CANADA / JUDGMENT

# Nijjer v. Bierman

## 2023 BCSC 1882

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2023 BCSC 1882 Nijjer v. Bierman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nijjer v. Bierman,

2023 BCSC 1882

Date: 20231026

Docket: M55501

Registry: Kamloops

Between:

Ajvinder Nijjer

Plaintiff

And

Mekayla Catherine Bierman

Defendant

- and -

Docket: M59888

Registry: Kamloops

Between:

Ajvinder Nijjer

Plaintiff

And

Cade Dorian Hawkins-Bara

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page on October 07, 2024

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

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Place and Date of Trial

Kamloops, B.C.

November 16-18, 21-25, 28-30

and December 1, 2022

Place and Date of Judgment:

Kamloops, B.C.

October 26, 2023

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## Introduction

[1] The plaintiff, Ajvinder Nijjer, claims damages for injuries sustained in two motor vehicle accidents. The first accident occurred on November 3, 2016 (the "First Accident") and the second occurred on December 17, 2020 (the "Second Accident"). The defendants admit liability for both accidents.

[2] Mr. Nijjer claims that he sustained various injuries during the accidents: soft tissue injuries to his neck, back and shoulders leading to two cervical neck surgeries; headaches and migraines; impaired sleep; and psychological injuries. He contends these injuries are chronic and have rendered him permanently impaired, unable to work and unable to enjoy life in any meaningful way. Mr. Nijjer seeks substantial awards for non-pecuniary damages, past and future loss of income-earning capacity, the cost of future care, and special damages. He also seeks "in trust" damages to compensate his wife for providing care and services to him. All told, Mr. Nijjer quantifies his claim at close to $4 million.

[3] The defendants do not dispute that Mr. Nijjer sustained some injuries, but they contend that his injuries improved significantly not long after the First Accident and were only temporarily aggravated by the Second Accident. Challenging his credibility and the reliability of his evidence in several key areas, the defendants dispute the severity of the symptoms Mr. Nijjer claims and the extent of their effect on his life. Among other things, they dispute that the accidents caused both the condition that led to his two cervical neck surgeries and his psychological conditions. They also point to other intervening events and assert that his residual earning capacity is greater than he claims. The defendants quantify Mr. Nijjer's claim at between approximately $380,000 and $440,000.

[4] I will begin by setting out my general findings on the credibility of the witnesses and the reliability of their evidence.

## Credibility and Reliability Findings

[5] Mr. Nijjer testified for many hours at different times over the course of several days during this trial. He also called several lay witnesses in support of his case: a former co-worker, Darren Pittendreigh; his sister-in-law, Sukhi Tomana; a former co-worker and supervisor, Robert Howell; his brother, Jason Nijjer; and his wife, Navdeep Nijjer.

[6] Mr. Nijjer also relied on expert opinion evidence from a neurosurgeon, Dr. Navraj Heran; a physiatrist, Dr. Tony Giantomaso; a psychologist, Dr. Wilbert Reimer; a vocational consultant and rehabilitation professional, Niall Trainor; an occupational therapist, Sheila Branscombe; and an economist, Darren Benning. Mr. Nijjer also led evidence by way of pre-trial disposition from his former general practitioner, Dr. Donald McLeod, and called another general practitioner, Dr. William Edmunds, who was Dr. McLeod's locum on occasion. These two doctors were called not to give opinion evidence, but to describe their treatment of Mr. Nijjer.

[7] The defendants relied upon expert evidence from a physiatrist, Dr. Shawn McCann; a psychiatrist, Dr. Eugene Okorie; a neurosurgeon, Dr. Prenesh Govender; an occupational therapist, Mary-Jo Mulgrew; and an economist, Judy Ren. The defendants also called a neurosurgeon, Dr. Jean-Francois Chevalier, and a neurologist, Dr. Russell Mosewich. These two doctors were called not to give opinion evidence, but to describe their treatment of Mr. Nijjer.

[8] The court's fact-finding role requires an assessment of the credibility of witnesses and the reliability of their evidence. Credibility refers to truthfulness or honesty, and reliability refers to accuracy. Both credibility and reliability are to be assessed in the context of the evidence as a whole. This requires consideration of many factors. Justice Crabtree provided a helpful outline of the principles governing the assessment of credibility and reliability in Yang v. Duralia, 2020 BCSC 806 at paras. 40-44, followed by this summary at para. 45:

[45] In summary, the assessment of a witness's credibility and reliability must include a critical assessment of the witness's evidence in the context of the evidence as a whole. This involves an assessment of whether the witness's evidence is at odds with other evidence in the case, and whether the testimony is implausible or improbable, having regard to the surrounding circumstances. The real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities, which a practical and informed person would readily recognize as reasonable in that place and in those conditions. A trier of fact must also bear in mind that an apparently honest, confident or convincing witness may not necessarily be an accurate witness.

[9] To this, I would add that a court may believe some, all, or none of the evidence of a witness. As well, credibility determinations "may not be purely intellectual and may involve factors that are difficult to verbalize": R. v. R.E.M., 2008 SCC 51 at para. 49.

[10] I am also mindful not to base credibility determinations on emotional evaluations, stereotypes, guesswork or other impermissible forms of reasoning. Credibility and reliability determinations have to be grounded in reason and made as objectively as possible. I am also cautious in placing too much reliance on demeanour or courtroom presentation. As I have observed in other cases, I have no baseline upon which to assess those things and am aware that a courtroom can be an unfamiliar and intimidating place for some people. Everyone reacts to its pressures differently.

[11] It is with these principles in mind that I turn to my assessment of each witnesses' evidence in light of the evidence as a whole. I will begin with witnesses other than the plaintiff.

## Witnesses Other Than the Plaintiff

[12] With the exception of Jason Nijjer, I find that all of these other witnesses were credible and most of their evidence was reliable. They were all honest and balanced witnesses, doing their best to give truthful, accurate and fair evidence to the best of their memories. The parties raised concerns over the reliability of some of the evidence and the opinions of these witnesses. I will address and make findings in those areas during the course of my consideration of the issues.

[13] I will say a few words about Jason Nijjer here. Jason Nijjer is the plaintiff's brother. They are close in age and currently have a good relationship. To avoid confusion, I will refer to Jason Nijjer by his first name only. By doing so, I do not intend any disrespect.

[14] I find that Jason was not an entirely credible witness and most of his evidence was not reliable. While there are discrete aspects of his evidence that I do accept, most I do not. Jason was not a balanced witness. He exaggerated, minimized, and testified in such a manner that he appeared to have an agenda. Some of his evidence was inconsistent with reliable documentary evidence and inconsistent with other evidence I accept.

[15] Jason is an experienced entrepreneur. Three of his current or former businesses featured prominently in this trial. He currently owns two businesses in Kamloops. The first is called Leaps of Laughter, a party equipment rental service. The second is called Ezzzy Moving, a moving and cleaning company. The third was a marihuana dispensary called the Original Grass Junction ("OGJ") that he owned for a time in 2019 and 2020.

[16] There is no question that the plaintiff was involved in these businesses over the years, but the extent and nature of his involvement is contentious. When cross-examined about these businesses, and the plaintiff's involvement in them, Jason became flippant, belligerent and disrespectful. He frequently interrupted counsel. He was sarcastic, rude and argumentative. As one example, when asked about the year something occurred, Jason suggested counsel was making him "pick a number out of the air", gave his answer, and then sarcastically asked counsel "are you happy?" There are many examples of this.

[17] Jason also claimed to have memory difficulties, and gave misleading answers in areas where he was clearly uncomfortable answering questions. For example, Jason claimed to be unable to recall the details of his criminal record, other than that "there was a drinking and driving, fraud, driving while prohibited, theft". Jason claimed he could not recall when these convictions occurred, asserting only that they occurred a very long time ago, when he was younger and did "stupid things".

[18] During cross-examination, it was revealed that while Jason was convicted of impaired driving and two counts of theft in the early to mid-2000s, his conviction for fraud under $5,000 occurred in 2012. This was not, as Jason tried to portray, a youthful indiscretion. This conviction, which involved a jail sentence served in the community, occurred at a time when Jason was well into adulthood and was operating businesses in this community. Indeed, as

he acknowledged, the victim of his offence was a client. Jason's characterization of this conviction, and the two driving offences that followed it in 2013 and 2016, as things that occurred a "long, long time ago" when he was young and did "stupid things" was inaccurate and misleading.

[19] Jason's testimony was also undermined during the times he claimed to have limited knowledge about his businesses and gave nonsensical answers when asked about business-related documentation. For an astute, experienced and award-winning business owner, his answers did not ring true. I will give one example.

[20] Jason was asked about a draft partnership agreement created by his lawyer in relation to the operation of the OGJ. This document identified him, the plaintiff and a third person as "Principals". Jason claimed to be unaware of the meaning of the word "Principals" in this context. He testified that he believed it meant "principals of a high school". Not only is this answer unbelievable, his sarcastic tone made it abundantly clear that Jason was being deliberately untruthful.

[21] Jason's evidence was also inconsistent with documentary evidence and with other evidence I accept in one notable area. Jason testified that he started Ezzzy Moving in 2011. He was emphatic that his brother, the plaintiff, only assisted him with his business for a very short time in the beginning, and that his brother was never an owner. Jason testified that Mr. Nijjer began assisting him with this business in 2011, but that the two brothers went their separate ways fairly quickly thereafter when Mr. Nijjer took a position with the Kamloops Daily News. I will discuss Mr. Nijjer's position with the Kamloops Daily News later in my factual findings.

[22] Jason also testified that although Mr. Nijjer "hung out" with him at Ezzzy Moving from time to time after 2011, and occasionally helped him move things, Mr. Nijjer received no remuneration for this help. When asked in examination-in-chief if he, or anyone from Ezzzy Moving, ever paid Mr. Nijjer, Jason testified "No, not a thing". When asked in cross-examination whether Mr. Nijjer had performed any paid or unpaid work for him since 2011, Jason testified "No, never."

[23] As I will explain in detail later, Jason's evidence about Mr. Nijjer's role and participation in Ezzzy Moving was completely contradicted by Mr. Nijjer's evidence, and by certain reliable documentary evidence tendered in this trial.

[24] Jason's credibility and the reliability of his evidence about his brother's role in the OGJ was also undermined in cross-examination. In examination-in-chief, he testified that he and another person, his former landlord, started this business. Jason was unhelpful with dates, but other evidence tendered at this trial establishes that the OGJ commenced operation in about December 2019. Jason testified that his brother helped him with various aspects of the start-up of the business, such as setting up the point of sale, media and marketing. Jason said that Mr. Nijjer did so because Jason was not very "tech-savvy". Jason was adamant that other than helping him with the start-up, Mr. Nijjer did not have any interest in the business

and had nothing to do with its ownership.

[25] Jason further testified that he only remained an owner of the OGJ for about three or four months, when his relationship with his landlord broke down. He said that he then "washed his hands" of the business and gifted it to a third party. Jason's evidence in examination-in-chief left me with the firm impression that he owned and operated the OGJ for a short time and that his brother's involvement was minimal, limited to the early stages of the business.

[26] In cross-examination, Jason was shown several documents that tended to contradict this impression. When asked questions about these documents, Jason became defensive and argumentative. He often interrupted counsel as a question was being asked. He gave some non-responsive answers. The documentation, and Jason's responses to the questions about those documents, revealed that he had minimized his brother's involvement with this business.

[27] The documentation includes company searches and articles of incorporation in relation to a numbered company. When shown this evidence, Jason agreed that he and Mr. Nijjer had incorporated a numbered company together in November 2019, and were both directors of it. When asked if he and his brother were the "controlling directors" of this numbered company, Jason glibly replied "Sure."

[28] This numbered company is important because it was identified as one of the proposed parties to a draft partnership agreement dated December 1, 2019, relating to the operation of the OGJ. This draft partnership agreement was prepared by Jason's lawyer. The agreement was never signed, but Jason did not dispute that in December 2019 and January 2020, negotiations had taken place towards developing a partnership between the numbered company, his landlord's company, himself, his brother and his landlord. Jason did not dispute that his counsel circulated this draft partnership agreement to his landlord's lawyer, himself, his brother and others on January 23, 2020.

[29] Jason further agreed that, as the draft agreement showed, Mr. Nijjer had worked a significant number of hours before and after the OGJ commenced operations. He also agreed that, as the documents showed, Mr. Nijjer had injected a significant amount of money into the venture. This is one of the discrete areas of Jason's evidence I accept because it is supported by documents and to some extent, by Mr. Nijjer's evidence.

[30] The documentation shown to Jason also included a March 13, 2020 email from Mr. Nijjer, in which Mr. Nijjer followed up on the draft partnership agreement. Mr. Nijjer asked the recipients when they "can expect the partnership agreement to be finalized?" When shown this email, Jason agreed that the partnership discussions and negotiations involving him, his brother and his landlord continued into March 2020.

[31] The documentation shown to Jason also included purchase receipts from the OGJ from January 2020. Jason agreed that the telephone number that appears on these receipts - one a customer would call - is Mr. Nijjer's cellular telephone number.

[32] Even in the face of all of this documentary evidence showing Mr. Nijjer's participation in this business over a period of several months, including a significant financial contribution, Jason refused to concede that his brother had any interest in the business. He continued to insist that Mr. Nijjer's involvement was limited to doing "little things" on request to help Jason start up this business.

[33] In light of all of this, unless supported by other evidence I accept, I find I cannot rely upon the evidence of Jason Nijjer.

## The Plaintiff

[34] My assessment of Mr. Nijjer's credibility and the reliability of his evidence is central in this case. It is central in determining the nature and severity of his injuries, their causation, his residual capacity to work and, ultimately, his damages. My assessment also impacts the weight to be given to the medical opinions to the extent that they rely on Mr. Nijjer's subjective reporting and representations of his injuries and conditions at various times.

[35] The defendants submit that Mr. Nijjer's credibility and the reliability of his evidence in key areas has been severely compromised. They point to several aspects of his evidence, including what they say are inconsistencies; his history of criminal convictions; exaggerations and minimizations; and failures to disclose key information to medical professionals. They urge me to view many of the material aspects of Mr. Nijjer's evidence skeptically or to discount some aspects of his evidence entirely.

[36] The plaintiff submits that he was a credible witness and that his evidence was reliable. He urges me to accept his evidence, in its entirety. He argues that throughout his many hours of testimony, his evidence remained consistent, both internally and with the evidence of other witnesses and tendered documentation. He points to times where he remained firm in his recollections, even when faced with what initially seemed to be contradictory evidence, which was later shown not to be contradictory at all. He contends that if there are any inconsistencies between his evidence and entries in the voluminous clinical records, they are minor and inconsequential. Mr. Nijjer also highlights aspects of his evidence where he admitted personally difficult facts, avoided exaggeration, and, in one instance, successfully proved the accuracy of his challenged evidence.

[37] While I do not agree with the defendants' characterization of Mr. Nijjer's credibility and the reliability of his evidence as "severely compromised", I do find that his credibility and the reliability of his evidence was undermined in some respects. Mr. Nijjer's evidence had some strengths, but it also suffered from some shortcomings. Therefore, while I accept many aspects of Mr. Nijjer's evidence, there are some areas where I must exercise caution.

[38] Mr. Nijjer testified over a period of seven days and I therefore had the opportunity to observe his demeanour and assess his credibility and reliability for an extended period of time over different days. As so often happens in these types of cases, his evidence was interrupted many times in order to accommodate the scheduled testimony of expert

witnesses. Mr. Nijjer displayed stamina and patience during these days. Although his frustration was apparent on occasion, I do not view this as reflecting negatively on his credibility. Rather, I attribute it to the toll of testifying under less than ideal circumstances.

[39] With some exceptions, I am satisfied that Mr. Nijjer tried to provide truthful and accurate answers. He acknowledged personally difficult facts and admitted memory frailties. In the face of tough questioning, his evidence remained generally internally consistent and was generally consistent with other reliable evidence, including documentary evidence. Again, there are some exceptions to this. Any inconsistencies between his evidence and what various clinicians recorded in their notes over the years were minor and to be expected.

[40] Mr. Nijjer's credibility and the reliability of his evidence was bolstered in two notable instances. In each instance, he remained firm in his evidence, even when confronted with seemingly contradictory evidence. He was vindicated in re-examination by additional documentation.

[41] The first instance related to Mr. Nijjer's evidence that, among other things, he experienced left shoulder pain, including shooting pain down the left arm, after the First Accident. He was significantly challenged on this evidence in cross-examination. Part of this challenge involved counsel taking him through clinical records from the first four months after the First Accident where no such complaints were recorded. Mr. Nijjer did not resile from his evidence and genuinely seemed surprised by the absence of any recorded left-sided complaints. He maintained that he experienced these symptoms and that he told his doctor about them. Mr. Nijjer was vindicated in re-examination when he was taken to other clinical records near in time to the First Accident which contained entries regarding left-sided complaints.

[42] The second instance involved Mr. Nijjer's use of a prescription medication called Tramadol. In cross-examination, Mr. Nijjer's credibility and the reliability of his evidence in this area was challenged when he was shown a Pharmanet printout. This printout showed that his last prescription for Tramadol was in May 2020, which contradicted Mr. Nijjer's testimony about more recent use. Despite the apparent strength of this documentary evidence, Mr. Nijjer nevertheless remained firm in his evidence on this point. When court adjourned, Mr. Nijjer went to his pharmacy on his own accord. He obtained a printout of a record of his Tramadol prescriptions and brought it to court. This reliable documentary evidence supported Mr. Nijjer's evidence about his more recent Tramadol use and showed that the Pharmanet printout was incorrect or incomplete.

[43] Having outlined the strengths in Mr. Nijjer's evidence, I turn now to the shortcomings.

[44] Mr. Nijjer has been convicted of two offences: possession of a controlled substance and theft under $5,000. They are dated convictions. On their own, I would not find the fact of these convictions to necessarily undermine Mr. Nijjer's credibility or the reliability of his evidence. However, Mr. Nijjer's evidence pertaining to the circumstances and timing of these convictions does cause me concern.

[45] In examination-in-chief, Mr. Nijjer testified that he was charged with possession of a controlled substance in 2008. He testified about the circumstances that led to his arrest, his guilty plea and his sentence, a conditional discharge. Mr. Nijjer also testified about another criminal conviction, one he described as "theft under" or "shoplifting". He described the convictions as relating to things he did earlier in his life and emphasized that they were not a reflection of who he is today.

[46] Mr. Nijjer testified in examination-in-chief that he could not recall when the theft under conviction occurred, but was certain that it occurred before he obtained employment with the Royal Bank of Canada ("RBC"). He was certain of this because he recalled disclosing and discussing his convictions during their interview process. He highlighted that the bank hired him despite these convictions, lending support to his assertion that they were minor, youthful indiscretions.

[47] As I will be outlining in my findings of fact, Mr. Nijjer has worked in a variety of industries over the years, including the financial industry. His time in the financial industry saw him employed by Investor's Group and then by RBC, where he worked as an accounts manager at a branch in Vancouver for approximately one year.

[48] Mr. Nijjer's evidence about precisely when this year's work at RBC occurred was unclear. He first testified that he came back to Kamloops from working in Vancouver in 2007. As RBC was his only employment in Vancouver during this general timeframe, this suggests that he worked at RBC in 2006/2007. However, he also testified that he met his wife in either 2005, or late 2004, at a time when he was working at RBC in Vancouver. This suggests that he worked at RBC in late 2004 or 2005. Then, in cross-examination, Mr. Nijjer was taken to his resume, a document he prepared, in which he wrote that he worked at RBC from 2006 to 2007.

[49] In light of the evidence as a whole, I find that Mr. Nijjer worked at RBC in Vancouver in 2006. However, whether he worked there in 2004, 2005, 2006 or 2007 is really immaterial. It is the timing of his convictions in relation to that employment that is key.

[50] If Mr. Nijjer's evidence in direct examination about his disclosing and discussing his theft conviction during the RBC hiring process is to be believed, the conviction must have occurred prior to 2006. However, Mr. Nijjer said something quite different about the timing of his conviction in cross-examination.

[51] Mr. Nijjer was pressed about the date of his theft conviction in cross-examination. He first offered that he had no idea when it occurred. He then suggested that it likely occurred about 20 years ago. When asked more pointedly if the conviction occurred in September 2008, Mr.

Nijjer became argumentative and questioned counsel about the relevance of the conviction. As the questioning continued, Mr. Nijjer finally agreed that his theft conviction occurred in 2008. This means that Mr. Nijjer was 28 years old at the time of the theft conviction. He was well into adulthood.

[52] The inconsistency in Mr. Nijjer's evidence is obvious. Convicted in 2008, Mr. Nijjer could not have disclosed and discussed the conviction during the RBC hiring process in 2006. The conviction occurred well after his employment at RBC ended. Mr. Nijjer's earlier evidence was an effort to convey that these crimes were youthful indiscretions so minor that they did not concern a large financial institution. This was misleading and untrue.

[53] Another area of concern arises with respect to Mr. Nijjer's evidence pertaining to his involvement with Ezzzy Moving. As I will explain later in my factual findings, Mr. Nijjer's evidence about his involvement with this business was vague, internally inconsistent and inconsistent with some of the documents tendered at trial.

