

CANADA / JUDGMENT

Shoghi v. Lin

2019 BCSC 1818

COURT

Supreme Court of British Columbia

DECIDED

23 October 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 1818 Shoghi v. Lin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shoghi v. Lin,

2019 BCSC 1818

Date: 20191023

Docket: M147884

Registry: Vancouver

Between:

Aidin Shoghi

Plaintiff

And

Jin Min Lin and Su Min Pan

Defendants

- and -

Docket: M169600

Registry: Vancouver

Between:

Aidin Shoghi

Plaintiff

And

Sok Woo and Ideal Holdings Ltd.

Defendants

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for the Plaintiff:

G.S. Hoff

J. Boyd

Counsel for the Defendants in both actions:

L.C. Boulton

K. Kuefler, Articled Student

Place and Dates of Trial:

Vancouver, B.C.

May 27-31, June 3-7, 10-13,

19-21, 2019

Place and Date of Judgment:

Vancouver, B.C.

October 23, 2019

TABLE OF CONTENT

introduction. 4

chronology. 4

BACKGROUND FACTS. 7

Personal History. 7

Pre-Accident Employment History. 8

Recreational Activities. 10

Housework. 11

Previous Motor Vehicle Accidents. 12

THE first accident AND life after the first accident. 12

The First Accident 12

Employment after the First Accident 14

The Gap. 14

Simons. 16

Health Leading up to the Second Accident 19

THE SECOND accident AND life after the Second accident. 20

The Second Accident 20

Relationship with Ms. Neil following the Second Accident 22

Employment after the Second Accident 23

Simons. 23

Post-Simons. 26

The Plaintiff's Health after the Second Accident 27

experts' opinion. 29

The Plaintiff's Medical Experts. 29

Dr. Ramesh Sahjpaul 29

Dr. Stephen Anderson. 33

Dr. Mark Adrian. 38

Dr. Donald Cameron. 43

The Defendants' Medical Experts. 45

Dr. Robin Rickards. 45

Dr. Kulwant Riar 48

The Functional Capacity Evaluators. 51

Robert Gander 51

Paul Pakulak. 54

The Economic Experts. 55

John Lawless. 55

Dr. Tracy Witty. 56

Darren Benning. 58

damage awards sought. 59

Issues. 59

CAUSATION. 59

Legal Principles. 59

Application to the Facts. 61

Analysis and Conclusion regarding Causation. 62

quantum of damages. 66

non-pecuniary damages. 66

Legal Principles. 66

Application to the Facts. 67

Past Loss of Earning Capacity. 69

Legal Principles. 69

Application to the Facts. 71

Future Loss of Earning Capacity. 72

Legal Principles. 72

The Plaintiff's Income. 74

Application to the Facts. 74

Cost of Future Care. 76

Legal Principles. 76

Application to the Facts. 77

Special Damages. 78

In Trust Claim.. 79

Legal Principles. 79

Application to the Facts. 80

summary of awards. 80

costs. 80

introduction

- [1] The plaintiff, Aidin Shoghi, seeks damages in respect of two separate motor vehicle accidents.
- [2] The first accident occurred on December 27, 2012 (the "first accident"). The plaintiff was rear ended by the vehicle driven by Jin Min Lin and co-owned by Su Min Pan at the intersection of Highway 1 at Capilano Road in North Vancouver, BC. The defendants of the first accident admit liability but deny any damages resulting from the accident.
- [3] The second accident occurred on February 18, 2016 (the "second accident"). The plaintiff was driving eastbound on West Georgia Street in Vancouver, BC. When he entered the intersection of West Georgia and Jervis Street his vehicle was struck by a vehicle who failed to stop for a stop sign at the intersection. That vehicle was driven by driven by Sok Woo and owned by Ideal Holdings Ltd. Liability is similarly admitted for the second accident but the defendants deny any damages.
- [4] As a consequence of the second accident, the plaintiff claims he suffered a concussion; injuries to his neck, shoulders, and back; headaches; exacerbation of pre-existing anxiety and depression; and aggravation of the injuries sustained in the first accident. The plaintiff claims general damages for both accidents. He also claims damages for loss of past and future income earning capacity, cost of future care, and an in trust claim for past and prospective services provided by his family and friends. He further seeks special damages.

chronology

Dates

Events

August 1, 1976

Born in Tabriz, Iran

1981

Leaves Iran with his two brothers, sister, and parents for Quito, Ecuador

1988

Arrives in Toronto, Ontario, Canada; Granted refugee status

1988 to 1989

Moves to North Vancouver, British Columbia; Starts attending Carson Graham Secondary School in North Vancouver in an ESL stream

1994

Graduates high school

1995

Attends Capilano College taking university transfer courses; Works at Grand & Toy in retails sales for minimum wage

1996 to 1997

Works at Aldo as back of house manager

2000

Works as assistant manager in merchandizing at Winners in Coquitlam

2002

Moves to Winners in North Vancouver; Takes business-based courses at BCIT

2003

Hired by IGA Marketplace Corporate; Takes five month in-house management training program; Starts working at IGA New Westminster as an assistant manager; Starts skiing

2004

Transferred to Kingsway & Willingdon IGA and worked under Renaldo Infanti, acting store manager

2005

Transferred to IGA Marketplace Corporate on Dunbar Street, Vancouver where he worked for three months; transferred back to Kingsway & Willingdon IGA where he worked with Stefan Guminski

Late 2005

Transferred to start up a new store in West Vancouver with Guminski as the general manager and the plaintiff the assistant manager

Late 2006 to early 2007

Moved back to the Kingsway & Willingdon IGA and became a general manager. Within six months, he moved to West Vancouver as a general store manager

2008

Buys an IGA Store franchise in Port Moody

2009

Plaintiff is involved in a motor vehicle accident and his car is written off

2011

Sells IGA Store franchise back to IGA corporate

July 2011

Becomes a store manager at H&M in Metrotown Mall, Burnaby; Leaves after two months

Fall 2011

Works briefly at Tamwood International School

2011

Works at Sollys Bagel for two weeks

Early 2012

Works briefly as general manager at Super Valu in Sechelt, BC

2012

Goes to work for his father's couch business

December 2012

Hired as general manager of the Gap at Metrotown Mall, Burnaby

December 2012

Promoted to senior general manager at the Gap at Park Royal Mall, West Vancouver

December 27, 2012

First motor vehicle accident: Injuries to his low back, neck, and left shoulder

February 2, 2013

Attends Dr. Shahrokhi who notes the plaintiff's neck pain and parascapular (shoulder) pain

February 2013

Starts therapeutic massage, physiotherapy

March 2013

Attends Dr. Graham who sends him for further tests and X-Rays

March 2013

Lives almost full-time with Ashea Neil

Mid 2013

Loses interest in food

November 2013

Has a work place injury moving a box with his leg; Sees doctor but does not take time off work

By April 2014

Neck is better; shoulder pain continues. Attends massage therapy

July 2014

The plaintiff's son is born; Buys house in East Vancouver; Decides against renovation and rents it out

Early 2015

Offered position at Banana Republic but stays at the Gap

2015

Gives notice of resignation to the Gap

July 14, 2015

Interviews with Simons; Took job thinking it would be less physical than at the Gap; Still had constant left shoulder pain and felt down

December 2, 2015

Work place injury: Injures low back while lifting bins at work; Submits application for WorkSafeBC benefits

December 15, 2015

Returns to work on modified duties

December 2015

Saw a physiotherapist and stayed home for two weeks

January 12, 2016

Attends Dr. Gan regarding WorkSafeBC claim; Complains of severe depression and referred to Dr. Raycraft

Mid January 2016

Returns to work for four hours per day

February 2016

Pain improving with small setbacks occurring with lifting or bending down; WorkSafeBC stated he could return to work March 12, 2016

February 5, 2016

Dr. Gan notes depression; Discusses with the plaintiff that anti-depressant take time to work

February 18, 2016

Second motor vehicle accident: taken to the emergency room; Complains of headaches, neck pain, aggravation of left shoulder pain, low back pain, fractured left pinky finger, memory issues, mood issues, dizziness, disorientation

February 20, 2016

"likely concussion" noted by Dr. Gan

March 9, 2016

Learns of Ms. Neal's second pregnancy

April 2016

The plaintiff and his twin brother fly to Boston and drive to New Brunswick to examine a potential rental property

August 2016

Starts back at Simons full-time without accommodation

Approximately June 26, 2017

Suffers a lifting injury at work; Continues to work until mid-August of 2017 when he stops work

Fall of 2017

Seeks accommodation from Simons to do a graduated return to work program or work part-time

August of 2017

Begins day trading stocks; Initially received disability benefits from Manulife; Learned that no long-term disability benefits would be available

August 2018

Offers to go back to work full time with no restrictions; Simons requests medical assurances that he would be able to work and wants detailed medical confirmation; The plaintiff refuses to provide medical information and begins to look for other work

Late 2018

Offered a job at Askew's grocery store as a manager in Salmon Arm, BC

March 15, 2019

Completes probationary period at Askew's

April 28, 2019

Quits Askew's. Has not worked since

BACKGROUND FACTS

Personal History

- [5] The plaintiff was born in Tabriz, Iran on August 1, 1976. He is 43 years of age. He is the oldest of four children and has a twin brother (Yashar), a younger brother (Okhtay), and a younger sister. He currently resides with his common law spouse, Ahsea Neil, and their two children now aged five and three.
- [6] The plaintiff's family is of Turkish descent. The family practices the Baha'i religion. His parents had been immigrants to Iran. His first language is Azeri Turkish.
- [7] When he started school in Iran, the plaintiff learned Farsi. Following the Iranian revolution in 1979, the family immigrated to Ecuador in 1981, where the plaintiff attended school in Spanish. The plaintiff and his family came to Canada as refugees in 1988 and eventually became Canadian citizens. He began English schooling in the ESL program at Carson Graham Secondary in Grade 8 and graduated in 1994 with a solid "B" average.
- [8] The plaintiff's partner, Ashea Neil, testified that she first met the plaintiff in October 2012 on a dating website. Ms. Neil says that when they first met, the plaintiff was fun, caring, loyal, compassionate, and generous. She described him as a hard worker and a stoic and competitive individual. They would spend time hiking and walking.

Pre-Accident Employment History

- [9] In 1995, the plaintiff began taking university transfer courses at Capilano College, while also working at a stationery store in Capilano Mall in North Vancouver. He left after a year and a half to work at Aldo Shoes, where he obtained his first managerial job as a back of house manager doing inventory management.
- [10] In 2000 the plaintiff became an assistant manager for merchandising at a Winners store in Coquitlam. In 2002 he transferred to another Winners store in North Vancouver.
- [11] In early 2003 the plaintiff started working for IGA Marketplace ("IGA") corporate. He received in-house management training for five months. Following his training he started working at an IGA corporate-owned store in New Westminster as an assistant manager.
- [12] In 2004 he transferred to work at the IGA located on Kingsway Street and Willingdon Avenue in Burnaby. While there, the manager left and he commenced working under an acting store manager, Renaldo Infanti. He had a good working relationship with Mr. Infanti and they became friends.

- [13] In 2005 the plaintiff was briefly transferred to the IGA on Dunbar Street before transferring back to the Kingsway and Willingdon location. Around this time the plaintiff became friends with Stefan Guminski, another assistant manager at the store. The pair rock climbed together, and in late 2005 the plaintiff and Mr. Guminski were transferred to open up a new store in West Vancouver. The plaintiff was briefly transferred back to Kingsway before becoming a store manager in in West Vancouver in 2007.
- [14] In 2008, the plaintiff purchased an IGA franchise store in Port Moody. He paid himself \$85,000 annually. He testified that did not make any profits on the store due to the nature of the franchise agreement whereby the franchisor could dictate how earnings were to be spent. In his case, all earnings were to be spent on capital improvements. He kept the store for three years and sold it back to the franchisor in the summer of 2011. He did not make any money on the sale.
- [15] Following the sale of the IGA store, the plaintiff took a position as a store manager at H&M in Metrotown, Burnaby in July 2011. His salary was \$75,000 annually. He stayed in this position for two months.
- [16] The plaintiff then worked for a few days at Tamwood International School. He testified that he expected it to be an international sales job involving worldwide travel, and quit when he learned was a telemarketing position. He then took a position at a bagel company but worked there for only two weeks. He testified that he wanted a different position in the company and did not like the owner.
- [17] The plaintiff next worked as a general manager at a Supervalu in Sechelt in early 2012 but again did not stay long. For the majority of 2012 he worked without pay for his father's sofa framing business. He then started working at the Gap in Metrotown as a general manager in December 2012 and was quickly promoted to a senior general manager at the store's Park Royal Shopping Centre location. He was working at the Gap at the time of the first accident.
- [18] A number of witnesses testified about the plaintiff's work ethic prior to the accidents. One of the plaintiff's friends, Edis Besic, testified that he went to work for the plaintiff following the plaintiff's purchase of the IGA in Port Moody. He described the plaintiff as an excellent manager who was very dedicated to his work and wanted to succeed and wanted his staff to succeed. He also recalls the plaintiff working long hours six to seven days a week.
- [19] Likewise, Amir Akabarli testified that he first met the plaintiff when the plaintiff purchased the IGA store in Port Moody and worked as the general manager. Mr. Akabarli was a produce clerk. He testified that the store was struggling before the plaintiff began managing it. Sales had dropped and service was poor, but this changed when the plaintiff started working there. Mr. Akabarli testified that the plaintiff worked long hours. He was there from before the store was opened until after it closed. He said that, at that time, the plaintiff could lift anything and never complained about work.

- [20] Roxana Kankar worked with the plaintiff at the Gap and testified that the plaintiff never came to work early and never worked 12-hour days. However, because of the hours she worked, it would have been impossible for her to make the observations she claims to have made. I thus place little weight on her evidence.

Recreational Activities

- [21] Numerous witnesses testified that the plaintiff was very involved in recreational activities prior to the accidents. The plaintiff started weightlifting in high school. Michale Kulik met the plaintiff when he first arrived in Vancouver. They grew up together and attended Carson Graham Secondary. He said that he and the plaintiff spent much time doing physical activities together. They would go to the gym, mountain bike, and play basketball and soccer. He testified that, prior to the accidents, he and the plaintiff would work out at the gym three to four times a week.
- [22] The plaintiff would also often lift at the gym with his brother twin brother Yashar and his younger brother Okhtay. Yashar testified at trial and noted that before the accidents the plaintiff was healthy and fit and could lift an incredible amount of weight in the gym. While twins, Yashar said that he (Yashar) is now noticeably fitter, heavier, and more muscular than the plaintiff. Pictures of the twins prior to the accidents were placed in evidence and reflect two individuals who looked remarkably similar.
- [23] In addition to weightlifting, the plaintiff was introduced to rock climbing by Stefan Guminski, his co-worker at IGA, in 2006. Mr. Guminski and Mr. Infanti testified about their rock climbing experience with the plaintiff. The plaintiff became fairly proficient and went on rock climbing trips around North America. He also made regular climbing trips to Lighthouse Park and Squamish, and would climb indoors in gyms. At the time of the first accident the plaintiff had attained the ability to be a lead climber who picks the route and sets up protection for others in the group. He testified to spending well over \$5,000 on rock climbing gear. Yashar testified that he does not recall the plaintiff ever rock climbing or skiing following the first accident.
- [24] Yashar testified that the plaintiff was aware of how to properly lift heavy things at work and would show others how to do so safely. Yashar believes that the plaintiff had never injured himself at work prior to the first accident.

