IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sauve v. McComish,*
2025 BCSC 691

Date: 20250411
Docket: M206663
Registry: Vancouver

Between:

Timothy Lloyd Sauve

Plaintiff

And

Duncan McComish and Ian Robert McComish

Defendants

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Plaintiff:	M. Fahey M. Milenkovic
Counsel for the Defendants:	M. Neathway M. Durovic
Place and Dates of Trial:	Vancouver, B.C. November 18-22 & 25-28, 2024
Place and Date of Judgment:	Vancouver, B.C. April 11, 2025

INTRODUCTION

[1] The plaintiff, Timothy Lloyd Sauve, seeks damages from the defendants, Duncan and Ian McComish, for personal injuries sustained in a motor vehicle collision on June 16, 2018 at the intersection of the Cedar Valley Connector / Cedar Street and 7th Avenue in Mission, BC. Duncan McComish, then 18 years old, was driving his father's car. Ian McComish was named as a party to the litigation only as the vehicle's registered owner. When I refer to "the defendant", I mean Duncan McComish.

THE COLLISION

[2] Details of the collision came from the testimony of the parties themselves and two independent witnesses, Mr. Robert Reed and Mr. William Reid. I was also shown remarkably clear security camera footage from a gas station on the northeast corner of the relevant intersection which not only captured the collision itself, but also showed the traffic light for westbound traffic on 7th Avenue. There were the usual maps, diagrams and photos, but no accident reconstruction or engineering evidence. Probabilities concerning the plaintiff's speed of travel or acceleration prior to impact, for example, are purely matters of testimonial evidence or rational inference.

[3] The collision occurred at around 2:15 p.m. on a clear, sunny day. The Cedar Valley Connector at the approach to the intersection with 7th Avenue has two northbound through-going lanes with no dedicated turn lanes. There is a counter-clockwise curve in the road approximately 100 metres south of the intersection, at the beginning of which the upcoming 7th Avenue traffic light is clearly visible. This curve is followed by a straightaway on a gentle uphill grade for northbound traffic. The grade does not materially affect forward visibility, and there is no suggestion in evidence that, at any material time, a relevant line of sight for either party was blocked by vehicles or other obstacles.

[4] The plaintiff was operating a motorcycle northbound in the centre-line lane on the Cedar Valley Connector intending to carry on in the same lane and direction on

Cedar Street. The defendant, meanwhile, was travelling south on Cedar Street, which also consists of two marked through lanes without dedicated turn lanes onto 7th Avenue. The defendant entered the intersection on a green light from the centre-line lane, and stopped approximately a car-length into it with his turn-signal activated indicating his intention to turn left. When the light turned yellow, the defendant saw that vehicles approaching the intersection in the northbound curb lane were coming to a stop.

[5] A preoccupation of the defendant, I find, was a white Ford Mustang in the northbound curb lane that was indicating a right-hand turn. The driver of this vehicle was the witness Robert Reed. Once the defendant was satisfied that Mr. Reed was coming to a stop, he claims to have “scanned” the intersection, but he did not see the plaintiff approaching on his motorcycle in the centre-line lane. I think it likely that he assumed, wrongly as it turned out, that if Mr. Reed was stopping then vehicles located behind him in the northbound lanes would do so as well. The plaintiff, for his part, admitted that he saw the defendant stopped in the intersection, and I find as a fact that he was aware that the defendant was poised to turn left. My overall evaluation of the situation is that both parties made last second mistakes, the plaintiff to enter the intersection, and the defendant to start his turn, when neither maneuver was safe.

[6] Mr. Robert Reed confirmed that he was driving his white Mustang in the curb lane northbound on the Cedar Valley Connector. He saw the light in front of him turn yellow when he was approximately 50 metres from the intersection. It is clear that the plaintiff was somewhere behind him in the roadway and thus even farther from the intersection. Mr. Reed slowed and brought his vehicle to a stop. When he did this, no one was ahead of him in his lane. He saw the defendant waiting in the intersection with his left turn light activated. The light in front of Mr. Reed had not yet turned red, and the defendant had not started his turn, when he heard the “crack” of a motorcycle accelerating. He turned his head to the left and saw the plaintiff go by him in a “blur” followed, instantaneously, by the collision. He said that the plaintiff

was “ejected” from his bike and flew over the hood of the defendant’s vehicle, landing to the north of it.

[7] In cross-examination, Mr. Reed said that he stopped his vehicle before the light in his direction turned red. His purpose in doing this was to permit the defendant to proceed with his turn. He testified that he was a motorcyclist himself, and that the “crack” sound he heard before the plaintiff went by in a “blur” was that of “hard acceleration”. He said that the motorcycle collided with the defendant’s vehicle at an oblique diagonal in the area of its front bumper and quarter panel on the passenger side. This evidence was confirmed by other testimony, photographs, and the gas station video footage. I conclude that the defendant had only just started his left turn when the plaintiff ran into him.

[8] Mr. William Reid was a passenger in a vehicle operated by his late wife, Pauline Reid, also in the northbound curb lane of the Cedar Valley Connector approaching 7th Avenue, directly behind Robert Reed’s Mustang. Mr. Reid observed the Mustang stop at the intersection, and Pauline Reid did the same a few feet behind it. Mr. Reid then heard his wife say “Don’t do it guy”, which caused him instinctively to look to his left. The plaintiff’s motorcycle went by in the centre-line lane, and in the time that it took Mr. Reid to swivel his head to see what would happen next, the collision had already occurred – the plaintiff was in mid-air over the hood of the defendant’s vehicle. Mr. Reid noticed at this precise moment – and this part of his evidence was not challenged – that the light for northbound traffic had turned red.

LIABILITY

[9] The plaintiff says that the defendant is wholly liable for the collision because he made his left turn when it was not safe to do so. The defendant admits his fault to this extent, but he argues that the plaintiff was contributorily negligent by failing to slow and stop in response to a traffic light that had been yellow for several seconds before he entered the intersection.

