
CANADA / JUDGMENT

Wright v. Admiraal

2022 BCSC 742

COURT

Supreme Court of British Columbia

DECIDED

6 May 2022

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

2022 BCSC 742 Wright v. Admiraal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wright v. Admiraal,

2022 BCSC 742

Date: 20220506

Docket: M185774

Registry: Vancouver

Between:

Douglas Lloyd Wright

Plaintiff

And

Terrie Anne Admiraal and Mountain View Bakery Limited

Defendants

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for Plaintiff:

C. McIvor

K. McStravick, Articled Student

Counsel for Defendants:

T. Decker

Place and Date of Trial:

Vancouver, B.C.

February 7-11, 14-18, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 6, 2022

Table of Contents

Introduction.. 3

Background.. 3

Issues. 8

Liability for the Accident. 9

What are the nature, extent and duration of the injuries the plaintiff suffered in the accident?. 10

Plaintiff's Position. 10

Defendants' Position. 10

Relevant Law.. 11

Application of the Law to the Facts. 12

What is the Appropriate Award of General Damages for Pain and Suffering?. 21

Applicable Law.. 21

Application of the Law to the Facts. 22

Past and Future Loss of Income Earning Capacity. 26

Parties Positions. 26

Applicable Law.. 27

Application of the Law to the Facts. 29

Loss of Past Income Earning Capacity. 32

Loss of Future Income Earning Capacity. 35

Loss of Housekeeping Capacity. 37

Applicable Law.. 37

Parties positions. 38

Application of the Law to the Facts. 38

Cost of Future Care. 40

Applicable Law.. 40

Application of the Law to the Facts. 41

Special Damages. 44

Mitigation.. 45

Conclusion.. 46

Introduction

- [1] The plaintiff, Lloyd Wright, was involved in a motor vehicle accident on October 8, 2016. The plaintiff seeks damages for the injuries he alleges he suffered in the accident.
- [2] The defendants, Terrie Anne Admiraal and Mountain View Bakery Limited, admit the plaintiff was injured in the accident. The defendants do not admit liability for the accident.
- [3] The defendant concedes that the plaintiff sustained a soft tissue injury to his cervical spine and has suffered from headaches and an exacerbation of his pre-existing mental health issues. The defendants say that prior to the accident, the plaintiff had both physical and mental health issues which resulted in limitations in his ability to work.
- [4] The defendants take the position that the plaintiff failed to mitigate his damages by following the treatment recommendations made by various doctors, and any damages awarded should be reduced by 10%.
- [5] For the reasons that follow, I conclude the defendants are wholly at fault for the accident, and the appropriate award under all heads of damages is \$532,407.92. The defendants have not established the plaintiff failed to mitigate his damages.

Background

- [6] The plaintiff was a front seat passenger in a Ford F250 four door pickup truck being driven by Ken Schumann. Mr. Schumann's son was in the back seat. They were driving eastbound on highway 4 between Port Alberni and Nanaimo when the accident occurred. A 2000 Grand Caravan van travelling westbound and driven by the defendant Terrie Admiraal came around the corner and drove into the eastbound lane. The front end of the truck struck the van. The truck left the highway and went down a bank towards a lake. The truck was stopped by a tree which it hit dead on.

- [7] The plaintiff was unsure how much time passed between the time of the collision and when someone came to the passenger door and tried to open it. The door wouldn't open and people assisted the plaintiff unbuckle his seatbelt, exit the driver's door and climb up the bank where he sat waiting for the ambulance. The plaintiff was taken by ambulance to the hospital in Port Alberni.
- [8] The plaintiff was discharged from hospital early the next morning and went to stay with Mr. Schumann. The plaintiff testified that his whole body was sore, including his knee, his back and his neck. When he was discharged, the plaintiff was wearing a neck collar.
- [9] At the time of the accident, the plaintiff was 53 years old. He is currently 59 years old.
- [10] The plaintiff had a number of injuries prior to the accident. When he was 25 years old, the plaintiff was struck by a car when riding his motorcycle in Jamaica. He suffered a serious injury to his left leg which resulted in upward of 10 operations. During the time he was being treated for his leg injury he became addicted to pain medication. The plaintiff testified he eventually recovered from the injury to his leg. He was able to return to playing "old timer" hockey and other activities, although he lost some range of motion in his left ankle.
- [11] The plaintiff has worked a variety of jobs during his adult life. The plaintiff lived in Victoria in his early 30s where he took a travel agent's course. The plaintiff testified he did not end up working in the travel business because it was hard to find work.
- [12] When he was approximately 33, the plaintiff obtained his class 1 driver's license. After obtaining his licence, the plaintiff worked driving a gravel truck in Victoria for about six to eight years. While living in Victoria, the plaintiff married a woman with three young children, one of whom he adopted.
- [13] When he was in his mid-thirties, the plaintiff decided he needed help with his addiction to pain medication and attended a treatment centre in Guelph, Ontario. The plaintiff was successful in overcoming his prescription narcotic addiction. However, he was prescribed with alprazolam at the treatment centre on which he became dependent. The plaintiff continues to take alprazolam, and was taking it at the time of the accident.
- [14] After completing the program at Guelph, the plaintiff attempted to operate a charter sailboat business in Mexico. However, the business was unsuccessful and he returned to Victoria from Mexico in 2008. The plaintiff and his wife had marital problems and separated.
- [15] After separating from his wife, the plaintiff obtained a job in the Yukon working as an autobody repairman for Irving Collision. The plaintiff testified he worked at Irving Collision for approximately a year before he broke his wrist in July 2010. The plaintiff testified he attended physiotherapy for eight or nine months and was unable to return to work at Irving as a result of his injury. The plaintiff was off work from July 2010 to the spring of 2011. After his rehabilitation, the plaintiff looked for different work.

- [16] In the spring of 2011, the plaintiff obtained a job operating an excavator at a Yukon gold mining camp. This was a seasonal position, running from approximately May or June until October. The plaintiff testified he spent the winter in Mexico. He returned to work in the gold mining camp for another two seasons in 2012 and 2013, and spent the winters of 2012-13 and 2013-14 in Mexico.
- [17] The plaintiff testified he wanted to return to work at the gold mine in 2014, but was told the mine was not operating because the owner could not obtain the necessary permits.
- [18] Instead, the plaintiff obtained a position driving a tractor trailer in Beaver Creek, Yukon. While working as a truck driver, the plaintiff suffered a work place injury to his low back (the "2014 workplace injury"). The plaintiff testified that he was sent to a back clinic in Edmonton, Alberta by the Workers Compensation Board of Alberta ("WCB"), where he did rehabilitation. The plaintiff testified he had recovered from his back injury by the time he left the clinic. When he left the clinic, the plaintiff returned to Mexico where he had gotten remarried and his spouse resided.
- [19] The plaintiff testified that after he returned to Canada from Mexico in May 2015, he hoped to return to the gold mine. However, he was again told the owner had not obtained the necessary permits and would not be operating.
- [20] The plaintiff obtained a position driving a large industrial truck in Fort McMurray, Alberta. The plaintiff testified that he suffered a work place injury when jumping down from his truck (the "2015 workplace injury"). The plaintiff testified he injured his left hip, after hooking his pants on a nail and falling to the ground from a high boy, which is a trailer with a deck approximately six to seven feet off the ground. After this injury, the plaintiff was unable to work and returned to the rehabilitation clinic in Edmonton.
- [21] After 2015 work place injury, the plaintiff suffered from low back pain. In November 2015, the plaintiff went to Mexico for the winter.
- [22] The plaintiff testified that when he returned from Mexico in the spring of 2016, he was still having issues with his back. The plaintiff testified that WCB told him he needed to be retrained and would not be able to return to his previous work. After about two weeks of retraining, the plaintiff was informed that he had a degenerative disc disease that was unrelated to the 2015 workplace injury, and consequently WCB would not support for his retraining program.
- [23] After WCB stopped its support for his retraining, the plaintiff obtained a position with Ken Schurmann who owned two businesses, one making canvass boat covers and the other utilizing a pile driver for heavy building applications. The plaintiff testified that Mr. Schurmann agreed to pay him \$10,000, provide him with living accommodation, and buy him a plane ticket to Mexico at the end of the season, in exchange for the plaintiff's assistance in Mr. Schurmann's businesses. The plaintiff did not report the income he received on his income tax return.

