

CANADA / JUDGMENT

Sandhu v. Frendo

2025 BCSC 1945

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Supreme Court of British Columbia

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2025 BCSC 1945 Sandhu v. Frendo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sandhu v. Frendo,

2025 BCSC 1945

Date: 20251006

Docket: M35385

Registry: Chilliwack

Between:

Nardev Singh Sandhu

Plaintiff

And

James Frendo and Mark George Frendo

Defendants

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:

E. Lay

Counsel for the Defendants:

G. Christofferson

Place and Dates of Trial:

New Westminster, B.C.

December 4-8, 2023

April 18, 2024

Place and Date of Judgment:

Chilliwack, B.C.

October 06, 2025

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Introduction

- [1] This trial dealt with the appropriate damages for injuries suffered by the plaintiff Nardev Sandhu in a vehicle accident in January 2017. Liability for the accident was admitted.
- [2] The most contentious issues to be decided are: (1) whether the accident caused or contributed to Mr. Sandhu's post-accident cognitive impairment (which was apparent during his testimony) and (2) the assessment of his past and future loss of earning capacity, in light of his self-employment as a small business owner.
- [3] The parties also disagree on the seriousness and effects of the soft tissue injuries that he suffered in the accident, the presence of any accident-related psychological conditions, and whether he requires any meaningful future care. His modest claim for special damages has been agreed to.

Background

Personal Situation

- [4] Mr. Sandhu was 56 years old when the trial began. He lives with his wife Lovepinder Sandhu and their two adult children in Mission. He and his wife were married in 1995.
- [5] He, his wife, and their son Maninder Sandhu all testified that he was in good health before the accident. Although it emerged from his medical records that he had several chronic health issues, such as sleep apnea, diabetes, hypertension and hypothyroidism, it was not suggested that any of them played a role in the post-accident conditions that he claims.
- [6] He was also physically active, with preferred activities of running, playing soccer and cricket, and going for long walks with his wife.

- [7] Ms. Sandhu said that he was able to handle his housework responsibilities, which involved mowing the lawn and cleaning the gutters, as well as assisting her with vacuuming and mopping inside.
- [8] There were no signs of any mood or cognitive problems. Ms. Sandhu described him as "very happy" and "friendly", and also said that he was "very clever" before the accident -- always thinking about how to expand their businesses. Maninder said that his father was very patient and easy going, and joked frequently.
- [9] The spouses had a harmonious marital relationship, saw a group of friends once a month, and had a regular dinner or movie night with each other every week.

Work

- [10] Mr. Sandhu's employment background had included working in the restaurant industry, in construction with his father, and managing and then owning convenience stores. In the years leading up to the accident, he and Ms. Sandhu owned and operated several fast food franchises.
- [11] At the time of the accident they had a Jugo Juice store in Abbotsford, and were in the process of opening another Jugo Juice and an Indian takeout restaurant in Mission. The Mission businesses were located on a property that they owned and had developed. All three businesses were operated through a company that they controlled.
- [12] In the years leading up to the accidents, they had been operating two Taco Del Mar outlets, which they gave up because they were not profitable, in addition to the Abbotsford Jugo Juice.
- [13] Mr. Sandhu was unclear whether their two Mission businesses began operating in 2016 or 2017, but Ms. Sandhu said that they began in May or June 2017, after the accident. The 2016 annual report for the company referred to improvements to the two Mission businesses under its capital assets, but no wages were listed for those businesses, so it appears that they were constructed in 2016 but did not begin operating until the following year.
- [14] Mr. Sandhu testified that before the accident he was capable of performing all of the duties required by these businesses, but that he was mainly involved with ordering supplies and submitting the financial records to their accountant. His wife agreed that he did "much of the bookkeeping and accounting". He also dealt with any equipment problems that arose, and helped train employees. He was not able to estimate the number of hours that he put into the businesses per week, since he would do whatever was required to maintain them.

- [15] Maninder recalled that his father did "all the administrative stuff", which included bank deposits. He was regularly present at the businesses and was very "hands on" in his approach. He was available to take over a shift if an employee called in sick and his mother could not cover it, and would pick up supplies if they ran short, or try to repair any equipment that broke down. Shortly after the Indian takeout restaurant opened, he also did some food deliveries.
- [16] A document that lists all of the employees of the Abbotsford Jugo Juice and their hours of work for 2016 does not contain Mr. Sandhu's name. In contrast, Ms. Sandhu had a substantial number of hours listed under her name for that year. His T4 slips for that year are only from the company that had operated the Taco Del Mars that closed. Ms. Sandhu testified that Mr. Sandhu "was helping us, but he was not paid", because he was dealing with the property that they were developing for the Mission businesses, including being in contact with the City of Mission and the franchisor. She was the one who was responsible for actually operating the businesses, with the assistance of hired staff. She added that "when the work was slow" (by which I took her to mean the number of customers was low) she and her husband did those tasks themselves.
- [17] Based on the company's annual report, in 2016 the Abbotsford Jugo Juice had total sales of just over \$307,000 and paid wages of just over \$60,000.
- [18] Mr. Sandhu and his wife both testified that before the accident they considered purchasing a third Jugo Juice franchise, in Chilliwack.

The Accident

- [19] It occurred in a construction zone. The vehicle in front of Mr. Sandhu braked rapidly, and when he did the same to avoid striking it, his vehicle was struck by the one behind him. What is important for our purposes is that Mr. Sandhu testified that he recalled losing consciousness after the collision. He could not say for how long he had done so. When he opened his eyes, the flag person for the construction zone was banging on his vehicle and telling him to move. In cross-examination he described her as having woken him up.
- [20] A passage from his examination for discovery was put to him, in which he appeared to describe seeing the flag person telling the vehicle in front of him to move after his vehicle was struck from behind (that is, without any intervening gap in time), which could support the inference that he remained conscious throughout the process. Although he agreed that his memory had been better in 2022 when he gave that testimony, he did not concede that proposition, maintaining that "I don't know as to what happened".

Injuries and Their Effect on Lifestyle

- [21] Mr. Sandhu described experiencing dizziness after the accident and said that his head was "blurry [and] fuzzy". He also felt pain immediately in his shoulders and lower back.

- [22] The pain in those areas has continued. When asked to demonstrate his ongoing difficulties, he also gestured to his mid-back.
- [23] It appears that his most significant area of ongoing pain is in his lower back. He described this pain as "burning". It is aggravated by sitting or lying down, and is slightly worse in cold weather. Walking helps relieve it, and he also does some back exercises and takes Tylenol to address it.
- [24] He continues to experience pain in his shoulder areas regularly as well, but it is less serious than the lower back pain. Walking helps relieve it as well.
- [25] Later in his testimony he elaborated that the physical pain makes him feel sluggish and sleepy.
- [26] The effect of his ongoing injuries is that he can no longer take part in any of his former physical activities, or participate in the maintenance of the outside of the family home. Maninder said that he and his brother handle those outside responsibilities periodically, when the area gets overgrown. Mr. Sandhu is still able to vacuum inside when his wife asks him to do it.
- [27] Lifting objects weighing more than 10-15 pounds causes him pain in his upper and mid-back. His wife has also noticed this limitation, which contrasted to his previous abilities to lift heavy items when he was doing construction work. She added that he has difficulty bending, sits in a chair to put his socks on, and that activities as innocuous as moving his body to one side, or even yelling when he is angry, can provoke the pain.
- [28] Maninder saw him on the evening of the day that the accident occurred, and said that he was complaining about a migraine-type headache. After that, his father told him that he had a headache "maybe once or twice". His only other headache-related observation was that it "seemed" that when his father had "some pain or headache or something" he would take nap. (Mr. Sandhu himself did not attribute any headaches to the accident, saying that they only result from things that he has eaten.)
- [29] In late 2017 he began to notice his father doing stretches to address his back pain, and that he would also take naps when he was in pain. The overall result of these injuries was that his father was unable to do his "physical work".
- [30] Mr. Sandhu spoke of other, wider-ranging effects of the physical injuries. They have interfered with his sexual relationship with his wife, and the pain that he experiences from riding in a vehicle means he no longer goes to visit his friends, who live in Surrey. Ms. Sandhu confirmed these effects, and added that they no longer go for their weekly dinners or movies together.
- [31] His experience of his physical symptoms is that they are increasing.

- [32] He was not able to describe the mood and cognitive impairment that he claims resulted from the accident very clearly. When he was asked to explain what he meant when he described himself as suffering from depression, he said, "The task that I could do, I am not able to do it", and "[w]hen I have pain, then I forget everything". He indicated that his frustration with his post-accident condition had emerged in the last six to eight months before the trial.
- [33] Ms. Sandhu said that he is "not very happy" - he is always sitting "but holding his head and putting pressure on his mind". She and the children have to tell him to "stay happy" on an ongoing basis. She also described his mood as "pretty bad" and said that he "gets angry quite a bit", and is not as friendly towards her and the children as he was previously. She and Mr. Sandhu argue over small things, she added, and his depressed mood sometimes irritates her. Maninder observed that his parents now argue about "anything and everything".
- [34] Ms. Sandhu first noticed the change in his mood when they opened their "new stores", by which I took her to mean the business in Mission. She believed that this was in June or July 2017. At first, she attributed the change to how busy they were at the time, but once things settled down she determined that he was "getting into depression". He then started feeling bad because he was unable to work and was "stressing out" when the employees (by which I took her to mean the additional ones who had to be hired) started working.
- [35] She added that he has difficulty sleeping, a problem that she noticed by the end of 2017. When he is unable to sleep for the entire night, it has a negative effect on his mood.
- [36] With respect to Mr. Sandhu's cognitive impairment, he said that he realized that he was becoming forgetful when his wife and children told him about it. He described its more recent effects as "I forget what is to be said".
- [37] He could not say when that symptom began or how it progressed, other than "little bit started, after that it increased". His memory was not refreshed by being referred to an entry in his family doctor's records from September 2018, in which he had complained of forgetfulness and low mood.
- [38] A specific effect that he was able to describe is that he is no longer able to prepare his own meals, which I took to be related to his cognitive decline rather than physical pain.
- [39] He summarized the overall effect of his injuries on his life as "What it was for me before, that for me has totally ended, finished", and "My wife has to do everything now".
- [40] Ms. Sandhu's description of his cognitive impairment is that he "does not know how to start his day", and that she has to explain to him what he will be doing. He is also unable to find the words when he wants to say something. A specific challenge she referred to is that she has to remind him to take his prescription medication.

