

CANADA / JUDGMENT

Tootakhil v. Richmond Cabs Ltd.

2024 BCSC 1860

COURT

Supreme Court of British Columbia

DECIDED

8 October 2024

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2024 BCSC 1860 Tootakhil v. Richmond Cabs Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tootakhil v. Richmond Cabs Ltd.,

2024 BCSC 1860

Date: 20241008

Docket: M208277

Registry: Vancouver

Between:

Bashir Tootakhil

Plaintiff

And

Richmond Cabs Ltd. and Paramjeet Singh Sandhu

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 109 on November 12, 2024

Before: The Honourable Justice Tucker

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

December 11-15 and

19-20, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 8, 2024

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I. Introduction

[1] The plaintiff, Bashir Tootakhil, was in a motor vehicle accident on February 10, 2019, in Richmond, BC (the "Accident"). The car he was driving was struck from behind by a van owned by Richmond Cabs Ltd. and being operated by Paramjeet Singh Sandhu.

[2] Liability is admitted. The trial dealt solely with damages.

II. Plaintiff's Evidence

A. Pre-Accident

- [3] The plaintiff was 43 years old at the time of the Accident and 48 as of trial. He lives in a townhouse in Richmond, along with his spouse and their three children. The children were aged 11, 14 and 18 at trial.
- [4] Mr. Tootakhil was born and raised in Afghanistan. He attended a trades-oriented high school in Afghanistan, where he took electronics, along with courses, and graduated with a diploma in 1993. He speaks English and four other languages.
- [5] At age 19, the plaintiff moved to Pakistan. He worked in a relative's electronics shop for about a year and then opened his own shop. His shop repaired televisions, VCRs, and like equipment, and he built amplifiers and satellite dishes that were for sale in the shop.
- [6] In Pakistan, he obtained a one-year college diploma in computer science and several certificates related to electronics work, including a certification to work on Microsoft products. He also got married while living in Pakistan. His wife was a Canadian citizen, and they opted to move to Canada in or about 2004.
- [7] In Canada, the plaintiff obtained work doing metalworking and spot welding. At the same time, he worked as an on-call electronics technician for a television and stereo store, but was called in three or four times. In January 2005, he moved to a company that made electronic cables. There, he was promoted into quality control, which involved inspecting cables, checking connectivity, and some data-keeping and related computer work.
- [8] In October 2006, the plaintiff started at Engenuity Manufacturing Solutions Ltd. ("Engenuity" or, later on, "EMS") in Delta. Engenuity manufactured electronic products such as battery packs and circuit boards.
- [9] The plaintiff was hired for work for a specific project (Fueltest), but was kept on and made test department supervisor. Engenuity appears to have been a fairly small operation. (Another witness who worked at Engenuity, Vesna Mudrovic, said there may have been two junior technicians (one per shift) in the test department.)
- [10] While at Engenuity, the plaintiff reported to Ms. Mudrovic, whose then position was production manager. When testing issues arose with the Fueltest product, the plaintiff got to know a vice-president and co-owner of Engenuity, David (Scotty) McAlpine, as Mr. McAlpine oversaw the Fueltest project.
- [11] When the plaintiff left Engenuity in 2011, he was making about \$27 an hour and about \$39,000 annually.
- [12] In December 2011, the plaintiff began doing contract work as a linguist and cultural adviser for the U.S. military in Afghanistan. He resided on a U.S. military base in Afghanistan and provided translation services. He earned about \$185,000 a year doing this contract. He gave up this contract work in 2013 when the contract pay was significantly reduced.

- [13] In September 2013, the plaintiff returned to Canada and went on employment insurance. He testified that he spent this time looking for a position as an electronics technician. He did not find one. The plaintiff's testimony failed to squarely explain why the search for an electronic position was unsuccessful at this time.
- [14] In or about February 2014, the plaintiff began driving taxi for Garden City Cabs Ltd. ("Garden City") as a contractor. There were some inconsistent dates in the plaintiff's sign-up documents, but I accept that he first signed-up to work with Garden City in early 2014. He drove taxi for Garden City until the spring of 2018. The plaintiff testified that he only drove taxi in order to generate income while he continued his search for an electronics job. The plaintiff testified that he preferred driving taxi over an hourly wage position during this period because the flexibility in hours in driving taxi was an advantage to him, especially at times when he had more responsibility for the children.
- [15] The plaintiff testified that in or about March 2014, he emailed and then spoke with Mr. McAlpine. At trial, the plaintiff testified that he raised the possibility of returning to work at Engenuity with Mr. McAlpine. At discovery, the plaintiff he had said he did not approach Engenuity about a job in 2014. I find it plausible that the plaintiff could have concluded, on reflection, that his conversation with Mr. McAlpine had effectively covered that ground. I do not find this change in testimony to be a significant discrepancy.
- [16] The plaintiff testified that, in that 2014 conversation, Mr. McAlpine told him that he might have work for him in the future with a different company, Onyx Lithium Power Ltd. ("Onyx"). Onyx was a separate company that Mr. McAlpine had acquired or was acquiring. Onyx manufactured lithium battery packs. The plaintiff testified that after this conversation he kept on driving taxi, waiting for Onyx to become operational, as he thought Onyx could be a very good opportunity for him.
- [17] In or around August 2017, the plaintiff began performing contract work for Onyx on an "as needed" basis. He built and tested battery packs as and when Onyx got orders. The plaintiff testified he was given some training for the work by an engineer. Ms. Mudrovic testified that the plaintiff had already done the same work while at Engenuity, as Onyx had been an Engenuity client.
- [18] Onyx production was a one-man operation, with the plaintiff doing all of the work himself. He would go into the Onyx workspace to assemble and test enough batteries to fill the order, and then return to taxi driving. He might, for example, spend three days in a row working to fill an Onyx order, and then not be called upon by Onyx again for weeks or months. The plaintiff was paid \$40 per hour for the Onyx work, but also received bonuses frequently. The bonuses were at Mr. McAlpine's discretion.

- [19] The plaintiff described the Onyx work as requiring him to measure at a table, perform some welding and soldering, and then test performance at a testing station. A completed Onyx battery pack could weigh up to eight pounds. The plaintiff had no physical difficulty performing Onyx work prior to the Accident.
- [20] The plaintiff testified that he had hoped Onyx would thrive, but by 2018 he could see it was not. He said this realization caused him to resume looking for a full-time electronics technician position in 2018.
- [21] In April 2018, the plaintiff moved from Garden City to Richmond Cabs as a contractor. The plaintiff testified that he moved to Richmond Cabs so he could work less and spend time looking for an electronics technician position. He explained that because Richmond Cabs has daily cab leases (as opposed monthly), he could take more non-driving days.
- [22] The plaintiff produced one job application he made while he was at Richmond Cabs. On November 13, 2018, he emailed a resume out in respect of an "electronic assembler position". He could not recall if he had spoken with anyone about that position nor what the position paid. He said he "might" have made one other application for an electronics position in 2018. He said he thought about possibly taking a JavaScript course to update his electronics credentials, but did not look up courses or take any other concrete steps to that end.
- [23] He was still driving with Richmond Cabs on February 10, 2019, the date of the Accident.
- [24] At the time of the Accident, the plaintiff had no physical restrictions. He testified that he had no mental health issues prior to the Accident.
- [25] The plaintiff described himself as very social and having an active family-oriented lifestyle prior to the Accident. He played volleyball with friends or his children, and would go walking, jogging and cycling. They camped regularly in the summer, and he occasionally went fishing. He did some woodworking as a hobby, making items like chairs, shelves and beds.
- [26] At the house, he testified that he did some of the cooking, and did the family laundry, vacuuming and anything requiring heavy-lifting, all without any difficulty. Asked if he did a "substantial" part of the household house-keeping work pre-Accident, he testified that he had been "doing what he could". The only outdoor house or yard-related work he did was occasionally clearing snow from the townhouse patio, as the strata was responsible for the rest.
- [27] When his wife was injured in a motor vehicle accident, as well as during the time when she was in school and training to become a health care assistant, the plaintiff had increased responsibility for the children. He testified that he was readily able to do this because taxi driving allowed him to determine his own work hours.

B. The Accident

- [28] On February 10, 2019, the plaintiff's Toyota Prius was approaching the Massey Tunnel when traffic slowed and then stopped for a moment. He was hit from behind by a van. The plaintiff had no independent recollection of whether he pushed into the car in front of him. The photographs show no discernible damage to the front of his vehicle. There is significant visible damage to the rear of the plaintiff's vehicle and to the front of the van that hit him.
- [29] The plaintiff testified that he hit his head and felt dazed after the Accident. His back felt numb while he was still in the vehicle. He was assessed at the scene and went to the hospital in an ambulance. At the hospital, he reported a headache and pain in his back, neck and knee. After some scans were done, he was given pain medication and a neck collar to wear. He went home in a taxi.

C Post-Accident

- [30] The plaintiff claims to have suffered the following injuries as a result of the Accident:

- low back injury;
- injury to leg/knee;
- neck injury;
- headaches;
- dizziness;
- injury to head;
- numbness in hands and fingers;
- difficulty sleeping;
- anxiety and depression;
- memory issues.

- [31] The plaintiff reported that after the Accident, he could not move for a period of time due to pain, especially in his lower back, and laid in bed for several days. He felt dizzy for one or two days. The pain gradually improved over time. He used Advil, Naproxyn and Baclofen for the pain, but tried to minimize his use of these due to pre-existing kidney issues. He used the neck brace for about two months.
- [32] His lower back injury has always been, and remains, his central complaint.
- [33] At trial, the plaintiff submitted that the majority of his Accident injuries had resolved, with the exceptions being his lower back, some ongoing mood issues (depression and anxiety) and some sleep issues. He felt that his memory had worsened.

- [34] The plaintiff described his current low back pain as better than after the Accident, but still constant. When he engages in activities, he experiences flare-ups, which involve sharp pain. He said almost any activity can cause a flare-up, but that the sharp pain now only lasts about 10-15 minutes, and sometimes as little as five minutes, provided he continues with trigger point injections on a two week schedule. If he does not keep up with the trigger point injections, then the sharp pain caused by flare-ups can last a day or more.
- [35] He continues to have sleep issues related to back pain.
- [36] The plaintiff reports that his mental health worsened after the Accident. He says his memory has declined over the past two years or so. He believes that if his finances improve, his mental health may improve as well. He did not raise any mental health issues with his family doctor.
- [37] The plaintiff testified that he uses CBD (cannabidiol). He heard about it and did some internet research because he wanted to stop taking Naproxyn. He discussed CBD with his family doctor, but she wouldn't prescribe it. The plaintiff then made an appointment through a cannabis clinic and got a "prescription" that enables him to order CBD on-line. He believes the person he spoke with through the cannabis clinic was a doctor. He takes a CBD at night and also vapes. He says the CBD helps with pain. He still takes Baclofen or Advil occasionally, but not often.
- [38] The plaintiff testified that as of two months before trial he could carry more than 12 pounds (though it "depended on the day"), could wash his car at least for 30-40 minutes, and could, with pacing and breaks, do most housekeeping tasks.
- [39] He testified that his injuries have impacted his relationship with his children as he used to play with the younger children and do activities with them after school, but could not after the Accident.

