation of Mr. Esmaili Matanagh's pre-existing neck and back pain.

[88] Based on Dr. Kei's review of Mr. Esmaili Matanagh's personal history and clinical records, Dr. Kei considered that the prior neck and back pain was relatively stable in the months prior to the Collision. It is clear that this was primarily based on Mr. Esmaili Matanagh's self-reporting. Dr. Kei noted that Mr. Esmaili Matanagh was reporting new symptoms such as headaches, ringing in the ear, and radiation of pain down both lower extremities (versus previously being down one leg). Further, even though Mr. Esmaili Matanagh had "a couple falls which resulted in increased neck and back pain", there was "no evidence that the pain he was experiencing as a result of the subject Accidents was resolving".[6]

[89] Dr. Muhlstock did not agree with Dr. Kei's opinion on several fronts. He provided the following diagnosis of soft tissue injuries caused by the subject Collision:

- a) soft tissue (musculoligamentous sprain/strain) injury to the cervical spine, WAD I/II.
- b) soft tissue (musculoligamentous sprain/strain) injury to the upper back and shoulder girdles; and
- c) possible soft tissue (musculoligamentous sprain/strain) injury to the thoracic and lumbosacral spines.

[90] Dr. Muhlstock opined that Mr. Esmaili Matanagh had fully recovered from these soft tissue injuries, and there was no evidence of ongoing Collision-related physical impairment.

[91] According to Dr. Muhlstock, one would ordinarily expect the soft tissue injuries to heal within three to six months. However, given Mr. Esmaili Matanagh's age, pre-Collision history of chronic pain, and the 2019 Falls, he could have experienced prolonged recovery. Nevertheless, "even with a prolonged recovery, any soft tissue injuries have long since physiologically healed, given that more than five years have elapsed since the accident occurred".[7] According to Dr. Muhlstock:

Mr. Esmaili Matanagh's current condition is much more logically explained on the basis of his pre-accident chronic pain and his relatively advanced age of 58 years (and the associated degenerative changes that occur naturally over time) as opposed to any uncomplicated soft tissue injuries he may have sustained in the subject MVA. [8]

[92] Dr. Muhlstock concluded that Mr. Esmaili Matanagh does not have any permanent disabilities resulting from the 2018 MVC, and "further, given that his injuries have healed from a physiological perspective, it is my opinion that the healed injuries do not cause any susceptibility to further injury or illness".[9]

[93] Dr. Muhlstock disagreed that Mr. Esmaili Matanagh suffers from central sensitization.

[94] Dr. Kei and Dr. Muhlstock were cross-examined extensively on their opinions, and neither expert resiled from their core positions. Where their opinions differ, and unless noted otherwise, I have preferred the opinion of Dr. Muhlstock, which I generally find to be more reliable as it is supported by the evidence in this case.

[95] One limited exception is with respect to the diagnosis of central sensitization. On this point I prefer the evidence of Dr. Kei, insofar as it relates to the appropriateness of the central sensitization diagnosis. Dr. Kei's opinion was consistent with the evidence regarding the nature of Mr. Esmaili Matanagh's pain experience, i.e. having "more intense sensory experiences than usual which can result in pain that does not correlate with specific structural injury". However, I do not find evidentiary support for Dr. Kei's opinion that Mr. Esmaili Matanagh is currently experiencing central sensitization which is causally related to the Collision. Nor do I accept Dr. Kei's opinion regarding the cause of the various other physical injuries that he says Mr. Esmaili Matanagh is currently experiencing.

[96] I found several weaknesses in Dr. Kei's opinion which cause me to find his conclusions regarding causation unreliable.

[97] First, as noted elsewhere, Dr. Kei relied heavily on Mr. Esmaili Matanagh's unreliable self-reports to ground his opinion regarding causation. So too does Dr. Smith, whose opinion is discussed elsewhere in these Reasons.

[98] Second, Dr. Kei did not give adequate consideration to the serious injuries the Plaintiff suffered in 2019, which he characterized simply as a "couple" of falls "which resulted in increased neck and back pain". The 2019 Falls were in fact traumatic events that happened in rapid succession and caused: (a) a fractured left ankle and injuries to the left leg, left elbow, and head, requiring four days hospitalization (October 5 Fall); (b) injury to the head, loss of

consciousness, headaches and neck pain, which required emergency hospital treatment (October 9 Fall); and (c) re-injury to the left ankle before it was fully healed (December Fall). The seriousness of the October Falls was attested to by Mr. Esmaili Matanagh at trial. Not only did he agree that he told Dr. Soltani that he was in significant pain following the October 5 Fall and October 9 Fall, he also conceded that rather than tapering his medication, he had to increase the use of narcotics significantly as a result.[10]

[99] Third, Dr. Kei failed to recognize the significance of Mr. Esmaili Matanagh's altered medication intake following the 2019 Falls, though it is evident that he was aware of these changes. Mr. Esmaili Matanagh's dosage of Gabapentin (300 mg/dose) remained unchanged in the several years leading up to and following the Collision until he discontinued it entirely at the end of 2021. However, his dosage of OxyNeo suggests that his pain had reduced quite significantly prior to the October 5 Fall, such that he was almost back to the same level as he had been prior to the Collision.

[100] I pause here to note that there is not always a direct correlation between changes in a patient's prescriptions and changes in their actual experience of pain. However, the presence or change in pain control medications can provide strong evidence of the patient's pain experience, and should not be ignored.

[101] Prior to the collision, Mr. Esmaili Matanagh's consumption of OxyNeo was in decline. Mr. Esmaili Matanagh testified that at his doctor's recommendation, he had started to reduce his OxyNeo consumption. Indeed, Dr. Kei noted that Mr. Esmaili Matanagh had gone from a high dose of around 750 mg/day, to averaging about 360 mg/day by January 2018. His dose was reduced further over the ensuing months and by July 2018, Mr. Esmaili Matanagh was being prescribed about 260 mg/day of OxyNeo. He remained at about this dose until after the Collision.

[102] Following the collision, Mr. Esmaili Matanagh's dose of OxyNeo increased back up to about 360 mg/day. The dose was decreased temporarily in December 2018 to 280 mg/day, before returning to 360 mg/day in February 2019.

[103] In March 2019, Dr. Soltani noted that she was tapering the OxyNeo prescription once again. Consistent with this, the dose was reduced to 280 mg/day, and remained at that level until after the October 5 Fall and October 9 Fall. This would suggest that Mr. Esmaili Matanagh's pain had almost returned to its pre-Collision levels before the October 5 Fall.

[104] After the 2019 Falls, Mr. Esmaili Matanagh's consumption of OxyNeo increased significantly. By December 2019, he was up to 300 mg/day. This dose was increased again in January 2020, where it stayed at 320 mg/day for most of the 2020 year, before reducing slightly in December 2020, to 315 mg/day. For most of 2021, Mr. Esmaili Matanagh's OxyNeo prescription hovered around 310 mg/day, before going back up to 320 mg/day in December 2021. It remained at 320 mg/day for all of 2022, and into half of 2023, before reducing to 312 mg/day. It has remained around that level to the date of Trial.

