

CANADA / JUDGMENT

Weterings v. Liang

2022 BCSC 2158

COURT

Supreme Court of British Columbia

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2022 BCSC 2158 Weterings v. Liang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weterings v. Liang,

2022 BCSC 2158

Date: 20221209

Docket: M135456

Registry: Vancouver

Between:

Michael Weterings

Plaintiff

And

Yaoying Liang, and

Mercedes-Benz Financial Services Canada Corporation/

La Corporation de Services Financiers Mercedes-Benz Canada

Defendants

Before: The Honourable Justice Caldwell

Reasons for Judgment

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Place and Dates of Trial/Hearing:

Vancouver, B.C.

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Place and Date of Judgment:

Vancouver, B.C.

December 9, 2022

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- [1] The plaintiff, Michael Weterings, seeks damages for injuries suffered in a motor vehicle collision which occurred on September 26, 2011. Liability has been admitted. However, the cause and extent of injuries, and the consequent effects and damages suffered in relation to those injuries, are disputed. The most contentious issue here is that of income loss, both past and future.
- [2] The plaintiff was in a subsequent collision in 2012, but that matter has resolved in principle and awaits the outcome of this action in order to quantify that settlement. The fact of the occurrence of that subsequent collision was submitted before me, but little, if anything, was submitted in terms of the details or quantifiable effects of the 2012 collision.

THE PLAINTIFF

- [3] The plaintiff is 63 years old. He has had widely varied life experiences and education, including:
- an early interest in music in high school and church settings;
 - work in lumber mills in Mission;
 - a few semesters at Trinity Western University;
 - pilot's training and licencing, including as a commercial pilot;
 - three years of world travel; and
 - a Bachelor of Science degree from the University of British Columbia in 1989 and a Masters of Health Administration from UBC in 1992.
- [4] By 1993, he determined that only one of his previous interests represented his true passion in life and he began his pursuit of a career in music. He enrolled in Capilano College and, from 1993 to 1996, studied and worked to develop his skills.
- [5] In order to finance his studies and his living expenses, he worked in the commercial fishing industry during the summer months. This continued beyond 1996, when he left Capilano College and began pursuing his career in music - writing and performing his own musical compositions. He was and remains committed to only performing his own original songs. He does not perform "cover versions" of songs written by other musicians or composers.
- [6] Beginning around 1996, the plaintiff "hustled" - he self-promoted and sought "gigs" at bars, coffee shops, and open mics where new and upcoming entertainers were given opportunities to perform before a live audience.
- [7] He obtained a grant and, with the help of that money, recorded and released an album titled "Aluminum Sea" in 1998. He gave away approximately 1,000 copies of the album as promotional material and sold a further 1,500 copies. Financially, the album was basically a "break even" project.
- [8] The album was nominated for two West Coast Music Awards. The plaintiff was ranked in the top ten on one listing of North American songwriters. His band was the opening act for the band Glass Tiger, on at least one occasion. They also won a "Battle of the Bands" competition once.
- [9] Following the release of Aluminum Sea, the plaintiff and three other band members embarked on a two-week long, 12-city performance tour in Ontario. Over the next three to four years, he arranged similar tours in Western Canada.

- [10] Throughout this period of time, he continued to work in commercial fishing on a seasonal basis to pay the bills. He occasionally worked as a teaching assistant through the UBC Faculties of Medicine, Dentistry and Nursing. He also worked part-time giving music lessons to children.
- [11] By approximately 2004, the plaintiff realized two things. First, his audiences were dropping in numbers and interest. This meant that in order to continue, he needed new material and he needed to produce a new album for release. Second, he had developed a growing interest in real estate, particularly making money in the real estate investment business. He began taking courses in pursuit of this interest.
- [12] He had a catalogue of songs written in the late 1990s and early 2000s, and began recording for the new album in about 2004. That album has never taken final shape or been released.
- [13] He continued to hustle and pursue solo gigs throughout the Lower Mainland, on his own and later with the help of a booking agent.
- [14] During these years and up to approximately 2011, he took great interest in learning the engineering side of the music business and worked extensively with Anthony Polanowski to become familiar with a musical engineering software called ProTools.
- [15] In 2008, he purchased a home in Vancouver that he renovated and rented out to tenants. He continued to rent a separate residence where he lived and maintained his studio.
- [16] Prior to the collision, the claimant was healthy and reasonably active. He exercised somewhat regularly, ran and skied when time and finances allowed. He had suffered injuries in previous car collisions but had, for the most part, worked through those injuries and symptoms. He was an active self-promoter in the music industry and, by all accounts, a high-energy and entertaining performer on stage.

THE COLLISION

- [17] The collision was minor in nature. The plaintiff was rear-ended at very low speed. After the appropriate exchange of information with the defendant, the plaintiff carried on to West Vancouver. He performed a gig that evening but has no recollection of having done so.

FOLLOWING THE COLLISION

- [18] The plaintiff awoke the following day "stiff and sore", noting pain on his right side, his upper back and neck, and up over the top of his skull. He also experienced headaches, a brain fog, and the onset of fatigue and anxiety. These symptoms, particularly the neck pain and fatigue, have persisted and continue to some extent to this date. These symptoms continue to negatively affect his personal, social, and professional life.

[19] The plaintiff consulted his family doctor on September 28, 2011; October 20, 2011; December 1, 2011; February 10, 2012; and approximately every two to four months thereafter until the spring of 2015; and somewhat less frequently after 2015. He has been referred to and has participated extensively in active rehabilitation/kinesiology, physiotherapy, massage therapy and counselling, among other things. He has been prescribed a variety of medications for his symptoms and has experimented with naturopathic supplements. He continues to pursue relief from his symptoms by these and other means.

THE PLAINTIFF'S LAY WITNESSES

Reed Hortie

[20] Mr. Reed Hortie is 63 years old and is a realtor and software instructor. He met the plaintiff over 20 years ago, when he was tending bar and the plaintiff was performing at the Backstage Lounge. He liked the plaintiff's music and performances and they became friends. He described the plaintiff as gregarious and as having a certain joie de vivre - "a high-energy musical genius". He saw the plaintiff perform probably twice per month from the late 1990s to around 2012.