C. Return to Driving

- [40] In late May or early June 2019, the plaintiff returned to driving taxi. He testified that while he was able to work, his symptoms continued to be very bad, and he was taking Naproxen and Advil for pain. He did not indicate how many hours he was driving on his return to work driving taxi.
- [41] In February or March of 2020, the plaintiff began driving for Uber. He testified that Uber is more flexible and he can work whatever days and hours he wants as there is no car lease. The plaintiff testified that after he started with Uber, he also registered as a driver with Lyft and drove for Lyft occasionally.

- [42] In direct, he testified that the hours that he currently (as of trial) drives for Uber vary "depending on his condition" and that it might be as little as 1-3 hours a day or as much as 5-6 hours a day. He said he tries to avoid booking airport trips and "longer" trips. (He did not indicate what "longer" meant in this use.) He testified that even though he was driving fewer hours at Uber than he had driven as a taxi driver, he was making more money because he did not have to cover a taxi lease as an expense.
- [43] The plaintiff has continued to drive for Uber (and Lyft) through the date of the trial. He testified that he avoids airport bookings because of the likelihood of the customers having luggage. The plaintiff has a 4.98 (out of 5) star customer rating as an Uber driver.
- [44] He testified that he would drive more for Uber but for his lower back issues. Asked if he intends to drive for Uber until he retires, he responded that he will for as long as he is able.

D. Return to Onyx

- [45] As noted, in September/October 2019, the plaintiff began performing work for Onyx again. He testified that the work was hard on him given his symptoms, but that he was able to it with taking Naproxen and Advil for pain. He said it was hard to work through the pain, but that he needed to earn a living.
- [46] The following chart of the plaintiff's Onyx hours and earnings (both before and after the Accident) is supported by documentary evidence:

Date

Amount

Bonus

Hours listed

Hours calculated

Total Hours

6-Sep-17

\$ 2,740.00

\$ 500.00

64

27-Sep-17

\$ 3,500.00

87.5

25-Oct-17

\$ 4,000.00

100

29-Nov-17

\$ 3,200.00

80

2017 Total

\$ 13,440.00

64

267.5

331.5

28-Jan-18

\$ 640.00

\$ 200.00

11

4-Feb-18

\$ 1,000.00

\$ 280.00

18

14-Nov-18

\$ 2,500.00

41

23-Dec-18

\$ 3,990.00

\$ 740.00

76.5

2018 Total

\$ 8,130.00

146.5

0

146.5

2-Sep-19

\$ 4,000.00

\$ 560.00

86

14-Nov-19

\$ 4,520.00

\$ 1,000.00

88

21-Dec-19

\$ 1,400.00

\$ 380.00

27

2019 Total

\$ 9,920.00

201

0

201

10-Dec-20

\$ 1,600.00

\$ 1,000.00

15

2020 Total

\$ 1,600.00

15

0

15

- [47] Onyx went out of business in 2020. The plaintiff testified that he would have continued to perform casual work for Onyx had the company continued to operate.

E. Electronics Technician and Other Employment

- [48] The plaintiff testified that he doesn't believe he is capable of any work other than Uber (or Lyft) driving. He believes all electronics technician positions require 8-9 hour work shifts on a five days a week schedule, and that electronics employers would not want to "hear about his back problems".
- [49] The plaintiff testified to having looked at online job search boards and on LinkedIn prior to the trial, and having found lots of electronics positions available. He adduced a number of job postings he found in his search. He testified that the postings sought applicants with qualifications similar to his own and/or described skill sets that "matched his field". He had not taken steps to pursue any electronic technician positions, through these postings or otherwise, since the Accident. He testified this was "because I cannot do it now".
- [50] The plaintiff agreed he worked at Onyx in 2020 and that his pain is "quite a bit less" than it was in 2020. He agreed that the Onyx work was work in his "electronics wheelhouse". He agreed that his Onyx work had involved some standing, some sitting and some moving around. He maintained that he would be unable to do his Onyx work duties, now, on a full-time basis. He agreed that he has never tried doing any work of that type since the Accident, but said he was "not confident" that he could. He noted that at Onyx, he was able to work at his own pace in terms of breaks, although he was required to meet the customer delivery deadline.
- [51] The plaintiff agreed that, except for Onyx, he had only been hired in the electronics field in Canada in entry-level positions. He testified at trial that at least "some" employers would require a Canadian certification as a qualification, while at discovery he accepted that "most" employers would require Canadian qualifications. The plaintiff noted that Engenuity had wanted certifications he did not have, but thjat they had hired him anyway because of his experience.

F. Treatment

- [52] In late 2019, the plaintiff began to attend physiotherapy and kinesiology. The plaintiff said he did not start any earlier because his doctor had not explained what was involved. He tried massage therapy once, but found it painful.
- [53] When his physiotherapist recommended he try trigger point injections, the plaintiff got a referral and started them in mid-2022. He found them helpful. He continues to have them every two weeks. As of trial, he continued to see a physiotherapist (or kinesiologist) about once a week.

- [54] The plaintiff testified that he has not discussed his mental health issues with his doctor. He said this is because he is tired of seeing doctors and is not interested in taking any medications.

G. Income Taxes

- [55] The plaintiff testified that he did not realize when he started driving taxi that tips needed to be declared as income, but learned this after his first year. He testified in direct that he properly reported all of his earnings once he was aware that tips were earnings. He testified that he kept track of cash he received. On cross-examination, the plaintiff revised his position, saying that he made no attempt to keep track of cash tips, but did his best in respect of cash fares.
- [56] He testified that his accountant would recommend an amount for him to declare as tips for the year and that he would declare that number. He did not disagree with the suggestion that the number chosen was designed to be just enough to avoid an audit. He agreed that this practice excluded actual tips in excess of the declared amount from taxation, and that avoiding the tax was part of the reason for adopting that approach.

H. The ER Incident

- [57] On November 28, 2022, the plaintiff experienced numbness in his face. He thought it might be a brain stroke symptom. He went to emergency. He reported to the staff at the emergency department that he had experienced confusion as a "dream-like sensation" for hours. He had not experienced any confusion. He made the report because he knew confusion was a significant stroke symptom and he wanted a serious medical investigation done.
- [58] The scans and tests revealed nothing, but because of the unexplained confusion, the plaintiff was medically prohibited from driving. The driving prohibition was in place from November 28-December 22, 2022. It was only lifted when the plaintiff admitted to having fabricated confusion as a symptom.
- [59] In his testimony, the plaintiff insisted that his report of confusion amounted to an "honest mistake" because he made it because he was concerned the emergency staff wouldn't respond seriously to his complaints.

III. Collateral Witnesses

A. Waghma Waghma

- [60] Ms. Waghma is the plaintiff's spouse. She took a course to be a health care assistant in 2016-2017, and now works as one full-time.

- [61] She testified that prior to the Accident, the plaintiff was an active person, usually as part of family activities. He played some volleyball and basketball, went hiking and biking, and did various activities with the children. In the summers, the family would go camping and take road trips, such as a drive up to Whistler or, if the plaintiff had time off, to Kelowna or Kamloops. Sometimes they drove to Calgary. The plaintiff did these things without difficulty. She did not consider the plaintiff to have any mental health issues.
- [62] She described him as social, enjoying spending time with family and visiting their houses, and playing cards and other games. The plaintiff would help cook and would barbeque. She described him as helping with the house a lot. She said he vacuumed, did laundry, and took out the garbage and other tasks that required heavy lifting.
- [63] Following the Accident, the plaintiff stayed in bed, complaining about the pain. She had to make his breakfast and bring it to him.
- [64] She testified that the plaintiff no longer does the housework he used to do. The older children help some and her mother helps around the house a lot. Ms. Waghma testified that in the past six months or so, the plaintiff had done a little cooking, but had not done any vacuuming or laundry.
- [65] She perceived that his mood had changed after the Accident. Whereas he was generally calm before the Accident, she finds him hard to talk with and has the impression that he has to try to stay calm and not to be grumpy. She says he is disinterested in making social plans and will say that she and the children should go out, but that he will stay home.
- [66] She said they don't take family drives for fun to Kelowna and Kamloops any more. They did go on a family drive to Calgary. She said the plaintiff drove the first half of the drive to Calgary, but then his back hurt, so she and her sister-in-law drove the second half. She said they took breaks for the plaintiff's back.
- [67] She testified that their long-term plan was that she would go to school (which she did), and once they both had jobs, would try to save for a house. She was unable to say what job the plaintiff proposed to have under the long-term plan. She testified that driving taxi had not been the plaintiff's long-term career goal. She said he wanted to work on computers and electronics.

B. Mohammed Shohib

- [68] Mr. Shobib has known the plaintiff since 2004. He is married to the plaintiff's sister. He and his family moved to Chilliwack about six months before trial, but before that they lived in Greater Vancouver and he saw the plaintiff about once a week. Mr. Shobib sees the plaintiff about once a month since moving to Chilliwack.

- [69] When he saw the plaintiff, they would do activities such as playing volleyball and biking. In the summer, they would go hiking perhaps once or twice a month and go fishing occasionally. The plaintiff had no difficulty doing any of these things or in playing with the children. He described the plaintiff as friendly and humorous.
- [70] Mr. Shohib testified that he and the plaintiff no longer do the activities they did together before the Accident. He has asked the plaintiff, but the plaintiff declined. He said the plaintiff complains about pain and sleeps a lot now. He said he can see that the plaintiff has pain when he sits or stands up.

C. Manigah Wiazi

- [71] Ms. Wiazi is Ms. Waghma's sister. She moved to Kamloops since 2021.
- [72] She lived in Surrey before the move and saw the plaintiff about once a week at the plaintiff's house. They would play cards, watch movies, and the plaintiff would often barbeque. She said that he has always helped with the dishes and vacuuming.
- [73] She testified that after the Accident, she and her mother came to help Ms. Waghma with the house and children more often, and that they helped with cooking, cleaning and vacuuming.
- [74] Ms. Wiazi now generally sees the plaintiff when she is in the Vancouver area to visit her mother or when the plaintiff drives to Kamloops to pick up her visiting mother. She sees him perhaps once a month.
- [75] Ms. Wiazi testified that in the November before the trial, the plaintiff drove to Kamloops to pick up her mother. She testified that she put her mother's suitcase into the car as it was too heavy for the plaintiff. She saw the plaintiff attempt to pick up her one-year old son, but then put him back down instead. She had never observed the plaintiff to have any issues with lifting before the Accident.
- [76] Ms. Wiazi said that the plaintiff used to be very social and talkative, but now seems very quiet. If a group of people sat on the sofa, he might get up and go lay down.

D. Davinder Bahai

- [77] Mr. Bahai worked at Engenuity from 2005-2016, and then continued with the renamed company - EMS - from 2016 onward, including at the time of trial. Mr. Bahai is a machine operator. He worked at Engenuity when the plaintiff worked there, but they were always in separate departments.
- [78] Mr. Bahai testified that EMS continues to employ an electronic technician. The person in that position sits to perform testing work for an eight-hour shift. Mr. Bahai has no idea whether that person has ever asked for any work accommodations.