- [41] She first noticed the cognitive impairment in connection with his physical injuries, in that he was forgetting things in addition to expressing his pain. As in the case of his mood problems, she did not notice it during the time that they were opening the Mission businesses in mid-2017. She estimated that she may have begun to notice it in January 2018, when she had to remind him to perform certain tasks, such as calling the plumber, or check his email.
- [42] In her observation, the cognitive impairment is now worse. She described her husband as "kind of lost in himself" and "not active". He does not think about their business, and in contrast to his former role of giving advice to their children, he asks them what to do.
- [43] Maninder said that in conversation his father is not focused, and cannot remember the subject that is being discussed. He becomes very irritated when family members remind him to attend to various things, such as checking his email. His grooming has also deteriorated, and Maninder and his brother have to remind him to get a haircut. He mainly spends his time at home.
- [44] The cognitive impairment came to Maninder's attention in November 2017, when his father forgot the date of his own birthday, which is in that month. In Maninder's observation the problem has gradually progressed since then, although he was unable to quantify the amount of the deterioration, because his work schedule now prevents him from making regular observations of his father in the home.
- [45] The agreed statement of fact provides that Mr. Sandhu saw family doctors and a physiatrist, and attended for kinesiology, physiotherapy (very frequently), and acupuncture in relation to the accident, between the accident date and November 2022. The admissions also provide that he attended for five neurological assessments in relation to his cognitive impairment, between November 2022 and June 2023.

Effect of Injuries on Work

- [46] Mr. Sandhu testified that as a result of his injuries he was not able to perform any duties in relation to the businesses, except delivering financial documents to the accountant. This was due to the physical pain that he was experiencing (I took him to mean that this was initially, before his cognitive symptoms became apparent).
- [47] Ms. Sandhu said that he did not come into work for two weeks after the accident. After that, because they were about to open their two additional businesses and he was the one who had the specific knowledge with respect to that process, she would bring him in to deal with the required tasks, then drop him off at home when he had back pain.
- [48] The defendants' counsel sought to undermine the suggestion that Mr. Sandhu's injuries had affected his actual income, by pointing out that his T4 earnings in 2018 and 2019 (\$21,020 and \$29,720 respectively) were sharply above what he had earned in the year before the accident (\$14,560) (although in 2017, the year after the accident, they were only \$7,500).

- [49] Both spouses testified that two employees had to be hired in the Jugo Juice stores to replace the work that Mr. Sandhu had been doing before the accident. However, Ms. Sandhu added that "sometimes, we had to force him to come in and help us out".
- [50] She was referred to the 2017 annual report of the company through which the businesses were run, which showed total wages of just over \$175,000, in contrast to the total of approximately \$60,000 the year before. She said that this increase in wages reflected the need to hire those additional employees, "plus we had two other new stores". In cross-examination she clarified that with three stores now operating instead of one, they required more staff.
- [51] A clearer indication of the staffing increase that she claimed had been required by his injuries was the increase from 2016 to 2017 in total wages for the Abbotsford Jugo Juice store alone - \$60,502 to \$88,618. She estimated the cost of the additional employees, who backfilled in the Abbotsford store for experienced employees who were moved to Mission, as \$30-\$35,000 per year.
- [52] Ms. Sandhu said that her husband's condition required her to take on all of the administrative work connected to the franchises, which previously she had known nothing about, and that she had to work 80 hours per week to keep them running. She made repeated reference to her husband's ability to look after all of the required external communications in English, which she is unable to do. She added that the franchisor's representatives only wanted to speak to him.
- [53] She said that he stopped being involved in the bookkeeping and accounting around 2017, although he would come in to assist her when required. She explained that his signature was on the annual reports up to 2021 because she would take him with her (to the accountant) to learn about it, and then obtain his signature. Similarly, she said he received three different T4s in 2018 not because he was working at each of the businesses, but because as the franchise owner he was "teaching [her] how to do it", as well as their children, and was "helping" her.
- [54] She agreed however that before the Mission stores opened, Mr. Sandhu did all of the work associated with opening them - obtaining permits, working with the builder, the inspectors and the franchisor, and obtaining suppliers. I understood the point to be that this included the period after the accident in January 2017, but before they opened in May or June.
- [55] Maninder testified that after the accident he came in to assist at the businesses whenever his parents requested him to.
- [56] Mr. Sandhu testified that by 2019 or 2020 (he could not recall which) he was no longer taking part in any aspect of running the businesses. Although his answer was not entirely clear, it appeared that he still brought the required documents for the two Jugo Juice stores to the accountant until those stores closed, and continued to do so for the Indian take out restaurant for some period of time, although his wife had taken it over by the time he

testified. He clarified that what he stopped doing as a result of the accident was "the inside work", by which I took him to mean actually operating the businesses, as opposed to administrative tasks.

- [57] He agreed with the suggestion in cross-examination that he was paid by the hours that he worked for the businesses and that he had fairly declared all of his income on his tax returns. In her testimony however, Ms. Sandhu seemed to indicate that their pay depended on the success of the business. As she expressed it, "If the store was busy, we were taking it as a lump sum [a]nd if--or hourly too [I]t all depended on the profit." She said that conversely, "If it was slow, we were not paying it to ourselves". However, when she was shown the very small net incomes for the company in the financial statements for 2016 and 2017 (\$2,984 and \$4,732 respectively), she agreed that there was not much more the company could have paid them in salaries than it did.
- [58] She was shown the list of employees for the three businesses in 2020, in which Mr. Sandhu was listed as having worked in certain pay periods. Although his hours were shown as zero for each of those periods, he was credited with having been paid a total of about \$5,700. She agreed with the suggestion that this was an example of them paying themselves a lump sum for their work, even though that document shows her pay in 2020 resulting from actual hours worked in the two Mission businesses. According to the records, Mr. Sandhu was again compensated a small amount in 2021, despite his hours being zero. She also agreed with the suggestion that during the tax years 2018-2021, the fact that he received three different T4s each year meant that he had worked in all three stores in that period.
- [59] Over time it became unprofitable to run the two Jugo Juice stores, and the Sandhus eventually gave them up - Abbotsford in 2020 and Mission in 2021.
- [60] With respect to the Abbotsford store closure, Ms. Sandhu elaborated that because of his pain, Mr. Sandhu kept forgetting to call a plumber to deal with the leak, and after reminding him to do it without success she called the plumber herself. This ongoing issue caused the franchisor to terminate their franchise, and they closed the store in 2020.
- [61] She explained that the demise of the Mission Jugo Juice was caused by Mr. Sandhu's inability to attend at the store to run it, as the franchisor required, because "lots of times his mood wasn't good".
- [62] Maninder's observations were that his father would not respond to multiple email requests from the franchisor, before finally attending to them.
- [63] However, contrary to the implication that the Jugo Juice stores had become unprofitable because of his inability to contribute his labour, Mr. Sandhu agreed with the suggestions in cross-examination that sales slowed, that the pandemic led to fewer customers coming in, and that they had trouble hiring staff. He added that Jugo Juice's franchisor changed all of its products, which had a further negative effect, and the Abbotsford store had a leak in the ceiling which was not fixed. As he put it, "We closed because we were suffering".

- [64] As of the trial dates, the family was only operating the Indian take out restaurant. Ms. Sandhu takes the lead in operating it and Mr. Sandhu said they will keep it going "as long as it's possible".
- [65] Ms. Sandhu testified that the restaurant is doing "just okay" financially - it is barely covering its own expenses, and the family was not making any money on it. The company's financial statement for 2022 showed a loss of about \$25,000, but this was due to a loss on the sale of the assets of the Mission Jugo Juice that had closed the previous year. Wages for the Indian take out restaurant in 2022, out of which she was paid, was about \$127,000. Because of its limited earnings, they were not able to hire many employees for it. She said that she does not feel able to manage the business without Mr. Sandhu, "because he was taking care of everything where English was involved, and [she] can't do that." They would like to sell it, because managing it is putting too much pressure on her.
- [66] Maninder said that his father sometimes visits the restaurant, but that his mother sends him home because "he's just there messing up orders". As of the trial dates, Maninder was still being called in periodically to assist there.

Subsequent Accidents

- [67] Mr. Sandhu had two vehicle accidents after the subject accident - one in Abbotsford and the other in Mission. The evidence about these accidents was vague and somewhat inconsistent.
- [68] He was not able to provide many details of these accidents, but it appeared that one of them had been caused by a vehicle entering his lane inappropriately and the other had involved him rear-ending the vehicle in front of him. He believed that in the first of them his airbag had deployed, and that about \$16,000 worth of damage had been done to his vehicle.
- [69] He was cross-examined on an entry in his family doctor's records from January 2019, in which he had described accidents occurring in September and December 2018, the first involving him striking a vehicle after it had pulled out in front of him and the second in which a vehicle struck him from the side. The doctor had recorded that "since then" he was experiencing "pains especially affect[ing] the right side of [his] neck and shoulder". Mr. Sandhu denied that he had suffered any injuries in these accidents, or that the rear-end collision, in which his airbag had deployed, had caused him to lose consciousness at any point.
- [70] During his interview with Dr. Loch, the orthopedic surgeon who conducted an examination on behalf of the defendants, Mr. Sandhu described one subsequent accident, in 2019 or 2020, in which either his vehicle was struck on its driver side panel or his vehicle struck the other one in that location, and the airbag deployed. During this interview Mr. Sandhu did not recall his symptoms after the accident or seeing a doctor in relation to it, but Dr. Loch recorded that "to the best of [Mr. Sandhu's] recollection there was a temporary flare-up of this pre-existing neck and low back pain".

- [71] The letter of instruction to Dr. Lochter had asked him to assume as part of his opinion that Mr. Sandhu had been in a subsequent accident on October 27, 2018, but whatever evidence may have been in the defendants' possession to support that specific date was not adduced.
- [72] Ms. Sandhu was aware that he had been in one subsequent accident, which she understood to have been in 2018, but did not go to the scene of it and did not know the details of how it had happened.
- [73] Maninder testified that he and his brother went to the scene of the Mission accident, which he said had occurred in 2018, but he was not aware of an additional accident. He saw no change in his father after the Mission accident occurred.

Medical Opinions

Physical Injuries

Dr. Chow - Psychiatrist

- [74] He examined Mr. Sandhu in June 2023 and provided a report on his behalf. His diagnosis was of soft tissue injuries to Mr. Sandhu's cervical, thoracic and lumbar spine. This has resulted in chronic pain in the neck, shoulder girdles and lower back areas. Based on the chronology of the emergence of these symptoms, as shown in Mr. Sandhu's medical records, Dr. Chow's opinion was that the accident caused the injuries.
- [75] According to the records that he reviewed, Mr. Sandhu had complained of neck and back pain in 2015. There was no indication that those symptoms were ongoing, but Dr. Chow explained that as a result Mr. Sandhu likely has a "vulnerable spine", in the sense that the healed previous injury will be vulnerable to reinjury and the pain receptors in that area will be very sensitive.
- [76] Given that Mr. Sandhu had been experiencing symptoms for six years by the time of the examination, and most accident-related soft tissue injuries recover within two to three years, he gave a guarded prognosis with respect to these injuries. A full recovery is unlikely, he wrote.
- [77] He expressed the opinion that Mr. Sandhu's symptoms "will continue to interfere substantially in his normal life activities and future work ability" (although with respect to work impairment, his understanding was that as of the date of the examination Mr. Sandhu was "still helping out in his restaurant").
- [78] For pain management Dr. Chow recommended: occupational therapy (to help Mr. Sandhu perform functional tasks without causing further pain), physiotherapy, an exercise program, over the counter pain medication, and cognitive behavioural therapy (mindfulness for pain control and sleep disturbance).