[54] Another area of concern arises with respect to Mr. Nijjer's evidence pertaining to his involvement with the OGJ. Mr. Nijjer had the first of two cervical neck surgeries in July 2019. Mr. Nijjer testified that he has been unable to work, in any capacity, since that time. In examination-in-chief, Mr. Nijjer testified that the OGJ was Jason's business. It began operating in December 2019 and then closed in March 2020, following which Jason continued to operate the business online for a while. He denied significant involvement in this business, other than helping his brother to get it running.

[55] In examination-in-chief, Mr. Nijjer testified that he has been unable to return to any form of gainful employment since the summer of 2019 as a result of his accident-related injuries. He testified about the help he gave his brother with the OGJ later in 2019 and into 2020. He said he did anything he was "capable of doing", including some computer work, setting up a point of sale, and going through inventory, along with some administrative and "technology stuff". He characterized his involvement as going in for "an hour or two" a day while the business was getting off the ground, and thereafter only helping as needed. He denied any ownership interest.

[56] However, in cross-examination, it became clear that Mr. Nijjer's participation in and contribution to this business was more involved than his earlier testimony suggested. When shown the December 2019 draft partnership agreement I discussed earlier, Mr. Nijjer conceded that he was an intended party to the agreement, as was the numbered company of which he was a director. When shown the proposal for his and his brother's numbered company to own 66.6% of the business, he said he did not know about the ownership proposal. He agreed, however, that the document accurately depicted the items he contributed to the business, including inventory in the amount of approximately $20,000.

[57] When shown that 223 hours of work were attributed to him from October 2 to December 21, 2019, Mr. Nijjer suggested these hours might be a combination of his and his brother's hours. Jason testified that he believed the hours attributed to his brother were accurate. When shown that 122 hours were attributed to him from the date the business opened on December 21, 2019 to January 2, 2020, Mr. Nijjer testified that he did not know how many hours he worked.

[58] From all of this evidence, it became clear in cross-examination that Mr. Nijjer had understated his involvement with this business. While he was never an owner, as the draft partnership agreement was never signed, his involvement was clearly more than simply helping Jason with the start-up in the limited way he initially described. His attempt to characterize his investment as simply "helping" his brother does not harmonize with the evidence that shows he had been actively pursuing a significant ownership interest in the business for months, the number of hours he put in, and his financial investment.

[59] For all of these reasons, while I accept most of Mr. Nijjer's evidence, I find I must exercise caution in certain areas. I will identify those areas specifically during the course of these reasons.

## Facts

[60] I will organize my general factual findings in chronological order and will make further specific factual findings as I consider the various issues.

## Prior to the Accidents

[61] Mr. Nijjer was born in 1980. He was 35 years old at the time of the First Accident and 40 years old at the time of the Second Accident. At the time of trial, he was 42 years old. He is married with two young children.

[62] Mr. Nijjer was raised in Kamloops. He grew up in a loving home with his parents, two older siblings and, often, many extended family members. His father worked for CN Rail and his mother primarily stayed home and cared for the family. From a young age, Mr. Nijjer was expected, as were his siblings and cousins, to do unpaid work in various family businesses. He began doing this in elementary school when he helped with his uncle's janitorial business.

[63] Mr. Nijjer was an active young man. In high school, he participated on student council and played volleyball and basketball. He excelled academically and athletically. He also continued to help with his family's businesses, spending most of his free time helping at the two Robin's Donuts restaurants that his father and uncle owned. Mr. Nijjer was not paid directly for the work he did. As he understood it, his parents received his pay and saved it to fund his post-secondary education.

[64] Mr. Nijjer obtained his first job outside his family's businesses in either his last year of high school or first year of university. He worked at a CD store in the local shopping mall.

[65] After graduation from high school in 1998, Mr. Nijjer enrolled in the Bachelor of Arts program at the University College of the Cariboo in Kamloops, which is now Thompson Rivers University. His initial goal was to obtain a Bachelor of Arts degree; however, he found himself "jumping around" between different programs, including business and kinesiology. All told, Mr. Nijjer attended the University College of the Cariboo full-time for about two and a half years before leaving. He chose to move on without obtaining a degree because he was still exploring his career goals and felt that he was not applying himself in university the way he should have been.

[66] In about 2002, Mr. Nijjer decided to pursue a career as a pharmacy technician. He enrolled in a ten-month program at Sprott Shaw Community College. He did very well and obtained his diploma, with honours, at the end of March 2003.

[67] Shortly after obtaining his diploma, Mr. Nijjer obtained employment as a pharmacy technician at a pharmacy in Port Coquitlam. He worked there for only a few months before returning home to Kamloops. He soon began to work as a pharmacy technician at the IDA Pharmacy in the nearby community of Logan Lake.

[68] Mr. Nijjer worked at the IDA Pharmacy in Logan Lake for only about one year. He was unhappy with the remuneration, found the commute a challenge, and did not see the IDA Pharmacy as his ultimate career goal. His goal was to work as a pharmacy technician in a unionized hospital setting, where the pay was better and he would work less with the public. Mr. Nijjer testified that there was no job opportunity at the Royal Inland Hospital in Kamloops at the time he resigned from the IDA Pharmacy. Rather than wait for a position to become available or apply at other hospitals nearby, Mr. Nijjer chose to discontinue his chosen career path.

[69] In about the same timeframe, 2005, Mr. Nijjer met his future wife, Navdeep Nijjer. The two started dating and eventually married in 2010.

[70] After meeting his future wife, Mr. Nijjer continued to move from job to job. In 2005, he worked at Akal Forest Lumber Mill as a labourer. He described his job as working on a production line operating the green chain, grading lumber and assisting with preparing stacks and bundling product. Mr. Nijjer worked for this company until 2006, when his uncle's friend recruited him to work in another industry, as a financial consultant at Investors Group.

[71] Mr. Nijjer decided to give this new career a try. He went through the training that Investors Group offered and began working as a financial consultant. He sold mutual funds and life insurance at one point. Mr. Nijjer did not remain in this position for long. Within the first year, Mr. Nijjer found the commission-based remuneration less than ideal, so he jumped at the opportunity for a steady pay cheque when an opportunity came his way with RBC in Vancouver.

[72] Although Mr. Nijjer's evidence, as I explained earlier on this point, was somewhat unclear, I am satisfied from the whole of the evidence that it was in 2006 that Mr. Nijjer left Investors Group and accepted an accounts manager position with RBC in Vancouver. As with his previous jobs, this employment did not last long either. Mr. Nijjer realized the work was not for him so he left the position after about a year and returned home to Kamloops.

[73] In 2007, at the age of 27, Mr. Nijjer started working full-time at Sprott Shaw Community College in Kamloops as an Admissions Advisor. He did not remain at this job for very long either. He left in 2009 because he felt he had gone as far as he could with the organization and he wanted to look for other opportunities.

[74] Mr. Nijjer did not testify about any particular employment between 2009 and 2011, but I note that his resume indicates that he worked at one of his family's businesses, SunStar Shuttles, as a host, administrator and driver from 2008 to 2011. This is likely the shuttle business that Mr. Nijjer referred to later in his evidence as the business owned by his father and uncle in which he volunteered as a driver. Assuming this to be the case, the source of Mr. Nijjer's income between 2009 and 2011, how he supported himself, is not apparent on the evidence.

[75] In about 2010, Mr. Nijjer obtained professional treatment and therapy for substance misuse. He testified that he went into treatment because he was consuming marihuana recreationally, drinking alcohol occasionally and using cocaine when he drank too much.

[76] Mr. Nijjer also married in 2010. The couple lived together in Mr. Nijjer's parents' home. Mr. Nijjer testified that it was around this time that he was searching for new employment in a new field. He wanted to try sales.

[77] It was also in 2011 that Mr. Nijjer finally found a family doctor, Dr. McLeod. Dr. McLeod's practice was in the nearby community of Merritt.

[78] Mr. Nijjer found a job in sales in 2011. He was hired by Glacier Media, working in a sales position with a regional publication called Visitors' Choice. After working in this position for about six months, Mr. Nijjer accepted another position at a different Glacier Media publication, the Kamloops Daily News. His job title was the manager of special publications and online media consultant, but Mr. Nijjer described this position as essentially a sales position. He testified that he enjoyed the work and felt it paid well.

[79] It was also in 2011 that Ezzzy Moving was established in Kamloops. Jason continues to own and operate this business today. Mr. Nijjer's interest in this business, how long he worked there and whether he received any income from this business has been challenging to determine because the evidence is inconsistent.

[80] I have already discussed Jason's evidence about his brother's involvement in this business, which I have rejected. Mr. Nijjer testified to something very different than his brother on this topic, but Mr. Nijjer's evidence in this area is not without its difficulties as well.

[81] Mr. Nijjer testified that he and Jason started this business in 2011, and that they owned it "together as brothers". He was unsure about the length of time they owned and operated this business together, but recalled that they had to end their joint operation "very abruptly because of family dynamics". He was unable to say when his ownership interest in the business ended. A 2013 Kamloops Daily News article featuring the business helped him recall that he, his wife and Jason all still owned and operated it in 2013.

[82] There is no evidence about when, after 2013, Mr. Nijjer's ownership interest in Ezzzy Moving ended. Mr. Nijjer testified that after he and his brother ended their joint enterprise, he continued to help Jason in this business from time to time, but only prior to the First Accident. He did not help him after the First Accident.

[83] I accept that Mr. Nijjer helped his brother on occasion after their joint ownership in the business ended, but I do not accept Mr. Nijjer's testimony that he stopped doing so after the First Accident. His evidence in this regard is inconsistent with what he held out to the world and to prospective employers.

[84] Mr. Nijjer prepared a resume in which he wrote that he worked for Ezzzy Moving as a driver/labourer from "2011 - Present". Mr. Nijjer used this resume, current to 2019, to apply for a job in August 2019. As well, in Mr. Nijjer's LinkedIn profile, he states that he is an "owner/operator" of Ezzzy Moving from "June 2011 - Present - 11 yrs 1 mo".

[85] Mr. Nijjer also testified that he did not earn any income from Ezzzy Moving during his time as an owner. This evidence is inconsistent with one of his tax return information summaries.

[86] Mr. Nijjer tendered several tax return information summaries in this trial, but no full tax returns. His 2012 summary shows that he reported T4 earnings (salary and commission) from the Kamloops Daily News that year in the total amount of $44,293. His 2012 summary also shows that he reported gross business income in the amount of $38,296 (net $4,087). Mr. Nijjer denied this business income was derived from Ezzzy Moving, but he also denied operating any other businesses at that time. He claimed to have "no idea" about the source of this income, speculating perhaps that it was from his employment with the Kamloops Daily News, an assertion I reject given his employee status. The only reasonable and logical explanation for Mr. Nijjer reporting business income in 2012 was that he was reporting income from the only business that he owned at the time: Ezzzy Moving.

[87] In the result, I find I cannot rely on all of Mr. Nijjer's evidence in this area. Some of his evidence is vague, internally inconsistent and inconsistent with the documents I have discussed. I can, however, make a few findings based upon those aspects of Mr. Nijjer's evidence that I accept, evidence that finds support elsewhere.

[88] I find that Mr. Nijjer owned and operated Ezzzy Moving together with Jason from 2011 until at least 2013. As Mr. Nijjer only operated this one business in 2012, the business income he reported on his 2012 tax return was derived from Ezzzy Moving. Once he and Jason stopped operating Ezzzy Moving together, sometime after 2013, Mr. Nijjer continued to help Jason from time to time thereafter. I can make no specific findings about when the brothers stopped operating the business together, but it is clear that Mr. Nijjer continued to help Jason with the business from time to time, including after the First Accident.

[89] In 2012, Mr. Nijjer earned $36,830 in salary and $7,463 in commission income from his employment with the Kamloops Daily News.

[90] In October 2013, Mr. and Ms. Nijjer had their first child.

[91] In 2013, Mr. Nijjer earned $62,722 in salary and $23,796 in commission income from his employment with the Kamloops Daily News.

[92] In 2014, the Kamloops Daily News closed its doors and Mr. Nijjer lost his job. He was 34 years old.

[93] After being off work for a few months, Mr. Nijjer learned through a friend that CP Rail was hiring. Employment with CP Rail was not Mr. Nijjer's career ambition, but he applied because he felt he needed secure employment in order to support his young family. He was hired by CP Rail in April 2014 as a labourer.

[94] In 2014, between his employment at the Kamloops Daily News and his employment at CP Rail, Mr. Nijjer earned $49,093, as well as a small amount in commission income. He also received severance from the Kamloops Daily News that year in the amount of $17,167.

[95] Mr. Nijjer's new role as a labourer at CP Rail was a physically demanding one. It involved laying spikes, shovelling ballast, lifting plates and working with railroad ties, among other things. Mr. Nijjer explained that the position of labourer was the lowest position on a tie gang. From labourer, the positions were group 4 machine operator, group 3 machine operator, group 2 machine operator, group 1 machine operator, special group 1 machine operator, assistant foreman and then foreman. Other than the supervisory positions, these are all union positions.

[96] Mr. Nijjer's schedule saw him work year-round and cover a large area from Vancouver to Banff. He usually worked 11-hour shifts for seven consecutive days, followed by seven days off. Although overtime hours were offered less frequently to labourers, Mr. Nijjer worked some overtime.

[97] After about a year and a half working as a labourer, Mr. Nijjer successfully bid on a higher position. He then later successfully bid to a group 2 machine operator, which involved operating the rail tie lifter. Mr. Nijjer described this position as a physically difficult one. It was rough on the body. He then successfully bid on a group 1 machine operator position, which involved operating the snow fighter, a machine that helps keep the tracks clear of snow in the winter.

[98] As a machine operator, Mr. Nijjer was more sedentary, but he was still required to perform physical labour, as he and the other CP Rail witnesses described.

[99] All of this physical work was new to Mr. Nijjer. He developed aches and pains relating to those physical work demands, including some mid and lower back pain. He reported this back pain to Dr. McLeod first in 2015, and then again in July 2016. Dr. McLeod prescribed him THC. Mr. Nijjer did not miss any work as a result of this pain and it did not impact his personal life.

[100] At the time of the First Accident, Mr. Nijjer had worked at CP Rail for about two and a half years. In 2015, he earned about $67,000 from his employment at CP Rail. In 2016, up to the time of the First Accident on November 3, 2016, he earned about $75,000 from his employment at CP Rail.

## The First Accident

[101] The First Accident occurred on November 3, 2016. By this point, Mr. Nijjer and his wife and child had moved out of his parents' home and into their own home in Kamloops.

[102] On November 3, 2016, Mr. Nijjer was working in the Lower Mainland. On his way back to his aunt's home in Langley after work that day, Mr. Nijjer stopped for a coffee at McDonald's in a shopping complex in Pitt Meadows. He was alone in his vehicle and wearing his seatbelt. As Mr. Nijjer drove in the main lane in the parking lot on his way to exit, the defendant, Mekayla Bierman, drove her vehicle from a feeder lane into the right side of Mr. Nijjer's vehicle.

[103] The impact of the collision caused Mr. Nijjer's vehicle to move to the left. It came to rest with approximately three-quarters of his vehicle in the oncoming lane of travel. Mr. Nijjer did not see the defendant's vehicle prior to the collision. He was not expecting a collision. Mr. Nijjer felt his body thrown from side to side after impact, causing his head to strike the side door jam. The airbags of his vehicle did not deploy. No one called emergency response.

[104] Mr. Nijjer was driving very slowly at the time of the collision. He estimates that his vehicle was travelling between 5 and 10 kilometres per hour, although he could not say this with certainty. He initially estimated that the defendant's vehicle was travelling at least 30 kilometres per hour immediately prior to the collision; however, he conceded in cross-examination that this was only a guess based upon the impact. I am unable to draw any conclusions about the speed of the defendant's vehicle based upon the evidence adduced in

this trial.

[105] Following the collision, Mr. Nijjer moved his vehicle off to the side and parked it. He got out of his vehicle, exchanged information with the defendant, and then drove his vehicle to his aunt's home. From the photographs in evidence, it is clear that Mr. Nijjer's vehicle was damaged and required repair. The defendant's vehicle required repair as well.

### After the First Accident and Prior to the Second Accident

[106] After the First Accident, Mr. Nijjer continued to his destination. The next day, he went to a local walk-in clinic and saw a doctor there. Mr. Nijjer was supposed to go to work that day, but did not do so because he was in too much pain. Mr. Nijjer did not return to work until March 21, 2017, nearly five months after the First Accident.

[107] In the two to four months following the First Accident, Mr. Nijjer experienced headaches that sometimes became migraines. He experienced neck pain on both sides, right shoulder pain, and left shoulder pain. He started to have shooting pain down his left arm, with overall tightness and muscle pain.

[108] Mr. Nijjer had not experienced migraines before the First Accident. When they occurred following the First Accident, they periodically involved nausea and vomiting. They were always incapacitating when they occurred.

[109] Regarding his neck pain, Mr. Nijjer explained that in the first two to four months after the First Accident, he experienced tightness and soreness. He could not turn his neck in either direction.

[110] Regarding his shoulder pain, Mr. Nijjer explained that both of his shoulders were very sore, but that it was mostly his right shoulder and neck in the beginning. He testified that his left shoulder was "not okay either", but he found that his right shoulder pain was more debilitating. He also felt pain going down his left arm, like an electric current. This pain was intermittent at first, but got worse over time.

[111] The defendants urge me to reject Mr. Nijjer's evidence about the existence of left-sided pain and neurological symptoms following the First Accident, largely on the basis of what they say is a lack of any such complaints in Mr. Nijjer's clinical records. I do not agree.

[112] First, while I would not consider it conclusive of the issue in any event, there are several notations in the clinical records that Mr. Nijjer reported left-sided and neurological-type complaints following the First Accident. There are notations in November 2016 (Dr. Edmunds), January 2017 (physiotherapist Paul Carr), March 2017 (Dr. McLeod) and April 2017 (Dr. McLeod). As well, Dr. Navratill reported on August 18, 2017 that he was seeing Mr. Nijjer at that time for, among other things, chronic pain in both arms. Dr. Chevalier noted Mr. Nijjer reported on October 3, 2017 that he had been having episodic pain in his left shoulder, radiating occasionally to his elbow, over the months following the First Accident. Dr. Mosewich noted on October 2, 2017 that Mr. Nijjer reported that the pain in his neck and

right shoulder had evolved and seemed to extend more to the left shoulder and that for the "last six months or so" the left neck pain extended down toward but not past his left elbow.

[113] All of this is consistent with Mr. Nijjer's evidence about the timing of these complaints and with his evidence that he told his doctors about them.

[114] Mr. Nijjer clearly reported the left-sided symptoms in the months following the First Accident. However, even if such records did not exist, the absence of such records would not be a basis upon which to draw any inference about the existence or non-existence of a particular symptom: Edmondson v. Payer, 2011 BCSC 118, aff'd 2012 BCCA 114 at para. 36. As Drs. McLeod, Edmunds and Chevalier testified, clinical records do not reflect everything Mr. Nijjer said at a particular appointment about his symptoms or their impact upon him.

[115] During the first few months following the First Accident, Mr. Nijjer saw Dr. McLeod and his locum, Dr. Edmunds, regarding the symptoms arising from his injuries. Dr. Edmunds assessed him with whiplash and referred him to massage therapy and physiotherapy, which he began to attend right away.

[116] Mr. Nijjer was cleared to return to work in March 2017, and did so. He worked full-time, but did not return to full duties. Mr. Nijjer resumed the group 1 machine operator position that he held before the First Accident, but was placed on light duties as a result of his injuries, doing any tasks he could that did not involve lifting anything over 20 to 25 lbs. Mr. Nijjer successfully bid on a foreman position that was available because it was less physically demanding on his body and was more lucrative. His pain from his injuries continued, but he was able to work through it.

[117] Mr. Nijjer was referred to a rheumatologist, Dr. Navratill on March 20, 2017. Dr. Navratill ordered a cervical MRI. On August 18, 2017, Dr. Navratill explained to Mr. Nijjer that the MRI showed a posterior disc herniation at C5-6 impinging on and slightly deforming the cervical cord. He also observed a posterior disc herniation at the C6-7 level which was smaller and perhaps impinging on the exiting nerve root. His belief that this could be causing a C7 radiculopathy prompted a referral to a neurologist and a neurosurgeon.

[118] Mr. Nijjer's second child was born in September 2017.

[119] Mr. Nijjer saw neurologist Dr. Mosewich on October 2, 2017 and neurosurgeon Dr. Chevalier on October 3, 2017.

[120] Dr. Mosewich noted that Mr. Nijjer reported that from the time of the First Accident his neck and right shoulder pain had evolved and seemed to extend more to the left shoulder. He also noted that Mr. Nijjer had reported having left neck pain, intermittently extending down towards the left lateral forearm above the elbow over the last "six months or so", which caused him short-lived, but intense pain. Dr. Mosewich's physical examination findings were normal. His nerve conduction studies did not show an "active left radiculopathy."

[121] Although he could not make a definitive diagnosis, Dr. Mosewich noted that Mr. Nijjer's left arm symptoms "may represent a mild C6 or C7 radiculopathy". He recommended conservative treatment and deferred to Dr. Chevalier, the neurosurgeon that Mr. Nijjer was to see the following day.