- [24] The plaintiff testified in cross examination that when he returned from Mexico in April 2016, he believed he was capable of returning to heavy machinery operation, in particular operating an excavator in gold mining, but did not do so because WCB told him not to.
- [25] The plaintiff testified that he was still taking Tylenol 1 for residual low back pain when he was working for Mr. Schurmann. The plaintiff testified that his residual pain from his 2015 workplace injury did not impact his work duties with Mr. Schurmann, nor his recreational activities prior to the accident. The plaintiff testified that his plan in 2016 was to work until October and then return to Mexico.
- [26] At the time of the accident, the plaintiff had been planning to leave for Mexico for the winter and had his ticket. The plaintiff left for Mexico within a week after the accident.
- [27] On the way to the airport, the plaintiff attended a walk-in medical clinic in Langford, B.C. The plaintiff testified that he told the doctor he was waking up with headaches. The doctor prescribed a muscle relaxant.
- [28] The plaintiff testified that his back and left knee pain, which pre-existed the accident, were exacerbated for some time after the accident. The plaintiff testified his back pain improved to the pre-accident level within one or two years of the accident. The plaintiff suffered pain in his right knee but the pain has improved to post-accident condition except for feeling unstable when he goes up or down a hill. Following the accident, the plaintiff also heard noise in his ears that sounded like whistling, but that has lessened over time and does not impact him to any degree.
- [29] The plaintiff's major complaints following the accident were headaches, accompanied by dizziness, nausea and vomiting. The plaintiff testified that although he had been advised at the Langford clinic that his symptoms would improve his headaches became worse. He testified he would wake up with a headache and vomit. The plaintiff testified he started having problems with equilibrium and lost consciousness on three occasions.
- [30] The plaintiff testified that in April or May 2017, he travelled to Nova Scotia where his father lived in order to obtain treatment for his headache symptoms.
- [31] The plaintiff testified that his headaches can last for three to four days and he would have to lie in bed during that time. On bad days, the plaintiff is unable to do anything for himself, and cannot eat, drink or function in any capacity.
- [32] The plaintiff testified that the general severity, duration, frequency and nature of the headaches has not changed since shortly after the accident. The plaintiff testified that he still experiences nausea, vomiting and radiating pain into his neck. The plaintiff's evidence is that he never experienced similar headache, nausea, dizziness, vomiting, fainting and neck pain prior to the accident.

- [33] The plaintiff testified that he has also experienced cognitive problems since the accident. He has noticed a decline in his memory. The plaintiff testified that he has also struggled with depression and anxiety since the accident.
- [34] The plaintiff's evidence is that he had to give up fishing because the water triggered his equilibrium problems. The plaintiff has also given up driving on the advice of his doctor. The plaintiff testified that he had not been surfing or playing baseball since the accident. However, he is able to bicycle and go to the gym on his good days.

Issues

- [35] The issues raised by the pleadings and submissions are:
1. Are the defendants liable for the accident?
 2. What are the nature, extent and duration of the injuries the plaintiff suffered in the accident?
 3. What is the appropriate award for general damages for pain and suffering?
 4. What amount, if any, should be awarded loss of past and future earning capacity?
 5. What amount, if any, should be awarded for loss of housekeeping capacity?
 6. What amount, if any, should be awarded for cost of future care?
 7. What amount, if any, should be awarded for special damages?
 8. Did the plaintiff fail to mitigate his damages, and, if he did what if any amount should be deducted as a result of his failure?

Liability for the Accident

- [36] There is no question that the defendants are liable for the accident. Although the defendants did not admit liability, they did not argue that the plaintiff was at fault.
- [37] The defendant, Terrie Admiraal did not give evidence but portions of her examination for discovery were read into evidence. Ms. Admiraal is an owner of the corporate defendant, Mountain View Bakery Limited. On the date of the accident, Ms. Admiraal was driving the van owned by Mountain View. Ms. Admiraal was driving westbound on Highway 4 from Nanaimo to Port Alberni when the accident occurred.
- [38] Ms. Admiraal testified that as she was driving the rear end of the van started swerving back and forth and she lost control of the vehicle. When Ms. Admiraal was in the oncoming lane, trying to regain control, she noticed the truck coming towards her in its lane. Ms. Admiraal said she managed to get the front end of the van out of the oncoming lane, but the back end was still in the truck's lane and the truck hit her vehicle. Ms. Admiraal's evidence is the pickup truck was in its lane when it struck her vehicle. Ms. Admiraal did not know why she lost control of her vehicle. Ms. Admiraal admitted she caused the accident by being in the

wrong lane.

[39] Having considered the evidence, I find the defendant wholly at fault for the accident.

What are the nature, extent and duration of the injuries the plaintiff suffered in the accident?

Plaintiff's Position

[40] The plaintiff says as a result of the injuries he sustained in the accident he suffers serious and permanent headaches. These headaches not only cause head pain that radiates into the plaintiff's neck, but also nausea and vomiting. The headaches only impact the plaintiff on half of his days, but they are severely debilitating when they are present. Additionally, the plaintiff has experienced dizziness, balance problems and syncope (fainting) that were not present prior to the accident.

[41] The plaintiff submits his ongoing symptoms from the accident affect every aspect of his life. The plaintiff continues to have chronic pain, persistent headaches and dizziness that impede his functioning in all domains. In addition, his persistent symptoms have contributed to the plaintiff's ongoing major depressive disorder. As a result of the accident, the plaintiff experiences significant pain and suffering and impairment of his personal and home life. The plaintiff asserts that his condition on the days he has headaches has ruined his prospects of obtaining and holding employment.

Defendants' Position

[42] The defendants take the position that all the injuries alleged by the plaintiff are subjective in nature and there is little reported evidence of his self reported symptoms. The defendants assert there are many issues of credibility and reliability with the plaintiff's recitation of events and a significant degree of caution should be exercised when considering his evidence.

[43] After the accident, the plaintiff lived for six months in Mexico before he moved to Nova Scotia in April or May 2017 where he received treatment. During his time in Mexico, the plaintiff did not undergo any treatment and lived in his own apartment. There is no evidence of the plaintiff requiring any assistance during that time with tasks of daily living. The defendants point to the fact that the plaintiff did not call any witnesses from his life in Mexico who either knew him or saw him during the first winter following the accident.

[44] The defendants argue that the facts and assumptions on which the experts' reports were based were not proven and therefore no weight can be placed on their opinions.

- [45] The defendants submit the plaintiff's pre-existing 2014 and 2015 workplace injuries had already disabled him to the extent he could not return to his prior occupations as a heavy equipment operator or truck driver. According to his ex-wife, the plaintiff stopped participating in various recreational activities such as surfing, prior to 2015. The defendants point to evidence of pre-existing mental health issues suffered by the plaintiff.
- [46] The defendants do not take issue with the fact that the plaintiff suffers from chronic debilitating headaches and dizziness as a result of the injuries he suffered in the accident. However, they take the position that his pre-accident condition was such that he was limited in his ability to work by both physical and mental health issues.

Relevant Law

- [47] The Supreme Court of Canada considered causation in *Clements v. Clements*, 2012 SCC 32. At para. 8, the Court confirmed that the basic test for determining causation remains the "but for" test articulated in *Snell v. Farrell*, [1990] 2 S.C.R. 311, and *Athey v. Leonati*, [1996] 3 S.C.R. 458. The plaintiff bears the burden of showing on a balance of probabilities that "but for" the defendant's negligent act or omission the injury would not have occurred.
- [48] A plaintiff is not required to establish that the defendant's negligence is the sole cause of his or her injuries. A tortfeasor must take his or her victim as the tortfeasor finds the victim, and is liable even if pre-existing conditions or other causal factors, for which the tortfeasor is not responsible, result in the victim's losses being more severe than they would be for the average person. At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in but for the accident, and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event: *Athey* at paras. 34-35.
- [49] The factors to be considered when assessing credibility are summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, as follows:

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.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *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 (*Farnya* at para. 356).

Application of the Law to the Facts

- [50] A number of doctors and health care professionals provided expert reports and testified regarding their observations of the plaintiff, and their diagnosis and prognoses regarding his injuries. I will briefly review the opinions. Based on my review of the evidence, I find that as a result of the injuries he sustained in the accident, the plaintiff will continue to suffer from chronic headaches, dizziness and depression. As well, the evidence establishes the plaintiff will suffer from ongoing pain in his neck.
- [51] Dr. Donald Cameron, an expert in neurology, prepared a report and testified. Dr. Cameron conducted a neurological assessment of the plaintiff on June 25, 2019. The plaintiff advised Dr. Cameron that shortly after the accident he started having headaches and associated pain in his neck, dizziness and vomiting lasting several days in a row. The plaintiff reported that the pain was severe. He suffered a decrease in balance, vertigo and dizziness following the accident. The plaintiff told Dr. Cameron that anti-inflammatory medications and physiotherapy did not help the pain or headaches. The plaintiff told Dr. Cameron there has been little improvement in the headaches. The plaintiff reported four episodes of vertigo and then collapse after the accident. In 2017, the plaintiff reported a decrease in memory, attention span and concentration. The plaintiff reported that he developed symptoms of depression and anxiety within four to five months of the accident.
- [52] The plaintiff's MRI brain scan and CT brain scan performed following the accident were reported to be normal.
- [53] Dr. Cameron's opinion is that the plaintiff probably suffered an altered state of consciousness or a brief loss of consciousness at the time of the accident as he has no recall of the impact after the first spit second of the two vehicles colliding and has partial recall of the ambulance ride to hospital. In Dr. Cameron's opinion, the plaintiff probably remained in a period of post traumatic amnesia for up to about 30 minutes after the accident. Dr. Cameron's opinion is that the plaintiff probably fulfils the criteria to make a diagnosis of a mild traumatic brain injury ("MTBI") which he sustained at the time of the accident. However, in Dr. Cameron's opinion, the plaintiff did not develop symptoms of posttraumatic brain injury syndrome following the MTBI and has not suffered from any adverse residual effects from it.
- [54] Dr. Cameron's opinion is that the plaintiff has developed posttraumatic headaches following the accident. It is probable that the headaches are a combination of posttraumatic musculoskeletal headaches and posttraumatic common migraine headaches. The plaintiff's spells of collapse are possibly psychological spells or benign syncopal (fainting) spells.

