

CANADA / JUDGMENT

Rabnett v. Halliday

2022 BCSC 828

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 828 Rabnett v. Halliday IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Rabnett v. Halliday, 2022 BCSC 828 Date: 20220517 Docket: M162217 Registry: Victoria Between: Stefan Rabnett Plaintiff And Clifford Halliday Defendant Corrected Judgment: The text of the judgment was corrected at paragraph 21 on October 26, 2022. Before: The Honourable Justice Douglas Reasons for Judgment Counsel for Plaintiff: G.R. Jackson O.L. Grant Counsel for Defendant: J.R. Bradbury T. Sippel Place and Date of Trial: Victoria, B.C. December 6-10, and 13-17, 2021 Place and Date of Judgment: Victoria, B.C. May 17, 2022 Table of Contents I. INTRODUCTION.. 5 II. BEFORE THE ACCIDENT.. 5 III. THE ACCIDENT.. 6 IV. AFTER THE ACCIDENT.. 6 A. Injuries. 6 B. Treatment 7 C. Current Status. 8 V. CREDIBILITY AND RELIABILITY OF EVIDENCE.. 9 A. Mr. Rabnett 9 B. Lay Witnesses. 12 C. Medical Witnesses. 13 D. Economist Expert 14 VI. MEDICAL EVIDENCE.. 14 A. Dr. Peter Sullivan, GP.. 14 B. Dr. Corrie Grabowski, Psychiatrist 15 C. Dr. Brent MacNicol, Anaesthesiologist/Pain Specialist 17 D. Dr. Anthony Salvian, Vascular Surgeon. 19 E. Margherita Bracken, Occupational Therapist 21 VII. CAUSATION.. 22 A. Parties' Positions. 22 B. Legal Framework. 22 C. Analysis and Conclusion. 23 VIII. GENERAL DAMAGES.. 23 A. Parties' Positions. 23 B. Legal Framework. 24 C. Evidence. 24

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INTRODUCTION

- [1] On February 4, 2015, the plaintiff, Stefan Rabnett, was rear-ended while driving home from work in Victoria (the "Accident"). Liability for the Accident is admitted and the trial of this action proceeded on the issue of damages only.
- [2] It is common ground that Mr. Rabnett has been diagnosed with chronic myofascial pain and post-traumatic thoracic outlet syndrome ("TOS") caused by the Accident. The parties' central dispute is the severity of those injuries and the extent to which they have impacted Mr. Rabnett's life including, in particular, his ability to work as an acupuncturist.
- [3] Mr. Rabnett claims general and special damages, a loss of housekeeping capacity, damages for past and future income loss, and future care costs. He advances in trust claims on behalf of his common law partner and her sister. The defendant, Clifford Halliday, submits that Mr. Rabnett has failed to mitigate his loss. BEFORE THE ACCIDENT
- [4] Mr. Rabnett was 41 years old at the time of the Accident. He had worked as an acupuncturist since 2003. In 2005, following one year of additional study, he became a registered practitioner of Chinese medicine. He enjoyed a variety of recreational activities including running, hiking, and swimming. By all accounts, he was healthy and active.
- [5] Mr. Rabnett attended for different treatments at the multi-disciplinary clinic in Victoria where he worked before the Accident (the "BC Clinic"). He did so for non-therapeutic reasons to "enhance his efficiency" and to familiarise himself with his colleagues' practice styles, something he found useful when making referrals.
- [6] Mr. Rabnett married in 2005. At the time of the Accident, his marriage was deteriorating. By 2016, he was separated and had his own residence. He divorced in 2018. The failure of his marriage left him with significant debt. THE ACCIDENT
- [7] Mr. Halliday's pick-up truck struck Mr. Rabnett's vehicle from behind. Mr. Rabnett had stopped suddenly to avoid hitting the vehicle in front of him, after that driver braked abruptly.

- [8] Mr. Rabnett saw the grill of Mr. Halliday's truck in his rear-view mirror and braced for impact; he said his body whipped forward and backward when he was struck. After the Accident, he got out of his car and had an amicable conversation with Mr. Halliday before driving about four blocks to his home. No emergency vehicles attended the Accident scene. Based on the unchallenged statements in two of the expert reports in evidence, Mr. Rabnett was wearing a seatbelt at the time and airbags did not deploy. His vehicle sustained approximately \$7,000 in damage. AFTER THE ACCIDENT Injuries
- [9] The first night after the Accident, Mr. Rabnett experienced right-sided neck and arm pain. He described his right arm as feeling disconnected. Within a week, he had pain between the scapula (shoulder blade) and right upper back and a worsening sensation of numbness in his right arm. He said it felt like his right arm had been replaced with someone else's, but not wired properly. He complained of headache pain that radiated into his jaw but admitted it was not significant. He saw his family doctor, took Advil and Tylenol, and received some gentle treatments at work. He thought he had sustained a soft tissue injury that would heal.
- [10] According to Mr. Rabnett, his injuries gradually progressed in the three to six months after the Accident. The altered sensation in his right arm and hand seemed to worsen. His headache pain persisted but was not debilitating. He remained optimistic that his injuries would heal.
- [11] In the following months, Mr. Rabnett said his injuries continued to progress. His biggest concern was his perceived loss of strength, dexterity, and receptivity in his right hand. It felt to him like he had clamps at his right elbow and wrist (which he likened to a squeezing sensation) and that he was wearing a glove on his right hand. He had some headache pain but it was not his dominant concern. He described ongoing pain in his right neck, upper back, and shoulder blade and some interruption in his sleep. His symptoms were triggered if he took inadequate breaks at work or failed to rest appropriately. Treatment
- [12] Mr. Rabnett received a variety of treatments after the Accident, including chiropractic and massage therapy, scapular stabilisation exercises, and injections. Most recently, he has tried physiotherapy and IMS (intra-muscular stimulation). While he agreed that treatment nudged things in a positive direction, it did not resolve his symptoms. Mr. Rabnett recalled seeing neurologist, Dr. Wayne Shtybel, and undergoing neurological testing within six months of the Accident. In fact, this occurred in September 2016, about 1.5 years after the Accident. Dr. Shtybel recorded a normal neurological examination of the cervical spine and a normal electrophysiologic evaluation. He noted that Mr. Rabnett complained of a right upper extremity injury and had been treated with chiropractic therapy, massage, acupuncture, and active release. It was his recorded impression that Mr. Rabnett had suffered a muscular ligamentous injury and probable functional TOS. In his consultation report dated September 1, 2016, under the heading "Recommendations", Dr. Shtybel listed three treatment options:
- i) Just following things;
 - ii) Seeing a physiotherapist for TOS scalene stretching exercises; and
 - iii) A trial of Botox (which Dr. Shtybel noted he was not convinced would be effective).

- [13] Mr. Rabnett took issue with some aspects of Dr. Shtybel's September 1, 2016 consultation report. He denied he would have reported (contrary to what is recorded) having no pain down his right arm or only occasional neck pain (although he agreed he might have described the latter as intermittent). While he conceded that Dr. Shtybel's consultation report does not include a recommendation that he reduce his work hours, he maintained that Dr. Shtybel told him to avoid any activities which aggravated his symptoms. Mr. Rabnett admitted he did not follow Dr. Shtybel's recommendation to see a physiotherapist until about two months before trial (or more than five years after he saw Dr. Shtybel). By the date of trial, he had attended physiotherapy only twice in the almost seven years since the Accident.
- [14] Mr. Rabnett's current treatment includes physiotherapy, IMS, chiropractic sessions, and massage therapy. Dr. Peter Sullivan, his current GP, has referred him to a physiatrist in Calgary. He takes occasional Tylenol or Advil to manage his symptoms and does scapular stabilisation exercises and Tai Chi. Current Status
- [15] Mr. Rabnett's current complaints are predominantly focused on his neck, upper back, right shoulder, arm and hand. He remains active but has modified and eliminated some of the activities he previously enjoyed. While he said he no longer does back country hiking, he admitted in cross-examination that he hiked up a mountain in South Africa in 2017. He now takes dips in the pool rather than swimming laps. He tries to avoid roughhousing with his young son and uses a waist leash when taking his St. Bernard dog for a run. He has gained about 20 pounds since the Accident.
- [16] Mr. Rabnett said his symptoms intensify if he overworks or takes inadequate breaks; daily activities can aggravate them. While he is frustrated that he has not fully recovered, he concedes that he has had no psychological or mental health difficulties since the Accident.
- [17] In 2017, Mr. Rabnett met Kaitlin Nault, his current partner, with whom he has a three-year old son. She was then a receptionist at the BC Clinic. In May 2018, the month before their son was born, they moved in together. In August 2019, they relocated to Canmore, Alberta, to be closer to Ms. Nault's family and for reasons unrelated to the Accident. CREDIBILITY AND RELIABILITY OF EVIDENCE
- [18] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in the frequently cited passages of Justice O'Halloran in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357 (B.C.C.A.), and Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296 at para. 186. I have applied those principles here. Mr. Rabnett
- [19] Mr. Rabnett's credibility was not seriously challenged. However, the defendant says his evidence is unreliable, noting that where, as here, a plaintiff seeks to recover damages for what are essentially subjective complaints, reliability is a significant issue.
- [20] In *Allen v Figueira*, 2020 BCSC 1864, Justice Hori distinguished between the assessment of credibility and reliability. His comments are instructive:

- [93] I interpret the comments of Dickson J. to mean that the assessment of credibility involves two questions. The first question is whether the witness is being truthful, in the sense that the witness is not being deliberately deceitful. If a deliberate falsehood is established, then it may be difficult to disentangle truth from deceit and some truthful aspects of the witness' testimony may lose their force. However, an allegation that a witness is being deliberately deceitful under oath is a serious attack on an individual's integrity, which requires more than just speculation or innuendo to prove (Hardychuk at para. 9).
- [94] The second question in the credibility assessment is whether the evidence of the witness is reliable. The assessment of the reliability of a witness' testimony involves the examination of factors outlined by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, including:
- a) the ability and opportunity of the witness to observe events;
 - b) the firmness of the witness' memory;
 - c) the ability of the witness to resist the influence of interest to modify recollection;
 - d) whether the witness' evidence is in harmony with independent evidence;
 - e) whether the witness' evidence changes during direct and cross-examination;
 - f) whether the witness' evidence seems unreasonable, impossible, or unlikely;
 - g) whether the witness has a motive to lie; and
 - h) whether the witness' evidence is consistent with the probabilities affecting the case as a whole.
- [21] As noted by Justice Horsman (then of this Court) in *Kim v. Baldonero*, 2022 BCSC 167 at para. 62 [Kim], the evidence of an honest witness may be unreliable despite their genuine effort to tell the truth.
- [22] Mr. Rabnett was neither a precise witness nor a clear historian. He had a poor general recollection of many material details including, in particular, those related to his work history. By his own admission, he is not good with dates. His answers in cross-examination were often qualified and not always responsive. He claimed ignorance and confusion about business expense deductions in his own filed tax returns.
- [23] There was some evolution in Mr. Rabnett's evidence given on discovery and at trial. At trial, he testified about how his body moved inside his vehicle during the Accident; at his 2018 discovery, more than three years before trial, he was unable to recall those details. When confronted with this discrepancy, Mr. Rabnett said he was unable to describe adequately what had occurred on his discovery; at trial, he surmised that, since his vehicle was struck, it must have been pushed forward in the Accident. On discovery, he could not recall if his vehicle was drivable after the Accident; at trial, he retreated from this evidence and said he meant that, although he drove his vehicle home, it was not driveable. While he gave specific

evidence at trial about pulling over and crying after the Accident, he could not say when this memory returned.