- [79] He also identified the presence of mood disorders and cognitive impairment, but deferred the question of their specific nature and treatment of them to the appropriate specialists.
- [80] He was asked whether Mr. Sandhu's complaint to his family doctor of pain to the right side of his neck and shoulder as a result of the subsequent accidents, coupled with his indication that the airbag had deployed in one of the accidents, made it probable that he had suffered some injury in them. Dr. Chow described himself as "confused" by "all of the records" containing statements about the subsequent accidents (including from a physiatrist and a physiotherapist who had seen Mr. Sandhu in 2018), because they did not "coordinate that well" as to which accidents had occurred and their dates. He added that the deployment of an airbag in itself does not necessarily mean that there will be an injury.
- [81] He had noted in his report that the records did not suggest that Mr. Sandhu had suffered a concussion in the subject accident, because he was seen soon after the accident by his family doctor without any symptoms of one being mentioned, but that "one has to wonder if there was any possible concussion" from the following two accidents. When he was asked why he would not also wonder whether any physical injuries had been caused by those accidents if they had the potential to cause a concussion, he returned to the difficulty he had in "correlating" the records with respect to those accidents, and emphasized that it is the subject accident that has been the ongoing problem for Mr. Sandhu's neck and back.

Dr. Locht - Orthopedic Surgeon

- [82] He conducted his examination in August 2023. He noted Mr. Sandhu's cognitive impairment, which he said made it impossible for him determine the accuracy of Mr. Sandhu's reports of his current symptoms and abilities.
- [83] In his diagnosis, Dr. Locht concluded that it was likely that Mr. Sandhu had suffered "at least transient nonspecific injuries to the neck and/or lower back" in the subsequent accident (as I have mentioned, he was only aware of one), and that it was more likely to be the source of his current pain than the subject accident. He reasoned that although Mr. Sandhu reported that he had not suffered any injury in the subsequent accident and did not see a doctor, and although Dr. Locht could not verify that the airbag had deployed, the assumption that it had occurred as Mr. Sandhu described it was supported by the fact that he was able to recall details of the subject accident during the same examination[1].
- [84] Despite this assertion, he agreed in cross-examination that the evidence with respect to subsequent accidents was "extremely scanty", and went on to muse:
- [T]his other accident with the airbag deployment, did -- did -- I have no documentation. I mean, I don't know. Did it happen?

- [85] To compound the confusion, although his instruction letter had asked him to assume that Mr. Sandhu had been involved in a subsequent accident on October 27, 2018, he had not been supplied with any information about that accident. He agreed that in dealing with Mr. Sandhu's reference to an accident in 2019 or 2020 he had not actually addressed that assumption.
- [86] Dr. Lochter also offered the opinion that it was likely that Mr. Sandhu would be suffering "at least some intermittent/transient discomfort/tightness sensation in his neck and lower back" even if the subject accident had not occurred. His reasoning was that more than 50% of people in Mr. Sandhu's age group who have not suffered soft tissue injuries in rear end collisions have such symptoms, and that he had complained of such pain to his doctor in 2015, which also meant that he was likely at greater risk of sustaining injuries from the subsequent accident.
- [87] He agreed however that there was no indication of any additional factors that might have predisposed Mr. Sandhu to this kind of discomfort, other than his age group. He also agreed that there was no evidence that Mr. Sandhu was suffering from any of the 2015 symptoms at the time of the subject accident, and that he had no record of having asked Mr. Sandhu about those symptoms.
- [88] As a result of his analysis, Dr. Lochter's opinion was that there were three likely factors contributing to Mr. Sandhu's current pain symptoms: (1) the subject accident, (2) the subsequent one, and (3) the expected discomfort in those areas of the body that is present in the majority of people in his age group. He was unable to determine the amount that each factor was contributing to the symptoms.
- [89] However, he added that the injuries from the first accident would likely have restricted Mr. Sandhu's movements for no more than six months, and that following that period they were unlikely to have caused any disability in his activities. Nor is it likely to do so in the future.
- [90] In light of these opinions, Dr. Lochter believed no further treatments were necessary, although he considered it reasonable for Mr. Sandhu to take Tylenol for flareups, to continue walking and perform daily stretches, and for him and his family to attend a maximum of three physiotherapy sessions to provide him with a long-term home exercise regime (that his family members can supervise).

Mood disorders and cognition

Dr. Reddy - Psychiatrist

- [91] She also saw Mr. Sandhu in August 2023, and provided a report on his behalf. She found that he met the criteria for the psychiatric conditions of post-traumatic stress disorder, major depressive disorder and generalized anxiety disorder. In her opinion, the subject accident is the likely cause of these conditions, and "[h]is cognition is significantly negatively affected more likely than not" by it as well, although in her report she did not specify the mechanism by which his cognition was affected.
- [92] She explained that she attributed his psychiatric conditions to the accident because there was a decline in his function following it, and she was unaware of any other trigger for those conditions. She acknowledged that in the first four appointments with his family doctor following the accident, up to May 2017, he did not mention any cognitive impairment or concussion-related complaints, only the soft tissue injuries, but she pointed out that a family doctor's neurological examination would be "pretty basic" and, as I have previously described, he was complaining to his doctor about forgetfulness by September of the following year.
- [93] In addition to her review of the clinical records, and the results of screening tools that she administered, her opinions were based on her interview with Mr. Sandhu, in which he described his mental state after the accident in much more extensive detail than he was able to provide in his testimony, even though he testified about it only about three months later. Additional details that he provided to her included those with respect to his efforts to distract himself from bothersome thoughts (which are part of the criteria for PTSD), his anxiety and the ways that it manifests itself, and (as aspects of his depression) his feelings of worthlessness, guilt and self-blame. He also expanded on the effects of his cognitive impairment, which he told her had worsened in the last six to eight months.
- [94] She also spoke with Mr. Sandhu's son (the Sandhus' other child, not Maninder), who was there for the interview, but "not extensively".
- [95] In her opinion Mr. Sandhu has been "vocationally disabled" by the accident, and his cognitive impairment, which is expected to persist, will prevent him from pursuing any kind of work. She gave him a guarded prognosis in her report "[i]f he is not have resolution of his psychiatric conditions, chronic pain and improve [his] cognition." She elaborated in re-examination that both the chronic pain and the psychiatric conditions would have to be addressed for him to see improvement, hence the guarded nature of the prognosis.
- [96] With respect to future treatment, she recommended an anti-depressant, a new type of sleep medication, anti-anxiety medication, cognitive behavioural therapy to address both anxiety and depression, and trauma therapy, including eye movement desensitization reprocessing (EMDR), for his PTSD.

- [97] She also recommended some further investigations, including with respect to his cognitive impairment - a positron emissions tomography (PET) scan, a neurology consultation (to rule out a traumatic brain injury), and speech and language and neuropsychological assessments.
- [98] She was referred to a record from Mr. Sandhu's family doctor in February 2019, in which the doctor had diagnosed him with "major depressive affective disorder, moderate, single episode" as a result of his complaints about such issues as his sexual function, stress arising from his ownership of a property in India, and the resulting insomnia. She agreed that such a diagnosis is usually made in relation to the first episode of depression, but expressed her view that this was the first episode that the family doctor knew about.
- [99] Several reports were shown to her that she had not had the opportunity to review. These were from:
- An internal medicine specialist, in November 2022, who described Mr. Sandhu as having been referred to his clinic for "cognitive loss spanning over 2 years" (in other words, beginning well after the accident);
 - The same specialist, in February 2023, who referred to Vitamin B12 therapy (the deficiency of that vitamin is a potential cause of cognitive loss) being underway with no discernible effect, and expressed the view that Mr. Sandhu "likely does have an early-onset major neurocognitive disorder"; and
 - Dr. Dommann, a neurologist who saw Mr. Sandhu after Dr. Reddy did at the plaintiff's request, but whose report was ultimately relied on at trial by the defendants. As I will discuss further, he offered the opinion that Mr. Sandhu most likely suffers from Alzheimer's disease and more likely than not would have developed it without the subject accident.
- [100] When the defendants' counsel suggested, based on these other investigations, that people who have dementia or Alzheimer's diseases commonly also suffer from anxiety and depression, she pointed out that the reverse is also true. Those mood disorders can affect the patient cognitively - a condition known as pseudodementia. If the mood disorders are successfully treated, the pseudodementia will depart. She agreed however that she did not "query dementia" in her dealings with Mr. Sandhu (in other words, ask him about that issue). She did not feel that she needed to because she "thought that other things were going on."
- [101] Nevertheless, she disagreed with Dr. Dommann's diagnosis of Alzheimer's, which had been based largely on Mr. Sandhu's low score on the Montreal Cognitive Assessment (MOCA), a widely used screening test for cognitive impairment, although she did agree that such a score is definitely an indication of "a neurocognitive issue". She pointed out the significant additional amount of testing that needed to be done to support a diagnosis of Alzheimer's, such as the PET scan that she had recommended, which can detect the biomarkers that are associated with the disease.

- [102] Further weighing against such a diagnosis, she noted that Mr. Sandhu also does not display well-known features of Alzheimer's, such as dysregulation, hallucinations, or paranoia.
- [103] She concurred with the internal medicine specialist's investigation of a B12 deficiency as the possible cause, and also "speculated" that Mr. Sandhu had a traumatic brain injury that was not investigated, which could have affected his cognition. She raised the latter point because of the apparent sudden change in his level of function in running his businesses. She later added that his cognitive function "seemed quite severely impacted almost right away after the accident".
- [104] In general, she asserted that the cause of this cognitive loss has not been adequately investigated, and that she does not have enough information to say what Mr. Sandhu's underlying neurological condition is.
- [105] She was challenged on her assertion that Mr. Sandhu had stopped driving because of anxiety arising from the accident. Although the psychiatrist who saw him in November 2018 described him as "driving without fear", she disagreed with that comment, although the basis of her disagreement was not made clear. Similarly, although he reported having had his licence taken away only two weeks before their meeting, she relied on his comments that he had driven only short distances during the intervening years and had remained fearful when doing so.

