
CANADA / JUDGMENT

Moges v. Sanderson

2020 BCSC 1511

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1511 Moges v. Sanderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moges v. Sanderson,

2020 BCSC 1511

Date: 20201009

Docket: M182017

Registry: New Westminster

Between:

Isaias Moges

Plaintiff

And

April Sanderson, Christopher Sanderson &

Ensign Pacific Lease Ltd.

Defendants

-And-

Docket: M183523

Between:

Isaias Moges

Plaintiff

And

Brian Huynh and Khanh Huynh

Defendants

-And-

Docket: M198899

Between:

Isaias Moges

Plaintiff

And

Hikmattullah Taqdiri

Defendant

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

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A.M. Wood

Place and Date of Trial:

New Westminster, B.C.

June 22-25, 29 & 30, 2020

July 2, 3, & 6-9, 2020

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I. Overview

- [1] The plaintiff, Isaias Moges, claims damages for injuries and loss sustained as a result of three motor vehicle collisions ("MVCs") which occurred on: September 4, 2014 (ATS Sanderson et al., SCBC# M182017), October 11, 2014 (ATS Huynh et al., SCBC #M183523), and May 30, 2017 (ATS Taqdiri, SCBC# M198899). All three actions were heard together.
- [2] The plaintiff alleges that the first collision caused him significant physical and psychological injuries, which were aggravated by the two subsequent collisions. He says that he has been permanently disabled from working in a full-time capacity. In addition to damages for pain and suffering, Mr. Moges seeks compensation for past income loss, loss of opportunity, impairment of earning capacity, loss of housekeeping capacity, and cost of future care.
- [3] The defendants in all three actions have admitted liability.

II. The Plaintiff

- [4] The plaintiff is 31-years-old. He is single and currently lives with his sister and mother in the Metro Vancouver area of British Columbia. He was born in Sudan in 1989, and speaks Tigrinya, Arabic, and English. His biological parents separated while he was still young. Around the age of five, he moved to Eritrea to live with his mother. Mr. Moges completed grade 11 in Eritrea. He was a good student, particularly strong in math and science. Because there was a military requirement for grade 12 students in Eritrea, Mr. Moges returned to Sudan to live with his father, with the intention to further his studies.
- [5] Mr. Moges' father, Menghistab Tekhle, testified that the political situation in Sudan was very turbulent. They were a Christian family living in a predominantly Muslim country. Due to religious discrimination, it became difficult for the plaintiff to go to school. However, Mr. Tekhle valued higher education and determined that the plaintiff would study abroad. Not long after, they moved into a refugee camp. They eventually were granted landed immigrant status in Canada in October 2010.

- [6] At the age of 21, Mr. Moges immigrated to Canada with his father, stepmother, and three stepbrothers. As the eldest sibling and the only member of the family that spoke English, Mr. Moges assumed the responsibility of helping his family settle in B.C. About a year after arriving in Canada, Mr. Moges moved out on his own.
- [7] At the time of the first MVC, the plaintiff was working three part-time jobs, and enrolled at Vancouver Community College ("VCC") to upgrade his education. Mr. Moges did not return to his pre-injury employment after the first collision.
- [8] In February 2017, Mr. Moges was designated as a person with disabilities ("PWD") under the Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41. Since that time, he has been in receipt of disability assistance, of about \$1,100 per month. From 2018 to 2020, Mr. Moges has supplemented his income working as an interpreter for various organizations on a casual/part-time basis. In January 2018, he was appointed deacon of his church, where he continues to serve in a voluntary capacity.

III. The Collisions

- [9] The first collision occurred on September 4, 2014, in Surrey, BC, at the intersection of 64 Avenue and King George Boulevard. The plaintiff was operating a 1994 Toyota Corolla vehicle owned by his father, Menghistab Tekhle (the "Corolla"). Mr. Tekhle was a front seat passenger. Mr. Moges was heading southbound on 64 Avenue, when he brought the Corolla to a full stop at a traffic light at the King George Boulevard intersection. While still stopped at the traffic light, the Corolla was struck from behind by a vehicle being negligently operated by the defendant April Sanderson (the "Sanderson vehicle"). The Sanderson vehicle was owned by the defendant Ensign Pacific Lease Ltd., and leased to the defendant Christopher Sanderson.
- [10] The force of impact from the first collision caused the Corolla to be pushed forward and to collide with the vehicle in front of it. The front driver's side airbag in the Corolla deployed upon impact. Photographs of the Corolla reveal significant damage to its front and back end.
- [11] Emergency vehicles were called to the scene. Mr. Moges was able to extricate himself from the vehicle. He and his father were transported via ambulance to Surrey Memorial Hospital ("SMH"). Following discharge from hospital, he returned to his home via taxicab.
- [12] The second collision occurred on October 11, 2014, in a parking lot located around the 7200 block of Kingsway in Burnaby. The plaintiff was driving a 1998 Pontiac Sunfire (the "Pontiac"). He was proceeding through the parking lot with the intention of getting something to eat. The collision occurred when a vehicle owned by the defendant Khanh Huynh, and negligently operated by the defendant Brian Huynh, pulled out of a parking spot, hitting Mr. Moges' vehicle.

- [13] Mr. Moges described the incident as being less serious than the first collision. Mr. Moges got out of the Pontiac and exchanged information with the opposing driver. No emergency vehicles attended the scene. The Pontiac was driveable, and Mr. Moges proceeded to get his meal.
- [14] The third collision occurred on May 30, 2017, at or near Howes Street in New Westminster. The plaintiff was the driver of a 1997 Toyota Tercel (the "Tercel"). He and his passengers were heading to his brother's graduation during rush hour. When the plaintiff brought the Tercel to a full stop, it was struck from behind by a vehicle owned and operated by the defendant Hikmattullah Taqdiri. The force of impact caused the Tercel to move forward. The Tercel sustained damage mostly around the rear bumper.
- [15] Mr. Moges was able to get out of the Tercel on his own, and exchanged information with the defendant. No emergency vehicles attended, and Mr. Moges proceeded to his brother's graduation ceremony.
- [16] Mr. Moges had two additional motor vehicle collisions - one in 2017 and the other in 2018. However, they were both minor and did not cause him any injuries.

IV. Injuries

- [17] Mr. Moges claims for injuries to both of his knees, back, left ankle, both arms, neck and wrist, causing numbness, loss of sleep, depression, various bruises and lacerations, headaches, nausea and dizziness.
- [18] All parties agree that of the three collisions, the first collision was of the most causative significance. The force of impact caused Mr. Moges' body to move forward and backwards inside the vehicle, and the airbag to deploy. He felt immediate pain in his back and later his left ankle started hurting. The plaintiff was uncertain if the airbag hit his face, or if he lost consciousness. He recalls seeing some kind of a bright light at one point.
- [19] On arrival at the hospital the plaintiff complained of pain in his left leg and ankle, pain in his low back, and pain and swelling in his right knee. His neurological examination was normal. He denied any loss of consciousness or neck pain. Mr. Moges was found to have a normal Glasgow Coma Score ("GCS") of 15. He was assessed and discharged not long after his arrival.
- [20] Mr. Moges testified that the pain worsened after he returned home. He had difficulty sleeping. His body was tight and stiff, and he felt pain in his head radiating through to his low back/buttocks area. Both his ankles were swollen and he had pain in his right shoulder.

A. Treatment

- [21] Mr. Moges saw his family physician, Dr. Oosterholt a few days later. He was prescribed pain medication and muscle relaxants, and advised to avoid heavy lifting. Dr. Oosterholt recommended that he stay off work, but remain active with stretching and moving.
- [22] On his doctor's advice, Mr. Moges started massage therapy treatments, which were of some benefit. He began to see gradual improvement in his condition, but remained symptomatic and off work.
- [23] The second collision occurred about one month after the first one. Mr. Moges did not suffer any new injuries in this second collision, aside from a chipped tooth, which he believes happened because he was chewing gum at the time of impact. Mr. Moges testified that in the second collision, he aggravated his low back, mid back, and neck injuries from the first accident. Mr. Moges did not immediately seek medical treatment after the second collision.
- [24] Mr. Moges saw Dr. Oosterholt on October 24, 2014. The purpose of the visit was to report the second collision, provide Dr. Oosterholt with an update on the progress of his active rehabilitation therapy related to the first collision, and get a prescription for some medication. The appointment did not go well. Mr. Moges testified that Dr. Oosterholt was dismissive and would not listen to his description of the second collision. Indeed, there is no reference to the second collision in Dr. Oosterholt's clinical notation of October 24, 2014. However, the records note complaints of daily headaches and low back pain. Dr. Oosterholt prescribed pain medications and suggested active rehabilitation.
- [25] On November 3, 2014, Dr. Oosterholt referred Mr. Moges to active rehabilitation at KARP Physiotherapy. In a follow up visit on November 17, 2014, Mr. Moges reported that he had attended three visits at KARP but was finding that the treatment increased his pain. He sought to return to massage therapy, which Dr. Oosterholt was apparently against. The two had a disagreement. That was the last time that Mr. Moges saw Dr. Oosterholt for treatment.
- [26] Mr. Moges switched doctors and began to see Dr. Salman Ali. Mr. Moges first discussed his motor vehicle collisions during his second visit with Dr. Ali, on December 8, 2014. Dr. Ali noted on examination that Mr. Moges had "significant cervical paraspinal spasm and tenderness". Dr. Ali diagnosed the plaintiff with cervicogenic relating to the motor vehicle accident, prescribed pain medication, and recommended stretches and massage therapy. He also made a request for Mr. Moges' clinical files from Dr. Oosterholt.
- [27] Around December 15, 2014, Dr. Ali received a letter from Dr. Oosterholt, setting out his concerns that Mr. Moges was non-compliant with treatment, and may be motivated by secondary gain (the "warning letter"). The warning letter also indicated that Mr. Moges might "benefit from an anxiety med, SRI". Despite the warning letter Dr. Ali was undeterred, and continued with his treatment of Mr. Moges. On occasion, Dr. Ali's colleague, Dr. Kirby Simpson, also saw the plaintiff. Over the next few months, Dr. Ali tapered Mr. Moges off the Tylenol No. 3.

- [28] Dr. Ali encouraged Mr. Moges to become more active and find some remunerative employment. The plaintiff remained off work with complaints of acute neck and back pain, left foot pain, headaches, and sleep disturbance. Dr. Ali referred Mr. Moges to various treatment modalities, including manual therapy and active rehabilitation. Over the ensuing months and years, he was sent by Dr. Ali or other healthcare professionals, for X-rays of his ankle and back, a CT scan of his lumbar spine, a CT scan of his cervical spine, a bone scan, an ultrasound of his right shoulder, and an MRI of his head and cervical spine. A March 2015 CT of the lumbar spine showed Schmorl's nodes (non-specific finding of degeneration) at the L5-S1 region, and mild right neural foraminal narrowing. The test results were otherwise unremarkable.
- [29] In an effort to ready him for a return to work, Mr. Moges was sent for active rehabilitation at Community Therapists in February 2015. He made little progress and was discharged from the program in July 2015.
- [30] The clinical records indicate that Mr. Moges' condition began to worsen in the fall of 2016. On September 2, 2016, Dr. Ali notes that Mr. Moges "reported worsening mood due to his pain and disability." On examination, Dr. Ali found spasm and tenderness of the lumbar paraspinals. He advised Mr. Moges to continue with the Cipralex and also placed him on Wellbutrin.
- [31] In November 2016, Dr. Ali referred Mr. Moges to the rapid access psychiatry clinic for group sessions. Later that month, Mr. Moges' dosage of Wellbutrin was increased. On November 22, 2016, Mr. Moges reported ongoing pain in his back and tailbone even without sitting or pressure. The pain was not relieved by rest. Dr. Ali reports:
- On examination he was tender to palpation along the midline spine and coccyx, through the lumbar paraspinals, and gluteal area. There was also tenderness to palpation along the SI joints. X-rays and CT lumbar was ordered to evaluate the change in the pain. He was given a prescription for Tramacet
- [32] Mr. Moges had his CT of the lumbar spine in February 2017. The CT scan revealed that he had bilateral S1 nerve root impingement. Specifically, at "L5-S1, there is a mild disc bulging which abuts both S1 nerve roots with no displacement which is of uncertain clinical significance. Mild right foraminal narrowing noted. No significant left foraminal or canal narrowing". Under the heading "Impression", the CT report indicates: "Mild degenerative changes, most prominent at L5 - S1 which is [sic] not appear significantly changed."
- [33] In the months and years following the first motor vehicle collision, Dr. Ali referred Mr. Moges to a variety of healthcare professionals to address his injuries and pain, including: physiatrists Dr. Dawson and Dr. Shearer; neurologists Dr. Toth and Dr. Webber; and pain specialists Dr. Lau and Dr. Hyams.

