

CANADA / JUDGMENT

## Sehra v. Randhawa

2020 BCSC 752

### COURT

Supreme Court of British Columbia

### DECIDED

15 May 2020

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2020 BCSC 752 Sehra v. Randhawa

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sehra v. Randhawa,

2020 BCSC 752

Date: 20200515

Docket: S-M-183274

Registry: New Westminster

Between:

Gurdish Singh Sehra

Plaintiff

And

Jasraj Singh Randhawa

Defendant

and

Docket: S-M-203691

Registry: New Westminster

Between:

Gurdish Singh Sehra

Plaintiff

And

Bryanne Laura-Lea Hoing

Defendant

Before: The Honourable Madam Justice Douglas

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.

January 13-17 and 20, 21 2020

Place and Date of Judgment:

New Westminster, B.C.

May 15, 2020

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## INTRODUCTION

- [1] The plaintiff commenced these two actions, tried together pursuant to a consent order entered March 7, 2019, following his involvement in two motor vehicle accidents on November 8, 2014 ("MVA #1") and August 31, 2016 ("MVA #2") (collectively, the "Accidents").
- [2] The defendants admit liability for the Accidents and the trial proceeded on damages issues only. The plaintiff seeks general damages, special damages, future care costs, and damages for past and future income loss and the loss of future income earning capacity. The defendants dispute the severity and consequences of the plaintiff's alleged injuries, say the Accidents have had a minimal impact on his function, deny his claim for future loss of income, and argue he has failed to mitigate his damages.

## FACTUAL BACKGROUND

### Before the Accidents

- [3] The plaintiff is a 33 year-old married man who immigrated to Canada from India in 1995 with his parents at the age of seven. He currently lives with his wife, parents, and brother in Surrey. Apart from sustaining a remote right anterior cruciate ligament ("ACL") injury (a condition which was neither symptomatic immediately before nor aggravated by the Accidents), he was generally healthy before the Accidents.
- [4] The plaintiff denied any psychological problems before the Accidents and said he was happy, active, and engaged in life. He enjoyed close relationships with his parents and younger brother. He described himself as an optimistic "glass half-full" person who liked going to the gym (where he used the treadmill and did weight training), playing basketball, squash, and table tennis, and socialising with his brother and friends. He also enjoyed go-karting and was a car enthusiast.

### MVA #1: November 8, 2014

- [5] On November 8, 2014, the plaintiff was a front seat passenger in the four-door Mitsubishi Lancer driven by his friend, Jasraj Randhawa, travelling from Metrotown in Burnaby, when he was involved in MVA #1, a single vehicle accident. Mr. Randhawa was attempting to change lanes on the Nordell Exit ramp when he hit the median and a concrete pole; the car became airborne and spun out of control before coming to a stop. The impact was significant. The plaintiff was wearing a seatbelt and was pushed against the car door. Air bags deployed. He recalls seeing events unfold in slow motion at the time of MVA #1.

- [6] Once the Mitsubishi Lancer came to a stop, the plaintiff heard yelling. He opened his door and saw the vehicle was missing its hood. He was unable to open the driver's door. He noticed debris everywhere and that the vehicle was also missing its left front wheel. He telephoned his friend's parents and remembers traffic piling up. The fire department and an ambulance arrived at the scene. He recalls a fireman telling him it was a miracle there were no fatalities.
- [7] Mr. Randhawa was transported to hospital by ambulance. The plaintiff noted the floorboards of the Mitsubishi Lancer were "pushed up" and he worried he might have lost his legs if he had been driving. An ambulance attendant told the plaintiff it was unnecessary for him to travel by ambulance to Surrey Memorial Hospital ("SMH") but advised him to go there for an assessment. The plaintiff thinks he remained at the scene of MVA #1 for one to two hours before he went to SMH.

### Condition Post-MVA #1

- [8] The plaintiff was driven to SMH by his friend's parents. Once there, he called his own parents and spoke to his father. His parents later attended at SMH with Mrs. Sehra, who was then his girlfriend.
- [9] A nurse put the plaintiff in a neck brace and onto a bed. He recalls feeling a spike in his back pain once he lay down and thinks he was given some Advil. He remembers having generalised pain in his neck, upper, mid, and low back, chest, abdomen, and stomach (where he had some bruising from the seatbelt). He also had some left knee and shoulder pain. He could not recall undergoing any imaging studies. He was discharged from SMH that night without the neck brace. His father drove him home.
- [10] The plaintiff said his back pain worsened once the effect of the pain medication he had been given at SMH wore off. He took no other medication and went to bed without supper. He recalls replaying MVA #1 in his head and having trouble getting out of bed to go to the bathroom that night. The next morning, he had increased pain and required assistance getting out of bed and going to the bathroom. He took some Tylenol and his mother made an appointment for him to see his parents' GP later that week. He was prescribed pain medication and advised to rest and drink water.
- [11] The plaintiff recalls missing a week of school after MVA #1. He experienced some insomnia, was anxious about driving, and had neck, back, and left arm and shoulder pain. His left side hurt. His neck pain was associated with headache. He experienced neck stiffness and headache pain once or twice a week when studying or working on his computer.
- [12] The plaintiff's left arm and shoulder pain lasted only a few months. His left knee pain was brief in duration and had resolved before MVA #2. His upper back pain resolved within about one year of MVA #1.

- [13] Before MVA #2, the plaintiff's neck pain was improved but not resolved. He treated his headache with Tylenol and his neck pain with physiotherapy. The frequency of his headaches had diminished before MVA #2. By the time of MVA #2, he was getting headaches about once every few weeks, depending on his work load. He engaged in some chiropractic treatment, massage, and active rehabilitation for his back after MVA #1. His mid and low back pain persisted at the time of MVA #2. He testified he has not had a single pain-free day since MVA #1.
- [14] In the interval between the Accidents, the plaintiff's sleep improved from a few hours per night to about five or six hours. His nightmares (which were triggered by certain events, such as taking the Nordell Exit, and involved seeing a recurring bird's eye view of MVA #1) decreased as his sleep improved. They were infrequent in the months before MVA #2.
- [15] The plaintiff had ongoing anxiety about taking the Nordell Exit before MVA #2 but his driving confidence had improved. He admits he was doing well in life shortly before MVA #2: he was on his way to obtaining his Certified General Accounting ("CGA") designation and was working at a great place where he had many opportunities. He said his new fear of driving and criticisms by others about him being an overly cautious driver made him angry. He remained an anxious passenger and preferred to drive.
- [16] The plaintiff was working at Falcon Equipment Ltd. ("Falcon") as a junior accountant at the time of MVA #2. He said he was doing well there and described the status of his upper back as "quite good" before MVA #2. He was receiving an increased volume of work and beginning to get more intermediate level accounting work. He had been fitted for a personalised chair and sitting was tolerable with periodic breaks. On a good day, he worked 8 hours; he said he was exhausted if he had to work 10 hours a day.

## MVA #2: August 31, 2016

- [17] On August 31, 2016, the plaintiff was involved in MVA #2 when travelling to work. He was the driver and sole occupant of a 2007 Audi, stopped and waiting to make a left turn at the intersection of Fraser Highway and 166th Street in Surrey, when he was struck by an approaching vehicle. He anticipated the impact and braced himself for it. The approaching car hit the left front driver's side of the plaintiff's vehicle. Air bags did not deploy. The plaintiff completed his turn, pulled over, and got out of his car. The vehicle that struck him came to a stop across the median, facing the opposite direction. The fire department attended. The plaintiff lived about 10 or 15 minutes from the accident scene and drove himself home. He noticed the engine of his car overheating due to a coolant leak and subsequently had his vehicle towed to a repair shop. He said MVA #2 brought back memories of MVA #1.

## Condition Post-MVA #2

- [18] The plaintiff went to see his family doctor the day of MVA #2. Sometime thereafter, he began seeing Dr. Sawnhey, his current GP.
- [19] MVA #2 aggravated the plaintiff's back and neck pain; he had daily back pain in the one month following MVA #2. He experienced ongoing headaches associated with neck pain which he treated with Tylenol. His left arm and shoulder pain returned and was worse than it had been previously; those symptoms persisted for about one and a half years before they resolved. MVA #2 disturbed the plaintiff's sleep and he experienced some recurrent nightmares which involved him seeing a bird's eye view of the Accidents.
- [20] The plaintiff's workload affected his neck pain. His headache pain was much better when he worked an eight-hour day. He re-started the rehabilitation he had begun following MVA #1. He was unable to do the same stretches and had to learn new exercises.

### Current Condition

- [21] The plaintiff complains of ongoing back pain, aggravated by prolonged sitting. He estimated his current sitting tolerance to be two to three hours, if he sits hunched over. He said it is more painful for him to sit straight. His neck and headache pain is significantly improved since he started working for Core Living. He experienced no unusual neck pain in the week before trial and said working 8 hours has been very easy for him.
- [22] The plaintiff's sleep is also improved and the frequency of his nightmares has decreased. He said he was doing well until he spoke with Dr. Jung, psychologist, in September 2019 in connection with this claim. Dr. Sawnhey offered the plaintiff a prescription for sleep medication but the plaintiff did not fill it as he did not want to become dependant on it. He currently takes no prescription medication and manages his symptoms with Advil and Tylenol. He experiences sporadic sadness, improved but ongoing anxiety (mostly related to driving), and occasional nightmares related to the Accidents.