- [55] Dr. Cameron recommends a retrial of medications and suggests a number that might help the plaintiff's headaches. However, he noted that the plaintiff may experience very little improvement in his headaches with a change in medication and there are potential side effects from the medication. Dr. Cameron also recommends a course in botulism toxin ("Botox").
- [56] Dr. Cameron stated that while changing the plaintiff's medication may result in some improvement in the headaches, the headaches are unlikely to resolve. According to Dr. Cameron chronic headaches are difficult to treat and usually a combination of treatments needs to be tried. Dr. Cameron stated you had to be careful not to promise patients with chronic headaches they will go away as that is unlikely. In Dr. Cameron's opinion the plaintiff's headaches may improve with a combination of treatments but they are unlikely to resolve.
- [57] Dr. Cameron was asked about the potential of rebound headaches from the medication the plaintiff was taking. Dr. Cameron's opinion is that the plaintiff did not describe the classic rebound pattern of headaches. The plaintiff's headaches go on for several days which does not fit the pattern of rebound headaches.
- [58] Dr. Cameron's opinion is that the plaintiff's ongoing severe disability is due to the adverse effects of the injuries he suffered in the accident. This disability is due to the chronic pain, post-traumatic headaches and the significant psychological problems he suffers from. In Dr. Cameron's opinion the plaintiff's ongoing symptoms render him competitively unemployable. As well, the plaintiff has been significantly limited in his household and recreational activities due to the adverse effects of the injuries he sustained.
- [59] In Dr. Cameron's opinion, the plaintiff's symptoms will probably not improve in the future, and it is likely the plaintiff will remain competitively unemployable and permanently unable to resume household chores and recreational activities.
- [60] Dr. Zohar Waisman, an expert in psychiatry, prepared a report dated November 15, 2021 and testified. Dr. Waisman interviewed the plaintiff on November 4, 2021.
- [61] The plaintiff reported a history of anxiety to Dr. Waisman and that he had been taking alprazolam, an anti-anxiety medication, for many years at night. When he saw Dr. Waisman, the plaintiff was taking an anti-depressant, venlafaxine, alprazolam, and zopiclone for sleep.
- [62] Dr. Waisman's opinion is that the accident caused the plaintiff to develop a major depressive disorder, moderate, and non-psychotic, post traumatic stress disorder (PTSD), and a somatic symptoms disorder with predominant pain, moderate and persistent. The plaintiff suffers from depressed mood daily, as well a markedly diminished interest and pleasure in all activities.

- [63] Dr. Waisman opined that the accident triggered a pre-existing vulnerability to the effects of trauma. But for the accident, the plaintiff would not have developed a somatic symptom disorder and PTSD and the severity of his current depressive and anxiety symptoms. Dr. Waisman's opinion is that the plaintiff requires weekly psychotherapy for one year and then as needed. The prognosis for improvement of his symptoms is guarded.
- [64] Dr. Waisman was aware that the plaintiff had a previous history of physical injuries, but he did not have any physical problems just prior to the accident. Dr. Waisman was also aware that the plaintiff suffered from anxiety and insomnia prior to the accident and had taken alprazolam for many years for sleep. Dr. Waisman testified that psychotherapy could assist the plaintiff with overcoming his dependence on alprazolam, but this process could take several years.
- [65] At trial, Dr. Waisman was asked about an email written by the WCB which reported that the plaintiff was expressing upset that his benefits were suspended and had expressed suicidal ideations. Dr. Waisman stated he was only able to conclude that the plaintiff was upset with WCB at the time of the email. In Dr. Waisman's view the WCB report must be balanced with the contemporaneous clinical records from the plaintiff's family doctor or similar sources, which he reviewed, including one made just days before the accident, that don't document any issues of this nature.
- [66] Dr. Mohammed Khan, an expert in physical medicine and rehabilitation, prepared a report dated November 12, 2021 and testified. Dr. Khan assessed the plaintiff on November 8, 2021. Dr. Khan diagnosed the plaintiff as suffering from a cervical spine sprain/strain, a right knee sprain/strain and chronic myofascial pain in those regions.
- [67] Dr. Khan's opinion is that the plaintiff is currently independent with his self-care tasks but experiences difficulty with housekeeping tasks when his headache symptoms flare up. Dr. Khan reports that the plaintiff experiences a disability with respect to his housekeeping, recreational and vocational activities due to his symptoms of headaches, imbalance, and fear of passing out. Dr. Khan recommended that the plaintiff engage in an active rehabilitation program. Dr. Khan's opinion is that the plaintiff's prognosis for a complete recovery of his physical pain symptoms (or to pre-accident status) is poor. The plaintiff's current pain symptoms will likely continue to persist into the future.
- [68] Vanita Malhotra, an expert in physiotherapy with expertise in functional capacity evaluations, provided a report dated November 14, 2021 and testified. Ms. Malhotra assessed the plaintiff on November 10, 2021.
- [69] Ms. Malhotra reported that the plaintiff's main complaints were of intense headaches, balance problems, occasional syncope (fainting), neck pain, noises in his ears, and left knee pain.

- [70] Ms. Malhotra found the plaintiff demonstrated limitations in positional tolerances (sitting, standing, walking), agility (balance, climbing, low level work, prolonged neck positioning), and compromised workday tolerance. In addition to his physical limitations, the plaintiff also demonstrated cognitive limitations and psychological symptoms. The combination of physical limitations, chronic headaches, psychological and cognitive effects have interfered with the plaintiff's ability to work. In Ms. Malhotra's opinion the plaintiff's ability to carry out his household duties, recreational activities and social interactions have been severely compromised because of his physical, cognitive and psychological limitations.
- [71] In Ms. Malhotra's opinion the plaintiff does not meet the demands of a heavy equipment operator or a heavy industrial truck driver. The plaintiff is not able to engage in prolonged standing or sitting, nor does he possess the requisite agility for the job of truck driver.
- [72] Beriah Chandoo, an expert in occupational therapy, provided a report dated December 22, 2021 and testified. Ms. Chandoo provided a responsive report to the functional capacity evaluation of Ms. Malhotra. Ms. Chandoo did not assess the plaintiff.
- [73] Ms. Chandoo's opinion is that the test data in Ms. Malhotra's report raises areas of query in regard to the plaintiff's employability. In Ms. Chandoo's opinion the test results provided in Ms. Malhotra's report did not provide her with the full scope of information regarding the plaintiff's ranges of motion and functional limitations that would be expected. Ms. Chandoo states that based on the lack of quantifiable standardized testing of the ranges of motion, there are queries about the test results and reliability of the Ms. Malhotra's conclusions and opinions.
- [74] In cross-examination, Ms. Chandoo testified that there are no definitive tests that must or must not be done. It is up to the evaluator to determine how the day will structured. In conducting an assessment, an evaluator does an interview of the individual and observes the individual in a simulated or actual environment. As stated earlier, Ms. Chandoo did not interview or assess the plaintiff. Ms. Chandoo stated that for many of the queries in her responsive opinion an interview of the plaintiff or other steps she did not perform would have aided her in reconciling some of the apparent contradictory evidence.
- [75] The defendants assert that, at best, the plaintiff is a poor historian. There are issues with both his credibility and reliability. They point to a number of inconsistencies and inaccuracies in the plaintiff's evidence, including: the fact he gave inconsistent and inaccurate work histories, and failed to disclose his work place injuries and his pre-accident medication use to the various doctors and health care professionals who assessed him; and unreported income and improper receipt of employment benefits. The defendants take the position that the plaintiff is not reliable in his recitation of events and a significant degree of caution should be exercised when considering his evidence. The defendants say no reliance can be placed on the expert opinions in this matter because of the complete lack of disclosure to them provided by the plaintiff.

