

CANADA / JUDGMENT

Tyler v. Sowinski

2022 BCSC 878

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 878 Tyler v. Sowinski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tyler v. Sowinski,

2022 BCSC 878

Date: 20220525

Docket: M55304

Registry: Vernon

Between:

Kevin Tyler

Plaintiff

And

Maya Sowinski

Defendant

Corrected Judgment: The text of the judgment was corrected at paras. 158 and 161 on September 22, 2022.

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiff:

C.T. Hart

Counsel for the Defendant:

D.M. Darman

Place and Dates of Trial:

Kelowna, B.C.

March 28 - 31, 2022

Place and Date of Judgment:

Vernon, B.C.

May 25, 2022

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Introduction

- [1] The plaintiff, Kevin Tyler, was involved in a motor vehicle accident on February 16, 2018 (the "Accident") which gave rise to the injuries which are the subject matter of this claim. He was 52 years old at the time of trial.
- [2] Mr. Tyler claims that as a result of the Accident he suffered:
- a) a concussion;
 - b) headaches;
 - c) vertigo;
 - d) vision problems in his right eye;
 - e) injury to his neck;
 - f) shoulder pain;
 - g) anxiety;
 - h) depression;
 - i) soft tissue injury and pain;
 - j) sleep disturbances; and
 - k) chronic pain.
- [3] The defendant has admitted liability. The issue before this Court is the award of damages to which Mr. Tyler is entitled. Mr. Tyler seeks general damages as well as damages for past income loss, future loss of earning capacity, and costs of future care.

Background

- [4] Kevin Tyler was born in 1969. At the time of the Accident, he lived at a rental property located in Falkland, BC, with his common law spouse, Yvonne Logan, and their three children.
- [5] Mr. Tyler has a two-year college diploma in computer science.
- [6] For approximately 25 years, Mr. Tyler lived in various cities and towns throughout Ontario and BC. He also spent a year in Alberta. In Ontario, Mr. Tyler worked at various occupations, including as a carpenter, a log hauler, and an operator of a computerized numerical control ("CNC") machine. For a period of approximately 15 years before the Accident, Mr. Tyler had been either self-employed and operating a business where he used a CNC machine, or he was employed but supplemented his employment income with income from a business venture involving a CNC machine.
- [7] In 2015, Mr. Tyler moved his family from Ontario to the Okanagan Valley. Upon arriving in Vernon, BC, Mr. Tyler lived with his family at the Holiday Inn while searching for an appropriate residence. After six months, Mr. Tyler moved his family to a rental property in Falkland. He also purchased a commercial property on Highway 97.
- [8] In regard to Mr. Tyler's employment history, upon his relocation to BC, Mr. Tyler started a business in Vernon known as "Little Elves". He created signs and letters using a CNC machine. That business was short lived due to tenancy issues that were no fault of Mr. Tyler. Mr. Tyler then operated a sole proprietorship known as Gantry CNC and again used a CNC machine to create signs.
- [9] In 2016 Mr. Tyler started a new business known as Spidercut CNC, which he operated from the garage of his residence in Falkland. Mr. Tyler constructed and sold plasma tables. Plasma tables are industrial machines which use CNC technology to control plasma for the purpose of cutting metal. Mr. Tyler operated this business until shortly after February 16, 2018, when the Accident occurred.
- [10] The Accident occurred on February 16, 2018, on Highway 97 between Vernon and Falkland. Mr. Tyler was driving his Ford F-350; he was stopped and signalling to turn left onto St. Annes Road. Mr. Tyler had driven this particular section of Highway 97 on countless occasions. The speed limit on this particular stretch of road was 90 kilometres per hour.
- [11] Mr. Tyler testified that he was looking ahead and suddenly he found himself facing the ceiling of his truck. Upon realizing that he had been rear-ended, Mr. Tyler exited his truck and saw the motor vehicle behind him had been badly damaged, with fluids from the small car leaking onto the ground. He felt pins and needles throughout his body. He did not hear a horn, or screeching, before the Accident and he did not observe skid marks on the road after the Accident.

- [12] Mr. Tyler was transported by ambulance to Vernon Jubilee Hospital. He was discharged from Vernon Jubilee Hospital on the same day.

Parties' Positions

- [13] Mr. Tyler submits that his evidence at trial was effectively unchallenged by the defendant; the defendant called no evidence to dispute the plaintiff's claims. Mr. Tyler submits he has proven on a balance of probabilities that he has suffered from headaches, vision problems, injuries to his neck and shoulder, soft tissue injuries, sleep disturbances, anxiety, chronic neck and right shoulder injuries, and impairments to his concentration and focus since the Accident.
- [14] The plaintiff argues that he has established that these injuries were directly caused by the Accident. Mr. Tyler submits the evidence established that his physical and psychological injuries severely impacted his life for a period of approximately two to three years following the Accident. At the time of trial, he had not fully recovered from his injuries. Mr. Tyler contends that he has established on a balance of probabilities that he suffered a past income loss, loss of earning capacity, and will require future costs of care on account of his injuries sustained in the Accident.
- [15] The defendant challenges the quantum of damages on a number of grounds.
- [16] First, the defendant contends that the plaintiff was a poor historian, with a tendency to go off on discursive tangents. The defendant submits that Mr. Tyler was an unreliable witness. In making this argument, the defendant cites certain examples:
- a) The plaintiff's evidence at trial and during his examination for discovery regarding his reasons for selling his commercial property in Falkland were contradictory;
 - b) The timelines for the completion of the plaintiff's shop at his current residence as they related to the plaintiff's ability to operate a business out of his shop were inconsistent; and
 - c) The plaintiff's evidence during direct examination and cross-examination regarding the source and amount of income he reported on his 2018 income tax return for a trailer the plaintiff sold did not match an invoice dated March 23, 2018.
- [17] Second, the defendant emphasizes certain deficiencies in the opinion evidence. The defendant emphasized that the physiatrist, Dr. Rajasekaran, testified that if the plaintiff did not undertake his treatment recommendations, it would impair his ability to improve his musculoskeletal injuries. Dr. Rajasekaran confirmed during cross-examination that he did not believe the plaintiff's musculoskeletal symptoms affected his ability to work or impaired his ability to perform his household tasks or yard work.

- [18] The defendant further argues that the psychiatrist, Dr. Spivak, attributed statements in his report regarding alleged anxiety to Mr. Tyler which Mr. Tyler never told him. Dr. Spivak admitted to making an inference about the plaintiff's anxiety in his report. As such, the defendant submits that this Court should be exceedingly cautious about relying on Dr. Spivak's opinion evidence.
- [19] The defendant submits that the Court should not give any weight to the evidence of Ms. Fleming, an occupational therapist, because she did not physically examine the plaintiff. Ms. Fleming relied on the subjective reports of the plaintiff and did not conduct a functional capacity evaluation.
- [20] Third, the defendant argues that it may be possible the plaintiff suffered a psychological injury as a result of the Accident, but it was not reasonably foreseeable that the Accident would cause the level of psychological harm allegedly suffered by Mr. Tyler. The defendant submits that any psychological injury the plaintiff may have suffered is too remote to be compensable.
- [21] In the alternative, the defendant contends there are multiple causes for the plaintiff's psychological injury such as unrelated litigation (with Mr. Tyler's customers) and stress from being behind with work. The defendant argues that if the Court is inclined to conclude that it is reasonably foreseeable that the plaintiff has suffered a psychological injury as a result of the Accident, then the principles outlined in *Blackwater v. Plint*, 2005 SCC 58, are applicable and ought to be reflected in the plaintiff's award of damages.
- [22] Fourth, the defendant challenges the plaintiff's claim under both past and future loss of earning capacity. The defendant contends that the plaintiff's injuries may have impaired his ability to operate his business for approximately two months following the Accident; his injuries did not impact his ability to earn income beyond that period of time. The defendant argues that the plaintiff has never operated a stable business and this would not have changed absent the Accident. The defendant argues there is no evidence to indicate the plaintiff suffered any permanent impairment which will limit his ability to operate his business. The plaintiff has not reached the threshold of a "real possibility" of impairment of earning capacity.
- [23] In the alternative, if the Court determines that the plaintiff has met the onus for loss of future earning capacity, the defendant submits the capital asset approach is the most appropriate approach to quantify the plaintiff's loss in the circumstances. Under this approach, one year of the plaintiff's average income for the two years prior to the Accident is appropriate. The defendant calculates this to be approximately \$40,000.
- [24] Lastly, the defendant submits that the plaintiff has not proven he is entitled to any award for the costs of future care or for loss of housekeeping capacity.