[122] Dr. Chevalier was tendered by the defendants as a fact witness. He reported that Mr. Nijjer told him on October 13, 2017 that in the months following the First Accident he had been having, among other things, some episodic pain in his left shoulder "that occasionally radiates to the lateral aspect of his elbow. It is not radiating to his hand." His impression at the time was that the MRI showed disc bulging at both the C5-6 and C6-7 levels but that he did not think that Mr. Nijjer presented any cervical myelopathy (spinal cord damage), which was the concern at the time. His impression was also that Mr. Nijjer's left arm pain "may be from a C6-C7 disc herniation on the left", but observed that he did not have the typical radiation that goes all the way down to the hand and fingers. Dr. Chevalier felt it was a situation that should be observed and offered Mr. Nijjer a follow-up appointment in a year's time to see how "the situation evolves".

[123] Mr. Nijjer continued to work and to take recommended treatments. He was off work from May 21, 2018 to July 30, 2018 for reasons unrelated to injuries he suffered in the First Accident. It was a difficult time for Mr. Nijjer's family as his mother-in-law was ill and eventually passed away.

[124] Mr. Nijjer was experiencing symptoms of depression and anxiety at this time and communicated this to his employer. He said that he felt his stress and anxiety levels were building up to "dangerous levels". Mr. Nijjer started seeing clinical counsellor David Darwin in July 2018. He continues to see him. It was at this time that he started taking Clonazepam.

[125] Mr. Nijjer's T4 income in 2017 was $116,686. About $7,000 of this was derived from weekly indemnity benefits. He attributes this higher income to his attaining the higher paid foreman position as well as working a lot of overtime hours.

[126] Mr. Nijjer saw a physiatrist, Dr. Giantomaso, for an independent medical examination on August 9, 2018.

[127] Mr. Nijjer attended a follow-up appointment with Dr. Chevalier on October 24, 2018. He reported that things had not been perfect since they last met, but had been good enough that he was able to function. Mr. Nijjer also reported that he had been experiencing about three weeks of newly onset of pain from the "posterior aspect of his shoulder and the left aspect of his neck into the arm going first to the elbow level and now going to the mid-forearm". Dr. Chevalier ordered another MRI of the cervical spine.

[128] On November 5, 2018, Dr. Chevalier reviewed the MRI with Mr. Nijjer. Dr. Chevalier's impression was that the MRI showed recurrent left C7 radiculopathy. Dr. Chevalier initially recommended that Mr. Nijjer give it time because it might resolve on its own, but when that failed, he scheduled Mr. Nijjer for surgery in January 2019.

[129] Mr. Nijjer's T4 income in 2018 was $84,502 at CP Rail. He also received employment insurance benefits for the months that he was on leave as a result of his mother-in-law's illness and passing.

[130] Mr. Nijjer's January 2019 cervical neck surgery was cancelled, through no fault of his own, and rebooked for April 2019. Mr. Nijjer was nervous and afraid as he had never had surgery before. He was prepared and ready to go into surgery that day, but unfortunately it was cancelled approximately 20 minutes before it was to commence. He found this very disappointing.

[131] Mr. Nijjer finally had surgery to treat the C7 radiculopathy on July 29, 2019. Dr. Chevalier performed a "posterior left-sided minimally invasive foraminotomy and removal of disc matter". Unfortunately, this surgery proved unsuccessful in resolving Mr. Nijjer's symptoms related to the radiculopathy. In addition, he came out of this surgery with prominent numbness in his left thumb, index and middle fingers, a condition which persists today.

[132] When Mr. Nijjer went off work shortly before this surgery, co-worker Darren Pittendreigh was promoted to fill in for him.

[133] In August 2019, while Mr. Nijjer was off work as a result of the surgery, he applied for a non-unionized position with CP Rail as an employee security fund administrator, an office job. He did not get the position. He also testified that he had unsuccessfully applied for a supervisor position with CP Rail prior to his first surgery.

[134] Because Mr. Nijjer's neck and left-sided symptoms had not been resolved by the posterior approach surgery, Dr. Chevalier repeated the MRI. He then recommended that Mr. Nijjer undergo a second cervical neck surgery utilizing a different procedure.

[135] While Mr. Nijjer was recovering between the first and second surgeries, he required his wife's assistance doing many things. His pain persisted and nothing improved. This is consistent with his wife's observations. Mrs. Nijjer described having to help her husband get out of bed and help him shower. Mr. Nijjer also suffered negative side effects from his prescribed pain medication. He felt sluggish, experienced memory loss, and felt depressed. His wife witnessed these impacts to his mental health.

[136] Mr. Nijjer had his second surgery on October 30, 2019. He described feeling very frightened going into this surgery as it was more invasive and involved more risks that the first. This surgery was successful in resolving the shooting pain down Mr. Nijjer's left arm, but the weakness he experienced on the left side remained, as did the numbness in his fingers. His headaches and migraines also remained.

[137] Mr. Nijjer remained off work. Mr. Nijjer's evidence pertaining to the extent to which he was disabled during his recovery from the second surgery is one of those areas that I treat with caution. In examination-in-chief, Mr. Nijjer painted a very bleak picture of his life during this time, particularly in the four-to-six-month recovery period following his second surgery. He testified that his pain prevented him from doing anything. He said his wife had

to provide for his care and all he could do was sit or lie down all day and watch television. His mental health declined.

[138] Mr. Nijjer also described the pain he experienced in his buttocks about a month after the second surgery. He developed a pilonidal cyst. Mr. Nijjer testified that the pain he experienced from this cyst made it difficult for him to walk, sit, or even get up. He described attending at the emergency department just before Christmas 2019 to have the cyst drained.

[139] Mr. Nijjer also testified that he was thinking of going back to work in 2020 but that he was unable to do so because of the chronic pain, headaches and mental illness from which he was suffering. He described his headaches, neck pain, shoulder pain, weakness on his left side, and his symptoms of anxiety and depression. The picture he painted in examination-in-chief was of someone completely incapacitated during the several months following the second surgery.

[140] While I accept that Mr. Nijjer's time in these months was difficult and that he experienced serious physical, mental and emotional pain, I do not accept the full extent of his assertion that he was unable to do anything other than sit or lie down for those months. I do not accept his claim that he required near total care from his wife. His claim to have been completely incapacitated in the months following the second surgery is not consistent with his involvement in two family businesses during that time.

[141] Mr. Nijjer helped Jason get Leaps of Laughter off the ground in late 2019 and into early 2020 before the pandemic struck. That he was able to provide his brother with this assistance during this timeframe is inconsistent with his claim of near total incapacitation.

[142] As well, and more significantly, it was in and around the time of his second surgery that Jason also approached Mr. Nijjer with the idea for the marihuana dispensary, the OGJ. From October 2019 until the OGJ opened in December 2019 and then through January 2020, Mr. Nijjer spent a number of hours working, unpaid, for the OGJ. Mr. Nijjer took responsibility for setting up key aspects of the business, such as the point of sale, marketing and social media. He also went through inventory and performed administrative tasks. He supplied inventory to the business. Despite Mr. Nijjer's attempts to downplay his involvement in the OGJ, cross-examination revealed that he and his brother were actively taking steps to share ownership in the business with another person at the time. Mr. Nijjer put in many hours of unpaid work between October 2019 and at least January 2020 for this business. He conceded in cross-examination that he not only performed these work hours from home, but at the physical location of the cannabis store as well.

[143] I accept that Mr. Nijjer was not putting in full-time hours and that the work was not overly physical. I also accept that Mr. Nijjer was able to pace himself and that the work he did for the OGJ was fatiguing. I also accept his evidence that his motivation for working at Leaps of Laughter and the OGJ was to keep busy and "preserve his sanity". Nevertheless, the fact remains that Mr. Nijjer possessed the ability to do this work and that he occasionally did so

outside the home. This is wholly inconsistent with his claim to have been unable to do anything but sit and lie down for months after the second surgery.

[144] Other than the two-month and ten-day leave of absence he took from work related to his mother-in-law's illness and death, Mr. Nijjer continued working at CP Rail between March 2017 and his first surgery. Mr. Nijjer claimed he was off work about 80 days during this timeframe due to his accident-related injuries, but I do not accept this assertion. Mr. Nijjer has no memory of the days he missed, nor has he adduced any employment records to support this claim. He adduced only a handwritten note purporting to detail the days missed due to pain in this timeframe. I find I cannot rely on this record as it includes the lengthy time Mr. Nijjer was off work due his mother-in-law's illness, and more importantly, is inconsistent with his supervisor's evidence that he did not miss a day of work. I do accept, however, that Mr. Nijjer was not pain-free while he worked during this timeframe.

[145] Mr. Nijjer's T4 earnings in 2019 were $94,712.69. About $12,200 was for weekly indemnity benefits. He attributes earning higher income in only seven months to his perseverance in working through the pain, a small increase in his hourly wage, and working a great deal of overtime. He did so because he knew his surgery was pending and he wanted to earn as much income as possible.

[146] Mr. Nijjer was involved in another motor vehicle accident on September 25, 2020 (the "Single-Vehicle Accident"). The Single-Vehicle Accident occurred in heavy rain on the Coquihalla Highway between Merritt and Kamloops. Mr. Nijjer had attended a visit at his doctor's office in Merritt and was traveling back home on the highway at approximately 100 to 110 km/hr when his vehicle hydroplaned and spun out, striking the cement barriers on both sides of the highway. He was wearing his seatbelt. It was a frightening experience.

[147] Mr. Nijjer testified that the Single-Vehicle Accident caused an aggravation to his neck and shoulder symptoms and soreness in his middle-upper back. He testified that he experienced no new pain as a result of this accident. He was upset at being in another accident and worried about how it may impact the results of his surgery. Mr. Nijjer was relieved when x-rays showed that the results of the surgery had not been affected.

[148] While off work in 2020, Mr. Nijjer bid on another job at CP Rail, a "time keeper position". Mr. Nijjer described this as an office position and one that was difficult to obtain. When he applied, he did not have high expectations that he would be successful in his bid because of his lack of seniority. He was not successful.

## The Second Accident

[149] The Second Accident occurred on December 17, 2020. Mr. Nijjer was driving his vehicle and his seven-year-old daughter was in the back seat. Mr. Nijjer was wearing his seatbelt. He stopped the vehicle at the bottom of Batchelor Hills Drive in Kamloops in order to make a left-hand turn onto Norview Road. While waiting for oncoming traffic to clear in order to make the turn, Mr. Nijjer looked in his rear-view mirror and saw a vehicle approaching.

The driver of this vehicle, the defendant, Cade Dorian Hawkins-Bara, had his head down looking at his phone and his vehicle was not slowing down as it approached. Unable to move his vehicle out of the way and anticipating the collision, Mr. Nijjer reached back to his daughter in an effort to brace her. His vehicle was then struck from behind by the vehicle driven by the defendant.

[150] As the photographs depict, both vehicles suffered damage. At impact, Mr. Nijjer felt "extreme whiplash of the whole body". He also felt pain in his left hip and lower back, new pain that he attributes to the fact that his body was turned toward his daughter, who was in the back seat at the time of impact.

### After the Second Accident

[151] Mr. Nijjer testified that in the two to four months following the Second Accident he experienced an aggravation of all of his previous symptoms, as well as the new lower back and left hip pain. He found that his headaches were worse and more frequent. His neck was re-aggravated and more sensitive to physiotherapy. He found that his right shoulder was sore and that his left shoulder was much more sore. His lower back and hip pain are related and they cause him to walk with a semi-limp. Mr. Nijjer felt fed up, angry, emotional and defeated. He was also very concerned about his daughter who, at the age of seven, was now experiencing headaches. His mental health declined and he developed thoughts of self-harm.

[152] In April 2021, Mr. Nijjer underwent surgery for the pilonidal cyst that had developed in late 2019. He continues to have some discomfort and tightness in that area when sitting down or getting up.

[153] Throughout the summer and fall of 2021, Mr. Nijjer saw a number of specialists for independent medical examinations or assessments. He saw neurosurgeon Dr. Heran on July 19; neurosurgeon Dr. Govender on July 23; physiatrist Dr. Giantomaso on August 26; psychologist Dr. Reimer on September 16; occupational therapist Sheila Branscombe on October 18 and 19; vocational rehabilitation consultant Niall Trainor on October 21; psychiatrist Dr. Okorie on October 27; and physiatrist Dr. McCann on November 17, 2021. Mr. Nijjer continued to see his counsellor, Mr. Darwin. He began seeing a psychiatrist, Dr. Oladele Odubote, in July 2022. Mr. Nijjer continues to see Dr. Odubote, who is providing supportive psychotherapy and has prescribed medication.

[154] Mr. Nijjer has not worked at CP Rail, or in any other paid employment position, since his first cervical neck surgery in July 2019. He has not bid on other jobs within CP Rail since the 2020 bid on the time keeper position. He has been in receipt of long-term disability benefits. He has not attempted any retraining or applied for any other jobs. By way of letter dated November 21, 2022, his employment with CP Rail was terminated.

## Expert Evidence

[155] Both parties adduced expert evidence in this trial. Other than the two economists, whose evidence I will discuss at a later time, I will now summarize and discuss features of the expert evidence here. I will refer to other aspects of this evidence as it arises in my consideration of the issues.

Experts Called by the Plaintiff

## A. Dr. Tony Giantomaso - Physiatrist

[156] Dr. Tony Giantomaso is a physiatrist qualified to give expert opinion evidence in the area of physiatry, rehabilitation and assessing patients' pain and function. He has been practising since 2008 with a focus on the treatment and management of spine, neck and back pain, as well as brain injuries.

[157] Dr. Giantomaso conducted an independent medical examination of Mr. Nijjer on August 9, 2018 and prepared a written report outlining his opinions on August 16, 2018. Dr. Giantomaso assessed Mr. Nijjer again on August 26, 2021 and prepared a second written report outlining his opinions on August 31, 2021. He also testified. He is the only medical expert in this case who assessed Mr. Nijjer before and after his neck surgeries.

[158] In his first assessment, Dr. Giantomaso recorded that Mr. Nijjer appeared anxious during the examination but otherwise physically and mentally normal. He recorded that Mr. Nijjer felt pain when Dr. Giantomaso applied pressure to areas of his upper back, including his left upper trapezius, levator scapulae and rhomboids. He found that Mr. Nijjer had generalized pain from the mid-cervical paraspinals down to the T4-5 level. He observed that pain limited Mr. Nijjer's range of motion in extension and bilateral extension-rotation and that he felt significant pain with extension and extension-rotation of the cervical and thoracic spine.

[159] Dr. Giantomaso also reviewed Mr. Nijjer's medical records since the First Accident and noted that Mr. Nijjer was experiencing migraine headaches consistent with the criteria for post-traumatic migraine headaches.

[160] Based upon his examination and review of Mr. Nijjer's medical records, Dr. Giantomaso diagnosed the following post-traumatic injuries in his first report:

a) chronic cervical sprain-strain injury consistent with a WAD-II injury;

b) chronic thoracic sprain-strain injury Grade 1-2;

c) chronic right shoulder impingement syndrome; and

d) migraine headaches.

[161] In Dr. Giantomaso's opinion, at the time of the first assessment it was reasonable to conclude that all of the above-noted injuries were directly causally related to the First Accident and not otherwise pre-existing. While outside the scope of his expertise, Dr. Giantomaso also reported that Mr. Nijjer's post-traumatic mood and increased anxiety were possibly related to the First Accident.

[162] Dr. Giantomaso also opined at the time of the first assessment that his physical examination findings did not seem to indicate an ongoing radiculopathy, although he noted that Mr. Nijjer's cervical MRI showed some areas of disc bulging and possible nerve root irritation.

[163] As of the time of the first report, Dr. Giantomaso opined that Mr. Nijjer's pain was likely to continue to some degree long-term into the future and that he would require long-term pain management. He strongly recommended an active rehabilitation program including at least 16 further sessions with a kinesiologist. Dr. Giantomaso further recommended a variety of medications, referrals and other treatments to help Mr. Nijjer manage what was likely to be long-term pain. Mr. Nijjer was unable to immediately pursue some of these recommendations because he learned shortly after Dr. Giantomaso's first report that he would require neck surgery.

[164] Dr. Giantomaso's second examination and assessment of Mr. Nijjer occurred following the two neck surgeries, after the Single-Vehicle Accident and after the Second Accident. In his second report, Dr. Giantomaso opined that the following injuries were causally related to the First Accident:

1. post-traumatic cervical sprain/strain injury consistent with a WAD-II injury, initially with progression to left C7 radiculopathy requiring operative management post-trauma and eventual cervical neurosurgical procedures including C5-6 and C6-7 discectomy and arthroplasty;
2. ongoing post-surgical neuropathic pain syndrome;
3. chronic thoracic sprain/strain injury Grade 1-2; and
4. mild but ongoing post-traumatic cervicogenic headaches, which pre-date the Second Accident.

[165] Dr. Giantomaso further opined that the Single-Vehicle Accident had exacerbated and aggravated Mr. Nijjer's cervicogenic headaches, cervical pain, neuropathic pain features, and thoracic sprain/strain injury, as well as caused new onset low back symptoms.

[166] Dr. Giantomaso opined that the Second Accident further exacerbated and aggravated all of these conditions, including the low back pain resulting from the Single-Vehicle Accident. In Dr. Giantomaso's opinion, Mr. Nijjer's post-traumatic injuries are directly causally related to the motor vehicle collisions and do not seem to be significantly pre-existing.

[167] Dr. Giantomaso made three further diagnoses of unknown causation. He described these diagnoses as signs of left-sided carpal tunnel syndrome; left shoulder impingement syndrome; and pilonidal cyst starting in late 2019, now mostly asymptomatic.

[168] At the time of the second assessment, Dr. Giantomaso opined that Mr. Nijjer's chances for full recovery were remote and extremely unlikely. He noted that Mr. Nijjer had undergone multiple courses of surgery, therapy and medication management over the years and had not returned to work due to his slow and poor recovery, and COVID issues.

[169] Dr. Giantomaso further opined that Mr. Nijjer was likely to respond to some symptomatic pain management in the future. However, he felt the likelihood of a full resolution of his neck pain and neuropathic left arm features was low, even with further surgery and interventions. In his view, Mr. Nijjer would experience permanent chronic pain and dysfunction in the cervical thoracic region, but found there was a chance that his low back pain would resolve. Active rehabilitation and ongoing support for therapy could assist with resolving the lower back pain. Dr. Giantomaso opined that Mr. Nijjer's other areas of chronic pain would be more suitable for more long-term pain management, with some chance for decreased pain and increased function if Mr. Nijjer followed his recommendations.

[170] Dr. Giantomaso further opined that Mr. Nijjer was very unlikely to be competitively employable at CP Rail as a result of his injuries, citing the need to travel, the lifting and the driving involved, and other things. He also opined that Mr. Nijjer's injuries prevent him from being competitive in the job market generally. He did not preclude, as a reasonable possibility, that Mr. Nijjer might be capable of employment in a light to sedentary field on a part-time basis.

[171] Regarding his opinion about Mr. Nijjer being generally less competitively employable as a result of his injuries, Dr. Giantomaso explained that having had two surgeries, suffering from chronic pain, taking pain killers and needing time off work for treatments and pain overall renders Mr. Nijjer less competitively employable than a healthy person of the same age and same qualifications who does not have these difficulties. He recommended a vocational assessment and retraining in the future.

### B. Dr. Navraj Heran - Neurosurgeon

[172] Dr. Navraj Heran is a neurosurgeon qualified to give expert opinion evidence in the area of neurosurgery, the medical and surgical management of the spinal, cranial, nerve and vascular structures of the nervous system and supporting structures. Dr. Heran has been practising as a neurosurgeon since 2004.

[173] Dr. Heran conducted an independent medical examination of Mr. Nijjer on July 4, 2021 and prepared a written report outlining his opinions on July 19, 2021. Dr. Heran prepared an addendum report dated December 27, 2021, in which he responded to medical-legal reports prepared by other experts. He also testified.

[174] Dr. Heran reviewed Mr. Nijjer's clinical history and medical records and examined him. He diagnosed the following injuries resulting from the First Accident:

1. myofascial injuries involving the neck, upper torso and lower back;
2. mechanical neck pain arising from structural spinal elements, C6-7 with left-sided C7 radiculopathy;
3. cervicogenic headaches with progression to migraines;
4. soft-tissue injury around right shoulder; and
5. features of depression, anxiety, and post-traumatic stress.

[175] Regarding the last of these diagnoses, Dr. Heran was careful to explain that although he is not a psychiatrist, he is nevertheless a physician who can still recognize and identify such symptoms.

[176] Dr. Heran further opined that the Single-Vehicle Accident exacerbated Mr. Nijjer's myofascial neck and upper torso injuries and psychological impairments from the First Accident, and probably exacerbated or aggravated his pre-existing mechanical low back pain. He further diagnosed soft-tissue injuries in the hip region.

[177] Dr. Heran opined that the Second Accident further exacerbated or aggravated the following: Mr. Nijjer's myofascial injuries to his neck, upper torso and back; his cervicogenic headaches; and his psychological impairments. Dr. Heran found that the collisions were the only cause in evidence for these injuries. Dr. Heran noted there are pre-accident factors that influenced Mr. Nijjer's presentation likely with the low back pain. He opined that, other than the further worsening of his left-hand symptoms arising from the first surgery, there are no post-Second Accident factors influencing Mr. Nijjer's presentation. Dr. Heran is of the view that since the radiating pain from Mr. Nijjer's neck down his left arm resolved following the second surgery that the residual symptoms he now experiences are of chronic neuropathic pain and unlikely to resolve.