Dr. Dommann - Neurologist

- [106] He saw Mr. Sandhu at the end of August 2023. Once again Mr. Sandhu was accompanied by one of his sons, although it was not clear which one this time. Dr. Dommann permitted this despite his misgivings, because of Mr. Sandhu's lack of fluency in English and the cognitive difficulties that he was obviously experiencing.
- [107] During their interview Mr. Sandhu told him that following the accident he had lost consciousness for 30 seconds. Dr. Dommann's opinion was that it was more likely than not that Mr. Sandhu suffered a mild traumatic brain injury (or MTBI, the formal medical term for a concussion) in the accident. He had experienced the "usual post-concussion syndrome symptom, including headache, neck pain and cognitive difficulties".
- [108] Although it was not the main focus of his report, he also ruled out the existence of any nerve-based problems as contributing to Mr. Sandhu's physical pain. Instead, he thought that the accident had caused soft tissue irritation, and contributed to the degenerative condition of spondylosis in Mr. Sandhu's cervical and lumbosacral spine areas.
- [109] The main issue that Dr. Dommann identified from a neurological perspective was Mr. Sandhu's cognitive impairment. He explained that the risk of developing dementia following a single MTBI "is considered insignificant" when compared to the risk from repeated such injuries, or from moderate to severe brain injuries. Instead, his opinion, based on their interview and the MOCA score, was that Mr. Sandhu most likely suffers from

Alzheimer's. Because of the prevalence of that condition in the general population, he believed that it was more likely than not that Mr. Sandhu would have developed it even if the accident had not occurred.

- [110] When he administered the MOCA to Mr. Sandhu the score was 14 out of 30, which he explained indicates at least moderate dementia (Alzheimer's disease is a form of dementia).
- [111] Despite this opinion, Dr. Dommann also recommended that there be further investigation into the possibility that the cause of the dementia was a treatable one - low vitamin B12 level or other metabolic disturbances, multi-infarct (previous strokes) dementia, or a condition called normal pressure hydrocephalus, which was not explained further. As Dr. Reddy had explained in her testimony, he added that chronic depression can cause pseudodementia, although he later clarified that it was "not often" that it occurs, so an assessment by a psychiatrist was also recommended (it appears that he was unaware of Dr. Reddy's involvement at that point).
- [112] In cross-examination he clarified that he thought that Mr. Sandhu's MOCA score was too low to have been due solely to depression, but that since depression is treatable it should be followed up on. Having read Dr. Reddy's report since he wrote his, he accepted the proposition that Mr. Sandhu's depression would make pre-existing dementia, or dementia that was going to occur in any event, worse. In other words, Mr. Sandhu's experience of his dementia symptoms is worse than if he did not suffer from depression.
- [113] Leaving aside these possibilities of treatment, he explained that dementia is otherwise a progressive condition, and that there is "little in the way of disease-modifying medication" available. He expected Mr. Sandhu's cognition to deteriorate over the next few years, to the point at which he will become completely dependent.
- [114] He agreed that in general dementia starting before a person reaches 65 is "quite rare" - less than 10% of the total cases - and that for someone to suffer from it at Mr. Sandhu's age would be "unusual but not unheard of".
- [115] Similarly, although his opinion was that a concussion suffered by Mr. Sandhu in the accident is not a significant factor in the development of his dementia, he conceded that it is a factor. What literature there is on the subject says that one such injury does not significantly increase the risk of dementia, he explained, but "we just don't know" the degree to which it does increase it.
- [116] He also accepted that there is some evidence that the alternative explanations for the dementia have been rendered less likely. While he said that an MRI would have been better, the results of a CT scan suggested that Mr. Sandhu has not had multiple strokes, only degenerative changes typical of patients with his kinds of health conditions, and now that his B12 condition has been managed without it having any apparent effect on his cognition, it suggested that the deficiency in it was not a complete explanation for his symptoms.

[117] The other relevant proposition that Dr. Dommann agreed with is that dementia, as a progressive condition, can begin in an insidious way and then "ramp up" as time goes on. He frequently sees the condition become evident when a patient is admitted to hospital, even though their family members have not noticed it yet. Crucially, this means that it might not be noticed by family members for a few years (as in Mr. Sandhu's case, it appears).

[118] Ultimately, he agreed that it was "certainly possible" that a concussion contributed to Mr. Sandhu's dementia increasing "more than it would have otherwise". He noted the prevalence of Alzheimer's even at Mr. Sandhu's age and the absence of any other clear identifiable underlying cause other than that disease, but stressed that the only way to be absolutely certain about it is to identify its pathology in the brain, which cannot be done while the patient is alive. What he was prepared to say was that if Mr. Sandhu had suffered a concussion, then "he may be at a slightly higher risk of developing dementia".

[119] Mr. Sandhu's counsel then pressed the issue:

Q But based on what we know about this patient and as we've seen, the difficulties [in] ascribing a strict [etiology] or cause, would you not say that it's on a balance of probabilities at least more than 50 percent that this has contributed in some way to this developing?

A Yeah, I think it's reasonable.

[120] In re-examination he clarified that the chance of the accident triggering the dementia on its own is quite low, but that it "might" have contributed to it. He also had the following exchange with the defendants' counsel:

Q Take you to your opinion section [of his report]. Now, based on all the back and forth between everybody here today, would you change your opinion?

A No, I don't think so.

Nature and Causation of Cognitive Impairment

Positions

[121] As is obvious from the evidence, the most important finding of fact that must be made in this case is with respect to the relationship, if any, between the accident and Mr. Sandhu's cognitive impairment.

Mr. Sandhu

[122] His counsel candidly acknowledged that his situation is complex, and that neither the care providers who are looking into his situation nor the experts who provided opinions for the trial have a completely definitive understanding of his condition and its cause. His counsel also recognized that Mr. Sandhu's own testimony on this issue is not very clear.

- [123] But counsel stresses that for the purposes of this litigation, the question is one of probabilities, not certainty, and when viewed in that way it is certainly more likely than not that the cognitive impairment was caused by the accident. There was no indication of an issue with cognition before the accident occurred, and given that it took until late 2017 or early 2018 for his family members to notice it, it makes sense that he himself took some time to recognize that there was an issue, and to complain about it to his family doctor. It is also significant that his own experience of memory loss is that it is triggered by his post-accident pain.
- [124] It was also argued that Dr. Reddy's opinion that the cognitive impairment is not caused by Alzheimer's, and is most likely driven by his PTSD and mood disorders, should be preferred. Notably, the psychological symptoms also emerged only after the accident, and several of the diagnostic criteria for them overlap with Mr. Sandhu's cognitive problems, in particular his difficulty concentrating and his mind going blank. In addition, he lacks any of the attributes of an Alzheimer's sufferer - he is in an age group that has a low incidence of the disease, he lacks a family history of it or any of its usual precursors, such as previous strokes, and his treating neurologists have not been able to diagnose him as suffering from it, with further investigations remaining to be done. Dr. Dommann's almost complete reliance on the low MOCA score for such a diagnosis was characterized as being insufficient in that regard.
- [125] On the other hand, if Dr. Dommann's opinion is preferred, he ultimately accepted that it is more likely than not that the concussion that he believes Mr. Sandhu suffered contributed "in some way" to his cognitive impairment developing.
- [126] To find that such a concussion occurred in turn requires preferring Dr. Dommann's opinion to that of Dr. Chow, who said that the record is not suggestive of a concussion. This should be done for a variety of reasons, Mr. Sandhu's counsel submits, most importantly that Dr. Dommann is a neurologist, that he was retained specifically to address that question, and that the subsequent accidents that Dr. Chow speculates could have caused a concussion occurred after Mr. Sandhu had first complained to his family doctor about memory problems.

The Defendants

- [127] They take a different approach. Their counsel begins with the proposition that Mr. Sandhu's difficulties in recalling and relating important details makes him unreliable, and that because of their connection to him, his family members do not meet the standard of objective lay witness evidence that would be needed in order to confirm his testimony. If any family member evidence was to be relied on, Mr. Sandhu's other son, who attended with him for his examination by Dr. Reddy, was likely in a better position to describe his situation than Maninder, and could easily have been called for that purpose.

- [128] Their counsel also argued that Mr. Sandhu and his family members were not credible, but did not refer to any specific aspects of their evidence in support of that proposition. I infer that that position is based on the general concern that the symptoms and their effects may have been exaggerated by them to increase the magnitude of Mr. Sandhu's claim.
- [129] In addition, some of the expert evidence called on Mr. Sandhu's behalf was said to be unpersuasive.
- [130] Dr. Reddy was prepared to make diagnoses, and to attribute his cognitive issues to them, in the absence of the most recent medical investigations of those issues, which were not provided to her, and she ended up admitting that there was much more investigation to be done, which she listed in her report, to identify the cause. As she put it in her response to the MOCA scores - "there's a huge neurocognitive issue, but we don't know the cause".
- [131] She also relied on Mr. Sandhu's loss of two businesses due to his decline in the post-accident period as support for the conditions that she diagnosed, when the businesses actually closed years after the accident, and failed to take into account that the depressive episode that he was diagnosed with in February 2019 was attributed by him to events in his life other than the accident symptoms.
- [132] Further, she exceeded her expertise by disagreeing with Dr. Dommann on neurological issues, by rejecting the observation by the physiatrist in 2018 that Mr. Sandhu had no fear of driving, for no other apparent reason than it contradicted her assertion that he did, and by denigrating his family doctor's ability to identify a cognitive issue based solely on the doctor's area of practice.
- [133] On the question of whether a concussion occurred, the defendants' counsel submits that Dr. Chow's evidence, which considered the entire record relating to possible causes of such an injury, can be relied on, whereas Dr. Dommann reached the conclusion that it had occurred in the subject accident because of Mr. Sandhu's own description of a 30-second loss of consciousness. Also weighing against the likelihood of a concussion is the continuous recollection of events after the subject accident that the passages of Mr. Sandhu's discovery testimony that were put to him seem to suggest, the absence of any contemporaneous record of a loss of consciousness, and his very minimal experience of post-accident headaches, as both he and Maninder recounted. The point of Dr. Chow's reference to the subsequent accidents and the possibility that Mr. Sandhu received a concussion in one of them was mainly to distinguish the subject accident, in which it appeared that no such injury had been received, and in his testimony he went on to make the essential point that there are other reasons for the cognitive impairment than a concussion in any case.
- [134] Even if it is accepted that a concussion occurred, the defendants' counsel emphasizes Dr. Dommann's opinion that it would not be sufficient to create the cognitive issues that impair Mr. Sandhu, and his confirmation on re-examination that nothing in the preceding exchanges would change his opinion. Counsel submits that the 10% risk of a person in Mr. Sandhu's age group developing Alzheimer's is a far more significant one than that posed by

receiving a single concussion, and indeed the progress of Mr. Sandhu's impairment, and the lengthy time period after the accident that it was noticed by others and reported by him, is much more consistent with the onset of that disease than with being a post-concussion symptom.