Housework

- [25] Prior to moving in with Ms. Neil the plaintiff lived with his parents. Yashar testified that when he lived with his parents he would do all the cooking and helped significantly with cleaning and yard work. Okhtay similarly testified that the plaintiff would help out with buying and preparing food and with other household chores when he lived with his parents.

Previous Motor Vehicle Accidents

[26] The plaintiff was in an accident in 2010. He was backing out of a parking stall at the time of the accident and had been assessed 100% at fault. He testified that he had no injuries from that accident. It was his experience, he testified, that motor vehicle accidents could occur where there would be little symptoms or one would recover quickly. In 2015, the plaintiff was in another motor vehicle accident where he was at fault for running a stop sign.

THE first accident AND life after the first accident

The First Accident

[27] The first accident occurred on December 27, 2012, at approximately 6:20 p.m. The plaintiff was driving a 2010 Honda Fit and was stopped at a traffic light facing southbound on Capilano Road in North Vancouver at the intersection of the ramp onto Highway 1. He says had been stopped for a few moments when he was rear ended without notice by a Land Rover Discovery driven by the defendant, Jin Min Lin.

[28] The plaintiff testified that his vehicle was pushed forward in the collision and its rear bumper sustained significant damage. He noted that 28 hours of work was required in the repair shop.

[29] The defendant in the first accident was called as a witness. She denied that the plaintiff's car went forward.

[30] At the time of the first accident, the plaintiff was on his way to meet Ms. Neil at her apartment in East Vancouver. It was the beginning of their relationship, and the plaintiff testified that he wanted to carry on with his date arranged for that night. Since his vehicle was drivable, he continued to Ms. Neil's apartment from the first accident scene. The plaintiff told Ms. Neil about the first accident but they carried on to go for supper.

[31] The plaintiff said that his body moved forward then backward in the collision, with his head hitting the headrest with force. He testified that his left arm was on the steering wheel at the time of the impact. He indicated that at dinner after the accident he had a headache, trouble focusing, and shoulder and neck pain and general stiffness. The next morning he noticed quite severe low back pain.

[32] In the week following the first accident the plaintiff continued his work as the general manager of the Gap, but did not do anything other than work.

[33] Over the next month, the plaintiff said his symptoms did not go away and his shoulder pain got worse. He tried to go to the gym two weeks after the first accident but could not push, pull, or lift. He was not able to lift an empty 45-pound barbell, and attempting to do so caused pain to his left shoulder.

- [34] Ms. Neil became very concerned and wanted the plaintiff to go to a doctor. She accompanied him to an appointment with Dr. M. Shahrokhi on February 2, 2013. Dr. Shahrokhi noted neck pain, low back pain, and shoulder pain which he described in his notes as "parascap". The plaintiff was told that he had soft tissue injuries and was given Tylenol 3s for pain. He was also prescribed physiotherapy and massage therapy. The plaintiff says he tried the Tylenol 3s but felt they did not do anything.
- [35] The plaintiff testified that he saw another doctor on March 10, 2013, and he was sent for further tests, including an X-Ray, because he still had constant shoulder pain with pushing and pulling activities.
- [36] The plaintiff says he has not rock climbed since the first accident. He said he tried to continue with other activities, but was unable to do so. Yashar testified that he did not work out with the plaintiff for two months after the first accident, and when they went back to the gym the plaintiff could not work his shoulders or upper back at all. Mr. Besic likewise testified that the plaintiff was nowhere near capable of doing what he could do in the gym in the past after the first accident. Ms. Neil said that for the remainder of 2013 the plaintiff would try to go to the gym but could not lift and would come home and complain.
- [37] In the year following the first accident the plaintiff sought massage and physiotherapy treatments for the pain in his neck and shoulder. He said that the treatments occasionally gave him some immediate relief but often made his pain worse. He paid for the treatments himself.
- [38] The plaintiff testified that he is a stoic person and that he had been taught not to show his emotions. He said he tried not to focus on his symptoms, but they began to wear him down over time. He testified that in mid-2013 he began to lose his appetite and stopped enjoying food.
- [39] The plaintiff learned that Ms. Neil was pregnant in September 2013, and their son was born in July 2014. Ms. Neil underwent a difficult delivery and the plaintiff tried to assist as best as he could with cooking and cleaning. He testified that he felt he was of limited help because he usually would be upset coming home from work due to his constant shoulder pain. He said he was quick to anger and became very short tempered. Around the time their son was born, the plaintiff and Ms. Neil bought a house which they originally intended to renovate and live in but learned that it would be very costly. Consequently, they decided to rent out the house and never lived there.
- [40] The plaintiff said that by 2014 his neck pain was improving but he had persistent left shoulder pain and a sense of weakness, numbness, and tingling in his hand. He said that his physical symptoms stayed the same throughout 2014 but his emotional feeling of flatness and sadness continued to worsen. He continued to experience difficulty with eating.

Employment after the First Accident

The Gap

- [41] The plaintiff continued to work at the Gap following the first accident. Ms. Neil said that the plaintiff continued to work a lot after the first accident, going into work early and usually returning home after 6 p.m.
- [42] The plaintiff said he changed the way he lifted objects at work as a result of the injury to his left shoulder. He would lift objects in a way which guarded and protected the use of his left shoulder, trying to approach the object from an angle and scooping it with his right arm so the right side of his body was doing all the lifting with his left arm just supporting that lift.
- [43] The plaintiff had a work-related accident in November 2013. While lifting a box at work, he felt a sharp pain in his lower back and groin area. He attended Dr. Orng and a WorkSafeBC claim form was filled out.
- [44] The plaintiff testified that he had to work some overtime at the Gap in late 2014 in preparation for a visit from the CEO. Given the plaintiff's difficulties in meeting the physical demands of his job, Yashar indicated that he used his professional connections to get the plaintiff a job offer at Banana Republic in early 2015. While the job at Banana Republic would have been less physical, the plaintiff was persuaded by his boss to remain at the Gap.
- [45] Ms. Neil had a cancer scare in early 2015, and the plaintiff told his boss that he wanted to take a month off work to care for her. Before taking this leave the plaintiff got a new boss, Jeff Wadden. When Ms. Neil found out that she did not have cancer, the plaintiff says he told Mr. Wadden that he would not need a leave of absence and would instead take some time off, using up the extra time he had saved up working over Christmas. He then went for a trip with Ms. Neil to Venice via Paris.
- [46] When the plaintiff returned he was questioned by Mr. Wadden as to why he had taken a trip to Europe on his personal leave of absence. The plaintiff told him that he had not taken a leave of absence and that what he did on his own time was none of the company's business. A confrontation ensued, and the plaintiff gave notice of his resignation.
- [47] Mr. Wadden testified at trial and said that he worked with the plaintiff for a short time and did not have a good opinion of him. He testified that when he learned that the plaintiff was on vacation, it did not coincide with his view that the plaintiff was on leave to care for his partner. Further, he felt that the plaintiff did not have a good work attitude and disliked the plaintiff's managerial style, indicating that he believed the plaintiff treated men and women differently.
- [48] On cross-examination, Mr. Wadden agreed that he had only met the plaintiff on a few occasions. Given the short amount of time that Mr. Wadden interacted with the plaintiff, the difficult confrontation with respect to his leave, and the possibility of a misunderstanding, I do not give much weight to Mr. Wadden's evidence with respect to the plaintiff's style of work.

Simons

[49] After giving notice of resignation at the Gap in the summer of 2015, the plaintiff applied for an area supervisor position at Simons, an established department store in Québec which was opening a branch in Park Royal Shopping Centre in West Vancouver. He testified that the position required a university degree or equivalent experience. While he does not have a university degree, he has over 15 years of experience in retail management and believed he was qualified.

[50] The plaintiff's resume, submitted as part of his online application, was placed in evidence before the court. Under the heading "Education", the plaintiff wrote:

University of British Columbia

· Commerce

British Columbia Institute of technology

· Operations Management

University of British Columbia

· Mathematics

[51] The plaintiff was called in for a first interview with Marie Pascale Giroux in July 2015. The interview went well and he was called in for a second interview with Marie Christine Duval, who works in the human resources department. At the second interview he was asked to complete an additional employment application, which was completed by the plaintiff as follows:

Education Level, University or College, Name of Institution--UBC Diploma completed? "Yes".

Present Grade or Year of University--"Bachelor's".

Field of Study or Concentration--"Science".

Technical school--BCIT Diploma completed? "No".

High school--Carson Graham Diploma completed "Yes".

[52] The plaintiff testified that he wrote "Yes" to the question "UBC Diploma completed?" because he was trying to indicate that he had completed a university transfer program at Capilano College to get into UBC. In the next field where he was asked what year he was in he wrote "Bachelor's" to convey that he was going to go back to university to attain a Bachelor's degree. He testified that at this point he believed he was enrolled at UBC. However, after he had secured the job, he said the Registrar's office advised him that he could not attain a degree by simply enrolling himself; first he had to be accepted by UBC. The plaintiff testified that he did not pursue this further because he was in training with Simons.

- [53] The defendants called a number of Simons employees as witnesses.
- [54] Ms. Giroux, who conducted the plaintiff's initial interview, testified that management-level positions at Simons require a university degree. Mr. Giroux said she assumed from the plaintiff's employment application that he had a university degree, and that he never told her he did not have one.
- [55] In cross-examination, Ms. Giroux agreed that an applicant would not be disqualified if they didn't have a degree, but said that she would have conducted an interview differently. Rather than relying on the applicant's educational qualifications, the interview would focus on relevant work experience.
- [56] Ms. Duval, who conducted the plaintiff's second interview, testified that the plaintiff never told her that he did not have a university degree. She said the plaintiff did not inform her that he was in the process of attaining a Bachelor's degree.
- [57] Julie Duchenes works in human resources for Simons Montréal downtown and was the person who extended a job offer to the plaintiff at \$85,000 annually. She said he accepted the offer and seemed very excited. However, two days later he sent a lengthy email asking to be paid \$95,000 per annum. Ms. Duchenes testified that she was taken off-guard and found it "very weird". She phoned Ms. Giroux about the incident and they agreed to give the plaintiff the benefit of the doubt.
- [58] I do not accept the plaintiff's version of events in respect of his resume and find that he misrepresented his educational attainment. I find his application materials clearly convey that he had obtained a Bachelor's degree from UBC.
- [59] The plaintiff testified that he thought the position at Simons would be less physically demanding than his job at the Gap, which ultimately was not the case. On December 2, 2015, the plaintiff hurt his back while lifting some boxes at work. He thought that the boxes would not be as heavy as they were, and he felt a sharp pain on the right side of his low back.
- [60] The plaintiff testified that he filled out an incident report and kept working. He went to work the next day but was in pain and left half way through his shift. The plaintiff then saw Dr. Gan, who prescribed Naproxen and Flexeril. The plaintiff says he then filled out a WorkSafeBC application. He returned to work on December 15, 2015, on modified duties, but stayed home on WorkSafeBC benefits for approximately an additional two weeks after seeing a physiotherapist on December 21, 2015. He returned to work on a graduated return to work schedule in the second week of January 2016.
- [61] The plaintiff testified that his pain was improving in January 2016 and he was working up to six hours a day. He stated that he had minor setbacks when he bent down or tried to lift something. WorkSafeBC indicated that, by March 12, 2016, the plaintiff would be completely back at work and no further WorkSafeBC benefits would be paid to him.

Health Leading up to the Second Accident

- [62] Ms. Neil noted that the plaintiff began making jokes about being suicidal in early 2016. She was concerned, and told him that he had to start seeing someone about his suicidal thoughts and moods as they were having an impact on her and their son.
- [63] The plaintiff saw Dr. Gan on January 12, 2016, and was diagnosed with depression and chronic pain. Dr. Gan was not called as an expert witness, but gave evidence of his interactions with the plaintiff. He noted that the plaintiff stated he had been struggling with depression for several years and his recent back injury and back pain compounded his depressive symptoms. The plaintiff indicated to Dr. Gan that he was worried he might do something "stupid" to himself, that he no longer found joy in relationships or interpersonal interactions, and that if he did not have his son, he would not see a point to living. The plaintiff told Dr. Gan that prior to the first accident he had been a very positive person, but things had become very difficult in the last two to three years.
- [64] Dr. Gan referred the plaintiff to Dr. Stephen Raycraft, a psychiatrist, for anxiety and depression. In addition, he started the plaintiff on a low dose of Escitalopram, an antidepressant, with gradual increase to a therapeutic dose.
- [65] At a follow up visit on January 29, 2016, the plaintiff was diagnosed with a major depressive episode by Dr. Gan was referred on an emergency basis to Dr. Stephen Raycraft. At this time Dr. Gan also wanted to do a trial of Effexor, another antidepressant medication, as the Ciprallex was causing gastrointestinal problems. The plaintiff had not been able to take Effexor either, however, as it also resulted in gastrointestinal problems. Dr. Gan noted the plaintiff had passive suicidal ideation.

THE SECOND accident AND life after the Second accident

The Second Accident

- [66] On February 18, 2016, at 2 p.m., the plaintiff was on his way home from work driving a 2013 Fiat 500 travelling eastbound along West Georgia Street in the left-most lane. He entered the intersection of West Georgia and Jervis Street when a Porsche Cayenne SUV travelling southbound on Jervis Street cut into his path of travel, causing an impact between the front bumper of his vehicle and the right side of the SUV.
- [67] The plaintiff testified that the airbags of his vehicle deployed, causing the back of his head to be slammed forcefully into his headrest. His memory after that was not clear. He testified that he felt disoriented, confused, and "foggy". He remembers sitting on the curb and experiencing significant pain in his lower back, neck, left shoulder, and left pinky finger, which was later found to be fractured.

[68] The plaintiff was taken to St. Paul's Hospital by ambulance. He was seen by the emergency room doctor and was given a note indicating he was unable to go to work. He was further given a post-concussion protocol sheet but was not told he had suffered a concussion.

[69] As a result of the second accident, the plaintiff says he sustained:

- headaches;
- neck pain;
- an aggravation of his left shoulder pain;
- low back pain;
- fractured left pinky finger;
- memory issues;
- mood issues;
- dizziness; and
- disorientation.

[70] Ms. Neil testified that the plaintiff did not call her after the second accident. He showed up at home looking frail and shaky with a splinted finger, and told her he had been in an accident. He seemed confused and quiet. Ms. Neil said plaintiff simply came home the evening of the second accident, got undressed, had a shower and then went to his parents' home. The plaintiff's mother, Pattiverra Shoghi, said that the plaintiff seemed to her like he was drunk when he came to her home after the second accident. His brother Okhtay said that he looked pale and seemed confused and disoriented. Ms. Shoghi testified that the plaintiff did not stay long before going back to his home with Ms. Neil. She called Ms. Neil to advise her not to let him sleep as she was concerned he had a concussion.

[71] Ms. Neil remembers that the plaintiff complained of dizziness and headaches on the evening after the second accident, and told her that at one point he had thrown up. He told her about the ambulance but did not tell her about the airbags being deployed until a few days later. That was when Ms. Neil learned the plaintiff's car was a write-off.