[21] In 2008, the plaintiff used Mr. Hortie in his capacity of real estate agent to help him locate and buy a home in Vancouver. Their friendship developed a further symbiotic business aspect - the plaintiff sent friends and associates to Mr. Hortie for real estate matters and Mr. Hortie sent and brought friends to the plaintiff's performances.

[22] By 2012, Mr. Hortie noticed a precipitous drop in the plaintiff's spark of life. He was less engaged with his audiences, and did not dance as much or as energetically. Socially, their relationship waned as the plaintiff seemed to be either tired or napping, to the extent that they rarely even managed to meet at the local Starbucks for coffee.

Kent Rock

[23] Mr. Kent Rock is 52 years old and is a composer and music producer who is largely involved in arranging musical scores for film.

[24] Mr. Rock met the plaintiff in or about 2010, at the Fairmont Pacific Rim. He was tending bar and the plaintiff was performing. He saw the plaintiff perform almost weekly over the next eight years and enjoyed his music and high-energy performance. He noted that the plaintiff only played his own original music, refusing to perform cover versions of music written by others. He likened the plaintiff's musical style to that of Paul Simon, with its African influence and rhythms. Since 2012, he has noted that while the plaintiff's performances have remained "really good", he is clearly more drained after his gigs and appears tired overall.

[25] For the last five to six years, Mr. Rock has worked almost exclusively placing songs and music into film scores. He explained the process of licencing songs for use in films, including up front payment and ongoing royalty payments.

- [26] Mr. Rock has an extensive library of licenced songs from which to draw for his purposes. They tend to be songs written by friends, acquaintances, and other relatively new artists who are starting out and/or are seeking exposure and some income should their music make it into a film. He can also access songs from online sources such as Spotify and from specialized "library music" websites, but these tend to be much more expensive to use.
- [27] Mr. Rock has several of the plaintiff's songs in his library and at least one of his songs has been placed in a film soundtrack.
- [28] He also explained the process of song-writing, recording, engineering, and producing. He identified and explained some of the important equipment required for these tasks including ProTools, which he described as the industry standard.
- [29] In the right hands, this software can take recordings of voices, instruments, percussion and the like as essentially a large lump of musical clay and, by extensive computer manipulation, turn it into a digital audio version of Michelangelo's David - a polished, digital creation that bears little if any resemblance to the raw musical materials from which it sprang.

Anthony Polanowski

- [30] Mr. Anthony Polanowski is 53 years old and is a musician and music editor. He is highly experienced in the use of ProTools, which he also described as the industry standard.
- [31] Mr. Polanowski has known the plaintiff since the mid 1990s and has worked with him for two extended periods: first, from 2006 to 2011; and then again, from 2014 to 2021.
- [32] Both periods involved digitally editing and polishing songs written and performed by the plaintiff, for the purpose of producing and releasing a second album. The work was done in the plaintiff's basement studio.
- [33] During the first period up until 2011, the plaintiff was very involved in the process - he hovered over Mr. Polanowski, contributing as he could and learning about the editing process and ProTools. He was also gigging extensively during this period and carrying on an active lifestyle.
- [34] During the second period, which followed the collision, the work continued on the same basic catalogue of songs to further prepare or polish them for release in the form of an album. The plaintiff was less involved in the process during this time. He tended to give Mr. Polanowski a list of tasks to be done and leave him to the work. Mr. Polanowski observed the plaintiff to have less energy, to nap often, to not be as upbeat, and to not understand or grasp concepts as well.

Bryan Spicer

- [35] Mr. Bryan Spicer is a film director and producer. His main work is placing music into films and he has been doing that for several years. He testified about the process of placing songs into films and the financial benefit to the individual song-writer. In general, well-known songs and song-writers tend to demand relatively high compensation for use of their work, whereas unknown or lesser known artists command considerably lower licencing fees or royalties.
- [36] Mr. Spicer met the plaintiff several years ago, enjoyed his song-writing and performances, and over time they became friends. He has tried to place various pieces of the plaintiff's music into his films and productions several times but without success. He is only able to make recommendations - the decision regarding what music to place in a given film is made by those higher in the production hierarchy than Mr. Spicer.
- [37] Mr. Spicer lives in Hawaii and the plaintiff comes to stay with him for a couple of weeks each year, generally to relax and work on music. Following the collision, he felt that the plaintiff seemed to be in pain and was quite lethargic.

Carol Siebert

- [38] Ms. Carol Siebert is a registered clinical counsellor who began seeing the plaintiff as a patient in June 2002. Their sessions normally lasted approximately 55 minutes and covered a wide range of topics or subjects, from family and relationships to the ups and downs of the music industry. Her main role was to listen, assess, ask open-ended questions, and give feedback.
- [39] It is clear that both before and after the collision the claimant spoke positively and negatively about his life and about the music industry - his financial vulnerability, concerns about loss of creativity, loss of exposure and audiences, and other similar matters. Some of the many critical comments attributed to the plaintiff in Ms. Siebert's notes prior to the September 2011 collision include:
- I've lost energy around my album; musically it is very slow (February 2011).
 - I can't write; maybe my music has run its course (2004).
 - I haven't been writing, the music is gone (February 2009).
 - My agent phoned telling me I need to change my music, I was shocked (June 2009).
 - I heard they are cancelling one of my gigs; I'm burned out; I've been asked to produce a CD; I'm fearful I will lose on income; I'm fearful there's nothing better; I'm scared it will get worse; I'm scared I will lose everything I built up (March 2011).
 - My music is too intelligent, too innovative (September 2003).

· The music industry is frustrating; it is costing me therapy, 30 years of my life, it is a horrible business (October 2007).

[40] Following the collision, Ms. Siebert noted that the plaintiff had gained weight, had less energy and was exhibiting anger, fear and anxiety. Their discussions shifted and focused more on the collision and its effects, although family and other relationships remained significant topics of discussion until the end of their sessions in December 2021.

Laura Levitt

[41] Ms. Laura Levitt is a kinesiologist. She met and began working with the plaintiff in February 2017, when his previous kinesiologist left on maternity leave. Her main focus was on his right shoulder, neck tension, his chest and thoracic spine, and involved functional movement. They initially met three times per week but, more recently, they aim at two sessions per week.