E. Vesna Mudrovcic

- [79] Ms. Mudrovcic worked at Engenuity (and then EMS) between 1997 and April 2012. She was project team leader at the time she left, and a project manager during the time her employment overlapped with the plaintiff's. As project manager, she dealt with customers and suppliers and kept matters within their timelines. She was also the plaintiff's direct supervisor.
- [80] Ms. Mudrovcic described herself as an electronic technician by trade, but as also having some mechanical engineering training. She is currently the operations manager for a software company ("Rainforest") that specializes in electrical metering. She has been with Rainforest about six years.
- [81] Ms. Mudrovcic confirmed that the plaintiff started as an entry level technician at Engenuity, but was soon made the senior technician in the testing department. She considered the plaintiff her "go to" person for technical questions and found him very knowledgeable and reliable.
- [82] She would recommend the plaintiff to someone who was considering hiring him. At one point, when Rainforest had a staff shortage and needed to clear a backlog in chip manufacturing to keep up production, she considered offering the work to the plaintiff. Ultimately, Rainforest just bought some pre-assembled chips.
- [83] Ms. Mudrovcic did some contract work for Mr. McAlpine in relation to his acquisition of Onyx. She said that Engenuity used to perform some work for Onyx, and that the plaintiff had performed some of the Onyx work at Engenuity. She said she and Mr. McAlpine agreed the plaintiff should perform work for Onyx, as they knew he had the skill and experience required to do it.
- [84] Taken to some of the job postings in evidence, Ms. Mudrovcic testified that she had seen the plaintiff perform tasks of the kinds listed in the job descriptions, although in order to do so she had to make assumptions about what was intended by the descriptions.

III. Credibility and Reliability

- [85] In assessing credibility, I rely on the principles as set out in the often-cited passages of *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357, and *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296. Credibility concerns the veracity of a witness: truthfulness. Reliability involves the accuracy of the witness's testimony, and requires consideration of the witness' ability to observe, recall and recount what occurred: *R. v. Khan*, 2015 BCCA 320 at para. 44.
- [86] The defendants take issue with the plaintiff's reliability and his credibility. The defendants contend that he exaggerates in his own favour, is willing to blur lines to support his case, gave misleading testimony on direct, and has made limited document disclosure.

- [87] The plaintiff denies any significant inconsistencies. He notes that he admits many injuries resolved and asserts that the evidence shows a concerted effort at rehabilitation and to return to work.
- [88] Applying the Farnya and Bradshaw principles, I share the defendants' concerns about the credibility and reliability of the plaintiff's testimony and self-reporting. I will address some points on which the plaintiff's evidence and reporting is problematic in this section. Some additional points will be addressed as they arise for discussion under damages.
- [89] The plaintiff attempted to downplay the significance of the fabricated stroke symptom. I do not think that can be done. The plaintiff researched symptoms and then provided a detailed report of a serious symptom that he did not have. He did so in order to get something - an intensive medical investigation. He admitted to the fabrication only after it resulted in a 25-day driving prohibition. The plaintiff's testimony that he was fearful about his health may make the fabrication rather more sympathetic, but it was in no sense an "honest mistake". Notably, the false or exaggerated reporting of subjective symptoms in order to gain a benefit is one of the core credibility concerns in personal injury claims.
- [90] There is the issue of the plaintiff conflicting in testimony between direct and cross-examination with regard to how and whether he accounted for cash receipts when driving taxi. The plaintiff also acknowledged that he knew that declaring a nominal amount for tips on his income taxes could result in avoiding taxes and agreed that avoiding taxes was part of the reason for adopting this approach. Both the change in position between direct and cross, and the content of the testimony on cross-examination are concerning.
- [91] On direct, the plaintiff testified that he went back to work in 2019 because he "couldn't pay his bills" and that a credit card company was suing him. He was then asked, immediately after on direct, if he had ever had credit problems prior to the accident, to which he answered "no - well, one time, but not a big deal". He then testified that he had had to make a consumer proposal in 2019 to deal with the credit card debt. His testimony in direct clearly implied that the financial distress, lawsuit and consumer proposal were all consequences of the Accident. On cross-examination, he conceded that the credit card debt was overdue and unpaid for months prior to the Accident. The notice of civil claim filed by the credit card company specifically seeks relief for a sum owing "as of December 3, 2018". I am satisfied that the plaintiff's direct testimony was intentionally misleading.
- [92] With regard to self-reporting to experts, I find that the plaintiff's reporting to his functional capacity expert (Mr. Kowalik) at his September 2023 assessment regarding his present ability to perform household tasks conflicts with his trial testimony that he is able to perform almost all of his former household tasks (albeit with breaks and some pain). The plaintiff reported to Mr. Kowalik that his ability to perform almost all domestic activities was subject to "extreme" limitation and that he was "unable" to perform home maintenance. Notably, there is no evidence that the plaintiff's condition had significantly changed between the September 2023 and the trial. I am satisfied that the conflict in this respect cannot be

reconciled.

- [93] On reliability, the plaintiff testified that his memory is poor. The defendants note that when written records were put before him, he asserted a lack of independent recall with respect to events more than three months prior. The defendants contend all of the plaintiff's evidence in relation to events outside that three-month window should be viewed with caution. I do not think it unusual to be unable to recall specific treatment visits beyond three months ago given the frequency with which the plaintiff attends treatment. However, I find that the plaintiff's admission to having a poor memory in general is a factor for consideration, especially give the extent to which the plaintiff testimony is vague and/or lacking documentary support.
- [94] On the whole, I satisfied that the plaintiff's testimony and his self-reporting warrant close scrutiny. Corroboration will be an important factor in evaluating his statements.

IV. Expert Evidence - Medical

A. Dr. John Armstrong and the Armstrong Report

- [95] Dr. John Armstrong is a medical doctor with a degree from McGill University, graduate clinical training in neurology, and a Ph.D. in neuroscience, also from McGill. For the past 25 years, his practice has focussed on the interdisciplinary diagnosis and management of complex chronic pain. He assessed the plaintiff on August 28, 2023 and provided a report dated September 14, 2023 (the "Armstrong Report").
- [96] The Armstrong Report states that the plaintiff reported constant but variable, aching (occasionally sharp) pain across his low back, aggravated by twisting, bending, lifting and prolonged sitting or standing. He reported less severe pain sometimes radiating from his lower back to his legs. The plaintiff reported a "global pain burden" in the range of 1-9/10, but averaging 7/10 (moderately severe) in the week prior to the assessment. His reporting produced a severe disability score on a patient inventory and a severe pain rating on a pain disability index.
- [97] The Armstrong Report sets out following:
1. Chronic lumbopelvic myofascial disorder, as the principal cause of his low back pain ("Myofascial Diagnosis");
 2. Bilateral sacroiliac joint dysfunction, resulting in a spinopelvic misalignment ("SI Joint Dysfunction Diagnosis");
 3. Adjustment Disorder with mixed anxiety and depressed mood, with the stressors being chronic pain and physical impairment;

4. Unspecified Somatic Symptom and Related Disorder (with features that fail to reach the threshold for Somatic Symptom Disorder, but nonetheless intensify his symptoms and impairment); and
5. Complex chronic pain disorder.

[98] In the section of the Armstrong Report that details what happened following the Accident, Dr. Armstrong states that the plaintiff "was taken to the ER at RH where, after a clinical examination and CT scans of his head and neck[footnote], it was determined he had sustained soft tissue injuries of his neck and he was provided with a soft cervical collar." The associated footnote reads:

*The cervical CT scan revealed an apparent atlantoaxial (C1 on C2) rotatory subluxation, a rare condition that can be congenital or acquired, including through whiplash. This finding appears not to have been confirmed, followed up or commented upon further in Mr. Tootakhil's case and, should the spinal cord become compromised, this subluxation can result in neurological disability. It was unclear in the Documents as to what the opinion was among his caregivers as to the significance of this finding.

[99] There is no diagnosis with respect to atlantoaxial subluxation set out in the Armstrong Report, nor was the topic broached in Dr. Armstrong's oral testimony. The matter of this apparent atlantoaxial subluxation is not mentioned again until appearing in the treatment recommendations.

[100] The defendants take issue with the sufficiency of the reasons for opinion set out in the Armstrong Report. Originally, the defendants objected to the entirety of the Armstrong Report on this basis, but subsequently narrowed the objection to the third and fourth diagnoses above (the "Psychiatric Diagnoses").

[101] Notwithstanding the defendants' withdrawal of the defendant's broader Rule 11-6(1)(f) objection regarding the Armstrong Report, I note that their objection was far from specious. It ought not to be so challenging to identify the reasons in an expert report. In particular, one not have to parse dense paragraphs, retrieve information from footnotes, or sift through appendices to piece together the reasoning applied in the case at hand. The "reasons" in an expert report should be collated by the author and placed front and centre.

B. The Psychiatric Diagnoses

[102] The defendants objected to the admissibility of the Armstrong Report with respect to the Psychiatric Diagnoses. The objection was made with respect to both as to qualification to make the Psychiatric Diagnoses and for failure to set out reasons for the diagnoses reached.

- [103] Following a voir dire, I accepted Dr. Armstrong's evidence that complex chronic pain is an interdisciplinary field and that the specific psychiatric diagnoses in issue are common in the patient group assessed. Dr. Armstrong has extensive experience with complex chronic pain in an interdisciplinary context and has assessed and treated these particular psychiatric conditions as part of his practice.
- [104] Dr. Armstrong testified that although he routinely make these psychiatric diagnoses based on his experience and working knowledge, it is also his practice to label his own diagnosis "tentative" and refer the patient to a psychiatrist where he had any doubt about the diagnosis. My understanding of this testimony is that Dr. Armstrong is capable of making the Psychiatric Diagnoses in circumstances where the subject displays a classic presentation of key symptoms.
- [105] I ruled that Dr. Armstrong was qualified to give opinion evidence about complex chronic pain and capable of providing opinion evidence in the diagnosis, prognosis, and management of injuries following trauma. That qualification was made on the basis that its terms encompassed diagnosing adjustment disorder and somatic symptom disorders (as specified psychiatric disorders commonly encountered in complex chronic pain treatment). (This qualification aligns with that accepted by this Court in *Dahlke v. Davidson*, 2023 BCSC 1884.)
- [106] That brings us to the second prong of the defendants' admissibility objection - the assertion that the Armstrong Report fails to set out reasons for the Psychiatric Diagnoses.
- [107] The Armstrong Report describes symptoms and the result of certain tests or questionnaires. It states that the Psychiatric Diagnoses are made by reference to the diagnostic criteria set out in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM") for Adjustment Disorder and Unspecified Somatic Symptom and Related Disorder. It expressly and clearly articulates the opinion reached on application of the DSM criteria. It does not set out the DSM criteria nor articulate how the facts and assumptions align with these criteria.
- [108] I made an oral ruling holding that the reasons set out in the report "just barely" set out sufficient reasons to render the Psychiatric Diagnoses admissible under Rule 11-6(1)(f) of the Rules. In particular, the information was sufficient to enable the court to identify the bases of the opinion and to enable opposing counsel to prepare for cross-examination. Much as this Court has held that the standard for identifying the underlying facts and assumptions for an opinion at the admissibility stage is not that of perfection (see *Cooper v. Clements*, 2022 BCSC 1775 at para. 48), the standard for "reasons" under Rule 11-6(1)(f) is not one of perfection.

