

CANADA / JUDGMENT

McHollister v. Ma

2021 BCSC 1667

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1667 McHollister v. Ma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McHollister v. Ma,

2021 BCSC 1667

Date: 20210824

Docket: M173597

Registry: New Westminster

Between:

Ryan James McHollister

Plaintiff

And

Philip Ma

Defendant

- and -

Docket: M224884

Registry: New Westminster

Between:

Ryan James McHollister

Plaintiff

And

Tien Tuyet Huynh,

Harwinderjit Singh

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page for the order of the names of plaintiff's counsel. These changes were made on August 27, 2021.

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff, Ryan McHollister:

S.J. Turner

D. McCormick

Counsel for the Defendants, Philip Ma, Tien Huynh and Harwinderjit Singh:

C. Hope,

H. Dinh

Place and Date of Trial:

New Westminster, B.C.

September 24-25, 28-30, October 1-2, 2020, February 16-18, 2021

Place and Date of Judgment:

New Westminster, B.C.

August 24, 2021

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Overview

- [1] The plaintiff, Ryan McHollister, who was 32 years old at the time of trial, was injured in three car accidents that took place in 2013 and 2018. The plaintiff has ongoing symptoms from the injuries sustained in the accidents.
- [2] The plaintiff has not returned to work since the second accident, approximately three and a half years ago.

- [3] Liability for all three accidents has been admitted. The defendants acknowledge that the plaintiff sustained some injuries in the accidents. However, they disagree that he suffered a mild traumatic brain injury and they deny his injuries are as severe and debilitating as he alleges. The defendants also disagree that the plaintiff's prognosis is as unfavourable as he alleges.
- [4] The plaintiff's counsel submits that the injuries sustained in the first accident are divisible and should be assessed separately from those sustained in the other accidents. He further submits that the injuries sustained in the second and third accidents are indivisible and the court should find joint and several liability against the defendants involved in these accidents. Counsel for the defendants agrees with that approach, as do I, and therefore that is the approach I will take in these reasons.

Issues

- [5] The issues raised in these actions are:
- a) The plaintiff's abilities and life prior to the accidents;
 - b) The plaintiff's abilities and life after the accidents;
 - c) The plaintiff's prognosis;
 - d) The plaintiff's claim to damages, namely, the assessment of:
 - i. past income loss and loss of future earning capacity;
 - ii. past and future loss of housekeeping capacity;
 - iii. cost of future care;
 - iv. non-pecuniary damages; and
 - v. special damages.

The Plaintiff's Abilities and Life Prior to the Accidents

- [6] The court heard evidence from the plaintiff, his spouse, several of his friends and his family doctor regarding what the plaintiff was like prior to the accidents.
- [7] The plaintiff grew up in the lower mainland. In secondary school, the plaintiff said he earned good grades. By all accounts, the plaintiff was a gifted athlete. He played numerous sports competitively. In grade 11, the plaintiff joined the school rugby team. Rugby became the plaintiff's main sport and passion. Post-graduation, he started playing in the premier rugby league in British Columbia.
- [8] The plaintiff has a wide circle of friends. He described his rugby mates as a big extended family and clearly derives a great deal of enjoyment and personal satisfaction from his involvement in rugby.

- [9] There was considerable evidence that rugby is a highly physical game that includes tackling and a great deal of forceful contact between players.
- [10] Many witnesses described that physical injuries are expected while playing rugby at the provincial level. The plaintiff typically wore a "scrum cap" to protect his head while playing. He testified about sustaining numerous rugby injuries, including "head knocks", dislocations, muscle strains and muscle tearing.
- [11] The defendants called the plaintiff's family doctor, Dr. Hedges, as a fact witness. For many years, Dr. Hedges has acted as the plaintiff's family doctor and also as the rugby club's team doctor. In his capacity as the plaintiff's rugby team doctor, Dr. Hedges treated the plaintiff for many injuries. For example, in May 2013, he described seeing the plaintiff sustain a neck injury on the rugby field. Dr. Hedges examined the plaintiff and found a muscle tear in his lateral C6. The plaintiff was transported by ambulance to the hospital where Dr. Hedges said x-rays showed no abnormalities in the plaintiff's neck.
- [12] Dr. Hedges testified that the plaintiff suffered from chronic back pain which would flare up after games. Dr. Hedges said that "rugby neck" is a common complaint amongst rugby players. Over a period of a few months prior to the first accident, Dr. Hedges treated the plaintiff for right elbow and arm injuries.
- [13] During high school, the plaintiff started working at a tire wholesale store. He continued working there after graduating. He worked full time, approximately 42 hours per week, sometimes more during the busy winter tire season. His work at the tire shop included customer service, answering phones, computer work, ordering tires and, to a lesser extent, assisting with mechanic-type work in the shop. His duties sometimes involved physical tasks such as lifting tires up and down from storage areas.
- [14] In 2016, the plaintiff was promoted to assistant manager and he continued working at the shop until the second accident. The plaintiff testified that, prior to the second accident, he had no difficulties meeting the demands of his job.
- [15] While the plaintiff worked at the tire shop, he decided he would like to become a firefighter. In 2013, the plaintiff enrolled in basic fire training courses offered by a training centre in Texas. The courses involved online work, as well as two weeks of in-person training and testing. The plaintiff passed and obtained certificates after he completed the courses.
- [16] Prior to the accidents, the plaintiff enjoyed socializing with his friends and with people in the rugby community. For example, the plaintiff socialized with players and spectators in the rugby clubhouse. Sometimes after games, the plaintiff would go out to bars with friends and teammates.
- [17] The plaintiff's friends described him as someone who organized events. They also described him as positive, energetic and fun. In terms of his rugby skills, fellow players described the plaintiff as big, fit and as a "force on the field".

- [18] The plaintiff testified that, prior to the accidents, he was in excellent physical and mental health. He was able to play rugby at a very high level. He did not take any extended absences from work due to ill health or sports injuries. He went to the gym almost daily. During the season, he played rugby and attended practices numerous times a week.
- [19] In summary, before the accidents, the plaintiff participated in sports, work and social activities without restrictions. While he sustained numerous sports-related injuries prior to the accidents, he always managed to recover and resume playing rugby at a high level. He aspired to become a firefighter and successfully completed some training toward that goal. The plaintiff worked steadily at the tire shop and he received a promotion. He did not experience difficulties keeping up with his job duties as the assistant manager at the tire shop.

The Plaintiff's Abilities and Life After the Accidents

- [20] The first accident occurred during heavy traffic on November 22, 2013. At the time, the plaintiff was 25 years old. The plaintiff was driving a Honda Civic when he was rear-ended by a Toyota MR2 vehicle driven by Mr. Ma.
- [21] Mr. Ma described the traffic at the time as "bumper to bumper". When the traffic speed picked up, Mr. Ma increased his speed to about 30 kilometers per hour until he had to slam on his brakes. He stated that his brakes "locked up" and his vehicle slid approximately 10 to 20 feet before it collided and wedged under the back of the plaintiff's vehicle. Mr. Ma and the plaintiff exchanged information and then they drove away.
- [22] The plaintiff testified that he was "jostled quite hard" during the first accident. He hit his legs on the dash and jammed his hands onto the steering wheel. He reported being dazed and immediately felt pain in his neck, lower and upper back. The plaintiff also testified he experienced immediate numbness in his right hand up to his elbow. That numbness extended on his right hand from his pinky finger to part of his ring finger.
- [23] The plaintiff went to work right after the first accident. However, he stated that his body hurt and his muscles tightened up throughout the day.
- [24] The plaintiff saw his family doctor, Dr. Hedges, after the first accident, on November 26, 2013. Dr. Hedges' notes recorded the plaintiff telling him that his right arm was "okay". The plaintiff felt stiff and sore the day following the first accident. Dr. Hedges observed spasm and tenderness in the plaintiff's upper back and neck and to a lesser extent in his mid and lower back. Later, on March 1, 2014, Dr. Hedges saw the plaintiff for a right elbow injury with signs of contusion of the ulnar nerve.
- [25] The plaintiff claims the most significant injury from the first accident relates to the numbness in his right hand. As a result, because his ring and pinky fingers would not fully close, he was unable to tightly grip with his right hand.

- [26] The plaintiff's right hand was evaluated by neurologists and he was diagnosed with right-side ulnar neuropathy. Dr. George Medvedev, a neurologist, described this as a dysfunction in the ulnar nerve near the elbow. The plaintiff underwent surgery to address the right ulnar nerve in December 2018. The surgery was a success and now he has only very minor ongoing numbness.
- [27] After the first accident, the plaintiff attended approximately 38 physiotherapy treatments to treat the soft tissue injuries in his neck and back. He says these physiotherapy treatments focussed on treating his neck, lower back and leg pain.
- [28] Angus McQueen and Douglas Breadon, who are friends of the plaintiff, did not notice the plaintiff suffering from any injuries or physical limitations following the first accident. For example, Mr. McQueen could not recall the plaintiff having problems with his right hand even though they played rugby together and saw one another regularly.
- [29] Following the first accident, the plaintiff continued to travel, socialize, work and play sports without restriction. For example, he took leisure trips to Toronto and Arizona. The plaintiff continued to play rugby even though he stated that he missed quite a few games in the first week or two after the first accident due to back pain.
- [30] The plaintiff stated that, by the spring of 2014, except for his right hand numbness, all of his soft tissue injuries had resolved and he returned to playing rugby as normal. By 2017, he was in his "best shape ever" and enjoyed lots of success playing rugby.
- [31] The second accident occurred on February 22, 2018, at about 8:30 p.m., in dark and wet conditions. At this time, the plaintiff was approximately 30 years old and heading home on Canada Way after rugby practice. As he entered the intersection of Canada Way and Edmonds Street in Burnaby, his vehicle, a Nissan Leaf, was struck by a Mazda 3 driven by Tien Tuyet Huynh. The plaintiff attempted to swerve but he was unable to avoid the collision.
- [32] Ms. Huynh was making a left turn onto Edmonds when she collided into the front driver's side bumper of the plaintiff's vehicle. The plaintiff estimated that his vehicle was travelling at approximately 50 kilometers per hour. However, he agreed that he may have reduced his speed just before the second accident occurred.
- [33] The plaintiff described that he felt a "super high" impact on his body. He stated that his head hit the head rest, his legs hit the dash and he immediately felt his neck, back, hips and thighs begin to seize up. The plaintiff stated he felt dizzy immediately after impact and this lasted for months afterwards. Ms. Huynh and her passenger testified that, immediately after the accident, they saw the plaintiff sitting in his car, with his eyes open, looking shocked or dazed. The plaintiff's vehicle was not driveable after the second accident. Ms. Huynh's vehicle was badly damaged on the front end, including on the bumper.