- [34] Mr. Moges received trigger point injections from Dr. Hyams in February 2017. Mr. Moges also obtained trigger point injections at the CHANGEpain clinic. He attended the clinic between November 2015 and November 2017. In addition to classes for pain management, the plaintiff had approximately 18 trigger point injections to treat pain in the various parts of his back, neck and head. The injections provided only temporary relief.
- [35] Mr. Moges was still symptomatic at the time of his third motor vehicle collision in May 2017. After exchanging driver information, Mr. Moges proceeded to his brother's graduation ceremony. Sometime during the ceremony, he recalls shaking and feeling increased pain. Mr. Moges did not immediately seek medical treatment for this increased pain. Mr. Moges testified that he did not suffer any new injuries from the third collision. Rather, it caused an aggravation of his injuries from the first accident.
- [36] Mr. Moges testified to experiencing a worsening of his mood following the third collision, saying that he felt "cursed". Mr. Moges' mood had already started to deteriorate in early 2015. He had feelings of helplessness due to his ongoing pain, inability to work, and financial constraints. He was becoming increasingly socially isolated. Though his religious beliefs prevented him from making any suicide attempts, he expressed thoughts of dying.
- [37] In addition to placing him on antidepressants in May 2015, Dr. Ali referred Mr. Moges to a number of community health services as well as the Mood Disorders Association of B.C. Mr. Moges also saw a multitude of psychiatrists, such as Dr. Wicholas, Dr. Chan, Dr. Klein, Dr. Gorman, and Dr. Holden, and underwent cognitive behavioural therapy and group therapy.
- [38] In early 2020, Mr. Moges started Botox injections to control his migraines. By June 2020 he had completed two injections, and was finding the treatment beneficial.
- [39] As at the date of trial, Mr. Moges continues to experience chronic pain in his back, neck, and left foot, as well as migraines, depression, anxiety, and fatigue. He has difficulty sleeping, and remains restricted in his ability to work. The plaintiff's current medication regime includes antidepressants, painkillers, and medication to address his migraines. He remains under the care of Dr. Holden, Dr. Ali, and Dr. Webber.

B. Medical Evidence

- [40] Medical evidence at the trial consisted of five experts who testified on behalf of the plaintiff, one expert called on behalf of the defence, and three healthcare professionals who testified as fact witnesses.
- [41] In refuting the plaintiff's expert opinions, the defendants rely heavily on their cross-examination of the plaintiff and his experts. The main thrust of their argument is that the various medical diagnoses are not supported by any objective evidence. Insofar as the opinions are founded on self-reports from Mr. Moges, the defendants say that these opinions are unreliable. They say that Mr. Moges did not fully disclose his pre-accident medical history to the experts and other healthcare professionals; he misled them into

believing that he had dropped out of school following the first collision, when in fact he continued to take college-level courses for several years; he exaggerated the extent of his injuries and functional limitations post-accident; and he provided false information in order to qualify for a PWD designation.

[42] I have addressed specific concerns about the plaintiff's credibility elsewhere. While there are some discrepancies in what the plaintiff told his treating doctors, in my view these discrepancies do not undermine the reliability of any of the plaintiff's expert opinions. There is no evidence that the opinions of the plaintiff's experts would have changed had they been made aware of the information which the defendants say was not disclosed to them by Mr. Moges.

1. Dr. Salman Ali

[43] Dr. Salman Ali has been the plaintiff's treating physician since December 3, 2014. He was qualified as an expert in family medicine, and also provided fact evidence related to his treatment of the plaintiff.

[44] Dr. Ali has seen the plaintiff regularly since his first visit, with his most recent visit being in March 2020. In his medical legal report ("MLR") dated August 12, 2019, he provides the following diagnosis for the plaintiff's injuries:

- a) soft tissue injury to the neck, trapezius and lumbar spine, consistent with whiplash disorder;
- b) soft tissue injury to the right shoulder, consistent with the rotator cuff syndrome, but with no evidence of tear on imaging;
- c) bilateral S1 foraminal narrowing, with pain and reduced ankle reflex on the left;
- d) central sensitization syndrome;
- e) migraine headaches;
- f) post-concussion syndrome; and
- g) depression.

[45] At trial, Dr. Ali explained that his opinion is based on his treatment of the plaintiff, as well as a review of the medical records from the various doctors that have treated and assessed the plaintiff. Dr. Ali noted that the results of the February 2017 CT scan which show bilateral S1 nerve root impingement are consistent with the plaintiff's reports of pain in his leg and ankle, though he could not say whether the narrowing was present prior to the MVC.

[46] Dr. Ali provides a guarded prognosis for the plaintiff's recovery, opining that the plaintiff will likely experience soft tissue injury pain/chronic pain into the foreseeable future. In addition to Mr. Moges' physical injuries, Dr. Ali opined that Mr. Moges' depression and central sensitivity syndrome have impacted his ability to be more physically active. According to Dr. Ali, Mr. Moges is fully disabled from his pre-injury employment, and

greatly limited with his daily tasks. He concludes that Mr. Moges has the ability only to work in a sedentary position.

- [47] Dr. Ali was rigorously cross-examined on his opinion that Mr. Moges was suffering from post-concussion syndrome. Though he maintained that Mr. Moges had suffered a concussion in the first motor vehicle collision, Dr. Ali agreed that Mr. Moges' clinical profile was complex, making a diagnosis difficult. Dr. Ali acknowledged that the findings documented in medical records made in the immediate aftermath of the first collision would not support a diagnosis of concussion at this time. He also conceded that the plaintiff's headaches could be as a result of musculoskeletal injuries to his neck, and not necessarily evidence of a concussion.
- [48] The defence's cross-examination of Dr. Ali on the other aspects of his opinion was less successful. Dr. Ali refuted the defence's suggestion that Mr. Moges was noncompliant with treatment, noting that Mr. Moges has shown he is motivated to recover and has participated in all recommended activities. Having read Dr. Oosterholt's warning letter, Dr. Ali was particularly alert to any indication of secondary gain on the part of Mr. Moges. He found nothing to support such concerns, and observed that Mr. Moges appeared keen to get healthy.
- [49] Dr. Ali disputed the defendants' suggestion that there were no objective findings that would prevent the plaintiff from returning to physical activities. He noted a number of objective findings during his examination of Mr. Moges over the years, such as muscle spasms and blunt mood.
- [50] I found Dr. Ali to be a reliable and credible witness. He was objective in his testimony, and provided it without any bias towards any of the parties. With the exception of his diagnosis of post-concussion syndrome, Dr. Ali's opinion on the diagnosis, causation, and prognosis of Mr. Moges' injuries was generally consistent with the other medical evidence in the case. I have rejected his opinion that Mr. Moges suffered a traumatic brain injury ("TBI") following the first collision. While this opinion is shared by Dr. Lau and Dr. Anderson, I conclude that there is insufficient evidence to support this finding on a balance of probability.

2. Dr. Jonathan Hawkeswood

- [51] Dr. Jonathan P. Hawkeswood is a physiatrist retained by the plaintiff. He was qualified as an expert in physical medicine and rehabilitation.
- [52] Dr. Hawkeswood provides the following differential diagnoses of the plaintiff's injuries in his MLR dated February 20, 2020:
- a) Post traumatic myofascial neck pain;
 - b) Generalized thoracic pain, predominantly soft tissue in nature;
 - c) Mechanical low back pain;

- d) Right shoulder impingement pattern;
- e) Anterior knee pains, most in keeping with patellofemoral pain;
- f) Left ankle pain;
- g) Complex headaches; and
- h) Depression and anxiety.

[53] His opinion on causation can be summarized as follows:

- a) The first collision worsened a premorbid left ankle injury.
- b) There is no clear evidence of premorbid musculoskeletal problems.
- c) The first accident worsened previous nonspecific headaches, though it is unclear if any of the accidents bear relevance to his migraine symptoms; worsened headaches often coincident with more generalized pain.
- d) The generalized aches and pains affecting the cervical, thoracic, and lumbar areas are probably attributable to the first accident and worsened by the third accident.
- e) Some of the pain is attributable to a generalized chronic pain disorder.
- f) The right shoulder pain is probably due to the first and third accidents.

[54] Dr. Hawkeswood provides a guarded prognosis for full recovery, noting:

- a) Mr. Moges has developed a generalized chronic pain disorder that has been refractory to treatments and mental health interventions.
- b) Though his symptoms may fluctuate over time, he will likely have long lasting pain on account of the MVCs.
- c) His right shoulder will probably get worse if he does not exercise diligently.

[55] Dr. Hawkeswood expresses a cautious optimism that Mr. Moges can experience some improvement in function with a reactivation program that includes activity, stretches, and access to a gym.

[56] In terms of future functional prognoses, Dr. Hawkeswood does not see any limitations on Mr. Moges' ability to perform self-care. Nor does he believe that he will have household limitations "in absolute terms, recognizing Mr. Moges' mental health and physical pains probably make him less productive at times". Provided that Mr. Moges can progress with a reactivation program, Dr. Hawkeswood recommends a gradual return to activities such as hiking, biking, and light soccer. However, Mr. Moges will have ongoing restrictions due to his left ankle.

[57] In terms of vocational abilities and limitations, Dr. Hawkeswood opines that:

- a) Mr. Moges' time off work thus far has been reasonable and medically appropriate, noting that his employability has been impacted by "complex mental health issues, psychological factors, and physical pains".
 - b) Mr. Moges probably has a permanent partial vocational impairment, and should avoid any moderate to heavy duty labour.
 - c) He is not likely to tolerate on a full-time basis, any sedentary job that requires standing throughout the day.
 - d) Mr. Moges is not competitively employable right now, and is permanently disabled from meaningful employment for the rest of his life, with part-time sedentary work being the only realistic option for him in the future.
 - e) He may be able to approach consistent part-time hours in a sedentary job in the next two to five years, "but this would be contingent on Mr. Moges experiencing fairly substantial clinical improvements".
 - f) If he ever reaches full time work, it is unlikely to take place in the next decade.
 - g) He will remain vulnerable to re-injury.
 - h) He badly needs to progress with an activation program. Though he has pain and poor coping abilities, such involvement is within his physical capacity and will likely increase his employability.
- [58] Dr. Hawkeswood was cross-examined on his opinion that Mr. Moges was capable of participating in a reactivation program. He noted that while there were no orthopaedic or neurological symptoms that would disable Mr. Moges from participating, much is contingent upon comorbid factors such as his mental health as well as pain itself which can be fairly limiting. He testified that reactivation is not so simple to achieve in a clinical setting, as any participation or success would necessarily be subject to the influence of the plaintiff's mental illness.
- [59] Regarding whether the plaintiff had a TBI, Dr. Hawkeswood noted that it is "impossible to know whether or not he had a concussion in the first accident based on the mechanism of injury, the history and the early records." According to Dr. Hawkeswood, the symptoms experienced by Mr. Moges could be as a result of pain, headaches and sleep disruption, or a mild concussion. He concludes that regardless, he does not believe Mr. Moges has any long-term cognitive or mood implications from a TBI in and of itself.
- [60] I have placed a significant amount of weight on Dr. Hawkeswood's opinion. I found him to be a knowledgeable and careful witness, who did not overstate his case, and provided his opinion objectively. He was not shaken on cross-examination.