- [109] Sufficiency for admissibility is, however, a separate matter from weight. An admissible expert opinion that does not provide reasoning that enables the court to follow, evaluate, and independently agree or disagree with the expert's chain of reasoning is of little persuasive value: *Perry v. Vargas*, 2012 BCSC 1925 at paras. 122-125; *Repin v. Aam Ventures Ltd.*, 2020 BCSC 227 at paras. 143-145; *McHollister v. Ma*, 2021 BCSC 1667 at para. 76.
- [110] In this case, neither the Armstrong Report nor Dr. Armstrong's testimony established a persuasive case that the symptoms and test results set out fulfil the DSM criteria. That being so, I am not prepared to place any significant weight on the Psychiatric Diagnoses.
- [111] Further, Dr. Armstrong is not a qualified as a trained psychiatrist, but rather has experience-based expertise in the diagnosis of specific disorders to the extent that there is a classic presentation of key symptoms. The evidence does not enable me to form an opinion as to whether the plaintiff could be said to have had a classic presentation.
- [112] For the above reasons, I do not consider Dr. Armstrong's Psychiatric Diagnoses sufficient to ground a finding on the balance of probabilities.
- [113] I do, however, accept that the plaintiff suffered from a low mood and a change in personality following the Accident, including irritability and unsociability. This is established on the lay evidence before me.

C. The SI Joint Dysfunction Diagnosis

- [114] In evidence, three methods for assessment in relation to the SI Joint Dysfunction Diagnosis were identified: (1) the FABER test, (2) the Gillet test and (3) diagnostic branch blocks.
- [115] Dr. Armstrong agreed that the FABER test, on its own, is non-specific. Dr. Armstrong also agreed that there is commentary in medical literature stating that the Gillet test is unreliable for the purposes of assessing SI Joint Dysfunction. Dr. Armstrong testified that, in his view, the Gillet test is considered unreliable because people fail to perform it properly. He is confident that he performs the Gillet test properly. I do not find that evidence sufficient to resolve the issue of the unreliability of findings using the Gillet test.
- [116] Dr. Armstrong agreed that diagnostic branch blocks can be done to isolate the issue in a way that allows a positive diagnosis to be made. Diagnostic branch block testing was not done here.
- [117] Dr. Armstrong also conceded that it is "not uncommon" for someone to have SI Joint Dysfunction and yet experience no back pain. He agreed that it was possible that the plaintiff had asymptomatic SI Joint Dysfunction prior to the accident and continues to have asymptomatic SI Joint Dysfunction now. Dr. Armstrong also agreed that it is possible that the plaintiff developed SI Joint Dysfunction as a result of the Accident, but that the SI Joint Dysfunction is nonetheless asymptomatic.

[118] Given the above, I am not satisfied on the balance of probabilities that the plaintiff has SI Joint Dysfunction at all, let alone as a result of the Accident.

D. Myofascial Diagnosis

[119] Chronic lumbopelvic myofascial disorder is a specific form of soft tissue injury.

[120] The defendants concede that the plaintiff suffered a lower back soft tissue injury as a result of the Accident. The defendants also concede that the plaintiff continues to be affected by that injury. The degree of the impact of that injury on the plaintiff is disputed.

E. Complex chronic pain disorder

[121] Complex chronic pain disorder is explained in the Armstrong Report as the combined impact of the following features:

(a) features of nociceptive (myofascial) and neuropathic (nerve root tension) pain; (b) a pain experience [] complicated by emotional distress (depression and anxiety), mental distress (somatisation with symptom augmentation), psychic tension (shortening muscles), a complete loss of self-esteem, a strong focus on pain, disordered sleep with fatigue and diminished energy, cognitive slowing (difficulty with working memory and concentration), and cognitive distortions, the latter about physical activity as a cause of additional injury ("the hurt v. harm dilemma"), leading to an external locus of control and pain avoidance behaviour with muscular deconditioning.

[122] On cross examination, Dr. Armstrong confirmed that "complex chronic pain disorder" was not a stand-alone "diagnosis", but rather a recognition that physical, emotional, and psychological issues can have a compounding cumulative impact. As I have not accepted Dr. Armstrong's Psychiatric Diagnoses, I do not accept Dr. Armstrong's description of the plaintiff's experience of complex chronic pain as set out above.

[123] Dr. Armstrong testified in cross-examination that the plaintiff's injuries involve pain with spinal loading and impact the ability to engage in tasks requiring lengthy periods of standing or sitting. He said driving would be an aggravating activity. Dr. Armstrong was palpably surprised when advised, during cross-examination, that the plaintiff has carried on working as a driver.

[124] Dr. Armstrong opined that the plaintiff is better suited to a vocation where he can adjust between sitting and standing at will during the course of the day, as opposed to sitting in a car. He recommended the plaintiff work in a position that involved using a sit/stand desk or adjustable work table. On redirect, Dr. Armstrong was asked whether it was a benefit to the plaintiff to have a driving job in which he could set his own hours and take breaks whenever, and for as long as, he wished. In response, Dr. Armstrong re-confirmed his view that driving was itself aggravating.

F. Summary

- [125] I accept Dr. Armstrong's Myofascial Diagnosis with respect to the plaintiff's lower back. As already noted, I find on the lay evidence, that the plaintiff has experienced low mood and personality changes as a result of his lower back myofascial injury and pain. I also accept the evidence that the plaintiff's sleep is disordered as a result of his lower back pain.
- [126] While I do not accept that "complex chronic pain disorder" as outlined in the Armstrong Report has impacted the plaintiff, I do accept that his myofascial pain is complicated by his mood and sleep issues.

V. Expert Evidence -- Functional Capacity Evaluation

- [127] Mr. Raph Kowalik was qualified as an expert in the areas of functional capacity evaluations and cost of future care. He assessed the plaintiff on September 5, 2023, and provided a report dated September 14, 2023 (the "Kowalik Report").
- [128] The plaintiff testified he was already suffering an exacerbation of his pain when he attended for the functional capacity evaluation. This had some impact on the testing. For example, the plaintiff advised Mr. Kowalik that he was generally able to lift some luggage for his work, but declined to lift as part of the evaluation on the basis that his back was already aggravated. As already set out above, I find the plaintiff's self-reporting to Mr. Kowalik regarding his pain and abilities to perform household tasks was exaggerated. For clarity, I am not satisfied that the plaintiff's testimony about having an aggravated back at the time of the testing is a sufficient explanation for the inaccuracy of his self-reporting.
- [129] In Mr. Kowalik's opinion, consideration of the plaintiff's overall results suggests the plaintiff provided a full level of physical effort in the testing. On functionality, Mr. Kowalik made the following findings regarding the plaintiff's abilities and limitations based on his observations during the assessment:
- a) Limited sitting ability to an occasional basis or approximately 30 minutes before a micro break is needed;
 - b) Limited standing ability to an occasional basis or approximately 17 minutes before a micro break is needed;
 - c) Poor balance on either leg with eyes open when compared to the norm and unable to balance on either leg with eyes closed with additional pain symptoms;
 - d) Limited ability of stooping to a rare basis with additional pain symptoms;
 - e) Limited ability of kneeling to an occasional basis with additional pain symptoms;
 - f) Limited ability of reaching at shoulder and overhead height predominantly with right hand to an occasional basis with additional pain symptoms;

- g) Limited ability of occasional pushing and pulling of 25 lbs consistent with medium strength category with additional pain symptoms;
- h) Limited ability of ascending and descending stairs with the use of the left handrail to a rare basis with additional symptoms;
- i) Deconditioned cardiovascular fitness;
- j) Functional low back range of movement with slight decrease to left lateral flexion, moderate decrease to right lateral flexion and severe decrease to flexion and extension when compared to norm with additional symptoms.

[130] With regard to the plaintiff's limited ability to sit or stand without a "micro break", Mr. Kowalik explained that a micro break does not require taking any time out. For example, taking a micro break taken while sitting may involve simply adjusting one's sitting position. Mr. Kowalik observed that the plaintiff had sat for about three hours, with microbreaks, during the assessment (with the three hours being the length the test, not as maximum period of ability).

[131] Based on the plaintiff's subjective reporting and the objective functional testing together, Mr. Kowalik's opines that the plaintiff does not presently meet the critical job demands to perform the full-time duties of an Uber or taxi driver on a safe and durable basis, mainly due to reduced sitting capacity and inability to bend or lift luggage. He finds the plaintiff may be capable of part-time work as an Uber or taxi driver.

[132] Mr. Kowalik was not asked to opine on the plaintiff's ability to perform the duties of any employment position aside from that of an Uber or taxi driver.

[133] I generally accept Mr. Kowalik's objective testing and observations as accurate and reliable. To the extent, however, that he makes findings that are based on both the plaintiff's subjective reporting and objective measures, the credibility and reliability concerns with regards the plaintiff's evidence make it is necessary to carefully consider whether the subjective reporting relied upon is supported by findings of fact on the evidence. In particular, I note that the plaintiff told Mr. Kowalik that he was currently only able to Uber drive for 2-5 hours a day. More will be said about that reporting below.

IV. Injuries

[134] As above, I accept that the Myofascial Diagnosis and I accept that the pain caused by his lower back soft tissue injuries are complicated by his mood and sleep issues. There is no dispute regarding causation. The defendants concede that the Accident is the cause of these injuries.

A. Pain Levels and Impairment

- [135] On cross-examination, the plaintiff was taken at great length through the treatment records generated by a physiotherapy and sports injury clinic he attended for physiotherapy and kinesiology (the "Treatment Records"). There was no dispute about the admissibility of these records: Edmondson v. Payer, 2011 BCSC 118 [Edmondson BCSC] at para. 26-29, aff'd 2012 BCCA 114 [Edmondson BCCA].
- [136] One of the notable characteristics of the Treatment Records here is their sheer volume. As of trial, the plaintiff had attended well over 300 treatment sessions.
- [137] The plaintiff testified that he had little independent recall of the appointments or what he reported at those appointments. The plaintiff agreed that he would have reported truthfully to his care providers.
- [138] The defendants rely on, among others, the following notes found in the Treatment Records as documentary evidence of the plaintiff's recovery arc:
- February 5, 2020 - The plaintiff reported pain when: bending forward, twisting too quickly (causing sharp pain), picking things up from the floor, carrying over five pounds, standing 10-15 minutes, or walking 10 minutes.
 - August 24, 2020 - The plaintiff was driving for Uber 2-3 days per week for a couple hours.
 - September 15, 2020 - The plaintiff reported that it was difficult to sit and drive and get out of the car, that his pain was settling and only driving was causing discomfort.
 - September 17, 2020 - The plaintiff reported constant mild low back pain, that he had started working every day as an Uber driver, that he sometimes had to lift luggage and would squat to lift, and that he had worse low back pain in the morning.
 - October 6, 2020 - The plaintiff reported that he was able to drive for 4-6 hours with breaks in between.
 - November 3, 2020 - The plaintiff reported that his pain is now felt "occasionally", that he had not had radiating pain down his left leg for a week, and that the pain was random, with good days and bad days.
 - July 21, 2021 - The plaintiff reported reduced pain in the lower back and sacrum area. He noted that he was trying to sit longer for driving, and was coping with some pain.
 - August 31, 2021 - The plaintiff reported that he was on vacation and did not feel any increase in pain over the previous two weeks. He reported that he was able to sit comfortably for 35 minutes.
 - October 5, 2021 - The plaintiff complained of pain when he sat for longer durations, but reported that he did not feel pain otherwise.