Injuries

Physical Injuries

- [25] Mr. Tyler testified that the day after the Accident he felt "like he had been run over by a truck". He had pain throughout his body. He had pain in his shoulder and, later, his neck, and he developed a twitch in his right eye. His right eye twitch resolved shortly after the Accident.
- [26] Mr. Tyler's physical injuries improved over the first year following the Accident. His neck and shoulder pain is now intermittent and is not significant. Mr. Tyler views his neck and right shoulder function as being approximately 80% of his pre-Accident function. His neck becomes stiff when he sits for prolonged periods of time. He requires some help when lifting heavy items because of his right shoulder.
- [27] Dr. Rajasekaran, a physiatrist, was called by the plaintiff. Dr. Rajasekaran was qualified as a physiatrist to opine on the diagnosis, prognosis, and treatment of Mr. Tyler's physical injuries. He assessed the plaintiff on April 1, 2021, and prepared a report dated April 6, 2021.
- [28] In his report, Dr. Rajasekaran opined that Mr. Tyler suffered from Grade Two Whiplash Associated Disorder with upper trapezius myofascial pain and right subacromial-subdeltoid bursitis. Dr. Rajasekaran performed an ultrasound on Mr. Tyler's right shoulder and found that there was "significant thickening of the subacromial-subdeltoid bursal tissue along with fluid within the bursa".
- [29] While most of Mr. Tyler's physical injuries have resolved since the Accident, he continues to experience ongoing neck pain and stiffness and ongoing right shoulder pain and stiffness.

Mental Health Issues

- [30] Mr. Tyler experienced a number of mental health issues following the Accident, including generalized anxiety, panic attacks, sleep disruption, irritability, and difficulty concentrating. While some of these issues have resolved since the Accident, at the time of trial, Mr. Tyler continued to experience anxiety, irritability, and difficulty concentrating. He testified that he worries about his children and he is anxious when he is a passenger in a vehicle.
- [31] During trial, the defendant took issue with certain opinions in Dr. Rajasekaran's report. Namely, the defendant took the position that Dr. Rajasekaran had opined beyond his area of expertise as a physiatrist.
- [32] Expert evidence must be given by a witness who is "shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which they undertake to testify": *R. v. Mohan*, [1994] 2 S.C.R. 9 at 25, 114 D.L.R. (4th) 419. A properly qualified expert should not stray into expressing inadmissible opinions: *R. v. Sekhon*, 2014 SCC 15 at paras. 48, 76.

- [33] Here, Dr. Rajasekaran was qualified to give expert evidence on Mr. Tyler's physical injuries. However, he strayed into comments about Mr. Tyler's mood symptoms. I accept that as a psychiatrist, Dr. Rajasekaran would have a general understanding of mood symptoms and that psychiatrists have given expert evidence on psychological symptoms in other personal injury cases. Here, Dr. Rajasekaran admits (at lines 220-221 of his report) that his diagnosis of Mr. Tyler's mood symptoms was outside of his regular practice scope.
- [34] In this case, given the guidance from the Supreme Court of Canada in *Mohan and Sekhon*, and where there is expert evidence from a psychiatrist, I do not find Dr. Rajasekaran's evidence on Mr. Tyler's mood symptoms to be necessary. As a result, I redact Dr. Rajasekaran's third conclusion on page 6 of his report as well as the sentences between lines 206 and 209, lines 220 to 221, lines 236 to 237, and lines 243 to 245 of his report.
- [35] Mr. Tyler testified that he developed significant anxiety following the Accident. He started to experience panic attacks post-Accident. Mr. Tyler's panic attacks resolved within a year of the Accident. Mr. Tyler testified that post-Accident he had recurring nightmares of the driver of the other vehicle being killed. His nightmares resolved relatively soon after the Accident. Mr. Tyler testified that his ability to concentrate and focus were impaired following the Accident. Although Mr. Tyler's panic attacks have resolved, his problems with concentration and focus have persisted. Mr. Tyler estimates that his ability to concentrate and focus is at approximately 80% of his pre-Accident abilities.
- [36] Since the Accident, Mr. Tyler has noticed that he is more irritable and angry than he was before the Accident. Though the first year after the Accident was the worst, Mr. Tyler is often still irritable with his wife, neighbours, and his children. Mr. Tyler's spouse, Ms. Logan, testified that she and Mr. Tyler have had marital difficulties since the Accident and they have had to seek counselling.
- [37] Mr. Tyler testified that in the two months following the Accident, his alcohol consumption increased dramatically as a means of coping with his psychological symptoms. His consumption went from one to two alcoholic beverages per day to 12 to 15 beers per day. This period of increased alcohol consumption lasted for approximately two months before Mr. Tyler was able to bring his consumption back to his normal level.
- [38] Dr. Spivak was called by the plaintiff. He was qualified as a psychiatrist to opine on the diagnosis, prognosis, and treatment of psychiatric conditions. He assessed the plaintiff on November 5, 2018 and prepared a report dated November 6, 2018. Dr. Spivak prepared a follow-up report dated June 28, 2021 after reviewing the plaintiff's various medical records which arose subsequent to his initial report. In his follow-up report, Dr. Spivak reported that his opinion outlined in his initial report had not changed.
- [39] In his first report, dated November 6, 2018, Dr. Spivak opined that Mr. Tyler suffered from generalized anxiety disorder. As he stated:

Mr. Tyler had no previous history of mental health disruption prior to his motor vehicle accident. In the aftermath of the accident, he experienced a dramatic shift in his emotional functioning, which initially manifested as surges of dysphoria and worry. This persistently turned into a more chronic pattern of ongoing physical manifestations of anxiety that do not leave him. He describes it as a sensation that he feels viscerally in his chest and in his abdomen. Associated with his anxiety has been poor concentration and short-term memory that has impacted his ability to function in the workplace. There have been ancillary symptoms of panic attacks that have recently started to manifest.

Mr. Tyler's symptoms would be best categorized with a diagnosis of generalized anxiety disorder.

[40] With respect to Mr. Tyler's level of impairment, Dr. Spivak opined that:

Mr. Tyler's level of impairment could be said to be in the realm of moderate. A rating of moderate is appropriate, given the impact that it has had on his ability to function on a day-to-day basis. Mr. Tyler was previously a man who functioned effortlessly within his work and took great pleasure within the same. Despite his frustration over not being able to "get it together", he continues to struggle with taking care of tasks that were previously effortless for him. This is due to the fact that his concentration and focus have been affected by his anxiety and continues to affect him on a daily basis. The symptoms have become significant enough that they are now manifesting with panic attacks. It is possible that these surges of emotion that he was experiencing before were panic-like episodes as well. His symptoms have plainly impacted his ability to engage in his employment. He has experienced a significant downturn in his business in the face of his symptoms. He has recently made a significant change in his vocation in order to accommodate the change in his cognitive functioning.