- [105] In addition to taking OxyNeo, Mr. Esmaili Matanagh was also consuming medical marijuana for pain control. Mr. Esmaili Matanagh testified that Dr. Soltani was aware of his use of medical marijuana, but there is no reference to it in Dr. Soltani's medical records. Mr. Esmaili Matanagh also does not appear to have disclosed this to Dr. Kei or Dr. Muhlstock, for whom his consumption of pain control substances would be highly relevant. However, Mr. Esmaili Matanagh did tell Dr. Smith in February 2024, that he was smoking medical marijuana 2-3 times per day. Though he did not state when he started using medical marijuana, I infer from the evidence that he started taking it sometime after the 2019 Falls.
- [106] The pattern of the Plaintiff's consumption of pain relief medication is inconsistent with Dr. Kei's opinion that his current condition is due to injuries sustained in the Collision.
- [107] Mr. Esmaili Matanagh's chiropractic and physiotherapy records also do not support Dr. Kei's opinion. They reveal a pattern suggesting that he had substantially recovered from the Collision-related injuries prior to the October 5 Fall. His chiropractic treatment ended on August 31, 2019, a little more than a month before his fall from the ladder. His last physiotherapy treatment ended much earlier, on March 25, 2019. Mr. Esmaili Matanagh did not return to any form of treatment again until one year after the October 5 Fall. On October 5, 2020, he had a single physiotherapy session, which was followed in February 2022, by a few treatments for massage therapy, and later physiotherapy.
- [108] The evidence regarding Mr. Esmaili Matanagh's intake of pain relief medication, and his chiropractic, massage therapy, and physiotherapy records, suggest that he had substantially (if not completely) recovered from the Collision-related injuries before October 2019. They also suggest the 2019 Falls caused new and/or increased injuries and pain, which prompted changes to Mr. Esmaili Matanagh's medication and treatment from October 2019 onwards.
- [109] The trends in Mr. Esmaili Matanagh's OxyNeo and marijuana consumption, and the patterns of his chiropractic and physiotherapy appointments, provide compelling evidence that supports Dr. Muhlstock's opinion regarding causation of Mr. Esmaili Matanagh's current condition. According to Dr. Muhlstock, Mr. Esmaili Matanagh's current condition is not because of the Collision, but rather due to "his pre-accident chronic pain and his relatively advanced age of 58 years (and the associated degenerative changes that occur naturally over time)".[11]
- [110] I turn now to the causal connection between the Collision and the 2019 Falls. In my view, there is insufficient evidence to establish that the 2019 Falls were caused by the Collision.
- [111] Mr. Esmaili Matanagh alleges that all of the 2019 Falls are causally connected to the Collision, as follows: (1) the Collision caused him to experience symptoms of dizziness; (2) the October 5 Fall happened when he lost his balance due to dizziness after climbing four feet on a ladder; and (3) the October 9 Fall and December Fall happened when he lost his balance on crutches used for ambulation following the October 5 Fall.

- [112] The causal chain linking the Collision and the 2019 Falls is built on Mr. Esmaili Matanagh's assertion that he was experiencing dizziness from the injuries that he had sustained in the Collision. Thus, but-for the Collision, he would not have fallen in 2019. However, the evidence does not support this conclusion.
- [113] First, the only person who has direct knowledge about what he experienced at the scene of the Collision and in the weeks and months that followed is the Plaintiff. However, I have found the Plaintiff unreliable in his recollection of events. To the extent that Mr. Esmaili Matanagh's evidence is supported on this point by Ms. Shabgard, I also find it unreliable. Her evidence that her husband told her he was experiencing dizziness while at the scene of the Collision, is incongruous with the medical records.
- [114] This leads to my second point. If Mr. Esmaili Matanagh was indeed experiencing dizziness in the hours and months following the Collision, I find it highly unlikely that he would not have reported it to Dr. Soltani. Indeed, Mr. Esmaili Matanagh stated as much at trial.[12] Yet in the numerous visits that Mr. Esmaili Matanagh had with Dr. Soltani following the Collision, there is no notation of complaints of dizziness in any of the entries leading up to the October 5 Fall. This is particularly suspect given how significant a concern Mr. Esmaili Matanagh and his wife say his dizziness was for him. I find it against the preponderance of probability that Dr. Soltani would have missed recording dizziness prior to the 2019 Falls if it had indeed been reported. This is particularly so given the numerous other complaints which she recorded, including those that Mr. Esmaili Matanagh said were not too bothersome for him, such as tinnitus. Complaints noted in the clinical records include headaches, neck pain, pain in both shoulders, lower back pain, bilateral leg and foot pain, tinnitus, difficulty sleeping, pain in the hands, and testicular pain.
- [115] Third, there is an absence of reliable corroborating evidence that Mr. Esmaili Matanagh fell on October 5 because he was dizzy. The suggestion that he fell due to dizziness is inconsistent with what Mr. Esmaili Matanagh told the Emergency medical professionals that treated him after the October 5 Fall. Mr. Esmaili Matanagh agreed under cross-examination that the Emergency medical records from the October 5 Fall were accurate. Those records do not mention dizziness. Rather, they indicate that Mr. Esmaili Matanagh reported that he fell due to loose gravel. Ms. Shabgard's evidence on this point is also unreliable. She has relayed to the Court what Mr. Esmaili Matanagh told her about how he fell. Ms. Shabgard stated she did not actually see her husband fall - she was busy working in the yard near Mr. Esmaili Matanagh when she heard him fall.
- [116] Fourth, none of the experts, including Dr. Kei, link any of the 2019 Falls to the Collision specifically or to dizziness generally. While Dr. Kei agreed that the side effects of OxyNeo could be dizziness, he did not opine that dizziness was the cause of any of the 2019 Falls. Dr. Smith's opinion that the Plaintiff's dizziness was probably due to "re-injuring his neck", is also of no weight as it is predicated on the assumption that the Plaintiff was experiencing dizziness following the Collision. Finally, despite both experts being aware that the October 5 Fall resulted in a fracture, and the October 9 Fall caused loss of consciousness, neither Dr.

Kei nor Dr. Muhlstock considered the fracture or the loss of consciousness as part of the injuries attributable to the Collision.[13]

- [117] After considering all of the evidence in this case, I reject the assertion that Mr. Esmaili Matanagh fell on October 5 due to dizziness and that the dizziness was caused by the Collision. To the extent that the Plaintiff argues that the October 5 Fall occurred due to an altered gait or some other Collision-related injuries, there is insufficient reliable evidence to support that proposition. I also do not find any link between the Collision and the DVT and pulmonary embolism which caused the Plaintiff to be hospitalized in November 2019.
- [118] In summary, the Plaintiff has failed to meet his evidentiary burden to establish that the 2019 Falls were causally related to the Collision. As such, the injuries flowing from them are not compensable. I also find that injuries flowing from the DVT and pulmonary embolism, are unrelated, distinct and divisible, from the injuries sustained in the Collision.
- [119] I also specifically reject the Plaintiff's assertion that his current physical condition (including dizziness and altered gait) is partly or wholly related to the Collision. I find his evidence unreliable on this point, and any opinion based on that evidence, to be unsupported. Some of my concerns about the reliability of Mr. Esmaili Matanagh's evidence are set out below.
- [120] Mr. Esmaili Matanagh portrayed himself as a man who has extreme difficulty with mobility and balance, such that (by his own evidence): he is unable to safely traverse stairs, and he requires assistance from his family to do the same; he requires assistance while entering and exiting the shower; his walking tolerance ranges from about 15-20 minutes; and he often needs to use a cane when walking due to concerns about imbalance. Yet despite this, he was able to travel to Turkey for 25 days in 2023. Mr. Esmaili Matanagh explained that this was a medically necessary trip as he and his wife needed dental treatment. The flight alone would be challenging for a healthy body, let alone someone who has pain and restriction to the extent asserted by Mr. Esmaili Matanagh. There was no evidence that he had any difficulty making this trip, or that he was restricted in some way due to his injuries and pain.
- [121] Mr. Esmaili Matanagh also admitted telling the OT that: "walking is painful for him"; he "normally walks with a cane in his right hand or a crutch if he is having a bad day with his knee and the pain is too severe"; and "he feels unsteady on stairs, and therefore, his family is always with him when he is mobilizing up and down stairs".[14] Mr. Esmaili Matanagh agreed that the following summary noted by the Ms. Lane was accurate:

Mr. Esmaili Matanagh reports that he can walk for short periods of time outdoors utilizing his cane or a crutch to assist him while he is walking [he] reports that at times, he experiences difficulties with walking, due to pain in his right knee and leg such that he is not able to walk much at all independently.

