
CANADA / JUDGMENT

Millar v. Wasden

2020 BCSC 1210

COURT

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2020 BCSC 1210 Millar v. Wasden

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Millar v. Wasden,

2020 BCSC 1210

Date: 20200817

Docket: M146689

Registry: Vancouver

Between:

Danny Robert Millar

Plaintiff

And

Bryan Todd Wasden

Defendant

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

June 8-12, 15-19 and 26, 2020

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Vancouver, B.C.

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I. introduction

- [1] The Plaintiff, Mr. Millar, was injured in a motor vehicle accident that occurred on April 27, 2013 (the "Accident"). He was 67 years old at the time. Liability for the Accident is admitted. The parties also agree on various heads of damage including Mr. Millar's costs of future care and his special damages. The central issue in this case is the extent of Mr. Millar's ongoing impairments that arise from the Accident and the effect of those impairments on his employment from the date of the Accident to the present time.

II. BACKGROUND AND PRE-ACCIDENT CONDITION

- [2] Mr. Millar was born in June 1946. He has three children from an earlier marriage. He has been married to his present wife for more than 30 years.
- [3] He has an interesting and varied work history. In his early years, he worked as a logger. He thereafter worked as a prospector. Still later, he was employed as an arborist and he had a landscaping company. He then worked as a project manager in construction. He appears to have enjoyed considerable success in at least some of these endeavours. He turned to real estate when he was approximately 50 years old. He has worked as a realtor in the Fraser Valley since that time.
- [4] Mr. Millar enjoyed comparatively good health prior to the Accident. He had some history of lower back difficulties. He periodically had stress-related headaches. He is a lifelong smoker but he has, to this day, been spared any significant negative consequences from that habit. He had, prior to the Accident, drank more alcohol than he or his wife was comfortable with and he had stopped drinking approximately four or five years before the Accident.

- [5] It is relevant and telling that Mr. Millar and his granddaughter, who gave evidence at trial, went to Nepal together in 2010 for a month. Mr. Millar was in his mid-60s at the time. He was capable of being on his feet for five to six hours a day, of going for two-hour-long hikes, and of carrying 40 pounds of water for an equally long period of time.
- [6] There is no evidence that Mr. Millar suffered from any mood-related or cognitive difficulties prior to the Accident. In saying this, I recognize that Mr. Millar had told Dr. Bishop, a neurocognitive psychologist who filed a report on behalf of Mr. Millar, that he had suffered from headaches some 15 years before the Accident and that he "might have been depressed". Neither Mr. Millar nor his wife recalled any such earlier history with depression. Furthermore, when speaking to Drs. Levin and Solomons, psychiatrists who were called by Mr. Millar and the Defendant respectively, Mr. Millar did not recall any such earlier mood difficulties. Accordingly, I give little weight to the passing reference to depression that Mr. Millar made to Dr. Bishop.

III. THE ACCIDENT

- [7] The Accident occurred in Cloverdale. Mr. Millar had a very limited memory of the Accident and his memory of the events that followed, for a number of hours, was patchy. His vehicle was a write-off. Mr. Millar's airbag deployed and he was taken to the hospital by ambulance. He initially had a slightly reduced Glasgow score of 14. He was released some six or seven hours later, provided with painkillers, and he returned home with his wife.

IV. CREDIBILITY

- [8] The Defendant does not suggest that there is any concern with Mr. Millar's credibility. I consider that Mr. Millar was open and honest. If anything, his evidence was understated in that the true extent of his difficulties, and in particular, his cognitive and mood related difficulties, emerged from other witnesses. In addition, the evidence he gave was generally consistent with the history he had provided, at different times, to his caregivers and to various independent medical experts.

V. MR. MILLAR'S INJURIES

- [9] There is significant consistency in the evidence that relates to many of Mr. Millar's injuries and his ongoing difficulties. Mr. Millar suffered a number of physical injuries in the Accident. He suffered a large cut to his eyebrow and to the top of his nose--both of which required sutures. His left eye was blackened and largely closed and he had a large bump or swelling on the top of his head. These injuries, which healed, are nevertheless relevant because they are all consistent with his suffering a blow to his head.
- [10] He also suffered some bruises and a laceration to his left foot which healed within a reasonably short time with no ongoing effects.

A. Neck, Shoulder and Back

- [11] Mr. Millar suffered injuries to his neck, his left shoulder, and his mid and lower back. Aspects of these injuries improved over time but he still has some degree of ongoing pain in these areas. For example, Mr. Millar accepted that the pain in his neck was at its worst for approximately six months following the Accident and that thereafter the pain was in the nature of a more consistent "achiness".
- [12] Dr. Krassioukov is a physiatrist who saw Mr. Millar in late December 2019 and who filed a report and gave evidence on behalf of Mr. Millar. It is likely Dr. Krassioukov who addressed Mr. Millar's neck, shoulder and back pain most directly. He confirmed that, as a result of the Accident, Mr. Millar suffered soft tissue injuries to his neck, his upper trapezius muscles, his shoulders and his upper and mid back. Dr. Krassioukov confirmed that Mr. Millar continues to suffer from chronic myofascial neck and chronic mid and upper back pain. I have noted that Mr. Millar had an earlier history of lower back pain and he had received chiropractic care for that pain for many years. Mr. Millar's present back pain includes such historic back pain but also includes other areas of back pain that were, I am satisfied, caused by the Accident.

B. Headaches

- [13] Since the time of the Accident, Mr. Millar has had headaches on a consistent basis. There was a consistent body of evidence from a number of medical experts that described Mr. Millar's headaches as "cervicogenic". This description and/or diagnosis is found in the report of Drs. Bishop, Krassioukov and Cameron, a neurologist. The same conclusion is found in the report of Dr. Prout, a neurologist who filed a report and was called by the Defendant. It is clear that Mr. Millar's present headaches have a different genesis or cause than the earlier stress-related headaches that he had sometimes suffered from in the past. It is equally clear that these cervicogenic headaches were caused by the Accident.

C. Dizziness, Tinnitus and Balance

- [14] The expert evidence advanced by Mr. Millar and the Defendant is again largely consistent in relation to this group of difficulties. These experts agree, and I find, that Mr. Millar developed dizziness, balance issues and tinnitus following the Accident and that each of these conditions was caused by the Accident.

1. Dizziness

- [15] There was some evidence at trial that addressed a single pre-Accident record of Mr. Millar being dizzy. Counsel for the Defendant accepted that the genesis of that record was unclear and that little or no weight should be given to it. Neither Mr. nor Mrs. Millar had any memory of Mr. Millar being dizzy prior to the Accident. Still further, Dr. Cameron observed that it is common for individuals to complain of dizziness and that he would not, in any event, consider an isolated reference to dizziness as significant. Accordingly, I am satisfied

that Mr. Millar did not, prior to the Accident, suffer from dizziness in any relevant or meaningful way.

- [16] On the other hand, Mr. Millar did have some episodes of dizziness following the Accident. Those episodes have largely settled.

2. Tinnitus

- [17] After the Accident, Mr. Millar became aware that he had developed tinnitus. This persists to the present day. It is always present if Mr. Millar thinks about it but he appears to be able to ignore the condition if he is busy. Because Mr. Millar is able to cope with his tinnitus, without it intruding into his concentration or sleep, Dr. Longridge, an otolaryngologist, opined that Mr. Millar's condition is "mild". However, it is not likely to improve.

3. Balance

- [18] Mr. Millar's main concern is his balance. Dr. Longridge described this condition as significant. Mr. Millar has fallen since the Accident. He routinely bumps into his wife when they walk together, or into a wall and he will have to take a step to catch himself. Dr. Longridge opined that Mr. Millar, on account of his age, is more likely to run into "difficulties with balance and unsteadiness than someone who had not had an insult to his balance system". He further opined that Mr. Millar is at a greater risk for fall and injury.

D. Sleep

- [19] Mr. Millar had no difficulties with his sleep patterns or habits prior to the Accident. Since that time, his sleep has been significantly disrupted. This is so most days of the week. His sleep is so restless and he wakes up so frequently that he and his wife now sleep in different rooms. Several witnesses, in his family and from his workplace, commented that he regularly looks tired. Mr. Millar's difficulties with sleep are sufficiently severe that Dr. Prout considered that those difficulties were a significant contributor to Mr. Millar's ongoing cognitive difficulties--a concern I will address separately.