[72] At the referral of Dr. Gill, one of the plaintiff's GPs, the plaintiff went to a one-day concussion clinic at G.F. Strong Rehabilitation Centre in April 2016. The plaintiff says that at this time he was experiencing memory difficulties, decreased concentration, headaches, nausea, balance difficulties, light sensitivity, dizziness, and noise sensitivity.

[73] From April to August 2016, the plaintiff attended occupational therapy and physiotherapy sessions. He paid for these expenses himself and claims them as special damages.

- [74] The plaintiff travelled with his twin brother to Boston in April 2016. From there, they drove to St. John, New Brunswick to look at an investment house. The plaintiff was cross-examined at length on his ability to do a road trip where he was the driver because his brother did not drive, given that he complained that he had to sit and stand intermittently due to his low back pain.

Relationship with Ms. Neil following the Second Accident

- [75] In 2016, the plaintiff and Ms. Neil were living in a one bedroom apartment in Olympic Village in Vancouver. He testified that his pain was dominating everything and he would complain to Ms. Neil about the untidiness of the apartment. They would end up in a fight. She testified that the plaintiff was very forgetful following the second accident. She felt that he appeared confused and was not able to follow a conversation and would misinterpret things.
- [76] In March 2016 Ms. Neil became pregnant with their second child. Their relationship at this time was very tense. He testified that he now realizes he was not being supportive and was not helping out with any of the household chores.
- [77] The plaintiff's daughter was born in October 2016. As with their son, it was a difficult birth. The plaintiff continued to be irritable and struggled to help his partner physically. He testified that his low back was sore everyday, he had headaches, his left shoulder always bothered him, and he was not exercising, socializing, or helping Ms. Neil with the tasks associated with raising their children.
- [78] Ms. Neil testified that the plaintiff seemed very detached when their daughter was born. The plaintiff had difficulty handling noises associated with their small children and would get mad at her if the children were loud. The plaintiff testified that around this time he was not eating properly and had lost much weight.
- [79] He testified that during this period, he thought about killing himself but could not bring himself to act on his thoughts because of his children. He spent more and more time at his parents' home. The plaintiff and Ms. Neil separated in February 2017. They began living together regularly again in October 2018.

Employment after the Second Accident

Simons

- [80] The plaintiff returned to work at Simons on August 29, 2016, on a full-time basis. He testified he had to return full-time because an accommodated return to work schedule was not made available. He indicated that he struggled upon return and never felt 100% mentally present. He said that physical activity, including walking, bending, and lifting, irritated his lower back. When he went home he would argue with Ms. Neil. He nonetheless continued working up to August 17, 2017, without interruption, taking no time off as a result of injury. None of

the Simons workers noticed the plaintiff struggling to perform his job duties, though his manager Joanne Perrault wanted the plaintiff to take it easy and be mindful of his back on his return to work.

- [81] The plaintiff testified that when he first returned to work after the second accident he had a sympathetic boss, Ms. Perrault, who watched out for him. Ms. Perrault testified that she would urge the plaintiff not to lift things or do anything to aggravate his injuries. She further described the plaintiff as one of the strongest area managers. Ms. Perrault was let go by Simons in June 2017, and the plaintiff said the new store manager did not provide him with the same support.
- [82] The plaintiff was injured at work in April 2017 when a pipe burst in the alterations department, one of the departments he supervised. His legs were badly blistered. He reported the injury but continued to work and did not take time off.
- [83] The plaintiff testified that he suffered a further work injury on June 26, 2017, when he was lifting some bins and aggravated his lower back. He asked the human resources manager about filing a WorkSafeBC claim but was told that he would not qualify for WorkSafeBC benefits because of his previous injuries from motor vehicle accidents.
- [84] The plaintiff went on medical leave August 17, 2017, as a result of his cognitive symptoms and pain symptoms. He received 15 weeks of Employment Insurance ("EI") and medical benefits.
- [85] When he was off work, the plaintiff began to day trade stocks but lost in excess of \$50,000 that year. He could not continue not making money and needed to return to paying employment.
- [86] The plaintiff wished to go back to work and testified that on November 13, 2017, he contacted his human resources manager at Simons and advised that his doctor supported him to return on a graduated return to work schedule. He stated that his doctor wanted him to see a kinesiologist to determine his functional limitations. Simons did not make a graduated return to work schedule available.
- [87] The plaintiff testified that he then, on recommendation from one of his therapists, asked Simons if he could return to work using a Segway. They refused, indicating that it would be unsafe. Other recommendations for the plaintiff made by his therapists at this time included that he work a maximum of three days a week, eight hours a day; that he not lift any object weighing more than 25 pounds; that he take breaks as necessary; that he wear sport shoes instead of dress shoes; and that he should not be required to wear a suit at work.
- [88] When Simons refused to make a graduated return to work plan available, the plaintiff applied for a short-term disability coverage and received benefits for 26 weeks, from December 2017 to June 2018. These benefits were distributed on the basis that he was totally disabled. This exhausted the plaintiff's short-term disability coverage from Manulife.

- [89] When his Manulife benefits had ceased, he applied for WorkSafeBC benefits but was advised in June 2018 that he was not eligible as they determined that his inability to work was from the second accident. He also sought long term disability from Simons.
- [90] In August 2018, the plaintiff offered to return to work full-time without accommodation. Simons refused to permit the plaintiff to go back to work unless he had medical clearance. They indicated they needed the clinical records from the plaintiff's doctors, and were unwilling to accept him back to work full-time without medical confirmation of the plaintiff's ability to work. The plaintiff refused to provide this documentation, and thus did not return to work.
- [91] A number of Simons' employees testified at trial. Anne Fortin became the plaintiff's human resource manager in April 2017 when Hetal Kanabar, the human resources manager for the West Vancouver store, went on maternity leave. Ms. Fortin testified that there were no complaints about the plaintiff's performance, but there were issues with his absences. She said that the plaintiff stopped by her office in August 2017 saying he was not feeling well. She sent him home. He took two weeks off and she paid him sick time. From there, he went on short-term disability. She tries to stay in contact with employees on leave and typically does so by telephone, but found she was only able to reach the plaintiff by email. As such, she says it was difficult to discuss the accommodations the plaintiff was seeking in the fall of 2017.
- [92] Ms. Fortin recalls in that the plaintiff asked to come back to work wearing sports shoes and no suit in November 2018. She decided to wait for a formal letter from the plaintiff's doctor before making any decisions.
- [93] Ms. Fortin testified that she never asked him what was causing his illness in August of 2017 or why he did not feel well. She said that March 2018 was the first time the plaintiff indicated that he was suffering from a workplace injury. She says that the incident report from what the plaintiff said was a workplace injury in August 2017 was missing and was not found until Ms. Kanabar returned from leave in June 2018.
- [94] Ryan Derakhashan, an employee of Simons, was called as a witness and testified that he started working with the plaintiff in January 2017 when he was promoted to area supervisor. He said that he was aware the plaintiff had been in car accidents and had been off work. He recalled the plaintiff being hard-working, honest, straightforward, and that he kept himself very busy and did not have a lot of time to waste. He stated that, compared to other managers' jobs, the plaintiff had the most physically demanding one. His duties included security, building maintenance, alterations, customer service, stock handling, and managing the café. Often the plaintiff would have to unload trucks with merchandise.
- [95] Mr. Derakhashan was aware that the plaintiff had chronic pain in his back, neck, and shoulder. He observed that the plaintiff would still do the work despite of his pain. He did not believe the plaintiff to be a complainer, but on occasion the plaintiff would mention that he had back pain. Mr. Derakhashan was also aware that the plaintiff had severely burned his

leg in 2017 at work when a machine in alterations malfunctioned, and that he did not take any time off. He also recalls another work incident that involved the plaintiff kicking a bin but did not recall if the plaintiff took any time off for that occasion.

Post-Simons

- [96] In October 2018, the plaintiff applied for a number of jobs, including at Home Depot, Loblaw's, and Hudson's at the Vancouver International Airport. He was offered a position that paid \$120,000 a year at Hudson's, but declined the offer as he did not believe he could meet the mental and physical demands of the job due to his accident-related symptoms.
- [97] In late 2018, the plaintiff took a position with Askew's Foods in Salmon Arm, BC. He testified that he intended to try the job and see if Salmon Arm was a community he could move to. When the position came up, he and Ms. Neil discussed her moving there as well, but she ultimately decided to wait and see if the job opportunity would work out. Ms. Neil thought Askew's, being a small family oriented business, would care more about the plaintiff's well-being, but she was not sure if he could do the job. Ms. Neil testified that the plaintiff would try working at Askew's and would move if it worked.
- [98] The plaintiff soon found that he was having difficulty completing the tasks required of him at Askew's. He spoke with his employer in mid-March 2019 about reducing his hours to part time. He tried to come up with a way in order to keep his job at Askew's by job-sharing with his brother Yashar. His boss was not agreeable to this idea, and the plaintiff resigned from Askew's at the end of March 2019.
- [99] Yashar testified that since the plaintiff quit his job at Askew's he has been giving him between \$500 and \$1,000 a month and has no expectation of getting paid back.

The Plaintiff's Health after the Second Accident

- [100] On February 20, 2016, Dr. Gan determined the plaintiff had likely suffered a concussion in the second accident. Dr. Gan was called as a witness at trial but was not qualified as an expert. He testified that this diagnosis was likely made on the basis of the symptoms the plaintiff was presenting.
- [101] At the same appointment, Dr. Gan recorded that the plaintiff had neck and back pain following the second accident. The plaintiff indicated that his neck pain had resolved one to two months after the first accident and had completely resolved prior to the second accident, but he had been left with ongoing left shoulder pain. Dr. Gan also noted that the plaintiff had depression and anxiety but he was unable to tolerate Effexor due to gastrointestinal upset. He referred the plaintiff to Dr. Stephen Raycraft, a psychiatrist.

- [102] The plaintiff attended an appointment with Dr. Raycraft on February 22, 2016. Dr. Raycraft was also called as a witness at trial without being qualified as an expert. Dr. Raycraft observed that the plaintiff was experiencing anxiety and struggled with giving up many of the activities that were important to him after the first accident. Dr. Raycraft says he did not give the plaintiff advice on his medical legal matters, but testified that he advised the plaintiff he would feel better if he went to work.
- [103] Dr. Raycraft recommended that the plaintiff receive long-term psychotherapy in respect of the motor vehicle accidents he was in and the other matters troubling him. He testified that the plaintiff should be seen at least twice a week for several years. I find Dr. Raycraft's treatment recommendations to be very onerous. In closing submissions, defence counsel did not argue that the plaintiff should have done psychotherapy with Dr. Raycraft given his very onerous and restrictive rules surrounding treatments.
- [104] Following the second accident, the plaintiff's mother says she noticed he was in more pain than before and he could no longer hide it. He would find a comfortable spot on the couch and stay there for hours. When he went back to work in the summer of 2016 she had not noticed any improvement in his condition. She has seen him have difficulties with activities involving his left shoulder. Ms. Shogi also noticed that the plaintiff is less tolerant and patient and has outbursts.
- [105] The plaintiff saw his family physician a number of times in 2017 to help with his low back pain. During 2018 he continued to attend physiotherapy, focusing on his lower back which continued to improve. Mentally, however, he says he was noticing that he was unable to remember simple things. He was also very upset about not working, rock climbing, or working out as he had done before the accidents.
- [106] Ms. Neil testified that when he was off work, she would see the plaintiff more frequently and co-parent their children. However, day-to-day, he was up and down emotionally. Ms. Neil testified that, physically, the plaintiff seemed to have deteriorated and began looking like an old man. She testified that he is no longer physically the man he used to be: his posture has deteriorated and he no longer does any recreational activities.
- [107] The plaintiff testified that he became extremely depressed in March 2019. One evening he contacted a crisis hotline after contemplating suicide and realizing the impact it would have on his children. Shortly after he saw a new doctor who prescribed an antidepressant, which caused nausea, diarrhea, stomach aches, and panic attacks. A new antidepressant drug was tried but the plaintiff did not tolerate it any better.
- [108] The plaintiff has commenced seeing a psychologist, Dr. Owen James, and plans to see him on a weekly basis. The plaintiff is covering the cost himself.
- [109] The plaintiff continues to apply for jobs and has sent in applications for management position at Fossil and Rolex.

experts' opinion

- [110] The plaintiff tendered expert medical reports from Dr. Ramesh Sahjpaul, a neurosurgeon; Dr. Stephen Anderson, a psychiatrist; Dr. Mark Adrian, a physical medicine and rehabilitation specialist; and Dr. Donald Cameron, a neurologist. The defendants tendered expert medical reports from Dr. Robin Rickards, an orthopedic surgeon, and Dr. Kulwant Riar, a psychiatrist.
- [111] The defendant also tendered an expert report from Robert Gander, a functional capacity evaluator and occupational therapist. The plaintiff responded with a report prepared by Paul Pakulak, another functional capacity evaluator and occupational therapist, who reviewed Mr. Gander's report.
- [112] Finally, the plaintiff tendered opinion evidence from John Lawless, a vocational rehabilitation consultant; Dr. Tracy Witty, a life care planner who prepared a report outlining future care costs for the plaintiff; and Darren Benning, an economist who also provided an opinion on future care costs.

The Plaintiff's Medical Experts

Dr. Ramesh Sahjpaul

- [113] Dr. Ramesh Sahjpaul is a neurosurgeon and was qualified to give evidence in the area of general neurosurgery and the treatment of spine, cranial injuries, brain injuries, and concussions. At the request of the plaintiff, Dr. Sahjpaul provided an expert report based on two meetings with the plaintiff, a physical examination, and a review of the plaintiff's medical records.
- [114] Dr. Sahjpaul noted that the plaintiff complained of ongoing shoulder pain and weakness since the first accident. He also noted that the plaintiff experienced neck and back pain after the first accident which resolved, though massage and physiotherapy treatments were not helpful.
- [115] The plaintiff told Dr. Sahjpaul that he doesn't recall the actual collision or very much after the second accident, but that afterwards he had a headache and neck, shoulder, and low back pain. The plaintiff told Dr. Sahjpaul that the headache and neck pain eventually resolved and his shoulder returned to baseline, but his low back pain continued. He also told Dr. Sahjpaul that he had a concussion and reported impaired concentration and short term memory, mood swings, depression, anxiety, difficulty sleeping, and irritability, especially when in large crowds. At a second appointment the plaintiff stated that, due to his left shoulder pain, he had started to overuse his right shoulder. He said he has been having increased right shoulder pain for at least the last two years.

- [116] The plaintiff told him that he had been injured at work twice, in November 2013 and in December 2015, and had planned to return to work in March 2016. He also noted he aggravated his back in July 2017 at the work place.
- [117] Dr. Sahjpaul noted that a CT Scan of the plaintiff's lumbar spine was performed in July 2017 and did not reveal any abnormalities. Upon physical examination, Dr. Sahjpaul noted that the range of motion of the plaintiff's neck was restricted in all directions by 50% of normal. While he could perform spinal flexion, extension, and rotation, those manoeuvres caused low back pain.
- [118] It was Dr. Sahjpaul's opinion that as a result of the first accident the plaintiff had suffered soft tissue injuries to his neck and low back and suffered pain as a result. As well, the plaintiff had an injury to his left shoulder and a possible injury to his left ulnar nerve at the level of the elbow, though he noted at trial that there was no evidence of such an injury upon physical examination.
- [119] Dr. Sahjpaul opines in his report that the plaintiff sustained the following injuries in the second accident:
- 1) A significant aggravation of low back pain--myofascial [soft tissue] and mechanical;
 - 2) left hand injury (finger fracture);
 - 3) Headache--cervicogenic;
 - 4) Neck pain--myofascial and mechanical;
 - 5) Aggravation of pre-existing left shoulder injury--further comments are left to individuals that are more qualified;
 - 6) Symptoms consistent with concussion.
- [120] Dr. Sahjpaul noted that the plaintiff was not a candidate for neurosurgical intervention, but that he might benefit from an assessment in a pain management program, where he could potentially benefit from percutaneous injections and pain management strategies.
- [121] At trial, Dr. Sahjpaul noted that pain lasting longer than six months is described as "chronic pain syndrome". He opined that while the treatments he recommends may provide some degree of symptom reduction, resolution is not anticipated. In his experience, patients who have persistent symptoms beyond two years do not recover completely. He did not anticipate aggravation of the plaintiff's symptoms barring further injuries.