Mr. Esmaili Matanagh demonstrated walking with the assessor while utilizing his cane and without it, walking slowly and with a limp.[15]

- [122] However, some of Mr. Esmaili Matanagh's statements (and those of his family) about the extent of his functional limitations are contradicted by a surveillance video which suggests that he has understated his abilities and exaggerated his limitations. In considering this evidence, I am mindful that video surveillance is not always representative of a person's true abilities, since it is taken only at one point in time. However, the videos here are over three different days, and are also taken in close temporal proximity to the assessment done by Ms. Lane. As such, I find that the videos are of probative value in assessing the reliability of Mr. Esmaili Matanagh's evidence and that of his family.
- [123] The Plaintiff's actions were recorded on February 11, February 14 and February 15, 2024. On February 11, he is recorded walking with his wife and dog for approximately 1 hour 26 minutes; on February 14, the Plaintiff walked with his dog for approximately 25 minutes; and on February 15, the Plaintiff walked with his dog for approximately 34 minutes.
- [124] The video shows Mr. Esmaili Matanagh walking with a slight limp at various rates of speed without use of a cane (including walking briskly to cross the street). Contrary to his assertions and those of his family members, he does not appear to have any difficulty with walking or balance. His pace and posture at the end of the walks is similar to the beginning of the walks. The video reveals that Mr. Esmaili Matanagh has a walking endurance and bending ability that is far greater than what was represented to the Court or to Ms. Lane, who assessed him only a few weeks later.
- [125] Ms. Lane testified that her physical testing of Mr. Esmaili Matanagh was significantly compromised by his unwillingness or inability to perform many of the activities asked of him, ostensibly due to pain. She states that he is "able to walk with a cane and in the community with reported pain" and that he "does require assistance from equipment for walking". However, it is apparent that Mr. Esmaili Matanagh is able to walk in the community without a cane at least some of the time, as evidenced by the surveillance videos. Similarly, the videos suggest Mr. Esmaili Matanagh is capable of kneeling, even though the Lane Report concluded he is "unable to functionally kneel."
- [126] When it was put to Mr. Esmaili Matanagh during cross-examination that he had told Dr. Wen in January 2021 that he walks his dog daily for 1.5-2 hours, Mr. Esmaili Matanagh denied saying this. Rather, he insisted that the maximum he could walk with his dog was 35-45 minutes, and that walking for one hour could "never" happen and that he "never reach that". This statement is irreconcilable with the video evidence which depicts him walking for about 1.5 hours with his dog and his wife.
- [127] Even if I accept that the three separate days of video all caught Mr. Esmaili Matanagh on his "good days", these good days appear to be more frequent and better than what was presented to this Court and Ms. Lane. Mr. Esmaili Matanagh stated that his pain experience was worse in cold or rainy weather. However, in the first video, he is seen walking in the

rain with his wife for almost 1.5 hours. While the walking is at a leisurely pace and not continuous, he appears to have firm footing and a steady gait. He does not use his wife or a cane to steady himself. Ms. Shabgardi's evidence that her husband is embarrassed to use a cane in public does not address why he does not appear to have any difficulty when he is observed walking without a cane on the three recorded occasions. Similarly, the evidence that his children try to ensure that someone is always home with him for his safety, is at odds with the Plaintiff taking long walks outside, and crossing busy streets, without any family member by his side.

- [128] Some aspects of Mr. Esmaili Matanagh's evidence on the effect of the Collision-related injuries and his pre-Collision condition, were corroborated by one or more of his family members. However, I am unable to place much weight on many portions of their testimony as I find it to be unreliable, particularly with respect to the extent of Mr. Esmaili Matanagh's current limitations and their cause.
- [129] I have no doubt that Mr. Esmaili Matanagh depends heavily on his family at present in order to assist him with various tasks, and that they help him because they believe that he is seriously compromised in his physical abilities. What I do not accept is that he is actually restricted to the degree that he has represented to this Court (or even to his family).
- [130] I am not satisfied that the evidence from Mr. Esmaili Matanagh's family members is sufficiently reliable to meet the burden of proof when it comes to causation and damages. In particular, I find Mr. Esmaili Matanagh's family's testimony about his condition prior to the Collision and prior to the 2019 Falls, to be unreliable.
- [131] Mr. Esmaili Matanagh's spouse and children care for him deeply. It is also clear that they take his complaints at face value and help him whenever he asks. That is to be expected given their feelings towards him. However, I find that much of the testimony of Mr. Esmaili Matanagh's daughter and spouse is coloured by their love for him, and the human tendency to re-cast historical events in a favourable or beneficial light. The Plaintiff's son admits to having a poor recollection of these events. What he did recall was vague, and not entirely supportive of Mr. Esmaili Matanagh's condition, particularly as it was prior to the Collision.
- [132] I have already addressed some specific concerns about the reliability of Ms. Shabgardi's evidence. Similar issues arise with the Plaintiff's children's evidence.
- [133] For example, Kimia stated under cross-examination that while she was concerned about her father's opioid use prior to the Collision, her concerns were heightened after the Collision because he was now using far more opioids. In fact, the highest use occurred prior to 2017, when Mr. Esmaili Matanagh (according to Dr. Kei) was consuming about 750 mg/day, which is more than double the highest amount that he consumed following the Collision. Further, it was only when pressed that Kimia admitted that the more recent increase in opioid consumption occurred in early 2020, which was after the 2019 Falls.

- [134] Kasra was candid about his limited knowledge of his father's pre-Collision condition. He noted that he was not living at home between 2016 to the summer of 2017. He was vague on many pre-Collision details, and testified that his observations about his father's condition (including difficulties with sleep and dizziness) were mostly related to events during the months leading up to the trial, rather than shortly after the Collision.
- [135] The Plaintiff's position regarding causation is predicated on this Court accepting his evidence and that of his children and wife, at "face value". For the aforementioned reasons, I am unable to do that.
- [136] In *Shebat v. Zhang*, 2024 BCSC 1355, Justice Myers dealt with a similar circumstance where there was a significant pre-existing history. Justice Myers referred to the Court of Appeal's decision in *McGlue v. Girvan*, 2024 BCCA 208 ("*McGlue BCCA*"), and noted that:
- [148] At para. 79 of *McGlue*, the court recognized that in some cases, causation may be inferred from a temporal sequence of events, but that could not be done in that case because of the issue of pre-existing injuries. In the case at bar, the difficulty of relying only on a temporal analysis of causation is that it depends on Mr. Shebat's unreliable evidence, especially with respect to his post-accident condition. His self-described condition before the accident cannot also not be relied on. There are multiple factors that the defence has pointed to which could have caused Mr. Shebat's stated injuries, assuming that he did suffer from them.
- [137] The case of *McGlue BCCA* is instructive on the necessity of having reliable evidence to ground a finding of causation. In *Girvan v. McGlue*, 2023 BCSC 902 ("*McGlue BCSC*") the plaintiff claimed that the motor vehicle collision at issue caused him to suffer both new injuries and the exacerbation of pre-existing injuries. The Court of Appeal found that Mr. Girvan's credibility was "not only central, but determinative" of the trial judge's ability to evaluate such claims: *McGlue BCCA* at para. 50. By extension, credibility was also central to the weight the Court could give the expert opinions regarding causation, which relied on Mr. Girvan's self-reporting: *McGlue BCCA* at paras. 50-51.
- [138] In *McGlue BCSC*, the trial judge found that the plaintiff's evidence was not credible or reliable. Nevertheless, the trial judge awarded him a total of \$631,341 in damages. In allowing the appeal and dismissing the Plaintiff's claim, the Court of Appeal noted that while the trial judge's reference to the law and discussion of evidence were comprehensive, the trial judge did not have a factual foundation to make the award: *McGlue BCCA* at paras. 6, 51.
- [139] The Court of Appeal referenced the following passage from the trial judge's reasons about the impact of credibility in chronic pain cases:
- [17] The judge recognized Mr. Girvan's credibility was a central and determinative issue and observed that in chronic pain cases, "[t]he court must always be concerned with the reality of the plaintiff's complaints of ongoing pain in order to determine the existence and extent

of the injuries and properly assess damages based on such complaints": at para. 22, citing *Gee v. Bock*, 2019 BCSC 1348 at para. 36. The judge noted that "the absence of objective findings in chronic pain cases increases the opportunity for exaggeration, distortion, or even fabrication": at para. 22, citing *Wells v. Kolbe*, 2020 BCSC 1530 at para. 83.

