

CANADA / JUDGMENT

Safdari v. Buckland

2020 BCSC 769

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 769 Safdari v. Buckland

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Safdari v. Buckland,

2020 BCSC 769

Date: 20200525

Docket: M175087

Registry: Vancouver

Between:

Seyed Hemat Safdari a.k.a Vafa Safdari

Plaintiff

And

Leanne Buckland, John Doe, Jane Doe and

John Doe Corporation

Defendants

Before: The Honourable Justice Winteringham

Reasons for Judgment

Counsel for the Plaintiff:

H. Faramarzi

Counsel for the Defendants:

C. Manning

O. Sohi

Place and Date of Trial:

Vancouver, B.C.

January 6-10, 13-16 and

February 25-26, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 25, 2020

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I. OVERVIEW

- [1] On January 26, 2016, Seyed Hemat Safdari was stopped at a red light at the intersection of Austin Avenue and North Road, Coquitlam BC. He claims damages for injuries he says he suffered after a van driven by Leanne Buckland struck his car ("MVA").
- [2] The defendants deny liability for the accident asserting that Mr. Safdari failed to prove Ms. Buckland was even involved in the MVA let alone responsible for it. If liability is established, the defendants contend Mr. Safdari has not proven that the MVA caused the injuries for which he claims damages. If they lose on causation, the defendants submit:
 - a) Any damage award should be reduced due to his pre-existing low back injury (from a workplace accident that occurred in June 2015) and history of depression, both symptomatic at the time of the MVA;

- b) The chain of causation was broken by a work accident which occurred three years after the MVA and Mr. Safdari has not worked since; and
- c) Mr. Safdari failed to mitigate his losses by failing to engage in recommended medical treatment and failing to obtain alternative employment.

[3] The parties' positions on assessment of damages is similarly disparate.

[4] The plaintiff submits that he is entitled to the following awards:

Non-Pecuniary Damages:

\$200,000.00

Past Income Loss / Loss of Past Earning Capacity:

\$131,077.00

Loss of Future Earning Capacity:

\$1,373,100.00

Future Care Costs:

\$740,613.82

Special Damages:

Past Care and In Trust Claim

\$8,414.26

\$19,720.00

TOTAL

\$2,472,925.08

[5] On the issue of damages and subject to the resolution of the liability, causation and mitigation issues raised, the defendants submit that any award should be as follows:

Non-Pecuniary Damages:

\$40,000 - \$60,000

Past Wage Loss:

Nil

Loss of Future Income Earning Capacity:

Nil

Future Care:

0 - \$5,000

Special Damages:

Past care / intrust claim

\$1,200 - \$3,500

Nil

TOTAL

\$41,200-\$68,500

[6] I will deal first with the issue of liability. I will then turn to a determination of the balance of the issues.

II. LIABILITY

[7] On January 26, 2016, Mr. Safdari was driving a Nissan Versa with his spouse, Golaleh Ghaffari, in the front passenger seat traveling south bound on Austin Road. Intending to proceed straight through the intersection at North Road, he had stopped at the red light in the third lane from the curb and next to the left turning lane.

[8] Mr. Safdari testified that they had been at a full stop for about ten seconds when he suddenly heard a loud noise, "like an explosion." He believed that his car was lifted. He described the impact this way:

We were waiting at the red light - for a while. Suddenly, I heard an explosive sound. It was an awful sound and it carried from behind of the vehicle to the front. It was quite horrifying. My car was lifted by the left side. My wife screamed. I was shocked - I didn't know what to do. I went out of my car. There was a vehicle beside my vehicle - the one who struck my car - a red van. I went towards that driver, a lady. She was insisting to leave.

[9] Mr. Safdari testified that an unidentified male helped him. He testified that the unidentified male spoke to the woman because Mr. Safdari did not know what to do after the MVA and did not speak the language. The unidentified driver obtained the woman's driver's license and handed it to Mr. Safdari. The woman did not stay at the scene nor did the unidentified male. Mr. Safdari called 911 and the police and Emergency Health Services (EHS) attended shortly thereafter. Mr. Safdari testified that the woman and the unidentified male had both left the scene by the time the police arrived.

[10] Ms. Ghaffari also testified about the impact. She testified that just before the impact, she was talking to Mr. Safdari and looking towards him. She said she did not see any cars in the left turning lane. She testified that she suddenly heard a loud sound and felt the impact. She said the impact was severe enough that it caused her to place her hand on the dashboard. At the time of the MVA, Ms. Ghaffari was recovering from a workplace injury to her hand. She testified that Mr. Safdari left the vehicle and she stayed in the car. She testified that she saw

him speak to the driver of the car next to them. He returned to their car with a driver's license.

- [11] Ms. Ghaffari did not describe the driver of the other vehicle nor did she describe the vehicle that struck them. Her evidence on this point is simply that she observed Mr. Safdari interacting with the driver of the car beside them. She agreed during cross-examination that she was in considerable pain and she was transported by EHS to the hospital from the accident scene.
- [12] Mr. Safdari testified that after the police arrived on scene, he handed the driver's license to them.
- [13] I pause to deal with the balance of the evidence regarding the MVA and whether Mr. Safdari has proven, on a balance of probabilities that Ms. Buckland's negligence caused the MVA.
- [14] The defendants allege Mr. Safdari has failed to prove that Ms. Buckland caused the accident (and ask that an adverse inference be drawn) because Mr. Safdari failed to:
- a) Locate the unidentified male who was an eyewitness to the MVA and could have provided eyewitness testimony about the cause of the MVA;
 - b) Inspect Ms. Buckland's vehicle to show there was damage to the van consistent with the MVA described by him; and
 - c) Take any steps to forensically examine a piece of metal that Mr. Safdari later recovered from the accident scene.
- [15] I have declined to draw the adverse inference sought by the defendants. That is because in my view, Mr. Safdari took all reasonable steps in the circumstances following the MVA to secure what evidence he could.
- [16] The defendants contend, and I agree, that Mr. Safdari bears the burden of establishing on a balance of probabilities that Ms. Buckland caused the accident. Relying on *Zantvoort v. Welyk*, 2003 BCSC 995 at paras. 9-10, the defendants submit the plaintiff must establish, on a balance of probabilities the causal connection between the defendant itself and the alleged wrongdoing and that it is insufficient to merely put forward a theory about what might have caused the accident.
- [17] Further, the defendants rely on *Snell v. Farrell*, [1990] 2 SCR 311 for the proposition that causation need not be determined by scientific precision. It is "essentially a practical question of fact which can best be answered by ordinary common sense."
- [18] I have concluded that Mr. Safdari has met the burden of proof here. I say that even though Mr. Safdari did not specifically identify Ms. Buckland nor did he provide a detailed description of the driver beyond her approximate age and gender and the generic description given that the vehicle that struck him was a "red van."

- [19] However, in my view, there is a body of circumstantial evidence that corroborates Mr. Safdari's evidence on the issue of liability, including an admission from Ms. Buckland.
- [20] The parties tendered a police report as an exhibit agreeing that certain aspects of the report were admissible. Found in the police report is a purported admission from Ms. Buckland that she had been in an accident. I will turn to that admission and the weight that should be attributed to it shortly.
- [21] During her testimony, Ms. Buckland agreed that she was the person who handed over her driver's license to the unidentified male and that the police attended at her residence to return it to her. She testified that she did not believe she was in an accident and did not observe any damage to her vehicle albeit her vehicle was old and she may not have been in a position to observe "new" damage. She got rid of the vehicle many months later so the vehicle was not available for inspection.
- [22] The police evidence demonstrates that Cst. Gibson went to Ms. Buckland's residence on January 26, 2016 but she was not at home. He telephoned the residence later that day and reported that he spoke to a person who identified herself as "Leanne Buckland." During the phone discussion, Ms. Buckland said to Cst. Gibson that "she was in an accident and had spoken to ICBC regarding it." She testified that it was possible that she admitted to the police officer that she had been in an accident. She testified that this comment was simply her way of telling the police that she had phoned ICBC about the MVA because she was unsure about her reporting obligations in the circumstances.
- [23] Ms. Buckland stated that she does not believe she was in a car accident that day. While waiting at the stoplight at the intersection of North Road and Austin Avenue, she testified that two men suddenly started yelling at her, she felt intimidated and handed over her license. She left the scene, she stated, because she did not believe there had been an accident and that the light had turned to green so she needed to move her vehicle.
- [24] In direct examination, she said she did not hit the plaintiff's car. In cross-examination, her evidence changed somewhat. She was asked why she left the scene before the police arrived and she stated: "I didn't believe there was any damage" and "I couldn't believe anything that serious happened because I didn't feel anything." Her testimony during cross-examination was arguably different in that it was not an outright denial about whether an accident had occurred. Rather, her explanation for departing the scene was not that it didn't happen but that what happened wasn't serious.
- [25] Her testimony was also inconsistent with what she had stated earlier when first cross-examined on this point. When first cross-examined about her failure to wait for the police, she stated, "I thought we were finished. He had all my information. I didn't think there was anything wrong. So I kept going. If he needs me he's got my information."
- [26] In my view, this is a difference on the material point.

- [27] Additionally, her testimony about the manner of her driving immediately before the impact was inconsistent with her testimony from her examination for discovery. These factors regarding her testimony have caused me to prefer Mr. Safdari's version of Ms. Buckland's involvement in the MVA.
- [28] I pause to note that I have conducted a credibility assessment of Mr. Safdari that is not always favourable regarding some aspects of his evidence about his injuries. However, in my view, the plaintiff's evidence on the issue of liability does not suffer from the same weaknesses as those I have identified regarding his self-report of injuries.
- [29] In summary on this issue of liability, I am satisfied that Mr. Safdari has proven on a balance of probabilities that Ms. Buckland, while driving her red van, struck Mr. Safdari's vehicle while Mr. Safdari was properly and lawfully in his lane of travel. I am satisfied that there is a body of evidence, including circumstantial evidence, in support of this finding including:
- a) Mr. Safdari's testimony that it was the vehicle beside him that struck his vehicle and that there was a lady driving the vehicle;
 - b) Mr. Safdari's description of the unidentified male's interaction with the lady, obtaining her driver's license and handing it to Mr. Safdari;
 - c) Ms. Buckland's departure from the accident scene without her driver's license;
 - d) Ms. Ghaffari's description of the impact and her observations of Mr. Safdari's activities while outside of their car and then returning with the driver's license; and
 - e) Ms. Buckland's admission, albeit partial, to Cst. Gibson that she advised she was in an accident.
- [30] Ms. Buckland may have honestly believed that the MVA was not serious. I am nonetheless satisfied the evidence overall establishes that it is more likely than not that Ms. Buckland caused the MVA and is thus responsible for the damage and/or injuries related thereto.
- [31] In short, I am satisfied that the plaintiff has proven, on a balance of probabilities, that Ms. Buckland caused the MVA.

III. EVIDENCE RELEVANT TO CAUSATION/DAMAGES

A. Background Facts

- [32] Mr. Safdari was born in Iran on April 21, 1980. He described his family's political activities when he was growing up in Iran and said their political activism subjected the family to persecution by the Iranian government. Mr. Safdari testified that he was prohibited from attending university in Iran. He completed two years of mandatory military service and then started a construction stone exportation business where he worked until he was 27 years old. In the meantime, his sisters had immigrated to Sweden and Mr. Safdari provided financial support to his family abroad. He testified that he was arrested in about 2009 for

political activities, was released on bail and then left the country to go to Sweden.

- [33] Mr. Safdari testified that he spoke four languages including Kurdish, Farsi, Turkish and Arabic before he moved to Sweden.
- [34] In Sweden, Mr. Safdari attended a Swedish language school. He worked at some labour jobs to earn income for his family. In 2010, he started working for Aders Mobler where he was working in the warehouse. Based on their recommendation, he attended and successfully completed in June 2010, an interior design course at Stockholm House Design School. Thereafter, he secured employment as an interior designer at Aders Mobler earning equivalent to CDN\$4,000 to \$5,000 per month.
- [35] In January 2010, Mr. Safdari met his spouse, Golaleh Ghaffari. She was from Canada and had come to Sweden to visit relatives. They maintained a long-term relationship after Ms. Ghaffari's visit. She returned to Sweden in September 2010. They married in Sweden in 2011.
- [36] Mr. Safdari testified that his dream was to come to Canada and study interior design.
- [37] Despite his good income in Sweden at the time of their marriage, Mr. Safdari testified that the couple decided to try a life together in Canada where they hoped to eventually have children. Mr. Safdari believed that he would be able to obtain employment in Canada and be as successful as he was in Sweden.
- [38] Once in Canada, Mr. Safdari intended to enroll in an interior design course at British Columbia Institute of Technology (BCIT) or Vancouver Community College (VCC). However, he planned to first improve his English. Mr. Safdari testified that he was confident he could learn a new language and work at the same time based on his ability to do so in Sweden.
- [39] Mr. Safdari moved to Canada in November 2013. He testified that he had difficulty locating an English language program so he was not able to start classes until July 2014. In the meantime, he found work first as a dishwasher at Papa's Shish Kebab and then at Fresh Slice where he worked for two or three months. He later found a job with a cabinet making company, and then Enterpack Food Distributor Ltd. ("Enterpack") where he started working full-time as a warehouse worker in November 2014.
- [40] In September 2014, Ms. Ghaffari enrolled in a one-year Early Childhood Education program. The couple's plan was for Ms. Ghaffari to attend school full-time and for Mr. Safdari to work full-time and upgrade his English. After Ms. Ghaffari completed her course, Mr. Safdari intended to pursue interior design at either BCIT or VCC.
- [41] He testified that he worked for Enterpack in November and December 2014 but was paid in cash and did not receive benefits or a proper T4 for his employment in 2014.
- [42] The parties tendered a body of evidence about the circumstances surrounding Mr. Safdari's employment at Enterpack. Mr. Safdari testified that he started working for Enterpack in November 2014 but was not put on their payroll until January 2015. He testified that he was concerned about the manner of how Enterpack dealt with his employment, believing that

the company was acting improperly by paying him "under the table" for his first few months of employment. I accept Mr. Safdari's evidence that he began working for Enterpack in November 2014. Indeed, Enterpack's accountant, Reza Samei, testified that he believed he first met Mr. Safdari in 2014. Mr. Samei also testified that there were workers at Enterpack who were not on the payroll.