E. Changed Behaviours

- [20] There is complete consistency in the evidence that pertains to certain changes in some of Mr. Millar's behaviours since the Accident. He is less patient and he is easily frustrated. He has become angry and easily irritated. He tends to lash out at those around him. He speaks harshly. He sometimes uses foul language. These behaviours are materially different from his pre-Accident conduct and demeanor. Mr. Millar was formerly a soft spoken and polite individual.
- [21] These behaviours were addressed by various experts and by a number of the lay witnesses. Each of his wife, daughter, and granddaughter addressed his present demeanor. So too did Ms. Landers, an administrative assistant that Mr. Millar hired to help him after the Accident.

- [22] These behaviours are sufficiently severe that his relationships with his close family are significantly damaged. For example, he and his granddaughter now rarely speak. His daughter also has more limited contact with him and she has sometimes had to hang up the phone when speaking to her father because of the tone and content of what he is saying.
- [23] There are other significant and ongoing changes to Mr. Millar's persona and demeanour. He speaks less often. He now rarely communicates or displays affection to his family when he was formally expressive and overtly loving. He is also more withdrawn and he often chooses not to attend or interact at social gatherings.

F. Mood Difficulties

- [24] There is also significant consensus in the evidence of the various experts who addressed Mr. Millar's difficulties with, in particular, depression and anxiety. This is notwithstanding the fact that the Plaintiff tends to understate his difficulties in these respects. Several experts opined that he apparently lacks the insight and self-awareness to appreciate or understand these difficulties. He also has various inherent personality traits, such as a predilection for perfectionism, that militate against his acknowledging his difficulties.
- [25] Potential concerns with Mr. Millar's low mood and anxiety were first identified by his family doctor shortly after the Accident and he was prescribed anti-depressants at that time. Thereafter each of Drs. Bishop, Cameron, Krassioukov and Levin, on behalf of Mr. Millar, and Drs. Solomons and Prout, on behalf of the Defendant, addressed these concerns.
- [26] These opinions were proffered at different times since the Accident. Dr. Bishop's assessment was conducted in April 2014 or about a year after the Accident. Dr. Cameron performed two assessments, one in 2014 and one in 2018. Dr. Levin met Mr. Millar in 2018. Dr. Krassioukov did so in December 2019, and Dr. Prout did so in February 2020.
- [27] Though the formal diagnosis of a mood or other mental disorder lies primarily within the purview of psychiatrists, the reality is that many medical and other experts, who practice in different areas, encounter such difficulties in their work. This reflects the reality that mood disorders are sometimes, at least partly, the product of brain injuries or chronic pain or sleep disorders or other difficulties that fall within the expertise of other medical subspecialties.
- [28] Each of the experts I have referred to routinely identifies and addresses depression and anxiety in their practice. Each, but for Dr. Solomons, opined that Mr. Millar suffered from these difficulties.

- [29] Dr. Krassioukov considered that Mr. Millar presented with "severe symptoms of depression and anxiety". Dr. Levin considered that Mr. Millar suffered from a major depressive disorder. Dr. Prout considered that at the time of his recent assessment, Mr. Millar presented with, inter alia, ongoing difficulties with depression and anxiety and that these difficulties, in turn, were major contributors to his ongoing cognitive difficulties. I accept the opinions of these experts.
- [30] The lone contrary opinion, as I have said, is found in the opinion of Dr. Solomons. There are various concerns with the reports and evidence of Dr. Solomons that I will return to after I have addressed several other issues that form a necessary foundation for my assessment of Dr. Solomons' evidence.

G. Mild Traumatic Brain Injury and Issues with Cognition

1. Mild Traumatic Brain Injury

- [31] There is general consistency in those aspects of the expert reports and evidence that pertains to this particular sub-issue. To be specific, there is unequivocal agreement, including from Dr. Solomons, that Mr. Millar suffered a mild traumatic brain injury in the Accident and that he struggled with various manifestations of that injury for a period of time.
- [32] For example, Dr. Cameron opined:
- Mr. Millar has reported to me, and the clinical records of his family physician as well as the Fraser Health Concussion Clinic all document Mr. Millar suffering with decreased memory, decreased concentration, decreased attention span, decreased ability to process information, multitasking difficulties, sleep disturbance pattern, decreased libido, anxiety, irritability, mood swings, fatigue, decreased motivation, decreased interest in socializing, as well as dizziness, all present following this accident. It is my opinion that the symptoms are diagnostic of Mr. Millar developing a post traumatic brain injury syndrome following the mild traumatic brain injury that he sustained at the time of the accident of April 27, 2013.
- [33] Similar opinions pertaining to this range of difficulties or symptoms are found in the opinions of Drs. Krassioukov and Bishop. Indeed, Dr. Bishop used language that nearly mirrors the opinion of Dr. Cameron. The most significant of Mr. Millar's cognitive difficulties related to his loss of memory and concentration. It is primarily these ongoing difficulties, in turn, that underlie his wage loss claim.
- [34] The Defendant accepts that Mr. Millar suffered a mild traumatic brain injury in the Accident. The issue is whether Mr. Millar recovered from his brain injury over the ensuing years. This is important because the Defendant argues that Mr. Millar recovered from his brain injury in approximately two and a half years or by 2016.

[35] There is again consensus in the evidence of the various experts, apart from Dr. Solomons, that perhaps 10-20% of individuals do not recover from mild traumatic brain injury. This figure is likely higher within a more senior population.

[36] Drs. Bishop, Cameron, Levin and Krassioukov, recognizing that their opinions were prepared at different times, have opined that Mr. Millar had not, and likely will not, recover from his brain injury. Dr. Prout, on the other hand, opined that Mr. Millar had recovered from his brain injury and that his ongoing difficulties with memory and cognition were primarily attributable to his ongoing difficulties with sleep and mood. For reasons that will become apparent, these differences in opinion are largely, but not entirely, academic.

2. Issues with Cognition

[37] Once again, both the lay and expert evidence that pertain to Mr. Millar's cognitive difficulties are overwhelmingly consistent. Almost immediately after the Accident, Mr. Millar began to complain to his family doctor, Dr. O'Brien, who gave evidence, of forgetfulness and a lack of concentration. These complaints were made consistently and on virtually each occasion that Mr. Millar saw Dr. O'Brien. Mr. Millar was soon sent to a specialist concussion clinic and he had both a CT scan and an MRI performed.

[38] The cognitive testing undertaken by Dr. Bishop in April 2014 is important. It revealed that Mr. Millar's pre-Accident innate intellectual capacity was likely in the "Superior" range, or within the top 5-15% of the population. He functioned well in most domains or areas that were tested. His profile was, however, punctuated by select and significant impairments in higher order attention capacity and learning new verbal information. In particular, his memory performances, for both auditory and verbal information, were lower than expected and were described by Dr. Bishop as "impaired". This description, in turn, means that Mr. Millar performed in the bottom 5% of the population. Even if, as the Defendant argues, this description is overstated it appears clear, and I find, that Mr. Millar's memory has significantly deteriorated on account of the Accident.

[39] Other physicians, including Drs. Krassioukov and Prout, had Mr. Millar complete other forms of testing. Though Dr. Prout said that the value of these tests is unclear, their results were consistent with Dr. Bishop's testing and opinions. Specifically, Mr. Millar performed well in most areas but he struggled consistently with his short-term memory.

[40] These conclusions align with the lay evidence. Mr. Millar, his wife, and his daughter testified that Mr. Millar had an excellent memory prior to the Accident. Mr. Millar testified that though he had sometimes made notes, he was able to keep multiple clients, transactions and meetings clear in his head without any aids.

[41] Each of Mr. Millar, his wife, and his daughter addressed the difficulties he now has with his memory, albeit somewhat differently. Mr. Millar's emphasis was primarily work-related. Immediately after the Accident he was aware of his having significant memory and concentration related difficulties. These difficulties continue to this day. Though he sends

himself many emails and notes daily to help him recall his various obligations, he continues to struggle. Furthermore, though he was previously meticulous in his work, he now often makes mistakes in the contracts and documents he prepares.