- [24] It was my general impression that Mr. Rabnett has a poor recollection of precisely what occurred at the time of the Accident and that his memory coalesced somewhat as a result of his preparation for trial. He admitted in cross-examination that he does not know when he recovered a memory of certain details, conceding that, for him, there is no meaningful difference between something actually happening or him later surmising that it did. Mr. Rabnett's failure to appreciate this distinction raises questions about the reliability of some of his evidence.
- [25] Mr. Rabnett's trial evidence did not always accord with the contemporaneous records in evidence. While he could not recall at trial how many patients he was seeing on average before the Accident, he provided comparatively detailed information about his work history to the medical experts who assessed him, suggesting he had substantially reduced his patient volume after the Accident. The business documents produced pursuant to subpoena shortly before trial contradicted this evidence. In fact, until relocating to Alberta in 2019, Mr. Rabnett worked full-time hours after the Accident, taking some breaks during his work day. He saw more patients in the years immediately following the Accident than he did before the Accident. In an attempt to explain this discrepancy, Mr. Rabnett said he meant that his capacity to see patients was reduced after the Accident. Notably, he did not qualify the information he provided to the medical experts in this manner.
- [26] Plaintiff's counsel argues that minor inconsistencies in Mr. Rabnett's reports to doctors ought to be considered inconsequential, citing *Diack v. Bardsley* (1983), 46 B.C.L.R. 240 (S.C.). I do not agree this description is applicable here or that the inconsistencies in Mr. Rabnett's trial evidence were minor. Mr. Rabnett is a trained health care professional. He treated patients with motor vehicle accident injuries and ICBC claims at the BC Clinic. In the circumstances, I conclude that he would have appreciated the importance of providing a clear and accurate history to the experts who assessed him and that this information would form an integral part of the factual foundation for their opinions. In my view, the subjective history he provided to them was objectively misleading.
- [27] I accept that Mr. Rabnett attempted to answer questions to the best of his ability at trial. However, the discrepancies in his evidence, his use of imprecise and ambiguous language, his poor general recollection of many details, and the evolution in some of his evidence over time, persuade me that he was not a consistently reliable witness. I have, therefore, approached his uncorroborated evidence with some caution and skepticism. Lay Witnesses
- [28] Mr. Rabnett called Ms. K. Nault and her sister, Stephanie Nault, at trial. Despite their familial relationship with Mr. Rabnett, both were straightforward witnesses who answered questions clearly and directly. Their evidence was consistent and accorded with the preponderance of probabilities. I found them to be credible and reliable witnesses.

- [29] Sarah James and Julia Martorana were Mr. Rabnett's work colleagues at the BC Clinic. It is clear he was a well-liked acupuncturist when he worked there. In April 2016, Ms. James wrote a letter to plaintiff's counsel, setting out her calculation of Mr. Rabnett's past income loss. She retreated from this letter at trial, saying she did not know what she had based it on and suggesting her estimate seemed insufficient (although she had no better information at trial). Those answers raised questions about Ms. James' objectivity and whether her retrospective view of this letter (which, on its face, undermined Mr. Rabnett's substantial claim for past income loss at trial) influenced her evidence. When asked in cross-examination about Mr. Rabnett's absences from the BC Clinic after the Accident, Ms. James speculated in error that they must have been related to his rehabilitation. On the plaintiff's own evidence, he started taking Fridays off after his son was born in June 2018. Ultimately, I have some questions about Ms. James' objectivity and the reliability of some of her evidence.
- [30] Ms. Martorana, a chiropractor, treated Mr. Rabnett after the Accident at the BC Clinic. She conceded that she did not chart all of those sessions; it appears Mr. Rabnett has not paid for them. Like Ms. James, she testified about her personal expectations regarding Mr. Rabnett's post-Accident patient billings. She offered unsolicited views about his sincerity. While I accept that Ms. Martorana was attempting to be helpful, I question the reliability of some of her evidence and her ability to be wholly objective.
- [31] Vanessa Joosten is the owner of the clinic in Alberta where Mr. Rabnett currently works (the "Alberta Clinic"). She was a straightforward witness who answered questions in a forthright manner. Medical Witnesses
- [32] Mr. Rabnett called vascular surgeon, Dr. Anthony Salvian, anaesthesiologist, Dr. Brent MacNicol, and physiatrist, Dr. Corrie Grabowski. All are experienced specialists in their respective practice areas and knowledgeable about the diagnosis and treatment of TOS. They gave clear, responsive answers, made appropriate concessions as necessary, and were credible experts.
- [33] Mr. Rabnett also called his family physician, Dr. Sullivan. He and Mr. Rabnett cross-refer patients to each other and have both a working and doctor/patient relationship. Some of Dr. Sullivan's evidence extended beyond his role as Mr. Rabnett's current GP. For example, he testified about the success and financial viability of the Alberta Clinic and business prospects in Canmore. The source of this information was not always clear. Dr. Sullivan is not an expert in TOS and he relied heavily on the opinions of involved specialists. Ultimately, while I appreciate that he too was attempting to be helpful, I attach limited weight to Dr. Sullivan's evidence.
- [34] Finally, Mr. Rabnett called occupational therapist, Margherita Bracken. Defence counsel submits that she was a combative witness and an advocate for the plaintiff. There were some troubling errors in her functional capacity evaluation ("FCE") report:

- a) Contrary to what her report indicates, she did not complete the Valpar 9 test (which she said is not relevant in this case as Mr. Rabnett is not required to work in multiple different positions);
 - b) Her report references this test (based on a pre-populated template which included Mr. Rabnett's name), something she agreed could be misleading;
 - c) She included an erroneous neck disability score in her report (which she was unable to calculate manually as she relies on a computer for this purpose); and
 - d) She admitted the correct score for this test was 14 (and not 15.6, as noted in her report), which moved Mr. Rabnett from the moderate to the mild category of disability.
- [35] Ms. Bracken occasionally offered unnecessary explanation; her answers were not always responsive. When confronted with the error in her report regarding the Valpar 9 test, she suggested this test would have confounded her results, an answer that was somewhat defensive and different from the explanation she offered to plaintiff's counsel for her mistake (i.e., the use of a pre-populated template).
- [36] Ms. Bracken's report suggested in error that she had conducted a test when she had not done so; the result was an inaccurate and misleading report. However, Ms. Bracken acknowledged and corrected the errors in her report at trial. Ultimately, I accept that she conducted a reasonable assessment of Mr. Rabnett's functional abilities that produced reliable results. Economist Expert
- [37] The defendant called labour market economist, Mark Szekely, at trial. Mr. Szekely was a non-partisan witness who provided clear, informative, and responsive answers. I accept his evidence without difficulty. MEDICAL EVIDENCE Dr. Peter Sullivan, GP
- [38] Dr. Sullivan has been Mr. Rabnett's family physician since October 2019. He authored a medical-legal report dated September 13, 2021 and was qualified as an expert in the area of general family medicine. His report was based primarily on a review of the chart notes of other physicians involved in Mr. Rabnett's care, and information provided by Mr. Rabnett. Dr. Sullivan has seen Mr. Rabnett as a patient only four times in person and three times remotely.
- [39] Dr. Sullivan described Mr. Rabnett as a keen, reliable, and compliant patient. In his opinion, Mr. Rabnett's symptoms are chronic. He has referred Mr. Rabnett to a Calgary physiatrist and is currently awaiting input from this specialist. Dr. Sullivan admitted he assessed Mr. Rabnett's complaints within his limited understanding of TOS and the scope of his family practice. He conducted a grip strength test but agreed it was not objective. He referred Mr. Rabnett for physiotherapy but did not know when Mr. Rabnett started this treatment.

- [40] After the Accident, Dr. Sullivan diagnosed Mr. Rabnett with hypertension, sleep apnea, hemochromatosis (a genetic disorder characterised by excessive iron in the blood and associated with the potential for organ damage), and a deviated septum (resulting in a referral to an ENT specialist). None of those conditions is related to the Accident. Dr. Corrie Grabowski, Physiatrist
- [41] Dr. Corrie Grabowski was qualified as an expert in physical medicine and rehabilitation, and neuromuscular disorders. She sees a variety of patients in her practice, including those with headache, spasticity, and chronic and myofascial pain. She has been in practice since 2007 and has had an academic appointment at the University of British Columbia since 2008.
- [42] Dr. Grabowski obtained a history from Mr. Rabnett, examined him on May 5, 2017, and prepared a report of the same date. In doing so, she relied on the history he provided and the recorded observations of various health professionals who assessed him in the two years immediately after the Accident.
- [43] Mr. Rabnett reported ongoing right neck and shoulder girdle pain with radiation down his right arm. Dr. Grabowski noted those symptoms improved after the Accident and that his pain became diffuse and more localised to C5/6 and the scalene muscles. Mr. Rabnett described constant numbness of variable intensity in the inner aspect of his forearm. Dr. Grabowski assessed his hand strength to be normal and made the following findings on her examination of Mr. Rabnett:
- a) No pain behaviour;
 - b) No obvious atrophy or wasting of the right upper extremity or hand;
 - c) Full and pain-free range of motion in the shoulder and neck;
 - d) Normal sense of touch in both hands and no sensory loss in a dermatological or peripheral nerve distribution;
 - e) Normal strength testing in both arms;
 - f) No pain on palpation of the right forearm;
 - g) Some pain and palpable trigger points that reproduced symptoms in the right upper trapezius (the shoulder girdle muscles) and levator scapulae (the muscles from the neck to the shoulder blade);
 - h) Tender, but not painful, rhomboids (the muscles between the spine and the inside of the shoulder blade);
 - i) Some pain over the cervical paraspinals (the muscles that run up both sides of the spine) and right C3/4 and C4/5 facets; and
 - j) Tenderness through the scalene muscles (neck muscles extending from the jawline into the collarbone).

[44] She concluded that the Accident caused two medical conditions:

- i. Musculoligamentous strain of the cervical spine with secondary myofascial pain of the right shoulder girdle and mid-back; and ii. Irritation of the nerves of the brachial plexus with a functional TOS.

[45] Dr. Grabowski described functional TOS as muscle constriction or tightness that irritates the brachial plexus but does not cause permanent damage detectable on EMG studies. She agreed in cross-examination that neck range of motion is usually reduced in moderate whiplash cases and that Mr. Rabnett's neck range of motion was normal when examined on June 18, 2015. She admitted he reported right arm numbness only a few times a week on November 16, 2015. She conceded that both findings are important in assessing the severity of his diagnoses.

[46] Dr. Grabowski concluded that Mr. Rabnett was able to maintain his normal recreational activities without serious limitation after the Accident, acknowledging that doing so might increase some of his symptoms in the short and long term. In her opinion, he has made a good recovery but has some residual myofascial pain and subjective right arm numbness. In her view, he is unlikely to recover fully; while the treatments she recommends might address his symptoms, they are not curative. Dr. Brent MacNicol, Anaesthesiologist/Pain Specialist

[47] Dr. MacNicol is an anaesthesiologist and pain management specialist. He is an Associate Clinical professor in the Department of Anaesthesiology at the University of British Columbia. Since 2013, his practice has focused exclusively on medical and interventional chronic pain management. He was qualified as an expert in the areas of anaesthesiology, interventional and medical pain management, and the diagnosis and treatment of musculoskeletal injuries.

[48] Dr. MacNicol obtained a history from Mr. Rabnett and assessed him on July 25, 2018; his first report is dated July 26, 2018. Mr. Rabnett reported:

- a) Right neck, upper back, and shoulder pain;
- b) Right arm numbness and pain;
- c) Headaches (once or twice a month);
- d) Mild, primarily right-sided, low back pain; and
- e) Sleep disturbance.

[49] Dr. MacNicol made the following findings on his examination of Mr. Rabnett:

- a) Mild restriction of the cervical range of motion;
- b) A subjective tingling sensation in the ulnar (inner) side of the right arm during left lateral flexion; and

- c) Subjective reports of pain on palpation of the right mid to lower cervical facet joints and left upper cervical facet area, greater occipital nerve area, right scalene muscles, right levator scapulae insertion to the occiput, right mid thoracic and right coracoid process.

[50] Dr. MacNicol found:

- a) Shoulder range of motion was intact;
- b) No motor or sensory deficits were detected on screening neurological examination; and
- c) There were no areas of swelling, discolouration, or muscle atrophy.

[51] Dr. MacNicol diagnosed:

- a) Chronic whiplash-associated disorder affecting the right neck, upper, mid, and low back, shoulder, and arm with peripheral and central sensitisation;
- b) Mild to moderate scapulothoracic dyskinesia;
- c) Probable non-specific TOS; and
- d) Intermittent tension headache.

[52] Dr. MacNicol likened peripheral sensitisation to having an amplifier attached to the nerve and it being turned up to variable degrees, resulting in increased sensitivity. He explained that central sensitisation describes a condition that may present in patients with chronic pain, resulting in a remapping of the way nerves interact and manifesting in symptoms including muscle tension or weakness and increased pain, numbness or tingling sensations. He agreed in cross-examination that central and peripheral sensitisation are medical constructs that are neither observable nor objectively diagnosable. He described scapulothoracic dyskinesia as essentially an unbalancing of the muscles attached to the shoulder blade; it tends to be a fatigable condition (i.e., the more individuals move the affected arm or hold it in a static position, the more symptoms might present).

[53] In Dr. MacNicol's opinion, Mr. Rabnett will likely continue to experience pain after physical activity involving the right arm, particularly at or above the shoulder level, lifting, carrying, performing repetitive actions, or holding static positions for prolonged periods. In his view, Mr. Rabnett may not fully recover from his scapulothoracic dyskinesia; he agreed physiotherapy would be both beneficial and important in reducing Mr. Rabnett's symptoms.