[42] Ms. Levitt had a loose plan for each session but always had to be prepared to adapt it based on the plaintiff's condition during that session. Approximately one-third of his sessions involved "bad days" - days in which he was experiencing a "crash day" from fatigue. On those days, she would note such things as swollen cheeks, face and eyes; and overall reduced range of motion in his neck, thoracic spine, lower back and hips.

[43] The early sessions usually involved simple, isolated movements but progressed into compound movements involving more muscle groups and joints. She found the plaintiff very focused, willing to put forth full effort, and willing to try all suggestions. She describes the sessions and his progress as "two steps forward, one step back". The sessions were interrupted by COVID-19 and she noted a significant regression upon his return.

[44] Although these sessions continue, the overall goal is to equip the plaintiff to perform these activities on his own and to eventually wean him off of the need for a kinesiologist to oversee and guide his sessions.

David Kwan

[45] Mr. David Kwan is a physiotherapist and holds a degree in Kinesiology. He first met with the plaintiff on October 18, 2011, at which time he did a basic assessment and sent him back to his family doctor to have x-rays done in order to rule out any possibility of fractures.

[46] Mr. Kwan's sessions with the plaintiff began in November 2011, and continued quite regularly until September 2020.

[47] By April and May 2012, Mr. Kwan was working on the plaintiff's posture and muscle control and steering the plaintiff toward increasing homework - home-based programs of activity and exercise. He noted in his evidence that when the plaintiff was exercising, he needed less physiotherapy.

- [48] Following a second collision in October 2012, Mr. Kwan noted that the plaintiff was again experiencing upper spine and back issues, and was back to "muscle protecting". By November and December, he was pushing the plaintiff to become more active and to exercise on his own; he had also arranged for the plaintiff to see a registered massage therapist in the same clinic.
- [49] Mr. Kwan testified that the plaintiff ebbed and flowed in terms of energy and fatigue but that fatigue was a consistent issue. It was worse in the early sessions in the fall of 2011, improved somewhat over time, worsened again after the second collision, and then continued on and off over time. He noted that when it was bad, the plaintiff could barely get up off of the bed/table.
- [50] In spite of Mr. Kwan's efforts, the plaintiff did not follow his recommendations for independent exercise and activity with any consistency.

THE PLAINTIFF'S EXPERTS

Dr. Smith

- [51] Dr. Derryck Smith is a psychiatrist. He interviewed the plaintiff once, on October 14, 2014, for approximately two hours.
- [52] Dr. Smith indicated that while he had no recollection of the actual meeting, his normal practice is to review the documents provided to him, then conduct the interview, and review the documentation again in light of the interview prior to finalizing his report. He expected that he followed that process in the case of Mr. Weterings. He did not have nor did he review the notes of the plaintiff's clinical counsellor, Ms. Siebert.
- [53] Dr. Smith referenced and uses the DSM-5, The Diagnostic and Statistical Manual of Mental Disorders, 5th Ed. (Washington, DC: American Psychiatric Association, 2013), as the North American standard manual for psychiatric diagnosis. He did not diagnose the plaintiff with Post Traumatic Stress Disorder. He did diagnose the plaintiff as having Adjustment Disorder with Anxiety specifically related to the collisions of September 2011 and October 2012. He referred to the description of that disorder found and described at pp. 286-287 of the 2013 edition of the manual, and he read and commented as follows:

The development of emotional or behavioral symptoms in response to an identified stressor occurring within three months. The symptoms are clinically significant and evidenced and marked with stress and significant impairment. The stress related disturbance does not meet the criteria for other psychiatric diagnoses, is not bereavement and once the stressor or its consequences have terminated the symptoms do not persist beyond an additional six months.

- [54] Dr. Smith noted the neck and back pain and vertigo in his report because they were driving or contributing to the plaintiff's psychiatric issues.

- [55] Much of Dr. Smith's report simply catalogued what the plaintiff had told him in the interview and what the documents he reviewed had indicated. He seemed to relate the diagnosis to the collision but he at no point expressed the opinion that the condition or disorder was caused by the collision. He did not indicate what, if any, disabilities or limitations - physical, emotional, or otherwise - are associated with such disorder. He did not indicate whether or not there was any ongoing form or regime of treatment or medication for the disorder or, if so, whether that had been discussed with the plaintiff. The exception to this was his indication that the plaintiff should continue his activity level and attend twelve sessions with a qualified psychologist.

Gordon Milne

- [56] Mr. Gordon Milne is an economist and provided expert evidence regarding past and future income loss in a report dated February 7, 2022. I discuss the contents of this report in the damages analysis section below.

Dr. Hershler

- [57] Dr. Cecil Hershler is a physiatrist, now retired. He provided two expert reports on behalf of the plaintiff: the first in May 2015, and the second in April 2018. He diagnosed the plaintiff with chronic myofascial pain in the neck and upper back, associated cognitive dysfunction/mental fogging, sleep disturbance, and fatigue. It was Dr. Hershler's opinion that these injuries and symptoms are caused by the 2011 and 2012 motor vehicle collisions.
- [58] Dr. Hershler expects the symptoms to persist but recommended that the plaintiff continue sessions with a kinesiologist and supplement that with at-home exercise on his own. He found nothing disabling the plaintiff from undertaking an independent exercise program or continuing to work as a performer, albeit at a reduced level.
- [59] Dr. Hershler also saw the plaintiff in the mid-1990s regarding previous motor vehicle collisions, injuries, and symptoms. Due to then-existing sleep problems, he recommended against any form of shift work. Despite that recommendation, for many years the plaintiff continued his seasonal work in the fishing industry, including work at irregular hours, in order to support himself financially.

Dr. Kurdyak

- [60] Dr. Stephen Kurdyak became the plaintiff's family doctor in 1997, and continued in that role until he began shifting towards semi-retirement. He provided two reports in this proceeding: the first dated June 22, 2015, and the second dated July 10, 2018.