- [76] I agree that there were a number of inconsistencies in the plaintiff's evidence. However, the inconsistencies are not regarding the plaintiff's injuries from the accident. The defendants concede that the plaintiff is suffering from chronic headaches, dizziness and balance problems as a result of the injuries he sustained in the accident. The evidence is this was a significant accident and the plaintiff suffered a MTBI as a result.
- [77] All of the doctors who provided expert evidence agree that the plaintiff's symptoms of chronic headaches, dizziness and balance problems are the result of the injuries he sustained in the accident. The chronic headaches have resulted in a significant limitation of the plaintiff's ability to function in all facets of his daily life.
- [78] Although the plaintiff had pre-existing anxiety and depression and suffered from low back pain prior to the accident, there is no evidence that he was disabled from work or performing his household functions at the time of the accident. Rather the evidence is that prior to the accident, the plaintiff was working installing canvass on boat tops and enclosures and driving piles for stabilization of docks on Cowichan Lake.
- [79] Dr. Waisman's opinion is the accident caused the plaintiff to develop a major depressive disorder, moderate, and non-psychotic, PTSD, and a somatic symptoms disorder with predominant pain, moderate and persistent. The defendants have not tendered any medical expert evidence that the plaintiff suffered from any similar symptoms or had a similar diagnosis prior to the accident. As set out earlier, Dr. Waisman was also aware that the plaintiff suffered from anxiety and insomnia prior to the accident and had taken alprazolam for many years for sleep.
- [80] The defendants assert that the plaintiff's evidence is unreliable and therefore his complaints of neck pain and knee pain should not be accepted. However, the defendants did not argue that the plaintiff's complaints of headaches should not be accepted.
- [81] The defendants argue Dr. Khan's opinion that the plaintiff was suffering from neck pain and knee pain is based on the plaintiff's reports that he had been experiencing constant neck pain and knee pain since the accident. They say that there is no evidence that the plaintiff's neck or knee pain has been constant. The defendants assert that the plaintiff did not provide evidence that he had neck pain that wasn't associated with his headaches.
- [82] However, in his report, Dr. Khan refers to the fact the plaintiff had pain and stiffness in his neck on October 8, 2016 the date of the accident, when a CT scan was done of the plaintiff's cervical spine. Dr. Cameron's opinion is that the plaintiff's headaches are a combination of musculoskeletal headaches and post traumatic common migraine headaches. The fact that the plaintiff testified his neck pain was associated with headaches is not surprising given the frequency of his headaches and the fact they are, in part musculoskeletal in nature, and does not, in my opinion, undermine Dr. Khan's opinion.

- [83] As well, the defendants in their written argument concede that it is likely the plaintiff suffered a soft tissue injury to his cervical spine and as a result suffered headaches and an exacerbation of his mental health issues.
- [84] The defendants assert that the plaintiff did not complain of any right knee pain following the accident. However, the plaintiff testified that he had right knee pain when he walked up or down hills. The plaintiff testified apart from that, his knee pain was essentially back to baseline within a year or two after the collision.
- [85] As set out earlier, the plaintiff's main complaints relate to his chronic headaches, vertigo and dizziness which the defendants concede are a result of the injuries he sustained in the accident.
- [86] All of the doctors agree that there is unlikely to be any significant improvement in the plaintiff's symptoms.
- [87] Since the accident, the plaintiff has tried to return to some of his previous activities but without success. In my opinion, the evidence establishes a temporal connection between the accident and the plaintiff's ongoing physical and psychological symptoms. The evidence establishes that the plaintiff sustained a MTBI, and soft tissue injuries to his neck, and right knee in the accident. Insofar as the defendant suggests that the plaintiff's ongoing complaints are the result of pre-existing psychological problems and degenerative conditions in his spine, there is no evidence that the chronic headaches, dizziness and vertigo the plaintiff is currently suffering from would have occurred but for the accident.
- [88] Although the accident is not the original cause of the plaintiff's depression, there is no evidence that he was unable to function prior to the accident. The plaintiff's father and former wife stated there was a marked change in the plaintiff's mood and personality after the accident.
- [89] None of the medical experts suggest that the plaintiff's symptoms will resolve regardless of the treatments he receives or the steps he takes. Accordingly, I find on a balance of probabilities that as a result of the accident the plaintiff will continue to suffer from chronic pain, headaches, neck pain associated with the headaches, and dizziness. As well, he will continue to suffer from psychiatric symptoms of anxiety, depressed mood and PTSD.

What is the Appropriate Award of General Damages for Pain and Suffering?

- [90] The plaintiff seeks an award of \$215,000 for general damages. The defendant submits an appropriate award for general damages is in the range of \$75,000 to \$100,000, which should be reduced by 10% for lack of mitigation.
- [91] For the reasons that follow, I find the appropriate award for general damages is \$200,000.

Applicable Law

[92] A plaintiff is entitled to reasonable damages for his or her pain and suffering. The plaintiff should be placed in the same position she would have been if the accident had not occurred, but not in a better position. In *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, the Court noted that a non-pecuniary award will vary to meet the specific circumstances of each case, and set out the factors to be considered in making such an award:

[46] The inexhaustive list of common factors cited in *Boyd* 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] B.C.J. No. 163 (QL), 2005 BCCA 54).

[93] The plaintiff relies on *Sundin v. Turnbull*, 2017 BCSC 15; *Dornan v. Stephens*, 2019 BCSC 701, rev'd on other grounds 2021 BCCA 228; *Wallman v. John Doe*, 2014 BCSC 79; and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, to support the argument that the appropriate award for general damages is \$215,000.

[94] The defendant relies on *Danroth v. Dufresne*, 2021 BCSC 864; *Huang v. Young*, 2021 BCSC 2276; *Sharma v. Day*, 2020 BCSC 1365 and *Singh v. Storey*, 2021 BCSC 1825 to support the argument that the appropriate range for general damages is \$75,000 to \$100,000.

Application of the Law to the Facts

[95] A number of lay witnesses testified regarding their observations of the plaintiff since the accident in October 2016. It is apparent from the evidence of the plaintiff and the lay witnesses that the plaintiff has suffered a change to his physical abilities, and his emotional state following the accident.

- [96] Lloyd Wright, the plaintiff's father, testified about the changes in the plaintiff's personality following the accident. Mr. Wright testified that prior to the accident the plaintiff was a very happy go lucky individual.
- [97] Mr. Wright testified that he did not see the plaintiff immediately following the accident as he was in Nova Scotia and the plaintiff was in Mexico. However, he spoke to the plaintiff regularly. Mr. Wright testified that the plaintiff sounded down when he spoke to him.
- [98] Mr. Wright testified that the plaintiff came to live with him in Nova Scotia in 2017, about six to eight months after the accident, in order to obtain medical treatment for his injuries. Mr. Wright testified that when the plaintiff arrived in Nova Scotia he noticed a drastic change in the plaintiff both physically and personality wise.
- [99] Mr. Wright testified that after the accident, the plaintiff's personality had changed. The plaintiff appeared to have lost his confidence, and was no longer happy go lucky and outgoing. Mr. Wright testified that during the four to six months the plaintiff lived with him, the plaintiff hardly left his room and did not socialize.
- [100] Mr. Wright also observed physical changes in the plaintiff. Mr. Wright testified that the plaintiff appeared unstable on his feet and didn't seem to have any balance. Mr. Wright testified that he had never observed the plaintiff having balance problems prior to the accident. At one point, when the plaintiff was walking to the bathroom, he lost his balance, fell to the ground and lost consciousness. Mr. Wright testified he had to help the plaintiff, including cleaning the plaintiff's room and driving him to medical appointments, as the plaintiff wasn't capable of doing those things.
- [101] Mr. Wright testified he has not observed any change in the plaintiff's personality or physical abilities since 2017. Mr. Wright testified the plaintiff returned to Mexico to live in 2017, but has returned to Nova Scotia three or four times. Most recently, the plaintiff moved in with Mr. Wright in late 2021. Mr. Wright testified that the plaintiff did not appear to be doing well when he saw him in 2021. Mr. Wright observed the plaintiff having trouble with getting around as a result of balance issues. The plaintiff rarely ate the food Mr. Wright prepared, and stayed in his room most of the time. Mr. Wright has provided financial assistance to the plaintiff since the accident.
- [102] Yuri Valentina Riviera Martinez, the plaintiff's ex-wife testified about her observations of the plaintiff. Ms. Martinez testified she met the plaintiff in January 2013. They married in March 2014 and separated in November 2015. Ms. Martinez described the plaintiff's personality as super outgoing, very friendly, and charming. She testified that the plaintiff was fun to hang out with and full of energy. Ms. Riviera testified that during their time together, the plaintiff went to the gym regularly, played baseball, and surfed. Ms. Martinez testified that when the plaintiff returned to Mexico after an injury to his back at work in 2015, he did not surf or play baseball. Ms. Martinez testified she did not observe any other changes in the plaintiff's activities. They carried on doing activities together, including going places in the car, swimming, and walking. The plaintiff's disposition did not change.

