

CANADA / JUDGMENT

Sharma v. Day

2020 BCSC 1365

COURT

Supreme Court of British Columbia

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2020 BCSC 1365 Sharma v. Day

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharma v. Day,

2020 BCSC 1365

Date: 20200916

Docket: M1710151

Registry: Vancouver

Between:

Salesh Sharma aka Jake Sharma

Plaintiff

And

Colin Day, Yabo Pet Spa Ltd. and

Brown Bros Motor Lease Canada Ltd.

Defendants

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Plaintiff:

J.M. Green

Counsel for the Defendants:

R.F. Shirreff

R. Grewal

Place and Dates of Trial:

Vancouver, B.C.

June 15-19, 22, 24-26, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 16, 2020

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INTRODUCTION

- [1] The plaintiff suffered injuries in a motor vehicle accident that occurred on December 5, 2015 (the "Accident"). The defendants admit liability for the Accident. This trial concerned the appropriate assessment of damages.
- [2] The plaintiff was 53 years old at the time of the Accident, and 58 years old at the time of trial. At the time of the Accident, the plaintiff was a log broker. He also worked part-time as a cashier at the Real Canadian Superstore ("Superstore"). The plaintiff says the injuries he suffered in the Accident caused or contributed to the termination of his employment as a log broker and a cashier. He now works full-time as a lane closure technician and a flag person at road construction sites.
- [3] The defendants concede that the plaintiff suffered some soft tissue injuries in the Accident, but dispute their nature and severity. The defendants also dispute that the plaintiff's Accident-related injuries had any impact on his ability to continue with his pre-Accident employment. The defendants say the plaintiff has exaggerated his injuries and pain symptoms. They challenge his credibility. The defendants also say that the plaintiff did not take reasonable steps to mitigate his injuries after the Accident, and seek a reduction of damages on that basis.
- [4] The parties agree that the plaintiff's injuries were aggravated in a subsequent motor vehicle Accident which occurred on March 12, 2017 (the "Second Accident"). The plaintiff has filed an action seeking damages for the Second Accident. The defendant in the second action does not admit liability. That action has not been set for trial. The parties agree that the plaintiff can only claim damages in the present action for losses he suffered in the Accident and not for the aggravation of injuries caused by the Second Accident. This complicates the causation issue.
- [5] Accordingly, the issues to be resolved at this trial are as follows:
- i. the nature and extent of the injuries caused to the plaintiff by the Accident;
 - ii. the appropriate award of damages, if any, for the plaintiff's Accident-related injuries under the following headings:
 - (1) non-pecuniary loss;
 - (2) loss of past and future earning capacity;
 - (3) cost of future care; and
 - iii. the appropriate reduction in damages, if any, for the plaintiff's alleged failure to mitigate his loss.
- [6] The parties agree that the plaintiff is entitled to an award of \$2,051.20 for special damages.

BACKGROUND

- [7] The plaintiff currently lives in Mission, B.C. with his wife Nicole. They have been married for 20 years and have two children together: Liam who is 17 years old and Raychil who is 10. The plaintiff is also a stepfather to Nicole's two adult children from her previous relationship.
- [8] By way of providing narrative context, I will review the evidence of the lay witnesses regarding the plaintiff's pre- and post-Accident condition. Much of it is not in dispute. I will note where there are significant disputes in the evidence that affect the assessment of damages. My factual findings are set out in the Analysis section of this judgment.

The Plaintiff's Pre-Accident Condition

- [9] The plaintiff graduated from Simon Fraser University in 1993 with a Bachelor of Applied Science in Communications and a Bachelor of Business Administration. After graduation, he took a full-time job in customer service at Superstore in North Vancouver. Nicole also worked at Superstore. They began a relationship and eventually married.
- [10] The couple moved to Mission in about 2004 or 2005. The plaintiff's parents assisted them with the purchase of a house. Following the move to Mission, the plaintiff transferred to the Superstore in Maple Ridge.
- [11] In 2005, the plaintiff began working for Silver Creek Premium Products Ltd. ("Silver Creek") as a log broker. Silver Creek operated a mill in Mission processing red cedar shakes and shingles. The plaintiff's job was to find customers for the Silver Creek products. A significant component of the Silver Creek customer base is in the United States. The company also has customers in Europe and Asia.
- [12] The plaintiff started work at Silver Creek as a junior sales person. He was initially trained in his job duties by Satwinder Brar, who was then the senior salesperson at Silver Creek. The plaintiff directly reported to Devinder Brar, one of the owners of Silver Creek.
- [13] Satwinder Brar left Silver Creek around 2010. The plaintiff took over his role and customers. The plaintiff was initially a salaried employee of Silver Creek. Starting in 2010, after Satwinder's departure, the plaintiff was paid solely by commission.
- [14] The plaintiff continued to work at Superstore after taking the job at Silver Creek in 2005. In 2007, the plaintiff transferred to the Superstore in Abbotsford. He worked two to three shifts per week as a cashier. The plaintiff says he had no difficulty performing two jobs up to the time of the Accident. He did not require accommodation at either workplace. Devinder Brar testified that he had no concerns about the plaintiff's job performance at Silver Creek after Satwinder Brar left. The plaintiff appeared able to handle his increased duties and was able to take care of customer needs.

- [15] The plaintiff describes himself as leading an active lifestyle prior to the Accident. He enjoyed running and cycling. The plaintiff had a close relationship with his children. He helped them with homework and participated in activities with them. The plaintiff helped his son, Liam, practice sports such as lacrosse, baseball, and football. They went running and snowboarding together. Nicole and Liam both testified at trial. They corroborated the plaintiff's evidence regarding his pre-Accident condition. They described the plaintiff as generally happy, cheerful, and engaged prior to the Accident.
- [16] The plaintiff was also active in the upkeep of the family home. He carried out tasks such as painting, gutter and roof repair, and repairing the foundations. Nicole confirms that prior to the Accident, the plaintiff had no restrictions on his ability to complete household chores. She says he performed most of the renovation work on their house in Mission after they moved in.
- [17] The plaintiff and Nicole faced difficulties in their relationship that pre-dated the Accident. They had periodic separations during which the plaintiff would stay with his parents in North Vancouver, though neither the plaintiff nor Nicole took steps to end the marriage prior to the Accident.

The Accident

- [18] The Accident occurred on December 5, 2015 as the plaintiff was driving west on Lougheed Highway. Nicole was in the passenger seat and Raychil was in a rear seat. The family was travelling to IKEA. The plaintiff came to a stop at the intersection of Lougheed and 216th Street. His vehicle was hit from behind by a SUV driven by the personal defendant, Colin Day. The plaintiff had his head turned at the time of the collision.
- [19] The plaintiff exited the vehicle to speak to the other driver while Nicole attended to Raychil, who was crying. The family then carried on to IKEA but did not stay long. The plaintiff says that when he arrived at IKEA, he began to feel tightness in his mid to low back and his neck and shoulder hurt. Nicole was also experiencing shoulder pain.

The Plaintiff's Condition after the Accident

- [20] The plaintiff says his pain increased in the days following the Accident. It was painful to get out of bed, he could not move his neck, and he experienced headaches. Two days after the Accident, he attended a walk-in clinic in Mission to seek treatment for his injuries.
- [21] In December 2015, the Silver Creek mill was in the midst of a seasonal shutdown. This allowed the plaintiff to adopt a slower pace at work. While he did not stop working entirely at Silver Creek for a continuous period, he did attend the office less often in the months following the Accident and took time out during the day. The plaintiff found that sitting for a prolonged period hurt his back. He experienced headaches and blurry vision when he looked at the computer screen.

- [22] The plaintiff says his pain symptoms continued without improvement for a number of months after the Accident. The symptoms included neck and right shoulder pain, headaches, and back pain. The pain symptoms in turn led to sleep difficulties. He first saw his family doctor about these symptoms in early April 2016. By that time, the plaintiff had started seeing a chiropractor, Dr. Grant Perry, approximately twice a week. In April 2016, the plaintiff added massage therapy to his treatment regime.
- [23] In April 2016, the plaintiff stopped working at Superstore altogether with the support of his family doctor, Dr. Raminderjit Sandhu. In Dr. Sandhu's view, the plaintiff could not perform the ordinary duties of a cashier without modifications to address his neck and back pain. The plaintiff says he asked his employer to provide him with accommodation, such as the ability to sit on a stool rather than stand during a shift. He was told that such accommodations were not available.
- [24] The plaintiff did not return to his job at Superstore. He believed he was unable to meet the demands of two jobs. He decided to focus on his contract with Silver Creek, which potentially provided him with a greater income.
- [25] Although the plaintiff continued to perform sales work at Silver Creek, he says his work suffered as a result of his Accident-related injuries. The plaintiff found it difficult to accomplish tasks in a timely manner or to multi-task due to his ongoing headaches and neck pain. Devinder Brar eventually became concerned about the plaintiff's difficulties. In the spring of 2016, Silver Creek hired a second sales person, Deborah Keating, to assist with sales.
- [26] There is a dispute over the extent to which the plaintiff's Accident-related injuries impacted his pre-trial earnings at Silver Creek. The defendants point out that 2016 was the plaintiff's highest earning year at Silver Creek. The plaintiff says the business income he received in 2016 related to contracts he had secured prior to the Accident in 2015.
- [27] The plaintiff's family faced financial difficulties after the Accident. Nicole was on medical leave from her job at Canada Post for reasons that included a shoulder injury she suffered in the Accident. Other than Nicole's disability benefits, the plaintiff's income was the family's sole financial support. The plaintiff says he felt pressure to continue to work through the pain. The effort of doing so left the plaintiff with limited energy at the end of a workday. This impacted the quality of his time he spent with his children as he was unable to engage in the activities he had once enjoyed with them.
- [28] The plaintiff says he tried to go back to activities such as running and cycling after the Accident but they caused him to experience pain and headaches. He could not carry out household repairs and chores in the manner he could prior to the Accident.
- [29] There is a dispute between the parties as to the extent of the plaintiff's impairment when it comes to the performance of household duties. This dispute is of primary relevance to the plaintiff's claim for compensation for future care costs.