- [122] In addition to his opinion that the plaintiff was suffering from a chronic pain syndrome, Dr. Sahjpaul observed that the plaintiff had documented psychiatric disorders. He stated, "the presence of depression [and] anxiety may negatively impact his physical complaints." Dr. Sahjpaul stated in his report that further comments should be obtained from people more qualified in that area of chronic pain but he noted that based on his experience in chronic pain, there is an interplay between psychiatric and physical problems.
- [123] With respect to the vocational implications, Dr. Sahjpaul stated that, given the plaintiff aggravated his back pain at work in July of 2017 and has not returned to work since, he likely will not be able to return to any manual labour type work. Dr. Sahjpaul opined that he may be able to do work that does not require repetitive lifting, twisting manoeuvres of the low back, or repetitive impact activities, or may be able to perform modified duties with those restrictions in mind. He indicated that jobs requiring prolonged sitting are also probably best avoided.
- [124] Dr. Sahjpaul also stated in his report that he does not believe that the plaintiff would be able to continue working as a store manager given the considerable difficulty he was having performing these job requirements. However, he agreed in cross-examination that the plaintiff did not tell him this. He also agreed with the suggestion put to him in cross-examination that the plaintiff could do a management job in sales where he could help coworkers.
- [125] Dr. Sahjpaul reviewed the report of Dr. Robin Rickards, an orthopedic surgeon who prepared an expert report on behalf of the defendants. Dr. Rickards diagnosed the plaintiff with soft tissue cervical and lumbar spine symptoms and mild Adhesive Capsulitis (frozen shoulder) on his left shoulder.
- [126] Dr. Sahjpaul did not agree with Dr. Rickards' opinion on causation with respect to the plaintiff's low back symptoms. Dr. Rickards opined that the work-related accident was a significant factor in regards to the plaintiff's ongoing low back symptoms. Dr. Sahjpaul further disagreed with Dr. Rickards' opinion that, because the plaintiff waited until March 2013 (what he says was three months after the first accident) to seek medical attention, the plaintiff's shoulder injury was unrelated to the first accident. Dr. Sahjpaul would not comment further on the left shoulder symptoms, but indicated that his opinion on causation was not altered by the delay in medical presentation.
- [127] Dr. Sahjpaul also disagreed with Dr. Rickards' opinion that the cervical and lumbar spine would be gradually expected to improve and resolve with no permanent difficulties. He restated his opinion that patients with spinal soft tissue symptoms that do not resolve within two years generally do not completely recover.

- [128] Dr. Sahjpaul was asked if he was aware that the plaintiff had been diagnosed with significant mental health issues. Dr. Sahjpaul agreed that Dr. Gan had diagnosed the plaintiff with depression but he would not agree that it was significant. Similarly, with respect to Dr. Raycraft's report, Dr. Sahjpaul would not comment on whether the depression diagnosed was significant given that he is not a psychiatrist.
- [129] When questioned about the cognitive symptoms resulting from the second accident, Dr. Sahjpaul testified that some of the symptoms of depression and concussion can overlap. For example, mood swings are observed both in patients with depression and patients with concussions. However, he testified that some symptoms do not overlap: short-term memory issues and difficulty with registration of new information are not observed in patients with depression.

Dr. Stephen Anderson

- [130] Dr. Stephen Anderson, a psychiatrist, was qualified as an expert in the field of psychiatry and chronic pain. At the request of the plaintiff he prepared an expert report and testified at trial.
- [131] Dr. Anderson reported that the plaintiff likely had a mild traumatic brain injury ("MTBI") as a result of the second accident, but there was no evidence that he has ongoing post-concussive symptoms. Dr. Anderson noted that the plaintiff scored below the normal range on a routine cognitive screening test during the assessment and that he has ongoing difficulties with concentration, memory, word finding, and multitasking since the second accident. Although it was possible that the plaintiff's cognitive difficulties are due to the residual effects of a MTBI, Dr. Anderson was of the opinion that they are more likely the result of pain, insomnia, fatigue, anxiety and/or depression. Dr. Anderson noted the plaintiff developed significant anxiety and depressive symptoms following the MVAs and likely reached his lowest point emotionally during the summer of 2016.
- [132] In addition to diagnosing a likely MTBI, Dr. Anderson was of the opinion that the plaintiff presented with severe generalized anxiety disorder ("GAD"), severe major depressive disorder ("MDD"), and moderate persistent somatic symptom disorder ("SSD") with predominant pain. Dr. Anderson explained in his report that persistent SSD with predominant pain is the new term for chronic pain disorder. Finally, Dr. Anderson noted that the plaintiff has driving fears but did not have sufficient symptoms to warrant a diagnosis of post-traumatic stress disorder ("PTSD").
- [133] Dr. Anderson was of the opinion that the plaintiff was not competitively employable at the time of the writing of both his reports. He noted that emotional changes following the accidents has placed strain on his relationships with family members.
- [134] Dr. Anderson was of the opinion that there is no evidence during the assessment of conscious secondary gain or malingering.

- [135] Dr. Anderson's initial report made a number of treatment recommendations.
- [136] He is of the opinion that the plaintiff requires a course of psychotherapy with a registered psychologist who has experience in treating chronic pain, anxiety, and depression. Dr. Anderson suggests that psychotherapy focus on teaching the plaintiff pain-coping strategies, anger management strategies, relaxation techniques, and cognitive behavioural therapy strategies for reducing his anxiety and depressive symptoms. Dr. Anderson set out in his report that the plaintiff should be seen for 15 to 20 sessions of cognitive behavioural therapy before reassessing the need for further treatment. He indicated there was a possibility that the plaintiff might require long-term psychotherapy at 10 to 12 sessions a year. Dr. Anderson further recommended couples counselling with the mother of his children.
- [137] Dr. Anderson suggested an assessment from a physiatrist (physical medicine specialist) and felt that the plaintiff would benefit from an exercise program under the direction of a kinesiologist or an experienced personal trainer. Dr. Anderson was of the opinion that regular aerobic exercise could be beneficial in improving the plaintiff's mood, energy, and sleep provided that it not worsen his pain.
- [138] Dr. Anderson would prescribe a low dose of tricyclic antidepressant medication at night to reduce nighttime pain and improve sleep.
- [139] He suggested that the plaintiff be referred to a comprehensive multidisciplinary pain clinic where both physical and emotional factors affecting the plaintiff's pain can be addressed.
- [140] Dr. Anderson recommended that an occupational therapist assess the plaintiff to determine whether ergonomic interventions would be beneficial. An occupational therapist would also be qualified to teach him cognitive remediation strategies for improving concentration and memory function.
- [141] In terms of work, Dr. Anderson recommended that
- [The plaintiff] should ideally do sedentary, low stress work which does not exacerbate his pain or psychiatric symptoms. Mr. Shoghi will not likely be able to continue working at his present job much longer due to pain exacerbation, fatigue and increased anxiety and depressive symptoms.
- [142] Dr. Anderson provided a further medical legal report following a second assessment on March 19, 2019. Following the reassessment, his opinion remained largely unchanged but he noted that the plaintiff's emotional state had worsened since he had moved to Salmon Arm to manage Askew's. He once again recommended treatment with antidepressant medication and psychotherapy with a registered psychologist to stabilize his mood and prevent further deterioration.
- [143] Dr. Anderson's opinion on the plaintiff's long-term psychiatric prognosis was "guarded". He believes it is unlikely that the plaintiff will return to his pre-morbid level of emotional functioning as long as he has ongoing pain and functional limitations. While he defers to

the opinions of physical medicine specialists for a prognosis regarding the plaintiff's physical symptoms, he believes the plaintiff's pain disorder is likely due to a combination of physical and emotional factors. He stated that patients with persistent SSD lasting for more than two years generally continue to be symptomatic despite treatment at a pain clinic. However, such treatment may teach the plaintiff better ways of coping with this pain and prevent pain from being the primary focus of his life.

- [144] Dr. Anderson was of the opinion that it is most likely the plaintiff's current difficulties are primarily the result of the two motor vehicle accidents. While he was of the opinion that the plaintiff likely had MDD by January 2016, prior to the second accident, he noted that the plaintiff did not have a psychiatric illness prior to the first accident. He felt it was unlikely that the plaintiff would have developed his present physical, cognitive, and emotional difficulties if he had not been injured in the two accidents. He would have been better able to cope with his work-related injuries in December of 2015 and July of 2017, and family stressors, including separation from his partner.
- [145] As well, the plaintiff had sustained a fire to his rental property in January of 2016. He was paid out for that loss. He denied that this event was a stressor to him.
- [146] Dr. Anderson reviewed the report of Dr. Kulwant Riar, a psychiatrist, which expressed the opinion that the plaintiff's psychiatric prognosis was unrelated to the accidents. Dr. Anderson noted that Dr. Riar did not diagnose the plaintiff with a MDD or GAD, and was of the opinion that that the plaintiff was not "disabled" at the time of assessment. This conflicted with Dr. Anderson's opinion that the plaintiff had symptoms of severe MDD, severe GAD, and persistent SSD with predominant pain.
- [147] In cross-examination, Dr. Anderson was asked about the details of the Montréal cognitive assessment test examination conducted on the plaintiff. Dr. Anderson noted that a score below 26 of 30 was a poor one given that the plaintiff had a university education. Dr. Anderson testified that he was aware the plaintiff did not have a university degree but had taken some university courses. He had assumed that the plaintiff had completed them. Dr. Anderson agreed that the plaintiff has an average IQ.
- [148] Dr. Anderson was asked whether the plaintiff had compensation neurosis. Dr. Anderson did not think that the plaintiff was "faking". If the litigation had been resolved, the plaintiff might have done better with less stress and focus on the litigation. Dr. Anderson indicated that the plaintiff has a stoic personality and went to work at Askew's, which demonstrated his persistence.
- [149] Dr. Anderson testified that the plaintiff initially told him the job at Askew's was simple and should be "a piece of cake". However, when Dr. Anderson saw him the second time, the plaintiff told him that he was going to ask for accommodation. Dr. Anderson was cross-examined on whether he was surprised that the plaintiff went to obtain the job at Askew's. Dr. Anderson testified that he would have advised the plaintiff not to accept the job in Salmon Arm even though the plaintiff thought it would be less complicated than his

previous employment at Simons.

- [150] Dr. Anderson noted that the plaintiff periodically cried throughout the assessment.
- [151] Dr. Anderson said that the plaintiff had told him he reached his lowest point emotionally in the summer of 2016. It was put to Dr. Anderson that it seemed difficult to accept that the plaintiff's lowest point emotionally was in the summer of 2016 given he had returned to work at Simons with no accommodation and no restrictions. Dr. Anderson's response was that the plaintiff should not have been working because he still had MDD.
- [152] In his evidence in court, Dr. Anderson indicated he became aware that the plaintiff had been prescribed antidepressants but could not tolerate them, and this has occurred approximately four times.
- [153] Dr. Anderson testified that he had not been made aware that the plaintiff had made a WorkSafeBC claim following the December 2015 workplace accident or that this claim stated that his work injury had resulted in a permanent condition.
- [154] Dr. Anderson was also unaware of the plaintiff's request for a Segway or that he had asked for wardrobe accommodation (not wearing a suit). He was aware of the request to wear comfortable shoes.
- [155] Dr. Anderson agreed that he should have asked the plaintiff more about the opinion that he provided respecting self-care. He had no details on the plaintiff's inability to perform self-care, though he wrote that the plaintiff had difficulties with such activities.

Dr. Mark Adrian

- [156] Dr. Mark Adrian, a physical medicine and rehabilitation specialist, examined the plaintiff on October 1, 2018, and prepared a medical legal report at the request of plaintiff's counsel. He testified at the trial.
- [157] Dr. Adrian took a history from the plaintiff, who relayed that he had been in an earlier motor vehicle accident in 2008 but did not believe he sustained any injuries. He had not experienced any pre-accident concussions. He was physically active prior to the first accident, doing hiking, rock climbing, running, biking, and skiing, with no physical limitations.
- [158] The plaintiff explained to Dr. Adrian his vehicle was rear ended and pushed forward in the first accident. The airbags did not deploy and he did not hit his head, but he "felt jolted" and began experiencing pain in his neck, left shoulder, and left arm within a few hours of the collision. He did not recall specifically having low back pain.

- [159] Following the first accident, the plaintiff's neck pain symptoms eventually subsided but he experienced ongoing pain in his left shoulder that spread to his left shoulder blade. He began to develop symptoms in his right shoulder, which the plaintiff believed was due to the fact that he avoided lifting and reaching with his left shoulder and compensated by using his right side.
- [160] Dr. Adrian reviewed the plaintiff's clinical records and noted a history of symptoms involving the neck, lower back area, and the left muscles that span the neck, shoulder blade, and shoulder. He could not specifically say if the plaintiff a history of symptoms involving the shoulder because certain clinical records were difficult to read. In particular he had difficulty deciphering the notes prepared on February 2, 2013, by Dr. Shahrokhi at a walk-in clinic, Healthwise Medical Clinic.
- [161] Following the first accident, the plaintiff explained that he was injured at work in December 2015 when he was lifting and experienced symptoms involving his lower back. Dr. Adrian explained at trial that the plaintiff did not go into detail about the December 2015 injury. Following the injury, Dr. Adrian noted that the plaintiff filed a WorkSafeBC claim and was participating in a graduated return to work program, working four to five hours per day with near full duties. By early February 2016 the plaintiff's low back symptoms had resolved and he was planning to return to work full-time.
- [162] According to Dr. Adrian, the plaintiff did not have a detailed recollection of the events of the second accident and only had a vague recollection of the actual impact. The plaintiff recalled his body being lifted off the seat during the course of the second accident and dropped back into the seat. He believes he struck his head against the headrest. The plaintiff also relayed that he believed the airbags deployed.
- [163] While in the hospital following the second accident, the plaintiff reported experiencing a headache, lower back pain, left hand pain, neck pain, pain involving one of his thighs, and bilateral shoulder pain. Dr. Adrian noted from his review of the ambulance crew record that the plaintiff's symptoms included lower back pain but that the notes were difficult to read. There were also comments of symptoms involving the hand and the back. Dr. Adrian noted that the hospital records indicated that the plaintiff was experiencing symptoms involving the right aspect of the neck and mid-line neck pain, head, left hand, right lower back, and the right thigh, and an indication that the plaintiff denied losing consciousness. There were comments in reference to of an X-Ray showing a mallet finger.
- [164] The plaintiff stopped going to work after the second accident. He attended a family physician on February 20, 2016, where he complained of difficulty sleeping, light-headedness, and headache. Dr. Adrian testified that the plaintiff told him that, since the second accident, he was experiencing ongoing psychological and cognitive symptoms. Dr. Adrian noted that this area was not his area of expertise, though he wrote in his report that the plaintiff told him he was having ongoing problems with short-term memory, concentration, irritability, depression, low motivation, difficulty with coping, and loss of

"resilience".

