

CANADA / JUDGMENT

Travis v. Cosford

2025 BCSC 1227

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1227 Travis v. Cosford

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Travis v. Cosford,

2025 BCSC 1227

Date: 20250702

Docket: S-M-124529

Registry: Kelowna

Between:

Brody Adam Travis

Plaintiff

And

Elizabeth Sakuna Johnston, Lorne Arthur Cosford

and Hanna Louise Howarth

Defendants

Before: The Honourable Justice Latimer

Reasons for Judgment

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Place and Date of Trial:

Kelowna, B.C.

March 24-26, 2025

Place and Date of Judgment:

Kelowna, B.C.

July 2, 2025

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Introduction

- [1] On or about August 12, 2017, on Old Okanagan Highway near Butt Road in Kelowna, British Columbia, a vehicle operated by Elizabeth Johnston, and owned by Ms. Johnston and Lorne Author Cosford, rear-ended a vehicle owned and operated by Hannah Howarth (the "2017 Accident"). The plaintiff, Brody Travis, was a front-seat passenger in his then-girlfriend, Ms. Howarth's, vehicle.
- [2] In August 2019, the plaintiff filed the within notice of civil claim, listing Ms. Johnston, Mr. Cosford, and Ms. Howarth as defendants. In January 2020, the plaintiff's claim against Ms. Howarth was discontinued. The claims against Ms. Johnston and Mr. Cosford (the "Defendants") remain to be adjudicated.
- [3] Mr. Travis claims that the Defendants were negligent in the operation of their vehicle and that as a direct consequence of that negligence, he has suffered and continues to suffer injuries, loss, damage, and expense. He claims damages in the following amounts:
- a) Non-pecuniary damages in the amount of \$140,000;
 - b) Past loss of income in the amount of \$2,400;
 - c) Loss of future earning capacity in the amount of \$312,000;
 - d) Special damages in the amount of \$798.30; and
 - e) Cost of future care in the amount of \$5,000.
- [4] The Defendants do not deny liability. Their position is that the plaintiff was injured as a result of the 2017 Accident and is entitled to damages as follows:
- a) Non-pecuniary damages in the amount of \$50,000;
 - b) Past loss of income in the amount of \$2,400; and
 - c) Special damages in the amount of \$798.30.
- [5] The Defendants deny that the plaintiff's injuries entitle him to damages for a loss of future earning capacity or costs of future care.

Issues

- [6] For the reasons that follow, I conclude the Defendants are liable for Mr. Travis's injuries as follows:

- a) Non-pecuniary damages in the amount of \$60,000;
- b) Past loss of income in the amount of \$2,400;
- c) Future income loss of earning capacity in the amount of \$0;
- d) Special damages in the amount of \$798.30;
- e) Costs of future care in the amount of \$0.

Facts

Prior to the 2017 Accident

[7] Mr. Travis was born in 1996. He was raised in the Okanagan Valley.

Education and Work Experience

[8] Mr. Travis attended high school in West Kelowna. He graduated in 2014.

[9] After high school, Mr. Travis took a year off and worked in a few different labouring positions. For example, he worked for Davis Cove Resorts Ltd. doing landscaping. He worked for Lifetouch doing school photography.

[10] After his one-year hiatus from school, Mr. Travis attended Okanagan University College studying computer information systems. He knew from a young age that he wanted to work with computers. This course of study looks at how computers work, general programming, science and math. It could have been a four-year program, but Mr. Travis pursued a two-year diploma instead. He testified that he believed it would be better to get actual work experience rather than carry on with textbooks. He obtained his diploma in computer information systems from Okanagan University College in 2017.

[11] In each year between 2014 and 2017, Mr. Travis worked for his father's company, Cazador Resources Ltd. ("Cazador"). Cazador is a mineral exploration company. The plaintiff's work for Cazador was seasonal and occurred mostly in the warmer months. He typically worked in remote areas, often in Northern British Columbia. His work involved hiking, labouring, soil sampling, digging holes, and aerial surveying using a drone.

Recreational Activities

[12] Prior to the 2017 Accident, Mr. Travis was a frequent snowboarder. He would get a season's pass almost every year at the local mountain and try to make it financially worthwhile. Mr. Travis testified that you had to snowboard twelve days to break even when comparing the cost of a season's pass to the day rate so that was the baseline for his season. Mr. Travis had no limitations when it came to snowboarding.

- [13] As noted, hiking was part of his duties at Cazador and he would also hike a couple of times a month recreationally. For example, he would hike up Boucherie Mountain or Kelowna Mountain. Mr. Travis testified that it felt good to stay physically fit and staying fit in the off-months made his seasonal work with Cazador easier.
- [14] Mr. Travis also enjoyed swimming, biking, and rollerblading. He also enjoyed playing video games and lifting weights but he did not do either very frequently. He did more weight lifting in grade 12 than immediately prior to the 2017 Accident.

Relationships and Housekeeping

- [15] Mr. Travis lived with Ms. Howarth just before the 2017 Accident and she did most of the housekeeping.