- [30] The plaintiff attempted to alleviate his pain symptoms by taking Tylenol 3, Advil, and even medication (Gabapentin) that had been prescribed to Nicole. He also took Melatonin to assist with his sleep difficulties.
- [31] By the time of the Second Accident, the plaintiff says he continued to have constant pain in his neck and right shoulder, and had developed numbness in his fingers which had not been there prior to the Accident. The plaintiff says he also continued to experience frequent headaches, sleep disruption, and an inability to concentrate. The plaintiff says his low to mid back pain had improved.

The Second Accident

- [32] The Second Accident occurred on March 12, 2017 as the plaintiff was driving home from the Abbotsford airport. The defendant to the Second Accident, Ben Hurford, has not admitted liability for this accident and the circumstances of the accident are in dispute. As noted, the plaintiff has filed a second action seeking compensation for injuries arising from the Second Accident.
- [33] The second action was not part of this trial. However, Mr. Hurford testified at this trial as to his recollection of the Second Accident. He says that he was travelling north on Mount Lehman Highway when the plaintiff suddenly made a U-turn directly into his path, causing their vehicles to collide. The plaintiff says that he was attempting to turn left from a designated turn lane on the Mount Lehman Highway when Mr. Hurford hit him from behind.

The Plaintiff's Condition after the Second Accident

- [34] The plaintiff says that the Second Accident aggravated the injuries he suffered in the Accident. His low back pain returned, but then eventually improved to the point it no longer bothers him. His neck was stiffer and his headaches more frequent in the months after the Second Accident. His condition eventually returned to the same level it had been prior to the Second Accident.
- [35] In August 2018, Silver Creek terminated the plaintiff's contract. There is a dispute between the parties as to the reasons for the termination. The plaintiff says his sales performance steadily declined after the Accident due to his chronic pain and related concentration issues. The plaintiff perceives his declining job performance as at least part of the reason for his termination.
- [36] The defendants say that sale of red cedar shakes and shingles declined generally around the time of the plaintiff's termination by Silver Creek due to a tariff imposed on Canadian lumber products entering the U.S. market. The defendants say that it is these external economic circumstances, not the plaintiff's injuries, that led to the termination of his contract.

- [37] After his contract with Silver Creek ended, the plaintiff accepted a job offer from a neighbour who operated a traffic control company. The plaintiff started as a flagger, working eight- to ten-hour shifts.
- [38] The plaintiff eventually moved to a different company, Lanesafe Traffic Control Ltd. ("Lanesafe"), which offered better wages and hours. The plaintiff remains employed by Lanesafe at the time of trial. The plaintiff says he continues to experience headaches and neck pain at work. Standing for long periods of time triggers his headaches. He experiences pain while holding the traffic control paddle and he has to shift it from one hand to the other.
- [39] Despite having to work through pain, the plaintiff appears to be performing well in his current employment. His manager at Lanesafe, Shyenne Genaille, testified that the plaintiff is a diligent employee who completes his work without complaint. The plaintiff does, however, consider his job at Lanesafe to be demeaning and this has contributed to his depressed mood.
- [40] Depending on the site of his assigned road construction project, the plaintiff may have a long commute to and from work. He says he is tired when he gets home and has little energy to engage with Nicole or the children. He believes his relationship with Nicole has deteriorated since the Accident. Nicole says the plaintiff has changed since the Accident. He is irritable and dismissive with his family, and is unable to contribute to the household in the way he once did. Nicole has reached the point where she has considered initiating divorce proceedings. She says she never considered ending the marriage prior to the Accident.
- [41] The plaintiff has remained in occasional contact with Devinder Brar since leaving his employment at Silver Creek. Mr. Brar testified that the Silver Creek mill was permanently shut down in the fall of 2018. Mr. Brar wishes to sell the mill and retire, but to date, has not been able to find a purchaser. Mr. Brar testified that, as of the time of trial, there was still inventory stored at the mill with an estimated value of \$1 million. Mr. Brar offered the plaintiff a job selling the inventory on a straight commission basis. However, the plaintiff declined the offer because it would not provide him with a guaranteed salary the same way as his job at Lanesafe does.
- [42] The plaintiff was cross-examined regarding his attendance at Silver Creek in the week before the start of trial. He initially denied personally attending the Silver Creek office, but eventually agreed that he had gone there twice to gather personal items. The plaintiff denies that he has been working at Silver Creek.

- [43] The plaintiff has been off work from Lanesafe since May 11, 2020. He developed flu-like symptoms and was tested for COVID-19. His test was negative but the plaintiff remained off work as of the time of trial. The plaintiff says that his pain symptoms have persisted since he has been off work although they are less intense than when he is at work. He plans to return to his job at Lanesafe because he needs the income.
- [44] The plaintiff started taking Cymbalta, an anti-depressant medication, a few weeks before trial. As of the time of trial, he was also taking Gabapentin, Baclofen, and Tylenol 3. He says his current medications dull his pain and headaches, but he is concerned that they make him out of touch with reality. The plaintiff has an appointment with a neurosurgeon on referral from Dr. Sandhu in January 2021, and is on a waitlist for counselling.
- [45] The plaintiff says he had intended to work into his 70s at Silver Creek. He cannot imagine himself working until retirement as a flag person given the physical demands of the job. As of the time of trial, it was the plaintiff's intention to carry on with his job as a flag person for the foreseeable future.

EXPERT EVIDENCE

- [46] The plaintiff filed expert reports from a physiatrist, neurologist, psychiatrist, and two occupational therapists. One occupational therapist performed a functional capacity evaluation while the other assessed future care costs.
- [47] The defendants tendered one expert report from an expert in neurosurgery. The defendants challenge the admissibility of limited portions of the report of the plaintiff's neurology expert. Otherwise, the parties limited their submissions on the other parties' experts to the question of weight.
- [48] I will briefly summarize the evidence of the parties' experts regarding the nature and extent of the plaintiff's injuries, their cause, the plaintiff's prognosis, and treatment recommendations.

The plaintiff's Expert Evidence

Dr. Sathish Rajasekaran (physiatrist)

- [49] Dr. Rajasekaran is a physician specializing in physical medicine and rehabilitation. He assessed the plaintiff on March 7, 2020. In his report of March 20, 2020, Dr. Rajasekaran diagnosed the plaintiff with:
1. Whiplash Associated Disorder Grade II
 - a) Lower right cervical facet joint mediated pain
 - b) Right periscapular myofascial pain
 - c) Cervicogenic headaches

2. Right-Sided Carpal Tunnel Syndrome

- [50] Dr. Rajasekaran's report also lists the diagnoses of major depressive disorder of moderate severity and generalized anxiety disorder of mild severity. However, he notes that these are psychiatric diagnoses outside his area of expertise that were made by Dr. Abdorrahim Dahi, the psychiatrist who prepared an expert report on the plaintiff's behalf.
- [51] Dr. Rajasekaran opines that the diagnoses of cervical facet joint mediated pain and myofascial pain are supported by the location of the plaintiff's pain symptoms and their worsening with extension and rotation to the symptomatic side. Dr. Rajasekaran also suspects that the plaintiff has carpal tunnel syndrome, which refers to impingement of the median nerve in the carpal tunnel, and recommends further diagnostic investigation. Given the chronicity of the plaintiff's symptoms, Dr. Rajasekaran opines that the plaintiff has developed a chronic pain syndrome.
- [52] Regarding causation, Dr. Rajasekaran believes that the injuries associated with diagnosis 1 (Whiplash Associated Disorder) and diagnosis 2 (carpal tunnel syndrome) were caused by the Accident and then aggravated by the Second Accident.
- [53] In Dr. Rajasekaran's view, the plaintiff currently has "significant pain related limitations". He states:

His goal is to continue to work, and I commend him for exploring work opportunities on his own as I see many patients in his scenario who have stopped working due to the severity of their musculoskeletal and psychiatric symptoms. I would recommend he refrain from any household chores or recreational activities that impair his ability to work. For example, I would discourage him from doing yard work or mountain biking if these activities worsen his symptoms and persist into the following day. I believe his musculoskeletal symptoms and psychological symptoms are intertwined at this point, where both have contributed to the development of a chronic pain syndrome, which also worsens his prognosis and impacts his pain related limitations.

- [54] If the plaintiff's hand symptoms are confirmed as carpal tunnel syndrome, curative treatment options are available. Dr. Rajasekaran's treatment recommendations for the plaintiff's chronic pain symptoms include referral to a chronic pain physician and potential treatment through a radiofrequency ablation procedure. However, Dr. Rajasekaran opines that such treatments, even if effective, will only improve the level of severity of the plaintiff's symptoms and not cure them. He characterizes the plaintiff's overall prognosis as "poor".
- [55] Dr. Rajasekaran recommends that the plaintiff discontinue his use of the medications Gabapentin and Baclofen given their potential side effects, which include cognitive impairment, fatigue, depression, and sleep impairment.