[140] Accordingly, the weight I have given the expert reports before me reflects my findings regarding the reliability of Mr. Esmaili Matanagh's evidence.

[141] After considering all the evidence, I conclude that Mr. Esmaili Matanagh suffered the following injuries due to the Collision:

- a) soft tissue injuries to the cervical, thoracic, and lumbar spine, from which he recovered fully;
- b) temporary aggravation of pre-existing injuries to the neck, upper back, and lumbar region; and
- c) temporary aggravation of pre-existing central sensitization.

(collectively the "Physical Injuries")

[142] These Physical Injuries caused the Plaintiff to experience headaches, neck pain, pain in both shoulders, lower back pain, some transient tinnitus, and interference with his sleep. To manage the increased pain from the Physical Injuries caused by the Collision, the Plaintiff's pre-existing prescription of OxyNeo was increased from 260 mg/day to 360 mg/day. As his pain levels decreased, the OxyNeo dosage was reduced to 280 mg/day by March 2019. It remained at this level until the October 5 Fall, after which the dosage fluctuated between 310 to 320 mg/day, before settling at about 312 mg/day by around the summer of 2023, to the Trial date.

[143] The evidence leads me to conclude that the Plaintiff had substantially recovered from the Physical Injuries prior to October 5, 2019, with some ongoing residual low back pain and restriction attributable to the Collision that continued for some time after October 5, 2019. I find that this residual pain was relatively minor, as evidenced by the medical records, including Pharmanet, which show a slightly higher dose of OxyNeo that he was consuming (about 20 mg/day as compared to his pre-Collision consumption) in the months leading up to the October 5 Fall.

[144] To the extent that the Plaintiff continued to experience low back pain from the Collision past October 2019, I agree that it is difficult to separate this pain from some of the pain caused by the Falls. However, I reject the Plaintiff's assertion that any of Mr. Esmaili Matanagh's ongoing pain experience, including chronic pain, is attributable to the Collision (or the 2019 Falls). The only opinion that supports this assertion is Dr. Kei's which I have rejected as being unreliable.

[145] I also reject the Plaintiff's assertion that Dr. Muhlstock's testimony at trial supports a finding that the Collision related injuries are contributing to the Plaintiff's current chronic pain presentation. Dr. Muhlstock rejected that proposition and testified that there are lots of reasons "other than the accident" that the plaintiff has pain.[16] In arriving at this conclusion, I also do not agree with the Plaintiff that the following exchange supports the conclusion that Dr. Muhlstock was of the view that Mr. Esmaili Matanagh was still suffering from the Collision related injuries at the time of Dr. Muhlstock's assessment in 2024:[17]

Q Well if we go to page 10 of your report, line 339, you opine:

In my opinion, Mr. Matanagh's current condition is much more logically explained on the basis of his pre-accident chronic pain and his relatively advanced age of 58 years (and the associated degenerative changes that occur naturally over time) as opposed to any uncomplicated soft tissue injuries he may have sustained in the subject MVA.

You wrote that there; right?

A Yes.

Q Well, when we think about it after the answers you've already provided in this cross-examination logically it makes sense if it's all compiled. And one contributing factor to Mr. Esmaili's presentation is the subject accident; right, doctor?

A That's one contributor, yes.

[146] Putting aside the confusing nature of the question, when Dr. Muhlstock's testimony is read as a whole, the weight of Dr. Muhlstock's evidence affirms his opinion as articulated in his MLR - that the Plaintiff's current condition is attributable to his pre-Collision chronic pain and ageing, rather than the Collision.

[147] Based on the whole of the evidence, including Dr. Muhlstock's opinion, I find that Mr. Esmaili Matanagh had recovered fully from all injuries connected to the Collision (including any soft tissue injuries from the 2019 falls that are indivisible from the Collision injuries) by the time of the Trial. I also find that any ongoing symptoms of pain are attributable to other causes, such as the Plaintiff's pre-existing chronic pain and aging, rather than the Collision.

[148] I also find that the increase in the Plaintiff's overall consumption of OxyNeo, and his continued reliance on it to the Trial date, is not caused by the Collision. In my view, it is his pre-existing injuries and the injuries from the 2019 Falls, rather than the Collision, which are of causative significance in Mr. Esmaili Matanagh's continued opioid use. On that point, I specifically reject the Plaintiff's assertion that if the Collision had not happened, he would have discontinued his reliance on OxyNeo, or at the very least, reduced his dose substantially.

- [149] The evidence does not indicate that the Plaintiff was serious about ending his reliance on opiates in the year leading up to the Collision. In 2017, Mr. Esmaili Matanagh was sent to two addiction specialists. However, he admitted that he did not follow their advice about going on methadone or suboxone treatment. Mr. Esmaili Matanagh stated that he preferred to slowly reduce the OxyNeo on his own, rather than taking the recommended treatment, even though he had found it to be beneficial. He testified that after trying methadone for a few months, he discontinued it as he was worried about the associated stigma of attending at a place frequented by people with drug addictions.
- [150] Mr. Esmaili Matanagh admitted that Dr. Soltani spoke to him about the fact that he was "very high risk" because he was consuming about 362 mg/day of OxyNeo (which was extremely high albeit a substantial reduction from the previous 750 mg/day). He also admitted that he was given a naloxone kit and his wife was trained on how to use it. This was evidently due to concerns about the risk to his life posed by his opiate addiction. Despite these risks, it is apparent that Mr. Esmaili Matanagh did not fully accept that it was necessary to eliminate his dependence on opiates. The fact that he did not want to be associated with people with drug addictions suggests that he did not see himself as somebody with an addiction. This would reduce the likelihood that he would have successfully ceased using OxyNeo if not for the Collision.
- [151] Nevertheless, there remains a real and substantial possibility that the Collision delayed or interfered in the Plaintiff's ability to materially reduce or end his reliance on opioids.
- [152] There is evidence that Mr. Esmaili Matanagh had been working to reduce his opiate use prior to the Collision, and had made substantial headway in the year or two leading up to the Collision. He had cut his dose of OxyNeo from 750 mg/day to 260 mg/day by July 2018. However, by 2017 he appears to have hit a wall. He did not follow through with methadone treatment and it cannot be said that he was on the way to fully eliminating his reliance on OxyNeo or that he would have been successful with discontinuing it or reducing it materially, but for the Collision.
- [153] Following the Collision, his OxyNeo dose was increased temporarily, but levelled off at 280 mg/day by March 2019. The 280 mg/day dose was about 20 mg/day higher than it had been in the months leading up to the Collision. It remained at this amount until after the October 5 Fall, at which point the OxyNeo dose was increased substantially before levelling off to 312 mg/day by the middle of 2023.
- [154] Given Mr. Esmaili Matanagh's high pain levels prior to the Collision, his longstanding use of OxyNeo, his aversion to methadone treatment due to his worries about the stigma associated with it, his refusal to follow the advice of his doctors, and his subsequent 2019 Falls which caused a dramatic increase in his pain experience, it is highly unlikely that he would have been able to discontinue or even substantially reduce the OxyNeo even if the Collision had not happened.

[155] After considering all of the evidence in this case, including Mr. Esmaili Matanagh's pre-existing health conditions, and the injuries from the 2019 Falls, I find that there is about a 10-15% likelihood that Mr. Esmaili Matanagh would have been able to eliminate or substantially reduce the OxyNeo, but for the Collision. That possibility needs to be accounted for in the damages assessment.

[156] I turn now to the psychological injuries.

## B. Psychological Injuries

[157] Dr. Smith provided the following diagnosis:

- a) Insomnia Disorder - severe;
- b) Somatic Symptom Disorder with Predominant Pain;
- c) Major Depressive Disorder ("MDD") with Anxious Distress - severe; and
- d) Posttraumatic Stress Disorder ("PTSD") - severe

[158] Dr. Smith found no evidence that the Plaintiff had sustained a concussion or brain injury from the Collision. According to Dr. Smith, Mr. Esmaili Matanagh's MDD was pre-existing but in remission prior to the Collision. He opined that the Collision reactivated and worsened the pre-existing MDD, and caused him PTSD, which was a new diagnosis.