### Impact of the Accidents on Personal Relationships

- [23] The plaintiff met his wife in 2007. They married in November 2017. The plaintiff enjoyed their wedding but found it difficult to sit cross-legged for two or three hours during the ceremony. He danced at his reception but not the way he would have liked. Following his wedding, he travelled with his wife and parents to India for a three-week holiday, taking Gravol and Tylenol as necessary for back pain.
- [24] The plaintiff said the Accidents have affected his marital relationship. His wife thinks he is now an overly cautious driver and this causes arguments between them. He is embarrassed that his wife, who is doing well in her job, earns more money than he does. Both said his injuries have affected their intimate relationship. His wife is now pregnant. The plaintiff is excited and nervous about fatherhood. He hopes to be an involved parent.

- [25] The plaintiff is now less active than he was before the Accidents. He and his wife completed the Vancouver Sun Run in 2019, finishing close to last. They walked the route and took breaks, stopping at Tim Horton's along the way. The plaintiff wanted to give up and take a cab to the finish line.
- [26] The plaintiff is now less involved in household tasks than he was before the Accidents. His brother has become the "go-to-guy" for household chores. The plaintiff says he is unable to pressure wash the driveway or wash the car by himself. He finds vacuuming difficult and no longer washes dishes as often. His brother helped the plaintiff with pre-wedding home renovations, something the plaintiff said made him feel useless. His parents have a non-traditional relationship and share domestic duties; the plaintiff does not want his own child to see his wife doing all the housework.
- [27] The Accidents have also affected the plaintiff's relationship with his brother. While they remain close, he said his brother has moved on with his life and their bond is now weaker as they no longer spend as much time together.

#### Employment and Educational History

#### Work History before the Accidents

- [28] The plaintiff's first job after high school was at Cloverdale Paint, initially as a stock person and ultimately in customer service. He started at Cloverdale in the summer 2005 and worked there for about seven years on a part-time and full-time basis. Cloverdale was conveniently located and the plaintiff continued to work there after starting his accounting studies at the British Columbia Institute of Technology ("BCIT") and Kwantlen Polytechnic University ("Kwantlen").
- [29] In July 2013, the plaintiff obtained his first accounting job, a contract position at Creation Technologies. From October 2013 until January 2014, he worked as a junior accountant for Akhurst Machinery, before contacting a recruiter and obtaining an accounting assistant position with Oldcastle Building Envelope ("Oldcastle") where he earned an annual salary in the "low 40s". He remained at Oldcastle from April to September 2014.

#### Post-MVA #1 Work History

- [30] On February 2, 2015, the plaintiff accepted his dream job as a junior accountant with Ferrari Maserati of Vancouver ("Ferrari"), earning an annual salary of \$43,000. He initially thought this position would count towards the professional work experience he required to complete his CGA designation; he later learned that was incorrect. His back pain made the commute into Vancouver difficult. He was required to wear a suit and to present a certain image which made him uncomfortable. He said he did not have the best mentor. He found his work chair uncomfortable but did not ask for another one. He told no one at Ferrari about MVA #1.

- [31] Ferrari extended the plaintiff's probation period from three to six months as a result of him making careless mistakes on basic tasks. The plaintiff said his mistakes would have meant "a slap on the wrist" anywhere else. Ultimately, he decided Ferrari was not the best work environment for him and he resigned in June 2015. He thinks he could have focused better in this job if he had not been involved in MVA #1.
- [32] In July 2015, the plaintiff accepted a contract position as a billing analyst with Lululemon Athletica ("Lululemon") in Vancouver, about one block from Ferrari, earning \$23/hour. He quit this job in October 2015 after being advised it would not count towards his CGA professional work experience. He said the 1.5 hour commute each way from Surrey to Vancouver was "killing him".
- [33] On October 13, 2015, the plaintiff accepted a junior accountant position with Falcon, earning an annual base salary of \$45,000. This job was conveniently located close to his home. He did not disclose to Falcon he had been involved in MVA #1.
- [34] The plaintiff understood his position at Falcon would provide him with the 24 months' of junior, intermediate, and senior level professional experience he required to obtain his CGA designation. On that basis, he argues that, but for the Accidents, he could have completed this work experience requirement by October 2017, two years from the date he started at Falcon. He seeks damages for an alleged two-year delay in obtaining his professional accounting designation.
- [35] The plaintiff performed mostly junior accounting work at Falcon. He had an opportunity to do some intermediate level audit work towards the end of his employment. He said his condition improved while at Falcon because he did not have a long work commute and was able to engage in regular active rehabilitation. He typically worked 8 - 9 hour days, which extended to 10 hours/day at year end. He described the work environment as good and said he built positive relationships, received good work opportunities, progressed well, and gained confidence. His starting salary was increased to \$48,000 which reassured the plaintiff he was doing a good job.

### Post-MVA #2 Work History

- [36] Following MVA #2, the plaintiff took six weeks off work on the advice of his family doctor. He attended physiotherapy, massage, and chiropractic treatments. He later commenced active rehabilitation therapy and started swimming. He declined antidepressant medication because he did not think he was depressed.

- [37] The plaintiff was involved in MVA #2 before he received his annual review at Falcon. On October 17, 2016, following his six-week absence, he returned to Falcon and was immediately terminated due to a "breakdown in the relationship". The plaintiff believes he was fired because of the six-week medical absence he took following MVA #2. He was unaware of any issues with his job performance but admitted he had missed time from work for other medical reasons, unrelated to the Accidents. No one from Falcon testified at trial.
- [38] The plaintiff thought he had worked hard at Falcon and felt betrayed. He admitted he was not told he would receive senior level accounting work while there but had hoped he would, noting he was "just putting down his bricks for intermediate level work" when MVA #2 occurred. According to the plaintiff, if he had not been fired and had not received senior accounting work at Falcon, he would have quit and found another job. He agreed he has never had any difficulty finding work.
- [39] Following his termination from Falcon, the plaintiff promptly found another full-time job at Atlas Power Sweeping Ltd. ("Atlas"), a street cleaning and snow clearing business where he worked for about one and a half years. He described the workload as heavy and said he often worked 10 hours a day, which he said meant he needed to drink more water and take more breaks. He agreed he was able to get all his work done but said he had more headaches on long days. The pace slowed down in the summer when his usual work day was 8 - 9 hours.
- [40] The plaintiff started at Atlas on November 1, 2016 as an Accounting Assistant, earning \$48,000/year. He began doing junior level accounting and said he was promised work at the intermediate level once he had learned the accounting system and proved himself. He liked the fact Atlas was close to home but found the hours demanding. On May 11, 2018, he left Atlas when he failed to receive a raise he thought he had deserved. He said his departure was amicable.
- [41] On July 23, 2018, the plaintiff commenced work as an Operations Accountant with Great Canadian Casino ("Great Canadian"), working at the Elements Casino earning an annual base salary of \$55,000. This job was close to his home and allowed him to work an eight-hour day. His neck and back pain improved as a result. The plaintiff understood he would start working at the intermediate accounting level and said he had begun to do some senior level work before his December 2018 promotion to the Hard Rock Casino ("Hard Rock") location.
- [42] In January 2019, the plaintiff started an 18-month senior accountant contract position at Hard Rock, earning \$55,000/year, which increased to \$58,000/year in April 2019. He was then working 9 - 10 hours a day, except when his team had a third member and the job was less demanding. He enjoyed the work but not the hours. Extended periods of sitting aggravated his back pain. He left this position as he wanted to work fewer hours.

- [43] On January 6, 2020, the plaintiff accepted his current position as Assistant Comptroller at Core Living, a furniture company. His workload is much lighter there and he consistently works an 8-hour day. This job is close to his home and he described it as perfect for him. He currently earns \$60,000/year.

### **Educational History before the Accidents**

- [44] In 2005, the plaintiff graduated from high school. He described himself as a "busy bee" and, apart from physics, said he performed well. He decided early in life to pursue a career in accounting, one of the "holy trinity" of professions revered by his parents. Education was highly valued in his family and it was important to the plaintiff to make his parents proud.
- [45] In 2007, the plaintiff took his first accounting course in the financial management accounting program at BCIT. He took one course to "get a feel" for the program.
- [46] The plaintiff explained there are two ways to obtain a BCIT diploma in accounting: the full-time program (which requires students to enroll in six to eight courses and attend BCIT during the week) and the part-time program (which allows students to take courses in the evening and on weekends). In the fall 2013, the plaintiff began his CGA Bachelor of Accounting program at BCIT on a part-time basis. He wanted to support himself financially while pursuing his diploma and he continued to work at Cloverdale while studying at BCIT. Cloverdale was a flexible employer and the plaintiff was able to structure his work hours to accommodate his school courses. He was also then upgrading some of his marks.
- [47] In May 2013, the plaintiff obtained a Diploma of Technology in Financial Management Taxation Option from BCIT. In July 2013, he was granted acceptance into the BCIT CGA Program. In the fall 2013, he was accepted into the BCIT Bachelor of Accounting Program, commencing in September 2013.
- [48] In the fall 2014 (September semester), the plaintiff left his job at Oldcastle to focus on his studies. He was then taking one BCIT course, one class at the CGA Institute, a tax course at Kwantlen, and planning to write a previously deferred CGA exam. He completed the BCIT and Kwantlen courses but failed the CGA course and deferred the CGA exam.