Physical and Mental Health

- [16] Mr. Travis fairly acknowledged that in or around August 2014, he attended medical treatment for symptoms in his neck and upper back. At the time, Mr. Travis believed these symptoms were caused by physical labour. These symptoms were aggravated by bending, lifting, walking, and long hours of work. He rated his neck pain as 6 out of 10, his upper and mid back pain as 4 out of 10, and his low back pain as 6 out of 10.
- [17] He also acknowledged that in or around September 2014, he was in a car accident with Ms. Howarth. He suffered some mid to low back pain as a result of the 2014 accident. He attended chiropractic therapy and his symptoms resolved in or around December 2014.
- [18] Despite these symptoms in or around 2014, Mr. Travis testified and I accept that prior to the 2017 Accident his physical and mental health were good. He did not have any difficulty shoveling snow, washing dishes, or gardening. He had no difficulty lifting weights or exercising. He did not have any limitations when it came to playing video games. He rarely got headaches. He was young and felt like he could take on the world.

The Accident

- [19] On August 12, 2017, Mr. Travis was the front seat passenger in a Volkswagen Jeta vehicle operated by Ms. Howarth ("Plaintiff Vehicle").
- [20] He was wearing his over-the-shoulder and across-the-waist seat belt.
- [21] The Plaintiff Vehicle was travelling Southbound on Old Okanagan Highway approaching Butt Road. They intended to turn right at the intersection.
- [22] The Plaintiff Vehicle had stopped at the intersection and was struck from behind by a vehicle operated by the defendant Elizabeth Johnston ("Defendant Vehicle").

- [23] The Plaintiff Vehicle went through the intersection for approximately ten to twenty meters. Mr. Travis testified that Ms. Howarth would have had her foot on the brake but he fairly acknowledged that he could not say whether she accidentally hit the accelerator as they were hit from behind.
- [24] Mr. Travis had no advance warning that they were going to be struck from behind.
- [25] Mr. Travis did not lose consciousness, no part of his body impacted anything inside the Plaintiff Vehicle, airbags did not deploy, and he had no bruising, bumps, cuts, or scrapes as a result of the collision. He did not call an ambulance or go to hospital immediately following the 2017 Accident.
- [26] The Defendant Vehicle drove through the yellow or red light, and continued on.
- [27] Mr. Travis testified that the next thing he remembered was that he shouted out the window to see if any of the stopped traffic would follow the Defendant Vehicle that had struck them. Ms. Howarth pulled over to assess the damage and to call the police.
- [28] There was minimal visible physical damage done to the Plaintiff Vehicle. The Plaintiff Vehicle remained driveable after the collision.

After the 2017 Accident

- [29] Immediately after the 2017 Accident, Mr. Travis experienced symptoms in his neck, back, and shoulders. He also started experiencing headaches.
- [30] He attended a walk-in clinic the day after the 2017 Accident and was referred to chiropractic treatment. Eventually he was also referred for physiotherapy, massage therapy, and kinesiology.
- [31] Over time, he made some recovery but as is discussed in more detail below, he continues to experience headaches on a monthly basis, as well as mild chronic neck and back pain due to sprain-strain injuries to his spine.
- [32] He does not currently pursue any treatments for his injuries.

Analysis

Causation

- [33] The Defendants admit liability for the 2017 Accident and they admit that Mr. Travis was injured as a result of the 2017 Accident. However, the nature and extent of the injuries caused by the 2017 Accident is in issue. The Defendants accept that Mr. Travis suffers mild, occasional pain. However, they argue that he has failed to prove on a balance of probabilities that his monthly headaches are caused by the 2017 Accident. Additionally, they argue that mood and mental health injuries were not pleaded and that Mr. Travis has failed to prove on a balance of probabilities that any such injuries were caused by the 2017

Accident.

- [34] The primary test for causation asks: but for the defendants' negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where there is a substantial connection between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21--23.
- [35] For reasons I will explain, I find that the following injuries were caused by the 2017 Accident:
- a) Chronic mild left-sided neck pain secondary to a cervical spine sprain-strain injury (whiplash injury) with possible involvement of the left cervical facet joints.
 - b) Chronic mild lower back pain secondary to a lumbar spine sprain-strain injury.
 - c) Headaches that occur approximately monthly.

Neck and Back

- [36] Immediately after the 2017 Accident, Mr. Travis felt tension in most of his body, primarily in his back and shoulders.
- [37] The following day, August 13, 2017, his mid to low back area was in pain and there was a pinching sensation close to his spine. He had discomfort in his left hip and up the left side of his back. He experienced pain behind his left shoulder blade, left side of his neck and across the base of his skull. Mr. Travis also experienced headaches.
- [38] Mr. Travis testified that the day following the 2017 Accident, his worst symptoms were the neck pain and the headaches. These headaches would start at the base of his skull. He testified that it felt as though pressure would build up and propagate over time into his head, his temples and behind his eyes.
- [39] Mr. Travis attended West Kelowna Walk-in on August 13, 2017. He received a note from the physician dated August 13, 2017 which stated that he would be off work between August 13, 2017 and August 23, 2017 inclusive. The physician recommended chiropractic treatments and prescribed Naproxen.
- [40] Mr. Travis attended chiropractic treatments on August 16, 17, 22, 24, 29 and 31, 2017; September 7 and 26, 2017; October 2 and 10, 2017; and November 28, 2017.
- [41] Mr. Travis benefitted from the chiropractic treatment in the beginning but found that later on he was not getting as much benefit from it.
- [42] Mr. Travis attended physiotherapy treatments on September 1, 8 and 27, 2017; October 6, 2017; March 21 and 28, 2018; and April 9, 2018.
- [43] The physiotherapy released a lot of the muscle tightness in his shoulders, his mid to low back, and behind his shoulder blade.