- [34] Following the collision, the plaintiff was able to exit the passenger side of his vehicle, take photos, send texts and make calls to his father and his girlfriend, Anca Aroneanu. The plaintiff's father and his sister drove him home. Ms. Aroneanu came to the plaintiff's home later on the night of the second accident. Ms. Aroneanu stayed with the plaintiff for a few days, being worried he might have a concussion.
- [35] The plaintiff concluded that he had obviously suffered a concussion and testified that he felt panic and confusion after the accident. He also began experiencing headaches, loss of balance and sleep problems following the second accident. His eyes have become light-sensitive and he has double vision and blurry vision.
- [36] The plaintiff tried to drive himself to work a few days after the second accident. He was shaking and feeling anxious by the time he arrived at work, so he drove himself back home. He has not worked since the date of the second accident.
- [37] Ms. Aroneanu had limited knowledge of the plaintiff's abilities before the first accident. However, she did have knowledge about the plaintiff's abilities after the second and third accidents. Overall, she described noticing that the plaintiff had decreased energy, mood and strength and he had increased pain following the second and third accidents.
- [38] Mr. McQueen testified that he saw the plaintiff about one week after the second accident. He did not recall noticing anything about the plaintiff's physical condition. Mr. Breadon noticed that, following the second accident, the plaintiff had a lot of back and head issues. Mr. Breadon also noticed that the plaintiff seemed down and could not watch screens.
- [39] Mr. McQueen said that after the second accident he attended social gatherings with the plaintiff. He noticed that the plaintiff seemed down and less energetic than usual. According to Mr. McQueen, the plaintiff continued to come out and support the team and watch rugby games after the second accident. Mr. McQueen observed the plaintiff participating in post-game social activities and on occasion going out to a bar as part of a group.
- [40] As mentioned above, the plaintiff has not returned to work following the second accident. He could not work from February to May 2018 because he had a headache "pretty much everyday" and he suffered from dizziness, especially when he bent over to pick things up or put his arms in the air. He said he would not be able to pull tires off vehicles and found noise and light overwhelming.
- [41] In the days following the accident, the plaintiff described feeling overwhelmed and extremely anxious about driving. He felt nauseous when he lifted his head up quickly. He experienced headaches with pressure on his forehead area and a burning sensation in his right eye socket. He now wears sunglasses constantly due to light sensitivity. He also experienced memory loss.

- [42] Dr. Hedges treated the plaintiff on February 23, 2018, the day after the second accident. Dr. Hedges found spasm and tenderness in the plaintiff's right neck and upper trapezius. The plaintiff appeared quite sad and he complained of headache. Dr. Hedges prescribed Celebrex and he referred the plaintiff for physiotherapy.
- [43] The plaintiff said that, as the months passed following the second accident, his symptoms began to ease. He attended physiotherapy and also received IMS needling to his back. He spent considerable time doing exercises to relax and strengthen his neck, back and hips.
- [44] He also did light cardiovascular exercises and a small dumbbell weightlifting and stretching routine almost daily. However, he said that his "head was messed up". He testified that just before the time of the third accident, he noticed his muscles feeling more relaxed and estimated that he was feeling 60-70% better.
- [45] The third accident occurred on June 4, 2018. The plaintiff's vehicle, a Nissan Rogue, was rear-ended by a Dodge Charger driven by Harwinderjit Singh. Moments before the third accident, the plaintiff said he heard Mr. Singh's tires screeching. The plaintiff's vehicle's rear bumper was damaged and had to be replaced.
- [46] The plaintiff said he experienced a moderate level of impact to his body during the third accident. The impact immediately triggered "everything" again. For example, he stated that he hit his head on the head rest and felt dazed. He also stated his back and shoulders tightened up after the third accident and that his driving anxiety and headache symptoms increased. The plaintiff said he felt very discouraged and depressed because he went from feeling 60-70% to 0% better.
- [47] Mr. McQueen testified that the plaintiff was very upset about being set back again and was having trouble with his head. He described the plaintiff as less confident and energetic following both the second and third accidents. Mr. Breadon testified that the plaintiff seemed frustrated and worn down by the court case following the third accident. He did not observe any physical injury symptoms but noticed the plaintiff was sensitive to light and would suddenly go quiet when they were socializing.
- [48] Ms. Aroneanu said the third accident completely set the plaintiff's recovery back. She said he was in shock and disbelief that he had been in another accident.
- [49] Following the plaintiff's marriage to Ms. Aroneanu in 2020, they embarked on a twelve-day RV road trip from the Lower Mainland to Banff and Jasper to sightsee and hike. They shared the driving duties during the trip.
- [50] The plaintiff testified that he enjoyed being away but did not enjoy the driving. Ms. Aroneanu stated that she did a lot of the city driving because the plaintiff was anxious driving in the city and estimated that she did 60% of the driving overall. Ms. Aroneanu agreed that they hiked near Mount Revelstoke and Mount Robson, although she qualified that these were more like "long walks" than hikes.

Medical Opinion Evidence

- [51] The plaintiff called four witnesses to give medical opinion evidence: Drs. George Medvedev, Soma Ganesan, Brenda Lau and Betrand Perey.

Dr. Medvedev, Neurologist

- [52] Dr. Medvedev, who is a neurologist, testified in respect of his treatment of the plaintiff and expert report dated July 2, 2020. Dr. Medvedev initially treated the plaintiff for his right-hand numbness and, following the second accident, he treated him for headache symptoms.
- [53] Dr. Medvedev said there are many causes of ulnar neuropathy but it is often due to compression, usually where the nerve is close to the surface at the elbow. He agreed that it was possible to injure the ulnar nerve through small, repeated, traumas such as those that might occur while playing contact sports.
- [54] In cross-examination, Dr. Medvedev agreed that the surgeon remedied the plaintiff's ulnar nerve problem when he loosened the triceps fascia. He also agreed that a large triceps muscle could cause an ulnar nerve problem.
- [55] Dr. Medvedev was unaware that the plaintiff had multiple right arm injuries prior to and after the first accident. For example, he was unaware that the plaintiff complained of numbness in his right arm after he was tackled during a rugby match in 2011.
- [56] Dr. Medvedev examined the plaintiff following each of the accidents at issue. The result of each neurological examination of the plaintiff was normal. However, he explained that this did not necessarily rule out the existence of a neurological injury.
- [57] In his expert report, Dr. Medvedev diagnosed the plaintiff with posttraumatic headaches which could also be described as post-concussive syndrome and soft tissue trauma. Dr. Medvedev concluded that the plaintiff suffered a concussion in the second accident and he noted that the plaintiff was susceptible due to his history of acceleration-deceleration trauma related to sport.
- [58] Following the second accident, Dr. Medvedev began treating the plaintiff for headache symptoms and he administered botulinum toxin (Botox) treatments. Dr. Medvedev stated that the Botox treatments are proving effective, with the plaintiff reporting longer periods of improvement following each treatment. The plaintiff testified that the treatments reduced his headache pain by 20-30% for about two months but that excruciating head pain and concussion symptoms returned.
- [59] Dr. Medvedev explained that, on consideration of the entire constellation of the plaintiff's symptoms, the plaintiff suffered a mild traumatic brain injury (MTBI) in the second accident. The plaintiff's psychological and cognitive symptoms were likely multifactorial and "due to chronic pain as well as the direct effects of a persistent post concussive syndrome".

- [60] In cross-examination, Dr. Medvedev was not concerned about Dr. Hedges' observations that the plaintiff displayed no concussion symptoms the day following the second accident. Dr. Medvedev said that patients tend to misinterpret their symptoms and due to the stress of the accident, it can be difficult for a patient to "find the right words".
- [61] Dr. Medvedev, on his clinical review of the plaintiff's constellation of symptoms, concluded that his self-reported symptoms were typical of MTBI. Dr. Medvedev did agree that some altered state of consciousness was necessary for a concussion or MTBI diagnosis. However, he testified that an overall clinical diagnosis of MTBI or concussion is preferable to a diagnosis based merely on observations of the patient close to the time of trauma. He opined that symptoms of concussion are better observed over time rather than instantaneously.

Dr. Ganesan, Psychiatrist

- [62] Dr. Ganesan, who is a psychiatrist, examined the plaintiff on June 12, 2019. In his first report, Dr. Ganesan diagnosed the plaintiff with an anxiety disorder with mixed features of depression, post-traumatic stress disorder and pain syndrome. Dr. Ganesan recommended re-testing the plaintiff following appropriate treatment to review symptom improvement. In his first report, Dr. Ganesan appeared to anticipate improvement to the plaintiff's psychological health, potentially after six months of appropriate treatment.
- [63] Dr. Ganesan examined the plaintiff again on May 19, 2020. In a follow-up report, he made additional diagnoses: neurocognitive disorder due to traumatic brain injury and somatic symptom disorder with mixed emotional difficulties.
- [64] Among other things, Dr. Ganesan was concerned that, since his first assessment, the plaintiff's performance on a Montreal Cognitive Assessment started to show a problem with abstract thinking. In cross-examination, Dr. Ganesan agreed that symptoms such as cognitive difficulties, depression, anxiety and headaches could occur without a patient suffering from a traumatic brain injury.
- [65] In his second report, Dr. Ganesan concluded that full symptom relief was not possible. He stated that the plaintiff's cognitive function difficulties, including sleep problems and migraines, would continue into the future. The second report painted a more serious and pessimistic picture of the plaintiff's psychological health:

"Given his ongoing difficulty with using a computer, sensitivity to noise, difficulty in crowded places, claustrophobia in enclosed spaces, and ongoing fear in driving, it is very challenging to find a work accommodation for him".