- [42] Mrs. Millar spoke of her husband forgetting to lock their home, or to close the garage doors or to flush the toilets and with other very basic matters. His daughter said that they will sometimes agree to meet and he will text her repeatedly because he has forgotten where they are to meet or how to get to his intended destination.
- [43] These concerns were also supported by the evidence of various witnesses who worked with Mr. Millar in different capacities. Ms. Landers had worked as a realtor in Mr. Millar's team some years prior to the Accident. She described him, at that time, as smart, detailed and organized and always "on the mark". She later went to work for him in July 2013, a few months after the Accident, and she worked with him for much of the next two years. She now saw a completely different man. He was not focused. He forgot to input data into a database system that they maintained. He sent the same emails repeatedly. He made lots of little mistakes in his documents. He failed to follow up with his clients and he missed appointments that he had made. She also spoke, as I have said, about his anger and the other aspects of his demeanour that had changed.
- [44] Ms. Tsang is a conveyancer or paralegal who works in the same realty office as Mr. Millar. She had worked with him since 2009 and she continues to do so today. She testified that prior to the Accident, Mr. Millar was healthy and energetic. His paperwork was very organized and he provided her with everything that she required. He responded to her inquiries promptly.
- [45] Since the Accident, Ms. Tsang says he often appears tired. He is less energetic. He complains that his back hurts. His paperwork is now "sloppy" and he regularly misses necessary information. He has to be "chased for information" and he often fails to respond to her initial emails to him.
- [46] Each of Mr. Neufeld and Mr. Anderson, the manager and owner respectively of the Sutton Realty office where Mr. Millar worked, gave evidence. Mr. Neufeld is the former President of the Fraser Valley Real Estate Board and Mr. Anderson is the President-elect of that organization. Both men have spent their working lives in the real estate business. Both confirmed that Mr. Millar appeared to be in above average health before the Accident. He had no sick days, he was "high-energy" and he appeared to be in good spirits. He was "sharp", a "hard worker", "confident", and he was well respected in the office. He was extremely experienced and people would go to him for advice. He had been asked to train new realtors in the office.

- [47] After the Accident, he was less confident and it was clear that he was struggling. He regularly asked both Mr. Neufeld and Mr. Anderson "basic" questions. He had Mr. Neufeld look over his contracts because he was fearful he had missed something. He also took notes and wrote everything down because he was struggling with his memory and confidence. Both men also addressed Mr. Millar's decreased productivity after the Accident but I propose to develop that issue further when I turn to his loss of capacity or wage loss claim.
- [48] Thus, there has been a clear and significant change in Mr. Millar's confidence and cognition since the Accident. That change, and in particular his difficulties with his memory, continue to the present day.
- [49] The Defendant raised several issues. First, I have said that the Plaintiff's experts were of the consistent view that his ongoing memory and other difficulties were attributable, at least in part, to his brain injury. Dr. Prout said these ongoing difficulties were due to his difficulties with sleep and with depression and anxiety. The reason this is important, at least in concept, is because these latter conditions are, Dr. Prout said, more easily treated and would give Mr. Millar, who is now 74 years old, a better prognosis.
- [50] The reality, however, is that all of these experts, other than Dr. Solomons, recognized that Mr. Millar's condition and his ongoing difficulties with cognition and memory are multi-factorial. Dr. Krassioukov concluded that Mr. Millar's cognitive dysfunction is directly related to his mild traumatic brain injury, his depression and his chronic pain. He also considered, in light of the time that had passed since the Accident, that Mr. Millar is likely to have ongoing symptoms of cognitive deficit and pain.
- [51] Dr. Cameron considered that Mr. Millar's ongoing cognitive complaints are in part residual to his mild traumatic brain injury, in part due to his chronic pain and associated conditions, neither of which could be expected to improve to any significant degree, and in part due to his ongoing psychological problems. Dr. Levin considered that Mr. Millar satisfied the DSM-5 criteria for mild neurocognitive disorder and that this was likely due to his residual mild traumatic brain injury and to his ongoing major depressive disorder. He further opined that given his "advanced age and the chronicity of his psychological, emotional and cognitive difficulties his prognosis for a full recovery was guarded".
- [52] Thus, carefully considered, it is apparent that there is significant overlap in the opinions of these various experts, including Dr. Prout. On balance, however, I accept the collective opinions of Drs. Bishop, Levin, Krassioukov, and Cameron as it pertains to the ongoing residual effects of the Plaintiff's mild traumatic brain injury. I also accept and find that at this point in time there is unlikely to be any further appreciable improvement in Mr. Millar's level of cognitive performance.

3. The Issue of Age and the Plaintiff's Use of Alcohol

- [53] The Plaintiff's age at the time of the Accident, as well as his present age, are relevant in several respects. First, Dr. Bishop opined that Mr. Millar's age likely left him at increased risk or vulnerability to greater cognitive consequences from a neurological insult or injury than would otherwise be the case. Second, Dr. Cameron explained that after the age of 40 many individuals experience some level of cognitive decline in some areas. Individuals who have suffered a mild traumatic brain injury, and who are older, tend to improve for up to approximately 1 to 1 ½ years. Thereafter, "if they have ongoing cognitive deficits, they never return to pre-accident cognitive function as they are already in decline of cognitive function due to normal aging".
- [54] Dr. Levin confirmed both these points. Specifically, he confirmed that older individuals are more vulnerable to cognitive deficits as a result of a mild traumatic brain injury and that those deficits tend to last longer.
- [55] Aspects of these opinions engage "thin skull" principles; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 34. To the extent Mr. Millar's cognitive difficulties are more extreme, or will endure for a longer time than they might with a younger person, the Defendant remains responsible for such increased and protracted difficulty.
- [56] A second aspect of the issue of age relates to whether Mr. Millar would, on account of his age and independently of the Accident, have come to suffer the cognitive deficits that he now struggles with. This is a central thesis that is advanced by the Defendant. Specifically, the Defendant argues, as I have said, that Mr. Millar recovered from the consequences of his cognitive impairment by 2016.
- [57] This thesis is anchored, in part, by the fact that in 2016 Mr. Millar's earnings approximated what he had made in 2013. Accordingly, the Defendant argues that Mr. Millar had returned to his pre-Accident level of cognitive function.
- [58] I do not accept any aspect of this thesis. First, and importantly, it is inconsistent with the body of medical evidence, excluding Dr. Solomons', that I have referred to and that establishes that Mr. Millar continues to be cognitively impaired on account of his various struggles with mood, sleep, pain and the residual effects of his mild traumatic brain injury.
- [59] Next, and in a related vein, I have referred in particular to the evidence of Drs. Bishop and Cameron who described the range of issues that normally accompany a mild traumatic brain injury. This includes, inter alia, sleep disturbance, anger, social withdrawal, headaches, and a number of forms of cognitive impairment. Mr. Millar continues to struggle with all of these difficulties. It is improbable, and inconsistent with the medical evidence, that Mr. Millar's cognitive difficulties that were caused by the Accident would have resolved while the status of each of these other forms of difficulty would have remained constant.
- [60] Furthermore, Mr. Millar's change in cognitive function following the Accident was dramatic. Though Mr. Millar has now learned some tools that help him cope he continues, as I have said, to be cognitively impaired to a significant extent. The Defendant would have to argue

that Mr. Millar's Accident-related impairments improved while the normal consequences of aging were engaged and that these two paths intersected at some point in or around 2016. Though I accept that normal aging has, over the seven years since the Accident, likely affected Mr. Millar's cognition to some degree I do not accept the thrust or focus of the Defendant's position. The type of normal aging that Dr. Cameron, for example, discussed is a widespread generic phenomenon. Some people do better, some do worse.