### **Educational History after the Accidents**

- [49] In the winter 2015 (January semester), the plaintiff deferred his plan to focus on school to accept a job at Ferrari. That term, he registered for one BCIT course (from which he later withdrew) and enrolled in two classes at the CGA Institute. In the spring/summer 2015 (April semester), he again deferred his plan to focus on school and took a job with Lululemon, which similarly did not count towards his CGA professional work experience. He was then enrolled in two classes at the CGA Institute.

- [50] In the fall 2015 (September semester), the plaintiff completed his CGA courses, thereby satisfying the course component of the CGA program. That October, he quit his Lululemon job and accepted the position with Falcon. In the winter 2016 (January semester), he enrolled in three BCIT classes. In the spring of that year (April semester), he enrolled in two BCIT courses, later withdrawing from both.
- [51] In the fall 2016 (September semester), the plaintiff enrolled in and later withdrew from two BCIT courses. In the winter 2017 (January semester), he registered for one BCIT course from which he subsequently withdrew. He admitted in cross-examination that he took the spring/summer 2017 (April semester) off school to focus on his wedding preparations. He described his wedding as a "big deal" as both he and his wife were the eldest children in their respective families.
- [52] On July 14, 2017, the plaintiff received an email from the Chartered Professional Accountants of British Columbia (the "CPA") advising him that, based on the information he had provided regarding his work history, he would be unable to complete the required 24 months of professional level experience by the August 31, 2018 deadline. Accordingly, the plaintiff was identified for early transition from the CGA program to the CPA Professional Experience Required for Certification ("PERC") program, which meant he would have to complete 30 months of professional level work experience (rather than the 24 months required under the CGA Legacy program) by June 30, 2020. In the fall of 2017 (September semester), the plaintiff enrolled in two BCIT courses, later withdrawing from one.
- [53] In the winter 2018 (January semester), the plaintiff enrolled in three BCIT courses. In April 2018, he received his Bachelor of Technology in Accounting from BCIT. At trial, he explained he has now completed the academic portion of his degree. In cross-examination, he admitted that, given his decision to work and take only one to two courses per semester following the Accidents, his completion of this degree was delayed by one semester at most.
- [54] The plaintiff is currently awaiting formal approval of his professional accounting work experience before obtaining his CPA accounting designation which he now anticipates receiving by early spring 2020.

### **Evidence of Pavanjit Atwal, Friend/Mentor**

- [55] Pavanjit Atwal is the plaintiff's friend and former BCIT mentor. In 2011, she started the same BCIT accounting program as him. They met in 2012 at BCIT. She became his CPA mentor in 2018, shortly after receiving her designation in January 2018. Their mentor reviews occurred every six months. Ms. Atwal completed her Financial Management Diploma of Accounting in 2013 and worked while studying to obtain her degree. She now works 8 - 10 hours a day as a senior accountant in Richmond, earning \$75,000/year. Her income increased from \$51,000 to \$70,000 once she obtained her professional accounting designation.

- [56] Ms. Atwal was not the plaintiff's mentor when he worked at Falcon. In her view, his Falcon work experience ought to have counted towards his professional work experience. The defendants did not object to this lay opinion evidence despite the fact Ms. Atwal has no formal affiliation with BCIT or the CGA/CPA programs and was not responsible for assessing the plaintiff's professional work experience or determining whether it met program requirements. Ms. Atwal understood the plaintiff started as a junior/intermediate level accountant at Atlas after being fired by Falcon. She agreed his Atlas job was, at least initially, similar to his Falcon job and accordingly both could not count towards his required professional work experience.
- [57] The plaintiff and Ms. Atwal both testified that a job title does not necessarily coincide with the level of accounting work someone is actually performing and that what counts is not the title but the work. Ms. Atwal said it was unnecessary for a student in the CGA program to submit their work experience at any particular interval before the reporting deadline. She chose to report her work history once she thought she had accumulated the required two years of professional level experience. She admitted she had actually accumulated three years (rather than the minimum two years) of experience when she submitted her report. Her three years of experience included a few months of junior and intermediate level work in addition to senior level accounting work. In that regard, Ms. Atwal's reported professional experience was not comparable to the plaintiff's.
- [58] In cross-examination, it was apparent Ms. Atwal was uncertain what reference to "foundational work" in the 2019 - 2020 CPA Student Handbook for CGA Legacy Students meant. It was unclear on the evidence whether the requirements set out in this student handbook were the same as those applicable to the plaintiff when he was a student in this program. Ms. Atwal initially agreed the CGA program focused on an advanced level of expertise and that foundational work would not count towards that requirement. She then suggested she was given credit for six months of foundational level work experience. She later admitted that, by June 2018, when she submitted her work experience for approval, she had accumulated about two years of senior level accounting work experience and had about two years and five months of senior level accounting experience when she obtained her designation. On that evidence, her trajectory is not similar to the one followed by the plaintiff.
- [59] Ms. Atwal agreed there is a difference between entry level and professional level accounting work and that the focus of CPA PERC is on professional level accounting experience. In cross-examination, she agreed the jobs set out in the CPA Student Handbook refer to advanced level professional and not foundational work. She initially agreed that, if a student wanted to obtain their CGA designation by December 2017, they would need to be doing senior level accounting work by December 2015. She retreated from this answer in re-examination when she said that any accounting work experience would count towards the CGA professional level experience requirement, noting that a student need not have a senior accountant title in order to be doing senior level work. She also said the CGA requirement

for a student to complete 24 months of professional level work experience was not restricted to senior level work. Ultimately, she made it clear she was confused by the questions she had been asked by counsel on this subject.

- [60] Ms. Atwal agreed Michelle Lam, Legacy Practical Experience Officer, is a resource person who is well versed in the requirements of the CGA program and someone to whom students could direct inquiries if they were uncertain about whether or not their work history would count towards the required professional level experience.

#### EXPERT EVIDENCE

##### Dr. Sawhney, Treating GP

- [61] Dr. Sandeep Sawhney has been the plaintiff's family doctor since about June 2016. He authored a report dated December 19, 2018 and was qualified to give expert opinion evidence in the area of family medicine. He evaluates and treats patients with chronic and musculoskeletal pain. Approximately 50% of his practice involves the treatment of patients with motor vehicle accident injuries.
- [62] Dr. Sawhney testified the plaintiff had no significant medical history before the Accidents apart from a torn right ACL. On June 3, 2016, after MVA #1 and before MVA #2, Dr. Sawhney first assessed the plaintiff for complaints of insomnia, headaches, and neck and back pain. His examination demonstrated left shoulder tenderness and tenderness and stiffness of the neck and back. He planned chiropractic therapy.
- [63] Dr. Sawhney saw the plaintiff again following MVA #2 and thereafter periodically reassessed him for the injuries he sustained in the Accidents. Dr. Sawhney remains his family doctor. He diagnosed the plaintiff with the following injuries which he opined were caused by the Accidents:
- a) A sprain/strain soft tissue injury to the neck and back;
  - b) Chronic pain (i.e., greater than six months' duration);
  - c) Insomnia;
  - d) Cervicogenic headaches;
  - e) Cervical radiculopathy (now resolved); and
  - f) Depression and anxiety.
- [64] Dr. Sawhney recommended the plaintiff:
- a) Pursue one or more of the following treatment options:
    - i. Chiropractic therapy;
    - ii. Registered massage therapy;

iii. Physiotherapy; or

iv. Active rehabilitation;

- b) Increase his activity level;
- c) Take prescription medication for pain and insomnia, as needed;
- d) Follow-up with a physiatrist for ongoing management of chronic pain; and
- e) Follow-up with a psychiatrist or psychologist for mental health issues.

[65] In Dr. Sawhney's opinion, the plaintiff will likely have long-term chronic pain and not make a full recovery. He said the plaintiff's pain will likely "wax and wane" and he will probably have good and bad days. Dr. Sawhney's plan is for the plaintiff to choose from his recommended treatment options as necessary to manage his symptoms. In cross-examination, he admitted he intended this treatment to be intermittent (to manage flare-ups in pain) rather than ongoing care. He conceded the range of treatment sessions he suggested is inexact and that his recommendations are general. He agreed micro breaks, an improved ergonomic set-up, and a sit/stand desk might assist the plaintiff at work.