Prognosis

[41] With respect to Mr. Tyler's physical injuries, he still has some pain in his neck and right shoulder. Mr. Tyler testified that he feels he has 80% of his pre-Accident function. Dr. Rajasekaran testified that he did not believe Mr. Tyler's musculoskeletal symptoms affect his ability to work or impair his ability to perform his household tasks or yard work. I note that today Mr. Tyler resides with his spouse and their daughter on a property he owns in Armstrong, BC. Since the Accident, he has constructed a fence, a utility shed, and a shop on the property. He has also terraced a portion of the property and is in the process of constructing a cabin.

[42] Overall, the evidence is that Mr. Tyler's physical injuries do not prevent him from doing physical work. His prognosis for recovery from his physical injuries is good.

[43] With respect to his psychological injuries, Dr. Spivak opines that Mr. Tyler's prognosis is fair. Dr. Spivak states that Mr. Tyler was a previously psychologically-resilient person, and opines that hopefully with more aggressive management Mr. Tyler will see some resolution of his symptoms. Dr. Spivak recommends that Mr. Tyler see a mental health professional for psychotherapy. Dr. Spivak states that Mr. Tyler is "not a particularly psychologically-minded

individual and as such has limited tools for dealing with his anxiety". Dr. Spivak opines that seeing a cognitive behavioural therapist would be appropriate, and recommends that Mr. Tyler attend between ten to 12 sessions. After those initial sessions, Dr. Spivak would defer to Mr. Tyler's treating therapist regarding whether any further therapy is required.

- [44] I find that with appropriate therapy, it is more likely than not that Mr. Tyler's symptoms will improve. While Mr. Tyler will likely not experience total recovery, his ability to manage his symptoms will likely be better.

Post-Accident Work History

- [45] At the time of the Accident, Mr. Tyler was running his business, Spidercut CNC, selling plasma tables. Mr. Tyler testified that following the Accident, as a consequence of his lack of focus and concentration, he was unable to keep up with the work. Mr. Tyler testified that tasks which would have taken him days to complete before the Accident now took him weeks. He was unable to work quickly and therefore could not meet deadlines. He lost his business.
- [46] However, during cross-examination, Mr. Tyler acknowledged that, at the time of the Accident, he already had a backlog at his Spidercut CNC business. The Accident was not the sole reason that Mr. Tyler was behind with his orders.
- [47] In the summer of 2018, after the collapse of the Spidercut business, Mr. Tyler started a business where he constructed and sold tear-drop trailers. Again, Mr. Tyler was unable to meet his goals and deadlines because of an inability to focus and concentrate. This affected his ability to manufacture trailers within a timeframe suitable to his customers. In late 2018 and early 2019, Mr. Tyler was sued by a few of his customers. He ultimately refunded his customers the majority of the monies which he received from them.
- [48] After the collapse of his two businesses, Mr. Tyler sold the property he owned on Highway 97. He used a portion of the sale funds to pay back his customers. Then, Mr. Tyler was unemployed for more than a year. He did not start a business again until late 2019 when he started a screen-printing business using a CNC-type machine.
- [49] Mr. Tyler testified that when he started this new business, he changed his working style to accommodate his deficits. Mr. Tyler believed the greater automation of the screen-printing process would be more suitable to his diminished focus and concentration. He purchased a t-shirt screening machine and started a t-shirt business for sports teams and events. Unfortunately, the onset of the Covid-19 pandemic prevented this business from gaining traction and he shut the business down. Mr. Tyler next turned to sewing masks to respond to the Covid-19 pandemic. While he was initially successful, the business ended when the mask market became saturated by lower cost competitors.

- [50] In 2020, Mr. Tyler received a combination of Canadian Emergency Response Benefit ("CERB") and Canadian Recovery Benefit ("CRB") payments from the government, totaling \$25,695.
- [51] At the end of 2020, Mr. Tyler pursued a new business venture, Revy CNC, which constructed CNC routers. This business is similar to his former Spidercut CNC venture. Mr. Tyler testified that he made modifications to his new business to make his workflow more efficient and to accommodate his inability to focus. Rather than constructing custom made CNC routers, he constructed CNC routers in specific sizes. It took Mr. Tyler a number of months to design the various components of the CNC routers before beginning construction. Although the dates were unclear, construction likely began in the last six months of 2021.

Credibility

Legal Principles

- [52] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dillon summarized the key elements of a credibility analysis:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Faryna*] v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

Analysis

- [53] Mr. Tyler's claim is largely based on his psychological injuries. Due to the fact that psychological symptoms are inherently subjective, there is little objective evidence to support Mr. Tyler's psychological injuries and their effect on his life since the Accident. The vast majority of the evidence in this case has come from Mr. Tyler himself.
- [54] With respect to the diagnosis of Mr. Tyler's psychological injuries, the medical experts in this matter relied almost exclusively on Mr. Tyler's subjective complaints in coming to their conclusions. With respect to the effect these psychological injuries have had on Mr. Tyler's life, the vast majority of the evidence came from Mr. Tyler during his evidence-in-chief. Further, with respect to Mr. Tyler's past income loss and loss of earning capacity, since Mr. Tyler has been a self-employed entrepreneur during the relevant time periods the majority of the evidence on this issue originated from Mr. Tyler or business records prepared by him.
- [55] As a result, credibility and reliability are important factors in this case.
- [56] With respect to the concern about the lack of objective medical evidence of Mr. Tyler's psychological injuries, I find the following passage of Justice Southin in *Sandhu v. Braich* (1991), 61 B.C.L.R. (2d) 273 at para. 49, 1991 CanLII 1683 (C.A.), adopted by the Court of Appeal in *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at para. 44, to be helpful:
- [49] It is trite law--although I note that what is trite law is frequently brushed aside--that in order for an expert to give an opinion the facts upon which [they give] that opinion must be proven by the person who has personal knowledge of them: see *Enge v. Trerise*, (1960-62), 33 W.W.R. 577 (B.C.C.A.) and *Lenoard v. British Columbia Hydro and Power Authority* (1964), 50 W.W.R. 546 (Wilson, C.J.S.C.), in which that most distinguished judge said (at p. 548):

I now enter into an area in which I must consider subjective as well as objective evidence because both were placed before me without objection by counsel. All physicians must I think, rely to some extent on what their patients tell them. If, for instance, a patient had a pain in his neck and went to a doctor challenging him [or her] to find what, if anything, was the matter with him, then I think that doctor would be in almost as difficult a position as a lawyer would be if all his client told him was that he wanted to sue Tom Jones, and condescended to no further detail. When the doctor relates in court what his patient told him, he may be stating hearsay, but common sense in the courts has long ago rejected the idea that this evidence may not be heard and has accepted the idea that it should be listened to, not because it proves by itself the truth of the thing stated by the patient to the doctor, but because it defines to an extent his area of exploration and, if confirmed by the doctor's objective observations and by the patient's evidence given at the trial, may be convincing. I see no other approach to medical evidence...

[Emphasis added.]

- [57] Wilson C.J.S.C continues:

It is closely allied to the hypothetical question often put to other expert witnesses where the witness is asked: "Well, granting the existence of such and such facts, what is your opinion?" The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to rejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for instance, as evidence of spasm...