- [43] Mr. Safdari testified that in early 2015, he started to receive his pay by way of cheque but that he was still not given regular pay cheques, vacation pay, overtime pay or other benefits.
- [44] By May 2015, Mr. Safdari testified that his pay was approximately \$2,000 per month.
- [45] Mr. Safdari testified that he was angry with Enterpack's treatment of him in the early months of his employment. He testified that because of what he called "unlawful" treatment, Mr. Safdari had decided he would not return to Enterpack once WorkSafeBC found him fit to return to work from a workplace injury he sustained in June 2015. I will address this further when examining the vocational evidence.

B. Work Accident - June 1, 2015

- [46] The parties tendered considerable evidence^[1] about an injury Mr. Safdari sustained while at work on June 1, 2015 ("2015 Work Accident"). On that day, Mr. Safdari injured his back while moving a heavy object. WorkSafeBC accepted Mr. Safdari's claim that he suffered a low back strain (which developed into chronic low back pain) as a result of the 2015 Work Accident. Mr. Safdari was off work from June 1, 2015 through January 2016.
- [47] Mr. Safdari was required to participate in the WorkSafeBC rehabilitation program which included participation in a pain management program in November 2015. Part of the WorkSafeBC record suggests Mr. Safdari failed to engage with the rehabilitation in any meaningful way.
- [48] In early January 2016, Mr. Safdari was told by the Workers Compensation Board ("WCB") that they had determined he could return to work as of January 11, 2016. This decision was formalized in a letter dated January 27, 2016.
- [49] Mr. Safdari testified that he immediately began looking for work after learning about WCB's decision though he had decided not to return to Enterpack because of what he believed to be "unlawful" compensation practices.
- [50] Mr. Safdari appealed the WCB's decision to the Workers' Compensation Board Review Division. By reasons dated July 11, 2016, the reviewing officer dismissed the balance of Mr. Safdari's appeal, stating:

The worker was not entitled to temporary wage loss benefits beyond January 11, 2016 because his low back strain had resolved and his chronic back pain had stabilized into a permanent condition;

...

The worker was entitled to a referral to the Disability Awards Department for his permanent chronic pain condition;

The worker was capable of returning to his pre-injury job as of January 11, 2016.

[51] However, the reviewing officer allowed Mr. Safdari's entitlement to a referral to vocational rehabilitation services stating:

Taking into account the worker's difficulties to lift heavy weights, and the worker's pre-injury job duties, I am satisfied that the worker meets the referral guidelines because he has a compensable disability and requires assistance to return to his pre-injury job. As such, I find that the worker is eligible for a referral to Vocational Rehabilitation Services.

[52] I later address the use to be made of the WorkSafeBC records.

[53] Mr. Safdari described his physical and mental condition before the MVA and stated that he was generally healthy. Prior to the 2015 Work Accident, he attended only three times at his family physician in Canada, including one visit for "low mood." He testified that before the MVA, he was an active and happy person who could speak five languages and had hobbies including camping, fishing, walking, going to the gym and playing the Tar. He testified that he helped his wife in the home by grocery shopping, cooking, cleaning and general home maintenance. He testified about his spouse's hand surgery before the MVA and the fact he had to do all of the home care during her recovery.

[54] He testified he was little changed after the 2015 Work Accident although he agreed that he developed chronic lower back pain. He put it this way in his closing submission:

[Mr. Safdari] developed a chronic lower back pain. This was accepted by WorkSafeBC to be a permanent disability in the amount of 2.5%, but he could return to his pre-existing job (with modification). He also had some signs of depression. Otherwise he was still the same person and was capable of returning to his pre-injury job. However, after the [MVA], his life changed.

C. The MVA - January 26, 2016

[55] As noted above, the exact point of initial impact of Mr. Safdari's vehicle was not determined. However, the impact was along the driver's side of the vehicle. Mr. Safdari did not receive any treatment at the scene of the MVA and drove himself to the hospital in his damaged vehicle.

[56] Immediately after the MVA, Ms. Ghaffari went by ambulance to Royal Columbian Hospital. Mr. Safdari drove his vehicle away from the scene and met his spouse at the hospital. He testified that his vehicle required approximately \$4,500 in repairs. Photographs tendered showed damage to the driver's side of the vehicle. Mr. Safdari testified that he observed damage to his vehicle including having to pick up car parts at the scene of the MVA.

- [57] Mr. Safdari described experiencing neck, shoulder, back and leg pain after the MVA. It does not appear he lost consciousness.

D. Injuries and what followed - Evidence from plaintiff and lay witnesses

- [58] What follows is the plaintiff's description of the progression of his condition. I then turn to the non-medical witnesses who testified at the trial: the plaintiff's spouse and a family friend.
- [59] Mr. Safdari sought medical treatment from his family doctor, Dr. Majid on January 28, 2016, two days after the MVA. At that time, he was reporting neck and left shoulder pain and increased back and leg pain. He returned to see Dr. Majid about a week later complaining of persistent neck and upper back pain indicating that it was worse than immediately after the MVA. He was also experiencing pain in his left arm and numbness, headaches and light-headedness.
- [60] In addition to seeing his family doctor every couple of weeks, Mr. Safdari testified that he received physiotherapy, massage therapy, chiropractic treatments and one acupuncture treatment. He also saw a counselor several times and consulted a neurologist, Dr. Nazari.
- [61] Mr. Safdari testified about the impact of his injuries on his ability to return to work. Because of his prior experience with Enterpack, he testified that he had no intention of returning to their employment, despite their offer of a graduated return to work program. He testified that he tried to find alternative employment and presented a document he prepared describing his efforts. He testified that he tried working as an Uber driver but his efforts in that regard were unsuccessful. He also worked as an Amazon driver for a period of time but that position was also short-lived. In 2018, he operated his own cleaning business and was contracted to provide services at the head office of Waves Coffee House. He testified that this venture lasted for about two to three months and then they told him his services were no longer required. He began working for a furniture company in May 2019 but was injured when he was trying to move a sofa two days after he started that job on May 24, 2019 ("2019 Work Accident"). He testified that he was not as physically strong as he once was after the MVA and had difficulty carrying out his duties of moving heavy items.
- [62] At the time of the trial, he was receiving WCB benefits as a result of the 2019 Work Accident.
- [63] Mr. Safdari's primary complaints are constant headaches, neck pain, shoulder pain, cognitive dysfunction and memory problems. He described the impact of his injuries on his activities of daily living. He testified that he is no longer able to contribute to household cleaning and maintenance as he did before the 2019 Work Accident. He blames his injuries for his inability to learn English, stating that before the accident he was able to learn five languages but after the MVA he has failed in his efforts to properly learn English. With respect to employment, Mr. Safdari states that he is no longer able to concentrate because of his cognitive dysfunction and memory loss so he cannot retain new information such as English language. He says he forgets things. He attributes his inability to complete the

interior design program to the injuries he suffered in the MVA. He says that his employment prospects have been affected because he cannot even adequately perform physical jobs that he was able to do before the MVA.

- [64] Ms. Ghaffari testified about her observations of Mr. Safdari before and after the MVA. She described her spouse as someone, after arriving in Canada in 2013, who was working towards a career in interior design, had somewhat improved his language skills and was committed to achieving his goals. Of note, she stated, was his willingness to take on unskilled work while he waited to get into English classes. She also described someone who helped her with housework when she underwent surgery on her hand in December 2015 and she was off work until the end of January 2016.
- [65] She described Mr. Safdari after the MVA as someone who was struggling with day-to-day living. She testified that he "is not the same person. He forgets lots of things such as his keys and cell phone." She said that there is significant tension between the couple that did not exist before the MVA. She stated that he was no longer able to work and could not help her with household chores. She also said that he is no longer able to learn languages, something he was well adept at before the MVA. She said he used to be smart and outgoing but not anymore. Despite being off work for over seven months, Ms. Ghaffari testified that he was still the same person after the 2015 Work Accident, having "only limited problems in his lower back."
- [66] Mr. Safdari's sister-in-law, Mehrnoush Yazdanyar, testified. She testified that she and her husband saw Mr. Safdari and Ms. Ghaffari two or three times per week before the MVA but only about once per week afterwards. She described Mr. Safdari, before the MVA, as happy, active and outgoing. He was well-versed in other languages and enjoyed many social and outdoor activities. The couples went camping in Penticton in 2014. She knew that he did the groceries on the weekends and that "he was very quick and fast in completing tasks."
- [67] She said that he changed "drastically after the [MVA]. He is not happy anymore and does not like socializing with other people. He likes to be alone or sleep, and often complains about his headaches, neck pain, and memory problems." She testified that he does not help his spouse at home, does not go for walks, and has a deteriorating memory. She testified that although he had lower back pain before the MVA, he was still the same person. She testified "he has become a totally different person after the MVA."

E. Medical Evidence

- [68] In this case, causation is very much in issue. Mr. Safdari alleges that his significant injuries were all caused by the MVA. The defendants disagree but they submit, if some of the injuries were caused by the MVA, the court must nonetheless consider the issues of:
- a) The status of his pre-existing condition, including his lower back injury and psychological condition;

- b) Whether an intervening act (the 2019 Work Accident) caused his current state; and/or
- c) Whether he failed to mitigate his damages. The defendants disagree that his current condition has impacted his employment to the extent he asserts (or at all).

[69] I will now address the medical evidence. The medical experts, called on behalf of Mr. Safdari (Dr. Flaschner and Dr. Boucher) and the defendants (Dr. Grosch and Dr. McCann) agree to a certain extent about the nature of the injuries but disagree about the extent of any injuries. Later in these reasons I will address the evidence regarding vocational capacity and cost of future care.

1. Plaintiff's medical experts

a) Dr. David Flaschner

[70] Dr. Flaschner, a physiatrist, assessed Mr. Safdari on September 12, 2019 and he reported as follows:

Mr. Safdari is presenting with a report of ongoing symptoms following the [MVA] of January 26, 2016. Injuries secondary to the motor vehicle collision would include:

1. Cervicothoracic musculoligamentous sprain/strain
2. Headache, cervicogenic
3. Low back pain, aggravation of pre-existing condition
4. Mood disturbance.

A review of the provided documentation identified a history of chronic back pain from a back injury in 2015 that was managed by WorkSafeBC. A note of January 27, 2016 refers to acceptance of a permanent impairment from chronic low back pain related to the injury of June 2015. Despite the permanent impairment, Mr. Safdari was deemed to be able to return to work to his pre injury job, January 11, 2016.

Depressive symptoms were noted to predate the motor vehicle collision. A major depressive diagnosis was provided September 11, 2014 and January 15, 2015 as noted on the MSP printout. Additional documentation predating the motor vehicle collision described Mr. Safdari to be a poor participant in a pain program and to be pain focused January 15, 2016.

The initial documentation following the collision of January 26, 2016 describes symptoms at the neck and back with involvement of the left shoulder region described to be tenderness at the trapezius and left scapula. There was a worsening of preexisting back pain. No new neurologic dysfunction was reported and there was no initial concern regarding a structural injury to the spine. The description of injury is consistent with cervicothoracic and lumbar musculoligamentous sprain/strain injuries. The low back pain was reported to be more than usual in the note of January 28, 2016, consistent with an aggravation of the preexisting low back pain.

Headache was reported post MVC. There was no initial report of a direct impact to the head or concussive injury. Light-headedness and palpitations were reported by February 4, 2016 but at that time Mr. Safdari's mood was also very low and a stress reaction post MVC was diagnosed. It was not until later notes that a diagnosis of concussion was suggested due to the constellation of poor memory, insomnia, headache and dizziness. Dr. Nazari's consultation was December 7, 2018, greater than two years post MVC and the retrospective diagnosis of concussion is always questionable as post-concussive symptoms are not specific or limited to concussion only. Similar symptoms are seen in the setting of whiplash injuries, mood disorders and poor sleep, all of which are relevant to Mr. Safdari's presentation. The diagnosis of a concussion should be primarily based on symptoms acutely following an incident and contemporaneous documentation at that time. The available documentation does not support a significant head injury having been sustained in the collision of January 26, 2016.