- [165] Dr. Adrian noted that the plaintiff returned to work at Simons on a full-time basis in the summer of 2016. In June or July of 2017 the plaintiff experienced a flare-up of his lower back pain while lifting at work, and went off work in August 2017. He has not returned to Simons since. Following his lifting injury in the summer of 2017 the plaintiff explained to Dr. Adrian that his lower back symptoms had mostly improved but had not returned to the level experienced prior to the flare-up and the work injury of 2017.
- [166] At the physical examination on October 1, 2018, the plaintiff had increased kyphosis curvature of his spine but this was not related to the accidents. The plaintiff had full range of motion and his neck was able to perform pain-free flexion, extension, and rotation. He had painful and restricted range of motion of his lower back at 75% of normal. Forward and backward bending was restricted due to central lower back pain. He was tender over the base of his lumbar spine and over both sacroiliac joints.
- [167] The plaintiff had a painful range of motion of both of his shoulders. The O'Brien's test triggered lateral shoulder pain in both shoulders, which is consistent with symptomatic rotator cuff disorder. The plaintiff was tender over the top part of each shoulder joint area. There was no tenderness of any other areas apart from the top of the shoulder. There was pain in the left pinky finger that showed a flexion and adduction deformity (can't straighten his finger out) of the distal interphalangeal joint.
- [168] Dr. Adrian wrote in his report that the plaintiff developed psychological and cognitive symptoms following the accidents. In cross-examination, he agreed that that was what the plaintiff had told him. His opinion was that the plaintiff had suffered physical forces to the tissues of his left shoulder and lower back during the course of the accidents, resulting in injury and the following diagnoses:
- 1) Mechanical lower back pain;
 - 2) Left shoulder rotator cuff tendinopathy/bursitis; and
 - 3) Left hand small digit fracture, distal phalanx.
- [169] Dr. Adrian noted that mechanical lower back pain is likely the result of damaged spinal tissues. While diagnostic imaging revealed some degenerative changes, he believed these changes were age related and were likely unrelated to the plaintiff's pain. Such changes are common in the asymptomatic adult population.
- [170] Regarding causation, Dr. Adrian was of the opinion that it is unlikely the plaintiff would have developed persistent and physically limiting low back pain absent the second accident. While he had experienced symptoms involving his lower back following a lifting injury at work, he had returned to work and anticipated resuming a full-time schedule. Dr. Adrian stated that the plaintiff's history of pre-second accident symptoms involving his lower back likely made it vulnerable to injury. Dr. Adrian opined that the lower back

injuries which occurred in the second accident were likely aggravated by the 2017 episode at work.

- [171] Dr. Adrian was of the opinion that the plaintiff's left shoulder pain was a result of the first accident. The plaintiff did not have any problems with his shoulder prior to the first accident, and he indicated that, during the first accident, he was reaching forward and holding onto the steering wheel when he was struck from behind. He began experiencing shoulder pain shortly after the accident, and the symptoms have persisted ever since. Dr. Adrian believes the plaintiff likely suffered physical injuries to the tissues of his left shoulder during the first accident, which have resulted in chronic left shoulder pain and symptomatic tendinopathy and bursitis.
- [172] Respecting the left hand pain and the fracture, Dr. Adrian believed the plaintiff's ongoing left small digit pain and stiffness with forceful gripping and weather changes were causally related to the second accident.
- [173] Dr. Adrian opined that the plaintiff's right shoulder pain was likely not directly related to the injuries he suffered in the first accident. Since the plaintiff did not begin experiencing right shoulder pain until months to a year after the first accident and has indicated that he compensated due to his left shoulder pain by using his right upper extremity more than usual, his right shoulder pain is likely related to overuse.
- [174] On prognosis, Dr. Adrian stated that, in his experience, individuals suffering symptoms beyond two years from the injury are unlikely to experience further meaningful improvement. He noted that the plaintiff experiences regular ongoing physically limiting pain in his lower back and left shoulder as well as ongoing left hand symptoms. Given that over two years have elapsed since the accidents, the prognosis for further recovery of the injuries suffered in the accidents is poor. He opined that it is unlikely that the injuries suffered in the accidents will undergo progressive deterioration over time. However, the plaintiff's left shoulder, hand, and lower back are vulnerable to injury in the future.
- [175] Dr. Adrian recommended that the plaintiff continue with an independent exercise program to maintain his fitness. He indicated that the plaintiff should continue with physical therapy, as traction treatments provide temporary relief and allow him to manage his pain more effectively and without medication. Finally, Dr. Adrian suggested that the plaintiff would benefit from consultation with a vocational counsellor or occupational therapist to determine suitable employment opportunities based on his injuries, interests, physical limitations, and experience.
- [176] At trial, Dr. Adrian agreed he was aware that the plaintiff was not experiencing low back pain during his graduated return to work following his December 2015 workplace injury.
- [177] Respecting the first accident, Dr. Adrian testified that the plaintiff told him he was experiencing his symptoms within hours, but he did not explain why he waited over a month to seek medical attention.

- [178] Dr. Adrian was aware that the plaintiff wanted to go back to work at Simons without restriction and without a graduated return to work in July 2018.
- [179] Dr. Adrian seemed hesitant in giving his evidence and struggled to answer questions asked in cross-examination. For example, Dr. Adrian was unable to say whether the plaintiff experienced sudden pinching or the gradual onset of pain over a few days when he injured his back at work. Dr. Adrian wrote "[h]e attempted to continue his work but missed time from his employment", but did not know how many days were missed.

Dr. Donald Cameron

- [180] Dr. Donald Cameron, a neurologist, provided an independent medical examination and testified at trial at the request of counsel for the plaintiff.
- [181] The plaintiff told Dr. Cameron that he had no pain immediately after the first accident but developed shoulder and back pain after about 24 hours. He advised Dr. Cameron that he experienced left shoulder pain for about three years after the accident, and that rotator cuff exercises did help his pain. Dr. Cameron made a note that the plaintiff sought help two weeks after the first accident. The plaintiff sought medical help respecting the first accident on February 2, 2013, one month six days from the date of the first accident (December 27, 2012).
- [182] The plaintiff told Dr. Cameron that following the second accident that he experienced low back pain, headaches, left pinky finger pain, pain in his legs, photophobia, phonophobia, decreased memory, decreased self-esteem, decreased self-confidence, decreased concentration, decreased attention span, decreased libido, decreased appetite, and anxiety and depression. The plaintiff also reported that his relationship with Ms. Neil was strained due to irritability, mood swings, anger outbursts, and anxiety following the second accident.
- [183] Dr. Cameron was unsure of the date the plaintiff reported that he was suffering from decreased self-esteem to his health professional.
- [184] Dr. Cameron was of the opinion that the plaintiff suffered soft tissue and musculoskeletal injuries involving his back and shoulder in the first accident. Pain and discomfort rendered him partially disabled for a period of three years following the first accident. He returned to normal functioning ability, but was limited with respect to recreational activities and work-related activities which aggravated his pain.
- [185] It was Dr. Cameron's opinion that the plaintiff had not suffered any injury to his central nervous system or peripheral nervous system in the first accident.
- [186] Following the second accident, it was Dr. Cameron's opinion that the plaintiff likely suffered an altered state of consciousness or a brief loss of consciousness, as he had an incomplete recollection of the accident. Dr. Cameron thus felt that Mr. Shoghi fulfilled criteria for to make a diagnosis of MTBI, which was likely sustained during the second accident. Dr.

Cameron further believed it was likely the plaintiff had developed symptoms of post traumatic brain injury syndrome following the MTBI. Symptoms of post traumatic brain injury syndrome include a decrease in memory, decreased self-esteem, decreased self-confidence, decreased concentration, and decreased attention span.

- [187] Dr. Cameron diagnosed the plaintiff with MTBI. Dr. Anderson had expressed it as likely that he had MTBI.
- [188] Dr. Cameron reported that the plaintiff was unable to remain at work because he was making too many mistakes. However, I note that no such evidence was presented by the witnesses from Simons.
- [189] Dr. Cameron noted that the plaintiff had not suffered from clinical depression prior to the accidents but now had increased symptoms of depression, particularly following the second accident. He was of the opinion that the plaintiff's psychological problems are a major contributing factor to his ongoing cognitive complaints. He stated that it is very difficult to distinguish cognitive complaints caused by a MTBI from those resulting from chronic pain and the symptoms of depression. Dr. Cameron indicated that, if the plaintiff's symptoms of depression resolved, any residual cognitive problems could be attributed to MTBI.
- [190] Dr. Cameron noted that the plaintiff was not being followed by a psychiatrist or psychologist or taking antidepressant medication at the time of assessment. He recorded that the plaintiff was suicidal about eight months following the second accident, and recommended ongoing psychiatric care and psychological therapy.
- [191] Dr. Cameron was of the opinion that patients continue to improve for approximately two years following a physical injury, including a traumatic brain injury. Since the assessment occurred more than two years after the second accident, it was probable that the plaintiff's ongoing chronic pain would be permanent. He also believed that any MTBI-related cognitive problems would be permanent.
- [192] Dr. Cameron was of the opinion that, as of the date of assessment, the plaintiff was "completely disabled" and unable to return to work at his previous job or an equivalent job due to ongoing psychological and cognitive problems and chronic pain. He was of the opinion that the plaintiff may be able to work full-time in an alternate job with less responsibility, or return to work in a job similar to that he held at Simons but in a part-time position.

The Defendants' Medical Experts

Dr. Robin Rickards

- [193] At the request of counsel for the defendants, Dr. Rickards, an orthopedic surgeon, examined the plaintiff on February 5, 2019. The plaintiff presented to Dr. Rickards with constant low back pain, right and left buttock pain, and intermittent right and left shoulder

pain. The plaintiff indicated that he never had any difficulties with his low back or shoulder areas before the accidents. The plaintiff told Dr. Rickards that the pain in his low back area is aggravated by prolonged sitting or standing and when lying flat on his back. His pain improves with stretching and changing position.

- [194] Dr. Rickards diagnosed soft tissue symptoms of the cervical and lumbar spines and mild adhesive capsulitis of the left shoulder (i.e. frozen shoulder). He noted that a loss of mobility in the shoulder joint will cause significant interference with activities and pain.
- [195] Dr. Rickards noted that the timing of the onset of neck symptoms suggested that it was causally related to the first accident. However, he observed that the plaintiff did not seek medical attention until February 2013. Dr. Rickards noted that it would be unusual for a patient to wait so long to seek medical aid in the event of an acute injury.
- [196] Dr. Rickards made minimal findings on clinical examination of the plaintiff's shoulders, and felt full resolution of symptoms was likely with a structured range of motion exercise program. He did not anticipate permanent difficulties, and surgery was not required. He was of the opinion that it was not likely the shoulder symptoms were related to either motor vehicle accident.
- [197] Dr. Rickards noted that on November 30, 2013 the plaintiff indicated to his doctor that he had twisted his back at work two weeks prior and was presenting for a WorkSafeBC claim due to persisting pain in his low back and right hip. Dr. Rickards had obtained this information in a letter from defence counsel. Dr. Rickards noted that the plaintiff injured his lower back again after returning to work following the second accident. He was of the opinion that these workplace accidents "are likely significant factors in regards to ongoing low back symptoms," though they may be related in part to the motor vehicle accidents.
- [198] Dr. Rickard recommended nonsteroidal anti-inflammatory medication and muscle strengthening to address the plaintiff's soft tissue injuries in his cervical and lumbar spine and his frozen shoulder. An exercise program directed by a personal trainer, along with self-directed exercise, would also be beneficial.
- [199] Dr. Rickard was of the opinion that the plaintiff's soft tissue injuries would heal with the appropriate treatment.
- [200] He testified that the soft tissue injuries would be expected to heal with the appropriate treatment, being nonsteroidal anti-inflammatory medication and muscle strengthening to address the shoulder girdle, neck, low back, and pelvic girdle musculature. As well, an exercise program directed by a personal trainer for between one to three sessions would assist, with the patient continuing with the exercise sessions independently for four to six sessions per week. Dr. Rickards stated this treatment would also be appropriate for the plaintiff's left shoulder.

[201] In regards to the left shoulder, Dr. Rickards described that the treatment process would be for six-and-a-half years.

[202] In his testimony, Dr. Rickards indicated that there was no evidence to suggest the plaintiff would not be able to continue as a store manager. He based his opinion in part on the fact that there were no shoulder complaints until one month six days following the first accident.

[203] Dr. Rickards was asked in cross-examination about plaintiff's statement that he had not been injured since the motor vehicle accidents. Dr. Rickards replied that he asked the plaintiff more than once whether there were injuries or accidents since the motor vehicle accidents. The plaintiff never discussed the work place incidents with him.

[204] Dr. Rickards reviewed the records of Dr. Shahrokhi, the doctor the plaintiff first consulted about his shoulder pain. He noted that Dr. Shahrokhi had observed left parascapular pain. Dr. Rickards agreed in cross-examination with the following:

- that the plaintiff told him that his left shoulder symptoms started immediately after the first accident;
- that a period of two months had not elapsed between the first accident and his attendance at Dr. Shahrokhi's office, as he had noted in his report. The accident occurred December 27, 2012, and the plaintiff attended Dr. Shahrokhi's office on February 2, 2013;
- that parascapular pain can result in weakness in pulling and pushing and decreased mobility in the shoulder;
- that if the plaintiff's evidence that the shoulder pain started immediately after the first accident is believed, then the first accident and the shoulder symptoms are related in cause-and-effect.

[205] Dr. Rickards also agreed that a certain percentage of the population will not see a doctor if they have pain even where the pain is serious. He also agreed that the second accident was a significant contributing factor in the plaintiff's ongoing low back symptoms. Finally, he agreed there was a reasonable prospect that the plaintiff's shoulder symptoms may be chronic in nature and will never get better since they have now existed for six-and-a-half years.

Dr. Kulwant Riar

[206] Dr. Kulwant Riar, a psychiatrist, provided an independent medical legal report at the defendants' request after assessing the plaintiff on January 9, 2019. He conducted a two-hour interview with the plaintiff and reviewed his clinical records.

[207] Dr. Riar summarized the plaintiff's history as follows. Dr. Riar believed the plaintiff suffered musculoligamentous strains in both accidents. He noted that the plaintiff's symptoms after the first accident settled within a few months and he continued to function in his life. He took note of the plaintiff's workplace injuries, which occurred in November 2013 and

December 2015. Dr. Riar noted an injury to the plaintiff's left little finger in the second accident. His little finger healed but he continued to complain of other pain and attended physical treatment during the first half of 2016. The plaintiff then did not seek any treatment until June 2017, following a workplace injury. From August 2017 forward, he had significant problems with back pain. The plaintiff's back pain continued for some time, and he was off work until December 2018.

[208] Dr. Riar indicated that the plaintiff discussed his experiences of emotional distress during the interview. The plaintiff described feeling anxious after the second accident, particularly when driving, when in crowded spaces, and when overstimulated. He also reported feeling depressed. His feelings of depression started after the first accident and continued after the second.