- [61] Dr. Kurdyak had dealt with the plaintiff regarding two previous motor vehicle collisions that occurred in 1996 and 1997. Those collisions involved soft tissue injuries, some chronic pain, and work interruption. There had been no complaints of pain from these incidents after 2000 and up to 2011. Dr. Kurdyak considered those symptoms to have resolved from a medical standpoint.
- [62] The plaintiff attended Dr. Kurdyak's office two days after the September 26, 2011 collision. He reported neck pain and headache. He returned on October 20, 2011, again reporting pain and stiffness, headache, and dizziness. Dr. Kurdyak diagnosed him with Grade 2 soft tissue injuries affecting the neck and shoulders, and recommended continued physiotherapy and added massage therapy. A cervical spine radiograph was also ordered, but revealed no acute findings attributable to the motor vehicle collision.
- [63] Over the next three to four years, the plaintiff attended Dr. Kurdyak's office every one to four months regarding symptoms arising from the September 2011 collision and later, the October 2012 collision. He sought and obtained referrals to specialists including those in the areas of physiotherapy, massage therapy, psychiatric assistance, physiatry and rehabilitative medicine, and sleep disorders. Throughout that period, his complaints remained reasonably consistent involving neck pain, headache, fatigue, and reduction in mental focus and concentration.
- [64] In the 2015 report, Dr. Kurdyak diagnosed the plaintiff with soft tissue injuries affecting the neck, shoulders, and lumbar areas due to the motor vehicle collisions. He notes that the prognosis for full recovery is poor and the plaintiff is more susceptible to future soft tissue injuries to the neck, shoulder and back.
- [65] In his second report in 2018, Dr. Kurdyak outlined further attendances by the plaintiff between July 2015 and April 2018. While less frequent, these attendances involved continuing complaints of neck, shoulder and upper back pain, along with fatigue and brain fog, consistent with the previous attendances. Dr. Kurdyak reiterated his previous diagnosis with somewhat greater detail in the second report, as well as his previously stated prognosis.

Dr. Arseneau

- [66] Dr. Richard Arseneau is an internal medicine specialist associated with the Complex Chronic Diseases Program at BC Women's Hospital. He has 20 years of clinical and teaching experience with myalgic encephalomyelitis/chronic fatigue syndrome ("ME/CFS"), fibromyalgia, and related central sensitivity syndromes.
- [67] Dr. Arseneau examined the plaintiff on December 14, 2021, and diagnosed:
- myofascial pain syndrome;
 - ME/CFS;

- tension type headaches;
- aggravation of temporomandibular disorder; and
- anxiety.

[68] I found Dr. Arseneau's evidence to be of very limited assistance for a variety of reasons, including:

- he acknowledged in cross-examination that there is no universal acceptance in the medical community as to the cause, appropriate diagnostic methods, or effective treatments for ME/CFS. At best he referred to the acceptance of ME/CFS as being "broad";
- chronic myofascial pain, including related headaches and fatigue, was previously diagnosed by other professionals and not seriously denied or even contested by the defendant;
- the reference to temporomandibular issues was essentially unsupported by the evidence, and he acknowledged that such diagnosis was outside of his area of expertise; and
- while all other experts recommended exercise, stretching, physiotherapy, and kinesiotherapist supervised or structured physical activity, Dr. Arseneau recommended inactivity and a sedentary approach to treatment.

THE DEFENDANTS' LAY WITNESSES

Greg Gorrie

- [69] Mr. Greg Gorrie is a musician, producer, music engineer, and instructor who began his career in the 1970s. Although he formally retired in 2010, he continues to operate a home-based music production studio and to perform and host open mic sessions throughout the Lower Mainland of B.C. He does not write or perform original material and noted that, in his experience, it is easier to get work performing cover versions of popular songs than it is performing only original material.
- [70] Mr. Gorrie is familiar with and has taught courses on the use of ProTools. His evidence regarding that software was consistent with the other witnesses from the music industry.
- [71] Mr. Gorrie outlined the various steps normally taken in producing music recordings, from discussing general goals and working up arrangements, to recording the various instruments and vocals, to mixing for proper balance, and ultimately mastering the final product. He provided rough estimates of the time normally taken for the various steps, but expressly cautioned against "going down a rabbit hole", which he described as trying to make everything perfect, because that standard will never be met.

Peter Allen

- [72] Mr. Peter Allen composes music for film and television from his studio in Vancouver. He received his training in Hollywood in 1986, has over 30 years of experience, and estimates that he has composed between 300 and 400 musical scores for film and television. A considerable amount of his work is done for Lifetime and Hallmark movies and involves a very low license fee.
- [73] In addition to his own original material, he has a library of other music from other composers and musicians. He has not met the plaintiff but did place one of the plaintiff's songs in a Lifetime made-for-TV movie in 2007. The plaintiff signed a master license agreement for \$1.00 and receives occasional royalties when the movie is aired. He describes the plaintiff as talented and as being a "known person" in the industry.

THE DEFENDANTS' EXPERTS**Shannon Smith**

- [74] Ms. Shannon Smith is a certified occupational therapist, and also a certified work capacity evaluator and cost of future care planner. She assessed the plaintiff on April 16, 2018, and produced a report on June 19, 2018.
- [75] The assessment took approximately seven hours in total, including a 30-minute lunch break and an interview period of slightly more than two hours. The testing took place during what are normally the plaintiff's best hours of the day - not during the evening, when he would normally be performing and would be more likely to be experiencing fatigue and low-energy. However, the plaintiff's fatigue level was somewhat heightened due to the fact that he had performed the previous night and had limited sleep.
- [76] It is worth noting that the plaintiff reported being "zoned out" for one to two days following the assessment and did not perform a "gig" until three days following the assessment. Ms. Smith noted that such symptoms are not uncommon following testing and that it is her practise to follow-up with test subjects regarding this information.
- [77] Ms. Smith noted that the plaintiff participated in the work capacity testing with nearly full-to-high levels of effort overall, and thus the test results are considered to be an accurate measure of his present physical capacity.
- [78] Based on his performance and testing results, Ms. Smith opined that the plaintiff is capable of working in the range of six consecutive hours as a performing musician. She noted some difficulties in transporting and carrying some of his musical equipment, as well as the energy required to "hustle gigs", i.e. actively seek work as a performing musician at different venues. She noted, however, that this would require him to "push through his symptoms" and incorporate "pacing strategies", such as napping on days when he will be looking for work and not combining this "hustling" with performance days. She testified that the plaintiff was coping quite well to manage his fatigue and that his efforts seemed reasonable.