The ICBC documentation also suggested some lack of clarity with respect to whether a collision in fact occurred, but the evaluation of causation of the MVC is outside of my area of expertise and not within the scope of a medical IME.

There has been a continuous complaint of symptoms at the neck and back with intermittent reference to headache of variable severity throughout the provided documentation. Dr. Nazari commented on an improvement in headache with a near resolution of the "concussive" symptoms by April 11, 2019 that was also in the context of an improvement in anxiety and depression. It is likely that Mr. Safdari's pain presentation has been significantly influenced by psychological factors. He has been described on multiple occasions to be pain focused and to be a poor participant in the rehabilitation programs. He was discharged from an occupational therapy program due to a lack of effort and lack o[f] participation that appeared to relate to a report of pain with activity and fear of further injury. Kinesiophobia, or fear of movement, is a negative prognostic indicator for soft tissue injuries, as are both anxiety and depression.

Mr. Safdari is now presenting greater than three years post injury with a complaint of ongoing symptoms at the neck, back and head. The description of ongoing headache influenced by neck pain is consistent with a cervicogenic etiology. The chronic low back pain predates the motor vehicle collision but was reported to have worsened contemporaneous with the collision of January 26, 2016 and represents an aggravation of the preexisting condition. The diagnosis of an aggravation of the preexisting condition will be dependent on the history provided by Mr. Safdari and the comments from the documents reviewed above contemporaneous with the motor vehicle collision.

There are no objective tools to distinguish pre versus post MVC symptoms. Neck and regional shoulder girdle pain was not a concern prior to the motor vehicle collision but has been a consistent complaint since that time, in keeping with a chronic cervicothoracic sprain/strain.

[71] Dr. Flaschner said this about the 2019 Work Accident:

The symptoms from January 26, 2016 had been well established as a chronic pain condition prior to the additional injury (struck by a sofa bed) of May 24, 2019.

The ongoing chronic pain prior to the incident of May 24, 2019 would be expected to represent a permanent impairment requiring long-term management. Mr. Safdari remains within the time frame for some potential further improvement from his additional injury of May 2019.

[72] Regarding ongoing impairments, Dr. Flaschner reported:

Mr. Safdari remained off work at the time of the motor vehicle collision of January 26, 2016 as a result of his prior low back injury. WCB reported that he was considered able to return to work at his pre injury job January 11, 2016 but Mr. Safdari did not participate in the recommended graduated return to work program. Mr. Safdari has since tried a number of jobs but has not been able to maintain employment.

From a strictly physical perspective, Mr. Safdari would be expected to tolerate sedentary to light level employment that allows for frequent changes in position and posture throughout the day. Given the injuries described above, there is a reasonable expectation that prolonged static postures, heavier lifting, carrying, repetitive bending, twisting and reaching tasks will exacerbate pain.

Mr. Safdari reports that he has been limited with respect to his household capacity as a result of his ongoing symptoms, which is again consistent with the injuries described above.

The disability relates to the pain impairment rather than a structural limitation and will be expected to vary depending on the response to the treatment recommendations below.

[73] As for treatment recommendations, Dr. Flaschner wrote:

Mr. Safdari's mood will need to continue to be addressed by psychology/psychiatry.

Ongoing treatment should be directed at an active rehabilitation program for postural exercises, core stability and hip flexibility as well as regular cardiovascular fitness. A program can typically be learned over the course of six to eight weeks with two to three sessions per week. Manual therapies would not be expected to be curative but can be used for temporary symptomatic relief to allow Mr. Safdari to tolerate his vocational and avocational needs and participate in his exercise program.

Needle-based therapies including IMS, local anaesthetic trigger point injections or botulinum toxin injections would be expected to offer temporary benefit. Facet directed procedures may be helpful as well.

Mr. Safdari has used numerous medications but appears to have been reluctant to continue with regular use of usual medications for chronic pain. In general, a medication such as Duloxetine would likely be helpful given its indications for spinal and myofascial pain and can be combined with Pregabalin or Gabapentin as needed. A low dose of Nortriptyline at night would likely improve restorative rest as well as potentially mood and pain. Opioid medications should be avoided.

A topical analgesic such as a mixture of Diclofenac, Capsaicin, Cyclobenzaprine and Lidocaine would be expected to offer temporary symptomatic relief. The use of an analgesic medication such as Acetaminophen or Ibuprofen prior to engaging in physical activity may allow Mr. Safdari to progress with his active rehabilitation program with less discomfort.

The pharmaceutical and medical interventions will be expected to offer temporary symptomatic relief but do not significantly impact the natural history of the pain condition.

Given the long-standing symptoms and constellation of pain, sleep and mood difficulties, it would be in Mr. Safdari's best interest to be seen in the setting of an interdisciplinary pain management clinic.

[74] Dr. Flaschner was cross-examined about Mr. Safdari's condition before the MVA. He agreed that it was unlikely Mr. Safdari would have returned to physically demanding employment because of the injuries caused by the 2015 Work Accident. In particular, Dr. Flaschner testified that prior to the MVA, the plaintiff's prognosis with respect to his back pain was poor and he was unable to return to employment involving heavy lifting. The defendants rely on this evidence in support of the contention that Mr. Safdari's pre-existing condition impacted his employment capacity. I will address this submission below.

b) Dr. Michael Boucher

[75] Dr. Michael Boucher, a chronic pain specialist, examined Mr. Safdari on September 4, 2019 and wrote his report approximately six weeks later. In his report, Dr. Boucher was careful to describe Mr. Safdari's pre-MVA condition and made reference to his pre-existing condition throughout his report. In his report, Dr. Boucher noted as follows:

Pre-existing/Concurrent Diagnoses and Conditions:

- 1) Chronic Pain Syndrome;
- 2) Depression;
- 3) Lumbar myofascial strain with sciatica secondary to work related accident 2015;
- 4) Right shoulder strain/sprain.

Primary Diagnoses related to collision:

- a. Cervical myofascial neck strain (WAD II Injury).

- b. Thoracic myofascial strain.
- c. Lumbosacral myofascial strain (Aggravation of pre-existing).
- d. Temporomandibular joint dysfunction (TMD)
- e. Chronic daily headache - cervicogenic.
- f. Left shoulder strain/sprain.
- g. Query adjustment disorder with depressed mood and anxiety with predominant pain (Aggravation of pre-existing).
- h. Insomnia.
- i. Sexual Dysfunction/Loss of Libido.

Secondary Diagnosis

- 1) Chronic Pain Syndrome (Aggravation of pre-existing).

...

RELATIONSHIP OF DIAGNOSES TO THE COLLISION/CAUSATION.

In considering causation in this case, one needs to examine whether, on the balance of probabilities, Mr. Safdari's condition resulted from the subject motor vehicle collision. There is a temporal relationship; the interval between the onset of new symptoms, along with the exacerbation of his previous physical and psychological concerns, and the collision, is consistent with his complaints. The subject collision caused injury to his neck and left shoulder, aggravated previous lower back pain and induced significantly worse depression, anxiety and insomnia.

...

At this juncture, the above-listed primary and secondary diagnoses appear to be casually [sic] related to the injuries sustained in the motor vehicle collision that occurred on January 26, 2016.

EFFECT OF IMPAIRMENT ON FUNCTION

Mr. Safdari's collision-related impairments have left him with further diminished functional tolerances as it relates to activities that place strain throughout the neck, upper and lower back. While he can complete some daily tasks, he does so with varying amounts of pain that interferes with his ability to complete general activities of daily living, social and recreational activities as well as further interferes with his ability to perform employment tasks. Mr. Safdari's collision-related impairments have resulted in further physical and functional restrictions that substantially interfere with his ability to access employment, as well as most of his usual activities of daily living. The impairments have resulted in restrictions that I would consider necessary to perform the essential tasks of his employment as well as most of his usual activities of daily living, and I consider the effect of impairment on his function to be both serious and important.

...

Mr. Safdari's impairments have been continuous since the time of the work-related accident of June 2015, significantly worsened since the subject collision, despite him having participated in treatment as recommended by various health professionals. I would not expect at this point that his condition will substantially improve as compared to individuals with similar circumstances and I consider his impairments to be permanent.

...

Mr. Safdari continues to have further ongoing difficulty with recreational activities as a result of the 2016 collision. I believe that the collision-related impairments have further impacted Mr. Safdari's ability to complete his social and recreational activities on a regular and pain-free basis.

PROGNOSIS

It has now been over 3 years since the subject collision took place. Mr. Safdari presents with increased pain, as well as further functional and psychological limitations. The nature of his injuries, the longstanding duration of his problems, and his current presentation, which includes physical and significant emotional factors, are all negative long-term prognostic indicators. While most soft tissue injuries generally resolve within a matter of months, there is a subset of individuals, generally the ones I see due to the nature of my clinical practice, whom take significantly longer to recover with a certain percentage that never fully recover.

Mr. Safdari, despite his best efforts, appears to have fallen in this latter category. Despite his commitment to a significant course of rehabilitation and treatment shortly after the collision, he continues to struggle.

In certain cases, it can take up to 12 months for soft tissue injuries to resolve. He has exceeded this time quite significantly, resulting in a substantial reduction in physical conditioning. His mood and physical condition may present as major barriers to further improvement. If both his mood and his physical pain are not improved, it is likely that further functional limitations with respect to his activities of daily living, personal care, and employment may become apparent. His prognosis for return to sustainable full-time employment in any occupation is not likely. His employment options are now significantly limited by his physical and psychological impairments. Without ongoing treatment and support, this once engaged and active man is not likely to see pre-collision levels of function due to the physical injuries sustained and the associated psychological sequelae that he has developed.

...

As a result of the duration of time that has passed since the indexed collision has occurred, his pre-existing health concerns, and the presence of significant physical and significant emotional factors, his prognosis for complete resolution from pain is deemed to be guarded.

CONCLUSION

Mr. Safdari sustained injuries as a direct result of the subject motor vehicle collision which have significantly worsened a pre-existing Chronic Pain Syndrome.

...

In my opinion, Mr. Safdari's presentation features characteristics consistent with chronic pain syndrome.

... I believe Mr. Safdari has a chronic condition of permanent impairment, which I would describe as a Chronic Pain Syndrome related to aggravation of previous lumbar mechanical back pain, a cervical myofascial neck strain (WAD II Injury), a left shoulder strain, cervicogenic headache, worsened psychological function and insomnia). [sic] While I believe, further recovery is possible, I doubt he will return to a reasonable level of function.

[76] During cross-examination, Dr. Boucher was asked about the nature of his assessment of Mr. Safdari. He explained that Mr. Safdari was able to communicate without the assistance of an interpreter throughout his assessment and appeared able to participate fully in the assessment. Dr. Boucher described the major criteria associated with a diagnosis for chronic pain. He agreed that Mr. Safdari had all six of those criterion prior to the MVA although he did not know to what degree he was symptomatic. He testified that the MVA aggravated this pre-existing injury.

2. Defence experts

a) Dr. Richard Grosch

[77] Dr. Richard Grosch, a neurologist, assessed Mr. Safdari on October 7, 2019 and prepared a report on the same day. The defendants contend Dr. Grosch's report demonstrates that Mr. Safdari does not have any neurological impairment and as such no further neurological treatment is required. Dr. Grosch's diagnosis and prognosis is as follows:

DIAGNOSTIC OPINION:

...

Headaches: These are mostly muscle contraction in nature. They likely stem from the posterior cervical muscles (cervicogenic headaches). I cannot discount the possibility of migraine headaches occurring as a result of this, but I cannot be absolutely sure about this. He is unable to describe his headaches accurately; therefore, discounting an accurate headache diagnostic. The headaches are likely caused by the subject MVA as well as his stress, anxiety, and depression.

Anxiety and depression: This has been well-documented by a psychologist and psychiatrist. The depression stems from a combination of his work-related injuries and subsequent MVA pain. A lot of anxiety is the result of the recent renoviction, inability to find work, and uncertainty about his future capabilities in terms of employment and day-to-day activities.

Cognitive issues and short-term memory deficits: I do not believe that he has neurological cognitive decline. I think his cognition and memory problems are secondary to anxiety, soft tissue pain, headaches and interrupted sleep pattern.

Numbness: I could not demonstrate anything in terms of a peripheral nerve or nerve root problem clinically. The numbness he demonstrated in the left leg is not anatomical in nature and is not related to the subject MVA. Further, I could find nothing in terms of a lumbosacral radiculopathy involving the left leg, as his power, tone, sensation and reflexes were perfectly normal in the left leg and foot as they relate to the left L5 and S1 nerve root distribution.

Concussion: I do not believe Mr. Safdari suffered from a concussive injury nor did he experience any post-concussion symptoms. He does not fulfill any of the criteria necessary to diagnose these conditions.