[178] Dr. Heran found that Mr. Nijjer presented most problematic with impingement and pain in his neck centred towards the left side with extension toward the shoulder, as well as numbness and intermittent pain into his left hand. Mr. Nijjer also had low back pain and discomfort although he was not overwhelmed by it. Mr. Nijjer could function and perform his everyday activities. The headaches had resolved before the Single-Vehicle Accident, but the Second Accident reinitiated them. They were now improving again.

[179] Dr. Heran considered all previous courses of treatment to be reasonable, including the surgeries performed. He noted that the first surgery exacerbated Mr. Nijjer's neurological pain and that neither surgery resolved it, but that the surgeries had been effective in improving his neck pain. Dr. Heran found that it was reasonable for Mr. Nijjer to have stopped taking certain medications because he could not tolerate them, but suggested that he try another pain medication now that his pain was primarily neurological as opposed to arising from nerve irritation as it had earlier. Dr. Heran did not consider Botox injections or other injections to the spine or back to be necessary.

[180] Dr. Heran opined that it was reasonable for Mr. Nijjer to have not worked while recovering from his surgeries. He thought Mr. Nijjer should be able to work in some capacity, but felt he would not be as energetic as previously. Dr. Heran recommended formal functional capacity and occupational therapy evaluations. He opined that if Mr. Nijjer could not continue in his previous role that he would require vocational re-training. He expressed the opinion that Mr. Nijjer is employable in some capacity, likely sedentary to intermittent medium level capacity, with opportunities to shift his body position to avoid discomfort. He found that Mr. Nijjer is unlikely to ever return to playing basketball vigorously or performing heavier gym exercises but thought he may be able to return to lighter forms of those activities. Dr. Heran considered Mr. Nijjer to be at increased risk for exacerbation and aggravation of all of his continuing symptoms, in particular his neck. He is at risk for adjacent level breakdown as well.

[181] In his addendum report, Dr. Heran provided responsive opinions to the reports prepared by Drs. Shawn McCann and Prenesh Govender tendered by the defendants.

[182] The main point of disagreement between Dr. Heran and Drs. McCann and Govender is the significance of the months between the First Accident in November 2016 and the first clear signs of radiculopathy in October 2017. Drs. McCann and Govender considered this time span to be too large for the First Accident to be the cause of Mr. Nijjer's left-side pain and radiculopathy. Dr. Heran disagrees, responding that in his opinion it is common for neck pain arising from structural spinal sources to progress to radiculopathy months, or even years, after a traumatic event. Dr. Heran stated that the evidence was consistent with this gradual disc deterioration and further noted that from the clinical records he was given, there was evidence of left-side pain beginning in March 2017, rather than in August 2017 as Dr. McCann had stated in his report. Dr. Heran also opined that the absence of nerve conduction abnormalities is not diagnostic against a radiculopathy being present.

[183] Dr. Heran also did not agree with how Dr. Govender characterized the current status and functionality of Mr. Nijjer. Dr. Heran opined that Dr. Govender failed to acknowledge several aspects of Mr. Nijjer's condition: the impact of neuropathic pain; the lack of remediation of neck pain; and the potential for further breakdown adjacent to the site of surgery. Dr. Heran noted that Dr. Govender did not provide any recommendations for future treatment appropriate to Mr. Nijjer's situation.

### C. Dr. Wilbert Reimer - Psychologist

[184] Dr. Wilbert Reimer is a psychologist qualified to give expert opinion evidence in the area of psychology. He has been a registered psychologist in the province of British Columbia since 1997, with a particular expertise in neuropsychological and vocational assessments.

[185] Dr. Reimer conducted an independent medical examination of Mr. Nijjer on September 16, 2021. He prepared a report outlining his opinions, based on that assessment and his review of Mr. Nijjer's medical records, dated September 20, 2021. He prepared an addendum report dated October 26, 2022. He also testified.

[186] Dr. Reimer considered Mr. Nijjer to have symptoms related to anxiety and depression. He opined that Mr. Nijjer was probably pre-disposed to a level of anxiety, but that it did not cause him significant distress until after the First Accident. He observed that Mr. Nijjer appeared to have functioned adequately and managed his job at CP Rail prior to the First Accident. He considered Mr. Nijjer to have become increasingly depressed after the First Accident. He found that Mr. Nijjer presented with a high level of depressive symptoms and moderate level of anxiety symptoms.

[187] Dr. Reimer opined that Mr. Nijjer met the criteria for a "Major Depressive Disorder, single episode, severe" at the time of the assessment. He further offered the opinion that Mr. Nijjer met the criteria for a "Generalized Anxiety Disorder, Moderate" and a "Somatic Symptom Disorder with predominate pain". This last diagnosis, Dr. Reimer explained, involves pre-occupation with pain and catastrophizing. Dr. Reimer considered it more likely than not that Mr. Nijjer would not have experienced these mental health concerns had the First and Second Accidents not occurred.

[188] Dr. Reimer's prognosis for these conditions was closely tied to the potential for physical improvement in Mr. Nijjer's functioning. He observed that Mr. Nijjer considered himself to be disabled, a negative indicator for future prognosis. Dr. Reimer believes that any future improvement might come from Mr. Nijjer learning to manage his pain and developing a new life that has meaning for him. He considered it more likely than not that Mr. Nijjer would not return to his pre-First Accident functioning with respect to his mental health. Having experienced depression once, Mr. Nijjer was more likely to experience it again.

[189] Unless Mr. Nijjer finds a way to manage his chronic pain, Dr. Reimer considered it unlikely that he would be able to return to work at CP Rail. In his opinion, Mr. Nijjer would struggle to sustain even a low stress, low demand job with his mental health status at the time of the assessment. He also found that Mr. Nijjer's mental health difficulties made it more challenging for him to enjoy recreational activities.

[190] In his addendum report of October 2022, Dr. Reimer provided his comments regarding the clinical records of Dr. Odubote, the psychiatrist who has been treating Mr. Nijjer since July 2022. Dr. Reimer opined that Dr. Odubote's records confirmed Dr. Reimer's earlier opinion and diagnosis of Major Depressive Disorder. He noted that Dr. Odubote diagnosed Mr.

Nijjer with Major Depressive Disorder with anxious distress, secondary to the collisions; an Adjustment disorder due to social and occupational impairment; and possible post-traumatic stress disorder.

[191] Dr. Reimer was aware of the circumstances of the Single-Vehicle Accident at the time of his assessment. He was questioned about the impact of the Single-Vehicle Accident on Mr. Nijjer's mental health, but maintained his opinion that the Second Accident, the one involving Mr. Nijjer's daughter, had a more significant impact on him. This is consistent with Ms. Nijjer's evidence about her husband's psychological and emotional states following both the Single-Vehicle Accident and the Second Accident.

[192] Dr. Reimer was also asked about the impact of Mr. Nijjer's 2018 stress leave as a result of the illness and death of his mother-in-law. This did not change his opinion.

### D. Sheila Branscombe - Occupational Therapist

[193] Sheila Branscombe is an occupational therapist qualified to give expert opinion evidence in the field of occupational therapy, in the areas of functional capacity evaluation and cost of future care. Ms. Branscombe has worked as an occupational therapist for 30 years, with expertise in rehabilitation, recovery and mental health.

[194] Ms. Branscombe assessed Mr. Nijjer on October 18 and 19, 2021. Based on that assessment and on the written reports and medical records provided to her, she prepared a written report outlining her opinions dated November 4, 2021. She also testified.

[195] Ms. Branscombe noted that during the functional capacity evaluation, Mr. Nijjer rated his pain as functionally limiting and was observed to have pain behaviours in most situations. Ms. Branscombe generally found Mr. Nijjer's reports of pain and disability to be reliable, with a tendency to slightly exaggerate his functional limitations compared to the objective results of the assessment.

[196] Objective findings from the functional capacity evaluation indicated to Ms. Branscombe that Mr. Nijjer is able to perform everyday tasks within the light to medium capacity demand level. She observed that Mr. Nijjer can walk, but recommended that he avoid impact activities such as jumping, skipping or hopping. She noted that Mr. Nijjer is able to stand in a static posture for 18 minutes and can tolerate 45 minutes of sitting before needing to stand.

[197] Ms. Branscombe opined that Mr. Nijjer is no longer able to meet all of the demands of his past roles with CP Rail. She found that he has limitations for strength and postural demands and that he lacks the cardiovascular capacity to carry out the labouring portion of his work, which may occur without notice in a foreman position.

[198] For example, Ms. Branscombe opined Mr. Nijjer is unlikely able to tolerate the prolonged seating demands and medium to heavy labour tasks required of a tie crane operator. She also opined that he is unlikely to be able to meet the demands of a labourer due to extremity, neck and low back/hip limitations for overhead reaching, neck and back flexion and low-level positions. She also opined that he is likely unable to meet the physical aspects of the foreman position, which involve many of the same physical demands as a labourer.

[199] Ms. Branscombe also opined that Mr. Nijjer's mental health symptoms are likely to impact any type of work that Mr. Nijjer attempts. She believes that Mr. Nijjer is not competitively employable and requires access to an alternate position or occupation that is light capacity. In her opinion, Mr. Nijjer is only capable of working light capacity jobs. She feels he may be able to work on a full-time basis, depending on the specific physical demands of the job and if his mental health issues can be successfully addressed.

[200] Ms. Branscombe opined that Mr. Nijjer would benefit from rehabilitation services. I will outline these in greater detail, as well as Ms. Branscombe's cost of future care figures, at a later time.

### E. Niall Trainor - Vocational Rehabilitation Consultant

[201] Niall Trainor is a vocation rehabilitation consultant qualified to give expert opinion evidence regarding an individual's employment assets, barriers to employment, training options, vocational rehabilitation and vocational potential. Mr. Trainor has over 37 years of experience in vocational rehabilitation and has worked with a broad cross-section of disadvantaged workers, including persons with physical and psychological impairments.

[202] Mr. Trainor assessed Mr. Nijjer on October 21, 2021 by conducting a 5.5-hour interview and employing a series of standardized vocational tests. Mr. Trainor authored a written report outlining his opinions dated November 19, 2021, based on his assessment and review of Mr. Nijjer's medical records. He also testified.

[203] Mr. Trainor opined that prior to the First Accident, Mr. Nijjer did not have any significant employment barriers and that he was competitively employable in several fields. He felt that Mr. Nijjer was likely well-suited to the pursuit of low, semi-skilled and some skilled occupations in trades, transport and equipment operating; primary industries; and manufacturing and processing. Mr. Trainor opined that Mr. Nijjer would have been capable of achieving his pre-First Accident aspiration of advancing into supervisory roles at CP Rail. While acknowledging there was no indication that Mr. Nijjer intended to change his career before the First Accident, he noted Mr. Nijjer had a "significant aptitude to do so."

[204] Mr. Trainor's opinion is that while Mr. Nijjer has some residual capacity following the accidents, his vocational prognosis is poor to guarded. In Mr. Trainor's opinion, Mr. Nijjer has acquired barriers to employment as a result of the subject collisions, including chronic pain, functional impairment and mental health problems. Also hindering Mr. Nijjer's ability to attain future employment is his long period of unemployment since July 2019 and

consequent lack of recent job experience. All of these barriers, in Mr. Trainor's opinion, render Mr. Nijjer not competitively employable.

[205] Mr. Trainor recommended that Mr. Nijjer receive further support from a vocational case manager to help him explore specific job goals, revise his resume, and otherwise improve his likelihood of landing a job. He identified a number of potential careers in which he believed Mr. Nijjer could succeed, generally managerial, supervisory or clerical roles.

Experts Called by the Defendants

### A. Dr. Shawn McCann - Physiatrist

[206] Dr. Shawn McCann is a physiatrist qualified to give expert opinion evidence in the areas of physical medicine and rehabilitation. Dr. McCann works at a pain clinic that provides interventional spinal procedures and multidisciplinary pain management programs for people with chronic pain and other pain syndromes.

[207] Dr. McCann assessed Mr. Nijjer on November 17, 2021. He authored a written report setting out his opinions on that same day, having finished the assessment and reviewed Mr. Nijjer's medical history as well as other documents provided to him. He also testified.

[208] In his physical examination, Dr. McCann found that Mr. Nijjer had reduced or restricted range of motion in his neck and sensation in his left hand, but was otherwise normal. He did not find any asymmetry in muscle mass between arms, nor did he find any reduced range of motion in the shoulders.

[209] Dr. McCann found that Mr. Nijjer had neck pain with an associated loss of range of motion in his neck. He described Mr. Nijjer's history of treatment for this injury and found that further investigations could not add to his diagnosis or management at this stage. He recommended that Mr. Nijjer transition from his ongoing physical therapy sessions to more active treatment by seeing a kinesiologist for six to ten sessions.

[210] Dr. McCann further opined that Mr. Nijjer had cervicogenic and migraine-based headaches and advised him to see a neurologist. He further found that Mr. Nijjer showed symptoms of central sensitization, also known as chronic pain syndrome. In this regard, he recommended that Mr. Nijjer look into free online programs for chronic pain management. Lastly, Dr. McCann found that Mr. Nijjer had left lower back pain radiating from his left hip, which was consistent with mechanical lumbar back pain. He thought a stretching and exercise program would help ease the lower back symptoms.

[211] Dr. McCann opined that Mr. Nijjer's neck pain and headaches most likely resulted from whiplash suffered in the First Accident. He further opined that the chronic pain syndrome had developed since the First Accident and that Mr. Nijjer's lower back pain could be linked to the Second Accident.

[212] As I referenced in my summary of Dr. Heran's evidence above, Dr. McCann found that Mr. Nijjer's left neck and left arm pain were not attributable to the First Accident. He reached this conclusion because:

a) the first report of left-sided symptoms noted by Dr. McCann in the records did not occur until at least nine months after the First Accident; and

b) objective examinations of previous testing did not evidence a left-sided radiculopathy.

[213] Dr. McCann agreed, however, that if Mr. Nijjer's left-sided symptoms came on shortly after the First Accident, his opinion would change. In that case, he would conclude that the radiculopathy was likely attributable to the First Accident.

[214] Dr. McCann's assumption that Mr. Nijjer did not have or report left-sided complaints until nine months after the First Accident was incorrect. He did not have the physiotherapist's records and, like the rest of us, could not read the handwriting of Drs. McLeod and Edmunds. Both of these doctors interpreted their handwriting for us, an aide of which Dr. McCann was deprived. As well, Dr. McCann did not ask Mr. Nijjer about the onset of his left-sided symptoms and simply relied upon the incomplete and illegible records. Mr. Nijjer testified about the onset of those symptoms and I accept his evidence in that regard.

[215] Dr. McCann expected that Mr. Nijjer would be unable to return to his previous employment at CP Rail. He considered Mr. Nijjer capable of conducting light to sedentary work on a full-time basis, assuming that Mr. Nijjer took part in a regular intensive exercise program, took medications and enjoyed restorative sleep. Dr. McCann opined that an overall cardiovascular conditioning and strength training program developed by a kinesiologist would result in the most improvement for Mr. Nijjer.

### B. Dr. Prenesh Govender - Neurosurgeon

[216] Dr. Prenesh Govender is a neurosurgeon qualified to give expert evidence in the area of neurosurgery. He received training in South Africa, Scotland and Toronto before starting his neurosurgery practise in British Columbia in 2004. He has special training and experience in neurotrauma and spinal neurosurgery.

[217] Dr. Govender evaluated Mr. Nijjer on July 23, 2021. He prepared a written report outlining his opinions dated August 26, 2021, on the basis of that evaluation and his review of Mr. Nijjer's medical history. He later prepared an addendum report dated November 29, 2021. He also testified.

[218] In his initial report, Dr. Govender opined that the timing of the onset and progression of Mr. Nijjer's neurological symptoms in his left upper limb indicates that they were more than likely to be related to trauma sustained in the First Accident. Dr. Govender considered it unlikely that Mr. Nijjer would experience further problems in his cervical spine or have significant restriction in his physical functioning.

[219] Dr. Govender reviewed additional documentation, including the report of Dr. McCann and the first report of Dr. Heran, before completing his addendum report on November 29, 2021. In the addendum, Dr. Govender qualified his original opinion about causation of the left-sided neurological symptoms. Dr. Govender first confirmed that, if Mr. Nijjer did experience left upper limb neurological symptoms within the first few days or weeks after the First Accident, then he stood by his initial opinion that trauma from the First Accident caused those symptoms. However, he wrote that if those symptoms did not arise until more than six months after the First Accident, then he considered it unlikely that they were related to the First Accident. He emphasized that the time period between trauma and symptoms is very important in determining causation.

[220] Dr. Govender's qualified opinion did not note that Dr. McCann had erroneously stated that Mr. Nijjer's first report of left-sided neurological symptoms was in August 2017. The evidence establishes that the first report occurred much earlier. Nor did he have the benefit of Dr. Heran's addendum report written on December 27, 2021, where Dr. Heran pointed out this error and reaffirmed his opinion that the left-side neurological symptoms were connected to the First Accident and showed a typical pattern of disc degeneration.

[221] Dr. Govender also opined that the pilonidal cyst was not related to the First Accident. On cross-examination, he described this cyst as a localized infection just above the buttock, due to ingrown hair or follicle. He maintained that it was highly unlikely that Mr. Nijjer's cyst arose as a result of his post-surgery condition.

### C. Dr. Eugene Okorie - Psychiatrist

[222] Dr. Eugene Okorie is a psychiatrist qualified to give expert opinion evidence in the area of psychiatry. He has been certified to practise in psychiatry and geriatric psychiatry in Canada since 2013 and 2015, respectively.

[223] Dr. Okorie evaluated Mr. Nijjer on October 27, 2021. He authored a written report outlining his opinions dated November 15, 2021, based on information obtained from medical records, a structured interview, and behavioural observations of Mr. Nijjer. He also testified.

[224] Dr. Okorie observed that Mr. Nijjer presented with persistent depression, anxiety, loss of joy, sleep disturbance, fatigue, poor motivation, hopelessness, purposelessness, generalized worries, anxiety spikes when reminded of the collisions, social withdrawal, and reduced appetite. Although Mr. Nijjer reported developing emotional symptoms after the First Accident, Dr. Okorie found that the evidence at that time was not sufficient to clearly show that Mr. Nijjer satisfied the diagnostic criteria for such disorders found in The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (known as DSM-5).

[225] In Dr. Okorie's opinion, Mr. Nijjer's neck and left shoulder issues, and especially the resultant unsuccessful surgical treatments more likely than not caused Mr. Nijjer's depression. Dr. Okorie noted that, in his opinion, Mr. Nijjer's emotional symptoms reached

levels diagnostic of Persistent Depressive Disorder, with anxious distress after his neck surgeries yielded disappointing results. The subsequent collisions, pilonidal cyst and related surgery, and Mr. Nijjer's ongoing marihuana use have, he opined, aggravated Mr. Nijjer's depressive symptoms. Dr. Okorie believes Mr. Nijjer's physical pain and discomfort and his depressive symptoms are intertwined.

[226] Dr. Okorie recommended some dosage adjustments to Mr. Nijjer's medications and advised that he should abstain from using marihuana. He also encouraged Mr. Nijjer to continue to receive counselling and to receive an occupational therapy assessment and vocational therapy as further ways to ease his depression. Dr. Okorie opined that these recommended treatments would likely improve his depressive symptoms.

### D. Mary Jo Mulgrew - Occupational Therapist

[227] Mary Jo Mulgrew is an occupational therapist qualified to give expert opinion evidence in the area of occupational therapy and future care costs. Ms. Mulgrew has practised occupational therapy since 1988.

[228] Ms. Mulgrew did not conduct her own evaluation of Mr. Nijjer. She wrote a report dated January 7, 2022 in which she reviewed and responded to the reports of the other experts, particularly occupational therapist Ms. Branscombe. She testified as well.

[229] Ms. Mulgrew disagreed with Ms. Branscombe's opinion that Mr. Nijjer's subjective reports of pain and disability were consistent with his abilities demonstrated during the functional capacity evaluation. Ms. Mulgrew considered Mr. Nijjer to show a greater functional capacity than his subjective reports would suggest. Ms. Mulgrew further questioned why Ms. Branscombe did not include a work simulation or task analysis of the functional activities in her functional capacity evaluation.

[230] Ms. Mulgrew agreed with Ms. Branscombe's conclusion that Mr. Nijjer was probably capable of returning to work with a light capacity. Ms. Mulgrew also responded to Ms. Branscombe's recommended costs of future care, which I will discuss later.

[231] While I find there is some value to Ms. Mulgrew's report and opinions, there are large aspects of her report upon which I cannot rely. Ms. Mulgrew only relied upon the defendants' medical experts and allowed their conclusions on causation of the neurological and cervical spine injuries to colour her report. She also included opinion evidence about causation, which is not within the realm of her expertise. To the extent that she offers these opinions, I do not consider them. Indeed, I found Ms. Mulgrew's continual references to causation to be an indication that she was not only considering things outside her expertise but that she was verging towards advocacy. Where Ms. Branscombe's opinions conflict with those of Ms. Mulgrew, I accept Ms. Branscombe's.