[159] Dr. Smith also supports Dr. Kei's opinion that Mr. Esmaili Matanagh's headaches "were probably due to re-injuring his neck", and that Mr. Esmaili Matanagh's pre-existing chronic pain was made worse by the Collision.

[160] I do not find Dr. Smith's opinion reliable as it relates to the diagnosis of Mr. Esmaili Matanagh's injuries or their cause. I will first address concerns about the opinion relating to causation.

[161] First, Dr. Smith's view that Mr. Esmaili Matanagh's MDD was in remission prior to the Collision, appears to rely heavily on a single notation by Dr. Soltani on October 18, 2018, that Mr. Esmaili Matanagh's depression was "well controlled". However, just one month prior, Dr. Soltani had increased Mr. Esmaili Matanagh's dose of Effexor by more than 30% because the depression and anxiety was "not controlled". Dr. Smith does not adequately consider this, or explore what was happening with Mr. Esmaili Matanagh's mental health to cause a significant change in his depression and anxiety just over a month prior to the Collision, or explain why he considered the Plaintiff to be in remission if he was still taking these high doses of anti-depressants.

[162] Second, Dr. Smith appears to selectively pick only those entries in Dr. Soltani's clinical records which support his conclusions, without adequate regard to the surrounding entries that might provide more context or lead to a different conclusion. For example:

- a) At para. 21 of the Smith MLR, Dr. Smith highlights a January 11, 2019, notation indicating poor sleep and headaches, but does not mention the absence of such complaints in subsequent entries.
- b) At para. 23 of the Smith MLR, Dr. Smith highlights a February 8, 2019, entry noting "chronic severe backache" without noting:
  - i. the reference to "chronic severe backache" is associated by Dr. Soltani with Mr. Esmaili Matanagh's LTD (Long Term Disability) claim;
  - ii. subsequent entries only indicate "chronic back pain"; and
  - iii. the presence and implications of numerous similar entries indicating "chronic severe backache" which were made after the 2017 MVC, and prior to the Collision (such as a December 1, 2017, entry).
- c) Dr. Smith does not reference post-Collision clinical notes that appear to be identical to those referred to at paras. 13 and 14 of his MLR which say that the depression and anxiety are well controlled.

- [163] Third, Dr. Smith does not consider the implications of changes or consistency in Mr. Esmaili Matanagh's anti-depressant medication. The Pharmanet records (which were examined by Dr. Smith) reveal that Mr. Esmaili Matanagh was taking Effexor for depression and anxiety, both before and following the Collision. From about April 2018 to August 2018, Mr. Esmaili Matanagh was taking 150mg tablets of Effexor. However, by September 2018, Dr. Soltani noted that he was becoming more depressed, and his dose of Effexor was increased to 225mg. He remained at this dosage level even following the Collision, until April 2019, when the Effexor was temporarily increased to 262.5mg, before returning to 225mg in the summer of 2019. The 225mg dose continued thereafter, until the date of this Trial.
- [164] Fourth, despite recognizing that physical pain was a major contributor to Mr. Esmaili Matanagh's mental health, Dr. Smith opined on causation without any regard to the changes in the use of OxyNeo before and after the Collision, and after the 2019 Falls.
- [165] Fifth, Dr. Smith ignores the potential significance of the absence of suicidal ideation in Dr. Soltani's records versus his own finding that Mr. Esmaili Matanagh was suicidal, and how that might impact his view of causation. Dr. Smith could not recall under cross-examination whether he saw any reference to suicidal ideation in any of the clinical records. However, he speculated that this could have been because no other doctor had asked the Plaintiff about it. Yet it is clear that Dr. Soltani did turn her mind to whether Mr. Esmaili Matanagh had suicidal ideation. On multiple occasions Dr. Soltani notes that Mr. Esmaili Matanagh denied having "suicidal and homicidal ideation, plan, or intent". This is noted, for example, in the entries for: Jan 11, 2019; April 12, 2019; July 31, 2019; and March 5, 2020. Suicidal thoughts are also noted to be absent on June 22, 2020, December 23, 2020, October 13, 2021, Feb 11, 2022, and April 8, 2022.

- [166] Sixth, Dr. Smith does not consider the implications of Mr. Esmaili Matanagh's family situation on his mental health. When Dr. Smith examined Mr. Esmaili Matanagh on January 10, his son was in custody at Surrey Pre-Trial awaiting a January 18 court date for assault charges. Mr. Esmaili Matanagh agreed at trial that this was very upsetting for him. Yet Dr. Smith does not grapple with this obvious stressor and consider whether the criminal charges against the Plaintiff's son might be of causative significance, particularly given the absence of suicidal ideation in the clinical entries.
- [167] Dr. Smith's diagnosis of the severity of Mr. Esmaili Matanagh's psychological injuries is also unreliable. The foundation of his opinion is based on the accuracy of the statements made by the Plaintiff to him and the accuracy of the Plaintiff's reporting of symptoms in the various questionnaires that were administered to the Plaintiff by Dr. Smith. I have already found Mr. Esmaili Matanagh is not reliable. Any opinion that relies on the unreliable statements of the Plaintiff, is thus suspect. This applies not only to the severity of the Plaintiff's injuries, but also their cause.
- [168] Further, at least some of the facts and assumptions relied on by Dr. Smith in arriving at his opinion are not proven in the evidence. For example, at para. 80 (p. 10), Dr. Smith noted that Mr. Esmaili Matanagh walks his dog for 5-10 minutes per day, when in fact the walks are much longer. At para. 87 (p. 11) Dr. Smith writes that Mr. Esmaili Matanagh has not experienced any trauma since the Collision. That is also not true, as Mr. Matanagh had three significant falls in 2019 plus the DVT and pulmonary embolism. Whether Mr. Esmaili Matanagh was the source of these inaccurate statements or whether Dr. Smith simply got it wrong, the result is the same. Many important facts and assumptions on which Dr. Smith relied are not proven on the evidence.
- [169] In addition, there is also evidence that Dr. Smith was aware that Mr. Esmaili Matanagh may not have been a reliable historian, but failed to factor this into his opinion. For example, at para. 69 (pp. 9-10), Dr. Smith writes that Mr. Esmaili Matanagh told him that he did not have symptoms of depression and anxiety at the time of the Collision, and that his Effexor had been discontinued prior to the Collision. Dr. Smith's notation at para. 6 (p. 13) indicates that he was aware of Mr. Esmaili Matanagh's actual pre-Collision Effexor intake and the fact that Dr. Soltani had prescribed an increased dose of Effexor in September 2018 because his depression was "not controlled". Even if I accept the Plaintiff's denial that he made these statements to Dr. Smith (which I do not), the fact remains that Dr. Smith believed that Mr. Esmaili Matanagh had made these incorrect statements. It was therefore incumbent on him to address this discrepancy. During his cross-examination, Dr. Smith agreed that he accepted what Mr. Esmaili Matanagh told him, "unless I have reason to believe otherwise". The above inconsistency reveals at least one substantial reason to believe otherwise. Yet nowhere in his report does Dr. Smith consider the implications of an inaccurate statement and how that might affect his opinion.