PROGNOSIS:

The prognosis at this time is guarded for any significant improvement. He has psychological issues which would be best further investigated by a psychologist or psychiatrist. He may need cognitive behavioral training or psychiatric intervention now or in the future.

I doubt that physical therapy or medications at this time is affording him any significant permanent relief. I agree with the WorkSafeBC impression that he is now permanently partially disabled.

[78] Dr. Grosch was cross-examined about his opinion and, in particular, the extent of any disability. He agreed that the MVA increased the level of disability to the point that his employability is not predictable anymore. Plaintiff's counsel submitted that Dr. Grosch retreated from his written opinion with respect to the neurological injuries and that Dr. Grosch agreed that when he wrote in his report that "I do not believe any neurological injuries were caused by the accident", he was only referring to the structural neurological injuries, and not the functional neurological injuries. I will address this submission shortly.

b) Dr. Shawn McCann

[79] Dr. Shawn McCann, a physiatrist, conducted an assessment of Mr. Safdari on September 20, 2019. The defendants provided the following summary of Dr. McCann's findings:

- a) The plaintiff sustained soft tissue injury to his neck and upper shoulder region at the time of the MVA;
- b) The plaintiff did not sustain a mild brain injury or concussion as a result of the MVA;
- c) There was "some increase" to the plaintiff's symptoms of anxiety, poor sleep, and depression following the MVA, but that these probably did pre-exist the MVA;
- d) The plaintiff has evidence of muscular pain in his scapular areas on both sides, but this should not significantly restrict his activities;

- e) The plaintiff probably aggravated his pre-existing lumbar spine condition, but that this has since returned to his pre-MVA baseline level.
- [80] Mr. Safdari says that the court should place little or no weight on Dr. McCann's opinion because of errors contained in the report. As well, the plaintiff alleges that Dr. McCann was argumentative during cross-examination and acted as an advocate for the defendants. In particular, the plaintiff submits that Dr. McCann's opinion was based on a faulty assumption found in the WorkSafeBC file. The plaintiff further submits that, by basing his opinion on his faulty assumption regarding Mr. Safdari pre-MVA physical condition (and, more particularly, his capacity to return to work before the MVA), Dr. McCann misconstrued the evidence relating to Mr. Safdari's pre-existing condition. I will address this submission after I conduct the credibility assessment.

IV. CREDIBILITY

- [81] In motor vehicle injury cases, the victim is often called to speak on their own behalf and relay to the court the effects of the accident. This regularly leads to the victim's credibility and reliability being placed in issue and Mr. Safdari is no exception. My factual findings regarding his condition before and after the MVA and his prognosis are based in significant measure on his testimony, self-report and the observations of others including medical professionals, his spouse and his relative.
- [82] In his written submission, plaintiff's counsel described Mr. Safdari as:
- ... a straightforward, credible and truthful witness and the statements he made throughout the trial were consistent. After approximately 5 days of his testimony, [Mr. Safdari] remained consistent. He was articulate, calm, and dispassionate. [Mr. Safdari] was a candid and straightforward witness. Sometimes when he could not remember events (due to his loss of memory after the MVA), he informed the court.
- [83] In his submission, while there were minor inconsistencies between the witnesses and Mr. Safdari, the whole of the evidence was consistent with the evidence of Mr. Safdari on both direct and cross-examination. In short, in his submission, his evidence rang true and should be accepted.
- [84] According to counsel for the defendants, Mr. Safdari's evidence should be assessed cautiously, largely in part because his claims of residual MVA related psychological and cognitive injuries fundamentally rely on his subjective complaints. The defendants say that Mr. Safdari has adduced no objective evidence of injury and that his credibility ought to be carefully scrutinized.
- [85] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

- [86] If the plaintiff's account of their change in physical, mental, and/or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.
- [87] In addition to the above, the defendants remind the court that where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399; and *Tai v. De Busscher*, 2007 BCCA 371 at para. 41. The defendants go on stating, in the absence of objective signs of injury, the court's reliance on the medical evidence must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.
- [88] I turn to the credibility assessment in this case.
- [89] This is one of those personal injury cases where the parties present diametrically opposed positions about the gravity of any injuries. It is also a case where Mr. Safdari relies on subjective symptoms with little or no objective evidence of continuing injury. I must therefore be careful, as described in the jurisprudence, in examining the evidence and assessing credibility.
- [90] I did not find the plaintiff to be a particularly reliable witness. At times I also did not find him credible. I found his perspective was quite skewed. Confronted by evidence which contradicted his version of events, he would frequently state that he could not remember certain events. I find his inability to remember these events was not a result of his purported memory loss. As I explain later in these reasons, I reject that the plaintiff has the extent of the memory loss or cognitive impairment that he complains of. In particular, his

self-report of memory loss and cognitive dysfunction is not consistent with the totality of the medical evidence which I do accept.

- [91] There were three features of his testimony that I found problematic to the point that it detracted from the reliability and credibility of his testimony.
- [92] First, he testified that he expected that he would come to Canada and be a successful interior designer. He testified that his and Ms. Ghaffari's plan was for her to complete her program and then he would start. In the meantime, he would enroll in English classes and work to support her. He testified that he was unable to start the English classes until July 2014 because the classes were full. He described attending classes in the summer 2014 and doing self-directed online studies. He testified that he started working fulltime in November 2014 but injured his back on June 1, 2015. As such, he was off work until the MVA although he had started to look for work in the weeks leading up to the MVA. Mr. Safdari's testimony about his career aspirations was not consistent with the steps he had actually taken to advance those plans.
- [93] From the time he arrived in Canada to the time of the MVA, it did not seem as if Mr. Safdari was seriously pursuing his purported goal to learn English. He took only one basic English course at VCC and enrolled in another English course in Coquitlam, which he did not complete. He had not taken any steps to enroll in Grade 12 English which was something he was required to do. I also agree with the defendants' submission that the evidence tendered about Mr. Safdari's skills as an interior designer do not really support the notion that he would have been successful as an interior designer in BC. He was not an interior designer in Sweden nor did he have an interior design degree. Mr. Safdari tendered an exhibit showing that he completed an "on the job" training course and not a degree from an accredited institution. He had not taken any steps to determine whether this certification is recognized in Canada. Importantly, he had not applied for any interior design program once he was in Canada even allowing for a reasonable time to get settled in a new country.
- [94] Simply put, Mr. Safdari does not have the proven work history as suggested by him. I appreciate that Mr. Safdari had great aspirations and believes that he was committed to fulfilling those laudable goals. However, the evidence before me does not demonstrate the level of dedication he spoke of. Being fully off work for almost eight months may have had a role to play in his altered career course. In this case, the court was not assisted by any expert vocational evidence. That sort of evidence may have assisted with an assessment of Mr. Safdari's self-proclaimed interior design skills and whether that vocation was no longer available to him in any form. Without more, I cannot speculate about Mr. Safdari's work experience in Sweden and how it would impact his employment prospects in B.C.
- [95] The second feature of his testimony that caused concern was Mr. Safdari's testimony about cognitive dysfunction. This was highly controversial as it related to his cognitive functioning and whether the MVA caused the extensive cognitive dysfunction as described by Mr. Safdari. I am very concerned that Mr. Safdari has testified about cognitive impairment in the

absence of medical evidence to support those self-reports. I am not satisfied that instances of losing one's keys or phone constitutes cognitive impairment. In his written submission, Mr. Safdari:

. . . described his worst problem to be his cognitive dysfunction and loss of memory as he cannot retain new information such as the English language, forgetting things, and making numerous errors at work. Unfortunately, after the car accident and despite his various attempts, he was not successful to improve his English (due to various injuries and memory loss) to be able to attend VCC or BCIT to study interior design. English was a pre-requisite to study interior design.

[96] The medical evidence tendered by Mr. Safdari does not support the extensive cognitive dysfunction described by him or his spouse. Rather, the medical experts testified that his cognition and memory problems are secondary to anxiety, soft tissue pain, headaches and poor sleep. The only neurologist to testify at the trial stated that he did not believe that Mr. Safdari has neurological cognitive decline and did not believe Mr. Safdari suffered from a concussive injury nor did he experience any post-concussion symptoms. Following his assessment, Dr. Grosch found that he did not fulfill any of the criteria necessary to diagnose these conditions.

[97] The third feature of his testimony relates to matters he described that are inconsistent with the medical evidence tendered. I am concerned about Mr. Safdari's description of the magnitude of the injuries he attributes solely to the MVA. I note this aspect of his testimony is at times, inconsistent with even the experts called on his behalf. For example, both Dr. Boucher and Dr. Flaschner identified symptomatic pre-existing lower back pain in their reports. Mr. Safdari greatly minimized the status of his lower back injury immediately preceding the MVA in a manner that was inconsistent with Dr. Boucher and Dr. Flaschner.

[98] A second example of this type of inconsistency related to the reports of a pre-existing depressive condition and Mr. Safdari's testimony of "low mood." Mr. Safdari submitted that the MVA caused a psychological injury that he has not recovered from. He testified that he did not experience depression before the MVA but rather referred to it as "low mood." This is somewhat contrary to the medical records[2] indicating he was experiencing reactive depression when he consulted his family doctor on September 11, 2014. He had also been prescribed anti-depressants before the MVA. Dr. Flaschner also noted Mr. Safdari's major depressive diagnosis from September 11, 2014 and January 15, 2015. Further, many of the WCB records document his ongoing psychological complaints and his family doctor's clinical records noting his depression and anxiety symptoms. In my view, there was a well-documented history of psychological issues pre-existing the MVA.

[99] In light of the above credibility assessment, I have approached Mr. Safdari's testimony regarding his injuries with some caution.

[100] I have also considered the evidence of his spouse and sister-in-law. They both described significant changes in Mr. Safdari after the MVA. Their evidence suffers from similar flaws in that they describe Mr. Safdari's condition in a manner that is not consistent with the

medical evidence tendered. That is, they described someone who was incapacitated to an extent simply not observed by even Dr. Flaschner or Dr. Boucher. I have also concluded that both downplayed the significance of Mr. Safdari's 2015 Work Accident injuries in a manner that detracted from their testimony overall. In addition, I note Ms. Ghaffari has an outstanding and unresolved injury claim as a result of the MVA at the time of the trial.

V. ASSESSMENT AND FINDINGS

[101] The defendants do not agree that the MVA caused Mr. Safdari's injuries or that the MVA caused the injuries to the extent complained of. In addition to causation, the defendants contend that Mr. Safdari was suffering from a pre-existing injury at the time of the MVA and thus any damage award must be adjusted accordingly. In addition, the defendants assert the plaintiff's condition was exacerbated by an intervening act, specifically, the 2019 Work Accident. Finally, the defendants submit that the plaintiff has failed to mitigate his damages, requiring a further reduction of any damage award. In particular, the defendants allege the plaintiff unreasonably declined a graduated return to work program offered by his former employer; unreasonably declined light duties offered by his former employer; and failed to take reasonable steps to find alternative employment.

[102] I will deal first with causation. I will then address the issues of pre-existing condition, intervening act and failure to mitigate.

A. Causation -- Law

[103] The defendants refute Mr. Safdari's claims for damages on the basis that they are excessive and the issues now affecting him are not causally connected to the MVA.

[104] Mr. Safdari must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to each of the injuries he sustained in the MVA. In order to establish causation, Mr. Safdari must prove on a balance of probabilities that but for the MVA he would not have suffered the injuries of which he now complains.

[105] The defendant's negligence need not be the sole cause of the injury, so long as it is part of the cause beyond the range of *de minimus*. The tortfeasor must take their victim as the tortfeasor finds the victim and is liable even if other causal factors for which the defendant is not responsible result in the victim's losses being more severe than they would be for the average person (also referred to as the thin-skull rule). At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; and *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[106] The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[107] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway.

[citation omitted]

[108] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in if not for the defendant's negligence; no better or worse. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35.

[109] In *Rabiee v. Rendleman*, 2015 BCSC 595, the defendants took issue with the lack of objective evidence supporting the plaintiff's injuries. As such, Justice Sharma considered the standard of proof regarding subjective and objective evidence of injury and confirmed that the standard of proof remains unchanged:

[65] I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff's subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is "objective" or "subjective". In fact, after considering the above quotation, the Court of Appeal in *Butler v. Blaylock*, [1983] B.C.J. No. 1490 (B.C.C.A.) clarified: "It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages."

[66] The key consideration is whether the evidence, as a whole, establishes that the plaintiff's injuries were caused by the defendant's negligence on a balance of probabilities. I have concluded that Ms. Rabiee has met that burden. Thus, the fact that the evidence of her injuries is based largely on subjective reports does not detract from the application of the *Stapley* factors.

[67] With regard to those factors, Ms. Rabiee's injuries were mild in severity but had a longer duration than expected. The medical evidence suggested her age may account for at least part of that lengthened duration. I have also found that the demands of her job combined with her failure to attend physiotherapy and exercise aggravated her soft tissue injuries, increasing the pain she experienced and the duration of her symptoms.