Dr. Lau, Pain Medicine Specialist

- [66] Dr. Brenda Lau, who is an anesthesiologist with a subspecialty in pain medicine, examined the plaintiff on January 22, 2020. Dr. Lau is a co-founder of a physician-led community-based interdisciplinary pain clinic in Vancouver. Dr. Lau's report, dated May 25, 2020, noted that, at the time of his examination, the plaintiff had pronounced photosensitivity, pain reactions to palpation over his nuchal region, C7, T1, T2, T5 to T12, L1, L2, L4-5 and other areas, paresthesia sensations in various locations and limited lumbar extension due to pain and poor neck extension.
- [67] Dr. Lau diagnosed the plaintiff with the following conditions as a result of the first accident: soft tissue sprains to the neck and back; contusion and mild sprain of the right knee; and paresthesia of the fourth and fifth fingers related to mild ulnar nerve compression at the right elbow.
- [68] Dr. Lau diagnosed the following conditions as a result of the second accident, all of which she concluded were aggravated by the third accident: post-traumatic cervicogenic headaches due to occipital neuralgia, soft tissue contracture; whiplash associated disorder; mild concussion symptoms and persistent post-concussion symptoms such as photophobia, phonophobia, dizziness and periorbital tightness; depression; anxiety; driving phobia; and sleep disturbance.
- [69] In reviewing the plaintiff's post-motor vehicle accident history, Dr. Lau noted that he experienced immediate headache in the occipital region at the time of the second accident and reported feeling dazed and disoriented for months afterwards.
- [70] According to Dr. Lau, the plaintiff's prognosis to return to prior function is "guarded". Treatments to reduce his pain symptoms may help but she concluded that these treatments will not provide a permanent solution and he is unlikely to return to work or sports that involve his arms and back.

Dr. Perey, Orthopaedic Surgeon

- [71] Dr. Perey, who is an orthopaedic surgeon, examined the plaintiff on January 19, 2018. He examined the plaintiff prior to the surgery addressing the plaintiff's right ulnar nerve injury, but did not perform that surgery. Dr. Perey noted that the plaintiff's main symptom was numbness to the "ulnar one and half digits of his right hand" and grip weakness. The plaintiff denied experiencing any previous issues with hand weakness or numbness prior to the first accident. Dr. Perey concluded that most of this problem related to "compression of the ulnar nerve at the elbow" and agreed with the decision to perform an ulnar nerve decompression.

- [72] In cross-examination, Dr. Perey would not agree that it was unusual for a patient to fail to mention numbness in his right arm or hand immediately after a motor vehicle accident. He opined that people sometimes do not notice numbness until after the pain has subsided. He also stated that a failure to report numbness right away would not rule out a neurological injury.

Dr. Dommann, Neurologist

- [73] The defendants called Dr. Steven Dommann, who is a neurologist, to give medical opinion evidence. He examined the plaintiff on March 17, 2020. His report dated April 23, 2020 found no basis to directly link the right-sided ulnar nerve injury to the first accident and concluded it was more likely caused by a different mechanism.
- [74] Dr. Dommann also concluded that it was unlikely that the second or third accidents caused the plaintiff to suffer a MTBI or mild concussion because the plaintiff's symptoms have persisted for longer than six months. In his opinion, other factors, such as mood and anxiety disorders, were the likely causes of the plaintiff's ongoing symptoms.
- [75] Dr. Dommann concluded that if the plaintiff followed the advice of his neurologist related to headache treatment, his ongoing headaches should resolve with adequate treatment. Overall, Dr. Dommann concluded that the plaintiff has not suffered any permanent disability from the accidents.
- [76] The plaintiff's counsel submitted that little, if any, weight should be accorded to Dr. Dommann's opinion because he made bald conclusory statements and offered simplistic opinions that were not based on the plaintiff's particular circumstances. I agree that Dr. Dommann's report contained minimal information to understand how or why he reached his particular opinions. While Dr. Dommann did flesh out some of the reasoning behind his opinions during his cross-examination, the lack of analysis, detail and explanation in his expert report and in his testimony causes me to place little weight on his evidence.

Other Opinion Evidence

- [77] The plaintiff called Ms. Cecile Petra, an occupational therapist, to testify about an occupational performance evaluation and cost of future care report she wrote. Ms. Petra interviewed the plaintiff on May 6, 2020 and on June 3, 2020 she performed functional testing of the plaintiff in his home. Ms. Petra had to ask the plaintiff to lie down for parts of the assessment due to his reports of dizziness. When the plaintiff reached for something overhead, Ms. Petra had to terminate that test for safety because his body started to sway.

- [78] Ms. Petra concluded that, even though the plaintiff had to lie on the couch during part of the assessment, he participated to the best of his ability. His performance was consistent with his subjective reports and objective findings on the standardized tests performed. Based on testing, Ms. Petra found that the plaintiff had many symptoms that interfere with his daily function including: severe impact of headaches, high interference of pain, extreme anxiety or panic, severe depression, severe impact of fatigue and dizziness on daily activity.
- [79] Ms. Petra found the following limitations posed a barrier to the plaintiff's functional performance: "reduced strength and range of motion in all extremities (impacted by sensory symptoms and pain, and leading to deconditioning), balance impairments, dizziness, photo/phonosensitivity, reduced cognitive tolerance, reduced auditory memory, anxiety, low mood, sleep disturbance, and fatigue. Limitations are further impacted by experience of pain and headaches". For example, when lifting everyday objects weighing under 15 pounds, the plaintiff performed soundly but, beyond that weight, he started to wobble and report pain.
- [80] Ms. Petra concluded that the plaintiff's physical skill/performance deficits included moving slowly to manage dizziness, reduced shoulder, hip, knee and ankle strength and deconditioning for all major muscle groups, poor balance and reduced repetitive forward reach.
- [81] Ms. Petra concluded that the plaintiff had deficits in executive function that impact his daily living activity, including problems multi-tasking and organizing. She noted that the plaintiff was unable to manage household tasks below his waist or above-shoulder height due to pain and dizziness. However, he was capable of "light" tasks like dishwashing and cooking.
- [82] The plaintiff also called Ms. Avita Sharma, who is a rehabilitation specialist, to testify. Due to COVID-19 restrictions, Ms. Sharma could not assess the plaintiff in person. Rather, Ms. Sharma conducted a two and a half hour "virtual" vocational assessment on April 28, 2020. Ms. Sharma prepared two reports setting out her vocational assessment of the plaintiff; however, her assessment did not include any vocational testing because she was unable to conduct that testing of the plaintiff.
- [83] Ms. Sharma concluded that the plaintiff's injuries sustained in the second and third accidents, as relayed to her by the plaintiff in the interview and from the clinical records, have significantly narrowed the plaintiff's vocational options.
- [84] The defendants called Mr. Vincent Yip, who is a physiotherapist, as an expert witness. The plaintiff attended an appointment with Mr. Yip on March 3, 2020. However, according to Mr. Yip's functional capacity evaluation report dated April 3, 2020, he was unable to complete his functional capacity assessment because the plaintiff terminated the testing two hours and 55 minutes into the appointment due to increased dizziness and headache. Only 55 minutes of that time was spent conducting functional testing.

[85] Mr. Yip was unable to say whether the plaintiff is able to fully meet his pre-accident job demands as an assistant manager at a tire shop because he could not assess many important aspects of the plaintiff's functional capacity or determine his true functional limitations due to the plaintiff's self-limiting during most tests.

[86] Based on the testing that Mr. Yip was able to conduct, he noted as follows:

During today's assessment, signs of full muscular effort during strength testing including changes in grip, stance, and muscle recruitment were not observed. He appears to have worked to the limits of his symptoms only. Overall, results of functional testing cannot be considered a valid representation of Mr. McHollister's current level of function. Physiologically, the writer suspects that he is capable of performing more than what he demonstrated during this evaluation.

The Plaintiff's Prognosis

[87] The plaintiff testified that he suffers from ongoing dizziness, noise and light sensitivity. He has constant pain from headaches, neck pain and back pain. Since the second and third accidents, his cognitive abilities have declined. He has trouble remembering things and concentrating. He now suffers from ongoing feelings of anxiety and panic, especially about driving, and he feels overwhelmed and sad.

[88] The plaintiff has focussed a considerable amount of time and effort since the second and third accidents on his physical recovery. Since the second and third accidents, he has attended the gym very regularly, nearly daily.

[89] The plaintiff tendered records showing his attendance at the gym between 2016 and 2020. They confirm that, by March 8, 2018, the plaintiff attended regularly up to early March 2020. The plaintiff testified that he does cardio, weights, stretching and strength exercises at the gym. When his heart rate goes up, or when he lifts his head up quickly, he feels dizzy.

[90] Sometimes the plaintiff will practice yoga at a yoga studio after he finishes exercising at the gym. He frequently does hot yoga and stretching and exercise routines, both at home and outside the home. It is clear that he is extremely devoted to physical exercise and he pursues it diligently as part of his recovery strategy.

[91] The plaintiff testified that he cannot tolerate bright lights or loud noises. He wore dark sunglasses while testifying and many of the medical practitioners noted that he wore sunglasses during their appointments. However, he is able to watch movies and attend rugby games and the clubhouse for social events. His friends described the post-game atmosphere in the clubhouse as boisterous and loud.

[92] Dr. Medvedev noted that because the plaintiff's "physical, cognitive and psychological symptoms are aggravated by physical exertion or stress", he remained disabled from employment and could not return to his prior work or playing rugby. As for the period of disability, Dr. Medvedev said the duration was guarded.

- [93] In her vocational assessment report, Ms. Sharma noted Dr. Lau's guarded prognosis regarding the plaintiff's ability to return to his pre-accident level of function. Ms. Sharma stated that the plaintiff requires ongoing treatment and rehabilitative intervention to optimize symptom management and overall functionality but she noted these treatments were unlikely to make a significant long-term difference.
- [94] Ms. Sharma concluded that the plaintiff's physical limitations, combined with his documented psycho-emotional and cognitive symptoms, created negative challenges for his employability by potentially increasing his absenteeism and reducing his functioning at work.
- [95] Recently, the plaintiff got out of bed and became very dizzy. He lost his balance, fell forward and hit his nose against the doorframe. He then went to the hospital, where he was assessed and released.
- [96] In 2020, the plaintiff also started to experience chest pain and dizziness. He underwent a battery of tests such as an electrocardiogram, CT and MRI scans and had blood work done. The doctors concluded that there was nothing wrong with his heart but he was experiencing symptoms of stress and anxiety. The plaintiff stated the stress was caused by the accidents and "life in general".