3. Dr. Brenda Lau

- [61] Dr. Lau was the plaintiff's treating pain specialist. She was qualified as an expert in anesthesiology, pain medicine and pain intervention practices.
- [62] Dr. Lau is the cofounder and Medical Director of the CHANGEpain clinic located in Vancouver. Mr. Moges attended the clinic from November 2015 to November 2017. Dr. Lau was directly involved in his care since his first appointment with her in February 2016. She saw him again in September 2016 for the purposes of treatment. Prior to completing her MLR dated June 18, 2019, Dr. Lau met with Mr. Moges for a third time, in January 2019.
- [63] Dr. Lau notes that in 2017, Mr. Moges was diagnosed with chronic pain syndrome and central sensitivity syndrome ("CSS"). CSS refers to a group of medically indistinct or nonspecific disorders for which no organic cause can be identified. These include fibromyalgia, chronic fatigue syndrome, and irritable bowel syndrome. In addition, Dr. Lau provides the following diagnoses:
- a) neck pain with referred neck pain and headache;
 - b) back pain affecting the whole back due to multiple factors, including ligament laxity and myofascial pain;
 - c) depression due to adjustment disorder and multiple situational stressors such as physical limitations from chronic pain, job loss, financial stressors and impact on leisure activities;
 - d) posttraumatic cervicogenic headaches due to occipital neuralgia, C2 injury, facet joint dysfunction, referred pain from TMJ and ligament laxity;
 - e) post-MVA left ankle ligamentous injury sprain with eversion injury - acute signs of inflammation settled, with residual lateral malleolus pain; and
 - f) mild traumatic brain injury resulting in persistent cognitive dysfunction, headaches, sleep disturbance and mood changes.
- [64] Dr. Lau opines that Mr. Moges has developed secondary issues caused by untreated pain and injuries from the subject MVCs such as: high risk of gastric erosion due to long term use of naproxen; deconditioning from altered balance and gait; and widespread body pain and central sensitization.
- [65] Dr. Lau is of the view that Mr. Moges' current functional limitations are caused by the first MVC and aggravated by the second MVC. Prior to the third MVC, Mr. Moges had already developed widespread pain and numerous systemic symptoms.
- [66] According to Dr. Lau, Mr. Moges is permanently disabled, and is unlikely to ever be able to return to work in his previous capacity. While physical conditioning is required, Dr. Lau does not believe that Mr. Moges will make any progress with further physiotherapy and exercise on their own. She notes that he has not found any consistent relief despite seeing many specialists and trying many therapies.

- [67] Dr. Lau testified that Mr. Moges was compliant with therapies and employs several self-management strategies that are helpful, such as pacing and meditation. He reports having benefited from the various group workshops which have helped him to cope better with the pain. However, "he will continue to need ongoing help for his pain to prevent further physical and psychological deterioration."
- [68] In addition to 18 trigger point injections, Mr. Moges has received the following treatments at Dr. Lau's clinic: ultrasound-guided diagnostic testing for headache, back and neck; ultrasound guided diagnostic blocks of the low back (these have included epidural injections, facet blocks, sacroiliac joint blocks; head and neck type local anesthetic blocks; cognitive behavioural therapy in a group setting; and a group based pacing program. The treatments have all provided varying levels of relief, often minimal and transient.
- [69] Defence counsel urges me to discount Dr. Lau's opinion in its entirety for the following reasons: she saw the plaintiff on only two occasions; she omitted relevant and important information from the body of her report; she was argumentative and defensive under cross-examination; her recommendations are unreasonable and unrealistic as they include expensive medications not readily available in Canada; and the two-year course of treatment of the plaintiff at her clinic was largely unsuccessful.
- [70] I consider these arguments to be without merit. I did not find the manner in which Dr. Lau organized her report to reflect bias, nor did it detract from the overall reliability of her opinion. I also did not perceive her to be argumentative or defensive on cross-examination. Rather, she was patient and clear in her answers, and readily made concessions where it was reasonable to do so. For example, Dr. Lau conceded that Mr. Moges' left ankle sprain from August 2014 could be a contributor to his ongoing left ankle pain.
- [71] The fact that Dr. Lau has recommended medications or treatments that are expensive or may not be readily available in Canada is not a reason to reject her opinion. It is not Dr. Lau's job to recommend only those treatments that are the most easily accessible or cost effective for the defendants. The area of chronic pain is complex and the syndrome difficult to treat. In my view, Dr. Lau fulfilled her duty as an expert to this Court by recommending treatments that she believed would be the most beneficial to Mr. Moges. In addition, I consider the lack of substantial improvement experienced by Mr. Moges during the two years that he attended at her pain clinic, related more to the intractable nature of his condition, rather than the lack of qualifications of Dr. Lau. The reliability or credibility of Dr. Lau's evidence does not diminish because Mr. Moges has not seen much improvement over time. Rather, the lack of progress is an indicator of the extent of Mr. Moges' injuries.
- [72] I found Dr. Lau to be a very knowledgeable witness in the area of her specialty, and have placed significant weight on her opinion, with the exception of her diagnosis of a concussion. That diagnosis was arrived at by a process of elimination rather than any widely accepted diagnostic criteria.

4. Dr. Timothy Holden

- [73] Dr. Timothy Holden is the plaintiff's treating psychiatrist. He was called as a fact witness on behalf of the plaintiff. Dr. Holden has been treating Mr. Moges since 2017. The plaintiff's last visit with Dr. Holden was in September 2019, though he continues to remain under Dr. Holden's care.
- [74] Dr. Holden confirmed the accuracy of his clinical notes, testified as to Mr. Moges' presentation during therapy, and provided details of what transpired during some of their sessions. In his first session with Mr. Moges, Dr. Holden wrote that Mr. Moges gave an "excellent straightforward, unembellished account of what transpired." In his June 20, 2017 clinical entry, Dr. Holden noted that Mr. Moges recounted having brief dissociative episodes, social withdrawal, loss of motivation and pleasure in life, and rumination "about the point of continuing to live". Dr. Holden testified that Mr. Moges' condition deteriorated over the two years that he has seen him.
- [75] Dr. Holden was not shaken on cross-examination. He provided a straightforward account of his sessions with Mr. Moges, and I found him to be a reliable and credible witness. As to his September 15, 2017 clinical note recommending that the plaintiff resolve his ongoing I.C.B.C. claim as soon as possible, I did not find this entry to support the inference that Mr. Moges was motivated by secondary gain. I accept Dr. Holden's testimony that this note reflected his concern that it was important for Mr. Moges' mental health that the claim be resolved because the plaintiff's financial situation was a major stressor in Mr. Moges' life.

5. Dr. Stephen Anderson

- [76] Dr. Stephen Anderson is a psychiatrist retained by the plaintiff. He prepared a medical legal report dated August 23, 2019, and was qualified as an expert in psychiatry.
- [77] Dr. Anderson is the only plaintiff's expert in this case whose opinion is directly challenged by a defence expert (Dr. Solomons). He testified that while he agrees with the psychiatric diagnoses made by the treating psychiatrists that have provided care to Mr. Moges over the years, he disagrees with Dr. Solomons' opinion.
- [78] Dr. Anderson diagnosed Mr. Moges with the following psychiatric disorders:
- moderately severe major depressive disorder (MDD);
 - generalized anxiety disorder (GAD) also of moderate severity; and
 - a likely diagnosis of persistent somatic symptom disorder (SSD) with predominate pain of moderate severity.

- [79] According to Dr. Anderson, Mr. Moges' physical and emotional factors are likely interacting to create his pain condition. He notes that Mr. Moges has been treated by a number of psychiatrists with pharmacotherapy and psychotherapy, and has participated in group therapy programs. Despite these, he continues to have significant anxiety and depressive symptoms.
- [80] Dr. Anderson provides a guarded long term psychiatric prognosis for Mr. Moges, opining that he is not likely competitively employable at present and is likely permanently disabled. Dr. Anderson testified that while Mr. Moges was working part-time as an interpreter when he assessed him, this does not mean he is competitively employable. He explained that with major depressive disorder, generalized anxiety disorder and somatic symptom disorder, the plaintiff would experience difficulty securing and retaining employment. This is particularly so since stress worsens his pain, he experiences decreased cognitive function, and he cannot perform at the same level as others. He also noted that the longer a psychiatric disorder lasts, the less likely it is to remit as "chronicity begets chronicity".
- [81] In addition, Dr. Anderson is of the view that Mr. Moges will likely remain emotionally vulnerable and be at risk of deteriorating emotionally if his pain should worsen as he ages or if he is exposed to new psychosocial stressors. According to Dr. Anderson, Mr. Moges will likely have concentration and memory difficulties as long as he has significant pain, insomnia, fatigue, anxiety and/or depression, impacting his quality of life in the long run.
- [82] Dr. Anderson was of the view that the plaintiff likely sustained a concussion from the first MVC, but that Mr. Moges' cognitive difficulties since then are likely due to pain, insomnia, fatigue, anxiety, and depression. Dr. Anderson conceded under cross-examination that: he could not be certain if the plaintiff sustained a concussion in the first accident; he did not see any ongoing symptoms of concussion on examination of the plaintiff; and he does not believe that the plaintiff has any ongoing cognitive problems associated with a concussion.
- [83] In light of the above and for reasons outlined elsewhere, I am not able to place any weight on Dr. Anderson's opinion that Mr. Moges suffered a concussion in the first MVC. However, I found the balance of Dr. Anderson's opinion medically sound and supported by the evidence. I did not see any inconsistency between Dr. Anderson's opinion that the plaintiff was competitively unemployable by virtue of his psychological conditions, but that he would benefit mentally from exercise and employment.
- [84] I found Dr. Anderson to be a reliable and credible witness, and I have placed a significant amount of weight on Dr. Anderson's opinion regarding Mr. Moges' psychiatric injuries, their diagnosis, causation, and prognosis. His opinion was supported by medical and other evidence at trial, and based on sound medical reasoning, experience, and knowledge. He was unshaken in cross-examination, provided his testimony without bias, was non-defensive, readily made concessions, and did not overstate the case. For example, though there was some suggestion by Mr. Moges' treating psychiatrists that he was suffering from post-traumatic stress disorder (PTSD), Dr. Anderson rejected that diagnosis, noting that

while Mr. Moges may have had nightmares of the first MVC occurring for a period of time, "he did not likely ever have sufficient symptoms to warrant the full diagnosis of posttraumatic stress disorder (PTSD)."

6. Dr. Kevin Solomons

[85] Dr. Solomons is a psychiatrist retained by the defence. He was qualified as an expert in psychiatry. Dr. Solomons provided a report dated July 30, 2019, based on his assessment of the plaintiff on June 26, 2019. He was the only expert retained by the defendants to provide an expert opinion in this trial. His opinion is directly at odds with that of the plaintiff's experts and was proffered to refute the plaintiff's contention that he is suffering from psychiatric injuries.

[86] Dr. Solomons' opinion is summarized as follows:

- a) Mr. Moges did not sustain a head injury or MTBI as a result of any of the accidents.
- b) Mr. Moges did not suffer from Adjustment Disorder (AD), Major Depressive Disorder (MDD), or posttraumatic stress disorder, or any other psychiatric disorders, as a result of any of the MVCs.
- c) There is no psychiatric explanation for Mr. Moges' physical pain.
- d) Pain is a subjective symptom and there is no documentation of physical or investigational findings that correspond with Mr. Moges' reports of pain.

[87] Dr. Solomons concludes that Mr. Moges does not require any psychiatric treatment, and that "his current psychiatric treatment is clinically inappropriate, unnecessary and is a potential cause of iatrogenic harm by means of causing possible side effects without any expectation of benefit".

[88] Dr. Solomons opines that the major stressor in the plaintiff's life is his limited finances, the solution for which is an immediate return to the work force. According to Dr. Solomons, Mr. Moges could have returned to work "soon after the first accident", and that the "most helpful intervention for him would have been encouragement to return to work".

[89] In support of his conclusions, Dr. Solomons refers to his in person assessment of Mr. Moges, the history provided by the plaintiff during the assessment, and his review of the available clinical information.

[90] Dr. Solomons notes in his MLR that during his mental status examination, Mr. Moges was: stylishly groomed; alert and engaged; fully focussed and attentive; had a particularly pleasant and engaging interpersonal manner; displayed an appropriately reactive mood; and sat comfortably through the interview with no signs of discomfort, pain or pain behaviours. Dr. Solomons opined that Mr. Moges' thought faculties were intact, and he did not display any sign of memory, speech or communication difficulties.