- [103] Ms. Martinez testified she had no contact with the plaintiff after they separated until 2018. Since 2018, they have texted and had one video chat but she had not seen the plaintiff in person. Ms. Martinez testified the plaintiff seems darker, more depressed, and appears to have a lot less energy. Ms. Martinez testified the plaintiff sounds different. On the video call, he appeared down in the dumps and not as happy as he used to be.
- [104] Greg Gilmour testified that he met the plaintiff in 2011, when working at a gold mine 35 kilometres north of Dease Lake, B.C. They shared a trailer at the camp near the gold mine. Mr. Gilmour testified that he and the plaintiff worked together. The plaintiff operated an excavator, loading dirt and rocks into the wash tank. Mr. Gilmour operated the excavator at the bottom of the wash tank, loading the washed material into a truck and emptying it in another location. Mr. Gilmour testified that they worked 12 hours per day, 7 days per week, with a few short breaks during the workday. Mr. Gilmour testified that he worked with the plaintiff for three seasons. The plaintiff's job required sustained sitting, and extended periods of pacing and concentration. Mr. Gilmour observed that the plaintiff did a good job operating the excavator. Mr. Gilmour testified he stayed with the plaintiff in Mexico for five days. Mr. Gilmour testified that the plaintiff was a nice, charming guy, and he never observed any signs of the plaintiff being depressed or anxious.
- [105] Kathia Martinez Vargas testified she met the plaintiff in 2017 in Tecoman, Mexico. Ms. Vargas saw the plaintiff frequently as she operates a gift shop next door to the shop where the plaintiff buys his groceries and which is close to his residence. The plaintiff often visits her. Ms. Vargas testified that on one occasion when the plaintiff visited her they were talking when the plaintiff became dizzy and fell on to the counter. Ms. Vargas has observed the plaintiff having balance problems when walking and appearing dizzy when he stands up from sitting on a chair. Ms. Vargas testified that the plaintiff was outgoing and chatty. Ms. Vargas testified he was happy but she also observed him being sad.
- [106] Jeffrey Easterday met the plaintiff in Tecoman, Mexico in 2020. Mr. Easterday saw the plaintiff twice in 2020. Mr. Easterday testified he became better acquainted with the plaintiff in 2021, when the plaintiff was staying in the hotel operated by his sister-in-law. Mr. Easterday testified that at times when he saw the plaintiff he appeared to be suffering from a severe headache. On one occasion when he was having dinner with Mr. Easterday, the plaintiff became quiet and withdrawn and left early to return to the hotel. On another occasion, when Mr. Easterday stopped by the hotel, he went to the plaintiff's room. The plaintiff appeared to be suffering from a severe headache, and looked like he was in pain from the way he was holding his body. Mr. Easterday testified that his general impression of the plaintiff was that he a friendly, outgoing fellow.

- [107] Rosa Maria Sanchez Nava owns a hotel in Tecoman, Mexico called Hotel Catalina. Ms. Nava met the plaintiff in January 2018, when the plaintiff started living at the hotel. Ms. Nava testified that the plaintiff travelled to Canada for two months at one point, and then returned to live in her hotel. Ms. Nava lives at the hotel. The hotel is small and Ms. Nava testified she is always aware of her guests.
- [108] Ms. Nava testified that she does not usually cook for hotel guests but prepares food for the plaintiff because he is not well. Ms. Nava testified that she does not prepare food for the plaintiff everyday as she does not invite him to eat with her when he has a bad headache. She knocks on the plaintiff's door to check on him when she doesn't see him in the morning. Ms. Nava's evidence is that the plaintiff stays in his room for days at a time. Ms. Nava testified that when she goes to the plaintiff's room to check on him he is usually sick with a headache. Ms. Nava testified that the plaintiff often comes down from his room holding his head when he comes to eat with her and her daughter. Ms. Nava testified she has helped the plaintiff get a doctor on three occasions, including one time when she found him vomiting in his room. Ms. Nava testified that she had not observed any changes in the plaintiff's signs of illness over the year, and that every day she says "poor Douglas".
- [109] In my view, the medical expert evidence, and the evidence of the plaintiff and the lay witnesses supports a finding that the accident had a very profound effect on the plaintiff. As a result of the accident, the plaintiff suffers debilitating headaches with pain radiating into his neck, nausea, dizziness and balance problems three or four days a week. The evidence is that when suffering from a headache the plaintiff has to lie down and finds it difficult to eat or drink. The evidence is that the plaintiff's personality has changed, and he has become more depressed and anxious.
- [110] I have reviewed the various cases provided by counsel regarding the appropriate range for general damages. Each case has distinctive facts, and it is often difficult to reconcile them as awards for pain and suffering are individual in nature. In my opinion, the plaintiffs in the cases provided by the plaintiff are more comparable in terms of the impact of the injuries on the plaintiff's lives than those of the defendant has provided. However, as noted in *Stapley*, at para. 45, an award of non-pecuniary damages will vary in each case depending on the specific circumstances of the case.
- [111] Having considered the extent of the plaintiff's injuries, the fact that the symptoms have been ongoing for six years with little improvement, the plaintiff's age, the guarded prognosis for any further improvement, and the other factors set out in *Stapley*, as well as the authorities, I am of the view that the appropriate award for non-pecuniary damages is \$200,000.

Past and Future Loss of Income Earning Capacity

[112] The plaintiff advances claims for the loss of past and future income earning capacity. I find the appropriate award for past loss of income earning capacity is \$120,000, subject to deductions, and an appropriate award for future loss of income earning capacity is \$113,944.

Parties Positions

[113] The plaintiff advances a claim for past income loss for six years at \$30,000 per year, for the amount of \$180,000.

[114] The plaintiff claims \$225,000 for future loss of income earning capacity based on making \$30,000 per year between the ages of 59 and 70.

[115] The plaintiff concedes that he most likely would not have been able to return to the mining job he had from 2011 to 2014, even if the accident had not occurred as a result of the 2014 and 2015 work place injuries. Rather the plaintiff claims \$30,000 per year between the ages of 53 and 70, which is the amount he testified he aimed to earn during his work season.

[116] The plaintiff asserts he is likely to work past the age of 65 as his seasonal work is not as taxing as full-time work and he does not have significant financial resources that would allow him to retire at age 65. The plaintiff argues that although he did not earn \$30,000 from 2014 to 2016, he would have if he had not been injured in two work place accidents and there is no evidence that the workplace injuries would have continued to keep him off work after he was discharged by WCB in the summer of 2016. However, the plaintiff concedes a 25% negative contingency should be applied for the possibility that his non-accident related symptoms might have prevented him from working but for the occurrence of the accident and that he would have retired earlier than age 70.

[117] The defendants take the position that the plaintiff has not provided evidence of a work history that would justify an award based on \$30,000 per year. The defendants submit that the plaintiff's vocational future absent this accident is entirely unclear. He had no continuing employment position and had limitations related to his prior workplace injuries. In all probabilities, the plaintiff faced significant limitations and challenges in his vocational pursuits prior to the accident. There is no reliable evidence to support the conclusion that this future has been materially altered by the injuries sustained in the accident.

Applicable Law

[118] The assessment of loss for past and future income earning capacity was discussed in *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49:

[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.
- [119] The Court of Appeal recently considered the proper approach to determining a claim for loss of future earning capacity: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421.
- [120] In *Dornan* at para. 156, the Court reiterates that while an award for future loss of earning capacity is an assessment and not a mathematical calculation, it necessarily involves a comparison of the plaintiff's likely future if the accident hadn't occurred and his likely future after the accident.
- [121] In *Rab* at para. 46, the Court quotes the following from *Perren v. Lalari*, 2010 BCCA 140 at para. 32:
- [32] A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in [*Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.)], or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and [*Romanchych v. Vallianatos*, 2010 BCCA 20].

[Emphasis original.]

- [122] The Court then summarized a three-step process to be used when considering claims for loss of future income earning capacity:
- [47] From these cases, 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.

- [123] After applying the three-step process outlined above, the trial judge must consider whether the damage award is fair and reasonable: Lo at para. 117.