Findings and conclusions regarding the plaintiff's injuries

- [97] I will begin by providing some brief comments regarding the non-party witnesses who testified at this trial.
- [98] In *Radacina v. Aquino*, 2020 BCSC 1143, Justice Skolrood provided a useful summary of the law applicable to assessing credibility and reliability as follows:
- [92] Numerous authorities have discussed the principles governing the assessment of credibility: see in particular *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-87, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392. In *Bradshaw*, Madam Justice Dillon held that conflicting testimony should be assessed in light of the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (at para. 187, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Q.B.)).
- [93] In addition to the approach advanced by Justice Dillon in *Bradshaw*, Justice Abrioux, as he then was, in *Karim v. Li*, 2015 BCSC 498 at para. 89, identified a number of principles that may inform the court's approach in cases in which there is an absence of objective medical findings or where those findings are out of proportion to the symptoms claimed:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);

- every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: Price at 397;
- where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: Price at 399; Tai v. De Busscher, 2007 BCCA 371 at para. 41;
- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: Edmondson v. Payer, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114; and
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: Fan (Guardian ad litem of) v. Chana, 2009 BCSC 1127 at para. 73, aff'd 2011 BCCA 516.

[94]It is important to distinguish between credibility and reliability, which are different concepts. Credibility refers to the veracity of a witness's testimony whereas reliability is concerned with the accuracy of the testimony: R. v. Morrissey (1995), 22 O.R. (3d) 514 at 526 (C.A.).

[95]The distinction is well summarized by the Ontario Court of Appeal in R. v. H.C., 2009 ONCA 56 at para. 41:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

- i. observe;
- ii. recall; and
- iii. recount

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

[96]Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: R. v. R. (D.), [1996] 2 S.C.R. 291 at para. 93; R. v. Howe (2005), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).

- [99] The plaintiff's friends, Mr. McQueen and Mr. Breadon testified about their observations of the plaintiff prior to and after the accidents. There were no signs that they were exaggerating or tailoring answers to assist the plaintiff. Despite their long friendships with the plaintiff, they answered questions about him objectively. If they did not know something, they said so. I find Mr. McQueen and Mr. Breadon to be credible and reliable witnesses.
- [100] I find that in some respects, Ms. Aroneanu was credible and reliable, especially with respect to observations of the plaintiff's post-accident behaviour around their home, for example, her detailed description of his motivation problems, difficulty with household chores and how he was taking on new challenges, such as cooking.
- [101] Other parts of Ms. Aroneanu's evidence caused me to doubt her credibility, reliability, and some aspects of her evidence. She sometimes appeared to exaggerate or stray into opinion evidence. For example, she testified that, in the day or so following the second accident, the plaintiff seemed foggy and dizzy and she noticed an immediate "switch in his world perspective".
- [102] Ms. Aroneanu also described relying on her experience as a mental health crisis volunteer to notice when the plaintiff was experiencing depression and anxiety. She described pushing the plaintiff to discuss the possibility he would never work again and sharing with him her knowledge of how to cope.
- [103] She described that the plaintiff could react angrily when she pushed this topic and he eventually asked her to stop talking about it. Ms. Aroneanu said she believed she needed to "persist" with these discussions to help the plaintiff to realize that life as he knew it may no longer be possible.
- [104] I accept the evidence of Dr. Hedges concerning his treatment and observations of the plaintiff both in his office and at the rugby club. Dr. Hedges provided credible and reliable evidence about his long history of treating and observing the plaintiff. He testified based on his own memory and by referring to the clinical records that he prepared when he treated the plaintiff.
- [105] I will now comment on the plaintiff's evidence. The defendants' counsel submits that the plaintiff was not a credible or reliable witness due to the many contradictions in his evidence and his selective memory. For example, the plaintiff could not recall the many rugby injuries that he had sustained prior to the accidents, including injuries to the same areas that he claimed were injured in the accidents.
- [106] The plaintiff's counsel submits that any inconsistencies and memory lapses in the plaintiff's evidence were inconsequential. The plaintiff's counsel also submits that a patient is not required to recall every statement or symptom that he might have reported to a medical practitioner during a clinical visit.

- [107] I find that some aspects of the plaintiff's testimony lacked credibility. For example, he displayed a marked tendency to become evasive and argumentative when confronted with facts that were potentially unhelpful to his case. His evidence during cross-examination about his performance during firefighter training and testing exemplified this. The plaintiff became noticeably defensive and somewhat argumentative when cross-examined about his activities during the RV trip. He appeared to try to minimize his involvement in the driving during the trip.
- [108] Overall, the plaintiff had good recall of facts that were helpful to his case but conspicuously poor recall of facts that were unhelpful. For example, he had selective recall of the type of injuries he sustained prior to and after the first accident, especially those related to his head or his right arm and shoulder. When he answered questions that might reflect badly on his case, especially in cross-examination, he reflexively answered that he did not remember or know the answer.

First Accident

- [109] The plaintiff claims that he sustained injuries in the first accident, including soft tissue injuries to his neck, back and most significantly, an injury to his right ulnar nerve that caused numbness in his right hand. The defendants deny that the injury to the ulnar nerve was caused by the first accident.
- [110] In *Sawires v. Paris*, 2021 BCSC 240, Justice Adair helpfully summarized the principles applicable to determining causation as follows:
- [70] The basic principle of tort law is that the defendant must put the plaintiff back in the position the plaintiff would have been in had the defendant's tortious act not occurred. The test for causation is the "but for" test, meaning the plaintiff bears the onus of proving, on a balance of probabilities, that "but for" the defendant's negligence, the plaintiff's injuries would not have occurred. If, without the defendant's tortious act, the injury would have resulted in any event, the defendant is not liable for the injury or the losses flowing from it. However, if the injury would not have resulted but for the defendant's tortious act, the defendant is liable to the plaintiff for the whole of the losses flowing from the injury. A plaintiff must establish causation for both injury and loss. The losses "flowing" from an injury are those losses that the plaintiff proves, on a balance of probabilities, would not have occurred "but for" the defendant's negligent act. A defendant is not liable for injuries or losses that were not caused by the defendant's negligence. See: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 17, 19-20, 24 and 34-35; and *Blackwater v. Plint*, 2005 SCC 58, at para. 78.
- [111] I find that, in the first accident, the plaintiff sustained soft tissue injuries to his neck, back and leg which required physiotherapy treatments. He testified that he went to work the day of the accident and, while he felt some pain and stiffness, it did not impact his ability to work. I find the plaintiff was able to return to playing rugby after the first accident and played the rest of the season without any significant limitations. In cross-examination,

when confronted with a newspaper article picturing him playing rugby, the plaintiff admitted that he played rugby the day after the first accident.

- [112] The plaintiff testified that the soft tissue injuries that he sustained in the first accident were fully resolved by May 2014. However, his right ulnar nerve symptoms continued until corrective surgery in late 2018. Based on my assessment of the totality of the evidence, including the evidence from medical service providers and the evidence about injuries to the plaintiff's right arm before and after the first accident, I do not find that this right ulnar nerve injury was caused by the first accident.

Second and Third Accidents

- [113] The plaintiff testified that he experienced significant cognitive deficits caused by the second accident. During his testimony, I could not detect any cognitive deficits such as trouble finding words or expressing himself. He spoke clearly and articulately. He provided detailed explanations of his personal history, the accidents and his interaction with medical professionals.
- [114] In his direct examination, the plaintiff was asked about his ability to bend his neck. He stated that he had trouble holding his head up and, if his neck pulls forward, he experiences sharp pains. He also said he could not turn his neck all the way and, if he moved his head suddenly, such as to look up, he would become extremely dizzy. Ms. Petra also observed that when the plaintiff reached above his head to grab something, he became dizzy and his whole body swayed.
- [115] In contrast to his evidence about his significant difficulties bending down, moving his neck and looking up, which were corroborated by Ms. Petra's observations, the plaintiff is able, on an almost daily basis, to attend the gym and practice hot yoga. He testified to spending an hour or two, almost daily, doing cardio and strength exercises at the gym. With respect to his frequent yoga, he did not recount any problems, such as dizziness or sharp pains, when engaging in the full range of body movements typically associated with yoga.
- [116] I find the plaintiff's evidence about his ongoing capacity to engage in extensive physical exercise to be at odds with his own evidence about his limitations and pain and with the observations of significant physical limitations made by Ms. Petra, Ms. Sharma and Mr. Yip.
- [117] In her report, Dr. Lau noted that, after the second accident, the plaintiff developed mild concussion symptoms and persistent post-concussions symptoms including photophobia, dizziness and phonophobia.
- [118] The plaintiff's friends confirmed that the plaintiff has continued to attend rugby matches and post-match festivities in the boisterous atmosphere of the club house or a bar. The plaintiff also testified that he has been able to continue watching movies since the accidents. While the plaintiff testified that he is very light sensitive, and that he cannot tolerate watching screens or hearing loud noises, I have concluded that there is insufficient

evidence to establish the existence or cause of those alleged conditions being attributable to an injury he sustained in the accidents.