[66] Dr. Sawhney based some of his statements in his report on the plaintiff's completed self-report questionnaire regarding the effect of his injuries on his function. Dr. Sawhney agreed he required no particular expertise to interpret the plaintiff's answers on this questionnaire. He performed no vocational or functional capacity evaluations and did not assess the plaintiff outside his medical office. In the circumstances, I give this evidence minimal weight. Dr. Sawhney was aware the plaintiff has a sedentary job with no heavy labour requirements. In his opinion, the plaintiff's injuries may impact, but do not prevent, his work as an accountant. In cross-examination, he admitted he did not know the plaintiff had recently been promoted.

[67] Dr. Sawhney based his estimated cost of the treatments he recommended on his informal discussions with other patients. Those cost estimates were unsupported by any documentary evidence.

### **Dr. Giantomaso, Physiatrist**

[68] Physiatrist, Dr. Tony Giantomaso, assessed the plaintiff on June 21, 2018 and authored a report dated July 19, 2018. His community practice focuses on the management of chronic and post-traumatic pain. He was qualified as an expert in the area of physical medicine and rehabilitation.

- [69] Dr. Giantomaso said the plaintiff's area of maximal discomfort is his low back. He noted the plaintiff experiences constant low back pain at work, progressive neck and upper back pain when sitting during a workday, and increased stiffness at the end of the work day. He said the plaintiff does not usually experience headaches. He noted the plaintiff's past medical history was significant for obesity and a right ACL injury.
- [70] Dr. Giantomaso reviewed the documentation provided to him, noting the plaintiff received limited follow-up treatment for MVA #1 between September 2015 and April 2016. A March 17, 2018 MRI of the plaintiff's cervical spine demonstrated mild degenerative changes which Dr. Giantomaso confirmed were unrelated to the Accidents.
- [71] Dr. Giantomaso completed full musculoskeletal and neurological examinations and recorded the following findings:
- a) The plaintiff is significantly overweight and deconditioned;
  - b) Reproducible trigger points were identified in the upper trapezius, levator scapulae, mid-cervical paraspinals (from T4-5 on the right side and bilateral L3 to L5-S1, with discomfort on deep palpation);
  - c) Some mild hypertonicity was present, mostly in the cervicothoracic region;
  - d) Range of motion was somewhat limited in extension; and
  - e) Range of motion of the lumbar region was limited in flexion and extension and caused pain.
- [72] Dr. Giantomaso opined the following diagnoses were caused by MVA #1:
- a) Chronic post-traumatic cervical sprain-strain injury consistent with a WAD [whiplash-associated disorder]-II injury;
  - b) Chronic post-traumatic thoracic sprain-strain injury grade 1 - 2;
  - c) Chronic post-traumatic lumbar sprain-strain injury grade 1 - 2; and
  - d) Resolved contusions, abrasions, and abdominal and knee pain.
- [73] Dr. Giantomaso opined MVA #2 aggravated the plaintiff's cervical, thoracic, and lumbar soft tissue injuries. He confirmed the plaintiff suffered no peripheral nerve or spinal cord injury and that no further imaging studies are indicated.
- [74] Dr. Giantomaso made the following treatment recommendations:
- a) Further active rehabilitation to address core strengthening, scapular and cervical stabilization, and progressive aerobic and resistance training;
  - b) Nutritional counselling and weight loss to improve general health and endurance for work and daily activities;
  - c) An ergonomic assessment of the plaintiff's work station;

- d) Occasional passive therapies to address pain flare-ups, as necessary; and
- e) Oral medications, if all conservative therapies fail.

- [75] In Dr. Giantomaso's opinion, the plaintiff will likely experience some degree of chronic pain in the future. He would expect most improvement to occur within the first 12 months following the Accidents and testified that patient prognosis is generally worse following more than one whiplash injury. Dr. Giantomaso's treatment recommendations form part of a long-term pain management strategy. While they are not curative and will not change the plaintiff's diagnosis, he said the plaintiff may have less pain and improved function if he follows them.
- [76] Dr. Giantomaso summarised the plaintiff's self-described limitations in his report. He suggested a more quantitative and qualitative analysis would require a functional capacity evaluation. In cross-examination, he admitted he does not consider the plaintiff's injuries to be catastrophic but rather assesses them as mild to moderate. While the plaintiff has some decreased capacity and tolerance, he is still able to function. He agreed the plaintiff functions and copes fairly well with his injuries, noting he was not running marathons before the Accidents and is not doing so now. He accepted the plaintiff is significantly overweight and had some barriers before the Accidents. For that reason, he recommended the plaintiff engage in a chaperoned active rehabilitation program. He agreed studies have demonstrated that patients with good endurance and core strength generally cope better with pain.

### **Dr. Chuck Jung, Psychologist**

- [77] Registered clinical psychologist, Dr. Chuck Jung, assessed the plaintiff on September 11, 16, and 23, 2019. He interviewed the plaintiff's wife separately on September 27, 2019 and authored a report dated October 10, 2019. He was qualified to offer expert opinions as a registered clinical psychologist.
- [78] Dr. Jung administered a Personality Assessment Inventory test and noted a mild elevation of the validity score, indicating some element of exaggeration in the plaintiff's self-reports. Dr. Jung said this score could indicate a cry for help, an extremely negative self-evaluation, or deliberate distortion.
- [79] In Dr. Jung's opinion, the plaintiff meets the DSM-5 diagnostic criteria for an adjustment disorder with depressed mood and anxiety and specific phobias related to traffic and driving. He concludes these psychological problems are consistent with cumulative stress from the Accidents and a corresponding need to adapt to his physical injuries and resulting limitations. Dr. Jung opines the psychological problems the plaintiff suffered after the Accidents made the normal challenges of young adulthood more difficult for him.

- [80] At the time of Dr. Jung's assessment, the plaintiff reported ongoing sporadic sadness (although he said he is able to pull himself out of these moods), improved driving (although he remains cautious), and occasional nightmares.
- [81] Because the plaintiff has received no psychological intervention to date, Dr. Jung said it is difficult to determine his prognosis. The plaintiff has continued to pursue his chosen career path, a fact Dr. Jung agreed indicates strong resilience and a motivation to move forward in life. Dr. Jung anticipates psychological intervention would improve the plaintiff's emotional state and psychological functioning. While he testified the plaintiff's problems are treatable, he was unable to confirm treatment would be curative as the plaintiff has not yet had any psychological intervention. Dr. Jung recommended an initial round of 24 psychological counselling sessions, possibly followed by a second round. He said the plaintiff remains vulnerable to psychological problems if his pain persists.
- [82] In cross-examination, Dr. Jung confirmed the plaintiff declined his family doctor's suggestion to take antidepressant medication following MVA #1. Dr. Jung administered screening tests for anxiety and depression; the results indicated mild anxiety and moderate depression. Dr. Jung admitted a screening test is not comparable to a thorough mental health assessment.
- [83] Dr. Jung admitted the first documented reference to psychological issues in the medical records he reviewed is about one year after MVA #1, outside the three-month window contained in the DSM diagnostic criteria for an adjustment disorder. While Dr. Jung agreed timely psychological treatment affects a patient's recovery and prognosis, he said patients do not always have the necessary insight to appreciate they have psychological problems.
- [84] Dr. Jung admitted that patients tend to score high on the Beck Depression Inventory. Based on his cumulative assessment, Dr. Jung interpreted the plaintiff's result on this test as moderate. He noted the plaintiff attended work and school, wrote exams, and was able to do his job after the Accidents. He agreed the plaintiff is functional but said his psychological problems make things more difficult for him. While the plaintiff has some ongoing anxiety related to the Accidents, Dr. Jung admitted the fact he continues to drive is a positive sign. He agreed the plaintiff's sadness is sporadic only and that the plaintiff is intelligent, resilient, enjoys his work, and has many strengths. He is married, has a supportive wife and family, a new job, and is about to become a parent. Given these positive factors, Dr. Jung opines psychological intervention will improve the plaintiff's mental health.

### **Derek Robins, Occupational Therapist**

- [85] Occupational therapist, Derek Robins, performed an ergonomic assessment at the plaintiff's Hard Rock workplace on December 20, 2018. He authored two reports: one dated December 20, 2018, and an addendum report dated September 17, 2019. He was qualified to give expert opinion evidence in the area of occupational therapy.

- [86] Mr. Robins observed the plaintiff for approximately one hour and 45 minutes at the end of the plaintiff's workday. Because the plaintiff had attended a medical appointment that morning, he had not completed a full work day on the day of Mr. Robins' assessment. Based on his observations and information obtained from the plaintiff, Mr. Robins recommended the plaintiff obtain a high quality personalised work chair and additional items to improve the ergonomic setup of his workstation. He recommended a second OT visit to the plaintiff's workplace to ensure proper equipment set-up.
- [87] In cross-examination, Mr. Robins admitted he was unaware the plaintiff had secured a new job since his December 20, 2018 assessment. While he agreed his recommendations were adapted to the plaintiff's Hard Rock workplace, he said the plaintiff still requires a personalised work chair. He agreed the plaintiff's main work challenge is the need for prolonged sitting. He said the plaintiff could consider a sit/stand desk if he has ongoing discomfort after being fitted for a suitable work chair.