- [61] At the time of the Accident, Mr. Millar was a high functioning professional person of superior innate intelligence who had a better-than-average memory. There is no evidence that the general aging process causes such dramatic or severe deterioration in individuals. Furthermore, none of the medical experts who examined Mr. Millar, including Dr. Prout who did so only a few months before the trial, opined that he now suffers from some form of dementia.
- [62] A further somewhat related issue is relevant. Mr. Millar is, as I have said, a lifelong smoker and at times he drank more alcohol than he or his wife was comfortable with. There is no suggestion that his drinking ever interfered with his work and he stopped drinking, on his own, some for four or five years before the Accident. Approximately a year after the Accident Mr. Millar began to drink again. How much or how regularly he drank is unclear. He appears, however, to have done so intermittently and he has sought assistance on account of his drinking. Mr. Millar said that he began to drink again out of frustration. His wife said he drank to sleep. Dr. Bishop observed that he did so to deal with his "distress".
- [63] The medical evidence was consistent and confirmed that long-term tobacco and alcohol use are "risk factors" for cognition. This is expressly acknowledged in the expert report of Dr. Bishop. The impact of alcohol on cognition is a function of the severity of the issue, the particular individual, their medical history and other factors.
- [64] Unfortunately, most of the physicians who met with Mr. Millar failed to expressly address or consider what, if any, impact tobacco or alcohol use had had on Mr. Millar's cognitive status. Dr. Bishop, as I said, considered this issue and she testified that she did not believe Mr. Millar's tobacco or alcohol use had impacted the results of his neurocognitive test scores. She also said that there was no evidence that Mr. Millar's tobacco and alcohol consumption had impacted his cognition to any degree prior to the Accident.
- [65] I observe that each of Drs. Cameron, Krassioukov, Prout, and Levin had access to Dr. Bishop's expert report and her references to Mr. Millar's historic and current tobacco and alcohol use and none of them chose to develop this issue further in their reports.
- [66] I do not consider that the evidence before me establishes a sufficient basis to conclude that Mr. Millar's past and/or present tobacco and alcohol use have contributed, in any meaningful way, if at all, to the cognitive and other difficulties he experienced after the Accident and that he continues to experience to the present time.

VI. DR. SOLOMONS' EVIDENCE

- [67] Dr. Solomons filed two reports and he was cross-examined on both those reports. In his first report, dated April 19, 2016, Dr. Solomons had met with and conducted an assessment of the Plaintiff. He was provided with limited records and he was not provided with any of the expert reports, including the neurocognitive assessment conducted by Dr. Bishop, that existed at this time. To be fair it is not clear to me how many of these reports had been provided to the Defendant by this time. Based on this information Dr. Solomons opined that "Mr. Millar did not sustain a psychiatric injury from and was not psychiatrically impaired by this accident". In his second report, dated May 8, 2020, he was asked to comment on the reports of Drs. Bishop, Krassioukov, and Levin.
- [68] Counsel for the Plaintiff objected to these reports and the evidence of Dr. Solomons on several bases. This includes the assertion that Dr. Solomons had not been impartial but rather he had acted as an advocate for the Defendant and, in addition, that he lacked the expertise to comment on, in particular, the expert report of Dr. Bishop.
- [69] Though there are various concerns with Dr. Solomons' reports, I do not consider that those concerns warrant excluding either of his reports, or parts of them, or his evidence. Some of the concerns raised by counsel for the Plaintiff more properly go to questions of reliability than admissibility. Further, as it relates to Dr. Solomons' expertise to comment on the work of Dr. Bishop, Dr. Solomons testified, for example, that he had practical experience and familiarity with neurocognitive assessments. The test for admissibility of expert opinion evidence includes whether the expert "has acquired special or peculiar knowledge". This knowledge can be obtained through study or experience: *R. v. Mohan*, [1994] 2 S.C.R. 9 at 25.
- [70] The fact that Dr. Solomons had less formal training or fewer formal qualifications in the area of neurocognitive assessments and testing than Dr. Bishop or Dr. Levin goes to the weight of his opinions and not their admissibility.
- [71] Having said this, the concerns I have with the evidence of Dr. Solomons are sufficiently significant that I have given his evidence limited, if any, weight. This is so for various reasons. What follows is illustrative and not exhaustive of those concerns.
- [72] In his first report, Dr. Solomons, under the heading "Facts and Assumptions", provides a history of sorts. In that history, he states:
7. Mr. Millar followed up with his doctor, Dr. O'Brien, who'd noted his complaints of low back, neck and shoulder pain as well as neurocognitive symptoms of dizziness, being in a fog, forgetfulness, balance problems, headaches, memory and concentration difficulties and waking during the night. By early July his back pain was much improved, and he had ongoing cognitive complaints of memory difficulties.

8. Dr. O'Brien started Mr. Millar on treatment with the antidepressant citalopram in November 2013 without noting the reasons for his prescription. Mr. Millar did not notice a difference from the medication. Dr. O'Brien noted in December 2013 that Mr. Millar was content and happy and that his mood was good, and he noted in January 2014 that he felt the citalopram helped his mood and lessen his anxiety.
 9. Dr. O'Brien noted in his last entry in May 2014 that Mr. Millar had no mood disturbance. He had no headaches. He was sleeping well. His memory and concentration were normal.
- [73] The reality is that Mr. Millar saw Dr. O'Brien on a near monthly basis from July 2013 to May 2014. During that year, he complained to Dr. O'Brien about his problems with concentration and memory on each occasion. Dr. Solomons said that he had omitted these references in his chronology because, having noted that Mr. Millar complained about his memory on one occasion, there was no need to do so again. Be that as it may, the history Dr. Solomons provided, objectively viewed, is misleading. It suggests a fleeting difficulty with memory and concentration rather than a significant and enduring problem that caused Dr. O'Brien to send the Plaintiff to a concussion clinic and to get CT and MRI scans, all of which are noted in Dr. O'Brien's clinical records.
- [74] Furthermore, though there is a single reference in Dr. O'Brien's notes in May 2014 to Mr. Millar's memory and concentration being normal, this single notation was aberrant. The fact is that after May 2014, Mr. Millar continued to consistently complain about his memory and concentration. Dr. Solomons was not provided with these further notes but he apparently made no inquiry about Mr. Millar's status and progress after May 2014. Dr. Prout's report, conversely, does refer to such further notes and he observes Mr. Millar's ongoing difficulties.
- [75] Next, Dr. Solomons' opinions are, on a consistent basis, at odds with significant bodies of medical evidence on important issues. He concludes, for example, that Mr. Millar suffered no psychiatric difficulties in the Accident. I have earlier reviewed the relevant expert and lay evidence that relates to this issue. I observe, in particular, that Dr. Prout, an expert retained by the Defendant, though not a psychiatrist, concluded that Mr. Millar's ongoing difficulties were, in large part, on account of his depression and anxiety.
- [76] Similarly, though Dr. Solomons expresses the view that there is no need for the Plaintiff to receive counselling or psychological therapy the Defendant agrees that a part of Mr. Millar's cost of future care should be on account of counselling. Still further the Defendant argues that Mr. Millar failed to mitigate his losses by, inter alia, failing to obtain or attend psychological counselling.
- [77] In a similar vein, Dr. Solomons, in his evidence, refused for some time to accept that some segment of the population who suffer a mild traumatic brain injury do not recover from that injury. This is inconsistent with, for example, the evidence of Drs. Prout and Cameron, both of who are neurologists. Ultimately, Dr. Solomons yielded on this issue.

- [78] Next, Dr. Solomons questioned aspects of the reports of each of Drs. Bishop, Krassioukov, and Levin. There is a certain hubris or risk associated with a psychiatrist opining on the work of a neuropsychologist and a physiatrist respectively. Certainly the Defendant did not choose to retain experts with these sub-specialties to address the work of Drs. Bishop and Krassioukov. Furthermore, the tone of Dr. Solomons' written comments is unnecessarily strong in that it overtly questions the competence of Drs. Bishop and Krassioukov. I would observe, for example, that Dr. Krassioukov is an exceptionally accomplished individual with an international reputation. I had considerable confidence in his evidence.
- [79] Though I do not consider that I need to deal with all of the details of Dr. Solomons' opinions in relation to the work of others, a few examples are useful. Dr. Solomons raised various issues that he said others, including Drs. Krassioukov and Levin, had failed to raise. This included, for example, Mr. Millar's blood pressure, his blood sugar and his cholesterol. At trial the evidence suggested that none of these matters were pertinent to Mr. Millar's ongoing difficulties. Furthermore, there is no evidence that Dr. Solomons sought to obtain any such information for the preparation of his first report.
- [80] Similarly, Dr. Solomons was critical of Drs. Krassioukov and Levin for not addressing Mr. Millar's history of drinking and smoking in their assessment of his clinical presentation. The reality is that Dr. Solomons, in his first report, noted Mr. Millar's history with smoking and drinking, including since the Accident, but he ascribed no significance to these matters and they formed no part of the opinions he expressed.
- [81] Ultimately, for these and other reasons, I do not find Dr. Solomons' evidence useful or reliable.