[Emphasis added.]

[58] Wilson C.J.S.C. concludes:

I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established, having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.

[Emphasis added.]

[59] I find that Mr. Tyler candidly described his injuries to the Court. He readily acknowledged that his various chronic injuries had improved since the Accident, and he admitted that some of his injuries had entirely resolved. Mr. Tyler described his injuries in an unexaggerated manner, and his testimony was consistent with the various statements he made to Drs. Spivak and Rajasekaran. When questioned about the resolution of his injuries, Mr. Tyler did not attempt to exaggerate the severity of his injuries, and often agreed with the statements put to him by the defendant's counsel.

[60] Nevertheless, I agree with the defendant that the plaintiff was, at times, a poor historian. In particular, Mr. Tyler was unable to remember dates. For example, the timelines he gave for the completion of construction on his shop as it related to his ability to operate a business out of his shop were inconsistent.

[61] In summary, while I had no concerns with Mr. Tyler's credibility, I found his reliability to be problematic at times.

Causation

Legal Principles

- [62] The law of causation is well established. Before assessing damages, the "plaintiff must establish a causal connection between the defendant's negligence and [the plaintiff's] pain": *Farrant v. Laktin*, 2011 BCCA 336 at para. 8. The plaintiff bears the onus of proving that the defendant's negligence was the cause of her current symptoms: *Warkentin v. Riggs*, 2010 BCSC 1706 at para. 107.
- [63] The generally accepted test for causation is the "but for" test: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22. The plaintiff bears the onus of proving on a balance of probabilities that but for the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13, [1997] 1 W.W.R. 97; *Blackwater* at para. 78. Causation is made out if the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8.
- [64] In *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 323, 72 D.L.R. (4th) 289, the Supreme Court of Canada set out the test for causation, the hallmark of which is "a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion". The test for causation does not demand scientific precision and should not be applied too rigidly: *Snell* at 323. While proof of causation will often require expert evidence, common sense applies: *Athey* at para. 16; *Clements* at paras. 8-9.
- [65] The plaintiff must establish a connection between the tortious conduct and the injury, beyond the de minimus level: *Farrant* at para. 11.
- [66] The Supreme Court of Canada recently revisited the test for mental distress claims in *Saadati v. Moorhead*, 2017 SCC 28. The Court resisted the invitation to require expert evidence of a recognizable mental illness prior to recovery. As Justice Brown reasoned:
- [2] This Court has, however, never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for physical injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for mental injury does not require proof of a recognizable psychiatric illness. This and other mechanisms by which some courts have historically sought to control recovery for mental injury are, in my respectful view, premised upon dubious perceptions of psychiatry and of mental illness in general, which Canadian tort law should repudiate. Further, the elements of the cause of action of negligence, together with the threshold stated by this Court in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims. I therefore conclude that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness

[67] Remoteness can limit recovery. In *Bendzak v. Bohnet*, 2013 BCSC 435, Justice Schultes explained:

[46] For a risk to be foreseeable it is not required that it be more likely than not to occur or that there needs to be some particular degree of statistical probability attaching to it. In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para. 13, Chief Justice McLachlin described the correct approach:

Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant[t] . . . and which [they] would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643). [Emphasis in original.]

[47] It is also not necessary that the exact type of injury that occurred be foreseen. As Justice Dickson explained in *Assiniboine School Division No. 3 v. Hoffer* (1971), 21 D.L.R. (3d) 608 (Man. C.A.), at page 614:

It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence may not be foreseeable if physical damage of the kind which in fact ensued is foreseeable.

[48] In *R. v. Côté*, [1976] 1 S.C.R. 595, at p. 604 Justice Dickson elaborated on this principle:

It is not necessary that one foresee the "precise concatenation of events"; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred.

[68] The "thin skull" doctrine is related to the issue of remoteness. It is well accepted that tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for the average person: *Athey* at 473-474. If the plaintiff is injured to a greater degree than was foreseeable at the time of the breach, the defendant is still liable for the resulting injuries. If the defendant caused harm beyond the de minimus range, the extent of the harm is irrelevant. The but for test will be satisfied.

[69] In *Blackwater*, the Supreme Court of Canada discussed the issues arising from multiple causes of harm as follows:

- [74] Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a Plaintiff is entitled only to be compensated for loss caused by the actionable wrong. It is the "essential purpose and most basic principle of tort law" that the Plaintiff be placed in the position he or she would have been had the tort not been committed
- [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway .
- [80] Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.
- [81] All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position [they] would have been in but for the tort for which the defendant is liable.

Analysis

- [70] There is no real dispute that Mr. Tyler's physical injuries were caused by the Accident. As Dr. Rajasekaran opined:

The medical records detailed an immediate onset of neck pain and right shoulder pain. Reviewing the records, there were also clear details of a significant collision at high-speed I believe, the incident MVA probably caused his symptoms related to [Whiplash Associated Disorder] and [right subacromial-subdeltoid bursitis]

[Emphasis added.]

- [71] Although Mr. Tyler had a previous elbow injury, his elbow was not injured in the Accident. He had no previous related injuries. Specifically, Mr. Tyler did not suffer from neck pain or shoulder pain prior to the Accident. I therefore conclude that the Accident caused Mr. Tyler's physical injuries, including his ongoing neck and right shoulder pain and stiffness.

[72] With regard to Mr. Tyler's psychological injuries, the defendant argues that these injuries are too remote. The defendant argues that while it may be possible that the plaintiff suffered a psychological injury as a result of the Accident, it was not reasonably foreseeable that the Accident would cause the psychological harm allegedly suffered by the plaintiff.

[73] Dr. Spivak, the psychiatrist, opined that Mr. Tyler suffers from generalized anxiety disorder with related deficits in concentration and focus. Dr. Spivak stated the following regarding causation:

Mr. Tyler's generalized anxiety disorder was caused by the accident in question. There were no other factors that could account for the onset of his symptoms. His symptoms correlate logically and temporally with the accident in question. It is not unusual in the aftermath of a sudden and surprising motor vehicle accident for an individual to develop a spectrum of anxiety or depressive symptoms; this appears to be the case for Mr. Tyler. Absent the accident in question, it is impossible to imagine that Mr. Tyler would be experiencing his current symptoms.

[Emphasis added.]

[74] There was no evidence before me that Mr. Tyler suffered from any mental health problems prior to the Accident. Dr. Spivak noted this in his report. Nor is there any evidence before me that Mr. Tyler had problems with concentration or focus prior to the Accident. Mr. Tyler's evidence was that he was able to construct plasma tables in a fraction of the time which it took him to construct the tables after the Accident.

[75] That said, Mr. Tyler testified that he had no issues with efficiently working prior to the Accident and Dr. Spivak accepted this when he stated that Mr. Tyler "functioned effortlessly within his work." I find this is overstated. Mr. Tyler admitted he was behind in his orders at the time of the Accident. He also told his counsellor that his ability to manage his time and multitask was never his strong suit.

[76] While his pre-Accident efficiency was likely overstated, I do not accept the defendant's argument that it was not reasonably foreseeable that the Accident would cause Mr. Tyler psychological harm. The plaintiff was sitting and waiting to turn left. He had no warning of the Accident prior to its occurrence. It was a relatively serious Accident. Mr. Tyler was shaken not only by the Accident, but also by how injured the driver of the other vehicle was. In fact, for a period of time following the Accident, Mr. Tyler reported having a recurring nightmare that the other driver had died.