- [44] Mr. Travis attended for massage treatments on September 5 and 10, 2017.
- [45] On March 8, 2018, Mr. Travis was referred to kinesiology. Mr. Travis attended kinesiology treatments on July 24 and 25, 2018; September 13, 17, 20 and 24, 2018; and October 1, 11, 16, 22, 25 and 29, 2018.
- [46] Mr. Travis found the kinesiology treatments to be beneficial during the treatment and for a day or two following. The kinesiologist also gave him education for a program of exercises to complete at home which was beneficial. However, he only implemented this program to a small degree, less than he could have.
- [47] Mr. Travis attended a walk-in clinic on November 2, 2018 and February 28, 2021.
- [48] Mr. Travis attended a massage treatment on September 11, 2020.
- [49] Other than the massage treatment in 2020, Mr. Travis has not received any treatments for his injuries since 2018.
- [50] Mr. Travis tendered the opinion of Dr. Lawrence Kei, who was qualified to give expert opinion evidence in the field of physical medicine and rehabilitation.
- [51] Dr. Kei's opinions are based on the history provided to him by Mr. Travis, his physical assessment of Mr. Travis which took place on January 3, 2024, and a review of clinical records.
- [52] Dr. Kei opined that the 2017 Accident caused:
1. Chronic mild left sided neck pain secondary to a cervical spine sprain-strain injury (whiplash injury) with possible involvement of the left cervical facet Joints.
 2. Chronic mild lower back pain secondary to a lumbar spine sprain-strain injury.
- [53] Dr. Kei was aware that Mr. Travis had attended therapies in 2014 but noted that both the oral history he took from Mr. Travis and the clinical records he reviewed supported that these symptoms had resolved by early 2015. In contrast, after the 2017 Accident, neck and back pain were constantly documented in the clinical records.
- [54] Both Dr. Kei and the Court were referred to clinical records showing improvement of pain in November 2017 and the suggestion that Mr. Travis had returned to his pre-Accident status; however, Mr. Travis continued to receive treatments in 2018 for his continuing neck and back pain.
- [55] Dr. Kei explained, and I accept, that pain fluctuates and that while symptoms may be improved at one appointment (for example, in November 2017), depending on his level of activity, Mr. Travis may experience more pain later (for example, in 2018). As well, the fact that pain is not identified at one examination may simply reflect that a different technique was used by the care provider.

- [56] Dr. Kei opined, and I accept, that in light of the temporal association and consistency of the reported symptoms, it is more likely than not that the 2017 Accident caused the neck and back injuries.
- [57] I also accept Dr. Kei's characterization of the pain as both chronic and mild.
- [58] I do not accept the evidence of Mr. Travis's current girlfriend, Ms. Boyar, who characterized Mr. Travis's pain in more significant terms (for example, she testified that looking down causes him "agony" and she described various functional limitations which I will discuss in more detail below). Ms. Boyar's evidence is inconsistent with both Dr. Kei's opinion and Mr. Travis's own description of his injuries. I find both Dr. Kei and Mr. Travis to be more reliable witnesses on this point. Mr. Travis is the person actually experiencing the pain, and Dr. Kei has the expertise and experience to evaluate the symptoms reported.
- [59] Mr. Travis has himself often described his pain as "mild" and "manageable".
- [60] Mr. Travis testified that by November 2017, his symptoms were mild. He agreed that the description made by his chiropractor in November 2017 was accurate, which was that he had "been doing very well, with only some mild and occasional symptoms when he would work over his computer for extended periods of time. Joint movement is very good at his appointment today, and I believe he is at pre-accident status". Mr. Travis testified that he accepted the advice to end treatment and that he did not find that treatment gave him relief beyond a day or so.
- [61] Mr. Travis testified, and I accept, that all of his symptoms bother him to this day, with the exception of a reported pinching sensation in his mid to low back which has subsided. I also accept his evidence that while all of his symptoms are still prevalent, they have become more manageable. He testified that to manage symptoms in his neck and back he uses topical ointments like Voltaren, and infrequently he uses over the counter medications like Advil, but he does not take any prescription medications.
- [62] Mr. Travis testified that in February 2019, he was sent by his lawyer to a doctor for an examination, Dr. Frobb. In respect of neck pain, he accurately reported to Dr. Frobb that:
- a) His neck pain was very mild at the moment;
 - b) He could look after himself normally without causing extra neck pain;
 - c) He could lift heavy weights, but it gave him extra neck pain;
 - d) He could read as much as he wanted with slight neck pain;
 - e) He had moderate headaches that came frequently;
 - f) He could concentrate fully without difficulty;
 - g) He could work as much as he wanted to;