- [91] Regarding the clinical information on file, Dr. Solomons acknowledged that a number of treating psychiatrists had diagnosed and treated Mr. Moges for adjustment disorder; MDD; and PTSD. However, he criticized their opinions as lacking in sound methodology or proper factual foundation.
- [92] It is difficult to reconcile Dr. Solomons' conclusion that the plaintiff is not suffering from any psychiatric disorder, with his acknowledgement in his MLR and at trial that Mr. Moges may well have been suffering from MDD in December 2016, when he was reassessed by Dr. Chan. Dr. Solomons was not able to satisfactorily explain his failure to account for this discrepancy. When pressed in cross-examination, he finally conceded that his opinion as articulated in paragraph 35 of his MLR, should be modified to read as follows: "it is my opinion that the September 2014 accident and subsequent accidents did not result in any psychiatric disorder, impairment or disability but for the time when Dr. Chan diagnosed Mr. Moges with MDD" [italicized portion added].
- [93] I can find no reasonable explanation for Dr. Solomons' failure to fairly set out his opinion at the outset, except to conclude that he was tailoring his evidence to meet the position of his client on who he relies for the bulk of his work. In January 2018, Dr. Solomons closed his clinical practice for new referrals. Save for a handful of patients, his practice is almost exclusively restricted to preparing medical legal reports for the defence.
- [94] Dr. Solomons' conclusion that there is no documentation of objective findings to substantiate Mr. Moges' physical and psychological complaints also goes contrary to the evidence in this trial. As noted elsewhere, there are a number of entries in the medical records noting objective findings for both the physical and psychological injuries.
- [95] I note also Dr. Solomons' dismissal of the importance of the Patient Health Questionnaire 9 (PHQ-9). Dr. Anderson explained that the PHQ-9 is an important screening tool for depression, and is the most commonly used rating scale for monitoring MDD symptoms. It is a self-administered questionnaire which scores each of the nine DSM-V criteria used to assess depression. Dr. Solomons criticized reliance on the plaintiff's PHQ-9 scores by the plaintiff's experts and health care providers, testifying that diagnosing a depressive disorder required more than "just ticking the boxes" or adding up scores on a questionnaire. I note first that there is no evidence to suggest that the plaintiff's experts have approached the diagnosis of MDD in this manner. Second, I find Dr. Solomons' criticism of the PHQ-9 odd, in light of his concession under cross-examination that there are questions from the PHQ-9 that would be useful to help determine whether the plaintiff had MDD.
- [96] Having regard to all of the evidence in this case, I reject Dr. Solomons' opinion regarding Mr. Moges' psychiatric condition as it relates to the MVCs, and have placed no weight on his conclusions. In my view, his psychiatric opinion is not well founded in fact or methodology, contrary to the evidence at trial, and evidenced bias.

[97] While Dr. Solomons' opinion that Mr. Moges is not suffering from a TBI is consistent with the other evidence in this case, I do not need to place any weight on it in order to reject the TBI diagnosis made by other experts in this case.

7. Emily Banez

[98] Emily Banez is a contract physiotherapist at Community Therapists. She testified as a fact witness for the defence. Ms. Banez assessed Mr. Moges on February 27, 2015, and March 2, 2015, in order to determine his physical capacity and develop a physiotherapy program to get him back to work.

[99] Ms. Banez found Mr. Moges to have limited range of motion in the neck and back; muscle imbalance in the right shoulder; weakness in his legs, particularly the left one; muscle weakness and problems with joint mechanics in the upper and lower extremity; difficulty with test positions and getting up from the floor; and kinesiophobia (fear of movement).

[100] Ms. Banez provided physiotherapy treatments to the plaintiff from February to May 2015. Part of the program was an educational component to teach the plaintiff about pain in order to overcome his fear of movement. Mr. Moges was discharged at the end of May 2015 because he was not making progress. In her discharge report, Ms. Banez noted that there was no improvement in most of the objective findings, and that some findings were worse.

8. Rebecca McDonald

[101] Rebecca McDonald also testified as a fact witness for the defence. She is an occupational therapist working on a contract basis with Community Therapists, and supervised Mr. Moges' active rehabilitation program.

[102] In her February 20, 2015 assessment report, Ms. McDonald found reduced range of motion in the plaintiff's thoracolumbar spine, bilateral hips, and left neck rotation, as well as reduced strength in his thoracolumbar spine, bilateral hips and bilateral upper extremities. In addition, she noted pain complaints in the bilateral temples (headaches), bilateral neck, upper trapezii and low back, right upper-mid back, and left lateral-dorsal foot; paresthesia of the right upper-mid back and left foot; fatigue and sleep disruption; low mood; high reported pain levels; activity fear/avoidance behaviours; and high perceived disability. Mr. Moges' mood was up and down, and he reported having thoughts of death. Despite all this, Mr. Moges tried to keep a positive outlook, and wrote in his intake form that he was "very confident" that he would be successful in his reactivation program.

[103] The program designed by Ms. McDonald had the overarching goal of returning the plaintiff to work, but it is fair to say that it was doomed for failure. Ms. McDonald testified that based on her initial assessment, Mr. Moges did not meet the goals for even starting a graduated return to work ("GRTW") plan. Though Ms. McDonald believed that any vocational and rehabilitation plan should include psychological support for Mr. Moges, Mr. Moges was not approved for any psychological treatment.

- [104] Nevertheless, Ms. McDonald designed a return to work program which she anticipated would take Mr. Moges approximately 16 to 20 weeks to complete. The first phase of the program involved reactivation, and was expected to last approximately 10 to 12 weeks. It consisted of education, learning, and practising coping skills, as well as participation in gym exercises. The second phase of the program was aimed at work conditioning. It was projected to last six-to-eight weeks.
- [105] However, pain, kinesiophobia, sleep disruption, and mood issues hindered Mr. Moges' progress. After two months of regular attendance at Community Therapists, Ms. McDonald determined that Mr. Moges had not made sufficient progress. On May 26, 2015, Ms. McDonald referred Mr. Moges to Orion Health for work conditioning. Mr. Moges started an active rehabilitation program at Orion at the beginning of June 2015, which was also unsuccessful. He was discharged from the Orion program three weeks later without having made any real progress.
- [106] Ms. McDonald formally discharged Mr. Moges from the Community Therapists program on July 7, 2015. At the time of his discharge, Ms. McDonald did not believe that Mr. Moges was able to meet the critical job demands for a successful return to work. On parting, Mr. Moges told Ms. McDonald that while the reactivation program "was very painful", he liked it as it made him accountable and kept him busy.

C. Pre-Existing Condition

- [107] Mr. Moges was in good physical and psychological health prior to the first collision. He enjoyed various sports, and was active in his church. He participated in bible study and helped organize church events. During his spare time, he played recreational volleyball and soccer, and participated in walking and cycling.
- [108] Mr. Moges does not have any relevant pre-accident psychiatric history. His relevant medical history relates to headaches, back pain, and left ankle pain. In February 2012, he made a visit to Burnaby Hospital complaining of a headache associated with nausea and vomiting. In April 2012, he went to the hospital complaining of sudden weight loss, low back pain, intermittent headaches, and dizziness. He was sent for x-rays of his lumbar spine, which came back normal. On March 26, 2014, there is an entry in the clinical records of Dr. De Couto, noting complaints of headache pain, fever, and nausea. It appears that Mr. Moges may have had to miss class that day.
- [109] Regarding Mr. Moges' low back, Dr. Lau opines that Mr. Moges was suffering from pre-existing mild convex right lumbar scoliosis, and had pre-existing Schmorl's nodes at the L5/S1 region. However, it is unlikely that these are contributing to his post-accident back pain.
- [110] Based on the evidence, I conclude that the pre-accident headache and back pain are not of causative significance to Mr. Moges' post collision injuries. They resolved completely and there is no evidence that they had any lasting effect.

- [111] With respect to left ankle pain, the plaintiff acknowledges the potential presence of a pre-accident indivisible vulnerability. On May 18, 2012, Mr. Moges attended at Burnaby Hospital for a left ankle sprain. X-rays of his left ankle taken the same day show some "small well corticated bone fragments at the superior aspect of the navicular bone". It was postulated that these could represent a small avulsion injury or accessory ossicles. On August 18, 2014, Mr. Moges attended at Royal Columbian Hospital complaining of a left ankle sprain while playing volleyball. The left foot was swollen. An x-ray of the left ankle taken the same day shows no fractures or abnormalities.
- [112] While insufficient time had passed by the time of the first accident to be certain that the left ankle injury had resolved completely, there is very little evidence to suggest that Mr. Moges' post-collision left ankle pain is related to the ankle sprain which occurred two-and-a-half weeks prior.
- [113] Consistent with Mr. Moges' evidence that both historical volleyball ankle injuries resolved uneventfully, he did not go see his GP for the ankle injury prior to the September 2014 collision. However, I accept Dr. Hawkeswood's opinion that there is some potential that some of the post-accident left ankle pain could be coming from pre-accident injury, such that the first subject accident worsened a pre-morbid injury to left ankle. I have factored this into my assessment of damages.

V. Mitigation

- [114] The defendants argue that Mr. Moges has failed to mitigate his losses, and his award for damages should be reduced by 15% for failure to heed medical advice to return to work.
- [115] To establish a failure to mitigate, the defendants have the onus of proving, on a balance of probability, that (1) the plaintiff acted unreasonably in not taking the step advocated by the defendant; and (2) the plaintiff's damages would have been reduced had he taken the recommended step: *Chiu (Guardian ad litem of) v. Chiu*, 2002 BCCA 618 at para. 57.
- [116] The defendant is not required to call evidence to show that a plaintiff acted unreasonably, and that the damages would have been reduced if he or she had acted reasonably. Any evidence presented at trial may be used to meet the defendant's onus: *Gill v. Lai*, 2018 BCSC 101 at para. 70, rev'd on other grounds 2019 BCCA 103.
- [117] The defendant must establish a real and substantial possibility that the plaintiff would have had improved strength, endurance, tolerance for pain, functionality, and psychological fortitude if he had undertaken the rehabilitative measures recommended to him. Once that is established, that possibility must be taken into account based upon the relative likelihood that it would have arisen: *Gill* at para. 73.
- [118] The test is a subjective/objective one. The court must take into account the knowledge possessed by the plaintiff when considering the advocated step: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

- [119] The defendants argue that the plaintiff had been cleared by Dr. Ali to return to work by the end of July 2015, but did not return to work until June 2018 when he started casual employment as an interpreter. It is argued that instead of returning to work when he was medically cleared to do so, the plaintiff received payments through employment insurance and social assistance through his PWD designation. The defence submits that this was unreasonable, as was his failure to even attempt to return to his former employ at the Gap and the gas station. Had the plaintiff returned to work when cleared to do so by Dr. Ali, it is argued that there is a real and substantial possibility that the plaintiff's mood would not have deteriorated, as per the opinions of Dr. Ali, Dr. Hawkeswood, Dr. Anderson and Dr. Solomons, who all testified that patients' moods improve with a return to work.
- [120] There is no dispute that Dr. Ali testified that throughout his care of the plaintiff, he encouraged Mr. Moges to return to work in some capacity. However, I am unable to conclude that by failing to do so, Mr. Moges acted unreasonably. First, I note that Mr. Moges was suffering from three psychiatric disorders which on the evidence, would have impeded his ability to return to work. Second, I note that Mr. Moges also had physical injuries, chronic pain syndrome, and central sensitivity syndrome which all impacted his function and ability to return to work. Third, I have placed weight on Dr. Anderson's opinion that while a return to work could improve the plaintiff's self-esteem and mental health, it could also increase his stressors. Finally, I note Dr. Hawkeswood's opinion that Mr. Moges' time off work was reasonable and medically appropriate, given his complex mental health issues, psychological factors, and physical pains.
- [121] Having regard to all of the evidence in this case, I conclude that the defendants have failed to establish a failure to mitigate on the part of the plaintiff.

VI. The Lay Evidence

- [122] Four lay witnesses testified on behalf of the plaintiff: Mr. Moges' pastor (Yosief Tesfay), his father (Menghistab Tekhle), brother (Robel Moges), and friend (Tedros Geday).
- [123] Mr. Geday is Mr. Moges' best friend and has known Mr. Moges since before the first accident. He and Mr. Moges attended VCC around the same time, though they took different classes. Mr. Geday left VCC in 2013, and does not know if Mr. Moges was taking classes there in 2014. He and the plaintiff would speak about their futures both before the first accident and after. He stated Mr. Moges had plans to be a power engineer prior to the first accident but that these plans had now changed to perhaps wanting to run his own business as this would be physically easier to manage. He testified about seeing changes in Mr. Moges' mood, and noted that he is not as social as he was prior to the first accident.