## Causation

[232] Mr. Nijjer bears the onus of proving, on a balance of probabilities, that the defendants caused or contributed to the injuries for which he seeks compensation. Justice Horsman, as she then was, recently summarized the applicable analytical framework in Rattan v. Li, 2022 BCSC 648:

[105] The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: Athey v. Leonati, [1996] 3 S.C.R. 458 at paras. 13-14 [Athey].

[106] Tortfeasors must take their victims as they find them in the sense that the defendant is liable for the plaintiff's injuries, even if those injuries are more severe than might be expected in the average person: Athey at para. 34. At the same time, the defendant is not required to put the plaintiff in a better position than she would have occupied absent the wrongdoing. The defendant is liable for the injuries caused, but need not compensate for the effects of a pre-existing condition if there is a "measurable risk" that the plaintiff would have suffered those effects in any event: Athey at para. 35.

[107] Unrelated intervening events are taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the defendant's wrongful conduct is not as great, and damages are reduced proportionately: T.W.N.A. v. Canada (Ministry of Indian Affairs), 2003 BCCA 670 at para. 36 [T.W.N.A.].

[108] The question of whether the plaintiff's original position would, regardless of the tort, have been adversely affected by a pre-existing condition or an unrelated intervening event turns on a consideration of hypothetical events. Hypothetical events need not be proven on a balance of probabilities--rather, they are given weight according to their relatively likelihood. A future or hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. Where the evidence establishes a real and substantial possibility of the occurrence of a future or hypothetical event, this is a contingency that must be accounted for into the assessment of damages: T.W.N.A. at paras. 35 and 48.

[233] Mr. Nijjer submits that he has established that he has suffered the following injuries as a result of the First Accident:

· Soft tissue injuries to his neck, upper back and shoulders;

· The cervical radiculopathy condition leading to two surgeries;

· Headaches and migraines;

· The pilonidal cyst; and

· Psychological injuries including depression, anxiety and somatic symptom disorder.

[234] He further contends that he has established he suffered an aggravation of all of these injuries in the Second Accident, along with a new injury - lower back and left hip pain. His pain is now chronic.

[235] The defendants do not dispute that their negligence caused Mr. Nijjer to sustain whiplash injuries, type 2, with resulting headaches as a result of the First Accident. They also concede that those injuries were aggravated, as was the lower back and hip injuries they say were caused by the Single Vehicle Accident, by the Second Accident. While the defendants disagree about the cause of the pilonidal cyst and Mr. Nijjer's psychological conditions, their central point of disagreement relates to the cause of Mr. Nijjer's cervical radiculopathy leading to the two surgeries.

[236] The defendants contend that Mr. Nijjer has not established that the cervical radiculopathy that led to the surgeries was caused by the First Accident. They urge me to reject Mr. Nijjer's evidence about the onset symptoms related to this condition and instead find that his first complaints related to a condition that arose at least several months, or longer, following the First Accident. They emphasize that while Mr. Nijjer complained of pain or stiffness in his left shoulder in the months following the First Accident, that it was not until October 2018 that Mr. Nijjer came to Dr. Chevalier with "new onset pain" that ultimately led to the two surgeries.

[237] The defendants argue that this late onset of symptoms, coupled with the testing results of Drs. Mosewich and Chevalier in October 2017, provide the evidentiary basis in which to ground the opinion of Dr. McCann and the alternative opinion of Dr. Govender that Mr. Nijjer's radiculopathy was not causally related to the First Accident.

[238] The defendants further submit that even if I find the evidence establishes a causal connection between the First Accident and the cervical radiculopathy, the evidence falls short of establishing the pilonidal cyst was caused by Mr. Nijjer's immobility from the surgeries as he claims. They urge me to reject Mr. Nijjer's evidence about the extent of his immobility post-surgeries. They emphasize the absence of any expert evidence to support a causal link.

[239] Regarding Mr. Nijjer's psychological conditions, the defendants submit that these conditions, particularly the depression and anxiety, did not originate with the First Accident, but rather originated with his mother-in-law's illness and death in 2018. They contend that these conditions were then aggravated by several unrelated events, including the 2019 radiculopathy-related surgeries, the pilonidal cyst, and the Single Vehicle Accident. They concede, however, that these psychological conditions were likely aggravated by the Second Accident.

[240] With the exception of the pilonidal cyst, I agree with the position taken by the plaintiff.

[241] As I have explained, other than the extent to which Mr. Nijjer was incapacitated in the several months following his second surgery, I accept his evidence about the symptoms he experienced, when he began to experience them and generally how they have impacted his life. His evidence is supported by the evidence of his wife, sister-in-law and co-workers. As I found earlier, I accept Mr. Nijjer's evidence about the onset of his left-sided pain, including shooting pain, shortly after the First Accident. These symptoms were not the initial focus for him, as his right side was much worse than his left at first; however, his left-sided symptoms were always an issue for him following the First Accident. As time went on, Mr. Nijjer's left-sided symptoms became worse, to the point where he was referred to specialists who ultimately diagnosed the radiculopathy and treated it.

[242] I have already outlined why Dr. McCann was under the mistaken impression that Mr. Nijjer did not have any left-sided symptoms until at least August 2017. Dr. McCann relied only on what was recorded in the medical records that he could read and that were provided to him. He did not ask Mr. Nijjer when his symptoms began, the records were incomplete and in some important instances they were illegible.

[243] With the erroneous assumption about the onset of Mr. Nijjer's left-sided symptoms removed from the opinion of Dr. McCann and the alternative opinion of Dr. Govender, I find the opinions of the physical medicine experts generally align. Drs. Giantomaso, Heran, McCann and Govender all agree that in these circumstances the radiculopathy was caused by the First Accident. I accept their opinions. This conclusion is not undermined by the testing results of Drs. Chevalier and Mosewich or by Dr. Giantomaso's 2018 examination. Dr. Giantomaso opined, and I accept, that these tests are not necessarily diagnostic of radiculopathy. Radiculopathy symptoms will wax and wane over time. They may not always be present on any given day, at any given time. Moreover, I note that both Drs. Chevalier and Mosewich did not rule out radiculopathy. Rather, they preferred to wait and see if the issue would resolve itself. It did not, and surgery eventually occurred many months after it was initially recommended.

[244] I also accept the opinions of Drs. Giantomaso and Heran that, briefly summarized, in the First Accident Mr. Nijjer suffered soft tissue injuries to his neck, shoulders/upper back area; chronic headaches and migraines; and the C7 radiculopathy causing the left-sided symptoms leading to the surgeries and the resulting neuropathic pain. My factual findings regarding soft tissue injuries, headaches and radiculopathy are also supported by the opinions of Drs. McCann and Govender. Dr. McCann additionally diagnosed Mr. Nijjer with symptoms of chronic pain syndrome. I accept this opinion.

[245] With my finding that the radiculopathy was caused by the First Accident, the opinions of the mental health experts largely align as well. Both mental health experts agree that Mr. Nijjer is suffering from a type of psychiatric illness. Dr. Reimer causally connects the First and Second Accidents to his diagnoses of major depressive disorder, single episode; generalized anxiety disorder, moderate; and somatic symptom disorder, with predominate pain. Dr. Okorie causally connects his diagnosis of persistent depressive disorder with

anxious distress to whatever caused the neck and left shoulder issues associated with the unsuccessful surgeries. As I have concluded the neck and left shoulder issues associated with the unsuccessful surgeries were caused by the First Accident, the opinions of Drs. Reimer and Okorie generally align.

[246] From the whole of the evidence, I am satisfied that Mr. Nijjer has established that the defendants' negligence caused and materially contributed to all of his current complaints, other than the pilonidal cyst.

[247] Specifically, I am satisfied that Mr. Nijjer has established that the First Accident caused him to suffer the following physical and psychological injuries:

1. Cervical sprain/strain injury consistent with a WAD-II injury initially, with progression to left C7 radiculopathy requiring surgeries;
2. Ongoing post-surgical neuropathic pain syndrome;
3. Thoracic sprain/strain injury, grade 1-2, chronic and ongoing;
4. Cervicogenic headaches with progression to migraines;
5. Soft tissue injury to the right shoulder;
6. Symptoms of chronic pain syndrome including disturbance of sleep and mood;
7. Major depressive disorder;
8. Generalized anxiety disorder;
9. Somatic symptom disorder.

[248] I am further satisfied that the Single Vehicle Accident in September 2020 caused an exacerbation and aggravation of all of the injuries Mr. Nijjer suffered in the First Accident. The experts largely agree on this. While there was some disagreement between the experts about whether Mr. Nijjer's current and ongoing lower back and hip pain was caused by this accident, I am satisfied based on Mr. Nijjer's evidence about the onset of this pain and Dr. McCann's opinion that his lower back and hip pain was not caused by the Single Vehicle Accident, but rather by the Second Accident a few months later.

[249] I am further satisfied that the Second Accident in December 2020 caused a further exacerbation and aggravation of all of the injuries Mr. Nijjer suffered in the First Accident, as well as a lumbar sprain/strain. All of Mr. Nijjer's conditions are now chronic.

[250] The plaintiff has failed to establish the pilonidal cyst was causally connected to the First Accident. Mr. Nijjer claims that this cyst, suffered in late 2019 and early 2020 was a result of the First Accident; specifically, he attributes it to his inability to do anything other than sit or lie down in the months following the surgeries.

[251] First, as I previously explained, I do not accept Mr. Nijjer's evidence that he was as immobile during the months following the surgeries as he claims. He was limited to be sure, but not nearly as immobile as he claims.

[252] Second, the evidence about the nature of this cyst is unclear. Mr. Nijjer only described that it had to be "drained" in the emergency department, which suggests that perhaps it was a cyst exterior to the body. Dr. Govender's evidence also suggests there may have been a cyst exterior to the body. When asked to describe it in general terms, Dr. Govender explained that a pilonidal cyst is a localized infection just above the buttock, due to an ingrown hair or follicle. On the other hand, Dr. Giantomaso's evidence suggests that perhaps the cyst was internal to the body. When asked to describe the cyst in general terms, Dr. Giantomaso explained that it forms at the bottom of the spinal cord and is a potentially dangerous problem that requires surgical management. Mr. Nijjer testified about the surgical intervention in 2021 that was required, but the type and nature of this intervention was not explained.

[253] Third, the defendants correctly observe that none of the experts that discussed the pilonidal cyst have attributed it to the First Accident, or to the immobility caused by the surgeries. Dr. Giantomaso opined that the pilonidal cyst was of unknown causation. Dr. Govender went further and opined that the pilonidal cyst was not related to the First Accident. On cross-examination, Dr. Govender maintained that it was highly unlikely that this cyst arose as a result of the plaintiff's post-surgery condition.

[254] In light of evidence adduced at trial, I am not satisfied that the plaintiff has established that the pilonidal cyst was caused or materially contributed to by the First Accident and the resulting surgery.

## Pre-Existing Conditions and Intervening Events

[255] I am satisfied that Mr. Nijjer did not suffer from any pre-existing conditions. While he reported some back pain to his doctor in 2015 and 2016 after commencing his new and physical labour job with CP Rail, I do not consider this a pre-existing condition from which I could find there was a "measurable risk" that he would have suffered from the back pain he now suffers in any event. While Dr. McLeod queried it, he did not diagnose Mr. Nijjer with degenerative disc disease. He did not send him for any medical imaging or refer him to any treatment. Mr. Nijjer's back pain prior to the First Accident was situational and did not cause him to miss any time from work or impact other areas of his life.

[256] The defendants argue that Mr. Nijjer's damages should be reduced as there are intervening events that factor into his current condition. Specifically, they point to the emotional and psychological issues that they say were caused by his mother-in-law's illness and death; the pilonidal cyst; and the aggravation of injuries caused by the Single Vehicle Accident.

[257] The intervening act principle absolves an original tortfeasor of legal liability where a later event or act occurs that breaks the chain of causation. Whether a subsequent act or event is of significant magnitude to break the chain of causation is a question of fact. The reasonableness of a plaintiff's actions can be considered in determining whether the chain of causation has been broken: Allen v. Luca, 2021 BCSC 14, at para. 79, citing Hussack v. Chilliwack School District No. 33, 2011 BCCA 258.

[258] As the Court held in T.W.N.A. v. Canada (Ministry of Indian Affairs), 2003 BCCA 670, unrelated intervening events are treated in a manner similar to pre-existing conditions:

[36] Unrelated intervening events must be taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately (Athey v. Leonati ¶ 31-32).

[259] In Allen, Justice MacDonald explained when an intervening event has broken the chain of events:

[78] ... Therefore, I must consider whether the intervening events were sufficient to break the chain of causation, often referred to as the principle of novus actus interveniens. In the words of A.T.W.N. at para. 36, I must determine whether the subsequent events "would have affected the plaintiff's original position adversely in any event."

[79] This principle arises from the concept that defendants should not be liable for harm to the plaintiff that comes from objectively unforeseeable events. Whether a subsequent act is of significant magnitude to break the chain of causation is a question of fact: Hussack v. Chilliwack School District No. 33, 2011 BCCA 258 at paras. 76-77, 87-88 [Hussack]. The reasonableness of a plaintiff's actions can be considered in determining whether the chain of causation has been broken: Hussack at para. 82; Safdari v. Buckland, 2020 BCSC 769 at paras. 136-137 [Safdari].

[80] If the chain of causation has been broken, the defendant is correct that a reduction to Ms. Allen's damage award must be made similar to a reduction in a "crumbling skull" situation: see, e.g. 2019 BCSC 2252 at para. 144.

[260] I am satisfied that the Single Vehicle Accident is not an intervening event. I agree with the plaintiff's position that the injuries Mr. Nijjer sustained in the Single Vehicle Accident, which occurred when the plaintiff was driving home from a medical appointment, are indivisible from the injuries of the First Accident. I find that the injuries Mr. Nijjer suffered in the Single Vehicle Accident would only have occurred because of already existing issues and pain from the First Accident.

[261] Before the Single Vehicle Accident, Mr. Nijjer's physical and psychological pain arising from the First Accident was the same as it had been for some time. He was experiencing headaches, neck and shoulder pain and weakness on the left side. He was experiencing anxiety and depression. The Single Vehicle Accident aggravated all of the previous injuries from the First Accident, and did not break the chain of causation.

[262] I accept Mr. Nijjer's evidence that following the Single Vehicle Accident, he was starting to recover to a point where he was thinking of returning to some kind of employment. Then, the Second Accident happened. The Second Accident was a more significant event for Mr. Nijjer, largely because of his daughter's presence in the vehicle and because it was yet another negative event in his life. His counsel's description of the Second Accident as "crushing Mr. Nijjer both physically and mentally" is apt. In the end, I am satisfied that Mr. Nijjer did not suffer any damages as a result of the Single Vehicle Accident that are not encompassed in the First and Second Accidents. In other words, the Single Vehicle Accident is not an intervening event that would have adversely affected Mr. Nijjer's original position in any event.

[263] I am also satisfied that the illness and death of Mr. Nijjer's mother-in-law in 2018 is not an intervening event. None of the experts in this case gave opinion evidence that this event had any causal link to Mr. Nijjer's mental health conditions. His mental health conditions were caused by the First Accident and aggravated by the Second Accident.

[264] There is no doubt that life events we all experience, such as the illness and death of a family member, were challenging to Mr. Nijjer and that he experienced mental health difficulties during the period of his mother-in-law's illness and death. I am convinced on the evidence that he would have been more resilient in the face of that challenge had he not spent the preceding years battling physical and psychological injuries arising from the First Accident. The pain caused by the death of Mr. Nijjer's mother-in-law is indivisible from his injuries caused by the First Accident. There is no evidence that the illness and death of Mr. Nijjer's mother-in-law broke the chain of causation from the First Accident, and there is no justification for a deduction to his assessed damages to account for such an event.

[265] I am also satisfied that the pilonidal cyst is not an intervening event. The cyst did not cause Mr. Nijjer to be off work. His injuries caused by the First Accident and aggravated by the Second Accident caused him to be off work. At the time the pilonidal cyst arose, Mr. Nijjer was already off work because of his surgeries and he did not return to work following the Second Accident. The cyst had nothing to do with this.

[266] While I expect that Mr. Nijjer suffered pain from this cyst for a period of time and would have experienced that pain without the accidents, it certainly did not break the chain of causation. It temporarily contributed to the pain and suffering he was already suffering as a result of the injuries that he suffered in the First Accident. I will take Mr. Nijjer's original condition into account when assessing his non-pecuniary damages, but I find that the

pilonidal cyst has only a very minimal impact. I do not agree with the defendants' position that the pilonidal cyst factored in Mr. Nijjer's accessing treatment in any material way, or with his inability to return to CP Rail.

Damages

## Non-Pecuniary Damages

[267] The purpose of an award for non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for losses suffered by the plaintiff to the date of trial and those he will likely suffer in the future: Tisalona v. Easton, 2017 BCCA 272 at para. 39.

[268] In Stapley v. Hejslet, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. 100, at para. 46 the Court identified common factors influencing an award of non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the duration and severity of the pain; the level of 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. Generally, stoicism should not penalize the plaintiff.

[269] An award of non-pecuniary damages must also be fair and reasonable to each party. Fairness is measured, in part, against awards made in comparable cases. However, other cases only serve as a rough comparator, as each case must be decided on his own facts: Zamora v. Lapointe, 2019 BCSC 1053 at para. 56; and Trites v. Penner, 2010 BCSC 882 at para. 189. The amount of the award does not depend only on the seriousness of the injury, but also on the loss in the context of the specific plaintiff's circumstances: Tisalona at para. 39.

[270] Mr. Nijjer seeks an award of non-pecuniary damages in the amount of $275,000. He relies on the following authorities in support of his position: Grabovac v. Fazio, 2021 BCSC 2362 ($350,000); Zacher v. Prescesky, 2019 BCSC 500 ($300,000); and Martin v. Steunenberg, 2021 BCSC 1411 ($210,000).

[271] The defendants, in their closing submissions, offered two scenarios. First, they said that if the court found Mr. Nijjer's surgeries and time off were not related to the First Accident, non-pecuniary damages should be assessed in the range of $85,000 to $100,000. I have not so concluded.

[272] In the alternative, they said that if the court found the surgeries and time off work were caused by the First Accident, a non-pecuniary damage award in the range of $150,000 to $175,000 is fair and reasonable. They rely on the following authorities in support of this position: Amer v. Geoghegan, 2022 BCSC 1311 ($150,000); Sirak v. Noonward, 2015 BCSC 274 ($160,000); and Williams v. Sekhon, 2019 BCSC 1511 ($135,000).

[273] As I have noted earlier, I have found that Mr. Nijjer's injuries, eventual surgeries, and time off work (except for the period of his mother-in-law's illness and death) were caused by the First Accident.

[274] Mr. Nijjer was 35-years-old at the time of the First Accident and 40 at the time of the Second Accident. Prior to the First Accident he was healthy and active. He had a good relationship with his extended family members, other than perhaps Jason for a time. He was happily married and had a young child. He had been working hard at CP Rail, a relatively new career for him, and had plans to advance. Mr. Nijjer was outgoing, happy and working to create the life he and his wife wanted for their young family.

[275] I have detailed the injuries Mr. Nijjer suffered as a result of the First Accident. He suffered from significant physical and psychological pain. His symptoms affected all aspects of his life. Mr. Nijjer was immediately off work after the First Accident for a period of four months. He engaged in recommended treatments and saw specialists for the left-sided symptoms that continued to progressively worsen. He returned to work on light duties and worked through the pain. When he learned that he would require surgery and would be off work again, Mr. Nijjer worked as much overtime as he could in order to earn more money until then. Again, he worked through the pain.

[276] When Mr. Nijjer finally had his first surgery, he not only endured a recovery period, he also had to cope with the physical and psychological impact of its failure. He suffered new pain and permanent numbness in some of his fingers and had to face the prospect of another, more invasive surgery. Although the second surgery resolved some of his left-sided symptoms, he continued to have pain, headaches, and neurological symptoms. His mental health continued to decline. His sleep continued to be affected. Mr. Nijjer engaged in many forms of treatment, including massage therapy, physiotherapy, kinesiology, home exercises, injections, and counselling. He saw many doctors and took prescribed medications. Mr. Nijjer was reaching a point where he was considering a return to work in some capacity in 2020 when the Second Accident occurred, aggravating all of his injuries and creating new ones in his lower back and hip.

[277] Mr. Nijjer's ability to earn income has been affected by his injuries. The financial consequences he has suffered as a result will be addressed in the next section of this judgment, but his time out of the paid workforce has affected his enjoyment of life in other ways as well. Being out of the workforce has undermined his sense of identity, self-worth and emotional wellbeing.

[278] Also undermining his sense of identity, self-worth and emotional wellbeing has been Mr. Nijjer's reduced participation in the various family businesses. While Mr. Nijjer has been able to participate in them somewhat, his involvement is not what it had once been. His involvement is not what is expected of him by his family and this has created tension and conflict. Mrs. Nijjer has witnessed this tension and conflict with members of his extended family. She has seen the impact upon her husband. She has been present when extended

family members argue with Mr. Nijjer about his decreased contributions to the family. It is apparent, from the whole of the evidence, that the reality of Mr. Nijjer's limitations, together with his guarded or poor prognosis, has weighed heavily on him. This has all had an adverse affect on his overall emotion wellbeing.