[110] I also refer to *Dudek v. Li*, 2000 BCCA 321, regarding the divisibility of a workplace injury from that sustained in a motor vehicle accident and the apportionment of any award. In *Dudek*, Justice Braidwood wrote:

[11] These types of cases are discussed in the House of Lords decision of *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.*, [1969] 3 All E.R. 1621. In *McKew*, the appellant sustained an injury for which the tortfeasors were liable, in consequence of which he would unexpectedly lose control of his left leg, which would then collapse. It was expected that he would have recovered within a week or two but for a second injury which he suffered. The second injury, in which he severely fractured his ankle, occurred when he descended steep steps without a handrail. Lord Reid stated at p. 1623:

In my view the law is clear. If a man is injured in such a way that his leg may give way at any moment he must act reasonably and carefully. It is quite possible that in spite of all reasonable care his leg may give way in circumstances such that as a result he sustains further injury. Then that second injury was caused by his disability which in turn was caused by the defender's fault. But if the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is *novus actus interveniens*. The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the defender's fault or the disability caused by it. For it is not at all unlikely or unforeseeable that an active man who has suffered such a disability will take some quite unreasonable risk. But if he does he cannot hold the defender liable for the consequences.

The House of Lords found that the appellant in that case was acting unreasonably, thus breaking the chain of causation.

[12] The same principle was applied in the British Columbia Supreme Court decision of *Goldhawke v. Harder* (1976), 74 D.L.R. (3d) 721. In *Goldhawke*, the victim was injured in a motor vehicle accident and was restricted to using crutches for months. He had a brace on the cast of his left leg and to equalize the length of his legs, he wore a high-heel shoe on his right foot. One night, after going to a nightclub with friends, he suffered further injuries when the heel on his shoe broke, causing him to fall down the stairs. The question at trial was whether the tortfeasor was liable for only the injuries suffered in the original accident, or whether he was also liable for the injuries suffered in the fall down the stairs at the nightclub. Mr. Justice Macdonald referred to the decision of Lord Reid in *McKew* and found that Mr. Goldhawke was not acting unreasonably that night. Therefore the "chain of causation" had not been broken, and the tortfeasor was liable for the damages suffered in the motor vehicle accident including the damages suffered in the fall down the stairs.

[13] In both the McKew case and the Goldhawke case, therefore, the issue that the courts were wrestling with was the connection between the injuries suffered in the first accident and how they impacted on the occurrence of the second accident.

[Underline emphasis in original by Braidwood J.A.]

[111] I note Justice Fleming's recent summary of the authorities on this issue at paras. 134-142 in Dale v. Vickers, 2019 BCSC 821.

[112] In addition to the jurisprudence cited above, the plaintiff also refers to Gabor v. Boilard, 2015 BCSC 1724 at para. 545, where Justice Ballance stated:

[545] A pre-existing condition, whether latent or active, is part of the plaintiff's original condition. However, a deduction in certain heads of damages will not necessarily follow from the mere existence of a plaintiff's pre-existing symptoms. The evidence must establish the existence of a measurable risk that the pre-existing condition would have resulted in a loss to the plaintiff in the future without the defendant's negligence. Only then is that risk of loss taken into account in the assessment and will serve to reduce the award of certain heads of damages: Athey at para. 35; Sangha v. Chen, 2013 BCCA 267; Bouchard v. Brown Bros. Motor Lease Canada Ltd., 2012 BCCA 331; Moore v. Kyba, 2012 BCCA 361, at para. 43. The contingency of a pre-existing condition manifesting on its own to cause a loss at some point does not have to be proven to a certainty; it is given weight according to its relative likelihood: T.W.N.A. v. Canada (Ministry of Indian Affairs), 2003 BCCA 670.

B. Medical Evidence

[113] I will first provide an analysis of the medical evidence on the issue of causation, pre-existing injury and intervening act. I will then address whether the defendants have established that Mr. Safdari failed to mitigate bearing in mind the credibility findings I have made.

1. WorkSafeBC findings

[114] Before I turn to the analysis of the medical evidence, I wish to address Mr. Safdari's submission that the court is bound to accept the WorkSafeBC findings regarding Mr. Safdari's physical and psychological condition as reflected in its decision of January 27, 2016. To that end, Mr. Safdari made the following submission:

... WorkSafeBC decided that [Mr. Safdari] was ready to return to his pre-injury job at Enterpack. However, [Mr. Safdari] declined to return to Enterpack due to the disputes he had with Enterpack and their illegal activities. However, [Mr. Safdari] started looking for another job immediately.

Between January 11, 2016 to January 26, 2016 (a few days), [Mr. Safdari] was looking for another job. However, he was involved in a motor vehicle accident on January 26, 2016 that changed his life.

This is a unique case, in which a WorkSafeBC file of 830 pages clearly illustrates the capacity of [Mr. Safdari] to work and the extent of his injuries due to his work accident as of January 11, 2016. WorkSafeBC is an appropriate authority in BC to determine the capacity of individuals to work and their injuries due to work accidents.

The Plaintiff submits that this Honourable Court must take into consideration the decision of WorkSafeBC, which is an appropriate authority in British Columbia to determine the plaintiff's ability and health condition prior to the car accident. In this case, WorkSafeBC determined that [Mr. Safdari] had chronic back pain as of January 11, 2016 (minimal disability of 2.5%), and despite [Mr. Safdari's] chronic back pain, he was able to return to his pre-injury job. The Plaintiff submits that the decision of WorkSafeBC must be followed by this Honourable Court; otherwise if this Court reaches a different conclusion, the outcome may cause prejudice to the Plaintiff.

[115] Mr. Safdari does not rely on the doctrines of issue estoppel, res judicata or abuse of process to advance his submission. Rather, he advances this submission on the basis of fairness. He does not provide any authority for the proposition advanced.

[116] The defendants take the position that the court is not bound to follow the WorkSafeBC decision of January 27, 2016. Their submission is as follows:

As illustrated in *Harris v. Gill*, 2019 BCSC 1665 (CanLII), although the content of a WCB decision may be relevant and informative to the assessment of a tort claim, the actual WCB decision itself is not binding on this court. This is for reasons, it is submitted, which include:

- a) the decision is made with respect to whether benefits are to be awarded;
- b) the decision is subject to internal policies and procedures; and
- c) the totality of the evidence considered in making the decision may, or may not be, before the subject court.

In any event, the plaintiff appealed the decision outlined in the January 27, 2016 decision on the basis that:

- a) further wage loss benefits were warranted;
- b) Chronic pain is not the sole permanent condition;
- c) Pre-injury job is not suitable;
- d) All ongoing disability, including neurological impingement and lumbar sprain/strain symptoms is compensable; and
- e) A loss of earning assessment is warranted.

[117] In any event, the defendants take the position that Mr. Safdari's act of filing an appeal of the decision is evidence that he disagreed with the January 27, 2016 findings of the extent of his impairment, which detracts from the evidentiary value of the earlier WorkSafeBC finding.

[118] I have concluded that the WorkSafeBC records have only limited evidentiary value. In my view, I can rely on the WorkSafeBC records to establish the chronology of treatment from the time of the workplace injury to the MVA. In addition, I can rely on the WorkSafeBC records to demonstrate that a decision had been made that Mr. Safdari was able to return to his pre-injury job but that he met the WorkSafeBC criteria for chronic pain in the lumbar region. I agree that the court is not otherwise bound by the WCB finding that Mr. Safdari's lower back injury constituted a permanent impairment of 2.5%. I do not know how that assessment was made. Without more, the percentage of 2.5% is meaningless. Simply put, the WorkSafeBC findings do not bind this court because they were made pursuant to a distinct statutory scheme on a different evidentiary record.

2. Psychiatrist and chronic pain expert evidence

[119] Dr. Flaschner and Dr. McCann addressed causation in their evidence regarding Mr. Safdari's physical injuries. Although they agreed about the cause of some of Mr. Safdari's injuries, they disagreed about the extent of the injuries. For the most part, their evidence was fairly consistent regarding headaches and neck/upper back pain. Dr. Flaschner concluded that Mr. Safdari's injuries secondary to the motor vehicle collision would include neck and upper shoulder sprain/strain injury, cervicogenic headaches, aggravation of pre-existing low back pain and mood disturbance. Dr. Flaschner also identified that depressive symptoms were noted to predate the MVA noting that Mr. Safdari was described as a poor participant in a pain program and to be pain focused. He noted that the available documentation did not support a significant head injury having been sustained in the MVA. Mr. Safdari is now presenting greater than three years post injury with a complaint of ongoing symptoms at the neck, back and head. He concluded that Mr. Safdari's description of ongoing headache influenced by neck pain is consistent with a cervicogenic etiology. He reported that the diagnosis of an aggravation of the pre-existing condition will be dependent on the history provided by Mr. Safdari and the comments from the documents reviewed above contemporaneous with the motor vehicle collision. Again, during cross-examination, Dr. Flaschner agreed that the plaintiff's prognosis with respect to his back pain was poor prior to the MVA and he was unable to return to employment involving heavy lifting.

[120] The plaintiff says little to no weight should be placed on Dr. McCann's evidence. I have reviewed Dr. McCann's evidence carefully and I do not find that his evidence was undermined during cross-examination in the manner suggested. With respect to the lower back injury, Dr. McCann's evidence is consistent with the other experts. That is, that Mr. Safdari probably aggravated his pre-existing lumbar spine condition. Similarly, with respect to psychological injuries, Dr. McCann's opinion is consistent with other medical evidence that Mr. Safdari did not sustain a brain injury or concussion as a result of the MVA. Regarding anxiety and depression, there was a significant body of evidence to support Dr. McCann's conclusion that his symptoms of anxiety, poor sleep and depression probably pre-existed the MVA.

[121] Dr. Boucher stated as much in his evidence:

Mr. Safdari's presentation is consistent with a pattern of incomplete recovery and the development of worsened chronic pain problems that occasionally occurs after a motor vehicle collision. At the time of the subject collision, he had previous and significant difficulties with depression, anxiety and low back pain. These were already significantly impacting his [activities of daily living], employment, and social roles. Since the January 26, 2016 collision, he has been suffering from increased pain and disability along with significantly worsened psychological dysfunction. His pre-collision mental and physical health was tenuous and is more than likely partially responsible for his failure to recover. . .

The subject collision caused injury to his neck and left shoulder, aggravated previous lower back pain and induced significantly worse depression, anxiety and insomnia.

[122] Dr. Boucher testified that Mr. Safdari's symptoms are more extreme than that described by Dr. McCann. However, Dr. Boucher reported that Mr. Safdari suffers from a chronic pain syndrome related to aggravation of previous lumbar mechanical back pain, a cervical myofascial neck strain, a left shoulder strain, cervicogenic headache, and worsened psychological function and insomnia. Dr. Boucher concludes that the MVA significantly contributed to worsening Mr. Safdari's pre-existing chronic pain from both a physical and psychological perspective.

3. Neurological Evidence

[123] Dr. Grosch maintained in his report and during his testimony that:

[he could] find nothing to suggest any neurological abnormality at this time and did not believe any neurological injuries were caused by the [MVA]. Injuries sustained at the time of the [MVA] were non-neurological in nature and are impeding full recovery.

[124] Mr. Safdari takes the position that Dr. Grosch's opinion was modified in some respects because of the distinction between structural neurological injuries and functional neurological injuries. The submission suggests that Dr. Grosch testified that when he gave his opinion that Mr. Safdari did not have a neurological injury:

[he] meant structural neurological injuries/issues, not the functional ones. Indeed, during the Cross-Examination, Dr. Grosch agreed that [Mr. Safdari] has various functional neurological issues such as cognitive dysfunction, loss of memory, post-concussive symptoms, stress, anxiety, and depression.

[125] As I reviewed his testimony, Dr. Grosch was careful to qualify his opinion regarding structural neurological injury stating that those conditions were better suited to psychiatric or psychological expertise.

[126] As set out in my findings below, I am satisfied that Mr. Safdari's ongoing psychological complaints are connected to the injuries he sustained in the MVA (subject to a determination of pre-existing condition) in the manner described by Dr. Boucher. That is, the MVA worsened existing depression, anxiety and insomnia.

C. Summary of Findings

[127] In summary, I am satisfied that the plaintiff has proven on a balance of probabilities that he suffered the following injuries as a result of the MVA:

- a) Cervicothoracic musculoligamentous sprain/strain (soft tissue injury to neck and upper left shoulder);
- b) Cervicogenic headaches;
- c) Aggravation of symptomatic pre-existing low back pain;
- d) Aggravation of pre-existing anxiety, insomnia and depression; and
- e) Aggravation of chronic pain syndrome.

[128] I am satisfied that the plaintiff had substantial and symptomatic pre-existing chronic low back pain and psychological impairment at the time of the MVA.

[129] With respect to the plaintiff's pre-existing chronic low back pain, I accept the testimony of the medical experts who each described Mr. Safdari's condition prior to the MVA. I find that Mr. Safdari's pre-existing low back condition included a diagnosis of chronic pain syndrome as described by Dr. Boucher as a result of the 2015 Work Accident. Despite Mr. Safdari's testimony that he had, in essence, fully recovered, the medical evidence provides to the contrary. Even so, I am satisfied on a balance of probabilities that the low back pain would have manifested at some point in the future. The condition had not been resolved. The plaintiff had a physically demanding job at the time of the 2015 Work Accident and indeed that injury had kept him off work for almost eight months. In other words, his back condition had already manifested itself severely enough to force him off work for a significant period of time.