- [124] Despite their close personal friendship, I found Mr. Geday to be a credible and reliable witness. He had a good recollection of events, provided a straightforward and unbiased account, was unshaken in cross-examination, and did not appear to embellish or tailor his evidence to favour the plaintiff. Though he was not aware that Mr. Moges had been involved in additional MVCs, this goes more to significance of the second and third accidents on Mr. Moges' condition, rather than on the reliability of Mr. Geday's testimony.
- [125] Robel Moges (who I will refer to as Robel in order to avoid confusion), corroborated Mr. Moges' personal pre-accident history, and attested to Mr. Moges receiving payment from their father for performing janitorial services leading up to the first accident. He testified that following the first accident, in which their father was also a passenger, he and his other brother started helping in the janitorial business. He was paid about \$700 per month for his services. I found Robel to be a generally credible and reliable witness, and did not consider him to be biased in favour of his brother. He was candid in his statement that he does not know what is wrong with the plaintiff nor does he understand his injury. He did not overstate his knowledge about the plaintiff's injuries, saying that aside from there being a back injury, he did not know the exact injuries suffered by Mr. Moges in the first accident.
- [126] Mr. Tekhle testified about his close parental bond with Mr. Moges, and provided evidence about Mr. Moges' pre- and post-accident personal history, work history, educational history, career goals, educational goals, and health. I have discounted large portions of this evidence as lacking in credibility. It was evident that Mr. Tekhle tailored his evidence to portray Mr. Moges as being more disabled than he was. For example, in his direct examination, Mr. Tekhle initially testified that Mr. Moges never returned to help him with the cleaning contract after it had been transferred to Mr. Tekhle in early 2014. However, following the morning break, he revised his answer saying that the plaintiff did in fact accompany him on this contract on some occasions, but that this was mainly to give him company and get the plaintiff out of the house. On cross examination, Mr. Tekhle explained that he had originally said the plaintiff never returned to work on the contract because, when the plaintiff would accompany him, the plaintiff never contributed to the janitorial duties in any meaningful way. I did not find this explanation credible.
- [127] As another example, Mr. Tekhle denied that Mr. Moges had returned to school after the first accident, testifying that "he would not be capable of studying". Given Mr. Tekhle's close relationship with his son, I find it implausible that he would not have known that Mr. Moges continued to be enrolled in school for several semesters following the first accident.
- [128] Pastor Tesfay is the founder and pastor of the Rehoboth Eritrean Church and has known Mr. Moges since 2012, when Mr. Moges was in school and working. He testified to the following:
- a) the plaintiff had a plan to go to college and was taking courses to upgrade his high school education in anticipation;

- b) the plaintiff was working with his father cleaning, working at a clothing store, and recently was working at Mosaic;
- c) the plaintiff was actively involved in helping set up and grow the Rehoboth Eritrean Church from its inception in 2012 to the present;
- d) the plaintiff did not have an official title with the Rehoboth Eritrean Church until 2018 when he became a deacon;
- e) as a deacon he is responsible for collecting donations from congregants after Sunday service, taking the donations to the bank, managing the banking for the church, and signing cheques; and
- f) he was aware that the plaintiff was involved in at least one accident in 2014, and noticed that the plaintiff's physical posture changed after the accident.

[129] I found Pastor Tesfay to be a credible and reliable witness. His evidence was delivered in a forthright manner, without embellishment or bias. He readily admitted the limitations of his knowledge, and only testified about the things that he was personally aware of.

VII. Credibility and Reliability

[130] Having regard to the factors set out by the Court in *McCully v. Moss*, 2019 BCSC 81 at para. 63, I generally found the plaintiff to be a credible witness. He readily admitted the limits of his memory, made admissions against self interest, and did not appear to embellish or otherwise exaggerate his testimony. For example, there are numerous reports in the clinical and other records where the plaintiff tells the treatment provider that he is feeling better. These types of statements are inconsistent with a plaintiff motivated by secondary gain.

[131] I do not fault the plaintiff for giving vague answers about the extent of his pain and disability. The plaintiff had a tendency to minimize his pain. As held in *Giang v. Clayton*, 2005 BCCA 54 at para. 54, the plaintiff's stoicism should not, generally speaking, penalize the plaintiff.

[132] I am also not swayed that the veracity of the plaintiff's claims are brought into question due to contradictions in some of his testimony. I have addressed these in detail below, but as a general point note that the alleged inconsistencies were often minimal or non-existent. Where there were contradictions, I considered these to be more of a function of poor memory, rather than an act of deception.

[133] There is no doubt that the plaintiff is a poor historian. Parts of his testimony lacked sufficient detail, while other parts were contradicted by documentary or other evidence. For example, the plaintiff was insistent that his final visit with Dr. Oosterholt was when he went to report the second collision, i.e., October 24, 2014. But based on Dr. Oosterholt's clinical records, it is evident that Mr. Moges saw him on two more occasions before their

doctor-patient relationship was terminated. Thus, while Mr. Moges' account of the event appeared accurate, his recollection of the timing was not.

[134] I am satisfied on the evidence that Mr. Moges' poor recall was unintentional. I conclude that it was related to his physical and psychological condition rather than a desire to mislead the Court or otherwise improve the outcome of this litigation. Insofar as discrepancies exist in some of his testimony or information provided to his treatment providers, I have factored these into my assessment of reliability.

[135] I will now address specific concerns raised with respect to the plaintiff's evidence.

A. Failure to Disclose

[136] The defendants allege that Mr. Moges failed to disclose his pre-collision medical history to his treatment providers and the experts. However, in light of my conclusion (set out elsewhere) that Mr. Moges' pre-existing medical history was largely unremarkable, his failure to fully disclose it does not detract from his credibility. I accept Mr. Moges' explanation that his pre-MVC complaints were not ongoing and that he did not remember them when asked.

[137] The defendants also say that Mr. Moges has been less than candid with his treatment providers regarding his educational abilities following his accidents. In support they point to the various excerpts from the expert reports of Dr. Lau, Dr. Anderson, and Laura Smith (who was qualified as an expert in occupational therapy and rehabilitation), which suggest that Mr. Moges told his healthcare providers that he had to drop courses or was otherwise not able to further his education following the first accident. The defendants assert that the plaintiff deliberately withheld information from these people that would have contradicted this assertion, i.e., that Mr. Moges managed to complete four courses, achieving an "A" in one of them, all after his first two accidents.

[138] The evidence does not lead me to conclude that the plaintiff was actively misleading the experts or treatment providers. One must bear in mind that not everyone perceives events the same way. Mr. Moges explained that he did not tell these experts about the courses he did complete, because he did not achieve the marks that he needed in order to be admitted into BCIT's Power Engineering program. A key feature of Mr. Moges' psychological disorder is his overwhelming focus on his pain and limitations. It is not unusual then, that he would view his post-accident transcript a reflection of his failure rather than his success. This becomes even more evident when we consider the grades themselves.

[139] Mr. Moges' transcript from VCC reveals that: Mr. Moges obtained a C+ in an English writing course completed during the fall session (September to December) of 2014; he got an incomplete (N) in a further English writing course which he took in the winter session (January to April) of 2015; he enrolled in two further courses in the fall of 2015, receiving an A in Math 10, and an IP in Math 11 (In Progress); the Math 11 was still IP in the winter of 2016; Mr. Moges got a D in a Writing course also taken during the winter 2016 session. Not

surprisingly, his grades appear to follow the trajectory of his unstable and worsening physical and psychological conditions.

- [140] While it may have been important for him to provide details of his grades in the interests of full disclosure, his failure to do so is not fatal to his credibility. One must have regard to the passage of time, the nature of the injuries suffered by the plaintiff, and the nature of the omissions or inconsistencies alleged. To ignore these mitigating factors is to hold the plaintiff to a standard of perfection that no witness can reasonably meet.
- [141] There is also no evidence that the opinions of the treatment providers would have changed had Mr. Moges disclosed the details of his post-accident grades. Indeed, Dr. Anderson said that he was not surprised that Mr. Moges got an A in math, as this is not a skill which is significantly affected by anxiety or depression. Laura Smith testified that she would need more information about the nature of the course and what was involved, before she could come to any conclusions about the impact these grades would have on her opinion.

B. Inconsistencies

- [142] The defendants also submit that Mr. Moges is not credible or reliable, because he inconsistently reported his injuries and his pain. First, I note Dr. Hawkeswood's opinion that "Individuals with generalized 'soft tissue' pains tend to experience a fluctuant course of symptoms". Thus, while inconsistencies about his reporting of pain may in some circumstances go to the reliability of some of the plaintiff's evidence, they do not affect my view of Mr. Moges' credibility.
- [143] Further, I do not find any inconsistency with Mr. Moges' statement to Laura Smith that he now experiences headaches about every two weeks, with his trial testimony that since his first accident, not a day has gone by when he does not have pain. Given the diffuse nature of his pain, including back pain and ankle pain, a decrease in headache pain does not preclude ongoing pain in other parts of his body. Rather than detracting from his credibility, I find that this statement to Ms. Smith of reduced headache pain enhances his credibility as it reveals that the plaintiff is willing to acknowledge when his condition has improved.
- [144] Third, while there do appear to be varying accounts of whether Mr. Moges lost consciousness in the first collision, this does not diminish my view of the plaintiff's credibility. Mr. Moges testified at trial that he was not certain if he lost consciousness in the first collision. That lack of certainty is reflected in the varying accounts.
- [145] In the almost six years since the first collision, Mr. Moges has seen numerous healthcare professionals for a myriad of health issues. Given the "human tendency to reconsider, review and summarize history in light of new information" (*Burke-Pietramala v. Samad*, 2004 BCSC 470 at para. 104), it is not surprising that there is some variation between his testimony and the entries in the medical records or histories recorded in the expert reports.

- [146] Finally, I note that one must proceed with caution when dealing with alleged inconsistencies based on clinical or other medical records. As noted by Justice Smith in *Edmondson v. Payer*, 2011 BCSC 118 at para. 34, *aff'd* 2012 BCCA 114:
- [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
- [147] Justice Smith's observations in *Edmondson* are apt in this case.
- [148] There are many other alleged inconsistencies raised by the defence. I am not able to address all of them, but note that I do not find them of consequence. For example, Mr. Moges' contention that he has become socially isolated since the first accident is supported by the evidence of a number of his lay witnesses, and is not undermined by Facebook pictures showing Mr. Moges participating in a friend's wedding in 2018. Similarly, Mr. Moges' participation in church activities and appointment as a deacon is not inconsistent with his contention that he is competitively unemployable. Mr. Moges is a deeply religious man who finds solace in his church. He took on the volunteer deacon position to keep himself busy. The limited hours he volunteers as a deacon are far less than what would be required to constitute evidence of competitive employability. Finally, I put no stock in a notation in Dr. Ali's records that on some occasions Mr. Moges appeared "well", or in Dr. Anderson's evidence that he did not appear dishevelled. Dr. Ali indicated that his reference to Mr. Moges appearing well was intended to reflect that he was put together well, not that he did not appear to be in distress. Further, there is insufficient evidence to draw the inference that just because he dressed well, or did not appear dishevelled, he was not depressed or in pain.

C. The PWD Application

- [149] In the spring of 2016, Mr. Moges applied for a person with disabilities designation (the "first application"). The PWD application consisted of three sections: Section 1 - Applicant Information; Section 2 - Medical Report; and Section 3 - Assessor Report. Dr. Ali completed sections 2 and 3. In a letter dated August 25, 2016, Mr. Moges was notified that his PWD application had been rejected on the grounds that Mr. Moges did not have a severe physical or mental impairment.
- [150] Mr. Moges re-applied for his PWD designation on November 30, 2016 (the "second application"). This time, Mr. Moges got assistance from Nancy Newman, a registered social worker, to complete section 3, while Dr. Ali completed section 2. Mr. Moges was notified in February 2017, that his second application had been approved, effective March 1, 2017. As a result, Mr. Moges receives approximately \$1,100 per month from the provincial

government, with partial coverage for his medication. The PWD designation permits him to earn up to \$12,000 per year without jeopardizing his entitlement.