VII. CAUSATION

- [82] I previously summarized the legal framework relating to causation in *Brewster v. Li*, 2013 BCSC 774 at paras. 81-82:
- [81] The test for causation in Canada is the "but-for" test (*Bradley v. Groves*, 2010 BCCA 361 at para. 37, 8 B.C.L.R. (5th) 247; *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22, [2007] 1 S.C.R. 333; *Blackwater v. Plint*, 2005 SCC 58 at para. 78, [2005] 3 S.C.R. 3 [Blackwater SCC]; *Clements v. Clements*, 2012 SCC 32 at para. 8, [2012] 2 S.C.R. 181). To assess whether the defendant caused an injury, the trial judge asks if, without the defendant's tortious act, the injury would have resulted. If the answer is "yes", the defendant is not liable for the injury or the losses flowing from it (*Athey* at para. 41). If the answer is "no", the defendant is liable to the plaintiff for the whole of the losses flowing from the injury (*Athey* at paras. 22 and 41).
- [82] Once causation for an injury is established, the defendant is liable to the plaintiff for all of the loss(es) flowing from that injury. The losses "flowing" from an injury are those losses which the plaintiff proves, on a balance of probabilities, would not have occurred "but-for" the defendant's act (*Blackwater SCC* at para. 78; *Smith v. Knudsen*, 2004 BCCA 613 at para. 26, 33 B.C.L.R. (4th) 76).

- [83] I have earlier addressed my specific findings related to causation. To reiterate, I find that Mr. Millar's following injuries or other difficulties were caused by the Accident: chronic neck, shoulder and back pain; chronic cervicogenic headaches; dizziness, balance issues and tinnitus; sleep disruption; changes in behaviour; depression and anxiety; and a mild traumatic brain injury and its residual effects including issues with memory and concentration.

VIII. MITIGATION

- [84] The Defendant argues that the Plaintiff has failed to mitigate his losses and that any award that he might otherwise receive should accordingly be reduced. To be specific, the Defendant grounds this submission in i) the Plaintiff's failure to seek out and participate in psychological counselling and ii) the Plaintiff's drinking to "self medicate".
- [85] The relevant legal framework, in the personal injury context, is straightforward and was succinctly summarized in *Chiu v. Chiu*, 2002 BCCA 618:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
- [86] The Defendant is required to establish both these things on the balance of probabilities: *Zell v. Carvajal*, 2019 BCSC 1979 at para. 58, citing *Myatt v. Holicza*, 2000 BCSC 1149 at para. 96.
- [87] The evidence that underlies the two components of the Defendant's assertion that Mr. Millar failed to mitigate his losses is different. Mr. Millar was advised, at a reasonably early date, to attend psychological counselling. Such recommendations are found, for example, in Dr. Bishop's April 2014 report. That recommendation was endorsed in the report of Ms. Murray, an occupational therapist, who prepared two cost of future care reports, the first of which is dated May 22, 2015.
- [88] Dr. Levin did not see Mr. Millar until 2018 and, at that time, Dr. Levin opined that on account of the chronicity of Mr. Millar's various difficulties it was "highly unlikely" that he would, even with appropriate treatment, return to his pre-Accident level of function.
- [89] Though Mr. Millar attended a few counselling sessions early on he stopped doing so because he did not consider them helpful. He has more recently sought out further assistance. This appears to pertain in large measure to his drinking though that issue, in turn, is likely related to some of his other accident related conditions.
- [90] I do not question that it would have been reasonable and prudent for Mr. Millar to obtain professional counselling assistance more diligently and more consistently than he did. This conclusion is not, however, sufficient. Instead, the Defendant must also establish, on the

balance of probabilities, the extent to which Mr. Millar's losses would have been reduced had he acted reasonably. In this case the Defendant is unable to do this. Counsel for the Defendant relied, in particular, on Dr. Prout's conclusion that Mr. Millar's present difficulties, and in particular his cognitive difficulties, are attributable to his sleep and mood issues, both of which Dr. Prout said could be treated.

- [91] I have, however, concluded that Mr. Millar's ongoing difficulties, and in particular his cognitive difficulties are contributed to by other factors including his chronic pain and his mild traumatic brain injury. I emphasize his cognitive difficulties because it is those difficulties that ground his past loss of earning capacity claim and it is that claim that is the dominant focus of this action. There is no expert or other evidence that addresses or establishes, on a balance of probabilities, the extent to which counselling would have assisted with the broader constellation of Mr. Millar's difficulties and, in particular, his cognitive difficulties.
- [92] The second issue the Defendant relies on is the fact that Mr. Millar resumed drinking sometime after the Accident, that he has done so at least intermittently since then and the Defendant submits that his drinking is a "contributing causative factor to his cognitive decline".
- [93] The case law that pertains to a plaintiff's alcohol use after an accident generally addresses this issue in one of two ways. It either considers whether such alcohol use gives rise to a causation issue and is a factor in determining a plaintiff's non-pecuniary damages as in *Miller v. Dent*, 2017 BCSC 1177 at paras. 147 and 150, or, alternatively, whether it gives rise to a mitigation issue as in *Zawadzki v. Calimoso*, 2011 BCSC 45 at paras. 161-162 and 173. In either circumstance, the Court generally has access to expert evidence regarding a plaintiff's alcohol use.
- [94] In this case, several experts agreed that long-term smoking and/or excessive alcohol consumption can be relevant to and contribute to cognitive decline. That evidence was, however, generic and pertained to the population at large. There was limited expert evidence that directly addressed Mr. Millar's drinking and its effect on his cognitive status. Dr. Bishop, however, expressly said that Mr. Millar's pre-Accident drinking may have made him more vulnerable to the consequences of his neurological injury. More importantly, she said that she had considered his post-Accident drinking in her opinion. Neither she nor any other expert, however, opined on the extent to which, if at all, Mr. Millar's post-Accident drinking contributed to his present status or difficulties or on the extent to which his losses would have been reduced had he not resumed drinking. Accordingly, the Defendant is again unable to meet the burden that rests with him or to establish that Mr. Millar failed to mitigate his losses.

IX. THE PLAINTIFF'S LOSSES

[95] Mr. Millar raises two principal claims. The first relates to his non-pecuniary losses. The second to his past and future loss of earning capacity.

A. Non-Pecuniary Loss

[96] The purpose of an award of non-pecuniary damages is to provide comfort to a plaintiff for such things as pain, suffering, disability, inconvenience, and loss of enjoyment of life. The principles that govern an award of non-pecuniary damages are set out in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100. Such awards are intended "to meet the specific circumstances of the individual case": para. 45. A non-exhaustive list of pertinent considerations are described at para. 46 of *Stapley*.

[97] Mr. Millar has struggled with various difficulties since the Accident. For a period of a few months he was in "rough shape". He thereafter enjoyed some improvement, in some respects, and some of his early physical difficulties resolved. He continues, however, to suffer with neck, shoulder and back pain. He has ongoing cervicogenic headaches. These conditions have become chronic and there is limited prospect that they will improve.

[98] He has also suffered from periodic dizziness, from tinnitus and from balance issues and unsteadiness. There is some prospect that aspects of these conditions will further worsen.

[99] Mr. Millar struggles with extremely disrupted sleep and he is consequently often tired. Still further he suffers from depression and anxiety. Once again, there is some prospect that these conditions may worsen with time.

[100] Mr. Millar was formerly an avid hiker and skier but he had significantly withdrawn from these activities prior to the Accident. He also maintained his home and, though he now does less than he formerly did, some aspects of these changes would, on account of his age, likely have occurred in any event. Thus, though he now walks less and gardens less than he might otherwise have, these are not the central concerns that ground his non-pecuniary damage claim.

[101] Instead, two other considerations are particularly important. First, Mr. Millar is someone who "self identifies" with his work. He was formerly confident, successful and he was well regarded in his professional life. He has become insecure and he is aware that he struggles at work. He is no longer able to enjoy his professional life as he formerly did.