[56] In cross-examination, Dr. Rajasekaran confirmed that, during their interview, the plaintiff reported having to take a continuous period of time off work after the Accident due to his injuries. The plaintiff also reported that his injuries led to the termination of his work as a log broker. Dr. Rajasekaran agreed that his opinions about the severity of the plaintiff's injuries were influenced in part by the plaintiff's time off work and the assumption that the injuries led to the termination of his contract with Silver Creek.

Dr. Donald Cameron (neurologist)

[57] Dr. Cameron is a neurologist with expertise in the area of cervicogenic headaches. He assessed the plaintiff on two occasions; first on November 8, 2017 and again on November 21, 2019.

[58] In his first report of January 18, 2018, Dr. Cameron opines that the plaintiff suffered soft tissue and musculoskeletal injuries in the Accident and the Second Accident, and that the plaintiff was rendered "completely disabled" for a period of two to three months following the Accident. In Dr. Cameron's view, these injuries have, in turn, caused the plaintiff to suffer from post-traumatic musculoskeletal or cervicogenic headaches that are associated with his persistent neck and shoulder pain.

[59] In terms of treatment, Dr. Cameron recommends that the plaintiff be assessed by a physiatrist or a kinesiologist to determine whether further rehabilitation therapy is appropriate. Dr. Cameron also considers the plaintiff to be a potential candidate for prophylactic pain and posttraumatic headache medications. I note that one of the medications listed by Dr. Cameron, Gabapentin, is a medication that Dr. Rajasekaran recommends that the plaintiff stop using. Dr. Cameron also recommends the plaintiff receive botulinum toxin ("botox") injections on two occasions to assess the potential benefit of such therapy.

[60] In his updated report of November 21, 2019, following his further assessment of the plaintiff on the same date, Dr. Cameron notes deterioration in the plaintiff's cognitive functioning since the first assessment. The plaintiff's cognitive complaints during the second assessment included difficulty with memory and focus, and a decreased ability to multi-task and make decisions. Dr. Cameron opines that these difficulties are likely caused by the plaintiff's chronic pain and associated depression and anxiety. The plaintiff also reported that he continued to experience headaches at the time of the second assessment. Dr. Cameron remains of the view that the headaches are causally related to injuries suffered by the plaintiff in the two accidents. Dr. Cameron describes the plaintiff as "partially disabled" due to his ongoing chronic pain and psychiatric injuries.

[61] In cross-examination, Dr. Cameron agreed that in reaching his opinions he assumed that the plaintiff had been off work for a continuous period after the Accident. This assumption influenced his opinion about the nature and severity of the plaintiff's injuries. Dr. Cameron also agreed that the plaintiff told him the reason for the termination of his employment at Silver Creek was his declining job performance as a result of injuries sustained in the Accident.

Challenge to admissibility of portions of Dr. Cameron's report

[62] The defendants say that portions of Dr. Cameron's report are inadmissible. This objection was not particularized in the defendants' final argument. As I understand the argument, the defendants say that Dr. Cameron's opinions strayed beyond his expertise as a neurologist and that he is not competent to opine on the plaintiff's level of disability as a result of the soft tissue injuries he suffered. The defendants particularly object to those portions of Dr. Cameron's report which set out his opinion that the plaintiff is partially disabled as a result of the injuries.

[63] In my view, and assuming I have correctly understood the defendants' objections, the objections go to the weight of Dr. Cameron's report rather than its admissibility. Dr. Cameron's views regarding the plaintiff's level of disability are based, to a significant extent, on the plaintiff's self-reports regarding his ability to work after the Accident. If I do not accept the factual assumptions that Dr. Cameron has made, then it follows I will assign limited weight to his opinions. However, in my view, the opinions contained within Dr. Cameron's report are within his area of expertise as a neurologist with experience in the treatment of soft tissue injuries.

Dr. Abdorrahim Dahi (psychiatrist)

[64] Dr. Dahi conducted a psychiatric assessment of the plaintiff in September 2019 and provided a report dated October 2, 2019. Dr. Dahi describes the plaintiff as appearing hopeless and "defeated" during the assessment. The plaintiff admitted to struggling with sadness and anxiety, and having fleeting suicidal thoughts. In Dr. Dahi's view, the plaintiff meets the diagnostic criteria for:

1. Major depressive disorder, moderate.
2. Generalized anxiety disorder, mild.

[65] Dr. Dahi opines that the plaintiff was prone to depression and anxiety due to issues in his past relationship with his parents and their dysfunctional family dynamics. However, prior to the Accident, he managed to function well in his work and family life without psychiatric support. Dr. Dahi believes that the Accident and the Second Accident triggered the plaintiff's existing psychiatric vulnerability, bringing symptoms of depression and anxiety to the surface.

- [66] Dr. Dahi believes that the plaintiff's mental health will improve if he meaningfully commits to a course of psychiatric treatment. Dr. Dahi recommends that the plaintiff receive individual psychotherapy for an indefinite duration, as well as a minimum of 20 sessions of family and couples therapy. Dr. Dahi also suggests that the plaintiff could benefit from taking anti-depressant medication and medication to improve his sleep.
- [67] In cross-examination, Dr. Dahi agreed that if the plaintiff had started counselling and taking anti-depressant medication in early 2019, he would likely have started to receive the benefit of that treatment by the time of trial. Dr. Dahi also agreed that the plaintiff reported having lost his job at Silver Creek as a result of his Accident-related injuries.

Stephanie Chauhan (occupational therapist)

- [68] Ms. Chauhan conducted a functional capacity assessment of the plaintiff on November 17, 2019 and prepared a report dated March 19, 2020. The purpose of her assessment was to measure the plaintiff's functional ability to perform personal and occupational tasks. In the course of the assessment, Ms. Chauhan interviewed the plaintiff and administered a number of functional tests, including tests designed to determine the plaintiff's effort during the assessment. Ms. Chauhan opines, based on the results of these tests, that the plaintiff has some difficulty with prolonged sitting and standing, as well as lifting, reaching, and grip strength.
- [69] Ms. Chauhan concludes that the plaintiff is currently able to meet the job demands of a lane closure technician, with some accommodation. The plaintiff reported to Ms. Chauhan that he had learned to modify some work tasks to lessen his pain, and also that he had an assistant able to help with activities such as lifting. In Ms. Chauhan's view, it is possible that the plaintiff would not be competitively employable if he had to work in a different area that did not afford the same level of flexibility and support. She also believes that he would likely be limited in his ability to return to a cashier job without accommodation due to the prolonged standing, reaching, and finger dexterity required. In Ms. Chauhan's experience, the availability of such accommodations varies between stores.
- [70] Ms. Chauhan does have the ability to perform cognitive assessments but she was not asked to do so in this case. As such, she could not comment on the plaintiff's cognitive capacity to perform the job of a log broker. Ms. Chauhan believes that the plaintiff would be able, with some ergonomic adjustments, to meet the physical demands of such a job as it largely involves desk work.
- [71] Ms. Chauhan's treatment recommendations for the plaintiff include physiotherapy with a treatment provider specializing in cervicogenic disability and headaches as well as active rehabilitation. Ms. Chauhan would defer to the recommendations of physiatrist regarding the plaintiff's physical rehabilitation.

[72] She agrees with Dr. Dahi's recommendation that the plaintiff receive psychiatric treatment. In Dr. Chauhan's view, the plaintiff would also benefit from vocational counselling, and potentially testing to assess his cognitive abilities. Finally, Ms. Chauhan recommends that the plaintiff use portable heat packs and take the medications recommended by other experts.

Jennifer Lane (occupational therapist)

[73] Ms. Lane prepared a report on the plaintiff's future care costs that is dated March 20, 2020. For the purpose of preparing her report, Ms. Lane conducted an assessment of the plaintiff and his activities of daily living at the plaintiff's home on February 23, 2020. She also reviewed the reports of Drs. Rajasekaran, Cameron, Dahi, and Ms. Chauhan. Ms. Lane's report includes two tables summarizing the plaintiff's functioning in activities of daily living, one based on his self-reports and one based on Ms. Lane's testing. Ms. Lane notes that the plaintiff's self-reports are consistent with the medical information and also with his demonstrated abilities during functional testing.

[74] Ms. Lane opines that the plaintiff is able to complete personal care, meal preparation, and grocery shopping tasks independently and does not require professional assistance. She is, however, of the view that he is unable to complete exterior and home maintenance, as well as yard and garden tasks, without exacerbating his symptoms which, in turn, requires him to seek assistance. She recommends that he have assistance with these tasks when he is experiencing symptom flare-ups.

[75] Ms. Lane has provided a summary of future care costs that are based on her own assessments as well as the recommendations of other experts. I will review Ms. Lane's summary in greater details in the Analysis section of this judgment in assessing the plaintiff's damages for future care costs.

The Defendants' Expert Evidence

Dr. Navjot Chaudhary (neurosurgeon)

[76] Dr. Chaudhary conducted an independent medical examination of the plaintiff on February 4, 2020 and prepared a report dated March 10, 2020. She describes the plaintiff's post-Accident injuries as follows:

- Cervicogenic headaches. His headaches are worse when his neck pain is worse, which is consistent with headaches which emanate from the neck.
- Cervical musculoskeletal sprain/strain myofascial injury with aggravation of pre-existing cervical degenerative disc disease - ongoing.
- Lumbar musculoskeletal sprain/strain myofascial injury - minimal or near resolution.