- [151] The defendants take issue with Mr. Moges' re-application for PWD benefits, and assert that he "portrayed himself on the second Persons with Disabilities designation application as being much more disabled than he was on the first application six months earlier". In support, the defendants point to marked differences between the first application and the second application, in the following categories: Mental or Physical Impairment, Mobility and Physical Ability, Cognitive and Emotional Functioning, and Daily Living Activities.
- [152] The evidence does not support a finding that Mr. Moges lied in order to obtain his PWD designation. Rather, the reported limitations in the second PWD application are consistent with the medical evidence which shows that Mr. Moges' condition deteriorated substantially from the time of the first application to the time of the second one. The medical records reveal that Mr. Moges' physical and psychological condition began to worsen in the fall of 2016. His dosage of Wellbutrin was increased, he was referred to group therapy, given a prescription for Tramacet, and referred for x-rays and a CT scan of the lumbar spine for "worsening pain at lower back and coccyx."
- [153] When asked under cross-examination if his condition had deteriorated from the time Dr. Ali completed his assessor report to when Nancy Newman completed the assessor report a few months later, Mr. Moges replied, "I don't quite remember". This is inconsistent with the defence theory that he is claims-conscious.
- [154] In addition, given that Dr. Ali completed the medical section on both applications, in order for the defence theory to stand, I would need to conclude that Dr. Ali conspired with Mr. Moges or supported his attempts to defraud the provincial government. There is simply no evidence to support this. While Dr. Ali was not able to recall from memory if Mr. Moges' condition had deteriorated by the fall of 2016, he stated unequivocally that he would not have lied in the second application. I have no reason to doubt the veracity of this statement.
- [155] I also do not put any weight on the suggestion that there is an inconsistency between Mr. Moges' reports in the second application of having difficulties with reading and writing, and the evidence of Dr. Anderson that Mr. Moges' reading ability seemed fine when he was assessed. First, almost three years had passed between the date of the second application, and the assessment by Dr. Anderson in which time there is evidence that Mr. Moges' condition had changed. Second, Mr. Moges made it clear in the second application that these difficulties arose due to poor concentration. Third, there is evidence that pain, headaches and sleep disruption can cause the cognition problems experienced by Mr. Moges.

D. Lack of Motivation

- [156] The defence contends that Mr. Moges was not making maximum effort to get better or return to work. For example, as part of the GRTW program, Ms. McDonald arranged a job site visit at the Gap in April 2015. During the visit, Mr. Moges hung back and tried on clothes, while Ms. McDonald toured the facility.
- [157] I do not find Mr. Moges decision to stay back and try on clothes to be evidence of a lack of motivation to return to work. Ms. McDonald testified that she did not ask the plaintiff to accompany her throughout the visit. In addition, Mr. Moges expressed to her that he did not want to participate in the job site visit as he was worried that his colleagues would perceive him as being not fit for returning to work. In my view, any concerns about lack of motivation on the part of Mr. Moges must be seen in light of his depression and experience of pain.

E. Dr. Oosterholt

- [158] The defendants argue that the relationship between the plaintiff and Dr. Oosterholt ended because Mr. Moges refused to follow recommended treatments. They rely on an entry in Dr. Oosterholt's clinical records describing a November 17, 2014 visit, as well as the warning letter in which Dr. Oosterholt tells Dr. Ali of his concerns that the plaintiff: was showing some "pain magnification behaviours"; "likes" his Tylenol 3s; was non-compliant with treatment; and may be motivated by secondary gain.
- [159] Mr. Moges disputes Dr. Oosterholt's characterizations, and denies that he and Dr. Oosterholt had a disagreement. He testified that he changed doctors because Dr. Oosterholt was dismissive of his injuries and complaints. I accept Mr. Moges' uncontroverted evidence on this issue, and find nothing untoward in Mr. Moges changing family doctors. The doctor-patient relationship requires an element of trust on both parts. The natural course of action for Mr. Moges was to change family doctors when he believed that he could not trust his family physician to be attentive to his care.
- [160] I also place no weight on the assertions made by Dr. Oosterholt in the warning letter. While Dr. Oosterholt did not testify in the trial and the warning letter was not admitted for the truth of the contents.

F. Alleged Gaps in Evidence

- [161] The defendants argue that there is a "notable gap in the evidence" led by the plaintiff, which should cause this Court to review the plaintiff's evidence with caution. They point to the plaintiff's choice of experts; the opinion evidence that they say was lacking in this case; and the plaintiff's failure to call witnesses that have lived with the plaintiff in recent years.

- [162] The evidence of the former roommates, mother and sister, may have given this Court different insight into Mr. Moges' post-collision function. Yet had the plaintiff opted to call them instead of Mr. Moges' father and brother, the defendants would no doubt have criticized those choices for also creating gaps in the evidence. Bearing in mind the burden of proof in civil proceedings, a party is not required to fill every gap in a case. A gap does not equate to a hole.
- [163] There are many reasons why a party may decide to call or not to call, a particular witness. The relevance of the evidence, the availability of the witness, and the amount of court time that has been scheduled for trial, are but some of the considerations. It is not necessary, nor is it feasible or desirable, to require a party to call every single person that may have some knowledge about the subject matter of the litigation.
- [164] The defendants' criticism of the plaintiff's failure to call all of his healthcare treatment providers is equally unfounded. The plaintiff has undergone treatment from an enormous number of specialists over the years. He is not required to call each of them to testify. The two most critical treatment providers, his family physician and psychiatrist, did provide evidence. In my view, their testimony, coupled with the evidence of the other experts that attended trial, is sufficient to meet the evidentiary burden that rests on the plaintiff.
- [165] Further, if the defendants thought that the healthcare providers who did not testify had something important to add to the evidence, they could have taken it upon themselves to subpoena them. They chose not to do so.
- [166] I also do not agree that the plaintiff was required to call Dr. Holden to testify as an expert witness, rather than a fact witness. There may have been many bona fide reasons for counsel's decision to use Dr. Holden only as a fact witness, such as his ability to prepare an expert opinion report in a timely manner, or his professional obligations. None of these were explored by the defendants during Dr. Holden's cross-examination. To surmise that the plaintiff must have had nefarious reasons for not calling Dr. Holden without some evidentiary basis for arriving at that conclusion is mere speculation.
- [167] I also reject the defendant's criticism of the plaintiff for failing to obtain a functional capacity evaluation, vocational consulting report, and accounting or economists report. Adding more witnesses means adding more court time, thereby causing delays and increased litigation costs. Counsel must be selective in their choice of witnesses when devising their litigation strategy, and have regard to the economic realities in which their clients and the courts operate. Similarly, the court must be alert to the financial or other constraints that parties might be operating under.
- [168] The rising cost of litigation has been the subject of much debate both inside and outside the legal community in recent years. In an effort to control litigation costs, particularly in motor vehicle accident cases, the provincial government recently proposed legislation to limit the number of experts and expert reports that can be used in court on the issue of damages. In such a climate, I find it particularly strange that the defendants would insist

that the plaintiff should have retained even more experts. While additional expert evidence may be helpful, it is not always necessary or warranted. More does not necessarily mean better. Each case must be determined on its own merits. This Court can, and has, made substantial damage awards, including for loss of earning capacity, in the absence of a functional capacity evaluation, vocational consultant, or economist report: see *MacGregor v. Bergen*, 2019 BCSC 315, where the Court countenanced the use of a multiplier from the Civil Jury Instructions rather than requiring a party to retain an economist to provide such evidence.

- [169] The focus for this Court is the evidence that was received, not the evidence that could have been received had counsel turned every stone. I conclude that there is sufficient evidence in this case for me to determine the issues before me.

VIII. Non-Pecuniary Damages

- [170] A damage award for non-pecuniary losses is intended to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Though restitution is never possible for these types of losses, the monetary award is intended to provide a substitute for pleasures and amenities to make the life of the plaintiff "more bearable": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 97 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 105.
- [171] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal *ref'd* [2006] S.C.C.A. No. 100, the Court set out a non-exhaustive list of factors to be considered in assessing non-pecuniary damages. These include: the plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle.
- [172] The award is to be fair to both parties and fairness is measured against awards in comparable cases: *Olson v. Farran*, 2016 BCSC 1255 at para. 156.
- [173] At the time of the first accident, Mr. Moges had a promising future ahead of him. He was a 25 year old man in good health who had recently immigrated to Canada. He was hard-working and studious, and committed to making a better life for himself. He was working three jobs, and enrolled in college to upgrade his English and math skills. He had plans to apply for a professional program of some type, and had been considering becoming a power engineer.

- [174] In September 2014, his life took a fateful turn when he was involved in an accident through no fault of his own. The force of impact was significant, causing substantial damage to his vehicle, the airbags to deploy, and the car to move forward into the vehicle ahead of it. Five weeks later, he had his second accident. This time he suffered a chipped tooth and a small setback in his recovery from the first accident. Two-and-a-half years later, Mr. Moges had his third collision, which further aggravated his injuries.
- [175] Though Mr. Moges was hopeful he would recover quickly, he has been left with permanent injuries and a bleak future. Six years after the first accident, this previously healthy young man who worked three jobs, attended college, and enjoyed hiking, biking, and playing soccer, is severely restricted in his employment and other activities of daily living. Though the plaintiff has experienced some improvement in his condition with the use of medication, psychotherapy, and nerve block injections, his quality of life remains poor. He is competitively unemployable with grim prospects of ever returning to work in the foreseeable future.
- [176] Through a complex combination of physical and psychological injuries, Mr. Moges continues to suffer from: pain in his neck, low back, right shoulder, knee, and left ankle; migraine headaches; myofascial pain; chronic pain; central sensitization; moderately severe major depressive disorder; moderately severe generalized anxiety disorder; and somatic symptom disorder with predominate pain of moderate severity. These, in turn, have lead to kinesiphobia, insomnia, fatigue, and difficulties with concentration and memory. His physical activities are restricted to short walks, limited driving, and sedentary tasks lasting less than an hour in duration.
- [177] Mr. Moges is not prone to complaining, but it is evident that his mental suffering has been profound. Though his deep religious convictions prevent him from attempting suicide, he has expressed thoughts of wanting to die, testifying that he has felt like a burden to society and his family. Through it all, Mr. Moges has tried to lead some semblance of a normal life. He is active in his church community, and was appointed a deacon in January 2018. Since then he has also secured casual part-time employment working as an interpreter.
- [178] The evidence of the lay witnesses is consistent with the medical evidence and that of Mr. Moges. Mr. Moges' pastor, brother, and friend all testified to the changes that they have seen in him following the first accident. He is less social, less active, has gained weight, and does not seem to have any plans for the future.
- [179] Though there is some suggestion that Mr. Moges could see improvement in his physical and mental condition with a reactivation program and enhanced therapies to address his CSS, it is unlikely that he will ever be able to regain his pre-accident lifestyle. Indeed, there is a very real possibility that his condition may worsen or be susceptible to aggravation or re-injury.