[77] Mr. Tyler started having panic attacks following the Accident, was irritable, and suffered from loss of concentration and focus. He did not suffer from any of these conditions prior to the Accident. Dr. Spivak notes that poor focus is not an unusual outcome following a motor vehicle accident.

- [78] Lastly, in the two months after the Accident, Mr. Tyler also began to drink heavily as a means of coping with his psychological injuries. In his report, Dr. Spivak ties Mr. Tyler's alcohol consumption during this period to his psychological injuries, stating: "Symptomatic of Mr. Tyler's level of emotional disruption has been his alcohol consumption, which manifested as a marker of his anxiety when he increased his alcohol consumption in order to deal with his anxiety and insomnia".
- [79] In my view, it is not unforeseeable that a plaintiff would be traumatized by a motor vehicle accident of the type Mr. Tyler was involved in. I find that a reasonable person in the defendant's position "would not brush aside as far-fetched" Mr. Tyler's psychological response to the Accident.
- [80] To be foreseeable, it is not required that the injury be more likely than not to occur. There need not be some particular degree of statistical probability of it occurring. The exact nature of the injury need not be foreseen: *School Division of Assiniboine South No. 3 v. Hoffer et al.* (1971), 21 D.L.R. (3d) 608 at 614, [1971] W.W.R. 746 (Man. C.A.), *aff'd* 40 D.L.R. (3d) 480 (S.C.C.); *Bendzak* at para. 47.
- [81] Given the timing of the onset of Mr. Tyler's psychological injuries, I am persuaded that these psychological injuries were caused by the Accident. I accept that Mr. Tyler's now resolved panic attacks, his now resolved drinking problems, his ongoing generalized anxiety disorder, and related difficulty concentrating were directly linked to the Accident. They were not too remote.
- [82] I am also not persuaded there are multiple causes for the plaintiff's psychological injury. I accept that litigation can cause stress and that, at the relevant time, Mr. Tyler was being sued by some of his customers for his failure to provide the promised services. Mr. Tyler certainly could have experienced some stress from being behind with work. However, I find that at least part of Mr. Tyler's problems were caused by the Accident.
- [83] In any event, even if Mr. Tyler's psychological injuries were caused in part by the unrelated litigation and his backlog at work, I would find his injuries to be indivisible. As stated in *Bradley v. Groves*, 2010 BCCA 361, at paras. 21, 24, leave to appeal *ref'd* [2010] S.C.C.A. No. 337, where there is more than one cause of an injury, resulting in an indivisible injury, each tortfeasor is jointly and severally liable for the full loss, absent contributory negligence on the part of the plaintiff. This principle was recently re-stated in *Khudabux v. McClary*, 2018 BCCA 234 at paras. 30-35.
- [84] A robust and pragmatic approach to the "but for" test allows for there to be more than one cause of an injury. So long as I am satisfied that the defendant's actions were a cause of Mr. Tyler's psychological injuries, the defendant is fully liable for that damage: *Blackwater* at para. 78. Given the closeness in time between the Accident and the onset of Mr. Tyler's psychological symptoms, and relying on the expert evidence of Dr. Spivak, I find that the Accident caused Mr. Tyler's psychological injuries.

Non-Pecuniary Damages

Legal Principles

- [85] A fundamental principle of tort law is that, to the extent a monetary award can accomplish it, a plaintiff should be placed in the same position they would have been in had the accident not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.
- [86] Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, loss of enjoyment of life, and loss of amenities": *Trites v. Penner*, 2010 BCSC 882 at para. 188. The compensation should be fair to both parties and fairness is measured against awards made in comparable cases: *Trites* at paras. 188-189.
- [87] As set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, common factors that influence an award of non-pecuniary damages include:
- a) age of the plaintiff;
 - b) nature of the injury;
 - c) severity and duration of pain;
 - d) disability;
 - e) emotional suffering;
 - f) loss or impairment of life;
 - g) impairment of family, marital, and social relationships;
 - h) impairment of physical and mental abilities;
 - i) loss of lifestyle; and
 - j) the plaintiff's stoicism.
- [88] In *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, [1982] 1 W.W.R. 433, Justice Dickson stated that an award for non-pecuniary damages does not depend only on the seriousness of the injury, but also on the seriousness of the individual's loss:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders*, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

Analysis

[89] The plaintiff relied on the following cases in support of an award for non-pecuniary damages in the range of \$80,000 to \$115,000:

- a) *Mallier v. Falcomer*, 2021 BCSC 1827, where the court assessed non-pecuniary damages in the amount of \$120,000;
- b) *Melahrinakis v. Melahrinakis*, 2021 BCSC 1837, where the court assessed non-pecuniary damages in the amount of \$160,000;
- c) *St. Jules v. Cawley*, 2021 BCSC 1775, where the court assessed non-pecuniary damages in the amount of \$200,000;
- d) *Singh v. Storey*, 2021 BCSC 1825, where the court assessed non-pecuniary damages in the amount of \$115,000; and
- e) *Thompson v. Masse*, 2021 BCSC 159, where the court assessed non-pecuniary damages in the amount of \$120,000.

[90] The defendant relied on the following cases in support of an award for non-pecuniary damages in the range of \$30,000 to \$50,000:

- a) *Buttar v. Brennan*, 2012 BCSC 531, for general principles where there is little objective evidence of injuries, where the court assessed non-pecuniary damages in the amount of \$60,000;
- b) *Cegielka v. Grace*, 2020 BCSC 115, where the court assessed non-pecuniary damages in the amount of \$40,000;
- c) *Ludwiczak v. Nguyen*, 2020 BCSC 1202, where the court assessed non-pecuniary damages in the amount of \$50,000; and
- d) *Palmer v. Pozniak*, 2021 BCSC 1703, where the court assessed non-pecuniary damages in the amount of \$35,000.

[91] I have reviewed these cases. Comparable cases, though helpful, serve only as a rough guide. Each case depends on its own particular circumstances: *Trites* at para. 189.

[92] Prior to the Accident, Mr. Tyler was an entrepreneur who was either self-employed or supplemented his employment income through self-employment while working at another job. While he changed jobs frequently, he was resourceful in staying employed.

[93] Mr. Tyler is currently 52 years old. I have found that Mr. Tyler suffered from and continues to suffer from both psychological and physical injuries from the Accident.

[94] Immediately after the Accident, Mr. Tyler's injuries were significant. He experienced shoulder and neck pain, disrupted sleep, panic attacks, recurrent nightmares, irritability, and a diminished ability to focus and concentrate.

- [95] Today, Mr. Tyler's neck and right shoulder function continues to be impaired by what he described as "stiffness". Mr. Tyler's sleep schedule is not as good as it was prior to the Accident. Most significantly, Mr. Tyler continues to suffer from anxiety and difficulty concentrating. Mr. Tyler's focus and concentration remains at approximately 80% of his pre-Accident functioning, though some of this may be the natural result of aging and he admitted to his counsellor he did not have strong time management skills prior to the Accident. Ms. Logan described that Mr. Tyler's focus and concentration were particularly poor in the year after the Accident, and that he has improved in this regard. However, she still has to text him and write out lists for him or he cannot remember to do things.
- [96] Mr. Tyler continues to be irritable and quick to anger, which has impacted his family, marital, and social relationships. Mr. Tyler's inability to concentrate and focus, in combination with his irritability and anger, has resulted in him and his spouse pursuing marriage counselling. Mr. Tyler's relationship with his sons has also been strained.
- [97] Since the Accident, Mr. Tyler has had to make changes to his employment. Recently, he developed a more modular process which allows him to gain efficiencies. He also made changes to his workstations, and he hired his son to assist him.
- [98] Lastly, Mr. Tyler's injuries have affected his recreational activities, including his ability to ride his motorcycle. Prior to the Accident, Mr. Tyler rode his motorcycle every day during riding season. He has not ridden his motorcycle since the Accident. He testified that if he had been on his motorcycle the day of the Accident, "he would be dead".
- [99] Mr. Tyler's main ongoing concern is his difficulty with concentration, focus, and anxiety. These injuries impact Mr. Tyler's ability to work, and impair his family and social relationships. While Mr. Tyler has demonstrated his resilience by continuing to work despite these injuries, recently in a stressful new business venture, his anxiety continues to plague him. In my view, it is likely to continue to do so in the future.
- [100] In all the circumstances, and considering the principles and factors set out in Stapley and the authorities provided by the parties, I find an appropriate non-pecuniary damages award to compensate Mr. Tyler for his injuries is \$85,000.