- [119] A key issue is whether the plaintiff suffered an MTBI in the second accident. Dr. Medvedev opined that the plaintiff sustained a concussion and MTBI in the second accident. Dr. Dommann disagreed with that diagnosis.
- [120] Dr. Hedges was firm in his testimony that the plaintiff showed no signs of concussion during the appointment on February 23, 2018 which was the day after the second accident. Dr. Hedges testified that the plaintiff did not report any concussion symptoms when specifically asked. As a result, Dr. Hedges did not conduct a concussion assessment of the plaintiff on February 23, 2018.
- [121] Dr. Hedges testified that he had assessed the plaintiff for concussion and other injuries on many occasions prior to February 23, 2018. For example, in November 2016, in relation to an injury to the plaintiff's right temple, Dr. Hedges performed a full concussion assessment of the plaintiff in the team dressing room.
- [122] Dr. Hedges described his practice of keeping detailed notes of the pertinent information that he gathered during medical appointments. He was adamant that, had the plaintiff mentioned or shown signs of concussion, he would have recorded it.
- [123] I find Dr. Hedge's evidence regarding his clinical assessment of the plaintiff on February 23, 2018 to be significant and helpful. Dr. Hedges has a long history of treating the plaintiff, as well as other athletes, for injuries including head injuries. I find that Dr. Hedges has extensive experience diagnosing and treating concussion due to his many years of experience as the rugby team doctor. In my view, it is reasonable to infer that Dr. Hedges was experienced at identifying and treating concussion injuries generally, but also with respect to the plaintiff in particular.
- [124] In my view, Dr. Hedges was uniquely placed to assess the plaintiff following a head injury. On February 23, 2018, Dr. Hedges actively considered and discussed the possibility of a concussion injury with the plaintiff.
- [125] It is a well established principle that courts must be cautious when considering minor discrepancies in clinical records, or even a complete absence of a clinical record regarding an alleged injury.
- [126] In *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114 at para. 32, Justice N. Smith noted that statements in clinical records are not verbatim records of everything said. Usually, they provide a brief summary of what the doctor thought was pertinent to the treatment at the time.

- [127] I find that the plaintiff was a sophisticated and knowledgeable patient. Over the years, he experienced numerous injuries, including head injuries. I find that his experience playing rugby, sustaining injuries and being assessed for injuries, such as concussions, gave the plaintiff greater than average experience describing his symptoms and circumstances to treating medical professionals, including Dr. Hedges.
- [128] The particular circumstances of this case typify the unusual circumstance mentioned in Edmonson, at para. 37 where a party's description of his symptoms is "clearly inconsistent with a failure to seek medical attention". Such a circumstance could lead the court to draw an adverse conclusion about a party's credibility.
- [129] In the present case, I do make an adverse finding and infer that the plaintiff did not mention concussion-type symptoms, such as dizziness and fogginess, to Dr. Hedges in his appointment after the second accident despite being asked about it.
- [130] I do not find that the plaintiff has established that he sustained a concussion or an MTBI in the second accident that was aggravated by the third accident. It follows that I do not accept the opinions of Drs. Medvedev, Lau and Ganesan to the extent that they rely on the fact that the plaintiff sustained a concussion/MTBI in the second accident.
- [131] As a result of the second and third accidents, I find that the plaintiff sustained soft tissue injuries to his neck and his low, mid and upper back, and he now experiences intermittent chronic muscle strain. He has also developed ongoing post-traumatic headaches following the second accident, which worsened following the third accident. His headaches have required pharmacological, Botox and nerve block treatments, all of which have provided only temporary relief.
- [132] As a result of the soft tissue injuries and the associated pain, the plaintiff's psychological health has deteriorated. The plaintiff's inability to resume playing rugby since the second and third accidents is a major contributor to his diminished psychological health. He experiences frustration over his inability to play rugby since the second accident. He described experiencing sadness and depression as a result. His friends confirmed that his overall mood and energy levels have declined since the second and third accidents.
- [133] The plaintiff relies on the expert reports provided by Dr. Ganesan to support his claim that he has developed significant psychological problems as a result of the accidents. As I already noted, Dr. Ganesan's second assessment of the plaintiff diagnosed several new and serious psychological conditions.
- [134] However, as I have already concluded that the plaintiff did not suffer an MTBI in the accidents, Dr. Ganesan's opinion the plaintiff is suffering from a neurocognitive disorder, due to traumatic brain injury, is not supported by my factual findings. In addition, Dr. Ganesan's evidence did little to assist me in understanding how, or why, the plaintiff developed somatic symptom disorder with mixed emotional difficulties in the 11 months that elapsed between Dr. Ganesan's first and second assessment.

- [135] The plaintiff and Ms. Aroneanu testified that, following the third accident, the plaintiff initially suffered emotional and physical setbacks. However, they described improvements in his condition to the date of trial.
- [136] The plaintiff testified that his occupational therapist and Dr. Hedges referred him to counselling to deal with his "wandering thoughts" and anxiety, especially around driving. The plaintiff said that he is learning assertiveness training, breathing and meditation techniques at his counselling sessions. He also reported that recent medication adjustments have helped even out his mood and improve his sex drive.
- [137] Evidence such as this causes me to doubt Dr. Ganesan's new diagnosis of somatic symptom disorder with mixed emotional difficulties. I find that this new diagnosis does not accord with my overall assessment of the evidence.
- [138] However, the evidence is clear that the plaintiff did develop some psychological symptoms following the second accident, which were aggravated in the third accident. I find that as a result of injuries sustained in the second accident, the plaintiff developed anxiety disorder with mixed features of depression, post-traumatic stress disorder and pain syndrome.
- [139] Dr. Ganesan diagnosed these conditions in his first report. Dr. Ganesan stated that with proper treatment, it was possible the plaintiff would experience improvements in his condition. I agree with that aspect of Dr. Ganesan's opinion and note it is consistent with the accepted evidence that, by the time of trial, the plaintiff had experienced some improvements to both his mental and physical health.

Past income loss and loss of future earning capacity

- [140] In *Sawires*, Adair J. summarized the well-settled principles for assessing damages for past income loss and loss of future earning capacity as follows:

[109] There are two stages in assessing a claim for damages for loss of earning capacity (in this case, loss of future earning capacity): *Gillespie v. Yellow Cab Company Ltd.*, 2015 BCCA 450, at para. 34. The first stage is entitlement. A plaintiff must prove that the injuries suffered in the accident and the resulting symptoms have impaired the plaintiff's ability to earn income and that there is a real and substantial possibility that the plaintiff's diminished earning capacity will result in a pecuniary loss. A plaintiff may be able to prove that there is a substantial possibility of a future loss despite having returned to his or her usual employment. However, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss. If the plaintiff satisfies that burden, and therefore establishes an entitlement to compensation, then the second stage requires an assessment of the loss. A plaintiff may prove the quantification of that loss either on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured. See generally *Perren v. Lalari*, 2010 BCCA 140, at paras. 21 and 32. Either way, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of the plaintiff's working career, taking into account relevant and realistic negative and positive contingencies.

Past Income Loss

First Accident

- [141] The plaintiff testified that, following the first accident, he missed approximately 10 days of work due to attending medical or therapy appointments. Most of the time, he used his vacation days to cover these absences from work. When he was away from work due to medical appointments, he was not earning commission on tire sales. He estimated that, in 2014, he earned \$150 per day, so ten days added up to approximately \$1,500 of lost wages.
- [142] I do not find that the plaintiff has proven that he suffered a past loss of income after the first accident on a balance of probabilities. There was no documentary evidence to support his statement that his vacation days were not paid-out to him since he had to use vacation days to attend medical appointments.
- [143] In my view, the plaintiff's claim that he was required to use vacation time to attend medical appointments following the first accident is more appropriately dealt with as part of the plaintiff's non-pecuniary loss claim.

Second and Third Accidents

- [144] The plaintiff has not attended work since the date of the second accident. His counsel submits that it is appropriate to assume that, but for the second and third accidents, he would have continued working at the tire shop up to the date of trial. I agree with this approach. Counsel for the defendants also agreed with that assumption and that \$145,000 was an accurate and reasonable assessment of the plaintiff's past net income loss.
- [145] I find that the plaintiff has established, on a balance of probabilities, that but for the second and third accidents, he would have continued his full-time employment as an assistant manager at the tire shop, especially since he had maintained employment there since high school. I also find that he has established that he is entitled to a net amount of \$145,000 as an award for past loss of income resulting from the second and third accidents.

Loss of Future Earning Capacity

- [146] To succeed in his claim for loss of future earning capacity, the plaintiff must prove that the injuries suffered in the accidents and the resulting symptoms have impaired his ability to earn income and that there is a real and substantial possibility that his diminished earning capacity will result in a pecuniary loss.

- [147] I have already determined that the plaintiff sustained soft tissue injuries in the first accident which fully resolved and did not prevent him from working. While the plaintiff underwent treatment for his right ulnar nerve after the first accident, I was unable to conclude that this was caused by the first accident and therefore, there is no basis to award the plaintiff an amount for loss of future earning capacity related to his complaint of very mild residual numbness in his right hand.
- [148] I have also already determined that he sustained soft tissue injuries and chronic post-traumatic headache and psychological problems arising from the second accident, which were aggravated by the third accident. His ongoing symptoms from those injuries have prevented him from working since the second accident. The plaintiff's symptoms mean that he can no longer concentrate, multi-task effectively, tolerate loud noises or bright lights. He frequently gets dizzy when he moves his head suddenly and his sore back and neck prevent him from reaching, bending down or lifting up heavy objects.
- [149] The plaintiff's counsel submits that I ought to approach the claim for loss of future earning capacity on the basis that the plaintiff is totally, permanently, disabled from working in the future and, but for the second and third accidents, the plaintiff would have begun working full time as a firefighter by approximately September 2020. Accordingly, assuming no residual earning capacity, the plaintiff's counsel submits the plaintiff's future loss of earning capacity is \$2,800,000 as supported by the calculations provided by Mr. Darren Benning, an economist.
- [150] In the alternative, the plaintiff's counsel submits that I ought to employ a blended approach that assumes the plaintiff would have worked as both a firefighter and as a manager at the tire shop until retirement. Based on such an approach, assuming no residual earning capacity, the plaintiff's counsel submits the plaintiff's future loss of earning capacity is \$2,400,000.
- [151] In the further alternative, the plaintiff's counsel submits that I ought to assume the plaintiff would have worked only as a manager at the tire shop until retirement. Based on such an approach, assuming no residual earning capacity, the plaintiff's counsel submits the plaintiff's future loss of earning capacity is \$2,000,000.
- [152] I begin by considering whether the plaintiff would have worked as a firefighter but for the second and third accidents. The plaintiff completed basic firefighter course work and training in 2013. He said that, by 2013, he had everything necessary to become a firefighter. Between 2013 and 2015, he applied for entry level positions in four fire departments in British Columbia, namely, Delta, Burnaby, New Westminster and Vancouver. He did not receive any calls for interviews after he applied.