Application of the Law to the Facts

- [124] The plaintiff's claims for past and future loss of income earning capacity are difficult to assess because the plaintiff did not report some of the income he testified he earned for income tax purposes. As well, the plaintiff provided incorrect information to some of the experts about his work history.
- [125] As set out earlier, in the years before the accident, the plaintiff worked seasonally at a variety of jobs. The plaintiff worked in a gold mine from 2011 to 2013 in a seasonal position running from approximately May or June to October. The plaintiff testified that he worked 12 to 14-hour days, earned \$10,000 per month, and lived in camp. According to the plaintiff, the owner of the mine was a friend of his. The owner had a reputation for not paying and the plaintiff did not know if money was being deposited into his account as he had not access to his account when he was in camp. The plaintiff testified he received part of his pay in gold nuggets, which he would have to sell.
- [126] The plaintiff did not report the earned working in the gold mining camp between 2011 and 2013 for income tax purposes. The plaintiff's explanation was that he thought the gold nuggets he received did not qualify as income.
- [127] The plaintiff did not return to the gold mining camp in 2014, as there was no work for him. The plaintiff found alternate employment with Sidhu Trucking in Beaver Creek, Yukon. Unfortunately, the plaintiff injured his lower back while working and was sent to a rehabilitation clinic. The plaintiff's income for 2014 includes WCB benefits.
- [128] In 2015, the plaintiff obtained employment driving a truck in Fort McMurray. The plaintiff was again injured at work, and spent part of 2015 at a rehabilitation clinic in Edmonton, Alberta. The plaintiff's income for 2015 includes WCB benefits.
- [129] The plaintiff testified that when he returned from Mexico in 2016, WCB personnel told him he could not return to his previous work and needed to be retrained. The plaintiff started the retraining but WCB withdrew their support. The plaintiff testified that when he was cut off it was too late in the season to obtain a job at the gold mine camp. The plaintiff testified that he obtained work with Mr. Schumann, who owned two businesses, one making canvass boat covers and the other driving piles. The plaintiff testified that Mr. Schurmann agreed to pay him \$10,000, provide accommodation and purchase a plane ticket for him to Mexico. The plaintiff did not report the income he earned working for Mr. Schurmann for tax purposes.

[130] The plaintiff testified that when working in 2016, he was taking Tylenol 1 for residual back pain from his 2015 workplace injury which was aggravated by the long days he worked with Mr. Schurmann. The plaintiff testified he also had some knee pain during this period. The plaintiff's evidence is that his back and knee pain did not hold him back from his work duties with Mr. Schurmann or substantially affect his other activities.

[131] The plaintiff income tax returns from 2010 to 2017, show the following earning history:

2010

Total earnings = \$26,771

WCB benefits (wrist injury) = \$15,686

Total income = \$42,457

Net income = \$42,457

2011

WCB benefits (wrist injury) = \$9,447

Employment insurance = \$16,380

Total income = \$25,827

Net income = \$25,827

2012

Employment insurance = \$5,616

Total income = \$5,616

Net income = \$5,616

2013

NIL

Net income = \$0

2014

Total earnings = \$14,261

WCB benefits (back injury) = \$22,523

Total income = \$36,784

Net income = \$36,784

2015

Total earnings = \$11,706

WCB benefits (second back injury) = \$20,948

Total income = \$32,654

Net income = \$32,654

2016

WCB benefits - \$10,683

Total income = \$10,683

Net income = \$10,683

[132] According to the plaintiff, the income listed for 2011, 2012, and 2013 do not include undeclared income of \$10,000 per month that the plaintiff testified that he earned at the gold mining operation. The amount listed for 2016 does not include \$10,000 which the plaintiff testified Ken Schurmann paid him.

[133] The plaintiff testified that he collected employment insurance benefits after his WCB benefits (obtained after the wrist injury) ran out 2011. He admitted that he continued to collect these benefits after starting work at the gold mining camp around June of 2011, and after he left the gold mining camp and returned to Mexico. These employment insurance benefits continued into 2012 and are captured in the table above.

[134] The evidence is that the plaintiff has not worked or earned income since the time of the accident.

[135] As set out earlier, the medical expert evidence, and the evidence of the plaintiff and the lay witnesses supports a finding that the injuries the plaintiff sustained in the accident have had a profound effect on his ability to work in any capacity.

[136] Dr. Khan's opinion is that the plaintiff experiences a disability with respect to vocational activities due to his symptoms of headaches, imbalance and fear of passing out. Dr. Waisman's opinion is that the plaintiff's impairments impact his ability to attend work. Due to the synergistic effects of chronic pain and depression, the plaintiff has been unable to return to gainful employment and his prognosis remains guarded. Dr. Cameron's opinion is that the plaintiff's ongoing post accident symptoms have resulted in him being rendered competitively unemployable and he will likely remain competitively unemployable in the future.

[137] Ms. Malhotra's opinion is that as a result of the combination of chronic headaches, physical limitations, and psychological and cognitive effects of the injury, the plaintiff is unable to work as a heavy equipment operator. Ms. Malhotra's opinion is that due to the plaintiff's symptoms from the injuries he sustained in the accident, and the high possibility of not finding an employer who would provide permanent accommodations to him, such as

accepting chronic absenteeism, multiple medical appointments and lack of dependence for productivity, there is a real and substantial possibility of future financial income loss.

- [138] As set out, the evidence supports a finding that the plaintiff suffers debilitating headaches three to four days a week, where he has to stay in bed and finds it difficult to function or eat or drink anything.

Loss of Past Income Earning Capacity

- [139] It is clear that the plaintiff's ongoing symptoms of headaches, dizziness, nausea, and lack of balance have had an impact his capacity to earn income from the date of the accident to the trial.
- [140] As stated earlier, it is difficult to determine what the plaintiff's potential income earning capacity was between the date of the accident and the trial if he had not been injured, given his evidence that he did not report his income for income tax purposes.
- [141] In *Doberstien v. Zhao*, 2020 BCSC 1788, the Court reviewed the cases dealing with the issues of credibility and failure to report income for tax purposes. While there is authority for including unreported income from cash jobs in the calculation of income, the plaintiff has the burden of establishing the wage loss. At paras.89-90 the Court stated the following:
- [80] Perhaps Fitch J. (while in this court), put it best in *Wong v. Hemmings*, 2012 BSCS 907. While noting at para. 84 that the defendants argued that the plaintiff had "demonstrated a pattern of deception and is prepared to mislead if it is in her economic interest to do," he concluded there was sufficient independent and objective evidence to confirm the plaintiff's evidence as to the injuries she says she received in the accident. I find the same holds true here with respect to the injuries and ongoing chronic pain Ms. Doberstein has described. Indeed, the defendants clearly recognize the legitimacy of the physical symptoms Ms. Doberstein has described, as they accept a relatively significant award for non-pecuniary damages is appropriate.
- [90] Fitch J. went on to state that the impact a failure to report income has on the credibility of a plaintiff "is a case specific inquiry," which "must take account of factors that are more encompassing and more subtle than the failure to report income in isolation." He added:
- [105] In the case at bar, I am unable to find that the plaintiff's admittedly dishonest conduct in the preparation of her tax returns adversely affects on her credibility on the central issues before me. I would note, in this regard, that virtually all of the plaintiff's evidence relevant to the heads of damage that are at issue in this case is independently and objectively supported by other evidence which I accept

- [106] To discount the plaintiff's evidence in these circumstances would be to punish her for misconduct that is not directly before me. It forms no part of my role to do so. In all the circumstances of this case, it would be unfair to the plaintiff, and would lead to an unjust result, to make an adverse credibility finding in relation to her as a consequence of her dishonesty in the preparation of her tax returns.
- [142] The evidence in this case is that the plaintiff has defrauded the federal government by failing to report his income from the gold mining operation in 2011, 2012 and 2013, failing to report the income he earned from Mr. Schurmann in 2016, and collecting unemployment insurance benefits improperly for a period of time in 2011 and 2012.
- [143] The plaintiff asserts he declared his income from other jobs besides the gold mining work and the job with Mr. Schurmann. The plaintiff's evidence on his unreported earnings from the gold mining camp was consistent with the evidence provided by Mr. Gilmour. Mr. Gilmour started earlier in the season and had a different compensation structure. He was paid \$300 a day and would have grossed approximately \$55,000 in the six-month period he worked. As a consequence, the plaintiff says that an adverse credibility finding in this action that he did not earn monies working in the gold mine would lead to an unjust result.
- [144] While unreported income from cash jobs can be included in the calculation of income, the evidence does not support a finding that the plaintiff would have been able to return to the work at the gold mine. Mr. Gilmour's evidence contradicted the plaintiff's evidence as to whether work was available at the gold mine in 2014 and 2015. Although the plaintiff was told the gold mine would not be operating in those years because the owner did not obtain the required permits, Mr. Gilmour's evidence was that he continued to work at the gold mine in 2014 and 2015. As a result, I find the evidence does not support a finding that the plaintiff would have been able to return to gold mining but for the accident even if he had not suffered the two work place injuries in 2014 and 2015.
- [145] The evidence is that the plaintiff earned less than \$15,000 per year from 2014-2015, with the rest of his income being WCB benefits. The plaintiff testified that prior to the accident WCB told him that he could not return to his prior employment and needed to be retrained. The evidence of his work history prior to the accident supports a finding that the plaintiff was disabled from doing the heavy equipment jobs he had done prior to 2014, despite the plaintiff's evidence that he thought he was capable of returning to that type of work. As conceded by the plaintiff he was still suffering from lower back pain when he was working for Mr. Schurmann in 2016.
- [146] Although there are credibility problems with the plaintiff's evidence, and he has conceded that he has defrauded the government by not reporting income and collecting benefits when he should not have, the plaintiff's evidence relating to his injuries and functionality was consistent with that of the lay witnesses who testified at trial.