- November 2, 2021 - The plaintiff complained of an increase in pain after he tried to drive a little longer, but reported the pain had settled to the usual stiffness and tightness by the time of assessment.
- February 1, 2022 - The plaintiff reported that he was driving around 8 hours daily, but that he needed to take frequent breaks (this was repeated in the records through 2022).
- February 28, 2022 - The plaintiff reported that he felt big improvement, that he was experiencing pain less frequently. He rated his pain at 2-3/10, and indicated that his low back felt okay.
- April 5, 2022 - The plaintiff reported that he was on vacation and walked over 1 km and then had severe pain and was not able to sit for "loner" [presumably, longer] duration driving, but is feeling better than last week.
- May 31, 2022 - The plaintiff reported that he was feeling better after trigger point injections, and that he was able to sit for a longer duration without pain.
- June 27, 2022 - The plaintiff reported went for a long drive in Calgary and just came back yesterday, "client is able to sit longer and movement is better" and "can sit longer for about 30 mins without pain".
- July 19, 2022 - The plaintiff reported a severe increase in pain after playing volleyball with his kids. He was encouraged to continue with his exercises and leisure activities like playing volleyball.
- August 16, 2022 - The plaintiff reported that he was improving overall. He noted that he felt sharp pain more frequently, but that it did not last as long.
- August 30, 2022 - The plaintiff reported that his pain increased 3-4 days prior after lifting some luggage, and that the next day he had been able to walk for 45 minutes and do some pushups. The plaintiff reported that the pain had reduced.
- September 12, 2022 - The plaintiff reported that he had been doing 30 minute walks 2-3 times per week, and that he felt his back when he was carrying over 25 lbs.
- January 9, 2023 - The plaintiff reported his back pain rated 1-2/10. He noted that he was feeling pretty good, that his low back was not bothering him as much, and that he was still taking frequent breaks when working in between drives to rest.
- January 30, 2023 - The plaintiff reported his back pain rated 1.5/10.
- May 1, 2023 - The plaintiff reported that his back pain was on and off, and rated up to 4/10. He noted a baseline tightness of 1-2/10.
- May 29, 2023 - The plaintiff reported a baseline tightness of 1-2/10. He reported that he would still get sharp pain with fast movements, but that it was now just a shock and would release after 15 minutes.

- August 21, 2023 - The plaintiff reported a baseline tightness of 1-2/10.
- October 4, 2023 - The plaintiff provided a major status update:
 - i. He reported himself as "much improved" since the Accident.
 - ii. He reported that in the past he was "able to sit 45 with less pain just constant break in between while working both standing and sitting" and current was "1-1.5 hours but constant break still".
- October 30, 2023 - The plaintiff reported a constant 1/10 pain baseline. He also reported: "felt more pain on the low back 6 hrs max and carried luggage and tensed up the back (Max 5 hrs)".

[139] The Treatment Records canvassed above are not the only Treatment Records in evidence. There are considerably more. I have reviewed all of those in evidence.

[140] In Edmondson BCSC, Justice N. Smith outlines some qualifications on the use of clinical records:

[30] Unlike prior inconsistent statements of an ordinary witness, which may only be used to impeach credibility, prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content. However, there are important qualifications that apply to such statements in clinical records, whichever purpose they are being used for.

[31] In *Diack v. Bardsley* (1983), 1983 CanLII 541 (BC SC), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], *aff'd* (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

[32] That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.

...

[34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:

...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

[36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

[141] A patient cannot be expected to complain about everything at every visit, and every patient will feel better and worse on a fluctuating basis. As a result, the snapshot of the patient's condition captured at any given any appointment provides a very limited basis for inference. However, at some point, a sheer volume of clinical records - especially where (as is the case here) the patient had a focussed complaint - can paint a telling picture over time. I am satisfied that the Treatment Records are sufficient to ground conclusions about the plaintiff's recovery arc.

[142] The Treatment Records indicate that the plaintiff's back pain did improve after he started treatment notwithstanding that it was so long after the Accident. Notably, that is so notwithstanding his driving and Dr. Armstrong's evidence that driving would be inherently aggravating. They indicate a plateau of sorts in late 2022/ early 2023, at which point the plaintiff began to consistently report baseline back pain of 1/10 or 1-2/10. He also continued to report having worse days, particularly in relation to having undertaken activities other than driving, but those worse days were in the context of an established baseline. The Treatment Records also show that continued strengthening continued to improve the plaintiff's lifting capacity through 2023.

- [143] Taken as a whole, I find the Treatment Records provide a reliable portrait: by 2023, the plaintiff had constant baseline lower back pain in the 1-2/10 range, with intermittent flare-up pain generally caused by engaging in more vigorous activities. They also show improvement in the ability to lift, including ongoing improvement with strength training. The Treatment Records are significantly focussed on the plaintiff's ability to sit and drive - as would be expected given his complaint and given his work as a driver. Aside from flare-ups and the October 30, 2023 record, the Treatment Records show a general trend of improvement in sitting ability.
- [144] This is generally consistent with the evidence of the collateral witnesses, whose evidence I find reliable to the extent it is based on their own observations. The plaintiff's mood was low. He declined to do things he used to do in order to avoid increased pain. However, he continued to Uber drive. He continued to drive longer distances (e.g., back and forth to Kamloops to pick up his mother-in-law), although he no longer did those drives just for family entertainment. When the family group went to Calgary, the plaintiff drove the first leg (some five hours or so), even though there were others who could have driven riding in the car.
- [145] The lay witnesses testified that the plaintiff no longer does some of the household chores that he used to do because it causes him back pain, as indicated by some of the lay witnesses. However, this evidence must be seen in conjunction with plaintiff's testimony at trial was that he is, in fact, able to do most of his former household chores, with pacing and with some pain. I am satisfied that the plaintiff avoids doing these things to avoid pain, but not that he is able to do them with pacing and some pain.
- [146] With respect to Ms. Wiazi's testimony about her one-year old son and her putting her mother's suitcase into the car is consistent with the plaintiff having lifting restrictions, she did not testify as to weights involved nor whether it was lifting from floor level. Her testimony is not inconsistent with Dr. Armstrong and Mr. Kowalik's evidence that the plaintiff is capable of safely and durably lifting up to 25 lbs on an occasional basis, but challenged by heavier weights.
- [147] I am satisfied that the plaintiff overstated his pain symptoms both in trial testimony and in his reporting to his experts. I have already commented on his self-reporting to Mr. Kowalik regarding inability to do household task. I am also satisfied that his baseline pain reporting in the 2023 Treatment Records does not align with his self-reporting to Dr. Armstrong at his August 28, 2023 assessment. Again, this is the case even if the plaintiff's lower back was aggravated at assessment. His flare-up pain reporting in the Treatment Records does not approach his pain reporting to Dr. Armstrong.
- [148] With those findings, I turn back to the Armstrong and Kowalik Reports.
- [149] As Dr. Armstrong's prognosis was made based on his collection of diagnoses, I do not accept it as such. However, I accept his guarded prognosis for further any other than further symptomatic improvement with respect to the plaintiff's myofascial injuries. I

reject the defendants' contention that the plaintiff has not yet plateaued. The plaintiff has had, however, had continuing symptomatic improvement after early 2022, particularly through trigger point injections and improved conditioning and strengthening improved. I accept Dr. Armstrong's opinion that if the plaintiff continues to build strength, especially core strength, he will likely have yet more symptomatic improvement, in particular with respect to pain with lifting.

B. Impact on Driving Ability

- [150] It is difficult to determine what impact the plaintiff's lower back injury has had on his capacity to drive. That is because there is little reliable evidence as to the number of hours that plaintiff drove before the accident and little reliable evidence as to the number of hours he has driven since or is driving at present.
- [151] Further, the plaintiff used the term "part-time" and "full-time" in an idiosyncratic way. The plaintiff testified that he moved from Garden City to Richmond Cabs so he could work "part-time" and look for an electronics technician position. He also testified in direct that his hours at Richmond Cabs changed all the time - sometimes working "part-time", sometimes working "full-time".
- [152] In direct, the plaintiff testified that he had 12-hour shifts as a taxi driver. This is also what he told Mr. Kowalik. On cross-examination, he agreed that 12 hours is the amount of time the cab is available under the lease arrangement, not the number of hours he spent driving. He agreed that he regularly drove fewer hours than were available under the lease, and often far fewer. His use of "part-time", at least at times in his testimony, appears to have meant working less than a "12-hour shift", which is of no meaningful assistance in the circumstances.
- [153] I intend to avoid the terms to the extent possible and speak in terms of vocational driving hours.
- [154] In terms of documentary evidence, there are no records at all relating to the plaintiff's time spent with Garden City.
- [155] There are some records from Richmond Cab for the period of April 2018 through to the February 2019 Accident. These records show the hours the plaintiff was logged onto the dispatch system. These show a broad variation of hours logged on. There are frequently days of between 6 and 7 hours, as well as some days for lesser time. An employee from Richmond Cabs, Reshma Singh (called by the defendants) testified that the time shown on the records indicates time logged into the dispatch system, and that being logged in does not equate to driving time.

- [156] There is a single "Daily Trip Sheet" in evidence. Ms. Singh testified that it shows trips booked through dispatch (i.e., does not show flagged trips). In any event, the one daily trip sheet in evidence relates solely to the month of April 2018. Accordingly, the daily trip sheet in evidence is of little assistance.
- [157] There are no Richmond Cab records at all relating to the period of the plaintiff's return to work in May/ June 2019.
- [158] The plaintiff testified that he started driving with Uber in early 2020 and, shortly after that, also registered with Lyft. There are no Uber documents in evidence that indicate the number of hours the plaintiff spent driving, nor even indicating hours he was on the system and theoretically "available" to pick up for Uber. With respect to driving for Lyft, the plaintiff's testimony was that he does this "sometimes", but did not provide any more detail. There are no documents regarding Lyft.
- [159] With respect to the testimony, the plaintiff did not testify as to how many hours he drove when he started back with Richmond cabs.
- [160] Again, in direct, he testified that he currently drives for Uber "depending on his condition" and that he might drive 1-3 hours a day or might drive 5-6 hours a day.
- [161] The defendants note that, contrary to the plaintiff's testimony about the hours he is able to Uber drive, starting in February 2022, there are Treatment Records indicating he reported driving about eight hours daily, but needing to take frequent breaks. They submit that the reports in the Treatment Records should be preferred to the plaintiff's testimony, given his credibility issues and the fact that he has produced no documents to support his testimony.
- [162] I am satisfied that there are a number of identical entries in the Treatment Records that were carried over repeatedly because the treatment provider/author re-wrote on the form as a template. This practice makes the repeat reports unreliable. As the maker of the records in question did not testify, there is no basis for concluding they were repeated because they were confirmed. The apparently rote entries include the repeated entry about reporting driving for Uber about eight hours a day.
- [163] The defendants submit that even looking only at the first report of driving Uber about eight hours daily (February 1, 2022), the Treatment Records are significant evidence. They note that there are no subsequent Treatment Records entries indicating the plaintiff reporting struggling with his Uber driving hours or having reducing his Uber driving hours. (On my review of the Treatment Records, the possible exception is the report that starts October 30, 2023, and refers to 5 and 6 hours as "max".)
- [164] The plaintiff says the defendants' argument based on the February 1, 2022 entry about eight hours relies on the "absence of reporting" in subsequent clinical notes, and that relying on an absence of reporting is specifically cautioned against in Edmondson BCSC.