[10] The broad legal framework applicable to liability in left-hand turn cases was reviewed by this court in *Pirie v. Skantz*, 2015 BCSC 368, aff'd 2016 BCCA 70 at paras. 32-33 as follows:

> [32] …This case requires me to consider the interplay between the following sections of the *MVA*:
>
> > 125 Unless otherwise directed by a peace officer or a person authorized by a peace officer to direct traffic, every driver of a vehicle and every pedestrian must obey the instructions of an applicable traffic control device.
> >
> > …
> >
> > 128(1) When a yellow light alone is exhibited at an intersection by a traffic control signal, following the exhibition of a green light,
> >
> > > (a) the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, unless the stop cannot be made in safety.
> >
> > ...
> >
> > 144(1) A person must not drive a motor vehicle on a highway
> >
> > > (a) without due care and attention,
> > >
> > > (b) without reasonable consideration for other persons using the highway, or
> > >
> > > (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
> >
> > ...
> >
> > 174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.
>
> [33] Counsel for the parties referred to various authorities that have judicially considered these statutory requirements for drivers. Though counsel rely strongly on the *MVA* provisions, I note that while the statutory provisions provide guidelines for assessing fault in motor vehicle accident cases, they do not, alone, provide a complete legal framework: *Salaam v. Abramovic*, 2010 BCCA 212 [*Salaam*] at para. 18. One must acknowledge the realistic exigencies involved in making what are usually split-second decisions by drivers in circumstances where traffic factors have to be assessed quickly: *Henry v. Bennett*, 2011 BCSC 1254. The standard of care of a driver is not perfection, but is that of an ordinary prudent person: *Hadden v. Lynch*, 2008

> BCSC 295 at para. 69; *Uyeyama (Guardian ad litem of) v. Wittenberg*, [1985] B.C.J. 1883 (C.A.).

[11] In *Steinlauf v. Deol*, 2021 BCSC 1118, aff'd 2022 BCCA 96, these principles were amplified in the trial judgment at paras. 9-16, which were cited without criticism in the Court of Appeal reasons at para. 20 as follows:

> [9] The driver of a vehicle approaching an intersection and facing a yellow light must stop before entering the intersection unless the stop cannot be made safely: s. 128(1)(a) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*].
>
> [10] The driver facing the yellow light has the onus of proving that they cannot safely stop: *Vapheas v. Madden*, 2014 BCSC 138 at para. 34, and *Wattar v. Lu*, 2013 BCSC 603 at para. 20.
>
> [11] A signalling left turning vehicle in an intersection must yield the right of way to approaching traffic that constitutes an immediate hazard. Having done so, oncoming traffic must yield the right of way to the left turning vehicle: s. 174 of the *MVA*.
>
> [12] The colour of the traffic light is the starting point in analyzing liability as between the left turning and through drivers: *Miller v. Dent*, 2014 BCCA 234 at para. 16.
>
> [13] The next step is to assess whether the left turning driver acted with reasonable care in the circumstances and with regard to manifest hazards: *Lozinski v. Maple Ridge (District)*, 2015 BCSC 1277 at para. 71.
>
> [14] A left turning vehicle is entitled to proceed on the assumption that oncoming traffic will act in accordance with the law: *Swieczko v. Nehme*, 2016 BCSC 399 at para. 36, referring to *Kokkinis v. Hall* (1996), 1996 CanLII 2404 (BC CA), 19 B.C.L.R. (3d) 273 (B.C.C.A.).
>
> [15] In addition to oncoming traffic, left turning drivers have a duty to be aware of cross traffic, pedestrians, and whatever else is in an intersection: *Kokkinis* at para. 10.
>
> [16] Through drivers approaching a busy intersection must expect that a yellow light may be the only opportunity when left turning vehicles can complete their turns. There is no burden on left turning drivers to wait until oncoming traffic stops. If there was, traffic would come to a standstill: *Kokkinis* at para. 10.

[12] At para. 32 of the *Steinlauf* appeal reasons, the court confirmed that, while a through-driver has the right of way if he or she is close enough to an intersection to constitute an immediate hazard, that fact alone is not determinative of negligence or apportionment. It is relevant only as a starting point that assists in assessing relative fault. This point was repeated in *Cipllaka v. Albert-Moore*, 2023 BCSC 457, at para. 23, where the court observed that, even where a through-driver is found to be an

immediate hazard, he or she may yet be found to be negligent based on a breach of competing common law or statutory duties, among which, of course, is the s. 128(1)(a) duty of every motorist approaching a yellow light to slow down and stop unless it cannot be done safely.

DISCUSSION

[13] In final submissions, the defendant argued that his failure to see the plaintiff's motorcycle may have had to do with the plaintiff traveling at an excessive speed, or because the plaintiff changed from the curb to the centre-line lane to pass vehicles on his right that were slowing to a stop after the light turned yellow. There is an insufficient basis in evidence to support the former possibility, and none at all to support the latter. Both of the independent witnesses gave evidence suggesting that the defendant was going at a pretty good clip, but there was no firm evidence about speed, other than from the plaintiff, who insisted that he was traveling at around the municipal speed limit of 50 km/h. The plaintiff agreed that he had changed lanes, but said that he did this a hundred or so metres back, at the start of the uphill curve in the road. He denied changing lanes closer to the intersection, and no other witness contradicted him.

[14] I will approach this case, therefore, on the footing that immediately before the collision the plaintiff was traveling at approximately the municipal speed limit of 50 km/h, and did not change lanes close to the intersection. I would emphasise, however, that the defendant did no wrong entering the intersection on a green light and waiting to make his left turn, while the plaintiff admitted that he entered it on a "late yellow light". This latter point was confirmed with great clarity by the gas station security camera footage. Evidence of the light sequences at the intersection was presented to me by consent establishing that, once activated, the yellow light facing the plaintiff was displayed for 4.1 seconds. This was followed by a one second interval during which the lights in all four directions were red, a safety feature which permits traffic to clear before the lights turn green for through traffic.

[15] In the security camera footage, one sees that at the moment of impact the light for westbound traffic on 7th Avenue continued to display red. The force of the collision caused the plaintiff to come off his motorcycle and propelled him briefly through the air. Before he had fully come to ground – his torso had landed but his legs were still in the air – the westbound light turned green. For a full second before that, as the admitted light cycle evidence shows, the lights in all directions would have showed red. I am prepared to accept that the plaintiff's flight through the air may have lasted for longer than one second, but not much longer, and I would repeat the unchallenged evidence of William Reid that the light facing northbound traffic was red immediately after the collision and while the plaintiff remained airborne.