Discussion

- [135] The evidence of Mr. Sandhu and his family members on this issue is relevant to the timing of the onset of his cognitive symptoms and the way that those symptoms have presented themselves. However, in order to assess credibility and reliability of their evidence for those purposes, it is necessary to consider their overall testimony.
- [136] Of the factors that are capable of influencing findings about credibility and reliability, the most influential ones in this analysis are the extent to which Mr. Sandhu's recollections are affected by his cognitive impairment, his wife and son's ability to observe and recollect the post-accident changes in his condition, the ability of all three of them to resist the influence of their interest in the outcome of the case on their recollections, and whether what they claimed occurred was consistent with what a reasonable person would expect to find in such circumstances: see, for example, the helpful summary in *Allison v. Radtke*, 2014 BCSC 1832, at paras.119-121.
- [137] There is no question that Mr. Sandhu's impairment rendered his testimony quite vague overall, and he was not able to provide many details of his depression or the increase in his cognitive symptoms, beyond very basic descriptions. His meaning was also obscured at times by awkward syntax and word choice, although since he testified through an interpreter those shortcomings cannot be definitively attributed to his disability, as opposed to the approach of the interpreter. But considering the entirety of his evidence, there were several areas, as I have summarized, in which he was able to give straightforward answers, and even in the vaguer parts it did not appear that he was inventing or embellishing anything.
- [138] As examples, he did not seek to place himself in a more central role in the actual operation of the businesses to increase the scale of the resulting loss, and his description of his physical symptoms was restrained and factual, lacking the heightened emotional emphasis that is seen in many personal injury cases. His statement that in essence he views his life as being over, which is not really an overstatement from the cognitive perspective, was all the more convincing because of that level of restraint. Overall, the content of his responses seemed wholly without guile.
- [139] Similarly, while I accept that arm's length observers are the gold standard in cases of this kind, and the indirect benefit that family members will receive from a substantial award of damages always needs to be factored into the analysis, there is no reason in principle that the testimony of such family members cannot be reliable and persuasive. It all depends on the nature of that evidence.

- [140] In that regard, I did not find that either Ms. Sandhu or Maninder gave evidence that inflated Mr. Sandhu's symptoms beyond the sort of everyday details that one would expect to find in a case of moderately severe soft tissue pain, depression and cognitive impairment. Like Mr. Sandhu, they did not seek to extend his role in the businesses beyond a well-defined one, which expanded when he was pitching in with operations to address missing staff or a downturn in business. Perhaps most importantly, they candidly situated their observations of his cognitive decline a considerable period after the accident, when I think more outcome-driven witnesses would have tried to draw a close temporal link between those events, or to augment that intervening period with retrospective interpretations of what they observed during it. In general, they seemed to be recounting commonplace observations to the best of their abilities, without any overt shaping of the narrative.
- [141] The only area of the testimony of Mr. Sandhu and either of his witnesses that seemed lacking was the description that he and Ms. Sandhu provided of how they compensated themselves from the business. It was unclear how and when Mr. Sandhu worked and was paid in each of the three businesses, beyond his overall administrative role, or how the lump sum alternative in good years that Ms. Sandhu described was carried out. It is possible of course that they simply allocated any excess funds to themselves as wages, rather than as dividends or cash withdrawals, without it corresponding to whatever specific hours they had actually worked. As a result, I think that all that can be said about Mr. Sandhu's income in the relevant period is that it reflected his value to the company in some manner, and that it was influenced by the company's overall income in a given year.
- [142] Although I have taken a generally positive view of the evidence of Mr. Sandhu and his family members, the reality is that it offers limited assistance in relating his cognitive symptoms to the accident. Until he began to undergo neurological investigations in 2022, the objective medical tracking of his situation, as shown in the records was similarly limited, with no mention of memory loss until September 2018. This was followed by a further reference to memory loss in his doctor's "assessment" section of the appointment notes in March 2019, and a complaint of increasing forgetfulness and a score of 22/30 on his "mini mental exam" (another screening tool) in July 2022, which I infer led to the referrals to Mission Hospital.
- [143] As a result, if a persuasive connection is to be made between the accident and the cognitive impairment, it must be found in the expert opinions.
- [144] I did not find Dr. Reddy's evidence helpful on that issue. First of all, despite the resourceful extraction by Mr. Sandhu's counsel of her comments about the ability of mood disorders to cause pseudodementia, she did not actually diagnose that as Mr. Sandhu's condition, and while she attributes his cognitive impairment to the accident, her report does not state the mechanism by which it occurred. Instead, she sets out the various investigations that still need to be carried out to determine the cause. It is significant in that regard that she did not "query" dementia with him, because she felt that there were "so many other things going on."

- [145] Viewing her report and testimony as a whole, it is speculative to elevate the possibility that the mood disorders are responsible for the dementia above other equally likely possibilities. Her comment that "there's a huge neurocognitive issue, but we don't know the cause", accurately sums up the effect of her evidence on this issue.
- [146] Had it been necessary to do so, I would have been cautious about putting weight on her evidence in any event, because of her tendency to overstate matters that could be considered to favour Mr. Sandhu's position, such as her assertion that he "seemed quite severely impacted almost right away after the accident" when she raised the possibility of a traumatic brain injury, even though there is no evidence of such impact until about 18 months later, or her intransigence on the ultimately inconsequential issue of the extent of his fear of driving.
- [147] That leaves Dr. Dommann's concessions in cross-examination as the basis for finding that the accident contributed to cognitive impairment.
- [148] Although Mr. Sandhu's counsel assailed the diagnosis of Alzheimer's as being unduly reliant on the MOCA score, even if some weight is put on that submission, it does not undermine Dr. Dommann's principal position that the risk of developing dementia from the concussion that he found had occurred is insignificant. To develop that into an actual probability of contribution to impairment requires findings that (1) a concussion actually was sustained, and (2) Dr. Dommann's concessions on cross-examination can be characterized as an acceptance of such probability.
- [149] His diagnosis of concussions appears to be based on Mr. Sandhu having experienced the usual post-concussion symptoms of headache, neck pain and cognitive difficulties. Of course, the evidence from Mr. Sandhu and his son was of minimal post-accident headaches (with Mr. Sandhu describing them as being caused by eating) and there is no medical confirmation that they were an ongoing problem. More generally, no references to cognitive effects were recorded until September 2018. Perhaps most importantly, Dr. Dommann recorded the 30-second loss of consciousness after the accident in his summary of his interview with Mr. Sandhu but did not refer to it in his opinion section and one of the reasons for believing that there had been a concussion. I feel comfortable taking judicial notice, as a matter of common sense and ordinary human experience, that a loss of consciousness is frequently associated with concussions, but I cannot supplement an absent medical explanation of how exactly such an event figures in the diagnosis here.
- [150] With respect to the contrary opinion, Dr. Chow's speculation that a concussion may have resulted from the subsequent accidents is undermined by the fact that Mr. Sandhu's first complaint of a cognitive symptom to a physician seems to predate them (although he told the doctor in January 2019 one of the accidents had been in September, it seems unlikely that he would fail to relate it to his memory loss during his medical appointment that same month if that accident had already happened by then). It also seems inconsistent to speculate that a concussion occurred in the subsequent accidents but not believe that they

contributed anything to Mr. Sandhu's soft tissue injuries.

- [151] Nevertheless, Dr. Chow's main basis for finding it unlikely that a concussion resulted from the first accident - that no concussion-related symptoms were mentioned by Mr. Sandhu in his first four post-accident medical appointments (not even headaches), despite his having provided quite a detailed recitation of his pain symptoms, is quite a compelling point, and provides a much stronger basis for his opinion that Dr. Dommann can point to.
- [152] At the end of the day, the state of the evidence as a whole does not satisfy me on a balance of probabilities that Mr. Sandhu suffered a concussion in the accident. It is certainly possible that he did, but the absence of any even roughly contemporaneous complaints of related symptoms or any evidence of how significant a loss of consciousness might have been to such a finding, I cannot say that it is more likely than not.
- [153] The removal of that link in the connection between the accident and the cognitive impairment makes it strictly unnecessary to go further. I will nonetheless go on to say that Mr. Sandhu's counsel deserves credit for his skilful cross-examination, persuading Dr. Dommann to concede that on a balance of probabilities the accident has contributed "in some way" to the cognitive impairment. But Dr. Dommann's evidence must be looked at as a whole, and that helpful concession was sandwiched between the statement of his original opinion that a single concussion is thought to have played an "insignificant role", and his response in re-examination that it "might" have played a role. It must also be kept in mind that "[a] contributing factor is material if it falls outside the de minimis range" (see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 15) and even taken at its highest a contribution "in some way" to the cognitive impairment is unquestionably broad enough to include a contribution to no more than the de minimis level. As a result, even if there had been a finding that he had suffered a concussion in the accident, it would not have availed Mr. Sandhu.
- [154] In conclusion on this point, I am unable to find that the accident caused or materially contributed to the cognitive impairment.

Non-Pecuniary Damages

Positions

Mr. Sandhu

- [155] His counsel submitted that even without a finding of a link between the accident and the cognitive impairment, a reasonable award of non-pecuniary damages would be \$120,000. This takes into account Mr. Sandhu's chronic neck and back pain, his fatigue and sleep issues, what counsel describes as a "significant psychological overlay", and the court's discretion to include the loss of housekeeping capacity under this head of damages, instead of making a separate award.