- [165] Edmondson BCSC does not indicate that an inference cannot, in any circumstances, be drawn from on the absence of patient reporting in treatment records. Rather, it observed that the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom: para. 36 (emphasis added). Moreover, in Edmondson BCCA, the Court of Appeal clarified that these propositions do not amount to legal principles applicable in every case: para. 30.
- [166] Here, the defendants are not pointing at an absence of a report on a topic on any specific record, but rather asking the Court view the reporting that is seen in the Treatment Records as a trend. Again, here the Court has a very large volume of Treatment Records, all of which deal with treatment for lower back pain. Each Treatment Record includes a subjective update about the state of the plaintiff's lower back. A significant majority of those subjective updates are framed in terms of his ability to sit.
- [167] Again, what is of particular assistance here are not the individual notes, but the narrative arc that arises from the sheer number of them and that fact that the treatment was focussed on one area. The Treatment Records show that the plaintiff he was able, on October 6, 2020, to "drive 4-6 hours with breaks in between", and on February 1, 2022 (the first time the report appears), reported driving eight hours daily with breaks. The plaintiff's subjective reports with respect to sitting ability from 2022 forward trended positive, although with intermittent activity-based flare-ups.
- [168] At trial, the plaintiff also testified that he began trigger injections in 2022 and that these were very helpful to him. That too is inconsistent with the plaintiff having slid back in terms of his ability to drive hours with breaks to the hours he testified to at trial - testimony that puts him in a worse position in that respect than he reported being in in early 2020.
- [169] Further, the plaintiff's Uber earnings have increased over time since he started in 2020. There is nothing in the plaintiff's earnings trajectory that would align with his having improved to driving eight hours a day in early 2022, and then having significantly decreased his driving hours thereafter.
- [170] The sole objective support for the plaintiff's trial testimony about his work hours are the ambiguous references to 5 and 6 hour "max" references as of October 30, 2023. Those notes appear in the run-up to the trial. I am not prepared to put any reliance on that note in the circumstances. I note that the plaintiff did not testify that he had recently had a set back and was currently able to only drive up to 5-6 hours, but rather that this was the extent of his recovery.
- [171] The plaintiff's trial testimony that he is now capable of performing most household tasks with pacing is also inconsistent with the idea of there having been any recent setback.

[172] Looking at the evidence that I accept, and considering it as a whole, I find it to be inconsistent with the plaintiff's trial testimony. I find it to be more probable than not that the plaintiff is able to Uber drive about eight hours a day, with breaks, and that he has been able to do that on a regular basis since early 2022.

[173] Mr. Kowalik opined that the plaintiff is not capable of driving for Uber on a full-time basis. His opinion on the point was based in part on the plaintiff's self-reporting. While I accept Mr. Kowalik's objective findings, I do not accept his conclusion that the plaintiff is not capable of working work full-time as a driver. He has been doing that, albeit with breaks (micro and real) and by declining fares he suspects will have luggage. Further, he has been able to do this notwithstanding Dr. Armstrong's evidence that driving would be aggravating.

C. Summary

[174] On all the evidence, I find as follows:

- a) The plaintiff's main limitations involve spinal movements and spinal loading activities and this impacts his lifting and impacts his ability to maintain static upright postures (standing or sitting) for more than 30 minutes without adjusting his posture (inclusive of micro breaks as an adjustment in posture).
- b) He is capable of occasionally lifting about 25 pounds from table height. Improved strength and a stronger core would very probably enable him to safely lift heavier weight and lift from the floor.
- c) Working as a taxi or Uber driver exacerbates the plaintiff's lower back pain. He would experience less lower back pain if he were to perform work using a sit/stand desk or an adjustable work table.
- d) The plaintiff suffers from a low mood and a change in personality following the Accident, including irritability and unsociability.

[175] I accept Dr. Armstrong's opinion that the plaintiff's myofascial injuries have rendered him more vulnerable to further soft tissue injuries should he be in another motor vehicle accident, a slip and fall, or similar event.

VI. Non-Pecuniary Damages

[176] Non-pecuniary damages are meant to compensate a party for the pain and suffering experienced by an individual. The awards given in other cases provide a useful, albeit rough, guide. However, the specific circumstances of the plaintiff must be considered, and the compensation awarded must be fair and reasonable to both parties: *Marriott v. Peterson*, 2021 BCSC 1066 at para. 47.

[177] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors for consideration in assessing non-pecuniary damages. These include: a plaintiff's age; the nature of the injury; the severity and duration of pain; disability;

emotional suffering; loss or impairment of life; impairment of family, marital and/or social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism. A plaintiff should not be penalized for being stoic: *Giang v. Clayton*, 2005 BCCA 54 at paras 54-55. In *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 1981 CanLII 35 (SCC), Justice Dickson emphasized that the quantum of an award is determined through a functional approach and should not depend alone upon the gravity of the injury.

- [178] The plaintiff was 43 years old at the time of the Accident and is currently 48. After an acute period of several months, the plaintiff's other injuries resolved, and he left with soft tissue injuries causing chronic low back pain. The low back pain is near constant, but at a low level. His low back is aggravated by certain activities resulting in flare-ups. The pain has restricted his activities. His recovery in terms of healing his soft tissue injury has plateaued. However, core conditioning will likely improve his functional abilities and his pain symptoms. His pain symptoms could also be improved by taking less aggravating employment, although he intends to continue to drive.
- [179] Before the Accident, the plaintiff was fully involved in his family during his non-working hours. He was able to participate fully in whatever recreational activity he chose, and would play sports, go hiking and camping, go bicycling and play with his children. He was upbeat and social, and would spend time visiting with extending family on a regular basis. In addition to being unable to engage in these activities as he used to, he now suffers from low mood, is unsociable and often irritable. His change in personality and sociability is evident to his family and friends.
- [180] The evidence indicates that the plaintiff participated in household tasks, although it stops well short of indicating he and Ms. Waghma shared household tasks equally. That said, the evidence demonstrates that, aside from cooking, the plaintiff helped with heavier tasks. The plaintiff testified that as of the date of trial he was able to do most of his former daily tasks, albeit with pacing and some pain.
- [181] Both Dr. Armstrong and Mr. Kowalik found lifting limitations at the heavier end, although Dr. Armstrong found it likely that these could be significantly improved by strength conditioning. I am satisfied that an award for unusually heavy home tasks should be made separately. However, the pain and suffering involved in all other home tasks can be appropriately compensated by non-pecuniary damages.
- [182] It is the position of the defendants that an award in the amount of \$80,000 is appropriate. The defendants have identified the following as cases with comparable facts.
- [183] *Jindal v. Poulton*, 2023 BCSC 2157: the plaintiff was 51 at time of injury and 62 at trial. He was awarded \$75,000 on facts involving soft tissue injuries to his neck and back causing continuing intermittent fluctuating pain symptoms, but which did not prevent him from working full-time. There had been an initial period of significant and partially disabling pain following the accident, but by trial the plaintiff had been living with some pain symptoms for ten years, which he managed with medication (and very minor stretching).

Mr. Jindal's symptoms did not impact him emotionally or psychologically or affected his family relationships.

- [184] Wale v Laughland, 2021 BCSC 20: the plaintiff was 51 at time of injury and 56 at trial. He was awarded \$75,000 (\$82,500 inflation adjusted). The plaintiff suffered significant pain in his upper back and neck, as well as aggravation of neck issues resulting in headaches. His symptoms were stable but chronic. The plaintiff continued to enjoy his job and his hobby of restoring cars, although he longer participated in car shows. The court accepted that that his injuries impacted his enjoyment of life. It is unclear whether the court accepted that his family, marital relationships were impacted.
- [185] Lluncor v. Anderson, 2020 BCSC 767: the plaintiff, 36 at trial, continued to experience pain from a soft tissue injury to his low back that was likely superimposed on a pre-existing asymptomatic degenerative condition, which caused him noticeable discomfort pain and impacted his life on a day-to-day basis. His prognosis allowed for some improvement in symptoms with weight loss and muscle toning. His ability to engage in activities with his children and wife was impacted. He experienced a modest loss of housekeeping capacity, but was not unable to perform any household tasks, although there were things he now declined to do. His ability to walk was reduced from three to four hours per event to 45 minutes and there were a number of pre-accident recreational activities that he could only do now at a reduced level. The court accepted he was emotionally downcast as a result of his injuries and that his personality had changed. The Court awarded \$72,500 (\$83,500 inflation adjusted).
- [186] The plaintiff seeks an award in the range of \$175,000, relying on the following as comparables.
- [187] Chaudhry v. John Doe, 2017 BCSC 1895: Mr. Chaudhry was about 43 at time of injury and 50 at trial. He was awarded \$185,000. He suffered neck and back pain that had largely resolved, but suffered likely permanent damage to the vestibular system in his left ear, resulting in significant balance issues, tinnitus, and dizziness. He also suffered severe chronic headaches, as well as ongoing sleep problems, fatigue, anxiety, depression and symptoms akin to PTSD. His social activities were greatly diminished and he had ceased driving.
- [188] Melvin v. Li, 2023 BCSC 241: Mr. Melvin was 32 at the time of injury and 39 at the time of trial. He was awarded \$135,000. He sustained soft tissue injuries resulting in chronic upper and lower back pain. His pain varied in intensity. He suffered from episodic severe pain spasms and heat in his thoracic region. His lower back pain appeared to be more in the mild to moderate range and his upper back pain ranged from moderate to severe. He did not suffer from any psychological disorders, but the effects of chronic pain had made him feel depressed and anxious. Chronic pain was found to have severely affected his enjoyment of life, he had moved back to New Brunswick to live with his mother and led a very reclusive life.

- [189] Chand v. Aujla, 2023 BCSC 1473: Mr. Chand was 54 at the time of injury and 60 at the time trial. He was awarded \$170,000. The pain he had experienced on the right side of his body resolved with a year or so, but he continued to experience pain on his left side including his head, neck, shoulder, back, arm, hip, and leg pain. His dizziness, headaches, and insomnia also persisted. He had developed PTSD and depression, for which he took medication and counselling. He had had two medical procedures, both of which had significantly improved his pain. His injuries had significantly affected his enjoyment of life.
- [190] The cases relied upon by the plaintiff involve more serious injuries and more serious impairments and impacts than are disclosed on my findings here.
- [191] In my view, Lluncor is a very persuasive comparable. The injuries, impairments and impacts on life are similar, as are the findings as to downcast mood and personality change. The evidence that the plaintiff's pain and function can be improved with strengthening and also that his back pain is aggravated by his driving is also comparable. Additionally, the non-pecuniary award in Lluncor addressed pain in performing household tasks, which is appropriate here given the narrowness of my finding with respect to heavier tasks.
- [192] Mr. Lluncor is younger (a consideration that increases damages), but the most significant distinction here is the amount of pain the plaintiff experienced in the period immediately following the accident, as compared to Mr. Lluncor. The plaintiff initially had additional injuries, although those later resolved. I am satisfied that an upward adjustment should be made to account for the initial degree of pain and suffering experienced by the plaintiff.
- [193] I award the plaintiff \$90,000.