- Possible carpal tunnel syndrome vs C7 radiculopathy - confirmatory nerve conduction studies have not been performed.
- [77] Dr. Chaudhary opines that it is more likely than not that the plaintiff's musculoskeletal sprain/strain and myofascial injuries were initially caused by the Accident, and then aggravated by the Second Accident. In Dr. Chaudhary's view, the chronic nature of the plaintiff's symptoms is likely due to the aggravation of underlying disc disease and psychological overlay. She does not believe the plaintiff's hand numbness and tingling is causally related to either accident given the timing of its onset in May 2016.
- [78] Dr. Chaudhary's prognosis for the plaintiff is "guarded" given the chronicity of symptoms. She opines that it may be challenging for the plaintiff to become fully pain free. In terms of treatment recommendations, she opines that during flare-ups, the plaintiff would benefit from pain medications, physiotherapy, and chiropractic or massage therapy. She recommends that the plaintiff engage in active rehabilitation therapy, avoid extremes of neck flexion and extension, and minimize repetitive lifting, twisting, and bending movements. Given that mood symptoms can contribute to the chronic pain cycle, Dr. Chaudhary also recommends that the plaintiff consider consulting with a psychologist.
- [79] In cross-examination, Dr. Chaudhary agreed that without the Accident, the plaintiff may never have experienced symptoms from the degenerative disk disease. She agreed that it is possible that the plaintiff's recovery may have been inhibited by the fact that his head was turned at the time of impact. She also agreed that the tingling the plaintiff experienced in his fingers was not a pre-existing symptom.

CREDIBILITY

Assessment of the Plaintiff's Credibility

- [80] A significant focus of the defendants' submission at trial was on the plaintiff's credibility. The defendants say the plaintiff is not a credible witness, and accuse him of failing to give honest and forthright answers in his testimony at trial as to the reasons why his job at Silver Creek was terminated in August of 2018. The defendants say the plaintiff knew, and deliberately failed to disclose, that the Silver Creek mill shut down shortly around the time the plaintiff left his job. The defendants allege that the plaintiff consistently and intentionally mislead medical experts as to the length of time he was off work after the Accident and the reasons for the termination of his employment at Silver Creek.
- [81] The defendants argue that the plaintiff has not simply been mistaken in his evidence, but rather deliberately dishonest. The defendants point out that the plaintiff initially denied having gone to the Silver Creek office at all in the week or two before trial before conceding, when pressed, that he had probably been there for several hours the previous Monday and Tuesday. With his memory refreshed, the plaintiff then testified in detail as to what he did while at the Silver Creek premises on these occasions. The defendants invite me to conclude that the plaintiff was in fact working at Silver Creek immediately prior to trial, despite the

plaintiff's denials.

[82] The assessment of a witness's credibility involves an examination of various factors, such as:

- the witness's ability and opportunity to observe events;
- the firmness of the witness's memory;
- the witness's ability to resist the influence of interest to modify his or her recollection;
- whether the witness's evidence harmonizes with independent evidence that has been accepted;
- whether the witness changes his or her testimony during direct and cross-examination;
- whether the witness's testimony seems unreasonable, impossible, or unlikely;
- whether a witness has a motive to lie; and
- the demeanour of a witness generally.

See: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[83] I do have some concerns about the credibility and reliability of the plaintiff's evidence. He had a tendency to minimize events that undermined his damages claims, and to exaggerate events that supported his claims. The plaintiff's evidence about the impact of his Accident-related injuries on his employment at Silver Creek is an example of this tendency. In his direct evidence, the plaintiff cited his declining job performance after the Accident as the reason for the termination. He did not mention other factors such as market conditions and the fact that the Silver Creek mill permanently shut down around the time his employment ended. He did not tell them that he has an open job offer from Devinder Brar to sell the mill's remaining inventory. As the defendants note, the plaintiff similarly told the experts who assessed him--including Drs. Rajasekaran, Cameron, and Dahi--that he lost his job as a log broker solely as a result of the Accident.

[84] There is also reason to doubt the reliability of the plaintiff's evidence in light of his admitted memory difficulties. The plaintiff's evidence in cross-examination regarding his visits to the Silver Creek office in the week before trial provides a particularly dramatic example. The plaintiff initially testified he had no recollection at all of attending the Silver Creek office in the week prior to trial and could only recall a phone call with Devinder Brar. When pressed, the plaintiff then agreed he had attended the Silver Creek office twice to remove paperwork and his personal computer equipment.

[85] While such examples raise concern about the plaintiff's credibility and reliability, I do not find that he was deliberately dishonest, either in his evidence at trial or in his interviews with the medical experts. It is apparent from the evidence at trial, including the evidence of the defendants' expert, that the plaintiff suffered injuries in the Accident that have led him to experience chronic pain symptoms for a period of over four years. The chronic pain has, in turn, impacted the plaintiff's mood and, to some extent, his cognitive functioning. It is

not surprising in such circumstances that the plaintiff is not always precise in his recollection, or that he may have an exaggerated perception of the impact of the Accident on his personal and professional life.

- [86] Bearing in mind that the plaintiff may not be the most reliable historian, I will approach his evidence cautiously when it is not corroborated by the evidence of other witnesses. However, I reject the defendants' submission that the plaintiff was dishonest in his evidence or deliberately mislead the expert witnesses. I find that the evidence does not support the inference that the plaintiff was working at Silver Creek immediately prior to trial, as the defendants suggest.

ANALYSIS

Causation

Legal framework

- [87] The general principles of causation are well established. The onus is on the plaintiff to prove on a balance of probabilities that the defendant caused or contributed to the injuries for which he seeks compensation. The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14 [*Athey*].
- [88] It is not necessary for a plaintiff to prove that a defendant's negligence was the sole cause of the plaintiff's injury, only that it was a cause: *Athey* at paras. 17-19. As noted in *Athey*, since most events are the result of a complex set of causes, there may be many non-tortious causes that a defendant can point to as part of the causal chain. If the identification of such non-tortious causes were sufficient to reduce the defendant's liability, this would undermine the essential purpose of tort law which is to restore the plaintiff to the position they would have enjoyed but for the defendant's negligence: *Athey* at para. 20.
- [89] The situation in *Athey*, where tortious and non-tortious factors contributed to the plaintiff's injury, is not analogous to one where an injury has multiple tortious causes. Apportionment between multiple tortious causes is both consistent with general principles of tort law and is expressly permitted by provincial negligence statutes (in British Columbia, s. 1(1) of the Negligence Act, R.S.B.C. 1996, c. 333). Where an injury is caused by multiple tortfeasors, each remains fully liable to the plaintiff for the injury. The legislation simply permits the defendants to seek indemnity from one another.

- [90] An indivisible injury cannot, by definition, be divided into distinct parts. Defendants are jointly liable to the plaintiff because it is impossible to divide the injury up into constituent causes or points in time: *Bradley v. Groves*, 2010 BCCA 361 at para. 34 [Bradley]. Where damages for a single, indivisible injury are apportioned between tortfeasors pursuant to the Negligence Act, the inquiry is into fault, rather than causation, with "fault" meaning blameworthiness.
- [91] Torfeasors must take their victims as they find them in the sense that the defendant is liable for the plaintiff's injuries even if those injuries are more severe than might be expected in the average person: *Athey* at para. 34. At the same time, the defendant is not required to put the plaintiff in a better position than she would have occupied absent the wrongdoing. The defendant is liable for the injuries caused, but need not compensate for the effects of a pre-existing condition if there is a "measureable risk" that the plaintiff would have suffered those effects in any event: *Athey* at para. 35.
- [92] A weakness inherent in the position of the plaintiff that might realistically contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in assessing damages. Such a contingency does not have to be proven to a certainty; it is given weight according to its relative likelihood: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 48.

The nature and extent of the plaintiff's injuries

- [93] The evidence overwhelmingly establishes that the plaintiff suffered soft tissue and musculoskeletal injuries in the Accident, which were exacerbated in the Second Accident. The plaintiff developed neck, shoulder, and low back pain within days of the Accident. While his low back pain has largely resolved, the plaintiff has continued to experience neck and shoulder pain.
- [94] The chronic pain has led to a sequela of other issues for the plaintiff. I accept the evidence of Dr. Cameron that the debilitating headaches that the plaintiff has experienced since the Accident are cervicogenic headaches associated with his persistent neck and shoulder pain. I find that the pain symptoms, combined with the plaintiff's interrupted sleep and frequent use of pain medication to alleviate the symptoms, have impaired his focus and concentration. I also accept the opinion of Dr. Dahi that the plaintiff suffers from depression and anxiety and that these conditions were triggered by the accidents.
- [95] The evidence of the medical experts consistently supports the conclusion that the plaintiff's injuries are causally related to the Accident. The causal relationship is also supported by the evidence of the lay witnesses, including the plaintiff's wife, Nicole, his son, Liam, the plaintiff's family physician, Dr. Sandhu, and his former employer, Devinder Brar. These witnesses corroborated the plaintiff's own evidence about his chronic pain symptoms, and the impact they have had on his mood, sleep, and cognitive abilities since the Accident.