- h) He could drive his car with only slight neck pain;
 - i) His sleep was disturbed for less than one hour; and
 - j) He was able to engage in most but not all of his recreational activities because of his neck pain.
- [63] Mr. Travis testified that in 2024, he accurately reported to Dr. Kei that his pain was manageable at work because he used a sit-to-stand desk and lumbar support. He stated that he had not needed to take time off work due to pain.
- [64] He has also not used any of his paid sick days to accommodate his injuries since 2020.
- [65] As noted, other than a massage treatment in 2020, Mr. Travis has not received any treatments for his injuries since 2018. I do not accept Mr. Travis's evidence that the treatments he was initially receiving had become cost prohibitive or were interfering with his career. In rejecting this explanation for the cessation of treatment, I note Mr. Travis's own acknowledgment that most of these treatments were pursued outside of work hours, that he had benefits that would pay for a portion of these treatments and that his lawyer's law firm had offered to pay for these treatments. Ms. Boyar testified that she also had extended benefits that would cover these treatments.
- [66] Nevertheless, I accept that there are a number of valid explanations for the cessation of treatment which do not suggest that his symptoms are other than chronic. As Dr. Kei explained in cross-examination, it is not uncommon to have fluctuation in attendance at treatment when patients find the treatment is not helping anymore. That is consistent with one of Mr. Travis's explanations for his discontinuation of treatments - the benefits he experienced from them had plateaued. I expect, however, that if his symptoms were continuing to cause more significant pain and "agony" as posited by Ms. Boyar, Mr. Travis would likely have sought out additional treatments or at least implemented the at home kinesiology exercises that had been recommended to him.
- [67] On balance, I accept that the plaintiff's neck and back injuries are chronic and mild.

Headaches

- [68] In his report, Dr. Kei observed that:

Neck pain from cervical sprain strain injuries is associated with altered neuromuscular control and activation of the muscles. In particular, the deep neck muscles are affected in that they lose endurance and have delayed activation, whereas the superficial neck muscles overcompensate, become tight and often lead to headaches. [Emphasis added]

[69] In direct examination, Dr. Kei clarified that he was offering a general opinion and not referring specifically to Mr. Travis in this portion of his report. No specific opinion was offered by Dr. Kei, one way or the other, as to whether the 2017 Accident caused Mr. Travis's headaches. The Defendants argue that because Dr. Kei has not provided an expert opinion about the cause of Mr. Travis's reported headaches, Mr. Travis has failed to meet his burden of proof that the headaches were caused by the 2017 Accident.

[70] I do not accept this argument.

[71] The test for causation must not be applied too rigidly. Causation need not be determined with scientific precision, as it is essentially a practical question of fact best answered by ordinary common sense: *Kallstrom v. Yip*, 2016 BCSC 829 at para. 318.

[72] I am satisfied based on Mr. Travis's own evidence, the body of documentary evidence before me, the temporal association and consistency of the reported headaches, and Dr. Kei's general description of the commonplace association of headaches and Mr. Travis's physical neck injuries, that Mr. Travis's monthly headaches are caused by the 2017 Accident.

Mental Health Symptoms

[73] As noted, the defendants argue that mental health and mood symptoms were not pleaded and that Mr. Travis has failed to prove them on a balance of probabilities.

[74] Part 1 of Mr. Travis's notice of civil claim does not specifically identify mood and mental health symptoms but does refer to "other injuries as shall be shown at trial". Part 2 of the notice of civil claim specifically seeks damages for loss of physical, mental, emotional and nervous health" (emphasis added).

[75] I need not resolve whether the issue is sufficiently particularized in the pleading because I have determined it has not been made out on the evidence.

[76] Some of the lay witnesses gave evidence about the impact that Mr. Travis's symptoms have on his mood and mental well-being.

[77] For example, Ms. Boyar testified that she has to contend with the mental health impacts that Mr. Travis's discomfort has on his mood. She testified that he becomes agitated more quickly, loses the soft demeanor required for conversation, and tends to isolate himself.

[78] To some extent, the notion that Mr. Travis tends to isolate himself due to his symptoms was echoed by Mr. Travis's friend, Mr. Hoffer, who described Mr. Travis as being less open to conversation and going to bed early on a trip to Greece.

[79] Likewise, the notion that Mr. Travis is more agitated than before the 2017 Accident was echoed by another of Mr. Travis's friends, Mr. Schisler, who testified that Mr. Travis is now quicker to anger, more easily frustrated, and generally "down" since the 2017 Accident.