- [170] I turn now to Mr. Esmaili Matanagh's psychological injuries. There is evidence that Mr. Esmaili Matanagh is currently suffering from symptoms that support the following diagnoses made by Dr. Smith - insomnia disorder, somatic symptom disorder with predominant pain, and major depressive disorder with anxious distress. That evidence is provided by his family members whose observations about his current mental health I find reliable. However, for the reasons mentioned earlier, I am not able to find that the Plaintiff's current condition is caused by the Collision, or that the level of his current distress is as severe as Dr. Smith has indicated.
- [171] Dr. Smith's opinion that Mr. Esmaili Matanagh is currently experiencing ongoing and severe PTSD, which is related to the Collision, is also not borne out by the evidence. This opinion is based partly on Mr. Esmaili Matanagh's elevated score on the PCL-5 (which screens for PTSD), and Mr. Esmaili Matanagh's self reports. As I have said, the Plaintiff's self reports (which ground the PCL-5 score and form the foundation for Dr. Smith's opinion), are unreliable. Even if I was to accept that Mr. Esmaili Matanagh is currently suffering from a severe case of PTSD, there is insufficient reliable evidence that his current condition is caused by the Collision.
- [172] Dr. Smith testified as to the criteria that must be met to support a diagnosis of PTSD. These include: (1) exposure to actual or threatened death or serious injury; (2) presence of one or more intrusion symptoms associated with the traumatic event; (3) persistent avoidance of stimuli associated with the traumatic event; (4) negative alterations in cognitions and mood associated with the traumatic event; (5) marked alterations in arousal and reactivity associated with the traumatic event; and (6) duration of the disturbance for more than one month. I infer from Dr. Smith's testimony that he believed that all of these factors were present in this case. However, that is not my view of the evidence.
- [173] The first criteria for the existence of PTSD following the Collision is clearly met on the evidence. I accept that the nature of the Collision was such that Mr. Esmaili Matanagh was exposed to serious injury. The Plaintiff testified to seeing his wife's body hit the back of the car seat, and being concerned for her well being. Given the significant injuries the Plaintiff and his wife sustained during prior accidents, and the significance of the impact of the Collision, which was felt by both he and his wife, is very likely that he felt quite concerned for their safety and well being.
- [174] Regarding the second criteria, it is also reasonable to assume that the Plaintiff's experience was of sufficient magnitude as to cause him to ruminate about the Collision and have some nightmares or experience flashbacks. There is no direct evidence of this from the Plaintiff, though at para. 81 (p. 11) of the Smith MLR, Mr. Esmaili Matanagh is reported to have said that he has bad dreams "being hit by a large truck in a motor vehicle accident. In the accident, he feels trapped under the seat". However, I have concerns about the reliability of this statement given that the Plaintiff is the sole source of this information, and there is no evidence that he was experiencing these dreams in the weeks or months after the Collision, and that they have continued to the date of the assessment.

- [175] The third criterion relates to persistent avoidance of stimuli associated with the accident - such evidence is absent in this case. For example, there is no evidence that the Plaintiff has avoided driving by the scene of the Collision, or that he has avoided driving altogether due to the trauma experienced from the event. Rather, Dr. Smith notes at para. 64 (p. 9) of his MLR that Mr. Esmaili Matanagh reported that "[a]s a result of the neck injury he is not able to drive as much as he did in the past because he has difficulty with shoulder-checking". A subsequent statement at para. 88 of the Smith MLR that the Plaintiff's son "drives him to his appointments", does not associate this failure to drive with psychological trauma.
- [176] There is some evidence supporting the fourth and fifth criteria from Mr. Esmaili Matanagh which is corroborated by his wife and daughter. This includes diminished interest or participation in significant social activities, sleep disturbance, and problems with concentration. However, it is difficult to discern from the evidence when these symptoms arose, how long they lasted, and whether they relate to PTSD or other psychological or physiological conditions such as depression and anxiety, or urinary tract issues. For example, there is evidence that Mr. Esmaili Matanagh has had difficulties with sleep due to the need to frequently urinate. Similarly, difficulties with concentration or withdrawal from social activities are commonly associated with depression. Further, there is no clear indication that the withdrawal from social engagement was because of the Collision, versus the injuries sustained in 2019. The Plaintiff testified that he gave up being a treasurer of his faith community in 2019, and in 2019 or 2020, he stopped going to Baha'i functions altogether. This timing is consistent with the social withdrawal occurring due to the 2019 Falls, rather than the Collision. I also note that the Plaintiff's evidence of his diminished social life post Collision is tempered by Kasra's evidence that the Plaintiff did not often have people over even prior to the Collision. Thus, even if I was to accept that the Plaintiff had negative alterations in cognitions and mood, as well as marked alterations in arousal and reactivity, the evidence does not show a clear connection of these symptoms to the traumatic event (i.e. Collision).
- [177] The sixth criterion requires that the "disturbance" continue for more than one month. While the evidence suggests that the Plaintiff was experiencing some disturbance when Dr. Smith examined him in 2024, there is insufficient evidence linking this disturbance to the Collision. Even if the disturbance in this case met all the other criteria for PTSD (which it does not), there is no reliable evidence that it is causally related to the Collision.
- [178] Based on the above, I am unable to conclude on the evidence that Mr. Esmaili Matanagh is currently suffering from PTSD, or that, if any PTSD does presently exist, it is causally related to the Collision. While it is possible that Mr. Esmaili Matanagh may have temporarily experienced PTSD due to the Collision, many of the required elements to establish the existence of this condition are not made out in the evidence.

- [179] For clarity, I do not accept that the Collision caused the depression, anxiety, suicidal ideation, somatic symptoms, insomnia, or PTSD that Dr. Smith says that Mr. Esmaili Matanagh continues to experience.
- [180] After considering all the evidence, I conclude that Mr. Esmaili Matanagh suffered some psychological injuries as a result of the Collision, specifically a temporary worsening of his pre-existing depression and anxiety. This caused him increased psychological distress, and required him to increase his dose of Effexor for a short period of time between April and June 2019, before reducing back to his pre-Collision dose of 225 mg/day. This reduction in medication correlated with Mr. Esmaili Matanagh's recovery from his Collision related psychological injury, and return to his baseline psychological condition. I therefore conclude that Mr. Esmaili Matanagh had fully recovered from the psychological effects of his Collision-related injuries by the time of the October 5 Fall.

## VI. Non-Pecuniary Damages

- [181] A damage award for non-pecuniary losses is intended to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Though restitution is never possible for these types of losses, the monetary award is intended to provide a substitute for pleasures and amenities to make the life of the plaintiff "more bearable": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 97, 1985 CanLII 179 (S.C.), *aff'd* (1987), *aff'd* 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.); and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 105.
- [182] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC *ref'd* [2006] S.C.C.A. No. 100, the Court set out a non-exhaustive list of factors to be considered in assessing non-pecuniary damages. These include: the plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family; marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle: *Stapley*, at para. 46. The plaintiff's stoicism is a factor that should not, generally speaking, penalize the plaintiff: *Stapley*, at para. 46 citing *Giang v. Clayton*, 2005 BCCA 54 at para. 55.
- [183] The award is to be fair to both parties and fairness is measured against awards in comparable cases: *Olson v. Farran*, 2016 BCSC 1255 at para. 156.
- [184] Loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited, but not unable, to do household tasks for physical or psychological reasons. A pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *Kim v. Lin*, 2018 BCCA 77 at para. 28 citing *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 73 (C.A.) and *Liu v. Bains*, 2016 BCCA 374 at para. 26.
- [185] The Plaintiff submits that "he has lost nearly everything" due to the Collision, which has caused him extreme pain and mental distress, such that he is now suicidal and has considered MAID (medical assistance in dying). He says he is a dramatically changed man,

who is severely depressed, socially isolated, and needs constant care and attention from his family to ensure his safety and wellbeing. Whereas he was previously in the process of eliminating his reliance on opiates due to their adverse side effects, he is now required to take them for the rest of his life. The Plaintiff submits that while no amount of money can fully compensate him for his pain and suffering, the sum of \$330,000 is appropriate in his circumstances. In support, he relies on: *Felix v. Hearne*, 2011 BCSC 1236 (\$200,000[18], which is now equivalent to \$267,827); *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155 (\$265,000, which is now equivalent to \$332,279); and *Michael v. Bergeron*, 2024 BCSC 715 (\$350,000).