- [96] The defendants acknowledged in their final argument that the plaintiff has developed chronic pain, at least in his neck, as a result of soft tissue injuries suffered in the Accident. The dispute between the parties is over the severity of the impact these injuries have had on the plaintiff's ability to function in his life and employment. The defendants say the injuries are not disabling, but they do not dispute that the chronic pain was caused by the Accident.
- [97] While the defendants concede that the Accident caused the plaintiff's neck pain, they dispute that the numbness and tingling in the plaintiff's hand is causally related to the Accident. They rely on the opinion of Dr. Chaudhary who, as I have noted, believes that the numbness and tingling was likely not caused by the Accident due to the timing of its onset. I prefer the evidence of Drs. Cameron and Rajesekaran, both of whom opined that there is a causal relationship between Accident and the plaintiff's subsequent development of numbness and tingling in his fingers. Although Dr. Chaudhary acknowledges that the plaintiff did not experience numbness and tingling before the Accident, she does not offer an alternative explanation for this condition. In any event, little turns on this issue as it is the plaintiff's chronic pain, rather than the numbness and tingling in his fingers, that is primarily responsible for the impairments in the plaintiff's function.
- [98] The evidence supports that the Second Accident aggravated the plaintiff's existing injuries rather than causing a new injury. It is difficult to precisely determine the extent of the aggravation, particularly given that none of the experts were asked to address this issue. The plaintiff says that although his symptoms were improving by the time of the Second Accident, he had not returned to baseline. He says by the time of the Second Accident, he had for a period of over a year, experienced chronic neck and shoulder pain that led to headaches and sleep disruption. As I have already noted, there is corroborating evidence from the plaintiff's lay witnesses.
- [99] I address the impact of the Second Accident on the damage assessment process in this case below at paras. 101-109.
- [100] The evidence does not establish that plaintiff's injuries prevent him from engaging in full-time employment, although I accept that his injuries may have a limiting effect on his range of employment options. In assessing the plaintiff's damages for loss of earning capacity, I have accepted that the plaintiff was unable to continue with his job as a cashier at Superstore as a result of his Accident-related injuries. However, I conclude that he is capable of performing his current duties as a flag person, as well as his former duties as a log broker.
- [101] The defendants say that the plaintiff's damages should be reduced by 10% to account for the measurable risk that he would have developed depression and anxiety even absent the Accident. The defendants rely on a convoluted hypothetical that was put to Dr. Dahi about the likelihood that a 50 year-old man experiencing relationship problems and financial stress would develop depression. I did not find the hypothetical to be helpful. The question is whether evidence supports that the plaintiff would have developed depression and

anxiety even absent the Accident. The evidence does not persuade me that this is a material risk that ought to be accounted for in the assessment of damages. I will, therefore, not apply a reduction to the plaintiff's damages on this basis.

The plaintiff's indivisible injuries and the Second Accident

- [102] The causation issue in the present case is complicated by the fact that the injuries the plaintiff suffered in the Accident were exacerbated by the Second Accident. The parties agree the injuries are indivisible. Although the plaintiff has filed an action seeking damages for the Second Accident, that action did not form part of this trial. For reasons that are not clear to me from the record, neither party applied to consolidate the two actions. Counsel advises that the defendants applied for an adjournment of trial shortly before its start, in part based on concern with the need to have evidence regarding both accidents before the Court, but that application was dismissed.
- [103] As a result, I must assess damages for indivisible injuries suffered in two motor vehicle accidents in the absence of a determination, or any ability to fairly determine, who is at fault for the Second Accident. If the plaintiff is not at fault for either accident, no difficulty arises. The defendants in the present case would be jointly liable to the plaintiff for the full extent of his injuries. It would be open to the defendants to seek contribution and indemnity from the defendant to the Second Action but apportionment between the defendants would be "a matter of indifference to the plaintiff": Bradley at paras. 32-34.
- [104] However, if the plaintiff is found to be at fault for the Second Accident, then damages attributable to that accident must be in some manner removed from the overall award despite the fact that the plaintiff suffered indivisible injuries. In *Demidas v. Poinen*, 2012 BCSC 416 [Demidas], Justice Humphries addressed the process for assessing damages in such circumstances:
- [51] The effect of the at-fault accident on the overall damage award is not a matter of contributory negligence, although the effect on the overall result may be similar. It is a matter of ensuring that the defendants are responsible only for the loss and damage they caused to the plaintiff.
- [52] None of the cases cited to me by the plaintiff deal with sequential accidents, and none have at-fault accidents in the midst of accidents for which the plaintiff can claim damages. In *MacGillivray [v. Amar Trucking et al]*, 2002 BCPC 0437, the provincial court judge applied *Long v. Thiessen*, (1968) 65 W.W.R. 577 and assessed damages separately for each of three accidents. Where the effects of the injuries are not divisible, as here, that approach is not appropriate as between tortfeasors (*Bradley v. Groves* 2010 BCCA 1507). On the other hand, the defendants are not responsible for the injuries Mr. Demidas caused to himself, so the effects of that accident have to be accounted for.

...

- [56] While this is not a situation where damage is divisible and capable of individual apportionment, nevertheless the loss and damage caused by the accident for which Mr. Demidas is at fault must be considered and removed from the overall award so that the defendants are not held responsible for that amount.
- [57] This is an imperfect exercise, dealing with intangibles and hypotheticals.
- [105] The approach suggested by Humphries J. in *Demidas* was followed in *Uppal v. Chung*, 2017 BCSC 80; *Blenkarn v. Mills*, 2016 BCSC 1976; and *Chavez-Babcock v. Peerens*, 2020 BCSC 863 [Chavez-Babcock]. Each of these cases involved the assessment of damages for indivisible injuries caused by multiple accidents where the plaintiff was at fault for one accident but not the others. The cases differ in terms of the order in which the plaintiff's at-fault accident occurred, and its severity in proportion to the overall damages.
- [106] The facts of *Chavez-Babcock* are the most similar to the present case. The plaintiff in *Chavez-Babcock* was injured in an initial accident caused by the defendant. His injuries were aggravated in a later accident for which he was found to be at fault. Justice Matthews described the approach to the damage assessment process in these circumstances as follows:
- [153] The goal is to apportion the damages so that the tortfeasor only pays for the portion of the harm he or she caused: *Blackwater [v. Plint]*, 2005 SCC 58] at para. 70; *Blenkarn* at para. 23. The approach is to assess the overall damages, then estimate the damage caused by the at-fault accident, and deduct it from the award. In practice, courts attempt to determine a percentage of the overall loss that is caused by the accident for which the plaintiff was at fault and then apply it to the dollar figure of overall damages. This is different from the apportionment of damages, which compares the degrees of departure from the standard of care as between several tortfeasors and the plaintiff if the plaintiff has been contributorily negligent.
- [107] Justice Matthews concluded that the second accident at issue in *Chavez-Babcock* had aggravated the plaintiff's injuries in a manner that was more than *de minimus*. She applied a 10% reduction to the plaintiff's damages for non-pecuniary loss and loss of earning capacity to account for the aggravation of injuries resulting from the accident that was the plaintiff's fault.
- [108] This line of authority is not directly applicable in the present case because the plaintiff's liability for the Second Accident has not been determined. Nevertheless, both parties have adopted the same approach in their submissions on damage assessment in this case. Both urge me to apply a percentage reduction to the plaintiff's overall damages to account for the aggravation of damages resulting from the Second Accident, although they differ somewhat on the magnitude of the reduction. The plaintiff proposes a reduction of 10%, while the defendants say the reduction should be 10% to 25%.

- [109] In the absence of any alternative proposals from the parties as to how to address the impact of the Second Accident, I will adopt the approach they have suggested and apply a percentage reduction to the plaintiff's overall damages. As a matter of fairness, there needs to be some means of preventing the plaintiff from receiving damages for which he may be at least partly responsible. For the purpose of this trial, accordingly, I will assume without deciding the point that the plaintiff is at fault for the Second Accident and apply the approach suggested in *Demidas* and the cases which followed.
- [110] Bearing in mind that the process of accounting for the plaintiff's fault in assessing damages for indivisible injuries has been described as "an imperfect exercise dealing with intangibles and hypotheticals" (*Demidas* at para. 57), I consider it appropriate to apply a 10% reduction to the plaintiff's damages for non-pecuniary loss, loss of future earning capacity, and cost of future care. Such a reduction is consistent with the evidence that the plaintiff's injuries were primarily incurred in the Accident, and aggravated to a limited extent by the Second Accident. For reasons explained below, I will not apply the 10% reduction to the award for past wage loss.

Non-Pecuniary Damages

Legal framework

- [111] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those he will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 [*Tisalona*] at para. 39.
- [112] As set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100 [*Stapley*], common factors influencing an award of non-pecuniary damages include:
- a) age of the plaintiff;
 - b) nature of the injury;
 - c) severity and duration of pain;
 - d) disability;
 - e) emotional suffering;
 - f) loss or impairment of life;
 - g) impairment of family, marital and social relationships;
 - h) impairment of physical and mental abilities;
 - i) loss of lifestyle; and
 - j) the plaintiff's stoicism (as a factor which should not, generally speaking, penalize the plaintiff).