- [80] I place little weight on Ms. Boyar, Mr. Hoffer and Mr. Schisler's evidence in this respect because they are not well positioned to compare Mr. Travis's demeanor immediately prior to and after the 2017 Accident.
- [81] Both Mr. Hoffer and Mr. Schisler were childhood friends of Mr. Travis and all three graduated from high school together in 2014. Mr. Schisler took a year off and then moved to Nanaimo. Since that time, he has only seen Mr. Travis approximately three times a year. Although they remained friends, Mr. Hoffer and Mr. Travis were less frequently in touch after high school. Mr. Hoffer only learned about the 2017 Accident in 2021. Their observations of Mr. Travis' mood are impressionistic. They are comparing his demeanor as an adolescent to his demeanor as a young man. They are not well positioned to comment upon whether and how the 2017 Accident has affected his mood and demeanor as a young man.
- [82] Ms. Boyar did not know Mr. Travis until after the 2017 Accident. She is therefore also ill-positioned to make any comparative comments about his mood and demeanor. I also found Ms. Boyar's evidence with respect to Mr. Travis's symptoms to be somewhat exaggerated.
- [83] More significantly, this evidence was not well supported by Mr. Travis's own account of his injuries. Nor is there any evidence that Mr. Travis has sought treatment of any kind for mental health symptoms. Ms. Boyar testified that Mr. Travis has never been to a counsellor to the best of her knowledge, nor has he talked to a physician about his mental health. Ms. Boyar testified that Mr. Travis does not take medication for his mental health. I consider Mr. Travis and health care professionals to be the most reliable witnesses to report on his symptoms and well-being.
- [84] I accept that a successful mental injury claim does not necessarily require a claimant to prove that they have a recognized psychiatric illness. The claimant does, however, need to prove that their mental disturbance is serious and prolonged, and rises above the ordinary annoyances, anxieties and fears that come with living in civil society. Expert evidence, though not required, can assist in determining whether or not a mental injury has been shown: *Saadati v. Moorhead*, 2017 SCC 28, at paras. 36--37.
- [85] In the instant case, there is no expert evidence of mental injury. The non-expert evidence provided is impressionistic, unreliable and not well corroborated by Mr. Travis himself. I find this claim was not proven on a balance of probabilities.

Non-Pecuniary Damages

- [86] An award of non-pecuniary damages is intended to compensate for pain, suffering and loss of enjoyment of life, both prior to the trial and into the future.
- [87] A non-exhaustive list of factors that influence an award of non-pecuniary damages was set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

- a) Age of the plaintiff;
- b) Nature of the injury;
- c) Severity and duration of pain;
- d) Disability;
- e) Emotional suffering;
- f) Loss or impairment of life;
- g) Impairment of family, marital and social relationships;
- h) Impairment of physical and mental abilities;
- i) Loss of lifestyle; and
- j) The plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).

[88] The compensation awarded should be fair to all parties. Awards made in comparable cases may be a helpful indicator of fair compensation, but they serve only as a guide. The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences. Each case depends on its own unique facts: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 55.

[89] In this case, Mr. Travis argues that appropriate award of non-pecuniary damages is \$140,000, which includes \$15,000 for loss of housekeeping capacity. He says he is young and has been greatly impacted by the 2017 Accident. He experiences chronic, incurable pain and can no longer enjoy the same activities that would be expected of someone his age and which he enjoyed before the 2017 Accident.

[90] The Defendants argue that in light of the mild nature of his physical injuries, a fair and reasonable award for non-pecuniary damages is \$50,000.

[91] In this case the plaintiff is relatively young, being 29 years of age at the time of trial, and 21 years of age at the time of the 2017 Accident.

[92] The nature of his injuries has been described above and will not be repeated here.

[93] The pain experienced by Mr. Travis is mild and chronic. Although symptoms fluctuate over time, Mr. Travis has been in pain since the 2017 Accident occurred, seven and a half years ago.

[94] Mr. Travis experiences mild chronic pain. However, pain is not synonymous with disability. Mr. Travis is not impaired in his ability to complete day-to-day tasks or in his physical or mental function. Dr. Kei's evidence, which I accept, is that Mr. Travis will continue to have pain with activities involving repetitive or heavy lifting, prolonged neck flexion or computer use, repetitive neck rotation, or prolonged sitting or standing. Dr. Kei opined that Mr. Travis

will be able to do these tasks in isolation but will need to continue to be mindful of his posture, adjust his position frequently, and take micro-breaks as needed. Dr. Kei clarified that a micro-break is not a ten-minute break, but simply an opportunity to change positions and adjust. In particular, the plaintiff's ability to sit and work on the computer for more than an hour without a break is decreased. Dr. Kei opined that Mr. Travis will continue to be able to work in his current employment as a senior software engineer. Dr. Kei opined that Mr. Travis will continue to be independent with daily self-care and household tasks but may have some pain while doing so and thus may take a longer time.