- [156] His counsel draws my attention to the evidence of Mr. Sandhu and his family members about the level of ongoing pain that he experiences from the injuries, and the extent to which they have interfered with aspects of his life such as his household responsibilities, his recreational activities, and his ability to sleep. In addition to establishing a direct link between the accident and the soft tissue injuries, Dr. Chow offers a guarded prognosis, and predicts that these injuries will continue to interfere substantially with Mr. Sandhu's life.
- [157] Counsel argues that Dr. Lochter's attempts to limit the effects of these injuries to a short period following the accident are not persuasive. His suggestion that Mr. Sandhu falls into an age group where such complaints are likely to arise in any event is undermined by the absence of any evidence of such symptoms before the accident, or that the single episode of such pain that he reported to his doctor in 2015 continued to trouble him up to the time of the accident.
- [158] Equally unhelpful, it was argued, are Dr. Lochter's attempts to attribute some of Mr. Sandhu's symptoms to a subsequent accident. He and his family members maintained in their testimony that those accidents did not cause him any injuries, and all he described in his interview with Dr. Lochter was a temporary flare-up of his pre-existing symptoms. In addition, the defendants' counsel were aware of a specific date of one of the accidents - October 27, 2018 - which they asked Dr. Lochter to assume in his letter of instruction and put to Mr. Sandhu at his discovery. Having been retained to act for the defendants by the provincial insurer, the defendants' counsel was uniquely positioned to obtain and present whatever further evidence may have been generated by the accident, and to show that meaningful injuries were caused by it, which they have failed to do.
- [159] The other major impact on the quality of Mr. Sandhu's life were said to be his PTSD and mood disorders, the latter brought on by his chronic pain. His counsel points to the severity of his feelings of hopelessness and failure, and his persistent anxiety about his future. This experience is not just painful to him, but causes him to interact negatively in his family situation, and to be socially isolated. Maninder's description of his father's declining mood and neglect of his personal grooming was said to be especially compelling in that regard.
- [160] To situate the award that is being sought within a range of similar cases, Mr. Sandhu's counsel relied on the following decisions, with the awards that were made before 2023 being adjusted for inflation rate since then:
- Kam v. Van Keith, 2015 BCSC 1519: The 39-year-old plaintiff received injuries to her neck, upper and lower back. This caused depression, sleep disturbance, fatigue, headaches and chronic pain. She continued to have daily pain to her lower back and was diagnosed with chronic regional myofascial pain syndrome in the pelvic area (the cause of the lower back pain), although her headaches and pain in other areas of her body had improved. She was found to have been a fit and gregarious person before the accident, and since it occurred she had gained significant weight and suffered from low self-esteem and anxiety about driving. Her abilities to perform her household duties had been curtailed, and her intimate relationships with her husband had

suffered. She had also become socially isolated and had to give up all of her recreational pursuits. Award: \$150,000.

· *Kler v. Kumar*, 2023 BCSC 1515: The 53-year-old plaintiff experienced significant ongoing lower back pain as a result of the accident, which also caused a pre-existing asymptomatic back condition to become symptomatic. Numerous activities of daily living were capable of aggravating his back pain, although he was capable of managing his pain by stretching, physiotherapy and avoiding certain movements. Award: \$140,000, less a 15% reduction to reflect the likelihood that the pre-existing condition would have become chronic even without the accident.

· *Predinchuk v. Spencer*, 2009 BCSC 1396: The 62-year-old plaintiff sustained soft tissue injuries to her neck, back and shoulder, as well as headaches and arm and hand numbness. The accident also caused a dormant degenerative condition to become symptomatic. The trial judge found that due to the accident the plaintiff had gone from being a "highly industrious, successful businesswoman with many recreational interests and pursuits" to a person with markedly depleted energy levels, who could no longer engage in caring for her home or social activities as she had previously, and who was becoming increasingly reclusive. Award: \$110,000 (the trial judge found that there was no measurable risk that the back condition would have become symptomatic without the accident).

· *Simmavong v. Haddock*, 2012 BCSC 473: This plaintiff, a 33-year old pregnant woman, was involved in a collision that caused her child to be born prematurely. Her injuries from the collision led her to suffer from significant back pain, anxiety and depressed mood. These symptoms in turn affected her quality of sleep and her energy level. Her previous sense of self-sufficiency had diminished, she became easily impatient with her husband, she was no longer able to complete her housekeeping duties without her mother's assistance, and she had curtailed her formerly frequent recreational activities. Award: \$98,000.

The Defendants

[161] Their counsel placed strong emphasis on Dr. Lochter's opinion. The short period for which he believed the soft tissue injuries from the subject accident would have continued was said to be confirmed by Mr. Sandhu's ability after that accident to engage in all of the required activities connected with maintaining the Abbotsford store and opening the two new ones in Mission. As further support for that recovery timeline, Mr. Sandhu told Dr. Lochter at the time of their interview that he had been able to resume his walking, as well as all of the chores that he was able to do before the accident.

[162] Their counsel submitted that in contrast, Mr. Sandhu's family members were able to contribute little actual supporting evidence of ongoing physical symptoms. Instead, they lapsed regularly into discussing his cognitive impairment, which is, counsel argues, what his current disability really stems from.

[163] Thus, I am asked to find that the soft tissue injuries had "little impact" on Mr. Sandhu's function.

[164] Given this much more modest physical impact, the range of decisions cited on behalf of the defendants present a correspondingly more modest range than those relied on by Mr. Sandhu:

- *Siu v. Regehr*, 2022 BCSC 1876: The 60-year-old plaintiff suffered new injuries and an aggravation of pre-existing injuries, the most severe of which was pain in his lower back area. That pain was found to have taken about two years to resolve, as did the low mood that he was found to have suffered because of his situation. The trial judge did not find that the plaintiff had suffered any permanent impairment of his lifestyle or relationships. Award: \$60,000.

- *Fillo v. Yoshime*, 2022 BCSC 1578: The 60-year-old plaintiff experienced pain and discomfort in his right neck, shoulder and back areas as a result of the accident. The trial judge found that the pain was moderate and had worsened in the period leading up to trial, despite having previously improved by about 80%. The plaintiff was limited in his recreational activities and had to modify his work practices to accommodate his discomfort. A further impairment of his lifestyle was in the limitations that his injuries placed on his ability to play with his grandchildren. Award: \$70,000.

- *Seganfredo v. Hernandez*, 2023 BCSC 1253: The plaintiff, also 60 years old, and a previously fit mother of six children who served part-time in the military reserves, sustained whiplash injuries, with cervicogenic headaches and various related soft tissue injuries. The trial judge found that she was functionally impaired for 16 months following the accident, but continued to experience pain and headaches that reduced her enjoyment of life, by requiring her to restrict her activities. Award: \$70,000.

- *Stone v. Milev*, 2022 BCSC 319: The soft tissue injuries sustained by the 45-year-old plaintiff in this case were to his neck, back and shoulder. These injuries had "significantly resolved" by slightly more than two years after the accident, with only mild pain following "strenuous activity or at the extremes of his movement range" remaining. The pain had been moderate for a period closer to the accident, and then mild afterwards. Award: \$30,000.

[165] The defendants' position is that the low end of this range is appropriate if Dr. Loch's opinion is accurate, whereas Dr. Chow's opinion, if it is accepted, supports an award at the higher end.

Discussion

[166] As I summarized in *Groeneveld v. Hissink*, 2023 BCSC 621:

[176] The purpose of non-pecuniary damages is to compensate a plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, at para. 134.

- [177] Among the factors that can influence the amount of the award are the age of the plaintiff; the nature of the injury; the severity and duration of the pain; and the degree of disability, emotional suffering and impairment of life experienced by the plaintiff, including impairment of their important relationships and lifestyle pursuits. Crucially, a plaintiff should not generally be penalized for their stoicism: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46.
- [178] The amount of the award is guided by what is required to ameliorate the condition of the plaintiff in their particular situation. Their need for solace may not necessarily correlate with the seriousness of their injury. Because of this need to recognize the specific circumstances, there can be no general "tariff" of awards: *Lindal v. Lindal*, [1981] 2 S.C.R. 629, at 637. That said, other decisions dealing with similar circumstances can serve as a guide in arriving at an award that is "just and fair" to both parties: *Kuskis v. Tin*, 2008 BCSC 862 at paras. 135-136.
- [167] With respect to the additional findings of fact that are necessary to apply these principles, first of all my previous favourable impression of Mr. Sandhu's credibility and reliability, and the support provided by the evidence of his family members, also applies to his physical pain complaints, and I am satisfied that they are essentially as he has described them.
- [168] I am not satisfied that either of the alternative's contributions to the persistence of the symptoms from the subject accident that were put forward by Dr. Lochter are likely. There is no evidence that the 2015 neck and back pain complaints persisted for any meaningful period, and certainly not that they were in existence at the time of the subject accident. Further, Dr. Lochter's bald statement that the majority of people in this age group have meaningful enough neck and low back discomfort from non-accidental causes to qualify as a potential contributor to the level of pain that I have found Mr. Sandhu experiences is not something that I could give weight to in the absence of some empirical support. Once I have rejected those alternative contributors, his opinion about the duration of the injuries from the subject accident cannot survive my acceptance of Mr. Sandhu's evidence that they were continuing as of the trial dates.
- [169] I am also not satisfied that Mr. Sandhu's current symptoms are attributable to the subsequent accidents to any meaningful extent. He was certainly contradicted in his claim to have suffered no injuries from them by his statement to his doctor in January 2019 and the "flare-up" that Dr. Lochter referred to, but none of the subsequent complaints of soft-tissue related symptoms attribute them to these accidents. More importantly, his complaints in January 2019 were not of his actual debilitating area of pain in his lower back.

- [170] In general, I found Dr. Chow's report and testimony about these injuries to be balanced and persuasive. As I have said, his speculation about how a concussion could have resulted from one of the subsequent accidents was undermined by their chronology, but in light of my rejection of ongoing pre-accident injuries or any meaningful contribution from the subsequent accidents, there is no reason to doubt his essential opinion and prognosis.
- [171] Except as it related to his cognitive impairment, counsel did not spend much time on Mr. Sandhu's psychological injuries. Dr. Reddy's diagnosis of major depression is amply supported by the reliable descriptions of it from Mr. Sandhu and his family members, which I found one of the most convincing parts of their testimony, and I find that he suffers from it as a result of the accident. I acknowledge that his family doctor's post-accident depression diagnosis apparently stemmed from stresses in his life other than the accident-related ones, but what he chose to relate in that single incident does not undermine the effect of the much larger body of persuasive evidence that it was caused by the accident and is ongoing.
- [172] I was not persuaded by Dr. Reddy's diagnoses of PTSD and generalized anxiety disorder however. Even assuming that Mr. Sandhu's extensive narrative to her about his symptoms of those conditions are analogous to a physical examination, and therefore do not have to be proven independently in order to support her opinion, their entire absence from his own testimony and that of his family members makes it unlikely that they actually form part of his day to day experience. As an obvious example, it would have been simple for any of them to recount a post-accident fear of driving if it had any substance. In reaching this conclusion, I do not suggest that Mr. Sandhu was not truthful or that Dr. Reddy did not record him accurately, only that for whatever reason the details she extracted seem to have little or no relationship to the evidence of his post-accident lifestyle that I have accepted.
- [173] Applying these findings to the principles, I find that quite aside from the unrelated cognitive impairment, Mr. Sandhu suffers from meaningful ongoing back pain that substantially interferes with his enjoyment of life, including his ability to engage in formerly enjoyable recreational activities, to contribute to his household or to enjoy family relationships and friendships to their fullest. I am also satisfied that he suffers from a meaningful level of ongoing depression due to his pain from the accident and the activities that it prevents him from engaging, although dismay about his cognitive impairment no doubt contributes to that depression.
- [174] I also accept Dr. Chow's prognosis that his pain symptoms will "continue to interfere substantially in his normal life activities" and that he is unlikely to experience full recovery. Dr. Reddy seems to offer some greater hope in the form of treatment for depression, but she also links its resolution to the management of Mr. Sandhu's pain, so her prognosis is only marginally more optimistic.