[209] Following his interview with the plaintiff, Dr. Riar was of the opinion that the plaintiff had a somatic symptom disorder ("SSD") of a mild to moderate degree, with pain as a prominent feature. Since the plaintiff did not display the typical symptoms of a head injury, he was not of the opinion that the plaintiff had suffered a concussion or a MTBI. He stated that the plaintiff's lack of awareness after the second accident was most likely related to the acute stress of the event rather than a concussion.

[210] Dr. Riar did not believe the plaintiff had PTSD or any driving-relating phobia.

[211] He felt the plaintiff had symptoms consistent with "either unspecified anxiety disorder or adjustment disorder with anxiety":

I felt his depression has been that of adjustment disorder with depressed mood. His social anxiety, cognitive complaints and behavioural dysfunction are part and parcel of his anxiety and depression rather than any stand alone disorders.

[212] Dr. Riar was of the opinion that the SSD he diagnosed was caused by the plaintiff's December 2015 work injury and was likely aggravated by the second accident. He formed this opinion on the basis that the plaintiff's SSD was more marked for the eight to nine months after the second accident before settling. It was aggravated again in June 2017 after a workplace injury. Dr. Riar was of the opinion that the plaintiff did not suffer symptoms of SSD after the first accident and if he did, they were very mild and not causing significant problems. He believed that the re-emergence of his SSD in the middle of 2017 had little to do with the accidents in question.

[213] Dr. Riar was of the opinion that the plaintiff's SSD was aggravated and perpetuated by his anxiety, depression, personality profile, and other social stressors, especially from June 2017 onward.

[214] Dr. Riar was of the opinion that the plaintiff's anxiety following the second accident was a result of the plaintiff's generalized or nonspecific anxiety disorder rather than any emotional trauma from the second accident. Dr. Riar believes the plaintiff was experiencing anxiety and depression prior to the second accident, which continued

afterwards. While he believes the second accident likely aggravated the plaintiff's anxiety and depression for a short while, the plaintiff would have continued to have those symptoms absent the accident. This is evidenced by the relapse of those disorders in the middle of 2017 due to various social stressors.

- [215] Dr. Riar noted that the plaintiff had been prescribed three antidepressant medications, but the doses were not optimized. He further noted that the plaintiff attended psychotherapy for seven sessions, but that no psychiatric or psychological treatment was pursued after the spring of 2016.
- [216] Dr. Riar recommended that the plaintiff continue to perform his active exercises. Respecting psychiatric intervention, Dr. Riar recommended psychotherapy and psychotropic medication. He recommended that the plaintiff be referred to a psychiatrist, and if that was not possible that his family doctor prescribe medication, starting with small dosages to be optimized depending on the benefit and the side effect profile. Finally, Dr. Riar recommended that the plaintiff attend a psychologist for 10 to 12 one-hour sessions.
- [217] Dr. Riar was of the opinion that resolving the stress of the litigation by settling it would enhance the plaintiff's recovery by reducing anxiety.
- [218] Dr. Riar did not believe that the plaintiff was disabled at the time of his review of January 9, 2019. He was guarded about the plaintiff's psychiatric prognosis over the next four to six months, but believed that with the appropriate interventions his functioning could markedly improve. In terms of a long-term prognosis, Dr. Riar believed the plaintiff would eventually achieve remission from his present symptoms. However, Dr. Riar believes that the plaintiff is likely to have recurring episodes of anxiety and depression under stressful situations. Dr. Riar states "this has to do with his constitutional vulnerability rather than any effect of the accident." I find it difficult to understand how the doctor made this determination. If by this statement he means that people with mental illness are weaker than others or somehow are responsible for their illness, I do not accept this.
- [219] Dr. Riar was of the opinion that once the plaintiff's anxiety and depression symptoms improved, then there would be improvement in his SSD as he would have a better ability to deal with his residual symptoms.
- [220] Dr. Riar was cross-examined extensively, particularly on the diagnostic criteria of MDD. He admitted that if the plaintiff's evidence of his depression was to be believed, then he met the criteria for MDD. In addition, Dr. Riar conceded that the plaintiff has GAD.
- [221] With respect to the SSD, Dr. Riar's evidence on cross-examination was that his rationale for concluding that the plaintiff's symptoms had resolved within months of the accident was related to the fact that the plaintiff did not consistently seek treatment.

The Functional Capacity Evaluators

Robert Gander

- [222] The plaintiff was seen by Robert Gander, a functional capacity evaluator and occupational therapist in January 2019 at the defendants' request. Mr. Gander performed a functional capacity evaluation ("FCE") on the plaintiff. He indicated that a FCE is intended to evaluate an individual's physical abilities and limitations through a battery of standardized tests measuring capacity to perform selected work and daily activities. In addition to relying on the findings of the standardized tests he administered, Mr. Gander based his findings on a comprehensive interview, a review of medical correspondence, and his observations of the plaintiff.
- [223] Mr. Gander took comprehensive notes on the plaintiff's history. He noted the plaintiff's current complaints were of headaches, constant bilateral shoulder and low back pain of variable intensity, intermittent bilateral hip region pain of variable intensity, and occasional pinky finger pain. He also noted that the plaintiff complained of poor sleep, altered emotional status, and cognitive limitations. The plaintiff advised Mr. Gander that his left shoulder is "about the same" but his right shoulder has become worse over the last one-and-a-half to two years.
- [224] Mr. Gander was of the opinion that psychophysical constraints at times prevented the plaintiff from demonstrating his full strength capacity. He nonetheless found that the plaintiff passed a physical effort analysis, meaning his functional capacity could be accurately determined. Mr. Gander found that the plaintiff had a tendency to underestimate some of his abilities, in particular his standing and loadbearing capacity. The plaintiff's report that his standing tolerance is limited to less than an hour conflicts with Mr. Gander's observation that he was able to remain on his feet for multiple hours during the FCE. Likewise, the plaintiff was able to effectively perform lifting and lowering exercises that he stated he was not able to do. This leads Mr. Gander to conclude that the plaintiff has a tendency to overstate his level of disability.
- [225] Mr. Gander further opines that the plaintiff was at times unable to demonstrate his full physical capacity during testing. He believes this is the result of the plaintiff's tendency to underestimate his physical capabilities. Despite this, Mr. Gander noted that the plaintiff's report of the symptoms he experiences match objective measures of his functioning and observations of his behaviour. These observations, coupled with the fact that the plaintiff passed reliability tests, indicated to Mr. Gander that the plaintiff's tendency to overstate his disability is likely influenced by his perception of vulnerability or another emotionally-based factor.
- [226] Given the plaintiff's tendency to overestimate his level of disability and to underestimate his physical capacity, it is Mr. Gander's opinion that the results of the objective functional testing should be emphasized for determinations for determinations over the plaintiff's reports.

- [227] It is Mr. Gander's opinion that the plaintiff's low back pain, and to a lesser extent his bilateral shoulder pain, decrease his physical capacity. Mr. Gander opines that the plaintiff's current lifting capacity does not meet the requirements for past jobs he held at the Gap or Simons, but that he has the physical capacity to perform his job at Askew's. Mr. Gander notes that in his new job at Askew's the plaintiff is able to delegate certain jobs to coworkers or request assistance during certain tasks, and otherwise has the capacity to do the work. It is Mr. Gander's opinion that the plaintiff is capable of working full time so long as the work he performs remains within the bounds of his measured physical abilities.
- [228] Mr. Gander believes that the plaintiff's target employment to work as an area or district manager would be advantageous from a physical capacity standpoint because it involves less physical work.
- [229] Mr. Gander opined that the plaintiff is likely not optimally managing his symptoms and mood, and would benefit from education on pain management and sleep strategies. He notes the plaintiff presents with mild cognitive limitations, and indicates that he defers to a physician or psychologist for opinions regarding the possible origins of the plaintiff's cognitive limitations.
- [230] Mr. Gander had no opinion on causation.

Paul Pakulak

- [231] Mr. Pakulak is an occupational therapist and certified work/functional capacity evaluator. He prepared a report on behalf of the plaintiff in response to the assessment and opinions contained in Mr. Gander's FCE report.
- [232] Mr. Pakulak opines that Mr. Gander's interpretation of testing results were, for the most part, interpreted appropriately. However, Mr. Pakulak takes issue with Mr. Gander's opinion that psychophysical constraints precluded the plaintiff from realizing his full physical capacity. Mr. Pakulak believes this conclusion is inconsistent with Mr. Gander's observation that the plaintiff displayed high physical effort during testing. Mr. Pakulak further noted that some guarding during physical activity is natural out of a fear of aggravating symptoms, and believes Mr. Gander should have made additional efforts to determine whether the plaintiff's guarding behaviour was reasonable in the context of the assessment.
- [233] Mr. Pakulak further disagrees with Mr. Gander's conclusions regarding the plaintiff's ability to work at Askew's. He notes Mr. Gander's finding that the plaintiff demonstrates the capacity to complete his work relies in part on the fact that he can delegate physically demanding tasks to his coworkers. Mr. Pakulak generally agrees with this conclusion, but notes the plaintiff reported concerns that his store may reduce staff, impacting his ability to delegate tasks, to Mr. Gander. Since the plaintiff's ability to delegate tasks is essential to sustain his work, Mr. Pakulak believes further inquiries into potential changes in the plaintiff's work environment and the impact they would have on future physical demands

of the work are warranted.

- [234] Finally, Mr. Pakulak disagrees with Mr. Gander's opinion that the plaintiff's employment target of eventually working as an area or district manager would be advantageous from a physical capacity standpoint. He notes Mr. Gander indicated that the plaintiff does best when he is able to move about. While Mr. Pakulak agrees that the plaintiff's target employment would involve a decreased level of reaching, lifting, and dynamic body positioning, Mr. Gander did not state that such a position would also likely require significantly longer periods of sedentary work with much less opportunity to change positions.

The Economic Experts

John Lawless

- [235] At the request of counsel for the plaintiff, John Lawless, a vocational rehabilitation consultant, prepared a report after administering a vocational test battery on the plaintiff on January 15, 2019.
- [236] Mr. Lawless reviewed the plaintiff's employment history and noted that he had owned and successfully operated an IGA franchise store and worked in senior management positions in retail, earning up to \$99,900 per year. Mr. Lawless opined that the plaintiff's strong attainment and employer accolades prior to the accidents boded well for him. Regarding the plaintiff's pre-injury vocational prospects, Mr. Lawless indicates that the plaintiff could have continued to advance in the retail industry, though his prospects would have been further improved had he completed a relevant degree program.
- [237] Mr. Lawless notes that the plaintiff had earned \$99,900 in the year before his second accident while working at Simons. His most recent in income was projected to be \$80,000 per annum at Askew's. Mr. Lawless noted the plaintiff's past work as a retail trade manager and in the grocery business. Mr. Lawless believed the plaintiff is not capable of reaching, handling, lifting, and bending, and therefore not suited for jobs involving such movements.
- [238] In opining on the plaintiff's post-injury vocational prospects, Mr. Lawless noted the opinions of Dr. Anderson and Dr. Cameron indicating the plaintiff is not completely employable. He noted that the plaintiff was, at the time of their meeting, managing Askew's and receiving a salary of \$80,000 per annum, but indicates he believes the plaintiff's concern that the position would not work out is valid. Given his difficulties since the accidents, Mr. Lawless felt the plaintiff could not succeed as a retail manager given the physical and cognitive requirements of such a position. Instead, Mr. Lawless was of the opinion that the plaintiff might be able to handle more junior occupations in retail sales, specifically as a retail supervisor or salesperson.

- [239] Mr. Lawless noted that the plaintiff's vocational testing indicated an interest in an accounting clerk-type occupation. He indicated that such an occupation can be pursued by completing a one-year, part-time program through Douglas College at the cost of \$4,300, but that he would not recommend the plaintiff undertake such an endeavour given his present cognitive, physical, and emotional limitations.
- [240] Finally, Mr. Lawless noted that the plaintiff's difficulties put him at greater risk of further unemployment or underemployment. While it is impossible to predict an individual's future risk of unemployment and underemployment, Mr. Lawless indicates that disabled persons are, on the whole, less attached to the workforce.
- [241] Mr. Lawless was unclear on some points, notably with the plaintiff's purchase of an IGA store franchise. Mr. Lawless was of the view that the sale of the business back to IGA corporate made a profit, however the plaintiff in fact did not profit from the sale back to IGA corporate.

Dr. Tracy Witty

- [242] The plaintiff was assessed by Dr. Witty, an occupational therapist and certified life care planner, of Turning Point Rehab. She prepared a report outlining future care cost for the plaintiff at the request of his counsel. One difficulty with Dr. Witty's evidence is that Ms. Neil also works at Turning Point Rehab. It was not known to Dr. Witty that Ms. Neil was the mother of the plaintiff's children and in a relationship with him until after the report was prepared. For that reason, I find that the conflict did not impact Dr. Witty's report.
- [243] Dr. Witty testified at trial and was qualified as an expert to give opinion evidence in the area of occupational therapy, life care planning, and the cost of future care. She noted the primary impairments the plaintiff had on assessment were pain and impaired mental functioning. She noted the plaintiff's previous diagnoses of neck, low back, and shoulder pain; headaches; persistent SSD; and MTBI. She further noted the plaintiff experiences fatigue; impaired attention and memory; and disrupted emotional, perceptual, and higher level cognitive functioning as a result of a MTBI.
- [244] I note that the plaintiff was never conclusively diagnosed with a concussion, though Dr. Anderson and Dr. Cameron opined that he had possibly sustained a MTBI.
- [245] Based on her assessment of the plaintiff, Dr. Witty recommended that the plaintiff should have ongoing access to a combination of therapies and comfort measures. She opined that access to these therapies and measures will help to ensure optimal pain management and participation in a balance of work-life activities including socializing, leisure, and parenting, and will increase the plaintiff's likelihood of sustaining employment.
- [246] Dr. Witty concurs with Dr. Anderson's recommendation that the plaintiff would benefit from attending a multidisciplinary pain clinic. Treatment at such a clinic is full-time, and would require the plaintiff to take five to six weeks off from work. She further agrees with

Dr. Anderson's opinion that the plaintiff would benefit from antidepressant medication and from a gym and pool pass. Given his past success with physiotherapy, Dr. Witty indicates that he should continue to have access to these treatments on a monthly to bi-monthly basis. She states he would also likely benefit from a home neck traction device and monthly massage therapy. She recommends that the plaintiff begin a structured exercise program with a kinesiologist, starting with an initial 48 sessions over a four-month period and gradually reducing to a maintenance level of two sessions per month.

[247] Based on her observation that the plaintiff demonstrated a poor sitting tolerance, Dr. Witty recommended ergonomic seating at home and work, and suggested an ergonomic office chair and a zero gravity recliner.

[248] Dr. Witty further recommended a number of therapies to assist the plaintiff, including: nutritional consultation to assist the plaintiff with his appetite; consultation with a speech pathologist and occupational therapist for cognitive rehabilitation; and vocational counselling to assist with navigating occupational challenges.

[249] Finally, Dr. Witty opined that the plaintiff would require seasonal homemaking assistance if he were to move back into a condo (at the time of the assessment he was living in a hotel in Salmon Arm). She also recommended a provision for child care up to 40 hours per month until his youngest child is 11 years old.