- [147] While the plaintiff was challenged regarding his evidence relating to the employment information he gave to independent medical examination providers, the evidence is that prior to the accident the plaintiff was capable of working in some capacity. I accept the plaintiff's evidence that in 2016, Mr. Schurmann paid him \$10,000, and provided him with lodging and a plane ticket to Mexico.
- [148] Since the accident, the plaintiff has been completely disabled from work as a result of the chronic headaches, dizziness and vertigo. The defendants did not argue that the plaintiff could return to work or has any residual capacity to work even on a part time basis.
- [149] In my opinion, the evidence of the plaintiff last year working prior to the accident supports a finding that the plaintiff had a capacity to earn approximately \$20,000 per year (including lodging) working seasonally.
- [150] Accordingly, I have determined that the appropriate award for past loss of income earning capacity is six years at \$20,000 per year for a total of \$120,000, subject to deductions for tax.

Loss of Future Income Earning Capacity

- [151] As set out earlier, in Rab a three-step process was outlined for assessing a plaintiff's loss of future income earning capacity.
- [152] At the first stage, the medical evidence indicates that the plaintiff will continue to suffer from the ongoing symptoms of chronic headaches, nausea, dizziness and vertigo in the future which prevent him from working, and his prognosis for improvement is very guarded.
- [153] At the second step, the evidence supports a finding that there is a real and substantial possibility that the plaintiff's ongoing symptoms of chronic headaches, dizziness, nausea and vertigo will cause a pecuniary loss. There is no evidence that the plaintiff will recover to the point where he will not suffer from debilitating headaches that impact his ability to function for three or four days per week. Nor is there any evidence that the plaintiff has any residual capacity to find employment with his ongoing symptoms. As stated by Ms. Malhotra there is a high possibility that the plaintiff will not find an employer who could provide accommodations for chronic absenteeism and lack of dependence for productivity. The defendants did not argue that the plaintiff has any residual capacity to return to any type of work.
- [154] At the third stage, the value of the future loss is assessed, including assessing the relative likelihood of the loss occurring. As set out, the evidence is that it is unlikely the plaintiff would have been able to return to his former employment of truck driving or operating heavy equipment even if the accident had not occurred.

- [155] Having considered the plaintiff's income in the years immediately prior to the accident, and 2014 and 2015 workplace injuries, I find the plaintiff's ability to work in jobs involving heavy physical demands was limited regardless of the accident. Although the plaintiff asserts it is likely he would have worked past the age of 65, I find that it is unlikely that the plaintiff would have been able to carry on doing jobs involving even moderate physical demands past the age of 65.
- [156] In my opinion, the appropriate award for the plaintiff's loss of future income earning capacity should be based on an income of approximately \$20,000 per year to age 65.
- [157] There are both positive and negative contingencies to be considered. The negative contingency is that the plaintiff may not have been able to work until age 65 regardless of the accident. The positive contingencies is that the plaintiff will find a job that pays more than \$20,000 a year. In my view, having considered both contingencies no further reduction should be made for negative contingencies.
- [158] Accordingly, the appropriate award for the plaintiff's loss of future income earning capacity is $5.6972 \times \$20,000$ or the present value of \$113,944. In my opinion, an award of that amount is fair and reasonable in the circumstances of this case.

Loss of Housekeeping Capacity

- [159] The plaintiff advances a claim for an award for past and future loss of housekeeping capacity in the amount of \$230,000. In my opinion the appropriate award for loss of housekeeping capacity is \$40,000.

Applicable Law

- [160] In *Riley v. Ritsco*, 2018 BCCA 366 at paras. 96-103, the Court discussed claims for loss of housekeeping capacity, and where a segregated award of non-pecuniary damages for loss of housekeeping capacity is appropriate.
- [161] In *Riley* at para. 99, the Court referred to the comments in *Kroeker v. Jansen*, [1995] 6 W.W.R. 5 (B.C.C.A.), that it is open to a trial judge to segregate damages for loss of housekeeping or homemaking capacity. The Court also reiterated the comments in *Liu v. Bains*, 2016 BCCA 374, that it is well established that an injured plaintiff may claim for the value of the work that would have been done by the plaintiff but which he is incapable of performing as a result of the injuries sustained.
- [162] In *Riley* at para. 101-102, the Court stated:

- [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
- [102] I acknowledge what was said in Kroeker about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

Parties positions

- [163] The plaintiff takes the position that the evidence shows the plaintiff's father and Ms. Nava have gratuitously performed a wide variety of housekeeping tasks for plaintiff. Accordingly, the plaintiff's position is that this is one of the cases referenced in Riley whose special facts do warrant a separately-quantified non-pecuniary award.
- [164] Katelyn D'Entremont, an expert in occupational therapy and cost of future care, prepared a report dated November 14, 2021 and testified. The plaintiff relies on Ms. D'Entremont's evidence that Mr. Wright will "require frequent home care services to maintain safety, provide assistance with housekeeping and meal preparation tasks if he moves out of his father's home." Ms. D'Entremont quantifies three four-hour housekeeping sessions per week, at a cost of \$20-25 per hour, as totalling \$12,480 - 15,600 per year. The plaintiff takes the position that applying this multiplier to calculate the present value of the future losses, the projected pecuniary loss of his housekeeping capacity is \$212,312.25 - \$265,390.32. The plaintiff submits that the sum of \$230,000 would therefore be a just and fair award under this head.
- [165] The defendant takes the position that the evidence establishes the plaintiff is capable of performing housekeeping tasks on good days and no segregated award should be made for loss of housekeeping capacity.

Application of the Law to the Facts

- [166] Prior to the accident, the plaintiff was able to perform housekeeping tasks and was self-sufficient. Since the accident, the plaintiff has required assistance with housekeeping tasks.

- [167] The plaintiff claims he has suffered a loss of housekeeping or homemaking capacity. His evidence is that when he has a headache, he has difficulty with housework and cooking. Mr. Wright and Ms. Nava both testified that they have performed a wide variety of housekeeping tasks for the plaintiff, including cooking for him and cleaning.
- [168] However, the evidence is that the plaintiff is able to do his own self-care and has good days where he is able to function. As set out in Ms. D'Entremont's report, when the plaintiff is in Mexico on a good day he is able to go to the gym, ride his bike, cook a meal and live a "normal life".
- [169] The plaintiff is seeking an award for past and future loss of housekeeping capacity based on recommendations made by Ms. D'Entremont. The plaintiff is claiming three four-hour housekeeping sessions per week, at a cost of \$20-25 per hour, as totalling \$12,480 - 15,600 per year. The plaintiff is seeking future loss of housekeeping capacity to age 80, in the amount of \$230,000. In other words, the plaintiff's claim under this head of damages is more akin to cost of future care rather than the loss of housekeeping capacity.
- [170] It is clear from the case law that loss of housekeeping or homemaking capacity is a claim for loss of capacity and not a claim for cost of future care: *O'Connell v. Yung*, 2012 BCCA 57 at para. 65. It is to reflect the diminished capacity of a plaintiff to take care of his household, not the cost of provision of services by others. An award for loss of housekeeping capacity reflects the loss of a personal capacity, and is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required. The case law suggests a conservative approach should be taken in making an award for loss of housekeeping capacity.
- [171] Having considered the evidence, it is apparent the plaintiff suffers diminished capacity in his ability to perform household tasks as a result of his chronic headaches, dizziness and vertigo. Accordingly, I have concluded it is appropriate to make some award under this head of damage. However, the plaintiff is still capable of performing housework and other household tasks on days when he is not suffering from a headache. Having considered the evidence and the case law, it is my opinion that an award of \$40,000 is appropriate to compensate the plaintiff for his loss of both past and future housekeeping capacity.

Cost of Future Care

- [172] The plaintiff is advancing a claim for cost of future care in the amount of \$330,000. The plaintiff is relying on Ms. D'Entremont's report on cost of future care and the recommendations of the various experts regarding future treatment.
- [173] The defendants submit that the appropriate award for cost of future care is \$10,000.

[174] For the reasons that follow, I find the appropriate award for cost of future care is \$56,963.92.