- [175] The range of cases put forward on behalf of the defendants are not applicable to this situation. The symptoms that they feature had substantially resolved by the time of trial and/or at their worst were less serious than what Mr. Sandhu has suffered and will continue to suffer.
- [176] The cases put forward on his behalf are more comparable, although I think the presence of a diagnosed and possible irremediable mood disorder aggravates his situation beyond even the most serious of them. For example, the trial judge in *Siu* made a point of noting, at para. 151, that the plaintiff had not been diagnosed with "clinical depression", as Mr. Sandhu has. *Simmavong* also lacked that finding, even though a psychiatrist was called by the plaintiff (see para. 47), and the issue was not broached in *Kler and Predinchuk*.
- [177] In contrast, I accepted the evidence that Mr. Sandhu's diagnosed depressive disorder has meaningfully affected the quality of his life. While I did not accept her overall opinions, Dr. Reddy's view that his depression also likely makes his experience of Alzheimer's worse than it would otherwise have been is persuasive, and I am satisfied that it applies to whatever cognitive disorder he actually suffers from.
- [178] As a result, I think Mr. Sandhu's counsel has slightly understated the appropriate range of damages, which in my opinion should exceed the awards in his higher range, to reflect the presence of an additional aggravating factor that has and will continue to affect his pain and suffering. In the absence of further considerations I would award \$175,000.
- [179] The other relevant matter is that Mr. Sandhu's counsel has asked that his loss of housekeeping capacity be reflected in the award of non-pecuniary damages, rather than as a separate pecuniary award. The Court of Appeal in *Kim v. Lin*, 2018, BCCA 77, suggested that doing so was appropriate when the plaintiff "suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering", and that when they are unable to perform "usual and necessary household work", the loss may be compensated by pecuniary damages: para. 33. However, the Court also endorsed the comments in *Liu v. Bains*, 2016 BCCA 374 that "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [180] Here, although Mr. Sandhu has been completely precluded from performing his former household maintenance tasks, they were not that extensive. His sons appear to have picked up his outside work when the need requires, and Ms. Sandhu did not suggest that no longer being able to direct him to vacuum and mop inside the house created any additional meaningful burden for her. I view this loss as more of a non-pecuniary loss, in that he has been deprived by his injuries from continuing to contribute in an area of his home life that previously had meaning for him. As such, I think it justifies a very modest increase in the award that would otherwise have been made, of \$5,000.
- [181] Accordingly, I will award \$180,000 for non-pecuniary damages.

Loss of Past Earning Capacity

Positions

Mr. Sandhu

- [182] His counsel submits that despite a finding that the cognitive impairment is not related to the accident, damages for past loss of earning capacity should be awarded up to approximately the middle of 2022, when that condition rendered him unable to work in any event. That loss is best conceptualized as his loss to the company as a business asset. It is argued that without the accident he would have been able to put additional hours into the businesses, be more productive during his working hours, reduce the need for additional employees and the accompanying wage costs, and reduce the risk that the Jugo Juice stores would close.
- [183] To value the loss of his capacity to fulfil this role, counsel suggests that 2018 should be used as a baseline year, and that I should proceed on the basis that without the accident the net profits of the businesses in that year (consisting of the net income of the company, plus the salaries paid to him and Ms. Sandhu, which totals approximately \$80,000), would have been at that level from the date of the accident until he became completely disabled, and that the salary he drew in that year (\$27,848) would have continued as an element of that net profit until then. That would lead to a total award of \$159,288.

The Defendants

- [184] Their counsel vigorously opposed any award under this head of damages, characterizing the evidence as "a big mess thrown at the court" that is not based on any sound assumptions, such as those that would be found in a report from an economist or accountant. Undermining Mr. Sandhu's claim are the facts that:
- After the accident he was actively dealing with the two new Mission franchises, organizing suppliers, training staff, and even doing takeout deliveries for a time;
 - The businesses earned significantly more after the point that his contribution had supposedly diminished;
 - He conceded that the businesses suffered several challenges that were unrelated to his injuries: slowing sales, the pandemic, difficulty hiring staff, and the leaky roof that eventually led to the demise of the Abbotsford store;
 - The losses that the businesses suffered in 2022 were due to the sales of the assets of the stores that closed, and were unrelated to his ability to contribute his services; and
 - His history of business operation does not contain any sustained successes, suggesting that these businesses would not have thrived in the long-term regardless of the extent of his involvement.

Discussion

- [185] The principles governing a claim of this nature were explained in *Lamarque v. Rouse*, 2023 BCCA 392:
- [29] An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have, not could have, performed, but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The standard of proof for past hypothetical events is: whether there is a "real and substantial possibility" that the events would occur: *Grewal v. Naumann*, 2017 BCCA 158, at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. If the claimant establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48.
- [30] In many cases, a claimant's actual lost income will be the most reliable measure of a loss of earning capacity. However, there is no hard and fast rule that only loss of actual income is compensable. It must be remembered that it is not the actual lost income that is compensable, but the loss of capacity: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. An award of damages for past loss of earning capacity compensates a claimant for any pecuniary loss resulting in an inability to work, and evidence supporting such loss can take different forms. In *Ibbitson*, for example, the plaintiff, who worked in the forest industry, maintained his pre-accident level of income by working longer hours. Thus, he was found to have suffered a pecuniary disadvantage that was compensable through an award of damages for loss of earning capacity: *Ibbitson* at paras. 20-21.
- [186] It is well established that when a plaintiff conducts business through a closely-held company, it is sometimes appropriate for the company's loss of profits to be considered the plaintiff's. In that analysis, the company is treated as the plaintiff's "alter ego", despite being a separate legal entity: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 23. As it was expressed in *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232:
- [28] Earning capacity is an asset. The value of [the plaintiff's] lost earning capacity is the income [the plaintiff] (or, in this case, [the company], as the "alter ego" of [the plaintiff]) could have earned if that earning capacity had not been lost. Such valuations could be relatively straightforward if a plaintiff could show, for example, that they did in fact hire an additional employee to compensate for the lost "capacity". In such circumstances, the additional wages quantify the loss. The value of lost opportunities or sales could also help quantify the value of the lost earning capacity.
- [187] In this case, Mr. Sandhu seeks to use his own income for 2018, a year in which the company did well, as a proxy for the income that he could have earned but for his non-cognitive injuries. This presents some difficulties. He continued to work towards the opening of the two Mission business after the accident in 2017, and the income that the company paid him in 2018, when all of the stores were operating, was about four times greater than he had received in the previous year, when any physical effects of the accident and the mood

disorder resulting from it would already have been affecting him. His income from the company then fluctuated, before bottoming out:

2019: \$2,304.95

2020: \$5,503.13

2021: \$12,831

2022: 0

[188] There is no discernible pattern here, and certainly not one that could be attributed to a loss of physical capability, or a depressed mood due to pain. It does not even show a decline due to progressive cognitive impairment. There was no evidence that these conditions waxed and waned, and Mr. Sandhu's assertion that his physical symptoms were getting worse is not supported by the expert evidence. He also recalled that he stopped working in 2019 or 2020, and while that may not be accurate, there was no more reliable competing evidence about the date by which payments to him would no longer have had any relationship to his actual work contributions. Finally, while it is clear that he would pitch in with more operational tasks as required, the roles that he and his family members described him fulfilling were largely administrative. Unless the depression was what actually disabled him from doing so, which was not established by the evidence, it is difficult to see how pain would have had as great an impact on his role as if he had been responsible for mainly physical tasks.

[189] As I have mentioned previously, one inference that could be drawn is that his salary from the company was discretionary, based on what it could afford to pay him and not his actual hours. Ms. Sandhu's testimony certainly left this open as an alternative. This would drive the analysis back to the overall change in the company's profitability, as discussed in Reynolds.

[190] The value of directly replacing his contribution was also not clearly explained by the evidence. Ms. Sandhu's estimate of having spent \$30,000-\$35,000 to hire additional staff for that purpose could not be identified in the differences in wage totals between the relevant years. Instead, I think that the evidence better supports the inference that as a result of having to take on the administrative work that he previously performed, she would have required backfill for her main role in actually running the store. The payroll for the company was:

2016: \$60,502

2017: \$175,305

2018: \$203,608

2019: \$206,471

2020: \$168,610

2021: \$145,070

2022: 127,111

[191] To guard against the possibility that the wages paid in 2016 were an outlier, I will average them with what was paid in 2015 (\$71,790), which yields a figure of \$66,146. Even after taking that step, and leaving aside 2020 and 2021, which can be satisfactorily explained by the restrictions imposed by the pandemic, and 2022, in which only one business was operating, the payroll in 2018 and 2019 increased from the pre-accident year of 2016 by more than multiplying the pre-accident payroll by three. Even in the first post-accident year of 2017, in which Mr. Sandhu's physical symptoms can be inferred to have been most acute, the wage bill is still almost three times more than the previous year's total even though the two additional stores were only open for six or seven months.

[192] It is therefore possible that the gap between the expected increase based on tripling the number of stores and the actual wages paid represents the amount that was required to supplement Ms. Sandhu's assumption of Mr. Sandhu's duties due to his accident-related disability, and fairly values his loss of capacity in the pre-accident period.

[193] Where this analysis stumbles however, is that Ms. Sandhu took more in salary out of the company herself in those years, and given her non-arm's length relationship with Mr. Sandhu and the company, these increases may well have been no more than allocation of the available profit to one of the owners of the business - maybe the kind of "lump sum" in prosperous years that she testified about. In other words, their likely discretionary nature makes them uninformative about the actual cost of replacing Mr. Sandhu's contribution.

[194] At the end of the day, I think that the only sufficiently reliable way of valuing Mr. Sandhu's lost capacity is to consider its effect on the actual profit from the company to the family unit after the accident.

[195] The average of that profit (net corporate income plus wages paid to both spouses) in the pre-accident years of 2015 (\$41,675) and 2016 (\$16,477) is \$29,076. Extrapolated to three stores that profit would be \$87,228. The average of 2018 (\$81,019) and 2019 (\$61,892), the two non-pandemic years in which the three stores were operating for the entire year is \$71,455. I think that fairly represents the best those business were capable of doing in the post-accident period. It is 18% less than the average before 2015 and 2016 extrapolated to three stores.