### Mark Gosling, Economist

- [88] Economist, Mark Gosling, was qualified to give expert opinion evidence regarding economic losses in personal injury claims. He estimated the plaintiff's past and future income loss arising from an assumed two-year delay in obtaining his CPA designation. He authored a report dated January 7, 2019, setting out his calculations and employment income multipliers.
- [89] Mr. Gosling provided three different estimates of income loss based on assumptions the plaintiff's earnings would have been (and will be) consistent with:
- i. Averages for B.C. male accountants (based on the National Occupational Classification 1111 for financial auditors and accountants) as indicated by 2016 Census data; and
  - ii. Median (i.e., the earnings level at which half of respondents have lower earnings and half have higher earnings) or mean (i.e., average) earnings data from the 2017 CPA Profession Compensation Study Report.
- [90] Mr. Gosling also relied on Statistics Canada life tables for BC males to calculate average survival probability. His estimates of past and future income loss are summarised below.

2016

CPA Study

Census

Median

Mean

January 1, 2018 to Trial Absent-Accident

\$64,429

\$87,086

\$104,963

With-Accident

\$62,744

\$62,744

\$62,744

Difference (Pre-Tax)

\$1,686

\$24,343

\$42,219

Difference (Net of Tax/El)

\$1,129

\$17,438

\$30,061

Trial Date Onward Absent-Accident

\$2,080,672

\$2,679,504

\$3,555,737

With-Accident

\$1,964,992

\$2,536,390

\$3,328,729

Difference (Pre-Tax)

\$115,680

\$143,114

\$227,007

- [91] Mr. Gosling appropriately offered no opinion about whether or not the assumptions he was asked to make were reasonable. He agreed that, if the dates plaintiff's counsel gave him were incorrect, his estimates would require adjustment.

### **Dr. Richard Kendall, Orthopedic Surgeon**

- [92] Dr. Richard Kendall, an orthopedic surgeon since 1995, was qualified as an expert in the area of orthopedic surgery and medicine. His practice includes the treatment of trauma patients who have sustained soft tissue injuries. He assessed the plaintiff at the defendants' request on December 20, 2018 and authored a report of the same date.
- [93] Dr. Kendall opined the plaintiff sustained soft tissue injuries to his neck and upper and lower back in MVA #1. He noted the plaintiff reported being 70 to 80% recovered and experiencing ongoing improvement in his condition at the time of MVA #2. Dr. Kendall concluded MVA #2 aggravated the plaintiff's mid and low back symptoms. He found no evidence of any fracture, dislocation, structural or nerve root injury and no focal neurological deficits or surgical lesions on examination. He understood the plaintiff had no headache issues and that his neck was unaffected by MVA #2, saying the plaintiff mentioned no neck or leg symptoms on assessment.
- [94] At the time of his assessment, the plaintiff was attending physiotherapy and massage therapy infrequently. In Dr. Kendall's opinion, it is unlikely those treatments were providing any lasting benefit and he recommended they be discontinued. The plaintiff reported being about 70% recovered from the injuries he had sustained in the Accidents at the time of Dr. Kendall's December 2018 assessment.
- [95] Dr. Kendall noted the plaintiff had gained a significant amount of weight after the Accidents and was severely deconditioned at the time of his assessment. The plaintiff presented with an obese abdomen and poorly developed arm and leg muscles. He demonstrated poor abdominal strength and was unable to sit up from a lying position without rolling onto his side. Dr. Kendall emphasised the importance of weight loss and an improved fitness routine to improve the plaintiff's core strength, flexibility, spinal mechanics, and general health, to relieve low back strain, and to manage ongoing back pain.
- [96] Dr. Kendall recommended no investigations or specialist referrals and concluded there was nothing to suggest the plaintiff could not continue to work as an accountant. He agreed micro breaks during the workday would help him re-establish normal body mechanics and manage his ongoing symptoms.

### **CREDIBILITY AND RELIABILITY OF EVIDENCE**

- [97] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, as follows:

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

[98] The plaintiff presented as a personable self-described optimist. His credibility was not seriously challenged and I conclude he did his best to answer questions in a responsive and forthright manner.

[99] However, I am of the view he demonstrated a tendency to paint a somewhat rosy picture of his life, work, and career prospects before the Accidents. He provided lengthy and detailed accounts of the Accidents, their immediate aftermath, and his brief, objectively unremarkable, stay at SMH following MVA #1. I found that evidence to be somewhat disproportionate relative to the severity of his injuries. Contrary to his lawyer's suggestion, I would not describe the plaintiff as stoic. By contrast, I found him to be quite focused on his ongoing symptoms, limitations, and perceived negative impact of the Accidents on his life, income, and work trajectory. He overlooked or excused any shortcomings in his own educational or work performance under the guise of being an optimist.

[100] In cross-examination, the plaintiff referred to his "argument" that the Accidents caused a two-year delay in him obtaining his professional accounting designation, rather than answering questions directly. He anticipated some questions and occasionally offered explanations which were not requested. His answers were not always responsive to the questions asked and he expounded on some matters unnecessarily. It was my general impression the plaintiff remains quite fixated on the Accidents and his perception of how his life would now be different if they had not occurred. I am mindful of the slightly elevated validity test score described by Dr. Jung following his administration of a Personality Inventory Test.

[101] The photographs and video evidence introduced during the plaintiff's cross-examination of him engaged in various activities at his stag party, wedding, and honeymoon depict an exuberant, engaged, and outgoing individual enjoying the company of family and friends, with no apparent limitations. At a minimum, I find that evidence supports the conclusion there may be some discrepancy between the plaintiff's perceived and actual functional capacity. For these reasons, while I found the plaintiff to be a credible witness, I conclude

he was not a consistently reliable historian.

- [102] The plaintiff's wife, brother and friend all corroborated the plaintiff's evidence regarding the impact the Accidents have had on his physical and mental health and described changes they have observed in him. While I found them all to be candid witnesses, it is clear they are closely aligned with the plaintiff, a fact I conclude may have inadvertently coloured some of their perceptions.
- [103] Ms. Atwal gave evidence as the plaintiff's friend and former mentor. She did not purport to speak on behalf of BCIT or the CGA or CPA programs. Cross-examination revealed some obvious gaps in her knowledge. She admitted to confusion regarding terminology, the CGA/CPA program requirements, and whether or not some of the plaintiff's past jobs would have qualified towards his professional work experience, if he had submitted them for consideration. Ultimately, while I appreciate Ms. Atwal was attempting to be helpful, I have considered these limitations in assessing the weight to be given her evidence.
- [104] I found the medical and other experts who testified to be objective, fair, and credible witnesses. In my view, there were no significant material discrepancies in the evidence of Dr. Giantomaso and Dr. Kendall regarding the plaintiff's diagnosis, prognosis, and treatment recommendations. Both agree he will likely have some degree of chronic back pain indefinitely and that it could probably be alleviated by weight loss, increased activity, and improved overall fitness. The plaintiff suggested Dr. Kendall did not review Dr. Sawney's updated clinical records and, accordingly, failed to appreciate he has ongoing neck pain. However, on the plaintiff's own evidence, his predominant physical complaint is back pain. While I accept the plaintiff may have ongoing neck pain, I conclude he did not mention it to Dr. Kendall on assessment.

## LIABILITY

### Causation

- [105] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [106] The primary test for causation asks: but-for a defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23. Causation must be established on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

- [107] The most basic principle of tort law is that a plaintiff must be put in the position he would have been in but for the defendant's negligence. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person.
- [108] Justice Lambert summarized the principles to be applied in assessing claims of psychological injury in *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.) at paras. 12-13. General causation principles apply to both psychological and physical injury. The concept of "reasonable foreseeability" is qualified when an injury is psychiatric. When a psychiatric injury is consequential to a physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury, even if it was not foreseeable: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 74.
- [109] The defendants admit liability for the Accidents. The plaintiff had no significant pre-existing medical issues before the Accidents. I am satisfied the Accidents caused his soft tissue injuries, back, neck, abdominal, knee, left shoulder and left arm pain, headache, insomnia, nightmares, anxiety, and depression.

## DAMAGES

### Non-Pecuniary Damages

- [110] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties; fairness is measured against awards made in comparable cases. Such cases, while helpful, serve only as a rough guide. Each case depends on its unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [111] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life.