[250] Dr. Witty summarized the plaintiff's costs of future care needs as follows:

Description

Cost Per Year

Non-Recurring Cost

Medications

\$200 to \$1,300

Ergonomic Supplies

\$119.8 to \$207

\$599 to \$1,035

Vocational/Educational

\$6,659 to \$8,199

Projected Evaluations

\$1,235 to \$1,390

Projected Therapeutic Modalities

\$3,870 to \$5,540

\$20,100 to \$21,760

Home Support

\$6,752 to \$11,936

Home Furnishings

\$370 to \$1,099.80

\$1,850 to \$5,499

Health Maintenance & Leisure

\$900

\$5,330 to \$6,150

Total

\$12,011.80 to \$19,482

\$35,973 to \$45,333

[251] I note that Dr. Witty was incorrect in reporting on some aspects of the plaintiff's past, notably in the area of education. She indicated that he had been attending UBC and stopped on entry into third year because he found it difficult to juggle between work and school, and wanted to focus on work. As noted by the defendants, there is no evidence of the plaintiff completing courses at UBC.

Darren Benning

[252] Mr. Darren Benning, an economist, provided a present value of cost of future care report dated March 1, 2019, in which he estimated the present lump sum of the plaintiff's future care expenses based on Dr. Witty's report to be \$357,617.

damage awards sought

[253] In all, the plaintiff claims the following:

Non-pecuniary damages

\$200,000

Loss of future earning capacity

\$1,464,445 to \$1,523,028

Past loss of earning capacity

\$149,022

Cost of future care

\$357,617

Special Damages

\$6,403

Total

\$2,177,487 to \$2,236,070

[254] The plaintiff also seeks costs, disbursements, and court-ordered interest.

Issues

[255] As liability has been admitted, the issues remaining for determination are:

- i. Did the motor vehicle accidents cause or contribute to any of the plaintiff's injuries?
- ii. If any of the plaintiff's injuries were caused by the motor vehicle accidents, what is the appropriate measure of damages?

[256] Credibility and reliability of the plaintiff is central to the determination of this matter.

CAUSATION

Legal Principles

[257] The onus is on the plaintiff to establish on a balance of probabilities that the defendants' negligence caused both his injuries and the resulting losses. 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 [Athey] at paras. 13-14. The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[258] Causation is a factual determination. The "but for" test does not require scientific precision, and using common sense is generally sufficient: *Clements v. Clements*, 2012 SCC 32 at paras. 8-9. As noted by the Supreme Court of Canada in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 324, "a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion."

- [259] The plaintiff need only prove that the defendant's tortious act was a material contributing cause of his injury, not the only cause: *Athey* at paras. 17-19. Many injuries are the result of both the defendant's negligent act and other non-tortious causes. The purpose of tort law, which is to restore the plaintiff to the position he would have enjoyed but for the defendant's negligence, would be undermined if the identification of non-tortious causes of the plaintiff's injury were sufficient to reduce damages: *Athey* at para 20.
- [260] The tortfeasor must take their victims as they find them. The defendant is liable for the plaintiff's loss even if that loss is more severe than what would be expected in the average person: *Athey* at para. 34. However, the defendant is not required to place the plaintiff in a better position than he would have occupied absent the wrongdoing. The defendant need not compensate the plaintiff for the effects of a pre-existing condition where there is a "measurable risk" that the plaintiff would have sustained the injury anyway: *Athey* at para. 35.
- [261] A weakness inherent in the plaintiff that might realistically cause or 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 the award. Moreover, such a contingency does not have to be proven to a certainty and should be given weight according to its relative likelihood: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 48.
- [262] The Supreme Court of Canada distinguished between causation and the rules of damage assessment in *Blackwater v. Plint*, 2005 SCC 58. Causation considers whether the defendant is a "but for" cause of the plaintiff's injury on a balance of probabilities. Where causation is established, the rules of damage assessment then consider what the plaintiff's original position would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Plint* at para. 78.

Application to the Facts

- [263] Counsel for the plaintiff's submissions on causation were not particularly clear. As I understand it, the plaintiff says that the accidents caused or materially contributed to his injuries. I understand the plaintiff further argues that the December 2015 and June 2017 workplace injuries were caused by the plaintiff's weakened condition following the accident, and thus indivisible from the accident injuries.
- [264] The defendants dispute that the evidence establishes the defendants caused or materially contributed to the plaintiff's injuries. The defendants further say the plaintiff's injuries are less extensive than he alleges. The defendants point out that, other than the plaintiff's fractured pinky finger, there is no objective evidence of injury. The findings of the plaintiff's experts thus rely solely on his subjective reports of symptoms. Beyond that, the plaintiff's claim rests entirely on his own testimony. The defendants argue that the plaintiff was not an honest or credible witness, and the court thus cannot rely on the plaintiff's

expert's findings to establish causation.

[265] I do not take the defence argument to be that the workplace injuries displace the injuries sustained in the Motor vehicle accidents. Rather the argument is that the plaintiff's injuries are not as severe as he makes out for several reasons, including:

- The plaintiff did not seek treatment for over one month following the first accident;
- He took no time from work after the first accident;
- His vehicle was not severely damaged following the first accident;
- Following the second accident the plaintiff after some months worked for a one year period without medical treatment or assessment and without any complaints of his performance at work;
- That even before the accidents the plaintiff did not work consistently year after year; and
- That he overstates his success of his past work performance. For example the IGA was never sold at a profit and was simply sold back to corporate.

Analysis and Conclusion regarding Causation

[266] I find that the motor vehicle accidents materially contributed to the plaintiff's injuries. Prior to the accident he was active, participated in sports, was happy, and had strong relationships with family and friends. I find that but for the accidents he would have continued rock climbing, which he abruptly had to stop following the first accident. Further, the fact that the plaintiff had workplace accidents is not at issue. I find, however, that those incidents aggravated his existing injuries from the accidents.

[267] The nature of the plaintiff's injuries in this case leaves the court in a position that is not uncommon in cases involving a plaintiff who suffers from ongoing chronic pain that is real in its impact but is not clearly identifiable through currently available medical technologies. The absence of a precise medical explanation for the plaintiff's injuries means the causation analysis turns on the expert evidence, which, in this case, is largely dependent on the plaintiff's evidence.

[268] The plaintiff says he suffered soft tissue injuries to his neck and left shoulder in the first accident. He indicated that he had largely recovered from the neck injury after two to three months and had completely recovered after a year. He had some problems with his low back, but his main complaint after the first accident was pain in his left shoulder.

[269] The plaintiff says the second accident in 2016 resulted in more extensive injuries. In addition, he has been left with a significantly increased depressed mood, and attributes his ongoing mental health issues to the injuries he said he suffered in the accidents.

- [270] The plaintiff also suffered two work place injuries which were significant enough for him to make WorkSafeBC claims. The first injury took place on December 2, 2015 - prior to the second accident - when he hurt his back lifting boxes at work. He felt a sharp pain on the right side of his low back. After this injury the plaintiff's depression and anxiety increased, and he received an emergency referral to a psychiatrist. The evidence indicates that he had mostly recovered from this back injury at the time of the second accident.
- [271] A second work place injury occurred on June 26, 2017. He did not make a WorkSafeBC claim because his human resources manager told him his condition was related to previous injuries from the motor vehicle accidents. He went off work on August 17, 2017, as a result of his pain and cognitive symptoms, and claimed medical, EI, and short term disability benefits.
- [272] The plaintiff did not stop work following the first accident. He did cease all of his recreational activities, which I accept he enjoyed thoroughly and was an enthusiastic participant. The plaintiff no longer rock climbed or went to the gym, and no longer pursued these activities with his friends and family. He did try to go to the gym to lift weights but was unsuccessful.
- [273] I find that from the first accident on, the plaintiff had a shoulder issue. His arm had been on the steering wheel at the time he was rear-ended. His neck and low back injuries eventually resolved, leaving his shoulder injury.
- [274] Following the second accident, I find the plaintiff had an aggravation of the shoulder, low back, and neck pain, and began experiencing headaches and symptoms consistent with a concussion. I note, however, that no physician has indicated conclusively that he suffered from a post-traumatic brain injury.
- [275] The records of Dr. Gan note the plaintiff did not develop severe GAD or severe MDD until January 2016. I find the plaintiff's GAD and MDD are attributable to his state following the first accident. His emotional difficulties were later aggravated by his inability to work and the second accident, such that he now has SSD.
- [276] I accept the opinion of Dr. Sahjpaul and find that the second accident is the cause of the aggravation of plaintiff's shoulder, low back, and neck pain. I accept his opinion that the plaintiff had symptoms consistent with concussion.
- [277] I also accept the opinion of Dr. Adrian, who concluded that the accidents are more likely than not the cause of the plaintiff's chronic shoulder pain. Dr. Adrian was also of the opinion that the plaintiff would not have developed persistent and physically limiting low back pain absent the second accident.

- [278] In finding that the plaintiff's headaches, low back pain, and shoulder issues are causally connected to the accidents, I note that there was no evidence that the plaintiff suffered from these conditions prior to the accidents. Further, there was no evidence that the plaintiff was malingering or making up his injuries. To the contrary, Robert Gander recorded that the plaintiff for the most part tried hard in the evaluation.
- [279] With regard to chronic pain, I reject the evidence of Dr. Rickards. He opined the left shoulder problems were not caused by the either motor vehicle accident. To the contrary, I find that the accidents materially contributed to the injuries to the plaintiff's shoulder and the subsequent compensation problems with his right shoulder. Not every individual seeks immediate medical assistance. I accept the plaintiff's evidence that, given he had been in previous accidents with no ill effects, he expected he would similarly recover from the first accident. He did not.
- [280] I accept the evidence of Dr. Anderson respecting the plaintiff's severe GAD and MDD and find that, but for his accident injuries, the plaintiff would not have developed his present physical, cognitive, and emotional difficulties. I accept the evidence of Dr. Sahjpaul, Dr. Anderson, and Dr. Adrian that the plaintiff's psychiatric problems were caused by the accidents and are due to his pain, insomnia, and depression. Given the absence of depressive symptoms in the plaintiff prior to the first accident, I do not accept Dr. Riar's opinion that the plaintiff was prone to GAD or other psychiatric diagnoses. No evidence was led that the plaintiff suffered from any psychiatric difficulties before the accidents. Further undermining his credibility was Dr. Riar's concession while testifying that the plaintiff met the diagnostic criteria for GAD and MDD, contradicting his earlier report.
- [281] While I accept that the plaintiff was injured in the accidents and suffers current difficulties related to his accident injuries, I am unable to accept the plaintiff's contention that his accident injuries entirely preclude him from working in any capacity. Dr. Cameron, Dr. Anderson, and Dr. Adrian all agreed the plaintiff could do easier work. Dr. Adrian testified that he could be a store manager. It is important to bear in mind as well that the plaintiff worked continuously for one year following the accident with absolutely no issues concerning his work. Similarly, he did not attend medical services for the entirety of 2014.
- [282] Further, the plaintiff's shoulder issue is now being addressed. While I do not accept Dr. Rickards' evidence on causation, he nonetheless described a path of treatment that, if followed, could lead to recovery in six years.
- [283] This matter is difficult in that I do not accept all of the plaintiff's evidence. Clearly, he was untruthful in his applications to Simons when he indicated that he had a bachelor's degree. His past dishonesty makes it difficult for the court to accept everything the plaintiff said. However, I do accept that he is suffering from all of the psychiatric symptoms that have been described.
- [284] I find that the plaintiff has no PTSD but has driving fears due to the accidents.

[285] In conclusion, I find that the motor vehicles accidents were a material cause of the plaintiff's injuries. I find that the plaintiff has suffered an indivisible injury as the injuries cannot be separated. They include aggravation and exacerbation of earlier injuries and result in joint liability for tortfeasors: *Bradley v. Groves*, 2010 BCCA 361 at para. 20; *Athey* at paras. 22-25.

quantum of damages

[286] I now turn to discuss quantum of damages in the following order:

- Non-pecuniary damages;
- Past loss of earning capacity;
- Future loss of earning capacity;
- Cost of Future Care;
- Special Damages; and
- In Trust Claim.

non-pecuniary damages

Legal Principles

[287] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, and loss of enjoyment of life. The award must assess both the losses suffered by the plaintiff to the date of trial and the losses he will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 [Tisalona] at para. 39.

[288] As set out in *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, 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; and
- i) loss of lifestyle.

[289] The plaintiff's stoicism should not, generally speaking, penalize the plaintiff.

[290] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured, in part, by looking to awards made in comparable cases. However, each case must be decided on its own facts. The amount of the award does not depend on the seriousness of the injury, but rather compensates the loss in the context of the specific plaintiff's circumstances: Tisalona at para. 39.

Application to the Facts

[291] I have already indicated my conclusions on the issue of causation. My findings as to the impact of the plaintiff's accident related injuries as they pertain to the assessment of non-pecuniary damages are as follows:

- The plaintiff suffered soft tissue injuries in the accidents which have led him to develop chronic pain in his low back, neck, and shoulders. The level of pain has fluctuated over time but has not resolved. The pain has impacted the plaintiff's ability to perform job duties as a retail manager.
- The chronic pain has prevented the plaintiff from enjoying his pre-accident activities such as rock climbing, skiing, and weightlifting.
- The plaintiff's chronic pain has led him to develop MDD, GAD, and SSD. He further reports experiencing sleeplessness, memory issues, and suicidal thoughts, and states that he no longer enjoys food.
- The plaintiff's injuries have impacted his personal and family life. He has experienced strain on his family, marital, and social relationships.
- The plaintiff has not been able to engage in household activities to the extent he previously did.
- The plaintiff's prognosis is uncertain, especially given the length of time he has experienced chronic pain without improvement.

[292] The plaintiff seeks an award for non-pecuniary damages in the amount of \$200,000. He relies on the following cases as establishing an appropriate range:

- Felix v. Hearne, 2011 BCSC 1236 [Felix] (\$200,000);
- Gill v. Stevens, 2019 BCSC 798 [Gill] (\$200,000);
- Kallstrom v. Yip, 2016 BCSC 829 (\$180,000); and
- Sebaa v. Ricci, 2015 BCSC 1492 (\$180,000).

[293] The defendants argue that the appropriate range is \$35,000-\$50,000. The defendants rely on the following cases:

- Sandher v. Binning, 2012 BCSC 1000 (\$40,000);
- Stevanovic v. Sin, 2007 BCSC 1797 (\$35,000); and

· Bern v. Jung, 2010 BCSC 730 (\$50,000).

[294] I refer to criteria enounced in Stapley in determining the compensation to be provided. In particular, I note that the plaintiff's injuries are chronic and that he has suffered from suicidal ideation.

[295] I do not find the cases presented by the defendants to be helpful in determining non-pecuniary damages as they involved plaintiffs who experienced less severe impacts than those experienced by the plaintiff in this case. None of the authorities the defendants rely on involved plaintiffs who suffered psychological injuries.

[296] I find the plaintiff's damages to be similar, though somewhat less severe, than those of the plaintiff in Gill, where Madam Justice Gropper awarded \$200,000 in non-pecuniary damages:

[51] Applying those factors, Mr. Gill is now 49 years old and he has been suffering from his injury for almost four years. The treating doctors and Dr. Tarzwell opine that Mr. Gill's psychological problems continue and will not be cured. Mr. Gill is isolated from his peers. Mr. Gill's ambition and drive towards his career goals have dissipated. Mr. Gill's future career prospects, if there are any, will likely include work that is less challenging, interesting or rewarding for him. Mr. Gill has lost his own sense of self-worth and confidence. Mr. Gill's degree of emotional suffering has been extreme and reflects a lonely, frustrated, and frightened individual. Mr. Gill's family, marital and social relationships have been directly impaired, as have his physical and mental abilities. Mr. Gill has completely lost his pre-accident lifestyle. Mr. Gill is unable to bear his loss stoically.