[54] Dr. MacNicol authored a second report dated September 11, 2021, prepared following his review of normal cervical spine imaging, his reassessment of Mr. Rabnett, and the administration of various injections. He concluded that treatments (including PRP injections, corticosteroid injections, and facet medial branch blocks) had provided no significant benefit. Acupuncture, massage, and chiropractic therapy similarly offered no progressive benefit. Dr. MacNicol prescribed no medication; he agreed a mental health referral was unnecessary. In his view, Mr. Rabnett has reached the maximal medical improvement that can reasonably be expected for his chronic whiplash-associated disorder.

Dr. Anthony Salvian, Vascular Surgeon

- [55] Dr. Salvian is a vascular surgeon in full-time practice at Vancouver General Hospital and a clinical professor of surgery at the University of British Columbia. He was qualified as an expert in vascular surgery, with a subspecialty in the diagnosis and treatment of TOS. He assessed Mr. Rabnett on August 26, 2020.
- [56] Dr. Salvian obtained a history from Mr. Rabnett, performed a physical examination, reviewed some medical records, and authored two reports dated October 30, 2020 and September 26, 2021. He was asked to provide a medical opinion regarding Mr. Rabnett's complaints of:
- a) Right-sided headache;
 - b) Right-sided neck, scapular, and anterior chest pain; and
 - c) Numbness, tingling, pain, and paraesthesia radiating down his right arm and into the fourth (ring) and fifth (little) fingers of his right hand.
- [57] Dr. Salvian noted the following findings on his examination of Mr. Rabnett:
- a) Normal range of motion of the cervical spine;
 - b) Marked spasm and tenderness of the right trapezius and right scalene muscles with positive trigger points radiating down the right arm and into the fourth and fifth fingers of the right hand and pectoralis minor (chest wall muscle);
 - c) Some tenderness to the mid-point of the right clavicle;
 - d) Slight winging (i.e., prominence) of the right scapula (shoulder blade);
 - e) Tenderness along the medial aspect of the right scapula and into the muscles with some spasm and positive trigger points;
 - f) Normal bulk, tone, and power in all muscle groups tested in the right arm, wrist, and hand, except for some slight weakness of abduction of the fifth finger in the small muscles of the right hand;
 - g) Slight diminished pin prick and fine touch sensation in the medial forearm and more definitely in the medial hand and fourth and fifth fingers; and
 - h) Equal grip strength in both hands.
- [58] Dr. Salvian conducted a variety of TOS-specific tests and ruled out other differential diagnoses. In his opinion, the Accident caused two medical conditions:

- i. Chronic myofascial pain syndrome involving the muscles and ligaments of the neck and upper back, with trigger points in the right trapezius and scalene muscles radiating down the arm into the right hand; and ii. Chronic post-traumatic TOS, with irritation of the lower nerves of the brachial plexus.
- [59] Dr. Salvian explained that post-traumatic TOS is characterised by intermittent compression of the lower portion of the brachial plexus (i.e., the C8/T1 nerve root, which becomes the ulnar nerve and innervates the fourth and fifth fingers), usually with resulting numbness and tingling in those two fingers, occasional weakness of the small muscles of the hand and, rarely, permanent atrophy of those muscles. He agreed that TOS permanently alters the anatomy of the thoracic outlet and results in scarring of the scalene muscles. Straining the scalene muscles, increasing neck muscle tension, elevating the arm, or engaging in repetitive or prolonged activities which increase nerve irritation, can cause symptoms to recur, become additive, and eventually intolerable. Margherita Bracken, Occupational Therapist
- [60] Margherita Bracken was qualified as an expert in occupational therapy, with expertise in the assessment of functional capacity and disability, vocational assessment and rehabilitation, and future care needs. She completed an FCE over seven hours on September 4, 2020, and prepared a report dated September 18, 2020.
- [61] Ms. Bracken based her opinions on her interview of Mr. Rabnett, a review of medical records, standardised and functional testing, work simulation, and repeat testing to gauge symptom response to the activities evaluated. Mr. Rabnett reported the following ongoing symptoms:
- a) Headache;
 - b) Neck pain;
 - c) Right scapula/upper thoracic pain;
 - d) Right arm and hand symptoms; and
 - e) Impaired sleep.
- [62] Ms. Bracken concluded that Mr. Rabnett demonstrated competitive behaviours and high levels of effort on testing. In her view, his reports of pain and disability correlated well with observed function and her test results are an accurate representation of his functional capacity.
- [63] The defendant adduced no medical evidence at trial. CAUSATION Parties' Positions
- [64] The parties agree the Accident caused two conditions:
- i. Chronic whiplash-associated disorder; and ii. Post-traumatic TOS.

Legal Framework

- [65] A plaintiff must establish on a balance of probabilities that the defendant's negligence caused their injury. It is not necessary for the defendant's negligence to be the sole cause of the injury so long as it is part of the cause beyond the de minimus range. Causation need not be determined with scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [Athey]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [66] The primary test for causation asks: but for a defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that negligent conduct is only compensable when there is a substantial connection between the injury and the defendant's conduct: *Clements v. Clements*, 2012 SCC 32 at paras. 20-21. Causation must be established on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78 [Blackwater].
- [67] I find that the Accident caused the injuries Mr. Rabnett alleges including chronic whiplash-associated disorder, with some central and peripheral sensitisation, affecting his right neck, shoulder, arm, upper and mid-back, scapulothoracic dyskinesia, post-traumatic TOS, resulting in subjective paraesthesia and numbness down the right arm and into the fourth and fifth fingers of the right hand, intermittent tension headache, and some interruption in his sleep. The uncontroverted evidence supports those conclusions.
- GENERAL DAMAGES
Parties' Positions
- [68] The parties have polarised views regarding the severity of Mr. Rabnett's Accident-related injuries. Mr. Rabnett asserts they are disabling and affect every aspect of his life; the defendant describes them as mild.
- [69] Plaintiff's counsel assesses general damages in the range of \$135,000 to \$150,000 and relies on the following authorities:
- a) *Lampietro v. Leung*, 2019 BCSC 1750 (\$125,000);
 - b) *MacLeod v. Whittemore*, 2018 BCSC 1082 (\$135,000);
 - c) *Firman v. Asadi*, 2019 BCSC 270 (\$170,000);
 - d) *Fancello v. Cupskey*, 2019 BCSC 1724 (\$175,000);
 - e) *Fletcher v. Biu*, 2020 BCSC 1304 (\$200,000); and
 - f) *Gill v. Apeldoorn*, 2019 BCSC 798 (\$200,000).
- [70] The defendant assesses Mr. Rabnett's general damages in the range of \$60,000 to \$75,000, citing:
- a) *Allen v Figueira*, 2020 BCSC 1864 (\$60,000);
 - b) *Langley v Heppner*, 2011 BCSC 179 (\$55,000 or \$65,000, adjusted for inflation);

- c) LaRocque v LaRocque, 2019 BCSC 655 (\$72,000 or \$76,000, adjusted for inflation);
- d) McKay v Powell, 2012 BCSC 1935 (\$65,000 or \$76,500, adjusted for inflation); and
- e) Gleason v Yoon, 2015 BCSC 586 (\$75,000 or \$85,000, adjusted for inflation).

Legal Framework

- [71] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties; fairness is measured against awards made in comparable cases. Such cases, while helpful, serve only as a rough guide. Each case depends on its unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [72] The Court of Appeal outlined the non-exhaustive factors to be considered when assessing non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. They include the plaintiff's age, the nature of the injury, the severity and duration of pain, disability, emotional suffering, impairment of life, family, marital and social relationships, physical and mental abilities, the loss of lifestyle, and stoicism, a factor which generally ought not to penalise a plaintiff. *Evidence Online Videos and Video Surveillance*
- [73] In an unsuccessful attempt to generate revenue during the pandemic, Mr. Rabnett devised a plan to provide "long-distance acupuncture" by posting online videos offering information soundbites and acupuncture demonstrations. This business concept was never realised. Mr. Rabnett did not produce these online videos in this litigation; defence counsel discovered them serendipitously shortly before trial and served notice of their intention to rely on them. Ultimately, these videos were introduced into evidence during the cross-examination of Mr. Rabnett by consent and marked as exhibits. In closing, plaintiff's counsel objected to this evidence on the basis the videos had not been put to the medical experts in cross-examination, citing *Browne v. Dunn*, [1893] J.C.J. No. 5, 6 R. 67 (H.L.).
- [74] Defence counsel confirmed that he did not intend to rely on these videos to disprove Mr. Rabnett's diagnoses or to impugn his credibility. Rather, he relied on them as evidence of Mr. Rabnett's functionality in a non-test setting. Plaintiff's counsel did not seek to re-open his case to respond to this evidence. I conclude it is admissible for the narrow purpose intended by defence counsel.
- [75] Mr. Rabnett filmed and posted his online acupuncture demonstration videos in March, April, and June 2020. They show him filming himself (while holding a camera in his outstretched right hand), hiking in the mountains near his home with his son in a child-carrier on his back, wearing a backpack/water carrier, and demonstrating a variety of different acupuncture techniques.

- [76] The surveillance videos were taken in July 2021. They depict Mr. Rabnett, often in the company of his young son, engaged in various daily activities including walking his dog, driving, running errands, opening and closing the doors and rear hatch on his vehicle, carrying bags of groceries, lifting and carrying his son, and placing him in and out of a vehicle. Mr. Rabnett is seen using his right hand, with some regularity and no apparent difficulty. Medical Evidence
- [77] Dr. Grabowski opined that Mr. Rabnett has recovered well from his Accident-related injuries. She admitted that, after the Accident, he remained able to mountain bike, garden, and run (although those activities could aggravate some of his symptoms) and roughhouse with his nieces and nephews, although not the same way he had previously.
- [78] Dr. Salvian admitted in cross-examination that a clinician cannot measure complaints of numbness, tingling, or pain and necessarily relies on a patient's subjective reports. He conceded that his assessments depend on patients providing him with accurate information about the frequency and severity of their symptoms. He agreed that about 30% of all patients who sustain whiplash injuries have TOS, a condition associated with a wide spectrum of symptoms (ranging from minor to debilitating). When assessing the severity of TOS, he relies on patients' subjective reports and the extent to which their symptoms result in lifestyle changes.
- [79] Dr. Salvian conceded that TOS patients are generally advised against carrying heavy packs which he agreed could provoke symptoms. Given the significant risks of surgery and the fact Mr. Rabnett is currently functioning in all four of the main domains in life (i.e., work, home, recreation, and sleep), Dr. Salvian does not consider him to be a surgical candidate. Lay Evidence
- [80] Ms. K. Nault and her sister both said they have seen Mr. Rabnett periodically rub his right shoulder, massage his right arm, pump his right fist, and stretch his neck. Ms. K. Nault confirmed that he stretches and periodically uses pain patches, kinesiotaping, and a hot pad. She thought his sleep might be slightly impaired. It is her sister's impression that Mr. Rabnett is unable to participate fully in all activities and compensates with his left hand. Both described him as a positive person.
- [81] Ms. Joosten first met Mr. Rabnett in September 2019, more than four years after the Accident. She described him as a happy, capable, and highly professional acupuncturist. She was unaware of the Accident or his Accident-related injuries until a few weeks or possibly a month before trial. She first noticed a change in him in the last six to twelve months: she thought he had gained weight, looked tired and a bit haggard, and did not seem himself. The timing of her observations raises questions about whether those changes are due to the Accident or other factors, including Mr. Rabnett's recent non-Accident related medical diagnoses. Notably, Ms. Bracken confined her testing at the FCE to the sedentary level due to her concerns about cardiovascular risks related to Mr. Rabnett's hypertension. Analysis and Conclusion

- [82] While the decisions cited by the parties assist in establishing an appropriate range for non-pecuniary damages, each case must be decided on its unique facts. I accept that Mr. Rabnett has suffered compensable injuries which may not resolve.
- [83] Mr. Rabnett gave evidence at trial over three days. He appeared to be in no obvious discomfort. The video surveillance and online videos in evidence show him moving normally and engaging in many of the usual activities of daily living with no apparent difficulty. While I accept this evidence does not disprove Mr. Rabnett's diagnoses, I conclude it is consistent with his injuries falling predominantly on the mild end of the spectrum for TOS patients, a common condition in people with whiplash disorders. Mr. Rabnett is not a surgical candidate because he is functioning so well. He takes no prescription medication and requires no invasive therapy. He has suffered no psychological impairment or mental health difficulties since the Accident. He maintains positive relationships with his family and work colleagues. Dr. Shtybel recommended he pursue physiotherapy in September 2016. In my view, Mr. Rabnett's failure to do so before late 2021 is also consistent with his symptoms being relatively mild.
- [84] Mr. Rabnett has normal strength and sensation in his right hand. His TOS symptoms are intermittent. He has normal, pain-free range of motion in his neck and right shoulder. Dr. Grabowski's sensory examination was normal; Dr. MacNicol's neurological examination demonstrated no motor or sensory deficits. He has no atrophy or wasting in his right upper extremity, a finding which is consistent with the video evidence showing him making regular use of his right arm. On the evidence of Drs. Grabowski and Salvian, his grip strength is normal. The intermittent subjective paraesthesia in his right hand affects only the fourth and fifth fingers. He has mild occasional headache pain. His sleep disruption is not debilitating.
- [85] On all the evidence, I conclude that Mr. Rabnett suffered predominantly mild injuries as a result of the Accident. He can walk, sit, stand, run, and drive without difficulty. He is independent in all the usual activities of daily living. While I accept that recreational, home, and work activities might aggravate his symptoms, he remains highly functional almost seven years after the Accident. On all the evidence, he is an engaged father and remains a positive, outgoing, and charismatic individual. Until his move to Alberta in 2019, more than four years after the Accident, he continued to work full-time hours, albeit with some breaks during the day.
- [86] Having reviewed the authorities referenced by the parties, I conclude that the decisions cited by the defendant are generally more comparable on their facts. The decisions relied on by Mr. Rabnett involve plaintiffs with more serious injuries, including some who had psychological difficulties and were unable to return to work. While I acknowledge that Mr. Rabnett's injuries have affected his life, I do not agree they are as devastating as he asserts.