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

- (g) impairment of family, marital and social relationships;

- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and the plaintiffs stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [112] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and his ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [113] The court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.).
- [114] In cross-examination, the plaintiff admitted his physical injuries from MVA #1 were 70 to 80% recovered before MVA #2, and that he was about 70% recovered from the injuries he sustained in the Accidents by December 2018. His predominant ongoing complaint is low back pain, aggravated by extended periods of sitting. He agreed his driving anxiety has improved since the Accidents. He has some ongoing sporadic sadness, diagnosed by Dr. Jung based on a screening test as moderate depression, which, to date, has not been treated. The plaintiff said he has "become more at ease" with his involvement in the Accidents.
- [115] I accept the plaintiff now has chronic daily back pain which is likely to persist indefinitely, despite treatment, and Dr. Giantomaso's evidence that patient prognosis is generally worse following more than one motor vehicle accident. The plaintiff has undergone substantial passive treatments to date. He has continued to work full-time, except for one six-week absence following MVA #2, and for brief intervals between jobs. He has done so with no formal accommodations at work, although he has been assessed for an ergonomic work station at Core Living. His mild anxiety is now improved and does not preclude him from driving. His sporadic sadness does not impair his ability to work.
- [116] While I accept his life has changed and he is less active since the Accidents, the evidence indicates the plaintiff functions quite well. He is independent in all the usual activities of daily living, except for some housework, and is able to participate in most things, although not always to the same extent he once did. He travelled to Whistler in 2015 or 2016 and drove an ATV. He enjoyed white water rafting with friends in May 2017, approximately eight months after MVA #2. He participated in a treetop adventure and backwards bungee jumping activities organised by friends at his stag party. He sat, albeit with some difficulty, cross-legged on the ground for approximately three hours at his July 2017 wedding. He danced Gangnam style at his reception and rode a camel on his honeymoon. He made the two-day journey by air to India after the Accidents, enjoyed sightseeing activities while there, and admits he had fun on this trip. I conclude the plaintiff's participation in these activities is consistent with Dr. Giantomaso's description of the plaintiff's symptoms as mild to moderate in severity.

- [117] The plaintiff completed the Grouse Grind in October 2019 although doing so was difficult and persuaded him he would not want to repeat the experience. While he was slow, he completed the Vancouver Sun Run in 2019. Although he does so with modifications, the plaintiff has participated in intense active rehabilitation classes since the Accidents.
- [118] The plaintiff's wife, brother, and friend, Ms. Atwal variously described the plaintiff as fun, energetic, happy, motivated, and driven before the Accidents and as generally less active and engaged thereafter. Mrs. Sehra admitted she is sometimes frustrated by what she perceives to be the plaintiff's overly cautious approach to driving since the Accidents, noting he could earn more money working in Vancouver but that he is uncomfortable with the long commute. Mr. and Mrs. Sehra both agreed his driving anxiety has improved.
- [119] The plaintiff and his brother both testified that they played basketball, went to the gym, and lifted weights together before the Accidents and that the plaintiff is now less physically active. However, the plaintiff is now in his thirties, married, and expecting his first child. He and his brother are both working full-time. In that context, I do not find it surprising that their relationship has evolved since they were young single students.
- [120] The plaintiff has now completed the academic and work experience portions of his CPA program and anticipates obtaining his professional designation this spring. He works full-time in a job he likes and to which he is well suited. He has an accommodating employer who has agreed to provide him with a personalised chair and a sit/stand desk. He takes obvious pride in his recent promotion to the position of Assistant Comptroller. He is happily married, eagerly awaiting the birth of his first child, and enjoys the support of a close-knit family and wide circle of good friends.
- [121] The plaintiff assesses general damages in the amount of \$90,000 to \$100,000, relying on the following decisions in support of such an award:
- a) Harry v. Powar, 2018 BCSC 845 [\$85,000, adjusted for inflation to approximately \$87,400];
  - b) Willett v. Rose, 2017 BCSC 627 [\$90,000, adjusted for inflation to approximately \$94,600];
  - c) Villing v. Husseni, 2015 BCSC 1604 [\$85,000, adjusted for inflation to \$94,600]; and
  - d) Kelly v. Kalra, 2019 BCSC 1305 [\$120,000, adjusted for inflation to \$121,100].
- [122] The defendants submit \$40,000 is an appropriate award for non-pecuniary damages, citing Mothe v. Silva, 2015 BCSC 140 in support of that assessment.
- [123] I am of the view the decisions relied on by the plaintiff are more closely aligned on their facts to the one before me. While Dr. Jung did not diagnose the plaintiff with PTSD, he observed there is a trauma influence which pervades his diagnoses of mild anxiety and moderate depression. I have considered the fact it has now been more than five years since MVA #1, and more than more than three years since MVA #2, and the plaintiff's physical and psychological injuries are not resolved. While I accept weight loss, further active rehabilitation therapy, and counselling may improve his fitness and level of function, I

conclude he will probably experience some degree of chronic pain, with its corresponding limitations, indefinitely.

- [124] Recognising each case is unique and having regard to all the evidence, the relevant authorities, and the parties' submissions, I assess the plaintiff's non-pecuniary damages in the amount of \$85,000.

### Duty to Mitigate

- [125] The defendants argue the plaintiff has failed to mitigate his damages by declining antidepressant medication and failing to engage in timely mental health counselling after the Accidents.

- [126] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, at para. 234. Once a plaintiff has proved the defendant's liability for his injuries, the defendant must prove the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389, at para. 202.

- [127] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 sets out the test for a failure to mitigate by not pursuing recommended treatment as follows:

In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

- [128] The plaintiff said he made a conscious choice not to take anti-depressant medication after the Accidents as he did not wish to develop a dependency on it. To date, he has taken no antidepressant medication or sleep aides. He agreed he has been able to manage so far without doing so and hopes his condition will improve further. The plaintiff agreed he told no one he was having psychological difficulties after the Accidents until 2018. He said this was not something he liked to discuss. He told no one he was suffering depression until 2019.

- [129] Dr. Jung testified the plaintiff's mental health issues are treatable and, given his many strengths, treatment will likely improve his mental health. He also said that, although the treatment of psychological issues can help patients cope, they remain vulnerable to psychological difficulties if their pain persists.

[130] I accept Dr. Jung's evidence that not all individuals have the necessary insight to recognise they are experiencing mental health difficulties which might benefit from treatment and the plaintiff's evidence that he did not think he was depressed after the Accidents. While the evidence supports the conclusion mental health intervention is likely to assist the plaintiff, I am not persuaded he has failed to mitigate his damages by not pursuing such treatment earlier.

[131] In my view, the plaintiff's stated wish to avoid becoming dependant on antidepressant medication or sleep aides was not unreasonable. He testified he prefers to avoid prescription medication and for that reason, takes Advil or Tylenol for his complaints of physical pain. I am satisfied the plaintiff did not appreciate he might benefit from counselling before he met with Dr. Jung in the context of this litigation. The plaintiff testified he was busy in late 2017 with work, school, and his wedding preparations and thereafter with preparation for this trial and accordingly was not focused on seeking counselling. I accept he is now willing to engage in this treatment. I conclude the evidence does not support a finding the plaintiff has failed to mitigate his damages.

#### Past Loss of Income

[132] The defendants admit the plaintiff's claim for past income loss of \$4,726.27.

#### Future Loss of Income

### Alleged Delay in Obtaining CPA Designation

[133] The plaintiff seeks damages arising from an alleged two-year delay in obtaining his CPA designation. He argues that, but for MVA #2, he would have obtained this designation by late 2017 or early 2018. Using the multipliers provided by economist, Mr. Gosling, the plaintiff quantifies this loss in the amount of \$201,281.87. The defendants dispute this claim, which they say is unsupported by the evidence.

[134] The plaintiff relies on *Williams v. Nekrasoff*, 2008 BCSC 1520. In that case, Justice Smith made the following comments:

[34] Of greater significance is the fact that he has been, and will continue to be, unable to take a full course load, which means that his graduation and entry into his ultimate career will be delayed. The plaintiff has produced economic calculations showing how delayed entry into the workforce can have a lifetime impact on earnings

[35] Those calculations assume not only an immediate loss from delayed entry, but also a continuing loss, because the plaintiff will always be earning less than others of the same age who entered the profession earlier. I do not accept the latter assumption because, once the plaintiff enters his chosen profession or career, his income will depend on a variety of factors that would have been present in any case. For example, he may demonstrate abilities or have employment opportunities that result in earning more than the average for his age peers, even though he has less experience.