[16] I will accept the plaintiff's claim that he was traveling at around 50 km/h because there is no reliable evidence to the contrary, but this only means that, while he was proceeding at a reasonable rate of speed, he had almost the entire 4.1 seconds of the yellow light cycle to slow down and stop – which was plenty of time – and I find as a fact that he knew or ought to have known that this was precisely what the vehicles beside him in the curb lane were doing. I conclude that he could and should have done the same. Instead, the evidence suggests that he accelerated into the intersection. I am persuaded on all of the evidence that he was probably trying to beat the light when, instead, he was subject to the statutory obligation, imposed by s. 128(1)(a) of the *MVA*, to come to a stop and allow the defendant's vehicle to clear the intersection.

[17] The plaintiff bears the burden of proving on a balance of probabilities that he could not have stopped safely. He has failed to do so. He testified that in the run-up to the intersection he was too busy "scanning" his surroundings for potential "hazards" to see that the light facing him had turned yellow. If this is true, and I am not certain that it is, I can only conclude that he was looking around for imagined contingencies instead of focusing on the concrete realities of the highway and traffic in front of him – in the language of s. 144 of the *MVA*, he was driving without due care and attention. The likelier thing, in my view, is that he saw the yellow light, knew

that it was “stale”, and made a last second decision, not to stop as he should have, but to take his chances and attempt to squeeze through the intersection in circumstances where it was very dangerous to do so. Considered either way, the plaintiff was negligent, and liability for the collision is shared and must be apportioned.

[18] Defence counsel conceded in submissions that the plaintiff probably entered the intersection, and the collision likely occurred, when the light for northbound traffic was at the final extremity of its yellow phase. This was a reasonable and fair concession on all of the evidence, and one that I accept, but it has to be said that it was an awfully close-run thing. Based on all of the evidence, including, especially, the security camera footage, I conclude that the accident occurred only a fraction of a second before the light for northbound traffic turned red.

[19] In summary, I am satisfied on a balance of probabilities that: 1) the plaintiff and his motorcycle constituted an immediate hazard when the defendant started his turn; 2) the defendant should have yielded, but failed to see the plaintiff through momentary inadvertence in the midst of a rapid decision to proceed; 3) the plaintiff entered the intersection on a very stale yellow light when, instead, he was bound by a duty to stop and allow the defendant to turn; and 4) the plaintiff has failed to prove that he could not have come to a safe stop.

[20] For all of these reasons, the plaintiff’s position that the defendant is wholly liable for the collision is unsustainable. In my view, in all of the circumstances, the defendant’s submission that fault is equally shared by the parties is more than reasonable, and I endorse it. I note, in passing, the similarity between the facts in this case and those in *Cipllaka* and *Elima v. Dhaliwal*, 2017 BCSC 1922, where the same result was reached. I find that each driver was 50 percent liable for causing the collision.

THE PLAINTIFF

[21] The plaintiff was born on March 2, 1988 and raised in Montreal. He was 30 years old when the accident occurred and is now 37. He has a high school

education. He did mostly labouring jobs before moving to BC in 2016. After that he worked for a variety of employers in the business of fibre optic cable installation earning wages of $20-$30 per hour, latterly with a small company called Ragnarok Drilling. He had been employed by Ragnarok Drilling for only four months before the accident. His paystubs indicate that he worked 38 hours per week at a wage, first of $25, then of $30 per hour.

[22] The plaintiff testified that in his working life before the accident he was fully employed between 80-90 percent of the time, with intermittent down-time ascribable to layoffs or the completion of fixed-term contracts. His tax records show that he has occasionally received employment insurance benefits. In his spare time, he enjoyed a wide range of recreational activities: jogging, riding moto-cross, go-carts and ATVs, hunting, paintballing, snowboarding, basketball, football, and watersports. He attended a gym regularly for cardio workouts and weightlifting. He often performed mechanical repairs on his friends' vehicles, not for pay, but for the pleasure of doing it. He had no pre-existing injuries or deficits either physical or mental.

PLAINTIFF'S INJURIES

[23] Unfortunately, the parties' respective split-second errors of judgment led to very serious consequences for the plaintiff, who was gravely injured as a result of the collision. The defendant has not disputed this, and acknowledges that he is liable to pay damages under all the usual categories of loss.

[24] The plaintiff was airlifted from the scene of the collision to Royal Columbian Hospital. He was determined to have sustained a fracture to one of his lumbar vertebrae (L4) and a comminuted fracture to his left tibia which required surgical intervention involving the insertion of a metal rod, nails and blocking screws. He remained in hospital for the better part of a month and was in severe pain throughout. Thereafter he was bedridden at home for a couple of weeks, and then confined to a wheelchair.

[25] The plaintiff remained wheelchair-dependent for several months, eventually progressing to a walker and crutches, and then to a cane. He had the assistance of

a care aide for some of the time but otherwise had to fend for himself, apart from intermittent help from family members, especially his mother, Nancy Seasons. In addition to his serious orthopedic injuries, he suffered from road rash, abrasions, contusions and the like. He sustained soft tissue injuries to his neck, shoulders, back and wrists. He has experienced headaches, cognitive deficits likely due to concussion or a head injury, and periods of depression.

[26] His rehabilitation efforts have involved kinesiology and physiotherapy, twice weekly in the initial phase, and eventually tapering to physiotherapy once every three weeks. The pain and physical incapacity from his injuries continues to limit his functioning to a marked degree. He testified that his back pain is constant, as is the pain in his left leg at the fracture site, in his knee and also his ankle, which he cannot bend fully. His neck, shoulder and wrist pain all persist, although not as acutely as before. He continues to experience difficulties with cognition, memory and concentration. His post-accident depression was such that in 2022 he returned to his hometown of Montreal to live with his mother and stepfather. Low moods remain a feature of his everyday psychology accompanied by the upset and anxiety caused by his functional limitations and fears for his future.

[27] The plaintiff manages his pain with non-prescription analgesics, Tylenol 3s and stretching and exercising within the limits of his capabilities. He has tried anti-depressants but dislikes their side effects and has resolved to get along without them. In fact, for personal reasons that have to do with a fear of side-effects, dependency or addiction, he is reluctant to take any prescription medication, at least on a sustained basis. His medical advisers have recommended not only anti-depressants, but also counselling for his persistent low moods, but the plaintiff has not followed these recommendations. The defendant argues that this amounts to a failure to mitigate, and he seeks a reduction of the plaintiff's award across all heads of damages because if it.