VII. Loss of Housekeeping Capacity

- [194] The Court of Appeal for British Columbia summarized the proper approach to the assessment of loss of housekeeping capacity in Kim v. Lin, 2018 BCCA 77, at paras. 27-37. At paras. 33-34, the Court of Appeal set out the basis upon which the court should evaluate such claims:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
121. Like other loss of capacity claims, loss of housekeeping capacity is a matter of assessment, not mathematical calculation: *Jindal v Poulton*, 2023 BCSC 2157, at para. 249.
- [195] The plaintiff testified that as of trial he could perform almost all of his former household tasks with pacing. He did not testify that he could perform them all.
- [196] The defendants concede that the plaintiff's ability to lift is compromised. They note that he has demonstrated the ability to lift luggage weighing 20-40 lbs, at least occasionally. Dr. Armstrong and Mr. Kowalik both confirm occasional lifting of 25 lbs as being within his current capability, and Dr. Armstrong's evidence is that strengthening will likely further improve his capacity.
- [197] The plaintiff's family presently resides in a strata, reducing their responsibility for yard work and household repairs. Ms. Waghma testified that they would like to buy their own house, but there is no evidence on which to assess probability of that.
- [198] I accept that there is a subset of household tasks that the plaintiff might have performed and for which the plaintiff's lifting restrictions may not be able to be overcome through pacing. Given the plaintiff's testimony about his abilities as of trial, this would appear likely to consist of more atypical tasks - e.g., moving furniture, carpet cleaning, seasonal changes (e.g., patio furniture, seasonal items). Although there are other members of the household who may help perform these at times, I am satisfied that some separate award for this particular subset of household activities is nonetheless appropriate.
- [199] Mr. Kowalik's recommendation estimated the cost of obtaining help for heavier home tasks at a rate of \$50 per hour. That appears high given the sort of tasks the award is being made for here, but it provides some baseline evidence for making a finding.
- [200] In light of my comments above, I award the plaintiff an additional \$7,500 (present value) for impaired ability to perform atypical household tasks that involve particularly heavy lifting.

VIII. Past Loss of Earning Capacity

- [201] Claims for past and future loss of earning capacity are subject to many of the same legal principles. Both are claims for the loss of the value of the work the plaintiff was or will be unable to perform as a result of the accident: *Falati v. Smith*, 2010 BCSC 465 at para. 39, *aff'd* 2011 BCCA 45.

- [202] The plaintiff must demonstrate that the injuries and symptoms caused by the accident have impaired his capacity to earn income, resulting in a pecuniary loss. Past events must be proven on a balance of probabilities. Hypothetical events, including what would have happened in the past but for the accident and what would have and will occur in the future, will be considered where there is a real and substantial possibility the events would occur. A hypothetical event is then given weight according to its relative likelihood: *Athey v Leonati*, [1996] 3 S.C.R. 458 at para 27, 1996 CanLII 183. Compensation is awarded based on an estimation of the chance the event would have occurred or will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17; *Grewal v. Naumann*, 2017 BCCA 158, at paras. 44-48.
- [203] Evidence of a speculative loss, as opposed to a real and substantial possibility of loss, is not sufficient: *Gao v. Dietrich*, 2018 BCCA 372 at para. 66.
- [204] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [205] As Justice Warren observed in *Searle v Xie*, 2023 BCSC 1716, a common approach to assessing this value involves projecting the income the plaintiff would have earned from the accident to the trial had the injury not occurred, and to award the difference between the projected income and the actual income earned during this period, considering all realistic contingencies.
- [206] The plaintiff seeks a past loss award on the hypothesis that but for the Accident he would have moved into full-time employment as an electronic technician.
- [207] The plaintiff testified that he has been looking for an electronic technician position since 2014. His evidence does not adequately explain why he has been unable to obtain one. Further, there was no need to put off a return to electronics while waiting to see Onyx would be operational. The plaintiff could have taken an electronics job and waited to see what happened with Onyx. Instead, he kept driving taxi while his electronics credentials and experience became ever more outdated.
- [208] He testified that he realized Onyx was not likely to succeed and started looking for an electronics position again in 2018. He said that he was driving less while at Richmond Cabs so that he could find an electronics position. The evidence, already reviewed above, does not support his claim that he was seriously looking for an electronics position. The evidence of this ostensibly concerted search is a single emailed application. Nor is there evidence indicating that the plaintiff drove fewer hours at Richmond Cabs/ Onyx than at Garden City.

- [209] The evidence indicates it is unlikely that the plaintiff could have gotten anything other than an entry level position as an electronics technician, even with his Engenuity references. While the plaintiff's actual income driving taxi is unclear - both because there is no evidence to indicate whether his business expense claims were proper and because he did not track or declare cash tips - there is no evidence suggesting he would have done better as an hourly employee in an entry-level electronics position.
- [210] I am not persuaded that his work for Onyx is evidence of any intent to stop driving taxi and return to working in electronics full-time. The plaintiff performed work for Onyx, but on a casual basis where he could arrange to do it during his off-time from driving, thus supplementing his taxi income. I do accept that, had Onyx taken off as a business in 2017, the plaintiff may have taken up full-time employment there, but the reality is that it was an unsteady venture from the outset.
- [211] Conversely, the plaintiff had done what was required to become a taxi driver, and was pleased with the daily leasing arrangements at Richmond Cabs. That flexibility was of value in allowing him to both drive taxi and perform available casual work for Onyx, which appears to have paid him well in consideration of his willingness to work casual hours to fill orders.
- [212] The plaintiff's evidence that he was looking to change career fields at the time of the Accident lacks an air of reality. I note Ms. Waghma's evidence about the plaintiff not having formed a long-term career plan as a taxi driver. I do not doubt that the plaintiff had aspirations to be something else. Almost everyone who works does. What he did not have was any remotely concrete plan to do anything else but drive for the foreseeable future.
- [213] The evidence does not establish a real and substantial possibility that he might have obtained employment as an electronic technician but for the Accident. On balance, the evidence indicates that he would have continued to drive indefinitely, but that he would likely have moved to Uber in any event.
- [214] The plaintiff did not make any submissions addressing past loss earning capacity on the basis that the plaintiff continued to drive in any event of the Accident.
- [215] The following table of past earnings was referred to by both counsel in argument:
- [216] The defendants submitted that there is no discernible income pattern to be taken from the plaintiff's past employment. The defendants argue that the plaintiff's past employment comprises five distinct periods:
- a) 2009-2011: steady employment income of \$37,000-39,000 at Engenuity;
 - b) 2012 and 2013: atypical income contracting as a US military translator;
 - c) 2014-2018: \$16,000-20,000 annually, driving a leased taxi with supplemental income from casual hours with Onyx;

- d) 2019 and 2020: driving a leased taxi and performing some hours for Onyx income, but with reduced earnings;
 - e) 2021 onwards: Uber driving, with an income level exceeding any year in which he drove taxi.
- [217] The last full year worked by the plaintiff pre-Accident was 2018. The plaintiff's 2018 Tax Return Summary in evidence shows a gross income of \$52,955 and a net income of \$17,924. The amount of undeclared cash income is unknown. There is no evidence as to business expenses.
- [218] The plaintiff's acknowledged underreporting of cash income is a complicating factor. In his testimony acknowledging the under-reporting of income, the plaintiff did not provide any evidence that would enable the Court to make a finding regarding the amounts of income that went undeclared.
- [219] The plaintiff also provided a September 15, 2023 expert report by Nicholas Coleman (the "Coleman Report"). Mr. Coleman is a forensic economist with a master's degree in economics from the University of Victoria. Mr. Coleman testified. The introductory comments to the Coleman Report suggest that Mr. Coleman was not provided with any information regarding the plaintiff's past earnings beyond that in evidence. Mr. Coleman notes that self-employed taxi drivers have a greater than usual ability to under-report income and that he has been given no information as to whether the plaintiff under-reported his taxi business income. His report references Statistics Canada data regarding earnings of taxi drivers, but notes that the data may reflect under-reporting.
- [220] The Coleman Report cites some documents regarding the under-reporting of gross business income. It cites a 2017 United Kingdom study for the proposition that UK taxi drivers fail to report more than half of their income in their tax returns. Mr. Coleman agreed that he has no basis for supposing the study results apply in Canada or even that the taxing schemes are comparable. The Coleman Report also cites a Canada Revenue Agency audit from the early 2010s for the proposition that waitstaff, on average, report a low percentage of tips as income. Mr. Coleman had been unable to review the audit itself and was aware only of reported results. He agreed that he could not speak to the details of the audit nor to its applicability to taxi drivers.
- [221] On the evidence, it is established that the plaintiff did under-report his business income as a taxi driver, but there is nothing before me regarding the extent of that under-reporting. As submitted by the defendants, the award must be limited to what has been established by evidence.
- [222] The plaintiff's 2021 Tax Return Summary shows a gross income of \$62,201 and a net income of \$29,589. Both the gross and net 2021 numbers substantially exceed the plaintiff's 2018 numbers. The plaintiff's 2022 Tax Return Summary shows a gross income of \$80,983 and a net income of \$22,074. As of 2023, according to his Uber records, the plaintiff made, with exception of making about \$5800 in April, gross amounts of about \$7000 to \$8000 a month

as an Uber driver. There is no evidence regarding Uber tipping practices. There is no evidence as to business expenses.

- [223] I find that the appropriate reference point for assessing the plaintiff's past loss is, as submitted by the defendants, to compare his post-Accident earnings as an Uber driver to his pre-Accident earnings as a taxi driver. In the circumstances, it is reasonable to average the three years and reasonable to include the Onyx income on the assumption that the plaintiff would have driven more if he had not taken time off to work for Onyx. I note that rolling in the Onyx income is favourable to the plaintiff given the drop off in Onyx hours in 2020, but the defendants support this approach.
- [224] In their written submissions, the defendants set out a calculated average of \$18,180 annually. On that basis, the defendants submit the loss is \$6,057 in respect of 2019, and \$5,429 in respect of 2020, for a total past wage loss of \$11,486. Given there is no evidence before me as to the actual impact of Covid-19 on the taxi industry, I am of the view that the defendants' proposal accounts for the plaintiff's CERB benefits fairly.
- [225] I find the defendants' approach and calculation as set out appropriate. The plaintiff did not take issue with either in reply. The plaintiff is awarded \$11,486 as compensation for net lost earnings in 2019 and 2020. As of 2021, the plaintiff was earning more than he did in the three years prior to the Accident.

IX. Future Loss of Earning Capacity

- [226] The burden of proof of actual past events is a balance of probabilities, whereas assessing future loss of earning capacity involves a consideration of hypothetical events. Hypothetical events are not required to be established on a balance of probabilities. Instead, they are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility, and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.
- [227] The modern framework for analysis was recently restated by the Court of Appeal in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 and reiterated in subsequent cases: *Zenone v. Knight*, 2024 BCCA 200; *Murphy v. Snippa*, 2024 BCCA 30. In *Ploskon-Ciesla*, Harris J.A. (writing for the Court) stated:

Operative Principles

- [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016

BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

- [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.
- [9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55-56.
- [10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
- [47] ... The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras. 93-95.