- [153] In cross-examination, the plaintiff had no idea why his applications were unsuccessful nor did he seem aware of any potential weakness in his qualifications. When asked about Mr. McQueen securing a position as a firefighter, the plaintiff said he had no idea what might have set Mr. McQueen's application apart from his own.
- [154] Mr. Lehmann, the Fire Chief for the City of Surrey Fire Department, testified as a witness for the defendants. He is involved in hiring firefighters but had no knowledge of the plaintiff nor his job applications.
- [155] Mr. Lehmann testified that Surrey receives approximately 400 applications for firefighting jobs each year. Surrey typically hires about 12 to 16 firefighters annually. Out of the 400 applications received, only about 20 to 25 applications are screened out for lack of required qualifications. In other words, Mr. Lehmann's evidence was that, for the City of Surrey, there are many more qualified applicants than positions available in a typical year.
- [156] As part of her vocational assessment, Ms. Sharma considered whether the plaintiff could have become a firefighter. She concluded that he was a reasonable candidate because he met the minimum requirements and he had some preferred qualifications. However, Ms. Sharma agreed that the plaintiff could have been more highly qualified, for example, had he taken emergency medical training.
- [157] Mr. Breadon and Mr. McQueen testified regarding their experience preparing for and embarking on firefighting careers. Both testified to having post-secondary education and participating in a volunteer program at the Point Roberts, Washington firehall. Mr. Breadon spent one and a half years volunteering there. That program involved, among other things, staying at the firehall one night each week.
- [158] Mr. McQueen's and Mr. Breadon's evidence demonstrated that post-secondary education and fire related volunteer experience likely contributed to their success securing jobs as firefighters. The plaintiff took no steps to gain the same kind of focussed and time consuming education and volunteer experience to enhance his qualifications.
- [159] On my view of the totality of the evidence, the plaintiff has not established a substantial possibility that, but for the accidents, he would have secured a job as a firefighter by September 2020 or at any point thereafter. While the plaintiff met the basic job requirements, he lacked the additional experience, education and skills to assist him to secure a firefighting job, especially given the evidence about the desirability and high levels of competition for such jobs. I therefore conclude that, but for the accidents, the plaintiff would have continued working as an assistant manager at the tire shop.
- [160] I will now consider whether the plaintiff has established that the second and third accidents caused or contributed to the impairment of his future earning capacity. Dr. Lau's opinion was guarded as to whether the plaintiff could return to his previous work or other work that required arm and leg use. Dr. Medvedev's opinion was also guarded regarding the plaintiff's chances of returning to his previous work.

- [161] In Dr. Ganesan's first report, he opined that with effective treatment of the plaintiff's anxiety disorder, depression, post-traumatic stress disorder and pain syndrome, including medication adjustments, there would be grounds to reassess him after six months to review symptom improvement. In other words, Dr. Ganesan contemplated the potential for symptom improvement with effective treatment.
- [162] I have already laid out my findings regarding the injuries that the plaintiff sustained in the accidents. To the extent that the expert reports rely on factual assumptions that the plaintiff sustained injuries which have not been established, I have taken that into account in weighing the expert evidence.
- [163] Turning to the plaintiff's functional capacity evaluation, his gym attendance records indicate he went to the gym on March 3, 2020, prior to his appointment with Mr. Yip that day, and again on March 4, 2020, the day after his appointment. He testified that his typical gym workout involved an hour or more of strength training, potentially with light dumbbell weights, stretching and cardio, sometimes followed by yoga. He stated that frequent gym workouts or yoga assisted him when he was planning to do something vigorous since the exercise could reduce his headaches and help his functioning.
- [164] The plaintiff's counsel submitted that Mr. Yip's report merely shows a "snapshot" of the plaintiff's ability to perform specific tests, on a specific day, at specific weight ranges in a non-real world setting. At most, the plaintiff's counsel submits that the report shows that the plaintiff's ability to carry out physical tasks on the day in question was "profoundly limited by his symptoms".
- [165] In light of the evidence as a whole, I am troubled by the circumstances surrounding the plaintiff's functional capacity evaluation. On the day in question, the plaintiff attended the gym, which he said could help his functioning for vigorous activity. However, after 55 minutes of functional testing, the plaintiff's symptom aggravation caused him to terminate the testing. As a result, the court lacks the benefit of an expert assessment of the plaintiff's functional capacity.
- [166] I have a similar concern with respect to the plaintiff's participation in Ms. Petra's occupational performance evaluation. It is troubling that, while he manages to exercise almost daily at the gym and/or the yoga studio, he demonstrated body sway so dangerous (while reaching overhead for a household object), that Ms. Petra terminated the testing for the plaintiff's own safety.
- [167] Ms. Petra concluded that the plaintiff was unable to perform household tasks below hip or above shoulder height due to back and shoulder pain and severe dizziness associated with those movements. I find the plaintiff's inability to safely lift or reach for a common household object in the presence of Ms. Petra hard to reconcile with the evidence about his exercise regime focussing on strength building, stretching and cardio.

- [168] The evidence taken as a whole, causes me to conclude that there are significant discrepancies in evidence about the plaintiff's current capacity to carry out day-to-day activities.
- [169] I find that Ms. Sharma's reports regarding the plaintiff's vocational assessment are of limited assistance because no actual vocational testing of the plaintiff occurred. In saying so, I appreciate that COVID-19 safety protocols restricted Ms. Sharma's ability to apply the usual vocational assessment practice and vocational testing to the plaintiff. Ms. Sharma's reports are thus highly reliant on the accuracy of the plaintiff's self-reporting during his interview and on the accuracy of the medical records and reports that were provided, such as that of Dr. Ganesan.
- [170] Ms. Sharma's assessment of the plaintiff is bleak. She concluded that the plaintiff "cannot be regarded as competitively employable in any of his past physically-demanding positions in comparison to another non-injured worker in a similar job". She concluded that the plaintiff's "psychological, visual and cognitive impairments, pain and associated functional limitations" have significantly impaired his current and future levels of employability. Ms. Sharma stated that "the plaintiff is no longer considered as suited for the few occupations that he has done for the bulk of his working career."
- [171] In considering the plaintiff's suitability for other vocational options, Ms. Sharma noted that he considered himself vocationally disabled and, based on her review of the medical evidence, the plaintiff "would not be competitively employable for any prospective occupations requiring cognitive acuity and endurance, physical strength, significant postural demands" nor could he deal with exposure to noisy, visually stimulating environments.
- [172] Ms. Sharma concluded that the plaintiff is not a candidate for formal academic training at this time and considered him better suited for employment with lighter job demands such as customer service or cashier positions. Overall, she opined that he is not currently employable, even with accommodations.
- [173] The plaintiff's counsel urges me to find that the plaintiff is so profoundly and permanently disabled that he will never work again. In the alternative, his counsel submits that I should find his residual earning capacity to be a very modest \$400,000 from part-time employment, earning approximately \$20 per hour up to retirement. The plaintiff relies on the bleak picture painted by the various medical and non-medical experts regarding his injuries and prognosis.
- [174] The defendants' counsel points out that no expert has opined that the plaintiff can never work again. The defendants submit that the plaintiff is more likely than not to be able to return to work in the future, possibly even to his former employment. They submit that an appropriate award for loss of future earning capacity is \$200,000 to \$300,000.

- [175] I do not find that the plaintiff has established that he is permanently or totally disabled from carrying out any work as a result of the injuries he sustained in the second and third accidents. In reaching this conclusion, I have considered, among other things, the medical expert evidence and the non-medical expert evidence, such as the evidence provided by Mr. Yip, Ms. Sharma and Ms. Petra.
- [176] While the plaintiff has failed to establish that he will never work again at any job due to his injuries, I do conclude that due to the injuries he sustained in the second and third accidents he has suffered some impairment to his ability to earn income and that he has suffered a resulting pecuniary loss. I find it more likely than not that the injuries sustained in the second and third accidents will prevent him from returning to his job as the assistant manager at the tire shop.
- [177] In my opinion, there are a number of reasonable and appropriate contingencies to take into account when considering the plaintiff's future earning capacity. For example, he is highly motivated to pursue physical exercise and treatments and he devotes considerable time to this. I find it more likely than not that the plaintiff will derive maximum benefit from these activities, which were recommended by the medical experts, and the plaintiff is likely to experience ongoing improvement in his functioning.
- [178] Currently, the plaintiff is beginning to engage in volunteer activities. Both he and his spouse testified that his physical and mental health had gradually improved following the third accident. For example, his driving anxiety has improved to the point that he was able to drive an RV on a road trip. Based on the plaintiff's history of recovering from and managing his functioning after multiple injuries, I find it more likely than not that his physical and mental symptoms will continue to improve with ongoing and appropriate treatment.
- [179] I agree with the plaintiff's counsel that the plaintiff was a reliable and diligent worker while he worked at the tire shop. He clearly enjoyed his job and he took pride in his excellent attendance record. The plaintiff identifies with being a valued employee and I find it more likely than not that he will ultimately achieve a return to paid employment in the future.
- [180] However, I find that the plaintiff is more likely than not dealing with the accumulated effect of years of sports injuries, on top of the injuries that he sustained in the second and third accidents. Dr. Lau described the degenerative changes and accumulated effects of sports injuries in her report. It is more likely than not that the plaintiff will experience periodic headaches and episodes of neck and back pain as a result of accumulated injuries and that this will hamper his ability to work in a heavy physical job and result in periods of missed work during symptom flare-ups.
- [181] In view of the particular circumstances of this case, which I have explained above, I have concluded that the capital asset approach is best suited to assessing the plaintiff's loss of future earning capacity.