- [95] There is also no impairment in Mr. Travis's physical function. Dr. Kei observed that Mr. Travis had normal range of motion in every region examined, including neck, low back and shoulders. He also observed that the results of Mr. Travis's neurologic examination were normal.
- [96] There is no evidence of impairment of mental function.
- [97] I do not find emotional suffering to be a significant concern in this case.
- [98] There is no evidence of loss or impairment of life.
- [99] There is little evidence that the 2017 Accident has caused impairment of family, marital or social relationships. Indeed, Mr. Travis's most significant relationship with his partner Ms. Boyar started years after the 2017 Accident. Ms. Boyar testified that his mood and inability to socialize impact his ability to maintain friendships. However, Mr. Travis rekindled his friendship with Mr. Hoffer years after the 2017 Accident. He has maintained his relationship with Mr. Schisler since high school and there is no evidence of a strain on those relationships.
- [100] There was no evidence from his family or other close friends evidencing any strain or breakdown in relationships.
- [101] I do find that the injuries have had a mild negative impact on Mr. Travis's lifestyle.
- [102] Mr. Travis testified that he no longer engages in activities he used to enjoy, such as snowboarding, weight lifting and hiking. I cannot attribute the complete cessation of these activities to the 2017 Accident. I find that it is likely that even absent the 2017 Accident, Mr. Travis would have become less engaged in these activities for a number of reasons. For example, snowboarding became less convenient and less integrated in his social and family life in recent years. His family sold the family ski condo, Ms. Boyar does not prefer to snowboard and some of his friends who engage in that activity have moved away. Further, he was only working seasonally prior to the 2017 Accident, and he now works full-time during the winter months. It is not surprising, then, that his engagement in snowboarding has decreased. Likewise, hiking became less integrated in his life when he chose to stop working at Cazador. Up to that point in time, hiking was a big part of his work and he saw the benefit in staying fit for that purpose. Finally, Mr. Travis's own evidence was that weightlifting was an infrequent activity even before the 2017 Accident.

- [103] While I do not attribute the total cessation of these recreational activities to the 2017 Accident, I do find that it is more likely than not that because of the mild chronic pain he experiences, Mr. Travis no longer enjoys his recreational and leisure activities as much as he used to. I do attribute part of his diminished enjoyment and engagement in these activities to the 2017 Accident.
- [104] Mr. Travis argues that \$15,000 for loss of housekeeping capacity should be included as part of the non-pecuniary damages award. Both Mr. Travis and Ms. Boyar gave evidence about the disparity in their respective contributions to household maintenance since they moved into a sizeable two-story rental house in May 2024.
- [105] They both testified that they are required to do shovelling, gardening, mowing the lawns and cleaning.
- [106] They both testified that Ms. Boyar does most of this work and that Mr. Travis assists with shoveling and mowing the lawn. Even these tasks cause him back and neck pain. Mr. Travis described needing to do these tasks in sections. Neither Mr. Travis nor Ms. Boyar had asked their landlord for a self-propelled lawn mower.
- [107] Both Mr. Travis and Ms. Boyar gave evidence that it causes Mr. Travis discomfort to look down into the sink to do dishes. However, they both acknowledged in cross-examination that they have a dishwasher.
- [108] Ms. Boyar testified that the disparity in their contribution towards household tasks has been a source of more fights in the last year than it had been prior.
- [109] However, as I have set out above, I accept Dr. Kei's opinion that Mr. Travis is able to be independent with daily self-care and household tasks but may have some pain while doing so and thus take a longer time. He is thus able to contribute towards household tasks.
- [110] I accept that in part because of his pain he does not enjoy engaging in household activities. However, there is little evidence that he was an active or enthusiastic participant in household chores prior to the 2017 Accident. Ms. Boyar testified that when she met Mr. Travis, he was living with his mother and his mother was maintaining the living area. Ms. Boyar testified that before that, he was living with Ms. Howarth and Ms. Howarth did most of the housekeeping. I find on the evidence that it is more likely than not that Mr. Travis has never enjoyed housework. He may enjoy it less now because it causes some mild pain. He therefore chooses not to participate in housekeeping.
- [111] With those factors in mind, I turn to the cases I have been referred to regarding the appropriate award for non-pecuniary damages in this case.
- [112] I do not find the cases put forward by the plaintiff to be particularly helpful in approaching the assessment because the non-pecuniary loss in each of these cases was much more significant:

- a) In *Woloschuk v. Neuman*, 2021 BCSC 940, in addition to chronic pain, the plaintiff suffered significant mental disorders and cognitive issues. Her physical symptoms reduced her capacity to undertake the demands of her business, which was an endeavour that was "integrated into her personal identity" (at para. 103).
- b) In *Tolea v. Huang*, 2021 BCSC 260, in addition to chronic pain and headaches, the plaintiff suffered major depressive disorder, generalized anxiety disorder, and somatic symptom disorder. These conditions had significant impacts on all facets of his life, including his relationship with his spouse and child, and reduced his own sense of self worth.
- c) In *Yang v. Lockhart*, 2022 BCSC 32 in addition to physical pain including daily headaches and migraine headaches one or two times a month with nausea and vomiting, the plaintiff had developed anxiety and depression.

[113] Of more assistance are the cases relied upon by the defendants: *Harle v. Williams*, 2020 BCSC 1684; *Cegielka v. Grace*, 2020 BCSC 115; *Kim v. Dresser*, 2021 BCSC 1032. The plaintiffs in these cases were relatively young, between 26 and 32 years of age. In each case, the plaintiff suffered from mild chronic pain. Damages ranged from \$40,000 to \$60,000.