- [135] In Williams, Smith J. concluded the plaintiff ought to be compensated for the time he would be in school when, but for the accident, he would already have had the opportunity to be working and earning an income in his field. This was factored into the overall award for lost earning capacity "to a small degree": Williams at para. 36.
- [136] The plaintiff's claim for alleged academic delay is premised on assumptions that, but for MVA #2:
- a) He would not have been fired from his position at Falcon;
  - b) He would have remained at Falcon and progressed to intermediate and senior level accounting work there; and
  - c) His Falcon work experience would have counted towards the 24 months of professional level experience he required to obtain his CGA designation.
- [137] For the reasons which follow, I am not persuaded the evidence supports those assumptions as sound.
- [138] It is common ground the plaintiff was required to do the following in order to satisfy the three core requirements of the CGA Legacy program:
- a) Completion of the CGA courses by October 2015;
  - b) Completion of a bachelor's degree by June 1, 2020; and
  - c) Completion of 24 months of approved CGA professional work experience by August 31, 2018.
- [139] A failure to meet any one of those requirements meant transfer from the CGA Legacy program to the CPA program which required 30 months (rather than 24 months) of professional work experience. The plaintiff met the first two of these requirements within the applicable deadlines. At issue is whether he could have met the third requirement in time but for the Accidents.
- [140] In order to satisfy the professional work experience requirement, the plaintiff agreed he had to submit reports outlining his work history to the CPA for approval before the specified deadline. On February 21, 2017, he sent an email to Ms. Lam, CPA Legacy Practical Experience Officer, to inquire about the professional work experience he required to obtain his CGA designation. He expressed concern he might not have had the proper job titles and might not obtain his designation. He requested guidance.
- [141] The same day, Ms. Lam sent the plaintiff a lengthy email reply, which he admitted he received and read. He agreed Ms. Lam was a resource person on whom he relied to determine whether he had the necessary professional level experience. In her emailed reply, Ms. Lam provided the plaintiff with examples of professional level accounting experience (including, for example, the preparation of financial statements, working with budgets, financial analysis, preparing financial reports for senior management and supervising junior accounting staff). She noted that bookkeeping, accounts receivable, and

accounts payable are typically considered foundational to intermediate work experience which does not qualify for work experience credit under the CGA PERC program. Ms. Lam noted she had reviewed the plaintiff's resume and it appeared to her that he was working at the junior/intermediate level. She encouraged him to submit an employment file for a more in-depth review by the PERC assessment team if he felt he was working at the professional level.

- [142] In cross-examination, the plaintiff admitted he did not submit his Oldcastle work experience for review until June 1, 2017. On July 14, 2017, he was informed he would not meet the August 31, 2018 deadline for completing his 24 months of professional work experience. At that point, he agreed he had submitted only his Oldcastle work experience for consideration, and that he had not reported his Falcon experience. He conceded he did not know how his Falcon experience would have been evaluated, if he had submitted it. He admitted that, by July 2017, following discussion with Ms. Lam, he had already transitioned from the CGA program to the CPA program (which meant he needed to complete an additional six months of professional work experience).
- [143] The plaintiff maintains he was terminated from Falcon as a result of MVA #2. I am not persuaded the evidence supports that conclusion. No one from Falcon explained why the plaintiff was fired. In cross-examination, the plaintiff initially said he did not know why he was fired; he later said he was advised it was due to a breakdown in the professional relationship and that he believed he was terminated because he had taken six weeks off work following MVA #2. While I accept that belief is genuine, I conclude it is ultimately speculative and insufficient to form the basis for an award of damages.
- [144] The plaintiff was employed at Falcon for about seven months, from March 21, 2016 until October 17, 2016. He admitted his experience at Falcon was limited to mostly junior level accounting work and that he was just beginning to get some intermediate level work when he was terminated. While he admitted in cross-examination that he hoped he would eventually receive senior level work at Falcon, he agreed that was not guaranteed. Beyond mere speculation, I am unable to assess the likelihood the plaintiff would have progressed to senior level work at Falcon, if he had not been terminated.
- [145] Ultimately, I find Ms. Lam's February 2017 email correspondence to the plaintiff to be the most persuasive evidence regarding the nature of his accumulated work experience to that point. Based on those communications, I conclude the plaintiff was not on track to complete his professional work experience on time. While I accept the plaintiff and Ms. Atwal began in the same program and will end up with the same designation, I do not agree they followed a comparable career path. The plaintiff's transcripts do not reflect a consistently strong academic performance. It was necessary for him to upgrade some of his marks before enrolling at BCIT; he deferred some examinations and failed some courses. The plaintiff encountered early struggles at Ferrari which he conceded involved him making careless mistakes. He was unhappy he did not receive a raise he thought he deserved at Atlas, after being fired at Falcon. Ms. Atwal described no similar difficulties.

She followed an accelerated career path and worked while she completed her studies. Unlike the plaintiff, she submitted more than two years of senior level work experience before the deadline. For these reasons, I do not find it useful to compare her career trajectory with that of the plaintiff.

- [146] Following his termination from Falcon, the plaintiff promptly secured a position at Atlas where he worked for about 18 months, from November 1, 2016 until May 11, 2018. He said he had progressed to doing some senior level work towards the end of his employment there. He agreed the CPA did not recognise his work experience at Falcon but refused to admit the time he spent there (doing junior and intermediate level work) caused him any delay in obtaining his CPA designation. In cross-examination, he agreed he would defer to the judgment of the CPA PERC assessment team as to whether or not his Falcon experience would have qualified as professional level work, conceding he did not submit it for evaluation. Neither Ms. Lam nor anyone formally affiliated with the CGA or CPA program was called at trial to address that issue.
- [147] Ultimately, I conclude the evidence does not permit me to determine whether or not the plaintiff would have been given credit for his Falcon experience, if he had submitted it for approval. I find Ms. Lam's February 2017 email correspondence to be significant. She distinguished "junior and intermediate level" experience (i.e., like that obtained by the plaintiff at Falcon and Atlas) from "professional level" experience. She described the plaintiff's experience as appearing to her to be at the "junior/intermediate level", while inviting him to submit an employment file (which he did not do) if he felt he was working at the "professional level". I conclude that correspondence strongly suggests the plaintiff's Falcon experience would not have counted towards the "professional level" experience he required to obtain his designation and infer that is likely why the plaintiff did not submit it to Ms. Lam for consideration.
- [148] For these reasons, I decline to award any damages for academic delay. I am mindful of the decision of the Court of Appeal in *Morris v. McEachran*, (1996) 23 B.C.L.R. (3d) 256 (C.A.) at 18 - 21, that it is an error to treat future income loss and diminished earning capacity as separate subjects of inquiry, as both exist under the same head of damage.

### **Loss of Future Income Earning Capacity**

- [149] The plaintiff also seeks damages of \$138,000 to \$184,000 for an alleged loss of future income earning capacity, based on three to four years of his current net income. He says he is now less competitive because his ongoing physical and mental difficulties prevent him from commuting long distances to work and working overtime. The defendants dispute this claim and say the plaintiff has suffered no future loss of earning capacity.
- [150] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The

assessment of loss must be based on the evidence, and not the application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232 at para. 19. The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1, at para. 18.

- [151] To the extent possible, the plaintiff should be put in the position he would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, at para. 185. The essential task of the Court is to compare the plaintiff's likely future working life without the accident with that he will have after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144, at para. 32.
- [152] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both are correct. The "earnings approach" is generally more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. When the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.
- [153] The earnings approach involves a form of math-oriented methodology such as: i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert* at para. 233.
- [154] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert* at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56. Although the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis for the award: *Morgan* at para. 56.
- [155] The principles that apply in assessing the loss of future earning capacity were summarized by Justice Low in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the

accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

### Ability to Commute

[156] While the plaintiff testified he is unable to commute into Vancouver for work (where he says he could earn more than in Surrey), he was doing so after MVA #1 while employed at Ferrari and Lululemon. On his own evidence, his driving anxiety is mild, has improved, and does not prevent him from driving. On the evidence of Dr. Jung, it is likely to improve further with counselling. None of the experts indicated the plaintiff's back pain precludes him from commuting into Vancouver or elsewhere to work. The plaintiff has a current sitting tolerance of two to three hours, consistent with his demonstrated ability to sit in the witness box at trial. He agreed his back pain is now 70% improved since the Accidents. It may improve further if the recommendations of Dr. Giantomaso and Dr. Kendall are followed. On all the evidence I infer the plaintiff prefers to work close to home and has made a personal choice to do so. I am not persuaded he is unable to commute to Vancouver or elsewhere for work because of the Accidents.

### Overtime Hours

[157] The plaintiff's long term dream has always been to work and retire as an accountant. He is not considering altering those career plans. He agreed he has worked 8 - 10 hour days and enjoyed success in many different accounting jobs since the Accidents. He described himself as a hardworking and highly employable person whose interpersonal skills "shine through". He consistently managed to work 9 - 10 hour days at Atlas during the busy winter months, albeit with some difficulty. He admitted working long hours at Hard Rock when his team had only two members and reported receiving good performance reviews from Great Canadian. Since the Accidents, he has received regular pay increases and recently been promoted to the role of Assistant Comptroller at Core Living.

[158] Dr. Sawhney suggested the plaintiff may be at a competitive disadvantage because his chronic pain, headache, anxiety, depression, insomnia, and limited sitting tolerance could affect his efficiency and concentration. The evidence does not suggest the plaintiff is having any difficulty concentrating or working efficiently.