CREDIBILITY AND RELIABILITY OF EVIDENCE

- [79] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, as follows:
- [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).
- [80] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 44.
- [81] The defence points to certain inconsistencies in the plaintiff's provision of information to various treaters over the years, as well as some inconsistencies in the evidence which he presented to the court.
- [82] In *Carvalho v. Angotti*, 2007 BCSC 1760, the court commented that:
- [15] It is a rare case of this kind where such inconsistencies cannot be found. By the time a personal injury case gets to trial, the plaintiff typically will have provided information to a number of people - including doctors, adjusters and disability insurers - on a number of occasions over a period of years. This provides fertile ground for cross-examination precisely because very few people will have perfect and identical recollection on each of those occasions.
- [16] The danger of giving too much weight to such inconsistencies was noted by Parrett J. in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:

First of all, the reports are those of a layperson going through a traumatic and difficult time
Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important.

- [83] In the later case of *Soltan v. Glasgow*, 2019 BCSC 1527 the court stated this idea even more concisely:
- [39] It cannot be expected that a plaintiff will, years after an accident, have a perfect recollection of sequences of events, treatments rendered, and other fine details. Cross-examination that takes the form of a test of a plaintiff's memory when there is such a gap in time is often unhelpful, and such slight inconsistencies are seldom sufficient to impugn a plaintiff's credibility generally.
- [84] In the present case, approximately 11 years has passed since the subject collision and approximately ten years since the second collision. The plaintiff has seen his family doctor literally dozens of times regarding his injuries and symptoms. He has seen additional specialists on several occasions on recommendation from his family doctor in order to address those symptoms. Absent the gift of total recall on the part of the plaintiff, I might be more suspicious of the absence of such inconsistencies.
- [85] Overall, I found the plaintiff to be a credible witness regarding the injuries which he suffered in the motor vehicle collision, the subsequent collision, and the symptoms which arose from those injuries. His evidence was supported in large part by his expert witnesses and by his lay witnesses. It was also supported, to a significant degree, by the evidence of the defence expert Ms. Smith. No contrary evidence was led by the defence and the plaintiff's evidence was not significantly eroded or weakened under cross-examination.
- [86] I am satisfied that the plaintiff sustained soft tissue or myofascial injuries which have resulted in a degree of chronic myofascial pain in the neck, shoulders, upper and lumbar areas of the back, along with related headaches, sleep problems, periodic fatigue, and mental foggy. These ongoing symptoms affect, to some degree, the plaintiff's day-to-day life, his social and domestic activities, and his chosen vocation as it relates to musical and vocal performance or "gigging."
- [87] On the evidence before me, I am satisfied on a balance of probabilities that the plaintiff suffered some worsening of his overall anxiety as a result of, or causally related to, either or both of the September 2011 collision and the October 2012 collision. The evidence and notes of Ms. Siebert clearly indicate to me that the plaintiff suffered from considerable anxiety related to his life situation and his vocational pursuit for years prior to these collisions. Either or both collisions served to add to that anxiety.

DAMAGES - EXECUTIVE SUMMARY

Non-Pecuniary Damages

[88] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89.

[89] In *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley], the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (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: *Giang v. Clayton*, [2005 BCCA 54].

[Emphasis omitted.]

[90] 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, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[91] Courts must still be "exceedingly careful" when assessing subjective reports of pain, especially where "complaints of pain persist for long periods extending beyond the normal or usual recovery": *Edmondson v. Payer*, 2012 BCCA 114 at para. 2 citing then-Chief Justice McEachern in *Price v. Kostryba* (1982), 70 B.C.L.R. 397, 1982 CanLII 36 (S.C.) at 399.

- [92] Prior to the September 2011 collision, the plaintiff was in generally good health. He did not provide detailed evidence about his recreational pursuits at that time but did refer to some travel, skiing, running, and other exercise. Witnesses also testified as to the high-energy nature of his onstage performances, as well as to his gregarious nature and joie de vivre.
- [93] It is to be noted that the plaintiff is now 63 years of age, 10 years older than he was in 2012. However, following both the 2011 and then 2012 collision, it seems clear that the injuries suffered and the symptoms of those injuries affected the plaintiff's enjoyment of life. He suffered more pain, some of which is now chronic or ongoing. He has had difficulty performing certain domestic tasks, particularly those of a heavier nature. His onstage performances have suffered a significant downturn in energy. He has suffered periodic but regular and continuing fatigue and mental fuzziness which has required him to dedicate, at times, significant portions of each day to rest and recuperation. While many of the symptoms have become less severe and/or frequent since the collisions, most remain to some extent and have become chronic. He has had to learn how to avoid, as much as possible, triggering the onset of symptoms by being cautious about how he approaches a task or situation.
- [94] It is to be noted, however, that these symptoms have in no way rendered the plaintiff totally disabled socially, domestically, recreationally, or vocationally. In particular, I note that he continues to travel to Hawaii almost annually. While in Hawaii, he stays with Mr. Spicer, one of the witnesses who testified in this trial, and has taken instruction in surfing.
- [95] His own experts testified that he is capable of continuing an exercise regime with or without the assistance of a kinesiologist. Mr. Kwan, the plaintiff's physiotherapist, indicated that when the plaintiff was exercising as recommended he required less physiotherapy, but that he had not been able to get the plaintiff to follow his recommendations for exercise and activity.
- [96] Ms. Smith estimated that "with the appropriate structure of his schedule to allow for effective management of his fatigue" the plaintiff was capable of working in the range of six consecutive hours. That is more than enough time to allow for his average gigs, which run between two and four hours. It does not, however, appear to account for such related tasks as instrument and equipment set up, sound checks and setting adjustments for room acoustics, and breakdown and transport of instruments and equipment following the gig.
- [97] Assessment of non-pecuniary damages is an inexact science - if science at all. It is trite to point out that no two cases are ever exactly alike and, accordingly, decisions in previous cases - on other facts and in the unique circumstances of those cases - can serve only as general guides. The injuries suffered by this particular plaintiff, the symptoms arising from those injuries, and the effect of those symptoms, both in terms of severity and duration, are what must be assessed in each particular case in order to determine the appropriate award of non-pecuniary damages: Stapley at paras. 42-45.