[56] Mr. Gill's physical symptoms have been secondary to his psychological injuries. The psychological injuries have had a devastating impact on every aspect of his life. He was a happy, healthy, ambitious person. He was involved in a loving marriage and had close relationships with both his children. He was pursuing a job that he loved. He enjoyed socializing, he was concerned about his appearance, and he was physically active. His future was bright. That is no longer the case. Mr. Gill is a shadow of his former self. His interaction with his friends and family is non-existent. The effect of these injuries on his day-to-day functioning is profound. Some of his family, friends, and the experts described that Mr. Gill is unable to even engage in basic health self-care and personal hygiene.

[57] Mr. Gill has suicidal ideation that manifested itself in his attempt to take his own life in January 2018.

[297] This case is likewise similar to Felix, where the plaintiff's suicidal ideation was related to the depression she suffered as a result of her accident. However, in Felix, Grist J. found there was only a modest chance of improvement (para. 38).

[298] Taking into account all of the circumstances, I find that an appropriate award in non-pecuniary damages would be \$160,000.

Past Loss of Earning Capacity

Legal Principles

- [299] An award for damages for loss of earning capacity, whether past or future, compensates the plaintiff's pecuniary loss. Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *X. v. Y.*, 2011 BCSC 944 at para. 185. Compensation for past loss of earnings is based on what the plaintiff would have, not could have, earned up until the date of trial but for the accident related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [300] The burden of proof for actual past events is the balance of probabilities. However, an assessment of both past and future earning capacity requires the court to hypothesize about how a plaintiff's life would have unfolded in the pre-trial period absent the injury, and how it will likely unfold after the trial.
- [301] The standard of proof in relation to hypothetical events is simple probability, with hypothetical events given weight according to their relative likelihood: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29 [Smith]; *Athey* at para. 27.
- [302] Where a plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, damages are awarded pursuant to an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss: *Sendher v. Wong*, 2014 BCSC 140 at para. 162 [Sendher]. However, the plaintiff must still establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Sendher* at para. 161; *Falati v. Smith*, 2010 BCSC 465 at para. 43, *aff'd* 2011 BCCA 45; *Smith* at para. 36.
- [303] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62 at para 40. The trial judge has a discretion to determine what period or periods of time are appropriate for the determination of net income loss: *Lines v. W.D. Logging Co. Ltd.*, 2009 BCCA 106 [Lines] at paras. 181-186. In exercising this discretion, the trial judge should keep in mind that the plaintiff is to be put back in the position he or she would have been in had the accident not occurred: *Lines* at paras. 185-186.

Application to the Facts

- [304] While the plaintiff was not off work following the first accident, he did not work for some time following the second accident. He was off work from the second accident in February 2016 until returning full time and without accommodation at Simons in August 2016. He then worked for approximately one year before going off work following a lifting injury.

[305] I accept the plaintiff's evidence respecting his injuries and the pain that he felt. I do not accept, however, that the injuries were such that they completely or partially disabled him from working. In reaching this conclusion, I rely in particular upon the testimony of a number of witnesses from Simons, who testified that in the year following the second accident, no one complained that the plaintiff was making mistakes or was otherwise cognitively impaired. Further, the plaintiff continued to seek out positions in grocery stores, knowing the duties that were required.

[306] I also rely on the opinion of Dr. Cameron who noted the plaintiff can still work at a less physically demanding job, and of Dr. Anderson who opined that the plaintiff should do easier work. Dr. Adrian and Dr. Gander also expressed similar opinions.

[307] I appreciate that the plaintiff had difficulties completing his work in early 2019 after taking a position at Askew's. However, I find the plaintiff's difficulties were compounded by the fact that he was away from his family and his support network by being isolated in Salmon Arm. I also find that the plaintiff tends to overstate his physical limitations, as was noted by Mr. Gander during the FCE.

[308] I accept that the plaintiff could have earned \$95,000 a year at Simons. However, just taking the three years earnings before the first accident on average he was making:

2010

\$86,300 (employment income)

2011

\$57,500 (employment income)

2012

\$32,800 (employment income)

The plaintiff earned an average of \$53,733 per year or approximately \$4,500 per month.

[309] The plaintiff did not work for six months in 2016. The plaintiff was also off work from August 2017 to November 2018, when he commenced work at Askew's. He worked there for approximately six months, until he left on April 28, 2019. To date of judgment, he did not work for a total of 28 months. Had he been earning \$95,000 per year, the plaintiff would have made approximately \$221,700.

[310] I find that \$120,000 is an appropriate award for past loss of earning capacity given the varying circumstances. I will leave it to the parties to make the appropriate deductions, with leave to seek further direction from the court if necessary.

Future Loss of Earning Capacity

Legal Principles

- [311] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [Brown]; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) [Pallos]; *Pett v. Pett*, 2009 BCCA 232.
- [312] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: Lines at para. 185. The valuation of lost earning capacity involves a comparison of what the plaintiff likely would have earned but for the accident with what he will likely earn in his present condition: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para 32. Additionally, the overall fairness and reasonableness of the award must be considered. The task of the court is to assess the losses, not to calculate them mathematically: *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 11 and 18. Finally, since future is unknown, allowance must be made for possibility that the assumptions upon which the award is based are wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [313] There are two possible approaches to assessing loss of future earning capacity: the "earnings approach" and the "capital asset approach." Both are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140, at para. 12.
- [314] The earnings approach involves a math-oriented methodology whereby the court:
- i. postulates a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or
 - ii. awards the plaintiff's entire annual income for a year or two.
- See *Pallos* at 271.
- [315] The capital asset approach involves considering whether the plaintiff:
- i. has been rendered less capable overall from earning income in all types of employment;
 - ii. is less marketable or attractive as a potential employee;
 - iii. has lost the ability to take advantage of all job opportunities that might otherwise have been open; and
 - iv. is less valuable to himself as a person capable of earning income in a competitive labour market.

See Brown at 356.

[316] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[317] Ultimately the court must award damages in a manner that is reasonable in all the circumstances. Economic and statistical evidence is only useful to the extent that it assists in making a determination of what is fair and reasonable: *Grewal v. Naumann*, 2017 BCCA 158 at para. 49, citing *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

The Plaintiff's Income

[318] In 2008, when the plaintiff was the franchisee of IGA, he paid himself a salary of \$85,000. Since then, his annual income has been:

2009

\$86,256 (employment income)

2010

\$86,300 (employment income)

2011

\$56,732 (employment income)

2012

\$32,798 (employment income)

2013

\$96,287 (employment income)

2014

\$88,496 (employment income)

2015

\$100,501 (\$99,929 employment income and \$572 from EI benefits)

2016

\$60,868 (\$54,747 employment income and

\$6,121 from EI benefits)

2017

\$68,459 (\$60,314 from employment, \$8,145 from EI Benefits)

Application to the Facts

- [319] A determination of the plaintiff's loss of future earning capacity is very much dependent upon credibility and acceptance of the evidence of the plaintiff and his collateral witnesses respecting his ability to work.
- [320] Turning to the plaintiff's employment history, it is of note that he has never worked consistently without taking breaks. The plaintiff did not work for much of 2012, working instead without pay for his father. He stopped working again in 2017, doing stock day trading at home and losing over \$50,000. He has a history of working for short periods of time for certain firms then leaving to try his hand in a different area. I thus do not agree with Mr. Lawless' opinion that, absent the accidents, the plaintiff would have continued to advance in the retail industry. I find instead that he has an ambivalent attitude to the workplace.
- [321] This is not a case where I can find that the plaintiff would have otherwise been employed as a retail manager earning up to \$95,000 per annum until retirement. I thus find that the earnings approach is inappropriate in the case at hand, and will determine the plaintiff's loss of earning capacity pursuant to the capital asset approach.
- [322] I do not entirely accept Mr. Lawless' opinion that the plaintiff is completely precluded from being a manager. At present it is clear that the plaintiff is unable to work in his prior capacity as a high functioning executive. However, he can still work in a less physically demanding position. Accordingly, I find that, while he cannot earn \$80,000 to \$100,000 annually, having declined work which has a physical component, he could nonetheless work as a lower level manager and earn \$60,000 per annum.
- [323] I do accept that the plaintiff has ongoing mental health issues which have impacted all areas of his life, for which he has only recently started treatment with a psychologist, Dr. Owen James. The plaintiff plans to see him on a weekly basis and has applied for funding for this. The plaintiff continues to explore other treatment possibilities, and has recently seen a rheumatologist and a physiatrist. The plaintiff confirms that if he is willing to try treatments from a pain clinic, physiotherapist, psychiatrist, registered massage therapist, nutritionist, and cognitive rehabilitation specialist.
- [324] Given that the plaintiff has received minimal treatment for his GAD, MDD, and SSD beyond the initial appointment with Dr. Raycraft, I find it reasonable to expect that he will improve by exploring new therapies. With respect to his shoulder injury, according to Dr. Rickards, if the plaintiff follows the appropriate course of treatment, he could see recovery in six years. I thus take the contingency that the plaintiff will improve into consideration in assessing his claim for future loss of earning capacity.

- [325] In considering my finding that the plaintiff is capable of working in a lower-level management position, the contingency that his condition will continue to improve, and his employment history, I find that his claim seeking over \$2 million in future loss of earning capacity is not realistic.
- [326] He worked for an entire year following the second accident and, accordingly, there is some question about his inability to work on a sustained basis. While it is clear that he cannot work at the present time in the capacity he did when he started at Simons or before the accidents, he is nonetheless capable of employment in a less demanding position as was suggested the experts.
- [327] In the circumstances, I find that his future loss of earning capacity is more in the nature of \$30,000 a year. I must, however, also consider economic contingencies of taking time from work such as illness, as well as taking time to care for others, unemployment, etc.
- [328] I find there is little evidence on when the plaintiff would retire, and thus conclude that he would retire at age 65. Applying standard actuarial contingencies to his annual loss of \$30,000 per annum, the plaintiff's loss of future earning capacity is assessed at \$440,520.

Cost of Future Care

Legal Principles

- [329] An award for future care costs is based on what is reasonable necessary to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. The authorities establish that the items or services claimed must be medically justified and reasonable: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210-211. The criterion to be used in addressing a claim future care costs is whether a reasonable person of ample means would be ready to incur the expense for which an award is sought. However, in assessing what is reasonably necessary to promote the plaintiff's health, the court should also look for evidence of a real and substantial possibility that the expense will be incurred: *Harrington v. Sangha*, 2011 BCSC 1035 at paras. 150, 152.

Application to the Facts

- [330] The plaintiff testified that he would be willing to try treatments from a pain clinic, physiotherapist, psychiatrist, registered massage therapist, nutritionist, and cognitive rehabilitation program. He would also like to try vocational counselling. He further seeks homemaking support, childcare, a comfortable chair and traction unit for use at home, a gym membership, and the costs of medications.

- [331] I find that assessing future care costs in this case is not straightforward. The plaintiff did not seek medical attention for over 30 days following the first accident, and did not attend the doctor for the entirety of 2014. Given his intermittent attendance on medical professionals, I do not find it likely that the will use all of the modalities of future care as suggested by Dr. Witty.
- [332] I find that the plaintiff is being urged to continue with physiotherapy, and award \$30,000 for that purpose.
- [333] The plaintiff attends the gym. Accordingly, I will allow for ergonomic supplies with an initial outlay of \$600. I will allow \$4,000 for projected therapeutic modalities. For gym memberships and health maintenance, I will award \$10,000.
- [334] The plaintiff may undertake further training to assist in finding more sedentary work. I further accept that the plaintiff would require some vocational counselling if he were to find himself in need of alternate employment. I anticipate, however, that he will be able to return to retail management. I thus allow for vocational counselling and occupational therapy in the amount of \$9,000.
- [335] I make an award for medication costs in the amount of \$1,300.
- [336] I am mindful that the plaintiff testified that he would try anything. However, his past behaviour suggests otherwise as he has not followed through with certain medications or continued with therapeutic recommendations, as demonstrated by discontinuing care for a year following the second accident. Accordingly, his award under this heading is limited.
- [337] I award a total of \$54,900 (\$30,000 + \$600 + \$4,000 + \$10,000 + \$9,000 + \$1,300) for cost of future care, including non-recurring cost for the future care needs of health maintenance and leisure, projected therapeutic modalities, and ergonomic supplies. I make no award for home support.

Special Damages

- [338] Plaintiff's counsel reported the plaintiff's special damages as follows:

Raincoast Physiotherapy

\$50

Burrard Physiotherapy

\$30

Gastown Physiotherapy

\$350.25

Treloar Physiotherapy

\$280

Turning Point Rehab

\$3,714.78

Blue Sky Physiotherapy

\$613

Treloar Physiotherapy

\$430

Prescription Medication

\$420.08

Miscellaneous Medical

\$515

Total:

\$6,403.11

[339] As well, the plaintiff had out laid for numerous medications and BC Ambulance Service respecting the second accident. The special damages totalled \$6,403.11.

[340] The plaintiff testified to a number of prescriptions that he paid for as well as for the costs for medical notes and for BC Ambulance Services at \$80.

[341] In evidence were all the documents (receipts, bills) paid by the plaintiff. I accept that evidence. For special damages, I award in the amount of \$6,403.11.

In Trust Claim

Legal Principles

[342] I note that the plaintiff seeks in trust claim on behalf of Ms. Neil and his family. The test for in trust claims is set out in *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735 [Bystedt] at para. 180, aff'd 2004 BCCA 124, and requires a consideration of six relevant factors. For an in trust claim to be established, the services provided to the plaintiff must go above and beyond what one would be expected to be performed out of a sense of love, friendship, or family duty: *Dufault v. Kathed Holdings Ltd.*, 2007 BCSC 186 at para. 176.

[343] The six relevant factors from *Bystedt* are:

- a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;

- b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- c) the maximum value of such services is the cost of obtaining the services outside the family;
- d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
- f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

Application to the Facts

[344] There was little evidence that the Ms. Neil has been required to do anything extra beyond what she normally does. While I can infer that her housekeeping responsibility has increased, there was no evidence of her providing extra personal care to the plaintiff. Nor was there evidence that the plaintiff's family was providing him personal care.

[345] I find that there is no indication that Ms. Neil is providing to the plaintiff will go above and beyond what she has always done and, consequently, I make no award under this claim.

summary of awards

[346] In summary, I award the following:

Non-pecuniary damages:

\$160,000.00

Past loss of earning capacity:

\$120,000.00

Future loss of earning capacity:

\$440,520.00

Cost of future care:

\$54,900.00

Special damages:

\$6,403.11

In trust claim:

\$0.00

Total

\$781,823.11

costs

[347] In the event that counsel are unable to reach an agreement respecting costs, they may, within 60 days of the release of this judgment, arrange to address costs by contacting the Supreme Court Scheduling.

"Maisonville J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/18/2019BCSC1818.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/shoghi-v-lin-2019>

Prepared on 28 October 2026 · Esheria