[28] The plaintiff testified, and I accept, that his chronic pain interferes with his sleep and prevents him from getting a good night's rest. He is seriously and

negatively affected by reduced functionality. Most movement involving torsion of the spine worsens his pain. He limps and continues occasionally to use a cane. He has difficulties walking on inclines and getting up and down stairs. He needs extra cushioning in his shoes to reduce pain, and says that when he walks his left tibia feels like ‘two pieces of concrete hitting each other’. He continues to suffer from shoulder pain and has to be careful to avoid activities that worsen it. His chronic pain has compromised his sexual functioning.

[29] The plaintiff was off work altogether for some 14 months. There was no question of his returning to his pre-accident employment laying fibre optic cable. I accept, and the defendant does not dispute, that this type of heavy-duty labouring work now exceeds the plaintiff’s capacities. Once he was well enough, the plaintiff took a light-duty driving job delivering auto parts, and then moved into short-haul truck driving. To get ahead in this line of work he qualified for a commercial driver’s licence and got his air-break certification. Since the beginning of 2024, he has been employed driving a water truck for a hydro-vac company called High Altitude in Kitimat, BC, earning the highest income of his working life thus far.

[30] As mentioned above, before the accident the plaintiff liked hard physical exertion and took pride in his fitness. He is now unable to engage in most of the sporting activities he once enjoyed. He still goes to the gym to perform rehabilitative exercises recommended by his physiotherapist and low-impact training. Other than that, his previous recreational activities are closed off to him. He has become physically deconditioned and has gained a lot of weight since the accident.

MEDICAL EVIDENCE

[31] I received opinion evidence from two orthopedic surgeons, one retained by the plaintiff, Dr. Fadi Tarazi, and the other by the defendant, Dr. Erik Calvert. There is not much disagreement between them about the plaintiff’s injuries, proposed treatments, and future prospects.

[32] Dr. Tarazi performed an examination of the plaintiff on February 15, 2024, at which the plaintiff reported that his overall condition and functioning was at

approximately 60-70% since the accident. In Dr. Tarazi's opinion, the accident caused a cervical myofascial soft tissue strain which has affected the muscles, ligaments and facet joints in the plaintiff's neck, causing chronic pain that has only partially improved with a conservative physiotherapy regime. Dr. Tarazi recommended anti-inflammatory medication and continued rehabilitative work on his cervical spine such as an exercise program to strengthen the paraspinal and neck musculature. Dr. Tarazi's opinion is that the plaintiff's neck pain is unlikely to fully resolve in the future and will vary in severity depending on his physical activities.

[33] Dr. Tarazi confirmed that the plaintiff suffered an L4 vertebral compression fracture as a result of the accident. He recommends continued rehabilitation with a physiotherapist or a kinesiologist on a weekly basis over the next year to increase the range of motion in his lower back. In Dr. Tarazi's opinion, the plaintiff is at an increased risk of developing osteoarthritis which would cause further pain and limitation. This could leave the plaintiff at risk of requiring a L3-L4 fusion surgery. As it has now been over five years since the accident, it is Dr. Tarazi's opinion that the plaintiff's lower back pain is likely permanent. He will have to be circumspect about his activities and avoid heavy lifting, sustained bending, and significant sudden lateral movements or twisting. Dr. Tarazi believes that these limitations are also likely permanent.

[34] In Dr. Tarazi's opinion, moreover, the accident caused myofascial soft tissue strain in the plaintiff's right shoulder, who reported that pain from this injury is mostly activity related and tends to come and go with lifting, strenuous tasks and overhead exertions. Dr. Tarazi recommended ongoing physical rehabilitation efforts to strengthen his right shoulder and wrist, but he believes that his pain in those areas will probably be permanent.

[35] Dr. Tarazi also confirmed that the plaintiff suffered multiple fractures to his left tibia and fibula that required painful and invasive surgery. The plaintiff reported ongoing significant pain in multiple areas of his leg, including in the front of the knee where a large nail was inserted. Dr. Tarazi believes that the pain in the plaintiff's left

shin region is likely related to callus bone formation and surrounding scar tissue. Dr. Tarazi recommends that the plaintiff should take steps to strengthen the musculature of his left leg and eventually have the medical hardware removed. He added, however, that removing the screws and other gear will not resolve the pain in the plaintiff's shin or knee, which he believes is permanent and unlikely to improve significantly.

[36] In Dr. Tarazi's opinion, the plaintiff will likely be able to drive a truck for the rest of his working career, but he qualified this with the warning that if any such occupation is accompanied by heavy lifting, squatting, kneeling, twisting, walking on inclines or uneven ground, then his pain will likely increase to the point of incapacity requiring him to stop working. Dr. Tarazi recommended that the plaintiff should continue to be as active as he can within his pain limits. Non-weight bearing and low-impact activities, such as riding a stationary bicycle, swimming and walking, which will place less stress on his vertebral column and left leg, should be continued. He will likely be unable to return to any intensive sporting pursuits.

[37] Dr. Tarazi characterised the accident as a "life changing event" for the plaintiff, and his overall opinion is that the plaintiff is now permanently partially disabled. I agree with him. The IME orthopedic surgeon retained by the defendant, Dr. Calvert, offered no contrary opinion. He agreed with Dr. Tarazi that a regime of kinesiologist/physiotherapist-supervised exercise and rehabilitation would be advisable, and he expressed the same apprehension that substantial improvement in the plaintiff's overall physical condition is unlikely. Dr. Calvert's assessments of the pain and disability affecting the plaintiff's neck, shoulder and wrists were more or less the same as Dr. Tarazi's. He also agreed that the plaintiff may receive some limited pain relief from having the medical hardware in his left leg removed.

[38] Additionally, however, Dr. Calvert believes that the plaintiff could benefit from corticosteroid injections for overall pain control as well as nerve ablation. He also said that sitting for extended periods – for example, when driving a truck – is not contra-indicated orthopaedically because it would cause no strain or physical harm

to the plaintiff's spine. He said that it is really a question of what, subjectively, the plaintiff can tolerate. In cross-examination at trial, however, Dr. Calvert agreed that the degenerative changes seen on the plaintiff's 2019 spinal imaging were unusual or early for a person of his age, and that the natural progression of such degeneration over time would likely result in a higher level of pain and disability.

[39] Dr. Gurdeep Parhar is an occupational medicine and disability specialist. He conducted an assessment of the plaintiff on July 5, 2024. He testified that the plaintiff's accident-related injuries included a traumatic brain injury with post-concussion syndrome, a left tibia/fibular fracture with ongoing left knee and left ankle pain, a lumbar spine fracture, hematoma to the right upper arm, abrasions/hematoma to the face, abrasions to both legs and knees, musculoligamentous injuries of the cervical spine, thoracic spine, and lumbar spine, bilateral hand contusion/sprain, bilateral wrist contusion/sprain, depressed mood, anxiety, sexual dysfunction, and post-traumatic osteoarthritis in the hands/wrists.