- [98] The plaintiff's counsel provided reference to seven cases in which non-pecuniary damage awards between \$160,000 and \$200,000 were made. The plaintiffs in those cases range from 33 to 69 years of age. Some were unemployed, others fully employed. Some suffered concussions and/or were diagnosed with PTSD. While of some assistance, I found these authorities to, in general, relate to plaintiffs with more severe injuries and symptom-related limitations.
- [99] Defence counsel provided cases in which non-pecuniary damage awards between \$55,000 and \$75,000 were made. The plaintiffs in those cases were all in their 50s at the time that they suffered their injuries. While somewhat varied in the individual cases, the types and combinations of injuries and symptoms were more similar to those suffered in the present case, although in most cases not as comprehensive nor as severe. I found both the case of *Sulinska v. Payne*, 2021 BCSC 202 and the case of *Young v. Shao*, 2018 BCSC 2017 to be of assistance, but the case of *a Dueck v. Lee*, 2019 BCSC 1936 [Dueck] to be most applicable.
- [100] In *Dueck*, the plaintiff was similar in age to the plaintiff in the present case. The collision caused myofascial injuries and ongoing symptoms related to various areas of her body, including the neck, shoulders and lower back. She suffered headaches and sleep difficulties which were continuing. She taught piano and had a catering business, both of which required ongoing contact with the public, and both of which were impacted by her injuries and symptoms. The award of non-pecuniary damages in that case was \$75,000.
- [101] Though *Dueck* is a helpful starting point, I note one significant difference in the present case as compared to all of those that were cited to me. The present case involves a plaintiff who is, in every sense of the word, a performer. The financial positives and negatives associated with his chosen form of vocation will be dealt with later in this decision, but one cannot ignore the fact that this plaintiff has identified as a performer and has been invested in performing his music in front of an audience for decades - be it paid in a formal setting or unpaid in an impromptu social setting. He is an entertainer. That part of his life and of his identity has not been destroyed by these collisions, but it has been permanently compromised, curtailed, and limited.
- [102] Considering the circumstances of the present case and the factors in *Stapley*, I award the plaintiff \$125,000 in non-pecuniary damages.

Past loss of earning capacity

- [103] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned, not could have earned, but for the injuries sustained: *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [104] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. The trial judge has discretion to determine what

period or periods of time are appropriate for the determination of net income loss: Lines v. W. & D. Logging Co. Ltd., 2009 BCCA 106 at paras. 181-186 [Lines]. In exercising this discretion, the trial judge should keep in mind that the purpose of compensating the plaintiff for past loss of earning capacity is to put the plaintiff back in the position they would have been in had the accident not occurred: Lines at para. 185.

[105] The burden of proof on actual past events is on a balance of probabilities, but an assessment of loss relating to both past and future earning capacity involves not actual events, but rather a consideration of hypothetical events. The plaintiff is therefore 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. Economic evidence can be a helpful tool for considering hypothetical loss and determining what damages are fair in the circumstances: Grewal v. Naumann, 2017 BCCA 158 at paras. 48-49; Athey v. Leonati, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 27.

Live performances

[106] Mr. Milne's expert report from February 7, 2022, provides a calculation of past loss of income from gigs to March 1, 2020, under two different scenarios:

Scenario 1: takes the marginal approach where the actual gigs are deducted from the projected number of gigs, to arrive at the potential loss in gigs performed. The loss in gross revenue is then calculated by multiplying the loss in gigs performed by a specified rate of revenue per gig. No consideration is given to the actual gross revenue earned, only the number of actual gigs performed; and

Scenario 2: takes the gross revenue approach where the projected gross revenue is calculated using the projected number of gigs at the specified rate of revenue per gig. Mr. Weterings' actual gross revenue is then deducted from the projected gross revenue, to arrive at the loss in gross revenue. This approach considers the reduction in the post-accident average revenue per performance as a loss of income due to the required extra use of a booking agent.

[107] After deduction of estimated taxes, Mr. Milne's estimate of net past loss of income to March 1, 2020 is as follows:

- Scenario 1 - \$117,447; and
- Scenario 2 - \$105,560.

[108] Mr. Milne bases these figures on the assumption that the plaintiff would average 225 gigs per year. In the years 2008 to 2011 inclusive, the plaintiff averaged only 205 gigs per year. No evidence was provided regarding the number of annual gigs prior to 2008. Between 2012 and March 2020, the plaintiff performed 835 gigs or an average of approximately 100 gigs per year.

[109] In my view, the use of an average of 225 gigs per year is artificial and unreasonably high. It does not recognize that in only one of the four years prior to the first collision did the plaintiff meet the 225 target and, even in that year, he barely exceeded that number. It also fails to recognize that, aside from his injuries and symptoms, the plaintiff's refusal to perform cover songs and to insist on performing only his own original music may well have limited, and continues to limit, his access to gigs. Experiential evidence to that effect was provided by Mr. Gorrie, based upon his years of performing and gigging in the Lower Mainland.

[110] Accordingly, I award the plaintiff \$90,000 in past loss of earnings from gigs.

Assistant music editor

[111] Between 2014 and 2021, the plaintiff hired Mr. Polanowski to edit music with the stated goal of releasing a new album. He paid Mr. Polanowski a total of \$52,380. He says that but for the collisions and his injuries and the related symptoms, he would not have required Mr. Polanowski's services but rather would have done the editing on his own with the use of ProTools, and so he claims the amount paid to Mr. Polanowski as past loss of income.

[112] There are a number of problems with this assertion including:

1. Production and editing of this intended album began in or about 2004/2005, long before either of the collisions.
2. The album involved music written by the plaintiff prior to 2004/2005 and was in production with the assistance of Mr. Polanowski from approximately 2007 to 2011, prior to the collisions.
3. Mr. Gorrie gave evidence that he completed courses on the use of ProTools and has also taught a course that runs for four semesters of 13 weeks each, following which students could move on to more advanced courses involving engineering, production, and editing. This suggests that there is a requisite level of education and learning required to master the use of ProTools.
4. Although the plaintiff received some education and training regarding ProTools through his work with and observation of Mr. Polanowski during those years, no evidence was presented to suggest that he has ever received proper formal training or any type of certification in the use of that software;
5. In spite of the expenditure of both time and money, the intended album has never been completed, finalized, or released.
6. No evidence was presented showing, or even suggesting, that there was or is a viable market for another album of the plaintiff's music which could generate a profit.