[130] Similarly, Mr. Safdari's psychological condition was well documented prior to the MVA. Relying on the evidence of Dr. Flaschner and Dr. Boucher, I have found that Mr. Safdari was suffering from much more than "low mood" at the time of the MVA.

[131] I conclude that the plaintiff's damages must be adjusted to reflect the unresolved chronic low back pain and psychological condition. A reduction of 25% on the account of his pre-existing condition is appropriate in the circumstances presented here.

- [132] The 2019 Work Accident occurred when Mr. Safdari was moving a sofa and it fell on his head and shoulder while moving it out of an elevator. Dr. Boucher testified that this accident caused a new injury to his right shoulder. Dr. McCann also noted that the 2019 Work Accident caused injury to his neck and upper shoulders. Dr. Flaschner also stated that the 2019 Work Accident caused an "injury to the right shoulder, head and right low back after a sofa fell on Mr. Safdari's head two to three months ago".
- [133] After the 2019 Work Accident, Mr. Safdari was not able to return to work and has been receiving WCB benefits since that date.
- [134] The defendant submits the 2019 Work Accident is an intervening event as it has resulted in a new injury to him; it has caused him to commence a new WCB claim for his injuries and it has caused him to again be off work and he had returned to full-time employment after the MVA.
- [135] I accept that Mr. Safdari's symptoms were exacerbated on May 2019 as a result of the 2019 Work Accident. However, I do not agree that this broke the chain of causation. The chain of causation will be broken where an intervening event, rather than the defendants' conduct, is considered the proximate or legal cause of the subsequent injury. This principle, known as *novus actus interveniens*, recognizes that defendants should not be held liable for objectively unforeseen consequences of their actions: *Hussack v. Chilliwack School District* No. 33, 2011 BCCA 258 at para. 87; and *Yoshikawa v. Yu*, [1996] 8 W.W.R. 239 at para. 21, 21 B.C.L.R. (3d) 318 (C.A.).
- [136] The question of whether an intervening event breaks the chain of causation is a question of fact and it may depend on whether the plaintiff acted unreasonably: *Hussack*. As stated by Justice Bennett in *Hussack* at para. 82:
- In essence, the decisions say that if an injured party acts unreasonably and causes him or herself further injury, the tortfeasor is not responsible for injuries suffered as a result of the second injury.
- [137] I do not find that Mr. Safdari acted unreasonably in lifting the couch in the manner he did. The 2019 Work Accident was another event that contributed, for some time, to an exacerbation of Mr. Safdari's existing symptoms but that further exacerbation cannot be viewed as an unforeseen consequence of the defendants' negligence. Accordingly, the defendants remain liable, regardless of the contribution of another cause: *Athey* at paras. 24-25; and *Dorsey v. Bhindi*, 2016 BCSC 499 at para. 100.
- [138] Nonetheless, I must take into account Mr. Safdari's physical and mental condition at the time of the 2019 Work Accident, including the fact that he had managed to go back to work when this work accident occurred.
- [139] I accept Dr. Flaschner's evidence on this point regarding the impact of the 2019 Work Accident where he stated:

... the symptoms from [the MVA] had been well established as a chronic pain condition prior to the [2019 Work Accident]. The ongoing chronic pain prior to the [2019 Work Accident] would be expected to represent a permanent impairment requirement long-term management. Mr. Safdari remains within the time frame for some potential further improvement from his additional injury of May 2019.

[140] The 2019 Work Accident complicates Mr. Safdari's claim for loss of earnings because, on the one hand, he suggests he has been actively looking for work yet on the other hand, has advanced a loss of future earning capacity based on total incapacity.

[141] Taking into account the medical evidence, all of the experts seem to agree that Mr. Safdari will have some restriction in his employment capacity moving forward. I accept Dr. Flaschner's testimony that his ability to work as a labourer is now restricted although I have also found that this restriction is not fully caused by the MVA.

[142] I have found that Mr. Safdari's prognosis is guarded although I do not find that has rendered him incapable of any residual earnings as suggested by Mr. Safdari. I will deal with the impact of these findings on his vocational capacity when I deal with that head of damage.

D. Failure to Mitigate

[143] In this case, the defendants submit that Mr. Safdari failed to mitigate his losses with respect to his physical injuries by failing to adhere to certain medical treatments. The defendants rely on *Mullens v. Toor*, 2016 BCSC 1645, aff'd 2017 BCCA 384 which provides at paras. 102-104:

[102] The defendants bear the onus of establishing that the plaintiff failed to take reasonable steps that would likely have reduced her damages, as explained in *Graham v. Rogers*, 2001 BCCA 432 (CanLII), leave to appeal ref'd [2001] S.C.C.A. No. 467 (QL) at para. 35.

[103] Questions of mitigation often arise when the plaintiff fails to undergo certain medical treatment or therapies. The test in those circumstances was explained in *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 (CanLII) at para. 56 (see also *Chiu v. Chiu*, 2002 BCCA 618 (CanLII) at para. 57):

I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment... [Emphasis in original.]

[104] In determining the reasonableness of a refusal of medical treatment, the trier of fact will take into account the degree of risk to the plaintiff from the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak v. Ippolito*, [1985] 1 SCR 146, 1985 CanLII 62 (SCC), at para. 31 (cited to CanLII).

[144] The defendants rely on entries in various clinical records suggesting that Mr. Safdari failed to engage in active rehabilitation and failed to follow the advice of his treating medical professionals. The defendants stated it this way:

Although the plaintiff has attended a multitude of various treatments, his historical participation is noted to be low. The plaintiff was often noted to be "pain focused" and worried about "getting hurt" which was documented to negatively impact his participation in various treatments [McCann Report p. 2].

In Dr. Flaschner's report he notes that "the impression from occupational therapy to ICBC of March 12, 2017 was that Mr. Safdari did not seem to display any effort in trying to progress or improve. He reported a lot of pain and little effort while doing exercises and did not seem motivated or willing to push himself there was a request to discharge Mr. Safdari from the program due to the lack of benefit". [Dr. Flaschner p. 16].

This impression is in keeping with the lack of participation noted in during the plaintiff's treatment for his 2015 WCB Accident injuries, pre-Car Accident.

A discharge report of April 19, 2017 described the plaintiff as "pain focused" and noted he was "reluctant to do or try anything that might increase pain. He was described to display no interest or effort in trying to improve". There was a recommendation to continue a gym program independently and use pacing and pain management techniques. Psychology was also recommended. [Dr. Flaschner p. 16].

In addition, Dr. Flaschner opines "Mr. Safdari has used numerous medications but appears to have been reluctant to continue with regular use of usual medications for chronic pain a low dose of Nortriptyline at night would likely improve restorative rest as well as potentially mood and pain" [Dr. Flaschner p. 27].

The Defendant submits that the plaintiff's low participation in treatment indicates he is not especially invested in his recovery, but rather attends because he "has to".

Despite the plaintiff's attendance, the Defendant says that it is the act of participating that achieves the benefit of any treatment. This is especially the case with active treatments or therapies as recommended by the experts in this case.

The plaintiff's lack of participation despite the number of treatments attended is unreasonable, it is submitted, and is directly linked to the plaintiff's lack of recovery.

The Defendant argues this supports a finding of a failure to mitigate as the purpose of an "active" therapy program, is to be active. Without this component, the treatment becomes of little benefit, it is submitted.

The Defendant further submits that the plaintiff's reluctance to use medication to gain some control of his symptoms is unreasonable, especially in light of Dr. Flaschner's recommendations and the severity of the plaintiff's complaints.

- [145] In addition to the authorities referred to above, I have referred to *Lewis v. Gibson*, 2018 BCSC 1713, in which Justice Russell stated the following regarding the test for failure to mitigate:
- [202] In *Morgan v. Galbraith*, 2013 BCCA 305 at para. 78, the Court of Appeal affirmed *Chiu v. Chiu*, 2002 BCCA 618 as the "guiding authority" on the question of mitigation. In *Chiu*, the court said:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.
- [203] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, a case where the allegation of failing to mitigate involved a refusal to undergo cortisone injection treatment, the court said that it:
- [56] would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment.
- [Emphasis in original]
- [146] I turn to my analysis regarding the defendants' submission that Mr. Safdari failed to mitigate.
- [147] I am not satisfied that Mr. Safdari has failed to mitigate his damages regarding his injuries because of the medication he did not take or by his failure to "better engage" in certain programming.
- [148] In his testimony, Mr. Safdari explained his rationale for certain decisions he made regarding treatment. Importantly, he had attended medical experts on a regular and consistent basis from the time of the accident to the time of trial. Although there is reference to a failure to engage, Mr. Safdari explained some of those accusations. I accept that part of Mr. Safdari's issue regarding resistance to treatment relates to his chronic pain syndrome and a somewhat incessant focus on pain.
- [149] In summary, I am not persuaded that the defendants have met their burden that Mr. Safdari has failed to mitigate his damages with respect to his injuries and resultant chronic pain. I make this finding based on the totality of the evidence presented and in considering the number of treatment providers whom he has consulted since the MVA.

[150] Although perhaps less than ideal, Mr. Safdari's approach to his treatment has not been unreasonable in the circumstances.

VI. DAMAGES

[151] Mr. Safdari seeks compensation for the injuries he suffered as a result of the defendants' negligence under the following heads of damages and for the amount set out at the beginning of these reasons:

- a) Non-pecuniary damages for pain and suffering;
- b) Damages for past wage loss;
- c) Loss of future earning capacity;
- d) Cost of future care[3];
- e) Special damages; and
- f) Past-care and in-trust claim.

[152] The defendants agree that, if negligence is found, Mr. Safdari is entitled to an award for non-pecuniary damages and some special damages. The defendants disagree that any entitlement has been shown for past and future wage loss, future care costs or the in-trust claim.

A. Non-Pecuniary Damages

[153] I have found Mr. Safdari's most significant injury to be the upper back and neck pain, shoulder injury, cervicogenic headaches and aggravation of a pre-existing lower back injury.

[154] Regarding non-pecuniary damages awards, the case authorities are clear that any award is to compensate the injured party for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties and fairness is measured against awards made in comparable cases. Though helpful, similar cases serve only as a rough guide, as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[155] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Kirkpatrick J.A. outlined the factors a court should consider when assessing non-pecuniary damages:

The non-exhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;

- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[156] The proper approach to assessing injuries that depend on subjective reports of pain was discussed by Chief Justice McEachern in *Price*, which was quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2:

In *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.) at 397 and 399, Chief Justice McEachern, in remarks since quoted many times, stated:

The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.

...

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

- [157] Mr. Safdari was almost 36 years old at the time of the MVA. I have found that his prognosis for a full recovery is guarded, although engagement with further treatment may provide some improvement. Mr. Safdari will be restricted, to some extent albeit much less than what he claims, in his day-to-day activities. The impact of his condition has been overstated by him, resulting in self-imposed reduced work hours, nominal participation in extracurricular activities and a reported inability to attend to his home responsibilities.
- [158] When considering the extent and nature of his injuries, the impact on his enjoyment of life and guarded prognosis, counsel for Mr. Safdari submits that \$200,000 is a reasonable award for non-pecuniary damages. In support of this position, counsel relied on the following case authorities:
- a) Gabor v. Boilard, 2015 BCSC 1724;
 - b) Sirna v. Smolinski, 2007 BCSC 967;
 - c) Adamson v. Charity, 2007 BCSC 671; and
 - d) Broad v. Clark, 2018 BCSC 1068.
- [159] The defendants submit that an award for non-pecuniary damages should be in the range of \$40,000-\$60,000 and rely on the following case authorities:
- a) Erwin v. Buhler, 2017 BCSC 362;
 - b) Nguyen v. Bhatti, 2017 BCSC 1537;
 - c) Janda v. Mackenzie, 2018 BCSC 168; and
 - d) Yannacopoulos v. Cronk, 2015 BCSC 1154.
- [160] Considering the position taken by both counsel on this issue, it is not surprising that the cases they cite are very different factually. The defendants rely on cases where the injured party is older than Mr. Safdari and exhibited relatively minor accident injuries but also had a well-documented history of (sometimes) multiple pre-existing conditions. However, the balance of the injuries sustained in those cases (except for Yannacopoulos which I will address shortly) were less serious than those which I have found for Mr. Safdari. For example, in Erwin, the 55-year-old plaintiff suffered relatively minor injuries in the subject motor vehicle accident which did not include headaches. He also had a pre-existing condition more serious than that of Mr. Safdari. Also, in Nguyen, the plaintiff, 49 at trial, suffered soft tissue injuries to his neck, back and right shoulder, which was an aggravation of injuries he sustained in a prior MVA. He also had pre-existing sleeping problems, which caused fatigue and lethargy. The trial judge found the plaintiff's condition "greatly improved" about 3 years after the MVA and would be fully resolved 5 years after the MVA. In Janda, the plaintiff, 61 at trial, sustained an exacerbation of a pre-existing shoulder injury and soft tissue back injury. He also suffered new soft tissue injuries to his neck, low back, and left hip. These were effectively resolved by the time of trial, and were effectively

resolved within months of the MVA.