- [186] The cases relied on by the Plaintiff are of no assistance to this Court. That is because none of them relate to a plaintiff that has a significant pre-existing medical condition or has experienced post-Collision events to the magnitude that the Plaintiff has experienced.
- [187] The Defendants argue that Mr. Esmaili Matanagh fully healed from the injuries sustained in the Collision, and that any ongoing pain and suffering is due to pre-existing injuries and condition, and his 2019 Falls. They argue that an appropriate award for his non-pecuniary loss is in the range of \$60,000, which is supported by the following authorities: *Kulla v. Chiu*, 2024 BCSC 687 (\$60,000); *Lin v. Koszmider*, 2023 BCSC 752 (\$35,000); *Sandhu v. Morris*, 2023 BCSC 35 (\$40,000); *Seganfreddo v. Hernandez*, 2023 BCSC 1253 (\$70,000); *Ford v. Lin*, 2021 BCSC 456 (\$30,000); *Khudabux v. McClary*, 2016 BCSC 1886, upheld on appeal 2018 BCCA 234 (\$75,00 reduced to \$30,000 due to pre-existing condition and post accident injuries, and reduced a further 20% for the plaintiff's contributory negligence); and *Shebat v. Zhang*, 2024 BCSC 1355 (\$60,000).
- [188] I find that the circumstances of this case most closely resemble those of *Shebat*, except that the Plaintiff in *Shebat* was found to lack both credibility and reliability. As mentioned, while I have some concerns regarding Mr. Esmaili Matanagh's lack of credibility, they are not of the magnitude found in the *Shebat* case. Further, Mr. Esmaili Matanagh's injuries are more consequential than those of the plaintiff in *Shebat*, which should result in a higher non-pecuniary award than what was made in that case.
- [189] At the time of the Collision, Mr. Esmaili Matanagh was 53 years old. He had been off work for four to five years due to significant physical and psychological injuries flowing from several workplace injuries and motor vehicle accidents. He was on a high dose of OxyNeo and Gabapentin to help manage his pain. He was also taking Effexor for his depression and anxiety. The depression was still in a state of flux, and had worsened prior to the Collision. Just a month prior to the Collision, his anti-depressant medication had to be increased as Mr. Esmaili Matanagh's depression was not controlled.
- [190] The Collision caused Mr. Esmaili Matanagh the following Physical Injuries: soft tissue injuries to the cervical, thoracic, and lumbar spine; a temporary aggravation of pre-existing injuries to the neck, upper back, and lumbar region; and a temporary aggravation of pre-existing central sensitization. These Physical Injuries caused the Plaintiff to experience

headaches, neck pain, pain in both shoulders, lower back pain, some transient tinnitus, and interference with his sleep. Based on the pattern of Mr. Esmaili Matanagh's fluctuations in medication and care and Dr. Muhlstock's evidence regarding healing time for soft tissue injuries, I find that the acute phases of his injuries and pain lasted for about 6-9 months following the Collision. The Plaintiff had substantially recovered from the Physical Injuries by October 2019, with some residual low back pain that continued for some time afterwards, and intermingled with pain from the 2019 Falls. Mr. Esmaili Matanagh's Physical Injuries fully resolved well in advance of this Trial, as did the injuries from the 2019 Falls.

- [191] The Collision also caused the Plaintiff a temporary worsening of his pre-existing depression and anxiety, from which he fully recovered within about one year following the Collision. The increased depression and anxiety caused him some distress, which I accept was likely of greater significance to him emotionally due to his pre-existing emotional state. The psychological injuries also negatively impacted Mr. Esmaili Matanagh's family relationships during this period, because of his worsened mood and irritability flowing from the Collision.
- [192] Because of his central sensitization, I find that Mr. Esmaili Matanagh's pain experience and depression and anxiety were heightened more than they would otherwise have been. His pre-existing injuries also delayed his recovery more than it might otherwise have been if he had not been suffering from these prior injuries.
- [193] In addition, Mr. Esmaili Matanagh had to temporarily increase his use of opioids following the Collision, to address his increased pain. Given the health dangers posed by consuming high doses of opioids, and Mr. Esmaili Matanagh's doctor's advice that he reduce his reliance on the medication, I accept that any increase in the dose of OxyNeo would have caused distress, as well as exposed him to additional health risks. Further, I have found that there is a real and substantial possibility of 10-15% that the Collision delayed or interfered in the Plaintiff's ability to materially reduce or end his reliance on opioids. I have accounted for that possibility by increasing the award for non-pecuniary damages.
- [194] After considering all of the evidence in this case, I find that the sum of \$95,000 is fair and reasonable to compensate the Plaintiff for his non-pecuniary loss and put him in the place he would have been, but for the Collision. This sum includes the impact that the injuries had on his housekeeping abilities, which is discussed in further detail below.

## A. Loss of Housekeeping Capacity

- [195] The Plaintiff seeks \$77,500 for diminished future housekeeping capacity and \$30,000 for past loss of housekeeping capacity. These amounts are based on an estimate that, but for the accident, Mr. Esmaili Matanagh would have been capable of completing a share of the housework equivalent to 34 hours per year of lawn and garden care and 19 hours per year for home maintenance, until he turned 75. They rely on an estimate that the annual value of that work would be approximately \$5,000.
- [196] As noted above, an award for loss of housekeeping capacity may be made through pecuniary or non-pecuniary damages. The Court summarized the different considerations in *McKee v. Hicks*, 2023 BCCA 109:
- [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.
- [197] A claim for damages in relation to homemaking tasks performed by others will lie even where the services have been replaced gratuitously by a family member: *Liu v. Bains*, 2016 BCCA 374, at para. 25. Such damages may be assessed on a replacement cost basis: *McTavish v. MacGillivray*, 2000 BCCA 164, at paras. 8, 48-49, 68.
- [198] Mr. Esmaili Matanagh testified that, prior to the collision, his wife was primarily responsible for cooking and cleaning, but he would "help" with this task, as well as baking, doing dishes, taking out the garbage, and light gardening. Following the Collision, he said he relies heavily on his family for household tasks, including cooking, cleaning, shopping and picking up his medicine. He repeated similar things to Ms. Lane.
- [199] The evidence regarding the Plaintiff's current limitations for household activities, and their cause, is unreliable.
- [200] First, the evidence is based on Mr. Esmaili Matanagh's self reports, which cannot be relied upon absent other reliable evidence.
- [201] Second, the corroborating evidence from his wife appears to relate to a much earlier time period, which was likely well before the 2014 MVC. For example, Ms. Shabgardí was asked to describe the Plaintiff's pre-Collision household activities for the period one or two years prior to the Collision. Ms. Shabgardí tied her recollection of her husband gardening, baking, and serving guests, to her husband also taking her children to activities, including taking her son swimming. However, in 2016 to 2017, Kasra was around 20 or 21 years old and living away from home. I infer from Ms. Shabgardí's evidence that their son was of school age when Mr. Esmaili Matanagh was doing these household activities - which would

have been prior to 2014.

- [202] Third, Kasra's evidence (which is itself limited because he was living away during the relevant period) indicates that the Plaintiff did not contribute very much to the household activities prior to the Collision. Kasra testified that he only recalled his father occasionally doing the dishes or dusting "a little bit". In terms of yard work, he could only recall his father watering the plants with a garden hose. To the extent that Kimia's evidence differs from that of her brother, I note that it also cannot be relied on given how young she was during the period of time in question.
- [203] In my view, any current restrictions in the ability to perform household activities are unrelated to the Collision, and not compensable. I am supported in this conclusion by Dr. Muhlstock, who testified that there was no evidence of any ongoing impairment in relation to the Collision.[19]
- [204] It is logical to assume that the Plaintiff's injuries (both physical and psychological) had some impact on his ability to perform his household activities on a temporary basis, such that the Plaintiff was limited in (but not unable) to do household tasks. However, the evidence leads me to conclude that the Plaintiff largely recovered from any functional limitations regarding his household activities by the October 5 Fall, with any residual limitations resolving well before the Trial. It is notable that the October 5 Fall happened when the Plaintiff had climbed on a ladder to trim some plants - the plant trimming activity that he described performing was very similar to what he said he was capable of doing prior to the Collision.
- [205] In the circumstances, it is appropriate to compensate Mr. Esmaili Matanagh for this loss using the non-pecuniary approach, rather than providing him with a separate award for loss of housekeeping capacity. I have done so in the preceding analysis for non-pecuniary damages.
- [206] I find that a separate pecuniary award for loss of housekeeping capacity is not supported by the evidence. As such, Mr. Esmaili Matanagh's claim for loss of housekeeping capacity is dismissed.