- [113] There is no evidence before me to establish that the plaintiff has or ever had sufficient proficiency with ProTools to undertake the editing and production of this intended album to completion. Mr. Polanowski has far more experience and training in that software than the plaintiff, and even with his level of expertise and the expenditure of over \$52,000 for his time and his work product, the plaintiff is not satisfied with the state of the album.
- [114] In my view, and based upon the evidence, there is no real and substantial possibility that this intended album would have been finalized and released but for one or both of these collisions - either with or without the involvement of Mr. Polanowski.
- [115] This is not an expense which should properly be visited upon the defendants and I dismiss the claim for damages related to it.

Licencing, royalties, album sales, and loss of creativity

- [116] The plaintiff claims the sum of \$50,000 under this suggested head of damage. I take the argument to be that had a new album been released, it would have generated profits and income by way of licensing agreements, payment of royalties, and the sale of albums themselves.
- [117] The only evidence relating to profits from album sales related to the plaintiff's first album in 1998. That album was produced in less than six months with the assistance of a \$10,000 grant and for an overall cost of approximately \$20,000 or slightly less. The plaintiff testified that he gave away approximately 1,000 copies for promotional purposes and sold approximately 1,500 copies. The sales may have covered the total production costs of the album.
- [118] The evidence before me indicates that licensing agreements for songs are signed for a nominal fee in hopes that they will generate royalty income in the future. This is particularly so regarding relatively little-known artists such as the plaintiff. Other, more well-known and established artists can demand and receive higher licensing fees and/or royalty structures based on their reputations.
- [119] As I have noted, in 2007 the plaintiff licensed one song for use in a made-for-TV movie for a fee of \$1.00. At least two of the plaintiff's witnesses testified that they are in the business of placing music in movies and television. They have several of the plaintiff's songs in their libraries and have attempted on many occasions over the years to place his songs into movies and television shows, but have been unsuccessful save for the single 2007 placement.
- [120] In the case of *Howell v. Strutt*, 2021 BCSC 92, Justice Macintosh faced a case involving a plaintiff who was a photojournalist and art photographer. In that case, the plaintiff had experienced some national and international success and was selected as one of the top photojournalist prospects in the world in 1994 by the photo editor of the New York Times. In 2011, he enjoyed a year of reasonably good income attributable in large part to one

particularly successful exhibition of his work. He claimed damages after a collision on the basis that he would have had similar exhibitions with similar income approximately every three years, if not for the accident. Justice Macintosh addressed the issue of damages in light of the variable levels of income for artists:

- [93] I set out above that unfortunate financial track record of Mr. Howell before the accident with reluctance, because I do not doubt his artistic dedication and talent, as evidenced for example by the Shopping Carts show. But the gap between financial success and talent in the arts is notorious. The evidence at trial pointed to many artists in this province, better-known than Mr. Howell, who depend on a second job, in addition to their art, to make ends meet. Mr. Howell's record is a case in point. The art market, always fickle, has not recognized his talent in financial terms. Perhaps fine arts comprise the most difficult work sector in which to hope for financial success. A very few artists, in music, painting, photography, literature and elsewhere, make a living, while the others do not. In a sense, the arts are at the opposite end of the spectrum of financial security from careers in medicine, law and other professions. The reality is that profitable careers in the fine arts are notoriously difficult to attain.
- [97] However, there is not the evidentiary base from which one can find a real and substantial possibility that another exhibition like Shopping Carts, which was about four years before the accident, would again be produced and enjoy support in the art market. At best, one could only hope, and speculate, that the future would unfold in that way. There was too little financial success before the accident for there to be a real and substantial possibility of increased earnings from Mr. Howell's art photography after the accident
- [98] In summary, Mr. Howell, from all the available evidence for the time before the accident, cannot demonstrate any financial track record from which I can find the necessary real and substantial possibility of any lost earning capacity resulting from the accident. As noted above, I found Mr. Howell lost the focus necessary to do what he loved doing. However, this impairment, for which Mr. Howell is being compensated by non-pecuniary damages, does not directly translate into a loss of earning capacity, which requires a demonstrated financial gain from the capital asset that is absent in this case. In my view, the past and future lost earning capacity claims must be dismissed.
- [121] Similarly, in the present case, the plaintiff has simply provided no evidence of a financial track record from which I could find there to be a real and substantial possibility of loss of earnings related to past licensing, royalties, or album sales. I dismiss the plaintiff's claim for such damages.

Future loss of earning capacity

- [122] A claim for loss of future earning capacity raises two key questions:

- (1) Has the plaintiff's earning capacity been impaired by his or her injuries?

- (2) If so, what compensation should be awarded for the resulting financial harm that will accrue over time?

The assessment of loss must be based on the evidence, and is a matter of judgment, not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.).

[123] There are two possible approaches to loss of future earning capacity, one is the "capital asset" approach and the other is the "earnings approach": *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232 at paras. 19-21.

[124] The Court of Appeal recently provided further guidance on the issue of future loss of income in the cases of *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345 [Rab]; and *Lo v. Vos*, 2021 BCCA 421. This trilogy of cases consolidates the established principles relating to damages that I have cited here. In particular, Justice Grauer in *Rab* succinctly described the "three-step process" that the court must undertake when considering a claim for loss of future earning capacity:

[47] The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras. 93-95.

[125] I have noted that I am satisfied that as a result of the accident, the plaintiff has experience chronic pain issues, disordered sleep, periodic fatigue and worsened anxiety, among other symptoms. On the evidence, these symptoms presently impact and will likely continue to impact his earning capacity in various ways, and there is a real and substantial possibility that these ongoing symptoms will cause a pecuniary loss. However, for the reasons outlined below, I find that such a loss is only reasonably connected to a reduction in the plaintiff's capacity for live performances, the value of which I assess below.