[114] Each case is unique. Non-pecuniary damages must be assessed by considering the unique factors in the case at bar. Mr. Travis is a young man who is not functionally disabled but who will continue to experience daily pain in his neck and back, and occasionally, headaches. These injuries lower his enjoyment of the recreational and leisure pursuits he once had. He is able to work and do household tasks, but requires certain accommodations (e.g., a sit-to-stand desk) and micro-breaks throughout the day.

[115] I find that an award of \$60,000 is appropriate for non-pecuniary damages.

Past Income Loss

[116] Mr. Travis testified that he was supposed to be headed to Northern British Columbia to work for Cazador on August 13, 2017. The work he was supposed to be performing was physical labour and drone work.

[117] He missed this planned ten days of work, which paid \$300 per day. He did not ask, after those initial 10 days, whether he could go up and join, although this was an option.

[118] As agreed between the parties, damages for loss of past wages are assessed at \$3,000 gross and \$2,400 net.

Future Loss of Earning Capacity

[119] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the Court recognized a three-step process for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. 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). 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 must include assessing the relative likelihood of the possibility occurring.

- [120] In cases like this where the plaintiff's injuries have become chronic but their income at trial is similar to what it was at the time of the accident, the first and second steps of the analysis take on increased importance: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 11.
- [121] Mr. Travis submits that he has demonstrated a real and substantial possibility that as a result of his injuries, he will suffer a loss of future income earning capacity and that his loss should be assessed at three years his salary, being \$312,000.
- [122] The defendants' position is that Mr. Travis is not entitled to any damages for loss of future earning capacity.
- [123] I agree with Mr. Travis that the capital asset approach to determining any lost future earning capacity is appropriate in this case.
- [124] The fact that a claimant experiences chronic pain does not, on its own, satisfy the first step in the Rab analysis: *Dong v. Li*, 2024 BCCA 404, para. 22. Instead, the court must look to the evidence about the nature and extent of a claimant's injuries, the claimant's circumstances, and the impact that work has on their ability to function.
- [125] Here the plaintiff argues that it is possible that his chronic pain will lead to a loss of capacity as he ages. He is relatively young. He argues that no employment is guaranteed in the decades to come when he will still hope to be employed. While his current employer is supportive of Mr. Travis and the workplace accommodations he requires, this may not always be the case. He argues that the employee handbook for his current employer stipulates that his ability to work from home is at his employer's discretion. As well, Mr. Travis argues that his employment contract specifically contemplates that there may be slowdowns in the business which could result in him being temporarily laid off. The contract also contemplates that if the company sells the business in which he is engaged, he may be terminated. He would then find himself competing in the marketplace, and he argues he may find himself at a disadvantage because of his injuries.
- [126] There is insufficient evidence on which I can find there is a real and substantial possibility of any pecuniary loss.
- [127] After his graduation from College in 2017, regardless of the 2017 Accident, Mr. Travis hoped to get work in the technology industry. He testified that working for Cazador was not aligned with his goals and he was not pursuing it as a career. He testified that he had declined work with Cazador because it took him away from Kelowna and his goal of getting into web development.

- [128] In pursuit of that goal, he testified he sent out resumes to web development companies. Mr. Travis testified that he found the job search challenging because many employers wanted a candidate with a degree rather than a diploma.
- [129] Nevertheless, Mr. Travis testified that in or around February 2018, he was successful in finding employment with Natco Trading Corporation ("Natco"). Mr. Travis testified that Natco is a technology company that runs online marketplace, buy and sell websites.
- [130] Mr. Travis testified that he was initially hired as a fraud prevention specialist and data entry employee. At the beginning, he was compensated on an hourly basis.
- [131] Mr. Travis testified that his career had progressed fairly well at Natco. He has received promotions and his employers are happy with his work. Mr. Travis testified that sometime after he was hired he moved to the developer team where he was able to use more of his skillset from college. The developer team is responsible for programming behind the scenes to keep the marketplace running.
- [132] Mr. Travis testified that eventually he was promoted to intermediary engineer and then in 2023 he was promoted again to senior software engineer. Mr. Travis testified that for the most part he is happy with his work. He has moved to a salaried position and Mr. Travis testified that his base salary starts at \$100,000.
- [133] I find that Mr. Travis has proven himself to be a valued employee at Natco who has attained multiple raises and promotions after the 2017 Accident. Today, he is earning more at Natco than at any other time in his life. There remains room to grow at Natco and Mr. Travis intends to continue applying for advancement at the company. On the evidence before me, there is no reason to doubt that those plans are realistic.
- [134] While the work from home arrangement that Mr. Travis enjoys is apparently within his employer's discretion, there is no evidence from his employer about any plan to require Mr. Travis to return to an office setting. While a slow down is always possible, there is no evidence of any real or substantial possibility of a slow down requiring Mr. Travis to be laid off, and no evidence this has occurred in the several years he has been employed with Natco. Nor is there any evidence of a planned sale of the business.
- [135] There is expert evidence that Mr. Travis likely "will continue to be able to work in his current position as a senior software engineer" despite his pain. The accommodations required by Mr. Travis to perform his job are not onerous. These include an ergonomic workstation, the flexibility to work from home and the ability to take micro-breaks. Again, micro-breaks are not even ten minutes long. They are simply an opportunity to change positions.
- [136] There is expert evidence from Dr. Kei that:

Mr. Travis will continue to have pain with activities involving repetitive or heavy lifting, prolonged neck flexion or computer use, repetitive neck rotation, or prolonged sitting or standing. These activities result in a load through the back and lead to tightness and pain in the neck and back muscles. He will be able to do these tasks in isolation but will need to continue to be mindful of his posture, adjust his position frequently, and take micro-breaks as needed. In particular, his ability to sit and work on the computer for more than an hour without a break is decreased .