[40] On examination, the plaintiff's complaints were of pain in his neck in the right, left and midline regions, and pain travelling down his right arm combined with right arm weakness which worsened with movement or exertion. The plaintiff described persistent mid-back pain in the right, left and midline regions which, once again, worsened with exertion. He reported lower back pain in the midline region, weakness in his left leg, right and left wrist pain, right and left hand pain, left knee and ankle pain, depressed mood, episodes of sadness, mood swings, decreased concentration, decreased energy, sexual dysfunction, feelings of guilt, and anxiety about driving, especially through intersections.

[41] In Dr. Parhar's opinion, the plaintiff presented in a straight-forward manner without any apparent exaggeration. He had normal posture but favoured his left leg when he walked. He was able to walk on both heels, but could not toe-walk on his left leg. He was only able to squat about 75% of the way down, with pain standing up again. Dr. Parhar expressed concerns about the plaintiff's ongoing musculoskeletal pain, saying that the majority of patients who suffer such injuries recover fully within

six to nine months post-trauma. He concluded that these injuries are likely permanent, and said they may become worse. Specifically, he believes that the plaintiff's post-traumatic osteoarthritis in his hands/wrists will worsen as he ages. He said that the plaintiff could benefit from increased use of analgesics and anti-inflammatory medication, and from an additional session of massage therapy or physiotherapy.

[42] Dr. Parhar testified that the plaintiff's depressed mood and anxiety are also likely permanent, as are the problems with concentration brought on by his traumatic brain injury and post-concussion syndrome, and that his sexual dysfunction has reached a "plateau". Dr. Parhar recommended eight to ten psychologist sessions as well as a trial of antidepressant/anti-anxiety medication, and said that the plaintiff should avoid activities that require sustained postures of sitting, standing or prolonged walking, repetitive bending and twisting of the cervical spine, thoracic spine and lumbar spine, as well as any work that requires repetitive lifting or carrying.

[43] As a result of his depressed mood and anxiety, furthermore, Dr. Parhar suggested that the plaintiff should avoid any future work that would require emotionally intense interactions with clients, customers, co-workers or supervisors. He also said that the plaintiff's cognitive deficits will make it challenging for him to work in a competitive work environment due to limited executive functioning and struggles with organising his thoughts. Dr. Parhar confirmed in cross-examination that the plaintiff's psychological deficits might be improved by taking anti-depressants and psychological counselling.

[44] Also in cross-examination, Dr. Parhar testified that he was "floored" that the plaintiff had returned to full-time work in light of the seriousness of his injuries. He described him as an "outlier" and "stoic" who tended to minimise or underreport his difficulties, and said many of his patients with injuries of like severity would not have returned to work at all.

DAMAGES

Failure to Mitigate

[45] The defendant seeks a 15 percent reduction in the plaintiff's award across all heads of damage for his alleged failure to reasonably mitigate his losses by not following medical advice that he should take antidepressant medication and psychological counselling. In *Mullens v. Toor*, 2016 BCSC 1645, aff'd 2017 BCCA 384, at para. 116, the Court found that the plaintiff, who was diagnosed with depression following a motor vehicle accident, had failed to mitigate her loss, in part, due to her failure to obtain psychiatric treatment:

[46] As I have said, the plaintiff claimed in evidence that he has tried anti-depressant medication, but is reluctant to continue doing so regularly for fear of side-effects and the risk of dependency and addiction. I am not able to fault him for this. He testified that he has not yet taken psychological counselling because he cannot afford it. I am prepared to accept that this was true for most of the interval between the accident and trial, but the plaintiff conceded in cross-examination that the extended health plan available to him in his present employment will cover the sort of treatment or counselling that Dr. Parhar has recommended. I trust and expect that he will take advantage of this as it would seem plainly to be in his best interest.

[47] However, I decline to reduce his award for not having done so yet, and would emphasise, as did Dr. Parhar, that notwithstanding his seriously debilitating injuries, including psychological and cognitive deficits, the plaintiff has made admirable efforts to remain employed and get his life back on track. I would repeat Dr. Parhar's commentary, based decades of clinical experience, that many of his patients disabled by traumatic injuries of a like severity would not have returned to work at all. In my respectful view, to penalise the plaintiff for not doing more would be unjust.

Non-pecuniary damages

[48] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal refused, [2006] S.C.C.A. No. 100. The factors to be considered include the

plaintiff's age, the nature of his injuries, the severity and duration of his pain, disability, emotional suffering, the impairment of his physical and mental abilities, the impairment of his family and social relationships, and loss of lifestyle. Stoicism should not reduce a non-pecuniary damages award.

[49] In my view, the plaintiff's demand for a stand-alone award for loss of housekeeping capacity is better dealt with under this heading. This is because the evidence overall leads me to conclude that the plaintiff remains capable of performing all necessary household tasks, but now finds them much more difficult, time-consuming and frustrating. This part of his overall claim is in keeping with a loss of amenities, or of general pain and suffering, which is more appropriately compensated by non-pecuniary damages.

[50] The Plaintiff submits that the appropriate range for the award is $225,000-$275,000. In support of this position, he relies on the following cases:

a) *Dhaliwal v. Wu*, 2024 BCSC 1380 – $225,000

b) *Harper v. Mezo*, 2024 BCSC 874 – $250,000

c) *Ho v. Ip*, 2019 BCSC 2220 – $280,000; inflation adjusted $329,000

d) *Parmar v. Rink*, 2019 BCSC 1626 – $200,000; inflation adjusted $236,500

[51] The defendant submits that the appropriate non-pecuniary award is $150,000 based on the following cases:

a) *Manky v. Scheepers*, 2017 BCSC 1870 – $125,000

b) *Scott v. Cheng*, 2019 BCSC 697 – $125,000

c) *Williams v. Sekhon*, 2019 BCSC 1511 – $135,000

d) *Madill v. Gill*, 2021 BCSC 1991 – $125,000

[52] There is no doubt at all that the plaintiff has endured much pain, suffering and loss of enjoyment of life. He is now permanently partially disabled, and is no longer fit for his previous employment or recreational activities. I can easily understand how this has led to a great deal of upset and anxiety in the plaintiff's daily life, negatively affecting almost everything he does or attempts to do. It is a most unfortunate fact that this young man, who should be enjoying the prime of his life and strength, is instead afflicted by chronic pain and discomfort.