[279] Mr. Nijjer's personality has also been affected by his injuries. His appearance has changed. His mood has changed. His wife and sister-in-law describe how he is not the same happy, confident, and outgoing person that he once was. Mr. Nijjer is now temperamental and can "snap" on a moment's notice. Ms. Tomana witnessed an example of this on a family vacation in 2021. It has undermined their relationship.

[280] Mr. Nijjer now stands differently. His personal grooming has deteriorated. He rarely smiles or laughs. Mrs. Nijjer testified about how she cared for her husband following his surgeries and how he has and continues to struggle with pain and negative mood. He does less work around the house and is no longer as involved in child care. He is no longer as playful as he once was with the children. He does not participate in school and family events as he once did, including things such as field trips, father/daughter dances or even a day in Disneyland. He can no longer participate in most of their recreational activities he once enjoyed, or at least not at the same level.

[281] Mr. Nijjer's marriage has been negatively affected as well. His personality changes and his decreased contribution to the family have taken their toll. This was plain to see from Mrs. Nijjer's testimony. Though they still live together, the two seem to be now on different paths. They do not connect as husband and wife and no longer discuss their future as they once did. Overall, the important relationships in Mr. Nijjer's life have all suffered as a result of the impact of the injuries he sustained.

[282] Mr. Nijjer's prognosis is guarded. I accept Dr. Giantomaso's opinion that while there is some hope for improvement in his lower back issues by following recommended treatment, the likelihood that he will experience a full resolution of his neck pain and neuropathic left arm features is low. Even if he were to have further surgery and interventions Mr. Nijjer will most likely experience permanent chronic pain and disfunction in the cervical thoracic region of his body for the rest of his life. While his other areas of chronic pain have some chance for a reduction in pain and increase in function, if recommended treatment is successful, it is clear from the whole of the evidence that Mr. Nijjer will likely never be completely pain-free.

[283] Mr. Nijjer's mental health conditions continue to require treatment as well. I accept the opinions of Drs. Reimer and Okorie that Mr. Nijjer's prognosis for his psychological conditions is closely tied to the potential for physical improvement in his functioning. It is very likely that Mr. Nijjer will not return to his pre-First Accident functioning with respect to his mental health, but there is a cautious optimism that if he experiences improvements to his physical health, learns ways to manage his pain and develops a new life that has meaning for him, that he will see some improvements in his mental health as well.

[284] There are aspects of the authorities referred to by counsel which are helpful, but they all have features which distinguish them from the case at bar.

[285] For example, the plaintiff in Grabovac was a 26-year-old dental hygienist who was injured in two motor vehicle accidents. In the first, she suffered soft tissue injuries to her neck, shoulders and back. She also experienced headaches, fatigue, problems with memory and concentration, as well as depression and anxiety. Her injuries had largely resolved by the time of the second accident which caused her to suffer soft-tissue injuries to her neck, shoulders, upper and lower back, right arm (with tremors), left hip and leg. Ms. Grabovac had headaches three times a week or sometimes daily and suffered from fatigue, insomnia, and ongoing problems with memory and concentration. Her pain was chronic, which led to major depressive disorder, somatic symptom disorder, post-traumatic stress disorder and general anxiety disorder. Chief Justice Hinkson awarded Ms. Grabovac non-pecuniary damages of $40,000 in respect of the first accident and $310,000 in respect of the second.

[286] While there are some parallels between the situations of Ms. Grabovac and Mr. Nijjer, there is a material difference. A component of the award in respect of the second accident was based on the court's finding that Ms. Grabovac will not likely have children as a result of injuries she suffered in that accident. Notably, counsel for the plaintiff had proposed $225,000 as a global non-pecuniary award, but Chief Justice Hinkson awarded more under this heading.

[287] As another example, the plaintiff in Sirak was 45-years-old at the time of the accident and a painter. Mr. Sirak was found to have disabling neck and back pain, headaches and bilateral numbness, tingling and pain in his arms, hands and legs as a result of disc protrusions and nerve root compression in the cervical and lumbar spine. His symptoms were getting worse over time and, although it was recommended that he have surgery on his lower back and possibly his neck, it was determined that this would not eliminate his pain. Mr. Sirak had become moody and withdrawn and could only work part-time ten years after the accident. This plaintiff was awarded $160,000 for non-pecuniary damages, which would be slightly higher in today's dollars.

[288] Again, there are several parallels between Mr. Sirak's and Mr. Nijjer's cases, but Mr. Nijjer's injuries have already resulted in surgery and have had a more significant impact on his employment. As well, Mr. Nijjer has been diagnosed with three mental health conditions arising from the accidents. Like the other cases relied upon by the defendants in the case at bar, I would characterize Mr. Sirak's injuries as less severe than those suffered by Mr. Nijjer.

[289] A decision that more closely aligns with Mr. Nijjer's circumstances is Martin. In that case, the plaintiff was a 45-year-old firefighter at the time of the accident. He suffered soft tissue injuries to his neck, left shoulder, left rotator cuff, left wrist and mid and lower back; chronic pain; ongoing cervicogenic headaches; unresolved psychological injuries consisting of major depressive disorder, somatic symptom disorder, and generalized anxiety disorder; and improved but not resolved driving-related specific anxiety disorder.

Mr. Martin's injuries caused him to suffer a significant reduction in the quality of nearly every aspect of his life, including his ability to earn income. All of his important relationships were affected. Mr. Martin's prognosis was guarded regarding a full recovery and it was questionable whether he would ever return to work as he had in his chosen profession. He was awarded $210,000, which included consideration of a loss of housekeeping capacity.

[290] Mr. Nijjer is a changed person and has suffered a considerable loss in his enjoyment of life, as well as his social, recreational, family, and vocational interests. His pain is chronic and his prognosis is guarded. In all of the circumstances, I assess his award for non-pecuniary damages at $220,000. This award takes into account a slight reduction for the additional loss of enjoyment of life that occurred in the pre-trial period as a result of the pilonidal cyst and the surgery that it required. It also includes considerations related to any loss of housekeeping capacity.

Past Loss of Earning Capacity

## Legal Framework

[291] An award of damages for loss of earning capacity, whether in the past or in the future, compensates for a plaintiff's pecuniary loss. Compensation for past loss earnings is based on what a plaintiff would have, not could have, earned but for the accident-related injuries: Rowe v. Bobell Express Ltd., 2005 BCCA 141 at para. 30. Such calculations are challenging because they involve a consideration of hypothetical events.

[292] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: Grewal v. Naumann, 2017 BCCA 158 at paras. 44, 48 and 49.

[293] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, the plaintiff's recovery is limited to net income loss: Rizzolo v. Brett, 2009 BCSC 732 at para. 72; aff'd 2010 BCCA 398.

Position of the Parties

[294] The plaintiff seeks an award for past loss of earning capacity in the amount of $457,000 (net).

[295] Mr. Nijjer takes the position that in the absence of the accidents, he would have continued to earn income similar to comparable or replacement co-workers at CP Rail in the pre-trial period, that is from November 4, 2016 to November 14, 2022. He would have continued to work full-time, taken as much overtime as offered, and advanced to the position of foreman as he did. He would have continued to receive the benefit of saving 30% of his tax-free per diem allowance of $112.10.

[296] In support of this position, Mr. Nijjer relies on the opinion of Mr. Benning. Mr. Benning was qualified to give expert opinion evidence on economics and, specifically, the quantification of past and future income loss. Mr. Benning's August 3, 2022 report estimates Mr. Nijjer's past and future income loss, and the present value of his future cost of care. His August 24, 2022 report updates his August 3 report to account for a new collective agreement signed between CP Rail and the union.

[297] Using Mr. Benning's estimations (which are based, in part, on Mr. Nijjer's co-workers' incomes), Mr. Nijjer submits that, without the accidents his gross income in the pre-trial period would have been $924,617. This is based on what he says would have been annual incomes of $86,848 in 2016; $135,873 in 2017; $97,132 in 2018; $152,426 in 2019; $157,370 in 2020; $155,388 in 2021; and $139,581 in 2022 up to the time of trial.

[298] Mr. Nijjer's T4 forms for 2016 through 2020 are in evidence and show that, with the accident, he earned a gross income of $384,604 in the pre-trial period. Specifically, $74,087 in 2016; $116,686 in 2017; $84,502 in 2018; $94,712 in 2019; $14,617 in 2020. The with-accident earnings for 2021 and 2022 are set to zero.

[299] Mr. Nijjer submits that the injuries he suffered in the First Accident, as aggravated in the Second Accident, caused a complete loss of earning capacity for certain periods, and reduced capacity for another. In particular, he submits that from November 4, 2016 to March 21, 2017 he had a complete loss of earning capacity; from March 21, 2017 until the time of his first surgery on July 29, 2019 he was able to return to work at CP Rail and earn an income, but was unable to work to full capacity, having to take sick days and accepting less overtime work; and from the time of his first surgery in July 2019 to the time of trial in November 2022 he suffered a loss of capacity to earn income from CP Rail, or any source.

[300] Relying on Mr. Benning's calculations, Mr. Nijjer submits that his gross income loss during the pre-trial period is $540,013 (i.e., $924,617 - $384,604). After accounting for taxes, the weekly indemnity benefits Mr. Nijjer received during this period which will require reimbursement, and the non-taxable per diem that he lost as a result of his loss of capacity, he estimates his total net income loss in the pre-trial period at $457,136, rounded down to $457,000.

[301] The defendants disagree with the plaintiff's approach to assessing his without-accident earnings. They say that relying on the earnings of co-workers to ground the analysis overstates what Mr. Nijjer would have earned. They suggest relying upon Mr. Nijjer's historical hourly wage and an estimate that Mr. Nijjer would have worked 151 hours a month to determine income loss. Alternatively, they suggest looking to census data, as their economist, Ms. Ren did in her calculations and estimations.

[302] The defendants submit that Mr. Nijjer's injuries arising from the First Accident caused a loss of capacity leading to an economic loss, but only during the time he was off work immediately following the First Accident - from November 4, 2016 to March 21, 2017. Using historical earnings or census data to assess what his earnings would have been had the First Accident not occurred, they urge me to assess his gross income loss during this period at $17,164. They say, therefore, Mr. Nijjer's total award for past loss of earning capacity should be approximately $15,000.

[303] While the defendants' primary position is that Mr. Nijjer suffered no further loss of capacity and resulting economic loss related to the accidents in the pre-trial period, they do offer two alternative submissions.

[304] First, in the event I were to conclude (as I have) that the condition that led to Mr. Nijjer's two surgeries was causally connected to the First Accident, the defendants submit that the only pecuniary loss Mr. Nijjer suffered owing to this loss of capacity between March 21, 2017 and the time of trial, is a four-month period between the time of Mr. Nijjer's first surgery on July 29, 2019 through to December 1, 2019. For this period of July 29 to December 1, 2019, the defendants ask me to assess Mr. Nijjer's loss at $43,729. After this time, the defendants say Mr. Nijjer demonstrated he had the capacity to earn income through his work with the OGJ.

[305] The defendants further say that Mr. Nijjer suffered no pecuniary loss from March 21, 2017 to the time of his surgery on July 29, 2019. They point to the fact that he worked full-time during this period, was able to secure substantial overtime hours and presumably collected his per diem with any associated savings. The defendants urge me to reject Mr. Nijjer's evidence that he missed any time from work as a result of his injuries during this period and that he missed further overtime opportunities.

[306] As of December 1, 2019, the defendants say that Mr. Nijjer could have and should have returned to work and therefore there is no further pecuniary loss attributable to the injuries he suffered in the First Accident.

[307] Second, in the event I were to find that the Second Accident resulted in a loss of capacity leading to a past income loss, the defendants urge me to rely upon Ms. Ren's estimations, based upon census data rather than the earnings of co-workers for this time period (December 17, 2020 to the time of trial). They ask me to assess the loss during this period, before any tax considerations at $210,402.

## Discussion

[308] I have reviewed the evidence and find as facts that, were it not for the accidents, Mr. Nijjer would have continued to work full-time at CP Rail during the entirety of the pre-trial period (with the exception of a few months during his mother-in-law's illness and death). He would have continued to work as a machine operator and then continued advancing through the unionized positions to the position of gang foreman. He would have continued to accept premium shifts and overtime hours as he could.

[309] Although Mr. Nijjer's historical tendency to bounce between jobs and industries gives me less confidence that he would have stayed working at CP Rail in the very long term, I am satisfied that the evidence establishes that he would have stayed working at CP Rail, in the manner I have described, in the pre-trial period. These findings are supported by several facts.

[310] When Mr. Nijjer started working at CP Rail in 2014, he had mixed feelings. It had not been a career aspiration for him. It required physical labour that he was unaccustomed to. However, he had a young family to support and he needed to make money. Mr. Nijjer started as a labourer. He found the physical aspects of the job difficult, but he persisted. Mr. Nijjer worked full-time and took overtime hours, although overtime hours were less available to labourers. He had the desire and plans to advance through the various unionized positions in order to increase his rate of pay, work increasingly less physical jobs and have more opportunities for overtime and premium shifts. Mr. Nijjer was in the labourer position for about one-and-half years when he bid on a higher position. He was eventually successful in obtaining this position before moving up again. By the time of the First Accident, Mr. Nijjer held the position of Group 1 Machine Operator.

[311] The fact that Mr. Nijjer returned to work following the First Accident, and continued on his career trajectory for a time also supports my conclusions. He was advancing and was there to make money for his young family. There is nothing in the evidence to support any possibility that Mr. Nijjer would have worked part-time, not saved part of his per diem, and/or not pursued overtime hours. The amount of overtime he would likely have worked, however, is something I will discuss in more detail later when considering Mr. Nijjer's occupational characteristics as compared to his co-workers'.

[312] I also find as a fact that Mr. Nijjer would have taken the same leave of absence from his employment in the summer of 2018 as a result of his mother-in-law's illness and death if the accidents had not occurred.

[313] To assess Mr. Nijjer's loss of earning capacity, I must consider what he would have earned without the accidents, continuing along the career trajectory I have found above, and compare that with the income he earned with the accidents.

[314] One of the difficulties here is that the injuries Mr. Nijjer sustained from the accidents have not impacted his capacity to earn income in a consistent way throughout the whole of the pre-trial period. There were sustained periods in the pre-trial period where Mr. Nijjer was able to return to CP Rail and work as I have found he would have had the accident not occurred. In this situation, I agree with the approach taken by the defendants of considering the losses for certain time periods, and will approach my analysis in that manner.

[315] Before embarking on that exercise, however, I make a few observations on the approach taken by Mr. Benning, as he was instructed, to calculate Mr. Nijjer's without-accident income and past loss.

[316] Mr. Benning has estimated Mr. Nijjer's without-accident income using several methods, all of which rely, to varying extents, on the hours worked and incomes earned by Mr. Nijjer's co-workers (Max Edgar, Barinder Jaswal and Darren Pittendreigh). The without-accident incomes for 2016, 2017, 2018 and 2019 are the sum of Mr. Nijjer's with-accident income (i.e., the amounts on his T4) and what Mr. Benning estimated as the gross income loss. This gross income loss is, in turn, an estimate based on looking at what Mr. Nijjer's co-workers earned for the periods he was off work. In addition, Mr. Benning was instructed to assume that between March 21, 2017 and July 29, 2019 Mr. Nijjer missed 80 days of work due to his injury. He estimated that loss at $34,022 and pro-rated it across 2017, 2018 and 2019. The without-accident income for 2020 is identical to the income of Mr. Nijjer's co-worker (Mr. Pittendreigh) in that year. The 2021 and 2022 amounts are based on the expected earnings of a foreman working an assumed 4,124 straight-time equivalency (STE) hours. The 2022 amount is pro-rated to the start of trial in November 2022. STE hours refer to the number of hours that would need to be worked at the base rate of pay in order to generate the average level of annual income earned.

[317] Mr. Jaswal, Mr. Edgar and Mr. Pittendreigh all worked full-time, on the same tie gang as Mr. Nijjer, at the same rates of pay, and during the same timeframe. They all had the opportunity to work overtime and premium shifts. Mr. Pittendreigh was Mr. Nijjer's direct replacement in the foreman position in 2019. While these commonalities establish a real and substantial possibility that Mr. Nijjer would have earned incomes similar to these men, the possibility is very high that Mr. Nijjer would have earned somewhat less than they did. To use their precise earnings or rely on the STE hours they worked to estimate Mr. Nijjer's without-accident earnings or his income loss would be to overestimate what Mr. Nijjer would have earned in the pre-trial period. I say this for a few reasons.

[318] First, Mr. Nijjer's historical earnings at CP Rail were less than these colleagues. For the nine months that Mr. Nijjer worked at CP Rail in 2014, he earned $66,958. In 2015, he earned $67,500. In 2016, up to the time of the First Accident, his taxable earnings were $69,704.18. For example, and by contrast, Mr. Jaswal's taxable earnings in 2016 up to the time of the First Accident, were $89,721.25. I have no evidence upon which to assess why this would be, but the fact remains that Mr. Jaswal earned about $20,000 more than Mr. Nijjer in 2016 up to

the time of the First Accident.

[319] Second, while there are similarities between the employment characteristics of these men and Mr. Nijjer, there are some differences too. For example, Mr. Pittendreigh's taxable earnings in 2019 were $116,391.81. As of the time of trial in 2022, he worked as a special group machine operator and earned over $150,000 per year in that role. Some of Mr. Pittendreigh's employment characteristics are similar to Mr. Nijjer. Mr. Pittendreigh started at CP Rail in 2017 and was placed on the same crew as Mr. Nijjer. He had the desire to work overtime and earn money. He was young and healthy. He advanced through the ranks and was promoted to foreman in order to fill Mr. Nijjer's position when Mr. Nijjer went for his first surgery. He earned the same rate of pay as Mr. Nijjer. As foreman, he worked overtime everyday.

[320] On the other hand, there are some personal characteristics of Mr. Pittendreigh that set him apart from Mr. Nijjer. Mr. Pittendreigh is younger than Mr. Nijjer. When he started at CP Rail, he was in his late 20s. Unlike Mr. Nijjer, Mr. Pittendreigh had no family commitments, so he was able to dedicate more time to work. Mr. Pittendreigh also had additional motivation to earn as much income as possible because he was trying to play "catch-up" as a result of some occurrences in his past.

[321] Third, and related to the above, I am satisfied that there is a real and substantial possibility that Mr. Nijjer would have participated more in his family's various businesses were it not for the accidents during the pre-trial period. Mr. Nijjer has always participated in his family's businesses from a young age. The relative likelihood of the possibility that he would have continued to do so during the pre-trial period without the accidents is very high. This would have further reduced the time he had available to dedicate to work, and to take on overtime hours to the same degree that his co-workers did.

[322] I am satisfied that there is a real and substantial possibility that Mr. Nijjer's without-accident earnings and the number of STE hours he would have worked in the pre-trial period would have been similar to, but somewhat less than, the earnings and hours of the three similarly situated co-workers he has provided. I would assess the relative likelihood of this possibility as high. For all these reasons, I therefore exercise some caution when considering Mr. Benning's estimates of Mr. Nijjer's gross income loss and his without-accident earnings, which rely on these co-workers' earnings and hours.

[323] I turn now to consider Mr. Nijjer's loss of earning capacity for the five time periods at issue. The question is what he would have earned based on a real and substantial possibility. While I am mindful that the court assesses damages for past loss of capacity and does not calculate them mathematically, the court should also endeavour to use mathematical aids or anchors as a starting foundation to quantify such loss: Rosvold v. Dunlop, 2001 BCCA 1, para. 18; and Jurczak v. Mauro, 2013 BCCA 507, paras. 36-37.

### November 3, 2016 to March 20, 2017

[324] After the First Accident, Mr. Nijjer was off work for nearly five months - approximately two months in 2016, and another 2.6 months in early 2017. This is not disputed. During this time Mr. Nijjer was experiencing neck and shoulder pain, shooting pain down his left arm, as well as migraines. I accept that he had no capacity to return to work during this period.

[325] I recognize that the number of hours Mr. Nijjer worked in a month varied, depending on the amount of overtime that was available and that he performed. I also accept that opportunities for Mr. Nijjer to work overtime increased as he progressed from a labourer to a foreman.

[326] To assess what Mr. Nijjer would have earned during this time without the accident, it is appropriate to consider the number of STE hours he would have worked and multiply that by his hourly wage at the time. While this is a difficult estimate, it is not pure speculation. There are factual anchors on which to rely, such as the average number of hours Mr. Nijjer worked in the years leading up to the First Accident, and the trend of increasing the hours he worked.

[327] In 2015, the year before the accident, Mr. Nijjer earned $67,487.76 in taxable earnings. Assuming an hourly wage of $30.86, Mr. Nijjer worked 2,187 STE hours over the course of the year, or an average of 182 STE hours per month.

[328] In 2016, in the ten months prior to the First Accident, Mr. Nijjer earned $69,704.18 in taxable earnings. With an hourly wage of $30.86, this means he worked an average of 226 STE hours per month.

[329] Taking into account the amount of hours Mr. Nijjer was working prior to the First Accident, and the trend of working, on average, more hours a month in 2016 than in 2015, I conclude there is a real and substantial possibility that but for the accident Mr. Nijjer would have worked approximately 230 STE hours per month from November 3, 2016 to March 20, 2017.