- [87] Having regard to the factors in Stapley including, in particular, his age, the nature, severity, and chronicity of his compensable injuries, the impact they have had on his recreational pursuits, lifestyle, and work, and the likelihood his current condition will not improve, I assess general damages in the amount of \$95,000. LOSS OF HOUSEKEEPING CAPACITY Parties' Positions
- [88] Mr. Rabnett seeks a separate award to compensate him for an alleged loss of housekeeping capacity. He assesses this loss in the amount of \$56,000 to \$70,000, based on the calculations of his economist expert, Nick Coleman, whose report was admitted into evidence unchallenged. This range represents the present value of services Ms. Bracken recommended, including housekeeping, yard work, and snow removal.
- [89] The defendant submits that Mr. Rabnett can perform all housekeeping activities, albeit with some pain, and that any loss of housekeeping capacity is appropriately considered as part of a general damages award.

Legal Framework

- [90] The governing principles that apply to awards for the loss or impairment of housekeeping capacity were summarized by Newbury J.A. in *Dykeman v. Porohowski*, 2010 BCCA 36 [Dykeman]. Plaintiffs may recover for the loss of past and future ability to perform household tasks. The compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29. Depending on the facts, a loss of housekeeping capacity may be compensated by pecuniary or non-pecuniary damages: *Campbell v. Banman*, 2009 BCCA 484 at para. 13, citing *McTavish v. MacGillivray*, 2000 BCCA 164. Evidence
- [91] At the FCE, Mr. Rabnett was evaluated at the sedentary strength level only because of his markedly elevated blood pressure of 170/90 at the start and end of the test day. In Ms. Bracken's opinion, his responses to the Multidimensional Task Ability Profile ("MTAP") were consistent with her test results and indicated he was:
- a) 100% capable of self-care;
 - b) 100% capable of cooking;
 - c) 100% capable of light housekeeping;
 - d) 95% capable of heavy housekeeping, light gardening, and home maintenance; and
 - e) 84% capable of outside home repair and lawn/garden maintenance.
- [92] Based on his self-report on the MTAP, Mr. Rabnett is able to do all the tasks described, except for being slightly restricted in:
- a) Using a roller to paint an interior wall;
 - b) Using a garden rake to collect leaves from a lawn;

- c) Sanding a table with an electric sander;
- d) Unloading a 20-pound grocery bag from the trunk of an automobile;
- e) Using a hoe to mix cement in a wheelbarrow;
- f) Driving a stake with a sledge hammer;
- g) Lifting a 50-pound milk crate from the floor to eye-level;
- h) Lifting a 100-pound milk crate from the floor to a bench; and
- i) Carrying a 100-pound crate for 50 feet.

[93] In Ms. Bracken's opinion, Mr. Rabnett likely has limitations doing heavier cleaning, yard, and home maintenance given his dominant right arm and neck restrictions. She recommended an in-home assessment to explore his need for services and supportive equipment. Dr. Grabowski admitted that Mr. Rabnett remained able to do his house and yard work after the Accident, albeit not as productively and with some pain.

[94] In cross-examination, Mr. Rabnett confirmed that he lived alone between October 2017 and April or May 2018 (when he and Ms. K. Nault began to share a residence) and hired no one to assist him with housework in this interval. He and his partner currently rent the top two floors of a single detached home in Canmore. Mr. Rabnett avoids housework that he knows will aggravate his symptoms (including rearranging furniture, painting, heavy scrubbing, and overhead work); the evidence does not suggest he must do any of those tasks on a regular basis. Mr. Rabnett described Ms. K. Nault as a very handy "do-it-yourselfer" kind of person. Both agreed she has assumed more responsibility for housework and that they have hired professional cleaners for deep, structural cleaning in the past. Based on the invoices in evidence, Ms. K. Nault has incurred professional cleaning expenses of about \$430 since the Accident; it is unclear on the evidence whether she did so because of Mr. Rabnett's Accident-related injuries. Mr. Rabnett said they incurred additional professional housecleaning expenses but did not retain receipts. He agreed they are required to do no tree pruning and only a modest amount of grass cutting at their rented home. Analysis and Conclusion

[95] I make no separate award for the loss of housekeeping capacity. In my view, any such loss is appropriately considered as part of a non-pecuniary award in this case. I have considered Mr. Rabnett's housekeeping limitations in my assessment of non-pecuniary damages. IN TRUST CLAIMS Parties' Positions

[96] Mr. Rabnett seeks in trust awards for Ms. K. Nault in the range of \$20,000 to \$25,000 and for Ms. S. Nault in the range of \$14,280 to \$19,040 (based on three to four hours of housekeeping services per week x 119 weeks from August 2019 to December 2021 at \$40/hour).

[97] The defendant disputes this claim. He denies the contributions of Ms. K. Nault or Ms. S. Nault extended beyond what would reasonably be expected of family members, that either suffered any corresponding economic disadvantage, or that Mr. Rabnett's injuries are sufficiently severe to warrant such an award.

Legal Framework

[98] Awards in trust are generally limited to seriously injured plaintiffs for support services beyond those normally expected in a marital or family relationship: *Farand v. Seidel*, 2013 BCSC 323 at para 99. Justice Savage described the test for in trust claims in *Frankson v. Myre*, 2008 BCSC 795 at paras 50-51 as follows: The law of "in trust" claims is governed by the principles set out by the British Columbia Supreme Court in *Bystedt (Guardian ad litem of) v. Bagdan* 2001 BCSC 1735 at para. 180, *aff'd* 2004 BCCA 124. The six relevant factors are:

- (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; and
 - (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.
- Analysis and Conclusion

[99] Having regard to these principles, I conclude the evidence does not support an in trust award in this case. Mr. Rabnett is not severely disabled as a result of his Accident-related injuries. Neither Ms. K. Nault nor her sister has provided any care to him. In my view, neither performs any services beyond those that would be expected based on their familial relationship with Mr. Rabnett.

[100] Ms. K. Nault testified that she has assumed primary responsibility for housework and yard work, with help from Mr. Rabnett. She noted that he uses his left hand to vacuum. Ms. S. Nault provides some assistance with home chores and childcare to help her sister and to spend time with her nephew. The evidence falls short of establishing that she does so because of Mr. Rabnett's Accident-related injuries. SPECIAL DAMAGES Parties' Positions

- [101] The defendant admits special damages of \$4,860.40, as set out below. Service Provider Particulars Cost Healthwithin Acupuncture Acupuncture Services \$1,790 + \$513 mileage Equinox Health Clinic Massage Therapy \$170 + \$6.00 mileage Total Body Health Chiropractic Services \$1,928 + \$258.40 mileage Rundle Physiotherapy Physiotherapy Services \$195 TOTAL \$4,860.40
- [102] Mr. Rabnett seeks to recover additional special damages of \$7,685.46, as summarised below. Service Provider Particulars Cost Rundle Physiotherapy Mileage \$11.00 Back to Back Massage Therapy (\$1,533) Chiropractic Services (\$3,148) \$4,681 Back At It Massage Therapy \$464 + \$27.50 mileage Precision Spinal and Wellness Chiropractic Services \$1,179 + \$77 mileage Julia Day Craniosacral Therapy \$800 + \$9.00 mileage O'Neill Mountainview Cleaning Cleaning Services \$131.25 Mountain Power Cleaning Cleaning Services \$305.71 TOTAL \$7,685.46
- [103] The defendant disputes these additional expenses and denies they were necessary or reasonably incurred.

Legal Framework

- [104] Claims for special damages are generally subject only to the standard of reasonableness. When a claimed expense has been incurred regarding treatment aimed at promoting a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para 55 [Redl]. However, a plaintiff does not have carte blanche to undertake any and all therapies which he believes will make him feel good: *Redl* at para 55. Evidence
- [105] The invoices from the BC Clinic (i.e., Back to Back) in evidence relate to multiple massage therapy and chiropractic treatments that various practitioners (who were then Mr. Rabnett's work colleagues) provided to him from February 2015 to February 2019. Most are directed to Mr. Rabnett's lawyer; all remain unpaid. When asked, Mr. Rabnett had no idea if he would be required to pay them, if his claim for reimbursement of those expenses is denied. On his own evidence, Mr. Rabnett attended for this kind of therapy regularly before the Accident.
- [106] Mr. Rabnett conceded in cross-examination that many of his claims for mileage expenses are for trips he made between his home and workplace. The invoices from the Alberta Clinic (i.e., Back at It) are directed to his attention and relate to five massage therapy sessions that Mike Howard and Carrie Bredinski provided to him from October 19, 2019 to October 13, 2021. They have been paid.
- [107] The invoices in evidence from Precision Spinal and Wellness Centre relate to chiropractic treatments Christopher Long provided to Mr. Rabnett in Alberta from October 21, 2019 to October 28, 2021; all have been paid. Mr. Rabnett seeks to recover the cost of craniosacral therapy sessions he attended.

- [108] The invoices for cleaning expenses total \$436.96. All are directed to Ms. K. Nault. They describe basic residential services including kitchen, bathroom, floor cleaning, and dusting. Analysis and Conclusion
- [109] The defendant accepts as reasonable the costs invoiced by Rundle Physiotherapy. I accept as reasonable the mileage costs of \$11.00 to attend this treatment.
- [110] The trial evidence does not establish that Mr. Rabnett will be required to pay for the treatments he received from his former colleagues at the BC Clinic after the Accident. Not all of Ms. Martorana's chiropractic treatments were for his Accident-related injuries. I conclude that Mr. Rabnett has failed to meet the onus he bears of proving that he has, or will, incur these costs as a result of his Accident-related injuries.
- [111] I decline to award the cost of massage therapy treatments at the Alberta Clinic and the chiropractic treatments at Precision Spinal and Wellness Centre. They occurred after Drs. Grabowski and MacNicol assessed Mr. Rabnett in 2017 and 2018; neither recommended regular ongoing passive therapy for the treatment of his Accident-related injuries. Mr. Rabnett attended for this kind of therapy before the Accident.
- [112] No medical professional involved in Mr. Rabnett's care has recommended that he pursue craniosacral therapy; in cross-examination he conceded that he was simply curious about it. One of Ms. Day's invoices for this treatment apparently pre-dates the Accident. I am not persuaded this cost is recoverable.
- [113] On Mr. Rabnett's own evidence, and the results of the FCE, he is able to perform basic residential cleaning, albeit with some aggravation of his symptoms. He has normal function in his left arm. It is unclear on the evidence whether the cleaning expenses claimed were required because of Mr. Rabnett's Accident-related injuries. I decline to award these costs.
- [114] I award special damages of \$4,871.40. PAST LOSS OF INCOME-EARNING CAPACITY Parties' Positions
- [115] The parties' positions on past income loss are diametrically opposed.
- [116] Mr. Rabnett seeks damages for past loss of earning capacity in the range of \$411,000 to \$689,000. This range is based on two hypothetical, without-Accident, past income projections that assume:
- i. Mr. Rabnett's annual income would have increased steadily by 15% from 2015 to 2018, and thereafter remained the same until 2021; or
 - ii. He would have seen 60 patients/week, 48 weeks/year, and charged fees of \$80 to \$95/visit, thereby generating gross annual income of \$230,000 to \$273,000 in the years 2015 to 2021.
- [117] Mr. Rabnett subtracts what he asserts was his actual business income from these projected incomes, to estimate his past income loss.

- [118] The defendant submits that an appropriate range of damages for past lost earning capacity is \$1,500 to \$12,000 (based on an estimated loss of about two patients/week or about \$4,000/year for three years (i.e., 2015 - 2018, excluding 2016, a year the defendant describes as particularly profitable for Mr. Rabnett).