- [182] Keeping in mind the principles stated in cases such as *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 and *Pett v. Pett*, 2009 BCCA 232, the role of the court is to assess losses based on the evidence and not merely to engage in mathematical calculations. However, as explained in *Villing v. Husseni*, 2016 BCCA 422 at paras. 18-19, use of the capital asset approach does not mean the court can make awards entirely at large.
- [183] The capital asset approach is appropriate in this case because I am satisfied that, as a result of the injuries sustained in the second accident and aggravated by the third accident, the plaintiff is less valuable to himself, as he has been rendered less capable overall of earning income from all types of employment, and he is a less attractive employee: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at 356.
- [184] I am satisfied that the plaintiff has made out an entitlement to compensation because, but for the accidents, he would have continued working full time at the tire shop until he retired at age 65. As a result of the injuries he sustained in the second accident, aggravated by the third, I am satisfied that the plaintiff has established that he can no longer perform the duties of that job in the future.
- [185] However, the plaintiff has not established that he will never work again. I find it more likely than not that his physical and mental health will continue to improve to the point that, in the future, he will return to full time employment, for example, as an assistant manager at a retail sales business.
- [186] At the tire shop, the plaintiff earned approximately \$69,000 per year prior to the second accident. Given that he is no longer capable of performing that job and my finding of the strong possibility that he will suffer a future loss of earning capacity for the remainder of his working life, due to his ongoing pain and headache symptoms, I estimate that the plaintiff is now approximately 25% less valuable to himself. As a result, I estimate the annual value of his loss of earning capacity at approximately \$17,000.
- [187] When I apply the multiplier of 25.8790, which factors in the prescribed discount rate of 1.5%, to determine the present value of an assessed annual loss of \$17,000 for 33 years, I arrive at a net present value of the plaintiff's loss of future earning capacity of \$439,943.

Past and Future Loss of Housekeeping Capacity

- [188] The plaintiff seeks \$6,400 and \$77,000 for past and future loss of housekeeping capacity respectively.
- [189] There is no evidence that the plaintiff, prior to moving in with Ms. Aroneanu, performed any housekeeping tasks for himself or anyone else. He did not testify about the housekeeping tasks that he performed while living with his parents. Ms. Sharma made a notation that the plaintiff was not responsible for housekeeping while he lived at his parents' home.

- [190] Ms. Aroneanu has carried out the bulk of the housekeeping tasks due to the plaintiff's fatigue and general lack of motivation to take on these tasks. This is a source of tension in their relationship.
- [191] Ms. Aroneanu testified that the plaintiff complains about feeling dizzy and having pain in his hip and back when he bends down low to the ground. He cannot vaccum, garden or clean the bathroom. The plaintiff testified that, when doing housekeeping tasks, he will experience sharp pains in his lower back, for example, if he bends over to pick something up, such as a dustpan.
- [192] Ms. Petra testified about her assessment of the plaintiff's housekeeping capacity, and I have already discussed my concerns about this assessment and outlined my findings about the injuries that the plaintiff sustained in the accidents.
- [193] The plaintiff appears to lack motivation to perform housekeeping tasks and requires reminders to complete many of them. However, based on my assessment of the evidence as a whole, I am not satisfied that the plaintiff's problems with housekeeping are caused by the injuries that he sustained in the second and third accidents.
- [194] In all of the circumstances, I conclude that any loss of housekeeping capacity is more appropriately considered as part of the plaintiff's non-pecuniary loss, rather than as a separate head of damage.

Cost of Future Care

[195] The plaintiff seeks an award for cost of future care as follows:

Botox \$122,543

Prolotherapy \$11,110

Ketamine Infusions \$231,608

Medications \$138,970

Rehabilitation Services \$76,375

Support Services \$25,401

Assistive Equipment

and Other Costs \$59,167

Total Present Value Cost: \$665,174

[196] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Adair J. helpfully summarized the law related to awards for costs of future care:

[107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

Medical Services

[197] The plaintiff seeks an award for the following medical services: Botox, prolotherapy and ketamine infusions. Ms. Petra provided an opinion regarding the future care costs for each of these medical services.

[198] The plaintiff has been receiving regular Botox treatment from Dr. Medvedev. The plaintiff described the relief from Botox to be of moderate benefit. For example, he said his headaches improved 20-30% after receiving Botox injections. In contrast, Dr. Medvedev described Botox as providing the plaintiff with consistently increasing periods of relief. Dr. Medvedev and Dr. Ganesan both recommended that the plaintiff continue to receive Botox treatments every three months for several years. The defendants agreed that an award for future Botox treatments is reasonable for a limited duration.

[199] Based on the medical recommendations, and the plaintiff's evidence about the benefit he derives from Botox, I am satisfied that it would be reasonable to award an amount for future Botox treatments every three months for two more years as recommended by Dr. Medvedev. Ms. Petra estimated the annual cost at \$3,200 plus \$800 for the injection fees. Therefore, I award the plaintiff \$8,000 to cover two years' worth of Botox treatments. I will leave it to the parties to make any adjustment that may be necessary to reflect the net present value of this award.

[200] To be clear, I award an amount for Botox on the basis that it provides ongoing symptom relief and may improve the plaintiff's quality of life, not on the basis that it will cure his headache symptoms or restore him to his pre-accident condition.

[201] Dr. Lau has recommended the plaintiff receive treatment from a multi-disciplinary team to treat his complex "musculoskeletal issues, ligament and soft tissue strain" with, private pay, prolotherapy assessment and treatment. Prolotherapy is recommended for musculoskeletal pain and sports injuries and it involves injecting dextrose into joints, ligaments and tendons to stimulate repair. Dr. Lau recommends this advanced therapy in combination with treatment of myofascial pain, physical therapy, active lifestyle, good nutrition and sleep.

Most patients require three to six treatments administered every two to six weeks.

- [202] Ms. Petra provided prolotherapy costs that assumed the plaintiff would receive an assessment and treatment to four body areas, four to six times in total. The plaintiff continues to experience musculoskeletal issues, including ongoing pain to his neck and lower back. In my view, Ms. Petra's estimate of the cost of prolotherapy is consistent with Dr. Lau's recommendation and reasonable. Given the plaintiff's ongoing symptoms and his lack of sustained benefit from other treatments, such as Botox and nerve blocks, I find that there is a sufficient evidentiary and medical basis for the plaintiff to receive a prolotherapy assessment and treatment.
- [203] Given that Dr. Lau describes prolotherapy as a treatment capable of resulting in connective tissue repair, I am satisfied that prolotherapy may provide rehabilitative benefits to the plaintiff. In other words, I am satisfied that an award for cost of prolotherapy assessment and treatment is appropriate because there is a real possibility it could assist in restoring the plaintiff, as much as possible, to the condition he was in prior to the second and third accidents. I therefore award the plaintiff \$11,110, which is the net present value of the cost of future prolotherapy assessment and treatments.
- [204] Dr. Lau also opined, in light of the plaintiff's accumulated head injuries overlapping with headache and depression symptoms, that "[g]iven the severity of the headaches, [he] may need to consider advanced therapies such as ketamine infusion which can benefit headaches, depression and various pain issues".
- [205] Dr. Lau described ketamine as a relatively new drug infusion treatment for depression and pain. Counsel for the defendants' points out that Dr. Lau does not actually recommend ketamine infusion for the plaintiff in her report and instead mentions it as something he may need to consider due his severe headaches.
- [206] I find that a cost of future care award for the cost of ketamine infusions is not reasonably necessary in the circumstances. I have reached this conclusion mainly because the plaintiff does not appear to have received the kind of standard psychological treatment that was recommended by Dr. Ganesan in his first report.
- [207] Dr. Ganesan recommended that the plaintiff obtain cognitive behavioural therapy with a psychologist for about 20 to 25 sessions. Dr. Ganesan also recommended that the plaintiff receive a "comprehensive psychopharmacology" approach, with an electrocardiogram as a baseline, to assess the interaction of certain of his current medications.
- [208] The plaintiff has been prescribed various anti-depressant medications but only started attending sessions with a counsellor in 2019. Both the plaintiff and his spouse testified that he has experienced some improvement in his psychological health. However, it does not appear that he has had the type and extent of treatment recommended by Dr. Ganesan.

[209] In my view, it would be unreasonable to award the plaintiff an amount for ketamine infusions when it was not clearly recommended to him and where there are other medically recommended treatments for his pain and depression. Given that ketamine infusions are not reasonably necessary, in all of the circumstances, I decline to award an amount for such treatment.

Medications

[210] The plaintiff seeks an award of \$138,970 (net present value) for various medications, including over-the-counter medications and supplements, to age 80. The medications also include things like anti-depressants.

[211] In my view, I must take into account the additional contingency that the plaintiff's current medication regime may be subject to adjustment. Dr. Ganesan recommended that the plaintiff receive an assessment to consider medication interactions and to provide him with a "comprehensive psychopharmacology" approach. For example, Dr. Ganesan suggested that the plaintiff simplify his medications and discontinue the use of certain medications. Dr. Ganesan expected the plaintiff would require psychotropic medications for years to come, but he did not say that the plaintiff's need would continue indefinitely.

[212] I have concluded that \$75,000 is an appropriate and reasonable award for the cost of prescription medication and over-the-counter pain relief medication. I will leave it to the parties to make any adjustment that may be necessary to reflect the net present value of this aspect of the cost of future care award.

Rehabilitation Services

[213] The plaintiff seeks an award of \$76,373 as the net present value for various rehabilitation services made up of the following items:

Functional Capacity Evaluation \$3,200

Neuropsychological Evaluation \$3,700

Vocational Assessment \$5,714

Occupational Therapy \$10,928

Physiotherapy \$17,432

Psychological counselling - initial 24 sessions \$5,046

Psychological counselling maintenance sessions \$25,199

Functional Driving Evaluation \$1,163

Driver Rehabilitation Program \$2,727

Vision Therapy \$1,266

- [214] Counsel for the defendants points out that the plaintiff has already had a functional capacity and neuropsychological evaluation, as well as a vocational assessment and occupational therapy. I agree, with the exception of vocational assessment, that it would be inappropriate to award an amount for these services when they have already been received. However, to the extent that the plaintiff already incurred the cost of a functional capacity and neuropsychological evaluation and occupational therapy, then I am of the view of that these costs are properly part of the plaintiff's claim for special damages.
- [215] In light of my comments about Ms. Sharma's vocational assessment, and given that she was unable to administer testing to the plaintiff due to COVID-19 restrictions, I find that it is appropriate to award an amount for a vocational assessment to assist the plaintiff with his re-entering the workforce. Therefore, I award \$5,714 as the net present value of the cost of a vocational assessment.
- [216] Ms. Petra noted that the plaintiff experienced "mixed benefit" from physiotherapy but recommended periodic access to it during flare-ups and for symptom management. Counsel for the defendants opposed an award for physiotherapy because the plaintiff already regularly exercises at the gym and because he had not attended physiotherapy for several years prior to the trial.
- [217] The plaintiff already utilizes physical exercise as a way to manage flare-ups and for symptom management. He testified that he found his current exercise regime helpful, for example, to build strength and to prevent muscle stiffness. Therefore, I agree that there is no reasonable basis to award an amount for physiotherapy costs.
- [218] Regarding psychological counselling, the defendants' counsel agreed that the plaintiff should be entitled to a time-limited award for this cost. Dr. Ganesan and Ms. Petra recommended that the plaintiff receive treatment for a registered psychologist for 24 sessions with potential for follow-up sessions in the future. I agree that psychological counselling is a reasonable item of future care for the plaintiff. I find that this treatment, coupled with the comprehensive medication approach mentioned by Dr. Ganesan, holds potential for resolving some or all of the plaintiff's mental health problems and to improve his functioning.
- [219] I therefore award the plaintiff \$15,000 for reasonable future cost of treatment by a registered psychologist. I will leave it to the parties to make any adjustment that may be necessary to reflect the net present value of this future care award.