Loss of Earning Capacity

Past Wage Loss

Legal Principles

- [101] The legal principles with respect to past loss of income were helpfully explained by Justice Goepel in *Grewal v. Naumann*, 2017 BCCA 158:
- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities

- [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
- [29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [102] 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. The assessment of damages is not simply a mathematical calculation. It is the loss of capacity to earn income that is compensable, the "damage to the asset": *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. That said, economic and statistical data can be helpful in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [103] The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, leave to appeal ref'd [2003] S.C.C.A. No. 221; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

Analysis

- [104] To determine Mr. Tyler's past loss of earning capacity it is important to examine Mr. Tyler's pre-Accident income. In 2015, Mr. Tyler made no income. This was the year in which he sold his equipment from Flying Squirrel CNC and moved to British Columbia.

- [105] From 2016 to 2018, Mr. Tyler operated his business Spidercut CNC. In 2016, Mr. Tyler earned a net income of \$29,900 from this venture. In 2017, Mr. Tyler earned a net income of \$52,084 from Spidercut.
- [106] The Accident occurred on February 16, 2018.
- [107] In 2018, Mr. Tyler made \$13,000 from his tear-drop trailer venture and the sale of one CNC machine. In 2019, Mr. Tyler made \$6,500 from one of the remaining sales of his tear-drop trailers. In 2020, Mr. Tyler earned a net income of \$25,695 from his mask selling business.
- [108] Mr. Peever, an economist, was called by the plaintiff. He was qualified to give expert evidence on estimates of past and future loss of earnings. He provided a report dated July 23, 2021, in which he provided various economic multipliers and made various calculations associated with Mr. Tyler's losses.
- [109] Mr. Peever assumed that absent the Accident, Mr. Tyler's annual earnings as a machinist could have been equal to his earnings in 2017 (approximately \$52,084), adjusted for inflation. He also assumed that absent the Accident, Mr. Tyler would have continued working as a self-employed machinist until his retirement. He provided three different retirement dates: age 65, 67, or 70.
- [110] Mr. Peever calculated Mr. Tyler's total net past loss of earnings to be approximately \$130,000 after tax. He applied a 15.2% effective tax rate. Mr. Tyler acknowledges that he had no income loss in 2021 and therefore reduces this calculation to approximately \$100,000
- [111] The defendant challenges the plaintiff's calculations. The defendant contends that the plaintiff's injuries may have impaired his ability to operate his business for approximately two months following the Accident, as the plaintiff reported to Dr. Spivak. His injuries did not impact his ability to earn income beyond that period of time. The defendant argues that the plaintiff has never operated a business or been employed in any one particular area for longer than three years. The plaintiff has changed businesses many times over the years. Based on this employment history, the defendant argues that the plaintiff has never operated a stable business and this would not have changed absent the Accident.
- [112] The defendant emphasizes that Mr. Tyler was behind in his work before the Accident, that he had customers in places as far away as Alberta and Saskatchewan, and he was travelling to fill his customer's orders, which he admitted was a mistake because he got behind in his schedule. The defendant notes that Mr. Tyler reported to his counsellor that the ability to self-supervise, to multi-task, and manage his time was never his strong suit.
- [113] I accept the past income loss calculations of Mr. Peever and find that Mr. Tyler would have continued to have an income of \$52,000 absent the Accident. However, I agree with the defendant that Mr. Tyler did not have a consistent employment history. I note that Mr. Tyler made \$52,000 in 2017. However, in 2015, he earned no income and in 2016 he earned only \$29,900. This fluctuation in income is illustrative of Mr. Tyler's unstable employment history. In determining Mr. Tyler's past wage loss, I must account for the possibility that

even if Mr. Tyler had not been injured in the Accident, he may have changed business ventures and had a reduced income. I must consider this contingency to ensure the assessment is fair to both parties.

[114] In the circumstances, I find there is a 60% probability that Mr. Tyler would have continued to have stable business income and continued to make at least \$52,000 between 2018 and the date of trial even if the Accident had not occurred. As a result, Mr. Tyler's wage loss of \$100,000 should be reduced by 40% to account for this contingency.

[115] I award Mr. Tyler \$60,000 for his past wage loss. I leave it up to the parties to adjust the calculation, if necessary, to determine the net amount.

Loss of Future Earning Capacity

Legal Principles

[116] In determining a claim for loss of future earning capacity, the court must consider two questions. First, has the plaintiff's earning capacity been impaired by their injuries? To answer this question in the affirmative, there must be sufficient evidence that there is a real and substantial possibility of future income loss. Second, if so, what compensation should be awarded for the resulting financial harm that will accrue over time?: *Hoy v. Williams*, 2014 BCSC 234 at para. 153.

[117] The BC Court of Appeal recently released a trilogy of cases which attempt to clarify the procedure trial courts should use in assessing a plaintiff's future loss of earning capacity: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421.

[118] In *Dornan*, at para. 156, Justice Grauer cited *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, where the Court described an award for loss of earning capacity as follows:

[32] An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8

[119] In *Rab*, Grauer J.A. set out a three-step test for assessing a plaintiff's claim for loss of future earning capacity:

[47] a three-step process emerges 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, 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.

- [120] In regard to the first step of the Rab test, this Court must determine whether, on the evidence, there is a real and substantial possibility of a future event leading to an income loss, in addition to that already lost as a result of the Accident: Rab at para. 33. The potential future event that may lead to further loss of earning capacity may be one caused by the loss of capacity suffered as a result of the accident (e.g., the possibility that accident-related injuries worsen): Rab at paras. 48, 60. This is not assessed on a balance of probabilities. Rather, it is measured by whether there is sufficient evidence that there exists a real and substantial possibility of future income loss and not mere speculation: Grewal at para. 48.
- [121] If step one is answered in the affirmative, the second step of the Rab test asks whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff. The case law suggests a number of factors which are relevant to determining whether there is a real and substantial risk of pecuniary loss:
- a) The plaintiff's intention to keep working and what they intend to do for work: Rab at para. 60;
 - b) The plaintiff's inability to devote the same energy or hours to their pre-accident occupation: Rab at para. 60;
 - c) The plaintiff's work history: Rab at para. 60;
 - d) The plaintiff's medical conditions: Lo at para. 97; and
 - e) The plaintiff's intentions concerning their future lifestyle, and the risk inherent in those plans: Dornan at paras. 119-130.
- [122] The third step of the Rab test asks what is the value of that possible future pecuniary loss, which requires an assessment of the relative likelihood of the possibility occurring. At this stage there are two possible approaches: the "earnings approach" and the "capital asset approach": Rab at paras. 66-68; Grewal at para. 48; Perren v. Lalari, 2010 BCCA 140 at para. 32. Both of these approaches are correct. The earnings approach is more useful when the loss is easily measurable: Perren at para. 32. The capital asset approach is more appropriate where the loss is not measurable in a pecuniary way: Perren at para. 12.
- [123] While assessing an award for future loss of income is not a purely mathematical exercise, the court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss: Jurczak v. Mauro, 2013 BCCA 507 at paras. 36-37; Morgan v. Galbraith, 2013 BCCA 305 at para. 54; Knapp v. O'Neill, 2017 YKCA 10 at para. 17.