[53] No two cases are identical, of course, and each one must be evaluated individually, but previous decisions are useful in establishing a general range of damages in roughly analogous circumstances. Having regard to the case law referred to me, as well as the *Stapley* factors, the plaintiff's personal circumstances, including the impairment of housekeeping capacities, and bearing in mind that the determination must be fair and reasonable for both parties, I award non-pecuniary damages in the amount of $250,000.

Loss of Past Earning Capacity

[54] In *Rattan v. Li*, 2022 BCSC 648 at paras. 130-131, this court restated the principles to be applied when considering this head of damages as follows:

> [130] An award of damages for loss of earning capacity, whether in the past or the future, compensates for a plaintiff's pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would have, not could have, earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
>
> [131] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Grewal v. Naumann*, 2017 BCCA 158 [*Grewal*] at paras. 44, 48–49.

[55] I agree with the plaintiff that, but for the accident, he probably would have continued working as a fibre optic cable installer. As I have said, his employer in that

occupation immediately before the accident was Ragnarok Drilling. I accept the evidence presented showing that the plaintiff's pre-accident wage was $30 per hour. I do not accept his evidence that he ever worked up to 80 hours per week, a claim not supported by the very few paystubs from Ragnarok Drilling that were presented in evidence. These suggest, as I have said, that he worked only 38 hours per week.

[56] The plaintiff engaged a forensic accountant, Carolyn Seaquist, to give expert evidence about his likely loss of income earning capacity, past and future. For past loss, Ms. Seaquist assumed, based only on what the plaintiff told her about his employment at Ragnarok Drilling, that by the time of trial he would have been earning $50 per hour with significant overtime pay. She also considered the fact that since the beginning of 2024, the plaintiff has been working full-time for High Altitude as a water truck driver in Kitimat, BC, earning an income that she extrapolated to be $139,915 per year. Because this is far more than the plaintiff earned in any previous job, Ms. Seaquist assumed, and I agree with her, that he suffered no material pretrial income loss after December 31, 2023.

[57] Ms. Seaquist made a basic assumption about the plaintiff's past loss of earnings that I am unable to accept. She testified that she used the plaintiff's 2017 income ($56,383) and his extrapolated 2024 income ($139,915) as "anchors", and assumed that, but for the accident, his earnings from Ragnarok Drilling (or a similar employer) would have risen gradually over time with increased experience and responsibility to the level of his present-day income of $139,915. She assumed, in other words, that the plaintiff would have enjoyed equal annual income rises of 13.865 percent during the pretrial period before 2024, mostly on the basis of his strong earnings since then in an unrelated occupation which pays him a great deal more than he ever earned laying fibre optic cable. I am afraid that I can see no plausible basis for this assumption, and I reject the defendant's submission based on it that he is entitled to an award of $295,000 under this heading.

[58] The defendant does not quarrel with the basic assumption that the plaintiff would have continued working for Ragnarok Drilling or a similar employer during the

pretrial years. He is also prepared to assume – and I consider this to be generous – that the plaintiff would not have been affected during the same interval by seasonal or economic layoffs, which were a reasonably consistent feature of his pre-accident working life, or by any work interruptions during the Covid-19 pandemic. The defendant argues, however, and I have already signaled my agreement, that Ms. Seaquist's opinion concerning past income loss is based on faulty assumptions, and he emphasises the absence of any information gathered by Ms. Seaquist, or presented at trial, from anyone presently associated with Ragnarok Drilling to shore up this part of the plaintiff's claim.

[59] I agree that this last point is a weakness in the plaintiff's argument. The only information I received about Ragnarok Drilling came from the plaintiff, who told me only that it was a "start up" family operation with few employees. There is no independent evidence to support his claim, accepted unquestioningly by Ms. Seaquist, that the company would have continued to enjoy strong growth, or that he would have been promoted to management, or that his hourly rate would have risen over the pretrial period to as high as $50 per hour with plenty of overtime. I note in passing the plaintiff's testimony on cross-examination that he remains in occasional contact with Ragnarok Drilling's owner, and he gave me no reason to suppose that this person could not have been produced to testify at trial. The defendant asked me to draw an adverse inference against the plaintiff because of this absence of evidence.

[60] Such an inference is unnecessary. It is enough for me to say that the plaintiff bears the onus of proving, not only that he is entitled to recovery for past income loss, but also the extent of his loss. I do not accept that it is logical or admissible to assume that the plaintiff's income from fibre optic cable installation would have risen in equal annual increments during the pretrial period to the level of his present much higher income in a completely different occupation in Kitimat, and there is insufficient evidence to support his claim that, during the same interval, he would have enjoyed the significant pay increases and additional overtime at Ragnarok Drilling that would justify the generous compensation that he claims under this head of damages.

[61] Instead, I endorse the defendant's more realistic assumption that the plaintiff probably would have continued earning approximately $30 per hour, 38 hours per week, from the date of the accident in June 2018 until the end of 2023. It is possible that he could have got the odd raise, or worked longer hours, but such positive contingencies are tempered by negative ones, such as market downturns, hiatuses between contracts, seasonal layoffs, and so on. In my view, a fair and reasonable assessment of the plaintiff's past income loss is yielded by measuring, on this basis, what he would likely have earned at Ragnarok Drilling against what he actually earned between the accident and trial.

[62] At a rate of $30 per hour, 38 work hours per week, the plaintiff's gross income for the remainder of 2018 would have been approximately $29,640, and $59,280 per year from 2019 to 2023, inclusive. From these amounts must be deducted such income as the plaintiff was able to earn from his various jobs during the pretrial period. To his credit, the plaintiff went back to work as soon as he was physically capable of it, and established a new career path for himself as a truck driver, culminating in his present advantageous position with High Altitude which eliminated his losses entirely after 2013. The defendant does not question or downplay the plaintiff's efforts or claim that he has been insufficiently diligent in seeking and maintaining employment.