Legal Framework

- [119] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 [Rowe]; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for net past income loss only. A trial judge has the discretion to determine what periods of time are appropriate for the determination of net income loss: *Lines v. W & D. Logging Co. Ltd.*, 2009 BCCA 106 at paras. 181-186 [Lines]. When exercising this discretion, a trial judge must attempt to return a plaintiff to the position he would have been in, absent the accident: *Lines* at paras. 185-186.
- [120] The burden of proof regarding actual past events is on a balance of probabilities. Assessing the loss of past and future earning capacity involves consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of probabilities. Hypothetical possibilities will be considered, if they are real and substantial and not mere speculation: *Athey*, at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34-39, *Rab v. Prescott*, 2021 BCCA 354 at paras. 27-28 [Rab].
- [121] There are two possible approaches to the assessment of lost earning capacity: the earnings approach and the capital asset approach. Both are correct. The earnings approach is generally more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren]. When the loss is not measurable in a pecuniary way, the capital asset approach is more appropriate.
- [122] In every case where the capital asset approach is adopted, the four questions in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [Brown] form the non-exhaustive basis of the assessment: *Villing v. Husseni*, 2016 BCCA 422 at paras. 19-20. They include whether the plaintiff:
- i. Has been rendered less capable overall from earning income from all types of employment;
 - ii. Is less marketable or attractive as an employee to potential employers;
 - iii. Has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 - iv. Is less valuable to himself as a person capable of earning income in a competitive labour market.

[123] As noted by Justice Adair in *MacLeod v. Akoury*, 2021 BCSC 454 at para. 146, citing *Tisalona v. Easton*, 2017 BCCA 272 at paras. 50-51, while the Brown factors are the means of assessing an earning capacity award, they alone do not entitle a plaintiff to damages. Adopting the capital asset approach does not mean the assessment is entirely at large, without the necessity to explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[124] An assessment based on the capital asset approach is ideally grounded in a factual or mathematical anchor, even though these tools do not change the exercise from an assessment to a calculation: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21. Adopting the capital asset approach does not justify an undisciplined approach: *Knapp v. O'Neill*, 2017 YKCA 10 at para. 17. Agreed Facts

[125] The following facts are not contentious:

- a) Mr. Rabnett worked as an independent contractor and practitioner of traditional Chinese medicine at the BC Clinic from 2005 until August 2019.
 - b) Mr. Rabnett:
 - i. Paid the BC Clinic a combination of rent (\$24,000/year) and 10% of the fees he billed to his patients; and ii. Received compensation comprising:
 - (1) acupuncture treatment fees;
 - (2) proceeds from the sale of herbal products; and
 - (3) proceeds from assignments or directions to pay (on the resolution of pending litigation).
 - c) The BC Clinic charged patients:
 - i. \$68 for a 30-minute acupuncture session (from March 2014 to May 2018); and ii. \$73 for a 30-minute acupuncture session (from May 2018 to date).
 - d) On August 30, 2019, Mr. Rabnett relocated to Canmore, Alberta.
 - e) On September 3, 2019, he started working as an independent contractor at the Alberta Clinic (which has two locations in Canmore and one in Banff), practicing in the areas of acupuncture and traditional Chinese medicine.
 - f) From September 2019 to date, he paid the Alberta Clinic 33% of the fees billed to his patients.
 - g) From 2019 to 2021, the Alberta Clinic charged patients:
 - i. \$75 for a 45-minute acupuncture session; ii. \$95 for a 60-minute acupuncture session; iii. \$110 for a 75-minute acupuncture session; and iv. \$130 for a 90-minute acupuncture session.
- Analysis and Conclusion

i. Actual Past Income

[126] I begin my analysis of Mr. Rabnett's claim for past income loss by considering his actual business income in the years 2012 to 2020. Based on his filed tax returns, he earned gross and net business income (after expenses but before tax) in those years, as set out below. Tax Year Gross Business Income Net Business Income 2012 \$84,100 \$25,566.74 2013 \$112,571 \$53,475.05 2014 \$129,633 \$66,476.48 2015 \$143,227 \$73,570.28 2016 \$151,551 \$61,640.18 2017 \$149,450.52 \$59,760.51 2018 \$152,850 \$74,195.45 2019 \$117,750 \$41,407.56 2020 \$66,382 \$30,499.45

[127] Those figures translate into average annual net incomes as follows:

- a) 2012 to 2014 - \$48,506.09
- b) 2014 to 2015 - \$70,023.38
- c) 2015 to 2018 - \$67,291.61
- d) 2019 to 2020 - \$35,953.50

[128] Based on the computer-generated practitioner yearly comparison Ms. James prepared for trial, Mr. Rabnett saw patients between 2009 and August 2019 (before he relocated to Alberta), as set out below. Year Total Patient Visits/Year Average/ Month Average/ Week (48 Weeks/Year) Average/Day (5 days/week) 2009 1,767 147 36 7 2010 1,864 155 38 7 2011 1,769 147 36 7 2012 1,757 146 36 7 2013 2,015 167 41 8 2014 2,297 191 47 9 2015 2,283 190 47 9 2016 2,459 204 51 10 2017 2,100 175 43 8 2018 2,094 174 43 8 2019 (to August) 1,200 150 33 6

[129] Mr. Rabnett saw patients in the 13 months before the Accident as set out below. Month Total Patients Weekly Average Daily Average (5 days/week) January 2014 211 53 10 February 2014 143 36 7 March 2014 182 45 9 April 2014 203 51 10 May 2014 187 47 9 June 2014 198 50 10 July 2014 197 49 9 August 2014 167 42 8 September 2014 170 42 8 October 2014 214 53 10 November 2014 209 52 10 December 2014 216 54 10 January 2015 229 57 11 Monthly Average for 2014 (April to December) 191 44 9 Monthly Average (April 2014 to January 2015) 194 48 9

[130] Mr. Rabnett took no time off work immediately after the Accident. He agreed he was then available for full-time hours and worked five days a week; however, he said he took breaks and made sure he "had the space" to listen to his body. While he conceded that his patient numbers increased after the Accident, he described the months when he saw 200+ patients as him "overloading" himself and later paying a price for doing so. He took his first absence from work about two weeks after the Accident, travelling to an elephant sanctuary in Indonesia for a planned vacation and riding an elephant when there.

- [131] Mr. Rabnett enjoyed a substantial increase in his income in 2015, the year of the Accident. His 2015 net income was the highest it had ever been to that point in his career. In January 2015, the month before the Accident, he saw 229 patients. Patient visits between January 2014 and January 2015 do not reflect a steady upward trend. In 2016, his gross business income exceeded what he had earned in any previous year. It declined significantly after the deduction of his business expenses.
- [132] Mr. Rabnett's income dropped slightly in 2017. That is the year he took an extended vacation to South Africa, divorced, and learned Ms. K. Nault was pregnant. His patient numbers declined again in 2018; his son was born in June of that year. Thereafter, Mr. Rabnett was absent from work for a few weeks and then began taking Fridays off for an indeterminate period. Despite that, his 2018 net business income was the highest it had ever been in his career.
- [133] Based on the evidence of Ms. James, the average acupuncturist at the BC Clinic saw 5 - 8 patients/day (or 25 to 40/week). In the years 2015 to 2018, Mr. Rabnett's patient numbers were consistently almost twice the low end of this range and compared favourably with its high end. ii. Move to Alberta
- [134] Since re-locating to Alberta, Mr. Rabnett has seen patients (at three different locations) in the numbers set out below. A standard visit at the Alberta Clinic is one hour. 2019 Total Patients Average/Week Average/Day [5-day week] September October November December 68 111 125 134 17 28 31 33 3 5 6 6 2020 January February March [Onset of COVID-19] April [Clinic closed] May [Clinic closed] June [Clinic re-opens on 12th] July August September October November December 108 105 70 0 0 50 75 78 116 109 97 131 27 26 17 0 0 12 18 19 29 27 24 32 5 5 3 0 0 2 3 3 5 5 4 6 2021 January February March April May June July August September October November 78 79 111 100 77 67 57 70 62 70 71 19 19 27 25 19 16 14 17 15 17 17 3 3 5 5 3 3 2 3 5 3 3
- [135] Mr. Rabnett was absent from work for two days in January 2020 to attend examinations for discovery in this action. If Mr. Rabnett's 2020 and 2021 patient numbers were doubled (to reflect the fact that a standard patient visit at the Alberta Clinic is twice as long as one at the BC Clinic), the Alberta Clinic and the BC Clinic numbers compare more favourably. iii. Work History Provided to Medical Experts
- [136] At best, Mr. Rabnett provided an imprecise work history to the medical experts who assessed him. He told Dr. Grabowski in May 2017 that he had cut back on the number of patients he treated after the Accident and begun scheduling afternoons off, especially at the end of the week. Based on this history, she understood he had reduced his work schedule from 38 to 40 hours per week (before the Accident) to 35 hours per week (after the Accident), and again to 30 - 32 hours per week by the time she saw him.
- [137] Mr. Rabnett admits he told Dr. Grabowski that he was seeing fewer patients after the Accident than he had previously. When challenged about the accuracy of this statement, he said he meant that he had a reduced capacity to treat patients after the Accident. In cross-

examination, he conceded that he potentially increased the number of patients he saw between May and June 2017, while maintaining "the availability that [he] could have seen people could vary a lot". Dr. Grabowski received no work records; the only information she had about Mr. Rabnett's pre and post-Accident work hours, work capacity, and patient load came directly from him.

- [138] Ultimately, Dr. Grabowski opined that Mr. Rabnett was able to perform all of his job functions but experienced more severe arm symptoms as his schedule intensified. She concluded he would need to continue to work a shortened schedule (based on her understanding that he was then doing so). In her view, he would not be left with any permanent work-related functional impairment; she conceded that an intensive schedule could exacerbate his symptoms.
- [139] Dr. MacNicol first assessed Mr. Rabnett in July 2018. He too received no work records and relied exclusively on Mr. Rabnett for a work history. Mr. Rabnett admitted in cross-examination that he may have told Dr. MacNicol (as recorded in Dr. MacNicol's report) that he was then seeing only 2/3 of his pre-Accident patient volume. When confronted with the records in evidence, Mr. Rabnett agreed that he actually saw more patients between January and May 2018 (before taking a week off after his son was born in June 2018) than he had before the Accident. In an attempt to explain this discrepancy, Mr. Rabnett maintained he had been referring to his availability to see patients, rather than his actual patient numbers. He later denied knowing exactly what he told Dr. MacNicol, suggesting his capacity "did not feel like what it was [before the Accident]" and that this is what he had been trying to communicate. He conceded that he did not know how to separate his feelings from what had actually transpired. Notably, Mr. Rabnett did not qualify the information he gave Dr. MacNicol in this manner.
- [140] Two-thirds of 2,297 (the total number of patients Mr. Rabnett saw in 2014) is 1,531. Mr. Rabnett saw substantially more than 1,531 patients in 2015 to 2018. He saw 2,459 patients in 2016, the year after the Accident. Dr. MacNicol recommended that Mr. Rabnett continue with a reduced workload "for now" (based on his understanding that Mr. Rabnett was then working reduced hours).
- [141] Dr. Salvian assessed Mr. Rabnett on August 26, 2020. He too relied exclusively on Mr. Rabnett for a work history. In cross-examination, Mr. Rabnett agreed he must have told Dr. Salvian (as recorded by Dr. Salvian) that he worked eight hours/day and saw about 60 patients/week before the Accident. While Mr. Rabnett admitted this was not true every week, he maintained that, but for the Accident, he would have had the capacity to do so. When pressed in cross-examination and confronted with the records produced pursuant to subpoena the week before trial by the BC Clinic, Mr. Rabnett conceded that he had never seen an average of 60 patients/week in any one-month period before the Accident. He admitted (contrary to Dr. Salvian's recorded history) that he took no time off work after the Accident, saying instead that he was not working to full capacity (which he suggested is effectively the same thing as taking time off work). Notably, that is not what he told Dr.

Salvian.

[142] Dr. Salvian testified that patients with TOS generally need to take breaks, stretch, slow their pace, and change their positions at work. As an independent contractor, Mr. Rabnett has the flexibility to do all of those things. Dr. Salvian recommended that Mr. Rabnett continue working part-time (based on his understanding that Mr. Rabnett was then doing so).

[143] On September 3, 2020, Ms. Bracken obtained a history from Mr. Rabnett and completed the FCE. She concluded that he does not fully meet the demands of his work as an acupuncturist including, in particular, those involving sustained neck flexion, reaching, and dexterity. She found him capable of:

- a) Dexterity-intensive tasks with his right hand for periods of five to ten minutes at a time;
- b) Close range reaching with both arms (provided his neck limitations are satisfied);
- c) Neck flexion for ten minutes at a time; and
- d) Incidental shoulder or overhead reaching with the right arm.