- [159] The plaintiff agreed his main challenge at work is sitting for prolonged periods due to back pain. He admitted his job allows him to take short breaks during the day to stand, stretch, or take a short walk. He now appreciates the importance of doing so during his work day. He has a personalised chair, an ergonomic work station, and manageable eight-hour days. He anticipates receiving a sit/stand desk from his employer shortly.
- [160] Based on his own self-reports, I accept the plaintiff may be limited in his lifting capacity and ability to engage in heavy physical labour as a result of the Accidents. The plaintiff admitted the job of an accountant is sedentary. On all the evidence, I conclude it is highly unlikely he will ever abandon his dream job as an accountant to work as a manual labourer or in a physically demanding position. The plaintiff has clearly worked hard to obtain his professional designation which represents a significant achievement and is an obvious source of pride for him and his family. Accordingly, I find this modest loss of earning capacity to be of minimal practical significance to the plaintiff.
- [161] The plaintiff is relatively young and has not exhausted all treatment options available to him. On the evidence of Dr. Jung, Dr. Giantomaso, and Dr. Kendall, I conclude there is reason for him to be optimistic that his mental and physical condition may improve with further treatment. On their evidence, cognitive behavioural therapy, weight loss, and physical fitness will better equip him to manage his physical and psychological difficulties, reduce symptoms, and promote good sleep and improved mood. None of the experts who testified at trial suggested the plaintiff's condition is unstable or likely to deteriorate over time or that he cannot work as an accountant.
- [162] Ultimately, the question I must ask whether there is a real and substantial possibility, beyond mere speculation, that the Accidents have impaired the plaintiff's capacity to earn an income. On all the evidence, I conclude the plaintiff will almost certainly continue working full-time as an accountant. His current employer has promoted him and given him a new title. He enjoys a reasonable work/life balance and is not required to work more than eight hours a day which the plaintiff admits he is easily able to manage. No expert testified the plaintiff's chosen career path is unsustainable. I conclude he will likely continue to work for his current employer indefinitely and that his salary will be probably be increased once he obtains his professional designation later this year. Ms. Atwal enjoyed a salary increase of almost \$20,000/year once she obtained her professional designation.
- [163] I accept the plaintiff now has daily mild to moderate chronic back and neck pain, ongoing mild anxiety (primarily related to driving), and moderate depression and that working extended hours has exacerbated his symptoms in the past, despite his demonstrated ability to work overtime. The plaintiff and Ms. Atwal testified overtime is not uncommon in the competitive accounting profession. Fortunately, the plaintiff now has the benefit of an accommodating employer, manageable hours, an ergonomic work station, and the flexibility to take short breaks as necessary during his work day. Notably, he has worked full-time continuously since the Accidents apart from one six-week medical absence after MVA #2 and when between jobs. By his own admission, he has encountered no difficulties

securing work within his chosen profession and has received consistent pay raises since the Accidents. I conclude the evidence as a whole indicates the plaintiff remains functional and competitive in his chosen career, despite the injuries he sustained in the Accidents. I accept he is a hard-working individual which has undoubtedly contributed to his success.

[164] While I conclude the plaintiff is likely to remain with his current employer indefinitely and is unlikely to encounter any significant difficulties securing a new position, I recognise it is possible he may lose his current job and that he has persistent physical and psychological symptoms several years after the Accidents. Other than asking for different chairs at Falcon and Hard Rock, the plaintiff neither received nor requested any work accommodations from past employers following the Accidents. He is able to perform his current job with only minor accommodations, in the form of an ergonomic work station and the ability to take micro breaks during the day.

[165] Ultimately, on a review of all the evidence, I am not persuaded, beyond mere speculation, that the plaintiff has suffered a compensable loss of capacity to earn an income.

### Costs of Future Care

[166] The plaintiff seeks future care costs in the range of \$12,000 to \$15,000 to fund the recommendations of Mr. Robins and Dr. Giantomaso, Dr. Jung and Dr. Sawhney. The defendants assess the plaintiff's future care costs in the amount of \$3,000.

[167] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition to the extent possible. When full restoration is not possible, the court must strive to ensure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[168] 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* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[169] Future care costs are "justified" if they are both medically necessary and 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. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.

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

### Ongoing Passive Therapies

[171] I accept the evidence of Dr. Giantomaso and Dr. Kendall that ongoing passive therapy will offer the plaintiff no further functional improvement at this stage and are therefore not recommended. Accordingly, I decline to award the cost of ongoing physiotherapy, chiropractic therapy, or massage therapy. I recognise the plaintiff is likely to have some degree of chronic pain indefinitely and, on the evidence of Dr. Giantomaso, Dr. Sawhney, and Dr. Kendall, may benefit from further passive therapy to assist in managing periodic flare-ups in his symptoms. Based on Dr. Sawhney's evidence, the cost/session of passive treatment is as follows:

- a) Chiropractic treatment: \$50;
- b) Massage therapy: \$60; and
- c) Physiotherapy: \$75.

[172] The plaintiff does not require all of these therapies and none is required on an ongoing basis. On all the evidence, having regard to the plaintiff's age, I conclude a lifetime contingency fund of \$5,000 to cover the cost of future passive therapy to manage periodic flare-ups, as necessary, is reasonable.

### Active Rehabilitation Gym Membership

[173] The plaintiff seeks \$1,800 to cover one year of active rehabilitation therapy, based on the recommendations of Dr. Sawhney and Dr. Giantomaso. Dr. Sawhney gave evidence about this cost based on informal discussions with some of his patients. The medical experts who testified at trial, including Dr. Kendall, were unanimous in recommending the plaintiff lose weight and become more physically active. All confirmed active rehabilitation offers the plaintiff many potential benefits.

[174] Dr. Giantomaso recommended 16 to 24 active rehabilitation sessions; I accept that as reasonable and conclude the plaintiff can thereafter implement what he has learned on his own. I award the cost of one year of active rehabilitation therapy in the amount of \$1,800.

## Cognitive Behavioural Therapy

- [175] The plaintiff requests \$9,360 to cover the cost of two rounds (each comprising 24 sessions) of cognitive behavioural therapy, calculated at \$195/hour (as set out in the Insurance (Vehicle) Regulation, B.C. Reg. 447/83, Part 7, s. 88 and Schedule 3.1 for psychology sessions), discounted to present value.
- [176] I accept Dr. Jung's evidence that the plaintiff's anxiety and depression are treatable and he is likely to benefit from psychological intervention. Dr. Jung recommends the plaintiff undergo an initial round of 24 counselling sessions, to be followed by a second round, as necessary. To date, the plaintiff has had only three counselling sessions. He said he has had insufficient time to focus on counselling since seeing Dr. Jung given his work commitments and the demands of this litigation. The plaintiff testified he is now receptive to cognitive behavioural therapy and willing to engage in further counselling, as recommended by Dr. Jung. It is unknown whether he will require two rounds of 24 counselling sessions.
- [177] I conclude the plaintiff's anxiety, described by Dr. Jung as mild, relates primarily to driving and his tendency to be overly cautious. The plaintiff and his wife both agreed he continues to drive, has been doing so for some time, and his anxiety has improved. The plaintiff testified it is now "half-way better", from which I conclude it is about 50% improved. On all the evidence, I conclude his anxiety is not debilitating.
- [178] I have considered the plaintiff's slightly elevated validity score in his self-reported psychological symptoms, as described to Dr. Jung. While I accept the plaintiff lacked the necessary insight to seek mental health counselling earlier, and that it was reasonable for him to decline antidepressant medication, I conclude that if his depressive symptoms were significantly disabling, he would have likely have pursued the treatment Dr. Jung recommended earlier. I accept the evidence of Dr. Giantomaso that the plaintiff is coping well with his physical limitations from the Accidents. Like Dr. Jung, I am hopeful weight loss and increased activity will improve his mood, sleep, and overall function.
- [179] For these reasons, I award the cost of 24 counselling sessions in the amount of \$4,680. I have not discounted this amount to present value as I assume the plaintiff will undertake this counselling this year. I conclude on all the evidence it would be speculative to award the cost of two rounds of counselling.

## Ergonomic Equipment

- [180] The plaintiff seeks to recover \$708.44 to \$1,048.44 to cover the costs of providing an ergonomic work station, based on the recommendations of Mr. Robins. The bulk of this amount covers the cost of a personalised ergonomic office chair (estimated by Mr. Robins in the range of \$549 - \$889). The remaining recommended items include a headset, phone shoulder rest, document holder, monitor risers and laptop riser.

[181] On the plaintiff's evidence, his current employer has now provided him with an ergonomic work station, including a personalised office chair adapted to his work site. I accept the evidence of Mr. Robins that the equipment he recommends is necessarily adapted to a particular work place. In the circumstances, I find the plaintiff's needs for an ergonomic work station have been met.

#### Special Damages

[182] The defendants admit the plaintiff's special damages claim of \$10,931.73.

#### SUMMARY

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

- a) Non-pecuniary Damages: \$85,000
- b) Special Damages: \$10,931.73
- c) Past Loss of Income: \$4,726.27
- d) Future Care Costs: \$11,480

TOTAL: \$112,138

[184] If the parties are unable to agree on costs, they may apply to speak to this issue within 30 days.

"Douglas J."

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