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

Assessment of the plaintiff's non-pecuniary damages

- [114] The plaintiff seeks an award of non-pecuniary damages in the amount of \$135,000. He relies on *Kellett v. Stam*, 2018 BCSC 1127 [Kellett] and *Sommerville v. Munro*, 2018 BCSC 457 [Sommerville] in support of such an award.
- [115] The plaintiff's cases are not directly on point given the relatively more severe injuries they involved. The plaintiff in *Kellett* was bedridden for a month after a motor vehicle accident and had to take nine months off work. The plaintiff suffered ongoing injuries that included debilitating joint pain in her hands which prevented her from performing her job duties. The medical evidence in *Kellett* indicated that the plaintiff's hand pain would not improve without surgery. With surgery, the plaintiff faced a long period of recovery and was likely to permanently lose grip strength. She was awarded \$135,000 in non-pecuniary damages.
- [116] The plaintiff in *Sommerville* suffered fractures in his neck and back in a head-on motor vehicle collision. He had to wear a neck collar for 12 weeks, attending the hospital twice weekly through this period. The injuries led to a permanent restriction in his neck mobility and chronic pain in his lower back that necessitated a further period of hospitalization and, at times, the use of a walker or cane. The plaintiff was awarded \$150,000 in non-pecuniary damages, reduced to \$135,000 to account for a pre-existing back condition.
- [117] The defendants say that \$50,000 to \$75,000 is an appropriate range of non-pecuniary damages in this case. They rely on a number of cases involving soft tissue injuries, leading to chronic pain and associated psychological and/or mood disorders: *Rabiee v. Rendleman*, 2015 BCSC 595 (\$40,000) [Rabiee]; *Saidy v. Louzado*, 2019 BCSC 281 (\$50,000); *Abraha v. Suri*, 2019 BCSC 1855 (\$70,000); and *Eaton v. Riddell*, 2020 BCSC 734 (\$75,000).
- [118] These cases are also not entirely on point as they generally involve injuries that are less severe in their impacts. In *Rabiee*, for example, the plaintiff was described as having "minor, lingering pain" in her neck and back.
- [119] My findings relevant to the assessment of the plaintiff's non-pecuniary damages in the present case are as follows:
- i) The plaintiff suffered whiplash-type injuries in the Accident that led to the development of chronic neck and shoulder pain, numbness and tingling in his fingers, and cervicogenic headaches.

ii) The chronic pain and headaches have led the plaintiff to experience disrupted sleep, which in turn has caused some cognitive difficulties such as impaired memory. The chronic pain has also led the plaintiff to develop depression and anxiety.

iii) These Accident-related injuries have negatively impacted the plaintiff's quality of life in that he cannot engage in the physical activities he previously enjoyed. He is restricted in his ability to carry out household tasks.

iv) The plaintiff's relationship with his wife and children has deteriorated as a result of his irritability and depressed mood.

v) At the same time, the plaintiff has been able to maintain a full-time job since the Accident, albeit with some discomfort. He is not disabled from full-time employment.

vi) The plaintiff did not require hospitalization at any time and he has been able to manage his pain to apparently tolerable levels through chiropractic and massage therapies and the use of pain medication.

vii) The plaintiff is mobile. He can engage in some limited physical activities, including walking, and is able to drive. He can carry out light household tasks.

viii) Although the plaintiff's prognosis for a complete recovery is poor, there are treatment options (such as botox injections) that may assist with pain management. The plaintiff has recently started taking an anti-depressant medication which, at least to date, has improved his mood. There is reason to hope that psychotherapy, which the plaintiff has not accessed to date, will also improve his psychological symptoms.

[120] Bearing in mind that the assessment of non-pecuniary damages is an individualized exercise, and having regard to the Stapley factors, I conclude that \$90,000 is an appropriate award of non-pecuniary damages in the present case. The award will be reduced by 10% to account for the Second Accident, resulting in a final award of \$81,000.

Past Loss of Earning Capacity

Legal framework

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

[122] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the

hypothetical event is a real and substantial possibility and not mere speculation: Athey at para. 27; Grewal v. Naumann, 2017 BCCA 158 at paras. 44, 48-49.

Assessment of the plaintiff's damages for past loss of earning capacity

The parties' positions

- [123] The plaintiff seeks an award of \$68,222 for past loss of earning capacity, subject to "statutory deductions". By this, I assume the plaintiff means the deduction of income tax to ensure the plaintiff recovers damages only for past net income loss in accordance with s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. The plaintiff calculated his pre-trial loss of earnings by averaging his annual income from employment and Silver Creek between 2013 and 2016 (\$73,150), and subtracting from this number his actual earnings from 2017 up to the time of trial. Put another way, the plaintiff's calculation assumes that, but for the Accident, he would have continued to earn income at the same level as his highest earning years at Superstore and Silver Creek up until the time of trial.
- [124] The defendants say the plaintiff suffered no past loss of earning capacity at all because: (i) his decision to leave Superstore in April 2016 was due to his desire to focus on his job at Silver Creek and not due to the Accident, and (ii) the decline in the plaintiff's income at Silver Creek, and the eventual termination of his contract, was due to external economic and industry factors rather than the Accident. Alternatively, the defendants say that if any award of damages for past loss of earning capacity is warranted, it should only consist of six months of lost wages at Superstore. The defendants calculate the lost wages to be \$3,264.

Discussion

- [125] I do not accept either parties' submission as to the correct method to calculate past loss of earning capacity.
- [126] With respect to the plaintiff's employment at Superstore, I find that but for the Accident, he would have continued to work part-time as a cashier up to the time of trial. The medical evidence supports that the plaintiff was unable to continue working at Superstore in April 2016 due to his injuries. He took time off work with the support of his family physician, Dr. Sandhu. Ms. Chauhan's evidence, which I accept, is that the plaintiff is limited in his ability to return to a cashier job given the required prolonged standing, reaching, and finger dexterity required.
- [127] It is also important to note that the question is not simply whether the plaintiff can return to a part-time cashier job, but whether he can do so while simultaneously working full-time at another job. I find that it was reasonable for the plaintiff in April 2016 to focus on the higher earning job at Silver Creek, rather than continuing employment at Superstore, given his physical limitations. I further find that it is wholly unrealistic to expect the plaintiff to maintain a part-time job as a cashier at the same time that he is working full-time as a flag person. It requires all of the plaintiff's physical and mental energy to manage his chronic

pain while carrying out his current full-time duties.

- [128] I therefore conclude that the plaintiff should receive an award of damages for past loss of earning capacity that compensates him for the loss of the part-time job at Superstore from April 2016 to the time of trial. But for the Accident, the plaintiff could have continued with his part-time work in addition to his full-time employment at Silver Creek and later as a flagger.
- [129] The plaintiff's average gross annual earnings at Superstore from 2013 to 2015 was \$7,500. He should be compensated for the loss of equivalent annual earnings for 2016, 2017, 2018, 2019 and the first half of 2020 ($\$7,500/\text{year} \times \text{four years} + \$3,750 = \$33,750$), less the earnings he received from Superstore up to April 2016 (\$2,144). The total amount is \$31,606. Given that the plaintiff left his employment at Superstore in April 2016, I will not apply a 10% reduction to this award to account for the Second Accident. I conclude he likely would have incurred the same loss even if the Second Accident had not occurred.
- [130] The plaintiff's claim for damages for past loss of earning capacity in relation to his job at Silver Creek presents greater challenges. The plaintiff says I can simply look to the amounts he earned in from 2017 to 2018, in comparison to previous years, and conclude that the reduction in income was attributable to the Accident. The defendants say that there are other explanations for the decline in the plaintiff's income, including the tariff imposed by the U.S. on Canadian lumber products and the fact that Silver Creek was put up for sale and eventually closed.
- [131] The evidentiary record on this issue was under-developed. The parties debated the question of the impact of US tariffs on the BC lumber market generally, but the evidence on this point was limited and anecdotal. No expert evidence was led about industry trends. The most that can be said is that an industry downturn may account for at least some of the reduction in the plaintiff's income in 2017 and 2018. The plaintiff conceded as much in his cross-examination. The fact that the Silver Creek mill was for sale and then shut down entirely in the fall of 2018 may also explain the plaintiff's declining income.
- [132] The plaintiff asks me to conclude that the decline in his income at Silver Creek was entirely attributable to the Accident, notwithstanding such alternative explanations for the decline. I have no basis in the evidence to draw such an inference other than the plaintiff's own belief. The plaintiff did not lead evidence regarding Silver Creek's overall performance in 2017 and 2018. While he says he lost contracts to Ms. Keating when she joined Silver Creek, there is no objective evidence of this and Ms. Keating denies it. She testified that she had to find her own accounts. Devinder Brar did not testify that he terminated the plaintiff due to his job declining performance. On the contrary, Mr. Brar says that a job remains open to the plaintiff at Silver Creek selling the mill's remaining inventory.

[133] The onus is on the plaintiff to establish a real and substantial possibility that his Accident-related injuries impacted his pre-trial earning capacity. I conclude that he has not met that onus in relation to the plaintiff's employment at Silver Creek. The fact that the plaintiff's income at Silver Creek was lower in 2017 and 2018 than in previous years is not, in itself, a sufficient basis to draw the inference that the plaintiff would have earned more absent the Accident.

[134] In summary, I award the plaintiff \$31,606 for Superstore for past loss of earning capacity, subject to statutory deductions.

Future Loss of Earning Capacity

Legal Framework

[135] A claim for future loss of earning capacity requires the court to compare the likely future of the plaintiff's working life had the accident had not happened with the plaintiff's likely future working life after its occurrence, accounting for negative and positive contingencies: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 33.

[136] The principles governing the assessment of damages for loss of future earning capacity were summarized by the Court in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

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.

[137] There are two possible approaches to loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct and will be more or less appropriate depending on whether the loss in question, though proven, can be quantified in a pecuniary way: *Perren v. Lalari*, 2010 BCCA 140 at paras. 12 and 32.

[138] The earnings approach involves a math based formula whereby the court crafts an award based on the plaintiff's past income, perhaps by awarding a minimum annual income loss for the remainder of the plaintiff's working life, or awarding the plaintiff's entire annual income for a period of time: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at 271.

[139] 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 herself as a person capable of earning income in a competitive labour market.

See: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at 356; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10.