[102] Second, Mr. Millar's relationship with his wife and close family have significantly deteriorated on account of changes in his personality and demeanour. He is angry and withdrawn. He is sometimes abusive in his tone and language and he is sometimes vulgar. He is aware that his behaviours have harmed his relationship with his wife and others but he seems to be unable to conduct himself differently. These attributes are completely at odds with who he was and how he formerly carried himself.

- [103] Thus, Mr. Millar is an individual who previously had two primary focuses: his family and his work. The Accident has significantly affected both of these things.
- [104] Mr. Millar was 67 at the time of the Accident. There are various authorities that address claims for non-pecuniary damages that are advanced by older plaintiffs. There is some tension between two realities. There is the legal reality that claims for non-pecuniary loss are intended to cover the whole of a person's life. Thus, the claim advanced by a younger person might logically be thought to be larger than a claim advanced by an older person who had suffered similar injuries. Conversely, there is the practical reality that injuries will sometimes impact an older person, who is already less able to engage in certain activities, and who is now further limited in their ability to enjoy their remaining activities, differently and more severely. This premise or reality is sometimes referred to as the "Golden Years" doctrine.
- [105] In *Fata v. Heinonen*, 2010 BCSC 385, the Court said:
- [88] The retirement years are special years for they are at a time in a person's life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age. The impact an injury can have on someone who is elderly was recognized in *Giles v. Canada (Attorney General)*, [1994] B.C.J. No. 3212 (S.C.), rev'd on other grounds (1996), 21 B.C.L.R. (3d) 190 (C.A.).
- [106] Several decisions, whose conclusions I accept, have considered that a plaintiff's age and the application of the "Golden Years" doctrine may in a sense balance each other out; see for example *Johal v. Radek*, 2016 BCSC 454 at para. 52 and the authorities that are referred to in that paragraph.
- [107] The parties advanced different figures on account of Mr. Millar's non-pecuniary losses. Counsel for Mr. Millar submitted that an award of between \$125,000 and \$175,000 would be appropriate in the circumstances. Counsel for the Defendant, in turn, suggested that an award in the range of \$75,000 - \$85,000 would properly compensate Mr. Millar for this category of loss.
- [108] The authorities relied on by the Defendant reflected the Defendant's theory of the case and perception of the severity and enduring nature of Mr. Millar's injuries. They also generally pertained to plaintiffs whose injuries were less severe than those of Mr. Millar. For example, in *Beaudoin v. Fennel*, 2019 BCSC 852 the plaintiff, who was 69 when injured, had retired. She had numerous pre-existing difficulties including chronic obstructive pulmonary disorder, hip bursitis, occasional headaches and periodic anxiety and depression. The Court considered that her accident had contributed to the various difficulties that she subsequently struggled with. The Court was also concerned with

aspects of her evidence and the evidence of some of the witnesses who were called on her behalf. Still further, the Court concluded that the plaintiff's mild traumatic brain injury, neck pain, hip pain, pain to the shoulders and abdomen had all largely resolved by the time of her trial. The Court determined, having regard to the relevant circumstances, that an award of \$85,000 for the plaintiff's non-pecuniary loss was appropriate.

- [109] Conversely, several of the authorities relied on by the Plaintiff pertained to plaintiffs whose injuries were more significant than those of Mr. Millar. The recent case of *Hawkins v. Kumar*, 2019 BCSC 1896, though inevitably different in some respects, provides useful guidance. In *Hawkins*, the plaintiff was 55 years old at the time of trial. The Court concluded that the plaintiff's most significant injuries were her cognitive impairments. She suffered from reduced concentration and attention, memory problems, language difficulties and a reduced ability to multitask and organize. These limitations had had a profound and dramatic effect on the plaintiff. Her soft tissue injuries were less significant but nevertheless serious. As a result of those soft tissue injuries the plaintiff suffered from chronic pain, headaches and fatigue. These various injuries had dramatically affected her ability to work and had taken a significant emotional toll on her. Her injuries also significantly impacted her recreational activities and her ability to work around her home. The Court determined that an award of \$140,000 properly compensated the plaintiff for her non-pecuniary losses.
- [110] In *Paterson v. Hindle*, 2017 BCSC 1104, the plaintiff was 79 years old at the time that she was injured. She had suffered from some pre-existing health issues including depression and anxiety. She had suffered various soft tissue injuries and a mild traumatic brain injury in the accident. Most of her soft tissue injuries had resolved but she still suffered from chronic neck pain. She also suffered from ongoing cognitive and psychological problems, including memory loss, depression and anxiety. The Court was satisfied that these various injuries had impacted every aspect of the plaintiff's life. She had previously managed her 20-acre farm and had been active in various activities. After the accident the plaintiff had given up many of her outdoor pursuits, she could not farm, she was less social, she laughed less, she stopped writing--an activity that previously given her much pleasure, and she had lost much of her independence. Two of her children now took time off work to help her with farm maintenance, to take her to appointments and to shop for her. The Court determined that the appropriate award for non-pecuniary damages was \$125,000.
- [111] Based on the various authorities I was provided, the circumstances I have described and the findings I have made, I consider that an award of \$125,000 fairly compensates Mr. Millar for his non-pecuniary losses.

B. Past Loss of Earning Capacity

- [112] Mr. Millar was injured, as I have said, when he was 67 years old. He is now 74. His wage loss claim is premised on his retiring at age 75. Accordingly, most of his loss of earning capacity claim is based on his past losses. Because Mr. Millar did not earn a fixed wage, because he was 67 at the time of the Accident and because the real estate market is known to be volatile the quantification of his claim is not straightforward.
- [113] The case law and the legal principles that govern a claim for past wage loss are, however, reasonably well established. Recently, in *Williams v. Sekhon*, 2019 BCSC 1511 I said:
- [132] The legal principles that address a loss of earning capacity are well developed. Those principles, in many respects, align in relation to past and future loss of capacity claims. A claim for past loss of earning capacity is based on what a plaintiff would have, not could have, earned but for the injury the plaintiff suffered: *M.B. v. British Columbia*, 2003 SCC 53 at paras. 49-50 and *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. The purpose of the award is to compensate a plaintiff for what he or she lost as a result of the accident: *DeGuzman v. Ge*, 2013 BCSC 1450 at para. 42.
- [133] Both awards may be viewed as a loss of income earning capacity: *Ibbitson v. Cooper*, 2010 BCSC 1916 at para. 60, *aff'd* 2012 BCCA 249. Both are often based on hypotheticals. The standard of proof for hypothetical events, past and future, is the same. A "hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation": *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. In both cases, to the extent possible, a court nevertheless looks to numerical signposts or guidance, or to other objective data, to assist with the exercise.
- See also the discussion and authorities that are referred to in *Carrillo v. Deschutter*, 2018 BCSC 2134 at paras. 111-117.
- [114] There are multiple discrete considerations that are relevant to Mr. Millar's past loss of capacity claim. First, although Mr. Millar became a realtor relatively late in life he enjoyed considerable success almost immediately. An exhibit at trial listed the various real estate awards that Mr. Millar had received at different times over the years. From 1997, when he started as a realtor, to 2007 he received such awards on a consistent basis and in some years he won multiple awards.
- [115] In addition, from at least 2004 to about 2007, Mr. Millar had a group of realtors who worked for or under him as a "team". In 2010, Mr. Anderson, the owner of the realty company where Mr. Millar now works, reached out to him and he asked Mr. Millar to come join his office. The two men had known each other for many years and Mr. Anderson said that the Plaintiff was successful and well respected. Mr. Neufeld, who came to know Mr. Millar in 2010, described him as "well known in the industry" and as a "top producer". Both individuals described Mr. Millar as "hard-working". Mr. Millar testified that that he had historically worked more than 50 hours a week.

[116] The second body of evidence that is relevant tracked Mr. Millar's gross revenues, the number of units and homes he had sold, and the average commission he had earned, on an annual basis from about 2004 through to 2019. Aspects of this information are potentially misleading, or at least confusing, because the gross revenue and units sold figures for the years 2004 through to 2007 reflected years when Mr. Millar had up to five realtors working for him in his team and these figures also included the results of these other realtors.