[330] This amounts to an estimate of without-accident earnings of $14,195.60 for November 3 to December 31, 2016 (230 hours x 2 months x $30.86/hour); and $19,004.44 for January 1, 2017 to March 20, 2017 (230 hours x 2.6 months x $31.78/hour) for a total of $33,200.04.

[331] From this, I deduct the amounts Mr. Nijjer received in taxable earnings during the applicable pay periods in 2016 and 2017 ($5,344.74 in 2016 and $8,453.93 in 2017) for a gross income loss of $19,401.37.

### March 21, 2017 to July 29, 2019

[332] On March 21, 2017, Mr. Nijjer returned to work. During the time period from his return to work until his first surgery in July 2019, he was working full-time, but did not return to his full duties. It was during this period that Mr. Nijjer obtained the position of foreman.

[333] Mr. Nijjer claimed that he was off work for approximately 80 days during this period due to accident-related injuries. Mr. Benning's instructions were to assume that Mr. Nijjer was off work for 80 days, and he calculated this income loss (noted in his table as "income loss while at work") at $34,022 and pro-rated across 2017, 2018 and 2019. As noted earlier, I have not found that Mr. Nijjer was off work for 80 days, and therefore do not accept this calculation.

[334] I find that during the period from March 21, 2017 to July 29, 2019, Mr. Nijjer had the capacity to work full-time at CP Rail and sustained no income loss.

### July 30, 2019 to November 30, 2019

[335] In the time period from July 30, 2019 to November 30, 2019, Mr. Nijjer was recovering from the first and second surgeries. Following the unsuccessful first surgery his symptoms related to the radiculopathy and the pain persisted. In addition, he developed numbness in his left thumb and certain fingers. Both he and his wife testified about the degree of assistance he required for daily tasks.

[336] On October 30, 2019, Mr. Nijjer had his second surgery. While successful, following the second surgery Mr. Nijjer had a recovery period and still experienced weakness on his left side, numbness in his fingers, and migraines. Mr. Nijjer testified that following the second surgery he continued to experience pain and that his wife had to provide for his care. I find that he had no capacity to return to work during this time.

[337] To assess Mr. Nijjer's past income loss for this period, it is again necessary to consider what his income would have been for this period without the accident.

[338] Mr. Benning's estimate of Mr. Nijjer's gross income loss for this period was calculated based on the difference between the income earned by Mr. Edgar and Mr. Pittendreigh for certain pay periods, and that earned by Mr. Nijjer. As I have noted earlier, I have concerns about relying on the incomes of Mr. Nijjer's co-workers given the differences between their employment characteristics and Mr. Nijjer's.

[339] In my view, a more appropriate estimate of the income Mr. Nijjer would have earned in this time period without the accident can be assessed by looking at the average hours he worked in the preceding period (for which I found he sustained no loss of capacity) to determine the number of STE hours he likely would have worked and multiplying that by his hourly wage.

[340] In 2018, Mr. Nijjer earned $85,688.65 in taxable earnings. This was the year in which he took approximately two and a half months off work during the illness and death of his mother in law. With an hourly wage $35.50, this means that Mr. Nijjer worked an average of 254 STE hours per month in 2018.

[341] In 2019, in anticipation of surgery, Mr. Nijjer increased the hours he worked. By the time of his surgery, he had earned $81,906.45. With an hourly wage of $36.213, this means Mr. Nijjer worked an average of 323 STE hours per month in the first seven months of 2019.

[342] By comparison, in 2019, Mr. Pittendreigh earned $116,391. With an hourly wage of $36.213 this means Mr. Pittendreigh worked an average of 268 STE hours per month in 2019.

[343] There is no real and substantial possibility that, without the accident, Mr. Nijjer would have worked approximately 323 STE hours per month in the period from July 30 to November 30, 2019. His evidence was that he was working the additional hours specifically in anticipation of being off work following surgery. In addition, given my conclusions about Mr. Nijjer generally working and earning somewhat less than his co-workers, a more realistic estimate of the number of STE hours Mr. Nijjer would have worked in 2019 without the accident is 260. This is slightly more than his average monthly hours in 2018 and slightly less than Mr. Pittendreigh's average monthly hours in 2019.

[344] Based on Mr. Nijjer working an estimated 260 hours per month for August, September, October and November, I assess his without-accident earnings for this time period at $37,661.52 (260 hours x 4 months x $36.213/hour).

[345] From this, I deduct the amounts Mr. Nijjer was paid during the applicable pay periods ($12,278.11) for a gross income loss of $25,388.41.

December 1, 2019 to December 17, 2020

[346] I turn now to the period from December 1, 2019 to December 17, 2020.

[347] Mr. Benning's estimate of Mr. Nijjer's income loss for 2020 is based on the assumption that Mr. Nijjer would have earned what Mr. Pittendreigh did in 2020 ($157,370, which reflects 4,260 annual STE hours, or an average of 355 hours per month). From this, Mr. Benning subtracted the $14,617 with accident income reflected on Mr. Nijjer's T4 for a gross loss of $142,753.

[348] I have found that relying on Mr. Pittendreigh's income would result in an over-estimation of the income Mr. Nijjer would have earned without the accident. Based on his employment history and characteristics, there is a high likelihood that Mr. Nijjer would have worked fewer hours per month than Mr. Pittendreigh. In my view, an estimate of Mr. Nijjer working 275 STE hours for this period is fair and reasonable. I would assess Mr. Nijjer's without-accident income for this period at $126,970.93 (275 hours x 12.5 months x $36.937/hour).

[349] From this, I deduct Mr. Nijjer's with-accident income, i.e., the $14,617 noted on his T4, to reach a gross income loss of $112,353.93.

[350] While I have accepted that Mr. Nijjer experienced serious physical, mental and emotional pain in the months following the second surgery, I do not accept that he was fully incapacitated during this time. In particular, he assisted his brother with Leaps of Laughter

in late 2019 and early 2020; and, more significantly, assisted his brother with OGJ from late 2019 through to January 2020. In addition, in 2020 Mr. Nijjer applied for a time keeper position at CP Rail. This too suggests that he had some capacity to return to work, even if in a different position. These facts suggest that Mr. Nijjer's without-accident income in 2020 of $14,617 undervalues his income earning capacity during this time.

[351] At the same time, however, the medical and therapy records reviewed by Dr. Giantomaso suggest that in 2020 Mr. Nijjer was continuing to struggle and was not ready to return to work. In January 2020, Dr. Chevalier removed restrictions on Mr. Nijjer's activities, as he could tolerate them. He expected any return to work would be gradual and progressive. In May 2020, the physiotherapist noted Mr. Nijjer was experiencing ongoing pain and was showing difficulty progressing and improving. This suggests he was not ready to return to work. Notes from the fall of 2020 indicate ongoing neck, shoulder and back pain and a slow recovery.

[352] I am satisfied there is a real and substantial possibility that Mr. Nijjer could have worked in a limited and part-time capacity doing sedentary work of the sort he was doing for his brother in early 2020 and earned some income. I assess the relatively likelihood of this at low to moderate. I therefore apply a 20% reduction to Mr. Nijjer's gross income loss for this period to reach an amount of $89,883.14 ($112,353.93 - $22,470.79).

### December 18, 2020 to November 2022

[353] Finally, I turn to the period from December 18, 2020 to the time of trial in November 2022. The experts generally agree that Mr. Nijjer had very limited capacity during this time after the Second Accident, and was not able to continue in his previous roles at CP Rail.

[354] Dr. Giantomaso, who assessed Mr. Nijjer in August 2021, opined that he was very unlikely to be competitively employable at CP Rail as a result of his injuries, and questioned his competitiveness in the job market generally. Dr. Heran opined that Mr. Nijjer could not continue in his previous role at CP Rail and would require vocational retraining. He offered a somewhat more positive opinion that Mr. Nijjer would be employable in sedentary to medium level capacity. Ms. Branscombe opined that Mr. Nijjer was no longer able to meet the demands of his former roles with CP Rail.

[355] I find that Mr. Nijjer had no earning capacity during this period.

[356] To calculate Mr. Nijjer's without-accident income for this period, Mr. Benning applied the applicable hourly wage to an assumed 4,124 STE hours. For all the reasons I have set out earlier, I find this to be an overestimation of the hours Mr. Nijjer would have worked without the accident. I find, instead, there is a real and substantial possibility that Mr. Nijjer would have continued to work approximately 275 STE hours per month, such that his 2021 without-accident earnings would have been $124,330.80 (275 hours x 12 months x $37.676/hour); and his 2022 without-accident earnings would have been $112,583.63 (275 hours x 10.5 months x $38.99/hour).

[357] In sum, I assess Mr. Nijjer's gross income loss as follows:

a) $19,401.37 for the period from November 3, 2016 to March 20 2017;

b) $25,388.41 for the period from July 30, 2019 to November 30, 2019;

c) $89,883.14 for the period from December 1, 2019 to December 17, 2020; and

d) $236,914.43 for the period from December 18, 2020 to trial.

[358] This is a total of $371,587.35.

## Per Diem

[359] Mr. Nijjer argued that as part of his past income loss, he is also entitled to be compensated for the loss of what he would have saved of his non-taxable per diem. Mr. Nijjer testified that the per diem is an allowance given to employees to cover the cost of meals and accommodations while working on the road. Where a CP employee requires meals and accommodations, the daily allowance is $112.10. Where a CP employee only requires meals (because they are staying at a CP hotel or with a relative), the daily allowance is set at $43.00.

[360] Mr. Nijjer testified that he tried to save as much of the daily allowance as he could by, for example, finding a cheaper hotel or even bunking with a co-worker. He generally agreed that he would have saved 30% of his per diem, but also noted this was a "bit low." I am satisfied that, without the accidents, Mr. Nijjer would have saved 30% of the per diem allowance he received for each day he would have worked in the pre-trial period.

[361] Mr. Benning was instructed to assume that Mr. Nijjer would have earned $112.10 per day in the form of per diem allowance, and would have saved 30% of this payment. Taking into account that Mr. Nijjer worked a week-on/week-off schedule, and would also have taken 35 days per year as vacation, Mr. Benning assumed that Mr. Nijjer would have been entitled to collect this per diem 165 days per year ([365-35]/2 = 330/2 = 165). He assessed Mr. Nijjer's annual per diem allowance saved as being $12,950, based on the following calculation: $112.10 per day x 165 days x 0.7.

[362] This calculation requires adjusting in two respects. First is the assumption that Mr. Nijjer would have been entitled to the $112.10 allowance every day. It is not clear on the evidence how frequently Mr. Nijjer received the full allowance of $112.10, as opposed to the meal allowance of $43.00. I note that at the time of the First Accident, Mr. Nijjer was staying with a relative in the lower mainland, and therefore would have been only receiving the $43.00 meal allowance. I would reduce the $112.10 figure by 20% to reflect that Mr. Nijjer did not always collect the full $112.10 per diem. Second, Mr. Benning's calculation seems to be based on Mr. Nijjer saving 70% of the per diem allowance (i.e., x 0.7), as opposed to 30% (i.e., x 0.3), as I have found.

[363] I assess what Mr. Nijjer would have saved annually of his per diem as follows: $112.10 - 20% = $89.68 x 165 days x 0.3 = $4,439.16. Broken down monthly this is $369.93 per month.

[364] I have found above that Mr. Nijjer was off work for 4.6 months between November 3, 2016 and March 20, 2017; for four months between July 30, 2019 and November 30, 2019; for 12.5 months between December 1, 2019 and December 17, 2020; and for 22.5 months from December 18, 2020 to the time of trial. This is a total of 43.6 months. This represents a loss of $16,128.95 in savings from his daily per diem.

[365] The total of Mr. Nijjer's gross income loss and the loss of savings from his daily per diem is: $387,716.30 ($371,587.35 + $16,128.95). I would round this down to $385,000. In my view, this amount is fair and reasonable in the circumstances.

[366] This is a gross figure, and I expect the parties will be able to reach agreement on the adjustments that must be made per s. 98 of the Insurance (Vehicle) Act to arrive at the net loss.

Future Loss of Earning Capacity

## Legal Framework

[367] The assessment of an individual's loss of future earning capacity involves comparing the plaintiff's likely future had the accident not happened to their actual future after the accident. While this is an assessment that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment at issue, and is not a mathematical exercise, economical and statistical evidence can help determine what is fair and reasonable: Ploskon-Ciesla v. Brophy, 2022 BCCA 217 at para. 7.

[368] In Rab v. Prescott, 2021 BCCA 345 at para. 47, Grauer J.A. set out a three-step test that a trial judge must undertake when assessing a plaintiff's loss of future earning capacity. Justice Burke summarized the three steps in Choi v. Ottahal, 2022 BCSC 237 at para. 182.

[369] First, does the evidence disclose a potential future event that could lead to a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues that may affect their ability to meaningfully gain employment or remuneration.

[370] Second, does the evidence demonstrate that there is a real and substantial possibility that the potential loss of capacity will cause a pecuniary loss? After establishing that the plaintiff may suffer from a long-term loss of capacity at the first step, the court here evaluates the likelihood that this loss of capacity will affect the plaintiff's ability to earn income.

[371] Third, what is the value of the possible future loss? After establishing a loss of capacity and resultant loss of capacity to earn income, the court should consider the appropriate basis for compensation, contingencies, and the relative likelihood of the loss occurring. The court should reduce the damages award based on the relative likelihood that the hypothetical future would not occur.

[372] The third step may involve one of the two accepted bases for compensation: the "earnings approach" or the "capital asset approach". The earnings approach is more appropriate where there is an identifiable loss of income at the time of trial, often because the plaintiff has an established work history and a clear career trajectory: Ploskon-Ciesla at para. 16. Where no loss of income has occurred at the time of trial, the capital asset approach is generally more appropriate. The capital asset approach allays the risk of under-compensation where the plaintiff lacks a settled career path by creating a more holistic picture of the plaintiff's potential future: Ploskon-Ciesla at para. 17.

[373] Justice Grauer, for the Court, discussed the third step in Steinlauf v. Deol, 2022 BCCA 96 as follows:

[55] As for the quantification, this Court described the process in Gregory v Insurance Corporation of British Columbia, 2011 BCCA 144 at para 32:

An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: Rosvold v. Dunlop, 2001 BCCA 1 at para. 11; Ryder v. Paquette, [1995] B.C.J. No. 644 (C.A.) at para. 8 .

[56] Accordingly, as discussed in Dornan at para 156, it became necessary to assess the respondent's without-accident earning potential, and what the respondent was likely to earn as a result of the accident. At the same time, as discussed in Andrews v Grand & Toy Alberta Ltd, [1978] 2 SCR 229 at 251: "It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made".

[374] In Dornan v. Silva, 2021 BCCA 228, Grauer J.A. discussed the role of contingencies in the analysis:

[92] In approaching this part of the appeal, it is useful to remember that we are dealing with specific contingencies, not general contingencies. The importance of evidence in cases involving a specific contingency was discussed in Graham (and cited with approval by this Court in Hussack):

46 [C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a

trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: Schrump v. Koot, supra, at p. 343 O.R.

[Emphasis added.]

[93] The process, then, as discussed above at paras 63-64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from Athey quoted above at paragraph 64.

[375] Therefore, the application of a specific contingency, whether positive or negative, engages the "real and substantial possibility" analysis, and not simply the "relative likelihood" analysis that follows. "If the contingency is a real and substantial possibility, the process becomes one of assessing its relative likelihood": Boal v. Parilla, 2022 BCSC 2075 at para. 166.

[376] The burden of proof in establishing that a contingency should apply lies on the party seeking to assert it: Lo v. Vos, 2021 BCCA 421 at para. 39.

[377] Following this three-step test, the court must determine whether the proposed damages award is fair and reasonable: Lo at para. 117.

Positions of the Parties

[378] Mr. Nijjer seeks an award of $2,950,000 for his loss of future earning capacity.

[379] Mr. Nijjer submits that the first step of the test has been met as there is clearly a potential future event that could lead to a loss of capacity. He is not working, has chronic permanent injuries and there is a risk of future surgery. Mr. Nijjer says that he is unable to work at the time of trial and into the foreseeable future. His injuries have rendered him not competitively employable.

[380] Mr. Nijjer says the second step of the test is also met. There is a real and substantial possibility that, because of his injuries which have rendered him not competitively employable, he will suffer an income loss. Mr. Nijjer submits his situation was contemplated in Rab.

[381] In terms of assessing the value of the possible future loss, Mr. Nijjer relies upon the earnings approach. He notes the following negative contingencies:

a) His injuries, both physical and mental, are permanent and will likely impact his ability to earn an income for the rest of his life;

b) He may never work again;

c) His vocational prognosis is poor to guarded; and

d) He has a criminal record, which may impact his ability to become employed in the future, but without the accidents would not have been an issue as he would have retired with CP Rail.

[382] Mr. Nijjer also notes a few potential positive contingencies, including that he may learn to live with his injuries to the point where he can work part-time and periodically throughout his life; and may be able to participate in family businesses and earn an income.

[383] Mr. Nijjer says the negative contingencies he has provided are based in the evidence provided by experts and meet the standard of a real and substantial possibility, whereas the positive contingencies are speculative. In any event, Mr. Nijjer says the contingencies can balance themselves, and there should be no contingency deduction.

[384] The defendants concede that the first step of the test is met. They accept that Mr. Nijjer has sustained injuries that pose a real and substantial possibility of a future income loss. They note the experts opined that he sustained chronic injuries that likely preclude heavier, more physically demanding, employment.

[385] The defendants do not, however, agree that the second step of the test is met. They submit there is no real or substantial possibility that the future event in question will cause a pecuniary loss.

[386] The defendants emphasize that none of the experts have opined that Mr. Nijjer cannot return to work. They point out that the only pecuniary loss is in relation to Mr. Nijjer's ability to engage in employment in the heavy category. He can still pursue opportunities of a more sedentary nature, in the light to medium category. They submit such positions are in keeping with Mr. Nijjer's employment prior to joining CP Rail, where he did office jobs, and are consistent with the work he did for OGJ.

[387] The defendants note the following potential positive contingencies:

a) by following the recommended treatments Mr. Nijjer's condition will improve;

b) Mr. Nijjer may participate in a family operated business; and

c) Mr. Nijjer will prove to be industrious as in the past and engage in varied forms of employment using an array of skills.

[388] The defendants urge the court to use the capital asset approach, as the asset that is lost is employment in the heavier demand category. Relying on Kim v. Baldonero, 2022 BCSC 167, they submit that a fair and reasonable award can be derived by taking the plaintiff's pre-accident average earnings (either $75,000 based on Ms. Ren's report, or $100,000 based on Mr. Nijjer working as a foreman) and multiplying this by two. Accordingly, they submit that a fair and reasonable award for loss of future earning capacity would be in the range of $150,000 to $200,000. They add that any such award should be reduced by 25% to account for a failure to mitigate.

Discussion

Step 1: Does the evidence disclose a potential future event that could lead to a loss of capacity?

[389] I am satisfied that the evidence discloses a potential future event that could lead to a loss of capacity. The defendants concede Mr. Nijjer has met this step.

Step 2: Does the evidence demonstrate that there is a real and substantial possibility that the future event in question will cause a pecuniary loss?

[390] Mr. Nijjer's mental and physical injuries are chronic. Because of these injuries, Mr. Nijjer was unable to work at the time of trial and, in my view, will continue to suffer these injuries for the foreseeable future, impeding his ability to work. The medical evidence and Mr. Trainor's evidence supports this conclusion.

[391] Dr. Giantomaso and Ms. Branscombe opined that Mr. Nijjer's injuries have rendered him not competitively employable at CP Rail, or more generally.

[392] Ms. Branscombe was of the view that Mr. Nijjer may be able to work on a full-time basis depending on the physical demands of the job and if his mental health issues can be addressed, but noted that he may be more successful in returning to work if he was able to transition first to part-time work. She also noted that Mr. Nijjer had not participated in employment for the last two years and that prolonged absences from work result in a lower rate of return to employment, particularly if mental health issues are present, as they are here.

[393] Mr. Trainor found Mr. Nijjer's vocational prognosis to be poor to guarded. He also noted the many barriers to employment Mr. Nijjer had acquired including not only the physical and mental injuries, but also his long period of unemployment, and lack of recent job experience. He opined that his competitive employability had been substantially diminished, as following the accidents there are fewer occupations open to him and he is a less attractive candidate for those within his grasp. He noted that while future employment was possible, in his opinion, it was not probable. In his view, Mr. Nijjer was likely to have ongoing difficulty re-establishing and maintaining a durable attachment to the labour force.

[394] I do not accept the defendants' submissions that the only pecuniary loss is to Mr. Nijjer's ability to engage in forms of "heavy" employment. Mr. Nijjer's injuries have affected him as a whole person, and he is less valuable to himself as a person capable of earning income. While there may still be opportunities for him to participate in light or sedentary work, as a result of his injuries his prospects for employment have diminished, he is less capable of earning income from all types of employment (including the work he had been doing at CP Rail between 2014 and 2019), less marketable or attractive as an employee in a competitive labour market, and less likely to rejoin and stay in the labour force.