Applicable Law

[175] In *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63, the Court of Appeal reiterated the test for assessing future care costs as follows:

[62] The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):

3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

[63] McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

[176] As noted in *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20:

[20] I agree with counsel for the plaintiff that there is no hard and fast rule that requires a plaintiff to testify that he intends to use every item in the "wish list" of an occupational therapist in order to justify some award. On the other hand, a plaintiff must prove his case, both in terms of need and the likely utility of the item sought: see *O'Connell v. Yung*, 2012 BCCA 57 at para. 68. Where the costs claimed are not matters of absolute necessity, a plaintiff cannot assume that the court will simply accept the recommendations of occupational therapists or even of medical practitioners.

Application of the Law to the Facts

[177] The plaintiff claims damages up to the age of 80. The plaintiff submits the following costs are medically justified in this case:

Venlafaxine

\$124.48 per year

Zopiclone

\$98.16 per year

Botox Injections (600 units per year at a total cost of \$2,400 per year)

\$2,400 per year

Occupational therapy, two-to-three times per year

\$230 - \$345 per year

Clinical psychologist

\$4,080 per year

Companionship (reduced to half the amount recommended by Ms. D'Entremont)

\$11,520 - \$14,400 per year

TOTAL

\$18,452.64 - \$21,447.64 per year

[178] The defendants take the position that the recommendations made by the medical experts were not considered by Ms. D'Entremont as she was only provided with Dr. Cameron's expert report. As a result, the recommendations lack any medical justification.

[179] The defendants say that of particular concern are Ms. D'Entremont's recommendations for home care/companionship and a service dog as none of these items are supported by medical evidence.

[180] Dr. Cameron's opinion is that the plaintiff is a candidate for Botox injections for chronic pain and headaches. Dr. Cameron recommends that if the plaintiff agrees to pursue this therapy, he receive injections on at least two occasions to provide an adequate assessment regarding possible benefits of this therapy. There is no evidence that the plaintiff had any injections prior to the trial, and what, if any, benefits he would receive from the treatment. As a result, it is my view, that the plaintiff has not established the requirement for an award for yearly Botox injections. However, in my view, it is appropriate to award an amount for a trial of 400 units or the amount of \$1600.

[181] Ms. D'Entremont's recommends home care and companionship, including a service dog. The evidence is that the plaintiff goes out on good days, is able to shop, has made friends since his accident, and is able to bicycle. There are no medical recommendations for either a service dog or companionship for driving and other tasks.

[182] Ms. D'Entremont's opinion is that if the plaintiff were to relocate and live independently, which he told her was his goal, he would need frequent home care services to maintain safety, and to provide assistance with meal preparation, grocery shopping and housekeeping. Ms. D'Entremont recommends home care three times a week for four hours at a time at the cost of \$12,480 - \$15,600 per year.

[183] However, the evidence is that the plaintiff is able to do housekeeping, go grocery shopping, prepare meals and ride his bicycle on his good days. Ms. Vargas testified that the plaintiff would drop into her shop because it was close to where he did his grocery shopping. This evidence does not support a finding that the plaintiff is completely disabled from

housekeeping, meal preparation and shopping, and as a result requires assistance three times a week with these tasks. However, the evidence establishes that the plaintiff requires some assistance with housekeeping and meal preparation. Both the plaintiff's father and Ms. Nava have assisted the plaintiff with those tasks.

- [184] In my view, given the plaintiff's residual capabilities, assistance one day every two weeks for four hours is reasonable. Ms. D'Entremont estimates each session will be \$80 to \$100. Accordingly, I have concluded that a reasonable award under this heading is one day every two weeks for four hours or \$1920 - \$2400 per year. Although the plaintiff asserts the award should be to age 80, given the plaintiff's prior injuries it is likely he would have needed assistance with those tasks prior to age 80 if the accident had not occurred. In my opinion, an appropriate award under this heading is \$2,160 per year (the average) until age 75 or \$29,326.32.
- [185] Dr. Khan recommends two consultations with an occupational therapist in order to optimize the plaintiff's housekeeping abilities. There is no recommendation by any of the health care professionals for the need for ongoing occupational therapy. The cost of two sessions of occupational therapy is \$250.
- [186] Dr. Waisman recommended weekly psychotherapy for one year and then as needed. The defendants agree that one year of psychotherapy at the approximate cost of \$8,000 is appropriate. In my view, an additional amount of \$4,000 to cover the costs of follow up treatments is appropriate for a total of \$12,000.
- [187] The plaintiff claims for the costs of zopiclone, a sleep aid, and venlafaxine, for treatment of depression. In Dr. Waisman's report he sets out that the plaintiff currently is prescribed zopiclone, venlafaxine and alprazolam. The evidence is that the plaintiff was taking alprazolam at the time of the accident, and continues to take it as a sleep aid. Although Dr. Waisman and Dr. Cameron testified they had concerns about the plaintiff's use of these medications, both indicated that reducing his medications is complicated and neither recommended he do so. The evidence is that the venlafaxine and zopiclone were prescribed post-accident to assist in dealing with the plaintiff's ongoing symptoms. There are no recommendations to the contrary. As a result, I am of the view that the appropriate amount for ongoing medications is \$222.64 per year to age 80 or the net present value of \$3,787.60.
- [188] The plaintiff also claims the amount of \$10,000 for mobility aids outlined in Ms. D'Entremont's report. Ms. D'Entremont recommends a variety of items, including an angle adjustable bed, a clamp on tub rail, a shower seat, a handheld shower head, and a four-wheeled rollator walker. None of these items have been recommended by a medical doctor.

- [189] However, both Ms. D'Entremont and Ms. Chandoo testified that occupational therapists have the expertise to assess requirements for mobility aids for patients. Ms. D'Entremont did a home assessment on November 13, 2021. At that time, Ms. D'Entremont observed the plaintiff holding on to the towel rack and the shower head to transfer himself into the shower. She recommended a tub grab bar, shower seat and hand-held shower head to assist him and decrease the risk of falls as this was a safety concern.
- [190] Ms. D'Entremont reported that the plaintiff had no difficulty transferring himself in and out of bed. However, the plaintiff reported he is unable to lay flat as this results in increased head pain and so props himself up on pillows. Ms. D'Entremont also observed the plaintiff was unsteady on his feet and recommended a four-wheel walker. In my opinion, an award for mobility in the amount of \$10,000 is appropriate based on the costs set out in Ms. D'Entremont's report.
- [191] The total award for cost of future care is \$56,963.92.

Special Damages

- [192] The plaintiff seeks an award of \$1,500 for special damages. The plaintiff testified that he has spent \$2,000 to \$3,000 for medications in Mexico. This evidence was not challenged, however some of the medication he purchased relates to alprazolam which he would have purchased in any event. The defendants did not make any submissions regarding special expenses.
- [193] Accordingly, I am awarding \$1,500 for special damages.

Mitigation

- [194] The defendants argue that the plaintiff failed to mitigate his damages by following the recommendations made by the physician he saw shortly after the accident regarding attending massage therapy and physiotherapy.
- [195] The defendants assert these recommendations were made to reduce the plaintiff's pain experience and improve his function. The defendants submit that any award of damages should be reduced by 10% for the plaintiff's failure to follow these recommendations.
- [196] There is no question that every plaintiff has an obligation to take reasonable steps to reduce the damages flowing from a tort. In order to be successful in discharging the burden of proving that the plaintiff has failed to mitigate, the defendants must establish that the plaintiff failed to undertake a recommended treatment, that his refusal to follow the recommendation was unreasonable, and that by following the recommended treatment the plaintiff would have overcome the problem: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[197] In *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56, the Court of Appeal stated the mitigation test is a subjective/objective test:

That is, whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment.

[198] The defendants argue that while there is no certainty that these treatments would have been effective, it is a reasonable assumption they would have improved his condition.

[199] While the plaintiff may have some improvement in his condition if he had attended massage and physiotherapy, there is no evidence there would have been a significant reduction in his pain and symptoms if he done so. In the circumstances, I have concluded that the defendants have not met the threshold for reducing an award set out in *Chiu*.

Conclusion

[200] I find the defendants are liable for the October 2016 accident.

[201] I am awarding the following amounts for the injuries suffered by the plaintiff in the accident:

- Non-pecuniary damages - \$200,000
- Loss of housekeeping capacity \$40,000
- Loss of past income earning capacity - \$120,000
- Loss of future income earning capacity - \$113,944
- Cost of future care - \$56,963.92
- Special Costs - \$1500
- Total - \$532,407.92

[202] As well, the plaintiff is entitled to his costs at Scale B.

"Gerow J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/07/2022BCSC0742.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/wright-v-admiraal-2022>

Prepared on 28 October 2026 · Esheria