- [220] I decline to award amounts for the cost of a functional driving evaluation and a driver rehabilitation program. To the extent that the plaintiff suffers from anxiety while driving, the psychological services component of the cost of future care is available. In addition, I am not satisfied that there is sufficient evidence to support this aspect of his claim because, for example, the plaintiff testified that he functioned well enough to manage driving an RV during a recent road trip.
- [221] Regarding the cost for homemaking services, I have already discussed my concerns regarding the assessment of the plaintiff's function and capacity to perform housekeeping tasks and I explained that this issue was more appropriate for consideration as part of the plaintiff's non-pecuniary loss. Therefore, I decline to award an amount for the cost of future housekeeping support because I am not satisfied that it would be reasonable to do so.
- [222] I also decline to award an amount for future childcare costs, since I disagree that the plaintiff has established that this is reasonably necessary. I have already discussed my concerns about the assessments conducted by Ms. Petra, Ms. Sharma and Mr. Yip and my findings about the plaintiff's injuries. In my view, there is insufficient evidence to demonstrate that, even if the plaintiff had children, he lacks the physical or mental capacity to parent or provide routine childcare.
- [223] Regarding the claim for assistive equipment, namely grab bars and specialized glasses, I decline to award an amount because I am not satisfied these costs are reasonable in the circumstances. There is insufficient evidence to establish the plaintiff's need for such equipment, especially in light of my finding that he did not sustain a MTBI. As well, there was no evidence that the plaintiff experienced dizziness while using the bathroom.
- [224] The plaintiff requests the future cost of a yoga pass. In my view, this is a cost that the plaintiff would have incurred regardless of the injuries that he sustained in the accidents. I find that the plaintiff attaches a high value to physical exercise and fitness. As such, he would have paid for the cost of exercise, such as yoga or attending the gym, regardless of the accidents. Therefore, I decline to award an amount for the future cost of a yoga pass.

Non-Pecuniary Damages

First Accident

- [225] The plaintiff experienced some soft tissue injury muscle pain caused by the first accident which required physiotherapy treatment. However, his pain and discomfort from the soft tissue injuries were short-lived and he was able to continue working.
- [226] The plaintiff confirmed that his soft tissue injuries resolved and he returned to playing rugby within approximately six months of the first accident. However, during cross-examination, he admitted that he played rugby the day after the first accident and the rugby season ended soon after that.

- [227] The plaintiff's counsel submits that an appropriate award for non-pecuniary damages for the first accident is \$100,000. He referred me to the decisions in *Cimino v. Kwit*, 2009 BCSC 912, *Mattice v. Kirby*, 2014 BCSC 657 and *De Fazio v. McClelland*, 2020 BCSC 704. However, each of these cases involved plaintiffs who had suffered soft tissue injuries as well as injuries causing limb numbness and tingling. In the present case, I have determined that the plaintiff's ulnar nerve injury was not caused by the first accident.
- [228] The defendants' counsel submits that the appropriate award for non-pecuniary damages is \$40,000 to \$50,000 and referred me to *Brass v. Von Chudentiz*, 2020 BCSC 343 and *Sharma v. Bhullar*, 2020 BCSC 379. In *Brass*, a 20-year-old plaintiff sustained headaches and soft tissue injuries to her neck and back in an accident. The plaintiff missed no work and her pain had improved by 50% within six months after the accident. The court awarded her \$50,000 for non-pecuniary damages. In *Sharma*, the plaintiff sustained headaches and soft tissue injuries from two accidents. The plaintiff's injuries had improved and the medical prognosis for a full recovery was favourable. The court awarded her \$40,000 before a 5% reduction for failure to mitigate.
- [229] Considering the evidence as a whole, and in light of my findings regarding the injuries caused by the first accident, I find that an appropriate sum to compensate the plaintiff for his pain, suffering, loss of enjoyment of life and loss of amenities following the first accident is \$40,000. I have reached this conclusion, in part, because of the evidence that the plaintiff's suffering from the soft tissue injuries was not severe and he was able to recover and play rugby as usual. I have also taken into account the plaintiff's evidence that he used his vacation time to attend physiotherapy appointments to treat the injuries he sustained in the first accident.

Second and Third Accidents

- [230] Earlier in these reasons, I find that the plaintiff sustained various injuries in the second accident which were aggravated by the third accident. The plaintiff testified that at the time of trial he was approximately 60-65% recovered from the second and third accidents. However, he has ongoing pain and other symptoms that prevent him from working, playing rugby and socializing as he had done prior to the second and third accidents.
- [231] The plaintiff described feelings of stress, sadness and hopelessness due to his injuries. He has clearly lost a great deal of meaning and pleasure in his life due to his inability to play rugby.
- [232] The plaintiff's counsel submits that, since the plaintiff likely sustained permanent, significant functional impairment in all aspects of his life, an appropriate award for the plaintiff's non-pecuniary losses from the second and third accidents is \$250,000. Counsel referred me to a number of cases, including *Lines v. Gordon*, 2006 BCSC 1929, rev'd in part 2009 BCCA 106 on other grounds, where the court awarded non-pecuniary damages of \$225,000 to a plaintiff who sustained an MTBI and profound post-concussion syndrome

following an accident similar to the plaintiff's second accident.

- [233] The plaintiff in *Lines* complained of headaches, vision problems, memory problems and concentration problems from the accident that left him unable to pursue his work and hobbies. In each of the cases the plaintiff's counsel referred me to, I note that the court accepted that the plaintiff had suffered either an MTBI, concussion or moderate traumatic brain injury.
- [234] The defendants' counsel submits that an appropriate award for the plaintiff's non-pecuniary losses from the second and third accidents, assuming that there is no finding of MTBI, is \$95,000 to \$100,000. Counsel for the defendants referred me to the cases of *Lane v. Ou*, 2019 BCSC 928 and *Klingler v. Lau*, 2019 BCSC 1776, where the court awarded \$96,000 and \$95,000 respectively, after accepting that the accidents caused emotional problems, chronic, likely permanent, soft-tissue pain and headaches that prevented the plaintiffs from returning to their pre-accident lifestyles.
- [235] After considering the authorities and all of the evidence in light of the type of common factors described in *Stapley v. Hejslet*, 2006 BCCA 34 that influence awards of non-pecuniary damages, such as the plaintiff's relatively young age, the severity and duration of his pain, his extensive emotional suffering and the impairment of his lifestyle, specifically his impaired work, social and recreational lifestyle, I have decided that, in the circumstances, \$135,000 is an appropriate award for non-pecuniary damages related to the second and third accidents. In reaching this decision, I have considered that one of the impairments of the plaintiff's lifestyle includes his pain while performing certain housekeeping duties and the tension with his spouse over his limited involvement in housekeeping responsibilities.
- [236] In reaching this award of non-pecuniary damages for the second and third accidents, I am mindful that the amount should compensate the plaintiff for his loss but also be fair to all parties as measured against comparable cases: *Karim v. Li*, 2015 BCSC 498 at para. 120. In my view, an award at the level of *Lane* and *Klinger* would not sufficiently reflect the findings that I have made, nor the impact on the plaintiff of the injuries that he sustained in the second and third accidents.

Special Damages

- [237] The parties are in agreement that the plaintiff has incurred out of pocket expenses of \$4,140.84 for the injuries he sustained. These costs include payments for physiotherapy treatment and prescription medication costs. I award the plaintiff \$4,140.84 as special damages.
- [238] As mentioned earlier, to the extent that the plaintiff incurred out of pocket costs for a functional capacity and neuropsychological evaluation and occupational therapy, I am of the view of that these costs should form part of the claim for special damages.

[239] Since the parties' agreement on the amount of the plaintiff's claim for special damages does not include these costs, I assume the plaintiff is not out of pocket for these. However, if that is incorrect, then I grant the parties' leave to seek to appear before me to provide further information regarding whether the plaintiff incurred out of pocket expenses for these items.

Conclusion

[240] The following is a summary of the amounts awarded to the plaintiff:

- a) Past loss of earning capacity - \$0 [first accident] and \$145,000 [second and third accidents - for which the defendants involved in these accidents are jointly and severally liable];
- b) Loss of future earning capacity - \$0 [first accident] and \$439,943 [second and third accidents - for which the defendants involved in these accidents are jointly and severally liable];
- c) Cost of future care awarded regarding injuries from the second and third accidents, for which the defendants involved in these accidents are jointly and severally liable - \$114,824 (consisting of: \$8,000 for Botox treatments; \$11,110 for prolotherapy treatment; \$75,000 for medication; \$5,714 for a vocational assessment; \$15,000 for psychological treatments); and
- d) Non-pecuniary damages - \$40,000 [first accident] and \$135,000 [second and third accidents - for which the defendants involved in these accidents are jointly and severally liable];
- e) Special damages - \$4,140.84.

Total: \$878,907.84

[241] The parties have liberty to apply if any issues arise as to the application of the Court Order Interest Act, R.S.B.C. 1996, c. 79 to any of the heads of damages, if there are any disagreements over tax gross-ups or if there are errors in the calculations in these reasons for judgment.

[242] Unless there are matters that I am unaware of that counsel wish to address before me, the plaintiff is entitled to costs.

[243] Should either party wish to make submissions regarding costs, or on the other matters referred to above, they must contact SC Scheduling within 30 days of these reasons for judgment.

"E. McDonald, J."

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