He will always be at a lowered threshold to experience increases in pain depending on the activity. He will have to continue to modify his activities in the future. Furthermore, with an increased level of baseline pain, his ability to manage normal age-related changes in the neck and back will likely be affected in the future. Overall, his prognosis to return to his pre-accident pain and functional level is poor given it has been over 6 years since his accident and he continues to have pain.

[137] In some cases, this Court has found plaintiffs entitled to damages for lost earning capacity even though, immediately after the accident, they were capable of carrying on with their prior work without losing income: *Cegielka v. Grace*, 2020 BCSC 115 at para. 43. Each of those decisions turned on its own facts, from which the Court was able to find a real and substantial possibility of future lost earning capacity due to pain or other difficulties, notwithstanding that the plaintiffs were able to carry on with their prior work at the same income.

[138] In this case, as I say, there has been very minimal loss of income to date. Mr. Travis' income is, in fact, higher than it has ever been. No evidence was led with respect to any potential impact on Mr. Travis's planned retirement.

[139] Mr. Travis's income appears to be on an upward trajectory and his job is relatively stable. A decreased ability to manage normal age related changes is possible in light of Dr. Kei's opinion. However, if that were to occur and his symptoms at the computer increased, Mr. Travis has the ability to take paid sick days. While Mr. Travis took approximately five paid sick days due to his injuries prior to 2020, he has taken no sick days since then. He is entitled to twelve paid sick days a year.

[140] There are also means for Mr. Travis to decrease his time at the computer without impacting his work. The evidence was that Mr. Travis's recreational time at the computer has increased in the wake of the 2017 Accident. He currently spends about three hours a day playing video games at his computer and perhaps more during the evenings. If later in life he had a reduced tolerance for sitting at the computer, he could reduce the time spent playing video games.

- [141] I cannot find any real and substantial possibility that Mr. Travis's injuries, even in light of the passage of time, age and uncertainty of employment will, cause a pecuniary loss. Even if Mr. Travis is at a lowered threshold to experience and manage age related changes to his neck and back, this is not likely to put an end to Mr. Travis's working life. It may result in the need for more micro breaks, the use of over the counter medications, or possibly the use of some of his paid sick days. It is unlikely to result in a pecuniary loss.
- [142] Given that Mr. Travis has not established a real and substantial possibility of any economic consequence of the 2017 Accident on his future income-earning capacity, I need not proceed to the third step of the analysis. He is not entitled to damages for future loss of earning capacity.

Future Care

- [143] Plaintiffs are entitled to compensation for the cost of future care that is reasonably necessary to restore them to their pre-accident condition, in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Peters v. Ortner*, 2013 BCSC 1861 at para. 141.
- [144] The test for determining the appropriate award for cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Peters* at para. 142.
- [145] In this case, the requisite medical justification for the claims for cost of future care is lacking.
- [146] The only recommendation made by Dr. Kei was that Mr. Travis "engage in regular low-impact aerobic activity, stretches and light resistance exercises. As he has already tried physiotherapy and kinesiology, he should continue to do the exercises provided at home." Dr. Kei did not recommend any medications or interventional therapies for pain.
- [147] There is no cost associated with implementing Dr. Kei's recommendations. As noted by Dr. Kei, Mr. Travis has seen health care providers who have provided him with a course of exercises to continue at home.
- [148] There is a further problem, which is that Mr. Travis testified that he only implemented the home exercise program to a small degree, less than he could have. The plaintiff has not provided any evidence that he will be returning to treatment.

[149] It is appropriate for the care item to be denied in cases where there is clear evidence that a plaintiff is unlikely to follow the recommended treatment: Coulter (Guardian ad litem) v. Leduc, 2005 BCCA 199 at paras. 85--86, 91; Penner v. Insurance Corporation of British Columbia, 2011 BCCA 135 at para. 14; Izony v. Weidlich, 2006 BCSC 1315 at para. 74; Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at para. 40.

[150] Dr. Kei also opined that if the plaintiff's symptoms increase in the future, then he can be referred to a physician for a trial of trigger point injections. There is no evidence that there is an associated cost associated with this treatment.

[151] The plaintiff and his partner both gave evidence that they have benefits available to the plaintiff if he had any desire to participate in treatment.

Special Damages

[152] As agreed between the parties, special damages are assessed at \$798.30.

Costs

[153] The parties have leave to speak to the issue of costs should they wish to do so, provided they contact Supreme Court Scheduling within 30 days of the date of this judgment to set down a hearing date.

"Latimer J."

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