[144] Ms. Bracken conducted a work simulation (which involved Mr. Rabnett twisting threaded metal pins into a board placed on a dummy). She considered this test to be similar, but not identical, to the actual placement of acupuncture needles into a patient. In her view, the twisting motion was similar to Mr. Rabnett's adjustment of acupuncture needles. She observed that the acupuncture needles Mr. Rabnett uses are finer than the metal pins he placed during her work simulation (which she suggested might have underestimated his dexterity demands). However, unlike acupuncture needles, they had no grip. Ms. Bracken did not inspect Mr. Rabnett's workplace. She agreed that acupuncture is considered a light strength job, with no significant lifting component. Ultimately, she opined that Mr. Rabnett is best-suited to part-time work and occasional dexterity (i.e., up to about 33% of the day).

[145] In cross-examination, Mr. Rabnett admitted "it followed" that he told Ms. Bracken (as she recorded) he was seeing 40 to 60 patients per week before the Accident "at times"; notably, this qualification is not included in her report. He conceded that he told her he was seeing only 20 to 30 patients/week at the time of her assessment. When asked if he told Ms. Bracken that he continued to see the same number of patients after the Accident as he had before the Accident until moving to Alberta, Mr. Rabnett said he was not certain.

[146] At a minimum, Mr. Rabnett gave Ms. Bracken incomplete information. She had no work documents and relied exclusively on him for a work history. There is no reference in her report to the longer duration of patient treatments at the Alberta Clinic (as compared to the BC Clinic) or the corresponding decrease in his patient numbers after relocating to Alberta. In my view, this omission is significant and distorted the work history Mr. Rabnett provided to Ms. Bracken. Her conclusions must be viewed in this context. iv. Corroborating Evidence

[147] There is limited documentation in evidence to support Mr. Rabnett's substantial claim for past income loss. He produced only his tax returns, with none of the supporting documentation he filed with the CRA. He claimed not to appreciate the relevance of any other documents including, for example, receipts substantiating his actual business expenses or the statements of earnings Ms. James provided to him. This explanation was not persuasive. Mr. Rabnett commenced this claim, with the benefit of experienced counsel, in May 2016. Rather than producing documents which might have assisted in establishing his income loss claim, he discarded them.

[148] In closing, plaintiff's counsel argued that Mr. Rabnett's tax returns overstate his income as some of his business deductions had a personal component. I reject this argument. While Mr. Rabnett claimed to be confused about this matter and deferred to his accountant, he alone provided his accountant with the documentation necessary to substantiate the expenses he incurred to generate a business income. Mr. Rabnett did not call his accountant to explain his business deductions; there is no credible evidence that any was improper. They reduced Mr. Rabnett's taxable income to his benefit. Mr. Szekely, whose evidence I accept, explained that business expenses with a personal component tend to be fixed (rather than variable) and that only a pro rata share of variable costs used to generate a business income is properly deductible.

[149] Mr. Rabnett had an obligation under the Supreme Court Civil Rules to produce all relevant documents within his possession and control to support his claims. He offered no compelling explanation for not doing so. In the circumstances, I draw an adverse inference and conclude that any documents Mr. Rabnett could have, but did not, produce would not have favoured his position: *Afework v. Correa*, 2019 BCSC 1672 at para. 99. I rely on his filed tax returns as the best evidence of his actual gross and net pre-trial business income.

[150] There are other significant gaps in the evidence. Mr. Rabnett produced no documents recording his hours of work, before or after the Accident. No patient schedules, work calendars, or wait lists (with patient names redacted) are in evidence. Mr. Rabnett's entire pre-Accident work day did not consist of invasive needling acupuncture treatments. On his own evidence, his job duties included:

- a) Obtaining patient health information;
- b) Inputting patient data into a computer;
- c) Preparing patient treatment plans;
- d) Performing needling and non-needling acupuncture treatments;
- e) Completing herbal consultations and sales;
- f) Cleaning treatment rooms after patient visits; and
- g) Charting patient visits.

- [151] Mr. Rabnett gave no evidence about what percentage of his work day he spent on each of these activities (most of which he can still perform without difficulty), either before or after the Accident. There was no trial evidence about how often he was seeing two patients concurrently before the Accident. There was no evidence from anyone about whether it is feasible for an acupuncturist to treat two patients concurrently five days a week, 48 weeks per year (as Mr. Rabnett asserts he had the capacity to do, absent the Accident). No acupuncturist who does so, or knows anyone who does, testified at trial. No other acupuncturist (who works at either the BC Clinic or the Alberta Clinic) gave evidence.
- [152] According to Mr. Rabnett, he blocked time off in his calendar after the Accident when he could otherwise have been seeing patients, evidence Ms. K. Nault (who was then booking his appointments) corroborated. However, the evidence is silent regarding:
- a) How much time he blocked off for breaks due to his Accident-related injuries;
 - b) How many patient visits were cancelled or rescheduled due to his Accident-related injuries; and
 - c) How many patients he would have seen, but for his Accident-related injuries.
- [153] According to Ms. Martorana, Mr. Rabnett had a diminished capacity to treat patients after the Accident and she told staff not to double-book him. However, she did not specify how many more patients he would have seen, but for the Accident. She estimated, in the absence of any corroborating evidence, that her own patient numbers, and those for the BC Clinic, increased by at least 30% after 2015. In cross-examination, she admitted this was due, at least in part, to her hiring additional independent contractors. Ultimately, I did not find her personal expectation that, but for the Accident, Mr. Rabnett would have enjoyed the same kind of increase in revenue as she and the BC Clinic did, to be persuasive.
- v. Assessment of Loss
- [154] I accept that Mr. Rabnett suffered compensable Accident-related injuries that impaired his capacity to work before trial. In my view, the factors set out in Brown are met. On the evidence, he now has a more limited capacity to perform his usual job duties due to his Accident-related symptoms. He stopped offering acupressure (a technique that involves him placing his fingers underneath a patient and pressing up). The challenge is to value this past income loss on the available evidence.
- [155] Mr. Rabnett's income increased significantly between 2012 and 2013; the reason for this is unclear on the evidence. It is consistent with the evidence of both Ms. Martorana and Mr. Rabnett that his compensation structure at the BC Clinic became more lucrative over time as he gained experience. It is also consistent with him starting to treat patients concurrently, or doing so more often. Mr. Rabnett's income increased again between 2013 and 2014; this increase is consistent with his transition to seeing patients concurrently in two dedicated treatment rooms at the BC Clinic's new and larger location.

- [156] According to Mr. Rabnett, his practice seemed to take off before the Accident. He said the area was undergoing a population explosion, evidence Ms. James and Ms. Martorana corroborated. On all the evidence, the BC Clinic was then thriving; Ms. James said it was so busy that advertising was unnecessary. Mr. Rabnett had the discretion to work the hours he wanted. I conclude on the evidence that, by late 2014, he was seeing the number of patients he wanted and reasonably could, within the confines of his work day.
- [157] In my view, the evidence does not establish that, but for the Accident, there is a real and substantial possibility, beyond speculation, that Mr. Rabnett's income would have increased by 15% every year until 2018, and thereafter remained constant. This hypothetical projection does not correspond to his actual pre-Accident income. As Mr. Szekely noted, his pre-Accident income demonstrates no clear pattern or trend. Ultimately, Mr. Szekely was unable to estimate Mr. Rabnett's past income loss as there were too many variables to permit him to do so. There was no better information at trial.
- [158] Ms. James, office manager of the BC Clinic, estimated Mr. Rabnett's past income loss in her April 19, 2016 letter to plaintiff's counsel as follows:
- [159] This is a letter to inform you of the time Mr. Stefan Rabnett missed from work due to [the Accident]. From the [Accident] until the end of April, Mr. Rabnett blocked off time throughout his days worked to break up his days and allow his body to rest. Thursdays were his long days so Mr. Rabnett had to shorten his Thursdays and also take an extended break. Adding up all the time he blocked off from February to the end of April 2015, Mr. Rabnett lost just over two days total of work (approximately 20 hours). The total loss of patient revenue would be approximately \$1,500.00. In addition, Mr. Rabnett also lost potential new patients who would continue to come in and see him on a weekly basis because he did not have the extra space available to fit them into his schedule. So there was future earnings he lost out on as well due to his injuries from [the Accident].
- [160] At trial, Ms. James confirmed she had no information about Mr. Rabnett's business expenses. Neither the letter of instruction provided to her, nor the documentation on which Ms. James based her letter, is in evidence. Ms. James retreated from her April 2016 letter at trial, saying she was not sure what she was thinking when she wrote it or where she got the information on which it was based. However, she conceded in cross-examination that she typed the letter, had access to Mr. Rabnett's schedules when she wrote it, and understood its purpose was to provide information about his time missed from work in the context of this litigation. It suggests a substantially more modest claim for past income loss than the one Mr. Rabnett advanced at trial.
- [161] Ms. James offered no compelling explanation for why she now thinks she understated Mr. Rabnett's past income loss in her April 2016 letter. She had no better information at trial. Her estimated past income loss of \$1,500 (for a three-month period) is consistent with the BC Clinic documents in evidence indicating Mr. Rabnett saw more (not fewer) patients in the two years after the Accident and that his billings increased substantially in 2016. It is

also consistent with my finding that his functional impairment following the Accident was relatively modest.

- [162] Mr. Rabnett's annual patient numbers dropped only slightly in 2015 (by 14, as compared to 2014, the year before the Accident). Assuming 30-minute standard visits (at \$68/visit), the loss of 14 patients translates into a gross loss of revenue of \$952 (before expenses and tax). Mr. Rabnett saw substantially more patients in 2016 than he did in 2014. If the number of patients Mr. Rabnett saw in 2014 (2,297) is compared to the equivalent figure for 2017 (2,100), the difference is 197 patients/year or (assuming 48 work weeks/year) or about 4 patients/week. The corresponding figure comparing 2018 patient numbers (2,094) and those in 2014 (2,297) is 203.
- [163] If it is assumed that Mr. Rabnett would have seen four additional patients/week from 2017 until August 2019 (when he relocated to Alberta), but for the Accident, gross past income loss would be \$36,096, as set out below. Year Standard Patient Visit Cost Annual Loss of 4 Patient Visits/Week x 48 Weeks (before expenses and tax) 2017 \$68 \$13,056 2018 \$68 (Jan to April) \$73 (May to Dec) \$4,352 \$9,344 2019 \$73 (Jan to Aug) \$9,344 TOTAL \$36,096
- [164] This figure would be subject to adjustment for relevant positive and negative contingencies. In my view, it is possible that Mr. Rabnett might have seen more than four additional patients, but for the Accident. In my view, it is equally possible, given the non-Accident-related changes in his life at the time (including his divorce, re-partnering, and parenthood), that he would have seen fewer patients. Ultimately, I conclude these competing contingencies are speculative, unmeasurable on the evidence, and effectively cancel each other.
- [165] Mr. Rabnett's August 2019 move to Alberta was not precipitated by the Accident. Thereafter, his patient numbers declined significantly. He did not attribute this decline to any deterioration in his condition; rather, he said he has become more conscious of listening to his body.
- [166] Mr. Rabnett has a substantially less lucrative compensation package with the Alberta Clinic than he had with the BC Clinic. Patient visits are longer and generate lower fees. He retained 90% of his billings at the BC Clinic but retains only 2/3 of his billings at the Alberta Clinic. While he was required to pay rent when working at the BC Clinic (and does not do so at the Alberta Clinic) he covered all his own expenses at both clinics.
- [167] The Alberta Clinic was closed for three months in 2020 (from mid-March to mid-June) due to COVID-19. Mr. Rabnett conceded that patients were slow to return after the Alberta Clinic re-opened in June 2020. It was prohibited from operating two treatment rooms concurrently from December 2020 until April 2021.
- [168] According to Ms. Joosten, Mr. Rabnett could accommodate 12 patients/day (or 60/week) if he worked to full capacity. While she conceded that there currently are (and never have been) any acupuncturists at the Alberta Clinic who have been capable of working this

much, she maintained it is possible because acupuncturists set their own schedules. She testified that Mr. Rabnett works more than any acupuncturist she has ever known (including all those now working at her three clinic locations). Notably, she first met him after the Accident. While Ms. Joosten said that Mr. Rabnett builds breaks into his day; neither she nor Mr. Rabnett specified their number or duration. Mr. Rabnett now travels between three clinics; he agreed none has the same volume of MVA patients as did the BC Clinic.