- [124] Following this three-step test, the court must determine whether the proposed damages award is fair and reasonable: Lo at para. 117.
- [125] If the quantification of the loss is to be proven on the capital asset approach, the well-known factors identified in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8, 1985 CanLII 149 (S.C.), and re-affirmed by the Court of Appeal in *Rab* at para. 35, are considered:
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 them, had they not been injured; and
 4. The plaintiff is less valuable to themselves as a person capable of earning income in a competitive labor market.
- [126] The assessment of loss of future earning capacity must be based on the totality of the evidence and take into account both positive and negative contingencies: *Gregory* at para. 33. Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622, 74 D.L.R. (4th) 1 at 15 (C.A.).

Analysis

- [127] The plaintiff seeks an award in the range of \$60,000 to \$120,000 for loss of future earning capacity. Mr. Tyler's claim is based on his submission that, but for the Accident, he would have continued with his Spidercut CNC business venture. Mr. Tyler submits that as a result of the psychological injuries he sustained in the Accident (most notably, his anxiety and inability to concentrate), he was unable to keep up with the tasks at his business.
- [128] Turning to the first question from the three-step test set out in *Rab*: does the evidence disclose a potential future event that could lead to a loss of capacity?
- [129] I have found that the plaintiff suffers from anxiety and lack of concentration that has not resolved since the Accident. In my view, Mr. Tyler likely will continue to suffer from his psychiatric injuries for the foreseeable future. Dr. Spivak's report and evidence supports this conclusion. Dr. Spivak found that Mr. Tyler suffers from generalized anxiety disorder which causes his lack of concentration and focus. Dr. Spivak opined that "Mr. Tyler's prognosis is fair In the aftermath of the accident, he has developed anxiety symptoms, which have become somewhat chronic in nature" (emphasis added).
- [130] Dr. Spivak further opines that Mr. Tyler's symptoms have "plainly impacted his ability to engage in his employment". As he explained:

Mr. Tyler's level of impairment could be said to be in the realm of moderate. A rating of moderate is appropriate, given the impact that it has had on his ability to function on a day-to-day basis. Mr. Tyler was previously a man who functioned effortlessly within his work and took great pleasure within the same. Despite his frustration over not being able to "get it together", he continues to struggle with taking care of tasks that were previously effortless for him. This is due to the fact that his concentration and focus have been affected by his anxiety and continues to affect him on a daily basis. The symptoms have become significant enough that they are now manifesting with panic attacks. It is possible that these surges of emotion that he was experiencing before were panic-like episodes as well. His symptoms have plainly impacted his ability to engage in his employment. He has experienced a significant downturn in his business in the face of his symptoms. He has recently made a significant change in his vocation in order to accommodate the change in his cognitive functioning.

[Emphasis added.]

[131] I accept Dr. Spivak's opinion that as a result of his psychological injuries, Mr. Tyler's ability to work at jobs that require significant concentration in the future may be limited. Thus, I find that the factors identified in Brown are present: Mr. Tyler has been rendered less capable overall from earning income from all types of employment, is less marketable or attractive as an employee to potential employers, has lost the ability to take advantage of all job opportunities which otherwise might have been open to him had he not been injured, and is less valuable to himself as a person capable of earning income in a competitive labour market.

[132] In my view, the evidence establishes that Mr. Tyler's psychological injuries sustained in the Accident could lead to a loss of future income earning capacity.

[133] Turning to the second question from the three-step test set out in Rab: has the plaintiff established a real and substantial possibility of a future income loss as a result of his ongoing anxiety and concentration issues? Mr. Tyler is required to prove a real and substantial possibility of a future income loss, and not mere speculation, in order to recover damages for loss of future earning capacity: Grewal at para. 48.

[134] As a result of his Accident-related injuries, Mr. Tyler ceased operating his Spidercut CNC business. Mr. Tyler provided evidence that in his new business venture he has had to make adjustments to the way in which he works to accommodate his psychological injuries. Mr. Tyler has altered his usual work process in order to gain efficiencies, he has made changes to his workstations, and he has hired his son to assist him.

- [135] I do not accept the defendant's arguments that there is no real and substantial possibility of a future event occurring which will result in a loss of earnings. While Mr. Tyler's physical injuries will not affect his employment, I am not persuaded that his anxiety will not be problematic in the future. While Mr. Tyler may not have been the most efficient worker pre-Accident, I accept that Mr. Tyler suffers from anxiety and reduced concentration and focus as a result of the psychological injuries he sustained during the Accident.
- [136] In my view, Mr. Tyler has established that he suffers from psychological injuries that may impair his ability to earn income in the future. Based on Mr. Tyler's testimony and the opinion evidence of Dr. Spivak, I find that there is a real and substantial possibility that Mr. Tyler will continue to be plagued by lack of concentration and focus in the future that will result in a real and substantial possibility of a future income loss.
- [137] Turning now to the third step in the test set out in Rab: assessing the value of the possible future loss, which must include assessing the relative likelihood of the possibility occurring.
- [138] I accept the evidence that with proper treatment Mr. Tyler's anxiety and lack of focus and concentration will likely be at a mild to moderate level.
- [139] It is particularly difficult to assess the value of a loss of earning capacity in circumstances where the plaintiff has continued to earn income at or near their pre-accident level. Damages for loss of future earning capacity in such cases tend to be assessed using the capital asset approach: *Kim v. Baldonero*, 2022 BCSC 167 at para. 92. The capital asset approach is more appropriate when the loss is not as easily measurable in a pecuniary way: *Perren* at para. 12.
- [140] Here, Mr. Tyler is working in the same field as he was pre-Accident and his income has recently increased to well-above his pre-Accident level. In 2021, as a result of his new business venture, Revy CNC, Mr. Tyler earned approximately what he earned in 2017 (\$52,000). However, in the first quarter of 2022, Mr. Tyler testified that he earned income of approximately \$150,000. The significant increase in his earnings makes it difficult to assess Mr. Tyler's future pecuniary loss.
- [141] I find that Mr. Tyler's future loss of income is not easily measurable in a pecuniary way. Thus, I find that the capital asset approach is the most appropriate way to quantify Mr. Tyler's loss of future income earning capacity.
- [142] The plaintiff submits that if this Court chooses to quantify Mr. Tyler's loss of income earning capacity using the capital asset approach, a range of one to three years of Mr. Tyler's annual income (\$52,000) would be appropriate. The defendant submits that this Court should use the capital asset approach: one year of the plaintiff's average earnings in the two years prior to the Accident (\$40,992). Given that Mr. Tyler made \$52,000 in 2021, I find the defendant's calculation to be artificially low.