Assessment of the plaintiff's damages for loss of future earning capacity

Positions of the parties

[140] The plaintiff seeks an award of damages for loss of future earning capacity in the amount of \$350,000. He says the capital asset approach is the better way of valuing the loss of future earning capacity claim in this case, but says the approach may be informed by his income-earning history. The plaintiff's proposed award is, as I understand it, premised on the assumption that he will only be able to work part-time between now and a retirement age of 70. He therefore seeks compensation for a loss of \$30,000 per year over the next 12 years, which reflects roughly half of his salary as a flag person. The reduction of the proposed award from \$360,000 to \$350,000 accounts for negative contingencies but does not, as I understand it, include the 10% reduction to account for the Second Accident. The plaintiff has also not calculated the present value of a future income loss spread over 12 years.

[141] The defendants say that the plaintiff should not receive any award of damages for loss of future earning capacity because the evidence does not establish there is a real and substantial possibility that his future income will be impaired by the injuries he suffered in the Accident. Alternatively, the defendants say an award of \$20,000 is sufficient to compensate for any such possibility.

Discussion

- [142] Once again, I do not find the submission of either party to be particularly helpful in determining whether an award of damages for loss of future earning capacity is appropriate, and if so in what amount.
- [143] I agree with the plaintiff that the capital asset approach is most suitable to assessing future loss of earning capacity in this case given that the plaintiff's loss is not easily measurable in a pecuniary way. However, I do not agree that the evidence establishes that the plaintiff is permanently incapable of more than part-time employment as a result of the Accident. The reality is that the plaintiff does work full-time, and has been capable of doing so since December 2015. I acknowledge that maintaining full-time work presents challenges for the plaintiff in light of his chronic pain. He may require accommodation with certain tasks on the job. The effort of getting through a work day leaves him with little energy. However, the fact that full-time work is challenging does not mean that the plaintiff is only capable of working part-time.
- [144] Ms. Chauhan, the plaintiff's own functional capacity expert, opines that the plaintiff is able to meet his current job demands, provided he receives some accommodations. His supervisor, Ms. Genaille, testified that the plaintiff is a very good employee who works diligently and accomplishes work tasks. For the foreseeable future, at least, the evidence suggests that the plaintiff will likely be able to continue with his full-time duties.
- [145] I acknowledge that Dr. Cameron opined that the plaintiff is partially disabled from work. However, Dr. Cameron's opinion in that respect appears grounded in the plaintiff's subjective reports that: (i) he had to be entirely off work for several months after the Accident, and (ii) he lost his job at Silver Creek due to his Accident-related injuries. Neither report is consistent with the evidence. First, the plaintiff was not off work for a continuous period after the Accident. He remained working at Silver Creek throughout the post-Accident period.
- [146] Second, the evidence does not persuade me that the plaintiff lost his employment at Silver Creek as a result of the Accident. The plaintiff stopped working at Silver Creek because the mill shut down. Devinder Brar has offered the plaintiff a job selling the remainder of the mill's inventory. This offer remained open at the time of trial. The plaintiff has declined the job offer in favour of the more steady salary that comes with his employment as a flag person. In sum, to the extent that there is any sales job left open at all at Silver Creek, it is one that the plaintiff could perform if he chose to. There is no evidence of other opportunities for employment as a log broker that the plaintiff did not, or could not, pursue because of his Accident-related injuries. The plaintiff has instead chosen to pursue a job at Lanesafe that provides a more reliable source of income.

[147] The evidence also does not persuade me that the plaintiff is functionally incapable of performing the job of a log broker. As noted, Ms. Chauhan is of the view that the plaintiff is physically capable of carrying out the job duties of a log broker. She was not asked to perform a cognitive assessment.

[148] While I reject the argument that the plaintiff is incapable of working full time, I do accept that there is a real and substantial risk of loss for the plaintiff in terms of his future earning capacity. In particular, I note the following factors that I consider relevant to the capital asset approach to assessing loss:

- i) For the reasons I have already stated, I accept that the plaintiff is unable to continue a second, part-time job as a Superstore cashier as a result of the Accident. Given his age, it is unlikely that he would have maintained two jobs indefinitely even without the Accident. However, I accept that his inability to work as a cashier, or potentially in other jobs with similar physical requirements, is a real and substantial risk of loss to him in the future.
- ii) While the plaintiff can perform his job duties as a flag person, he requires accommodation. His need for accommodation renders him less marketable or attractive to potential employers.
- iii) Given the plaintiff's poor prognosis, and the physical demands of his current job, it is reasonable to expect that he may be required to retire earlier than he otherwise would have as a result of his Accident-related injuries.

[149] Taking into account the positive and negative contingencies in this case, and bearing in mind the difficulties of precise quantification of the plaintiff's future loss, I consider that \$140,000 is a fair and reasonable award to the plaintiff for his loss of future earning capacity. This roughly correlates to two years' of the plaintiff's income in his current job, plus an additional one to two years of part-time employment income from Superstore. Applying the 10% deduction to account for the Second Accident, this leaves an award in the amount of \$126,000.

Cost of Future Care

Legal framework

[150] The purpose of an award for future care costs is to restore the plaintiff to his pre-Accident condition, to the extent that is possible with a monetary award: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. The award is based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210-211 [Hardychuk].

[151] The test for determining the appropriate award under the cost of future care heading is objective and based on medical evidence. An award of future care costs requires: (1) a medical justification for the claim, and (2) that the claims are reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 35.

[152] Future care costs must be justified both because they are medically necessary and they are likely to be incurred by the plaintiff. The award of damages for cost of future care predicts what will happen in the future, and thus is not a precise accounting exercise: *Hardychuk* at paras. 212-214.

Assessment of the plaintiff's damages for future care costs

Position of the parties

[153] The plaintiff seeks an award of future care costs in the range of \$182,700 to \$189,300. The plaintiff relies on the summary of future costs that is appended to Ms. Lane's future care report. Ms. Lane estimates that the plaintiff will incur fixed costs in the amount of \$9,544-\$10,982 in relation to:

- i) two trial rounds of botox injections (\$2,300);
- ii) 8-15 hours of vocational sessions (\$1,080 to \$2,025);
- iii) 18-24 active rehabilitation sessions (\$1,404 to \$1,872);
- iv) a psychological assessment (\$225);
- v) 20 sessions of couples therapy (\$4,500); and
- vi) a carpal tunnel splint (\$35 to \$60).

[154] In the event that the plaintiff returned to his previous job as a log broker, Ms. Lane also recommends that the plaintiff retain an occupational therapist to perform an ergonomic assessment, and purchase any recommended office equipment. Ms. Lane estimates these fixed costs to be \$2,385 to \$2,585.

[155] The plaintiff adopts Ms. Lane's summary of fixed costs, other than in relation to the botox injections. The plaintiff says the evidence suggests that the botox injections are the only form of treatment that holds out hope for improvement of his pain symptoms, and he will require injections every three months. The plaintiff argues that the award of future care costs should include \$4,000 annually for botox injections for the next 20 years.

[156] In relation to annual care costs, Ms. Lane estimates as follows:

- i) \$382 annually for medications, including Tylenol, Gabapentin, Melatonin, and Baclofen;
- ii) \$780 to \$936 annually for 10 to 12 sessions of physiotherapy;
- iii) \$31 to \$468 annually for four to six sessions of active rehabilitation;

- iv) \$523 for an annual gym pass;
- v) \$20 for yearly replacement of ice packs;
- vi) \$35 to \$50 for yearly replacement of heat packs;
- vii) \$1759.50 for yearly lawn and garden care services (36 hours at \$51.75/hour); and
- viii) \$1,328.25 for yearly home maintenance (21 hours at \$63.25 per hour).

[157] Although recommended, Ms. Lane has not included the cost of sessions with a psychiatrist or physiatrist as she assumes these are services covered by Medical Services Plan.

[158] The plaintiff says that he should be awarded the annual costs estimated by Ms. Lane for the next 22 years, or until he reaches the age of 80. The plaintiff says he does not seek a separate award for loss of housekeeping capacity because compensation for replacement services for yard work the plaintiff can no longer perform is already included within Ms. Lane's estimates.

[159] In requesting an award of future care costs in excess of \$180,000 to cover annual costs for 20 to 22 years, the plaintiff does not appear to have undertaken, or at least did not provide to me, a present value calculation.

[160] The defendants say that most of the future care items listed by Ms. Lane are not supported on the evidence. The defendants say that an award of future care costs in the amount of \$850 to \$4,500 is justified to cover the costs of a limited number of active rehabilitation and physiotherapy sessions, a trial of botox injections, and some of the plaintiff's medication costs.

Discussion

[161] In my view, the evidence supports an award of future care costs in the short term (the next one to two years) to cover the cost of two trial botox injections (\$2,300), a psychological assessment (\$225), 12 sessions of physiotherapy and 24 sessions of active rehabilitation (\$2,803), the cost of an annual gym pass (\$523), and 20 sessions of couples and family therapy (\$4,500). I acknowledge the defendants' argument that the plaintiff's marital difficulties pre-dated the Accident. However, the Accident caused a significant deterioration in the plaintiff's relationship with Nicole, and also with his children. Dr. Dahi opines, and I accept, that couples and family therapy would assist the plaintiff in re-establishing those relationships.

[162] Accounting for positive and negative contingencies, an award of \$10,000 would be reasonable to compensate for these short-term future care costs.