Live performances

[126] In his report, Mr. Milne calculated the present value of future income loss related to a reduction in live performance gigs as follows:

Potential future income losses under Scenario 1:

\$187,936

Potential future income losses under Scenario 2:

\$207,251

- [127] The scenarios are based on the same annual gig estimates as Mr. Milne's past loss of income calculations and continue to age 75, with a reduction at age 70. As with the past income loss calculation, the greater projected loss in Scenario 2 arises from the use of an agent for locating and booking gigs in exchange for a fee for such services.
- [128] The plaintiff suggests that the Scenario 2 figure of \$207,251 is appropriate without adjustment or deduction.
- [129] Counsel for the defendants concedes that the plaintiff had established the existence of chronic myofascial pain and unresolved anxiety around his career, which establishes a potential future event that could lead to a loss of earning capacity from live performances. However, they submit that the likelihood of this happening is measurable but not to the extent claimed by the plaintiff.
- [130] The defendants suggest that the Scenario 1 figure of \$187,936 should be the starting point but should be subjected to adjustment and deduction. They suggest that the assumed number of gigs be calculated at 225 gigs per year to age 70, and then 200 gigs per year from age 71 to 75. They also suggest that as his rental property income increased, the plaintiff would likely have reduced his frequency of performances anyways. They additionally submit that based on his comments to his counsellor, Ms. Siebert, before 2011, the plaintiff would have hired a manager or agent even if the collisions had not occurred.
- [131] I am of the view that the starting figure of \$207,251 is appropriate, based in part on the evidence of the defence witness, Ms. Smith. In her evidence, she recognized that in order to work as a musician the plaintiff will have to "push through his symptoms", incorporate pacing strategies, rest or nap on days when he is going to hustle work or have a gig, and not schedule hustling work on the same day as he has to perform. The evidence at trial did not indicate that the business of locating, negotiating, booking, and performing live musical gigs at a variety of venues lends itself to such a calm, placid, and orderly management of one's time. The hiring and use of a manager or agent is one reasonable method of reducing overall stress to better allow the plaintiff to focus on music and performance.
- [132] I expressed my concerns about the average number of gigs per year used by Mr. Milne in his calculations when I dealt with past income loss. I maintain the same concerns in the context of future loss of income. The other concerns that I expressed in that section remain with me here as well.
- [133] In addition, while I am of the view that allowing for the hiring of a manager or agent is appropriate, I am also of the view that there is a reasonable possibility that the plaintiff would have hired an agent even if the collisions had not occurred. I consider that in further adjustment of the final figure.

[134] On the basis of the above, I would reduce the starting figure by 20% for the various contingencies and adjustments. I calculate an award for the plaintiff's future income loss from performance as follows:

$$\$207,251 - \$41,450 = \$165,801$$

Assistant music editor

[135] For the same reasons given regarding the past use of an assistant music editor, I dismiss this claim as it relates to damages.

Licencing, royalties, album sales, and loss of creativity

[136] For the same reasons given regarding loss of past licensing, royalties, album sales, and loss of creativity, I dismiss this claim as it relates to damages.

Cost of Future Care

[137] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition, in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. 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: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.) [Milina]; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[138] The test for determining an appropriate award for future care has two components:

- (1) there must be a medical justification for claims for cost of future care; and,
- (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[139] Future care costs are therefore "justified" if they are both medically necessary and reasonable, but they are also a matter of prediction. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.

[140] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is not required. In other cases, the award is reduced based on the prospect of improvement in the plaintiff's condition, or alternatively increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011

BCSC 1389 at para. 253.

[141] Similar to an assessment of loss of future earning capacity, an assessment of damages for cost of future care is a matter of prediction as to what will happen in future, not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[142] I have reviewed the plaintiff's claim regarding future care items and what evidence there is to support them. I find that:

1. The listed medications and supplements are excessive and, with rare exception, have little or no support in the evidence. The list of both seems more a cataloguing of possible options and available substances without any focus as to their purpose.
2. Continued use of a kinesiologist for anything more than quarterly assessments as to exercise routines and checking of mechanical form of performance should no longer be necessary. The evidence of his own experts clearly indicated that the intention was to wean him from ongoing kinesiologist supervised programs in favour of home-based, self-governed and self-performing programs.
3. There was little evidence to support trigger point injections and the evidence of the recommending expert indicated that those treatments are currently covered by MSP. While there is some speculation about changes to that coverage in the future, that speculation is not presently relevant.
4. There is evidentiary support for ongoing massage therapy but the suggested frequency of one session per week is in no way critically assessed, considered, or supported in the evidence or experts' opinions.
5. The occupational therapy expense was supported by the defence expert, Ms. Smith, and seems appropriate.
6. Neurofeedback and transcranial stimulation were somewhat supported by the evidence as being widely accepted and, importantly in my mind, connected to two of the plaintiff's main complaints, namely pain and cognitive problems.

[143] Assessing the matter globally, I award the plaintiff \$65,000 in cost of future care.

Special damages

[144] Claims for special damages are subject to a standard of reasonableness: *Kaler v. Lee*, 2016 BCSC 1125 at para. 271.

[145] I have reviewed the plaintiff's claims for special damages and have similar concerns to those expressed regarding cost of future care. In particular, I find the expenses relating to kinesiology to be unreasonably high since the aim of the experts and the plaintiff's kinesiologist is to support a transition to self-governed exercise and rehabilitation.

[146] In light of this, I award a global amount of \$60,000 towards the plaintiff's claim for special damages.

Apportionment

[147] In closing arguments, counsel raised the issue of apportionment of the damages between the September 2011 collision and the October 2012 collision. I was advised by counsel at the outset of trial that the October 2012 action had been resolved and was not before me.

[148] Incidental reference was made to the later collision at times during the trial, particularly in the evidence of medical or rehabilitative witnesses who noted simply that the plaintiff complained of an aggravation of symptoms flowing from the 2011 collision following the 2012 collision. However, I am unable to find any reference in my notes or in the materials to the particulars of the 2012 collision. There was no evidence provided by any of the medical experts quantifying the extent or duration of the aggravation of symptoms from previously existing injuries, or the onset of any new injuries separately attributable to the 2012 collision.

[149] In the absence of any such evidence, I am completely without any basis to determine the apportionment of damage between the two collisions. To do so would be little more than assigning values to each face of a die and rolling it to determine an outcome.

[150] Accordingly, at this time and on the basis of the evidence and argument before me, I make no order as to apportionment. If the parties wish to address the subject further, they will have liberty to apply before me for directions and determination as to how best to address this issue.

Summary

[151] Awards for damages are summarized as follows:

Damages Summary

Non-pecuniary damages:

\$125,000.00

Past loss of earning capacity:

90,000.00

Future loss of earning capacity:

165,801.00

Cost of future care:

65,000.00

Special damages:

60,000.00

Total damages:

\$505,801.00

Costs

[152] If the parties are unable to agree on costs, they may speak to the issue.

"Caldwell J."

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