- [143] As stated by Justice Horsman (as she then was) in *Kim*, citing *Kania v. Evans*, 2021 BCSC 797 at para. 91, "[i]n cases where courts have used one or more years of a plaintiff's pre-accident earnings to quantify the loss -- as suggested at para. 43 of *Pallos* -- a range of one to two years of income is usually applied": at para. 100.
- [144] Relying on *Kim* and *Kania*, I consider it reasonable to base the assessment of Mr. Tyler's possible future income loss on one to two years of his pre-Accident income. In the circumstances, I find two years' income should be awarded to Mr. Tyler for the loss of his future earning capacity.
- [145] However, I must account for certain contingencies in assessing the relative likelihood of Mr. Tyler's future income loss occurring. For example, it is possible that Mr. Tyler will not suffer a future income loss at all because his condition will improve as a result of treatment. This contingency is supported by Dr. Spivak's expert evidence that Mr. Tyler's symptoms may resolve with more aggressive treatment, including a referral to a cognitive behavioural therapist or psychiatrist. Conversely, I must account for the contingency that Mr. Tyler will experience a greater loss of income in the future than presently anticipated if his symptoms worsen or the changes he has made to his working process do not adequately accommodate his injuries in the long-term. In my view, an award of damages that approximates two years of Mr. Tyler's pre-Accident income balances the likelihood of these contingencies. Accordingly, I award Mr. Tyler \$104,000 in damages for future loss of earning capacity.

Mitigation

- [146] The principles regarding mitigation were articulated many years ago by Chief Justice Laskin in *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at 330-331, 57 D.L.R. (3d) 386:
- The primary [compensatory] rule . . . is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages . . . The extent of [recoverable losses] may depend on whether [the plaintiff] has taken reasonable steps to avoid their unreasonable accumulation.
- [147] The law is clear that Mr. Tyler is not entitled to recover damages that he reasonably could have avoided. He has a positive duty to take reasonable steps to minimize his losses brought about by the Accident: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1; *Chiu v. Chiu*, 2002 BCCA 618; *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 233.
- [148] The onus is on the defendant to prove that Mr. Tyler could have avoided all or a portion of his loss. Where the defendant asserts that the plaintiff has not mitigated their damages by failing to pursue a recommended course of treatment, the defendant must prove: (i) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (ii) the extent to which the plaintiff's damages would have been reduced had they pursued the treatment: *Chiu* at para. 57, citing *Janiak*.

- [149] In his report, Dr. Spivak discussed the treatment Mr. Tyler has pursued to address his psychological injuries. Dr. Spivak notes that "Mr. Tyler's symptoms have thus far only been managed with trials of two antidepressant medication, which he has not completely tolerated" and he "has not seen a mental health professional for psychotherapy". Dr. Spivak suggests that "more aggressive management", including referral to a cognitive behavioural therapist or psychiatrist may help to resolve Mr. Tyler's psychological injuries.
- [150] Mr. Tyler attended four counselling sessions following the Accident. He stopped because he did not want the sessions to go on forever. He has not followed Dr. Spivak's recommendations in this regard. He has not taken reasonable steps to minimize his losses in that he has failed to avail himself of psychotherapy or cognitive behavioural therapy. Mr. Tyler's failure to pursue either is significant given that the primary aspect of his damages, his future loss of income earning capacity, is grounded in his ongoing anxiety and lack of concentration/focus. Dr. Spivak's opinion is that Mr. Tyler's prognosis is fair and that his anxiety and lack of concentration may resolve, or at least improve, with more aggressive management. In these circumstances, I accept that Mr. Tyler could have minimized his losses had he attended psychotherapy and/or cognitive behavioural therapy.
- [151] In my view, Mr. Tyler's failure to attend either type of therapy since receiving Dr. Spivak's recommendations is a failure to mitigate his damages. I am satisfied that the defendant has established that Mr. Tyler's damages would have been reduced by pursuing further psychological treatment. As a result, I reduce Mr. Tyler's loss of future earning capacity award by 30% for his failure to mitigate his damages.

Future Costs of Care

Legal Principles

- [152] 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. When full restoration cannot be achieved, the court must strive to compensate the plaintiff through the provision of adequate future care. The award is to be based on what is reasonably necessary based on medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (S.C.); *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [153] The appropriate approach to be taken in assessing future care costs is set out in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9:
- [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from

what the evidence at trial indicates.

- [22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require.
- [154] Future care items must be medically necessary. There must be an evidentiary link between the medical experts' assessment of disability and the recommended care: *Paur v. Providence Health Care*, 2017 BCCA 161 at para. 109. In addition to establishing the costs are reasonably necessary, the plaintiff must establish they will likely incur these costs. If a plaintiff has not used a particular service in the past, it may be inappropriate to include it in a cost of future care award: *Langille v. Nguyen*, 2013 BCSC 1460 at para. 233.

Analysis

- [155] Ms. Fiona Fleming, an occupational therapist, was called by the plaintiff. She was qualified to opine on functional capacity impairments and costs of future care. She reviewed various records associated with Mr. Tyler and interviewed him on June 1, 2021 (for one hour) and June 3, 2021 (for one and a half hours). She provided a report dated July 7, 2021.
- [156] The defendant submits that this Court should give little weight to Ms. Fleming's evidence because she did not physically examine the plaintiff, she did not conduct the physical tests that an occupational therapist typically conducts, and therefore she did not conduct a full functional capacity evaluation. I agree. Given that Ms. Fleming did not examine Mr. Tyler in person, I give little weight to her opinion evidence.
- [157] Mr. Tyler seeks compensation for physiotherapy and psychotherapy. Mr. Peever, an economist, provided present value calculations of Mr. Tyler's future costs of care. Removing his request for Mirtazapine, which Mr. Tyler did not tolerate, and relying on the present value costs of the recommendations, as shown at pages 26 and 27 of Mr. Peever's report, Mr. Tyler requests a future cost of care award in the amount of \$10,000.
- [158] The plaintiff relies on Dr. Rajasekaran's expert testimony that if he did not undertake physiotherapy, it would impair his ability to improve his musculoskeletal injuries. However, I am not satisfied that Mr. Tyler would pursue physiotherapy in the future. Dr. Rajasekaran recommended this treatment to Mr. Tyler in April 2021, yet by the time of trial almost a year later, Mr. Tyler had not taken any steps to begin such treatment. I believe there is a 50 percent chance Mr. Tyler will pursue physiotherapy. I therefore award \$3,832.50 for these treatments.
- [159] With regard to Mr. Tyler's claim for psychotherapy, the plaintiff relies on Dr. Spivak's recommendation that Mr. Tyler receive treatment from a cognitive behavioural therapist or psychiatrist. However, I am not satisfied that Mr. Tyler would pursue psychotherapy if I award its future cost. While psychotherapy would likely be of assistance to Mr. Tyler, Dr. Spivak made this recommendation in November 2018 and since then Mr. Tyler has not sought any psychotherapy or pursued cognitive behavioural therapy to address his mental

health concerns.

[160] In all the circumstances, I am not persuaded that Mr. Tyler will pursue psychotherapy or cognitive behavioural therapy in the future. As such, I decline to make an award for the cost of these therapies.

Conclusion

[161] Mr. Tyler is entitled to the following damages:

Non-pecuniary Damages

\$85,000

Past Wage Loss

\$60,000 (gross) (\$100,000 reduced by 40%)

Future Loss of Earning Capacity

\$72,800 (\$104,000 reduced by 30%)

Cost of Future Care

\$3,832.50

TOTAL

\$221,632.50

Costs

[162] Subject to circumstances of which I am unaware, the plaintiff is entitled to his costs of the action at Scale B. Should the parties wish to make submissions on costs, they may arrange to do so with Supreme Court Scheduling. Any such arrangements must be made within 45 days of the date of these Reasons for Judgment.

"D. MacDonald J."

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