- [161] Crucially, the plaintiff in Nguyen and Janda sustained injuries that fully resolved no more than 5 years after the MVA.
- [162] The plaintiff's cases, on the other hand, are about plaintiffs who suffered far greater injuries than I have found for Mr. Safdari. In particular, most of the plaintiffs were found to have suffered a brain injury. I have not made a similar finding for Mr. Safdari. For example, in Adamson, the court found the plaintiff to have sustained the following injuries: chronic pain syndrome, permanent disability, permanent cognitive and emotional trauma, pain in cervical spine and shoulder, fatigue, major depressive disorder of moderate severity, memory difficulty, sleep disturbance, severe headaches, mild traumatic brain injury, and exacerbation of pre-existing hearing loss. As a result, in 2007, Justice Bauman ordered a \$200,000 award.
- [163] Additionally, In Gabor, the plaintiff was found to have some pre-existing neck and back pain, but it was periodic and would not have impacted her functioning at any level. She was also found to have no pre-existing cognitive impairments. The experts diagnosed her with an Adjustment Disorder, relating to her depression and anxiety. Also, she was diagnosed with a probable mild traumatic brain injury. These cognitive impairments were likely permanent.
- [164] In Sirna, the plaintiff, 22 at the time of the accident, sustained "significant and serious ongoing physical, psychological and emotional trauma that has left her with permanent functional deficits." These injuries included chronic pain and chronic fatigue associated with her soft tissue injuries; cognitive deficits affecting attention and memory, an impaired sense of smell and additional fatigue, all associated with her brain injury; and, reactive depression. The trial judge found "ongoing treatment will be largely palliative or directed at resolving periodic physical or emotional flare ups".
- [165] In Broad, the plaintiff, 23 at the time of the accident, suffered multiple soft tissue injuries. Her soft tissue injury to the lower back was severe, leading to multiple and complex issues. The trial judge found the plaintiff would suffer with these injuries for the entirety of her life. The impact was already profound, adversely affecting her emotional health, relationships with friends and family, her intimacy with her partner and ability to care for her two young children.
- [166] In all of the plaintiffs' authorities, the scope and severity of the injuries was more severe than those I have found for Mr. Safdari. In addition, the pre-accident condition of each plaintiff did not include any (Sirna; Broad) or very limited impairments (Gabor). Additionally, the prognosis for those injuries was much worse. Finally, the plaintiffs in Sirna and Broad were considerably younger.

- [167] I have found the case of Yannacopoulos to be persuasive. Justice C. Ross awarded \$80,000 less a 25% reduction for a total non-pecuniary damages award of \$60,000. The nature, scope, and severity of the injuries sustained by the plaintiff in Yannacopoulos were similar to those that I have found for Mr. Safdari. The plaintiff in Yannacopoulos suffered soft tissue injuries to his neck, back and shoulders. Most of his injuries resolved within 3 months of the MVA. However, the back pain remained. It was likely that the MVA accelerated the progression of his pre-existing, degenerative lumbar spine condition. He also suffered with depression. There was a prospect that the plaintiff's low mood and depression would improve with treatment, and that his ongoing lower back pain would improve with weight loss. The trial judge found he failed to establish a brain injury or memory loss as a result of the MVA. The plaintiff also suffered from additional pre-existing conditions not present for Mr. Safdari.
- [168] Taking into account the authorities[4] and my findings of fact, I am satisfied that \$90,000 will properly compensate Mr. Safdari for his pain and suffering and loss of past and future enjoyment of life. Taking into account the 25% adjustment for his pre-existing conditions, I award \$67,500 for non-pecuniary damages.

B. Loss of Past and Future Earning Capacity

- [169] This is the largest aspect of Mr. Safdari's claim. I will deal here with the vocational evidence presented, the legal analysis and my findings.
1. Vocational Evidence
- [170] The plaintiffs tendered a report from Christiane Clark, an economist. She prepared a loss of earning report based on certain facts and assumptions. Mr. Safdari takes the position that based on this report, his past wage loss (from the date of the MVA to the commencement of the trial) as an interior designer is \$131,077 (being \$140,000 of actual earning less income earned of \$8,923) or, as a warehouse worker his past loss of income would be \$107,577 (\$116,500 less actual earnings).
- [171] Mr. Safdari takes the position that his involvement with interior design in Sweden and his solid employment record supports his substantial wage loss claim, both past and future.
- [172] Mr. Safdari did not tender a report from a vocational consultant. There is no evidence before me that he would have earned the amount claimed as an interior designer working in the Lower Mainland nor do I have any evidence of wages for interior designers in this province. I also do not have any expert evidence about his capacity to work in interior design, in any manner. The only evidence I have about employment prospects is that of the doctors who agreed that he would have difficulty with heavy lifting.
- [173] In my view, I must assess this aspect of Mr. Safdari's claim based on the evidence that is before me and based on my determination of reasonable possibilities.

[174] I start with his reported earnings in Canada:

2013

Nil

2014

\$3,052

2015

\$21,561 (T4 earnings of \$9,929 and WCB of \$11,632)

2016

\$13,473 (EI benefits and WCB)

2017

\$13,540 (WCB)

2018

\$13,688 (T4 earnings of \$5,248 and WCB of \$8,440)

2019

No evidence provided

[175] In 2018, Mr. Safdari worked in his cleaning business but was let go. He then worked for two days at a furniture store before the 2019 Work Accident. He was still collecting WCB as a result of the 2019 Work Accident as at the time of trial. Mr. Safdari did not present evidence about his reported 2019 income.

[176] Mr. Safdari did not have substantial demonstrated earnings in the years leading up to the MVA.

2. Loss of Past Earning Capacity

[177] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[178] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that, in the ordinary course, the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62 at para. 42. The trial judge has a discretion to determine what period or 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 [*W & D Logging Co.*]. In exercising this discretion, the trial judge should keep in mind that the

plaintiff is to be put back in the position he or she would have been in had the accident not occurred (W & D Logging Co. at paras. 185-186).

[179] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: Athey at para. 27; and Morlan v. Barrett, 2012 BCCA 66 at para. 38.

[180] The defendants submit that the plaintiff has failed to prove any wage loss and make the following submission:

The plaintiff has based his claim for past wage loss on either the income of a warehouse worker or an interior designer. Neither of these comparisons are appropriate, it is submitted.

The plaintiff was not working at the time of the Car Accident as he was on a disability claim through WCB for his 2015 WCB Accident. However, the plaintiff claims he had made a significant recovery in the weeks before the Car Accident and was ready to return to work immediately prior to the Car Accident occurring.

...

Further, it is the Defendant's position that the plaintiff has adduced no evidence to support a finding that he would have earned any earnings but for the Car Accident; rather, the evidence supports a finding that he would have continued to be disabled from work, or be limited in the work he was able to perform. For example:

- a) Throughout his 2015 WCB Accident claim, the plaintiff claimed substantial, severe, and long-lasting injuries with little to no relief or recovery from treatment and cannot now renege in the weeks before the Car Accident in order to substantiate a wage loss claim.
- b) The plaintiff's pre-existing chronic pain was diagnosed as "permanent" prior to the Car Accident occurring. The plaintiff also had a symptomatic disc bulge and significant psychological conditions which were all negative prognostic factors to the plaintiff returning to employment, absent the Car Accident.
- c) The plaintiff refused to participate in a graduated return to work program offered by Enterpack and further refused a light duty position offered by Enterpack indicating an unwillingness to return to employment. The plaintiff's justification for not wanting to return to Enterpack is unreasonable, it is submitted.
- d) The plaintiff appealed the January 2016 WCB decision which held he could return to work. This further supports a finding that the plaintiff did not consider himself ready or able to return to employment at the time of the Car Accident.

- e) Dr. Flaschner testified on cross examination that prior to the Car Accident occurring the plaintiff's prognosis with respect to his back pain was poor and he was unable to return to employment involving heavy lifting.
- f) Dr. McCann testified on cross examination that it was his opinion and his impression that, prior to the Car Accident occurring, the plaintiff did not return to work due to pain. Dr. McCann provided evidence that he had a wealth of experience dealing with WCB claims both on behalf of the patient and the Board.

Furthermore, the plaintiff's claim that he was going to become an interior designer is also unsupported by the evidence and cannot be used to support a claim for past wage loss as: [he] had taken minimal steps to complete English language training; he has not taken any steps to investigate whether his [interior design certificate from Sweden] is recognized in Canada; and, [he] has not applied for any interior design program in Canada.

[181] In this case, the economist relied on certain facts and assumptions that have not been proven on the evidence before me. Also problematic was the fact that the economist did not include any capacity for employment earnings in the calculations she presented. In other words, based on the assumptions she was provided, the economist was asked to produce calculations that were based on hypothetical earnings far exceeding those I have found for Mr. Safdari. I do not question her calculations. They are undoubtedly correct. However, the underlying assumptions have not been proven so the calculations provide little assistance here.

[182] Mr. Safdari had a very limited employment history, interrupted by workplace injuries in 2015 and 2019. Although I am satisfied that he has proven some employment in Sweden in the area of interior design, I am simply unable to determine, based on the evidence before me, his equivalent Canadian earnings or his vocational capacity as an interior designer. The evidence before me would require speculation.

[183] However, I have some evidence that Mr. Safdari was working as a labourer before the MVA, he had not worked for seven months after the 2015 Work Accident but testified he intended to return to work (not Enterpack) and had taken some steps to find work after WorkSafeBC cleared him in January 2016. In my view, based on the limited work history before me, his CRA documents and his history of workplace injury leaves, I am satisfied that there is a reasonable possibility he would have had some earnings between the date of the MVA and trial. Based on his T4 earnings from 2015 (January through June 1, 2015) of \$9,929 and accepting that he would not have worked full-time January 15, 2016 through to the 2019 Work Accident, I am satisfied that Mr. Safdari has demonstrated an annual loss of pre-tax earnings of \$12,000 from February 1, 2016 through May 2019. Taking into account an estimate of taxes and residual earnings of \$8,923, I assess Mr. Safdari's past loss of earning capacity to be \$26,000.[5] Counsel have leave to reappear to address any arithmetic errors in this calculation.

[184] I am not satisfied that Mr. Safdari's aspirations are firmly based on the evidence tendered at the trial. I accept that he very much believes that his dream is viable. I am not satisfied that it is based on the evidence before me.

[185] I will say more about this after I deal with the jurisprudence of loss of future earning capacity.

3. Future earning capacity - legal principles

[186] The parties presented disparate positions. Mr. Safdari seeks \$1,373,100 for loss of future earning capacity. The defendants submit Mr. Safdari is not entitled to anything under this head of damage.

[187] The parties do not disagree about the applicable legal principles. I will start with those and then turn to my analysis.

[188] An award for loss of future earning capacity should be made where the plaintiff has established a "real and substantial possibility of a future event leading to an income loss": *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The loss is to be assessed based on the probability of the occurrence of future events.

[189] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by his or her injuries; and, (2) if so, what compensation should be awarded for the resulting financial harm that will accrue over time?

[190] The principles to be considered in determining a claim for loss of future earning capacity were summarized by Justice Fisher (then of this Court) in *Chappell v. Loyie*, 2016 BCSC 1722 at paras. 222-225:

[222] An award for future loss of income is to compensate a plaintiff for his loss of earning capacity. This kind of loss is also proven, not on a balance of probabilities, but if the plaintiff establishes that it is a real and substantial possibility that he will suffer a future income loss: *Athey* at para. 27.

[223] General factors for courts to consider in assessing a loss of earning capacity were set out in *Brown v. Golaiy* (1985), 26 BCLR (3d) 353 (SC) at para. 8:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff 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
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

- [224] These factors must be considered in the context of each case in order to determine what a particular plaintiff would realistically have done in the future had the injuries not occurred. If the plaintiff proves a real and substantial possibility of a future event leading to an income loss, that loss may be quantified either on a capital asset approach (where the loss is not easily measurable) or an earnings approach (where it is easily measurable): *Perren v. Lalari*, 2010 BCCA 140 at para. 32. This assessment should also take into account both positive and negative contingencies to be given weight according to their relative likelihood: *Cook* at para. 218.
- [225] A future loss of capacity may be established even where a plaintiff continues in the same job and continues to earn the same income as he did before the accident: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 BCLR (2d) 260 (CA); *Chang v. Feng*, 2008 BCSC 49. However, unless there is evidence that the plaintiff is disabled from performing some of his duties, or is unable to perform a realistic occupation, a future loss will not be proven: *Steward v. Berezan*, 2007 BCCA 150; *Perren*, at para. 32; *Kathuria v. Wildgrove*, 2015 BCCA 186 at para. 34.
- [191] The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiv*, [1985] B.C.J. No. 31 at para. 8; *Pallos v. Insurance Corp. of British Columbia*, [1995] B.C.J. No. 2 at para. 24; and *Pett v. Pett*, 2009 BCCA 232 at paras. 18-19. The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [192] The assessment will necessarily involve a comparison between what the plaintiff would probably have earned if the accident had never occurred and what he probably will earn having suffered the injuries in the accident: *Kondor v. Shea*, 2014 BCSC 2146 at para. 89.
- [193] Insofar as possible, the plaintiff should be put in the position he would have been in but for the injuries caused by the defendant's negligence: *W & D Logging Co.* at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
- [194] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.
- a) Has a loss of earning capacity been proven?
- [195] The first issue to determine is whether Mr. Safdari has proven a loss of earning capacity. The defendants disagree, characterizing this aspect of his claim as nothing more than speculative.