[395] I am satisfied on the evidence that Mr. Nijjer is less capable of earning income due his injuries. There is a real and substantial possibility that he will have difficulty re-entering the labour force, and that he will not be able to work consistently on a full-time basis until retirement age. I find there is a real and substantial possibility this loss of capacity will cause Mr. Nijjer a pecuniary loss in the future.

### Step 3: Assessing the value of the future loss

[396] The third step is valuation of the future loss. This may be done using either the "earnings approach" as the plaintiff suggests, or the "capital asset approach" as the defendants suggest. In Ploskon-Ciesla at paras. 16-27, the Court of Appeal described when it is appropriate to use each of these tests:

[16] The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

[17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: Brown at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[397] This is not a situation where at the time of trial the plaintiff has continued to earn income at or above his pre-accident level such that the capital asset approach is preferred. Mr. Nijjer has not worked for CP Rail since mid-way through 2019, and there was an identifiable loss of income at the time of trial. In my view, it is appropriate to use the earnings approach to assess Mr. Nijjer's loss of future earning capacity.

[398] Using the capital asset approach and assessing Mr. Nijjer's loss of future income on the basis of multiplying his CP Rail earnings by two years, as the defendants urge me to, would grossly underestimate the loss. However, some of the figures that are used in Mr. Benning's estimates that apply an earnings approach would tend to over-estimate the loss. Certain adjustments are needed.

[399] As I move to the assessment of the future loss of earning capacity, it must be recalled that the central task is to compare the likely future of the plaintiff's working life if the accidents had not occurred with the plaintiff's likely future working life after the accidents: Steinlauf at paras. 56, 71; Dornan at para. 156.

Without-Accidents Future Earning Capacity

[400] I start by considering what Mr. Nijjer would have earned absent the accidents.

[401] I begin by finding there is a real and substantial possibility that but for the accidents, Mr. Nijjer would have remained in the workforce, working on a full-time basis, until the reasonable retirement age of 65. The relative likelihood of this is high, based upon his work history, stated goals and family commitments. I also find there is a real and substantial possibility that Mr. Nijjer would have continued with his employment at CP Rail until retirement. I address the relative likelihood of this occurring shortly.

[402] With this as a starting point, I turn to Mr. Benning's estimates.

[403] Mr. Benning's estimates of Mr. Nijjer's without-accidents future income are based on the assumption that Mr. Nijjer would have continued to work at CP Rail or a similar employer earning income at his historical level to age 65. He estimated Mr. Nijjer's annual income to be $160,826, based on an assumption that Mr. Nijjer would have worked 4,124 STE hours a year. He calculated the present value of Mr. Nijjer's without-accident future income (salary and benefits) from CP Rail from 2022 to 2044 to be $2,389,170. To this he added CP Rail pension plan benefits of $373,752, and per diem allowance of $187,892. The sum is just over $2,950,000, as claimed by the plaintiff.

[404] In the section on past income loss, I found that Mr. Benning's estimates of Mr. Nijjer's without-accident income for 2020, 2021 and 2022, were too high as they were based on the earnings made by Mr. Nijjer's co-workers and an overestimate of the STE hours Mr. Nijjer would have worked. I concluded there was not a real and substantial possibility of Mr. Nijjer working 4,124 STE hours per year in 2021 and 2022, and instead assessed past loss on the basis of him working an average of 275 STE hours per month (or 3,300 STE hours per year). This is, in effect, a 20% reduction to Mr. Benning's estimates of Mr. Nijjer's without-accidents incomes for 2021 and 2022.

[405] In my view, the $160,826 amount Mr. Benning has used as Mr. Nijjer's full-time full-year future earnings from 2022 to 2044, which is based on an assumed annual STE hours of 4,124, is (similarly) too high. I would therefore apply a 20% reduction to the amount reflected on Mr. Benning's Table 1 (Addendum) for future income loss from salary and benefits. This brings the starting point for considering Mr. Nijjer's without-accidents earnings from salary and benefits down to $1,911,336 ($2,389,170 - $477,834).

[406] In addition, the amount reflected on this table for per diem allowance should be adjusted to reflect that Mr. Nijjer would have saved 30% not 70% of that allowance. Rather than $187,892 (12,950/1,000 x 14,509), this amount should be $64,407.77 (4,439/1,000 x 14,509). Accordingly, the starting point for my assessment of Mr. Nijjer's likely total without-accidents earnings is $2,349,495.77 (rounded to $2,350,000), not $2,950,813.

[407] From this, however, certain specific contingencies must be taken into account. While I have found there is a real and substantial possibility that Mr. Nijjer would have continued his employment with CP Rail to retirement, I have assessed the relative likelihood of that possibility as falling on the lower side. I say this for two reasons.

[408] First, Mr. Nijjer's employment history shows a tendency to switch careers. For example, he has worked as a pharmacy technician, a financial consultant, a college admissions advisor, and in sales for a media company. Some of these positions he held for less than two years, others for slightly longer.

[409] Second, Mr. Nijjer has a history of involvement in family businesses, from a young age and throughout his adulthood. He has also been involved in various business ventures with his brother, Jason, including Ezzzy Moving and the OGJ.

[410] This history of Mr. Nijjer shifting careers every several years, generally to office-based jobs, and of becoming engaged in family businesses points to a lower relative likelihood that Mr. Nijjer would have continued his employment with CP Rail for the next 22 years. There is, in my view, a moderate likelihood that Mr. Nijjer would have left CP Rail after a period of time to pursue a different type of career and/or to pursue business opportunities with family members. Such opportunities would, at least initially, likely be less lucrative than continuing on at CP Rail.

[411] I also find there is a real and substantial possibility that Mr. Nijjer would have taken more than ordinary time out of the workforce at various points over his career, unpaid, to attend to family matters. This is what he did in 2018 during his mother-in-law's illness and death, and I find there is a moderate likelihood that he will do so again.

[412] In addition, I agree with Ms. Ren that Mr. Benning's adjustments for labour force participation rates have tended to skew Mr. Nijjer's participation rates upward. In this regard, Mr. Benning relied on data from the 2016 census for males in B.C. of Mr. Nijjer's age and education level. He then adjusted these values to remove those in his cohort already outside of the labour force at the time. Notably, this adjustment assumed that Mr. Nijjer's

attachment to the labour force over his lifetime would be somewhat greater than the average male. Mr. Benning explained, in cross-examination, that his approach on this topic was based on his assumption that Mr. Nijjer had higher labour participation rates than most at the time of the First Accident. This assumption has not been established on the evidence.

[413] In light of these findings regarding Mr. Nijjer's career trajectory, I would further reduce Mr. Benning's estimates of Mr. Nijjer's post-trial without-accidents earning capacity by 20%. This brings the assessment of Mr. Nijjer's without-accidents future earning capacity down to approximately $1,880,000.

Post-Trial With-Accidents Earning Capacity

[414] I now consider Mr. Nijjer's with accidents future earning capacity.

[415] Mr. Nijjer has not worked at CP Rail since 2019 and his employment was officially terminated during the course of this trial. He argues that it is highly unlikely he will ever be employed again or earn income through various entrepreneurial businesses. In other words, he says he has no residual earning capacity. While he points to a few positive contingencies, including that he may learn to live with his injuries and take on periodic part-time work and/or participate in a family business, he argues that these positive contingencies require "things to line up" and a lot of potential events to occur. He says they are speculative, while the negative contingencies are based on the evidence. Ultimately, he says the negative and positive contingencies cancel each other out, and there should be no or very little deduction made in the amount sought for future loss of earning capacity.

[416] I do not accept the extent of the future loss Mr. Nijjer claims. Nor do I agree that the positive contingencies he outlined are speculative.

[417] Mr. Nijjer's prognosis is guarded, but not dire. There is the possibility that Mr. Nijjer's physical and mental injuries may not improve and may continue to impact his ability to re-enter the workforce. There is also the possibility that his conditions will worsen. He may struggle to find employment in a competitive labour market given his prolonged absence and/or criminal history. There is also the possibility that if he does find light or sedentary work, this is likely to be less lucrative than his former employment with CP Rail.

[418] Nevertheless, there is good reason, on the evidence, to have optimism about Mr. Nijjer's future. While the above negative contingencies should be accounted for in the assessment, I find the relative likelihood of the possibility that Mr. Nijjer will never work again, as he argues, to be very low. Rather, I find there is a real and substantial possibility that Mr. Nijjer will be capable of doing work that falls into the light category in the future if he follows the treatment recommendations (as I fully expect he will). This was the opinion expressed by Ms. Branscombe who noted that, depending on the physical demands of such a job, Mr. Nijjer may be able to work on a full-time basis, if he also managed to deal with this mental health issues.

[419] Mr. Trainor's assessment of Mr. Nijjer's capacity and probability of returning to work in the future was more guarded than Ms. Branscombe's. Mr. Trainor did, however, opine that Mr. Nijjer had some "residual sedentary to light strength demand employment options" in business administration, sales, and/or customer service. He noted that his options could be enhanced with additional training. Mr. Trainor also noted the possibility of Mr. Nijjer securing employment with "sympathetic employers" which may include family and friends, who would be prepared to accommodate him by allowing him to work part-time, allow for sick leave or stress leave if needed, and who would have reduced productivity expectations.

[420] Dr. Heran anticipated that Mr. Nijjer would be able to get to work in some sort of capacity, though may not be able to be as vigorous as before the accidents. He opined that he was employable in some capacity, likely sedentary to intermittent medium level capacity.

[421] Based on the opinions of Ms. Branscombe, Mr. Trainor, and Dr. Heran, and my earlier findings regarding Mr. Nijjer's work history and involvement in family businesses, I find there is a real and substantial possibility with moderate likelihood that Mr. Nijjer will be capable of performing light or sedentary work in the future, as well as a relatively high likelihood that he will find employment opportunities with a benevolent employer, such as a family business. Taking into account the negative contingencies I outlined above, I assess Mr. Nijjer's with-accidents future earning capacity (i.e., his residual earning capacity) at approximately 40% of his without-accidents earning capacity, or approximately $752,000.

[422] Taking into account the evidence, the positive and negative contingencies, and the estimates available, I am satisfied that a fair and reasonable award for Mr. Nijjer's future loss of income earning capacity, rounded up slightly, is $1,130,000.

## Failure to Mitigate

[423] A plaintiff in a personal injury action has a positive duty to mitigate, or take reasonable steps to limit their loss. The defendant has the burden of proving that a plaintiff failed to mitigate: Pearson v. Savage, 2020 BCCA 133 at para. 74.

[424] The defendants advanced brief arguments that any amount awarded to Mr. Nijjer for either past or future loss of earning capacity should be reduced by 25% to account for Mr. Nijjer's failure to pursue alternative employment based on the suggestions made by various assessors.

[425] In Porter v. Feizi, 2023 BCSC 491 at para. 44, Justice Lamb dealt with a similar argument, and concluded it was more appropriate to take this into account in assessing past and future loss of earning capacity, based on the real and substantial possibilities established by the expert evidence, adjusted for contingencies. Justice Hughes took a similar approach in Arvanitis v. Cleave, 2023 BCSC 672 at para. 312. I agree with these approaches.

[426] My award for past loss of earning capacity takes into account Mr. Nijjer's capacity in late 2019 and early 2020 to do some sedentary work. My award for future loss of earning capacity also takes into account the real and substantial possibility that Mr. Nijjer can engage in light or sedentary work, and also considers the impacts of his prolonged absence from the workforce. As such, I decline to make the reduction sought by the defendants based on a failure to mitigate.

## Future Care Costs

[427] The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the injured plaintiff to the position they would have been in had the accident not occurred. The award is based on what the medical evidence shows to be reasonably necessary to promote the mental and physical health of the plaintiff: Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at paras. 29-30, citing Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (SC). The test for determining the appropriate award is an objective one based on medical evidence. For an award of future care, claims must be reasonable and have a medical justification: Tsalamandris v. McLeod, 2012 BCCA 239 at paras. 62-63, citing Milina at 84. Generally, there must also be evidence that the plaintiff is likely to incur these costs in the future: Montazamipoor v. Park, 2022 BCSC 140, para. 112.

[428] Awards for the cost of future care may be adjusted for positive or negative contingencies depending on the plaintiff's specific care needs. The court may decrease an award based on the chance of the plaintiff's condition improving, or increase one based on the chance that the plaintiff will need additional care. Each case falls to be determined on its particular facts: Gilbert v. Bottle, 2011 BCSC 1389 at para. 253.

[429] Mr. Nijjer seeks an amount of $123,471 for his cost of future care. He relies on the medical evidence and Ms. Branscombe's report which notes four types of future care Mr. Nijjer will need: medication; various therapies including physiotherapy, kinesiology, psychology, counselling, and occupational therapy; services to assist with home, yard and vehicle maintenance; and equipment.

[430] Ms. Branscombe opined that Mr. Nijjer would benefit from various types of rehabilitative services. In particular, she noted he would benefit from participating in a ten-week progressive goal attainment program offered by an occupational therapist to focus on pain management and addressing pain perceptions. She also noted he would benefit from ongoing participation in an exercise program. Such a program would address physical strength, range of motion and flexibility, and also address mood symptoms. She recommended daily cardiovascular activity and stretching/meditative exercises, and participation in a strengthening exercise three times per week. She noted Mr. Nijjer will require vocational assessment and may require a work hardening program.

[431] Mr. Nijjer's claim, based on the chart in Ms. Branscombe's report, is as follows:

Item

Lump Sum Present Value

a. Medication

Bruproprion

Tramadol

Ibuprofen

Robax Platiuum

Dispensing Fees

$2,799.00

$8,987.00

$525.00

$742.00

$2,637.00

b. Therapies

Physiotherapy

PGAP

Psychology

Couples counselling

Work Hardening Occupational Therapist

Work Hardening Therapy Assistant

Kinesiology

Mileage

Fitness Pass to age 80

Yoga

$29,706.00

$1,897.00

$6,676.00

$2,077.00

$1,370.00

$2,612.00

$3,240.00

$119.00

$15,600

$26,998.00

c. Services

Seasonal Home and Yard Maintenance

Vehicle Maintenance

$11,512.00

$2,133.00

d. Equipment

Under knee bolster

Body Pillow

Stretch Bands

Wrap around neck Pillow

Snow Blower

Dog Poop Scooper

$289.00

$308.00

$199.00

$296.00

$2,618.00

$131.00

Total

$123,471.00

[432] The defendants submit that a fair and reasonable assessment of the cost of future care is approximately $100,000. They say the amounts Ms. Branscombe has allocated for certain medications (such as Tramadol) are too high, that the number and duration of the physiotherapy sessions (12 annually from 2021 onwards) are too high and continue for too long, and that couples counselling is not a reasonable expense related to the accidents.

[433] I find that all of the expenses claimed by Mr. Nijjer, with the exceptions noted below, are medically justified and reasonably necessary to promote his mental and physical health, and are likely to be incurred by him to the ages assumed in Ms. Branscombe's report.

[434] Mr. Nijjer's evidence was that he is not using Tramadol as frequently as Ms. Branscombe's report suggests. Accordingly, I would reduce this figure from $8,987 to $4,500. In addition, I agree with the defendants that couples counselling is not solely related to the accidents and there is no evidence that Mr. Nijjer and his wife are currently attending or plan to. I would remove this amount ($2,077) from the assessment. Mr. Nijjer testified that he and his wife share poop scooping duties, and there was no evidence he required a long-handled scooper for this task. I would remove this amount ($131) from the assessment.

[435] I do not agree that the physiotherapy sessions should be reduced. Mr. Nijjer has attended physiotherapy in the past, and continuing this form of therapy has been widely recommended. In this regard, I prefer the opinion of Ms. Branscombe over that of Ms. Mulgrew.

[436] I award at total of $116,776 for future care costs.

## Special Damages

[437] Special damages must be both reasonable and necessary. While not every expense needs to have been recommended by a healthcare professional, there must be a medical justification for each expense claimed: Taylor at para. 86.

[438] Mr. Nijjer submits he has attended treatments as a direct result of the accidents and has spent his own funds for items relating to his home and car. His summary of expenses is as follows:

a. Prescriptions

$121.39

b. Kamloops Integrated Wellness - Registered Massage Therapy

$540.00

c. Kinetic Energy & Wellness Centre -Physiotherapy

$660.00

d. Perspective Counselling

$1,197.00

e. Kamloops Physiotherapy and Sports Injury

$946.00

f. Miscellaneous - Medical

$1,024.81

g. Miscellaneous - Household

$8,917.09

h. Miscellaneous - Automotive

$4,369.62

i. Mileage

$5,741.82

j. SunLife Shortfall (not subrogated)

$191.55

k. Manulife Submitted Amount

$6,966.23

Total

$30,675.51

[439] With regard to miscellaneous automotive expenses, Mr. Nijjer concedes that the oil changes include the cost of oil, and not labour, and has reduced his claim under this heading by $280. Accordingly, Mr. Nijjer claims $30,395.51 for special damages.

[440] The defendants say that Mr. Nijjer's claim for special damages is largely reasonable. However, they take issue with certain of the expenses and propose a reduction to $27,550.14. In particular, they note that the prescription for Pantoprazole was not related to the accidents; that the cost for the irrigation blow outs (claimed as part of household expenses) would have been incurred regardless of the accidents; that pet grooming expenses (claimed as part of household expenses) are unrelated to the accidents; that the costs for oil changes (claimed as part of automotive expenses) also include the cost of oil, which would have been incurred regardless of the accidents (a point the plaintiff concedes); and that the numerous housecleaning invoices from Ezzzy cleaning may not have been paid and in any event cover tasks that family members would do regardless of the accidents.

[441] I find the expenses claimed by the plaintiff are largely medically justified and reasonable. However, I agree with the defendants' submissions that note where the expenses should be reduced as the costs would have been incurred regardless of the accidents. In particular, I find there should be reductions to the expenses claimed as miscellaneous household and automotive. The reduction to the prescription expenses is negligible. I award special damages in the amount of $27,550.

In Trust Claim

## Legal Principles

[442] In personal injury cases, an award may be made for services provided by a family member (often a spouse) beyond what would be expected from the nature of the relationship, and which would otherwise have to be done by a hired third party. These types of claims are referred to as "in trust" claims.

[443] Claims for household duties and other services rendered by immediate family members are allowable where the plaintiff demonstrates the need for such services as a consequence of the injuries sustained. The plaintiff must satisfy the court, on a balance of probabilities, that the family member providing the services suffered a direct pecuniary loss (because of the time and effort put into those services) or that the family member's efforts replaced housekeeping expenses that would have otherwise have been incurred: Ellis v. Star, 2008 BCCA 164 at para.17.

[444] In Bystedt v. Hay, 2001 BCSC 1735, aff'd 2004 BCCA 124 at para. 180 Madam Justice D. Smith (as she then was) summarized the factors to be considered in the assessment of such claims:

a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;

b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;

c) the maximum value of such services is the cost of obtaining the services outside the family;

d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;

e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,

f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

## Positions of the Parties

[445] Mr. Nijjer makes an in-trust claim of $25,000 for his wife's caregiving between the two surgeries and after the second surgery. He submits that the care Mrs. Nijjer provided during this time was over and above what would be expected from a family relationship.

[446] The defendants say no in-trust award should be made as no evidence was provided to substantiate the claim.

## Discussion

[447] Mrs. Nijjer testified that following her husband's surgeries, he "couldn't do anything" and needed assistance with basic tasks for several months. While Mrs. Nijjer was a credible witness, I find her evidence somewhat unreliable in this area. Given my findings about Mr. Nijjer's participation in the OGJ during this timeframe, I find Mrs. Nijjer has exaggerated the extent of Mr. Nijjer's incapacity and its duration. I do accept that in addition to taking care of the house and their young children, which she was already performing to a greater degree, helping Mr. Nijjer also fell to her for a time after his surgeries. In particular, she described having to help him get out of bed and shower him. I also accept that this was not easy for either of them.

[448] While I am satisfied that the personal care Mrs. Nijjer provided to her husband during his convalescence was difficult, I agree with the defendants that the evidence on this topic was not well enough developed and I decline to make any award.

[449] Authorities relied upon by Mr. Nijjer, like Sarginson v. Nordquist, 2019 BCSC 1386 had a fuller and more developed evidentiary basis to support the (modest) awards made. While Mrs. Nijjer gave some general examples of the care she provided her husband, the majority of her testimony focussed on the impacts the accidents had on their family life, broadly. I am not satisfied these general examples are over and above what would be expected of a family member. In addition, there was no evidence about hours Mrs. Nijjer put in caring for her husband, nor was there any evidence upon which I could try to assess the true and reasonable value of any services performed taking into account the time, quality and nature of those services.

[450] Considering all of the factors outlined above, I am not satisfied the plaintiff has met his burden with respect to this claim.

## Conclusion

[451] In summary, I award damages as follows:

Non-pecuniary damages

$220,000

Past loss of earning capacity

$385,000 (gross, and subject to adjustments)

Future loss of earning capacity

$1,130,000

Cost of future care

$116,776

Special damages

$27,500

TOTAL (subject to the indicated adjustment)

$1,879,276

## Costs

[452] The plaintiff is entitled to pre-judgment interest at the prevailing rate and costs. If the parties are unable to agree on costs, they may speak to the issue. All that remains is to thank counsel for their excellent work.

"S.A. Donegan J."

DONEGAN J.


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