[163] I also accept that the assessment of damages for future care costs should account for the possibility that the plaintiff may incur costs for botox injections, physiotherapy and active rehabilitation sessions, and annual gym membership fees beyond the short term. However,

I do not agree that it would be fair or reasonable to award the plaintiff Ms. Lane's full estimate of these costs for the next 22 years without deduction for the real and substantial possibility that: the plaintiff will not continue with active rehabilitation and physiotherapy beyond the initial 12 sessions; the trial of botox will not be effective; or the plaintiff's condition will improve to the point that he does not require this level of care. No expert has opined that the plaintiff would require or benefit from 22 years of physiotherapy and active rehabilitation.

- [164] In my view, it would be fair and reasonable, taking all contingencies into account, to award the plaintiff a further \$10,000 to compensate for the real and substantial possibility that he will incur additional costs for botox injections, physiotherapy, and active rehabilitation beyond the short term.
- [165] The evidence does not support an award of damages to cover vocational assessment, or an ergonomic assessment by an occupational therapist. Those recommendations, from Ms. Chauhan, are premised on the assumption that the Accident prevented the plaintiff from continuing in his former employment as a log broker, and that he is considering a return to this profession. This assumption is contrary to my finding that the plaintiff left Silver Creek because the mill shut down, not because of the Accident. It is also contrary to my rejection of the plaintiff's position that he is presently unable to work as a log broker.
- [166] I am also not persuaded on the evidence that it would be appropriate to award the plaintiff the annual cost of ice and heat pack replacement when he has not testified to using these pain management techniques, let alone testified to their efficacy, in the years since the Accident. The cost of a carpal tunnel splint is also not warranted in the absence of any confirmation that the plaintiff suffers from carpal tunnel syndrome.
- [167] In terms of the plaintiff's future medication costs, I accept that the evidence supports an award to compensate for the plaintiff's use of Tylenol and Melatonin for the next 22 years (to age 80) at an annual cost of \$50. I do not find that the evidence supports an annual award of costs to cover the plaintiff's future use of Gabapentin and Baclofen given Dr. Rajasekaran's recommendation that the plaintiff discontinue those medications. An award of \$1,000 is reasonable to compensate for the present value of the plaintiff's future medication costs.
- [168] I turn, finally, to Ms. Lane's estimate of the plaintiff's future care costs for lawn and garden care and home maintenance. As I understand Ms. Lane's report, she has assumed that the plaintiff is capable of performing 50% of lawn and garden care and home maintenance tasks, and that a professional service will be 25% more efficient. Relying on those assumptions, she then calculates future care costs using statistics of the average time men spend on such activities and an hourly "base cost" of \$51.75 for lawn and garden care and \$63.25 for home maintenance. Ms. Lane appears to derive the statistical averages from a resource entitled The American Time Use Survey, which is not included with her report. The source of the hourly base costs is not explained in the report. The evidence I have

before me does not include any British Columbia labour market data. Ms. Lane was not cross-examined on her methodology.

- [169] The defendants argue that the plaintiff should not be awarded any compensation for lawn and garden care because his evidence is that, both pre- and post-Accident, he mows the lawn and Nicole tends the garden. The defendants say the claim for home maintenance costs is speculative because there is no evidence of an existing maintenance project, and if one arises the plaintiff will likely be able to do it.
- [170] I reject the defendants' arguments. The evidence is that the plaintiff is limited in his ability to tend to the lawn and garden and that he seeks the assistance of his son when his symptoms flare up. Dr. Rajasekaran has specifically opined that the plaintiff should be discouraged from engaging in yard work if this activity worsens his symptoms. In short, he will require assistance with these tasks, which is the premise upon which Ms. Lane has estimated costs. As for home maintenance, the fact that there is no evidence of an existing maintenance project that the plaintiff cannot complete is not determinative. An award for future care costs is warranted if the evidence establishes a real and substantial possibility of a future loss.
- [171] In this case, I have found that the plaintiff's ability to carry out household chores has been impaired by the Accident, even though he is still able to do some limited tasks. My findings are thus consistent with the assumptions of Ms. Lane and the recommendations of Dr. Rajasekaran. The evidence establishes that the plaintiff is entitled to some compensation for the future costs of lawn and garden care and home maintenance services that the plaintiff previously performed. The question is how best to quantify that future loss.
- [172] Ms. Lane's estimates assumes that the plaintiff will require assistance until the age of 80. The present value of her estimate of future costs is \$31,070 for lawn and garden care and \$23,454 for home maintenance. In my view, there must be some downward adjustment in the assessment of damages to account for the possibility that the plaintiff will not require assistance for the next 22 years, or at least not the extent assumed by Ms. Lane. The assessment of damages should also account for the possibility that the plaintiff could secure replacement services at hourly rates less than the rather high rates assumed by Ms. Lane.
- [173] Taking all contingencies into account, I am of the view that a fair and reasonable assessment of the plaintiff's damages for the future costs of lawn and garden care and home maintenance services is \$20,000.
- [174] In summary, I assess the plaintiff's damages for future care costs as \$41,000. Applying the 10% deduction to account for the Second Accident leaves an award of \$36,900.

Mitigation

Legal framework

- [175] A plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. The burden is on the defendant to prove that the plaintiff failed to mitigate their losses. In order to do so, the defendant must first show that the plaintiff acted unreasonably in not taking the steps that the defendants say ought to have been taken, and second that the plaintiff's loss would in fact have been eliminated or reduced had those steps been taken: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
- [176] A failure to attend counselling or pursue an active rehabilitation or exercise program may constitute a failure to mitigate: *Hsu v. Williams*, 2011 BCSC 1412 at paras. 42-47; *Oberholtzer v. Tocher*, 2018 BCSC 1089 at paras. 78-95.
- [177] In considering the defence of mitigation, courts are cautious in finding that a plaintiff has acted unreasonably in making decisions about what treatment and employment steps they will take to address an injury. As stated in *Gallina v. Honda Canada Finance Inc.*, 2014 BCSC 974 at para. 128, citing *Paniccia Estate v. Toal*, 2012 ABCA 397 at para. 86::

the court only lightly reviews the decision of a person injured to try to mitigate his loss. Courts are extremely slow to criticize good-faith decisions by victims of torts about both whether to take steps in mitigation, or which steps, or how much expense or risk to incur in doing so.

- [178] Courts will also consider whether a plaintiff's capacity to make an objectively reasonable choice with respect to treatment recommendations has been substantially inhibited by their accident-induced injuries: *Cassells v. Ladolcetta*, 2012 BCCA 27 at para. 26.

Did the plaintiff breach his duty to mitigate?

- [179] The defendants say that the plaintiff breached his duty to mitigate by failing to start counselling and anti-depressant medication in early 2019. They rely on Dr. Dahi's opinion that the plaintiff could have seen improvements in his psychological conditions by the time of trial had he started counselling and anti-depressant medications in 2019. The defendants say the plaintiff failed to follow through on counselling and twice missed appointments due to work commitments. The defendants suggest a reduction of the plaintiff's damages by 5 to 10% would be appropriate to account for his failure to mitigate.
- [180] The defendants' arguments on mitigation mischaracterize the evidence. At trial, Ariana Gverzdys testified on behalf the plaintiff. Ms. Gverzdys is an occupational therapist and the plaintiff was her patient in 2019. She says that in February 2019, she submitted a note from the plaintiff's family doctor to an ICBC adjuster to support of a request for counselling funding. In May, the adjuster communicated ICBC's approval of the funding request, provided that the plaintiff met with the counsellor by June 30, 2019. The plaintiff could not meet this deadline due to work commitments and he requested an extension into July. The counselling did not occur by an extended deadline of July 19, 2019, because the counsellor was unavailable. ICBC refused to extend the deadline further.

- [181] Ms. Gverzdys testified that the adjuster did not provide her with a reason for the refusal of a further extension to the deadline. She spoke to the plaintiff, who conveyed frustration about being unable to attend counselling because he wished to do so. The defendants did not cross-examine Ms. Gverzdys.
- [182] In light of this evidence, it is simply wrong for the defendants to argue, as they do, that the plaintiff failed to follow through and attend counselling. What occurred instead is that an ICBC adjuster, without explanation, refused to extend a unilaterally imposed deadline for funded counselling that the plaintiff wished to attend. This does not amount to a breach of the plaintiff's duty to mitigate.
- [183] I am also not persuaded that the plaintiff was obliged to start taking anti-depressants the moment this medication was recommended to him or face the argument that he has breached his duty to mitigate. The decision to take anti-depressant medication is a significant personal health decision for any individual. There are many factors to consider in making such a decision, including potential side-effects. Dr. Sandhu testified that in her experience it is not unusual for a patient to resist going on anti-depressant medication out of a fear that they will have to take the medication for life. The plaintiff did not breach his duty to mitigate in taking time to deliberate over a health decision that stood to have profound personal consequences for him.
- [184] For these reasons, I reject the plaintiff's argument that there should be any reduction in damages to account for a breach of the duty to mitigate.

SUMMARY

- [185] In summary, I award the plaintiff the following damages, subject to any applicable statutory deductions:

Non-pecuniary damages:

\$81,000.00

Past loss of earning capacity:

\$31,606.00

Future loss of earning capacity:

\$126,000.00

Future care costs:

\$36,900.00

Special damages:

\$2,051.20

Total:

\$277,557.20

costs

[186] Unless there are circumstances of which I am unaware, the plaintiff is entitled to his costs of the action at Scale B. If either party seeks a further hearing on costs, they should request such a hearing through Supreme Court Scheduling within 30 days of the date of this judgment.

"Horsman J."

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