- [169] To accommodate 12 one-hour patient visits/day, Mr. Rabnett would have to see six patients in two treatment rooms concurrently for six hours per day, 12 patients consecutively over 12 hours, or some combination thereof. A 15-minute cleaning block is allocated to every patient; Mr. Rabnett cleans his own patient rooms. This would require three additional hours of his time (i.e., 15 minutes x 12 patients/day). Mr. Rabnett is also required to allocate time to charting, ordering supplies, and completing professional education. In other words, it is not possible for him to spend his whole 8-hour day treating patients.
- [170] From October 2019 (excluding his first month of work while he re-established a new practice) to February 2020 (before the onset of COVID-19), Mr. Rabnett saw an average of 117 patients/month. On the assumption that standard patient visits at the Alberta Clinic are one hour (or twice as long as visits at the BC Clinic), this would equate to 234 one-half hour visits/month (i.e., 2,808 patients per year, or 58 per week, assuming 48 weeks of work per year). That figure compares favourably to the average number of patients Mr. Rabnett saw in 2014, the year before the Accident. Assuming a 5-day work week, this would roughly equal 11 one-half hour (or 5 one-hour) patient visits per day.
- [171] I am unable to conduct any meaningful comparison between Mr. Rabnett's earnings at the BC Clinic and those at the Alberta Clinic. Mr. Szekely was unable to do so. The evidence does not permit me to measure the impact, if any, of the ongoing pandemic, or Mr. Rabnett's recent non-Accident medical diagnoses, on his past income loss. Ultimately, I am not persuaded the evidence establishes, beyond speculation, a real and substantial possibility of a past, Accident-related, income loss after August 2019.
- [172] Doing my best on the available evidence, and recognising this is an assessment and not a calculation, I award damages for past income loss (net of expenses, estimated at approximately 20%, but before tax) of \$30,000. I leave it to counsel to discount this figure for tax. I conclude this award is reasonable and fair to both parties. FUTURE LOSS OF INCOME-EARNING CAPACITY Parties' Positions
- [173] Mr. Rabnett seeks damages in the range of \$1,000,000 to \$1,400,000 for an alleged loss of future income-earning capacity based on the present value of an annual loss of \$75,000 to \$100,000 to age 65 or 70. Applying Mr. Szekeley's multipliers, the present value of an annual loss of \$75,000 to age 65 is \$1,058,550, or \$1,161,975 to age 70. If Mr. Rabnett incurs an annual income loss of \$100,000, his claim to age 65 is \$1,411,400.

[174] The defendant assesses Mr. Rabnett's loss of future income-earning capacity in the amount of \$75,000, the rough equivalent of his best year of annual net income (after the deduction of business expenses but before tax) at the BC Clinic.

Legal Framework

[175] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by his injuries; and (2) if so, what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not the application of a purely mathematical calculation. The appropriate means of assessment will vary from case-to-case: Perren at para. 32. The assessment of damages is a matter of judgment, not calculation: Rosvold v. Dunlop, 2001 BCCA 1 at para. 18.

[176] To the extent possible, a plaintiff should be put in the position he would have been in but for the injuries caused by the defendant's negligence: Lines at para. 185. The court's essential task is to compare the plaintiff's likely future working life with and without the Accident: Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 32 [Gregory].

[177] In Rab at para. 47, Grauer J.A., speaking for the Court, set out a three-step process for assessing future earning capacity:

- i. Does the evidence disclose a potential future event that could give rise to a loss of capacity?
- ii. Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?
- iii. What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[178] The final step in the assessment process requires the court to determine whether the damage award is fair and reasonable: Lo v. Vos, 2021 BCCA 421 at para. 117.

[179] There are two possible approaches to an assessment of the loss of future earning capacity: the earnings approach and the capital asset approach. Both are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: Perren. The earnings approach involves a form of math-oriented methodology such as:

- a) Postulating a minimum annual income loss for the plaintiff's remaining years of work;
- b) Multiplying the annual projected loss by the number of remaining years; and
- c) Calculating a present value.

- [180] The capital asset approach involves considering the factors set out in Brown. The fact that a plaintiff's injuries do not cause an actual loss of income does not mean he has not suffered a loss of earning capacity. Nor does the fact that a plaintiff has earned the same or more income since his injuries preclude an award for future loss of income: *Jurczak v. Mauro*, 2013 BCSC 658, var'd on other grounds at para. 123. Analysis and Conclusion
- [181] For the reasons set out above, I accept that the factors in Brown are met and that Mr. Rabnett has suffered a future loss of earning capacity as a result of the Accident. On his evidence, as corroborated by Ms. James, Ms. Martorana, Ms. K. Nault, and Ms. Joosten, he requires some accommodation during his work day due to his Accident-related injuries. He takes more breaks and sees fewer patients as a result. As an independent contractor, he sets his own hours and work schedule. Ms. Joosten appreciates Mr. Rabnett's skills as an acupuncturist and is willing to accommodate him.
- [182] Mr. Rabnett described his sensory ability to gauge where he is placing acupuncture needles as his "vision inside the body". Dr. Salvian testified that Mr. Rabnett's TOS symptoms may become additive over time if he is required to engage in prolonged or repetitive activities involving his right arm.
- [183] Mr. Rabnett acknowledged that his current income is not economically sustainable. I conclude that, for this reason, he may decide to relocate his practice to a larger centre where he would enjoy more lucrative work. I accept that, given his Accident-related injuries, there is a real and substantial possibility he will be less marketable, as compared to able-bodied acupuncturists competing for the same jobs.
- [184] For the reasons set out above, I reject Mr. Rabnett's hypothetical income projections. In my view, they are speculative and do not reflect real and substantial possibilities that are supported by the evidence I accept. Given my concerns regarding the reliability of Mr. Rabnett's uncorroborated evidence, my findings regarding the severity of his Accident-related injuries, the gaps in the documentary and other evidence, and the evidence of Mr. Szekely that Mr. Rabnett's pre-Accident income did not follow any consistent pattern, I reject the approach advocated by plaintiff's counsel.
- [185] Given the inherent uncertainty in assessing Mr. Rabnett's future income, I conclude this loss is best valued using the capital asset approach. Based on *Pallos*, an award in the range of one to two years of lost income is usually ordered: *Kim* at para. 100, citing *Kania v. Evans*, 2021 BCSC 797 at para. 91. I accept that Mr. Rabnett's capacity to earn income will be affected by the chronic nature of his injuries and his corresponding physical limitations.
- [186] Mr. Rabnett suggested he may be required to abandon acupuncture altogether and retrain in his late 40s. He offered no specifics about what alternative career he might pursue, how long any such retraining program would take, what it would cost, where he would pursue it, or how much he might earn in a different job. Ultimately, I conclude this possibility is both remote and speculative.

- [187] Mr. Rabnett submits that his Accident-related injuries have disproportionately impacted his life because of the nature of his profession and the ethical need for him to do no harm. In my view, the evidence does not establish a measurable risk or a real and substantial possibility that he is or will become unsafe to practice because of his compensable injuries, or that he is likely to encounter any difficulties with his regulatory body. To date, he has had none. I infer from the trial evidence that he has likely treated hundreds of patients with invasive needling treatments in the more than seven years since the Accident, without incident. There are many ways Mr. Rabnett could adapt his acupuncture practice, as necessary, without abandoning it altogether. On his own evidence, Mr. Rabnett is passionate about his chosen career. In my view, it is highly unlikely he will leave it because of his Accident-related injuries. By contrast, I agree there is a real and substantial possibility that he will do so for economic reasons, unrelated to the Accident.
- [188] On the evidence, it is possible that Mr. Rabnett's condition will improve with formal physiotherapy (as recommended to him in 2016). Conversely, he may experience a greater income loss if his condition deteriorates. Ultimately, I assess both contingencies to be relatively unlikely and roughly equal; neither is measurable on the evidence. While I accept that prolonged or repetitive use of his right arm might result in additive symptoms, the evidence suggests that Mr. Rabnett has adapted his work situation over the last seven years to one which is medically sustainable.
- [189] I conclude that Mr. Rabnett has substantially overestimated his future income loss. The defendant's estimate of \$75,000 is based on Mr. Rabnett's highest year of annual earnings at the BC Clinic. Mr. Rabnett is now working in Alberta where his compensation is structured differently.
- [190] One year of income at the Alberta Clinic, based on five one-hour patient appointments per day (roughly equivalent to Mr. Rabnett's average of about 10 one-half hour patient visits per day shortly before the Accident), five days per week and 48 weeks per year, billed at the standard rate of \$95/hour, less approximately 20% for business expenses, equals \$91,200. Two years of annual income based on the same assumptions equals \$182,400.
- [191] Doing my best on the available evidence and recognising this is an assessment and not a calculation, I award \$125,000 for the loss of future income-earning capacity. This figure is consistent with my assessment that Mr. Rabnett's Accident-related injuries fall predominantly on the milder end of the spectrum. In my view, this award is reasonable and fair to both parties. FUTURE CARE COSTS Parties' Positions
- [192] Ms. Bracken assessed Mr. Rabnett virtually via Zoom on July 13, 2021, before completing a cost of future care report dated July 27, 2021. Mr. Rabnett claims future care costs in the range of \$110,500 to \$133,100, representing the present value of the items and services Ms. Bracken recommended, as set out in tables 2 and 3 in the report of economist, Mr. Coleman.

[193] The defendant admits future care costs of \$1,602.18, representing the present value of the following therapies:

- a) \$890.10 for the cost of 10 physiotherapy sessions (as recommended by Ms. Bracken, less the cost of the one Mr. Rabnett has already had) at \$90/session; and
- b) \$712.09 for the cost of eight kinesiology sessions at \$90/session.

Legal Framework

[194] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-Accident condition to the extent possible. When full restoration is not possible, the court must strive to ensure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) at 78, 84 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.). The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence.

[195] Future care costs are justified if they are both medically necessary and likely to be incurred by the plaintiff: *O'Connell v Yung*, 2012 BCCA 57 at paras 55, 60, & 68-70 [O'Connell]; Gregory at para 39. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, a plaintiff can recover the cost of such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell* at paras. 68-70.

[196] Adjustments must be made to a future cost of care award to account for contingencies. The extent to which a future cost of care award should be adjusted for contingencies depends on the plaintiff's specific care needs. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, the award is reduced based on the prospect that the plaintiff's condition might improve, or increased because additional care might be required. Each case is determined on its particular facts: *Gilbert* at para. 253. An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. Analysis and Conclusions Medications

- [197] Ms. Bracken includes the cost of two tablets per week of Advil and Tylenol (from an undefined start date for the duration of Mr. Rabnett's lifetime) in her future cost of care report. She also includes costs for Nortriptyline, Lyrica, and Gabapentin. In his report, Dr. Salvian states that anti-inflammatories, muscle relaxants, or anti-neuralgic medications (such as Lyrica, Nortriptyline, or Gabapentin) might be beneficial for managing increased muscle spasms due to over-exertion. To date, none has been prescribed.
- [198] No medical expert recommends that Mr. Rabnett take Advil or Tylenol on a weekly basis for life for the management of his symptoms. Mr. Rabnett currently takes occasional Tylenol and Advil. According to Dr. Grabowski, it has provided him with marginal benefit at best. In his September 2021 report, Dr. MacNicol noted that analgesic and anti-inflammatory medication is typically poorly effective for chronic whiplash pain and, at the time of his last assessment, Mr. Rabnett was of the view that the potential benefits of other medications (for neural sensitisation) were not worth the potential risks.
- [199] I conclude that any award for the cost of future prescription medications is speculative and that the evidence does not support an award for the lifetime costs of over-the-counter medications. Kinesiologist/Personal Trainer
- [200] Ms. Bracken estimates the cost of a kinesiologist or personal trainer to be \$90 to \$100/session. She includes the cost of ten initial sessions, followed by two sessions per year to age 75, in her future cost of care report.
- [201] Dr. MacNicol supports a referral to a physiotherapist or kinesiologist; he recommends that Mr. Rabnett continue with the exercises he has been given. Dr. MacNicol does not suggest this exercise program must be revisited semi-annually. Dr. Grabowski recommends that Mr. Rabnett continue with an active rehabilitation program, noting that a kinesiologist could help him review and adjust his program. She does not suggest this is an ongoing cost that will continue for his lifetime.
- [202] According to Dr. Salvian, patients with TOS typically get their exercise from walking or pool exercises. He recommends fitness maintenance and that Mr. Rabnett have sufficient access to a personal trainer or kinesiologist to assist him in developing a personalised exercise program. He does not suggest that Mr. Rabnett requires personal training sessions for life. He recommends home exercise and stretching which, on Mr. Rabnett's evidence, he has been doing.
- [203] I award the cost of ten one-to-one sessions with a kinesiologist (at \$100/session) for a total cost of \$1,000. Thereafter, I conclude that Mr. Rabnett can implement what he has learned on his own. I have not discounted this cost to reflect a present value as I anticipate Mr. Rabnett will pursue this treatment in 2022.