- [180] The plaintiff seeks a non-pecuniary damages award of \$225,000. In support, he relies on the following authorities which provide awards ranging from \$175,000 to \$275,000: *Best v. Thomas*, 2014 BCSC 1033 (\$225,000); *Gill v. Stephens*, 2019 BCSC 798 (\$200,000); *Sundin v. Turnbull*, 2017 BCSC 15 (\$175,000); and *Howell v. Machi*, 2017 BCSC 1806 (\$275,000). The common feature amongst the plaintiffs in these cases is that they have all been rendered competitively unemployable by virtue of their motor vehicle accidents, with significant psychological injury and pain. The distinguishing feature is that the plaintiffs in some of these cases also had an MTBI.
- [181] The defendants' position on non-pecuniary damages is somewhat more nuanced. In their written submissions, they submit that an award of \$85,000 under this head of damages is appropriate. However, during oral arguments, counsel clarified that such an award would be for recognition of soft tissue injuries, depression and anxiety. In the event that I accept Dr. Solomons' opinion that Mr. Moges is not suffering from a compensable psychological injury, an award of \$60,000 would be appropriate. In support, the defendants rely on the following authorities providing for awards ranging from \$60,000 to \$90,000: *Dhaul v. Meahan*, 2019 BCSC 990 (\$90,000); *Dhillon v. Singer*, 2017 BCSC 414 (\$85,000); *Ponsart v. Kong*, 2017 BCSC 1126 (\$85,000); *Vankoll v. Williamson*, 2020 BCSC 271 (\$85,000); *Bove v. Wilson*, 2016 BCSC 1620 (\$60,000); and *Bansi v. Pye*, 2012 BCSC 556 (\$75,000). With the exception of *Vankoll* (and to some degree *Bove*), all of these cases involve a psychological component to the plaintiff's injuries.
- [182] Bearing in mind that no two cases are identical, and that each case must be decided on its own merits, I conclude that an award of \$200,000 in general damages is fair and reasonable compensation for Mr. Moges' non-pecuniary losses.
- [183] The parties did not argue that there should be an apportionment of damages as between the defendants, likely because they view the injuries as being "indivisible". As a general principle, tortfeasors whose tortious acts combine to produce indivisible injuries are jointly and severally liable for the full extent of the injury: *Siddall v. Bencherif*, 2016 BCSC 1662 at para. 212 citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 467-468; *B.P.B. v. M.M.B.*, 2009 BCCA 365 at para. 72, leave to appeal ref'd [2010] S.C.C.A. No. 90; and *Bradley v. Groves*, 2010 BCCA 361 at para. 37, leave to appeal ref'd [2010] S.C.C.A. No. 337. As such, I have made a global assessment of damages.

IX. Special Damages

- [184] Although a claim for special damages was plead, no evidence was tendered on this issue, and the claim was abandoned during closing arguments. Therefore, no award for special damages is made.

X. Impairment of Earning Capacity

[185] The plaintiff advances a claim for impairment of past and future earning capacity on the grounds that his injuries have substantially and permanently interfered in his ability to work to capacity. Central to the plaintiff's claims is the assertion that the accident has prevented him from attaining his career goals as a power engineer.

[186] The defendants say that the plaintiff has suffered a modest past loss of income. They resist any award for loss of earning capacity, on the grounds that it is speculative.

A. Background

[187] In his first year in Canada, Mr. Moges was supported financially as a refugee. By the end of 2011, Mr. Moges had found a part-time job working at the Gap. Mr. Moges eventually picked up another part-time job at a gas station. In addition, Mr. Moges started a janitorial cleaning franchise, with the intention of eventually transferring it to his father. In 2012, he made \$6,676 in T4 earnings, and was no longer dependent on social assistance.

[188] Mr. Moges had desires to improve his education so that he could further his employment options. He decided to take a college preparation program, and enrolled in English and math classes through VCC. Mr. Moges attended these classes throughout 2012, taking more advanced courses as he went along. In 2013, the plaintiff was going to college and working the equivalent of full-time hours with three part-time jobs: 8-16 hours per week as a retail clerk at the Gap; 8-16 hours per week as a gas pump attendant; and 12-24 hours per week operating his janitorial business.

[189] Mr. Moges' employment earnings in 2013 totalled \$29,917. Approximately \$16,000 of this was from his gas station and retail jobs, and \$14,000 was net business income from his janitorial contract.

[190] In March 2014, Mr. Moges transferred the janitorial franchise business to his father. Mr. Moges did not pick up another job, as he was finding it difficult to maintain three jobs while going to school, and wanted to focus on his education. He picked up a third course in the spring of 2014, but later dropped it as his grades were starting to suffer with the extra coursework.

[191] Mr. Moges resumed doing janitorial work after his father became injured in a motor vehicle accident in the spring of 2014. Though Mr. Moges said his father paid him \$1400 to \$1500 per month for this work, he did not declare this income on his taxes. Nor did he provide any other documentation to support this claim.

[192] Mr. Moges reported income for 2014 in the amount of \$17,954, of which \$14,269 was T4 income and \$3,685 was net business income for the janitorial contract (earned prior to transferring the franchise).

- [193] Mr. Moges did not return to work at any of his three jobs following the first accident. He continued to be enrolled in classes at VCC to upgrade his education, but dropped out of school after the winter session in 2016. He has not returned to school since.
- [194] In 2015, his total income was less than \$1,000. In 2016, he received \$3,720 in EI benefits, and about \$6,000 in social assistance. In 2017, Mr. Moges started receiving his PWD pension. His social assistance benefits totalled \$12,414 for 2017, and \$14,260 for 2018. He continues to receive social assistance at approximately the same rate for 2019 and 2020.
- [195] In 2019 and 2020, Mr. Moges also earned income from the Immigrant Services Society of British Columbia (ISS) and the Women's Economic Council (WEC) totaling less than \$3,000 in each year.

B. Legal Framework

- [196] Damages for impairment of earning capacity are awarded to provide a plaintiff with full compensation for all their pecuniary losses: *Thomson v. Thiessen*, 2018 BCSC 1353 at para. 55.
- [197] Claims for past and future loss of income earning capacity are subject to the same legal test. This is because "[w]hat would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events": *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.
- [198] As such, hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, citing *Athey* at para. 27.
- [199] When advancing a loss of earning capacity claim, the onus is on the plaintiff to demonstrate that the injuries suffered in the accident have impaired their income earning ability, such that there is a real and substantial possibility that the diminished earning capacity has resulted in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 21, 32 and 33. The Court must then award compensation on an estimation of the chance that the event will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17.
- [200] In *Pololos* at para. 133, the Court summarized the applicable principles for assessment of loss of capacity:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;

- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [201] Generally speaking, "the value of the plaintiff's capacity to earn is equivalent to the value of the earnings she would have received, in the past or the future, had the tort not been committed": *Turner* at para. 317, citing *Crimeni v. Chandra*, 2015 BCCA 131 at para. 15.
- [202] The court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77.

C. Past Loss

- [203] The plaintiff advances three scenarios, in decreasing order of likelihood, for assessment of his past earning capacity loss claim. In Scenario 1, he quantifies his net loss at \$120,000. It is based on the assumption that in all likelihood, but for the accidents, he would have:
- a) earned \$30,000 per year (or \$2,500 per month) during the period January 2014 to August 2016;
 - b) enrolled in the two-year Power and Process Engineering (PPE) program at BCIT in September 2016, and attended school full-time from September 2016 to June 2018, with no employment income during this time;
 - c) secured a job immediately after completing the PPE program;

- d) earned an annual salary of \$64,480 as a power and process engineer, for the period July 2018 to June 2020 (date of trial); and
 - e) incurred an income tax liability of 15%.
- [204] Under this scenario, the expected income for the period is \$208,960. After deducting total money received of \$82,140, one arrives at gross loss of \$126,820 (this is approximately \$16,000 lower than the gross past loss figure of \$142,954.26 arrived at by the plaintiff). After deducting income tax, the net loss is \$107,797.
- [205] In Scenario 2, the plaintiff submits that he would have attended the shorter 38-week Power Engineering (PE) program at BCIT, during the period September 2016 to June 2017. Upon completion, he would have started earning an annual income of \$54,080 as a power engineer, resulting in a gross past loss of \$163,819.64, or a net loss of \$139,246.
- [206] In advancing scenarios 1 and 2, the plaintiff concedes that he had not formed the specific intent to become a power engineer. However, relying on *Peter v. Beveridge*, 2020 BCSC 750, he argues that specific intent is not necessary to establish such a claim.
- [207] In Scenario 3, the plaintiff submits that if he had not completed a professional training program at all, he would have continued earning an annual income of \$30,000 per year. This results in a gross past loss of \$116,579.64, and a net loss of \$99,092.
- [208] The defendants say that the plaintiff attending any power engineering program is too far fetched. They argue that had the collisions not occurred, the plaintiff would have continued working at the Gap and gas station jobs, earning an annual income of no more than \$16,000. Following the collisions, they say that the plaintiff was capable of returning to work by the end of July 2016. After deducting other income received by the plaintiff during the same period, they quantify his past loss of income at \$7,000.
- [209] Alternatively, the defendants say that the plaintiff suffered an income loss of \$41,578.70, calculated on the basis of \$16,000 per annum for five years less any income the plaintiff earned from his work as an interpreter (\$4,892.64), any Social Assistance payments received through his PWD designation (\$32,707.66) and any other income claimed on the plaintiff's income tax returns (\$821). The defendants do not seek any deduction for income tax from these figures on the grounds that due to the low income, no tax would have been payable.
- [210] Based on the evidence which I have referenced elsewhere, I conclude that the plaintiff's past earning capacity was significantly impaired by his injuries. In doing so, I specifically reject the defendants' position that the plaintiff was capable of returning to work by the end of July 2016. While the plaintiff was able to eventually take on casual employment, I find that his ability to work continued to be substantially impaired by his compensable injuries from the date of the first collision to the date of trial.

- [211] With respect to the compensation that should be awarded for this loss, I have given no weight to the hypothetical advanced by the defence: that Mr. Moges would have earned no more than \$16,000 per year, and that he would not have advanced his career options through a college program. This hypothetical is illogical, and not grounded in the evidence. There is no evidence to support the contention that not only would Mr. Moges' upgrading have been unsuccessful, but that he would not have returned to full-time work on the completion of his upgrading. An income of \$16,000 per year is equivalent to part-time employment. If Mr. Moges would have worked at a reduced capacity to upgrade his qualifications to improve his employment options, then it is a fallacy to argue that he would be stuck forever performing part-time, minimum wage work. Surely, he would have returned to full-time work as soon as his upgrading was completed, thereby doubling those earnings. In addition, even if I accept that Mr. Moges would have worked at a reduced capacity while upgrading his education, there is no basis for fixing his income at \$16,000. Extrapolating the plaintiff's T4 earnings in 2014 from his Gap and gas station jobs results in annual T4 income of at least \$21,000, which was earned while he was attending school part-time.
- [212] Rather, absent accident, I find that the two most likely trajectories for Mr. Moges' life were that:
- Trajectory 1 - he would have continued to pursue his education, resulting in reduced immediate earnings but increased long term earnings; or
 - Trajectory 2 - he would have discontinued his educational pursuits and resumed working full-time hours.
- [213] Plaintiff's scenario 3 is captured by trajectory 2; scenario 1 and scenario 2 both fall under trajectory 1.
- [214] In my view, both trajectories 1 and 2 provide real and substantial possibilities for Mr. Moges' absent accident life. However, the evidence supports a finding that trajectory 1 was more likely. His personal goals, family goals, and work and educational history all align with this trajectory. Prior to the first accident, Mr. Moges had already begun upgrading his education; had met with an advisor at BCIT to discuss the admission requirements for the two-year Power and Process Engineering (PPE) program as well as the shorter 38-week Power Engineering (PE) program; and spoken with a friend to explore the job opportunities and income earning potential of these two programs.
- [215] While successful completion of the PPE or PE programs was far from certain, there is little doubt that prior to the first accident, Mr. Moges had formed a general intention to complete a professional course of study that would capitalize on his strong math skills. As part of his commitment towards pursuing this goal of having a stable and remunerative career, he made inquiries into the PPE and PE programs at BCIT.

- [216] The evidence regarding Mr. Moges' potential earnings as a power engineer with PE or PPE qualifications is uncontroverted, and I accept that upon completion of these programs, he stood to earn approximately \$54,000 or \$64,000 per year, respectively. However, it is difficult to assess how much income Mr. Moges may have lost under trajectory 1, due to the number of variables that come into play, such as: whether he would have ultimately decided to pursue the PPE or PE programs; his success in completing the prerequisites for his chosen course of study; challenges faced by his English language limitations; the timing and length of Mr. Moges' educational program; his ability to fund his education; availability of work; how long it would take to find a job in his chosen field; and the expected income he could derive through this employment.
- [217] Of the two programs of study, I find that Mr. Moges was more likely to have pursued the PE, which was a shorter program and within closer reach for Mr. Moges. The two year PPE program would have required greater financial resources and academic performance, making it less certain that he would have pursued it, even if it did result in higher earnings on completion.
- [218] I note also that though less likely, there remains a real and substantial possibility that Mr. Moges' life would have followed trajectory 2. Thus, while I have given it less weight than trajectory 1, I have factored into my assessment of loss the very real possibility that Mr. Moges would have continued his academic pursuits for the duration of 2014, but then would have abandoned his education altogether without achieving any qualifications that would enable him to earn higher than minimum wage. Once resuming full-time work under trajectory 2, I find that it is more than likely that Mr. Moges' annual income would have been at least \$30,000 per year. This figure is consistent with his 2013 earnings (when he was also going to school). It is also consistent with him working full-time hours at minimum wage jobs, which his proven track record showed he was more than capable of doing.
- [219] Bearing in mind that this is an assessment and not a precise mathematical calculation, and after giving the various hypothetical possibilities weight in accordance with the likelihood of their occurrence, discounting for income tax, accounting for all of the negative and positive contingencies, and subtracting income earned by Mr. Moges during the relevant periods of time, I assess Mr. Moges' past loss of earning capacity at \$105,000. I find this is fair and reasonable compensation for this loss.