[63] The following table sets out the plaintiff's probable annual income with Ragnarok Drilling, offsets the income he actually earned as reported in his tax returns, and shows his annual gross losses:

Year	Projected	Actual	Gross Loss
2018	$52,967	$23,327	$29,640
2019	$59,280	$10,989	$48,291
2020	$59,280	$29,367	$29,913
2021	$59,280	$32,248	$27,032
2022	$59,280	$40,797	$18,483
2023	$59,280	$52,476	$6,804
		TOTAL	$160,163

[64] In my view, an award of $160,163 under this heading is reasonable and fair to both parties. The defendant proposed, and the plaintiff did not argue against it, that this award should be reduced by approximately 20 percent to account for income tax that would have been payable. This results in a net award of $128,130.

Future Loss of Income Earning Capacity

[65] The principles governing an assessment under this heading were reviewed by this court in *Rattan v. Li*, 2022 BCSC 648 at paras. 145-150 as follows:

> [145] An award for future loss of earning capacity represents compensation for a pecuniary loss. While the award is an assessment of damages, not a calculation, the award nevertheless involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157 [*Dornan*].
>
> [146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.
>
> [147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
>
> [148] At para. 47 of *Rab*, Grauer J.A., writing for the Court, sets out a three-step process for considering claims for loss of future earning capacity:
>
> > (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?;

> (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?; and,
>
> (3) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?
>
> [149] As a final step in the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117 [*Lo*].
>
> [150] The relevant jurisprudence identifies two approaches to the assessment of damages for loss of earning capacity: an earnings approach and a capital asset approach. In cases using the earnings approach, valuation of the future loss—the third step of the process—typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: *Lo* at para. 109; *Dornan* at paras. 155–156. In cases using the capital asset approach, such as cases where the plaintiff continues to earn income at or near pre-accident levels, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: *Rab* at para. 72; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), at para. 43; *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

[66] The parties agree, as do I, that the first two questions posed by *Rab* at para. 47 must be answered in the affirmative. The focus, then, is on the third question – what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring? The parties have jointly suggested, and I am prepared to accept, that the capital asset approach to the evaluation is appropriate. While the plaintiff, since the accident, has shifted his career away from heavily physical employment and into the lighter work of a truck driver, with the result that he is presently earning more income than ever before, nevertheless I conclude that his capacity to earn income viewed as a capital asset has been badly damaged by the accident in the sense described by the Court of Appeal in *Pallos v. Insurance Corp. of British Columbia*, [1995] B.C.J. No. 2.

[67] Here, as in *Pallos*, I have received uncontradicted – indeed, unanimous – medical evidence of permanent partial disability that will likely have a negative impact on the plaintiff's capacity to work and his overall employability for the rest of his productive years. I conclude that the plaintiff has been rendered less capable of earning income from all types of employment, less attractive as a potential employee to new employers, is unable to take advantage of all job opportunities that previously

would have been open to him, and is less valuable to himself as a person capable of earning income in a competitive labour market: see also *Brown v. Golaiy*, [1985] B.C.J. No. 31; *Kwei v. Boisclair*, [1991] B.C.J. No. 3344.

[68] The plaintiff is quite clearly capable, with accommodations, of performing all the tasks required by his present employer, he is working long hours, and he is earning much more money than before the accident. As long as he keeps his present job or replaces it with a similar one, with similar accommodations, and continues to work similar hours, he is unlikely to suffer much loss. I would stress that there is no evidence to suggest that he could be earning more in his present employment if he were not injured, or that there are plausible vocational options available to him in which, uninjured, he would be paid more.

[69] This head of damages, however, is all about real and substantial possibilities. I consider it reasonable and realistic to apprehend that because of his injuries, which the preponderance of the medical evidence suggests will not improve and may even worsen with time, especially when combined with the frailties that come to us all with advancing age, will result not only in premature retirement, but also in regular hiatuses from work over the years before then. I note as well the plaintiff's evidence that he likes to work hard, that doing so is a large part of his sense of self worth, and that his goal has always been to carry on in paid employment for as long as possible, even after the age of 65.

[70] I cannot rely on Ms. Seaquist's opinions concerning future income loss, because all of her proposed alternative scenarios proceed from an assumption that I do not accept – namely that the plaintiff is unlikely to experience any economic loss until after the age of 55 or 60. As I have said, I foresee a real and substantial possibility that, because of accident-related injury, he will lose income well before that time. I would refer, once again, to Dr. Parhar's expressions of astonishment that the plaintiff, as seriously physically debilitated as he is, has been able to work and earn at his current levels. In my view there is a substantial possibility that this will prove to be unsustainable.

[71] Somewhat unusually, having presented Ms. Seaquist's report and produced her for cross-examination at trial, the plaintiff himself has urged me to disregard her opinion, and to replace it with an award based upon the following submission:

> It is not unreasonable to suppose that the plaintiff will earn, on average, at least $25,000 less per year than he would have without injury. Projected to age 65, this yields a present value of $557,750 (applying the multiplier set out in Schedule 4 to Ms. Seaquist's report [22.31]). An assumption of early retirement at age 60 adds significantly to this number and may well double it. A loss projected on the same basis ($25,000 per year) to that age would have a present value of $496,250, to which would be added 100% of whatever amount it is assumed the Plaintiff would have earned until without-injury retirement (obviously a very large number). Nor is there any reason to assume that the Plaintiff would necessarily have retired at 65. This goes against both the Plaintiff's clear commitment to/enjoyment of work and the labour market trends toward over-65 employment identified by Ms. Seaquist.
>
> Taking all of these factors into account, it is submitted that an appropriate award under this head would be $750,000.00.

[72] The defendant's position, meanwhile, assumes that the plaintiff likely will work full-time until age 60; that he will lose two months of paid employment every five years between now and then; and that he will work part-time thereafter until age 65. Using the plaintiff's current annual income, and applying economic multipliers referred to in a table appended to a report by Mr. Mark Szekely, an economist who testified at trial, the defendant submits that a fair measure of damages under this heading would be $226,098. This is comprised of $57,850 in total compensation from the present day until the plaintiff turns 60, and $168,248 to age 65. The defendant suggests that an additional sum should be awarded to compensate the plaintiff for time off work to recover from the recommended surgery to remove metal hardware from his left leg, for an all-inclusive total of $250,000.

[73] As the Court of Appeal said in *Dong v. Li*, 2024 BCCA 404 at para. 29:

> Often, a judge will be faced with numerous possibilities and variables in assessing the loss of future earning capacity, and the assessment will be a rough one. As this Court has said, judges are not, in making such awards, required to "show [their] math": *Kringhaug v. Men*, 2022 BCCA 186 at para. 50. An award will be upheld as long as it is a reasonable one on the evidence.