First Step

- [11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29-30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.
- [12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

- [36] are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.
- [37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.
- [13] For ease of reference, the Brown considerations set out at para. 8 of that decision include whether:
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. the plaintiff is less marketable or attractive as an employee to potential employers;
 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: Rab; Perren v. Lalari, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the Brown factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

Second Step

- [15] The reference to paras. 93-95 of Dornan v. Silva, 2021 BCCA 228, in para. 47 of Rab, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": Gao v. Dietrich, 2018 BCCA 372 at para. 34.

Third Step

- [16] As touched upon above, depending on the circumstances, the third and final step--valuation--may involve either the "earnings approach" or the "capital asset approach": Perren at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

- [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: Brown at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.
- [228] The plaintiff's position at trial was that but for the Accident, he would have returned to work as an electronic technician, but his injuries rendered him unable to do that. He asserts that working as an Uber driver is now the only work he can do as it accommodates his restrictions by allowing him to set his hours and breaks, but that, as a result of his injuries, he can only be an Uber driver part-time.
- [229] As foreshadowed by my findings under past lost of earning capacity, I find that the evidence fails to establish a real and substantial possibility that the plaintiff would have returned to work as an electronic technician at some point at some point after trial but for the Accident.
- [230] I find it is very probable that he would have become an Uber driver in any event of the Accident. He testified that he did not like being restricted by lease agreements and values setting his own work hours, which suggests he would have moved to Uber regardless. His testimony demonstrates that he intends to continue doing this work and the evidence shows that he is earning considerably more than prior to the Accident. Because the plaintiff has put in no evidence of his business expenses - before or after the Accident, the Court is not in position to compare anything other than declared net income.
- [231] For the reasons already set out above, the plaintiff has failed to satisfy me that he is Uber driving fewer hours now that he was taxi driving in the years prior to the Accident.
- [232] Thus, the plaintiff has not established either a reduction in driving hours as a result of the Accident, nor a reduction in earnings. Accordingly, the plaintiff's case falls under the second category of cases identified in Rab - cases where "injuries have led to continuing deficits, or have exposed [the plaintiff] to future problems, yet [the plaintiff's] income at the time of the trial is at or near the level of earnings they enjoyed before the accident": para. 30.
- [233] The defendants, in their closing submissions, conceded that the plaintiff met the first and second step of the Rab analysis by application of the Brown factors (as outlined in Brown v. Golaiy, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.)), although they did not make specifically related factual concessions.
- [234] I am satisfied that Brown factors are engaged here. As a result of his injuries, the plaintiff is less marketable or attractive as an employee to potential employers and less valuable to himself as a person capable of earning income in a competitive labour market.

- [235] The breaks (micro and otherwise) now taken by the plaintiff while driving and his practice of declining Uber bookings that are likely to have luggage are accommodations, and the plaintiff would have no need of them but for the Accident. Should the plaintiff ever seek to a different kind of driving (e.g., charter), similar formal or informal accommodations might be necessary and limit his options.
- [236] The evidence is far short of establishing that the plaintiff cannot work as an electronics technician. Indeed, the evidence suggests not only that it would be an option that he was physically capable of, but one that would benefit his condition. However, Dr. Armstrong and Mr. Kowalik testified that if the plaintiff were to pursue more sedentary employment, a height adjustable desk or worktable would be an appropriate accommodation for the plaintiff. While that particular accommodation is one commonly made in the modern work world, it is an accommodation. As such, it can be expected to somewhat narrow the pool of potential employers should the plaintiff ever choose to move to such employment.
- [237] Establishing that the plaintiff's situation falls into one or more of the Brown factors is not enough; at the second stage the plaintiff must next make out a real and substantial possibility that this diminished earning capacity would lead to a loss of income: Ploskon-Ciesla, at para. 14. I am satisfied that the above factors move the possibility beyond mere speculation. I find there is a real and substantial possibility of future loss. The evidence, however, is not sufficient to establish that the probability is particularly high.
- [238] The next question, then, is how to value that loss. I find the capital asset approach is appropriate here: Ploskon-Ciesla, at para. 17; McKee v. Hicks, 2023 BCCA 109 at para. 78.
- [239] The plaintiff made no submissions regarding a capital asset valuation. The defendants, however, submitted that the loss would be appropriately valued at one year's lost income (\$30,000). I note that the defendants' submission appears to reflect the plaintiff's 2021 net income (\$29,590) rather than his 2022 net income (\$22,075).
- [240] I am satisfied that the evidence here does not allow a more probabilistic approach than a resort to years of income. In my view, it is appropriate to average the plaintiff's 2021 and 2022 net income, but to award two years income based on the average. Taking that approach, I award the plaintiff \$52,000 in respect of his impaired residual capacity.

XI. Cost of Future Care

- [241] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore them to their pre-accident condition, insofar as that is possible, and to preserve and promote their mental and physical health: Milina v. Bartsch, 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (S.C.), , aff'd 1987 49 B.C.L.R. (2d) 99, (C.A.), [1987] B.C.J. No. 1833; Spehar v. Beazley, 2002 BCSC 1104 at para. 55, aff'd 2004 BCCA 290; and Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at paras. 29-30. The test is an objective one, based on the medical evidence. An item of future care must be reasonable and medically justified, but not medically necessary, to be recoverable:

Milina BCSC at 79-80.

[242] Dr. Armstrong made the following recommendations:

- a) The plaintiff should consult a spine surgeon about his apparent atlantoaxial subluxation;
- b) The plaintiff should use a minimum of nonsteroidal anti-inflammatory drug (NSAID) medications (naproxen and ibuprofen).
- c) The plaintiff could benefit from 24 physiotherapy sessions (3 sessions per week for 8 weeks) focused on his sacroiliac joints.
- d) The plaintiff would benefit from a sacral belt.
- e) 15 visits of counselling with a clinical psychologist to address pain, stress and disability management.

[243] Mr. Kowalik recommended the following:

- a) Ice packs;
- b) Heating pad;
- c) Home exercise equipment;
- d) Sleep aides (body pillow and mattress topper);
- e) Gym pass;
- f) Active rehabilitation;
- g) Ongoing physiotherapy;
- h) Advil, Baclofen, and CBD oil.

[244] The plaintiff makes the following claims in the following amounts per the Coleman Report's evaluation of the present value including tax:

- a) Ice pack (recurring) \$546
- b) Heating pad (recurring) \$296
- c) Sacroiliac Belt (recurring) \$264
- d) Home exercise equipment \$1,518
- e) Body pillow (recurring) \$232
- f) Mattress topper \$1,870
- g) Gym pass/pool \$8,156
- h) Orthopaedic consultation \$2,500

- i) Active rehab initial treatment \$4,083
- j) Active rehab review and update \$825
- k) Physiotherapy initial treatment \$4,507
- l) Physiotherapy ongoing treatment \$26,119
- m) Cognitive behavioural therapy \$3,336
- n) Travel cost contingency to appointments \$500 per year = \$11,950
- o) Advil 400mg \$2,925
- p) Baclofen \$4,623
- q) Dispensing Fee \$956
- r) CBD Oil 2023 \$300 per year = \$7170 plus 12% tax (\$860) = \$8030

[245] Dr. Armstrong did not diagnosis with plaintiff with an atlantoaxial subluxation. He did not provide the Court with any reasons in support of the possible existence of such being connected to the Accident. The claim is disallowed. In any event, the consultation is covered by MSP, and there is no evidence justifying the expense of a private care consultation.

[246] The claim for an intense physiotherapy program at the cost of \$4,560 is allowed.

[247] There is no medical recommendation for ongoing physiotherapy. Mr. Kowalik observes there is literature showing passive modalities are "useful" on an occasional basis, and has recommending 12 sessions a year ongoing. The plaintiff's Treatment Records establish a pattern of flare-ups. The claim for \$26,000 is allowed.

[248] The claim for a sacral belt replacement (one-time) is allowed at \$80.

[249] The claim for counselling and cognitive behavioural therapy is allowed at the claimed amount of \$3,375.

[250] The plaintiff testified that he uses ice packs and heating pads to treat his back and I accepted his testimony that his back pain interferes with his sleep, but consider these inflated as recurring claims. These claims are allowed in a total of \$2000.

[251] The defendants object to the active rehabilitation claims, the gym pass claim and the home exercise equipment claim on the basis that there is no medical recommendation. I am satisfied that Dr. Armstrong's comments on deconditioning as a contributing factor and his comments that conditioning and core strength would improve the plaintiff's symptoms to be an implicit recommendation for re-conditioning and for some basic maintenance. On that basis, the claims for the initial active rehab and the home exercise equipment are allowed for a total of \$5600.

- [252] There will an award for travel costs in relation to the physiotherapy and counselling in the amount of \$400.
- [253] There is no medical recommendation for Baclofen (a muscle relaxant). Moreover, the plaintiff's testimony did not indicate any regular present use.
- [254] There is no medical evidence supporting the plaintiff's use of CBD for Accident-related injuries. It is not addressed in the Armstrong Report. The plaintiff testified that his family doctor declined to prescribe it for him. The plaintiff's testimony that some unnamed person he was in contact with through a cannabis clinic prescribed him CBD is not sufficient evidence to support a claim.
- [255] The claims for Baclofen and CBD are not allowed.
- [256] While there is no express medical recommendation regarding Advil, Dr. Armstrong's comment that the plaintiff should minimize his use can be considered an implicit acknowledgement that he considered continued minimal Advil use appropriate. The claim made is based on daily use. The plaintiff's testimony indicated that he uses Advil far less than that. The amount \$750 is awarded.
- [257] In total, the amount of \$42,765 (all present value) is awarded for costs of future care.

X. SPECIAL DAMAGES

- [258] The parties agree on special damages with the exception of the plaintiff's claim for CBD purchases.
- [259] Claims for special damages are subject to the standard of reasonableness. When a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.
- [260] The evidence is insufficient to make the plaintiff's CBD purchases reasonable expenses for purposes of special damages.
- [261] Accordingly, special damages are awarded in the amount of \$2,098.95.

XI. SUMMARY

- [262] In summary, damages are assessed as follows:

Non-Pecuniary Damages

\$90,000

Loss of Housekeeping Capacity

\$7,500

Past Loss of Earning Capacity

\$11,486

Future Loss of Earning Capacity

\$52,000

Future Cost of Care

\$42,765

Special Damages

\$2,098.95

TOTAL:

\$205,849.95

subject to residual adjustments

VII. TAXES, STATUTORY DEDUCTIONS, INTEREST, AND COSTS

[263] I leave it to the parties to consider any residual costs, tax, gross-up, statutory deductions or interest implications. If they cannot agree on these items, they are at liberty to request a hearing to make further submissions. Further to Justice Branch's comments in *Park v. Sheppard*, 2022 BCSC 2270 at para. 20, I direct that any application by the defendants for statutory deductions should be served within the next 90 days.

"Tucker J."

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