## B. Cost of Future Care

- [207] The plaintiff seeks \$1,950,000 for future care costs. This figure is comprised primarily of the cost of full-time care for Mr. Esmaili Matanagh, but also includes other items such as medications and mental health treatment. It is based on an annual full-time caregiver cost ranging from \$182,000 to \$350,000 to age 75; additional annual costs of about \$7,000 to \$8,000; and a fixed cost of \$91,761. The total figure of \$3,000,000 has been reduced by 35% to account for negative contingencies.

- [208] When determining a cost of future care award, the court should try to restore the plaintiff, as best as possible with a monetary award, to the position he would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30; *Milina* at para. 184.
- [209] A claim for future care is established if there is medical justification for the claim, the claim is reasonable, and the expense is likely to be incurred by the plaintiff: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113-115, citing *Milina* at para. 211; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210-212.
- [210] A future cost of care award can be justified without the need for expert reports: *Moges v. Sanderson*, 2020 BCSC 1511 at para. 168.
- [211] Plaintiff's counsel submits that Mr. Esmaili Matanagh requires constant care and supervision and that, currently, Mr. Esmaili Matanagh's family fills this need by trying to ensure that someone is home at all times to assist him. Counsel further submits that Mr. Esmaili Matanagh's circumstances raise key risk factors for suicide and that 24/7 nurse care is needed to monitor Mr. Esmaili Matanagh.
- [212] There are a number of problems with the claim for full-time future care. First, the evidence that Mr. Esmaili Matanagh is currently suicidal and requires full-time care, is unreliable. Second, the evidence does not support the conclusion that Mr. Esmaili Matanagh's Collision caused him to become suicidal or to require full time care and supervision. Third, I have found that Mr. Esmaili Matanagh fully recovered from his Collision-related injuries, such that there is no medical justification for the claim, whether it is for medications, mental health treatment, or other costs.
- [213] The Plaintiff's claim for costs of future care is dismissed.

### C. Special Damages

- [214] Mr. Esmaili Matanagh claims \$471.80 for reimbursement for his out-of-pocket physiotherapy treatments. However, of that amount, only \$425 was incurred between the date of the Collision and the October 5 Fall. The remaining \$46.80 was incurred for massage therapy treatments taken in February 2022. There is no evidence that the massage therapy treatments are related to the Collision. As such, Mr. Esmaili Matanagh is entitled to be reimbursed \$425.
- [215] The Plaintiff seeks \$51,236.22 for the cost of his medications. However, the vast majority of this expense is not attributable to the Collision, for the following reasons:
- Mr. Esmaili Matanagh was already taking OxyNeo, Effexor, and Gabapentin prior to the Collision. Therefore, he is only entitled to reimbursement for the amount that he would not have incurred, but for the Collision.

- b) The claim includes the costs of other medications (such as magnesium, compounds, etc.) for which there is insufficient evidentiary basis supporting their connection to the injuries sustained in the Collision.

[216] Mr. Esmaili Matanagh's consumption of Gabapentin remained the same both before and after the Collision. There is no indication that but for the Collision, this medication would have been reduced or eliminated. Rather, the evidence supports a finding that Mr. Esmaili Matanagh would have continued to consume the Gabapentin in the same quantities regardless of the Collision. Therefore, I find that Mr. Esmaili Matanagh is not entitled to reimbursement for the costs related to the Gabapentin.

[217] It is difficult to calculate with any precision the amount of money Mr. Esmaili Matanagh has incurred for the OxyNeo prescriptions but for the Collision. This is because: (a) there is no comparison as to how much the prescription medication cost before the Collision; (b) the exact dose varied over the months; and (c) Mr. Esmaili Matanagh's condition was not static and rather it gradually improved over time, with a corresponding reduction in his dose. I have therefore considered his prescription history both before and after the Collision, to determine an appropriate amount for this expense.

[218] Mr. Esmaili Matanagh's consumption of OxyNeo increased by about 30% following the Collision, before decreasing in the summer of 2019 to about 8% higher than it was prior to the Collision. The reductions in the OxyNeo dose correlated with Mr. Esmaili Matanagh's recovery from his Collision related Physical Injuries. I have already found that he recovered fully from the effects of the Physical Injuries by about the end of December 2019. The cost for the OxyNeo prescriptions for the period November 2018 to October 2019, ranges from about \$500 to \$600 per month; 30% of this amounts to a range of \$150-\$180 per month. Doing the best that I can with the evidence before me, I have calculated the monthly expense for this medication to the end of 2019. I arrive at \$2,200 as the amount that Mr. Esmaili Matanagh is entitled for reimbursement for the OxyNeo.

[219] Mr. Esmaili Matanagh's consumption of Effexor (or related medication) is also difficult to calculate, as there is no consistent amount that he was paying on a regular basis. However, there was very little increase in Mr. Esmaili Matanagh's consumption of Effexor following the Collision. His dose of 225mg tablets was instituted one month prior to the Collision, and remained at that level through to the Trial, with the exception of a brief period from April to June 2019 when it was increased by 37.5 mg to a 262.5 mg dose. This represents an increase of about 4% during the 12-month period. There is no evidence that Mr. Esmaili Matanagh's consumption of Effexor would have reduced or been terminated, but for the Collision. As Mr. Esmaili Matanagh paid about \$410 for the Effexor, he is entitled to reimbursement of \$16.40, which represents 4% of that amount.

[220] In total, Mr. Esmaili Matanagh is entitled to reimbursement of \$2,641.40 for his out-of-pocket expenses.

## VII. Summary of Damages

[221] For the foregoing reasons, the plaintiff is entitled to the following quantum of damages as a result of the defendant's negligence:

Non-pecuniary damages: \$95,000.00

Special damages: \$ 2,641.40

Total \$97,641.40

[222] I also award the plaintiff interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

## VIII. Costs

[223] The general rule is that costs follow the event. As the plaintiff was successful, he would generally be entitled to his costs at Scale B for a matter of ordinary difficulty. However, there may be settlement offers or other matters that I am not privy to which could affect the award of costs.

[224] A party who wishes to address the Court on costs may prepare written submissions up to a maximum of seven (7) pages in length (excluding attachments), for my consideration. These should be submitted through Supreme Court Scheduling within 45 days of this Order. Responding submissions are to be provided seven (7) days thereafter and are not to exceed seven (7) pages. Any Reply submissions are to be provided within seven (7) days following receipt of Response submissions, and are limited to three (3) pages.

[225] Absent further court order or agreement of the parties, the costs award payable under the general rule referenced above at para. 196, will stand.

"Shergill J."

[1] I have referred to the Plaintiff's children by their first names in these Reasons, to avoid confusion. No disrespect is intended.

[2] Notice to Admit, para. 40.

[3] Trial Transcript, June 17, 2024, p. 38, lines 19-23.

[4] Kei MLR at p. 12.

[5] Ibid.

[6] Kei MLR at p. 13.

[7] Muhlstock MLR at p. 8.

[8] Muhlstock MLR at pp. 8-9.

[9] Muhlstock MLR at p. 10.

- [10] Trial Transcript, June 19, p. 16, lines 33-47.
- [11] Supra, at para. 91.
- [12] See paras. 66-67, supra.
- [13] See Kei MLR at p. 12 and Muhlstock MLR at p. 8.
- [14] Lane Report at pp. 14-15.
- [15] Ibid. at p. 27.
- [16] Trial transcript, June 24, 2024, at p. 24, lines 8-33.
- [17] Trial Transcript, June 24, 2024, p. 46, lines 45-46, to p. 47, lines 1-20.
- [18] Figures relate to the court award for non-pecuniary damages.
- [19] Trial transcript, June 24, 2024, at p. 25, lines 44-46.
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Prepared on 30 October 2026 · Esheria