- [204] I also award a lifetime contingency fund of \$1,000 to allow for periodic re-assessment by a kinesiologist, as necessary. This roughly equals the cost of 10 additional kinesiology sessions. In my view, this fund reasonably addresses the potential need for Mr. Rabnett to adjust his exercise program over time. Physiotherapy
- [205] Ms. Bracken includes funding for physiotherapy in her future cost of care report. She contemplates an initial assessment (at a cost of \$105), followed by ten sessions and, thereafter, one physiotherapy session/year for life (at a cost of \$90/session).
- [206] Dr. Grabowski recommends that Mr. Rabnett engage in continued active rehabilitation. Dr. MacNicol endorses continued regular stretching, mild strengthening, and mild aerobic exercise. Dr. Salvian encourages fitness maintenance. None suggested Mr. Rabnett requires ongoing physiotherapy for life.
- [207] Physiotherapy was recommended to Mr. Rabnett in September 2016; he first pursued it two months before trial. On the preponderance of medical evidence, I agree he would benefit from an active rehabilitation or physiotherapy program. I do not accept he requires this kind of therapy on an ongoing basis for life.
- [208] Although I understand that Mr. Rabnett has now attended one or two physiotherapy sessions, it is unclear on the evidence whether he has had the benefit of a comprehensive initial assessment. I have therefore included this cost, followed by ten physiotherapy sessions for a total of \$1,005. I have not discounted this cost to present value as I contemplate Mr. Rabnett will pursue this therapy in 2022. Gym Membership
- [209] Ms. Bracken includes the cost of a gym membership (\$57 to \$59/month to age 67) in her future cost of care report. Dr. Salvian recommends a gym pass.
- [210] On Mr. Rabnett's evidence, he attended the gym before the Accident and had gym memberships before the onset of the COVID-19 pandemic. He admitted in cross-examination that, while this cost is not new since the Accident, he would like to have a space to do his current exercise program. I conclude that Mr. Rabnett would likely have incurred the cost of a gym membership absent the Accident. Passive Therapies
- [211] Mr. Bracken suggests funding for passive therapies as follows:
- a) 12 chiropractic sessions per year for life (at a cost of \$65/session); and
 - b) 12 massage therapy sessions for life (at a cost of \$98.50/session).
- [212] Dr. Grabowski recommends that Mr. Rabnett transition away from passive therapies. She suggests intermittent massage, acupuncture, and chiropractic treatment for major pain flares.
- [213] Dr. MacNicol suggests periodic passive therapy (i.e., chiropractic adjustments, massage therapy, acupuncture, and physiotherapy) to treat pain exacerbation, if this treatment provides progressively increasing benefit and facilitates active rehabilitation. He notes

these therapies are not curative and that over-reliance on them can detract a patient's focus from active therapies. He confirms (in both his July 26, 2018 and September 11, 2021 reports) that, to date, acupuncture, massage, and chiropractic therapy have provided Mr. Rabnett with mild, temporary relief only and no progressive benefit.

- [214] Dr. Salvian agrees that passive treatments are not curative and benefits tend to be transient. He suggests this treatment might be beneficial to address increased muscle spasms, if patients have overexerted themselves.
- [215] Mr. Rabnett conceded in cross-examination that he regularly attended for chiropractic and massage sessions before the Accident for non-therapeutic reasons. By his own admission, he enjoys this kind of therapy and would have pursued it absent the Accident.
- [216] I accept that Mr. Rabnett might benefit from occasional passive therapy to manage pain flares. The medical experts do not recommend he pursue it on a regular or ongoing basis. I award a lifetime contingency fund of \$2,000 for passive therapy, to manage pain flares, as necessary. This amount is roughly equal to the cost of 12 chiropractic sessions and 12 massage therapy sessions and takes into account the probability, on Mr. Rabnett's own evidence, that he would have attended regularly for this kind of therapy, absent the Accident. Botox Injections
- [217] Ms. Bracken includes the cost of Botox therapy (every 12 weeks at a cost of \$800/treatment) in her future cost of care report.
- [218] Dr. Salvian agrees that Mr. Rabnett could consider a trial of Botox injections into the scalene muscles. In his response report dated September 26, 2021, he discusses the risk of Botox therapy in some detail, noting as follows:
- a) It is invasive and non-curative;
 - b) It is not a panacea and can be associated with significant side effects including weakness of the muscles in the neck;
 - c) The effects are temporary and last only three to four months;
 - d) This partial benefit occurs in only 40 - 50% of patients; and
 - e) Randomised controlled trials have demonstrated no significant long-term benefit for patients with TOS.
- [219] Dr. MacNicol would recommend Botox injections for Mr. Rabnett only if his symptoms start to interfere with his function; at the time of his last assessment in June 2019, he concluded Mr. Rabnett did not require this treatment.

- [220] Dr. Shtybel first suggested Botox as a possible treatment option in September 2016 (although he was reportedly not optimistic about its likely efficacy). To date, Mr. Rabnett has not pursued it. I conclude that any award for Botox therapy is speculative and that, given its significant risks and modest, transient benefit, Mr. Rabnett will not likely pursue it. I award no costs for Botox therapy. Home Cleaning/Yard Work
- [221] Ms. Bracken includes the cost of housekeeping and home maintenance services in her future cost of care report, as set out below. Service Cost Replacement Start Date End Date Regular Housekeeping \$40/hour 3 hours/month TBD Age 80 Seasonal Housekeeping \$40/hour (2-hour minimum) 16 hours/year TBD Age 75 Interior Window Washing \$100 - \$150/service Two services/year TBD Age 75 Snow Removal \$25 - \$50/visit 10 - 20 visits/year TBD Age 70 Exterior Window Washing \$100 - \$150/service One service/year TBD Age 70 Laborer \$26.25/hour 10 - 20 hours/year TBD Age 70 Tree Pruning \$250/visit One session/year TBD Age 70
- [222] In my view, Ms. Bracken's recommendations for home cleaning and maintenance significantly overstate Mr. Rabnett's actual, Accident-related, future care needs. In the FCE report, Ms. Bracken confirmed he is capable of 95% of heavy housekeeping, light gardening and home maintenance, and 84% of outside home repair, lawn and garden maintenance. In my view, her future care recommendations are inconsistent with those conclusions.
- [223] Dr. Grabowski notes in her report that Mr. Rabnett reported being able to do his housework and yard work, albeit with some pain when lifting and performing overhead tasks. He reportedly found gardening to be challenging. She concluded that he is able to do his housework and yard work, albeit with some pain afterwards. She acknowledged he is not as productive as he once was and that he might require breaks due to his symptoms.
- [224] In his July 2018 report, Dr. MacNicol notes that Mr. Rabnett reported household and yard chores increase his symptoms, lifting above his shoulder aggravates his pain, and he finds gardening particularly difficult. Dr. Salvian observed in his report that Mr. Rabnett does not have a lot of yard work; in his view, Mr. Rabnett requires some assistance with heavy seasonal housework (i.e., wall washing, window washing, painting, raking, shovelling and hoeing). He advised Mr. Rabnett against carrying heavy items and recommended a small vacuum cleaner.
- [225] I have considered Mr. Rabnett's inability to perform occasional heavy home cleaning and yard work in my assessment of non-pecuniary damages. He currently rents a property and has no immediate plans to purchase a home. Most of the heavy cleaning tasks identified by Ms. Bracken in her report are not required on a regular basis.

- [226] The evidence persuades me that Mr. Rabnett is able to do general housekeeping, provided he paces himself, and avoids heavy lifting, overhead reaching, and prolonged repetitive use of his right arm. I conclude that he can do light housekeeping, with accommodations (including the use of his left hand), as necessary. I make no separate award for the future cost of general housekeeping services.
- [227] Mr. Rabnett does not currently own a home; on the trial evidence, neither he nor his partner is likely to be in a financial position to purchase one in the near future. Ms. K. Nault started her own alternative medicine business in 2021 and has yet to realise a profit. Mr. Rabnett concedes that his current income may not be economically sustainable. He is not required to do most of the home care tasks Ms. Bracken includes in her future cost of care report.
- [228] If Mr. Rabnett buys a house, he may incur some of the home cleaning and maintenance costs Ms. Bracken estimates. However, if he buys a strata property, many of them are likely to remain unnecessary. Assuming mid-range figures, the total annual cost of the home services included in Ms. Bracken's report, less regular housekeeping, is \$2,221. Based on Mr. Coleman's multipliers, the present value of this annual cost for the next 22 years (to about age 70) is roughly \$40,000. In my view, this figure must be substantially discounted to reflect the significant possibility that Mr. Rabnett will never purchase a home and never incur these costs. Doing my best on the available evidence, I award \$4,000 or about 10% of this total.
- [229] Ms. Bracken also includes in her report the cost of a self-propelled lawn mower. There is minimal grass cutting required at Mr. Rabnett's rental property. Ms. Nault is able to do it, as is Mr. Rabnett, albeit with some increase in his symptoms. I am not persuaded he currently requires a self-propelled mower. Based on Mr. Coleman's multipliers, the mid-range present value cost of providing a self-propelled mower in 5 years (and replacing it in 15 and 25 years) is \$1,728; I award \$175, or roughly 10% of this amount to reflect the substantial likelihood Mr. Rabnett will never incur this cost.
- [230] In summary, I award future care costs as follows:
- a) Kinesiologist/Personal Trainer - \$2,000
 - b) Physiotherapy - \$1,005
 - c) Passive Therapies - \$2,000
 - d) Heavy Yard Work/Labour Costs - \$4,000
 - e) Self-propelled mower - \$175 TOTAL: \$9,180 FAILURE TO MITIGATE Parties' Positions

- [231] The defendant submits that Mr. Rabnett's claims for non-pecuniary damages and past loss of income or earning capacity (if anything other than nominal damages are awarded) are appropriately discounted by 20% due to his failure to mitigate. Specifically, defence counsel argues that Mr. Rabnett failed to pursue timely physiotherapy and active rehabilitation (as recommended by various medical practitioners and experts), instead favouring passive treatments (including massage therapy, acupuncture, and chiropractic sessions).
- [232] Mr. Rabnett rejects this argument. He denies the evidence establishes that a specific physiotherapy program would have reduced or eliminated the effect of his injuries, or that the exercise and stretching program he followed (as recommended by Dr. Salvian) was an inadequate substitute for more formal physiotherapy.

Legal Framework

- [233] A plaintiff in a personal injury action has a duty to take reasonable steps to mitigate his loss. A defendant bears the burden of proving: (1) that the plaintiff acted unreasonably in not doing what the defendant asserts ought to have been done; and (2) that the plaintiff's loss would have been reduced or eliminated if those steps had been taken: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Graham v. Rogers*, 2001 BCCA 432 at para. 35.
- [234] In *Antoniali v. Massey*, 2008 BCSC 1085, Justice Preston considered an alleged failure to mitigate in comparable circumstances: [30 In this case, the defendants submit that Ms. Antoniali unreasonably failed to embark on a program of exercise under the guidance of a personal trainer to rehabilitate herself and reduce or eliminate the continuing effect of the injuries on her.
- [31] In order to conclude that Ms. Antoniali's damages should be reduced by application of the principle that a plaintiff has a positive duty to mitigate his or her injuries, I would have to find that the defendant has established:
- that a program of stretching and conditioning under the guidance of a personal trainer would have reduced or eliminated the effect of the injuries;
 - that the reasonable plaintiff in Ms. Antoniali's circumstances would have followed such a program;
 - that Ms. Antoniali unreasonably failed to follow such a program and;
 - the extent to which Ms. Antoniali's damages would have been reduced if she had followed such a program.
- [235] The law does not require a plaintiff to do that which cannot be controlled; nor does it require perfection in the pursuit of rehabilitation: *Gilbert v. Bottle*, 2011 BCSC 1389 at para 203. Analysis and Conclusion

[236] Even if Mr. Rabnett unreasonably failed to follow the advice of Drs. Shtybel, Sullivan, and MacNicol to pursue physiotherapy, the evidence falls short of establishing that doing so sooner would have reduced or eliminated his loss. The evidence also fails to establish that the exercise program Mr. Rabnett followed on his own was an inadequate substitute for more formal physiotherapy. While I am not persuaded that Mr. Rabnett's failure to attend physiotherapy earlier constitutes a failure to mitigate, I conclude it is consistent with his symptoms being predominantly mild.

DISPOSITION

[237] I award damages as follows:

- a) General Damages (including loss of housekeeping capacity) - \$95,000
- b) Special Damages - \$4,871.40
- c) Past Loss of Income-Earning Capacity - \$30,000 (before tax)
- d) Future Loss of Income-Earning Capacity - \$125,000
- e) Future Care Costs - \$9,180 TOTAL: \$264,051.40

[238] Absent information the parties may wish to bring to my attention, Mr. Rabnett is entitled to his costs on the ordinary scale. If there are any matters arising from these reasons, the parties are at liberty to apply to speak to them within 30 days. "Douglas J."

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