[196] I am satisfied that I can value the loss of capacity by finding that, whatever the number of stores in operation at the time, absent the accident the total profit each year would have increased by at least 18% in the post accident years. In my estimation, it is a real and substantial possibility.

[197] In reaching this conclusion, I recognize that at some point the cognitive impairment that I could not be satisfied was caused or contributed to by the accident would have overtaken any pain and depression-related disability, and rendered Mr. Sandhu unable to work anyway. Since the investigations of that impairment were not undertaken until November 2022, I feel comfortable including that year in the assessment, on the basis that by then he was still not so disabled by it that he could not recognize its effects and seek assistance for them.

[198] This approach generates the following amounts:

2017: $\$32,251 \times .18 = \$5,805$

2018: $\$81,019 \times .18 = \$14,583.42$

2019: $\$61,892 \times .18 = \$11,140$

2020: $\$34,762 \times .18 = \$6,257$

2021: $\$67,621 \times .18 = \$12,171$

2022: $\$7,832 \times .18 = \$1,409$

Total loss: \$51,365. This is the amount I will award under this heading.

Loss of Future Earning Capacity

[199] The question of an award under this head of damages turns on a narrow point, and can be dealt with in a more focused way.

[200] Mr. Sandhu's counsel provided submissions for the contingency that I would be unable to accept either Dr. Reddy's opinion or Dr. Dommann's opinion about the nature of his cognitive impairment. In that scenario the impairment caused by the physical and psychological injuries would have continued, whereas the cognitive symptoms, "if unexplained on the evidence, may continue indefinitely, may resolve, or may improve to some indeterminate extent." What this means, it is argued, is that there remains the possibility of a future loss based on the accident-related injuries (because it is possible that the cause of the cognitive impairment will improve or resolve).

[201] Counsel concedes that it is not easy to value the loss represented by this possibility, but suggests that an award of \$80,000, representing the company's net income for the representative year of 2018, would be a fair and reasonable amount in the circumstances.

[202] The law governing awards of this nature is not in issue. There is a three-step process to assessing damages for loss of future earning capacity, as explained in *Rab v. Prescott*, 2021 BCCA 345:

[47] ... The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown [v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.)]*).

The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step which must include assessing the relative likelihood of the possibility occurring ...

[Full citation added]

[203] There is no question that there is already a loss of capacity due to the ongoing effects of the physical and psychological symptoms. The former symptoms are certain to continue and the latter are almost certain. Where Mr. Sandhu falls short, in my opinion, is in showing a real and substantial possibility that loss of capacity will lead to a pecuniary loss.

[204] What mattered on the question of causation of the cognitive impairment was whether I accepted Dr. Dommann's finding of a concussion and his concession that it may have played some role in what then developed. But the fact remains that he and Dr. Reddy agree that a serious neurocognitive disorder is present, remedying Mr. Sandhu's B12 deficiency had no effect, there is no evidence based on the investigations so far of multiple strokes, and I have rejected the theory that it was caused by his psychological conditions. Whether or not he has Alzheimer's, there is no evidence of an alternative that gives rise to any measurable possibility, let alone a real and substantial one, that he will be sufficiently cognitively rehabilitated that his physical and psychological injuries will lead to any pecuniary loss. In other words, the possibility of him being able to work again, and thereby suffer from his accident-related loss of capacity, is non-existent.

[205] As a result, no award can be made under this heading.

Cost of Future Care

Mr. Sandhu

[206] In the absence of any cost of future care report, Mr. Sandhu's counsel submits that an award can be made for certain recommended items, based on the billing rates paid by the provincial insurer. Leaving aside the various assessments recommended by Dr. Reddy, which his counsel concedes are duplicative of existing services, are covered by the public health plan, or do not have a sufficient evidentiary basis, Mr. Sandhu seeks compensation for:

- Functional capacity evaluation and ongoing occupational therapy (Dr. Chow): 15 hours x \$131/hr = \$1,965. Counsel concedes that Dr. Chow did not specify the number of hours that would be required, but submits that the number proposed, which is inclusive of the initial assessment, would be fair and reasonable;

- Physiotherapy (Dr. Chow): While weekly physiotherapy until age 75 at \$80 per hour would result in an award of over \$62,000, counsel acknowledges that Mr. Sandhu's use of this therapy has been less consistent recently than it was in the years closer to the accident, and says that \$25,000 would fairly reflect the amount of therapy that he will reasonably require and is likely to use.
- Over the counter pain medication (Dr. Chow): utilizing the rough and ready approach endorsed in *Pak v. Ham*, 2024 BCSC 43, at para. 257, counsel submits that \$5,000 should be awarded. It is higher than the low end of the range for such awards identified in that case, but is justified by the indefinite duration for which Mr. Sandhu will require pain medication;
- Cognitive Behavioural Therapy (Dr. Reddy): 40 hours x \$140/hr = \$5,600; and
- EMDR therapy (Dr. Reddy): 15 sessions x \$131 session = \$1,965.

This would yield a total award of \$39,530.

[207] Mr. Sandhu's counsel rejects the suggestion that the serious cognitive impairment that he has developed removes the need for these treatments. His accident-related symptoms will continue to be experienced by him regardless of how the cognitive impairment progresses.

The Defendants

[208] As a threshold issue, their counsel submitted that the absence of evidence of costing of these items is fatal to any award with respect to them.

[209] Counsel's submission on the merits of these claims was based in part on Dr. Lochter's report. Since I have declined to accept Dr. Lochter's opinion on the nature of the soft tissue injuries, his limited care recommendations are not geared to the level of disability I have found actually exists, so that part of the submissions does not need to be summarized.

[210] Counsel's positions on Dr. Chow's recommendations were that some of them dealt with areas outside of his area of expertise ("cognitive difficulties and sleep apnea"), and that occupational and physiotherapy had been recommended on the mistaken basis that Mr. Sandhu was still working in his businesses to some extent as of the date of the examination. There was also no specific form or duration of treatment proposed in order for him to engage in ongoing stretching. Dr. Lochter's concurrence confirmed the necessity and reasonableness of ongoing Tylenol use, but the absence of costing precluded any award based on that recommendation.

Discussion

[211] Once again, there is no dispute about the governing principles, which are concisely summarized in *Langille v. Nguyen*, 2013 BCSC 1460:

[231] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full

compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (B.C.S.C.); *Williams (Guardians ad litem of) v. Low*, 2000 BCSC 345 (B.C.S.C.); *Sphehar (Guardian ad litem of) v. Beazley*, 2002 BCSC 1104 (B.C.S.C.).

- [232] The test for determining the appropriate award under the heading of cost of future care is an objective one 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 v. Bartsch* at 84.
- [233] Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 (B.C.S.C.) at para. 74.
- [212] On the disputed issues, two objections by the defendants can be dealt with readily. First, the findings with respect to ongoing physical and psychological symptoms due to the accident are independent of my rejection of the claim of causation of the cognitive impairment. There was no evidence, and I would not infer it as a matter of common sense or general knowledge, that a decline in Mr. Sandhu's cognitive function has or will in the future reduce his need for assistance with his proven accident-rated symptoms. Second, I do not accept that as a physiatrist Dr. Chow is restricted in his ability to recommend cognitive behavioural therapy as being helpful in dealing with "pain control and sleep disturbance" which were the actual issues he sought to address, or that those issues fall outside the effects of the injuries that I have found to exist. Those concerns seem directly related to pain management, in his role as a doctor of rehabilitation medicine, and even if that were not so they are still within the competence of any qualified physician. Nor do I accept that his recommendations for physiotherapy were premised solely on Mr. Sandhu's work requirements. Both were obviously directed to pain management as an ongoing general issue including, with respect to the occupational therapy, safely carrying out physical tasks in his home life so that he does not suffer further injury.
- [213] In principle, I am satisfied that all of the recommendations are medically necessary and reasonable. The crucial question is whether the absence from the trial of actual evidence of their cost, as opposed to taking judicial notice of the insurers fee schedule, in itself precludes an award with respect to them.
- [214] I will begin by making the obvious points that (1) the onus is on a plaintiff to prove their damages, and that (2) a court should not be put in the position of being asked to speculate about the amount of those damages to the prejudice of the opposing party. Where recommended future care items are straightforward and well-known, inferences from existing evidence, common sense, or judicial notice may make it possible to attribute

reasonable costs to the items without impermissible speculation. If there is any complexity to the assessment however, a court may not be able to take it on in the absence of actual evidence.

[215] Here all of the recommended therapies are well-known, the tariff for insurer funding of them is readily accessible as a reference, and it stands as a reasonable proxy for their likely costs if they had to be privately paid for. Without condoning the practice, I feel comfortable taking judicial notice of those rates and applying them as the cost of those items for the purposes of making an award.

[216] The only exception is the proposed cost of ongoing Tylenol use, the amount of which seems untethered from anything other than it was the same as the "rough and ready" amount sought by Mr. Sandhu's counsel for medication in the Pak decision. Justice Blok in Pak had other cases cited to him on this issue that are not before me, and at para. 257 he awarded \$1,500, which was at the low end of the range established by those cases (\$3,000), and then reduced it by 50% to reflect the uncertainty about the extent to which the plaintiff would require the medications. Here, I am quite satisfied that Mr. Sandhu will need that medication indefinitely to address his pain, and since the only principled basis to identify an amount to cover them is the low end of the range to which Blok J. referred, I will award it: \$3,000.

[217] The total award for cost of future care is therefore \$37,530

Special Damages

[218] Counsel agree that special damages of \$3,068.32 are appropriate.

Summary

[219] Mr. Sandhu will receive the following damages:

- Non-pecuniary: \$180,000
- Loss of past earning capacity: \$51,365
- Cost of future care: \$37,530
- Special damages: \$3,068.32

The total award is \$271,963.32

[220] Any matters of mathematical calculation that may be required, and the correction of any mathematical errors that may be apparent on the face of these reasons, can be referred to a registrar, who will certify the results.

- [221] Liability was admitted in this case and remedies were obtained by Mr. Sandhu, so in the absence of any other factors that would affect them, he is entitled to his costs. This is based on the principle that a plaintiff who establishes liability, even by means of an admission, is the successful party for the purposes of costs: *Loft v. Natt*, 2015 BCCA 418. These will be at the ordinary scale of difficulty.
- [222] If there are matters that would affect his entitlement to, or the scale of costs, counsel may arrange to make written submissions with respect to them, according to whatever schedule for exchanging and filing those submissions they find convenient.

"Schultes J."

- [1] In re-examination, Dr. Lochter added that there would be "considerable trauma" when airbags deploy, but since that was not responsive to the question he was being asked, which was about his inability to apportion the cause of the pain among the three potential sources, and amounted to an elaboration on his opinion that cross-examining counsel had not opened up by his questions, I will not give it any weight.

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