Such is the case here. The parties have canvased various possibilities and advanced significantly divergent scenarios. In my view, the award sought by the

plaintiff of $750,000 – or lost income of approximately $27,000 per year until he turns 65 – would amount to over-compensation. The defendant's submission of $250,000, meanwhile, though more nuanced concerning contingencies and actuarial factors, fails to account for what I consider to be the real and substantial possibility that the plaintiff will experience more frequent injury-related absences from work, and therefore higher income losses, before the age of 60. I therefore decline to follow either submission, and will substitute a rough but hopefully reasonable and fair assessment that lands between them.

[74] The parties agree that the award under this heading should be based on the plaintiff's current occupation and income. I think this is fair because, after the accident, in order to mitigate his losses and maximise his prospects, the plaintiff retrained to be a commercial truck driver, a less physical occupation than he had previously pursued, and one which, with his reduced capacities, he will be better able to sustain on a full-time basis over the long-term. He has secured a solidly remunerative position with High Altitude that pays him approximately $140,000 per year. I will adopt the parties' position and assume that the plaintiff will likely continue in this line of employment, either with High Altitude or another company, at a similar rate of pay.

[75] As I have said, the defendant has submitted that, because of accident-related injury and incapacity, the plaintiff will need to take time off work from time to time between his present age of 37 and the age of 60, and that he will likely have to slow down or retire from the workforce between the ages of 60 and 65. I agree, but I foresee a real and substantial possibility that he will lose income in the run-up to age 60 with greater frequency than the 2 months every 5 years posited by the defendant. In my assessment the likelier scenario is that he will lose approximately one month every year. Bearing in mind the present value actuarial evidence of Mr. Szekely, and allowing for all additional contingencies, including that I may be wrong about the future possibilities and the likelihood of their occurrence, a reasonable award covering the plaintiff's income losses from his present age of 37 until age 60 is $150,000.

[76] Between the age of 60 and 65, I think it a real and substantial possibility that the plaintiff will only be able to work part-time, or that he will have to leave the workforce altogether. Mr. Szekely calculated in his report that, if the plaintiff works part-time for the last five years of his working life, then based on the present value of an annual loss of $69,958 (half of his present-day annual income of $139,915), he would sustain an aggregate loss of roughly $170,000. I am prepared to accept this calculation, but in my view an additional amount of $50,000 should be awarded to cover the possibility that the plaintiff will have to stop working completely before reaching the age of 65, for a total loss during this period of $220,000.

[77] The cumulative total award for future loss of earning capacity is therefore $370,000.

Future Care

[78] The principles governing an award for future care are summarised in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

> [244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:
>
> - the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
> - the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
> - the test for determining the appropriate award is an objective one based on medical evidence;
> - there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
> - the concept of “medical justification” is not the same or as narrow as “medically necessary”;
> - admissible evidence from medical professionals (doctors, nurses, occupational therapists, *et cetera*) can be taken into account to determine future care needs;
> - however, specific items of future care need not be expressly approved by medical experts. It is sufficient that the whole of the evidence supports the award for specific items;

- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.

[79] In the present case there is no cost of care report from an occupational therapist or other expert. I agree with the defendant that recommendations contained in the medical reports in this case may be summarised as follows:

a) exercise program directed by a physiotherapist or kinesiologist on a weekly basis for one year (Dr. Tarazi, Dr. Calvert);

b) trigger point injections to the neck (Dr. Tarazi);

c) Celebrex or Naprosyn for pain (Dr. Tarazi);

d) anti-depressant medication (Dr. Parhar);

e) regular gym attendance/gym pass (Dr. Tarazi, Dr. Parhar, Dr. Calvert);

f) psychological counselling (Dr. Parhar);

g) two sessions with an occupational therapist (Dr. Parhar);

h) wrist brace and injections (Dr. Calvert);

i) X-rays and MRI imaging (Dr. Calvert);

j) two sessions with a vocational rehabilitation consultant (Dr. Parhar);

k) home care assistance (Dr. Parhar); and

l) screw removal from the left lower extremity.

[80] The plaintiff seeks an allowance for future physiotherapy, medication and the supervised exercise programs recommended by both Dr. Tarazi and Dr. Calvert. This would seem to me to be reasonable. The plaintiff gave evidence that he currently attends physiotherapy once every three weeks. I am prepared to accept that the rate for standard physiotherapy is $79 per treatment. I agree that the plaintiff will have to incur these costs, and continue doing so indefinitely. He has also asked to be compensated in a small amount for non-prescription pain medication, which seems fair enough to me.

[81] The plaintiff's position is that he should be awarded $29,500 under this heading, while the defendant, for various reasons including that some of the costs claimed will be covered by the Medical Services Plan, has submitted that $20,000 is a more appropriate amount. My award under this heading is $25,000.

In-Trust Claim

[82] The plaintiff's mother, Nancy Seasons, traveled to BC from Montreal as soon as she heard about the accident. She is a healthcare worker trained as a nurse's aid and residential care aid. It was not disputed that she looked after the plaintiff for approximately 120 days. I accept her evidence that the homecare specialists who looked after the plaintiff once he got home charged $30 per hour, which Ms. Seasons told me was a standard rate nationwide. In my view, the plaintiff's claim for an award in trust for the benefit of his mother in the amount of $3,600 is perfectly reasonable.

Special Damages

[83] The defendant concedes the plaintiff's entitlement to special damages totalling $13,326.33. He also accepts the list of in trust special damages incurred by Ms. Seasons in the total amount of $6,454.49. As I understand it, this leaves only the plaintiff's claim of $5,000 for his destroyed motorcycle, less what he was able to obtain from the sale of salvaged parts. I decline to award this amount as I am not persuaded by the evidence presented concerning its value. If I am wrong about this,

then given the overall award, and considering shared responsibility for the collision, it is merely a rounding error.

[84] I therefore award the combined claim of special damages that the defendant has agreed to, which amounts in total to $19,780.82.

Summary

[85] In summary, I grant judgment in favour of the plaintiff and award damages as follows:

Non-pecuniary damages	$250,000.00
Past loss of earning capacity	$128,130.00
Future loss of earning capacity	$370,000.00
Future care	$25,000.00
In-trust	$3,600.00
Special damages	$19,780.82
TOTAL	**$796,510.82**
Less 50% liability apportionment	**$398,255.41**

[86] The plaintiff's action is allowed to this extent. Costs may be spoken to, if necessary.

"Baird J."