[117] The third body of relevant evidence arises from the historical record of real estate transactions in the Fraser Valley. These records address both total residential sales on an annual basis and they track the increases in average sales prices. This latter set of statistics is relevant because Mr. Millar, as a realtor, is paid a commission that is directly related to the sales price of the unit or home he sells. The following tables reflect these statistics:

British Columbia Multiple Listing Statistics - Fraser Valley

Year

Number of Residential Properties Sold

Average Residential Price (\$)

2006

18,093

393,047

2007

18,032

423,761

2008

12,588

431,781

2009

15,660

425,796

2010

13,977

451,221

2011

14,727

502,562

2012

13,083

483,730

2013

12,895

490,433

2014

15,017

517,718

2015

20,055

577,507

2016

23,086

676,946

2017

21,436

701,842

2018

14,837

747,725

2019

14,683

721,775

[118] The fourth body of relevant evidence pertained to the business plan that Mr. Millar had developed prior to the Accident. From 2008 through to 2012, the real estate market in the Fraser Valley was somewhat depressed. This reality is reflected in the information

contained in the preceding paragraph. In 2011 and 2012, Mr. Millar invested significant time and some money in developing a new interactive webpage that would direct prospective purchasers and online traffic to him. His plan was to hire perhaps two further realtors, and to do perhaps 50 sales per year, as a team.

- [119] There was some dispute about whether Mr. Millar's new website was, in fact, unique or even significantly different from other interactive sites that existed or that were being developed. Mr. Millar maintained that at least some aspects of his website were unique and I accept that evidence. Furthermore, Mr. Neufeld said that Mr. Millar had "one of the best websites going".
- [120] The evidence that pertains to Mr. Millar's business plan and website has other relevance. The Defendant argued that in 2013, when the Accident occurred, Mr. Millar was 67 and that he would naturally be winding down and becoming less productive. The Defendant's expert economist provided some evidence of average earnings for realtors in their 40s, 50s and 60s and the decline in those earnings. Once again, this evidence, based on averages, is generic. It is likely true of most professions that most individuals begin to slow down in their 60s, if not before. And yet there are individuals in every profession who do not slow down, who wish to continue to work and who continue to be productive.
- [121] Mr. Neufeld and Mr. Anderson confirmed both these facts. There are comparatively few realtors who work into or past their 60s. There are however some individuals who do, who are well regarded and who continue to do well financially.
- [122] In this case Mr. Millar was in his mid-60s when he went hiking in Nepal. He was in his mid-60s when he was hired by Mr. Anderson and changed realty companies. He was in his mid-60s when he developed his new business plan and invested in his new website. These latter facts speak to a level of both energy and commitment and are inconsistent with any intended withdrawal from the workforce. It is also somewhat relevant that Mrs. Millar, who is 72 years old, also continues to work. She repeatedly commented that continuing to work was important to both the Plaintiff and to herself.
- [123] The fifth body of evidence pertained to Mr. Millar's results in 2013. Mr. Millar's website started up in 2013 and he had 23 sales in the four months prior to the Accident. Though this is a short period of time, it is telling. In 2010, 2011, and 2012, Mr. Millar had 22, 15, and 18 sales respectively throughout the whole of the year. Furthermore, Mr. Millar had only five sales after the Accident, from May to December 2013. Mr. Millar's success in 2013 is also significant because it is apparent from the Fraser Valley Real Estate Board statistics that the real estate market in 2013 was largely consistent with the market that had existed in the three preceding years. Thus Mr. Millar, with his new website, enjoyed significantly increased success in a relatively flat market.
- [124] An additional body of evidence, also arising from 2013, was relied on by the Plaintiff. Mr. Millar maintained a database or "Contact Management System" in which he, and in the second half of 2013 Ms. Landers, entered various forms of information including new client

contacts, further client interactions and other information. From this database and other sources Mr. Millar generated a list of clients who had contacted him in 2013 and who, he said, had not stayed with him but had, instead, gone to other realtors. This, Mr. Millar argued, was on account of his unresponsiveness, forgetfulness, the various errors he made in the documents he prepared and other similar concerns.

- [125] Mr. Millar said that in the normal case, he expected to convert 20% to 40% of the potential clients who contacted him into clients with whom he later completed a transaction. This statistic varies from realtor to realtor, I accept from Mr. Millar's evidence as it relates to his historical client conversion rate. In this case Mr. Millar said that he had somehow narrowed his list further, to include better or more likely prospects, with the result of his list of 26 initial contacts he said he would, but for the Accident, have converted 17 into clients. This figure, together with the 28 transactions that Mr. Millar actually closed in 2013 yields a total of 45 transactions. This 45 transaction figure, in turn, was one of the building blocks in the Plaintiff's past loss of capacity claim.
- [126] The Defendant called evidence from one individual and, with the Plaintiff's agreement, filed written evidence from two other individuals who were prospective clients and who were included in Mr. Millar's list of 26 initial contacts. The gist of the evidence of these three individuals was that they did not leave Mr. Millar, and go to a different realtor, on account of any perceived shortcomings or forgetfulness on his part.
- [127] Be that as it may, Mr. Millar would likely, in normal circumstances, have converted some of these individuals who contacted him into clients. Even if one takes 30% as a conversion rate, this being mid-point between the 20% and 40% that Mr. Millar normally achieved, and applies that 30% to Mr. Millar's 26 initial contact list, a figure of about 9 further sales is achieved. Combining this figure with Mr. Millar's actual sales in 2013 results in about 37 sales.
- [128] There are several further facts or issues that are relevant to the assessment of the Plaintiff's claim. First, there appeared to be general agreement that Mr. Millar's annual gross revenues should be reduced by approximately 40% on account of various categories of expenses. Furthermore, if Mr. Millar had built a small team he would also have had to pay 50% of the revenue that was generated by the realtors in his team to them.
- [129] Second, the Defendant did not appear to contest that the Plaintiff, in hiring Ms. Landers, incurred expenses in the years 2013, 2014 and 2015 that he would not, but for the Accident, have incurred. Those expenses, for those three years, total slightly more than \$37,000.

- [130] Third, Mr. Millar consistently split a portion of the income he generated with his wife. The amount of income that Mr. Millar moved to his wife for income tax purposes varied from year to year. In the seven years from 2013 to 2019 that figure averaged just under \$30,000 per year. Mrs. Millar also did the books for her husband's business and the Defendant argued that these figures should be treated as an expense while conceding that the payments being made to Mrs. Millar were likely "generous".
- [131] There are a number of authorities that address the question of whether income that is transferred, for tax planning purposes, by an injured plaintiff to a spouse should nevertheless be considered as part of the injured spouse's income. Each of *Mayer v. Umabao*, 2016 BCSC 506 at para. 302, *Pistruga v. Garcia*, 2014 BCSC 1795 at para. 107 and *Zollinger v. Kong and Kong*, 2003 BCSC 1932 at para. 119 address this issue. In each case the court was satisfied that it was appropriate to add the income that had been moved to a spouse back to the injured plaintiff for the purposes of assessing his or her income loss.
- [132] There is a further expense, on account of "Business Home Use" that Mr. Millar claimed on his taxes and that has over the last 10 years averaged approximately \$2,700 a year. The parties appeared to agree that this sum should also be added to Mr. Millar's annual income.
- [133] Finally, I was provided with both the average commissions that Mr. Millar generated from his sales in each year as well as the value of the average of his commissions from all sales from 2004 to 2013 as well as from 2014 to 2019.
- [134] Accordingly, there is a considerable body of evidence, including economic data and other forms of guidance, that assist in the assessment of Mr. Millar's past income loss. It is also worth observing that an aspect of Mr. Millar's past income claim addresses a past hypothetical. It raises the question of what Mr. Millar would have earned but for the Accident. Nevertheless, many of the contingencies, positive and negative, that inform this issue are known. For example, the status of Mr. Millar's health, including his Accident-related injuries, is known. So too is the performance of the real estate market throughout the period of time in question.

1. Analysis

- [135] I start by returning to the Defendant's submission that because Mr. Millar's income had, by the end of 2016, largely returned to the level of his 2013 income he had recovered from those of his injuries that affected his work and that any subsequent diminution in his income was largely attributable to his age or to factors that were unrelated to the Accident. This pertains to both some foreseeable cognitive decline in older individuals and to a natural withdrawal from the workplace by a person of Mr. Millar's age.