[196] I am satisfied that the evidence demonstrates a diminished ability to earn income in the future. In other words, there is uncontradicted medical evidence of a partial physical disability, attributed to the MVA which could have an effect on Mr. Safdari's capacity to work.

[197] He described his efforts to find work immediately prior to the MVA and again before the 2019 Work Accident. He also described the temporary positions he was able to find including working at Amazon and his cleaning business at Waves Coffee.

[198] I am satisfied, based on the totality of the evidence, that there is a real and substantial possibility of a future event leading to income loss. In other words, I am satisfied that there is cogent evidence that demonstrates Mr. Safdari's earning capacity has been reduced.

b) Assessment of loss of future earning capacity

[199] I do not agree with Mr. Safdari's submission that, in the circumstances presented here (particularly with a lack of defined work history) that the earnings approach assessment is preferable.

[200] In my view, the better approach is the capital asset approach which involves considering factors such as:

- a) Whether the plaintiff has been rendered less capable overall of earning income from all types of employment;
- b) whether the plaintiff is less marketable or attractive as a potential employee;
- c) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and
- d) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: Brown at para. 8; Gilbert v. Bottle, 2011 BCSC 1389 at para. 233; and Morgan v. Galbraith, 2013 BCCA 305 at paras. 53, 56.

[201] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: Morgan at para. 56.

[202] In Villing v. Husseni, 2016 BCCA 422, Justice Savage said the following about the capital asset approach when dealing with the 17-year-old plaintiff:

[18] Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in Morgan v. Galbraith, 2013 BCCA 305:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in Brown in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the

award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.

[Emphasis added.]

- [203] I have considered the evidence presented, including the opinions about Mr. Safdari's guarded prognosis and his ability to work in the future. I am satisfied that Mr. Safdari will be able to return to work at 90% capacity. I come to this assessment after taking into account Mr. Safdari's pre-existing conditions and the exacerbation of his condition by the 2019 Work Accident. Mr. Safdari had determined he would return to the workforce before the 2019 Work Accident and had taken steps to that end, including running a cleaning business for a few months in 2018. Mr. Safdari's return to work will be assisted by allowing some of the aids as assessed in his claim for cost of future care. I address this aspect of his claim below.
- [204] I agree with the defendants' submission that Mr. Safdari has a far greater residual earning capacity than that suggested by him. However, I am satisfied that, based on the totality of the medical evidence, Mr. Safdari has been rendered less capable overall of earning income because of his physical limitations caused by the MVA. I am also satisfied that he could be less marketable as a labourer and is less valuable to himself as a person capable of earning income in his previous vocations.
- [205] Weighing the different methods of assessment, and the positive and negative contingencies, and taking into account his age, I consider Mr. Safdari will be able to work at approximately 90% full-time capacity once he returns to work. In my view, based on the evidence presented, the reduced workload should take him through to the age of retirement of 70 years old. In reaching this conclusion, I have taken into account positive and negative contingencies, including treatment prospects from the pain clinic. I thus consider a reasonable assessment of the plaintiff's loss of earning capacity (based on 30 years starting at approximately \$30,000 per year and increasing to approximately \$56,000 at age 70 years less residual working capacity of 90%) to be approximately \$113,000. I have relied on Ms. Clark's report for the calculations and her hypothetical that she used for a warehouse worker and adjusted her example by the residual earnings to reflect the annual loss from the time Mr. Safdari re-enters the workforce and retires at age 70.
- [206] I appreciate Mr. Safdari's employment future is unknown, in part because he has yet to undertake treatment at the pain clinic and has not examined other employment opportunities that may be more conducive to his condition. I have tried to address the uncertainty as best as I am able and have structured the assessment accordingly.
- [207] My consideration of these figures takes into account the positive contingency that he would return to work as a warehouse worker working at about 90% capacity, with the anticipated earning increases over his professional life, along with the negative contingencies. Applying the economic multiplier identified by Ms. Clark, which includes labour market

contingencies, the present value of this loss is \$113,000. This does not take into account time out of the workforce but rather, it is based on working at about 90% capacity to retirement at a position similar to that of his pre-MVA salary of almost \$10,000 for six months of work before the 2015 Work Accident. As a round estimate and taking into account a further adjustment for the pre-existing conditions for which I have found, I assess Mr. Safdari's loss of future earning capacity to be \$80,000.

C. Cost of Future Care

- [208] Mr. Safdari seeks \$740,613.82 for cost of future care expenses. He does not adjust this claim for present value. He submits that he is entitled to every item that was included in Simone Szarkiewicz's cost of future care report, without adjustment.
- [209] Insofar as is possible, Mr. Safdari is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition. When full restoration cannot be achieved, the court must strive to ensure full compensation by ensuring 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: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.); *Williams v. Low*, 2000 BCSC 345 at para. 48; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [210] The test for determining the appropriate award for the cost of future care is objective, and must be based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at 79; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. However, the award may also be reduced or increased based on the prospect of improvement or deterioration in the plaintiff's condition. Each case falls to be determined on its particular facts: *Gilbert* at para. 253. Again, assessing a future cost of care award is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [211] I have reviewed Ms. Szarkiewicz's report and the costs she has assessed for each. I agree with the defendants that any future care award must be adjusted for present value. I also agree with the defendants' submission that some of the items found in Ms. Szarkiewicz's report were contrary to recommendations made by the medical experts. I agree that the plaintiff was taking a variety of medications prior to the MVA and that the defendants should only be responsible for an increase or new medication. I also note that Dr. McCann recommended against needle based therapies. In addition, a functional capacity evaluation was conducted in 2017 and there does not seem to be a basis for a second assessment. It may also be more appropriate for this evaluation to be conducted after WorkSafeBC

determines Mr. Safdari's status. Finally, Dr. Grosch has not recommended any further neurological treatment and a neuropsychological evaluation is not established. I am not satisfied that a further attendance with an occupational therapist would be of any benefit, as the plaintiff has already participated in this programming. As for adaptive cleaning equipment, this has not been demonstrated to be medically justified. Finally, the plaintiff has had the benefit of vocational counseling through WCB and it has not been demonstrated that further vocational counseling is medically justified.

- [212] I am satisfied that Mr. Safdari may gain some benefit from attending the chronic pain clinic despite his historical lack of engagement and participation in treatment at Orion Health Pain Clinic in 2015. Attendance at this program is medically justified and reasonably necessary on the medical evidence to preserve and promote Mr. Safdari's health and will provide him with some assistance as he returns to the workforce. The amount estimated for a return to Orion Health is \$13,600 and I grant that amount.
- [213] I am also satisfied that the plaintiff has demonstrated that the following treatments/aids are medically justified but to a much lesser extent and duration than that claimed. As such, I have awarded an additional \$12,000 to allow for some active rehabilitation treatment, as recommended by Dr. Flaschner, some medication, counseling and gym membership is medically justified. In total, I would award \$25,600 for cost of future care.
- [214] As stated previously, in his notice of civil claim, the plaintiff claims damages for "loss of house maintenance capacity". In his closing submission, this claim was subsumed into the cost of future care award.
- [215] The defendants made submissions with respect to a discrete head of damages for loss of housekeeping capacity. They submitted that no such award should be made here or, in the alternative, it should be captured in the non-pecuniary damages award.
- [216] As I review the evidence and based on the findings I have made, I am not satisfied that the plaintiff has established that this claim is medically justified or that the amount sought is reasonable.

D. In-trust Claim

- [217] Mr. Safdari makes an in-trust claim for his spouse. He submits that before the MVA, he was helping his spouse at home with cleaning, cooking, grocery shopping and other home maintenance. He testified that after the MVA, he was not able to contribute to his share of household activities. Ms. Ghaffari testified as well that Mr. Safdari was no longer contributing to the household chores. He seeks \$19,720 for household and seasonal cleaning.
- [218] The defendants contend that there should be no award for an in-trust claim or alternatively, that any loss here is better addressed as a part of the non-pecuniary award.

[219] The parties agree that the factors to be considered are as set out by Justice Smith in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, as follows:

- 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 (here, the normal care of an uninjured child);
- c) the maximum value of such services is the cost of obtaining the services outside the family;
- d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
- f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[220] Mathematical precision is not required to assess the value of this claim. In *Atker v. Nair*, 2011 BCSC 1877, Justice Wedge awarded \$5,000 in-trust to the plaintiff's sister-in-law for the care and services provided to the plaintiff following the collision. In so doing, she stated the following:

[49] I turn then to Ms. Atker's in-trust claim. I accept the evidence of Ms. Atker and her spouse that prior to the accident, Ms. Atker was responsible for the full spectrum of child care and house care duties together with her sister-in-law and did in fact fulfill all those duties before reporting for work for an eight hour shift each day. I also accept her evidence that following the accident, Ms. Atker's sister-in-law performed all of Ms. Atker's duties for the first two to three months. I accept that Ms. Atker continued to require her sister-in-law's assistance, albeit to a lesser extent, for a further four to five months.

[50] It is open to the Court to observe that it would cost approximately \$20 per hour to hire a domestic worker to perform those duties. I cannot calculate the in-trust claim with mathematical precision, but on the basis of the time frames involved, I am satisfied that an in-trust award of \$5,000 is appropriate in the circumstances.

See also *James v. James*, 2018 BCSC 603 at paras. 148-149, wherein Justice Betton confirms that the in-trust award for past care must be reasonable.

[221] I am satisfied that Mr. Safdari is entitled to a nominal amount to compensate his spouse for housekeeping assistance she provided that was over and above what would be expected in the family relationship. This reflects Ms. Ghaffari's housekeeping and care provided for a reasonable time after the MVA.

[222] Although I cannot calculate the in-trust claim with mathematical precision, I accept that Mr. Safdari would likely have provided greater contribution to the household and his spouse was required to contribute over and above what would be expected. Estimating the cost associated with housekeeping and yard maintenance and although not calculated with mathematical precision, an award of \$2,000 is reasonable in the circumstances.

E. Special Damages

[223] The plaintiff seeks \$8,414.26 for special damages he has incurred since the MVA. The defendants take the position that Mr. Safdari has not proven many of the out-of-pocket expense he claims. They submit that he is entitled to \$1,200-\$3,500 for special damages. The defendants submit that it is unclear, for example, whether the physiotherapy, chiropractic or massage therapy receipts are outstanding.

[224] Based on Mr. Safdari's testimony and my review of the receipts tendered, I am satisfied that he has proven his special damages as follows:

Claim

Amount

Physiotherapy, massage therapy and chiropractor

\$3,746.29

Prescriptions

\$1,000.00

Transportation

\$147.50

Gym

\$244.16

Parking for medical appointments

\$28.52

TOTAL

\$5,166.47

VII. Summary

[225] In summary, damages are awarded as follows:

1.

Non-Pecuniary Damages

\$67,500

2.

Past Wage Loss

\$26,000

3.

Future Wage Loss

\$80,000

4.

Cost of Future Care

\$25,600

5.

In-trust claim for spouse

\$2,000

6.

Special Damages

\$5,166.47

Total:

\$206,266.47

[226] Again, if there are arithmetic errors, interest adjustments or otherwise that require further calculations, counsel are granted leave to appear.

VIII. Costs

[227] If the parties are unable to agree on costs, they may speak to the issue.

[228] I thank counsel for their helpful written submissions provided prior to the commencement of the closing arguments.

"Winteringham J."

[1] This included approximately 830 pages of documents from the file of WorkSafeBC. Both parties rely on aspects of this record.

[2] At trial, the parties relied on a document agreement and made various admissions about the six binders of documents that were tendered. Unless proven during the trial, the documents were not tendered for the truth of their contents. During his direct and cross examination,

Mr. Safdari was taken to the medical records referenced in this paragraph and agreed with the content and subject matter of the records although he was not familiar with some of the medications prescribed. In addition, both parties, in their closing submissions, relied on the records referenced in this paragraph.

- [3] In his Notice of Civil Claim, the plaintiff claims damages for "loss of house maintenance capacity". This claim has been subsumed into the plaintiff's closing submissions on the cost of future care award.
- [4] See Justice Griffin's decision in *Deol v. Sheikh*, 2016 BCSC 2404 where the injured party had pre-existing chronic pain syndrome and multiple events.
- [5] 2016 - \$11,000; 2017 - \$12,000; 2018 -- \$12,000; 2019 -- \$5,000

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