D. Future Loss

- [220] The plaintiff seeks an award for loss of future earning capacity in the range of \$1,000,000 to \$1,500,000. The defendants resist the making of any future lost capacity award, saying that there is insufficient evidence that Mr. Moges' earning capacity has been impaired by his injuries. In the event such an award is warranted on the evidence, the defendants submit it should be around \$45,000. This figure is the rough equivalent of what they argue is Mr. Moges' anticipated annual salary over three years.

[221] In *Audet v. Chan*, 2018 BCSC 1123 at para. 90, the Court held that in determining whether a plaintiff is entitled to an award for loss of earning capacity, the court must answer two key questions. The first is whether the plaintiff's earning capacity has been impaired by the injuries. The second is what compensation should be awarded for the resulting harm that will accrue over time.

[222] I conclude that the plaintiff's future earning capacity has been impaired by his injuries. Evidence from Dr. Ali, Dr. Hawkeswood, Dr. Lau, and Dr. Anderson, supports the finding that Mr. Moges has been permanently impaired in his ability to work as a result of his compensable physical and psychological injuries. Though there is some debate about whether he is completely competitively unemployable, or capable of performing sedentary work in a part-time capacity, either now or in the future, the evidence is clear that Mr. Moges will never regain full function even with significant clinical improvement. As such, I conclude that a future loss of earning capacity award is warranted.

[223] I turn now to assessing the compensation which should be awarded for the resulting harm that will accrue over time.

[224] Though the earnings approach is more appropriate in this case, I note that even under the capital asset approach, Mr. Moges' loss would be substantial. The capital asset approach was explained by Justice Marzari in *Ferguson v. Watt*, 2018 BCSC 1587 at para. 122:

The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown; Gilbert* at para. 233; and *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56 [Morgan].

[225] There is no doubt that the plaintiff is at a competitive disadvantage in all forms of employment. He is less marketable to potential employers, unable to take advantage of all job opportunities, and less valuable to himself as a person capable of earning an income in a competitive labour market.

[226] Based on the reasoning set out in the previous section, I conclude that the plaintiff has demonstrated that there is a real and substantial possibility that absent accident, his life trajectory would have followed scenario 2, 1, or 3, (in descending order of likelihood), such that:

- a) he would have completed the PPE, PE or some other equivalent educational program which would have enabled him to earn an income ranging from \$54,000 to \$64,000 per year, which would likely have increased over time as he gained experience and seniority; or

- b) in the event that he did not complete any educational program, he would have worked in a full-time capacity, starting at minimum wage, but with his income increasing over time as he gained experience and seniority.

[227] To assess the plaintiff's future lost capacity, the plaintiff asks that I employ the earnings approach to the three different scenarios discussed in the past loss claim. Rather than relying on an economist's report, the plaintiff asks me to employ Appendix E from the Civil Jury Instructions and s. 56 of the Law and Equity Act, R.S.B.C.1996, c. 253, to obtain a present value multiplier of 26.4817 to obtain the legislatively prescribed discount rate of 1.5% for a period of 34 years. This approach was approved by Justice Branch in MacGregor at paras. 107-127.

[228] In *Pearson v. Savage*, 2020 BCCA 133 at para. 104 the Court noted:

[Section] 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253 was added to obviate the need to resort to expert evidence on discount rates in every case. This section allows the Chief Justice of the Supreme Court of British Columbia to make regulations prescribing the discount rate. On future awards, defendants receive the benefit of a "discount" on the assumption that a plaintiff will earn investment returns on the award. The rates establish the expected return on invested sums in excess of the rate of inflation. The regulation currently sets a discount rate of 1.5% for loss of future earnings and 2% for the cost of future care: Law and Equity Regulation, B.C. Reg. 352/81, s. 1.

[229] Applying this discount rate, under scenario 1, the plaintiff arrives at future earnings as a PPE, of approximately \$1,707,000. Under scenario 2, he submits that he would have earned \$1,432,000 working as a PE. Under scenario 3, he submits that even without any educational upgrading, he would have earned \$40,000, per year, or \$1,059,000. All figures are calculated to age 65.

[230] To offset any negative contingencies, the plaintiff has not adjusted the above figures for any salary increases. However, in my view, this concession does not adequately account for negative contingencies such as the possibility that Mr. Moges would have faced periods of reduced employment, or unemployment.

[231] Based on the evidence, I conclude that there is a real and substantial likelihood that absent accident, the plaintiff would have earned in the range of \$1,300,000 to \$1,500,000. However, when I factor in the various negative and positive contingencies, such as the possibility that Mr. Moges would have faced periods of reduced employment, or unemployment, as well as the possibility that his income may have increased over time due to promotions or salary increases, I conclude that it is appropriate to discount the overall absent accident earnings figure by 15%.

[232] I turn to what Mr. Moges' employment future now holds. The plaintiff argues that with accident, his future earnings are restricted to \$5,000 to \$10,000 per year, resulting in a deduction of \$132,000 to \$265,000 for each of the scenarios. This figure does not include any

PWD allowance, as it is submitted that Mr. Moges would no longer qualify for PWD once his assets increase above a certain amount. This latter assumption was not challenged by the defence and I have accepted it for the purposes of these calculations. However, in my view, the range provided by plaintiff's counsel does not adequately account for the plaintiff's condition improving, such that his residual earning capacity would be increased. When the possibility of the plaintiff's condition improving or deteriorating is properly factored in, I find that the plaintiff's with accident earnings will likely approximate \$200,000 to \$300,000.

- [233] After giving weight to all of the various hypothetical events in accordance with the likelihood of their occurrence, and factoring in the various positive and negative contingencies, I conclude that an award of \$950,000 is fair and reasonable compensation for the plaintiff's future loss of earning capacity.

XI. Loss of Housekeeping

- [234] Although the plaintiff sought a separate award for loss of housekeeping capacity in his pleadings, no such claim was advanced at the conclusion of trial. There is evidence that the plaintiff has been restricted from performing heavier household tasks. For example, he testified that his mother and sister assist him with cleaning, cooking, and shopping. I have accounted for the plaintiff's restriction in his ability to perform housekeeping tasks in the non-pecuniary damages award, and conclude that no separate award is warranted.

XII. Cost of Future Care

- [235] The defendants resist any award for cost of future care on the grounds that the treatment is not medically justified, reasonable, or likely to be incurred.
- [236] A future care cost award is based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health. A claim for future care is established if there is medical justification for the claim, the claim is reasonable, and the expense is likely to be incurred by the plaintiff: Audet at paras. 114 and 115. The quantification of damages under this head is an "assessment and not a precise accounting": Midgley v. Nguyen, 2013 BCSC 693 at para. 337.
- [237] A cost of future care award is subject to a discount rate of 2%: Pearson, supra.
- [238] The plaintiff seeks an award of \$350,000 under this head of damages, for future lifetime expenses such as continuation of his current medication regime, recommended treatments by Dr. Lau for pain therapy; rehabilitation or counselling therapy services; equipment such as hot packs and braces; and support services for home maintenance and seasonal cleaning.

- [239] The plaintiff relies on the evidence of Laura Smith. In her cost of future care report dated July 23, 2019, Ms. Smith provides a breakdown of costs for the various treatment recommendations made by Mr. Moges' health care providers and experts who testified at the trial.
- [240] The plaintiff has appropriately factored in the 2% discount rate to the future care costs claimed over Mr. Moges' lifespan, by using a present value multiplier of 31.4236. This assumes an additional 50 year life expectancy. However, where the intended costs will be incurred in a shorter time period, a different multiplier is necessary, and I have adjusted the figures accordingly.
- [241] Having regard to all of the evidence, I conclude that the following future care treatment costs are medically justified, reasonable, and likely to be incurred by the plaintiff:
- a) \$30,000 for the plaintiff's current medication regime, calculated to his lifetime: This medication includes Modafinil, Duloxetine (Cymbalta), Gabapentin, and Quetiapine, but may be changed from time to time depending on its continuing efficacy. It is intended to manage his pain symptoms, migraines, and depression and anxiety, and accounts for the 2% discount rate.
 - b) \$9,000 for 10 future Botox treatments: The plaintiff has recently undergone two Botox injections with some symptom relief and improvements in his headaches. As there is uncertainty as to whether the plaintiff will continue this medication into the long term future, coverage for four treatments per year through to his lifetime is not warranted. In arriving at this figure, I have assumed that the plaintiff will undergo this treatment over two-and-a-half years and adjusted the calculation accordingly.
 - c) \$75,000 for infusion therapy or other alternative treatments recommended by Dr. Lau: The optimal treatment approach recommended by Dr. Lau is multidisciplinary and coordinated with advanced infusion therapies to help reduce overall sensitization. These recommendations range from inexpensive treatments such as the muscle relaxant dantrolene (\$6,285 to \$12,569) to exorbitant costing ones such as ketamine infusions (\$314,000 to \$786,000). As the treatments are intended to be used on a trial-and-error basis, it is not possible to know which would be helpful until they are actually attempted. The plaintiff concedes that the fairest approach is to consider the cost of each treatment individually over the course of Mr. Moges' lifetime and then to recognize that in all probability, no more than one of those treatment options would ultimately be relied upon for such a long course of time. Bearing in mind that there is a real risk that any average figure used will either grossly overestimate or grossly underestimate the cost of the treatment, I conclude that \$75,000 is a reasonable global cost in this case, after factoring in the 2% discount rate. In *Manoharan v. Kaur*, 2016 BCSC 692, the Court considered similar treatment recommendations made by Dr. Lau, and concluded that not even a plaintiff with ample financial means was likely to spend the almost \$1 million for the recommended course for the ketamine infusions.

- d) \$12,400 for a total of 75 counselling/psychotherapy sessions over Mr. Moges' lifetime: This is based on Dr. Anderson's recommendation of an initial course of 15 sessions (at \$200 per session), with subsequent supportive therapy of six to eight sessions per year. The plaintiff has taken some therapy sessions and found them beneficial. However, continuing these sessions at the frequency suggested by Dr. Anderson is neither reasonable nor likely to be incurred. In arriving at this figure, I have factored in the 2% discount rate, assuming that Mr. Moges will take most of these treatments over the ensuing 10 years.
- e) \$2,640 for a rehabilitation assistant or kinesiologist to help Mr. Moges develop and implement an exercise regime: As noted by Dr. Hawkeswood, Mr. Moges is badly in need of a reactivation program, and in my view, subject to his mental state, is likely to pursue it.
- [242] The above figures total \$129,040, which I have rounded off to \$129,000. In arriving at this figure, I note that I have not made an award for home maintenance and seasonal cleaning. Insufficient evidence was provided to support such a claim. Mr. Moges testified that he lives in rental accommodations and has not incurred any costs for seasonal cleaning and exterior home maintenance. Absent evidence that his living situation is likely to change, there is no justification for such an award.

XIII. Summary of Damages Awarded

[243] The plaintiff's damages are assessed as follows:

Non-Pecuniary Damages

\$200,000

Net Past Loss of Income

\$105,000

Loss of Future Earning Capacity

\$950,000

Costs of Future Care

\$129,000

Total Loss

\$1,384,000

[244] The plaintiff is entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

XIV. Costs

[245] The plaintiff is entitled to his costs at Scale B, subject to any offers or other matters that I have not been made aware of.

[246] In the event that a party wishes to make submissions on the issue of costs, they may do so in writing up to a maximum of ten pages in length. These should be submitted through Supreme Court Scheduling within 30 days of the release of these Reasons. Any responding submissions are to be provided within 14 days of receipt of the opposing party's submissions on costs.

"Shergill J."

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