- [136] These submissions fail to recognize that most of Mr. Millar's 2013 income was earned in the four months before the Accident. They also fail to recognize that 2016 was an extraordinarily active real estate market. Sales volumes had nearly doubled from their 2013 levels and prices had increased by approximately 35%. The fact that Mr. Millar generated the same or similar gross revenue in 2016 as he had in 2013 means, in real terms, that he continued to significantly underperform where he had been in 2013.
- [137] Similarly, in 2017, 2018, and 2019, although the market was cooling and sales volumes were decreasing, those volumes were still higher than they had been in 2013 and home prices were nearly 50% higher than they had been. Mr. Millar's gross revenues in those three years were, on average, only slightly more than one half of what they had been in 2013.
- [138] In 2013, Mr. Millar's net family income, adjusting for the approximately \$10,000 he paid to Ms. Landers, was approximately \$131,000. This does not, however, include any adjustment for the potential sales he lost after he was injured in the Accident. His net family income in the last three years has been approximate \$66,000.
- [139] I am satisfied, as I have said, that Mr. Millar's ongoing cognitive limitations significantly impacted his ability to function at work and adversely impacted his income. This is notwithstanding the fact that Mr. Millar has, over time, developed various skills and tools to address his shortcomings.
- [140] This conclusion is supported by the evidence of his family and coworkers that I have referred to. I wish, however, to return to the evidence of Ms. Tsang, Mr. Neufeld and Mr. Anderson. These latter witnesses emphasized that following 2013, in an improving and often overheated market, Mr. Millar was not benefiting from that market or generating the sales that he would, as an experienced and well respected realtor, be expected to. Instead, his sales volumes were largely flat. He was also not converting the calls or approaches that potential clients made to him into sales.
- [141] Often experienced realtors, on account of their experience, reputation and established sales platforms will benefit from an active market more than an average realtor will. Mr. Millar, however, was not even holding his ground. He significantly underperformed in the market.
- [142] Counsel for the Plaintiff provided me with various scenarios that consisted of various components or elements of evidence. At the low end, counsel for the Plaintiff simply used Mr. Millar's 2013 net income, including the payments he made to Ms. Landers, the income he gave his wife and the amounts that he claimed as an expense for "Business Home Use" and compared that net income to the income he generated annually from 2014 to the end of 2019. That exercise yielded an amount of approximately \$335,000.

- [143] In a middle scenario, the Plaintiff undertook this same exercise but, in addition, added in the commissions from the 17 additional sales that the Plaintiff claimed he lost in 2013 and he used that figure as his 2013 baseline. That new baseline was then compared to the income that Mr. Millar earned from 2014 to 2019. This exercise yielded a loss of approximately \$1 million.
- [144] Finally, at the high end, counsel for the Plaintiff again undertook the previous exercise but he now also factored in the amounts that Mr. Millar would have earned, as an average realtor, from increases in the real estate market subsequent to 2013. That exercise yielded a figure, for the six years from 2014 to 2019, of just under \$1.5 million.
- [145] Counsel for the Defendant adopted aspects of the Plaintiff's first scenario and generated a calculation that ended in 2016, that being when the Defendant argued Mr. Millar had recovered from those aspects of his injuries or impairments that affected his ability to work productively. The Defendant's calculations did not, however include any amount on an account of income that Mr. Millar split or transferred to his wife. The Defendant submitted that an amount of between \$120,000 and \$150,000 would fully compensate Mr. Millar for his past loss of earning capacity.
- [146] The various bodies of evidence that I have identified do not entirely align and they give rise to different sources of inconsistency and concern. For example, the real estate market has fluctuated significantly over the years 2013 - 2019.
- [147] Furthermore, a significant building block in the Plaintiff's claim is the fact that he enjoyed significant success in the four months prior to the Accident. The result of those four months, when extrapolated over a year, gives rise to approximately 70 sales annually. This is many multiples of what Mr. Millar had accomplished, albeit in a poor market, in the years prior to the Accident. Indeed it approaches what he had achieved nearly a decade earlier when he worked with and oversaw a team of five other realtors.
- [148] If one further adjusts those results for improvement in the market in 2015, 2016 and 2017 Mr. Millar would have been doing more than 100 sales annually. This seems quite unlikely. Though the Plaintiff does not suggest he sought to or would have achieved such volumes these figures are nevertheless useful in testing the viability or sustainability of the sales volumes that Mr. Millar enjoyed in the early part of 2013.
- [149] I also accept that there is some prospect that Mr. Millar would have slowed down somewhat over the years. One aspect of his business plan was a desire to reduce his working week from approximately 50 hours to approximately 40 hours. In addition, I have considered that some of the competitive advantages that Mr. Millar might have enjoyed with his new website in 2013 would, with the passage of time, have been diminished as the technology used by other realtors inevitably improved.

- [150] On the other hand, even if one assumes a more reasonable sales level or expectation for Mr. Millar, with his new business plan and website of 25 to 35 homes annually, and one adjusts that level of activity for increased volumes in 2015, 2016 and 2017 and for increased home prices, his claim would be several multiples of what the Defendant submits is appropriate. It is also important, in assessing Mr. Millar's wage losses, to recognize that more than seven years have elapsed since the Accident.
- [151] Although I have been provided with a significant amount of empirical information and with numerous detailed calculations, the Plaintiff's past loss of earning capacity claim is ultimately, and necessarily, in the nature of an assessment. I have also said that I consider it appropriate to recognize the amounts that Mr. Millar paid to Ms. Landers, that the income split with his wife and that he claimed a home office on his taxes when assessing his claim.
- [152] Based on the information, data and the various considerations that I have described, I consider that an award of \$700,000 properly compensates Mr. Millar for his past wage loss claim. Counsel for the parties have agreed that they will undertake the necessary tax calculations that arise from this part of Mr. Millar's claim.

C. Future Loss of Earning Capacity

- [153] The various approaches that can be used to assess a plaintiff's future loss of earning capacity are described in numerous cases, including *Perren v. Lalari*, 2010 BCCA 140, *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (C.A.) and *Djukic v. Hahn*, 2007 BCCA 203.
- [154] In this case, I do not propose to address these authorities or this aspect of the Plaintiff's claim in any detail. The reality is that Mr. Millar proposes to retire in less than a year and this aspect of his claim covers a reasonably brief period of time. Still further, the reality is that the real estate market has, as has everything else, been affected by the COVID-19 pandemic. What effect that pandemic will have on real estate sales in the coming year is unclear but there is a substantial possibility that those effects will be negative.
- [155] There was evidence at trial which suggested that although sales volumes were significantly depressed in each of March, April, and May 2020, they were rebounding in June. A further consideration is, however, relevant. Mr. Millar is now 74 years old. He belongs within the subset of the population that is most vulnerable to COVID-19 and that is required to take the greatest precautions. I expect that those precautions would have significantly impacted on how he conducted himself and on how he was able to conduct his business. I consider that there is a substantial possibility that Mr. Miller would have significantly withdrawn from his normal business activities with the result that decreases in his sales volumes, for the balance of this year, would be attributable to factors apart from the injuries he suffered in the Accident. Accordingly, I do not consider that the Plaintiff is able to establish any loss in this aspect of his claim.

D. Cost of Future Care

[156] The parties agree that Mr. Millar should be awarded \$16,835 for this component of his claim. This global sum is to be on account of the following discrete items:

a) Psychology:

\$4,473

b) Physiotherapy/Kinesiology:

\$9,860

c) Non Prescription medications:

\$656

d) Prescription medications:

\$1,846

Total:

\$16,835

E. Special Damages

[157] The parties agree that Mr. Millar should be awarded \$6,233.13 as special damages.

X. CONCLUSIONS

[158] I have awarded Mr. Millar the following amounts on account of the following categories of loss:

a) Non-pecuniary damages:

\$125,000.00

b) Past loss of earning capacity:

\$700,000.00

c) Future loss of earning capacity:

\$0.00

d) Cost of future care:

\$16,835.00

e) Special damages:

\$6,233.13

Total:

\$848,068.13

[159] I am satisfied that the total amount fairly and properly compensates Mr. Millar for his losses arising from the Accident.

"Voith J."

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